REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
TAX APPEAL NO. 525 OF 2020

CAMUSAT KENYA LIMITED.................................................. APPELLANT

VERSUS

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

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company duly incorporated and registered in Kenya under the Companies Act. Its principal activity is designing building, managing, and powering telecommunication infrastructure.

2. The Respondent is a Principal officer of the Kenya Revenue Authority, an agency of the Government established under the Kenya Revenue Authority Act 1995 for the collection of revenue and related purposes.

3. The Respondent analysed the Appellant’s goods imported from Wanlong Cable Company Limited of China vide entry Number 2020ICD230213. The consignment was targeted for verification because there was another entry number 2010ICD201827 of goods imported by the Appellant for which the Appellant had declared a different value. Following the verification, a valuation ruling was issued which as a result an amount of
Kshs 1,702,286.00 was assessed on the Appellant. The amount was dismantled as follows:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Amount (Kshs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Import Duty</td>
<td>986,941.00</td>
</tr>
<tr>
<td>VAT</td>
<td>531,328.00</td>
</tr>
<tr>
<td>IDF</td>
<td>98,394.00</td>
</tr>
<tr>
<td>RDL</td>
<td>56,225.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,703,286.00</strong></td>
</tr>
</tbody>
</table>

4. The Appellant objected against the value uplift vide its letter dated 9th October 2020. The Respondent vide a letter dated 30th October 2020 confirmed the values it had assigned the Appellant’s goods.

5. Aggrieved by the Respondent’s action, the Appellant filed a Notice of Appeal on 10th November 2020 against the decision of the Commissioner. The Appeal documents were filed on 11th November 2020.

THE APPEAL

6. Based on the Memorandum of Appeal, the Appellant premised its Appeal on the following grounds.
   
   a. That the assessment on the Appellant is ambiguous and excessive.
b. That the Respondent issued the assessment in breach of Section 122 read together with the Fourth Schedule of the East African Community Customs Management Act, (EACCMA) 2004.

c. The Respondent is in breach of the Appellant's right to fair administrative action.

d. That Appellant stands to suffer irreparable economic harm unless the relief herein is granted.

e. That it is in the interests of justice to grant the reliefs sought herein.

The Appellant's Case

7. The Appellant's case was premised on its statement of facts dated and filed on and the affidavit of its agent Mr. Samuel Mwaura of Grant Thornton Taxation Services Limited.

8. The Appellant averred that there were two key issues for determination before this Honourable Tribunal:

   i. *Whether the Appellant fulfilled the conditions for use of transaction value method of customs valuation.*

   ii. *Whether the Respondent was justified in applying the value of identical goods method of customs valuation.*
i. **Whether the Appellant fulfilled the conditions for use of transaction value method of customs valuation**

9. It was the Appellant's submission that Section 122 (1) and the Fourth Schedule of the East Africa Community Customs Management Act, 2004 (EACCMA 2004) read together with the East African Community Customs Valuation Manual provides for determination of value of imported goods liable to ad valorem duty. Paragraph 2 of the Fourth Schedule to the EACCMA, 2004 provides for determination of customs value of goods and sets out six methods as follows:

   i. The transaction value method.

   ii. The transaction value of identical goods.

   iii. The transaction value of similar goods.

   iv. The deductive value method.

   v. The computed value method; and

   vi. The fall-back method.

10. According to the Appellant, the Interpretive Notes under Part II of the Fourth Schedule to the EACCMA, provide for application of the valuation methods as follows:

    *Where the customs value cannot be determined under the provisions of paragraph 2, it is to be determined by proceeding sequentially through the succeeding paragraphs to the first such paragraph under which the customs value can be determined. Except as provided in*
Paragraph 5, it is only when the customs value cannot be determined under the provisions of a particular paragraph that the provisions of the next paragraph in the sequence can be used.”

11. From the foregoing, it was the Appellant's submission that the transaction value method is the first method to be applied before any other method is considered.

Application of the Transaction Value Method

12. The Appellant submitted that it purchased the coaxial cables from Wanlong Cable Company Limited. Payment for the consignment to Wanlong Cable Company was made by Camusat Romania, the Camusat Group Central purchasing entity.

13. It argued that on 29th July 2021, Wanlong Cable issued a Commercial Invoice No.20W0609-1 for the amount of USD 60,092.93. Payment for the same was made through three swift instalments of USD 30,096.46, USD 20,000.00, and USD 10,096.46 by Camusat Romania as per the invoice terms. It stated that the Respondent assessed total duties and taxes amounting to Kshs 4,232,386.00 which was paid through RTGS on 17th September 2020.
14. The Appellant submitted that the conditions for application of the transaction value method are set out in Paragraph 2 of the Fourth Schedule to the EACCMA read together with the EAC Customs Valuation Manual as follows:

"The Customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State adjusted in accordance with the provisions of Paragraph 9, but where—

a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

i. are imposed or required by law or by the public authorities in the Partner State.

ii. limit the geographical area in which the goods may be resold; or (iii) do not substantially affect the value of the goods.

b) the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued.

c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Paragraph 9; and
d) the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of subparagraph (2)"

15. According to the Appellant, it is not in contention that the goods in question were imported free of any encumbrances as contemplated in Paragraph 2 of the Fourth Schedule to the EACCMA. The Appellant avers that on this account the transaction falls squarely within the ambit of the transaction value method.

16. The Appellant further submitted that in addition to fulfilling all the conditions set out by Paragraph 2 of the Fourth Schedule to the EACCMA, the Appellant availed all the required documents to fulfil a condition of sale. Despite having availed the necessary information and fulfilled all conditions for application of the transaction value method, the Respondent unilaterally imposed an uplift amount the basis of which was not communicated to the Appellant.

17. The Appellant contended that it is trite law that the primary method for determination of customs value is the transaction value method. It is only upon failure of the transaction value method that other methods can be applied sequentially. It averred that in the absence of justifiable reasons, the transaction value must be used to determine the customs value of goods.
Whether the Respondent was justified in applying the value of identical goods method of customs valuation

18. The Appellant submitted that upon rejection of the transaction value method, the Respondent applied the transaction value of identical goods. The Respondent maintained that the basis of the duty uplift is the fact that the Appellant imported identical goods with a higher customs value from a different producer.

19. It was the Appellant’s submission that the Respondent’s Statement of Facts filed before the Tribunal averred that, the goods which are alleged to be identical were imported by the Appellant and entered into the country vide Customs Entry No. 2010ICD201827 from Technitix Limited.

20. The Appellant submitted that Part 1 of the Fourth Schedule to the East African Community Customs Management Act read together with the EAC Customs Valuation Manual defines identical goods as follows:

“Identical goods” means goods which are same in all respects, including physical characteristics, quality, and reputation. Minor differences in appearance shall not preclude goods otherwise conforming to the definition from being regarded as identical.

21. The Appellant further submitted that the EAC Customs Valuation Manual defines identical goods as follows:

“Identical goods are defined as goods which are:

i. The same in all respects including:
• Physical characteristics,
• Quality, and
• Reputation,

ii. Produced in the same country as the goods being valued; and

iii. Produced by the producer of the goods being valued; “-

emphasis added

22. The Appellant averred that from the entry documents of the Technitix consignment, there exists significant differences which precludes the two consignments from being treated as identical and which the Appellant outlines as follows:

a) Physical characteristic Differences

From the Import Declaration Form for Import Entry No. 2020ICD201827-
Technitix cargo, the Appellant imported the following:

<table>
<thead>
<tr>
<th>Description</th>
<th>HS Code</th>
<th>Quantity</th>
<th>FOB Value Kshs</th>
</tr>
</thead>
<tbody>
<tr>
<td>RG11 Cable Trishield 77 percent with messenger</td>
<td>8544.20.00</td>
<td>61,000</td>
<td>17,232.50</td>
</tr>
<tr>
<td>RG6 Cable Trishield 77 percent white</td>
<td>8544.20.00</td>
<td>500,200</td>
<td>63,725.48</td>
</tr>
<tr>
<td>RG6 Cable Trishield 77 percent with messenger black</td>
<td>8544.20.00</td>
<td>610000</td>
<td>98,942.00</td>
</tr>
</tbody>
</table>
On the other hand, Import Declaration No. E2007372086 - Wanlong consignment the Appellant imported the following:

<table>
<thead>
<tr>
<th>Description</th>
<th>HS Code</th>
<th>Quantity</th>
<th>FOB Value Kshs</th>
</tr>
</thead>
<tbody>
<tr>
<td>PH025 Cable RG6 Messenger Black</td>
<td>8544.20.00</td>
<td>404430</td>
<td>46,299.15</td>
</tr>
<tr>
<td>PH025 Cable GR6 Non messenger White</td>
<td>8544.20.00</td>
<td>170800</td>
<td>17,679.44</td>
</tr>
</tbody>
</table>

23. It was the Appellant’s submission that there was significant difference in the two consignments. In the Technitix consignment, the Appellant imported RG6 Cable Trishield 77 percent while the Wanlong consignment the Appellant imported RG6 messenger and non-messenger cables.

24. According to the Appellant there are several types of RG6 coaxial cables. The cables, which can be used for satellite TV, Digital TV, internet, or other high frequency applications, can be classified as follows:

- RG6 Standard,
- RG6 Tri Shield cable, and
- RG6 Quad Shield.
Construction Difference between RG6 vs RG6 Tri Shield as imported from Wanlong and Technitix respectively:

The RG6 cable

25. The Appellant explained that the RG6 cable is the most common type of cable with its main characteristic being that it only has two layers of aluminium shielding. The construction components of RG6 standard are layered as follows:

- 18AWG Copper Conductor;
- PVC Dielectric;
- Aluminium Foil;
- Aluminium Braided Mesh; and
- Outer Jacket.

RG6 Tri shield cable,

26. According to the Appellant, the RG6 Tri shield cable is a higher-grade cable being that it has three layers of aluminium shielding. The construction of a RG6 tri shield cable include:

- 18AWG Copper Conductor,
- PVC Dielectric,
- Aluminium Foil,
- Aluminium Braided Mesh,
- Aluminium Foil and
27. The Appellant argued that the key distinguishing factor between the RG6 cable and the RG6 Tri-shield cable is that the Tri shield cable, which was imported from Technitix Ltd, has an extra layer of aluminium shielding. The extra shielding or layering component to the RG6 Tri-shield cable would reasonably result a higher price.

28. It was the Appellant’s submission that the two cables cannot reasonably be treated as identical, nor can the price point be expected to be the same. It further submitted that over and above the two consignments being of different quality and physical characteristics, the quantity of the goods imported is significantly lower for the Wanlong consignment.

29. The Appellant submitted that the Note to Paragraph 3 of the Fourth Schedule to the EACCMA provides for adjustments where the transaction value of identical goods method is used as follows:

"1) In applying paragraph 3, the proper officer shall wherever possible, use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used:

a) a sale at the same commercial level but in different quantities."
b) a sale at a different commercial level but in substantially
the same quantities; or

c) a sale at a different commercial level and in different
quantities.

2) Having found a sale under any one of these three conditions
adjustments will then be made, as the case may be, for:

a. quantity factors only;

b. commercial level factors only; or

c. both commercial level and quantity factors

30. The Appellant averred that the quantities imported in the Wanlong
consignment for the RG6 cable were significantly lower with the Appellant
having imported 205,570 Kgs less of the black cable and 329,400 Kgs less
of the white cable. In addition, the Technitix consignment contained an
extra package of RG11 cables of 61,000 Kgs.

31. The Appellant submitted that the Respondent did not demonstrate the
adjustments made in arriving at the uplift amount nor has it adduced
evidence before this Honourable Tribunal in support of adjustments clearly
provided for under the law.

32. It was the Appellant’s submission that the two consignments cannot
reasonably be expected to have the same customs value and the failure by
the Respondent to take these factors into account is highly prejudicial to
the Appellant.
33. It was the Appellant's assertion that the Respondent alluded to other importers other than the Appellant who imported identical goods from the same country which informed the decision to reject the transaction value of goods being that the other importers declared higher customs value for the identical goods.

34. The Appellant argued that whereas it is admitted that the Respondent has a right pursuant to Section 122(4) of the EACCMA to satisfy itself as to the truth or accuracy of a declaration, the Appellant submits that the Respondent has an obligation to act reasonably in ascertaining the transaction value. To support its case, the Appellant cited Geothermal Development Company Ltd v Attorney General & 3 Others, where Majanja J. opined as thus:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demand that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well.”
35. Thus, the Appellant argued, it is not enough for the Respondent to state that other importers have brought in identical goods of a higher customs value. Such a claim must be sufficiently supported with substantial evidence.

36. The Appellant contended that having established the differences in two consignments, the Respondent ought to have demonstrated the details of the "other" importations which were used to form the basis of the duty uplift. It cited *Standard Resources Group Ltd v Attorney General & 3 others [2018] eKLR*, where the Court opined that:

"I have gone through the 2nd and 3rd respondents' responses to this petition in the form of replying to affidavits but could not find any documents that show the identical transactions the 2nd and 3rd respondents used in determining the extra customs duty. Where the issue of what customs duty was payable is raised, and the 2nd and 3rd respondents claim that they were correct in assessing that extra customs duty and that they used identical transactions to determine the duty payable, they were under obligation to satisfy the court that the petitioner was wrong in its declaration and that the 2nd and 3rd respondents were right in what they did. The 2nd and 3rd respondents could only do so by showing to the court's satisfaction the documents they relied on in arriving at the disputed customs duty. Failure to do so would only be taken to mean that there were no such
identical transactions and that the 3rd respondent acted arbitrarily in
the exercise of his discretion"—emphasis added

37. The Appellant argued that the Respondent having failed to satisfy the pre-
conditions for use of identical goods method, the transaction value of
identical goods method is not appropriate for purposes of valuing the
consignment under contention (from Wanlong).

38. The Appellant further submitted that in the absence of proof by the
Respondent demonstrating the alleged other identical transactions which
were relied on in arriving at the uplift, the transaction value method be
applied to the consignment from Wanlong Cable Company.

The Appellant’s Prayers

39. The Appellant sought for orders that

a. That the demand of the duty uplift amount, penalties, and offense
charges in the amount of Kshs 2,584,000.00 by the Respondent
be vacated.

b. That the Honourable Tribunal be at liberty to make any such
orders as it deems necessary in the circumstances.

c. That the costs of this application be in the cause.
THE RESPONDENT’S CASE

40. In its opposition to the Appeal, the Respondent relied on the following documents:

   a) Statement of Facts dated 10th November 2020 and filed on the same day together with the documents attached thereto.

   b) The Respondent’s written submissions dated 7th June 2021 and filed on the same date.

41. The Respondent stated that it analysed the Appellant’s import of a consignment of goods from Wanlong Cable Company Limited situated in China and declared vide entry Number 2020ICD230213.

42. It averred that the consignment was targeted for undervaluation on 26th August 2020 by the business intelligence team since there was an entry number 2010ICD201827 on an identical importation by the Appellant.

43. It further stated that upon verification of the goods, a valuation ruling was issued on 25th September, 2020 in accordance with Paragraph 3 of Fourth Schedule of EACCMA which states that:

   "(3) Where in applying the provisions of this paragraph, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods."

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44. The Respondent averred that during the aforesaid review, the Appellant appealed against value guided method vide letter dated 24th September 2020 and presented documents to support transaction value namely:
   a) Commercial Invoice
   b) Packing List
   c) Bill of Lading and PVoC.

45. According to the Respondent it analysed the documents in line with the Fourth Schedule of EACMMA. It made comparisons with test values of identical importations and values declared and the values were found to be low. Hence, the value uplift was upheld on 29th September 2020 in accordance with Paragraph 3 of the Fourth Schedule of EACMMA.

46. The Respondent averred that the Appellant further appealed against value uplift vide letter dated 9th October 2020 upon which the Respondent confirmed the applied values vide letter dated 30th October 2020.

47. The Respondent argued that it discovered that the Appellant had earlier made an importation entry number 2020ICD201827 in May 2020 where it imported the same goods at a higher value which per the invoice ref: 4644487 dated 19.03.2020 the values for RG6 WHITE were USD 0.1274/M and RG6 With Messenger Black USD 0.1622/M. As a result, the Respondent raised taxes amounting to Kshs 1,703,286.00 consisting of
Import Duty Kshs. 986,941.00 VAT Kshs. 531,328.00 IDF Kshs. 98,394.00
RDL Kshs. 56,225.00 PEN Kshs. 33,398.00

48. In its submissions it identified four issues for determination in this dispute namely.

i) Whether the Respondent erred in value uplift and transaction value applied?
ii) Whether Respondent took into consideration all-additional information availed before making the decision?
iii) Whether the assessments issued were excessive based on transaction value applied?
iv) Whether the Respondent issued the assessments in breach of section 122 read together with the Fourth schedule to the EACCMA?

49. The Respondent submitted that the assessments were correctly issued and conform to the customs tax laws. It insisted that the onus of proof in tax objections falls on the taxpayer who in this case failed to avail evidence that would support a contrary assessment or that would have guided the Respondent in arriving at a different Objection Decision. The documents and literature provided did not provide any additional information which would have led to the change on tariff.
50. The Respondent submitted that the Appellant did not provide any evidence that would have altered the tax assessment based on the transaction value used. The law places the onus of proof in tax objections on the taxpayer who in this case failed to avail evidence that would support a contrary assessment or that would have guided the Respondent at arriving to a different transaction value. That classification of goods for levying customs duty is governed by the International Convention on Harmonized Commodity Description and Coding system or Harmonized System, which is vital in keeping statistics worldwide.

51. It was the Respondent’s assertion that the taxpayer had filed all necessary entries and declared the coaxial cables using an erroneous transaction value which it assessed itself. The Respondent found that the values as declared by importers including the Appellant were too low and were not a true reflection of the correct transaction value for the imports. The Respondent submitted that the Transaction Value applied was lawful and justified under Section 122(4) of the EACCMA. The Section provides as follows:

“Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for Customs valuation purposes.”
52. The Respondent asserted that there were variances in the transaction value used hence the variances were brought to charge under the customs law. The Respondent therefore and in accordance with the law chose to use the second and third valuation method, that is, identical goods and similar goods methods of valuation. The definition of identical and similar goods is as under Section 1(2) (a) of Part 1 of the Fourth Schedule to the EACCMA provides:

"goods shall not be regarded as "identical goods" or "similar goods"

unless they were produced in the same country as the goods being valued"

53. According to the Respondent the transactional value method as proposed by the Appellant was not justified as there were no documents given to back up its position. Further to that, there were discrepancies of the value as declared by the Appellant and values as charged the Respondent was therefore unconvinced by the documents produced by the Appellant forcing it to change the valuation method.

54. The Respondent submitted that it is not restricted by law to accept the Appellant’s documents or those provided by any taxpayer as provided by Section 122 (4) of the EACCMA. The Respondent is allowed to depart from the transactional value method where there is doubt for which reason the EACCMA provides other valuation methods to be used where the Transactional Value method fails. The Respondent guided by the law
followed the method permissible in law and found that the value of the imports as given by the Appellant was much lower than the actual value and the same was increased to the value as charged on other importers, an act which the law allows for.

55. Further, the Respondent insisted that it was keen to ensure that the imports were valued correctly and at a more standard rate where necessary. It asserted that the Appellant filed a review of the tax as assessed according to the law. It communicated to the Appellant its responses for upholding the transaction value and hence the Appellant should make full payment of the taxes raised. The Section 229 of the EACCMA states that:

“A person directly affected by the decision or omission of the Commissioner or any other officer on any matter relating to customs shall within thirty days of the date of the decision or omission is lodge an application for the review of that decision or omission.”

56. The Respondent asserted that the Appellant has not paid all its tax dues of Kshs. 1,703,286.00 based on the correct transaction value and reiterates that the transaction value applied is correct under the law. It insisted that classification of goods under HS Code is determined by characteristics, composition, and components of the product and not what the product is called or what it is alleged to do.
57. The Respondent submitted that the Tribunal should be guided by the following considerations:
   
a) Were any documents provided to justify the Appellant’s objection?
   
b) Was the transaction value applied by the Appellant correct per the laws?
   
c) Were any transactions been omitted from or incorrectly recorded in the Appellant’s books of accounts /bankings?

58. The Respondent relied on Cape Brandy Syndicate Vs. Inland Revenue Commissioner [1921] 1 KB 64, where it was held that:

   “In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

59. The Respondent also cited the Supreme Court of Appeal South Africa in Africa Cash & Carry Ltd –V–Commissioner Sars (2019) ZASCA 148 which found that:

   “The point of departure should always be that a tax court is a court of revision and, not a court of appeal in the ordinary sense. The legislature ‘intended that there could be a re-hearing of the whole matter by the Special Court and that the Court could substitute its own decision for that of the Commissioner’, if justified on the evidence before it.”
‘A tax court accordingly rehears the issues before it and decides afresh whether an estimated assessment is reasonable. It is not bound by what the Commissioner found. In rehearing the case it can either uphold the opinion of SARS or overrule it and substitute it with its own opinion.’

‘The powers of the tax court and its functions are unique. It places itself in the shoes of the functionary and re-evaluates the facts and circumstances of the subject matter on which the assessments were based.’

‘By its very nature an estimated assessment is subject to change based on an evaluation of the evidence and any information that becomes available. What is important is that the methodology used and the assumptions on the strength of which the estimated estimates were made should remain the same, otherwise the conclusions reached by the tax court might not be procedurally fair.’

‘The tax court must place itself in the shoes of the functionary to determine whether the methodology followed and the assumptions on which the estimated assessment are based, are reasonable and produce a reasonable result.’

‘Reasonableness requires that a balance must be struck between a range of competing considerations in the context of a particular case.'
'The principal enquiry is whether SARS struck a balance fairly.'

The unfairness of the decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision had erred in respects that would provide grounds for review; That inference is not easily drawn'

60. The Respondent also relied on TAT No. 415 of 2018 -Rai Plywoods (K) Ltd—Vs- Commissioner of Domestic Taxes where the Tribunal stated that.

"We note the loss adjuster in its report stated that the claim from the Appellant was overstated not being burnt as originally claimed by the Appellant. In the absence of any tangible proof from the Appellant to convince the Tribunal to veer from the independent loss adjuster report, the Tribunal has not been persuaded that the sum of .... Was wholly and exclusively incurred by Appellant in the production of income”

"We concur with the Respondent that the Appellant has not met its burden as stipulated in legislation."

61. It also cited the case of Kudheilha –Vs- Kenya Revenue Authority and others (2014) eKLR where it was stated that

"Article 209 of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise
tax. The manner in which the tax is defined, administered, and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax.”

The Respondent’s Prayers

62. Based on the above submissions, the Respondent prays that:

a. This Honourable Tribunal to uphold the transaction value applied by the Respondent and order the Appellant to pay the confirmed tax assessments issued by the Respondent

b. The Appellant’s Appeal be dismissed for lack of merit.

c. Award the Respondent the costs of the Appeal.

ISSUE FOR DETERMINATION

63. After a careful consideration of the submissions of both parties, the Tribunal was of the view that the only issue for determination in this dispute was; whether the Respondent erred in adjusting the value of the Appellant’s goods on the basis of value declared for goods previously imported by the Appellant.
ANALYSIS AND DETERMINATION

64. Before the Tribunal is a dispute relating to customs valuation. The Respondent stopped for valuation review a consignment of coaxial cables. The review resulted into an uplift of value based on the values declared for another consignment of coaxial cables imported by the Appellant. The Respondent argued that it was guided by the law and that it followed a method permissible in law and found that the value of the imports as given by the Appellant was much lower than the actual value and the same was increased to the value as charged on other importers, an act which the law allows.

65. The Appellant on the other hand argued that the Respondent should not have adjusted the value declared because it was the actual price of the goods and therefore represented the transaction value of the goods. It went on to argue that the Respondent had no justification to deviate from the primary method of Customs valuation.

66. Section 122(4) of the EACCMA provides that:

"Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes."

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This is also echoed in Article 17 of the WTO Agreement on Implementation of the GATT 1994 which states:

"Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes."

67. The Respondent drew authority from this provision to call in question the correctness of the declaration made by the Appellant. In the view of the Tribunal the Respondent was within its mandate to suspect and not be satisfied with the Appellant's declaration. The law does not set a standard of satisfaction or set any limits to which the Commissioner should be satisfied with a declaration.

68. Customs valuation shuns the use of arbitrary values or use of arbitrary methods of determining the value of goods for the purposes of levying import duties. In this regard, Section 122 prescribes six methods of determining value. The law prescribes that these methods are to be applied in a hierarchy one after another until the value is determined. Thus, the valuation methods represent positive actions of dealing with Customs dissatisfaction with a declaration of value.
69. Put differently, when a Customs Administration is dissatisfied with a declared value, it may ask for additional documents to verify the correctness of the declaration and if still dissatisfied apply subsequent methods of determination of value. It cannot pick a figure from the air and use it to assign customs value to imported goods. It can only assign a value using any of the six methods prescribed in the Fourth Schedule of EACCMA applied in sequence.

70. In the instant case, the Respondent stated that it analysed the documents presented by the Appellant in line with the Fourth Schedule of the EACCMA. It compared those documents with test values of identical importations and values declared were found to be low hence, the value uplift. The Appellant in its submissions demonstrated that the coaxial cables whose values were used by the Respondent as test values were substantially different from the ones which were the subject of the current dispute. Its argument which was not disputed by the Respondent was that the test value was derived from a product that was not identical both in characteristics, price quality, quality and indeed supplier.

71. In the view of the Tribunal, the Appellant discharged its burden of proving that the Respondent’s assessment was wrong because the test value used as a basis for adjusting the transaction value was wrong. With the Appellant having discharged the burden the burden shifted to the Respondent to prove the correctness of its assessment.
72. It was observed in Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR that:

"The shifting of the burden of proof in tax disputes flows from the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency. The Commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption created by the above provisions is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position. If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer."

73. Thus, once the taxpayer adduces evidence that discharges his burden, the burden shifts to the Commissioner who must demolish such evidence. This view was held in Supreme Court of Canada's decision in Hickman Motors Ltd. v. Canada, [1997] 2 S.C.R. 336 the Court stated that:

"The taxpayer's initial onus of "demolishing" the Minister's exact assumptions is met where the Appellant makes out at least prima facie case... Where the Minister's assumptions have been "demolished by
the Appellant, "the onus.... shifts to the Minister to rebut the prima case" made out by the Appellant and to prove the assumptions...The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions; ...Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed; and even if the evidence contained "gaps in logic, chronology, and substance", the taxpayer's appeal will be allowed if the Minister fails to present any evidence as to the source of income."

74. The Supreme Court of Canada provided guidance on the issue of demolition in the Hickman case where it stated that the onus is met when a Taxpayer makes out at least a prima facie case. According to the Supreme Court, a prima facie case is made when the taxpayer can produce unchallenged and uncontradicted evidence. Similarly, in Helvering v. Taylor, 293 U.S. 507 (1935) it was said that.

"But, whereas in this case the taxpayer's evidence shows the Commissioner's determination to be arbitrary and excessive, it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him."
75. The Agreement on Customs Valuation which was adopted in the EACCMA advocates a fair, uniform, and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values. In this regard, the Tribunal was of the view that this goal could not be achieved when the Respondent imposes an arbitrary uplift of value to match its test values. The value determined by the Respondent would have sounded less arbitrary if it had been determined not by an uplift but by one of the prescribed methods such as the transaction value of identical goods.

76. The upshot of the foregoing was that the Tribunal found that the value assigned by the Respondent on the Appellant’s goods was determined on a fundamentally wrong basis. It was of the opinion that use of anti-abuse provisions like Section 122(4) should not form a justification to make adjustments to the transaction value that are not provided for in the Fourth Schedule of EACCMA. In any case, if the intention of the Respondent was to apply transaction value of identical goods as an alternative method of valuation, it should have used the guidelines provided for in the Fourth Schedule to the EACCMA.

77. The Tribunal consequently found that the Respondent erred in uplifting the Value of the Appellant’s goods.
FINAL DECISION

78. Following analysis of submissions by both parties and their respective bundles of documents, the Tribunal determined that the Appeal has merit and therefore succeeds. The orders that commend themselves are as follows:

a. The Respondent’s Valuation ruling issued on 25th September, 2020 be and is hereby set aside.

b. The Objection Decision contained in the Respondent’s letter dated 30th October 2020 confirming the values it had assigned the Appellant’s goods be and is hereby set aside.

c. Each party to bear its costs.

79. It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of November, 2021.

[Signatures]

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[Signatures]

JUDGMENT: TAT NO. 525 OF 2020 CAMUSAT KENYA LIMITED – vs – COMMISSIONER OF CUSTOMS & BORDER CONTROL