Tax Alert

No room for speculation in Tariff classification of goods for customs duty purposes

Summary

This alert brings to your attention the High Court of Kenya ruling in the case of **Commissioner of Customs and Border Control v Kenya Breweries Limited (Tax Appeal E157 of 2021)**.

The main dispute between the parties was the classification of the Apple Concentrate (an ingredient used for manufacturing Cider, an alcoholic beverage). Kenya Breweries Limited (KBL) believed the concentrate should be classified under Chapter 21 (edible preparations) specifically under HS code 2106.90.20 which attracts a duty rate of 10%. The Commissioner on the other hand, argued that the Concentrate was classifiable under Chapter 22 (beverages, spirits & vinegar), specifically under HS Code 2206.00.90 which attracts a duty rate of 25%.

In a Judgement delivered on 25th June 2021, the Tribunal ruled in favour of KBL and stated that the Apple Concentrate was a raw material for the manufacture of cider, an alcoholic beverage, and the duty applicable was 10%. The Kenya Revenue Authority (KRA) appealed the TAT ruling at High Court. The High Court on 31st October 2022 similarly ruled in favour of KBL.

Background

KBL is involved in the manufacture and distribution of both alcoholic and non-alcoholic beverages. KBL imports Alcoholic Fermented Apple Plus for use in the manufacture of cider and had reached an agreement with the KRA on the classification of the product under HS code 2206.00.90.

In the normal course of business, KBL now intended to import fermented apple concentrate for the manufacture of its Cider product. It is on this basis that in July 2019, KBL (Respondent) requested for the Commissioner's (Appellant) opinion on the tariff classification of the fermented apple concentrate.

The Appellant in a letter dated 24th September 2019, stated that following a test, a sample of the Concentrate was found to have alcoholic strength by volume of 14.06% and as such fell under tariff code HS Code 2206.00.90 of the EAC Common External Tariff (CET) which attracts duty at the rate of 25%.

Further vide a letter dated 17th January 2020, the Respondent formally applied for a tariff classification ruling with respect to the concentrate. In the letter, the Respondent opined that the Concentrate should be classified under the HS Code 2106.90.20 (preparations of a kind used in manufacturing of beverages).

Respondent's submissions

In its submissions, the Respondent asserted that:

1. The fermented apple compound is a clear brown liquid that is used as a raw material in the manufacture of cider, an alcoholic beverage made from fermented juice of apples.
2. The apple concentrate contained alcohol prior to it being converted into a concentrate as the apple juice had undergone a fermentation process.
3. The apple concentrate was not a beverage but a raw material for use in the production of alcoholic beverages and in particular, cider.
4. The Apple Concentrate was neither a fruit nor a vegetable thus Explanatory Note (d) to Chapter 20 of the CET did not apply.
5. The apple concentrate undergoes a series of processes to convert it into a beverage and that in as much as one can consume the concentrate, this did not qualify it as a beverage. This is because consumption did not represent the true test in determining whether a product is a beverage.
6. The World Customs Organization's ("WCO") Opinion Number 21069082 adopted in 2016 classified powdered alcohol consisting of ethyl alcohol and dextrin under Heading 2106. Thus, the Respondent was of the view that the concentrate, which is in powdered form, is a raw material used in the manufacture of alcoholic products(beverages) and that water is removed for ease of transportation.
7. The Concentrate is supplied by Döhler, a renown brand which provided the Respondent with the product specifications which included the tariff classification of the Concentrate as having been under Heading 2106; and
8. The Respondent relied on three decisions of the court i.e., ***R v Commissioner General & Another Ex-Parte AWAL Ltd [2018] eKLR, Enkasiti Flowers Growers Limited v Kenya Revenue Authority [2010] eKLR and Commissioner of Customs and Excise v Export Trading Company Limited [2019***] to show that courts have not only placed importance on the specific descriptions of the products but also the ultimate intended usage of the product as the basis of determining their tariff codes.

Appellant's submissions

The Appellant asserted that:

1. Based on the laboratory analysis of the apple concentrate, and Chapter 20 note (d) that excludes fruit or vegetable juices of an alcoholic strength by volume exceeding 0.5% vol and classifies such products in Chapter 22, the KRA was of the view that the apple concentrate falls under Chapter 22 that deals with fermented beverages such as cider.
2. The sample was tested at the Kenya Revenue Authority Inspection and Testing Centre and found to be an Apple Concentrate with alcoholic strength by volume of 14%. In this regard, the Apple Concentrate was not classifiable under Chapter 20 (preparations of vegetables, fruit…) or 21 (edible preparations) due to its 14% alcohol content and thus classifiable under Chapter 22 of the CET.
3. The sample tested was considered fermented alcoholic concentrate made from apple fruit classified in HS Code 2206.00.90 and in this regard, the HS Code 2206.00.90 as declared by the Appellant in their letter dated 24 September 2019 agreed with the laboratory findings; and
4. Heading 2206 includes the classification of cider which is an alcoholic beverage obtained by fermenting the juice of apples and that the beverages remain classified in this Heading when fortified with added alcohol content or when the alcohol content has been increased by further fermentation, provided they retain the character of the products falling in the Heading.

Issues for determination

a) Whether the KRA erred in classifying the apple concentrate under tariff 2206.90.20
b) Whether KRA should be directed to refer the question of Tariff classification of apple concentrate to WCO

High Court ruling

The High Court decided on the above issues as follows:

1. The Respondent discharged its burden of proof by demonstrating that the Appellant was wrong in its classification.
2. The Respondent was able to demonstrate, and the Appellant agreed that the Apple Concentrate was a concentrate and not a juice and as such, neither Chapter 20 nor the Explanatory Note (d) therein which the Appellant relied on was applicable to the Apple Concentrate's classification as the same only dealt with juices.
3. The Respondent further demonstrated that the alcoholic content volume was not relevant to the classification and that HS Code 2106.90.20 does not specify whether beverages have alcohol content or not and that there was no Explanatory Note therein where alcohol content was a factor for classification. Thus, the argument that since both the Apple Concentrate and the Alcoholic Fermented Apple Plus had the same alcoholic content, they both belonged to the same Tariff Code could not hold.
4. Other factors, other than the alcohol content, were to be considered in determining the Concentrate's classification and that the Appellant's witness also admitted that the alcohol volume specified in Chapter 22 was to distinguish between non-alcoholic and alcoholic beverages under the tariff.
5. The Respondent's proposed classification of the concentrate under HS 2106.90.20 falls within the language of the Tariff Heading, Section and Chapter Notes and was within the interpretation rules of the GIR.

Based on the above, the High Court ruled that the Tribunal rightly concluded that the Concentrate fell within HS Code 2106.90.20 and was correct in concluding that the Apple Concentrate was a raw material for the manufacture of cider, an alcoholic beverage.

Our Opinion

The High Court decision is good news to companies in the manufacturing sector who import cider concentrate as a raw material for use in the manufacture of various products.

The decision also provides further clarity on the interpretation of the CET as it brought out the aspect of "intended use of a product" which as reiterated in the ruling should be considered in determining the correct tariff classification of a product.

Notwithstanding this win for the taxpayers, it is important that businesses evaluate their specific cases to ensure that they are classifying their products and accounting for tax correctly.

KPMG is happy to assist on any issues arising from this decision and any other matters relating of classification of goods. Contact our East Africa Customs and Excise lead on jsyengo@kpmg.co.ke.

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