

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 441 OF 2020

INUA SALES LIMITEDAPPELLANT

VERSUS

**COMMISSIONER OF INVESTIGATIONS
&
ENFORCEMENT.....RESPONDENT**

JUDGMENT

BACKGROUND

1. The Appellant is a Limited Liability Company duly incorporated in Kenya under the Companies Act in 2019 and commenced its operations in Kenya in March 2020. The Company is an authorised distributor of tupperware products from Tupperware Southern Africa (Proprietary) Limited, South Africa.
2. The Respondent is a principal officer appointed pursuant to Section 5 (1) of the East Africa Community Customs Management Act 2004 (EACCMA) as read together with Section 13 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and is charged to ensure proper administration of customs and the collection of any custom duties due on behalf of the Government of Kenya.

3. Tupperware products are plastic kitchen and fridge containers that are made from virgin plastic material for food storage for food safety.
4. On 7th June 2020 an entry number 20200NMA167646 was lodged with the consignor being Tupperware Southern Africa PTY Limited (Tupperware) and the Appellant being the consignee.
5. The goods were conveyed by road through Namanga border on motor vehicle registration number KCP 004D and upon scanning, the scanner report concluded that the consignment was not suspicious.
6. On 19th June 2020, the Respondent through intelligence sources was informed that the above mentioned motor vehicle had been intercepted along Isinya Road by Directorate of Criminal Investigations officers. The vehicle was suspected to have been ferrying alcohol and had been detained at the DCI Headquarters, Kiambu Road on 18th June 2020.
7. Upon conducting investigations and verification of the consignment in the subject vehicle, it was established that the goods included Tupperware products which had been declared in entry number 2020NMA167646 and other goods that had not been declared.
8. The un-declared goods were Dark and Lovely Hair Products, Stylin Dredz Moulding Gel, Nestle Baby Formulae and Nestle Cerelac.
9. During the investigations, one Stanley Wambui Mwaniki, who was the Appellant's transporter presented himself and confirmed that he was the owner of the un-declared goods.
10. Under the justification that the goods imported by the Appellant were understated during the valuation, the Respondent through its Valuation Department, Customs & Border Control assessed the extra taxes amounting to Kshs. 10,245,628/= on goods imported by the Appellant under entry number 2020NMA167646.

11. On 3rd July 2020, the Respondent issued a demand letter on the above additional taxes which demand was appealed against by the Appellant vide a letter of 15th July 2020.
12. In response, the Respondent confirmed its decision vide its letter of 14th August 2020.
13. The other parties moved to court seeking a release of the undeclared goods and motor vehicle KCP 004P and a Court order was obtained for the goods to be released upon the payment of the requisite taxes and the said order was subsequently effected upon the conditional compliance.
14. Thereafter the Appellant had three meetings with the Respondent on diverse dates but the negotiations were unsuccessful prompting this Appeal.

THE APPEAL

15. The Appeal is based on the following grounds as set out in the Appellant's Memorandum of Appeal dated 25th September 2020:-
 - a) THAT the Respondent erred in law and fact by finding that the pricing of the goods sold to the Appellant by Tupperware Southern Africa did not reflect an arm's length transaction value contrary to the provisions of the East Africa Community Customs Management Act;
 - b) THAT the Respondent erred in law and in fact by rejecting the transaction value method adopted by the Appellant contrary to the provisions of Paragraph 2(1) (c) of the Fourth schedule to the East Africa Community Customs Management Act;

- c) THAT the Respondent erred in law and in fact by rejecting the transaction value method adopted by the Appellant for customs declaration purposes on the basis that Tupperware South Africa controls the sale of products in the country; and
 - d) THAT the Respondent's demand for taxes amounting to Kshs. 10,245, 629.10, rejection of the Appellant's transaction value method, rejection of the Appellant's conditional request of its goods and rejection of the Appellant's request to have their goods separated from the other consignments, that do not belong to them, prior to the aforesaid release violates the Appellant's right to a fair administration action.
- 16. The Appellant thus prayed that the Tribunal sets aside and annuls the assessment by the Respondent.
 - 17. To support the above grounds, the Appellant filed its Statement of Facts dated 25th September 2020, a witness statement filed on 17th March 2021 and a subsequent Supplementary Statement and bundle of documents filed on 30th March 2021.
 - 18. In opposition to the Appeal, the Respondent filed its Statement of Facts on 26th October 2020, witness statements on 22nd and 23rd March 2021 and bundles of documents on 25th March 2021 and 7th April 2021.

THE APPELLANT'S CASE

- 19. In addition to the above documents, the Appellant filed its submissions dated 24th March 2021.

20. Firstly, to the assessment amounting to Kshs. 10,245,628.00, the Appellant appeals against the Respondent's failure to separate the Appellant's consignment from the transporter's under declared consignments.
21. It is the Appellant's submission, which is corroborated by the Appellant's Director, Mr. Mangoa Onuanga, vide his witness statement that upon agreeing with Tupperware, it contracted an independent transporter, Mzansi Logistics Limited (Transporter) on a supplier contract, to transport goods from South Africa to the Appellant in Nairobi.
22. That it was only after the motor vehicle ferrying the Appellant's consignment was held by the DCI that the Appellant was made aware that the transporter was carrying additional goods, which were not declared to customs.
23. The Appellant states that it provided the documentary evidence to confirm the description of the goods ordered from Tupperware as well as the quantities in a bid to confirm that any other goods by the transporter belonged to unknown third parties.
24. That in subsequent meetings held between the parties, the Respondent had confirmed that the owners of the undeclared goods had come forward to claim their goods and sworn affidavits in regard to the same. Further, the Respondent's, via an email dated 11th March 2021, conveyed to the Appellant's tax advisors that the owners of the 'uncustomed goods' had paid the taxes due and the Respondent would release the said goods on 12th March 2021.
25. Documentary evidence being the Court Order authorising the release of the undeclared goods and the impounded motor vehicle upon payment of the assessed taxes together with the Respondent's letter dated 1st February 2021 confirming the said release have been produced in the Appellant's filings.

26. To conclude the above issue, the Appellant opines that the Respondent demanded extra taxes amounting to Kshs. 10,245,628.10 from it without separating its goods from the undeclared /uncustomed goods. For the reasons stated above, the Appellant vehemently disputes the assessed amount.
27. Secondly, the Appellant appeals against the impugned assessment on the ground that the Respondent rejected the Appellant's transactional value (TV) without following the due process outlined in the EACCMA, 2004. The Appellant cites Section 122 of the EACCMA as read together with Paragraph 2(I) of the Fourth Schedule of the said Act which provides:-

(2) (1) 'The customs value of imported goods shall be the transaction value on which the price is actually paid or payable for the goods when sold for export to the partner state adjusted in accordance to the provisions of Paragraph 9, but where-

- a) There are no restrictions as to the disposition 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 states;*
 - 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 goods by the buyer will accrue directly or indirectly to the seller,*
- d) The buyer and the seller are not related, or where the buyer and the seller are related, that the transaction value is acceptable for customs purposes under the provisions of subParagraph (2)*

28. The Appellant avers that in rejecting its method of valuation, the Respondent has not availed any details for consideration or information or computations used to arrive at the uplifted taxes. That for this reason, the Appellant states that its goods had been withheld without a legitimate basis yet the undeclared goods had been released to third parties.
29. To explain its business model, the Appellant has submitted that Tupperware, globally undertakes a direct selling model where there are numerous parties within the supply chain. Additionally, Tupperware is regulated by the Direct Selling Association of South Africa (DSA), a national business association founded in 1972. DSA's main role includes representing member direct companies that distribute goods and services through independent contractors directly to consumers, away from a fixed retail location.
30. That from the above, Tupperware and the Appellant are not related but distinct and independent companies. That as a company operating under direct selling model, Tupperware recommends the selling price as a guide to the Salesforce. This enables the parties in the supply chain determine their profit margin if they would choose to sell the product at the recommended price. However, the parties in the supply chain reserve the right to make the final decision in relation to the sale price and discounts depending on commercial variables such as low intake in the market, own consumption etc.
31. That to support the above assertions and dispel the Respondent's allegation that the transaction is not at arm's length, the Appellant has produced the Distributorship Agreement together with its company's official search (CR12) and affirmed that there is no document that has reflected any ownership or shareholding between the two parties.

32. That contrary to the Respondent's assertion, the Appellant further demonstrated that the conditions set out by EACCMA particularly on the imposition of any restriction as to disposal and purchase did not affect Tupperware and the Appellant, particularly as :-
- a) INUA and Tupperware are not officers or directors of each other's businesses;
 - b) INUA and Tupperware are not legally recognized as business partners;
 - c) INUA and Tupperware do not have an employee and employer relationship;
 - d) Neither INUA nor Tupperware directly or indirectly own, control or hold five percent or more of the outstanding voting stock or shares of both of them;
 - e) Neither INUA nor Tupperware directly or indirectly controls the other;
 - f) INUA and Tupperware are not directly or indirectly controlled by a third person;
 - g) INUA and Tupperware officials are not members of the same family.
33. That as none of the conditions stipulated under Paragraph 2(1) of the Act (*cited above*) applies to the Appellant's goods, the Appellant states that it declared its imports as per the price by Tupperware and which price is paid to Tupperware in totality as no other proceeds are paid thereon. As such, the pricing of the imports are in line with the transaction value method and correctly applied.
34. To conclude, the Appellant has pleaded for the assessment and demand to be vacated and allow the Appeal highlighting that the Respondent's actions have caused dire cash flow constraints on a legitimate company which has affected its business operations.

THE RESPONDENT'S CASE

35. In addition to the pleadings mentioned under Paragraph 18 hereinabove, the Respondent filed its written submissions on 22nd April 2021.
36. The Respondent avers that on 19th June 2020, it was informed through intelligence sources that a motor vehicle registration number KCP 004D had been intercepted on suspicion that it was ferrying alcohol and that it was detained at DCI Headquarters.
37. That the investigations determined that the goods on the said vehicle included those of Tupperware as declared under entry number 2020NMA167646 and other goods that had not been declared. That the latter included Dark and Lovely Hair Products, Stylin Dredz Moulding Gel, Nestle Baby Formulae and Nestle Cerelac. That further, it was established that the Appellant was the consignee of the Tupperware products from Tupperware South Africa as the consignor.
38. That during the investigations, one Stanley Wambui, who was the Appellant's transporter presented himself and confessed that he was the owner of the undeclared goods.
39. That the Respondent on forwarding the goods to its Valuation Department to determine the value of the imported consignment, the same was assessed at Kshs. 10, 245,628.10 which the Respondent demanded vide the letter of 3rd July 2020.
40. To the Respondent, the consignment belonged to the Appellant as declared during the time of importation under the entry number 2020NMA167646 which included the undeclared goods. The Respondent as such, cannot separate the consignment as the only known consignee is the Appellant.

41. That further, at the time of the issuance of the demand letter, as there was under declaration of goods, the consignment was valued as a whole. That subsequently two individuals namely Alex Muthama and Muhamud Mohammed paid the taxes on the undeclared goods and the Respondent as a show of good faith released part of the consignment on which the duties were paid.
42. That contrary to the Appellant's assertion, upon the above payment, the parties had meetings and the Respondent issued a revised tabulation of taxes in light of the tax paid by the above third parties. That further, the Respondent also factored in the payment made of Kshs. 1,547,776/= that had been paid by the Appellant and communicated the findings to the Appellant.
43. The Respondent then revised the tax computation to Kshs. 6,371,352/= which was produced as KRA 5 in its bundle of documents. That in light of this, the Appellant's allegations that the Respondent did not separate the consignment are unmerited and non-factual.
44. As to whether the valuation method used by the Respondent was lawful, the Respondent submits that the assessment above was carried out in accordance with The Fourth Schedule of EACCMA, 2004 which outlines the six methods of valuation to be applied in sequential order and section 122 thereof.
45. In its opinion, the most appropriate method in relation to the Appellant's import is the deductive value method as the value of the imported goods cannot be determined. That this was deduced upon placing reliance on the information availed by the Appellant, the Valuation & Tariff Section recommended is by FOB values as per Ref: CUS/V&T/VAL/MEMP/06/65 received on 1st July 2020 and the values determined in line with the provisions of Paragraph 2(1) of the fourth schedule of EACCMA (cited above) and Paragraph 1(3) of part 1 of the same schedule which provides conditions for a relationship to exist:-

.... (d) one of them directly or indirectly controls the other.

46. To the Respondent, the transaction between the Appellant and Tupperware is not at arm's length as Tupperware controls the sale of its products in Kenya. That from the documents presented by the Appellant, the review of the values failed to demonstrate an arm's length transaction between the Appellant and Tupperware.
47. In addition, the sale agreement between the two parties demonstrates that Tupperware remains as the owner of the products and therefore the prices as per the company's current price are contrary to section 2 (1) of EACCMA, 2004 .
48. On the above, the Respondent particularly relies on *Paragraph 9.15* of the sale agreement and submits that its application requires the Appellant to sell and supply the products at prices as from time to time recommended by Tupperware. That the foregoing is against the conditions that should be fulfilled for transaction value to be accepted, whereby there must be no restriction which is imposed or required by law in the country of importation or are limited to the geographic areas in which goods may be resold and do not sustainably affect the value of goods.
49. That in addition to the above, the Respondent states that the letter from Tupperware to the Appellant agreeing to advance interest free loans and funds sufficient to cover initial start-up stock and any other necessary funding that may be agreed upon.
50. According to the Respondent, based on the above, the local selling prices and all other activities are determined by Tupperware and as such the transactional value is disqualified. Further, this was agreed upon by both parties in a meeting held on 22nd September 2020. The Respondent cites the case of **Republic versus Neolife International Limited ex-parte Kenya Revenue Authority** where the court found that the Respondent had not acted arbitrarily in changing the methods of valuation since the

law provides that the methods can be changed depending on the circumstances of the case.

51. The Respondent prays that the Honourable Tribunal upholds the assessment of Kshs. 6,371,352/= and dismisses the Appeal with costs.

ANALYSIS AND ISSUE FOR DETERMINATION

52. There were a number of issues that were argued between the parties with regard to the consignment imported using Motor Vehicle Registration Number KCP 400D.
53. The Tribunal noted that the Respondent's assessment of the extra taxes amounting to Kshs. 10,245,628.10 from the Appellant under Entry No. 2020NMA167646 took into account the undeclared goods, including but not limited to; Dark and Lovely Hair Products, Stylin Dredz Moulding Gel, Nestle Baby Formulae, Nestle Cerelac and other electronic goods.
54. The Respondent conceded that the undelivered goods did not belong to the Appellant and that the importers thereof were not agents of the Appellant. As explained in the earlier parts of this judgment, the importers of these undeclared goods resolved the issues relating thereto and paid the taxes due to the Respondent and had their goods released to them.
55. From the actions of the Respondent, it is apparent that the assessment of the extra taxes payable by the Appellant of Kshs. 10,245,628.10 cannot be left standing since part of the said taxes were paid by the third-party importers.

56. Indeed, at Paragraph 33 of its Written Submissions dated 20th April, 2021, the Respondent conceded that it had reviewed the taxes payable by the Appellant to Kshs. 6, 371,352/= . Even then, the Respondent has not issued any fresh assessment for this sum which fact was conceded by the Respondent's Witness M/s Florence Kirira while testifying before the Tribunal.
57. For the foregoing reasons the Respondent's assessment of the extra taxes is not payable and the Tribunal shall not consider the same in substance having been rendered moot.

ISSUE FOR DETERMINATION

58. Other matters having been dealt with, the Tribunal has framed the following single issue for determination.

Which method of valuation should be used in determining the taxes payable by the Appellant?

ANALYSIS AND DETERMINATION

59. The Appellant lodged a Notice of Appeal against the Respondent's decision dated 14th August 2020 on 11th September 2020 and served the same on the Respondent on the same date.
60. It appears that before and subsequent to the filing of the Notice of Appeal by the Appellant and service thereof on the Respondent, the parties engaged in an arbitration process with a view to resolving the dispute.

61. The Respondent filed a Further Bundle of Documents dated 6th April, 2021 in which it exhibited Minutes of a meeting held between the Appellant and the Respondent on the 22nd September, 2020 labelled as KRA 3. Filed alongside the Minutes as KRA 5 is the Respondent's Revised Tax Computation showing that the total tax due from the Appellant is Kshs. 6,371,352/=.
62. A cursory glance at the Minutes aforesaid reveals that the parties were discussing the valuation method to be adopted by the parties in determining the taxes payable. The Appellant made a case that the correct customs value to be used for declaration was the transaction value method while the Respondent favoured use of the deductive method to determine the applicable customs value.
63. From the Minutes, the parties appear to have noted some action points in resolving the matter. Among the issues the Respondent proposed was for the Appellant to withdraw its Notice of Appeal in order for the discussions to progress consequent upon which the Commissioner was to issue a decision. This appears not to have been done as the Appellant went ahead and filed its Appeal on 25th September, 2020.
64. The other action point was for the Respondent to use the deductive value method to determine the applicable taxable value. This would then be used to determine if any more taxes were payable.
65. The Appellant corroborates the position stated above at Paragraphs 11, 12, and 13 of its Statement of Facts. At Paragraph 14 thereof, the Appellant states that as at the time it filed the Appeal, the Respondent had not supplied it with the Minutes of the meeting of 22nd September, 2020 and a reviewed decision. The Appellant then states that it was left with no option but to file the Appeal to protect its interests.

66. The Tribunal has looked at KRA 5 which is the Respondent's tax tabulation ostensibly applying the deductive value method noted in the meeting of 22nd September, 2020. It does appear that the Respondent has used the South African Rand (ZAR) as the currency for the value of the different goods imported by the Appellant. The Respondent's Witness Mr. Stephen Mutua in his testimony explained that they obtained the prices of the goods from the Appellant's supplier's website. This could explain why the unit of currency used in the Respondent's tabulation is ZAR.
67. The Appellant's contention that the Respondent did not supply it with the Minutes and the tax tabulation (KRA 5) appears to be correct as the first time they are appearing is in the Respondent's filings. KRA 5 does little in resolving the dispute by reason of the fact that the Respondent has not given any exchange rate for the Kenya Shilling against the ZAR to determine how the Kshs. 6,371,352/= was arrived at.
68. Having laid down the above basis, the Tribunal will now turn to determining the issue of the method to be used in determining the taxes payable by the Appellant.
69. From the Minutes of 22nd September, 2020 (KRA 4), part of the action points noted by the parties as stated is that the deductive method of valuation be used, the Tribunal determines that this method be applied in determining the taxes payable by the Appellant.
70. The Tribunal has arrived at the use of the deductive method considering that in its submissions, the Appellant does not appear to be objectionable to the use of this (deductive) method, although it favours the transaction value method.
71. The Tribunal also considers that it is necessary to do justice to the parties. That is to say, the Appellant should only pay the tax due and payable by it while the Respondent should only collect tax due to it – not a cent more or a cent less.

72. In order to properly use the deductive method of valuation, the Appellant shall supply the Respondent with its retail prices in Kenya. The Tribunal believes that use of this method will permanently resolve the method to be applied each and every time the Appellant imports similar goods in the absence of any other method agreed to by the parties.


FINAL DETERMINATION

73. The Tribunal therefore makes the following final Orders:-

- a) The Appeal be and is hereby allowed in part.
- b) The Respondent's tax demand for Kshs. 10,245,628.10 dated 3rd July, 2020 be and is hereby set aside.
- c) The Respondent do determine the extra taxes payable by the Appellant using the deductive method of valuation based on the retail prices available in Kenya.
- d) The Appellant do supply the Respondent with the Kenyan retail prices of the imported goods within 14 days from the date hereof.
- e) Each party to bear its costs of this Appeal.

74. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of June, 2021.



PATRICK LUTTA
CHAIRPERSON



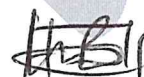
HELEN BILA
MEMBER



MWAI MBUTHIA
MEMBER



ELISHAH NJERU
MEMBER



HABON FARAH
MEMBER

