Automark Industries Kenya Limited v Commissioner of Customs & Boarder Control (Income Tax Appeal E006 of 2022) [2023] KEHC 20278 (KLR) (Commercial and Tax) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20278 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E006 OF 2022

A MABEYA, J

JULY 17, 2023

BETWEEN

AUTOMARK INDUSTRIES KENYA LIMITED .... APPELLANT

AND

COMMISSIONER OF CUSTOMS & BOARDER CONTROL .... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 28/1/2022 in TAT Appeal No. 139 of 2021: Automark Industries Kenya Limited vs Commissioner of Customs & Boarder Control)

JUDGMENT

1. The appellant is a company incorporated in Kenya and is in the business of importation and sale of thermoplastic road coating material used in marking roads as a yellow/ white marked line.
2. The respondent is a principal officer of Kenya Revenue Authority, KRA, which is an agency of the government whose core mandate is to assess and collect government revenue and related purposes.
3. On August 9, 2018, the respondent issued a tariff ruling addressed to M/S Kansai Plascom Limited wherein he classified road marking paints under HS 3911.10.00. Relying on that ruling, the appellant declared its imports under that tariff heading.
4. Vide letter dated December 29, 2020, the respondent demanded payment of customs duty of Kshs 17,208,377/- and VAT of Kshs 2,468,306/- for the period 2019 to 2020 following a desk audit. The demand was premised on reclassification of the appellant's product from HS CODE 3911.10.00 which attracts zero import duty and VAT of 16% to HS CODE 3208.90 which attracts import duty of 25% and VAT at 16%.

5. The appellant objected to the demand on January 13, 2021 and the respondent issued a review decision on February 12, 2021 confirming the desk assessment demand of Kshs 19,676,683/- against the appellant.

6. Aggrieved by that demand, the appellant lodged an appeal before the Tax Appeals Tribunal ('the Tribunal') vide memorandum of appeal dated March 24, 2021. The Tribunal delivered its judgment on January 28, 2022 in favor of the respondent and upheld the review decision dated February 12, 2021.

7. Being aggrieved with that finding, the appellant filed the instant appeal vide a Memorandum of Appeal dated February 14, 2022 setting out 12 grounds which can be summarized as follows: -

   a. The Tribunal erred in holding that the thermoplastic products be reclassified under HS CODE 3208.90.00 as opposed to HS CODE 3911.10.00

   b. The Tribunal erred in upholding the respondents demand for additional tax, interest and penalties of Kshs 22,468,306/- for products imported in 2019-2020

   c. The Tribunal erred in applying interpretation Rule (GIRs) Rule 1 as the only Rule applicable to interpretation of the appellant's product and erred in failing to apply Rule 3(b) of the GIRs to the appellant's product

   d. The Tribunal erred in upholding the respondent's decision of February 12, 2021 which demanded for retrospective taxes over products imported in 2018-2019

   e. The respondent's decision as upheld by the Tribunal was arrived at in the absence of an independent expert analysis of the appellant's product to determine the true composition and the Tribunal's decision was contrary to law.

8. This Court has considered the submissions and the entire record.

9. As a first appellate court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own independent conclusions and findings. See *Peter M Kariuki v Attorney General [2014] eKLR*.

10. The grounds of the appeal are inter-related and all center around the reclassification of the appellant's product from HS CODE 3911.10.00 to HC CODE 3208.90.00 which attracts 16% VAT and Import Duty at 25%.

    > 'Whether the tribunal erred in upholding the respondent's reclassification of the appellant's products from zero rated under HS CODE 39011.10.00 to HC CODE 3208.90.00 which attracts an Import Duty of 25%.'

11. On whether the respondent's tariff ruling addressed to M/S Kansai Plascom Limited could be used to estop the respondent from reclassifying the appellant's product based on legitimate expectation, the Tribunal found that the respondent had a statutory duty to ensure that all goods entering Kenya were properly classified and necessary taxes paid. That nothing in the EACCMA required the respondent to furnish the appellant with a laboratory test result that made him classify the appellant's product under HS COSE 3208.90.00.

12. The Tribunal also found that advance rulings were provided for under section 148A of the EACCMA wherein tariff rulings could be issued at the request of a taxpayer and are valid for only 12 months. That the ruling in question could was not issued at the request of the appellant but at the request of a different importer. That the ruling was issued on August 8, 2019 and could not be binding on

the respondent during the audit period. That though the ruling was published on the respondent's website, it was not a binding public ruling as the procedure for such rulings was not followed.

13. The Tribunal thus found that the doctrine of legitimate expectation was not violated and the respondent could not be estopped from demanding additional revenue following the determination of the correct classification.

14. The appellant submitted that the respondent had already classified reflective road markings under HS CODE 3911.10.00 and there was no legislative change to tariff classification nor was there any other laboratory test done by the respondent to prove otherwise.

15. The appellant further submitted that the reclassification was illegal as the respondent did not provide adequate documentary evidence for the product to be reclassified nor was a laboratory test done to inform that decision.

16. Section 148A of the EACCMA provides that: -

> ' 1. A person intending to import goods, may make a written application to the Commissioner for advance binding ruling on any of the following-
>
> a. Tariff classification
>
> b. .
>
> 4. The decision issued under subsection (3) shall be binding on the Commissioner and the applicant for a period not exceeding twelve months.'

17. Section 65 of the TPA also provides for binding private rulings and states: -

> (1) 'A taxpayer may apply to the Commissioner for a private ruling which shall set out the Commissioner's interpretation of a tax law in relation to a transaction entered into, or proposed to be entered into, by the taxpayer.'
>
> (2) An application under this section shall be in writing and—
>
> (a) Shall include all relevant details of the transaction to which the application relates together with all relevant documents;
>
> (b) Shall specify precisely the question on which the Commissioner's interpretation is required; and
>
> (c) Shall give a full statement setting out the interpretation by the applicant of the tax law in relation to the transaction.
>
> (3) Subject to section 66, the Commissioner shall issue a private ruling to an applicant within sixty days of receiving an application for a private ruling under this section.
>
> (4) If the taxpayer has made a complete and accurate disclosure of the transaction in relation to an application for a private ruling and the transaction has proceeded in all material respects as described in the application, the private ruling shall be binding on the Commissioner.
>
> (5) A private ruling shall not be binding on a taxpayer.'

18. From the forgoing, it is trite that advance ruling tariffs are only issued upon application by the taxpayer. They are also binding between the particular taxpayer and the Commissioner for 12 months.

19. The ruling sought to be relied in this matter was not issued at the request of the appellant and neither did it have a binding effect between the parties. The appellant cannot estop the respondent from making an independent finding on the applicable tariff on the basis of a ruling that is inconsequential to the appellant. In any case, the ruling was issued on August 9, 2018 and could only have been valid for 12 months and thus its effect expired on September 8, 2019.

20. It was the appellant's submission that publication of the ruling in the respondent's website gave the ruling the character of a binding public ruling under section 62 of the *Tax Procedures Act* (TPA). The section provides: -

> ' The Commissioner may make a public ruling in accordance with section 63 setting out the Commissioner's interpretation of a tax law.
>
> (2) A public ruling made in accordance with section 63 shall be binding on the Commissioner until the ruling is withdrawn by the Commissioner.
>
> (3) A public ruling shall not be binding on a taxpayer.'

21. The said section 63 of the TPA provides for an elaborate procedure for making a public ruling and states: -

> ' (1) The Commissioner shall make a public ruling by publishing a notice of the public ruling in at least two newspapers with a nationwide circulation.
>
> (2) A public ruling shall state that it is a public ruling and have a heading specifying the subject matter of the ruling and an identification number.
>
> (3) A public ruling shall take effect on the date specified in the public ruling or, when a date has not been specified, from the ate the ruling is published in accordance with the provisions of subsection (1).
>
> (4) A public ruling shall set out the Commissioner's opinion on the application of a tax law in the circumstances specified in the ruling; and shall not be a decision of the Commissioner for the purposes of this Act or the *Tax Appeals Tribunal Act*, 2013.'

22. This procedure was not followed and the publication of the ruling on the website did not meet the detailed procedure for making public rulings. In this regard, the Tribunal was justified in finding that the appellant's legitimate expectation was not breached.

23. This Court now turns its attention to the real issue in question, whether the respondent's reclassification of the appellant's product was correct.

24. The appellant maintained that its product was classifiable under HS CODE 3911.10.00 whilst the respondent classified it under HS CODE 3208.90.00. The Tribunal begun by identifying the product, then it identified the applicable GIR and finally classified the product using the identified rule.

25. The Tribunal found that the product was a thermoplastic material used as a road paint and thus determined that the product was a paint. The Tribunal then found that by virtue of Rule 2(b) mixtures are to be classified under Rule 1 and classified the product as such, rejecting both the appellant's

classification under Rule 3(b) and the respondent's classification under Rule 3(a) as the product was only classified under one heading thus Rule 3 was inapplicable.

26. The Tribunal then turned to section 6 which provided for inter alia paints and varnishes as provided for under Chapter 32.08. The Tribunal found that the product was described as a paint and the addition of any other components forming the mixture did not change the essential character of the product as a paint. That being a mixture, the product was correctly classified under Rule 1.

27. The Tribunal thus found that the appropriate subheading was HC CODE 3208.90.00 as classified by the respondent and proceeded to uphold the review decision dated 12/02/2021.

28. On this, the appellant submitted that the Rules of Interpretation of the Harmonized System demanded that classification of a product is by terms of the headings subject to any legal text and under the General Interpretative Rule (GIR) which requires that most specific description is to be preferred to general ones.

29. That the product was more akin to those described in HS CODE 3911.10 than HS CODE 3208.90.00 and that one would have had to strain the language used in 3208.00 so as to include the appellant's products contrary to the principle of taxation that provides for strict construction to avoid imposing tax burdens that are not clearly provided for. The appellant referred this Court to *Keroche Industries Limited vs KRA & 5 Others (2007) eKLR* to buttress its position.

30. That the Tribunal erred in failing to apply Rule 3(b) which provided for mixtures that are made up of different materials and components. That the respondent's imposition of another tariff retrospectively was punitive and illegal and breached the appellant's legitimate expectation.

31. The main dispute between the parties is whether the imported product ought to be classified under HS CODE 3911.10 or HS CODE 3208.90.00.

32. It is not in dispute that the appellant imported thermoplastic material used as road paint. The product contained synthetic resin 20-25%, glass beads 22%, titanium dioxide as a pigment 10%, calcium carbonate and marble powder as fillers in the range of 43-48%. Thermoplastic material are materials that soften into a liquid in high heat and then harden again when cooled. The material contained a mixture of different materials.

33. From the foregoing, the Tribunal's finding that the product was a paint was thus justified. The mixtures all combined to make a paint that is used to mark roads.

34. The classifications under the General Interpretative Rules (GIR) are the primary method of GIR determining classification of materials and products. These are the 6 rules that are applied when setting up a 6-character commodity code. The rules are laid down in the global Harmonized System and transposed into the EU Combined Nomenclature.

35. GIR 1 provides that the classification is determined principally by the terms of the headings and the relative section or chapter notes. Mixtures fall under Rule 2(b) which provides that each heading which relates to a particular material or substance shall also apply to the mixtures and combinations consisting of it. The Tribunal cannot therefore be faulted in its interpretation of the GIR and in its findings.

36. Accordingly, I find the appeal to be without merit and dismiss the same with costs.

37 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE