Manaan Cargo Services Limited v Commissioner Customs and Border Control (Tax Appeal E116 of 2024) [2024] KETAT 1094 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KETAT 1094 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

TAX APPEAL E116 OF 2024

E.N WAFULA, CHAIR, CYNTHIA B. MAYAKA, RO OLUOCH, T VIKIRU & AK KIPROTICH, MEMBERS

JULY 12, 2024

BETWEEN

MANAAN CARGO SERVICES LIMITED ..... APPELLANT

AND

COMMISSIONER CUSTOMS AND BORDER CONTROL ..... RESPONDENT

JUDGMENT

Background

1. The Appellant is a limited liability company in the business of importing ready-made garments.

2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*. The Kenya Revenue Authority is an agency of the Government of Kenya mandated with the duty of collection and receipting of all tax revenue, and the administration and enforcement of all tax laws set out in Parts 1& 2 of the First Schedule to the Act, for purposes of assessing, collecting, and accounting for all tax revenues in accordance with those laws.

3. The dispute in this Appeal arose when the Respondent carried out a post-verification audit of the Appellant's imports and issued it with an assessment dated 1st December 2023.

4. The Appellant objected to this assessment vide its letter dated 7th December 2023 and the Respondent issued its objection decision on 20th December 2023 which varied the assessment to Kshs7,955,516.00.

5. Dissatisfied with the Respondent's objection decision the Appellant lodged a Notice of Appeal dated 30th January, 2024 at the Tribunal on the 31st January, 2024.

The Appeal

6. The Appellant in its Memorandum of Appeal dated 30th January 2024 filed on 31st January 2024 has set out the following grounds of Appeal:

    a. The Respondent erred in law and fact in finding that the Appellant has underpaid Customs duty.

    b. The Respondent erred in law and in fact in constructing and applying the law relating to the valuation method.

    c. The Respondent erred in law and fact in the applicability of benchmark rules at the point of importation.

    d. The Respondent erred in law and fact by applying the wrong rate for Customs duty.

    e. The Respondent erred in law by acting ultra vires by failing to give proper guidance on applying rates as per the EACCMA, 2004.

    f. The alleged claim of underpayment of Customs duty by the Respondent is inaccurate as the item in question was lawfully settled by the Respondent.

    g. The Respondent erred in fact and law by outrightly contravening the doctrine of legitimate expectation that rests the presumption on the Commissioner to follow certain procedures in arriving at the tax liability and the benefits that accrue from it.

Appellant's Case

7. The Appellant's case is supported by its:

    a. Statement of Facts dated 30th January 2024 and filed on 31st January 2024 and the documents attached thereof.

    b. Written submissions dated 9th May 2024 and filed on 11th May 2024.

8. The Appellant stated that it imported girls' dresses, girls' jeans blouses and boys' shirts upon which it was issued with an additional assessment of Kshs 7,955,516.00 on 1st of December 2023.

9. The Appellant stated that it had been importing ready-made garments since 2016 and through engagements with other traders they had negotiated a benchmark applicable to its products to facilitate trade.

10. That more specifically it held a Meeting with Respondent and other traders on the 4th of April 2023 where issues of quality declarations, verifications and valuation of goods were discussed.

11. That after the above-mentioned Meeting the Respondent wrote to the Appellant and other traders vide a letter dated 24th of May 2023 reminding them that 1st of June 2023 would be the effective date for implementation of the agreed duty rates of Kshs 3,900,000.00 for their imports of new clothes.

12. The Appellant held the view that the Respondent thus erred when it applied a different and wrong valuation method for the cargo it had imported. More so because the character, quality and reputation of its goods had not changed.

13. The Appellant stated that it had a legitimate expectation because the Commissioner of Customs Policy office had agreed that duty on these imports would be payable at Kshs 3,900,000.00 for new clothes. That the demand for duty arrears of Kshs 7,955,516.00 thus contravened its legitimate expectations.

14. The Appellant submitted that there was no basis in law for the demand for additional tax.

15. The Appellant's submission identified a single issue for determination: Whether the Respondent erred in applying the wrong valuation methods for the same cargo described and imported by the Appellant.

16. It submitted under this issue that the duty for its imports was agreed upon during the Meeting held on 4th April 2023 and as per the letter dated 24th May 2023.

17. It averred that if there was any ambiguity in the law, then the same ought to be resolved in favour of the taxpayer as was stated in the case of Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others (Interested Parties) (Civil Appeal E591 of 2021) [2022] KECA 1306 (KLR) (2 December 2022) (Judgement), Kenya Revenue Authority vs Export Trading Company Limited [2022] and Communications Commission of Kenya & 5 Others v Royal media Services & 5 Others.

18. The Appellant submitted that legitimate expectation ought not to be frustrated because it is the root of the Constitutional principle of the rule of law which requires predictability and certainty in Government dealings with the public.

19. The Appellant averred that it continued to incur unnecessary and high port charges, which continued to accrue for four (4) months which was exclusive of warehouse rent.

20. The Appellant submitted that its consignment was incorrectly valued and assessed by the Respondent which has led to the unreasonable, unlawful and wrongful withholding of the subject matter consignment at the Port in Mombasa.

Appellant's Prayer

21. The Appellant prayed that the Tribunal grants the following orders:

    a. A declaration that the Respondent's Objection decision dated 20th December 2023 is unjustified, unmerited and without any legal basis and is null and void.

    b. An order setting aside and or vacating the Respondent's impugned decision.

    c. An order quashing the Respondent's decision as in the letter dated 20th December 2023.

    d. An order for costs of the Appeal to be paid to the Appellant by the Respondent.

Respondent's Case

22. The Respondent's case is premised on its Statement of Facts dated and filed on 1st March 2024 and the written submissions dated and filed on 17th May 2024.

23. The Respondent's response to the Appellant's grounds of appeal was as follows.

a. On Whether the Respondent was justified in issuing the assessment and whether there was an underpayment of taxes

24. The Respondent contended that it was justified in issuing the assessment because the Appellant had under paid taxes on the import in the consignment Entry Number 23MBA1M406106319.

25. That it issued its assessment after referring the Appellant's consignment to its Valuation and Tariff Section of the Customs and Border Control Department for value opinion which was as follows;

Description	Quality (pieces)	Unit Value (USD)	FOB
Girl dresses	10,800	1.4	15,120
Men jeans trousers	26,500	3.3	87,450
Men t-shirt	13,500	1.4	18,900
Ladies' sweaters	1,500	3.6	5,400
TOTAL FOB			126,870

26. The Respondent contended that its assessment was based on the value of the product because the Appellant's Entry Number 23MBAIM406106319 declaration did not reflect the correct transaction value of the imports. Further, that the amount of taxes paid was low compared to the value of the consignment.

27. The Respondent stated that it did not act ultra vires and that the assessment was issued in accordance with the law after an under-declaration of the value of import by the Appellant contrary to Section 203 of EACCMA. That it subsequently charged tax as follows

Taxes	Rates	Payable (ksh)	Paid (ksh)	Due (ksh)
ImpOrt Duty	35%	6,843,435	2,248,664	4,594,771
VAT	16%	4,223,377	1,387,747	2,835,630
IDF	2.50%	488,817	160,620	328,197
RDL	1.50%	293,290	96,372	196,918
MSS		7,368	7,368	
TOTAL		11,856,287	3,900,771	7,955,516

b) Whether the Respondent erred in the construction and application of the valuation method

28. The Respondent stated that the Fourth Schedule of EACCMA provides for six (6) different methods that can be used in the determination of the value of imported goods liable to ad valorem import duty.

29. That the Appellant did not provide sufficient documents to support the declared value and the Respondent did not therefore have any sufficient cause to adopt the transaction value method as the method of valuation applicable in this case.

30. The Respondent stated further on a without prejudice basis that in Minute 3 of the alleged Minutes of the Meeting, the members present recognized that there are only six (6) methods of valuation.

31. The Respondent also stated that benchmark rules are not methods of valuation but internal guidelines. Further, that the same must have been supported by the Appellant's signed Minutes of a Meeting between the Respondent and traders.

c) Whether the Appellant discharged the burden of proof;

32. The Respondent averred that the Minutes and list of the purported benchmark rates were neither referenced nor signed by any of the members who attended the Meeting. It cast aspersions on the authenticity and credibility of the said unsigned Minutes and list.

33. It stated that it had no way of determining whether or not such a Meeting happened and if it did, whether the content of the Minutes and list were a true reflection of the deliberations of the Meeting.

34. It was its position that it could not rely on unsigned Minutes and a list of benchmark rates in determining the applicable method of valuation and the tax rate and amount of taxes to be paid.

35. That the Appellant had failed to provide supporting documents to support the varying the assessment issued.

d) Legitimate expectation

36. The Respondent contended that legitimate expectation is created within and in accordance with the law and in tax law, the legitimate expectation is that a taxpayer will pay the correct amount of taxes as per the applicable rate.

37. That the Meeting allegedly held on 4th April 2023 did not create an expectation that the imported goods would be valued and or assessed using a method or rate that is not provided by the law.

38. That underpaying of taxes goes against the very spirit of the legitimate expectation and on that ground, the Tribunal should direct that the Appellant pay the correct amount of taxes as assessed by the Respondent.

39. The Respondent relied on the case of Gira Enterprises v Commissioner of Customs (Customs, Excise and Gold Tribunal-Mumbai), to support the argument for uplifting taxes in this case.

40. It was also its position that the Appellant had not discharged its burden of proof as was required of it under Section 30 of the TAT Act and Section 56 of the TPA. It supported this position with the cases of Mulherin V Commissioner of Taxation (2013) FCAFC 115 and Boleyn International Limited v Commissioner of Investigations & Enforcement (Tax Appeals Tribunal No. 55 of 2019).

41. It averred that where words of a statute are clear and express, they must override any expectation to the contrary that a party may claim to have as was stated in the case of Republic vs Commissioner of Domestic taxes and another, ex-parte Kenton College trust [2013] eKLR.

Respondent's Prayer

42. The Respondent prayed that the Appeal be dismissed with costs and the review decision dated 20th December 2023 confirming the assessed Customs taxes of Kshs 7,955,516.00 be upheld

Issues For Determination

43. The Tribunal having carefully considered the parties' pleadings, submissions and documents submitted is of the view that the Appeal herein distils into a single issue for determination:

> Whether the Respondent's Review Decision dated 14th June 2023 was justified.

Analysis And Determination

44. The crux of this dispute hinges on the duty applicable to the imports. Whereas the Appellant asserted that the duty applicable for its imports had been agreed between it and the Respondent, the Respondent took the position that such an agreement was non-existent. That it applied the applicable duty for the Appellant's imports-based customs valuation.

45. The issue that now befalls the Tribunal is to determine which of the two duty rates applied to the Appellant's imports.

46. The record of appeal as discerned by the Tribunal shows that a Meeting was held between the Appellant, other traders and the Respondent on the 4th April 2023. The authenticity of the said Meeting is not in doubt for the reason:-

    a. The Minutes were recorded on the Respondent's letterhead.

    b. The Respondent has not tabled any document where it has filed a complaint against the Appellant for using its letterhead unlawfully and uttering false documents in the process.

    c. The Respondent wrote a letter dated 24th May 2023 confirming its Meeting with the Appellant and other Nairobi traders and also reminding the Appellant that the implementation date for the agreed quality declaration, verification and valuation of goods would be on the 1st June 2023.

    d. The Respondent provided four import declaration forms confirming that it had indeed paid a duty rate of Kshs 3,900,000.00 on its previous imports as had been agreed on by the parties in the Meeting of 4th April 2023.

47. The Tribunal is thus at a loss as to how the Respondent could implement a duty rate that was consistent with what was contained in the Minutes of 4th April 2024 and thereafter run away from the same agreement when it is convenient.

48. The conclusion arising from the above analysis is that the Appellant has proved on a balance of convenience that there was indeed an agreement between it and the Respondent on duty payable for its imports. The provision of the Minutes, the Respondent's follow-up letter of the Meeting and the declaration forms confirming the implementation of the said agreement confirm that the said Meeting indeed took place.

49. The Appellant thus paid the import duty of Kshs 3,900.000.00 which was agreed on in the Meeting of 4th April 2024 and which it had paid in all its previous consignments.

50. Under the circumstances, the Respondent ought to have provided the basis for the valuation uplift as is provided under the Fourth Schedule of EACCMA. This was not provided to the Tribunal and hence the reason why the Tribunal finds and holds that the Respondent was not justified in confirming the tax assessed upon the Appellant.

Final Decision

51. Flowing from the above analysis, the Tribunal finds that the Appeal is meritorious and accordingly makes the following Orders: -

    a. The Appeal be and is hereby allowed.

    b. The Respondent's objection decision 20th December 2023 be and is hereby set aside.

    c. Each Party is to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2024

ERIC NYONGESA WAFULA CHAIRMAN

CYNTHIA B. MAYAKA - MEMBER

DR. RODNEY O. OLUOCH MEMBER

DR. TIMOTHY B. VIKIRU - MEMBER

ABRAHAM K. KIPROTICH - MEMBER