



**Commissioner of Customs and Border Control v Promasidor (K) Limited (Customs Tax Appeal E008 of 2022) [2023] KEHC 20587 (KLR) (Commercial and Tax) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20587 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CUSTOMS TAX APPEAL E008 OF 2022**

**DAS MAJANJA, J**

**JULY 21, 2023**

**BETWEEN**

**COMMISSIONER OF CUSTOMS AND BORDER CONTROL ..... APPELLANT**

**AND**

**PROMASIDOR (K) LIMITED ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 28th January 2022 in Tax Appeal No. 462 of 2020)*

**JUDGMENT**

**Introduction and Background**

1. On 28<sup>th</sup> January 2022, the Tax Appeals Tribunal (“the Tribunal”) delivered a judgment holding that the Respondent’s product, MIKSI Instant Milk powder filled with Vegetable Fat (“the Miksi product”) is properly classifiable under Harmonised System (HS) Code 1901. 90.90 rather than HS Code 0402.29.00 of the East African Community Common External Tariff (EAC CET) as advanced by the Appellant (“the Commissioner”). The Commissioner appeals against the decision to this court and has set out its grounds for doing so in its Memorandum of Appeal dated 16<sup>th</sup> March 2022. The Respondent filed its Statement of Facts dated 13<sup>th</sup> April 2022. The appeal has been canvassed by way of written submissions which are on record. The parties’ respective arguments also emerge from the narration of the background of the matter.
2. In order to fully contextualize and appreciate the appeal, I will highlight the chronological background of the dispute. The Respondent is a manufacturer, importer and distributor of fast-moving consumer goods, mainly dealing with cereals, beverages and food products such as the Miksi product in more than 30 countries across Africa including Kenya.



3. Prior to importing the Miksi product, the Respondent requested the Commissioner for an advance tariff ruling on 3<sup>rd</sup> June 2020. By the letter dated 15<sup>th</sup> July 2020, the Commissioner stated that the Miksi product sample presented was obtained by blending skimmed milk, vegetable fats, whey, sucrose, lecithin and vitamins and that milk is classified in Chapter 4; Dairy produce; birds' eggs; natural honey; edible products of animal origin, not elsewhere specified or included and that it is specifically provided for in the subheadings below:
  - a. 04.01 - Milk and cream, not concentrated nor containing added sugar or other sweetening matter.
  - b. 04.02 - Milk and cream, concentrated or containing added sugar or Other sweetening matter (+).
  - c. 04.03 - Buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit, nuts or cocoa.
4. That Chapter 4, note 4b, states the expression “milk” means full cream milk or partially or completely skimmed milk and the Chapter notes state in pertinent part it covers; Dairy products, Milk, i.e., full cream milk and partially or completely skimmed milk, cream, buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream, whey, products consisting of natural milk constituents, not elsewhere specified or included, Butter and other fats and oils derived from milk; dairy spreads, Cheese and curd. The Commissioner further contended that as per the Chapter, the aforementioned products may contain, in addition to natural milk constituents (e.g, milk enriched in Vitamins or mineral salts), small quantities of stabilising agents which serve to maintain the natural consistency of the product during transport in liquid state (disodium phosphate, trisodium citrate and calcium chloride, for instance) as well as very small quantities of anti- oxidants or of vitamins nor normally found, in the product. That certain elements of these products may also contain small quantities of chemicals (e.g., sodium bicarbonate) necessary for their processing; products in the form of powder or granules may contain anticaking agents (for example, phospholipids. amorphous silicon dioxide).
5. The Commissioner observed that the Miksi product in question was milk with additives as described above and fell within the purview of classification as milk in powdered form. That Heading 04.02 covers Milk and cream, concentrated or containing added sugar or other sweetening matter (+) and the Explanatory Notes state that the Heading covers milk (as defined in Note 1 to this Chapter) and cream, concentrated (for example, evaporated) or containing added sugar or other sweetening matter, whether liquid, paste or solid (in blocks, powder or granules) and whether or not preserved or reconstituted. That the Note further states Milk powder may contain small quantities of starch (not exceeding 5% by weight), added, in particular, to maintain the reconstituted milk in its normal physical state. From the above information, the Commissioner concluded that the Miksi product is correctly classifiable in HS Code 0402.29.00 of the EAC CET based on the General Rules of Interpretation 1 and 6 (GIRs).
6. By its letter of 23<sup>rd</sup> July 2020, the Respondent informed the Commissioner that it had not changed the product or its suppliers and that it has always been classified under HS Code 1901.90.90 as evidenced by the Commissioner’s previous tariff ruling dated 20<sup>th</sup> October 2017 and referenced as CUS/V&T/TARI/RUL/447/2017. That the verification agency of its suppliers similarly classifies the Miksi product under the same Chapter 19.
7. According to the Respondent, the Miksi product is manufactured by taking full cream milk, removing all the butter fat from the milk, and then adding vegetable oil/ fat, whey, sucrose, lecithin and vitamins



prior to further processing and finally spray drying the preparation. It added that determination of the applicable tariff code ought to have been in accordance with the GIRs and that the Miksi product is classified under Chapter 19 which includes food preparations of goods of headings. 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.

8. The Respondent contended that the heading includes food preparation obtained from milk by replacing one or more constituents of milk (e.g. butyric fats) by another substance (e.g. oleic acid) and that the Miksi product is specified to be made from; Skimmed milk and that skimmed milk is made when all the milk fat is removed from the whole milk and thus contains zero— 0.1% fat. That it is also made from whey which is the liquid part remaining after milk has been curdled and strained and is a by-product of the manufacture of cheese or casein hence rendering it rich in protein. Further, it is also made from vegetable oils, mainly from coconut oils and they are added to replace the milk fats found in the whole milk making Miksi rich in both fats and milk proteins and the Miksi product is also made from other additives including lecithin and vitamins.
9. The Respondent faulted the Commissioner's reliance of Chapter 4 but disregarding Exclusion Note II(b) of the same Chapter. It requested the Commissioner to table evidence of the criteria used to determine the fat content, in this case the free fat content, of the Miksi product which gives guideline on indications of oleic fats added to milk or any food substance. The Respondent stated that it was clear from literature that skimmed milk have fat content (bound fat) of less than 1% not unless it has been fortified with other fats or oils.
10. Based the grounds outlined, the Respondent concluded that the Miski product is specific to the terms of Heading 19.01 and that by virtue of GIR 1 and 6, the correct tariff was 1901.90.90. It lodged an appeal to the Commissioner on 24<sup>th</sup> July 2020 reiterating that the Miski product was a food preparation classifiable under Chapter 19. The Commissioner, in its ruling dated 28<sup>th</sup> August 2020, maintained that the Miksi product is correctly classifiable in HS Code 0402.29.00 based on the GIRs 1, 3a and 6. It clarified that the product referred to in the classification guidance issued vide communication reference CUS/V&T/ADV/050/2020 was 'MIKSI Instant Skimmed Milk Powder with Vegetable Fat'. In arriving at this decision, the Commissioner stated that classification of goods is based on the GIRs and the Explanatory Notes that serve as a guide and that in classifying the Miksi product, deference should be made first and foremost to the goods description, that is, what it is? Its essential character. That the Miksi product is milk and not a product obtained from milk as per the Respondent's referenced Explanatory Note and that skimmed milk powder is not manufactured by removing milk fats with the aim of replacing them but to solely reduce its fat content.
11. The Commissioner further stated that based on the CODEX standard report submitted by the Respondent, the Miksi product is a blend of skimmed milk with vegetable fat, hence there is no extraction of milk fats that took place for the same to be replaced by vegetable fat. The Commissioner held that the Explanatory Note of Chapter 4 clearly provides that the natural constituents of milk, in this case, being milk fats must be removed and replaced by another substance, in this case, being vegetable fats for a product to be excluded from Chapter 4 and classified in Chapter 19. That in the production of skimmed milk the natural milk constituents are not removed/ replaced as skimmed milk is still classified as milk under Chapter 4 and neither does the replacement of natural milk constituent (fats) occur when the skimmed milk is blended with vegetable fat.
12. The Respondent, being dissatisfied by the Commissioner's decision, lodged an appeal at the Tribunal on 9<sup>th</sup> October 2020. In its decision rendered on 28<sup>th</sup> January 2022, the Tribunal considered whether the Commissioner erred in classifying the Respondent's product at HS Code 0402.29.00.



13. The Tribunal held that it was guided by GIR 1 and noted that the GIRs are applied sequentially such that if goods are classifiable under the first rule, they should not be subjected to the provisions of Rule 2 or any other rule and that the subsequent rules are only applicable if the goods are not classifiable under the previous rules. Having taken into account GIR 1, the Explanatory Notes of Chapter 4 and the evidence of the Respondent's expert witness, the Tribunal was of the view that the Miski product was excluded from Chapter 4 by virtue Chapter note 4 which stated that the chapter did not cover inter alia Products obtained from milk by replacing one or more of its natural constituents (for example, butyric fats) by another substance (for example, oleic fats) (heading 19.01 or 21.06). Further, that the Miski product contains more carbohydrates (39%) than the not more than 5% prescribed in the Explanatory Notes of heading 04.02. The Tribunal faulted the Commissioner's conclusion that the Miksi product would only be removed from chapter 4 if it is established that the natural milk constituent is totally/ wholly replaced with another substance. The Tribunal did not see anything in the phrase "Products obtained from milk by replacing one or more of its natural constituents (for example, butyric fats) by another substance" that refers to total removal and or replacement of the natural ingredient. The Tribunal was of the view that by adding the words "totally removing and replacing", the Commissioner introduced an additional criterion that is not specified in Chapter note 4. Furthermore, that isolating skimmed milk as an ingredient in the manufacture of the Miksi product was a rather restricted view as the product is manufactured from full cream milk from which animal fat (butyric fats), are removed to make skimmed milk, which are then replaced with vegetable oil/fat, and other ingredients.
14. The Tribunal took the position that so long as there was removal and the replacement of an ingredient from the product of Heading 04.02, the resulting product would be disqualified from Chapter 4 and classified under Heading 19.01 irrespective of the quantum. The Tribunal therefore determined that the Miksi product was classifiable under Heading 19.01 and more specifically HS Code 1901.90.90. The Tribunal made the finding that the Commissioner erred in classifying the Respondent's product at HS Code 0402.29.00. It set aside that the Commissioner's ruling that classified the Miksi product under HS Code 0402.29.00 rather than HS Code 1901.90.90 leading to this appeal by the Commissioner.

### **Analysis and Determination**

15. The Commissioner has raised 6 issues in its appeal but has condensed them into two issues in its submissions. First, whether the Tribunal was right to conclude that the Miksi product is classifiable under HS Code 1901.90.90 rather than HS Code 0402.29.00 of the EAC CET and whether the Tribunal's conduct of its proceedings were fair.

### **Classification of the Miksi product**

16. The Coding/Tariff classification system currently in use in the country for determining applicable tariffs for imported goods is adopted from the Harmonized System, an internationally standardized system of names and numbers to classify traded products which the EAC partner States agreed to adopt when they signed the Treaty for the establishment of the EAC on 30<sup>th</sup> November 1999. The customized EAC CET is always being updated and the version that was in use at the material time 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. Whether the Miksi product ought to have been classified under Heading 04.02 as fronted by the Commissioner or 19.01 as advanced by the Respondent is a question of fact and was within the province of the Tribunal. Under the GIRs, goods are classified in accordance with the Heading appropriate to the goods to which they are most akin and that the Heading which provides the most specific description shall be preferred to Headings providing a more general description. The jurisdiction of this court can only be properly invoked if the question before it is one of law and this entails a review of the Tribunal's conclusion and determining whether it was able to correctly apprehend the evidence before it.
19. Under section 30(a) and (b) of the Tax Appeals Tribunal Act and section 56(1) of the TPA, the burden of proving that a tax assessment or decision is excessive or should have been made differently is placed squarely on the Respondent as the tax payer. It is the one to prove the Commissioner wrong by meeting the minimum threshold of providing credible, competent and relevant information and documentation necessary to support its position and establish a prima facie case which the Commissioner is expected measure on a preponderance of probabilities (See Kenya Revenue Authority v Maluki Kitili Mwendwa ML HC ITA No. E078 of 2020 [2021] eKLR).
20. As I have highlighted in the introductory part, the Commissioner took the position that the Miksi product was milk and not a product obtained from milk and that it was skimmed milk powder that is not manufactured by removing milks with the aim of replacing them but to solely reduce its fat content. The Commissioner went on to add that the Miksi product is a blend of skimmed milk with vegetable fat, hence there is no extraction of milk fats that takes for the same to be replaced by vegetable fat. Thus, the Commissioner concluded that the Miksi product is Milk with additives, being added vegetable fat and vitamins and falls within the purview of Heading 04.02 that covers Milk and cream, concentrated or containing added sugar or other sweetening matter.
21. In its bid to disprove the Commissioner's classification, the Respondent provided the Commissioner with documents/charts outlining the processes of manufacturing the Miksi product and during the proceedings before the Tribunal, also called a witness to explain the product's composition and manufacture process. It stated that the Miksi product is a food preparation and not whole milk neither is it skimmed cream. That it is manufactured by taking full cream milk, removing all the butter fat from the milk and then adding vegetable oil/fat, whey, sucrose, lecithin and vitamins prior to further processing and finally spray drying the preparation. Thus, the Respondent stated that the Miksi product was covered under Heading 19.01; food preparations of goods of headings. 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.
22. To fortify its position that the Miksi product fell under Heading 19.01 as opposed to 04.02, the Respondent relied on the Notes in Chapter 4 where Note 4 provides as follows:

This Chapter does not cover:

- a. Products obtained from whey, containing by weight more than 95% lactose, expressed as anhydrous lactose calculated on the dry matter (heading 17.02);
- b. Products obtained from milk by replacing one or more of its natural constituents (for example, butyric fats) by another substance (for example, oleic fats) (heading 19.01 or 21.06); or



- (c) Albumins (including concentrates of two or more whey proteins, containing by weight more than 80% whey proteins, calculated on the dry matter) (heading 35.02) or globulins (heading 35.04).
23. The Respondent's witness also reiterated the position above. The Tribunal was convinced by the Respondent's position and held that the same was the correct one and thus the Miksi product was classifiable under HS Code 1901.90.90.
24. Based on the facts and evidence on record, I find that the Respondent was able to present a prima facie case that its Miksi product was excluded from Chapter 4 as it was a product from milk where the animal fat (butyric fats) was removed and replaced with vegetable fat (Oleic fats). The Tribunal rightly concluded that the Commissioner took a rigid position by failing to consider or take into account the explanations given by the Respondent on how the Miksi product was manufactured.
25. I further note that during the hearing, the Commissioner's witness could not confirm that laboratory tests were conducted on the sample of the Miksi product to confirm that the product's composition had changed from 2017 when the last laboratory test was done and the Commissioner ruled that the same was classifiable under Heading 19.01. In as much as the Commissioner's witness stated that the laboratory tests of samples of the Miksi product were done, the Commissioner did not provide the results to the Respondent or the Tribunal to indicate the content or change of composition of the product so as to fortify the Commissioner's classification. This means that the Respondent discharged its burden by providing explanations based on the documents and evidence.
26. The appellate jurisdiction of this court 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 will only intervene if the conclusions are not supported by the facts (see *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR and *Mercy Kirito Mutege v Beatrice Nkatha Nyaga & 2 others* NYR CA Civil Appeal Mo. 48 of 2013 [2013] eKLR). I am therefore satisfied that the Tribunal rightly analysed the evidence on record and came to a conclusion that was supported by the CET, the GIRs, the Explanatory Notes and the evidence before it. The Miksi product more likely than not fell within Heading 19.01 as opposed to 04.02 and I cannot fault the Tribunal for arriving at this conclusion.

### **Fairness of the proceedings**

27. The Commissioner submits that the Tribunal allowed the Respondent to ambush it with further evidence at the point of filing submissions without giving the Commissioner an opportunity to respond to or challenge the said evidence. That the Tribunal ignored the Commissioner's protests and that its silence could only be construed to mean that such documents were allowed by the Tribunal and subsequently formed the basis of the Tribunal's decision thereby denying the Commissioner its right to a fair hearing under Article 50 of the Constitution and the Commissioner's equal protection of the law.
28. The Respondent disputes this contention on the basis that it only provided a certificate of change of name clarifying that its name had changed from Wonder Foods Limited to Promasidor Kenya Limited.
29. In its judgment, the Tribunal addressed the insinuation of bias raised by the Commissioner. The Tribunal stated that the Commissioner did not formally express lack of confidence in the Tribunal and never objected to the manner the proceedings were being conducted before the Tribunal. Having



read the proceedings, I agree with the Tribunal that the Commissioner did not object to the manner the proceedings were being conducted. All witnesses were given a full opportunity to present their testimonies which were tested on cross-examination by counsel of both parties. The Tribunal also put forth questions to both parties' counsel and witnesses in line with Rule 20(3) of the Tax Appeals Tribunal (Procedure) Rules 2015 which provides that "The Tribunal may, at any time, put questions to either party or to any witness, and may, at its discretion, call additional evidence as it may be necessary for further clarification of the issues raised at the hearing of the appeal".

30. It is not disputed that the new evidence introduced is a copy of the certificate of the Respondent's change of name. The Tribunal did not make any reference to the change of name in its judgment as there was no contest as to whether the Commissioner's ruling of 1996 was addressed to the Respondent or not. In any case, the Commissioner's witness confirmed during the hearing that the said letter was addressed to the Respondent, Promasidor Limited. I therefore disagree with the Commissioner that this new evidence influenced the Tribunal's decision against it. This ground by the Commissioner fails.

### **Disposition**

31. The appeal lacks merit. It is dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JULY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr Michael Onyango.

Mr Nyapara instructed Kenya Revenue Authority for the Appellant.

Mr Manani instructed by Coulson Harney LLP for the Respondent.

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