Commissioner of Investigations and Enforcement v Capwell Industries Limited (Tax Appeal E093 of 2021) [2024] KEHC 12773 (KLR) (Commercial and Tax) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12773 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E093 OF 2021

WA OKWANY, J

OCTOBER 17, 2024

BETWEEN

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT

AND

CAPWELL INDUSTRIES LIMITED ..... RESPONDENT

(Being an Appeal from the judgment of the Tax Appeals Tribunal No. 286 of 2019 Capwell Industries Limited v Commissioner of Investigations and Enforcement delivered at Nairobi on 23rd April 2021)

JUDGMENT

Background

1. The Appellant is a Commissioner appointed under section 11(4) of the *Kenya Revenue Authority Act* responsible for investigations and enforcement of tax matters.

2. The Respondent is a private limited liability company registered in Kenya. Its activities involve both manufacturing and distribution of the maize, wheat flour, and rice, pulses, porridges and cereal milk drink.

3. The Appellant conducted a post-clearance audit to confirm the Respondent's compliance with the legal requirements of the East African Community Customs Management Act (EACCMA) and applicable procedures in the importation and consignment of goods, in this case, a stand-alone storage silo declared under Entry Number 2017MSA6476904 (hereinafter referred to as "the consignment").

4. At the conclusion of the audit, the Appellant raised an additional tax assessment and demand for KShs. 8,582, 654.00 comprising of custom duty of KShs. 4,768,141.00 and value added tax (VAT) of KShs.

3,814,513.00 on the basis that the Respondent had declared the storage silo plant under HS Code 8437.80.00 instead of tariff heading of HS Code 9406.00.90.

5. The Respondent was aggrieved by the Appellant's said decision to raise additional taxes and instituted an appeal to the Tax Appeals Tribunal wherein it sought a refund of the additional taxes that it had paid under protest/duress.

6. In its decision rendered on 23rd April 2021, the Tribunal held that the correct classification of silos is under HS Code 84 and not HS Code 94 as claimed by the Appellant. The Tribunal further held that the additional tax assessment of KShs. 8,582, 654.00, as communicated by the Appellant through its letter dated 26th October 2018, was unlawful and in breach of the taxpayer's legitimate expectation.

The Appeal

7. The Appellant was dissatisfied with the Tribunal's said judgment and instituted the instant appeal through the Memorandum of Appeal dated 16th June 2021 in which it listed the following grounds of appeal:-

    1. That the Honourable Tribunal erred in law and fact in finding that a grain storage silo (consignment) imported and declared by the Respondent on 18th May 2017 was properly classified under Harmonized System(HS) Code 8437 of the East African Community Common External Tariff.

    2. That the Honourable Tribunal erred in law and in fact by relying on a WCO Tariff ruling of the 59th Session of the HS Committee on the classification of the impugned consignment without taking into account the Commencement date of the Ruling.

    3. That the Honourable Tribunal erred in law and fact by failing to appreciate that taxing statutes are statutes of strict interpretation.

    4. That the Honourable Tribunal erred in law and fact in failing to consider the evidence tendered by the Appellant.

    5. That the Honourable Tribunal misapplied the law and facts and therefore arrived at the wrong decision.

8. The Appellant seeks the following orders in the appeal: -

    a. That the Appeal be allowed with costs to the Appellant.

    b. That the impugned Judgment of the Tribunal dated 23rd April 2021 be set aside.

    c. That the Appellant's Decision dated 26th October 2018 be upheld.

9. The Respondent opposed the Appeal through its Statement of Facts dated 7th September 2021 and Supplementary Statement of Facts dated 2nd February 2022. The Statement of Facts is made up of the background of the case from 30th March 2017 when the Respondent wrote to the Appellant's Policy and Compliance Division seeking information on the tariff classification for duty on the flour mill, grain store silos, wheat flour packaging line, grain cleaning, sorting and grading plant. The Respondent made the request for clarification ahead of the importation (as an advance ruling) so as to facilitate smooth importation and declaration of the goods as well as payment of the applicable duties and taxes.

