

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 296 OF 2018**

**JAYRAJ IMPEX LIMITED.....APPELLANT**

**VERSUS**

**COMMISSIONER OF CUSTOMS &  
BORDER CONTROL.....RESPONDENT**

**JUDGEMENT**

**A. INTRODUCTION**

1. The Appellant is a private company duly incorporated as such under the Companies Act, Chapter 486, of the Laws of Kenya and having its registered offices and operations within the Republic of Kenya.
2. The Respondent is a principal officer appointed under the Kenya Revenue Act, Chapter 469 Laws of Kenya. Under Section 5(1), the Kenya Revenue Authority (the Authority) is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) with respect to the performance of its function under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

**B. BACKGROUND**

3. The Appellant imported goods from India described as 480 bags of Sawaj Pandhaarpuri Tobacco, declared *vide* Customs Entry Number 2017MSA6540947. The import was declared under HS Code 2401.20.00 as unmanufactured tobacco which attracts duty at 25% and VAT of 16%.

4. The entry was targeted by the National Targeting Centre (NTC) of the Respondent which doubted the declared HS Code 2401.20.00 and suggested that samples be drawn for lab analysis to confirm the correct tariff for a possible revaluation of the declared values and tariffs.
5. A laboratory test report dated 4<sup>th</sup> December 2017 was made by the Inspection and Testing Centre where the sample tested was considered to be unmanufactured tobacco, not stemmed/stripped classified in HS Code 2401.10.00 and that the declared HS code 2401.20.00 is at variance with the laboratory findings.
6. The Appellant on its own volition, commissioned a laboratory test of a sample from the consignment by the Government Chemist to ascertain whether the sample was unprocessed (raw) or processed (with additives). In a Certificate of Analysis by the Government Chemist's Division dated 13<sup>th</sup> April 2018, it was reported that from the sample, dry tobacco product was found to contain nicotine, an alkaloid from tobacco plant hence no additive was detected.
7. In a report on importation of Tobacco (2017MSA6540947) dated 8<sup>th</sup> February 2018 by the Chief Manager – Analysis & Production Office to the Commissioner – Intelligence and Strategic Operations, it was reported that the Investigation Officer in this matter had reviewed the case as follows:
  - a. The initial position held that the product was manufactured was overturned based on the explanatory notes on chapter 2401, which caters for dried leaves, crushed and packed shipment.
  - b. A lab test analysis Ref. ITC/SAMP/078717 indicated that the imported goods are unmanufactured tobacco.
  - c. The Investigation Officer further vacated the assessment of Kshs.95, 529,753.00 and dropped re-verification by K-9.

- d. That the Investigation Officer directed C&BC to process the declaration
8. *Vide* a letter dated 27<sup>th</sup> February 2018, the Appellant wrote to the Investigations & Enforcement Department indicating that the cargo was pre-verified twice 100%, samples taken to lab for test which confirmed that the consignment was raw/unmanufactured.
  9. *Vide* a letter dated 9<sup>th</sup> May 2018, the Appellant wrote to the Respondent seeking the release of the consignment before it becomes unfit for consumption noting that for the past 10 months, officers from the KRA Departments had failed to agree with each other.
  10. In response to the letter dated 9<sup>th</sup> May 2018 by the Appellant, the Respondent issued a Tariff Ruling on the subject matter dated 29<sup>th</sup> May, 2018. In it, the Respondent concluded that the product under review was considered to be chewing tobacco, classified under HS Code 2403.99.00 of the EAC Common External Tariff.
  11. In a letter dated 4<sup>th</sup> June 2018, the Appellant appealed against the Ruling in accordance with Section 229 of the EACCMA 2004 asking for a review of the classification decision taken.
  12. The Ruling by the Respondent dated 29<sup>th</sup> May 2018 forms the subject matter of this Appeal.
  13. Upon filing the Appeal at the Tax Appeals Tribunal, the Appellant made a **Judicial Review Application No. 463 of 2018** against the Respondent, wherein the Court declined to grant leave sought by the Appellant for not exhausting the remedies under the EACCMA Act.
  14. By a Notice of Motion dated 2<sup>nd</sup> August 2019, the Respondent herein sought to strike out the Appeal for being fatally defective on the grounds that the Appeal is premature for want of exhaustion of the statutory dispute resolution mechanism.

## C. THE APPEAL

15. The Appellant appeals to the Tribunal against the Tariff Ruling dated 29<sup>th</sup> May 2018, issued by the Respondent *vide* a Memorandum of Appeal dated 5<sup>th</sup> October 2018. The grounds of Appeal are as follows;

- a. THAT the Respondent erred in law and in fact in ignoring the laboratory analysis by the Government Chemist and that of the KRA Laboratory and instead relying on physical verification to classify the consignment under review (entry No. 2017MSA654947) as HS Code 2403 (rather than 2401) of the East African Community Common External Tariff.
- b. THAT the Respondent erred in law and in fact in classifying the consignment under review as HS Code 2403 of the East African Community Common External Tariff on the basis of an assumption that “*chewing tobacco is highly fermented and liquored*” but failing to empirically establish and or prove the assumption by way of laboratory analysis of the samples.
- c. THAT the Respondent erred in law and in fact in presuming that because the consignment under review was “*...packed tobacco ready for retail sale*” the same was therefore processed and/or manufactured hence failing under the classification HS Code 2403.
- d. THAT the decision of the Respondent of the 29<sup>th</sup> May, 2018 is arbitrary, unfair, unjust and devoid of due process thus illegal in so far as it ignored the results/findings of scientific analysis of samples of the consignment under review by various agencies including the Government Chemist and KRA Laboratory.

- e. THAT the Respondent erred in law and in fact by failing to adhere to the General Interpretation Rules of the East African Community External Tariffs by classifying the consignment under review under a generalized heading (2403) and ignoring the more detailed, specific and descriptive heading (2401).
16. The Appellant prays to the Honorable Tribunal that the decision of the Respondent dated 29<sup>th</sup> May, 2008 be set aside and the consignment under review, entry No. 2017/MSA6540947 be classified as HS Code 2401 and cost be awarded in favour of the Appellant.

#### **D. RESPONSE TO THE APPEAL**

17. The Respondent responded to the grounds of appeal in the Statement of Facts dated 27<sup>th</sup> November 2018 as follows: -
- a. The Appellant's Import Entry No 2017 MSA 6540947 was stopped by the Respondent's Investigations & Enforcement Unit on 19<sup>th</sup> July 2017 after receiving information to the effect that the imported goods were allegedly mis-declared. It was required that I&E participate to ensure that a 100% verification be conducted to establish the accuracy of the declared descriptions, quantities, tariffs and values.
  - b. The Respondent's action was informed by a reasonable suspicion during the risk profiling of the entry that:
    - i. There was a high inherent **declaration risk** indicating that the declared invoices (and therefore) goods have been fraudulently mis-declared in their tariffs and/or values
    - ii. There was a high inherent **payment risk** indicating that the declared goods could have been the subject of tariff mis-declaration, thereby leading to a lower payment of taxes.

- c. The Respondent's Lab Report issued on 4<sup>th</sup> December 2017 indicated that The Appellant's imported product was "*fibrous, leafy, dried, brown plant material, without any presence of psychotropic substances indicating the presence of nicotine*" falling under Tariff Head 2401.10.00 – unmanufactured tobacco not stemmed or stripped
- d. The Description, character, nature and purpose of the goods indicate that the declared product falls under Chapter 2403 and not 2401. This, according to the Respondent was in line with Rule 4 of the EAC CET General Rules for the interpretation of the Harmonized System, which provides that

***"4. Goods which cannot be classified in accordance with the above Rules shall be under the heading appropriate to the goods to which they are most akin."***

- e. As per the Respondent, the basis of the Classification under Chapter 2403 is that, from the examination account of the goods and a KRA Laboratory Test Result dated 4<sup>th</sup> December 2017, the essential characteristics of the declared product was noted to be "*fibrous, leafy, dried, brown plant materials, without any presence of psychotropic substances indicating the presence of nicotine.*"
- f. The Respondent further based its classification based on numerous interviews held with the Directors of the Appellant and the fact that usage of the products is in a form ready for immediate consumption without the need for further processing. Furthermore, the Appellant indicated that it does not perform any further processing but sells the product in the ready market.
- g. Goods can be classified under Rule 1 or Rule 3 because the product's essential character is that it is unmanufactured (Chapter 2401), yet its usage is that it is a tobacco for consumption (2403). From the analysis

of evidence obtained by the Respondent, it established that the declared tariff 2401.21.00 is incorrect and that the correct tariff is 2403.19.00. The effect of the misdeclaration resulted in the tax loss of Kshs. 95,529,753

18. The Respondent prays that this Tribunal finds that:

- a. The Respondent's decision dated 29<sup>th</sup> May 2018 be upheld;
- b. The Respondent's classification of the Appellant's consignment under review under HS Code 2403 be upheld
- c. This Appeal be dismissed and the Respondent be awarded the cost of this Appeal.

## **E. ISSUES FOR DETERMINATION**

19. We have considered the rival submissions made by both parties and have also taken into account the materials placed before the Tribunal and in this Appeal two issues crystallized for determination by the Honorable Tribunal viz;

- a. Whether the Appellant exhausted the internal mechanism as laid down in the EACCMA Act
- b. Whether the Respondent erred in re-classifying the Appellant's imports under HS code 2403.19.00

**a. whether the Appellant exhausted the internal mechanism as laid down in the EACCMA 2004**

20. The Respondent in its Application dated 2<sup>nd</sup> August 2019 sought for orders that the Appeal be struck out as it is fatally defective on the grounds of it being premature for want of prosecution of the statutory dispute resolution



mechanism. The Respondent further submitted that the Appellant's letter dated 4<sup>th</sup> June 2018 was not made within the statutory timelines as provided under Section 229(1) of EACCMA as read together with Section 51(2) of the Tax Procedures Act.

21. Section 229 of the EACCMA provides as follows:

*“(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) .....*

*(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.”*

22. The import of Section 229 of the EACCMA is that the Appellant in the first instance before filing the Appeal was required by Statute to lodge an application for review of the Respondent's claim to the Respondent in writing, stating the grounds upon which the review is lodged. On receipt of the application, the Respondent is required to respond within thirty days of receipt of the application for review. Moreover, if the Commissioner has



not communicated his or her decision to the person lodging the application for review within the time specified, the Commissioner shall be deemed to have made a decision to allow the application.

23. We note that the Respondent submitted that the Appellant's letter of review was not made within the statutory timelines as provided under Section 229. The Respondent issued its decision that was adverse to the Appellant *vide* its letter dated 29<sup>th</sup> May 2018 and the Appellant was required to lodge its application for review within 30days.

24. The Appellant on the other hand lodged its application for review *vide* its letter dated 4<sup>th</sup> June 2018. The application for a review under Section 229 of the EACCMA was made within the statutory timelines as provided by the Act.

25. In the case of **Republic vs. KRA ex parte Metro Pharmaceuticals Limited HC Misc. Application No, 108 of 2011** the Court on what constitutes as application for review held as follows:

*"The Appellant has cited this letter as its application for review under Section 229 of EACCMA. I have carefully looked at Section 229 EACCMA and conclude that any application for review of the decision of the Commissioner of Customs should be worded in such a way as to make it very clear that the importer is making an application for review under Section 22."*

26. In the current case, in its letter dated 4<sup>th</sup> June 2018 the Appellant stipulated the grounds upon which the Respondent was to review the decision to reclassify the goods and it clearly indicated that it was an application for review as provided under Section 229 of the EACCMA.

27. The Tribunal has carefully combed through the pleadings and submissions and it is unable to lay its hands on the Respondent's response to the

Appellant's application for review dated 4<sup>th</sup> June 2018. Furthermore, the Respondent has not contested whether the application for review was lodged but has only contested the statutory timelines which the Appellant adhered to.

28. No communication was made by the Respondent after the application for review was lodged by the Appellant. As a result, as per the provisions of Section 229(5) of the EACCMA, the Commissioner is deemed to have made a decision to allow the application for review. In the case of Republic V Commissioner Of Customs Services Ex-Parte Unilever Kenya Limited[2012]eKLR the Court in interpreting the Section 229(5) of the EACCMA held as follows:

*“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.

29. From the above, we are of the respectful view that the Appellant lodged an application for review as provided for under Section 229 of the EACCMA and the Respondent failed to communicate its decision on the application for review.
30. The upshot of the foregoing is that the Appellant did exhaust the remedies as provided under the EACCMA 2004 by filing the application for review and that the Respondent is deemed to have allowed the Appellant's application for review dated 4<sup>th</sup> June 2018.

**b. Whether the Respondent erred in re-classifying the Appellant's imports under HS code 2403.99.00**

31. Notwithstanding our holding in (a) above, the Tribunal will delve into issue (b) herein as well.
32. The question is whether the correct tariff heading should have been under tariff heading 2401.20.00 as unmanufactured tobacco which attracts import duty at 25% and VAT of 16% or it should have been under tariff heading 2403.99.00 which attracts import duty at 25%, VAT at 16% and excise duty at Kshs 7000/kg.
33. In determining this issue, the Tribunal relied on the Harmonized Commodity Coding System and General Rules of Interpretation (GIR), EAC Common External Tariff, laboratory reports, the submissions by the parties and the Respondent's Affidavit dated 19<sup>th</sup> Feb 2021.
34. In the case of Republic vs Commissioner of Customs & Ex-parte Mulchand Ramji & Sobs Limited eKLR, it was held as follows:

*"To ascertain what code is applicable to particular goods, one has to look at the General interpretation rules for the classification of good, which sets out the principles of interpretation in conjunction with the various chapters, describing the goods, the duty due."*

35. For purpose of this case, General Rules of Interpretation of classification of goods (GIR 1) is applicable and therefore there was no basis to move to the other rules. Rule 1 of the GRI provides 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, according to the following provisions ....."

36. Chapter 24 of the Harmonized Commodity Coding System which covers tobacco and manufactured tobacco substitutes has 3 Headings thus:

*2401: Unmanufactured tobacco, tobacco refuse*

*2402: Cigars, cheroots, cigarillos and cigarettes of tobacco or tobacco substitutes*

*2403: Other manufactured tobacco and manufactured tobacco substitutes; homogenized or reconstituted tobacco; tobacco extracts and essences*

37. The Explanatory Notes to heading 2401 HS provide that this heading cover-

*“(1) Unmanufactured tobacco in the form of whole plants or leaves in the natural state or as cured or fermented leaves, whole or stemmed/stripped, trimmed or untrimmed, broken or cut (including pieces cut to shape, but not tobacco ready for smoking). Tobacco leaves, blended, stemmed/stripped and “cased” (“sauced” or “liquored”) with a liquid of appropriate composition mainly in order to prevent mould and drying and also to preserve the flavour are also covered in this heading.*

*(2) Tobacco refuse, e.g., waste resulting from the manipulation of tobacco leaves, or from the manufacture of tobacco products (stalks, stems, midribs, trimmings, dust, etc.)”*

38. From the explanatory notes, tobacco is still considered to be unmanufactured even after undergoing processes such as stemming, stripping, curing, fermenting and blending. A similar holding was held in TAT Appeal No. 266 of 2020 – Eric Ogola Adula vs Commissioner of Customs and Border Control, wherein the Tribunal, while differently empaneled held that:

*” Based on the Explanatory notes to heading 2401 the Tribunal observed that the unmanufactured tobacco remains within the scope of heading 2401 even after undergoing certain processes such as stemming, curing, fermenting, cutting or blending provided that it is not ready for smoking.”*

39. On the other hand, the Explanatory notes to heading 2403 covers:

*a. Smoking tobacco, whether containing tobacco substitutes in any proportion, for example manufactured tobacco for use in pipes or for making cigarettes*

*b. Chewing tobacco*

*c. Snuff*

*d. Tobacco compressed or liquored for making snuff*

*e. Manufactured tobacco substitutes*

*f. Homogenized or reconstituted tobacco*

*g. Tobacco extracts and essences*

40. In the Strategy, Innovation & Risk Department Memo dated 4<sup>th</sup> December 2017, it was reported that the sample tested was considered to be unmanufactured tobacco, not stemmed and classified in HS Code 2401.10.00. Similarly, in the Certificate of analysis issued by the Government Chemists Division to establish whether the sample was unprocessed or processed (with any additive). It was concluded that the sample was only found to contain nicotine, an alkaloid from tobacco plant hence no additive was detected.

41. The import of the above is that the imported tobacco was unmanufactured that contained no additives as was established in the Certificate of Analysis and the same was not fit for smoking or even chewing without undergoing a process of adding additives. We are of the similar holding as TAT Appeal No. 266 of 2020 – Eric Ogola Adula vs Commissioner of Customs and Border Control, wherein the Tribunal held that:

*“It is the addition of additives and grinding which would have qualified the tobacco to move from Heading 2401 to 2403”*

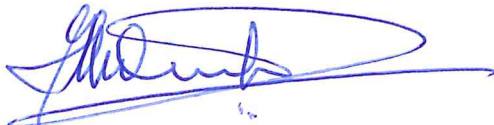
42. Based on the above, the Tribunal is of the view that the consignment is under the unmanufactured tobacco of Heading 2401 and the Respondent erred in classifying the tobacco under the Other manufactured tobacco and manufactured tobacco substitutes; homogenized or reconstituted tobacco; tobacco extracts and essences of heading 2403

## F. CONCLUSION


43. In light of the forgoing analysis the Tribunal makes the following Orders;-
- a. The Appeal herein is merited.
  - b. The Appellant’s application for review dated 4<sup>th</sup> June 2018 is deemed to have be allowed.
  - c. The consignment under review, entry No. 2017/MSA6540947 was rightly classified and declared by the Appellant under HS Code 2401.
  - d. Each party to bear its own costs.
44. It is so ordered.

DATED and DELIVERED at NAIROBI on this 23<sup>rd</sup> day of July, 2021.

  
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MAHAT SOMANE  
CHAIRPERSON

  
.....  
WILFRED GICHUKI  
MEMBER

  
.....  
ROSE WAMBUI NAMU  
MEMBER

  
.....  
JOHN KINYUA WANGARI  
MEMBER

  
.....  
TIMOTHY CHESIRE  
MEMBER



