Romageco Kenya Limited v Commissioner of Customs Services (Civil Appeal 37 of 2018) [2024] KECA 1416 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1416 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 37 OF 2018

DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA

OCTOBER 11, 2024

BETWEEN

ROMAGECO KENYA LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS SERVICES ..... RESPONDENT

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi Commercial and Admiralty Division (Ochieng, J.) dated 5th day of September 2016 in Customs Tax Appeal No. 13 of 2014)

JUDGMENT

1. The appellant, Romageco Kenya Limited, imported a consignment of semi-finished square, rectangular and triangle steel parts, which it could use to manufacture motor vehicle Bull Bars. According to the appellant, they were subjected to a tax Tariff Heading 8708.29.00 as opposed to the Tariff Heading 7207.11.00 based on the principles of interpretation set out in the *East African Community Customs Union Common External Tariff* together with the Explanatory Notes of the Harmonized Commodity Description and Coding System also known as the "H.S Code". Under the said taxation mode, the rate of taxation was 10%. The appellant contested the tax regime employed contending that because of the semi-finished nature of the products, the same should have been classified as semi-finished steel products under the Harmonized System Code 7207.1 1.00. Therefore, the respondent erred by classifying the products under the Harmonized System 8708.29.00, which deals with complete motor vehicle parts and accessories. The respondent also changed the tariff classification from semi-finished steel products under heading 7207.11.07 of the East African Community Common External Tariff to motor vehicle parts under HS code 8708.29.00 which attracts import duty at a rate of 10%.

2. The decision by the respondent was communicated to the appellant through a letter dated 3rd April 2012. The appellant then sought a review of the respondent's decision by a letter dated 25th April

2012 in accordance with section 229(1) of the *East Africa Community Customs Management Act* "EACCMA". According to the appellant, the application did not elicit the respondent's decision within 30 days as required by section 229(4) of the *EACCMA*. However, there followed several attempts by the appellant to have the respondent render a decision. To the appellant, the respondent finally rendered its decision on 15th November 2015, close to six months after the application for review was lodged. In its decision, the respondent dismissed the review sought by the appellant.

3. Aggrieved by the decision of the respondent, the appellant lodged an appeal at the Customs and Excise Tribunal, reiterating the same grounds. The Customs and Excise Tribunal upon hearing the appeal on merits delivered its ruling dated 12th August 2013, dismissing it in its entirety.

4. Undeterred, the appellant appealed the Tribunal's decision to the High Court of Kenya at Nairobi on the same grounds. The High Court heard the appeal and delivered its judgment on 5th September 2016, once more dismissing the appeal.

5. Aggrieved again, the appellant filed the instant appeal, challenging the decision on six grounds, inter alia, that the learned Judge erred in law in: finding that the decision of the respondent which was communicated to the appellant on 15th November 2012 was made within the period set out in section 229 (4) of EACCMA; that having established that the appellant made an application for review on 25th April 2012, failed to find that the respondent had no jurisdiction to refuse the application and therefore the application ought to have been deemed allowed as at 26th May 2012; falling in error by proceeding to determine the legality of the respondent's decisions that were communicated to the appellant on 15th November 2012 and 4th January 2013 respectively when the appellant's initial application ought to have been deemed as allowed as at the 26th May 2012; holding that the processes that were undertaken on the semi- finished products were essentially for purposes of assembling the parts in order to constitute them into final products, which was Bull Bars; failing to overturn the decision of the Customs and Excise Tribunal; and in failing to award the appellant costs of the appeal in the High Court and the Customs and Excise Appeals Tribunal.

6. The appeal was canvased by way of written submissions with limited oral highlights. At the plenary hearing of the appeal on 7th May 2024, Mr. Kimani Kiragu SC, teaming up with Mr. Ruto and Mr. Ogonji, learned counsel, appeared for the appellant, whereas Mr. Kithinji, learned counsel, appeared for the respondent. In highlighting the submissions, counsel for the appellant argued that the respondent failed to communicate its decision within the stipulated time, and therefore, the appellant's application for review was deemed as allowed. That the learned Judge erred in law in finding that the decision of the respondent which was communicated to the appellant on 15th November 2012 was made within the period set out in section 229 (4) of the EACCMA. Counsel submitted that the application for review was lodged within 30 days after receipt of the decision; that the respondent ought to have communicated its decision in writing within 30 days after receipt of the application for review, failing which it was deemed to have allowed the application. That the learned Judge, having found that the appellant made an application for review to the respondent on 25th April 2012, erred in law in failing to find that the respondent's application for review had been deemed as allowed as at 26th May 2012. In support of this proposition, counsel relied on the following authorities, Republic vs. Commissioner of Customs Services ex- parte Unilever Kenya Limited [2012] eKLR, and Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited [2012] eKLR.

7. It was submitted that given the appellant's application for review was deemed as allowed, the court ought not to have delved into the legality and merits of the respondent's alleged decisions communicated on 15th November 2012 and 4th January 2013 respectively. That the learned Judge therefore fell in error into proceeding to determine the legality of the respondent's decisions that

were so communicated. The appellant further submitted that the learned Judge erred in holding that the processes that were undertaken on the semi-finished products were essentially for purposes of assembling the parts in order to constitute them into final products, which were Bull Bars. The appellant submitted that the learned Judge erred in upholding the respondent's decision on the classification of the appellant's products.

8. The appellant submitted that the products imported were semi- finished with no essential character to the motor vehicle Bull Bar. The products were not assembled but rather went through a thorough manufacturing process in a bid to prepare the final products, which are not only motor vehicle Bull Bars, but also house window grills, gate grills, and carriers. This was a fact that the respondent overlooked and misled the High Court to believe to the contrary. That the holding failed to take into consideration the thorough manufacturing process the products go through. It also failed to take into consideration the other finished products that the imported goods were used to make. For the aforementioned reasons, the appellant urged this Court to allow the appeal and grant the prayers as set out in the memorandum of appeal.

9. In response, Mr. Kithinji, submitted that the respondent, the Tribunal, and the High Court were right to conclude that the parts which the appellant imported were evidently intended for making Bull Bars and therefore the respondent had classified them in the right tariff. That the Tribunal had noted that the appellant's key witness confirmed that the imported items could only be used for making Bull Bars, and not any other product. Counsel submitted that the appellant's own admissions were indicative of the fact that the respondent made a proper finding.

10. On whether the respondent had failed to communicate its decision to the appellant within 30 days as stipulated by law, it was submitted that the respondent's first decision was communicated in a letter dated 17th October 2012. This was the only decision that the appellant could legitimately object to, pursuant to the provisions of section 229 (4) of the EACCMA within 30 days. That the appellant did so within 30 days by an undated letter received on 6th November 2012. That the respondent, in full compliance with the law and within nine (9) days, wrote a letter dated 15th November 2012 in which it upheld its earlier decision. The letter conveying the decision was written and delivered within the statutory 30 days of the application for review by the appellant. That the appellant's present appeal was however founded on an alleged delay in responding to a second letter of objection by the appellant dated 29th November 2012, which was in fact a "re-appeal" or re-objection. That the respondent out of courtesy, responded to the appellant's several "re-objections", but was now no longer bound by the 30 days timeline. That the respondent is keen, not to allow a taxpayer to keep on raising several objections where they will entrap it by making it look like a first objection every time, and thereafter the taxpayer makes a claim that the statutory 30 days start running afresh with every objection. That the respondent is under an obligation to respond to a taxpayer's first application or review within the statutory period, rather than allowing the taxpayer to invoke a time limitation with every objection raised on the same issue.

11. The respondent further submitted that all the subsequent incessant communications made by the appellant could not invoke the original timelines that were already spent from the time the respondent rendered its decision on 17th October 2012. That the appellant had developed a pattern of invoking fresh running of statutory timelines by raising several letters of objection over a long period of time on the same question. That the High Court and the Tribunal's decisions were not only right, but were also lawful, well-reasoned, and sound. That the appellant had failed to demonstrate where the respondent and the High Court erred, either in law or in fact, in arriving at their decisions. We were therefore urged to dismiss the appeal with costs.

12. This is a second appeal. Our mandate in such an appeal has been enunciated in a long line of cases decided by the Court. See for instance, Maina vs. Mugiria [1983] KLR 78, and Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR, for the propositions, inter alia, that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. See also the English case of Martin vs. Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511, wherein it was reiterated that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

13. The first complaint in this appeal is that the respondent did not communicate its decision on the appellant's application for review within the stipulated timelines of 30 days.

14. Section 229 of the EACCMA provides in no uncertain terms that:

    1. A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

2. The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

3. Where the Commissioner is satisfied that, owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).

4. The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

5. Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4), the Commissioner shall be deemed to have made a decision to allow the application."

15. Our appreciation of the section is that once a taxpayer lodges an application for review, the respondent is obliged within 30 days to make and communicate a decision to the taxpayer. If the respondent does not do so, then the respondent is "deemed to have made a decision to allow the application." In the non-binding decision of the High Court in Republic vs. Commissioner of Customs Services ex-parte Unilever Kenya Limited [2012] eKLR, the Court held that:

> " My understanding of the above quoted section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the respondent, in this case, has 30 days within which to make and communicate a decision to the taxpayer. If the respondent does not communicate a decision within 30 days, then the respondent "shall be deemed to have

made a decision to allow the application." The law is so clear that it can only be interpreted in one way."

16. Clearly, therefore, an application for review of a decision of the respondent has to be made within 30 days of the decision. Further, the period of 30 days, for the respondent to communicate the decision runs from the date of receipt of the application for review, or from the date of receipt of such further information as the Commissioner may have sought from the applicant. The appellant's first letter seeking review was dated 25th April 2011, and the said letter was written pursuant to section 229 (1) EACCMA. The appellant essentially sought a review of the decision by the respondent to classify the appellant's imported goods under Harmonized Systems (HS) Code number 7207.11.40. Tariff Heading 8708.29.00 as opposed to Tariff Heading 7207.11.00

17. This was the application for review which was to be responded to within 30 days as provided for under the Act. The same was responded to on 18th May 2012, a fact conceded to by the appellant. It is therefore clear that the law was complied with when the response was rendered within time. We therefore agree with the learned Judge in his finding that the respondent communicated its decision well within the stipulated timelines of 30 days. The appellant cannot therefore purport to rely on subsequent review applications it made to set other timelines of the initial application as correctly submitted by the respondent. The stipulated timelines could not apply to subsequent incessant applications for review made by the appellant.

18. Turning to the second issue, the respondent classified the appellant's goods under Tariff Heading 8708.29.00 as opposed to Tariff Heading 7207.11.00. This was said to be based on the principles of interpretation set out in the East African Community Customs Union Common External Tariff together with the explanatory notes of the Harmonized Commodity Description and Coding System also known as the "H.S Code". That the H.S. Code is the relevant aid for interpretation and classification, together with the explanatory notes. Even though the appellant insists on reliance on rule 1 of the H.S Code, the correct rule was 2, given the nature of the products. This is due to the fact that the appellant's products were not just general steel and iron, but were actually shaped components required to assemble and finish Bull Bars. Because of this predetermined essential character of the goods in issue, rule 1 itself directs that one should in such a circumstance look, not only at the broad chapter heading but also at the relative sections where the chapter notes are specific to those goods.

19. According to the Explanatory Notes to the H.S Code, rule 2 (a):

> " Articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packaging, handling or transport."

The Tribunal had the first interaction with the parties herein and made the following salient observations:

1. That according to the documentary film presented to the Tribunal, the imported items do not undergo substantial transformation to reach the level of Bull Bars but they are assembled into Bull bars.

2. That the inputs are imported in form of Complete Knocked Down Kit (CKD) as an unassembled fully finished parts of motor vehicle Bull Bars. This was confirmed by both Parties.

3. That during the cross-examination, the appellant's key witness confirmed that imported items can only be used for making Bull Bars and not any other product. The witness therefore confirmed the position advanced by Respondent.

4. That Rule 2(a) is the applicable rule for purpose of classification of the imported items in form of Complete Knocked Down CKD Kits. It is applicable for classifying imported items under tariff no. 87098.29.00 instead of Tariff No. 7207.1100.

20. The Harmonized System code was designed to label all existing goods in elaborate detail so that it would be easier to identify products internationally. It is thus a unique identifier to classify the exact type of goods one is shipping. HS Code 7207.11.00: pertains to semi-finished steel products, specifically, it covers semi-finished products of iron or non-alloy steel. These products are in an intermediate state between raw materials and finished goods which are used in further processing: HS Code 8708.29.00: on the other hand, relates to motor vehicle parts and accessories. It encompasses various components used in assembling or maintaining motor vehicles for example engine parts, brakes, suspension components, and electrical systems. As such, it is safe to state that 7207.11.00 applies to semi-finished steel products while 8708.29.00 covers motor vehicle parts and accessories.

21. We have seen the pictures of the goods which are subject of the current appeal and we are satisfied that the imported items do not need to undergo substantial transformation to reach the level of Bull Bars but they are assembled into Bull Bars. The inputs are imported in the form of Complete Knocked Down Kit as an unassembled fully finished parts of motor vehicle Bull Bars. The parts came with manuals to guide the appellant on how to assemble them, thus the process at the appellant's factory did not change the said products at all so as to arrive at a finished product. This was confirmed by both parties. The general rules for the interpretation of the HS System provide guidance on how the East Africa Community Common External Tariff ought to be interpreted. Rule 2 (a) provides as follows:

> " 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 failing to be classified as complete or finished by virtue of this Rule) presented unassembled or disassembled."

Ideally, the essential character of the appellant's goods was motor vehicle spare parts and not general steel and iron. For that reason, the good's classification was proper.

22. We do not see any reason for us to depart from the finding of the Tribunal and the High Court about the type of classification employed by the respondent to the extent that the processes undertaken were essentially for the purposes of assembling the parts, in order to constitute them into the final products, which were Bull Bars, and thus the respondent rightly invoked the proper law in the assessment.

23. For all these reasons, the appeal lacks merit and is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR