



Mastermind Tobacco (K) Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E030 of 2021) [2024] KEHC 12914 (KLR) (Commercial and Tax) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E030 OF 2021**

**A MABEYA, J
OCTOBER 25, 2024**

BETWEEN

MASTERMIND TOBACCO (K) LIMITED APPELLANT

AND

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT RESPONDENT

JUDGMENT

1. This is an appeal against the decision of the Tax Appeals Tribunal delivered on 23/4/2021. On an operation conducted by the National Police Service in or about 2016, several goods were impounded from the appellant's residence. The respondent was notified of the same and investigations were commenced with an aim of establishing whether the cartons of cigarettes thus impounded were entered for export or dumped in the local market.
2. The appellant forwarded a report to the respondent as requested and on 10/1/2017, the respondent issued the appellant with a notice under section 235 and 236 of EACCMA requesting it to provide documents and information relating to the export consignments.
3. The respondent made an assessment on the consignment and on 28/3/2018 and made a tax demand of Kshs 517,755,155/-. The appellant raised an objection. An objection decision was rendered on 22/5/2018 and, being dissatisfied thereby, the appellant appealed to the Tax Appeals Tribunal ("the Tribunal").
4. In its judgment of 23/4/2021, the Tribunal dismissed the appeal and upheld the objection decision on a tax demand of Kshs 517,755,155/-. The appellant was dissatisfied with the judgment and lodged an



appeal to this Court vide a Memorandum of Appeal dated 3/5/2021. The appeal was premised on 17 grounds which can be summarized as follows: -

- a. That the Tribunal erred in holding that the appellant had not provided proof of export on the consignment and thus disregarded the certificates of export that had been provided by the appellant;
 - b. That the Tribunal erred in failing to consider the evidence that demonstrated that the consignment had exited through the Malaba border and received in the Burundi border;
 - c. That the Tribunal wrongly misinterpreted the meaning of the term export as defined under section 2 of the *Excise Duty Act*;
 - d. That the Tribunal erred in disregarding the certificates of export despite their veracity not being challenged by the respondent;
5. The respondent opposed the appeal via a statement of facts dated 7/6/2022. He contended that the Tribunal acted lawfully in making its decision, as the applicant had not met the burden of proof by providing the necessary evidence. That the Tribunal was correct in disregarding the certificate of export because it was issued at the appellant's premises rather than at the exit point. Furthermore, the Tribunal did not err in using the export entries and certificate of export to determine whether the consignment had been exported. Finally, that Tribunal correctly interpreted section 78 of the East African Customs Management Act (ECCMA), which requires the appellant to present a certificate of discharge.
 6. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that the Tribunal had erred in understanding the appellant's business in stating that the goods were not exported. That the appellant sold export cigarettes to appointed agents who were prequalified upon meeting a required criteria. That in this case, the customers based in Burundi and Congo paid for the goods and sent their agents to collect the goods from the appellant's premises and the same were loaded to the vehicles sent by customers for transport.
 7. That once payment is made by the customer, an invoice is raised and a customs export entry would be processed. A passed export entry would then be uploaded and printed copies availed to the appellant's export staff and the respondent's resident officer would endorse the physical export.
 8. That the Tribunal ignored and or disregarded the overwhelming evidence which demonstrated that the consignment in issue was exported and it left the Kenyan border. That pursuant to section 223(d) of the EACCMA, the production of documents was prima facie evidence that the documents were issued. That the evidence produced by the appellant was not disputed or controverted and therefore there was no basis of disregarding such evidence.
 9. According to the appellant, the burden of proof shifted to the respondent to demonstrate that the goods in issue did not cross the border. That the Tribunal failed to consider the fact that the certificate of export was a system generated document issued by the respondent at the tail end of the export. That the certificates of export were validly issued when the goods were rotated at the border and therefore the appellant had fulfilled its obligations.
 10. It was submitted that the Tribunal introduced a criteria which was not supported by the law when it held that the documents should be produced from the destination country. That the appellant's obligation ceased at the Malaba boarder once the goods were rotated into Uganda. That since the respondent's officers sealed the container with its seals as required under EACCMA, the respondent could not dispute the export.



