Rubis Energy Kenya Plc v Commissioner of Customs and Border Control (Tax Appeal E363 of 2024) [2025] KETAT 73 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KETAT 73 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

TAX APPEAL E363 OF 2024

CA MUGA, CHAIR, BK TERER, EN NJERU, E NG'ANG'A & SS OLOLCHIKE, MEMBERS

JANUARY 31, 2025

BETWEEN

RUBIS ENERGY KENYA PLC ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... RESPONDENT

JUDGMENT

1. The Appellant is a limited liability company duly incorporated in Kenya and a registered taxpayer whose principal business activity is importation, sale and distribution of refined and other petroleum products.

2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, CAP 469 of Kenya's Laws (hereinafter "the Act"). Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

3. Upon request for a private ruling in relation to a product tariff classification by the Appellant's predecessor, KenoKobil Plc, the Respondent rendered a decision on 28th November 2019 classifying the imported product, K-Lube ATF IID under HS Code 2710.19.56.

4. In a letter dated 4th September 2023, the Respondent demanded payment of Ksh 1,350,399.00 as short-levied duties emanating from tariff re-classification of the Appellant's K-LUBE ATF. The Appellant settled the amount on 13th October 2023.

5. On 29th December 2023, the Respondent issued an addendum in relation to the demand letter of 4th September 2023 listing additional K-Lube ATF items and proceeded to demand additional duties amounting to Ksh 12,830,887.00 comprising import duty and Value Added Tax (VAT).

6. The Appellant objected to the addendum demand in a letter dated 29th January 2024 stating that payments made in relation to the 4th September 2023 demand had been paid in error because the product in question was not a lubricant but a non-lubricant in the nature of automatic transmission fluid.

7. On 14th February 2024, the Respondent rendered its decision upholding the earlier tariff re-classification of K-LUBE ATF II-D and III-D and proceeded to confirm short levy duties of Ksh 12,830,887.00.

8. Aggrieved by the Respondent's objection decision dated 14th February 2024, the Appellant filed its notice of appeal dated 14th March 2024 on even date at the Tribunal.

The Appeal

9. The Appellant's grounds of Appeal were as laid out in its Memorandum of Appeal dated 28th March 2024 and filed on even date:

    i. That the Respondent erred in fact by premising their decision on a product narration on the Appellant's website, being that the product described (K-LUBE Lubricant) was different from the product whose tariff classification was under dispute (K-LUBE ATF II-D and III-D).

    ii. That the Respondent erred in fact by partially premising their decision on the provision of Section 248(A)(3) of the East African Community Customs Management Act, 2004 (hereinafter "EACCMA") which provides that an advance binding ruling on tariff classification shall be binding on the Respondent and the Applicant for a period not exceeding twelve months, despite the fact that the Appellant's continued reliance of the private ruling has been based on the establishment that K-Lube ATF IID and IIID are non-lubricating oils, and not lubricating oils as opined in the Respondent's objection decision. The Appellant reiterates that the lapse of a private ruling did not change a non-lubricating oil to a lubricating oil.

    iii. That the Respondent erred in fact by disregarding the Appellant's confirmation that there was no change in the chemical composition of the product subject of the dispute, this without providing any proof of their own that the Appellant's product K-LUBE ATF II-D and III-D had changed from non-lubricating to a lubricating oil.

    iv. That the Respondent was in breach of the Appellant's legitimate expectation being that the Appellant had all along relied upon the Respondent's private ruling, which clarified that the product was a non-lubricating oil. It was the Appellant's legitimate expectation that the Respondent must apply a higher rate of duty for non-lubricating oils only upon change in law providing for a different rate. It was also the Appellant's legitimate expectation that any new duty rate for the same product could only be applied on a going forward basis.

    v. That the Tribunal has jurisdiction to hear the Appeal.

Appellant's Case

10. The Appellant relied on its statement of facts filled on 28th March 2024 together with the testimonies of Mr. James Mutisya its Lube's technical manager dated 28th October and filed on 29th October 2024

and that of Ms Seraphine Anamanjia its tax agent dated and filed on 22nd October 2024. Both witness statements were adopted by the Tribunal on the 13th of November 2024.

11. It was the Appellant's case that the tariff re-classification of imported K-Lube ATF by the Respondent under heading 2710.19.51 as opposed to earlier classification under 2710.19.56 which covers non-lubricating oils (cutting oils, coolants, antirust, brake fluids and similar oils) resulted in short levied duties of Ksh 1,350,399.00 which the Appellant paid in error despite the re-classification having been done without any fresh sample tests.

12. The Appellant stated that upon reviewing their import records of K-Lube ATF it discovered that a similar issue had arisen in the year 2019 and the Appellant, then trading as KenolKobil Plc, sought and received a private ruling on 28th November 2019 from the Respondent classifying the product under HS Code 2710.19.56 attracting a duty import of 25% this was after samples had been taken and tested at the Respondent's testing center.

13. The Appellant held that it was well aware of the provisions of Section 248(A)(3) of EACCMA which provides that a private tariff ruling on classification shall be binding to the parties for twelve months which in the instant case elapsed on 27th November 2020; that however, the Appellant continued applying the HS Code as issued in the private ruling of 28th November 2019 since the products chemical composition had neither changed nor had there been a change in the classification law.

14. Further, that K-Lube being a brand name comprising several products among them K- Lube Lubricant (a lubricating oil), K-Lube ATF (a non-lubricating oil) among other products; it was erroneous for the Respondent to premise their classification under 2710.19.51 with a duty import of 35% based on the Appellant's website narration for a different product since the product in dispute was K-Lube ATF not K- Lube Lubricant. Moreover, that the chemical composition of the product had remained the same over time as evidence by the attached certificate of analysis for import consignments for various periods.

15. It was the Appellant's case that the Respondent violated its legitimate expectation by seeking to change product classification without specific change in law specifying a different rate for the product and relied on the case of Council of Civil Service Unions v Minister for Civil Service (1995) AC 374 where Lord Diplock defined the principle as follows:

> " For a legitimate expectation to arise, the decision must affect the other person by depriving him of same benefit or advantage which either;
>
> i. He had in the past been permitted by the decision maker to enjoy and which can legitimately expect to be permitted to continue to do until there has been committed to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or
>
> ii. He has received assurance from the decision maker that the benefit will not be withdrawn without giving him first an opportunity of advance reasons for contending that they should not be withdrawn."

16. The Appellant asserted that its legitimate expectation was that the Respondent should only apply a different import duty rate upon change in law and that even in that case, the adjusted rates could not be applied retrospectively.

Appellant's Prayer

17. The Appellant's prayer was that the Tribunal annuls and sets aside the objection decision.

The Respondent's Case

18. In response to the Appeal the Respondent applied to the Tribunal to deem its statement of facts dated 26th June 2024 as duly filed. Though the Tribunal in its Ruling dated 6th September 2024 ordered the Respondent to file and serve its statements of facts within 14 days of the said Ruling, it hereby deems the said statement of facts of the Respondent dated 26th June 2024 as having been duly filed and served.

19. While asserting that the Appellant's product was a lubricant, the Respondent held that even the Appellant's website explains K-Lube as a lubricant as cited below, the use of K-Lube as a brand name notwithstanding;

> " K-lube is a leading brand in motor, industrial, specialty lubricants and grease with a presence throughout Eastern & Southern Africa."

20. It was the Respondent's assertion that the Appellant could have chosen any brand name but ATF means 'Automatic Transmission Fluid', a synthetic base oil for proper vehicle functioning with automatic transmission and that however, ATF must be indicated as a global standard practice. Additionally, that it was wrong for Appellant to state that K-Lube lubricants is different from K-Lube ATF as the latter was a subset of the former as described in the Appellant's website and used for marketing the product and was Appellant's description which they should not be opposed to.

21. The Respondent stated that it conducted various laboratory tests on identical ATF DIIs from various suppliers to different importers in Kenya, which established that they were indeed lubricating oils and that its classification was guided by East African Community Common External Tariff (EAC CET) together with the General Interpretive Rules (GIRs) 1 and 6 which placed the product under the most appropriate HS Code of 2710.19.51 which covers "Lubricants in liquid form" as opposed to Appellant's classification under HS Code 2710.19.56 which covers, "Non-lubricating oils (cutting oils, coolants, antirust, brake fluids and similar oils)."

22. It was the Respondent's assertion that the Appellant sought to rely on a private ruling that was time-barred pursuant to Section 248(A) of EACCMA as it had already exceeded the 12-month mark since issuance and that equally, the Appellant's products had undergone various technological improvements.

23. The Respondent stated that contrary to Appellant's averments on legitimate expectation, the Appellant had actually agreed and paid the initial amount contained in a demand notice of 4th September 2023 and was thus in agreement that indeed short levied taxes were due as such was estopped from objecting to pay the same.

Respondent's Prayer

24. The Respondent made the following prayers:

    i. That the Tribunal dismisses the Appeal with costs for want of merit.

    ii. That the Tribunal upholds the decision of 14th February 2024.

Parties' Written Submissions

25. The Appellant's Submissions dated 26th November 2024 were filed on 27th November 2024 wherein the Appellant submitted on the following issues that it had identified for determination as hereinunder;

    i. Whether the K-lube ATF II-D and ATF III-D products are classifiable under subheading 2710.19.56 as non-lubricating oils not elsewhere specified in the 2022 EAC CET or 2710.19.51 as lubricants in liquid form.

26. That contrary to Respondent's assertion and grounds of reclassification under subheading 2710.19.51 premised on alleged website description, K-Lube is a brand name comprising various products that include lubricants and specialty products such as ATFs and brake fluids. That the products in dispute i.e. K-Lube II-D and III-D are both automatic transmission fluids thus specialty products due to their multi-functional nature the implication of which is that the Respondent's reclassification was flawed and erroneous.

27. The Appellant relied on the case of Car importers Association of Kenya v *Kenya Revenue Authority, Commissioner Customs and Border Control Department, Kenya Revenue Authority, Chief Manager, Value and Tariff, Customs Services Department, Kenya Revenue Authority and Kenya Ports Authority (Petition 190 of 2018)* [2019]KEHC 11878(KLR)(Civ)(16 October 2019)(Judgement) to buttress its position. The High court held as follows regarding reliance of a website for computation of tax;

> "...in my view, computation of tax due cannot be based on guesswork, conjecture, trial and error and Facebook data. The policy which citizens must pay their taxes cannot be left to a data to be sources in the website"

28. Further, the Appellant cited excerpts from the Respondent's private ruling confirming their conviction that the product was classifiable as a non-lubricant;

> "...K-Lube ATF IID is a therefore considered to be a non-lubricating oil preparation containing petroleum oils as basic constituent in EAC CET HS Code 2710.19.56."

29. The Appellant submitted that notwithstanding the provisions of Section 248(A)(3) of EACCMA, neither the product's chemical composition had changed nor had the Respondent afforded the Appellant a fair administrative action warranting a re-classification which even if were the case would not apply retrospectively. The Appellant in firming up its position cited Section 120 of the *Evidence Act*, CAP 80 of the Laws of Kenya (hereinafter "*Evidence Act*") which provides as follows:

> "when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

30. Further the Appellant relied on the following cases in buttressing its position;Jack Ogolla vs George Onyango Nyamor (2021) eKLRSerah Njeri Mwobi v John Kimani Njoroge (2013) eKLR

31. The Appellant submitted that classification of goods in the Nomenclature is governed by the six GIRs together with their Explanatory Notes (ENs) and the Compendium of classification opinions. Therefore, based on the products' description, properties and functions as enumerated together with

the witness statements and as provided for by the GIRs 1 and 6 the Appellant's products were properly classified under HS Code 2710.19.56 this is because the terms of heading 2710 provide for;

> "Petroleum oils and oils obtained from bituminous minerals (other than crude) and preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations, other than those containing biodiesel and other than waste oils:"

32. The Appellant submitted that even though its products have lubrication properties, in the automotive industry, ATF was recognized and categorized based on its multifunctional properties and is not marketed or used as a lubricant but as a critical fluid for the operation of automatic transmissions. Thus, the products could not be classified under HS Code 2710.19.51 as products in this category are chiefly intended for lubrication even though they may contain other properties such as anti-oxidation, rust prevention, or anti-foaming. That in contrast, the Appellant's products anti-wear or lubricating properties did not constitute the prime function.

33. In firming up this position, the Appellant cited the following provisions of EN (c) (2) to heading 2710:

> "(2) Lubricants consisting of mixtures of lubricating oils with widely varying quantities of other products (e.g., products for improving their lubricating properties (such as vegetable oils and fats), anti-oxidants, rust preventives, anti- foam agents such as silicones). These lubricants include compounded oils, oils for heavy duty work, oils blended with graphite (graphite suspensions in petroleum oils or in oils obtained from bituminous minerals), upper cylinder lubricants, textile oils, and solid lubricants (greases) composed of a lubricating oil with about 10 to 15 % of soaps of aluminium, calcium, lithium, etc."

34. The Appellant asserted that its products while possessing lubricating properties are primarily designed as specialized oils that serve distinct purposes tailored to their specific applications and functions beyond lubrication which include hydraulic power transmission, cooling and cleaning. That this being the case and the Respondent's private ruling of 28th November 2019 that had never been withdrawn, the Respondent's action was a violation of Section 4 (1) of the *Fair Administrative Action Act*.

ii. Whether the private ruling issued by the Respondent in 2019 classifying K-Lube ATF under HS Code 2710.19.56 created a legitimate expectation.

35. The Appellant submitted that the private ruling created legitimate expectation on its part that the Respondent would apply the tariff classification for its products unless the same was withdrawn since the ruling had affirmed that the Appellant's products were non-lubricating oils. In buttressing this position, the Appellant relied on the following case law;Kenya Nut Company Limited v Commissioner of Domestic Taxes (Tax Appeal 1278 of 2022)[2024] KETAT 101(KLR)(2 February 2024)Republic v Kenya Revenue Authority Ex-Parte M-Kopa Kenya Limited [2018]eKLR*Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)*[2022] KESC 31 (KLR)(17 June 2022) (Judgement)Council of Civil Service Unions v Minister for Civil Service (1995) AC 374

36. That there having been no material change to the chemical composition of the products, the Respondent was in breach of the Appellant's legitimate expectation. Further, that even if the Respondent were to conduct fresh laboratory test and classification process, any change arising from the process ought to take effect after the fact and not retrospectively. Thus, the Respondent's retrospective application of a different HS Code and duty rate was erroneous and unreasonable.

37. The Respondent's submissions dated 28th November 2024 were filed on even date wherein the Respondent submitted on two issues as hereinunder;

    i. Whether the Appellant could rely on a Ruling that was deemed expired by virtue of Section 248A of the EACCMA,2004.

    ii. Whether the products, K-Lube ATF II D and III D were classifiable under HS Code 2710.19.56 or 2710.19.51

38. The Respondent asserted that the Appellant erred in seeking to rely on a private ruling that was time barred and was for a specific consignment contrary to provisions of Section 248 A of the EACCMA.

39. The Respondent submitted that among the documents considered while classifying the Appellant's products, was the product narration on Appellant's website where the product, K-Lube was described as a lubricant. Thus, according to the Respondent, K-Lube and K-Lube ATF were not different since the later was a subset of the former. That even the Appellant considers the products as being lubricants and markets them as such.

40. That laboratory tests on identical ATF DIIs from various suppliers to different importers in Kenya had established the products as lubricating oils. Further, that the re-classification as guided by East African Community Common External Tariff (hereinafter "EACCET") together with General Interpretative Rules (hereinafter "GIRs") and witness statements had established the correct classification to be that under HS Code 2710.19.51. The Respondent asserted that the prime function of ATFs is to provide lubrication as a corrosion inhibitor thereby protecting transmission systems from wear and tear without which the transmission systems would break down hence the reason the products were classifiable as lubricating oil.

41. The Respondent stated that a look at the data sheet indicated that the viscosity levels of the products was high which resonated with the argument that the products were lubricant oils whereas other products such as coolants, break fluids which are non-lubricating fluids had low to no viscosity at all. Moreover, that the Appellant agreed and paid initial amount as demanded thus agreeing to the short-levied taxes which estopped the Appellant from objecting to pay the same.

Issues For Determination

42. The Tribunal having carefully considered the parties' pleadings, submissions and documentation adduced before it notes that the matter distils into a single issue for determination:

> Whether the Respondent erred in re-classifying the Appellants products under HS Code 2710.19.56 and demanding short levied duties.

Analysis And Determination

43. The Tribunal having established the above issue for determination will proceed to analyze it as follows;

> Whether the Respondent erred in re-classifying the Appellants products under HS Code 2710.19.56 and demanding short levied duties.

44. The Tribunal observes that the instant dispute originated from the Respondent's addendum dated 29th December 2023 listing additional K-Lube ATF items and demanding additional duties amounting to Ksh 12,830,887.00 comprising import duty and VAT. The Tribunal also notes that a similar demand had been issued on 4th September 2023 and settled when the Appellant made good the amount demanded which the Appellant averred was paid in error.

45. It is not in contention that the Appellant requested and received a private ruling in relation to its products, K-Lube ATF IIID wherein the Respondent classified the products under HS Code 2710.19.56 on 28th November 2019. What was in contention in this Appeal is that the Appellant continued to apply this classification to subsequent product imports long after the expiry of the private ruling's timeline which was 27th November 2020 contrary to Section 248(A)(4) of the EACCMA. This was the contested position by the Appellant who stated that there was neither a change in law nor material change on its products that would warrant it to classify its products under any other HS Code other than the one contained in the private ruling i.e. HS Code 2710.19.56.

46. The Tribunal notes that Section 248A of EACCMA commenced on 15th November 2019 pursuant to the East Africa Community Customs Amendment Act, 2019. The Appellant was issued the Private Ruling on 28th November 2019 after said Section came into operation. Accordingly, it is the finding of the Tribunal that the private ruling was not binding on the Respondent after 12 months of its issuance. The Appellant cannot therefore claim a legitimate expectation against the clear provisions of the law of *the constitution* as held in the case Communication Commission of Kenya & 5 others and v Royal Media and 5 others (2014) eKLR.

47. The Tribunal notes that there is consensus by the parties that the applicable product tariff heading is 2710 as provided by GIR 1 and 2 rules of classification. The Tribunal notes that in the dispute, material composition and use of the product at hand is on trial and the Tribunal seeks guidance under GIR 3 which provide as follows:

> " When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> a. The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> b. Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> c. When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

48. The Tribunal observes that the Appellant's assertion that its products had not undergone any material change was merely controverted by Respondent's reliance on website narration, expiry of its private ruling and the argument that by sight, the viscosity levels of the products was high which resonated with the argument that the products were lubricant oils. The Tribunal's firm view that the material composition of this product could only be established through scientific methodology such as a laboratory test or tests.

49. The Tribunal observes that with regard to the Appellant's burden of proving that a tax decision is incorrect. The provisions of Section 56(1) of the TPA read in tandem with Section 30 of the TATA and Section 109 of the *Evidence Act* guide the Tribunal and more particularly, the following provisions of section 109 of the *Evidence Act* provides as follows:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"

50. The Appellant adduced as evidence, its import certificates of analysis for all the products whose classification was disputed and the Respondent did not controvert this evidence.

51. In the case of *Commissioner of Domestic Taxes v Trical and hard limited (Tax Appeal E146 of 2020)* (2022) KEHC9927 (KLR)(Commercial and Tax) (8th July 2022) (Judgement) Majanja J, held as follows:

> " I agree with the Tribunal's holding that the burden of proof in tax matters is not stationary but is like a pendulum swinging between the taxpayer and the taxman at different points but more times than not swings towards the taxpayer."

52. Accordingly, the Tribunal finds that the Respondent erred in re-classifying the Appellant's products under HS Code 2710.19.56 and also in demanding the short-levied duties.

Final Decision

53. The upshot of the foregoing is that the Appeal herein is meritorious and the Tribunal accordingly proceeds to make the following Orders:

    a. The Appeal be and is hereby allowed.

    b. The Respondent's review decision dated 14th February 2024 be and is hereby set aside.

    c. Each party to bear its own costs.

54. It is so Ordered.

DATED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2025.

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CHRISTINE A. MUGA

CHAIRPERSON

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BONIFACE K. TERER ELISHAH N. NJERU

MEMBER MEMBER

....

EUNICE N. NG'ANG'A OLOLCHIKE S. SPENCER

MEMBER MEMBER