Avic International Beijing EA Co Ltd v Commissioner for Customs & Border Control (Tax Appeal 38 of 2022) [2023] KETAT 502 (KLR) (1 September 2023) (Judgment)

Neutral citation: [2023] KETAT 502 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

TAX APPEAL 38 OF 2022

E.N WAFULA, CHAIR, CYNTHIA B. MAYAKA, GRACE MUKUHA, JEPHTHAH NJAGI & AK KIPROTICH, MEMBERS

SEPTEMBER 1, 2023

BETWEEN

AVIC INTERNATIONAL BEIJING EA CO LTD ..... APPELLANT

AND

COMMISSIONER FOR CUSTOMS & BORDER CONTROL ..... RESPONDENT

JUDGMENT

Background

1. The appellant is a company incorporated in Kenya under the *Companies Act* 2015 and is a registered taxpayer. The appellant is a licenced importer of unassembled motor vehicles, trailers and spare parts and a service centre for earthmoving machinery, heavy and light trucks.

2. The respondent is a principal officer appointed under and in accordance with section 13 of the *Kenya Revenue Authority Act*, and Kenya Revenue Authority is charged with the responsibility of among others, assessment, collection, accounting, and the general administration of tax revenue on behalf of the Government of Kenya.

3. The respondent conducted a post clearance audit for the period January 2016 to December 2020 and issued audit findings vide letters dated July 12, 2021 and September 13, 2021.

4. The appellant objected to the findings *vide* letters dated August 18, 2021 and October 12, 2021, respectively.

5. The respondent issued its decision *vide* a letter dated November 12, 2021 demanding taxes amounting to Kes 798,941,823.00 being Kes464,307,464.31 in relation to classification of CKDs and Kes 337,834,600.62 in relation to valuation of imported goods.

6. The appellant being dissatisfied with the respondent's decision filed this Appeal on 14th January 2022.

The Appeal

7. Based on the memorandum of appeal dated December 24, 2021 and filed on January 14, 2022, the Appeal is premised on the following grounds: -

    i. That the respondent erred in law by assessing extra import duty, VAT and Excise Duty on the appellant contrary to the provisions of the *Tax Procedures Regulations (Unassembled Motor Vehicles and Trailers) 2019* and *EACCMA*.

    ii. The respondent has erred in fact by forming an opinion that the appellant imported kits did not meet the Completely Knocked down ("CKD") Regulation Guidelines;

    iii. The respondent erred in law by erroneously concluding that The appellant undervalued its imports based on the comparison between the appellant's purchases as per Audited accounts and imports data from the respondent's system.

appellant's Case

8. The appellant premised its case on the following documents:

    a. Its statement of facts dated December 24, 2021 and filed on January 14, 2022 together with the documents attached thereto.

    b. The appellant's written submissions dated September 10, 2022 and filed on October 19, 2022.

9. The appellant stated that the respondent conducted a customs post clearance audit of the appellant's import data for the period January 2016 to December 2020. That by the letters dated July 12, 2021 and September 13, 2021, the respondent issued the audit findings and a demand notice, respectively, assessing additional taxes amounting to Kes 859,199,373.00.

10. That subsequently, the appellant responded and objected to the audit findings and demand notice via letters dated August 18, 2021 and October 12, 2021, respectively.

11. That the respondent issued its review decision on November 12, 2021 where it revised the taxes demanded to Kes 798,941,823.00.

12. Regarding compliance to CKD Regulations, the appellant stated that it was an approved importer of CKD Kits for assembly of motor vehicles and, a licensed assembler of motor vehicles *vide* an authorization letter by the National Treasury dated January 3, 2017. That it is thus fully authorized to import CKD kits under the *Tax Procedures (Unassembled Motor Vehicles and Trailers) Regulations 2019* ("herein referred to as The Regulations").

13. The appellant averred that as an approved importer of CKD kits, it strictly adheres to the provisions of the *Regulations*. That moreover, the approval to commence operations as an authorized importer of CKD kits was granted after inspection which involved submission of sample kits to the joint inspection team that included the respondent.

14. That the above evidence elucidates that if the specific units were not indeed compliant with the *Regulations*, then most assuredly, the officer acting on behalf of the respondent at the appellant's bonded warehouse would have definitely charged any additional duty, VAT and Excise duty. The respondent in the review decision asserted that the F147 payment slips generated for the appellant by the Customs Site Officer at the bond were for tyres found in the consignments and not for violations of CKD Regulations. That this claim by the respondent reinforces its position that all the consignments were indeed inspected by the Customs Site Officer.

15. The appellant therefore stated that the respondent's claim of non•compliance to CKD Regulations was not only frivolous and vexatious,but in bad faith. As such the appellant prayed that the tribunal sets aside the respondent's claim.

16. Regarding consignments destined for the Ugandan market, the appellant stated that whilst undertaking the audit, the respondent contended that it took photographs during stripping of two of the appellant's consignments on the January 26, 2021 and February 25, 2021. That the respondent alleged that the consignments contained cabins and chassis frames that did not meet the requirements of disassembly as envisaged in the *Regulations*.

17. The appellant asserted that it is pertinent that the Tribunal takes note that the aforementioned consignment was destined for the Ugandan market. That this statement can be evidenced by supplier invoices. That however, these said consignments were sold to the Kenyan market in January 2021 and duty paid during the same period.

18. That the Tribunal succinctly elucidated in *Toyota Kenya Limited v Commissioner of Customs Services* TAT No. 184 of 2015 ("Toyota Case') that the onus in proving that the kits inspected at licensing differed from those at the point of audit was solely on the respondent. That it is prudent for the respondent to provide an inspection report. That mere photographs that bear no dates are not sufficient evidence to cast aspersions to the level of the appellant's compliance to the Regulations.

19. That alluding to the aforementioned photographs, the responded also alleged that the cabins and chassis kits were separately manufactured by different manufacturers. That paragraph 2 (1) of the *Regulations* encapsulate as follows:-

> " Where the chassis frame whether of box channel, tubular or other construction is in a form consisting of side, cross, cruciform or other members, each part of such member shall be imported adrift, except where each part of such member is welded or riveted together by the original equipment manufacturer".

20. That the *Regulations* define the meaning of "Original Equipment Manufacturer" in section 2 as;

> " Original equipment manufacturer means a manufacturer of parts and sub• assemblies where the manufacturer owns the intellectual property rights in the parts or Sub-assemblies."

21. That based on the above provision in section 2 and the definition in section 2 (1), the respondent erred in law by concluding that the consignments were not in tandem with the CKD Regulations and imposition of import duty and additional VAT and excise duty. The appellant averred that the *Regulations* allow a vehicle assembler in the form and condition that it was supplied by the Original Equipment Manufacturer.

22. The appellant demonstrated further by referencing to Paragraphs 2 and 3 of the First Schedule of the *Regulations*. That Paragraph 2 concisely elaborates that;

> " ... the cabs shall be broken down to the extent that the following items shall be imported as sub- assemblies;
>
> a. Doors;
>
> b. Floor assemblies;
>
> c. Bonnets;

d. Cab back panels;

e. Wheel larches;

f. Radiator grills;

g. Grille surround panels;

h. Door pillars;

i. Door surrounds;

j. Windscreen surrounds; and

k. Bumper valances."

23. That Paragraph 3 of the *Regulations* further stipulates that the dashboard panels, glove boxes, and doors may be in the condition as supplied by the manufacturer, but shall be devoid of all instruments and controls. The appellant stated that the *Regulations* further encapsulates in the Second Schedule Part A 2 (b), that the cab may be surface treated with paint, primer or other anti-rust preparation or substance as elucidated in the excerpt below; '...the cab may be surface treated with paint, primer and any other anti-rust preparation or substance.'

24. The appellant referred to the *Toyota case* (*supra*), with regards to the use of undated photographs by the respondent as evidence of non-compliance to the CKD Regulations. That the said photographs that the respondent so heavily relied on as evidence of non-compliance were not even serialized with the respective consignments indicating the specific dates that the photographs were taken.

25. On the issue of the respondent not complying to audit process regulations, the appellant averred that the *East African Community Post Clearance Audit Manual* ("EAC Manual") sets out the guidelines on operationalization of EAC Customs Post Clearance Audits ("CPC Audits") as set out in *EACCMA*. Chapter 3 paragraph 3.3.3 of the EAC Manual which provides that:

> " 3.3.5 Audit evidence gathering and analysis
>
> Audit evidence will comprise source documents and records underlying the Customs related information and corroborating information from other sources.
>
> In conducting the audit, sufficient, appropriate and complete audit evidence should be collected to enable the auditor to draw conclusions with respect to the audit findings."