10. The Respondent explained that the Appellant wrote a response letter dated 15th May 2017 in which it clarified the importation duty tariff classifications as follows:

a. The one-unit 250 tons/day capacity wheat flour meal and its main part (contract: 15P 267T534-R10-2016/9) shall be classified under HS Code 8437.80.00.

b. The one-unit seed cleaning, sorting and grading plant and its main parts shall be classified under HS Code 8437.10.00.

c. The one-unit wheat flour packaging line and its main parts shall be classified under HS Code 8422.40.00.

d. The one-unit grain storage silo and its main parts shall be classified under HS Code 7309.00.00

e. The other components (described as finished products/auxiliaries and spare parts of the plant shall be classified under their appropriate HS Codes.

11. The Respondent explained that its clearing agents, General Cargo Services Limited, thereafter wrote to the Appellant and pointed out that the classification of the storage silo under HS Code 7309.00.00 was incorrect as the silo was part and parcel of the wheat flour mill plant.

12. The Appellant then wrote back to the Respondent through a letter dated 18th May 2017 with a clarification that one-unit grain storage silo and its main parts shall be classified under HS Code 8437.80.00.

13. The Respondent averred that when it imported the consignment in 2018, it was solely guided by the private ruling of the Appellant in making its import declarations for payment of duties and taxes.

14. The Respondent stated that it was surprised that when the Appellant conducted a post-clearance audit of the importation of the consignment and rendered a decision in which it demanded additional taxes amounting to KShs. 8,582,654.00 while faulting the Respondent for non-compliance with the East African Community Customs Management Act (EACCMA). According to the Appellant, the one-unit grain storage silo and its main parts ought to have been classified/declared under HS Code 9406.00.90. The Respondent contended that the Appellant's classification was a clear departure from its private ruling that advised the Respondent to declare the goods under HS Code 8437.80.00.

15. The Respondent stated that the additional tax assessments were unfair, unreasonable and punitive to the taxpayer since they breached the taxpayer's legitimate expectation. The Respondent contended that the assessment went against the overarching principle that taxes must be certain.

16. The Respondent further explained that it wrote to the Appellant formally objecting to the additional tax assessment decision and sought for the release of a separate and unrelated consignment of Spaghetti imported under entry number 49794 which the Appellant had declined to release until the additional taxes raised in the decision dated 26th October 2018 were paid in full. The Respondent averred that it eventually paid the additional taxes, albeit under duress to ensure that it mitigates the loss occasioned by the Appellant's unlawful action of withholdings its unrelated consignment of Spaghetti but that it thereafter filed an appeal at the Tax Appeals Tribunal.

17. In the Supplementary Statement of Facts, the Respondent avers that this dispute is related to another concluded suit before the Tax Appeals Tribunal being TAT No. 287 of 2019 Capwell Industries Limited vs. Commissioner of Investigations and Enforcement wherein when faced with similar facts and subject matter, the parties herein engaged in an Alternative Dispute Resolution (ADR) Agreement dated 9th December 2019 where the Respondent agreed to revise its tax assessment to NIL.

18. The Respondent's case was that even though ADR agreement is specific to TAT No. 287 of 2019, the two matters are founded on similar facts and issues. The Respondent added that the law applicable to

the declaration of taxes on the consignments is the same and that the two matters should therefore be accorded similar treatment in law to ensure consistency.

19. The Appeal was canvassed by way of written submissions which I have considered.

Appellant's Submissions

20. The Appellant argued that chapter 84, specifically HS code 84.37.80.00, which the Tribunal adopted as the correct tariff applies to among other items, machinery used in the milling industry. It was the Appellant's case that the Tribunal erred in holding that the subject consignment is a machinery used in the milling industry, and failed to appreciate that there are certain structures that do not form part of a machinery even though they are used in the industry. For this argument, the Appellant referred to the Black's Law Dictionary (8th Edition) which defines a machinery as; a device or apparatus consisting of a fixed and moving parts that work together to form some function. Reference was also made to the Black's Law Dictionary (2nd Edition) which defines machinery as:

> Any contrivance used to regulate or augment force or motion; more properly, a complex structure, consisting of a combination, or peculiar modification, of the mechanical powers.

21. The Appellant submitted that silos are not typically used to regulate or augment force or motion as their primary purpose is the storage of grain in anticipation of either sale or processing. According to the Appellant, since the consignment could be used in the milling industry, it is not a machine and does not form part and parcel of the wheat flour plant as it

22. bears no functional and physical relationship the plant other than the storage of already processed wheat flour. It was the Appellant's case that a stand-alone silo is not a machine and is therefore automatically disqualified from heading 8437.

23. It was submitted that the Tribunal's attempt to fit the classification of the consignment as a machinery under HS Code 8479.89 while relying on the ruling of the HS Committee – 59th Session of the World Customs Organization (WCO) was erroneous as the said decision by the Harmonized System Committee (59th Session - March 2017) was applicable as from 1st June 2017 whereas the consignment subject to this appeal was imported on 16th May, 2017. The Appellant added that the WCO ruling therefore had no probative value in so far as classification of the Respondent's consignment is concerned as it could not apply to goods that had been imported prior to its effective date.

24. It was submitted that the said consignment was properly classifiable under tariff heading 9406.00.90 as communicated by the Appellant in its letter dated 26th October, 2018 as the applicable law at the time was the EAC Customs External Tariff (CET) 2005 and not the EAC CET 2017 version applied by the Tribunal without appreciating that this was a subsequent change in law that was not applicable to the consignment in dispute.

25. The Appellant faulted the Tribunal erred for concluding that it misclassified the tariff code that only related to prefabricated buildings made of wood thereby leading to the disqualification of the tariff code 9406.00.90 on the basis that the storage silos were made of steel whereas the code applied only relates to buildings made of wood.

26. It was submitted that the applicable tariff was EAC, CET, 2012, as it related to 'prefabricated buildings' without differentiating whether the said prefabricated building were made of wood or steel, as long as they do not fall under greenhouses and cold rooms. The Appellant noted that whereas the EAC CET 2017 creates a distinction at heading 94.06 between prefabricated buildings made of wood and those

made of other materials, no such distinction existed pre 2017 amendment as the applicable EAC CET, 2012 only makes reference to prefabricated buildings which are either greenhouses and cold rooms or falling under 'other' category.

27. Arising from the above, it was submitted that the Respondent's consignment, being made of steel, was properly classifiable under 9406.00.90 which was the applicable law at the time of importation of the consignment.

28. The Appellants contended that by using the tariff code introduced from the period July, 2017 when the consignment was imported in May, 2017, the Tribunal used the subsequent amendment (EAC, CET, 2017) retrospectively. Reliance was placed on Section 23(3) of the *Interpretation and General Provisions Act* which provides that: -

> " Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not-
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> a) ...
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> b) ...
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> a. affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed;"

29. Reference was also made to the case of Commissioner of Income Tax vs. Pan African Paper Mills (E.A) Limited [2018] eKLR where the Court quoted, with approval, Halsbury's Laws of England 4th Edition Re-Issue Volume 44 (i) para 1433 which states that:

> a. It is a principle of legal policy that an amending enactment should be generally presumed to change the relevant law only from the time of the enactment's commencement. "

30. It was submitted that the Appellant was justified in vacating its prior ruling as the same was done in in strict conformity with its mandate under section 135 of the EACCMA which allows it to undertake a post clearance audit, within a period of 5 years from the date when importation was done by the Respondent. According to the Appellant, the tribunal's finding that the Appellant's action, to change its position on the letter dated 18th May was in violation of the Respondent's right to legitimate expectation, is thus an error of law that is contra statute.

31. The Appellant submitted that its initial letter dated 18th May 2017 wherein it communicated that the material consignment was under heading 8437 did not bar it from changing its position when it exercised its powers under section 135 of EACCMA, 2004 as it was under a duty to implement tax laws and give effect to the correct position of law. It was submitted that where an error is made with respect to applicable tariff, the law allows the Appellant to change its position upon conducting the post clearance audit and to immediately correct the error, restate the correct position of law and communicate the same to the Respondent. Reference was made to the decision in Tarmal Industries Ltd vs. Commissioner of Customs and Excise and Commissioner of Customs and Others vs. Amit Ashok Doshi & 2 Others Mombasa Civil Appeal No. 157 of 2007 as cited in the case of Republic vs. Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another [2016] eKLR where it was held that: -

> " The High Court of Tanzania (Georges, C.J) held that there was no estoppel against statute and that although Commissioner initially erred in deciding the substance was not dutiable and possibly was negligent not to have analyzed the sample the Commissioner was bound under the law to correct the matter and levy duty on the basis that the substance had always

been dutiable. His lordship after a consideration of the authorities said in part at page 482 para E:-

'The fact that he failed to do so, on the authorities above cited cannot him from carrying out his duty when he discovers the original error. Indeed, his earlier classification under item 108 (k) was in breach of S. 195 of the East African Customs Management Act. It was a breach of statutory duty and in that sense it was not lawful and estoppel cannot be raised against him to prevent him from correcting that act. Naturally one reaches such conclusion with a certain measure of reluctance as it is undoubtedly hard on the defendant company to be called upon long after the event to find such a substantial sum, which would not have been payable but for the plaintiff's negligence in the first instance in not having pellets which were sent to him for examination properly tested. One can well understand, however, that on balance it is preferable that the law should be as it is. It is not in the interest of consistent application of the law that errors should be sanctified as principle..."

Respondent's Submissions

32. The Respondent submitted that the Tribunal was correct in holding that the applicable HS Code was 8437.80 .00 and not 9406.00.90 as alleged by the Appellant. The Respondent explained that the Tribunal considered the General Interpretation Rules 1 & 6 which require consideration of headings in determining classification of silos that automatically disqualified HS Code 9406.00.90 which deals in 'Prefabricated buildings of wood'.

33. The Respondent argued that the Courts have always considered the long headings of the Codes when determining where to classify a consignment. For this argument, the Respondent cited the decision in Republic vs. Commissioner General & Another Ex-Parte Awal Ltd [2008] eKLR, where Sergon J. held as follows: -

> " It is imperative to note that the rules of interpretation of tariff classification are also provided for in the world customs organization explanatory notes of Harmonized commodity Description and coding systems (H.S. Code) ....I will apply the interpretation provided for under the *customs and Excise Act* plus the rules of H.S. Code to determine this dispute. This court has been urged by the applicant to rule that the correct tariff heading is no. 2302.20.00. It is clear from tariff heading no. 2302.20.00 that it relates to residues and waste from food Industries prepared animal fodder. The items are specified as bran, sharps and other residues derived from the sifting, milling or working of cereals or leguminous vegetables."

34. It was the Respondent's case that, contrary to the Appellant's argument that the Tribunal did not delve much into the definition of a machinery, the Tribunal considered that the storage silos fit in as machinery used in the milling industry because of an interpretation of the milling industry which is a wide term referring to processes before and after the milling. The Respondent maintained that the Tribunal considered the definition of the milling industry and noted that it is wide and includes processes after milling where the silos are also included.

35. It was submitted that the Tribunal also borrowed the best practice from the WCO Harmonized System Committee (HSC) that classifies the silos as falling under HS Code Chapter 84 to buttress the position that the Tribunal had already taken on the applicable code by making reference to the General Interpretation Rules 1 & 6. According to the Respondent, the Tribunal merely referred to Ruling by the World Customs Organization (WCO) as a clarification of the correct classification that had been existing.

36. The Respondent argued that the Tribunal did not create its own law and that the WCO ruling was therefore applicable to the instant case since it only served to clarify what the correct HS Code for silos was. The Respondent added that the Appellant cannot rely on the rule of retrospectivity. Reliance was placed on the decision in Republic vs. Registrar of Companies & 2 others; Ex Parte Schindler Limited [2020] eKLR, where Mativo J. (as he then was) held as follows regarding retrospective application of statutes: -

> " Where the statutory provision confirms the existing law, it is not a case of true retrospectivity, since true retrospectivity means that at a past date, the law shall be taken to have been that which it is not. Thus, if the legal position is A, and enactment X is designed merely to confirm A, then it cannot be said that, subsequent to the promulgation of X, the legal position has become A."

37. It was submitted that the Appellant's letter (private ruling) dated 18th May 2017 created a legitimate expectation on the Respondent as the author of the said letter knew the exact item that the Respondent was importing and that the Appellant could not turn around later and state that it had just discovered that it was a silo during the post-clearance audit.

38. The Respondent maintained that the private ruling was binding on the Appellant and remained in force until it was withdrawn. For this argument, the Respondent cited the decision in Republic vs. Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited [2018] eKLR, where the sudden about-face to charge value added tax was held to be arbitrary and in violation of the right to legitimate expectation arising from private rulings, the Court cited with approval the position in De Smith, Woolf & Jowell, in "Judicial Review of Administrative Action that: -

> " A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

39. The Respondent also faulted the Appellant for failing to disclose material facts relating to ADR Agreement made on 9th December 2019 in respect to a similar appeal between the parties herein wherein it was agreed as follows: -

    a. The Appellant's assessment be revised to NIL.

    b. The agreement is legally binding and shall be the full and final settlement of the matter save where parties expressly specified in the agreement.

    c. The agreement to be a basis of consent between the parties to be submitted to the Tax Appeals Tribunal/High Court.

    d. Each party to fulfil obligations created under the agreement in the timelines provided.

    e. Where a party fails to comply, the other party to be at liberty to enforce the performance of the agreement.

40. The Respondent urged this court to find that the Appellant is bound by the settlement terms of the ADR Agreement in relation to a similar case wherein it revised its assessment to NIL which information the Appellant has not disclosed to this Court.

41. The Appellant reacted to the Respondent's submissions by stating that while it is not disputed that it wrote the letter dated 18th May 2017 indicating that the consignment fell under Chapter 84, the Respondent did not disclose that it had indicated that the storage silo was part and parcel of a grain milling plant thus forming the basis for the Appellant's private ruling. The Appellant asserted that Section 55 (4) of the *Tax Procedures Act* (TPA) is not applicable to tax disputes which are governed by East African Community Customs Management Act (EACCMA). The Appellant argued that the private ruling cannot be binding in perpetuity.

Analysis and Determination

42. I have carefully considered the record of appeal and the parties' respective submissions. I find that the main issue for determination is whether the Tribunal erred in classifying the storage silos under HS Code 8437.80.00 instead of HS Code 9406.00.90. The gist of this appeal is the classification or the proper HS Code applicable to the storage silos.

43. It was not disputed that the Respondent wrote to the Appellant's Policy and Compliance Division seeking information/clarification, ahead of the importation, on the tariff classification for duty on the flour mill, grain store silos, wheat flour packaging line, grain cleaning, sorting and grading plant. The clarification was sought, ahead of time and in advance, in order to facilitate smooth importation and declaration of the goods as well as payment of the applicable duties and taxes. I note that the Respondent's said request letter was worded as follows: -

44. It was also common ground that the Appellant wrote a response letter dated 15th May 2017 in which it clarified the importation duty tariff classifications in respect to one-unit grain storage silo and its main parts as HS Code 7309.00.00. The Appellant's said request however elicited further correspondence from the Respondent's clearing agents who pointed out that the classification of the storage silo under HS Code 7309.00.00 was incorrect as the silo was part and parcel of the wheat flour mill plant.

45. It was further not disputed that the Appellant then wrote back to the Respondent through a letter dated 18th May 2017 with a clarification that one-unit grain storage silo and its main parts shall be classified under HS Code 8437.80.00. The said letter was worded, in part, as follows: -

> "Your request has been considered in accordance with East African tariff nomenclature. Accordingly, the one unit grain storage silo and its main parts shall be classified under HS Code HS Code 8437.80.00".

46. The Respondent's case was that it relied on the private ruling dated 18th May 2017 and made a decision to import the consignment in 2018 which it declared as "Grain Storage Silo in CKD' under HS Code 8437.80.00' in full reliance on the Appellant's said private ruling.

47. The Respondent argued that the Appellant breached the doctrine of legitimate expectation when it turned around and claimed that the post-clearance audit disclosed a different item other than the storage silos.

48. The Appellant, on the other hand, argued that it acted in strict conformity with its mandate under section 135 of the EACCMA which allows it to undertake a post clearance audit, within a period of 5 years from the date when importation was done by the Respondent. The Appellant also faulted the Respondent for indicating that the consignment fell under Chapter 84 and for failing to disclose that it had indicated that the storage silo was part and parcel of a grain milling plant thus forming the basis for the Appellant's classification.

49. The Appellant asserted that the private ruling was not binding and that Section 55 (4) of the *Tax Procedures Act* (TPA) is not applicable to tax disputes which are governed by East African Community Customs Management Act (EACCMA).

50. The Tribunal rendered itself as follows on the issue of legitimate expectation: -

> "25. Having said that, we now turn our attention to the issue of legitimate expectation created by the Respondent's letter dated 18th May 2017, classifying silos under HS Code 8437.80.00. The Tribunal takes note of item 1.1 of the Respondent demand for taxes dated 26th October 2018; which reads as follows:
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> "1.1 Tariff Misclassification of Imported Goods –
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> It was established that all the imported goods declared as Storage Silo Plant had been declared under tariff head 84378000 instead of the correct tariff heading of 94060090 in comparison similar foods. We have now assessed and demand payment of taxes using the correct tariff heading of 94060090 which attracts import duty @25% and VAT @16%,"
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> 26. In contrast, the Respondent in his pleadings alleges that Appellant declared the goods correctly under HS Code 9406 and as such the Appellant should pay the resultant taxes. It is our view that goods do not attract taxes based on what the tax payer declares in their documents but rather what the law says about the item in question. Noted, some of the Appellant's document's classified the goods under HS Code 9406. Now, do silos become subject to import duty and VAT simply because of out the Appellant declared by the nature of the item in question and is proper classification in law. In our view, it is the item itself; being the silo, that determines the code for classification. In this Appeal the Respondent had already classified the silos under HS Code 8437. Rather than asking the Appellant to correct code declared in its goods, the Respondent has resorted has resorted to capitalize on the Appellant's error and demand the taxes levied under HS Code 9406. In the premise, this Tribunal will not let this tax demand stand as the Respondent's letter of 18th May 2017 created a legitimate expectation. The Tribunal places reliance on Keroche Industries Limited v Kenya Revenue Authority & 5 others (2007) eKLR wherein it was held as follows: -
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> "...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondent, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responding public administration."

51. The doctrine of legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. When considering legitimate expectation claims the court adopts a two-step approach. Firstly, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is

equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and most importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.

52. The requirements for the existence of such an expectation was discussed in South African case of National Director of Public Prosecutions vs. Philips [2002] (4) SA 60 (W) at paragraph *28*, where the court held that the same should include the following: -

    i. that there must be a representation which is "clear, unambiguous and devoid of relevant qualification",

    ii. that the expectation must be reasonable in the sense that a reasonable person would act upon it,

    iii. that the expectation must have been induced by the decision-maker and

    iv. that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed.

53. In addition to the above requirements, a legitimate expectation must not go against clear provisions of a statute in violation of the principle of legality which is a key principle in Rule of Law.

54. In Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others[2] where the Supreme Court stated that:-

> " Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."

H. W. R. Wade & C. F. Forsyth[3] at pages 449 to 450, thus:-

> " It is not enough that an expectation should exist; it must in addition be legitimate....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... Second, clear statutory words, of course, override an expectation howsoever founded..... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy...."
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> "An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice." (Emphasis added).

55. I will now turn and apply the legal tests discussed in the above cited cases to the facts and circumstances of this case. The Respondent's position, as stated in the Statement of Facts, was that there was an exchange of a string of correspondence between the parties herein before the Appellant arrived at the determination that the Respondent's consignment fell under the classification Code HS 8437.80.00. The decision to classify the consignment under the said code was communicated to the Respondent

in clear and unequivocal terms in the letter dated 18th May 2017 as already highlighted elsewhere in this judgment. The expectation was reasonable considering the length of time that the parties took before it was arrived at which means that it was not a decision that the Appellant made in the heat of the moment. The expectation was induced by the Appellant who had the mandate, under the law, to determine the applicable tariff.

56. My finding is that the Appellant's private ruling created a legitimate expectation on the Respondent who acted upon it by going ahead with the importation of the storage silo and paying the requisite importation taxes due. It is my further finding that it was incumbent upon the Appellant to abide by the terms of its own decision which remained in force as the same was not withdrawn. (See Republic vs. Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited [2018] eKLR).

57. The Respondent also referred to an ADR agreement that the parties herein entered into in a similar tax dispute and stated that since the said agreement was to the effect that the Respondent tax liability was NIL, the said agreement should be adopted in this case. I have carefully perused the ADR agreement and I note that even though it states, at paragraph 53 thereof, that it was binding on the parties only to the extent of TAT Appeal No. 287 of 2019, the said agreement also discussed the issues in this Appeal at length before making the following findings: -

> "6. A further analysis of the importation documents indicated that the goods originated from the same supplier as the goods under entry number 2017MSA6476904 (subject of TAT Appeal No. 286 of 2019) which were imported at around the same time.

35. The Commissioner responded to the Taxpayer's letter stating that the correct Tariff for the grain storage silo to be under HS code 8437.80.00" and the pre-cleaning, sorting and grading plant under HS code 8437.10.00."

37. The Taxpayer further stated that they are in the process of importing similar machinery and had followed the same procedure of seeking authority to import as provided. In addition, the Commissioner had clarified to them that the grain storage silos should be classified under HS code 8437.80.00.

39. In analyzing the Taxpayers importation, they noted that the taxpayer had indicated the tariff for grain silos as 94.06 but later discovered that a ruling had been issued classifying the same tariff as 8437.80.00.

41. The Commissioner stated that after reviewing the documents provided together with holding consultative meetings with the Custom policy team to understand the letter dated 15th May 2017 and to align their understanding on the correct tariff heading. After the meeting, the Commissioner was satisfied with the classification by the Taxpayer, which was in line with the letter from policy unit.

42. The Commissioner in view of the said meeting agreed that the assessment can be vacated and the demand for taxes be withdrawn.

43. Further deliberations took place and finally the parties agreed to treat all the issues in dispute as settled. The Commissioner amended the assessment in view of the discussions and the matter was marked as fully settled under the ADR mechanism."

58. My finding is that in view of the fact that the ADR Agreement expressly stated that it was in respect to all the issues in dispute thereby resulting in the withdrawal of the assessment, it will not be in the interest of justice to allow the Appellant to depart from the clear terms of the Agreement and revive the already withdrawn assessment through the instant appeal.

59. My above finding on the issues of legitimate expectation and the ADR Agreement would have been sufficient to determine this appeal but I am also still minded to determine the issue of the applicable HS Code for the Respondent's consignment. The Tribunal rendered itself as follows on the issue of the HS Code: -

> " 21. Our task in this Appeal is two pronged; determine the correct HS Code of the items imported by the Appellant and finally establish whether the Respondent's letter dated 17th May 2017 created legitimate expectation. On the issue of the HS Code the Appellant relied on 8437.80.00 while the Respondent relied on HS Code 9406.00.90 to raise an assessment. HS Code 8437.80.00 is under Chapter 84; Nuclear reactors, boilers, machinery and mechanical appliances; Parts thereof. This falls under Section XVI; Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers; television image and sound recorders and reproducers, and parts and accessories of such articles. More specifically the heading of HS Code 8437 state;
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> > "Machines for clearing, sorting or grading seed, grain or dried leguminous vegetable; machinery used in the milling industry or for the working of cereals or dried leguminous vegetable, other than farm type machinery."
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> 22. In contrast, HS Code 9406.00.90 as relied upon by the Respondent is captured under chapter 95 of the East African Community External Tariff Handbook. The heading of the Chapter reads as follows;
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> QUOTE{startQuote "}
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> Furniture, bedding, mattresses, mattress supports, cushions and similar staffed furnishing; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated name plates and the like; prefabricated buildings."
>
> 23. More specifically HS Code 9406.00.90 is headed as "Prefabricated buildings of woods." The Tribunal has also appraised its mind to the provisions of General Interpretation Rule 1 & 6 which stipulates that for legal purposes classification shall be determined according to the terms of the headings and any relevant Section or chapter notes. Bearing this in mind we note that the Appellant herein imported grain storage silos made of steal. This automatically disqualifies HS Code 9406.00.90 as the requirement therein is that for the code to apply the goods imported must be made of wood.
>
> 24. The Respondent sought disqualify declaring the goods under HS Code 8437 on basis that silos have no bearing on the milling process with respect, we must disagree with the Respondent on this issue. The heading of HS Code 8437 is instructive in its usage of this words "Machinery used in the milling industry" only to the process of milling. In our view the milling process co-exist with other process that happen before and after the actual milling industry. In any event, if the HS Code was to be considered with only the milling process, nothing would have been easier for the members of the East African Community than to have the heading of HS Code 8437 read "Machinery used

in the milling process." Our resolve in this regard is further buttress by the fact that the world Customs Organization, which the Respondent is a member, in March of 2017 on the HS Committee 59th Session classified storage silos whether flat based conical based under HS Code 8418.69 in Chapter 84. This, if nothing, indicates that silos are classified under Chapter 84 as opposed to 94.

60. I have considered the reasoning adopted by the Tribunal when discussing the subject of the milling process and the usage of the words, Machinery in the milling industry. I am of the view that the Tribunal gave the correct and comprehensive interpretation of the term "Milling Industry" before arriving at the finding that the milling process happens alongside other processes that occur before and after the actual milling. I also find that, as correctly observed by the Tribunal, WCO HS Committee 59th Session also classified silos under HS 8418.69 thus confirming that silos are classified under Chapter 84 and not 94. I find no reason to depart from the Tribunal's decision which was not only sound but also well considered.

Disposition

61. Having regard to the findings and the observations that I have made in this judgment, I find that the instant appeal is not merited and I therefore dismiss it with no orders as to costs.

62. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE