

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO 98 OF 2018**

MASTERMIND TOBACCO (K) LTD..... APPELLANT

-VERSUS-

COMMISSIONER OF INVESTIGATIONS  
& ENFORCEMENT.....RESPONDENT

**JUDGMENT**

**A. INTRODUCTION**

1. The Appellant herein is a limited liability duly incorporated in Kenya whose principal activity is the manufacture of cigarettes and tobacco products for both local and export market.
2. The Respondent is a principal officer of the Kenya Revenue Authority (hereinafter KRA) a public body, duly established under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya whose preliminary mandate is the assessment and collection of revenue on behalf of the Government of Kenya.

**B. BACKGROUND**

3. On 26<sup>th</sup> November 2016 officers of the National Police Service on an operation recovered firm arms stolen from the Booker police station and impounded 419 cartons of supermatch cigarettes for export at a

suspect's residence. The Respondent was notified and took over the investigations on the Appellant's exports with the objective of establishing whether the cigarettes entered for export by the company were duly exported and not dumped in the local market.

4. A sample of the cigarettes recovered was taken and provided to the Appellant herein for conformation and authentication of the product. On 2<sup>nd</sup> December 2016, the Appellant forwarded a report to the Respondent's investigation team indicating that the sample provided did not match the quality standards and physical characteristics of the products by the Appellant.
5. On 10<sup>th</sup> January 2017 the Respondent issued the Appellant with a notice under Section 235 and 236 of the EACCMA requiring it to avail documents and information relating to their export consignments. The Respondent on 10<sup>th</sup> March 2017 issued the Appellant with a reminder to comply with its previous notice and avail the export documents. Following the Appellant's failure to comply with these notices the Respondent stopped further import entries being entered by the Appellant in June of 2017.
6. Vide letters dated 27<sup>th</sup> June 2017 and 3<sup>rd</sup> August 2017, the Appellant provided part of the documents requested, mainly copies of the endorsed entries, certificates of export and customer delivery notes. However, the Appellant failed to provide the certificates of discharge and landing, despite specific request for the same.

7. On 14<sup>th</sup> September 2017 the Respondent wrote to the Appellant expressing frustration with the Appellant's consistent failure to provide the documents requested and reminding the Appellant to provide the specific documents. In light of this, the Respondent assessed the Appellant's taxes for the consignment. The Appellant raised an objection to the same on 28<sup>th</sup> March 2018. The Respondent rendered an objection decision on 22<sup>nd</sup> May 2018. This led to the Appellant lodging the Appeal herein on 10<sup>th</sup> July 2018

### **C. APPEAL**

8. The Appellant's Appeal as elaborated in its Memorandum of Appeal dated 10<sup>th</sup> July 2018, is premised on the following grounds;
  - a. That the Respondent erred in fact and law by holding that the Appellant did not prove export of goods on the basis that the documents provided were not sufficient to prove exportation of the consignments in question.
  - b. That the Respondent erred in law and fact by holding that the documents provided by the Appellant were not the required proof of exportation.
  - c. That the Respondent erred in law and fact by requiring the Appellant to provide certificates of landing from the country of importation, transit entries through country of transit and proof of banking in the

country of exportation which are outside the jurisdiction, requirement and reach of the Appellant.

- d. That the Respondent erred in law and in fact by failing to appreciate the meaning of 'export' as defined under Section 2 of the East African Customs Management Act (EACCMMA), 2004.
- e. That the Respondent erred in law and in fact by failing to appreciate the meaning of Section 7(1) (b) of the Excise Duty Act, 2015 which exempts Excise duty from exported under customs control.
- f. That the Respondent erred in law and fact by failing to appreciate the meaning of Part A of the Second Schedule of the VAT Act 2013 that zero rates the exportation of goods.
- g. That the Respondent erred in law and fact by failing to consider the various court rulings and judgements in respect of proof of exportation by a taxpayer.
- h. That the Respondent erred in law and fact in failing to appreciate the meaning and importance of the Customs and Regulations in particular Regulation 145A of the Customs and Excise Regulations which provides the circumstances under which the exporter can be held liable for duty exported goods.
- i. That the Respondent erred in law and fact in failing to provide the Appellant with evidence of dumping in the domestic market in line

with Paragraph 8 of Regulation 145A of the Customs and Excise Regulations.

- j. That the Respondent erred in law and fact by imposing Excise Duty and VAT on exported goods.

#### **D. RESPONSE TO THE APPEAL**

9. The Respondent responded to the grounds of Appeal in a Statement of Facts dated 7<sup>th</sup> August 2018 as follows:-
  - a. In response to Ground 1 and 2 of Memorandum of Appeal that the Respondent erred in law and fact by arriving at the decision that Appellant did not provide sufficient evidence to prove export, the Respondent states that at all material times it was guided by the provisions of the applicable law.
  - b. The Respondent state that the decision was sound and was guided based on the following:
    - i. The Other Countries were not traced in the URA system. All of them however rotated in the Kenya Customs and Certificates of Export (CEO) issued for nine (9) of them.
    - ii. Examination of the banking records indicated that the export consignment in question were paid for mainly by cash deposits into the company's bank at both KCB and NIC, from different branches within Kenya and some in Tanzania.

- iii. Examination and analysis of the availed records revealed significant contradictions in documentation which render the same questionable, for instance export goods delivery notes indicate that in all cases goods were received at destination on the same date of dispatch.
  - iv. Confirmation obtained from Uganda Revenue Authority staff at Malaba border confirm that 15 consignments were not transited through Uganda and therefore do not have a record in their system.
  - v. Examination, authentication and crosschecking of the Uganda transit entries (TIO) availed together with the documents provided at the Appeal stage revealed that 13 documents did not in any way relate to the queried export consignments of cigarettes. Four of the Thirteen entries provided related to completely different consignments by different entities.
- c. In response to Ground 3,7 and 9 of the Memorandum of Appeal that the Respondent erred in Law and fact by requiring the Appellant to provide certificates of landing from the country of importation, transit entries and proof of banking in the country of exportation which are outside jurisdiction.
- d. That the Respondent states that Section 78 of the East Africa Community Customs Management Act 2004 give the proper officer power to request from the exporter of any bonded goods which

have been placed on a board vessel for exportation to any place to produce a certificate from the customs authorities at the port of discharge of the due discharge there at of the goods according to customs entry.

- e. Moreover, the jurisdictions have measures of recording for goods imported into, on transit through and records are available to the importer/exporter and should be therefore readily availed where requested. The Appellant declined to provide the critical documents that would have proven exportation hence discharging the burden of proving actual exportation.
- f. Sections 77 and 78 of the EACCMA provides that export goods shall after being put on board, be duly exported to and discharge at the place for which they are entered and shall not be discharged within the partner states. Pursuant to Section 78 (3) the Commissioner has powers to require the production of certificates of discharge and other documents to evidence exportation took place.
- g. In response to grounds 4, 5, 6, 8 and 10 the Respondent restates that at all material times it was aware of the applicable legal regime and operated within the premises of the applicable law.
- h. Further the Respondent states that under Section 2 of the EACCMA, export” means to take or cause to be taken out of the partner states”

from the literal interpretation of this there to be export good must physically cross the border.

- i. The delivery of goods outside of the partner state is a key ingredient of an export, this in the current case can only be demonstrated by showing proper rotation at the border, making transit entry on URA systems and having certificate of landing at discharge, only then can you say that exportation, the Appellant, despite the several reminders and the opportunity granted to avail the documents which would have clearly showed that the consignments in question were actually taken out of a partner state, refused to provide the certificate of landing and the customs entries in Uganda. It is therefore clear that without discharging that obligation there cannot be said to have been export.
- j. The Respondent therefore rightly brought to charge for both excise duty and Value Added Tax as computed under appendix II, the consignments which had not been demonstrated to have actually been exported.

## **E. ISSUES FOR DETERMINATION**

10. The Appeal herein raises the following issues for determination by the Honorable Tribunal, namely;

- a. Whether the Appellant proved that the goods in question were exported based on the documents provided*

*b. Whether the Respondent's action to demand certificates of landing, transit entries through the country of transit and proof of banking in the country of export is reasonable, just and fair*

## **F. ANALYSIS**

*a) Whether the Appellant proved that the goods in question were exported based on the documents provided*

11. The Appellant submitted that in a typical export sale, after the customer pays for the goods, the Appellant would load the goods in a vehicle that would deliver the consignment. Upon loading, the agent of the customer would sign for the delivery on behalf of the consignee that goods have been delivered unto the vehicle for export. Once the goods are loaded, the tax resident officer at the Appellant's premises would seal the truck at the factory and endorse the entry at the back with the truck details and customs seal number. The truck conveying the export stocks bears electronic cargo tracking systems (ECTS) gadget as prescribed by the Respondent, in order to track movement of the cargo.
12. It was the Appellant's further submission that once the customer pays for the goods, the Appellant's only obligation is to confirm that the goods exit the borders of Kenya, a duty which the Appellant has delegated to its agents Dejas Enterprise Limited. Once the goods exit the Kenyan borders the Appellant's customer would engage their own clearing agent to facilitate the clearance procedures with the other jurisdiction's revenue authorities.

13. The Appellant further submitted that this demand commenced with an inquiry into the Appellant's exports dated 10<sup>th</sup> January 2017, wherein the Respondent requested for several documents. By a letter dated 17<sup>th</sup> June 2017 the Appellant provided the Respondent the following documents for the consignment; export invoices, certificates of export, delivery noted and transporter and truck registration numbers.
14. The Appellant submitted that the above documents are all the documentary evidence required to proof export from Kenya. Despite providing the above document's the Respondent requested for certificates of landing and Uganda Revenue Authority transit entries (URA entries (T1s)). The Appellant maintains that this request was unnecessary as T1 forms from Uganda and the certificates of landing from Burundi. As such the main issue for determination is whether the certificates of export and rotated entries constitute proof of export.
15. The Appellant relied on the case of *Republic v Kenya Revenue Authority & Another ex parte Pwani Oil Products Limited (2016) eKLR* for the position that the Respondent in various cases before the superior courts rejected other documents and stated that only certificates of export were acceptable as proof of export. Further, the Appellant relied on *United Millers Limited v Commissioner of Customs Service (2018)* wherein the Tribunal upheld the process of export as evidenced as follows;

- a. An endorsed road manifest which is properly rotated by issuing an outward rotation number in the rotation register at the exit point. The rotation number is handwritten on the road manifest after the details have been entered in the rotation register.
  - b. A proper entry in the rotation register capturing the entry number, description of the goods, the exporter, the importer and means of transport.
  - c. Verification account endorsed by hand at the back of the road manifest or export entry and signed stamped by verification officer (VO) who carried out a physical check to confirm that the goods declared for export are actually received at the exist station.
  - d. An online message input by the Head Verification Officer (HVO) or the VO indicating that they have indeed received the goods and physically verified or sighted them
  - e. A certificate of export (COE) is generated online once the HVO or the station head is satisfied that the goods declared for export through the particular station have been existed or left the country. Information used to generate the COE is from the verification account or rotation register.
16. As such, given that the veracity of the COE is not in question, the Appellant submits that pursuant to Section 223 (d) of the East African Community Customs Management Act, 2004 (EACCMA) the production of the certificates of export by the Appellant is prima facie evidence that the goods were exported.

17. In response to the foregoing, the Respondent avers that proof of export is actually a customs process, where if the process is not completed, then officially the goods are considered to be still in the local country and the exporter may therefore be liable to pay VAT and any other applicable taxes. The Respondent undertook a reconciliation with the Ugandan Revenue Authority Asycuda system indicated that only 15 consignments were received and cleared through Uganda with no trace of the remaining 15 consignments.
18. In order to confirm that the consignment indeed transited through Uganda on its way to Burundi, the Appellant was requested to avail URA transit entries (TI's) that were used to transit the goods through Uganda, which it failed to provide. It was further imperative for the Appellant to provide a certificate of discharge from Burundi Customs Authorities to confirm that the export consignment duly arrived in Burundi. As such, in failing to provide these documents per the Commissioner's request, the Appellant failed to discharge the burden of proof that indeed the alleged consignment was exported.
19. The Respondent further submitted that the Respondent further examination, authentication and cross checking of the Ugandan transit entries availed at the Appeal stage revealed that the 13 documents were not related to the queried export consignment. 4 of the 13 entries provided related to completely different consignments by different entities. The remaining 9 could not be traced in the Ugandan Revenue Authority customs clearance, hence leading the confirmation of the assessment.

20. The Respondent also sought to dissuade the Tribunal from giving any credence to the authorities relied on by the Appellant. In response to the Appellant's reliance on *Republic v Kenya Revenue Authority & another ex parte Pwani Oil Products Limited, (2016) eKLR*, it is the Respondent's submission that the Appellant relied on arguments proffered by the revenue authority and not the ratio decidendi of the case. Further, the circumstance of the case did not involve goods transit where additional evidence was necessary to substantiate proof of export.
21. With regards to *TAT No. 151 of 2015, United Millers Ltd v Commissioner of Customs*, the Respondent submitted that the Appellant once again sought to rely on the argument proffered by the Commissioner. Counsel for the Respondent submitted that in this case the Tribunal made a determination on whether the taxpayer duly exported its products. At Paragraph 99 of the Judgment, the Tribunal noted that the Respondent's submission that "the processing of export entries by its officers at the document processing center does not evidence exportation as any export entry so processed can only be discharged by a report of exit which must be generated at the exit points once the goods are physically received and exported. The burden of proving that the goods physically exited by way of documentary evidence lay on the appellant which burden it has failed to demonstrate to the Tribunal. The Appellant did not duly export its products declared as exports.

22. We have carefully reviewed the parties' extensive evidence on record as well as their oral and written submissions. As both parties have aptly put it, the issue for our determination in this Appeal can be captured in the form of, 'what constitutes proof of export in customs administration?' In answering this question, we are called upon to determine in line with the evidence adduced before us, whether the Appellant indeed exported the 15 consignments in dispute to Burundi.
23. Accordingly, we shall begin with a recapitulation of the relevant law on the issue. Section 2 (1) of the East African Community Customs Management Act, 2004 (EACCMA) defines the term 'export' as to take or cause to be taken out of Partner State. Further, Section 2 (2) (d) states that for purposes of this Act, the time of exportation of goods shall be the time at which the carrying aircraft or vessel departs from its final position, anchorage or berth at the port or place within the boundaries of the Partner state at which the goods are shipped for exportation; in the case of goods exported overland, the time at which the goods pass across the boundaries of the Partner state.
24. For the purpose of this Appeal, the task is to determine whether goods in question actually crossed and or exited the borders of Kenya, into Uganda. To establish this, the Appellant relied on the certificates of export to allege that because it has a certificate of export, this can only mean that the goods in question as matter of fact crossed the Kenyan borders into Uganda. The Respondent refutes this assertion on the basis that the said certificates of export were not stamped at the border point. We have been referred to the certificates of export by the both parties

to this Appeal. Upon examination of these certificates we note that all the certificates adduced by the Appellant, we note that the said certificates bear the stamp of the Ugandan Revenue Authority and the Kenya Revenue Authority.

25. It was the Respondent submission that although its stamp is engraved on the certificates of export, the same was done in the Appellant's premises as opposed to the exit point. As such, the goods were not at all presented in the border or the exit point into Uganda for export. Further, we have examined the export delivery notes presented before us by the Appellant and note that in all of them the goods were received at destination on the same date of dispatch from Nairobi and before rotation at the Uganda Malaba Border. This makes it impractical for the goods dispatched to arrive in Burundi the same day, hence affirming the Respondent's assertion that the consignment in question in this Appeal was not exported.
26. The Appellant was required to provide proof of transit in Uganda and the documents availed were crosschecked with the Ugandan Revenue Authority for authentication. Vide a letter dated a letter dated 3<sup>rd</sup> May 2018 the Respondent wrote to the Ugandan Revenue Authority to confirming the authenticity of the entries and whether the goods were processed and transited to enable it confirm exportation of the same. The Ugandan Revenue Authority via email correspondence dated 16<sup>th</sup> May 2018 confirmed that five of the T1s arrived at destination through with different items. For the remaining eight there were no documents

in the system at all with the entry numbers. The evidence before us also indicates that the Respondent wrote to the Burundian Revenue Authority and received a response on 11<sup>th</sup> May 2018. The Burundian Revenue Authority confirmed to the Respondent that the search it carried out for the period of 2013 to 2017 shows that no cigarettes import originating from the Appellant had reached Burundi.

27. The foregoing evidence leaves no doubt in the Tribunal's mind that this Appellant has failed to sufficiently prove that it actually exported the consignment in question. The Tribunal is also not persuaded by the Appellant's assertion that once the trucks were stuffed, loaded and left its premises, the goods ceased to be in its power, possession or custody and became the responsibility of the customer. We note that exportation of goods is a process which requires the Appellant to adduce evidence of documents acquired and or presented at every stage of the process; from the country of origin, to the transit state and finally at the country of destination. Let alone providing evidence that the goods actually arrived in Burundi, this Appellant has not supplied us with a shred of evidence that the goods in question were ever presented at the exit point from Kenya into Uganda.
28. The Appellant sought to rely on the Respondent's stamp on the certificates of export as proof that the goods were presented at the border point. As we noted earlier, these certificates were stamped in the Appellant's premises; which we must state is not an exit point. In the premise, while the Respondent herein has not in his submissions claimed fraud, it is clear to us that the documents presented by the Appellant do

not in the slightest support its allegation that the consignment in question was exported. Accordingly, we are persuaded by the Respondent's argument that the Appellant herein has not exported the said consignment and the taxes demanded are proper in law.

***b) Whether the Respondent's action to demand certificates of landing, transit entries through the country of transit and proof of banking in the country of export is reasonable, just and fair.***

29. The Appellant submits the Respondent's decision to demand documents from the Appellant which the Appellant has no access to, was manifestly unreasonable. The Appellant's duty in confirming the goods were exported end at the Malaba border. The documents from the competent authorities in the other states are never provided to any exporter nor are they supposed to. The Respondent reviewed the documents provided in an unreasonable and strained manner with the object of imposing a colossal unsubstantiated assessment on the Appellant.

30. It was the Appellant's further submission that the T1 documents provided to the Respondent were from the customer's agent and not the Appellant. The Respondent was informed of this fact when the documents were submitted. With regards to goods reaching Burundi, the Appellant submitted that the Burundian authorities failed to recognize that the Appellant does not export cigarettes directly to Burundi. Once the Appellant completes the process of confirming the

goods have exited Kenya, the same are imported by the Appellant's customer. It was therefore unfair for the Respondent to ask for documents from foreign jurisdiction which the Appellant had no access to.

31. The Respondent submitted that it was well within its statutory mandate to demand for a certificate of discharge pursuant to Section 78 (3) of the EACCMA as read with regulation 36 of the East African Community Customs Management Regulations, 2010. Regulation 36 states as follows;

*“Where the authorities of any country require a certificate of landing, a proper officer may issue the certificate in form C11 or in any other form, to a person who satisfies the proper officer that he or she is entitled to the certificate.”*

32. The Respondent submitted that had the Appellant satisfied the proper officers in Burundi that they were entitled to a certificate of landing or discharge following arrival of their export consignment from Kenya, nothing would have been easier than for them to be issued with the same. As such, the Respondent's request to be supplied with these documents is sanctioned by Section 78 of the EACCMA, which applied to Kenya, Uganda, Rwanda, Tanzania and Burundi.
33. Further Regulation 104 (7) provides that goods in transit shall be produced to the proper officer at the approved port or place of

exportation, together with the copy of the transit entry. If the consignment was indeed presented for transit through Uganda, the Appellant ought to have been presented the same together with a transit entry. With regards to the Appellant's assertion that the documents sought by the Respondent were from foreign jurisdictions, the Respondent submitted that the EACCMA applies to all the East African Community countries which Uganda and Burundi are members of.

34. We have carefully and respectfully reviewed the contesting submissions by the parties under this issue for determination. We note in the first instance the Appellant herein is either deliberately being oblivious or genuinely does not understand that the export from one country to the other within the East African Community is governed by the East African Community Custom Management Act 2004. In any event, we note that Section 78 of the EACCMA empowers the Respondent to require the Appellant to produce a certificate of discharge. A taxpayer should not have any difficulty in producing the same if at all an export took place. Seeing as we have established above that the consignment was not exported, it is understandable why the Appellant herein is willing to cast aspersions to the legality and the fairness of the Respondent's request.
  
35. The Tribunal is of the considered view that the Respondent is empowered under the EACCMA regime to request for the production of all the documents used at every stage of the export process. It should not be difficult for the Appellant to avail these documents, if indeed export did take place, the documents must either be in the custody of

the Appellant's agents, its customers or they are traceable in the system of the Respondent and the Partners states.

36. In addition to the foregoing, we find that request of production of documents by the Respondent speaks greatly on the burden on the tax payer to prove that the Respondent's assessment was wrong by demonstrating proof of exportation through documentary evidence. Section 78, among other Sections of the EACCMA that empower the Respondent to seek production of documents manifestly constitute a valuable weapon in the Respondent's hands; a weapon appropriately used in the context of this Appeal. It is our finding therefore that the Respondent's request for the production of these documents was neither unreasonable, unfair nor a violation of the Appellant's rights under Article 47 of the Constitution of Kenya, 2010.

## **G. CONCLUSION**

37. In light of the foregoing analysis, the Appeal herein is dismissed as the same lacks merit. The Tribunal accordingly makes the following Orders;
- a. The Respondent's objection decision dated 22nd May 2018 is proper in law and in conformity with the provisions of the EACCMA, 2004, the Excise Duty Act 2015 and Value Added Tax Act 2013.
  - b. The Respondent's Objection Decision confirming the assessment and demand for taxes in the sum of Kshs. 517,755,155.00 is hereby upheld.
  - c. Each party to bear its own costs.

38. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of April, 2021.**

**MAHAT SOMANE  
CHAIRPERSON**

**WILFRED GICHUKI  
MEMBER**

**ROSE WAMBUI NAMU  
MEMBER**

**JOHN KINYUA WANGARI  
MEMBER**

**TIMOTHY CHESIRE  
MEMBER**