



Autoexpress Limited v Commissioner of Customs & Border Control (Income Tax Appeal E079 of 2023) [2024] KEHC 7801 (KLR) (Commercial and Tax) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7801 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E079 OF 2023
JWW MONG'ARE, J
JUNE 27, 2024

BETWEEN

AUTOXPRESS LIMITED APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL RESPONDENT

(An appeal from the Ruling of the Tax Appeals Tribunal at Nairobi delivered on the 14th April 2023 in Tax Appeal No. 33 of 2018)

JUDGMENT

Background:-

1. The Appellant, Autoexpress Limited is an importer and seller of motor vehicle parts. It complained to the Respondent about unfair competition by unscrupulous traders and competitors through smuggling and under invoicing of imported tyres. The Respondent carried out investigations and found that the importers valued identical or similar tyres from China at different prices. As a result, the Respondent harmonized the values and uplifted duty on some tyres imported by various importers including the Appellant. The Appellant challenged the uplift and the Respondent through a letter dated 28th February 2018 upheld its decision to uplift the duty.
2. Aggrieved, the Appellant lodged an appeal before the Tax Appeals Tribunal (Tribunal) on 26th March 2018. Through its judgment dated 4th August 2020, the Tribunal found that the Respondent erred in law by departing from Transactional Value Method in valuing therefore denying the Appellant's an opportunity to justify the value declared. It thus directed that the Respondent re-assesses the customs duty payable by the Appellant in respect of the imports in dispute within 60 days from the date of the judgment.



3. Thereafter, the Appellant and the Respondent held a meeting on 30th October 2020. The Respondent requested the Appellant to provide documents to justify the declared values. The Appellant provided copies of invoices. Through a letter dated 3rd November 2020, the Respondent informed the Appellant that most of the documents shared did not relate to the assessment in question and requested for relevant documents. On 25th June 2021, the Respondent issued its decision to the effect that the value uplifts were justified and that the demand for a refund was not viable.
4. Aggrieved by that decision, the Appellant applied for review of the judgment before the Tribunal. Through its ruling of 14th April 2023, the Tribunal dismissed the application for review because the Appellant did not satisfy any of the preconditions for the grant of review orders. The Tribunal also found that the Respondent complied with its judgment.
5. Still aggrieved, the Appellant instituted this appeal through a Memorandum of Appeal dated 7th June 2023, on the following grounds:-
 1. That the Tribunal erred in law and in fact by holding that the Respondent's various correspondences, meetings held and ADR initiatives with the Appellant complied with the Judgment and Order of the Tribunal of 4 August 2020 directing the Respondent to revalue the goods in strict compliance with section 122, and the 4th Schedule of EACCOMA and other related laws, international conventions, guidelines and manuals following its judgment that the Respondent erred in law by departing from Transactional Value Method in valuing the Appellant's goods and that the Respondent's decision was contrary to the Fourth Schedule, Article 17 of WTO Customs Valuation Agreement and violated the Appellant's right to fair administrative action as provided for by the Constitution and the Fair Administrative Action Act.
 2. That the Tribunal erred in law and in fact in holding that the Respondent's had issued a fresh assessment of additional taxes in accordance with the judgment by its letter of 25 June 2021 that reconfirmed the that the initial uplift of duties based on similar or identical goods was conducted in accordance with the provisions of Section 122 EACCOM Act 2004, as read with the Fourth Schedule part I Par 3 that ought to inform a new cause of action.
 3. That the Tribunal erred in law and in fact in holding that the Appellant concealed material facts relating to the engagements between the parties subsequent to the delivery of the judgment.
 4. That the Tribunal erred in law and in fact in holding that the Appellant failed to controvert any material facts disclosed by the Respondent that demonstrate the Respondent's compliance with the directions of the Tribunal.
 5. That the Tribunal erred in failing to appreciate that the Appellant's Application sought for the review and variation of the Judgment of 4 August 2020 by seeking that the Tribunal makes a final determination on the taxes refundable to the Appellant pursuant to Rule 19 of the Tax Appeals Tribunal (Procedure) Rules, 2015.
 6. That the Tribunal erred in failing to appreciate that the Tribunal has the power to vary its judgment of 4 August 2020 under Rule 19 of the Tax Appeals Tribunal (Procedure) Rules, 2015 by making a final determination on the taxes refundable to the Appellant.
 7. That the Tribunal's erred in law by relying on the threshold of review of discovery of new and important matter or evidence; mistake or error apparent on the face of the record or any other sufficient reasons, as provided for under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 in contravention of section 14 of the Tax Appeals



Tribunal Act which governs the management and administration of appeals expressly prohibits the application of the provisions of the Civil Procedure Act.

8. That the Tribunal erred in law in determining that the Appellant had not meet the threshold for review of the orders made by the Tribunal in the judgment delivered on the 4th day of August 2020.
 9. That the Tribunal erred in law by failing to re-assess the customs payable by the Appellant.
 10. That the Tribunal erred in law by failing to make a final determination on the tax refundable to the Appellant.
6. The Appellant prayed that the Court allows its appeal with costs, sets aside the Tribunal's ruling dated 14th April 2023 dismissing the Appellant's application for review and makes a final determination on the taxes refundable. the Appellant also filed written submissions dated 21st September 2023.

Response:-

7. In response, the Respondent filed a statement of facts and written submissions dated 2nd August 2023 and 14th November 2023 respectively.

Analysis and Determination: -

8. I have carefully considered the record of appeal, the statement of facts and the parties' respective written submissions by the parties.
9. I note that the core issue that arises for determination is whether the Tribunal erred by referring to the grounds for review under the Civil Procedure Act and Rules in arriving at its decision.
10. The Appellant relied on Section 14 of the TAT Act to argue that the Tribunal erred by referring to the grounds for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules instead of the Tax Appeals Tribunal Act.
11. However, in a rejoinder, the Respondent contended that since Section 29A of the TAT Act which provides for grounds upon which an application for review could be made to the Tribunal had not yet been enacted, and that therefore the Tribunal had to rely on the principles considered by ordinary courts in determining review applications where such arose before it. The Respondent also contended that the Tribunal was right to dismiss the review application as the Appellant failed to establish the grounds for review as provided for by the law.
12. According to the Respondent, its decision dated 25th June 2021 was a fresh assessment, thus, the Appellant ought to have challenged it under sections 229 and 230 of the EACCMA. The Respondent concurred with the Tribunal's view that through the review application, the Appellant sought to reopen its Appeal which had since crystallised after the re-assessment for determination.
13. The Respondent also argued that in effect, the Tribunal was inviting the Tribunal to usurp its legislative mandate of determining the taxes payable by the Appellant which is solely the Respondent's mandate.
14. The legal framework is as established by Rule 14 of the TAT Act which provides that:-

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“ 14. Exemption from the provisions of Cap. 21



The provisions of the Civil Procedure Act (Cap. 21) shall not apply to the proceedings of the Tribunal.”

15. Rule 19 of the TAT Act provides that:-

“ 19. Upon an application by the applicant, the Tribunal, stating the reasons, may set aside, vary or review a decision made under these Rules.”

16. In the impugned ruling, the Tribunal observed as follows:-

“ 5. The Tribunal takes judicial notice that at the time of filing this application, Section 29A of the Tax Appeals Tribunal Act which expressly provides for review of orders and decrees issued by the Tribunal had not been enacted. The guiding provision for the Tribunal at the time was Rule 19 of the Tax Appeals Tribunal (Procedure) Rules 2015...

17. The Tribunal also observed below that:-

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“ 10. The Tribunal notes from the authorities cited by the parties and more particularly its previous decisions that orders for review can only be issued under circumstances as stated in TAT No. 183 of 2015 Jimmy Mutuku Kiamba vs. Commissioner of Investigations and Enforcement as follows:-

“It has been established in the foregoing that orders sought can only be granted in instances of:-

- a. Discovery of new and important matter or evidence
- b. Mistake or error apparent on the face of the record
- c. Any other sufficient reason.”

18. It is established that in interpreting statutes, regard must be had to the context of its enactment and a statute must be looked at as a whole. In *Kenya Revenue Authority v Republic (Exparte Fintel Ltd)* [2019] eKLR, the Court of Appeal noted that:-

“A statute ought to be looked at, in the context of its enactment and as a whole as opposed to picking and choosing words in isolation. “No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.” So said the learned Judges of the Supreme Court of India in *Reserve Bank of India V. Peerless General Finance and Investment Co. Ltd.*, 1987 SCR (2) 1. See also *The Engineers Board of Kenya V. Jesse Waweru Wabome & others Civil Appeal No 240 of 2013.*”

19. The Appellant contended that Tribunal erred by referring to the grounds for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. From my evaluation of the above-quoted Rules 14 and 19 of the TAT Act and in consideration of the context of their enactment, it is my view that the purpose of Rule 14 was not to exclude the application of the general principles for consideration in determining whether an applicant has met the legal threshold to warrant a review. This position is supported by the subsequent amendment to the Act to include Section 29A which captures the principles. This is also supported by the general principle that the power of the Tribunal



to grant an order for review though discretionary, must be exercised with regard to sound principles and not on a whim or capriciously.

20. Therefore, I find that the Tribunal was correct to pay regard to the general principles to be considered in review applications by Courts and Tribunals.
21. The next issue is whether the Tribunal erred in law in determining that the Appellant had not meet the threshold for review of the orders made by the Tribunal in the judgment. I note that the Appellant faulted the Respondent for non-compliance with the orders of the Tribunal. The Appellant contended that the Respondent did not re-assess the customs duty on its imported goods but simply indicated that its earlier valuation had been conducted in accordance with Section 122 of EACCMA.
22. However, in the impugned ruling, the Tribunal noted that the Appellant deliberately concealed material facts relating to the engagements between the parties subsequent to the delivery of the judgment. The Tribunal also noted that in its replying affidavit, the Respondent demonstrated that it undertook steps to comply with its orders and that the Appellant did not controvert the facts.
23. The Tribunal thus found that the Appellant had not disclosed any new evidence, demonstrated an error or mistake apparent on the record or any other sufficient ground to warrant a review of the judgment.
24. To my mind, the Appellant's complaint about the Respondent's non-compliance with the orders of the Tribunal, though a good ground of appeal was not a proper ground for review. Thus, I find that the Tribunal was correct in determining that the Appellant had not meet the threshold for review of the orders made by the Tribunal in the judgment.
25. In the upshot, I find that the Appeal is without merit and it is hereby dismissed with costs.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 27th DAY of JUNE, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

PARA 1.

N/A for the Appellant.

PARA 2.

Ms.Onyango H/B for Lemiso for the Respondent.

PARA 3.

Amos - Court Assistant

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