

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAX APPEAL NO. 116 OF 2016

THE EAST AFRICAN SEED CO. LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

A. INTRODUCTION

1. The Appellant is a private limited liability company incorporated under the Companies Act, Cap 486 (repealed) of the Laws of Kenya. The principal activity of the Appellant is processing, wholesaling and retailing seeds for sowing.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5 (1) of the Act, the Respondent is an agency of the Government for the collection and receipt of all revenue. Further under Section 5 (2) of the Act with respect to the performance of its functions under sub-Section (1) the Respondent is mandated to administer and enforce all provisions of assessing, collecting and accounting for all revenue in accordance with those laws.

B. BACKGROUND

3. The Respondent conducted a post clearance audit on the Appellant's operations covering the period of 2010 to 2015 culminating in provisional demand notice communicated to the Appellant vide the Respondent's letter

dated 29th April 2015, for an amount of Kshs. 69,819,334.00 comprising Kshs. 34,460,177.00 being import duty and Kshs.35,359,156.00 as Value Added Tax (VAT).

4. The Appellant objected to the assessment vide a letter dated 29th May 2015 on the following grounds;
 - a. The alleged HS Code that should have been used by the Appellant i.e. 1207.70.00 for watermelon seeds for sowing was non-existent in the customs system to process IDF's and customs entries prior to 29th April 2015.
 - b. VAT demanded on watermelon paper and coriander seeds for sowing for the period September 2013 to December 2014 had already been settled by the Appellant prior to the Post clearance audit.
 - c. The Respondent had assessed import duty and VAT on seed imports that were exempt by the Ministry of Agriculture.
5. Vide a letter dated 25th June 2015 the Respondent revised the demand notice downwards to Kshs. 63,334,461.00. The Respondent admitted to applying incorrect duty rates in some instances on the seeds for sowing imported by the Appellant.
6. The Appellant vide a letter dated 27th July 2015 objected to the revised demand notice. The Respondent revised the demand notice downwards again to Kshs.56,815,203.00 via a letter dated 26th August 2015 on admission of exemption letters issued by the Ministry of Agriculture as part of evidence.
7. On 21st October 2015 the Appellant held a meeting with the Respondent to discuss and clarify most of the issues objected. Following the meeting the

Respondent again revised the demand notice on 1st December 2015 to Kshs. 32,969,269.00.

8. Unrelenting, the Appellant once again objected to the Respondent's assessment through a letter dated 16th December 2015 citing a number of grounds therein. This was followed by a further objection on 14th January 2016 which culminated in the parties having another meeting between 25th January 2016 and 15th February 2016 with the aim of clarifying the outstanding issues.
9. The Appellant objected again to the revised demand on 16th March 2016. As a result the Respondent sought to have a further meeting with the Appellant prior to the issuance of the final decision vide a letter dated 12th April 2016. A further objection was lodged by the Appellant to the sum of Kshs. 29,842,011.00 but conceded to an amount of Kshs. 3,127,258.00.
10. The Appellant settled the undisputed amounts relating to import duty and VAT assessed on peas, sweet corn and coriander for sowing and notified the Respondent on 6th July 2016. The Respondent confirmed the revised post clearance audit of Kshs. 29,842,011.00 vide a letter dated 29th July 2016. This resulted in the Appellant filing a notice of intention to Appeal on 17th August 2016.

C. APPEAL

11. The basis of the Appellant's contention is captured in its Memorandum of Appeal dated 30th August 2016 on the following grounds;
 - a. The Respondent erred in tariff classification of water lemon seeds for sowing imported prior to July 2012 as per the East African Community Common External Tariff , 2007; and

- b. The Respondent's proposed Tariff classification of pepper for sowing describes pepper fruit or black/white pepper which cannot be used for agricultural purposes since it does not germinate.
12. The Appellant prays that the Tribunal;
- a. Allows this Appeal
 - b. Sets aside the Respondent's confirmed assessment ; and
 - c. Awards costs of this Appeal to the Appellant.
13. The Respondent on its part alleges as follows;
- a. The Respondent reiterated that the amount disputed to of Kshs. 29,842,011 raised in its revised assessment of 14th December 2015 is valid and payable.
 - b. The Appellant classified water melon seed under tariff code 1209.91.00 which related to seeds, fruit and spores of a kind used for sowing and specifically vegetable seeds. The Respondent states that this classification is erroneous for the reasons that botanically water lemon is a fruit. A fruit is a seed bearing structure that develops from the ovary of a flowering plant, whereas vegetables are all other plant parts such as roots, leaves and stems. By this therefore, water melon is a fruit and water melon seeds are fruits.
 - c. Following the General Interpretative Rules (GIRs) of classification, the Respondent did not err in tariff classification of water melon seeds for sowing imported prior to July 2012 (when melon seeds were specifically named under HS Tariff Code 1207.70.00) under HS Tariff Code 1207.99.00, as per the East African Community Common External Tariff (EAC CET) 2007 instead of 1209.91.00.
 - d. The Respondent The Respondent states that for the period prior to 1st July 2012, the appropriate HS tariff code for watermelon seed was 1207.99.00 and therefore subjected to the exclusion as per chapter note

3 of chapter 12 of EAC CET revised version 2007. The note excludes amongst others “products of headings 12.07 from being classified under HS Tariff code 12.09.”

- e. The legal force governing HS tariff classification is premised on the WCO Harmonized Commodity Description Coding System principles of General Interpretative Rules (GIRs) of classification, which was adopted and codified by the East African Community partner states through Common External Tariff (CET) BOOK. RULE 1 states that, “The titles of Sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or chapter Notes and, provided such headings or Notes do not otherwise require.
- f. Whereas chapter 12 generally covers “oil seeds and oleaginous fruits; miscellaneous grains, seeds and fruits; industrial or medicinal plants; straws and fodder,” heading 1209 specifically covers seeds, fruit and spores, of a kind used for sowing. This would ordinarily mean that watermelon seed for sowing is classifiable under this heading and therefore the reason for the appellant’s contention of classifying them under HS code 1209.91.00
- g. However, in order to arrive at the appropriate HS tariff classification, cognizance should be taken to the proviso of chapter note 3 to chapter 12 of the EAC CET Revised Version 2007, pursuant to the principles of the GIRs, which is quoted under paragraph above.
- h. Therefore, for the period prior to 1st July 2012, the appropriate HS tariff code for water melon was 1207.99.00 as per note 3 (d) to Chapter 12 of the EAC CET revised version 2007. The note excludes amongst other products of heading 12.01 to 12.07.

- i. Even though water melon seed for sowing was not specifically mentioned under heading 1207, being an oleaginous seed of a fruit as explained above, it cannot be classified under HS Tariff code 1209.91.00 for vegetable seeds. Watermelon seed for sowing is therefore classifiable under HS 1207.99.00 i.e. heading “others”, under EAC CET Revised Version 2007. Annexed hereto and marked as annexure KRA 10 is extract pages of EAC CET Revised Version 2007 and 2012.
- j. In order to arrive at an appropriate decision on the HS tariff classification for pepper seeds for sowing, the pertinent questions to ask is “whether pepper is a vegetable or a fruit?”
- k. The Respondent’s position is further attested to by the tariff ruling issued to the company vide letter ref; CUS/V&T/TARI/GEN/029/2015, DATED 16th April 2015, by customs department’s valuation and tariff office.
- l. The Respondent’s position is further supported by a communique from WCO tariff and trade Affairs Directorate Ref; 15NL0389 – TT, dated 26 October 2015, which had advised on the application of guide provided in chapter note 3 to chapter 12 of the HS tariff book.
- m. The Appellant has classified pepper seed for sowing under tariff code 1209.91.00 which relates to “seeds, fruit and spores, of a kind used for sowing and specifically vegetable seeds.
- n. The respondent however would like to point this tribunal to exclusion note 3 to chapter 12 of the EAC CET Revised version 2007 which states inter alia

“Heading 12.09 does not, however, apply to the following even if for sowing;

- a. **Leguminous vegetables or sweet corn (chapter 7);**
- b. **Spices or other products of chapter 9**
- c. **Cereals (chapter 10); or**
- d. **Products of headings. 12.01 to 12.07 or 12.11.**

- o. The Respondent states that pepper seeds are properly classified under HGS Tariff code 0904.11.00 (chapter 9). Therefore, pepper seeds for sowing are excluded from classification under HS tariff code 12.09. In accordance with provisions of chapter note 3 (b) to chapter 12 of the EAC CET Revised version 2007 and 2012 quoted above, being a spice or product of chapter 9.
- p. It is important to note that “all seeds spores and cut plants, imported specially treated, which the relevant authority in the ministry responsible for Agriculture has approved as fit for sowing” are granted exemption for import duty under the fifth schedule part B, paragraph 10, of the EACCMA, 2004. The exemption must however be applied for and submitted to the respondent to enjoy the tax exemption.

D. ISSUES FOR DETERMINATION

- 14. The Appeal herein raises the following issues;
 - a. *Whether the Respondent erred in its classification of water melon seeds for sowing prior to the period of July 2012?*
 - b. *Whether the Respondent erred in its classification of pepper fruit or black/white pepper seeds for sowing?*

E. ANALYSIS

- 15. The Appellant contends that the Respondent erred in its classification of water melon seeds for sowing prior to the prior of July 2012 by classifying the said seeds under HS tariff code 12.7.99.00 under the EAC CET version of 2007. The Appellant further avers that the EAC CET version of 2007 did not list water melon seeds for sowing among the predominant seeds that should be classified under heading 1207.

16. That due to the lack of clarity on classification of the seeds prior to the period of July 2012, the Appellant relied on EAC CET version of 2007 and classified the seeds for sowing under 1209.91.00 which is described as “Seeds, fruit and spores, of a kind sowed for sowing” and specifically “vegetable seeds.
17. In support of its usage of HS Code 1209.91.00, the Appellant argues that it placed reliance on the First Schedule to the Seeds and Plants Verities, Chapter 326 in arriving at the decision to classify the water melon seeds under HS 1209.91.00. The First Schedule of Chapter 326 classifies water melon as a vegetable as such the Respondent’s classification of water melon seeds as fruits flies in the face of Chapter 326 of the laws of Kenya. Therefore, water melon seeds are vegetable seeds similar to other fruit bearing vegetables such as tomatoes, eggplant, and cucumber and unlike perennial fruits such as oranges, apple and plums.
18. The Respondent states that this classification is erroneous for the reasons that botanically water melon is a fruit. A fruit is a seed bearing structure that develops from the ovary of a flowering plant, whereas vegetables are all other plant parts such as roots, leaves and stems. By this therefore, water melon is a fruit and water melon seeds are fruits. As such the proper classification is under HS Code 1207.99.00.
19. That even though water melon seed for sowing was not specifically mentioned under heading 12.07, being an oleaginous seed of a fruit as explained above, it cannot be classified under HS code 1209.91.00 for vegetable seed. Water melon seeds for sowing is therefore appropriately classified under HS 1207.99.00.

20. The Tribunal has carefully addressed its mind to the contending view by the Parties herein, the written submissions and evidence in support thereof. We note that as at the time of assessment, the applicable HS code was EAC CET version of 2007. The law under the 2007 version had a lacunae as it did not provide from HS code under which water melon could be declared. This lacunae in the law saw the Appellant lodge an objection notice after objection notice with the Respondent if only to determine the treatment of water melon seeds for sowing.
21. It is as result of the parties failing to agree on the appropriate and applicable rate that the Tribunal is called upon to determine the same in this appeal. According to the Appellant the applicable rate is HS Code 1209.91.00 under the heading “*Seeds, fruit and spores, of a kind used for sowing*” while the Respondent classifies the same under HS Code 1207.99.00 under the heading “**Other oil seeds and oleaginous fruits, whether or not broken**”.
22. In determining the applicable rate this Tribunal will be guided by the general interpretative rules as opposed to the headings of the particulars. Note 3 under Chapter 12 thus provides;
- “For the purposes of heading 12.09, beet seeds, grass and other herbage seeds, seeds of ornamental flowers, vegetable seeds, seeds of forest trees, seeds of fruit trees, seeds of vetches (other than those of the species *Vicia faba*) or of lupines are to be regarded as “seeds of a kind used for sowing”.”*
23. The above quoted note of the EAC CET version of 2007 is instructive, in our view on the usages of the product being import, hence “...are to be regarded as seeds of kind used for sowing”. Therefore, in our assessment, any tax payer importing seeds for the use or for the purpose of sowing in

brought within the ambit of HS Code 12.09. The Appellant in its various notices of objection as well as its submissions before the Tribunal has been categorical that it imported seeds for sowing. As such, and to this extent we have no difficulty embracing the classification adopted by Appellant.

24. The Tribunal is also persuaded by the Appellant's reliance on First Schedule of Chapter 326 which classifies water melon as a vegetable. We find that this reliance had been necessitated by the lacunae in law, wherein there was not specific classification for water melon seeds for sowing.
25. The Respondent in classifying the water melon seeds for sowing under 1207.99.00, sought to place reliance on the proviso to note 3 of the Chapter 12 of the EAC CET version of 2007 which provides as follows;

“Heading 12.09 does not, however, apply to the following even if for sowing:

a. ...

b. ...

c. ...

d. Products of headings. 12.01 to 12.07 or 12.11.”

26. We must record our disapprobation of this line of reasoning because the provisions of HS Code 12.07 had not specifically provided for water melon seeds for sowing. The Respondent argues and wishes to persuade this Tribunal that water melon seeds for sowing fall under the tariff code 12.07.99.00 under the heading “other”. We find this particular heading is ambiguous and wide in scope. It is because of the lack of specificity and the glaring obscurity that we find ourselves favoring the classification used by the Appellant.

27. The Tribunal finds that it is now trite law and rule of interpretation of tax statutes that whenever a taxing statute lends itself to ambiguities, was the case with the EAC CET version of 2007 on classification of water melon seeds for sowing, that the said ambiguities must be interpreted in favor of the tax payer as opposed to the revenue agency charged with the implementation of the tax laws.

28. In this respect, we are guided by the High Court case of *Commissioner of Income Tax vs. Westmont Power (K) Ltd Nairobi High Court Income Tax Appeal No. 626 of 2002*, where the court cited with approval the following expression in the case of *Inland Revenue vs. Scottish Central Electricity Company [1931] 15 TC 761*;

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity...any ambiguity in such a law must be resolved in favor of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”

29. We find our analysis in adopting the Appellant’s classification is further cemented in view of the fact that the classification adopted used by the Respondent to a higher tax liability at the rate of 10%. In contrast, the Appellant’s classification attracts 0% liability. In our view, nothing could be more undesirable, in fact, than the persuasions by the Respondent to impose

tax on a tax payer on basis of an unclear and ambiguous law. Accordingly, we find that the Appellant should be allowed the benefit of the lesser charges in light of the ambiguity in the law. In this regard, we are guided by the case of *Unilever Kenya Limited vs. The Commissioner of Income Tax Nairobi High Court Income Tax Appeal No. 753 of 2003* wherein it was held;

“...Where the language used in the legislation is somehow obscure, the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clarity before he is adversely affected.”

Whether the Respondent erred in its classification of pepper fruit or black/white pepper seeds for sowing?

30. The second issue that falls for determination by the Honorable Tribunal is rather straight forward and is on, again, the proper classification of pepper seeds for sowing. The Appellant is in disagreement with the Respondent on the appropriate applicable HS Code. According to the Appellant, pepper seeds for sowing qualify to be classified under HS Code 1209.91.00 of the EAC CET version of 2007. In contradistinction, the Respondent relies on HS Code 0904.21.00 as read with the provisions of Chapter note 3 (b) to Chapter 12 of the EAC CET version of 2007.
31. The Tribunal has reviews the HS codes relied on the parties herein and is satisfied with the classification applied by the Respondent in the assessment. In agreeing with the Respondent, we are equally guided by the exclusion clause under Chapter note 3 to chapter 12 of the EAC CET version of 2007 which stipulates;

“Heading 12.09 does not, however, apply to the following even if for sowing:

- a. ...
- b. Spices or other products of Chapter 9;
- c. ...
- d.”

32. We note that the words “...Heading 12.09 does not, however, apply to the following even if for sowing” to be instructive on the treatment that should be accorded to pepper seeds for sowing. In our view, the seeds, as much as their intended use is sowing, are explicitly excluded from the ambit and application of HS Code 12.09. Therefore, it would be contrary to the edicts of the General interpretative rules under Chapter 12 to bring and charge pepper seeds for sowing under the terms of HS code 12.09. Accordingly, we are satisfied that the Respondent’s treatment of the seeds was proper in law.

F. DETERMINATION

33. In light of the foregoing analysis, the Tribunal makes the following Orders;
- a. The Appeal herein is partly merited.
 - b. The proper classification for water melon seeds for sowing is HS Code 1209.91.00 of the EAC CET Version 2007.
 - c. The Respondent’s assessment in respect of water melon seeds for sowing is set aside.
 - d. The proper classification for pepper seeds for sowing is HS Code 0904.21.00 of the EAC CET Version 2007.
 - e. Each party to bear its own costs.

It is so ordered.

DATED and DELIVERED at NAIROBI on this 4th day of September 2020.

MAHAT SOMANE
CHAIRPERSON

PATRICIA MAGIRI
MEMBER

TIMOTHY CHESIRE
MEMBER

WAMBUI NAMU
MEMBER