Jubilee Jumbo Hardwares Limited v Commissioner of Investigations & Enforcement (Customs Tax Appeal E008 of 2021) [2024] KEHC 11185 (KLR) (Commercial and Tax) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11185 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E008 OF 2021

JWW MONG'ARE, J

SEPTEMBER 19, 2024

BETWEEN

JUBILEE JUMBO HARDWARES LIMITED ..... APPELLANT

AND

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ... RESPONDENT

JUDGMENT

Introduction and Background

1. On 24th September 2021, the Tax Appeals Tribunal ("the Tribunal") delivered a judgment where it dismissed the Appellant's Appeal and upheld the Respondent's ("the Commissioner") demand for short levied import duty and Value Added Tax(VAT) amounting to Kshs. 1,603,549.00. The Appellant is dissatisfied with this decision and now Appeals against the same to this court through its Memorandum of Appeal dated 7th October 2021. The Commissioner has opposed the Appeal through its Statement of Facts dated 15th July 2022. The Appeal was canvassed by way of written and oral submissions which are on record.

2. In order to fully contextualize and appreciate the Appeal, I will highlight the chronological background of the dispute. The Commissioner carried out investigations with regard to goods imported by the Appellant sometime in December 2017 and declared under entry number 2017MSA6747434 and under Heading 7216; Angles, shapes and sections of iron or non-alloy steel. On 26th February 2019, the Commissioner communicated to the Appellant its findings of the investigative examination where it stated that the Council of Ministers approved Kenya's stay application on specified Harmonised System (HS) Codes of Heading 7216 of the East African Community Common External Tariff (CET) subject to item No. 49 of the EAC Gazette Notice number EAC/69/2017 ATED 30/06/2017 ("the

Gazette Notice"). That following approved measures on import Duty rate in the CET, items under Heading 7216 attract import duty at a rate 25% and not 0%. Thus, the Commissioner called upon the Appellant to pay taxes totalling Kshs. 1,603,549.00/=.

3. The Appellant opted to seek an Appeal with the Commissioner under section 229 of the EACMMA through its letter of 26th April 2019. The Appellant stated that it could not honour the tax demand because firstly, while carrying out the investigative examination, it was never consulted or questioned to explain itself before the Commissioner arrived at a conclusion which had all the indications that the Appellant have knowingly undervalued the consignment by applying the wrong tariff. Secondly, that the onus of entering the correct tariff changes in the Simba System is squarely and solely the responsibility of the Commissioner and not the importer's as the Simba System is owned and controlled by the Commissioner and not the importer. That once the Appellant has declared the goods under the correct tariff the Simba System on its own as set by the Commissioner picks and applies the correct tariff rate automatically. That if the changes were never made by the Commissioner to the Simba System, then the Appellant ought not be made to pay for errors caused elsewhere and out of its control after more than one year of trading.

4. Thirdly, that the consignment was entered and cleared more than a year ago and was not meant to be stored but sold because the Appellant is in business; meaning the selling price for the consignment was set based on the duty paid at that time, the cost of buying and transporting the goods from the foreign country, the local transport cost, port charges and other costs. The Appellant stated that it would be unreasonable for the Commissioner to demand Kshs.1,603.549.00/= that was not factored in its selling price for a mistake it never created or were never part of. Lastly, the Appellant averred that the demand was against Chapter 4 of *the Constitution* more so the provision which states that every person has the right to administrative action that is expeditious, efficient, lawful, and reasonable and procedurally fair.

5. In response to the Appellant's Appeal, the Commissioner, in a decision and letter dated 27th May 2019 stated that the Gazette Notice came into effect on 1st July 2017 and that the Appellant was required to have done self-declaration and pay the extra taxes vide an F147 as demanded and as such, it maintained its previous position. Dissatisfied, the Appellant lodged an Appeal with the Tribunal which in its judgment identified three issues for determination; Whether the Commissioner misinterpreted the Gazette Notice in applying the duty at 25% as opposed to the 0% rate, whether the Commissioner's omission in updating the Simba System absolved the Appellant from its statutory obligation and whether the demanded by the Commissioner was justified and within the law.

6. On the first issue, the Tribunal concurred with the Commissioner that the publication of the Gazette Notice gave the change of tariff a seal of certainty, finality and legality and the publication thereof is deemed to have been sufficient notice for the Appellant to acquaint itself with the reviewed rates and comply accordingly. Thus, the Tribunal found that the Commissioner acted within the provisions of the Gazette Notice. On the second issue, the Tribunal found that the Appellant was statute bound to honour its tax obligations and that the Commissioner was well within the statutory limit of five years within which a demand for duty short levy may be made. On the final issue, the Tribunal noted that the Appellant imported the goods in December, 2017 whereas the Commissioner carried out the post clearance audit and issued the demand on 26th February 2019 which was well within the five years as provided in section 235(1) of the EACCMA. Further, the demand for the taxes was made within the statutory period of five years contemplated under section 135(3) of the EACCMA. As such, the Tribunal held that it was immaterial as to whether the goods had or had not been sold provided that the assessment was done within the statutory period of 5 years.

7. The Tribunal found that the Appellant was accorded a fair opportunity to present its case and rebut the assessment and that the Commissioner's communication was quite clear and that the Appellant understood the basis of the assessment and objected to the same accordingly, leading to the objection decision that triggered the Appeal before the Tribunal. Having established that the Commissioner was not only empowered by law to carry out the post clearance audit but also acted within the time confines of the applicable law, the Tribunal found that the Commissioner was justified and within the law to demand the taxes owed. It is for these reasons that the Appellant's Appeal was dismissed and the Commissioner's demand upheld hence the present Appeal that I now turn to determine below.

Analysis and Determination

8. In determining this Appeal, I am cognizant that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the *Tax Procedures Act*(Chapter 469B of the Laws of Kenya) which provides that "An Appeal to the High Court or to the Court of Appeal shall be on a question of law only". An Appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts (See John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR). In Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others NYR CA Civil Appeal Mo. 48 of 2013 [2013] eKLR the Court of Appeal stated that when a court that is limited to dealing with matters of law has a concern regarding the issues that dealt on facts, then the court will also be limited to re-evaluation of the lower court's conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law.

9. Even though the Appellant raises 17 grounds in its memorandum of Appeal, it has condensed the same to two issues in its submissions which are essentially the same as what the Tribunal determined; whether the Commissioner was justified in demanding for further taxes and whether it followed the law in doing so.

10. The dispute in this matter is not novel and I agree with the Appellant that it has since been settled by the Court of Appeal. In Kenya Revenue Authority v Export Trading Company Limited [2020] eKLR, that has been cited by the Appellant and which Appeal therein had raised similar issues and had almost similar facts as those in this case, the appellate court held as follows:

> " This Court has had occasion to consider the above provision of the law vis- à-vis a post clearance audit in the decision of the Krish Commodities case (supra) which has striking similarities with the Appeal before us. In the case, the Court stated:
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> "The issue was not whether the Respondent had the power to conduct the post clearance audit and demand the short levied duty. It is given that the Respondent has such powers under the EACCMA, in our view, the pertinent issue was whether the manner in which the decision was made or the process followed was reasonable, fair and in conformity with Article 47 of *the Constitution*. It follows that the learned Judge ought to have looked into the decision making process; whether the appellant was treated fairly by the Respondent in the circumstances. See this court's decision in Captain (Rtd) Charles Masinde vs. Augustine Juma & 8 Others [2016] eKLR.
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> To us, the fact that the Respondent was empowered to carry out the post clearance audit and demand short levied duty did not excuse the Respondent from exercising such power in a reasonable, fair, efficient and effective manner. As a public authority, the Respondent's obligation to act in the aforementioned manner while rendering decisions is delineated under Article 47 of *the Constitution*. Sub – Article (1) thereof reads:-

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

Did the Respondent act fairly and reasonably? We think not. There was no explanation as to why the post clearance audit and the subsequent demand for the alleged short levied duty was made about 4 years after the initial assessment and payment of the duty so assessed. Even, Mr. Nyaga was at loss of words which could explain as to why it took such a long time. It is not in dispute that Section 135(3) of the EACCMA allows the Respondent to make such a demand within 5 years. However, that is not to say that the Respondent should wait until the tail end of the said period before making such a demand. There ought to be sufficient reason(s) as to why such audit and demand is made at the tail end. In our minds, the Respondent cannot simply stand behind the time limit given to justify its conduct of demanding the short levied duty in question about 4 years later".

