

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

**TAX APPEAL NO. E068 OF 2024 CONSOLIDATED WITH E009 OF
2024; E042 OF 2024 & E064 OF 2024**

BETWEEN

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

AND

**SOLAR POWER INFRASTRUCTURE LIMITED.....
RESPONDENT**

***(Being appeals against judgments of the Tax Appeals Tribunal
at Nairobi dated 16th September 2023, 26th January 2024 and
2nd February 2024)***

JUDGMENT

Introduction and Background

1. This judgment is in respect of various appeals by the Appellant (“the Commissioner”) arising from judgments delivered by the Tax Appeals Tribunal (“the Tribunal”) and its findings that the

classification of solar water heaters imported by the Appellants fall under **Harmonized System** (HS) Code 8419.19.00 and not 8516.10.00 as reclassified by the Commissioner. Therefore, a determination in this appeal will apply to the other consolidated appeals as to whether the Tribunal was correct or erred in its findings about the classification of solar water heaters.

2. The Commissioner, through its Memorandum of Appeal dated 22nd March 2024 faults the Tribunal's judgment by stating that it failed to apply **Rule 1** of the **General Interpretation Rules(GIRs)** of the HS, instead relying on chapter titles which are only for reference, that the Tribunal ignored an exception in **Explanatory Note A(5)** of Heading 85.16, which classifies heaters designed solely for water heating or domestic use under that code, that the Tribunal failed to treat an incomplete article as a complete system when analyzing the solar water heaters, that the Tribunal disregarded classifications from the World Customs Organization(WCO), the mandated body for product classification, that it should have classified the product under Heading 85.16, that the Tribunal treated the electrical heating element as an accessory, whereas it is the basis for classifying it as a dual-system heater under HS Code 8516.10.00

and lastly, that the Tribunal misinterpreted legitimate expectation against express provisions of the **East African Community Common External Tariff (CET)** of 2017.

3. As such, the Commissioner urges the court to allow the appeal and set aside the Tribunal's judgment, uphold the Commissioner's Objection Decision classifying the solar water heaters under HS Code 8516.10.00 and uphold its tax demand of Kshs. 5,338,227.00. The appeal was responded to by the Respondent through its Statement of Facts dated 25th June 2025 and both parties canvassed the appeal by way of written submissions which I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

4. From the parties' submissions, the court is being called to determine whether the Tribunal erred in finding that the Commissioner wrongly classified the imported solar water heaters under HS Code 8516.10.00 as opposed to HS Code 8419.19.00. The parties agree that classification of goods is adopted from the said **Harmonized System**, an internationally standardized system of names and numbers to classify traded products, that the EAC

partner States agreed to adopt when they signed the Treaty for the establishment of the EAC on 30th November 1999. The parties also agree that to ascertain what code is applicable to particular goods, one has to look at the **GIRs** which are rules that govern the classification of goods under the **Harmonized System** and the **Explanatory Notes** which provide commentary on the intent and scope of provisions and as approved by the Customs Co-operation Council and constitute the official interpretation of the **Harmonized System** at the International level and are an indispensable complement to the **System**.

5. It is also not lost to me that this court is exercising appellate jurisdiction that is circumscribed by **section 56(2)** of the (**Chapter 469B of the Laws of Kenya**) (“the **TPA**”) which provides that “*An appeal to the High Court or to the Court of Appeal shall be on a question of law only*”. This means that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts (See **John Munuve Mati v Returning Officer Mwingi North Constituency, Independent**

**Electoral and Boundaries Commission & Paul Musyimi
Nzengu [2018] KEHC 8738 (KLR)]**

6. The Respondent classified the solar water heaters under Heading 84.19 which provides for *“Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 85.14), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilising, pasteurising, steaming, drying, evaporating, vaporising, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric”*. The Commissioner on the other hand reclassified the same under HS Code 8516.10.00 which provides for *“Electric instantaneous or storage water heaters and immersion heaters”*. In its judgment, the Tribunal, while relying on **GIR 1** held that the items could be classified under both Headings because they function as both solar and electric heaters. It then relied on **GIR 2(b)** to hold that the items are composite goods having a solar collector and electric immersion heater and it also relied on **GIR 3(a)** hold that neither Heading gives a more specific description

than the other as they are equally specific thus applied **GIR 3(b)** which allows for classification based on the item's essential character.

7. On the essential character of the solar heaters, the Tribunal found that solar collectors account for the majority of the system and its functionality, that the electric element is a backup accessory, fitted primarily as a regulatory requirement and that the goods are marketed and sold as solar water heaters with electric backup, not as electric water heaters with solar accessories. It is for these reasons that the Tribunal concluded that the essential character of the solar heaters points more to a classification under Heading 8419. Up to this point, I find that the Tribunal's reasoning was methodologically correct as it applied the **GIRs** correctly in a bid to establish a more specific description because under the **GIRs**, goods are classified in accordance with the Heading appropriate to the goods to which they are most akin and that the Heading which provides the most specific description shall be preferred to Headings providing a more general description (see **Commissioner of Customs and Border Control v Auto Industries Limited [2022] KEHC 15974 (KLR)**)

8. I find that the Tribunal correctly interpreted the **Explanatory Note A(5)** to Heading 85.16 which provides that *“Assemblies consisting of immersion heaters permanently incorporated in a tank ... are classified in heading 84.19 unless they are designed for water heating only or for domestic use ... Solar water heaters are also classified in heading 84.19.”* This is express and unambiguous and the Tribunal was therefore correct to hold that even goods with an electric immersion heater fall under Heading 84.19 if they are fundamentally solar water heaters. On the “dual-system heaters” argument by the Commissioner, I am in agreement with the Respondent’s submission that **Explanatory Note A(3)** to Heading 85.16 defines dual-system heaters as those using electricity or a fuel-heated hot water system. I cannot fault the Tribunal’s factual conclusion and observation that solar energy is not a “fuel” within the meaning of that **Note**. Therefore, the goods could not be deemed to be dual-system heaters under Heading 85.16.

9. In sum, I find that Grounds 1,2 & 3 of the Commissioner’s appeal fail as the Tribunal applied **GIR 1** first, found two possible classifications, then moved to **GIR 3** which is precisely how **GIRs** work. The Tribunal correctly quoted and applied **Explanatory Note**

A(5), which expressly classifies solar water heaters under Heading 84.19. **GIR 2(a)** was not relevant as the goods were complete systems whereas **GIR 2(a)** applies to incomplete articles, which was not the issue. On the WCO opinion, I am in agreement with the Respondent's submissions that a perusal of the Tribunal's record of proceedings indicates that the Commissioner failed to disclose the full WCO opinion and refused the Tribunal's orders and directions to produce it. A party cannot complain about a document it withheld and therefore Ground 4 of the appeal also fails.

10. Ground 5 and 6 of the appeal also have no merit as the Tribunal applied **GIR 3(b)** correctly and concluded the essential character is solar, not electric, the evidence on record, that is the manufacturer's letter, showed the electric element is a backup accessory. I am also in agreement with the Respondent's submission that the Tribunal ruled in its favour so the issue of legitimate expectation was moot.

11. In the end, I find that the Tribunal's decision involved the correct identification of the relevant **GIRs**, proper application of the said **Rules** to the facts and the correct interpretation of the **Explanatory Notes**. I find that the Commissioner is essentially

asking the Court to re-evaluate the facts and substitute its own view of which Heading is more appropriate which as I stated before, is not permissible on an appeal limited to questions of law. I find that the Tribunal's decision was sound in law and I see no reason to interfere with it.

Conclusion and Disposition

12. In the upshot, the court finds and holds that the Commissioner's appeals lack merit and they are hereby dismissed but with no orders as to costs. The Tribunal's decisions stating that the subject solar water heaters are most appropriately classifiable under Heading 84.19 are upheld. Each party shall bear their own costs of the Appeal.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
8th DAY of MAY 2026**

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Almadi for the Appellant

2. Mr. Kariuki for the Respondent

3. Amos- Court Assistant

ORIGINAL