11. On his part, the respondent submitted that appeals to this Court are only with respect to questions of law and the Court ought not to be drawn to the considerations of the credibility of witnesses. That proof of export is delivery that the goods had arrived where they were destined to go and in the contrary, they would still be termed to be in the local country.
12. It was submitted that the respondent had received communication from the Burundi Revenue Authority that between the period of 2013 to 2017, no cigarette imports reached Burundi. That in this regard, the Tribunal correctly held that the appellant had failed to sufficiently prove that it actually exported the consignment in question.
13. I have considered the record and the submissions by Counsel. The first ground of appeal is that the Tribunal erred in holding that the appellant failed to provide proof of export on the consignment by disregarding the certificates of export that had been provided by the appellant.
14. It was the appellant's position that its customers based on Burundi and Congo had sent their agents to collect the cigarettes and the process of loading was supervised by the respondent's officers. That thereafter, the respondent's officers affixed seals to the container and an electronic cargo tracking system device would be activated. The applicant stated that issuance export certificates was within the purview of the respondent and production of these certificates was prima facie evidence of export.
15. The issue therefore is whether there was an error on the part of Tribunal by holding that the appellant did not discharge the burden of proving that the consignment was actually exported. In order to determine the threshold for exportation, section 2(2)(d) of the EACCMA provides guidance as follows: -

“(2) For purposes of this Act –

(d) the time for exportation of goods shall be deemed to be;

(i) the time at which the carrying aircraft or vessel departs from its final position, anchorage or berth at the port or place within boundaries of the Partner State at which the goods are shipped for exportation;

(ii) in the case of goods exported overland, the time at which the goods pass across the boundaries of Partner States.”

16. In tax matters, it is settled that the balance of proof lies with the tax payer. See section 30 of the [Tax Appeals Tribunal Act](#) as well as section 30 of the [Tax Procedures Act](#).
17. In addition to this, sections 235 and 236 of the EACCMA gives the respondent the right to do an inspection or an audit on the records held by a tax payer. It provides in part, as follows: -

“235. The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods —

to produce all books, records and documents relating in any way to the goods;
and



to answer any question in relation to the goods; and

to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of trans-shipment of the goods, as the proper officer may deem fit.

...

236. The Commissioner shall have powers to—

verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods;

question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;

inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and

examine the goods where possible for the goods to be produced.”

18. From the foregoing, it is clear that the appellant carries the burden of proof to show that the goods were indeed exported. Thus, an export refers to the transfer of goods from a Partner State to another jurisdiction. For goods transported by air or sea, an export occurs when the vessel departs from its final anchorage or port. For goods transported overland, an export takes place when the goods cross the relevant boundaries.
19. The dispute originated from an investigation that led the respondent to conclude that the cigarettes did not leave the appellant’s premises. The respondent questioned the exportation of the goods based on the stamps in the export certificates and documentation from the Uganda Revenue Authority, which indicated that records showed the goods had arrived in Uganda. Additionally, the Burundi Revenue Authority provided evidence confirming that no cigarette imports originating from the appellant had reached Burundi.
20. On the balance of proof, I concur with the appellant that a Certificate of Export is a prima facie evidence that the export took place. This is because the certificates are issued by proper officers of the respondent. This evidentially burden however shifted back to the appellant after the respondent challenged the stamps contained in the Certificates of Export as well as the documentations of imports in the destination country.
21. The position remained that, while the Certificate may provide initial support for the claim of exportation, the discrepancies highlighted, such as the stamps on the export certificates and the documentation from the Uganda Revenue Authority, suggest that further investigation was warranted.
22. It is at this point that the balance of proof shifted back to the appellant to demonstrate that the consignment was indeed delivered to its intended destination. By failing to do so, the burden was not discharged and for this reason I agree with Tribunal’s holding on this issue. The appellant failed to demonstrate how the consignment was stamped in Nairobi and arrived at Burundi the same day. The appellant further did not controvert the evidence provided by the Burundi Revenue Authority as well as the Uganda Revenue Authority.



23. The second ground of appeal is whether the Tribunal wrongly interpreted and applied the meaning of the word export. The Court reiterates that the definition of the word export is contained in section 2(2)(d) of the EACCMA. The requirement of the appellant to provide additional documents was with regard to discharging its burden of proof in order to demonstrate that these goods actually crossed the border to another state.
24. Based on the foregoing, the Court finds no error on the part of Tribunal. The evidence adduced by the respondent before the Tribunal was not controverted by the appellant. The burden of proof was not discharged and in light of these findings, the Court finds no merit in the appeal.
25. Accordingly, the appeal is without merit and is dismissed with costs and decision of the Tribunal delivered on 23/4/2021 upheld.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE

