



Commissioner of Customs Boarder Control v Western Seed Ltd (Income Tax Appeal E035 of 2023) [2024] KEHC 6275 (KLR) (Commercial and Tax) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E035 OF 2023**

A. ONG'INJO, J

MAY 30, 2024

BETWEEN

COMMISSIONER OF CUSTOMS BOARDER CONTROL APPELLANT

AND

WESTERN SEED LTD RESPONDENT

(Being an appeal from the Judgment of the Tax Appeals Tribunal delivered on 14th July 2023 in Nairobi Tax Appeal Tribunal No. 590 of 2022)

JUDGMENT

1. The Respondent's consignment Multimicro WS 100L entry number 22EMKIMzxxxx was tested by the Appellant and on 19th April 2022 and a decision for reclassification given by the Appellant. The Appellant stated that the Multimicro WS 100l was reclassified from HS Code 3105.90.00 to HS Code 3824.99.90. The Respondent filed an objection to this reclassification vide a letter dated 21st April 2022 and the Appellant gave an objection decision on 5th May 2022.
2. The Respondent lodged an appeal at the Tax Appeals Tribunal and the Tribunal delivered its Judgement on 14th July 2023 allowing the appeal to the effect that even if the Respondent's product was potentially classifiable in two headings, it could not be classified under heading 3824 on the basis of GIR 3(c) because it would have been specified elsewhere. That nitrogen and phosphates which formed the bulk of the content of the product are covered under Chapter 28 while Sulphur is specified under Chapter 25. The Tribunal was of the view that fertilizer was specified under Chapter 31 under the Heading 3105. The Tribunal was of the view that the product satisfied the criteria set out in explanatory notes to Heading 3105 by virtue of the fact that the product is a mixture of fertilizing substances and also contains non-fertilizing substances including Sulphur. They faulted the Appellant for classifying the Respondents products under HS Code 3824.99.00.



3. Being aggrieved by that decision, the Appellant has filed the present appeal vide a Memorandum of Appeal dated 7th September 2023 on the following grounds: -
 1. That the Honourable Tribunal erred in law and fact in finding that the Respondent's product, Multimicro WS 100L is properly classifiable under HS Code 3105.90.00 rather than HS code 3824.99.90 of the EAC CET, 2017.
 2. That fact in finding that the Respondent's product, Multimicro WS 100L is properly classifiable under HS Code 3105.90.00 rather than HS code 3824.99.90 of the EAC CET, 2017, the Honourable Tribunal erred in law as it failed to consider the product's composition to the effect that in addition to fertilizing substance (macronutrients), the product equally contains a mixture of plant micronutrients which are beneficial to the soil/ crops.
 3. That in finding that the Respondent's product, Multimicro WS 100L is properly classifiable under HS Code 3105.90.00 rather than HS code 3824.99.90 of the EAC CET, 2017 the Honourable Tribunal erred in law by misinterpreting the General Rules of Interpretation (GIR) of Harmonized System(HS).
 4. That the Honourable Tribunal misapplied the law and facts and therefore arrived at the wrong decision
 5. That the Honourable Tribunal erred in law and fact in failing to consider the Appellant's submissions and responses in its finding.
4. The Appellant prayed that; -
 1. The appeal be allowed with costs to the Appellant.
 2. That the consequential findings and orders of the Tribunal subject to this appeal be set aside in its entirety.
5. The appeal was canvassed by way of written submissions. The said submissions were highlighted on 18th March 2024.

Appellant's Submissions

6. The Appellant submitted that in classification of products under the harmonized system, world customs Organization and the General Interpretative Rules, Rules 1 to 6 are considered and they ought to be read together with the WCO Explanatory notes as well as the EAC CET. Counsel submitted that a product would be correctly classified in accordance with a particular chapter unless the notes or hearings would say otherwise. With respect to the product in question, counsel submitted that it contained both the macro nutrients and micronutrients which were mixtures and by reference and description would be classified under heading 38.24 of the EAC, CET.
7. It was the Appellant's submissions that since the product was a mixture of more than one substance under two headings 31.05 and 38.24 reference should be made to rule 3 of the WCO GIR. That the Tribunal erred in excluding the application of GIR 3(C) on the basis that the bulk contents of the products was covered under chapter 28. It was the Appellant's submissions that the Tribunal did not consider the basic principles of classification of goods as provided for under the Harmonized Systems Convention (HS) and domesticated through the 2022 EAC CET.



Respondent's Submissions

8. The Respondent submitted that Multimicro WS 100L was correctly classified under HS code 3105.90.000 under the General Rules of Interpretation of the Harmonized Code. Counsel submitted that while the Respondent's product contained both macronutrients and micronutrients the classification applied by virtue of its essential character and that is nitrogen and phosphorus. Counsel submitted that the micronutrients were only for enrichment of the soil and therefore should not be considered as key elements. It was the Respondent's submissions that Rule 3(c) did not apply since the essential constituent of the product was nitrogen and phosphorus.

Analysis and Determination

9. I have considered the record, and the submissions on record. The appeal before the court is based on the classification of the Respondent's product Multimicro WS 100L. The Appellant faulted the Tribunal for holding that the Respondent's product was properly classified under HS Code 3105.90.00 rather than HS code 3824.99.90 of the EAC CET, 2017.
10. This court is therefore called to determine whether the Tribunal erred in classification of the Respondent's product under the General Rules of Interpretation of Harmonized System. On one part the Appellant is of the view that the Respondent's product should be classified under HS code 3824.99.90 of the EAC CET, 2017 whereas the Respondents view is that the product should be classified under code HS Code 3105.90.00.
11. The Tribunal in its decision held that the Respondent's product was classifiable under chapter 31 as fertilizer specifically under heading 3105 and it could not be classified under Heading 3828.
12. It is not in dispute that the Respondent product was a mixture of both the macro nutrients which is the fertilizing agent and the micronutrients. According to Rule 2(b) of the General Rules for the Interpretation of the Harmonized System the classification of goods consisting of more than one material or substance shall be in accordance to the principles of rules.
13. Rule 3 on the other hand states as follows;

When by application of Rule 2 (b) or for any other reason, goods are prima facie, classifiable under two or more headings, classification shall be effected as follows: (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable
- (c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration



14. It was the Appellant's assertion in view of the aforementioned rule that the Respondent's product ought to be classified in the heading that it is specifically described rather than generally described. I have considered chapter 31 on fertilizers and I reproduce it as follows:

Chapter 31 Fertilisers Notes.

1. This Chapter does not cover:
 - (a) Animal blood of heading 05.11;
 - (b) Separate chemically defined compounds (other than those answering to the descriptions in Note 2 (a), 3 (a), 4 (a) or 5 below); or
 - (c) Cultured potassium chloride crystals (other than optical elements) weighing not less than 2.5 g each, of heading 38.24; optical elements of potassium chloride (heading 90.01).
 2. - Heading 31.02 applies only to the following goods, provided that they are not put up in the forms or packages described in heading 31.05: Goods which answer to one or other of the descriptions given below:
 - (i) Sodium nitrate, whether or not pure;
 - (ii) Ammonium nitrate, whether or not pure;
 - (iii) Double salts, whether or not pure, of ammonium sulphate and ammonium nitrate;
 - (iv) Ammonium sulphate, whether or not pure;
 - (v) Double salts (whether or not pure) or mixtures of calcium nitrate and ammonium nitrate;
 - (vi) Double salts (whether or not pure) or mixtures of calcium nitrate and magnesium nitrate;
 - (vii) Calcium cyanamide, whether or not pure or treated with oil;
 - (viii) Urea, whether or not pure.
 - (b) Fertilisers consisting of any of the goods described in (a) above mixed together.
 - (c) Fertilisers consisting of ammonium chloride or of any of the goods described in (a) or (b) above mixed with chalk, gypsum or other inorganic non-fertilising substances.
 - (d) Liquid fertilisers consisting of the goods of subparagraph (a) (ii) or (viii) above, or of mixtures of those goods, in an aqueous or ammoniacal solution.
15. In view of the foregoing, this court agrees with the Tribunal's position that the Respondent's product being a fertilizer and having contained nitrogen and phosphates as the essential character was classifiable under Chapter 31 on fertilizers. The court further notes that in view of the explanation note C1 under the subheading 3105 the mixtures of fertilizing substances with non-fertilizing substances are classified under heading 31.02 or 31.03.
16. The court has further considered Chapter 38.24 to which the Appellant relies on and note that the same was a general classification with respect to chemicals. The courts finding is that the Respondent's product qualifies to be classified as fertilizer under HS Code 3105.90.00. It is further note that the



Tribunal's decision was guided by the principles of classification of goods provided for under the Harmonized Systems Convention as well as the EACCET.

17. For the reasons stated herein it is this court's finding that this appeal is without merit and the same is dismissed. Consequently, the decision of the Tax Appeals Tribunal dated 14th July 2023 hereby upheld. Each party shall bear their own costs of the appeal.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 30TH DAY OF MAY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Esther - Court Assistant

Ms. Chelangat Advocate H/B for Mr. Nyapara Advocate for the Appellant

Ms. Wanjiku H/B for Ms. Jan Mohamed Advocate for the Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Ms. Wanjiku: We pray for copies of judgment

Orders: Registry to supply copies of judgment to parties

HON. LADY JUSTICE A. ONG'INJO

JUDGE

