East African Seed Company Limited v Commissioner of Customs and Border Control (Civil Appeal E002 of 2020) [2021] KEHC 164 (KLR) (Commercial and Tax) (14 October 2021) (Judgment)

Neutral citation: [2021] KEHC 164 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E002 OF 2020

F TUIYOTT, J

OCTOBER 14, 2021

BETWEEN

EAST AFRICAN SEED COMPANY LIMITED ..... PLAINTIFF

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL ..... DEFENDANT

JUDGMENT

1. This Appeal arises from the decision of the Tax Appeals Tribunal in which it confirmed a Post Clearance Audit Assessment of Kshs.29,842,011/= against East African Seed Company Limited (EASC or the Appellant).

2. In a statement of facts presented at the proceedings before the tribunal, EASC states that its principal activity is processing, wholesaling and retailing of seeds for sowing.

3. The assessment now challenged is a substantial climb down from the demand initially made by the Commissioner on 29th April 2015 in which he demanded Kshs.69,819,334/=, comprising Kshs.34,460,177 as Import Duty and Kshs.35,359,156/= as Value Added Tax.

4. The objection to the revised assessment was on two broad grounds. EASC contended that:-

    a) Prior to July 2012, there was no clear guidance for classifying watermelon seeds for sowing under HS Code 1207.99.00 which refers to "other" oleaginous fruits and there is no industry known in Kenya or East Africa which uses watermelon seeds for the purpose of oil extraction.

    b) The purported classification by Commissioner of pepper seeds for sowing under 0904.11.00 or 0904.21.00 is inappropriate as pepper seeds cannot be used on spice whether treated or untreated."

5. In holding partly in favour of the Tax Payer on the first ground, the Tribunal held:-

> [27] The Tribunal finds that it is now trite law and rule of interpretations of law statutes that whenever a taxing statute lends itself to ambiguities, was the case with the EAC-CET version of 2007 on classification of water melon seeds for sowing, that the said ambiguities must be interpreted in favour of the tax payer as opposed to the revenue agency charged with the implementation of the tax law.
>
> [29] We find our analysis in adopting the Appellant's classification is further cemented in view of the fact that the classification adopted used by the Respondent to a higher tax liability at the rate of 10%. In contrast, the Appellant's classification attracts 0% liability. In our view nothing could be more undesirable, in fact, than the persuasions by the Respondent to impose tax on a tax payer on basis of an unclear and ambiguous law. Accordingly, we find that the Appellant should be allowed the benefit of the lesser chargers in light of the ambiguity in the law. In this regard, we are guided by the case of Unilever Kenya Limited vs The Commissioner of Income Tax Nairobi High Court Income Tax Appeal No. 753 of 2003 wherein it was held:-
>
> > "...Where the language used in the legislation is somehow obscure, the tax payer is entitled to demand that his liability to a higher charge should be made out with reasonable clarity before he is adversely affected."

6. On the second limb, the Tribunal stated:-

> [31] The Tribunal has reviews the HS Code relied on the parties herein and is satisfied with the classification applied by the Respondent in the assessment. In agreeing with the Respondent, we are equally guided by the exclusion clause under Chapter note 3 to Chapter 12 of the EAC-CET version of 2007 which stipulates:-
>
> > "Heading 12.09 does not, however, apply to the following even if for sowing.
> >
> > a) .....
> >
> > b) Spices or other products of Chapter 9.
> >
> > c) .....
> >
> > d) ....."
>
> [32] We note that the words"... "Heading 12.09 does not, however, apply to the following even if for sowing" to be instructive on the treatment that should be accorded to pepper seeds for sowing. In our view, the seeds, as much as their intended use is sowing, are explicitly excluded from the ambit and application of HS Code 12.09. Therefore, it would be contrary to the edicts of the General interpretative rules under chapter 12 to bring and charge pepper seeds for sowing under the terms of HS Code 12.09. Accordingly, we are satisfied that the Respondent treatment of the seeds was proper in law."

7. In the end, the Tribunal made the following orders:-

> " [33] In light of the foregoing analysis the Tribunal makes the following orders:-

a) The Appeal herein is partly merited.

b) The proper classification for water melon seeds for sowing Code 1209.91.00 of the EAC-CET version 2007.

c) The Respondent's assessment in respect of water melon seeds for sowing is set aside.

d) The proper classification for pepper seeds for sowing is HS Code 0904.21.00 of the EAC-CET version 2007.

e) Each party to bear its own costs."

8. Aggrieved by that decision, EASC prefers this appeal and raises grounds under six (6) headlines:-

i. That the determination lack a concise statements and reasons.

ii. That the Tribunal failed to determine the accurate definition and biological classification of pepper seeds for sowing.

iii. The Tribunal applied the wrong tariff line for classification of pepper seeds for sowing.

iv. The Tribunal failed to appreciate and correctly apply the import of the exclusion clause in Chapter Note 3 of Chapter 12 of the EAC – CET of 2007.

v. The Tribunal failed to appreciate and apply the import and effect of the World Customs Organization – Harmonized System Committee (WCO – HCS) jurisdiction and decision on classification of pepper seeds for sowing.

vi. The Tribunal erroneously applied facts and law and these led to a wrongful determination.

9. This Appeal, on agreement of the parties, was argued by way of written submissions. Having read them, it seems to the Court that the substantial issue that emerges is whether the Tribunal was correct in determining that the pepper seed for sowing are to be classified under HS Code 0904.21.00 and not HS Code 1209.91.00.

10. But first the appellant submits that the Tribunal disregarded the provisions of order 21 rule 1 of the *Civil Procedure Rules* by failing to give "concise points of determination and the reasons for its determination." In support of the arguments, EASC cites the English decision in *Flannery v Halifax Estate Agencies Ltd. [1999] EWCA 811* in which the Court held:-

> " That today's professional judge owes a general duty to give reasons is clear, (see *R -v- Knightsbridge Crown Court ex parte International Sporting Club* [1982] QB 304) although there are some exceptions. It does not always or even usually apply in the magistrates court, nor in some areas where the court's decision is more often than not a summary exercise of discretion - in particular orders for costs. For the general duty, see for example *R v Harrow Crown Court ex p. Dave* [1994] 1 AER 315, which was not cited to us but contains a useful review of earlier authority.
>
> It is not a useful task to attempt to make absolute rules as to the requirement for the judge to give reasons. This is because issues are so infinitely various. For instance, when the court, in a case without documents depending on eye-witness accounts is faced with two irreconcilable accounts, there may be little to say other than that the witnesses for one side were more credible (see DeSmith, Judicial Review of Administrative Action, 5th Edition, 9-049). But

with expert evidence, it should usually be possible to be more explicit in giving reasons: see Bingham LJ in *Eckersley -v- Binnie 18 Construction* Law Reports 1 at page 77:

"In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons. The advantages enjoyed by the trial judge are great indeed, but they do not absolve the Court of Appeal from weighing, considering and comparing the evidence in the light of his findings, a task made longer but easier by possession of a verbatim transcript usually (as here) denied to the trial judge."

11. The commissioner retorts by arguing that the Tribunal's decision gave a general overview of the case, issues for determination and reasons behind the decision.

12. This Court has looked at the Tribunal decision. In paragraph 30, the Tribunal identifies the issue surrounding the tax on pepper to be what is the proper classification of pepper seeds for sowing. It then, in two paragraphs (31 and 32 – see above), sets out the reasons why it agreed with the Respondent that it should be classified under HS Code 0904-21.00.

13. The reasons for the determination are in those two short paragraphs. I do not understand the law to prescribe how much detail is to be included on a decision. Different consideration applies for different circumstances. What is required is that the parties should be able to follow and understand why the decision maker reached a certain position and not the other. In the instance case, the Tribunal, after identifying the issue for determination, gave its reasons for siding with the Commissioner. Indeed, in this entire Appeal, EASC attempts to impeach those reasons. The parties have been able to understand the rationale for the Tribunal's decision and have made lengthy criticism of it in both the memorandum of appeal and submissions. This first ground of Appeal is without merit.

14. Before the Tribunal, the grievance of EASC was that the proposed tariff classification of peppers seeds for sowing by the Commissioner describes pepper fruit or black/white pepper which cannot be used for agricultural purposes since it does not germinate. The assessment under challenge covered the period 2010 to 2014. In this period there were two regimes of External Tariff for the East African Community. The 2007 version and then the 2012 version. The Court will make observations as to any differences in the two versions. To be noted at this stage is that the Commissioner's assessment of the pepper was under HS 0904.11.00 in the 2007 version and HS 0904.21.00 under the 2012 version.

15. It is submitted by EASC that the Commissioner neither provided any authority on botanical nomenclature and characterization nor did they call professional witness to support the assertion that pepper seeds for sowing and pepper fruit are the same.

16. It is however common ground that EAC-CET version 2007 and later EAC-CET version 2012 as read with the General Interpretation Rules (the Interpretation Rules) is the guide on the classification of pepper seeds for sowing. It is nevertheless the position of the Tax Payer that as the instruments do not define botanical nomenclature and characterization then only products with accurate and specific definitions can be classified under them.

17. The attention of this Court is then drawn to the interpretations on incomplete and unfinished articles which will thereafter be completed and/or finished (in part (a)) as well as mixtures and combinations of a material and substance (in part (b) of the Interpretation Rules). The Tax Payer asserts that it imports pepper seeds, separated and in singular and specifically without any additional components

and without any intention to add further components or combinations before the seeds are sown. Time and again, EASC emphasizes that the pepper seeds for sowing are of different and distinct character from pepper fruit.

18. The Court is also asked to have regard to Rule 3 of the Interpretation Rules which provides that the most specific description shall be preferred to headings providing a more general description. It is argued by the Appellant that defining pepper seeds for sowing as fruits is a generalized definition of the same.

19. EASC submits that it imports treated pepper seeds intended for sowing and those seeds cannot be consumed unlike ground pepper fruit. The seeds for sowing are specifically altered for sowing and is therefore distinct from the pepper fruit in character, use, make up and purpose.

20. For the Commissioner it is argued that it is clear that all seeds under Chapter 12 are to be considered in all of their usages which include even seeds for sowing. That the Chapter provides that even when the seeds are to be used for sowing, the correct classification would still be under the respective Chapters. In this case the classification for pepper is under Chapter 9.

21. Let me first reflect on the arguments made in respect to the *General Interpretation Rules* for classification. From the general wording and scheme of the Rules, some rules cross-reference to others and so must be read together. Take for example Rules 1, 2, 3, and 4 which I reproduce below:-

    1. "The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

        (a) 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. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

        (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

    2. When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

        (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

        (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by

reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

3. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin."

22. Rule 1 makes in the terms of the headings and any relative section or chapter notes the primary place for classification of goods. Rule 2 directs on how to treat incomplete or unfinished goods and mixtures or combination of a material or substance with other materials or substance. A recognition, I would think, of the reality that sometimes goods will not be in a complete or finished or pure condition. Rule 3 provides on how to treat goods which, at first sight, are classifiable under two or more headings.

23. The Court now turns to examine whether any of the rules assist in classifying pepper seeds for sowing as it does not seem contested that what the Tax Payer imports is pepper seeds for sowing. Heading 12.09 provides the tariff for seeds, fruit and spores, of a kind used for sowing. Note 3 to Chapter 12 clarifies that for purposes of heading 12.09 "beet seeds, grass and other herbage seeds, seeds of ornamental flowers, vegetable seeds, seeds of forest trees, seeds of fruit trees, seeds of vetches (other than those of the species Vicia faba) or of lupines are to be regarded as "seeds of a kind used for sowing"". However there is a rider to this:-

" Heading 12.09 does not, however, apply to the following even if for sowing.

(a) .....

(b) Spices or other products of Chapter 9."

24. Note 2 to chapter 9 provides that the chapter does not cover cubebs pepper (Piper cubeba) or other products of heading 12.11. There is no suggestion that the type of pepper for sowing imported by EASC falls under this excluded category. So one turns to the products under heading 09.04. These are pepper of the genus piper, dried or crushed or ground fruit of genus capsicum or of the genus pimenta. This Court has not heard EASC propose that the pepper it imports is not of the genus piper.

25. In a letter dated 27th July 2015 written by PKF Taxation Services Limited on behalf of the Tax Payer, it says partly:-

" We would also like to point out that pepper seeds for sowing are not classified under HS Code 0904.21.00 as per the KRA letter of 16th April 2015. This is because the general description of this HS Code is "Fruits of the genus capsicum or of the genus pimenta."

Since our client does not deal in fruits, their clearing agent used the only other available HS Code pertaining to pepper seeds – 0904.11.00 to clear the pepper seeds for sowing. These pepper seeds for sowing are "neither crushed nor ground"

However, our client has recently got confirmation from HS Japanese suppliers that they are using HS Code 1209.91.xxxx to export pepper seeds for sowing and HS Code 0904.11.00 is actually for pepper – black or white – which is actually a spice. Pepper seeds for sowing do not have any application as a spice. To classify pepper seeds for sowing in only 2 HS Code in EAC-CET i.e 0904.11.00 or 0904.21.00 would be in violation of the international HS

Code classification where the first 6 digits of any HS Code must be harmonized globally and the last four digits in what can be tailored to suit local classification."

26. In this letter PKF was making reference to classification 0904.21.00 which appears on the 2012 version. In that version code 0904.11.00 is for pepper of the genus piper (neither crushed nor ground). This is the same as HS Code 0904.11.00 in the older 2007 version. It therefore seems to this Court that there is a concession by EASC that the pepper it imports is of genus piper but only attempts to distinguish its products as of sowing and not a fruit. This Court takes a view that there is no ambiguity about the nomenclature of the product imported by the Tax Payer.

27. What the Tax Payer postulates is that the only seeds to be excluded from the heading 1209 are those which though used for sowing, may also be used for other purposes and classified elsewhere as well either by character or use. But where like, here, the seeds are to be used solely for sowing then they do not fall under the ambit of the exclusion clause and must be classified under 1209.

28. In taking this position the Tax Payer relied on the pronouncement of World Customs Organization – Harmonized System Committee of 24th August 2016. The question there was the classification of seeds of fruits of the genus capsicum for sowing. The seeds in question were used to grow four kinds of fruits of genus capsicum. The seeds have been separated from the rest of the pepper, cleaned and treated with fungicide Thiram after which they were packaged in envelopes of 10 grams of seed. The envelope features a warning "This package contains seeds for sowing which have been poison treated with an insecticide and/or fungicide. Do not use for food or oil purposes."

29. The committee observed:-

> "In this connection, the Secretariat would like to note that rendering products inedible by chemical treatment would not exclude the products from classification with their edible form. For example, Note 3(a) to Chapter 12 excludes from heading 12.09 leguminous vegetables of Chapter 7.
>
> Heading 07.13 covers dried leguminous vegetables. As mentioned in the first paragraph of the Explanatory Note to heading 07.13 on page II-0713-1, heading 07.13 also covers fried leguminous vegetables intended for sowing whether or not rendered inedible by chemical treatment.
>
> On the other hand, as mentioned in paragraph 15 above, the fact that the seeds in question have been treated with thiram suggests that the product has objective characteristics of seeds for sowing. That is why the Secretariat wonders whether the seeds of fruits of the genus Capsicum should not be considered as seeds for sowing of vegetables of Chapter 7, given the fact that the seeds will develop into plants which produce fruits of the genus Capsicum. If this is the case, the Secretariat considers that the seeds for sowing are not affected by the exclusion provisions of Note 3 to Chapter 12."

30. The Court agrees with the opinion of the Harmonized System Committee that Note 3 of Chapter 12 excludes the application to heading 12.09 to certain seeds, spices, cereals, vegetables or sweet corn even if for sowing. The Rule therefore contemplates that certain seeds even if for sowing will be classified under heading 12.09.

31. As I have understood the submissions by both sides, so as to grasp the true range of products covered under headings 09.04 to 09.10, regard must be given to Note 1 of Chapter 9 which provides:-

> " 1. Mixtures of the products of headings. 09.04 to 09.10 are to be classified as follows:
>
> (a) Mixtures of two or more of the products of the same heading are to be classified in that heading;
>
> (b) Mixtures of two or more of the products of different headings are to be classified in heading 09.10.
>
> The addition of other substances to the products of headings. 09.04 to 09.10 (or to the mixtures referred to in paragraph (a) or (b) above) shall not affect their classification provided the resulting mixtures retain the essential character of the goods of those headings. Otherwise such mixtures are not classified in this Chapter; those constituting mixed condiments or mixed seasonings are classified in heading 21.03."

32. Both sides, again, agree that on the heading of Note 1, where there is addition of other substances to the products of headings, does not change the essential character of the goods of those headings, then the classification provided should not be affected.

33. There is however departure as to what is the essential character of the product imported by the Tax payer. The Tax Payer submits that it imports pepper seeds, separated and in singular and without any additional components and without any intention to add further components or combinations before the seeds are sown. It argues that pepper seeds for sowing are distinct from pepper fruits. That the chemical components used for treating these seeds for sowing are intended to prevent, amongst other things, crop damage in the field. That pepper seeds for sowing cannot be consumed unlike ground pepper fruit and their character is specific and altered purposely for sowing.

34. On the other hand, the Court is urged by the Commissioner to give regard to the definition of a seed under the Seed and Plant varieties (seed) Act which reads:-

> " seed" means that part of a plant which is or is intended to be used for propagation and includes any seed, seedling, corm, cutting, bulb, bulbil, layer, marcott, root, runner, scion, set, split, stem, stock, stump, sucker or tuber so used or intended to be so used."

35. The Commissioner submits that a seed must be capable of use for propagation, that is, it must have the ability to reproduce. Further that a fruit is a ripened ovary of a flowery plant, enclosing the seed or seeds and a fruit includes a seed. The commissioner then submits that whatever happens to the seeds under the heading 09.04 to 09.10 shall not affect their classification provided the essential character is not changed. The committee's ruling is faulted for failing to take into consideration that Chapter 9 did not explicitly state that the products under Chapter 9 were to be used for consumption. The position of the Commissioner is that the additions made to the imported pepper seed does not alter its character and does not affect its potency or its ability to reproduce once sown.

36. In resolving these competing views the Court seeks the aid of Rule 1 of the General Interpretation rules which reads:-

> " The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings

and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

(a) 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. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3."

37. As stated earlier, the terms of headings and any relative section or chapter notes take primacy in determining classification for legal purposes.

38. The tax payer asserts, and this has not been controverted, that it imports pepper seeds for sowing. Generally speaking, both under CET 2007 and CET 2012, seeds and fruits are classified under Chapter 12. It is also true, however, that the notes to that chapter excludes its application to certain seeds and fruits. Chapter note 3 is categorical that heading 12.9 does not apply to spices or other products of Chapter 9 even if for sowing.

39. The Appellant suggests that note 3 to heading 12.09 makes reference to products which are normally used other than for sowing. In elaborating this argument, it is submitted that it is products which have multiple use, albeit in part used for sowing, that should be exempted from Chapter 12.

40. On the part of the Court, it cannot read any such differentiation in the words of Chapter Note 3. The relevant exclusion reads:-

" Heading 12.09 does not, however apply to the following even if for sowing."

To understand the breadth of this exclusion, in respect to the matter at hand, one has to look at the spices or other products of Chapter 9. In the 2007 version, regarding pepper in heading 09.04, it refers to pepper as crushed, uncrushed, ground or unground. For fruits of the genus capsicum or of the genus pimenta it is dried or crushed or ground. Crushed or ground fruits, spices or seeds cannot be used for sowing. The 2012 version is similar for pepper and for fruits of genus capsicum or of the genus pimenta, it is those dried, neither crushed nor crushed, crushed or ground. So that products falling under Chapter 9 are not limited to products of multiple use. The language employed in note 3 of Chapter when read together with the products described in Chapter 9 is broad so as to include in this exemption spices or other products under Chapter 9 which are solely used for sowing. And looking at other chapters of the Tariff, it is clear that where the rules intend to exclude anything inedible then it does so expressly. See for example note 1 to chapter 8 explicitly states that the chapter does not cover inedible nuts or fruits. I neither see an ambiguity nor the differentiation postulated by the Appellant.

41. Given any appreciation of the import of note 3 of chapter 12 , I now turn to examine whether the product imported by the Appellant, admittedly solely intended for sowing, fell under Chapter 9.

42. In the 2007 version, the chapter covers goods described in three categories. Pepper which is neither crushed nor ground (0904.11.00). Pepper which is either crushed or ground (0904.12.00). Fruits of the genus capsicum or of the genus pimenta, dried or crushed or ground. In their letter of 27th July 2015 (see paragraph 25 of this decision), the tax payer is categorical that its product is not a fruit and so cannot fall under code 0904.20.00. But because it is pepper seed which is neither crushed or ground then it would fall under code 0904.11.00. In the 2012 version it would also fall under 0904.11.00 for pepper neither crushed nor ground. I think that the Taxpayer would be well aware that the product it imported fell under its Code 0904.11.00. In that letter, the Taxpayer states:-

> " Since our client does not deal in fruits, their clearing agent used the only other available HS Code pertaining to pepper seeds – 0904.11.00 to clear the pepper seeds for sowing."

This is a concession that HS Code 0904.11.00 is also in respect to pepper seeds. And the language of the regulations supports this position. Unlike, reference to genius capsicum and genus pimenta which is restricted to fruits there is no such limitation to pepper of genus piper. In ordinary parlance, pepper is defined to be a pungent, hot tasting powder prepared from dried and ground peppercorns used to flavor food. Peppercorn is the dried berry of a climbing vine (see Concise Oxford English Dictionary, Twelfth Edition). Elsewhere (Dictionary.com) a berry has been defined to include a seed.

43. The stance taken by the Taxpayer that because its product is solely used for sowing and does not have the dual character of edibility then, the Code 0904.11.00 is inapplicable is not supported by the law. Such differentiation would require a change of policy and the Tax regulation.

44. Notwithstanding this outcome, the Court finds it necessary to reflect on the advice given by the Harmonized System Committee. First, it has to be emphasized that the United States sought views of the committee on the classification of the seeds of fruits of the genus capsicum, for sowing. The United States put forward the argument that the seeds of fruits of the genus capsicum or genus pimenta could not be recognized as entire pepper since they had been separated from the rest of the pepper and therefore did not constitute fruits. It was argued that the seeds in question could not be covered under the second part of heading 09.04 because the seeds in that state were not fruits as they had been separated from the rest of the pepper. The committee by consensus agreed and decided to classify the seeds of fruits of genus capsicum under heading 12.09.Even if the position taken by the committee is correct it may not overcome the position, here, where even the Taxpayer concedes that the seed product it imports falls under the category of pepper not of the fruit of pepper.

45. As I conclude I must observe that in both CET versions the correct HS Code for the product imported by the Taxpayer is 1904.11.00 and not HS Code 1904.21.00 of the EAC –CET version 2007 as held by the Tribunal. Only to that extent is the decision of the Tribunal erroneous. Otherwise the Appeal lacks merit and is dismissed with costs.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE