Hemwil Investment Ltd (Income Tax Appeal E162 of 2023)
[2024] KEHC 13792 (KLR) (Commercial and Tax) (7 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13792 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E162 OF 2023

A MABEYA, J

NOVEMBER 7, 2024

IN THE MATTER OF

HEMWIL INVESTMENT LTD ..... RESPONDENT

JUDGMENT

1. The appeal relates to the appellant's valuation and tax demand of Kshs. 18,672,921/= on the respondent. The demand was based on alleged misclassification of the imported consignment of Toyota Hiace Vans by the respondent under HS code 8702.10.20 and 8704.21.90 instead of HS Code 8702.10.22. The appellant's classification and tax demand was set aside by the Tax Appeals Tribunal "the Tribunal") on 8/9/2023.

2. Aggrieved by the Tribunal's decision, the appellant filed this appeal raising 5 grounds of appeal summarized as follows: -

    a. That the Tribunal erred in law and in fact by finding that the respondent's Toyota Hiace Vans were incorrectly reclassified by the appellant to HS code 8703.33.90.

    b. The Tribunal erred in law and in fact in its interpretation of Rule 4 of the Rules on Interpretation to mean that HS 87.02.10.22(sic) and 8704.21.90 as the more specific description of the motor vehicles imported by the respondent.

    c. That the Tribunal erred in fact in finding that the appellant was in agreement with the respondent that the imported vehicles were without seats.

    d. That the Tribunal erred in finding that the appellant's review decision of 14/4/2023 was not justified in accordance with sections 135 and 249 of the EACCMA.

3. The parties filed written submissions on the appeal. The appellant submitted that classification is governed by the EAC Common External Tarrifs and General Interpretation. That in this case, it

depends on the vehicle's capacity and the number of passengers it would carry. That Toyota Vans fall under HS Code 8702 for transporting 3-6 passengers.

4. That at the time of import and as per photographs on record, the respondent imported 3 Toyota Vans which were 3 to 6 seaters. That however, he later transformed the vehicles to increase capacity. That it was more expensive to import 10 to 15 seater vehicles. That the appellant has the right to assess and demand taxes through post clearance regime where the tax payer defaults. The onus was on the tax payer to prove proper payment of taxes.

5. On the part of the respondent, it was submitted that the appellant's staff are mandated by the General Interpretative Rules of EACCET to undertake physical verification to properly ascertain the vehicle design features for ease of tariff determination, collection and accounting for revenue.

6. That the appellant verified and determined the classification of the vehicles at the time of importation as per the evidence of Mr Benard Oyucho. That his testimony was that the vehicles in question underwent full verification at the Port of entry and that the remark 'TI APPLIES' was an indication that the respondent did not have any issues with the classification.

7. That there was a legitimate expectation created following the inspection and verification and that the HS Code declared was the correct one. A further legitimate expectation that the appellant would abide by the Policy guidelines dated 10 /8/2018 issued through the Commissioner of Customs Policy office wherein importers were expected to pay 20% on Excise Duty under tariff 8702.10.20, 8703.90.90 and 8704.21.90 as opposed to 30% under tariff 8703.33.90. The case of *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others* [2014] eKLR was relied on in support of that proposition.

8. where the Supreme Court stated that:- "Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."

9. Finally, that other importers have imported the same model of vehicles under the HS Codes 8702.10.20, 8703.90.90 and 8704.21.90 and have not been prejudiced by the appellants. That classification should be consistently and impartially applied without discrimination or favouritism

10. The appellant response was that the Tribunal's ruling was erroneous when it purported to classify the vehicles under HS Code 8704.21.90. That the respondent was relying on an internal memo which was not available at the time and had been withdrawn vide the letter dated 15/3/2023. That in the circumstances, there was no legitimate expectation. Lastly, that the respondent has not presented evidence of other importers who used the wrong tariff classification.

11. Section 56(2) of the *Tax Appeals Procedure Act* provides that: -

> " An appeal to the High Court or to the Court of Appeal shall be on a question of law only".

12. This means that the Court is bound by the evidence of witnesses as founded before the Tribunal. The Court will only interfere with the Tribunal's findings on fact if not founded on evidence or wrongly evaluated. See *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018]eKLR.

13. From the grounds of appeal, the issue is really whether the Tribunal erred in its interpretation and application of the applicable law and H.S codes and whether the decision to rely on HS code it did was based on evidence.

14. The relevant law is the East African Community Common External Tariff Version 2012 Nomenclature. This is a product of the World Customs Organization which we are party to and further adoption of Harmonized Commodity Description and Coding System generally referred to as "Harmonized System" or simply "HS" under WCO.

15. The General Interpretation Rules ("GIR") also apply. The first rule of the GIR is that the interpretation shall be in accordance with the terms of the heading or any relative heading or chapter note. Then what follows is that the heading which provides the most specific description shall be preferred to headings providing a more general description. See the cases of *R v Commissioner General & Another Ex-Parte AWAL Ltd* [2018] eKLR, *Enkasiti Flowers Growers Limited v Kenya Revenue Authority* [2010] eKLR and *Commissioner of Customs and Excise v Export Trading Company Limited* [2019] eKLR.

16. Moreover, courts have placed importance on the specific descriptions of the products and more importance to the intended usage of the product as the basis of determining their tariff codes.

17. In the present case, the respondent imported motor vehicles was found to be classified under HS Code 87. That is an issue of fact that is not in dispute. The appellant brought evidence through its employee who confirmed that the consignment was viewed at the point of import and that certain observations relating to the physical description of the vehicles were made.

18. The Tribunal's finding on fact, based on the evidence tendered before it was that, the vehicle(s) was not fitted with seats apart from the driver's seat and one more seat for the person accompanying the driver. That the vehicle did not have safety equipment, seat belts and ventilation related to private passenger vehicles. This was contrary to the appellant's letter dated 27/3/2023 and tax demand. In that letter, the appellant made a general classification of the Toyota Hiace as a vehicle used to carry passengers and that it was fitted with passenger seats and safety belts.

19. According to the Tribunal, what was before it was best suited for transport of goods or usable as commercial vans or matatus and HS Codes 8702.10.22 and 8704.21.90 give a more specific description of the vehicles imported. Photographs of the subject vehicles are also on record to back the findings of the Tribunal.

20. The appellant contended that the respondent imported 3 to 6seater vehicles and later transformed them to 15seater matatus to increase capacity. This was not urged and demonstrated before the Tribunal. It cannot therefore fall for determination before this Court. Further, the appellant's witness and report filed during assessment did not prove that the vehicles were later transformed as alleged.

21. The appellant took issue with the Tribunal's description of the vehicle(s) as a 'matatu'. He contended that that description does not form part of the classifications and codification. The view this Court takes is that, there was no error on finding by the Tribunal. This is because, the parties were in agreement that the general description was under HS Code 87 and that the most specific description and the applicable subheading would depend on whether it was for carrying passengers and if so, how many or on the other hand, whether it was for other purposes.

22. The appellant preferred classification that was for ferrying 10 to 15 passengers akin to a matatu or a van. In the view of this Court, the reclassification was lawfully overruled since the evidence before the Tribunal did not prove the appellant's case.

23. Lastly, the respondent urged that there was legitimate expectation and relied on the appellant's Policy guidelines dated 10/8/2018 issued through the Commissioner of Customs Policy Office and that importers were expected to pay 20% on Excise Duty under tariff 8702.10.20, 8703.90.90 and

8704.21.90 as opposed to 30% under tariff 8703.33.90. The appellant contended that that notice was reviewed.

24. For legitimate expectation to attach, there must be a promise or representation made on by a public authority and which the subject relies on. The subject should demonstrate that the authority had capacity to make the statement and that it was binding. Further that, the authority intends to or has acted in breach of its said representation.

25. In *Republic v Principal Secretary Ministry of Mining Ex-Parte Airbus Helicopters Southern Africa (PTY) Ltd* [2017] eKLR, the court cited with approval *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ. 607 [2002] 1 WLR 237 where the court held that: -

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

26. In *Keroche Industries Limited v Kenya Revenue Authority & 5 Others* Nairobi HCMA No. 743 of 2006 [2007] KLR 240, the court held that: -

> '... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

27. In the present case, the appellant's sudden change of policy which taxpayers had relied on should be viewed as a breach of tax payers' rights.

28. In the view of this Court, the burden of proof before the Tribunal was on the respondent to demonstrate that the appellant's assessment was erroneous. That burden was discharged on the basis of the evidence produced before the Tribunal. The appellant's assessment and demand was based on the suspicion that the respondent manipulated the vehicles at a later stage to evade tax. That suspicion was not based on any evidence before the Tribunal.

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

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE