IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MWARIJA, J.A., And MZIRAY, J.A.,)

CIVIL APPEAL NO. 10 OF 2018

COMMISSIONER GENERAL TRA .....APPELLANT

VERSUS

1.MAMUJEE PRODUCTS LIMITED
2.TANGA PHARMACEUTICAL AND PLASTICS LTD } ..... RESPONDENTS
3.ASHER INDUSTRIES LIMITED

(Appeal from the Decision of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Dr. Fauz Twaib-Chairperson (as he then was), Mr. D. Mwaibula Member and Mr. J.K. Bundala Member (as he then was)

dated the 12th day of May, 2016
in
Tax Appeal No. 1 of 2015

JUDGMENT OF THE COURT

3rd July & 2nd August, 2018

MWARIJA, J.A.:

The dispute giving rise to this appeal has its origin in legislative amendment to the Excise (Management and Tariff) Act [Cap. 147 R.E. 2002] (hereinafter "the Excise Act"). Through S.12 of the Finance Act No. 4 of 2013 (the Act), the Parliament amended the Fourth Schedule to the Excise Act (the Schedule) by introducing *inter alia,* under heading 33.04,

new excisable items and rates. The introduced items under that heading fall under the following description:

> *"perfumes and toilet waters,- beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen or sun tan preparations; manicure or pedicure preparations."*

The introduced items, which are excisable at the rate of 10% with their respective HS Codes in brackets are; lip make up preparation (3304.10.00), Eye make-up preparation (3304.20.00) and manicure or pedicure preparation (3304.30.00). Under this description, the items shown as "other", classified in HS Code 3304.99.00 are excisable at the rate of 10%.

The respondents, Mamujee Products Limited, Tanga Pharmaceutical and Plastics Limited and Asher Industries Limited (the 1st, 2nd and 3rd respondents respectively), were at the material time of the enactment of the Act, producers of *inter alia,* petroleum jelly (hereinafter "the Product"). Following the amendment to the Schedule in the manner stated above, the respondents were subjected by the appellant, the Commissioner General of the Tanzania Revenue Authority (the Commissioner), to payment of excise duty on the Product. They disagreed with the appellant, contending that

they are not liable to pay excise duty because the Product is codified under HS Code 27.12.10 of the East African Community Common External Tariff, 2012 Version (hereinafter "the EAC CET") and cannot therefore, be excisable under HS Code 3304.99.00 as one of the "other" items under the nomenclature of the products under heading 33.04 mentioned above.

The respondents' attempts to resist the appellant's demand for payments of excise duty on the Product were unsuccessful. They had to make payment under protest in the sums of Tshs. 1,115,800,852/=, 1,190,081,466.36 and 557,547,634/= respectively while taking action to seek redress. They did so by filing an application in the Tax Revenue Appeals Board (the Board), Income Tax Application No. 6 of 2015. In the application, which was taken out under *inter alia,* S.7 of the Tax Revenue Appeals Act [Cap.408 R.E. 2002] and S.6 of the Tanzania Revenue Authority Act [Cap. 399 R.E. 2006], the respondents prayed for, among others, the following orders against the appellant (the respondent in the Board):

> *1. That the directions by the Respondent vide the letter dated 25th July, 2013 and bearing Ref. No. 100-159-996 to the effect that the Applicants are henceforth*

required to extend the application of excise duty to petroleum jelly amounts to wrong interpretation and application of the law as provided for under the ***Excise (Management and Tariff) Act Cap. 147 R.E. 2008."***

2. *That the direction that the Applicants are henceforth to apply HS code 27.12.10.00 in handling all transactions pertaining to the importation and manufacture of petroleum jelly instead of HS code 33.04.99.00 as wrongly directed by the Respondent.*

3. *That Honourable Board be pleased to order that the Respondent's imposition and collection of excise duty on petroleum jelly is wrong at law;*

4. *The Honourable Board be pleased to order that the Applicants are entitled to refund of the money paid under protest and in compliance of the Respondent's orders."*

The respondents' case before the Board was that they were not liable to pay excise duty on the Product because the Act does not include it in the list of excisable items under the Schedule. It was argued by the respondent's counsel that, according to the EAC CET, the Product is

classified under HS Code 27.12.10. and that, such HS Code is not stated in the Schedule. It was the respondents' position that, in the circumstances, by virtue of the provisions S.124(1) of Cap. 147, the Product is not excisable. The provision states as follows:

> *"There shall be charged, levied and collected a duty, to be known as excise duty in respect of goods specified in second column of the Fourth schedule to this Act the rates specified in the third and fourth column of that schedule."*

It was agued further that the appellant's stance that the Product is included in HS Code 3304.99.00 as one of the "other" items under heading 33.04, is incorrect because, even by applying the statutory cannon of *ejusdem generis* rule, the nomenclature of the items under that heading does not fit that description.

On its part, the appellant stuck to his position that, although the product appears under HS Code 27.12.10 in the EAC CET, that does not preclude it from being included in the list of excisable articles. It was argued that, being a local product, it is not necessary that it should be specifically described in the corresponding HS Code as that is only

mandatory for imported goods. According to the appellant, the Product was properly taken to be excisable under HS Code 3304.99.00 in the description "Other", because of its nature, that is; preparations for the care of the skin. The counsel for the appellant relied also on the budget speech of the Minister for Finance in the Parliament, that he mentioned the Product ("Mafuta ya kujipaka") as one of the newly introduced items in the list of excisable goods.

Having considered the submissions and the provisions of S.124(1) of the Excise Act, the Board found that, in the Schedule, the Product is not classified under heading 33.04 but the same is under HS Code 2712.10.00 of the EAC CET. For that reason, it found that it is not excisable. In its ruling at pages 132-133 of the record, it held as follows:

> *"...After a keen perusal to the said Finance Act, No. 4 of 2013, Petroleum jelly was not mentioned and even by comparing the heading i.e 2712 in the East African Community Common External Tariff 2012 version, the HS Codes mentioned in the Finance Act No. 4 of 2013 and their subsequent goods and charging rates thereunder, no where petroleum jelly to that heading is featured."*

The Board went on to state as follows at page 135 of the record:-

> *"... it is obvious that petroleum jelly has its Hs code under subheading 27.12.10.00 well known and it is according to East African Common External Tariff version 2012. It is our view therefore that, as long as petroleum jelly its HS Code is well known under agreed common external tariff it can never be inferred to fall under "others" in a different HS Code namely 3304.99.00."*

Relying on the applicable principle on construction of tax statutes as stated in the English case of **Cape Brandy Syndicate v. Inland Revenue Commissioner** [1921] IKB 64, the Board was of the view that the Product cannot be charged under "other" items appearing in HS Code 3304.99.00 because, whereas the same is specifically listed under HS Code 2712.10, it cannot be implied to be excisable under another Code, HS Code 3304.99.00. It observed that, if the Parliament had intended to include the Product in the list of excisable items under a different HS Code, it should have expressly done so by listing it in the Schedule. The Board granted the application and ordered the appellant to refund the amounts of money collected from the respondents as excise duty on the Product.

On appeal, the Tax Revenue Appeals Tribunal upheld the decision of the Board. It agree with the findings of the Board that, since Tax statutes must be construed strictly as underscored in the **Cape Brandy Case** (supra), the appellant was wrong in trying to include the Product in the list of excisable items under HS Code 3304.99.00. It observed as follows in its judgment at page 310 of the record:-

> *"...It is not disputed that the law makes no specific mention of it [the Product]. The appellant simply tried to read into the category "other" in heading 3304.99.00 (in chapters of the HS Code). Indeed, it is trite that neither the Minister's speech in Parliament no Government policy is, ipso facto, law."*

And at page 312 it stated as follows:-

> *"... since petroleum jelly is specifically provided for under Heading 2712.10.00 it was wrong for the appellant to infer and include it as an excisable item under Heading 3304.99.00 as falling under the description 'Other'. The Board was thus right to say that the inclusion was merely an inference that was not supported by law."*

On that finding, the appeal was dismissed in its entirety.

The appellant was further aggrieved by the decision of the Tribunal hence this appeal. He challenges that decision on one main ground as follows:-

> *" That the Tax Revenue Appeals Tribunal erred in law by holding that petroleum jelly which is manufactured by the Respondents could not be classified under the Harmonized System (HS) Code Heading No. 3304.99.00 of the East African Community External Tariff (CET) 2012 Version and that its correct category is under Heading No. 2712.10.00 of the CET."*

At the hearing of the appeal, the appellant was represented by Ms Consolata Andrew, learned counsel whereas the respondent had the services of Ms Hadija Kinyaka and Dr. Erasmo Nyika, learned advocates. The learned counsel for the parties had earlier on filed their respective written submissions in compliance with Rule 106 (1) and (8) of the Tanzania Court of Appeal Rules, 2009. During the hearing, they spent the time allowed for oral submissions to highlight the points which they considered to be of vital importance to the appeal.

In her submission in support of the appeal, Ms Andrew relied to great extent on the arguments which were made before the Board and the

Tribunal as regards the appellant's contention that S. 12 of the Act introduced the Product under the Schedule as one of excisable items. She maintained that the Product is classified under heading 33.04 with HS Code 3304.99.00 thus falling under the "other" products in the nomenclature of the items listed thereunder. According to the learned counsel, going by General Interpretation Rules for Classification of Goods (GRI) and the Chapter notes, the heading 27.12 excludes the Product and instead fits it under heading 33.04 by virtue of the nomenclature of the items appearing under that heading.

She submitted that, according to the notes to Chapter 33, the Product does not fit within heading 27.12. She stressed that, once the product is for preparations for use in the care of the skin, it falls under heading 33.04 and that therefore, its HS Code is 3304.99.00. It was her submission that once it is for preparations for use in the care of the skin, the Product becomes different from the type specified under heading 27.10.

In her reply submission, Ms Kinyaka started by opposing the argument that the classification of goods may be based on their end-use. Citing the case of **Dunlop India Ltd & Madras Rubber v Union of**

India (Uoi) & Ors, 2003 (90) ECC 484, she argued that in principle, the product's end use is not relevant as far as its classification is concerned. With regard to the argument that, by virtue of explanatory notes, the Product is excluded from heading 27.10 and classified under heading 33.04, she argued in reply that, explanatory notes are not part of the law and cannot therefore be applied as interpretative authority for HS Codes. She relied on Art. 7(1) (b) of the International Convention on the Harmonized Commodity Description and Coding System, 1983 read together with Rule 3 of the Customs Tarrif and Harmonized System.

According to the learned counsel, explanatory notes may be used as a guide for application of the HS Code but such notes do not have a force of law. She submitted that it is the HS Code convention which is part of our law by virtue of Art. 13(1) and (2) of that Convention and S.2(1) of the EAC CET. To support her argument that explanatory notes do not determine classification of goods, she cited the decision of the High Court of Kenya in the Case of **Keroche Industries Limited v Kenya Revenue Authority and 5 Ors** [2007] eKLR as persuasive authority. She stressed that, since the Product has been classified under HS Code 2712.10.00, applying the GRI which are authoritative for that purpose, the use of

explanatory notes does not apply because classification is determined according to the heading and relative section or chapter note. In the circumstances, she argued, the contention that the Product is classified under HS Code 3304.90.00 is an incorrect assumption. She added that, in any case, classification of the Product under HS Code 33.04 does not accord to the *ejusdem generis* rule because it does not fall within the kind of the items specified thereunder.

As for the submission that the Product is excluded from heading 27.12, the learned counsel opposed that submission arguing that, what are excluded under chapter 27 are medicaments which are also excluded under HS Code 33.04 claimed by the appellant to be the specific HS Code for the Product. Ms Kinyaka argued further that by virtue of rule 1 of GRI, the explanatory notes which are mere guides to interpretation, cannot be resorted to where the words of the statute are clear and unambiguous. In this case, she submitted, since the Product is specifically mentioned in heading 27.12, it cannot be said that it is excluded by explanatory notes and try to include it under another heading where the item is not mentioned.

Adding to what was submitted by Ms Kinyaka, Dr. Nyika emphasized that since the Product is not one of the items listed under heading 33.04, the claim that the same is excisable is a misconception. Relying also on rule 1 of the GRI, he argued that, since it is provided in clear and unambiguous terms, that the Product is classified under HS Code 2712.10.00, the contention that the same is excluded from that heading is baseless. He added that, had the Parliament intended to include the product in the list of excisable items through the Act, that should have been expressly done. According to the learned counsel, inclusion cannot even be inferred because; by operation of rule 1 of the GRI, the Product is specifically classified under HS Code 2712.10.00

We have duly considered the submissions of the learned counsel for the parties. The arguments raise a narrow issue, whether or not, the Act added in the Schedule, the Product as one of the excisable items. It was not disputed **firstly**, that the Product is not specifically mentioned in the items listed under heading 33.04 and **secondly,** that in the EAC – CET, its HS Code is 2712.10.00 under heading 27.12 having the following description:-

"Petroleum jelly, paraffin wax micro-crystalline petroleum wax, slack wax, ozokerite, lignite wax, peat wax, other mineral wax, and similar products obtained by synthesis or by other processes, whether or not coloured."

The appellant's contention is that, notwithstanding the above stated position, following the amendment of the Schedule whereby the items under heading 33.04 were included in the list of excisable articles, the Product, being in the nomenclature of the added items, is inclusive under HS Code 3304.99.00 which covers "other" items under that heading.

As shown above, in her submission, the learned counsel for the appellant relied also on the nature of the product; that the same is used for the care of the skin. She argued therefore that for this reason, the same falls under heading 33.04. It was her submission that by applying the GRI aided by explanatory notes to Chapters 27 and 33, the Product, which is used for the care of the skin, is classified under heading 33.04. The explanatory note to heading 27.12 which she relied upon states as follows:-

" This heading does not however include petroleum jelly, suitable for use for the care of the skin, put up in packings of a kind sold by retail for such use (heading 33.04)."

The chapter notes show also that the product is included under heading 33.04. it was the learned counsel's argument therefore that, although the Product is included under heading 27.12, it is on the other hand, excluded by explanatory notes. The reason, she said, is that the Product mentioned in heading 27.12 is different from that which is mentioned under heading 33.04 as she explained above.

In opposing the arguments that classification of goods can be based on their end-use, the learned counsel for the respondents cited the case of **Dunlop India Ltd** (supra) as persuasive authority that goods are not classified according to their end-use. In that case, the Supreme Court of India held *inter alia,* as follows on that point:-

> *"The basis of the reason with regard to the end-use of the article is absolutely irrelevant in the context of the entry where there is no reference to the use or adaptation of the article."*

We are, with respect, unable to agree with the learned counsel for the respondents. In the case at hand, the use of the product is of essence in its classification in heading 27.12. Reference is made to its use, that is;

"preparations for the care of the skin (other than medicaments)." It is imperative therefore, that petroleum jelly which is not for preparations for the care of the skin, cannot fall under that classification. We find therefore that the principle applies only where the end-use of the goods are not referred to in classifying them, that is; "where there is no reference to the use or adaptation of the article". Since in this case, the end-use is of essence as stated above, the cited decision does not, in the circumstances, apply.

The crucial issue however, is whether classification of the Product under heading 27.12 is excluded by explanatory notes to Chapters 27 and 33 as argued by the learned counsel for the appellant. This takes us to the second ground which was relied upon by the appellant in the appeal; that despite being under heading 27.12 and classified under HS Code 2712.10.00, the Product is included under HS Code 3304.99.00. The learned counsel relied on the GRI. Rule 1 thereof provides as follows:-

> *"... classification is determined according to the terms of the heading and of any relevant section or chapter notes. The title of the sections, chapters and sub-chapters are provided for ease of reference only. If classification*

cannot be so determined, GRI 2 through GRI 5 must be applied in consequential order."

Rule 6 stipulates that rules 1-5 apply *mutatis mutandis* at subhead level, so long as only subheadings of the same level are compatible.

According to the International Convention on the Harmonized Commodity Description and Coding System (as amended by Protocol of Amendment of 24th June 1986), explanatory notes are not binding. They only provide guidance for application of HS Codes. It is provided so in the following words:-

"... Although these notes, opinions and rulings on specific goods are not legally binding, they provide useful guide and authoritative guide for the application of the HS."

It is a correct position therefore, as stated by Ms Kinyaka, that classification is not determined by explanatory notes. As pointed out above, she cited the decision of the High Court of Kenya in the case of **Keroche Industried Ltd** (supra) where it was observed that:

"The explanatory notes published by the World Customs Organization (HS) cannot supercede the clear and

[unambiguous] description found in the First Schedule. The literal and grammatical meaning of a statute or Act using linguistic cannons of constructions is always preferred where the meaning of an enactment is clear and unambiguous. The Act is to be read as a whole without attributing to any particular provisions or words or tortured or strained construction or interpretation. The starting point is the statute itself which is read by construing the words used or gathering the meaning from the words used before venturing onto other aids of construction..."

The learned counsel cited also the applicable principle in the construction of tax statutes as stated in the case of **Cape Brandy** (supra) which was applied by both the Board and the Tribunal in deciding the effect of the Act on the classification of the Product. In that case, the principle was stated as follows:-

"... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

In the case at hand, the Product is specifically classified under heading 27.12 and according to Rule 1 of the GRI, explanatory notes cannot be used to exclude it from that heading and include it under another heading. Guided by that rule and the decisions cited by the learned counsel for the respondents which, in our view, state the correct position of the law, we agree with the advocates for the respondents that this appeal is devoid of merit. As a consequence, the same is hereby dismissed with costs.

DATED at **DODOMA** this 31st day of July, 2018.

I.H. JUMA
CHIEF JUSTICE

A.G. MWARIJA
JUSTICE OF APPEAL

R.E. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. Mkwizu
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL