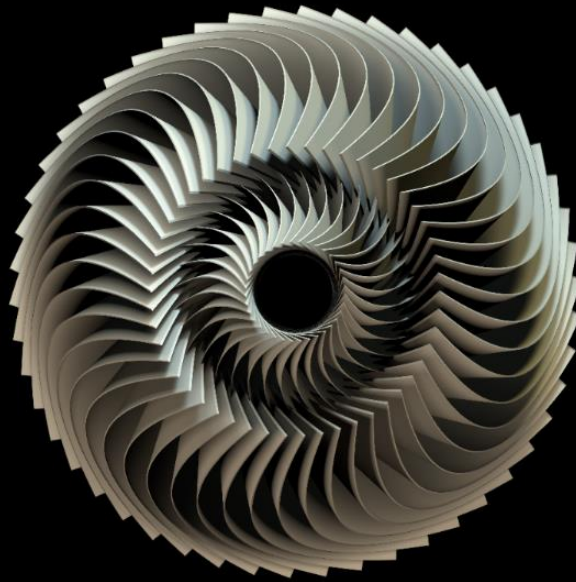


Tax & Legal Alert
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Tax Alert

The High Court rules on proof of exported goods and validity period of security bonds

The High Court of Kenya (“HC”) has, in a case between an exporter (“Appellant”) and the Commissioner of Investigations and Enforcement (“Respondent”), held that the burden of proof that goods have been exported lies with the exporter. In addition, the HC held that a certificate of export is not sufficient evidence that goods have been exported. Exporters may be required under Section 78(3) the East African Community Customs Management Act (“EACCMA”) to furnish the Commissioner with sufficient evidence including a certificate of landing. The owner as defined under Section 2 of the EACCMA is liable for import duties under the law and transfer of ownership of goods for customs purposes should be done in accordance with the law.

Further, the HC ruled that the Commissioner has the discretion to discharge a security bond beyond a period of 3 years to the extent that the conditions of the security bond have not been fulfilled. A security bond may therefore remain in force beyond 3 years if the conditions of the bond are not met. In addition, the HC ruled that the guarantor of a security bond is bound to the Commissioner for the due performance of the conditions of the bond and the Commissioner may demand for payment of taxes covered under the bond if the conditions are not met by the person under the bond.

In this alert, we discuss the salient arguments advanced by the Appellant and the Respondent and our view on the Judgement.

Background

The Respondent carried out investigations on various transit consignments entered by the Appellant destined for South Sudan through Uganda.

In its findings, the Respondent alleged that there was no evidence that the consignments had exited Kenya. In this regard, the Respondent deemed the goods to have been used in Kenya and demanded for additional import duties.

The Respondent noted, through a letter addressed to the Appellant, that since the goods had been sold to another company based in Kenya (the “Buyer”) the tax assessment should have been directed to the Buyer. Further, if the Buyer failed to respond to the tax assessment, the Appellant would be responsible for the taxes as the guarantor under the security bond pursuant to Section 109 of the EACCMA.

Following an application for review of the demand by the Appellant, the Respondent issued a review decision confirming the demand.

Aggrieved by the review decision, the Appellant filed an appeal before the TAT challenging the decision. The TAT ruled in favor of the Respondent, a decision that resulted in the appeal at the HC.

Appellant’s Case

The Appellant advanced the following arguments in support of its case:

- The consignment in question was sold to the Buyer and the title of ownership transferred vide a sale agreement and C17 forms while still under customs control. The Buyer, as the owner of the consignment was therefore liable for the additional taxes demanded by the Respondent.
- The Appellant had provided the Respondent with all documents reasonably required as proof that the consignment had been exported out of Kenya including the Certificate of Export (“COE”).
- The responsibility of an exporter with respect to goods in transit ends when a COE is issued by the Respondent. Therefore, the responsibility of the Appellant did not extend beyond providing documents issued by other Customs authorities including a certificate of landing issued by the destination country.
- A security bond is valid for a maximum period of three years pursuant to Section 107(3) of the EACCMA. Therefore, the Appellant’s bond having been executed on 20/5/2015 had lapsed on 19/5/2018.





Respondent's Case

The Respondent advanced the following arguments in rebuttal:

- The title of ownership of the consignment did not transfer to the Buyer. Even if it did, the transfer was not done in accordance with Section 51(1)(c) of the EACCCMA and Paragraph 71 of the East African Community Customs Management Regulations ("EACCMR"). Therefore, the Appellant was still the legal owner of the consignment and therefore liable to pay the additional import taxes.
- The consignment was not exported since the Appellant did not provide sufficient evidence to prove that the goods had indeed exited the Kenyan border. The COE availed by the Appellant only proved that the goods were cleared through Customs in Kenya. The Appellant ought to have provided additional proof to show that the consignment had actually been entered into the transiting country.
- The Appellant, as the guarantor under the security bond, guaranteed to pay import taxes should the conditions of the bond not be met pursuant to Section 106 of the EACCCMA. The Respondent averred that whether the consignment was sold or not, the guarantor was obligated to ensure that the consignment exited Kenya. The Respondent also noted that the Commissioner had a discretion to discharge the bond beyond 3 years since Section 107(3) of the EACCCMA is not couched in mandatory terms.
- The Respondent further argued that the Judgment by TAT was correct as the Uganda Revenue Authority (URA) had confirmed that the consignment was never sighted in Uganda where the goods were meant to transit.

The High Court's Determination

The High Court, in its analysis, determined the issues in dispute as follows:

- The HC held that the ownership of goods cannot be transferred from one party to another without the Commissioner's involvement and approval. The HC relied on Section 51(1) (c) of the EACCCMA which states that *'Where any goods are warehoused, the Commissioner may, subject to such conditions as he or she may impose, permit the name of the owner of such goods in the account taken under section 47 to be changed if application is made on the prescribed form and signed by both the owner and the intended owner.'*
- Further, change of ownership is only granted if the application is made on the prescribed form C16, duly filled, and signed by the owner and the intended owner in accordance with Regulation 71 of EACCMR. The sale agreement between the Appellant and the Buyer did not suffice as proof of change of ownership for customs purposes as it was not anchored in law.

In determining whether the consignment had exited the Kenyan border, the HC held that the Commissioner was empowered under Section 78 (3) of the EACCMA to request the Appellant to provide documents such as clearance certificates from the transiting and importing countries, and a certificate of landing to ascertain that the goods had actually been exported.

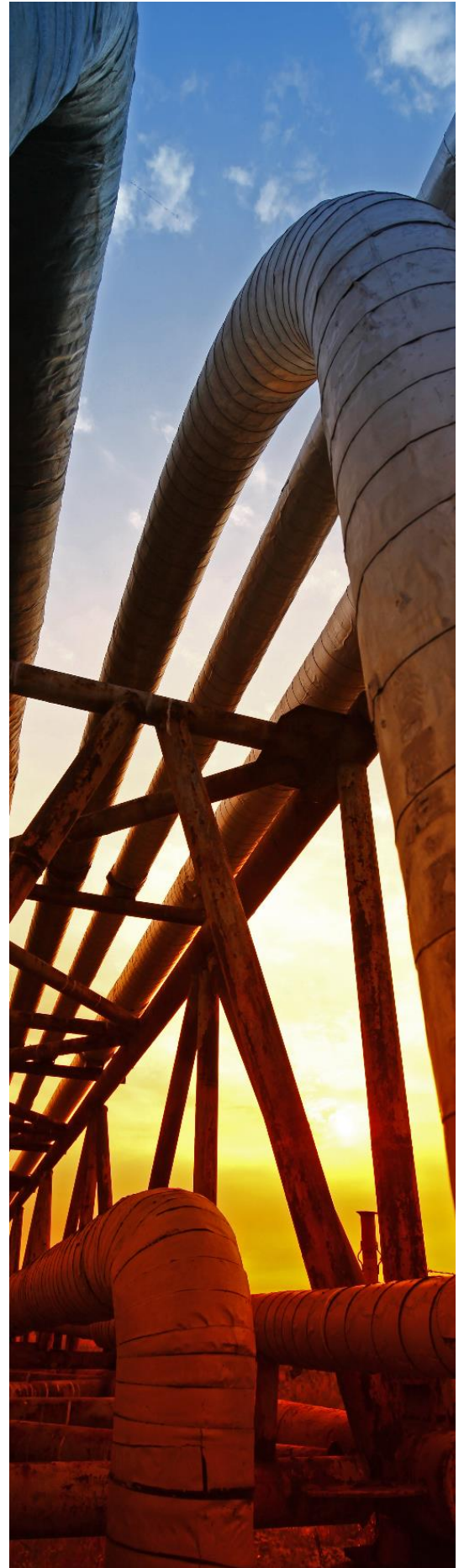
The HC, in holding that the burden of proof for export lies with the exporter, relied on *Republic v Kenya Revenue Authority Ex Parte United Millers Limited* NRB HC JR No. 323 of 2013 [2015] eKLR, wherein it was held that United Millers Limited ought to have demonstrated to the Revenue Authority that the goods had left Kenya by production of valid documents.

The Commissioner obtained confirmation from the Kenya National Highways Authority (KeNHA) Busia weigh bridge that the trucks carrying the consignment did not pass through the weigh bridge into Uganda. Further, URA confirmed that the consignment was not declared on its ASYCUDA system. To this end, the HC found that the consignment did not exit the Kenyan border.

With respect to the validity of the security bond executed by the Appellant, the HC argued that Section 107(3) of the EACCMA provides that the surety is bound to the Commissioner for the due performance of the conditions of a bond. The Commissioner may discharge the bond after three years, though the same is discretionary on the due performance of the conditions of the bond.

The security bond executed by the Appellant required the goods to be exported and satisfactory proof of export to be provided within the allowed period as a condition for discharging of the bond. The bond would remain in force in the event of non-fulfilment of this condition.

The HC therefore found that having failed to fulfil the conditions of the bond, the question of discharge of bond upon expiry of three years could not arise. Further, the bond would continue to remain in force until the conditions for discharge are met. In any case, the dispute arose before the expiry of three years, thus the bond was still in force.





Our View and Conclusion

The HC's judgement reaffirms the position that the burden of proof that goods have been exported lies with the owner of the goods, in this case, exporter of record. To this end, where the title of ownership, based on the contractual terms between an exporter and the customer, is transferred in Kenya when the goods are still under customs control, the exporter is still responsible for ensuring the goods are exported. The ownership of goods for customs purposes must be done in accordance with Section 51(1) of the EACCMA and Regulation 71 of the EACCMR. We however note that Section 51(1) of the EACCMA specifically relates to transfer of ownership with respect to warehoused goods. In our view, this provision cannot be applied with respect to goods entered for transit. In fact, in practice, the ownership of goods entered under the transit regime is not transferable for customs purposes. The details of owner/exporter of record in this case, can only be amended through cancellation of the entry and lodging of an alternative entry with the correct exporter details.

The HC has also ruled that a COE is not sufficient evidence that goods have been exported. The Commissioner may require the exporter to provide any other documents as proof of export including documents issued by the destination country such as a certificate of landing.

We however note that in practice most Customs authorities do not ordinarily issue certificates of landing in the course of clearing goods. Therefore, exporters seeking a certificate of landing from the Customs authorities must request for the certificates on a consignment by consignment basis. This is likely to pose administrative challenges to exporters considering that the request is made to Customs authorities in a foreign country. In addition, there is a risk that Customs officers in those countries may be reluctant to issue the certificate of landing particularly if such certificates are not ordinarily issued in the country.

COEs are designed to be issued by Customs upon satisfaction that goods have been exported out of Kenya in accordance with the law. In fact, KRA requires that copies of transit entries entered in the transit country (T1) are provided as a requirement for issuance of COEs. Strictly speaking therefore, a valid COE should suffice, in our view, as proof that goods have been exported.

In practice, most exporters rely on COEs, KRA stamped export entries/exit notes and road manifests endorsed with rotation numbers as proof of export.



Our View and Conclusion...

In light of the aforementioned, it would be prudent where possible, for exporters to obtain and maintain copies of documents from the importing countries to demonstrate that the exported goods were landed into those countries to mitigate against potential tax demand by Customs.

The determination by the HC that the validity of security bonds may extend beyond 3 years where the conditions of the bond have not been earlier discharged will provide much needed clarity to importers/exporters and guarantors.

In light of the HC ruling, it will be important for importers/exporters who have executed security bonds to ensure the conditions of the bond are fulfilled and the bonds cancelled in a timely manner to safeguard against potential tax demands.

In addition, guarantors such as banks and insurance companies should put in place measures to ensure that importers/exporters who have executed Customs security bonds fulfill the conditions therein and the companies obtain the original bond document and a bond cancellation letter issued by KRA which confirms clearance from Customs.

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