REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

INCOME TAX APPEAL NO. 4 OF 2015

IN THE MATTER OF

TWIGA CHEMICAL INDUSTRIES LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF CUSTOM SERVICES.....RESPONDENT

(Being an appeal form the decision of the Customs and Excise Appeals Tribunal at Nairobi Dated 30th June 2015)

J U D G M E N T

1. Twiga Chemical Industries Limited, the Appellant, is a limited company incorporated under the Companies Act. It is in the business of importing and manufacturing of agriculture inputs and chemicals. The Respondent, the Commissioner of Customs services is a Department of the Kenya Revenue Authority. Kenya Revenue Authority is a statutory body created under the Kenya Revenue Authority Act, Cap 469, as a collector and receiver of revenue on behalf of the Government of Kenya.

2. This is an appeal, filed by the Appellant, against the decision of the Customs and Excise appeals Tribunal (the Tribunal) on 30th June 2015, at Nairobi. By that decision, the Tribunal upheld the decision of the Respondent of the demand, from the Respondent, dated 18th November 2013, by which the Respondent demand from the Appellant Kshs. 45,549,121.00. The Appellant being aggrieved by that decision filed this appeal raising three grounds of appeal:

> ***a. The Customs and Excise Appeals Tribunal erred in law and in fact in that it did not address the grounds in the memorandum of appeal but only holding that the Appellant was liable to classify imported Prilled Porous Ammonium Nitrate products under heading 36.02 of the World Customs Organization (WCO) Harmonized Systems (HS) and in particular tariff 3602 00 00 of the East African Community common External Tariff (EACCET).***
>
> ***b. The Customs and Excise Appeals Tribunal erred in law and in fact by holding that the Respondent complied with the requirement of communicating her decision under Section 229(4) of the Act of the Appeal letter dated 2nd December 2013 against the demand for Kshs. 45,549,121.00 through her letter HQ/PCA/FA/229/2011 dated 18th November 2013.***
>
> ***c. The Customs and Excise Appeals Tribunal erred in law and in fact in allowing the Respondent to ignore her ruling/decision conveyed through her letter HQ/PCA/FA/076/07 dated 27th March 2009 where she vacated the taxes demanded amounting to Kshs. 45,549,121.00 on Prilled Porous Ammonium Nitrate for all importations except future importations should the World Customs Organization give a ruling contrary to the tariff declared.***

BACKGROUND

3. The demanded assessment relates to the Appellant's importation of Prilled Porous Ammonium Nitrate (the Product). The Respondent by its demand, by letter dated 18th November 2013, stated that there was inconsistency with tariff classification of the product.

That as set out in the Common External Tariff (CEF) General Interpretation Rules of Classification of the product was HS Code 3602.00.00 and not as declared by the Appellant HS Code 3102.30.00. Accordingly the Respondent demanded from the Appellant Kshs. 45,549,121 broken down as follows:

Import Duty Kshs. 16,503,305

VAT Kshs. 29,045,816

Total 45,549,121

4. Following that demand and because there was follow-up correspondence between the parting, including a meeting the Respondent wrote a letter dated 27th March 2009 which is central to this matter. I will therefore reproduce that letter for clarity of the matter as follows:

> ***"REF: HQ/PCA/FA/076/07***
>
> ***PIN: P000591317G***
>
> *27th March, 2009*
>
> *THE MANAGING DIRECTOR,*
>
> *TWIGA CHEMICAL INDUSTRIES LTD,*
>
> *P.O. BOX 30172 – 00100,*
>
> ***NAIROBI***
>
> *Dear Sir,*
>
> ***SUBJECT: DEMAND NOTICE – HQ/PCA/FA/076/07***
>
> *Your letter dated 23rd March, 2009 and the subsequent meeting on 26th March, 2009 refers.*
>
> *After going through your submissions, we have the following observations.*
>
> ***PRILLED POROUS AMMONIUM NITRATE***
>
> *This product has the same composition with the one on which the earlier tariff ruling has been made. We are therefore willing to vacate the demand on this item.*
>
> *However, the Department intends to seek a second opinion on the same from World Customs Organization (WCO). Should there be any change in tariff, we will communicate the same to you for use in future importations."*

5. The Appellant is of the view that the above letter was a ruling and, that its terms were that the demand for the assessed amount was vacated and, that it was only if a subsequent ruling determined that the product ought to have been classified under HS Code 3602.00.00 then the Appellant would be informed so as to apply that classification for future importation.

6. The Appellant is of the view that the letter of 27th March 2009 referred to a previous ruling, by the Respondent, of 14th October 2008, which was the applicable Ruling.

7. It should be stated that the Respondent did, as stated in the letter of 27th March 2009, seek a second opinion from World Custom Organization (WCO). WCO made a ruling on 29th September 2010, whereby it upheld the Respondent's ruling of 14th October 2008 to the effect that the correct classification of the product was HS Code 3602.00.00.

8. The Appellant also argued before the Appeals Tribunal that it sought a review of the demand made, by the Respondent, by its letter dated 2nd December 2013. That the Respondent sought for the demanded assessment to be quashed. The Appellant argued before the Tribunal, and has argued before this court, that the Respondent failed to respond to its application for review, by that letter, and therefore according to the provisions of Section 229(5) the Respondent should be deemed to have accepted the application for review.

ANALYSIS AND DETERMINATION

9. It is accepted by the parties that the product is classified under HS Code 3602.00.00. The area of controversy is whether the demand for enhanced assessment, by the Respondent, was right in law and fact. There are two reasons that the Appellant gives why it should be found that the demand was wrong in Law and fact.

10. Firstly is because of the letter dated 27th March 2009. By that letter the Respondent vacated the demand and stated it would seek second

opinion, on the right classification of the product, and would inform the Appellant for use in future importation.

11. It is of vital importance to state that there was a meeting between the parties, on 8th October 2013. The discussion in that meeting was, amongst others, the import of the letter dated 27th March 2009. After discussing that letter and the matter of assessment there was an agreement which was stated as follows:

> ***"It was agreed that the tax on the Prilled Ammonium Nitrate:***
>
> · ***Shall be charged from the date of the ruling that was done in October 2008.***
>
> · ***The earlier demand for the years that were prior to the ruling shall not be charged, this was the period earlier than October 2008, since the tax payer was acting under the ruling that had been given by the department in the year 2004, which had now been replaced by the ruling of the year 2008."***

12. It was following that meeting that the Respondent made the demand for assessed amount by letter dated 18th November 2013. The Tribunal, in my view cannot be faulted for finding that the correct classification was determined to be Tariff 3602.00.00. That finding was supported by WCO's ruling of 29th September 2010.

13. I further find that the letter dated 27th March 2009 did not estop the Respondent for applying the correct classification on receipt of the second opinion, which it did receive from WCO. But over and above that, I would still return to my finding that the demand of 18th November 2013 was following agreement at the meeting, between the parties, of 8th October 2013, which agreement is reproduced above.

14. In view of the above finding grounds (a) and (c) of appeal are dismissed.

15. On ground (b) of appeal, the Appellant argues that the Respondent on failing to respond to its letter dated 2nd December 2013, it is deemed that it accepted the Appellant's request to quash the demanded assessment.

16. Section 229 (1) of the East African Community Customs Management Act, 2004 (herein after referred to as EACCM) provides that a person affected by a decision or omission of the Commissioner of Customs should lodge an application for review of that decision or omission within 30 days. The Commissioner of Customs is required by Section 229 (4) of EACCM to respond to such an application within a period not exceeding 30 days from the date of receipt. Subsection (5) of that Section provides that if the commissioner does not respond within the days set out in sub Section (4) it shall be deemed that the commissioner has decided to allow the application.

17. The Appellant argued that it did not receive a response to its letter dated 2nd December 2013, when it sought the assessment to be quashed.

18. It is clear that, from the provisions of Section 229 (1) of EACCM that the dates of response begin to run from the date of receipt. The Appellant was therefore obligated to prove receipt of that letter. The letter shows some handwriting which states:-

> ***"Receiving copy***
>
> ***Received by 2/12/13***
>
> ***John***
>
> ***(Signature)"***

19. Who was John that received the copy of that letter. The letter was addressed to:

> ***"Ms Beatrice Memo Hsc***
>
> ***Commissioner of Customs Services***
>
> ***12th Floor***
>
> ***Times Tower"***

20. So who was John that received the letter on behalf of Ms. Beatrice Memo. There was no evidence of who John was, in relation to the Commissioner of Customs services. In my view on a balance of probability, the Respondent did not prove receipt of that letter by the commissioner of Customs. It therefore cannot rely on Section 229 (5) of EACCM.

21. The Tribunal on this issue found that there were continuous communication between the parties which showed that the commissioner complied with the provision of Section 229 (4) EACCM.

22. I cannot fault the Tribunal for that finding. Accordingly ground (b) of appeal also fails.

23. In the end, the appeal is hereby dismissed and the costs of this appeal and those of the Tribunal being awarded to the Respondent.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **5th** day of **MARCH,** 2019.

MARY KASANGO

JUDGE

Judgment Read *and* ***Delivered*** *in* ***Open Court*** *in the presence of:*

.....COURT ASSISTANT

.....…COUNSEL FOR THE APPELLANT

.....…….COUNSEL FOR THE RESPONDENT