"This Court in *Fleur Investments Limited vs. Commissioner of Domestic Taxes & Another-Civil Appeal No. 158 of 2017* (unreported), while considering the absence of a rational explanation for a conduct/decision in question, such as in this case, adopted with approval the High Court's decision in *Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006*. Analyzing the said decision, this Court went on to state:-

"It was held that in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith"."

During the virtual hearing of this Appeal, when we asked Ms Odundo, learned counsel for the appellant to comment on the Krish Commodities case, her response was that the Krish Commodities case was a bad decision. On our part, we do not think it was a bad decision. We say so because the amount of duty imposed on imported goods has a financial bearing that informs the sale price. In this case, the appellant imposed a duty rate of 35% and four years later, it made a demand that the duty rate ought to have been 75%. The imported goods in this instance was rice and being a perishable commodity, it is unfathomable to expect that an importer, such as the Respondent will keep the rice in its warehouse awaiting the expiry of the statutory period of 5 years within which the appellant, under the EACCMA is permitted to carry out a post clearance audit to ascertain the duty chargeable. This is inspite the fact that the rate of duty payable and the assessment thereof is done by the appellant and the Respondent has no role in setting the rate applied.

In the Krish Commodities case (supra) this Court further stated:

"Moreover, it is common ground that the identification of the applicable rate of duty and assessment of duty payable was done by the Simba System. The appellant had no role in declaring or setting the rate to be applied. For the Respondent to turn around and pass the buck to the appellant by contending that it was aware at all material times of the right rate cannot hold any weight. More so, taking into account that the Respondent's own officers verified the entries made and even inspected the consignments. The Respondent's officers were not acting as a conveyor belt performing a perfunctory exercise. The reason they were there was to verify the accuracy of the entries and the duty payable before clearance of the consignments in question. Having verified the entries in issue, rate applied and assessed duty

as correct, a legitimate expectation arose in favour of the appellant that the assessed duty was correct".[My emphasis]

11. Similarly in this case, the Appellant imported the subject goods in December 2017, the Commissioner verified the entries made and through its Simba system approved a rate of 0% which the Appellant relied on and paid taxes on the same. Two years later, the Commissioner informed the Appellant that it paid short levied duty citing the Gazette Notice. From the decision of the Court of Appeal above, I am in agreement with the Appellant that the Commissioner did not act in a reasonable, fair, efficient and effective manner in demanding the short-levied taxes from the Appellant when the Commissioner itself had two years earlier verified the entries in issue, applied a rate and assessed the duty paid. The Commissioner did not give valid reasons as to why there was this change of heart and tune. Its citation and reliance on the Gazette Notice cannot stand as the same was in force at the time the Commissioner verified the assessed duty as correct in December 2017. There was a legitimate expectation by the Appellant that the rate assessed by the Commissioner in its Simba system was correct and the Commissioner could not turn around 2 years later and arbitrarily demand additional duty while metaphorically waving the Gazette Notice in front of the Appellant as if the Commissioner had just discovered or come across the same. In the absence of a rational explanation, the court can only conclude that the Commissioner's decision was not only unreasonable but was also in bad faith and constituted a serious abuse of statutory power.

12. I am in further agreement that it was indeed unreasonable for the Commissioner to expect the Appellant to pay for the demanded short levied taxes when the said goods had already been sold. From a business standpoint, it would be a loss for the Appellant to pay further taxes on goods that had already been sold together with the presumptively correct assessed taxes.

13. In sum, I am in agreement with the Appellant that the short-levied taxes were being demanded by the Commissioner unfairly and against the law as was stated by the authoritative and binding decision of the Court of Appeal above. The Tribunal's decision was therefore perverse and this warrants the interference by the court.

Conclusion and Disposition

14. In the upshot, I find that the Appellant's Appeal succeeds and the Tribunal's judgment dated 24th September 2021 is hereby set aside in its entirety with the consequence that the Commissioner's demand for the short-levied taxes amounting to Kshs. 1,603,549.00/= is also set aside. Each party shall bear its costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Mkan for the Appellant.

2. Ms. Chelangat holding brief for Mr. Muhoro for the Respondent.

3. Amos - Court Assistant