

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 282 OF 2020**

**KENYA BREWERIES LIMITED .....APPELLANT**

**-VERSUS-**

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

**JUDGMENT**

**BACKGROUND**

1. The Appellant is a limited liability company licensed in Kenya to carry out the business of manufacturing and distributing both alcoholic and non-alcoholic drinks.
2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5(1), the Respondent is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) thereof, with respect to the performance of its functions under subsection (1), the Respondent is mandated to administer and enforce all provisions of the written laws as set out in Parts 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting, and accounting for all revenue in accordance those laws.
3. In or about September 2019, the Appellant contacted the Respondent seeking an opinion on the proper classification of Apple Concentrate. On 24<sup>th</sup> September 2019, the Respondent rendered an opinion classifying the Apple Concentrate under **HS Code 2206.00.90** of the East African Community Common External Tariff ('EACCET'), 2017.

4. Consequently, the Appellant formally applied for the classification of the Apple Concentrate vide a letter dated 17<sup>th</sup> January 2020, attaching all the relevant materials and information for the Respondent's further consideration and review.
5. In its response dated 7<sup>th</sup> February 2020, the Respondent issued a tariff ruling ('Tariff Ruling') that the Apple Concentrate is classifiable under **HS Code 2206.00.90**.
6. Dissatisfied with the Tariff Ruling, the Appellant lodged an Objection vide a letter dated 5<sup>th</sup> March, 2020. The Appellant averred that the Apple Concentrate ought to be classified under Chapter 21, specifically **HS Code 2106.90.20**.
7. The Respondent issued its Appeals Ruling dated 5<sup>th</sup> June 2020 upholding the said Tariff Ruling.
8. Aggrieved by the Respondent's Appeals Ruling, the Appellant requested the Respondent vide a letter dated 25<sup>th</sup> June, 2020 to refer the dispute to the World Customs Organization ('WCO') for classification determination pursuant to the provision under Section 122(6) of the East African Community Customs Management Act, 2014 ('EACCMA').
9. The Respondent declined the Appellant's request vide an email dated 17<sup>th</sup> August, 2020.
10. Dissatisfied with the Appeals Ruling and the subsequent refusal to refer the dispute to WCO for proper classification, the Appellant filed this appeal pursuant to Section 230 of the EACCMA as read together with Section 52 of the Tax Procedures Act, 2015 ('TPA').

## THE APPEAL

11. The Appeal was premised on the following grounds as set out in the Memorandum of Appeal; -

- i THAT the Respondent erred in law and on fact by invoking and relying on the provisions of Sections Notes 20(d) of Chapter 20 in the classification of the Apple Concentrate notwithstanding that such a provision did not exist either under the East African Community Common External Tariff, 2017 ('EACCET').
- ii THAT the Respondent erred in law and on fact in classifying the Apple Concentrate under Chapter 22 Heading 22.06 of EACCET disregarding the fact that the Apple Concentrate is not a beverage.
- iii THAT the Respondent misdirected itself in law by disregarding the express provisions as to the interpretation prescribed under the EACCET, and instead relied on the fact that the Apple Concentrate which is used for the manufacture of Cider would be automatically classified under the same Heading as Cider.
- iv THAT the Respondent misapprehended the provisions of sub-heading 2106.90.20 by erroneously finding that the sub-heading covered only *"food preparations not elsewhere specified or included"*.
- v THAT the Respondent misdirected himself in law by introducing the alcohol content of the Apple Concentrate as a criterion in the classification of the Apple Concentrate.
- vi THAT the Respondent erred in law by failing to appreciate the provisions of the General Interpretation Rules, the Section Notes and the Chapter Notes which emphasise on the intention of the product as opposed to its form as the basis of its classification.

vii THAT the Respondent erred in law by failing to consider the WCO Opinion Number 210690/32 of 2016 on the classification of the Apple Concentrate and failing to appreciate the applicability of WCO opinions locally in classification disputes.

viii THAT the Respondent acted unreasonably and unfairly in refusing to refer the issue of classification of the Apple Concentrate to the Customs Cooperation Council despite a request from the Appellant.

12. The Appellant has sought the following prayers:

- i. THAT the Ruling by the Respondent dated 5<sup>th</sup> June 2020 be set aside;
- ii. THAT the Apple Concentrate be classified under the HS Tariff Code 2106.90.20;
- iii. THAT, alternatively, the Tax Appeals Tribunal ('TAT') directs the Respondent to refer the question of the Tariff Classification of the Apple Concentrate to the WCO and the parties to be bound by the said decision of the WCO; and
- iv. The costs of this Appeal.

## **RESPONDENT'S CASE**

13. The dispute arose as a result of the Appellant's dissatisfaction with the tariff classification decision issued by the Respondent with regard to the classification of a product called Fermented Apple Concentrate. The Appellant sought to have the product classified under Heading 21.06, specifically HS Code 2106.9020, whereas the Respondent classified the product under Heading 22.06, specifically HS Code 2206.00.90.



14. The Appellant applied for a Tariff Ruling on the classification of the above-mentioned product which it intended to import and enclosed samples of the product which the Respondent forwarded to its laboratory for chemical analysis to aid in the classification.
15. The Respondent issued a Tariff Classification Ruling vide its letter dated 7<sup>th</sup> February 2020 and the Appellant objected to the tariff classification by the Respondent vide an objection dated 5<sup>th</sup> March 2020.
16. The Appellant subsequently applied for an Advance Ruling on the classification of Fermented Apple Compound vide a letter dated 25<sup>th</sup> June 2020 and sought referral of the matter to the WCO for tariff classification.
17. The Respondent refused to refer the matter to the WCO and the Appellant consequently filed this Appeal.

## **SUBMISSIONS BY THE PARTIES**

### **On the classification of the Apple Concentrate**

18. The Appellant submits that the Respondent's grounds for disallowing the Appellant's Appeal application were: -
  - i That Chapter 20 Note (d) excludes fruit or vegetable juices of an alcoholic strength by volume exceeding 0.5% vol and that such products are classified in Chapter 22 of the EACCET.
  - ii That Heading 22.06 covers 'other fermented alcoholic beverages (beer, wine, cider, etc.)' mixtures of fermented beverages and non-alcoholic beverages not elsewhere specified or included. The heading includes the classification of cider, an alcoholic beverage obtained by fermenting the juice of apples. The beverage remains classified in the heading when fortified with added alcohol content or when the alcohol content has been increased by further fermentation, provided they retain the

character of the products falling in the heading. Hence, the applicable subheading for the Fermented Apple Concentrate is HS Code 2206.00.90.

19. The Appellant submits that in determining classification of a product, the guiding instruments are the East African Community Customs Management Act, 2014 ('EACCMA') and the East African Community Common External Tariff, 2017, ('EACCET').
20. The CET provides for the respective tariff rates applicable to various products and the same must be interpreted in accordance with the WCO's General Interpretation Rules for the classification of Goods ('GIRs'). That the GIRs ought to be interpreted sequentially. Rule 1 or GIR 1 provides that:

*"The titles of sections, chapters, and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or notes do not require, according to the following provisions:"*

21. For purposes of reference one must consider the title of the sections, chapters, and sub-chapters. However, for purposes of determining classification one is required to consider first the terms of the relevant heading before considering the related section or chapter notes. Where the above does not suffice, then the explanatory notes thereto will be relied on. It is only after exhausting the provisions of GIR 1 that the subsequent Rules to the GIRs, i.e. Rules 2 to 6, can be considered in sequence. The purpose of the chapter notes, section notes, and explanatory notes is to provide guidance in the process of classification.

22. In PURATOS CANADA INC.-VS- CANADA (CUSTOMS AND REVENUE).  
2004 CANLII 57069 (CA CITT) the Canadian Court observed as follows: -

*“The General Rules for the Interpretation of the Harmonized System referred to in section 10 of the Customs Tariff originated in the International Convention on the Harmonized Commodity Description and Coding System. They are structured in cascading form so that, if the classification of the goods cannot be determined in accordance with Rule 1. then regard must be had to Rule 2 and so on. Rule 1 reads as follows:*

*The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.*

*The above legislation requires the Tribunal to follow several steps before arriving at the proper classification of goods on an appeal: first to examine the schedule to see if the goods fit prima facie within the language of a tariff heading; second, to see if there is anything in the chapter or section notes that precludes the goods from classification in the heading; and third, to examine the Classification Opinions and the Explanatory Notes to confirm classification of the goods in the heading.”*

23. The Respondent however submits that the guiding rule in classification is Rule 3(a) of the General Rules of Interpretation, i.e., the heading which provides the most specific description of the goods is to be preferred over a heading which provides a more general description.

## Chapter 20

24. The Appellant submits that the Respondent has in the Appeals Ruling dated 5<sup>th</sup> June 2020 stated that: -

*“based on laboratory analysis of the concentrate and chapter 20 Note (d) that excludes fruit or vegetable juices of an alcoholic strength by volume exceeding 0.5% vol and classifies such products in Chapter 22.”*

25. The Chapter and in particular the heading 20.09 referred to in that Note has the title: -

*“Fruit juices (including grape must) and Vegetable juices, and fermented and not containing added spirit, whether or not containing added sugar or other sweetening matter.”*

26. The Appellant submits that Chapter 20 was not relevant to the classification application and that the Respondent misdirected itself by relying upon or making any reference to it.

27. The Respondent, on the other hand, submits that GIR 3 provides that the most specific description shall be preferred to headings providing a general description. That this position was upheld by the Tax Appeals Tribunal (TAT) in **ENGINEERING SUPPLIES 2001 LIMITED-VS-COMMISSIONER DOMESTIC TAXES**. The Tribunal stated, at Paragraph 18, that: -

*“...the Honorable Tribunal notes that it is worth noting that Rule 3(a) which is the most specific description shall be preferred to headings providing a more general description.”*

28. The Respondent, however, contends that the Appellant made an application for an advance ruling on Fermented Apple Concentrate and upon its analysis it was found to be an alcoholic apple concentrate with alcoholic strength by volume of 14.06%. The product was made from water, glucose syrup, apple juice concentrate, fermented apple juice, acidifier malic acid (E296), colour sulphite ammonia caramel, natural flavoring, preservative sodium benzoate (E2110), acidifier acetic acid and preservative sodium metabisulphate, intended for use in production of alcoholic beverages.
29. The Respondent submits that the Appellant's product specification document also defines the product to be fermented apple compound with an ethanol content of 14.00-15.00%. That the ethanol or alcohol content of the product is an essential characteristic in the classification of the product.
30. The Respondent also submits that Chapter 20 of the EACCET provides for the classification of preparations of vegetables, fruit, nuts or other parts of plants. That Note (d) of Chapter 20 specifies that the chapter does not cover fruit or vegetable juices of an alcoholic strength by volume exceeding 0.5% volume. Thus, fruit or vegetable juices of an alcoholic strength exceeding 0.5% volume are excluded from Chapter 20 and provided for under Chapter 22.
31. The Respondent submits that the aforementioned explanatory note is instructive and must be considered when classifying fruit or vegetable juices that contain alcohol. Due to its alcohol strength, the Respondent considered this explanatory Note 20(d) as a guiding factor in the classification of that product.

## Chapter 22

32. On the Respondent's decision that the Apple Concentrate ought to be classified under Chapter 22, the Appellant submits as follows:

- i Chapter 22 provides for: **Beverages, Spirits and Vinegar**
- ii **Heading 22.06** provides for: **"Other fermented beverages (for example, cider, perry, mead, sake); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included."**
- iii **HS Code 2206.00.10--- Cider.**
- iv **HS Code 2206.00.20 Opaque beer (e.g., Kibuku)**
- v **HS Code 2206.00.90 -- Other**

33. The Respondent has, in its tax decisions and Appeals Ruling, stated that: -

*"the heading includes classification of cider, an alcoholic beverage obtained by fermenting the juice of apples. The beverage remains classified in the heading when fortified with added alcohol content or when the alcohol content has been increased by further fermentation, provided they retain the character of the products falling in the heading."*

34. The Appellant submits that the Respondent's aforementioned decision was influenced by the fact that the Chapter classifies cider obtained from fermenting apples and the cider remains in the classification when alcohol content is fortified or increased by fermentation.

35. The Appellant further submits that this Chapter deals with beverages, spirits and vinegar and not their derivatives. That the alcohol content of the beverages is only a factor at Chapter Note 3 to Chapter 22 in the context of whether the beverage is non-alcoholic or otherwise, but not for classification of a derivative.

36. The Appellant submits that the Respondent's argument that the Apple Concentrate ought to be classified under Chapter 22 on the basis that the chapter and headings therein cover mixtures of non-alcoholic beverages and fermented beverages was on the premise that alcoholic content is a fundamental factor to be considered during tariff classification.
37. The Appellant reiterates that alcoholic strength is not a criterion in determining whether a product is classifiable as a beverage, spirit and vinegar under Chapter 22. That it is only a determinate in distinguishing between non-alcoholic beverages and alcoholic beverages for proper classification under the relevant subheadings i.e., whether to classify a product under Heading 22.02 or 22.03 to 22.06 or 22.08 as appropriate.
38. The Appellant submits that consideration must be made of the terms of the headings in line with GIR 1, taking into account the decision in **Puratos Canada Inc. Case** (supra), i.e., whether the product in question fits the heading. In this case, Heading 22.06 covers: -

*"Other fermented alcoholic beverages (beer, wine, cider, etc.) mixtures of fermented beverages and non-alcoholic beverages not specified elsewhere."*

39. Neither EACCMA nor the EACCET have provided a definition of "beverage". As a result, the Appellant makes reference to the dictionary meaning.

**The Collins Gem English Dictionary** defines "beverage" as a "*drink*".  
*"Drink"- liquid for drinking; portion of this; act of drinking; Intoxicating liquor; excessive use of it.*

**The Concise Oxford Dictionary**, on the other hand, defines "beverage" as:  
*"beverage-a drink (hot beverage, alcoholic beverage. "*

40. It is the Appellant's submission therefore that a beverage is a drink capable of human consumption and that can be offered for retail sale for purposes of human consumption. That the Apple Concentrate, based on its chemical composition as per the Data Specification Sheet, is not consumable in its import state. The Apple Concentrate must undergo further processing into cider, before it is offered for human consumption.
41. The Appellant thus submits that the Apple Concentrate is not a beverage since it is not ready for human consumption, and cannot be offered for retail sale in its import state without undergoing a manufacturing process to make it consumable. Furthermore, the Supplier, Dölher, in its Safety Data Sheet have expressly stated (at Clause 1.2) that the product is only for industrial use in food stuff and not for direct consumption. That the supplier's Safety Data Sheet additionally sets out the First Aid Measures to be taken in the event the product is swallowed or comes into contact with eyes or skin.
42. The Appellant submits that the Explanatory Notes (General) to Chapter 22 which the Respondent has relied on has 4 broad classifications therein. The Explanatory Notes ("General") Notes provide as follows: -

*"The products of this Chapter constitute a group quite distinct from the foodstuff covered by the preceding chapters of the nomenclature. They fall into four main categories:*

- a) Water and other non- alcoholic beverages and ice;*
- b) Fermented alcoholic beverages (beer, wine, cider, etc.)*
- c) Distilled alcoholic liquids and beverages (liqueurs, spirits) and ethyl alcohol*
- d) Vinegar and substitutes for vinegar."*



43. That the Apple Concentrate is not one of the products anticipated under this Chapter. That the Apple Concentrate is not a fermented alcoholic beverage (beer, wine, cider, etc.), but a raw material for the manufacturing of the said alcoholic beverages, especially, cider.
44. The Respondent submits that the product was specifically provided for under Chapter 22, and specifically Sub-heading 2206.00.90, based on its description and chemical composition.
45. The explanatory notes to subheading 22.06 further state; -

*“All these beverages may be either naturally sparkling or artificially charged with carbon dioxide. They remain classified in the heading when fortified with added alcohol or when the alcohol content has been increased by further fermentation, provided that they retain the character of products falling in the heading.*

*This heading also covers mixtures of non-alcoholic beverages and fermented beverages and mixtures of fermented beverages of the foregoing headings of Chapter 22, e.g., mixtures of lemonade and beer or wine, mixtures of beer and wine, having an alcoholic strength by volume exceeding 0.5% vol.”*

46. That the Appellant in its application for a Tariff Ruling (dated 17<sup>th</sup> January 2020) described the product as: -

*“fermented apple compound (“concentrate”) for use in the manufacture of cider. ...the fermented apple compound is a clear brown liquid with an apple taste that is used as a raw material in the manufacture of ciders.... the concentrate contains inter alia ...fermented apple juice”*

47. The sample tested by the Respondent was found to be an alcoholic apple concentrate with alcoholic strength by volume of 14.06%.
48. The Fermented Apple Concentrate based on its physical & chemical characteristics, and having regard to classification of goods in line with the GIRs and Explanatory Notes, was found to be most specially provided for in HS Code 2206.00.90, based on: -
- i Chapter 22 notes. The Explanatory Notes to Chapter 22.06 provides that: -  
*“This heading covers all fermented beverages other than those in headings 22.03 to 22.05. This includes inter alia Cider, an alcoholic beverage obtained by fermented the juice of apples.”.*
  - ii The Explanatory Notes to Chapter 20, General state in the pertinent part: -  
*“The Chapter does not cover: (d) Fruit or vegetable juices of an alcoholic strength by volume exceeding 0.5 % vol (Chapter 22).”*
  - iii The GIR 3(a) states that the heading which provides the most specific description of the goods is to be preferred to a heading which provides a more general description.
49. The Respondent is therefore of the view that Chapter 22 is the most appropriate Chapter covering classification of the Apple Concentrate as guided by the GIRs read together with the EACCET 2017 and the relevant Explanatory Notes.
50. The Respondent disagrees with the Appellant’s contention that alcoholic content is not a criterion in the classification of products.

51. The Respondent submits that the Explanatory Notes to Rule 1 provide that:-

*“(1) The Nomenclature sets out in systematic form the goods handled in international trade. It groups these goods in Sections, Chapters and sub-Chapters which have been given titles indicating as concisely as possible the categories or types of goods they cover. In many cases, however, the variety and number of goods classified in a Section or Chapter are such that it is impossible to cover them all or to cite them specifically in the titles.”*

52. For this reason, Rule 3 then provides that the heading, which provides the most specific description, shall be preferred to headings providing a general description.

53. The Respondent also argues that the product can be consumed in its imported state.

54. The Respondent submits that the Appellant's position is erroneous and contradicts the provision of Rule 2(a) of the GIR which states that the essential character of a product must be borne in mind when classifying a product. The chemical composition of the Fermented Apple Concentrate is an essential character to aid in classification. It is for this reason that the Respondent always requests for a manufacturer's material safety data sheet which would show *inter alia* the chemical composition of a product. In this instance, the Appellant's Safety data sheet correctly provides for the chemical composition.

55. The Respondent further submitted that when classifying beverages or concentrates or mixtures, the alcohol content is a key determinant factor. If this was not the case, then the Safety Data Sheet would not have indicated the alcohol content.

56. The alcohol content being an essential character of the fermented apple concentrate is therefore a key determinant in classification.

## Chapter 21

57. The Appellant submits that Chapter 21 was intended to be a "catch all" provision unless otherwise expressly excluded, with the title: -

*"Miscellaneous edible preparations."*

That, Heading 21.06 provides for: -

*"Food preparations not elsewhere specified or included"*

while Subheading 2106.90.20 provides for: -

*"Preparations of a kind used in manufacturing of beverages."*

Hence it covers any preparation for beverages, whether of alcoholic or non-alcoholic nature.

58. Chapter 20, 21 and 22 all fall under *Section IV: Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes*. Where the alcohol content is relevant it has expressly been provided for by the following Chapter Notes: -

- i Chapter 20 at Chapter Note 6; and
- ii Chapter 22 at Chapter Note 3.

59. It is the Appellant's submission that there is no provision for alcohol content in Chapter 21 and therefore it is irrelevant whether or not the preparation is alcoholic or non-alcoholic.

60. The Appellant submits that contrary to the Respondent's assertion that the intention of the product is not a factor to consider in classification, the Court in **PROCTOR & ALLAN (E.A) LIMITED-VS-COMMISSIONER OF INCOME TAX [2014] eKLR** in fact considered this issue and stated as follows: -

*“It is the conclusion of this court that in the light of the Certificate of Analyses that were submitted by both the Appellant and the Respondent, the court had little choice but to look at the intended purpose of the vitamin premix with a view to establishing whether it had been classified under the correct Heading. The court finds that the purpose of the vitamin premix was to fortify or improve the vitaminic characteristics of the unimix. There was no justification or basis which would have required the Respondent to have re-classified the vitamin premix as had been contended by the Appellant. It was irrespective whether or not KRA could analyse and identify vitamins.”*

61. The Appellant submits that had the Respondent considered the description of the Apple Concentrate and its chemical composition in arriving at its classification, it would have found that the Apple Concentrate falls under Chapter 21, specifically **HS Code 2106.90.20** and not under Chapter 22 for the following reasons: -

- i The information in the product specification sheet describes the Apple Concentrate as follows:
  - a) *Appearance and Consistency*: “clear, brown, liquid”
  - b) *Odour and Taste*: “cider odour and apple taste”

The fact that the product has cider odour and apple taste does not make it a beverage but a product for manufacturing.

- ii The Physical and Chemical characteristics equally present a product that is not consumable in its current state and cannot be a beverage but rather a product for the manufacturing of cider.

62. In the **Proctor & Allan (E.A) Limited** case (supra), the Court emphasized the need to consider the chemical composition of a product as a basis for classification: -

***"32. It is therefore the finding of this court that the unimix did not and could not fall under goods that could be classified as Provitamins itemised on pp 154-162 of the Appellant's Record of Appeal for the reason that the vitamins were of very low percentages. The Customs and Excise Appeals Tribunal made a correct in finding that the Respondent had rightly classified the unimix under tariff 2106. 90.90 as the same was in line with the classification provided by the WCO."***

63. The Appellant submits that Explanatory Notes (Note 7) to Chapter 21 relied upon by the Respondent, confirm that the Apple Concentrate ought to be classified under class 21 and not 22 for the reasons that: -

***"As presented, these preparations are not intended for consumption as beverages and thus can be distinguished from the beverages of chapter 22."***

64. The Appellant submits that Dölher Raggel BV, the manufacturer and supplier of the Apple Concentrate have also advised that the product is classified under HS 21.06 by the WCO's Harmonised Systems Committee.
65. The Respondent submits that Chapter 21 of the EACCET provides for classification of "*miscellaneous edible preparations*". That the Explanatory Notes to Chapter 21, and specifically Heading 21.06, has a caveat to it stating that, "*Provided that they are not covered by any other heading of the Nomenclature, this heading covers...*"
66. The Respondent submits that this would mean that for a product to be classified under Heading 21.06, the product must not be specifically provided for by any other heading. That the Explanatory Note (7) to Heading 21.06 then provides that "*this heading includes, inter alia. "Non —alcoholic or alcoholic preparations (not based on odoriferous substances)*

*of a kind used in the manufacture of various non-alcoholic or alcoholic beverages.” ....* ...as presented, these preparations are not intended for consumption as beverages and thus can be distinguished from the beverages of Chapter 22.

67. The Respondent submits that the import of this Note is that for the preparations to be classified under Chapter 21.06, they must firstly not be covered by any other heading, and secondly, pursuant to Note 20 (d), such preparations cannot be consumed as beverages.
68. That Chapter 21 is for miscellaneous edible preparations not provided for elsewhere. This means that for one to classify a product under Chapter 21, such product must not be covered under any other heading of the nomenclature.
69. That both Chapter 21 and its Explanatory notes are silent regarding the alcohol composition of the products therein, yet alcohol composition is an essential character of the product in dispute.
70. That the question to be answered by the Tribunal is whether Fermented Apple Concentrate is not provided for specifically under other chapters of the HS Code, so as to be classified under Chapter 21.
71. It is the Respondent's opinion that the Fermented Apple Concentrate can specifically be classified elsewhere in the HS Code and need not therefore be classified under Chapter 21.

**On whether the Respondent erred in law and in fact in refusing to refer the matter to WCO**

72. The Appellant vide a letter dated 25<sup>th</sup> June 2020 requested the Respondent to refer the dispute with regard to the classification of Apple Concentrate to the WCO for an advance ruling.

73. The Respondent replied vide an e-mail dated 17<sup>th</sup> August 2020 and stated that it had made a decision not to refer the case to WCO because the matter could be decided locally.
74. The Appellant avers that Kenya is a signatory member to the World Customs Organizations (WCO). Thus, by dint of Article 2 of the Constitution of Kenya, the Harmonized Community Classification System ("HS. Code") developed by the WCO forms part of the Laws of Kenya.
75. Further, Section 122 (6) of the EACCMA requires that the decisions, rulings, opinions, guidelines and interpretations given by WCO be taken into account by the Respondent in interpreting the section. Thus, the assertion by the Respondent that it is not bound by the WCO classification opinion is meant to subvert clear statutory provisions.
76. For the avoidance of doubt, the Court in **EXPORT TRADING COMPANY LIMITED & ANOTHER-VS-COMMISSIONER OF CUSTOMS AND EXCISE (2018) eKLR** has clarified the place of WCO classification decisions as follows: -

*“It is not disputed that Kenya is a member of World Customs Organization.*

*One of the organization's role is to develop Harmonized commodity description and coding system generally referred to as "Harmonized System" or simply "HS". It is an international standard classification system for commodities, Harmonization is crucial for fair international trade. The role of a member state is to make the correct interpretation through its tax authority guided by General Interpretation Rules (GIR) of Harmonized Systems (HS): to ensure that correct classification of a product has been adopted. In the event of doubt on classification of a commodity the Respondent is at liberty to seek assistance from the World Customs Organization.”*



77. The Appellant recognizes that the Respondent is at liberty to seek assistance from WCO. However, this discretion in determining whether or not to refer a dispute ought to be exercised judiciously. In the words of the Court in **FARAH AWAD GULLET-VS-CMC MOTORS GROUP LIMITED [2018] eKLR:-**

*“discretion should be exercised judiciously, meaning, without caprice or whim and sound reasoning.”*

78. Additionally, the refusal to make the referral was made without any proper explanation other than by merely stating that it could be decided locally. Such a decision is constitutionally suspect and offends Article 48 of the Constitution on administrative fairness.

79. The Appellant submits that the Respondent’s refusal to submit the dispute to WCO had no iota of sound reasoning and remains capricious. That the Respondent is in contravention of the natural justice principle of *nemo judex in causa sua* meaning that one cannot be judge in his own cause, by denying the Appellant an impartial determination as to the correct classification of the Apple Concentrate. That the Respondent’s refusal is also in breach of the provisions of the Fair Administrative Action Act.

80. Further, the Appellant in its letters dated 17<sup>th</sup> January 2020 and 5<sup>th</sup> June 2020, availed to the Respondent, *inter alia*, a copy of the ruling from WCO with regard to the classification of a product similar to the Apple Concentrate. The Respondent however opted to disregard the WCO’s pronouncement on this issue and insisted on its misguided classification of the Apple Concentrate.

81. The Appellant also submits that its Supplier, a globally recognized entity, has advised that the Apple Concentrate has been classified in HS Code 21.06 by the WCO HS Committee. That unless there are good reasons warranting

reversal of this classification the Respondent cannot insist on classifying the Apple Concentrate differently.

82. The Appellant therefore prays that this Tribunal declares that the Respondent erred in refusing to submit the matter before the WCO for determination and for failing to consider the WCO H.S Committee decision, as provided for in the data safety sheet which expressly classified the Apple Concentrate under HS Heading 21.06.
83. The Respondent however submits that it has not forwarded the product for classification to the WCO for the following reasons: -
- i A chemical analysis of the product is not required;
  - ii The Respondent is not disputing the chemical analysis report provided by the Appellant;
  - iii Classification is based on the Explanatory Note (d) to Chapter 20 which specifically classifies the product; and
  - iv Cases that are referred to the WCO for classification advice are cases where there is no recourse for classification either vide the Section, Chapter or Explanatory Notes to the HS.
84. The Respondent submits that this dispute is not ripe for the intervention of the WCO. The Respondent concurs with the court's holding in the **Export Trading case** wherein the court stated that: -

*"It is not disputed that Kenya is a member of World Customs Organization. One of the organization's role is to develop Harmonized commodity description and coding system generally referred to as "Harmonized System" or simply "HS". It is an international standard classification system for commodities. Harmonization is crucial for fair international trade. The role of a member state is to make the correct interpretation through its tax*

*authority guided by General Interpretation Rules (GIR) of Harmonized Systems (HS); to ensure that correct classification of a product has been adopted. In the event of doubt on classification of a commodity, the Respondent is at liberty to seek assistance from the World Customs Organization. ”*

85. The Respondent submits that the court’s position was that the Respondent ought to seek assistance from the WCO if there was doubt and the Respondent is not in doubt as to the classification of the product in question.
86. The Respondent submits that the taxpayer being aggrieved by the Respondent’s ruling on classification of a product is not sufficient reason to invoke WCO.
87. The Respondent further submits that the material safety data sheet of a product is not conclusive evidence of the classification. In fact, the document guides the Respondent as to the characteristics and chemical composition of the product. Ultimately, the Respondent must carry out its verification under EACCMA and laboratory testing to satisfy itself of the chemical composition, and the tariff classification.
88. In reference to the WCO Ruling referred to by the Appellant, the Respondent submits that the said ruling is for a product called: -

*“food preparation in the form of dried powder alcohol, consisting of ethyl”*

which is a different product and cannot be relied upon as similar to the product in dispute.

**On whether the Issue of Fermented Apple Plus referred in this Appeal arises in this case**

89. The Appellant submits that the issue of Fermented Apple Plus was not a subject of consideration both in the Tariff Ruling, Appeals Rulings and therefore cannot be introduced by the Respondent. That the matter is settled and warrants no further consideration or determination by the Tribunal.
90. The Appellant nonetheless submits that the two products are distinctly different in chemical composition and therefore they cannot be similarly classified. This is evident from their respective Data Specifications.
91. The Appellant contends that even if the Apple Concentrate and the Fermented Apple Plus were similar products, admission of tax liability cannot be the ground of varying express provisions of the Statute. That the Court in the case of REPUBLIC-VS-LUCAS M. MAITHA CHAIRMAN BETTING CONTROL AND LICENSING BOARD & 2 OTHERS ex-parte INTERACTIVE GAMING AND LOTTERIES LIMITED [2015] observed that:

*“The law on admission is clear that an admission may be of no effect if it shown that it is made by mistake or under circumstances that would vitiate its import. This position was restated in PUSHPA D/O RAOJIBHAI M PATEL-VS-THE FLEET TRANSPORT COMPANY LTD CIVIL APPEAL NO. 5 OF [1960] EA 1025 where it was held an admission based on an incorrect legal position is not binding. In RAMUS VS. DONALDSON [1959] EA 355, the Court expressed doubts on the wisdom of contracting out of statutory provisions. I agree with the Home there can be no estoppel against a statute or the law.”*

92. The Respondent submits that the Appellant has been importing a similar product called Alcoholic Fermented Apple Plus with similar characteristics, i.e., a fermented apple concentrate with alcohol content of 14.5% by volume and which the Appellant had previously misclassified as a product under Heading 33.02 causing revenue loss to the Respondent. That the Respondent later issued a demand notice on the product classifying it under HS Code 22.06 and the Appellant agreed with the Respondent's position and paid the taxes demanded, including the resultant penalties and interest.
93. That the product specification of the Alcoholic Fermented Apple Plus contains the same chemical composition as the product in dispute herein. For instance, the ethanol content of the product is the same, i.e., 14% to 15%; the appearance (clear, brown liquid) is the same and, most importantly, it is supplied by the same manufacturer.
94. That even though the Alcoholic Fermented Apple Plus is not subject to the dispute before the Tribunal, it provides guidance to the Tribunal of the Respondent's decision and the Appellant's acquiescence to the decision.
95. The Appellant cannot therefore argue that the two are different in chemical composition or that the Respondent ought not to rely on its decision therein. The Appellant was aware of its rights of Appeal under the EACCMA.

### **ISSUES FOR DETERMINATION**

96. The Tribunal frames the following to be the key issues for determination: -
- i. **Whether the Respondent erred in classifying the Apple under the HS Tariff Code 2206.90.20?**

- ii. Whether the Respondent should be directed to refer the question of the Tariff Classification of the Apple Concentrate to the World Customs Organization ('WCO')?

## ANALYSIS AND FINDINGS

### i. Whether the Respondent erred in classifying the Apple Concentrate under the HS Tariff Code 2206.00.10

97. The Appellant submitted that under the EACMMA EACCET, the tariff classification applicable to various products must be interpreted in line with WCO's General Interpretation Rules for the classification of Goods ('GIRs').
98. Rule 1 or GIR 1 provides that the titles of sections, chapters, and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or notes do not require, according to the provisions that follow.
99. The Appellant argued that it is only when the stipulations of GIR 1 do not suffice that the Explanatory Notes and the subsequent GIRs (Rules 2-6) thereto should be applied. Furthermore, that the purpose of the chapter notes, section notes, and explanatory notes is to provide guidance in the process of classification.
100. The Appellant also submitted that the Respondent's classification under Chapter 22 on the basis that this chapter and the headings therein covered mixtures of non-alcoholic beverages and fermented beverages was on the premise that alcoholic content is a fundamental factor to be considered in tariff classification. Furthermore, Chapter 22 covers beverages, spirits and vinegar and that the Apple Concentrate does not constitute a beverage since it is not a product ready for human consumption and cannot be offered for

sale at a retail level in its state of importation. It must undergo a further manufacturing process to make it a consumable product.

101. The Respondent on its part however, submitted that the guiding rule in classification is Rule 3(a) of the General Rules of Interpretation, i.e., the heading which provides the most specific description of the goods is to be preferred over a heading which provides a more general description.
102. The Respondent also argued that the Appellant has previously imported a product of similar characteristics in terms of its chemical composition called Alcoholic Fermented Apple Plus and the Respondent had classified the product under HS Tariff Code 2206.00.10. The Appellant agreed to pay taxes thereon under the said tariff code.
103. The Respondent insisted that alcoholic content is a criterion in the classification of products and submitted that this characteristic being an essential character of the fermented apple concentrate, is a key determinant in classification.
104. The Tribunal having considered arguments by both parties and the various materials placed before it, is of the view that the General Interpretative Rule 1 (GIR 1) is the foremost rule of classification. For legal purposes classification is determined by the terms of the headings, the Section or Chapter Notes where relevant, and, if necessary and allowable, the other GIRs.
105. The Tribunal therefore agreed with the holding of the Canadian Court in **PURATOS CANADA INC.-VS- CANADA (CUSTOMS AND REVENUE). 2004 CANLI 57069 (CA CITT)**. The Court stated *inter alia* that:

*“The General Rules for the Interpretation of the Harmonized System referred to in section 10 of the Customs Tariff originated in the International Convention on the Harmonized Commodity*



*Description and Coding System. They are structured in cascading form so that, if the classification of the goods cannot be determined in accordance with Rule 1. then regard must be had to Rule 2 and so on. ....The above legislation requires the Tribunal to follow several steps before arriving at the proper classification of goods on an appeal: first to examine the schedule to see if the goods fit prima facie within the language of a tariff heading; second, to see if there is anything in the chapter or section notes that precludes the goods from classification in the heading; and third, to examine the Classification Opinions and the Explanatory Notes to confirm classification of the goods in the heading.”*

106. In the instant case, it appears to the Tribunal, that the Respondent placed more emphasis on the Chapter title and related Chapter Notes and Explanatory Notes in the classification of the product. The Respondent concluded that the Apple Concentrate was a beverage and was therefore within the ambit Chapter 22 of the EACCET.
107. The Tribunal faults the Respondent’s approach since the words in the Section and Chapter titles are to be used as a guide to where the appropriate Tariff Code of the product to be classified is likely to be found. A product may therefore be included in or excluded from a Section or Chapter even though the titles might lead one to believe otherwise.
108. The Tribunal also does not agree that the Apple Concentrate constitutes a beverage. The Respondent should have considered the purpose or use of the product before arriving at its decision. It is not in dispute that the Apple Concentrate is used by the Appellant as a raw material in the manufacture of Cider, an alcoholic beverage. In **PROCTOR & ALLAN (E.A) LIMITED-VS-COMMISSIONER OF INCOME TAX [2014] eKLR** the Court held that: -



*“It is the conclusion of this court that in the light of the Certificate of Analyses that were submitted by both the Appellant and the Respondent, the court had little choice but to look at the intended purpose of the vitamin premix with a view to establishing whether it had been classified under the correct Heading. The court finds that the purpose of the vitamin premix was to fortify or improve the vitaminic characteristics of the unimix. There was no justification or basis which would have required the Respondent to have re-classified the vitamin premix as had been contended by the Appellant. It was irrespective whether or not KRA could analyse and identify vitamins.”*

109. In view of the foregoing reasons, the Tribunal finds that the Respondent erred in classifying the Apple Concentrate under Tariff Heading 2206.00.10.
110. The Tribunal agrees with the Appellant that the correct classification is under HS Tariff Code 2106.90.20.
111. The Respondent argued that it had classified Alcoholic Fermented Apple Plus under HS Code 22.06 and the Appellant had conceded and paid extra/additional taxes assessed thereon. For this reason, the Respondent implored the Tribunal to hold that the Apple Concentrate that is the subject of this Appeal should automatically fall under a similar classification.
112. The Appellant in its short reply submitted that what was in dispute in this Appeal was Apple Concentrate and not Alcoholic Fermented Apple Plus. The Tribunal agrees with the position taken by the Appellant and declines the Respondent’s invitation as doing so will amount to engaging in speculation.

- ii. Whether the Respondent should be directed to refer the question of the Tariff Classification of the Apple Concentrate to the World Customs Organization ('WCO')

113. Having decided that the correct classification is HS Tariff Code 2106.90.20, the Tribunal finds that this issue is rendered moot.

## **FINAL ORDERS**

114. The upshot of the above findings is that the Appeal succeeds and the Tribunal makes the following final Orders: -

- i. The Appeal be and is hereby allowed.
- ii. Apple Concentrate falls under HS Tariff Code 2106.90.20.
- iii. The Respondent's tariff ruling dated 7<sup>th</sup> February 2020 and appeals ruling dated 5<sup>th</sup> June 2020 be and are hereby set aside.
- iv. Each party to bear its own costs.

115. It is so ordered.



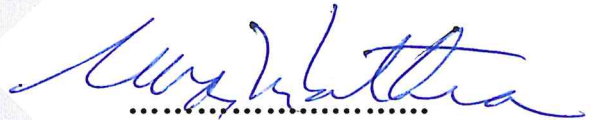
DATED and DELIVERED at NAIROBI on this 25<sup>th</sup> day of June, 2021.



.....  
PATRICK LUTTA  
CHAIRPERSON



.....  
HELEN BILA  
MEMBER



.....  
MWAI MBUTHIA  
MEMBER



.....  
ELISHAH NJERU  
MEMBER



.....  
HABON FARAH  
MEMBER