

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 408 OF 2020

MENENGAI OIL REFINERIES LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya under the Companies Act in 1988 and is a manufacturer of edible cooking oil. The Appellant is renowned for the manufacture and distribution of top fry vegetable cooking oil, Karibu and Somo vegetable cooking fats and Kibuyi bar soaps alongside industrial detergents as well as menendazi baking powder plain and vanilla.
2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act Cap 469 of the Laws of Kenya. Under Section 5 (1), the Kenya Revenue 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 written laws as set out in Part 1 & 2 of the First Schedule to the Act for the purpose of assessing, collecting and accounting for all revenues in accordance with those laws.

3. The Respondent carried out an audit of the Appellant's financial records for the period of January 2015 to December 2019 in accordance with customs procedure and law pursuant to the provisions of Sections 235 and 236 of the East African Community and Customs Management Act 2004 and the Excise duty Act with a view to establishing the level of compliances with the various tax regimes.
4. The Respondent noted that some of the machinery parts imported by the Appellant were being mis-declared under the tariff heading of assembled machinery which do not attract import duty and Value Added Tax. The Appellant misclassified the consignments as complete machinery under part 40 (c) of the customs form C17 B.
5. The Appellant indicated that some of the machine parts constituted a complete machinery and were being imported in unassembled state in several consignments for ease of transportation. The importation of plant/machinery and equipment of chapter 84 and 85 in partial shipments/consignment over a period of time for convenience of transport is provided for under the East African Community Common External Tariff (EAC CET) 2017 additional note 2 to Section XVI.
6. That in order to be able to declare the different constituent parts under the same tariff heading or subheading as the assembled machine, the declarant must make a request/application in writing to the Commissioner of Customs and Border Control not later than the first consignment and attach the manual diagram of the machine showing the serial number, general inventory containing an indication of the characteristics and approximate weight of the different parts, complete commercial/sales contracts for the supply of the machine and pro-forma invoices.

7. The Appellant did not fulfil these conditions for any single consignment which therefore led to the classification of the constituent parts in their respective tariff headings or sub-sub-headings. Consequently, extra taxes amounting to Kshs. 221,976,911.00 were assessed being import duty, VAT and interest thereof. The Respondent issued the demand notice dated 18th May 2020 to the Appellant pursuant to Sections 135, 235 and 236 of the EACCMA Act 2004.
8. The Appellant responded to the demand notice vide a letter dated 18th June 2020. In the letter, the Appellant sought for review of the taxes demanded under Section 229 of the EACCMA Act 2004.
9. The Respondent reviewed the Appellant's application for review and stayed the earlier position on the tariff reclassification and communicated the same to the Appellant vide a letter dated 17th July 2020. The Appellant subsequently being dissatisfied with the Respondent's review decision filed the Appeal herein.

THE APPEAL

10. The Appeal herein is premised on the following grounds;
 - a. That the Respondent erred in law and fact in finding that the Appellant had underpaid import duty.
 - b. The Respondent erred in its construction and application of the law as related to the computation of import duty, value added tax and interest.
 - c. The Respondent erred in law and fact in re-classification of the consignments in question.

- d. The Respondent erred in law and fact in its decision to the effect that some of machinery parts imported by the Appellant had been mis-declared as machinery which did not attract import duty.
 - e. The Respondent acted unreasonably, capriciously and was motivated by malice and extraneous considerations in issuing the various tax demands.
 - f. The Respondent erred by acting ultra vires the law by failing to give proper guidance on the tariff identifications in accordance with General Interpretation Rules (GIR).
 - g. That the re-classification out rightly contravenes the doctrine of legitimate expectation that rests on a presumption on the Commissioner to follow certain procedures at arriving at the tax liability and the benefits that accrue from it.
11. In line with the above grounds, the Appellant makes the following prayers;
- a. The Respondent's demand for additional taxes dated 18th May 2020 and 17th July 2020 be struck out in its entirety.
 - b. The Respondent's action to demand additional taxes despite logical and cogent explanations being given be declared arbitrary, capricious, unreasonable, unfair and contrary to the administration of justice and legitimate expectations of the tax payer.
 - c. The Respondent, its employees, agents/other persons purporting to act on its behalf be barred and or estopped from demanding or

taking any further steps towards enforcement or recovery of principal taxes, penalties and interest in the Respondent's demand.

- d. The costs of this Appeal; and
- e. Any other remedies that the Honorable Tribunal deems just and reasonable.

RESPONSE TO THE APPEAL

12. In response to the grounds of Appeal the Respondent avers as follows;

- a. The Respondent noted the Appellant misclassified the machinery parts under the tariff codes for complete machinery which do not attract import duty and Value Added Tax hence resulting in underpayment of import duty.
- b. The Respondent also noted that the Appellant's partial shipments of any of the consignment in dispute did not meet the requirements of Chapters 84 and 85, additional note 2 to Section XVI of the East African Community Common External Tariff (EAC CET) 2012 and 2017.
- c. The difference between the Appellant's classification and the Respondent's classification is that the Appellant classified constituent parts of machinery under the tariff code of complete machinery. The Respondent subsequently reclassified the constituent parts under their respective tariff heading/sub heading.

- d. In response to Appellant's allegation as stated in ground 6 of the appeal, the Respondent avers that the tariff classification is guided by the EAC Common External Tariff which is available to the public. However, in cases of any difficulties in classification, Section 248 (a) of the EACCMA Act 2004 allows the Appellant to seek advance ruling from the Commissioner, which the Appellant did not.
 - e. The declarant must make a request in writing to the Respondent not later than the first consignment and attach the documents as outlined under additional note 2. The Appellant's averments under paragraphs 15, 16 and 17 in its statement of facts are therefore erroneous and cannot stand.
 - f. Sections 235 and 236 of the EACCMA Act 2004 give the Respondent powers to call for documents and conduct post clearance audit on the import and export operations of tax payer within a period of five years from the date of importation or exportation.
 - g. Where the Respondent's post clearance audit reveals that the taxes were short levied or erroneously refunded, Section 135 and 249 (1) of the EACCMA Act empowers the Respondent to recover any such amount short levied or erroneously refunded with interest at a rate of two percent per month for the period the taxes remain unpaid.
13. Addition to the above stated averments the Respondent prays that the Tribunal finds his assessment and the subsequent review decision is valid and dismiss the Appeal in its entirety.

ISSUES FOR DETERMINATION

14. Having carefully reviewed the evidence, opposing pleadings and submissions, we have established that the Appeal raises a single issue for determination by the Honorable Tribunal, namely;

a. Whether the Appellant met the criterial for seeking prior written approval and if not, the Commissioner's assessment is proper

ANALYSIS

15. It was submitted for the Appellant that throughout the audit and application for review, the Appellant submitted documentation which clearly indicate that an application in the form and manner required at the time, being an approved import declaration for (IDF) and import entries (c17B) was accepted in terms of Note of part XVI of the EAC CAT 2017. The Appellant submitted the purchase contracts, proforma invoices, and invoices for the constituent parts, the bill of lading and the machine specification. Therefore, the insistence by the Respondent that each shipment will be considered a spare is an unreasonable preposition as eventually all the part shipments were assembled into one whole boiler.
16. The Appellant submitted that it is grossly unfair, unproportioned and perhaps unreasonable to penalize the Appellant for a procedural infraction for which the Commissioner of Customs is complicit and or the EAC CET 2012 did not require. It is public knowledge that within the industry that the Appellant operated, it is common practice that the machinery in question be imported as component/constituent parts for ease of transportation. It is a practice acceptable within the industry as it would be impossible to attempt to import

a boiler as a full machine. In fact every player in the industry doe part shipment as the manufacturer cannot make and ship a whole unit.

17. It was further submitted for the Appellant that of significance to note is that all the importation for the constituent parts of the machines were done prior to 29th June 2017. The requirement under Note 2 of the Section XVI of the EAC Customs External Tariff 2017 was introduced after 29th June 2017. It is imperative to note that the requirement to make an application as envisaged under note 2 of Section XVI of the EAC CET 2017 does not exist under EAC CET 2012. This therefore deals a fatal blow to the entire tax demand.
18. By its submissions dated 13th April 2021 the Appellant contended that note 2 does not reference to a prescribed standard nor a formal letter. In fact, the import declaration form and the specific entry made could very well be the written approval required. The Respondent had every opportunity to reject or approve the IDF at the time the same was lodged. The attempt by the Respondent to plead ignorance over five (5) years down the line is misplaced. It is therefore clear and obvious that the Appellant on the basis that the proper officer of customs failed to require and direct the Appellant to make a formal application to import constituent parts of a machine.
19. It was the Appellant's further submission that there is no requirement that the Respondent must answer to the application in writing. Note 2 of Section XVI of the EAC CET 2017 states that the application may only be accepted in fulfilment of a contract for the supply of a machine which can be regarded as complete for the purposes of the EAC Tariff nomenclature. The Respondent was satisfied with the self-assessment declaration and approved the importation of the constituent parts of the machinery in question based on the

information availed as such there is no justification for an officer acting post facto to contend otherwise.

20. On his part the Commissioner submitted that Sections 235 and 236 of the East African Community Custom Management Act (EACCMA) 2004 gives the Respondent powers to call for documents and to conduct a post clearance audit on the import and export operations of a taxpayer within a period of five years from the date of importation or exportation. In this case, the Respondent conducted an in depth field audit of the operations of the Appellant herein covering the period of January 2015 to December 2019.
21. During the audit the Respondent established that some machinery parts imported by the Appellant were being mis-declared under the tariff heading of assembled machinery which did not attract import duty or VAT. Particularly, the Respondent noted that while the Appellant's customs declaration from C17B indicated on item 40 (b) that the items imported were partial shipments of constituent parts of machinery, the tariff heading or sub heading applied for these items under column 40 (c) was for assembled machinery.
22. It was further submitted for the Respondent that a look at customs declaration form C17B by the Appellant reveals on item 40 (c) that the items imported were partial shipments of constituent parts of machinery but the tariff heading or sub heading applied for these items under column 40 (c) is for an assembled machine. This information is key because the tariff used by the Appellant, for an assembled machinery, does not attract Value Added Tax. The Commissioner invoked his powers under Sections 135 and 249 (1) of the EACCMA to recover any such amount short levied or erroneously refunded with interest in the event the post clearance audit revealed that taxes were short levied or erroneously refunded. As such, the Appellant's claim that the

tax demand was erroneous fails and should not be upheld by the Tribunal. In this regard, the Respondent placed reliance on ***Republic vs Commissioner General & Another ex parte Awal Ltd (2018) eKLR***.

23. It was contended by the Respondent that goods are to be classified at the time of entry and what matters is the nature of the goods at the time of entry and not upon assembling of the imported goods as held in. ***Deputy Minister of National Revenue for Customs and Excise v Ferguson industries Ltd***. That in order to be able to declare the different constituent parts under the same tariff heading or subheading as the assembled machine, the declarant must make a request/application in writing to the Commissioner of Customs and Border control. The requirement to make this request as under note 2 of the EAC CET 2017 is also provided for in EAC CET 2012. Therefore, the consignments under assessment are subject to this provision of making a request to import the constituent parts. As such, the IDF ad import entries form (C17B) do not constitute to the application referred to in note 2 to Section XVI of the EAC CET 2017.
24. On the issue of legitimate expectation as pleaded by the Appellant, the Respondent submitted that legitimate expectation arises where representation by a decision maker has created a genuine expectation that it is within his power to honor and make good. The representation the Appellant relied on is the fact that its goods were cleared by the proper officer upon importation, a position that does not appreciate the role of the post clearance audit. The Appellant did not rely on any representation by the Respondent. Despite the fact that the Respondent cleared and approved its consignment on importation, the Respondent reserved his right under Sections 235 and 236 of the EACCMA, 2004 to conduct a post clearance audit to verify the declarations

made by the Appellant. In this regard, the Respondent relied on Justice ***Kalpana H Rawal v Judicial Service Commission & 3 Others [2016] eKLR.***

25. Having carefully reviewed the contesting pleadings and submissions together with the authorities cited in support thereof, we think it apt to first reproduce the applicable laws as relied on by the parties. To this end, Section 135 (1) of the EACCMA, 2004 stipulates as follows;

“Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.”

26. Sections 235 (1), 236 and 249 (1) respectively further posit as follows;

“235 (1) The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods —

- a. to produce all books, records and documents relating in any way to the goods; and**
- b. to answer any question in relation to the goods; and**
- c. To make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transshipment of the goods, as the proper officer may deem fit.**

236 The Commissioner shall have the powers to—

- (a) verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods;
- (b) question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;
- (c) inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and
- (d) Examine the goods where possible for the goods to be produced.

249. Where an amount of duty or other sum of money which is due under this Act remains unpaid after the date upon which it is payable, an interest of two per cent per month or part of the month, of the unpaid amount shall be charged.”

27. In addition to the foregoing, additional note 2 of the EAC CET 2017, which is the kernel of contention in the appeal before us, stipulates as follows;

“A machine in a disassembled or unassembled state may be imported in several consignments over a period of time if this is necessary for convenience of trade or transport. In order to be able to declare the different constituent parts under the same tariff heading or subheading as the assembled machine, the declarant must make a request in writing to the customs post not later than the first consignment and attach:

- (a) a manual, diagram or, if necessary several diagrams, of the machine showing the serial numbers of the most important constituent parts;*

(b) a general inventory containing an indication of the characteristics and approximate weights of the different parts and the serial numbers of the principal parts referred to above.

The application may only be accepted in fulfilment of a contract for the supply of a machine which can be regarded as complete for the purposes of the EAC tariff Nomenclature.

All the constituent parts must be imported through the same entry point within the allowed time. However, in special cases, the competent authorities may authorize importation through several points of entry. This time limit may not be exceeded unless a reasoned and justified request for an extension is made to the competent authorities.

Upon each partial importation, a list of the parts making up the consignment with references to the above mentioned general inventory must be provided. The customs declaration for each consignment must contain descriptions of both, the part or parts making up the consignment and the complete machine.”

28. From what we can discern from the totality of evidence before us, the Appellant herein imported a boiler machine. As is the custom in the industry and for ease of transportation, the boiler was imported in partial shipments over a period of time. The Respondent in agreement with the Appellant that it is common practice to import the constituent parts of the machine over a period of time as opposed to the assembled machine at once. However, the real dispute as between the parties is reflected in fact the Appellant contends that it is not factually correct to allege that the constituent parts of boiler were declared as fully assembled machines. The customs entry form C17B clearly

shows under items 40 (b) that the goods description is unassembled and are partial shipments. on his part the Commissioner goes ahead to indicate that while item 40 (b) of the C17B form shows that the goods were unassembled, the same were declared under HS Code 8402.12.00 as an assembled machine contrary to the provisions of additional note 2 of the EAC CET 2012 and 2017.

29. We have thoroughly examined the contents of custom entry form C17B and of particular import to our circumstances in this Appeal are the entries declared at item 40 (b) and (c). We note under item 40 (b) entitled description of goods, the Appellant herein at all times described the goods imports as assembled as 'unassembled' and 'partial shipments'. We further note that these unassembled and partial shipments were declared under commodity code 84021200.00. The question for our resolution therefore is whether the items imported match with or were declared under the correct commodity code in the EAC CET 2017. A perusal of the East African Community Harmonized Commodity Description and Coding system indicates that HS Code 8402.12.00 relates to 'Water tube boilers with a steam production not exceeding 45 t per hour' which attract taxes at 0%.
30. In our understanding, this means that while the Appellant herein import the constituent parts of the boiler in several shipments, the same were declared at the entry point as whole assembled machine as opposed to declaring each of the constituent part under its respective HS Code. It is this act by the Appellant that the Commissioner finds offends the Provisions of additional note 2 of the EAC CET 2017. The import of additional note 2 under Section XVI of the EAC CET as we understand is that a tax payer may import a machine in a disassembled state for convenience of transportation. In such a case, each constituent part should be declared under its respective commodity code and must be imported through the same entry point within the allowed time.

31. The additional note also envisions a situation where a machine is imported in a disassembled state but declared under the code of an assembled machine. The note categorically states that in order to be able to declare the different constituent parts under the same tariff heading or subheading as the assembled machine, the declarant must make a request in writing to the customs post not later than the first consignment and attach;

(a) A manual, diagram or, if necessary several diagrams, of the machine showing the serial numbers of the most important constituent parts;

(b) A general inventory containing an indication of the characteristics and approximate weights of the different parts and the serial numbers of the principal parts referred to above.

32. The Appellant makes two arguments in this regard; one that its consignments were imported in the period to 29th June 2017, at which time EAC CET 2012 was in force. The additional note to Section XVI to the EAC CET 2012 did not have the requirement to make a request for declaring the constituent parts under the commodity code of the assembled machine. Secondly, that in any event the IDF forms approved by the Commissioner should suffice as the request envisioned in additional note 2. We reject the Appellant's arguments in their totality as the same are based on a misapprehension of the law. In the first instance, the impugned additional note to Section XVI in both the 2012 and 2017 versions of the EAC CET, at all times had similar; in fact verbatim provisions. The Appellant under both versions of the EAC CET was under obligation to make a request to the Commissioner not later than the first consignment, in order to declare the constituent parts under the commodity code of the assembled code. Further, we categorically decline from the Appellant's proposition that

the IDF forms in any event suffice as the request envisioned in the additional note. Surely, if the IDF forms (which general accompany all imports) were to suffice as the request in writing envisioned in additional note 2, then there would have been not need for the member states of the EAC to provide for this requirement.

FINAL DECISION

33. The upshot of the foregoing analysis is that the Tribunal finds that the Respondent's assessments were legally, reasonably and procedural fair in terms of the EACCMA and its protocols. The Tribunal therefore finds that the Appeal herein lack in merit and makes the following Orders;-


- a. The Respondent demand dated 18th May 2020 and the review decision dated 17th July 2020 be and are hereby upheld in their entirety.
- b. Each party to bear its own costs.

34. It is so ordered.

DATED and DELIVERED at NAIROBI on this 25th day of June, 2021.


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MAHAT SOMANE
CHAIRPERSON


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WILFRED GICHUKI
MEMBER


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ROSE WAMBUI NAMU
MEMBER


.....
JOHN KINYUA WANGARI
MEMBER


.....
TIMOTHY CHESIRE
MEMBER

