Commisioner of Customs and Border Control v Redavia Kenya Asset Limited (Customs Tax Appeal E016 of 2024) [2025] KEHC 1169 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1169 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CUSTOMS TAX APPEAL E016 OF 2024

RC RUTTO, J

FEBRUARY 28, 2025

BETWEEN

COMMISIONER OF CUSTOMS AND BORDER CONTROL ..... APPELLANT

AND

REDAVIA KENYA ASSET LIMITED ..... RESPONDENT

(Being an appeal from the Judgment of the Honourable Tax Appeals Tribunal delivered on the 9th day of February 2024 in TAT No. 1289 of 2022)

JUDGMENT

A. Introduction

1. The Appellant is the Commissioner appointed under section 13 of the Kenya Revenue Act and charged with the responsibility of assessment, collection accounting and the general administration of tax revenue on behalf of the Government of Kenya. The appellant being aggrieved by the decision of the Tax Appeals Tribunal (TAT) delivered on 9th February 2024 lodged this appeal seeking that the said judgment and the consequential orders be set aside and that the appeal be allowed. They also are seeking costs of the appeal.

2. The brief facts leading to the appeal are as follows; the appellant issued the respondent with preliminary post clearance audit (PCA) findings on a purported misclassification of solar aluminum mountings under tariff code 7610.90.00 instead of tariff code 7616.99.000. The Respondent filed an objection to the demand on the basis that there was in place a tariff ruling of reference number KRA/C&BC/BIA/THQ/GEN/008/ 01/2022 uploaded in the appellant's website and that the ruling created a legitimate expectation. The objection was dismissed and the Appellant issued a demand notice for the short-levied duty, VAT and penalties amounting to Kshs. 7,058,290/-.

3. The respondent was dissatisfied with the review, disputed the PCA findings on misclassification of the consignments of aluminium solar mountings and proceeded to lodge a Notice of Appeal at the TAT challenging the entire review decision by the Appellant herein.

4. Upon hearing the parties, the TAT set out the following issue for determination; whether the Respondent (appellant herein) erred in law and in fact in reclassifying the appellant's (respondent herein) aluminium solar mounting unit from tariff code 7610.90.00 to tariff code 7616.99.00. It then proceeded to hold in favour of the respondent.. It allowed the appeal by setting aside the Appellant's review decision dated 19.9.2022.

5. It is this decision of the TAT that aggrieved the Appellant and prompted the filing of this appeal on the following grounds of appeal namely;

    a. That the Tribunal erred in law and in fact in not taking into consideration that the East Africa Community Customs External Tariff (EAC/CET) is a document available to all parties and should guide them in applying the right HS code at all times.

    b. That the Tribunal erred in fact and in law in failing to consider that the Kenyan tax system is a self –assessment system where the respondent was required to assess itself and make payments to the appellant.

    c. That the Tribunal erred in law and in fact in not considering that the appellant being guided by section 135 of the East African Community Customs Management Act (EACCMA) can demand for short levied taxes.

    d. That the Tribunal erred in law and in fact in failing to consider that pursuant to section 248 A of EACCMA an advance tariff ruling is only binding on the party to whom it is issued and the Commissioner for a period not exceeding 12 months.

    e. That the Tribunal erred in law and in fact in failing to take into consideration that such a ruling cannot be relied upon by any other party.

    f. That the Tribunal erred in law and in fact in failing to consider that a party's legitimate expectation cannot override the law.

    g. That the Tribunal erred in law and in fact in failing to appreciate that the respondent's imports (aluminum articles) were not structures or part of structures.

    h. That the Honourable Tribunal erred in law and fact by failing to consider the evidence tendered by the appellant showing that the respondents imports (aluminium articles) were imported as a stand –alone aluminium articles

    i. That the Honourable Tribunal erred in law and in fact in allowing reclassification from 7616.99.00 to 7610.90.00.

    j. That the Tribunal erred in law and in fact in failing to consider all the facts presented before it.

6. The appeal was canvased by way of submissions.

Appellant Submissions

7. In support of the appeal the appellant relied upon its statement of facts and submissions filed at the TAT on 17th February 2023 and 1st December 2022 respectively. Also relied upon are the submissions dated 14th November 2024.

8. The appellant set out three issues for determination namely; whether legitimate expectation can override the law; whether an advance ruling issued to a tax payer can be relied upon by another taxpayer; whether the proper HS classification of the Respondent's imports is 7616.99.00 or 7610.90.00.

9. As to whether legitimate expectation can override the law, the appellant faulted the tribunal for finding that it had created a legitimate expectation through publication of tariff reference CUS/N&T/RUL/495/2017 in its website. Reference was placed to the Court of Appeal decision in Civil Appeal No.57 of 1968 Tarmal Industries Limited vs Commissioner of Customs and Excise (1968)EA 471 and the Supreme Court case of Kenya Revenue Authority vs Export Trading Company Limited Petition No.20 of 2020 [2022] KESC 31 (KLR) to buttress that legitimate expectation must be factual and not only confined to whether the expectation exist in the mind of the aggrieved but whether viewed legitimately the expectation is objective.

10. Reliance was also made to sections 235 and 236 of the East Africa Community Customs Management Act which provides that the appellant can conduct a PCA of any taxpayer's imports, exports or transfer or manufacture of any goods. Sections 135 and 249 of the East Africa Community Customs Management Act which provides that when duty has been short levied the person who should have paid the short levied amount shall, upon demand pay the amount short levied. In urging this reliance was placed in Pharmaceutical Manufacturing (K) Co Ltd & 3 others Vs Commissioner General of Kenya Revenue Authority & 2 others [2017] eKLR

11. On the issue whether an advance ruling issued to a tax payer should be relied upon by another tax payer reliance was made to section 248A of the EACCMA which requires a person intending to import goods to make a written application to the Commissioner for advance binding rulings on tariff classification, rules of origin or customs valuation. That such an advance ruling only binds the appellant and applicant for a period not exceeding twelve months.

12. It further submitted that the tariff ruling referenced 2017/CUS/V&T/TARI/RUL/495 was issued to a different applicant, it had a disclaimer that "these tariff rulings are based on material facts presented and do not absolve the importer from any liabilities that may arise at the time of importation, customs verification and clearance of goods" and therefore cannot be relied upon by another and that it was relied on after viewing from the appellant's website.

13. On the third issue, whether the proper HS classification of the Respondent's imports is 7616.99.00 or 7610.90.00 it was submitted that in classifying the respondent's goods, the appellant was guided by General Interpretative Rules (GIRs) 1 and 6. That the appellant's view that the respondent's aluminum alloys used as part of a mounting kit are not articles prepared for use in structures but intended for mounting solar panels on roof.

14. They urged that the appeal be allowed and the respondent be ordered to pay the outstanding custom duty as demanded.

Respondent Submissions

15. In response to the Appeal, the respondent relied upon its submissions dated 10th November 2024. It set out three issues for determination namely; whether the appellant was justified in classifying the aluminium solar mounting units as tariff heading 7616 instead of 7610; whether the actions of the Kenya Revenue Authority to demand short levied duty after the initial assessment and payment of the duty was done in a way that violated the Respondent's right to fair administrative action and whether the principle of legitimate expectation was applicable in the circumstance of this case.

16. The respondent submitted that their right to fair administrative action was breached. They urged that every person has the right to administrative action that is expeditious efficient, lawful, reasonable and procedurally fair. They referred to the Supreme Court case of *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020*) [2022]KESC 31 (KLR) to urge that PCA being an administrative action should be conducted in accordance with the dictates of *the Constitution* on fair administrative action. They urged that in the present appeal, the appellant failed to provide any clear justification to the alleged reclassification from tariff heading 7610 to 7616. That also, no written reason was given for their actions, that general allegations were made in their preliminary Desk Audit Findings Letter.

17. The respondent also stated that he was never provided with a breakdown of the import entries the appellant was charging the short levied duties and taxes on which would have enabled the respondent to substantiate the amount of taxes in question.

18. On the issue of alleged reclassification from tariff heading 7610 to 7616 the respondent made reference to General Interpretive Rules, Heading 7610 of the HS CET. He submitted that the appellant sought to rely on definitions which are not what is stated in either the explanatory notes or the terms of heading 7610.90.00. He thus urged that it would be a travesty of justice to allow the appellant to unilaterally change the meaning of structures and allow them to do so without properly relying on the terms of headings of the explanatory notes to the headings. They also urged that the right classification of the aluminium solar mounting kits in this case is 7610.90.00 as opposed to the erroneous reclassification of tariff code 7616.99.00.

19. On the issue of legitimate expectation reference was made to the Supreme Court Decision in the case of Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2015] eKLR that outlined the considerations in determining legitimate expectation. It also relied upon the case of Keroche Industries Limited v Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR.

20. The Respondent argued that the appellant had created a clear legitimate expectation through tariff ruling 2017/CUS/V&T/TARI/RUL/495 on its website and through which it had on various occasions proceeded to clear the respondent's goods under Tariff 7610.90 and thus any attempt to turn back on that was manifestly unlawful.

21. They submitted that they relied on the assurance from the tariff ruling to continue doing its business and the abrupt change targeted at the respondent was a clear case of abuse of power and was to have the effect of disrupting the business of the respondent. They urged the court to dismiss the appeal with costs.

Analysis and Determination

22. I have considered the record of appeal and the submissions filed by parties in this appeal, and the main issue arising for determination is whether the appellant erred in in law and fact in demanding the short levied duty through the demand notice dated 19th April 2022. In determining this issue it has to be established whether the appellant was justified in classifying the aluminium solar mounting units as tariff heading 7616 instead of 7610 including whether there was legitimate expectation to the respondent.

23. It is not in dispute that the appellant under section 236 of sections 236 of the East African Community Custom Management Act is mandated to conduct a Post Clearance Audit (PCA) to verify the accuracy of the entry of goods and documents and to seek documents to verify correctness of taxes declared and paid. Based on this provision, the appellant conducted a desk audit of the respondent's custom

entries for the period 2020 to 2021 to verify their accuracy. That audit revealed that the respondent had misclassified the import consignment of aluminium solar system mounting kits under HS Code 7610900.

24. It is common ground that classification of goods in Kenya is governed by the East African Community Common External Tariff (EAC CET) which codified and adopted the World Custom Organization Harmonized Commodity Description and its principles of General Interpretation Rules (GIRs) classification of goods. (See the decision of Republic v Commissioner General & Another Ex- Parte Awal Ltd [2008]eKLR and Beta Healthcare International Ltd v Commissioner of Customs Services [2010]eKLR.

25. The appellant's position is that the proper HS classification of the Respondent's imports is 7616.99.00 and not 7610.90.00 since the respondent's aluminum alloys used as part of a mounting kit are not articles prepared for use in structures but intended for mounting solar panels on roof. That this interpretation is guided by General Interpretative Rules (GIRs) 1 and 6.

26. The Respondent too made reference to the GIRs and submitted that the appellant relied on definitions which are not what was stated in either the explanatory notes or the terms of heading 7610.90.00.. They contended that they relied on tariff ruling CUS/V&T/TARI/RUL/495/2017 of 28th December 2017 which classified solar mounting kits in HS code 7610.90.00 and not 7616.99.00 as proposed by the appellant.

27. The TAT in its decision looked at and analysed the two contentious headings of the HS codes as well as the GRIs and held that the solar mounting kits for installation of solar panels are classifiable under the heading 7610.90.00 and not 7616.90.00 as indicated by the appellant herein.

28. Looking at the said definitions heading 7610 of the HS CET and as correctly stated by the TAT, the section provides for classification of Aluminium structures without providing the definition of what a structure is. It further gives the exclusion of what is not considered a structure and gives examples therein. Further, the definition under heading 7616 provides for other articles of aluminium. It goes ahead to list the said articles and this too does not include aluminium mounting kits for solar panels.

29. This court has analysed the reasoning of the tribunal on the classification of under the two heads as follows;

> 87. The Tribunal looked at the headings of the HS codes in contention as stated in 2017 East Africa Community External Tariff book and found the following description for Heading 7610:-
>
> "76.10 Aluminium structures (excluding prefabricated buildings of heading 94.06) and parts of structures (for example, bridges and bridge-sections, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns); aluminium plates, rods, profiles, tubes and the like, prepared for use in structures.
>
> 7610.10.00 - Doors, windows and their frames and thresholds for doors.
>
> 7610.90.0– Other"
>
> 87. The following is the description for Heading 7616
>
> ."76.16 Other articles of aluminium.7616.10.00 - Nails, tacks, staples (other than those of heading 83.05), screws, bolts, nuts, screw hooks, rivets, cotters, cotter-pins, washers and similar articles.7616.91.00 -- Cloth, grill, netting and fencing, of aluminium wire 7616.99.00. - Other"

89. The General Rules for Interpretation of the Harmonized System that govern the classification of goods under the Harmonized Commodity Description and Coding System (HS) give the steps to be followed in classification of goods.

90. General Rule No 1 states that:-

> "If a provision specifically and completely describes a product, then the product should be classified in that provision"

91. After analyzing the submissions, the General Rules of Interpretation and the items classified under the Headings indicated above, I find that the Appellant's aluminium structures, parts of structures and accessories for installation of solar panels are classifiable under Heading 7610.90.00 and not Heading 7616.99.00 as indicated by the Respondent the appellant in this case

30. Having gone through the holding of the tribunal as set out above I do not find any error in its reasoning. It is evident that there is no specific description of the aluminium rod for used for solar panel installation. This court notes the respondent's submission that the aluminum alloys were to be used as parts for mounting solar panels kit. The TAT when setting out the issue for determination also noted that aluminium was a solar mounting unit. The Appellant too admitted that the aluminum alloys used as part of a mounting kit intended for mounting solar panels on roof. Thus, the contention is whether or not it falls under the classification under aluminium structure (76.10) or whether they fall under other articles of aluminium (76.16).

31. Further, this court has taken time to look at the various, examples given under the two categorizations and draws the similarity in terms of purpose and usage. This court finds that indeed the aluminium alloys falls under the aluminium structure (76.10) since it is for use in the structures. I say this because the Black's Law Dictionary defines a structure to include a building or a framework or construction with elements identifiable giving stability and form. Moreover, the examples of parts of structures under 76.10 expressly includes towers, masts, balustrades, pillars and columns. The provision also includes rods and tubes which are consistent with what would be used to mount solar panels.

32. Thus, based on the above I find that the Tribunal correctly interpreted the said provision by finding that the Appellant herein erred in reclassifying the respondent's aluminium articles from Tariff code 7610.99.00 to Tariff code 7616.99.00.

33. Having made the above finding, it follows that the appellant erred in demanding the short levied duty on the basis of the appellant's reclassification. On the issue of legitimate expectation, the circumstances of the case favour the respondent in the sense that the appellant did not rebut the respondent's argument that it has previously benefited from the classification of its goods under 7610.

34. This court notes the respondent objection that referred to the appellant action of publishing in its website tariff ruling 2017/CUS/V&T/TARI/RUL/495 dated 28th December 2017. The respondent's submission is that it was guided by this ruling and that the appellant and had proceeded to clear the respondent's goods under tariff 7610.90. The Appellant position is that the law is superior to the principle of legitimate expectation. Also, in accordance with section 248A of the EACCMA that the ruling related to a private tariff ruling issued to another tax payer and that advance rulings are only binding to the party to whom it was issued and the Commissioner for a period of 12 months. The appellant faulted the respondent for referring to the ruling after viewing it from its website and urged and that the respondent should have sought an advance tariff ruling if it had doubts.

35. It is undisputed that the Appellant published the tariff ruling 2017/CUS/V&T/TARI/RUL/495 dated 28th December 2017. It is also not in dispute that the said ruling classified aluminium mounting kits for solar panels procured by a different entity. While the ruling remains binding between the party that sought the ruling and the appellant, this court notes that a public authority is bound to exercise its mandate fairly, predictably and not to vary the scope of its authority when exercising its respective statutory powers. See the case of Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited [2004] KEHC 1238 KLR where it was held a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

36. In the end, the court is not persuaded by the appellant to allow the appeal. The appeal is found to be unmerited and the decision of the TAT is to be upheld. The upshot of this is that the appeal is disallowed. As the appellant was merely carrying out its mandate under the statute, I do not see the need to burden it with costs. I therefore make no order as to costs.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED DATED AND SIGNED THIS 28TH DAY OF FEBRUARY 2025

For Appellant:

For Respondent:

Court Assistant: