



Commissioner of Customs and Border Control v Keppel Investments Limited (Tax Appeal E141 of 2020) [2023] KEHC 18548 (KLR) (Commercial and Tax) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E141 OF 2020
DAS MAJANJA, J
JUNE 16, 2023**

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER CONTROL APPELLANT

AND

KEPPEL INVESTMENTS LIMITED RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 25th September 2020 in Tax Appeal No. 164 of 2017)

JUDGMENT

Introduction and Background

1. The Respondent is a resident company whose principal activity is importation of tyres and selling of the same in the local market. It imported a consignment of 240 pieces of Changepeng brand radial tyres (“the Consignment”) through Entry No 2016MSA6209335 with declared values of USD 100 and USD108 respectively and paid the requisite duty of Kshs 728,585.00 and Kshs 950,000.00 respectively to the Appellant (“the Commissioner”) on October 24, 2016. When the Commissioner valued the Consignment, it concluded that it had been undervalued and thus uplifted the values from USD 100 to USD 126 and from USD 108 to USD 133. It therefore demanded additional duties and taxes amounting to Kshs 385,326.00.
2. The Respondent protested this uplifting of values through its letters dated 9th and 12th November 2016 stating that it was able to support the declared values through the Commercial Invoice showing the actual values which was supported by the Certificate of Conformity (PVOC), a Letter of Credit showing the amount payable which was the amount in the Commercial invoice and quotes from suppliers which showed that the current prices were even lower than the values in the Consignment.



3. The Respondent further tabulated the costing of its imports and comparison to market prices and stated that an uplift of 50% would render its business unprofitable and caused it close down its business. It asserted that it is a regular importer of tyres and the prices it obtained from its suppliers were lower than the prices quoted for importing only one container by the end users and that the documents produced showed the actual prices it had paid for them. The Respondent argued that it did not make sense to undervalue tyre imports as the import duty on truck tyres is 10% and that even if it undervalued them by USD 50, it would only save approximately USD 5 hence it could not benefit from undervaluing its imports. The Respondent then tabulated the values being declared by certain importers, the selling prices of the tyres in China and the implied undervaluation. From the table, it was clear that the value of its Changfeng tyres was higher than the comparable Chengshan and Roadshine tyres.
4. The Respondent also pointed out tyre prices have been declining globally over the three years prior to the assessment. The Respondent therefore stated that it had demonstrated and proved to the Commissioner that the declared values of the tyres are actual and correct. It complained that it was incurring unnecessary demurrage and interest costs due to the delay in releasing the Consignment. In order to avoid further losses, it stated that would be paying additional taxes and duties under protest in order to secure release of the Consignment.
5. The Commissioner, through its letter of November 17, 2016, responded that valuation of imported goods is guided by the provisions of section 122 and the Fourth Schedule to the *East African Community Customs Management Act, 2004* (“EACCMA”) which outlines rules and methods of valuation. That when the Commissioner has reason to doubt application of transaction value by virtue of section 122 and Fourth Schedule, customs value shall be determined under subsequently methods of valuation. The Commissioner stated that the transaction value was rejected on the basis of the low value of the tyres compared to similar imports of same size and quality from same country of supply and that determination of value is in accordance with provisions of part 1 paragraph 4 in the Fourth Schedule. The Commissioner therefore upheld its position.
6. The Respondent appealed to the Tax Appeals Tribunal (“the Tribunal”). The Tribunal rendered a judgment on September 25, 2020. On the key issue of customs duty payable, the Tribunal determined whether the Commissioner erred by uplifting the customs values declared by the Respondent. It was of the view that the crux of the appeal was whether the Commissioner erred by uplifting the values declared by the Respondent without informing it of the reasons for the uplift.
7. The Tribunal relied on section 122 of the *EACCMA* which provides that where imported goods are liable to import duty ad valorem, then the value shall be determined in accordance with the Fourth Schedule of the *Act* which provides for six (6) methods for calculating the customs value of goods, that is the Transactional Value method, the Transactional Value of Identical Goods Method, the Transactional Value of Similar Goods Method, the Deductive Value Method, the Computed Valued Method and the Fall-back Value Method. The Tribunal’s interpretation of section 122 as read together with the Fourth Schedule of the *EACCMA* is that in ideal cases, the customs value of imported goods ought to be determined using the Transactional Value Method, which is the price actually paid or payable for the goods when sold for export. However, that in the instant case, the Commissioner had departed from this norm and sought to rely on one of the other valuation methods owing to perceived under-declaration by the Respondent.
8. The Tribunal expressed the view that the additional tax which the Respondent was being asked to settle was unlawful since it had not been shown that the Respondent had breached any import regulations under the *EACCMA*. The Tribunal noted that the Commissioner relied on its letter of November 17,



2016, wherein it purportedly explained to the Respondent how the uplift of values was done. This letter, it stated, formed an integral part of the appeal as evidenced in the pleadings as well as the oral hearing of the case. The Respondent averred that it was not provided with the letter dated November 17, 2016 disclosing the rationale for the uplift despite producing sufficient documentary evidence to support its use of the transactional value method.

9. After looking at the Commissioner's Statement of Facts dated January 5, 2017 and the letter dated November 17, 2016, the Tribunal concluded that the Respondent had not received it. At the oral hearing, the Tribunal directed the Commissioner to produce any evidence that the letter had been sent and received by the Respondent but up to the date of the judgment, the Commissioner did not provide any evidence to show that the letter dated November 17, 2016 had reached the Respondent.
10. The Tribunal held that since the Commissioner did not rebut the allegation that the Respondent did not receive the letter of November 17, 2016, it could not place any weight on it. Consequently, the Tribunal concluded that at the time the Respondent paid the taxes resulting from the uplift, the Commissioner had not provided any explanations to the Respondent why it disregarded the declared values based on the commercial invoices supported by certificates of conformity and the quotation from the suppliers among other documents.
11. Based on its analysis of the issues, the Tribunal allowed the Respondent's appeal and held that the Commissioner erred by uplifting the values declared by the Respondent without giving reasons hence the Respondent was entitled to refund of taxes settled as a result of the uplift.
12. The Commissioner has now appealed to this court based on the Memorandum of Appeal dated November 19, 2020. The Respondent's Statement of Facts is dated March 15, 2021. The appeal has been canvassed by way of written and oral submissions where the parties reiterated the position summarized above.

Analysis and Determination

13. The Commissioner has submitted that the grounds of appeal set out in its Memorandum of Appeal can be condensed into two issues; Whether the uplift and additional tax assessment through F147 Ref 2016MSA1051657 totaling Kshs 398,226.00 is legal and in accordance with the law and whether the Respondent's right to information and availability of the same under the EACCMA and appellant's legal mandate considering the procedures underpinning the Simba System were infringed.
14. In short, this court is required to determine whether the Tribunal arrived at the correct conclusion in its determination that the Commissioner erred by uplifting the values declared by the Respondent without giving reasons and whether as a consequence, the Respondent was entitled to a refund of taxes settled as a result of the uplift. In resolving these issues, the 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". In reaching its decision, the court ought to accept the findings of fact by the Tribunal unless they cannot be supported by the evidence (see *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR and *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* NYR CA Civil Appeal Mo. 48 of 2013 [2013] eKLR).
15. It is common ground that section 122 of the *EACCMA* provides for the determination of value of imported goods liable to ad valorem import duty as follows:

122.



- (1) Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value.
- (2) Upon written request, the importer shall be entitled to an explanation in writing from the proper officer as to how the Customs value of the importer's goods was determined.
- (3) Where, in the course of determining the customs value of imported goods, it becomes necessary for the Customs to delay the final determination of such customs value, the delivery of the goods shall, at the request of the importer be made:
 Provided that before granting such permission the proper officer may require the importer to provide sufficient guarantee in the form of a surety, a deposit or some other appropriate security as the proper officer may determine, to secure the ultimate payment of customs duties for which the goods may be liable.
- (4) Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.
- (5) The Council shall publish in the Gazette judicial decisions and administrative rulings of general application giving effect to the Fourth Schedule.
- (6) In applying or interpreting this section and the provisions of the Fourth Schedule due regard shall be taken of the decisions, rulings, opinions, guidelines, and interpretations given by the Directorate, the World Trade Organisation or the Customs Cooperation Council.
- (7) The rate of exchange to be used for determining the equivalent of a Partner State currency of any foreign currency shall be the selling rate last notified by the Central Bank of the respective Partner State when an entry is presented to and accepted by the proper officer.

16. The Fourth Schedule therein further provides in part at Para. 2(1) that

‘The customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods....’.

I therefore agree with the Tribunal that the first port of call in determining the customs value, is the transaction value and it is only when this cannot be determined or satisfied that the Commissioner can rely on other methods of valuation provided in the Fourth Schedule (see *Commissioner Investigations and Enforcement v Eastern Consulting Management Limited* (Income Tax Appeal E132 of 2021) [2022] KEHC 12202 (KLR))

17. The question was thus whether the Respondent had satisfied the Commissioner about the transaction value of the Consignment. This was a question of a fact based on evidence and within the province of the Tribunal. I am satisfied that the Tribunal came to the correct conclusion when it found that the documents presented by the Respondent were prima facie and sufficient proof of the values of the Consignment. The Commissioner did not dispute that the Commercial Invoice for the Consignment showed the actual values which was supported by the Certificate of Conformity (PVOC) and that the



Letter of Credit showed the amount payable being the same as the amount in the Commercial invoice. The Respondent also went the extra mile to demonstrate that the current prices at the time were even lower than the values declared in the Consignment. What the Respondent was required by law to establish was a prima facie case and that the Commissioner ought to have measured all the evidence on a preponderance of probabilities (See *Kenya Revenue Authority v Maluki Kitili Mwendwa* ML HC ITA No E078 of 2020 [2021] eKLR). I cannot therefore fault the Tribunal for coming to the conclusion that the Respondent had sufficiently proved its value declarations.

18. The Commissioner submits that there is no basis for condemning it for failing to furnish evidence that it sent and the Respondent received the letter setting out the basis for the uplift as the Respondent failed to seek an explanation in writing from the proper officer as to how the Customs value of the importer's goods was determined. As stated above, section 122(2) of the *EACCMA* obligates the Commissioner to provide an explanation to a taxpayer as to how it arrived at the customs valuation and that this explanation is upon request by the taxpayer. On record is the Respondent's letter dated November 9, 2016 in which it stated that "We currently have two containers in the CFS at Mombasa, which Customs have insisted are to be valued at 150% above the declared value. We do not understand the rationale for imposing such values. We object to this valuation and state our reasons in this letter."
19. In my view, this statement by the Respondent clearly called for an explanation from the Commissioner as to how the uplift of 150% was done. The right of a tax payer to demand reasons for a decision and the duty of the Commissioner, being a statutory duty, is also underpinned by the principles and values in Article 10 of the *Constitution* including the rule of law, transparency and accountability. It is also encompassed in the right to fair administrative action under Article 47 of the *Constitution*.
20. I think it is erroneous for the Commissioner to dwell on the form rather than the substance of the Respondent's letter which was clearly against the Commissioner's valuation and cannot be interpreted otherwise than a request for reasons to which the Commissioner was obliged to respond. in writing. The Commissioner erred in not providing the reasons.

Disposition

21. This court's jurisdiction that is circumscribed 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. It can only intervene if the Tribunal's findings of fact or conclusions cannot be supported by the evidence on record (see *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR and *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* NYR CA Civil Appeal No 48 of 2013 [2013] eKLR).

22. Having considered the evidence and findings of the Tribunal, I hold that the conclusions of the Tribunal are not perverse and are reflective of the evidence and material before it. The Commissioner's appeal lacks merit. It is therefore dismissed.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.



Mr Chabala, Advocate instructed by Kenya Revenue Authority for the Appellant.

Mr Sarvia instructed by Desai, Sarvia and Pallan Advocates for the Respondent.