26. That it was as clear as day that the respondent did not rely on the above provisions that guide the *modus operandi* of CPC Audits. That the un- serialized and undated photographs thus fail the test of relevance, authenticity and validity and the appellant prayed that the Tribunal finds them inadmissible.

27. That it would therefore be unfair, unlawful, and excessive and in bad faith for the respondent to charge or demand additional duties where such taxes and duties were not due by virtue of the exemptions granted under the *EACCMA*, through unfair interpretation of the Regulations.

28. Regarding CIF valuations, the appellant stated that the respondent in its audit findings and review decision, made an erroneous conclusion that the appellant undervalued its imports based on the

comparison between the purchases as per audited accounts and the imports as declared in the respondent's Simba System. That the respondents analysis in a nutshell was as below;

> Imported Purchases = Purchases as per Audited Accounts - Local Purchases as per VAT returns on i-Tax

29. That the respondent averred that the appellant's cost of sales included other costs that do not constitute cost of sales such as, inter alia, rent, legal fees, audit fees, purchase of murram and after sales services. That the appellant had only adopted the same methodology as the respondent and included all costs incurred in its reconciliation.

30. The appellant stated that the respondent did not take time to analyze the appellant's ledgers to gain an understanding of the accounting systems. That the variances as alleged by the respondent can be explained as follows;

I. Purchases Not Declared In The Vat Return.

31. That as earlier stated, the respondent inaccurately contends that the appellant's imports were grossly undervalued by comparing the purchases declared in the audited accounts and the local purchases declared on iTax VAT returns. That this was an inept method of verification since purchases made by the appellant were not at all declared on the i-Tax VAT returns due to either of the following:

    a. Some of the purchases were exempt in nature such as labour costs.

    b. The appellant did not claim VAT amounting to Kes 71,509,226.84.00 on invoices of a cumulative value of Kes 446,932,667.84 for the period under review. That section 17 of the *VAT Act* 2013 imputes a discretionary obligation on a taxpayer with regards to claim of input VAT. That the precise wordings of the VAT Act are;

> " Subject to the provisions and of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may at the end of the tax period in which the supply or importation occurred, be deducted by the registered person... "

32. The appellant illustrated in the table below, the exempt purchases and the input VAT not claimed;

Summary of Unclaimed input VAT

Unclaimed Input VAT		
Year	Net Amount	VAT Amount
2017	169,127,862.69	27,060,458.03
2018	277,804,805.06	44,448,768.81
Totals	446,932,667.75	71,509,226.84

II. Assembling costs and other Direct costs recognized as purchases.

33. That the appellant recognized some of its direct costs as purchases because most of these costs were involved in the assembling of the CKD kits. That the costs include, but not limited to: truck body

fabrication costs, assembly and labor costs, painting among other related costs, warranties, and after sales services. To substantiate this, the appellant enclosed the respective purchase ledgers with the respective additional assembly costs and other costs

Year	2016	2017	2018	2019
Variance as per KRA Findings	136,086,517.40	74,804,221.50	132,769,859.00	27,437,143.00
Less unclaimed purchases	-	(169,127,862.69)	(277,804,805.06)	-
Costing				
Duties	(11,560,840.00)	(6,354,778.21)	(1,279,082.79)	(219,497.14)
Additional charges	(1,442,845.59)	(793,105.32)	(1,407,681.00)	
Clearance charges	(6,287,792.18)	(3,456,282.14)	(1,306,698.96)	(11,966,836.00)
Transportation	(3,450,000.00)	(1,896,400.68)	(3,549,617.68)	
Crane	(29,698,274.55)	(1,228,393.61)	(803,742.46)	(5,952,347.97)
Less additional cost				
Service after sales	(5,800,652.58)	(3,172,020.14)	(630,012.00)	(232,340.83)
Service travelling expenses	(6,744,768.93)	(2,608,111.02)	(629,130.89)	(258,900.00)
Service labour	(29,523,274.55)	(3,874,858.67)	(2,910,643.02)	(4,979,304.62)
Materials	(41,587,614.20)	(1,859,936.00)	{1,847,862.00)	(8,384,705.00)
Sub total	{136,096,062.57)	(194,371,748.48)	(292,169,275.86)	(31,993,931.56)
Variance	(9,545.17)	(119,567,526.98)	(159,399,416.86)	(4,556,788.56)

III. Costing of Imported Purchases

34. The appellant averred that its records on imported purchases based on costing after adjusting the CIF value with the incremental value of duties, clearance charges and other incidental costs such as transportation to the appellant's warehouse. As evidence to this, the appellant annexed the costing breakdown of these costs which it averred as having also provided to the respondent.

