**Customs v Car & General (Kenya) Ltd**

**Division:** High Court of Kenya at Mombasa; Court of Appeal at Mombasa

**Date of judgment:** 12 October 1973

**Case Number:** 2/1973 (21/74); 57/1973 (34/74)

**Before:** Sir Dermot Sheridan J, Law Ag V-P, Mustafa and Musoke JJA

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*[1] Customs & Excise – Classification by Commissioner – General – Industrial goods – Classification*

*not shown to be wrong upheld – Customs Tariff Act* 1970 (*K.*)*.*

**JUDGMENT**

**Sir Dermot Sheridan J:** This is an appeal from the judgment of the resident magistrate Mombasa that three battery boosters, which were imported by the respondent in 1972, and which were classified under Chapter 85 of the First Schedule to The Customs, Tariff Act 1970, hereinafter referred to as “the Act”, as electrical goods came under the Tariff Heading of “A. Industrial” and so were exempt from import duty. The magistrate rejected the contention of the appellant that they came under the Heading of “C. Other” and so were subject to 30 per cent duty. S. 2 (1) of the Act defines “industrial” in relation to an article as meaning “that the article has been shown to the satisfaction of the Commissioner-General to be made for use solely or principally as industrial apparatus, plant, or machinery, or as a specialized part thereof”. S. 2 (3) (i) provides: “(3) The interpretation of the First Schedule shall be governed by the following principles– (i) where goods are classified in the schedule according to their use either by way of general description of their use or by reference to the use intended on importation or clearance through the Customs, such conditions of use shall not be taken to be fulfilled unless at the time of importation or clearance through the Customs, the intended direct use is proved to the satisfaction of the Commissioner-General;” In support of its claim that the articles were industrial the respondent called Mr. P. H. Rainsford, its branch manager, who produced a brochure describing the small portable charger battery booster as bringing “to the small garage and filling station facilities for a rapid charging service at attractively low cost”. He stated that only one out of 14 articles previously imported had not been sold to a commercial workshop garage. They are not commonly used in homes or car showrooms. He maintained that a garage was an industrial establishment. Mr. M. Smith, the Chief Controller of Customs and Excise, would not agree that a small garage could be described as industrial. As the word “industrial” is only defined in s. 2 (1) of the Act by the repetition of the word in the body of the definition he fell back on its dictionary meaning. He took it to mean the production and manufacture of goods, in this case electrical energy. The Memorandum of Appeal lists the following grounds: 3. T hat the resident magistrate erred in law and in fact in failing to apply the principles governing the interpretation of the First Schedule to the said Act and in particular principles governing electrical machinery and equipment and parts thereof as contained in Chapter 85 of the said Act. 4. T hat the resident magistrate erred in law in failing to consider and apply the proper interpretation to be given to the definitions of “domestic” as opposed to “industrial” articles as contained in s. 2 of the said Act. 5. T hat the resident magistrate erred in law and in fact in directing his attention to the meaning given to the word “industrial” as defined in Chambers Dictionary when the said word has been given distinct definition in the said Act. 6. T hat the resident magistrate erred in law in misconstruing the definition of the word “industrial” as appearing in s. 2 of dealing with interpretation of the terms used in the said Act. Mr. Ouma, for the appellant, does not quarrel with the passage in the judgment of the magistrate. “It would appear from the customs Tariff item No. 85–01 that the legislature intended to encourage ‘Industry’ and therefore exempted the articles in Tariff item 85–01 A” but he contends that as far as import duty is concerned “Industry” relates to manufacture and not necessarily to any industrial activity. He relies on the Schedule to The Local Industries (Refund of Customs Duties) Act (Cap. 481) which refers exclusively to the local manufacture of specified articles. It is not disputed that the battery boosters were not connected with the manufacture of goods. Mr. Ouma further complains about the magistrate’s emphasis on the inherent character of the goods which remains no matter to what use they are put. This he submits is a misdirection in view of s. 2 (3) (i) of the Act under which the Commissioner-General has to be satisfied of the intended use to which the goods may be put. He cannot merely look at their inherent character. Mr. Inamdar, for the respondent, objects to the introduction of the contrast between industrial and domestic articles by the Commissioner-General in the correspondence but s. 2 (1) of the Act itself defines “domestic” in relation to an article as meaning suitable for use in a house, an hotel, a restaurant or a retail or similar establishment and under Part B of the Third Schedule to the Act exemption in regard to such items as kerosene depends on the use to which they are to be put, in that case solely for use in aircraft engines. Under item 13 sewing machines are exempted from duty if they are for installation in a factory approved by the Commissioner-General. A filling station would be a retail establishment and not an industrial complex. It was for the respondent to prove that the Commissioner-General was wrong when he stated that he was satisfied that the use of a battery booster in a garage would not be “for use solely or principally as industrial apparatus, plant or machinery”. Quite apart from the question of encouraging local industry, I think it is largely a question of degree. Even if a car, or cars, were sometimes repaired in *small* garages I doubt whether the use of battery boosters in them could be said to be in an industrial complex. Mr. Inamdar submits that the word “industrial” must be given its ordinary literal grammatical meaning. If it was to be limited to “a manufacturing plant” those words should have been inserted in the definition. The word “industrial” must have a wider content and due to the defective definition in the Act it was permissible to adopt a dictionary meaning such as that given in Chambers Twentieth Century Dictionary as covering “systematic economic activity, or any branch thereof; a trade or manufacture”. The battery boosters were intended for use in a place in which trade or productive labour was engaged. I repeat my doubts as to whether trade takes place in a small garage. Mr. Inamdar objects that the 1970 Act and Cap. 481 are not in pari materia as one refers to the imposition of duty and the other to the refund of duty. I think that the two Acts are part of the legislative structure regarding the imposition of and exemptions from import duties. The magistrate referred to the Government policy of encouraging local industries. This is done by the refund of duties as provided for by Cap. 481 and it should have been brought to the attention of the magistrate. The Commissioner-General has a wide discretion in these matters as is shown by the Third Schedule to the Act. It cannot have been the intention of the legislature to exempt from duty those articles which are designed for ordinary domestic or commercial use. I do not think that the respondent discharged the onus of proving that the Commissioner-General came to a wrong decision when he stated that he was satisfied that they were not an industrial item under Chapter 85–01A of the First Schedule. Before leaving this appeal I would remark that the concession by Mr. Smith that he consulted the dictionary meaning of the word “industrial” should not have bound the magistrate in trying to arrive at a right decision on the facts by reference to the interpretation of the relevant provisions of the Act; and the fact that the Commissioner-General may have made an erroneous exemption relating to the previous importation of similar articles cannot create an estoppel against him: *Tarmal Industries Ltd. v. Customs*, [1968] E.A. 471. He must not of course act capriciously but there is nothing to show that he has not acted otherwise than judicially and reasonably in the circumstances of this case: *Income Tax v. Noorani*, [1969] E.A. 685 per Sir Charles Newbold, P. at p. 688. I allow the appeal with costs here in the court below.

*Order accordingly.*

For the appellant:

*LP Ouma* (Assistant Counsel)

For the respondent:

*IT Inamdar* (instructed by *Bryson, Inamdar & Bowyer*, Mombasa)

**Editor’s**