



REPUBLIC OF KENYA



Commissioner of Investigations and Enforcement v Mombasa Maize Millers Limited (Tax Appeal E103 of 2021) [2023] KEHC 17836 (KLR) (Commercial and Tax) (12 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E103 OF 2021
DAS MAJANJA, J
MAY 12, 2023**

BETWEEN

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT

AND

MOMBASA MAIZE MILLERS LIMITED RESPONDENT

(Being an appeal against the Judgment of the Tax Appeals Tribunal at Nairobi dated 30th April 2021 in Tax Appeal No. 371 of 2019)

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal by the Appellant (“the Commissioner”) against the decision of the Tax Appeals Tribunal (“the Tribunal”) dated April 30, 2021 where it held that the goods imported and declared by the Respondent in Import Entry No 2017MSA6627971 as Grain handling equipment were to be classified under Harmonised System (HS) Code 8437.80.00 as declared by the Respondent as opposed to HS Code 9406.00.90 as advanced by the Commissioner.
2. The parties’ dispute and contention as to the applicable tariff in respect of the said goods can be traced back to the investigative examination that the Commissioner conducted on the subject goods imported. In its letter dated November 1, 2018, the Commissioner faulted the Respondent for declaring the goods under tariff Heading 8437 as opposed to 9406 in comparison with similar goods and as such re-assessed the taxes payable for the said goods at Kshs 10,710,130.00.
3. In its letter dated November 5, 2018, the Respondent objected to the demand arguing that it had not imported Grain Equipment for silo plant but chain conveyors, belt and bucket elevators, continuous weigher, flow pipes and accessories, dust collection system, commercial sweep auger, unload auger



and catwalk. That these items are a complete chain conveyor belt system which feeds the mills with the grain and that the mills cannot work without being fed with the grains. The Respondent gave a breakdown of these items and further stated that the supplier had generalized the description of the goods on the invoice and as such, the Respondent attached the sales contract which had detailed the goods being supplied to it. The Respondent invited the Commissioner to its premises to verify the goods. In sum, the Respondent contended that it did not import Grain Handling Equipment but rather milling machinery. It urged the Commissioner to vacate the demand and declare the correct tariff code as 8437.80.00.

4. The Commissioner, in its response dated November 8, 2018 maintained from the description of the goods on the Import Declaration Form (IDF) and custom entry, that the goods were detailed as Grain handling equipment and this was confirmed on the sales contract hence they could not be classified under HS Code 8437.80.00 as, “Machinery used in milling industry or for the working of cereals or dried leguminous vegetables, other than farm-type machinery”. That under paragraph 2 of the sales contract, the agreement was for sale of silos and equipment declared under HS Code 9406.00.90. The Commissioner stated that silos are not considered machines and that grain silos are prefabricated structures classified under Heading 94.06. It further noted that the Respondent had recently imported similar goods from the same supplier and declared and paid taxes based on the correct tariff.
5. The Respondent answered the Commissioner through its letter of November 20, 2018 where it acknowledged that indeed the description of the goods on the IDF and customs entry 2017 MSA6627971 stated ‘grain handling equipment’. It however clarified that this grain handling equipment is part of the milling process as it attached to the mill and feeds grain directly into the mill. Further, that the previous consignments for which taxes were paid related to silos and equipment for storage of grain when purchased before the grain is transferred to the mill for processing. It contended that the two items, although similar in nature, are separate and distinct in terms of function and nature of use. It buttressed its position by stating that para. 2 of the sales contract clearly indicated that the agreement was for sale of equipment as described in ‘appendix 1’ to the contract and not grain silos.
6. By the letter dated February 8, 2019 (“the Objection Decision”), the Commissioner stated that the subject sale contract was neither signed by the supplier nor by the Importer. That the IDF number E1703546731 was not fully utilized and that the Silos imported in Complete Knock-Down (CKD) are prefabricated structures classified under Heading 9406. That the Respondent imported silo in CKD as per the contents of the contract where the Respondent was referred to para. 2 of the sales contract. The Commissioner referred to Rule 2(a) of the General Rules for the Interpretation of the Harmonized System Head (GIRs) which states that any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article.
7. The Commissioner took the position that a machine in a disassembled or unassembled state may be imported in several shipments and in order to declare the different constituent parts under the same heading or subheading, the declarant must make a request in writing to the Customs Department to Import Partial Consignment as required as per section XVI additional note 2. The Commissioner noted that the Respondent did not avail authority from the Customs Department to import partial consignment as required as per section XVI additional note 2. It requested the Respondent to avail a manual, diagram or of necessary several diagrams, of the machine showing the serial numbers of the most important constituent parts and a general inventory containing an indication of the characteristics and approximate weights of the different parts and serial numbers of the principal parts referred to above.



8. The Commissioner therefore held that pursuant to section 135 of the *East Africa Community Customs Management Act, 2004* (EACCMA, 2004) the Respondent was reminded that the taxes demanded were still outstanding and were due and payable. The Commissioner followed up the Objection Decision with letters dated April 15, 2019 and June 10, 2019 where it informed the Respondent that it had not received the documents and information requested above and thus gave the Respondent a final reminder about the demanded taxes.
9. The Respondent preferred an appeal against the Objection Decision to the Tribunal. After considering the appeal, the Tribunal rendered its decision in the Respondent's favour.
10. The Tribunal noted that the Respondent had admitted that it had imported partial consignments of equipment used in a silo without the prior consent of the Commissioner but that in any case, the Respondent maintained that the consignment imported was declared under the correct HS Code 8437.80.00. After reviewing the competing arguments of the parties, the Tribunal stated that the Respondent imported a number of items used in a silo plant. That Tariff 9406 deals mainly with material made of wood, that is prefabricated buildings, furnished or disassembled but made of wood but that the items imported by the Respondent were made of steel and therefore it would be erroneous to classify the same under HS Code 9406.90.90 as contended by the Commissioner. The Tribunal buttressed its position in light of the heading in Chapter 94 which is instructive of the items classified therein. It was further persuaded by the Respondent's reliance on the World Customs Organization's (WCO) opinion during the 59th HS Committee in March 2017 in the classification of silo plants where WCO classifies silo plants under Chapter 84 as opposed to Chapter 94 as the Commissioner had done.
11. The Tribunal stated that while the tariffs used were not exactly same as the one used by the Respondent, the mere fact that it was classified under Chapter 84 was instructive as to why the Commissioner's classification was wrong. Accordingly, the Tribunal held that the Commissioner erred in issuing the Respondent with a tax demand on the basis of classification under Tariff 9406. It therefore set aside the Objection Decision.
12. The Commissioner is dissatisfied with this decision by the Tribunal and has appealed to the court through its Memorandum of Appeal dated June 24, 2021. In response, the Respondent has filed the Statement of Facts dated July 27, 2022. The parties have also filed written submissions to canvass the appeal and their respective counsel also highlighted the same.
13. Since the written and oral submissions regurgitate the parties' positions I have already outlined above, I find no reason to summarize the same, but I will make relevant references where necessary.

Analysis and Determination

14. This court is guided by section 56(2) of the *Tax Procedures Act* ("the TPA"), 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 Munuwe Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR). The court will only intervene in a decision on facts, if the decision of Tribunal is perverse in the sense that it is decision that cannot be reasonably supported by the facts.
15. Although the Commissioner raised six issues in its appeal, it has condensed the same into a single issue; whether the it erred in classifying the items imported by the Respondent under HS Code 94.06.
16. The Coding/Tariff classification system currently in use in Kenya for determining applicable tariffs for imported goods is adopted from the said Harmonized System, an internationally standardized system



of names and numbers to classify traded products. The East Africa Community Partner States agreed to adopt it when they signed the Treaty for the Establishment of the EAC on November 30, 1999. The customized EAC Harmonized System (Common External Tariff) (“CET”) is updated from time to time and the version in use at the time material to this case was the one revised in 2017.

17. The parties also agree that to ascertain what code is applicable to particular goods, one has to look at the GIRs which are rules that govern the classification of goods under the Harmonized System and the Explanatory Notes which provide commentary on the intent and scope of provisions and as approved by the Customs Co-operation Council and constitute the official interpretation of the Harmonized System at the International level and are an indispensable complement to the System.
18. Under the GIRs, goods are classified in accordance with the Heading appropriate to the goods to which they are most akin. The Heading which provides the most specific description is preferred to Headings providing a more general description. Whether the subject consignment ought to have been classified under Heading 94.06 as fronted by the Commissioner or Heading 84.37 as averred by the Respondent is a question of fact and was within the province of the Tribunal. As stated earlier, this court can interfere with the Tribunal’s decision if the conclusion reached by the Tribunal cannot be supported by the facts on record.
19. The Commissioner sought the reclassification of the subject consignment under Chapter 94; Furniture; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like; prefabricated buildings Heading 94.06; Prefabricated buildings. - Of wood.
20. On the other hand, the Respondent had classified the subject consignment under Chapter 84; Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof, heading 84.37; Machines for cleaning, sorting or grading seed, grain or dried leguminous vegetables; machinery used in the milling industry or for the working of cereals or dried leguminous vegetables, other than farm-type machinery.
21. The duty of the Tribunal was to examine which of the aforementioned tariffs heads best suited the classification of the subject consignment based on the evidence before it. Whereas the Commissioner submits that the subject goods were prefabricated structures made of galvanised steel that are assembled on site, it does not dispute that the same were not made of wood. It is apparent that it is only prefabricated structures made of wood that can fit into the Heading 94.06. I cannot fault the Tribunal on this aspect. In stating that the subject goods were best suited under heading 84.37, the Respondent explained that the same related to equipment that forms part of its milling process as it is attached to the mill and feeds grain directly into the mill.
22. In as much as para. 2 of the sales contract stated that what was being sold was various silos and equipment, I agree with the Respondent that this paragraph ought to have been read together with the annexed ‘Appendix 1’ of the sales contract which gave a further detailed description of the items being bought.
23. Based on the entirety of the record, I am satisfied that the Tribunal correctly analysed the evidence on record and came to a conclusion that was supported by the CET, the GIRs, the Explanatory Notes, opinion of the WCO and the evidence before it. Whether the subject goods fit within the head is a matter of substance rather than form. The Tribunal examined the evidence and concluded that they fit more under Heading 84.37 rather than Heading 94.06. The Tribunal cannot be faulted for coming to this conclusion.



Disposition

24. The Commissioner's appeal lacks merit. It is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango.

Ms Mutai instructed by the Kenya Revenue Authority for the Appellant.

Mr Khagram instructed by A. B. Patel and Patel Advocates for the Respondent.