Appellant's Prayers

35. The appellant prayed that:

    a. This Appeal be allowed and the respondent's review decision dated 12th November 2021 be set aside.

    b. The additional taxes on account of tariff reclassification and undervaluation amounting to Kes 464,307,464.31 and Kes 337,834,600.62, respectively, be expunged in totality.

    c. The costs of the Appeal be in the cause

Respondent's Case

36. The respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal;

    i. The respondent's statement of facts dated February 8, 2022 and filed on February 14, 2022 together with the documents attached thereto.

    ii. The respondent's witness statement of Moses Luande filed on August 26, 2022 and on the November 23, 2022 that were admitted in evidence on oath by the Tribunal on January 25, 2023.

    iii. The respondent's written submissions dated August 25, 2022 and filed on August 26, 2022 together with the authorities annexed thereto.

37. The respondent stated that the national treasury on January 3, 2017 granted the appellant the license for importation of Completely Knocked Down Kits (CKD) and the license was to be subjected to the applicable Regulations on the importation of the knocked down kits for assembling of motor vehicle.

38. The respondent averred that it conducted a desk post clearance audit of the imports transactions by the appellant in line with the provisions of section 234 and 235 of the *East Africa Community Customs Management Act. 2004*.

39. That the post clearance audit covered the period January 2016 to December 2020. It averred that the purpose of the audit was to assess the Company's compliance with tax laws and regulations with special emphasis on tariff declarations of completely knocked down consignments and valuation of imports.

40. That the audit exercise revealed incidences of non-compliance to the provisions of the *Tax Procedures (Unassembled Motor Vehicles and Trailers) Regulations, 2019*, specifically, the appellant was abusing the Completely Knocked Down (CKD) exemption privileges.

41. The respondent stated that it sent a letter of intention to carry out a customs post clearance audit on the import and exports customs operations of the appellant on December 8, 2020. That the appellant for the purpose of the audit was required to avail amongst other documents the following:

    i. Bank statements (Dollar and Kenya shillings);

    ii. Contracts between Avic International Beijing Co. Ltd China and Avic International Beijing E.A Co. ltd.

    iii. Goods received registers.

    iv. Franchise agreements for shacman trucks and shantui machinery.

v. Purchases ledgers (both foreign and local).

vi. The transfer pricing policy between Avic China and Avic E.A.

42. That the respondent's audit process began on January 25, 2021. That however, the appellant had not availed all the documents requested. That a letter of reminder was sent on February 2, 2021.

43. That the appellant despite the several indulgence by the respondent was hesitant and only availed bank statements.

44. The respondent stated that the audit revealed instances of undervaluation of imports and tariff mis-declaration of CKD trucks that did not meet the knock down guidelines contained in the Legal Notice No. 84 and the T*ax Procedures (Unassembled Motor Vehicles and Trailers) Regulations, 2019* hence the appellant was on 13th September 2021 issued with a demand Notice for payment of Kes 859,199,373.00.

45. That the appellant on October 12, 2021 applied for review of the decision on grounds that at all material times that they had complied with the relevant legal provisions amongst other things.

46. That the respondent having considered the explanations, information and all the availed documentation issued a review decision on November 12, 2021 revising the total tax payable to Kes 798,941,283.00.

47. That as a result of the foregoing and being aggrieved by the respondent's review decision to demand taxes amounting to Kes 798,941,283.00, the appellant filled a Notice of Appeal dated 10th December 2021.

48. Regarding the issue of tariff classification, the respondent stated that the audit revealed that the appellant was violating CKD Regulations as stipulated in the *Tax Procedures Regulations (Unassembled Motor Vehicle and Trailers), 2019* (hereinafter "CKD Regulations") of June 11, 2019 that govern the importation of CKD motor vehicles and trailers.

49. That the appellant had mis-declared the CPC Code for ex-warehouse for consignments for the period between June 2019 and December 2020 as C421/420, which is ex warehouse, Duty Exempt.

50. The respondent stated that Regulation 2 of the CKD Regulations defines Completely knocked down as:-

> " completely knocked down kit- means a motor vehicle or trailer kit comprising parts and sub-assemblies used for the assembly of a motor vehicle or trailer;"

51. That Regulation 8 provides that:-

> " 8. Knocked down kits for motor vehicles shall be imported as individual parts or sub-assemblies as specified in the First and Second Schedules to these Regulations."

52. That the First Schedule to the *Regulations* provides that:-

> " (I) Except where otherwise specified in these Regulations. Each individual part or sub-assembly shall be imported un-attached to other parts or sub assemblies.
>
> (2) Chassis frames

i. Where the chassis frame whether of box channel, tubular or other construction is in a form consisting of side, cross, cruciform or other members, each part of such member shall be imported adrift, except where each part of such member is welded or riveted together by the original equipment manufacturer.

3. Body or chassis panels, stamping and pressing

I. Cowls, scuttles, bulkheads or firewalls may be assembled, but shall not be surface treated in any way except with a coat of primer or other anti-rust preparation or substance.

2. The cabs shall be broken down to the extent that the following major items shall be imported as sub-assemblies-

a. doors;

b. floor assemblies;

(c) roof panels;

d. bonnets;

e. cab back panels;

f. wheel larches;

g. radiator grilles;

h. grille surround panels:

i. dash assemblies:

j. bulk-head assemblies;

k. door pillars:

l. door surrounds:

m. windscreen surrounds; and (n)bumper valances.

3. Instrument or dashboard panels. glove boxes and doors may be in the condition supplied by the manufacturer, but shall be devoid of all instruments and controls.

4. Windscreen frames may be imported with reinforcements or other attachments but shall be without glass.

5. Toe and running boards may be imported with reinforcements attached but shall not be surface treated in any way except with a coat of primer or other anti-rust preparation or substance.

6. Doors may be assembled with all internal fittings in position and may include deadeners or anti-drum materials but shall be devoid of-

a. door locks;

b. window winding mechanisms;

c. glass;

d. trim; or

e. upholstery material,

and shall not be surface-treated in any way except with a coat of primer or anti-rust preparation or substance."

53. The respondent stated that on various occasions it visited the appellant's warehouse during the audit and established that the appellant's imported parts of semi assembled motor vehicles and in some instance the motor vehicles were almost complete with only need for small mechanical adjustment and the same is ready for use.

54. That the respondent took photographs of the consigned goods, which admittedly the appellant was well aware of.

55. That further the images of the scan of the imports were reviewed and they showed that the appellant had imported kits which were already joined or welded together and were almost ready for use as opposed to CKD kits.

56. The respondent averred that the imports if given an analysis could as well be said that the appellant had imported containerized trucks which needed just a few mechanical adjustments and works and would be ready for use. This was not what an assembly plant envisioned under the CKD Regulations is required to undertake.

57. The respondent submitted that as per the legal provisions, if the consignments do not meet the CKD Regulations, they should not be subject to the exemption regime under the policy guidelines, hence liable to pay all Custom Duties upon importation.

58. That the correct code for all the consignments that violated the CKD *Regulations* was C410, which allows for ex-warehouse, duty fully paid and not C42l/420, which is duty exempt. That as such taxes assessed include import duty, excise duty, VAT, and interest thereof in accordance with section 135 and 249 of *EACCMA, 2004*.

59. The respondent stated that the First Schedule Paragraph 2 (2), (3), (4) and (5) of the *Regulations* provide the conditions of disassembly in which the chassis frames ought to be. That in the current case the welded chassis frame was already welded, riveted or bolted where the same need that the Regulations provided that they must be brought in adrift and the various parts welded, riveted or bolted together in the assembly plant which was not the case as per the consignment and the scans.

60. That further, the First Schedule Paragraph 3 (2) outlines the level of disassembly of the cabin. It averred that of note was that the cabin has to be devoid of doors, floor assemblies, roof panels. radiator grilles. grille surround panels, windscreens. seats and windscreen panels.

61. It contended that an analysis of scan images of consignments brought in at different dates showed semi knocked down assembly kits that did not meet the CKD Regulations, where each part should be imported adrift and broken down into sub-assemblies as guided by the provisions of the Regulations.

62. That further, an analysis of the photos and scan images showed that the consignments did not meet the requisite levels of disassembly. It stated that photos of consignments brought in *vide* entry numbers 2021ICD272230 and 2021ICD265269 plus those taken in the company's bonded warehouse (Bond

No. 569) show cabins and chassis frames that do not meet the requirements of disassembly as envisaged in the Regulations. That the cabins had windscreens. doors, floor assemblies and roof panels attached. Further the chassis frames were not disassembled to the level specified in the regulations.

63. The respondent stated that the appellant's claim that it had paid additional taxes for CKD kits that did not meet the requirements of the Regulations is misguided as it only paid for the undeclared tyres found in its consignments as per the F147 payment authorization form. That the said F147 forms had nothing to do with the miss-declaration.

64. Regarding the presence of a Customs Bond's officer at taxpayer's bonded warehouses, the respondent stated that this does not in any anyway stop Customs Post Clearance Audit (PCA) from doing compliance checks to determine if one is adhering to customs laws and other attendant regulations.

65. Regarding consignments to Uganda, it averred that the appellant in its objection clearly admit to importing goods which failed to meet the requirements of the CKD Regulations and further allege that the same were destined to Uganda. That the appellant claimed that the Uganda Regulations allows it to import Semi Knocked Down, that it, however, acknowledged that the same were later on diverted for home consumption in Kenya. The respondent averred that no entry to support the averments had been attached.

66. That further no evidence to support that indeed the consignment ever made it to Uganda and returned had been placed before the Commissioner or here at the Appeal.

67. That the respondent's agents on the diverse dates of January 26, 2021 and February 25, 2022 conducted a site visit and took the said photographs in the presence of the appellant's officers. That this was acknowledged by the appellant whom in its own pleadings make reference to the photos.

68. It stated that in the appellant's objection letter, the appellant clearly stated that the Ugandan consignments were imported in September and October 2020 as such the attached entries for 2021 does not support its averments.

69. The respondent added that a look at the commercial invoice and consignment manifest revealed that the items were destined to Kenya and indeed if the same were for transit a transit entry would have been made at the point of entry.

70. That further, the appellant stating that a customs officer was present at the site at all times is not a basis to invalidate a post clearance compliance checks. That post clearance compliance check is mandated to verify that the entry made is indeed correct and the duty paid is correct. Which is what has been undertaken herein.

71. That further the presence of customs officer does not in any way stop customs from doing post clearance check to determine if one is adhering to customs laws and other attendant regulations.

72. The respondent asserted that Kenya is a signatory to the *WTO Trade Facilitation Agreement* and article 7 Paragraph 5 states that "with a view of expediting the release of goods, each of the member shall adopt or maintain post clearance audit to ensure compliance with customs and other related laws and regulations. That therefore, the best practice in customs clearance is provision for expediting the movement, release and clearance of goods and deploying of PA for audit-based controls as opposed to transaction-based controls.

73. That it follows that this explanation was an afterthought after it was found to having imported kits which were contrary to the CKD Regulations. It averred that it was important to note that the entry regime for goods on transit and those for goods for home use are not only distinct but also the entry forms used are different.

74. On undervaluation of imports, the respondent stated that the audit revealed that there was a difference between the CIF values declared in the system and the value of imported purchases (Purchase figures from the audited financial statements minus the local purchases as indicated on iTax). That this was a clear pointer on undervaluation of the consignments by the appellant.

75. That during the compliance check the appellant was requested to avail documents to support the cost of sale in its audited accounts. That the documents were to include but not limited to bank statements (Dollar and Kenya shillings); Contracts between Avic International Beijing Co. Ltd China and Avic International Beijing E.A Co. ltd, goods received registers; Franchise agreements for shacman trucks and shantui machinery, Purchases ledgers (both foreign and local); and the transfer pricing policy between Avic China and Avic E.A.

76. The respondent averred that the appellant, however, failed to avail most of the documents and presented an analysis which included entries which do not relate to cost of sales. That the analysis revealed that the appellant wrongly included other costs such as rent, legal fees, audit fees, purchase of murram, purchase of hardcore, construction costs, after sales services and service travelling costs which do not constitute cost of sales in its valuation of imported goods.

77. The respondent submitted that it further found that clearance charges, transportation charges and crane costs had already been taken into account. That as a result of the foregoing, the respondent adjusted the local purchase figures with the importation duties paid.

78. That in view of the foregoing, the respondent found the difference amounted to Kes 371,097,741.00. That consequently, extra taxes amounting to Kes 394,891,908.12 were assessed on the variance.

79. That the respondent having adjusted for local purchases figures with the import duties paid and capped the interest penalty due. That the amount relating to undervaluation was revised from Kes 394,891,908.12 to Kes 337,834,600.62.

80. The respondent added that it reviewed the objection and revised the additional taxes from Kes 859,199,373.00 to Kes 798,941,283.00 after adjusting the cost of sales with importation duties paid within the audit period.

Respondent's Prayers

81. respondent prayed that the Tribunal finds that:

    a. The consignments imported by the appellant for the period January 2016 to December 2020 do not meet the exemption guidelines under the Completely Knocked Down (CKD) Regulations as stipulated in the *Tax Procedures Regulations (Unassembled Motor Vehicle and Trailers), 2019*.

    b. The appellant undervalued its imported consignments.

    c. The respondent's assessment of additional duties, taxes and interest thereof of Kes 798,941,283.00 being taxes due to misclassification of CKD consignments and being taxes due to undervaluation of imports be upheld.

    d. The Appeal be dismissed with costs.

Issue For Determination

82. Following a careful consideration of the pleadings, documents and submissions of both parties and the Partial Consent Judgment entered on the 25th May, 2023, the Tribunal was of the view that the only issue that distills itself for determination was:

> Whether the appellant's imported kits met the specifications of Completely Knocked Down (CKD's) as provided by law.

Analysis And Determination

83. The respondent's review decision dated November 12, 2021 demanded taxes amounting to Kes 464,307,464.31 in relations to tariff classification of CKD consignments and Kes 337,834,600.62 for valuation of imported goods by the appellant. The parties subsequently engaged and signed a Partial Consent in relations to valuation of imported goods. The Partial Consent dated May 4, 2023 was filed with the tribunal on May 8, 2023 and was adopted as a Partial Judgment on the May 25, 2023. The issue of valuation of imported goods having been settled will not form part of this analysis.

84. The respondent stated that its audit revealed that the appellant was violating CKD Regulations as stipulated in the *Tax Procedures Regulations (Unassembled Motor Vehicle and Trailers), 2019* (hereinafter "CKD Regulations") of June 11, 2019 that govern the importation of CKD motor vehicles and trailers.

85. That the appellant had mis-declared the CPC Code for ex-warehouse for consignments for the period between June 2019 and December 2020 as C421/420, which is Ex warehouse, Duty Exempt.

86. That the audit exercise revealed incidences of non-compliance to the provisions of the T*ax Procedures (Unassembled Motor Vehicles and Trailers) Regulations, 2019*, specifically, that the appellant was abusing the Completely Knocked Down (CKD) exemption privileges.

87. The respondent further stated that the audit revealed instances of undervaluation of imports and tariff mis-declaration of CKD trucks that did not meet the knock down guidelines contained in the Legal Notice No. 84 and the *Tax Procedures (Unassembled Motor Vehicles and Trailers) Regulations, 2019*.

88. On its part the appellant averred that as an approved importer of CKD kits, it strictly adhered to the provisions of the Regulations. That moreover, the approval to commence operations as an authorized importer of CKD kits was granted after inspection which involved submission of sample kits to the joint inspection team that included the respondent.

89. The appellant prayed that the Tribunal takes notice of the fact that a Customs Site Officer acting on behalf of the respondent is stationed at the appellant's bonded warehouse. That this officer is mandated to verify all consignments that do not meet the CKD requirements as stipulated in the Regulations. That in a case of non-compliance to the said *Regulations*, the officer then assesses the duties, additional taxes and charges penalties to the appellant.

90. The respondent had however stated that on various occasions it visited the appellant's warehouse during the audit and established that the appellant imported parts of semi assembled motor vehicles and in some instance the motor vehicles were almost complete with only need for small mechanical adjustment and the same are ready for use.

91. Regarding the photographs provided by the respondent the appellant averred that according to the definition in section 2(1), the respondent erred in law by concluding that the consignments were not in tandem with the CKD Regulations and imposition of import duty and additional VAT and excise

duty. The appellant asserted that the *Regulations* allow a vehicle assembler in the form and condition that it was supplied by the Original Equipment Manufacturer (OEM).

92. In its arguments the appellant relied on section 2(1) of the *Regulations* which provides as follows regarding conditions as supplied by OEM;

> " 2. Chassis frames
>
> (1) Where the chassis frame whether of box channel, tubular or other construction is in a form consisting of side, cross, cruciform or other members, each part of such member shall be imported adrift, except where each part of such member is welded or riveted together by the original equipment manufacturer."

93. The appellant further attached import documents, purchase ledgers to support its arguments.

94. However, the respondent averred that it took the photographs of the consigned goods, that which admittedly the appellant was well aware of.

95. That further the images of the scan of the imports were reviewed and they showed that the appellant had imported kits which were already joined or welded together and were almost ready for use as opposed to CKD kits.

96. Paragraph 3 (2) & (3) to the First Schedule of the CKD Regulations provide as follows regarding CKD for cabs;

> " (2) The cabs shall be broken down to the extent that the following major items shall be imported as sub-assemblies—
>
> a. doors;
>
> b. floor assemblies;
>
> c. roof panels;
>
> d. bonnets;
>
> e. cab back panels;
>
> f. wheel larches;
>
> g) radiator grilles;
>
> (h) grille surround panels:
>
> (i) dash assemblies:
>
> j. bulk-head assemblies;
>
> k. door pillars:
>
> (l) door surrounds:
>
> m. windscreen surrounds; and
>
> n. bumper valances.

(3) Instrument or dashboard panels. glove boxes and doors may be in the condition supplied by the manufacturer, but shall be devoid of all instruments and controls."

97. The Tribunal perused the photographs provided as evidence and attached by the respondent and noted partially complete cabs with seats already fixed, dash board and windscreen among others which is in contravention of the Regulations. Although the Tribunal could not examine all the photographs, it was clear that most of the visible items fixed do not fit into fixtures envisaged under paragraph 2 (1) of the Regulations as averred by the appellant and further in contravention of paragraph 3 (2) & (3) to the First Schedule of the *Regulations*.

98. Although the appellant had averred that the photographs used by the respondent as evidence of non-compliance were not serialized with the respective consignments indicating the specific dates that the photographs were taken, it did not provide anything in form of alternative images or drawings of the items imported to demolish the evidence adduced by the respondent. Further, the appellant did not dispute that the photographs were taken from its premises.

99. Section 30 of the *Tax Appeals Tribunal Act* 2013 places the burden on the taxpayer to prove the respondent wrong. The Section provides as follows:

> "In a proceeding before the Tribunal, the appellant has the burden of proving (a) where an appeal relates to an assessment, that the assessment is excessive; or
>
> (b) in any other case, that the tax decision should not have been made or should have been made differently."

100. In addition, the appellant's averments that its imports had indeed met the specifications set out for CKDs were not enough as set out in section 107 of the *Evidence Act* which provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

101. This position on discharge of evidential burden was upheld in *Kenya Power & Lighting Co Ltd v Rassul Nzembe Mwadzaya* [2020] eKLR where the court stated as thus:

> " Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of E*dward Muriga through Stanley Muriga v Nathaniel D. Schulter*, Civil Appeal No.23 of 1997, where the Court of Appeal stated: -
>
> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations."

102. The Tribunal further reiterates the holding by the Court in *Alfred Kioko Muteti v Timothy Miheso & another* [2015] eKLR where the court held that:-

> a party can only discharge its burden upon adducing evidence. Merely making pleadings is not enough." In reaching its findings, the court stated that: "Thus, the burden of proof lies

on the party who would fail if no evidence at all were given by either party.... Pleadings are not evidence. ”

103. In light of the foregoing, the Tribunal determined that the appellant had not discharged its burden of proving that its imports met the specifications of CKDs. Consequently, the Tribunal found that the appellant's imports did not meet the specifications of Completely Knocked Down (CKD's) as provided by law.

Final Decision

104. The upshot of the foregoing analysis coupled with the Partial Judgment flowing from the Partial Consent is that the Appeal is partially merited and the Orders that commend themselves are as follows: -

a. The appeal is hereby partially allowed

b. The respondent's review objection dated November 12, 2021 be and is hereby varied as follows:-

i. The demand and confirmation of the tax liability in relation to undervaluation for the period 2016 to 2020 is reviewed in terms of the partial consent executed between the parties on the May 4, 2023 and endorsed as a Partial Judgment on the May 25, 2025.

ii. The demand and confirmation of tax liability in relation to mis- declaration of the appellant's imported CKD Kits be and is hereby upheld.

c. Each party to bear its own costs.

105. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF SEPTEMBER, 2023

ERIC NYONGESA WAFULA.....CHAIRMAN

CYNTHIA B. MAYAKA.....MEMBER

GRACE MUKUHA.....MEMBER

JEPHTHAH NJAGI.....MEMBER

ABRAHAM K. KIPROTICH.....MEMBER