

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAX APPEAL NO. 65 OF 2017

PLATINUM PACKAGING LTD.....APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS &
BORDER CONTROL.....RESPONDENT

JUDGMENT

A. INTRODUCTION

1. The Appellant herein is a limited liability company incorporated in Kenya with the principal business of manufacturing flexible packaging and a regular importer of various raw materials in line with its business.
2. The Respondent is a principal officer of the Kenya Revenue Authority, which is established under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5 (1) of the Act the Respondent is an agency of the Government for the collection and receipt of all revenue. Further under Section 5 (2) of the Act with respect to the performance of its functions under sub-section (1) the Respondent is mandated to administer and enforce all provisions of assessing, collecting and accounting for all revenue in accordance with those laws.

B. BACKGROUND

3. The Appellant imported 20 pallets OC16155 prepared wax in bags of 20kgs under entry under 2017MSA 6312650 and B/L No. 958706390. On the 19th

of January 2017 the Respondent wrote to the Appellant through its agents demanding a further additional tax of Kshs. 1,465,576.00.

4. Due to the nature of goods declared in the said Form C17B and the fact that import duty had not been declared on the said goods, the Respondent requested for the goods' Technical Material Safety Data Sheet (TMSDS) prior to commencing the verification process.
5. The Respondent's officers involved in the verification took images of the goods imported which indicated the goods being described as Termoflex P 2415 on every bag and the only paper indicating packaging wax was a paper on top of the cargo.
6. As part of its due diligence the Respondent searched the term termoflex and found the same is a hot melt used as heat sealable materials to get unions from weak to strong bindings at very diverse temperatures.
7. The Respondent consulted the HS Code Tariff classification system to confirm whether the Appellant's classification is correct. The Respondent found that based on the components of the goods it was HS Code 3506.99 and not HS Code 34004.90 as alleged by the Appellant.
8. The Appellant took initiative and conducted independent lab tests and the results confirmed that the material was prepared wax as maintained by the Appellant.
9. The Appellant objected to the Respondent's classification through a letter dated 23rd January 2017, protesting that the correct classification was

heading 3404 of the HS Code. However, the Respondent maintained its classification of the product.

10. Due to the losses that were accruing as a result of the shipment being held at the Port for more than 2 months and attracting storage charges, the Appellant provided a bank guarantee of Kshs. 1,499,068.50 under protest as per the provisions of Section 229 (6) of the East African Community Customs Management Act, 2004.
11. The consignment was released following the provision of the bank guarantee dated 15th March 2017. Subsequent to the provision this guarantee the Respondent sought to liquidate the guarantee amount as evidenced by the letter dated 29th March 2017, hence necessitating this Appeal.

C. APPEAL

12. The substratum of the Appellant's claim is contained in the Memorandum of Appeal dated 5th July 2017 as follows;
 - a. That the Respondent has erred in both law and fact in finding that the Appellant had a duty to pay additional taxes.
 - b. That the Respondent erred in classifying prepared wax HS code 3404.90 as HS Code 3506.91.00
 - c. That the additional taxes by the Respondent are excessive, punitive and not as per the provisions of the East African Community Common External tariff.
 - d. That the Respondent violated the legitimate expectation relayed to the Appellant over the seven years the Appellant has been importing the same product at the same tariff.
 - e. That the Respondent breached the Appellant's fundamental rights of fair administrative administration action under article 47 (1) of the

Constitution by shifting grounds and approaches in raising additional assessment.

13. It is line with the foregoing grounds of Appeal that the Appellant makes the following prayers;
 - a. The additional assessment dated 19th January 2017 be set aside.
 - b. The Bank guarantee dated 15th March 2017 for the sum of Kshs. 1,499,068.50 be liquidated in favor of the Appellant.
 - c. That the Appellant be refunded by the Respondent the warehouse demurrage charge the Appellant incurred.
 - d. The Appellant's consignment 20 pallets OC16155 prepared wax in bags of 20kgs be deemed as goods under tariff HS Code 3404.90.00.
 - e. The costs of this cause be awarded to the Appellant.
 - f. The Appellant continue to use HS Code 3404.90.00 for future prepared wax consignment.

14. The Respondent on it part alleges as follows;
 - a. The Respondent avers that the correct classification of the goods the subject of the dispute herein is HS code 3506.99.00. The Respondent in arriving at this classification considered the technical material safety data sheet provided by the Appellant which indicated, inter alia, the composition/ingredients of the said goods, the physical verification findings carried out by the Appellant's verification officers, online research of the description of the term termoflex which was the description of the goods attached to all the individual bags carrying the goods but suspiciously missing on all importation documents.
 - b. The Respondent avers that it also relied on its lab analysis of a sample of the said goods taken in the presence of the Appellant's

agent and carried out at the Respondent's headquarters which analysis was duly requested by the Appellant themselves. Also the tariff unit analysis of the sample goods taken in the presence of the Appellant's agent, which tariff analysis and ruling was duly requested by the Appellant's themselves.

- c. The Respondent avers that its classification of the aforesaid material is consistent to all the evidence provided above and the aforesaid material cannot possibly be classified as stated by the Appellant i.e. under HS Code 3404.90.00.
- d. That the Honorable Tribunal will note from the Inspection and verification report that the inspection, verification and relay of the respective reports by the Respondent was at all times expedited in the spirit of trust and facilitation to the Appellant to ensure that the Appellant did not suffer delays caused by the Respondent.
- e. In response to the allegation that the Appellant had always imported the said material under HS code 3404.90.00, the Respondent avers that the it is investigating of the said allegation and shall take appropriate action once complete.
- f. The Respondent called for the money held by the bank guarantee vide its letter dated 29th March 2017 because the tariff ruling and the laboratory analysis supported its earlier verification report by stating that the correct HS Code applicable is 3506.99.00.
- g. That the Tribunal will note from its letter dated 7th February 2017 the Appellant had agreed to pay under protest pending verdict of its request from the Respondent.
- h. It is therefore clear from the Appellant's conduct that not only was the payment necessary to facilitate release of the consignment but also pending the verdict of the tariff ruling. The Respondent was

therefore under no duty to advise the Appellant of the lab analysis and the tariff ruling outcome on 3rd February 2017.

- i. The verdict having supported the Respondent's earlier report, the Appellant has now refused to abide by it. Once the verdict was out, only two decisions ought to have been made, either release of the bank guarantee to the Appellant if the verdict was in favor of the Appellant or calling for the money in the bank guarantee should it be in favor of the Respondent, as is the case herein.
- j. Contrary to the Appellant's averment that the Respondent never communicated to the Appellant of the adjudication from the Respondent's department on the differing HS Code and issues therein, it is clear from letters annexed hereto that the Respondent not only advised the Appellant on the outcome of both the lab analysis and tariff ruling through letters and the Simba system but also the Appellant acknowledged receipt of the same.
- k. The Respondent further avers that in determining tariff classification of goods, it is only guided by Kenyan Laws, the East African Community Common External Tariff and its explanatory notes and guidance from the World Customs Organization. The Respondent is not bound by the Appellant's exporter's lab analysis and findings.

15. Accordingly, the Respondent prays that the Tribunal finds as follows;

- a. The HS Code applicable to the goods in dispute herein is HS Code 3506.99.00.
- b. The Respondent was correct in calling for the Liquidation of the bank guarantee herein.
- c. The bank guarantee dated 15th March 2017 for Kshs. 1,499,068.99 be liquidated in favor of the Respondent.
- d. The Respondent be granted costs of the Appeal herein.

D. ISSUES FOR DEETERMINATION

16. The Appeal before us raises a single issue which this Tribunal must determine, namely;

a. Whether the Respondent erred in the Classification of the raw materials imported by the Appellant under the HS CODE?

E. ANALYSIS

17. The Appeal before us is rather simple and straightforward as it involves merely reading the HS Code and identifying the correct code for purposes of taxation. This is buttressed by the Respondent's witness, Mr. Bernard Oyicho, a chemist by profession who confirmed the product imported by the Appellant contained waxes, prepared waxes and polymers all the same. For some reasons, this has proven difficult among the parties hence this Appeal before the Tribunal. Appellant herein contends that the Respondent erred both in law and fact in assessing additional taxes against it as the same is based on the usage of the wrong HS Code in arriving at the taxes allegedly due from it.

18. The Appellant further contends that it had previously imported the same product and had it declared under HS Code 3404.90.00, covering prepared wax which attracts a duty at 0%. The Respondent had been approving of this declarations by the Appellant for the seven (7) years the Appellant had been importing the same product. As such the current action by the Respondent to have the goods re-classified under HS Code 3506.91.00 amounts to an erosion of its legitimate expectation and the unfair administrative action.

19. The Respondent on its part avers that following a due diligence investigation and the verification exercise by its officers revealed that the goods imported by the Appellant herein were described as “Termoflex P 2415” on every bag and the only paper indicating packaging wax is a paper pasted on top of the cargo. Further, that the Respondent did a research on the term Termoflex and found that there is a hot melt used as heat sealed materials to get unions from weak to strong bindings at very diverse temperatures. Accordingly, the correct HS Code applicable to these goods is under Heading 3506 as the declared HS code 3404.90.00 and the goods description are at variance with the laboratory findings.
20. In light of this rival assertions by the parties, it is necessary to reproduce the HS Code relied on by each party. The Appellant has relied on HS Code 3404.90.00 of the East African Community, Common External Tariff 2017 Version, under the heading of artificial waxes and prepared waxes which attracts tax at the rate of 0%. This heading falls under Chapter 35 of the Code and note 5 of therein states as follows;
- “5. in heading 34.04, subject to the exclusions provided below, the expression "artificial waxes and prepared waxes" applies only to:*
- a. Chemically produced organic products of a waxy character, whether or not water-soluble;*
 - b. Products obtained by mixing different waxes;*
 - c. Products of a waxy character with a basis of one or more waxes and containing fats, resins, mineral substances or other materials”*
21. On the other hand, the Respondent has relied on HS Code 3506.91.00 i.e. “adhesives based on polymers of heading 39.01 to 39.13 or on rubber”.

This falls under the heading 35.06: “prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg.”

22. In our view, the since the Respondent’s witness did confirm and agree with the Appellant that the product imported by the Appellant contains waxes, prepared waxes and adhesive alike, therefore it will be futile to belabor the issue of composition of the product so imported. Rather, we will be guided by the description and notes under the Common External tariff identify the proper classification under the code.
23. To begin with, two things stand out from the heading of the HS Code 35.06 as used by the Respondent. First, it refers to “...prepared glues and other prepared adhesives, not elsewhere specified or included”. Secondly, the phrase “not exceeding a net weight of 1kg”. If nothing else, these two phrases alone, in our view indicate why the Respondent’s classification cannot be the correct. The Appellant herein imported 20 pallets of OC16155 prepared wax under in bags of 20 kgs. This means that Appellant is entirely removed from the scope of Hs Code 3506.91.00. Additionally, and perhaps more importantly, there is a specific provision in the HS Code that deals with the description of the product imported by the Appellant, being HS Code 3404.90.00.
24. In our assessment, the classification of products imported by tax payers should be guided by the description in the HS Code as opposed to the composition of the products. In this case there is no doubt in our minds that the Appellant used the appropriate Code in its declarations.

Our position is further buttressed by the Appellant's submission that if indeed there was misdeclaration of its products, then the Respondent would have flagged out the same during the various post clearance audits.

25. Now, having classified the product appropriately, we must turn our attention to the issue of the bank guarantee. The Appellant herein on 15th March 2017 provided a bank guarantee of Kshs. 1,499,068.00 pursuant to the provisions of Section 229 (6) of the East African Community Customs Management Act, 2004. The Respondent via a letter dated 29th March 2017 was demanding the Appellant's bankers to pay the guarantee amount to it.
26. In this regard, we are in agreement with and are persuaded by the Appellant's submission that the Respondent's decision to liquidate the said amount when the same was not due at any time whatsoever is utterly misconceived, irrational and unreasonable; is grounded on a thorough misconception of the law and based on an erroneous understanding of the facts. Accordingly. The tribunal finds having established that the basis of the said guarantee was illegal assessment of taxes allegedly due from the Appellant. It is only in keeping with the finding that the amounts provided by the Appellant as guarantee under Section 229 (6) of the EACCMAA should be liquidated in favor of the Appellant.

F. ANALYSIS

27. In light of the foregoing findings, the Tribunal makes the following orders;
 - a. The Appeal herein is merited.
 - b. The correct HS Code for the prepared wax imported by the Appellant is 3404.90.00.

- c. The bank Guarantee provided by the Appellant on 15th March 2015 for a sum of Kshs. 1,499,068.00 be liquidated in favor of the Appellant.
- d. Each party to bear its own costs.

It is so ordered.

DATED and DELIVERED at NAIROBI on this 4th day of September, 2020.

**MAHAT SOMANE
CHAIRPERSON**

**PATRICIA MAGIRI
MEMBER**

**TIMOTHY CHESIRE
MEMBER**

**WAMBUI NAMU
MEMBER**