Commissioner of Customs & Border Control v Sai Pharmaceuticals Limited (Tax Appeal E098 of 2021) [2022] KEHC 10644 (KLR) (Commercial and Tax) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10644 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E098 OF 2021

DAS MAJANJA, J

MAY 31, 2022

BETWEEN

COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... APPELLANT

AND

SAI PHARMACEUTICALS LIMITED ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 23rd April 2021 in Tax Appeal No.188 of 2019)

JUDGMENT

1. The respondent is a limited liability company that offers a range of pharmaceutical services including the importation of drugs and medicines for sale and between 2012 and 2019, it had been importing tablets called FreeFlex Forte ("the tablets"). When it imported the tablets in May 2012, the Respondent declared the same to be under Heading System (HS) Code 2106.90.91. However, through its letter dated May 9, 2012, the respondent claimed that the said classification was an inadvertent error and it thus requested a laboratory analysis from the commissioner.

2. The commissioner delivered a tariff ruling on the request through its letter dated May 22, 2012 referenced CUS/V&T/TARI/RUL/284/12 where it held that the tablets tested were found to be a preparation containing glucosamine sulphate (500mg) and chrondroitin sulphate (400mg) and that the tablets were specified to be synergistic combinations and comprehensive supplements that aided in treating sports injuries, bursitis, osteoporosis and tendonitis. That Glucosamine sulphate is a component of muco-polysaccharide and glycoprotein which form part of the cell membrane and contributes to the strength of joint structures and also acts as a shock absorber, while chrondroitin sulphate is one of the main glycosaminoglycan (GAGS) found in human and animal cartilage and is used to treat arthritis and psoriasis. Thus, the Commissioner concluded by stating that the Heading

21.06 covers the classification of food preparations not elsewhere specified or included and covers preparations, often referred to as food supplements, vitamins and sometimes minute quantities of iron compounds, which preparations are often put up in packaging with indications that they maintain general health wellbeing. Based on the above, the Commissioner made a dispositive finding that the tablets are therefore considered to be a food supplement classified in HS Code 2106.90.91 of the Common External Tariff (CET) thus the Respondent's declaration was in concurrence with the laboratory findings.

3. The respondent, through its representative, responded by disputing and appealing the tariff ruling above through the letter dated June 26, 2012. The Respondent stated that it found no relationship whatsoever in the analysis report and the tariff ruling that warranted the tablets to be classified under Heading 21.06 and that the same ought to have been classified under HS Code 3004.90.00 and that this position was fortified by an earlier tariff ruling referenced as 2008/V&T/649. Therefore, the respondent requested the Commissioner to look into the tariff ruling with a view of reversing it and allowing it to put up a claim for a refund. The Commissioner responded to the Respondent in an evenly dated letter where it stated that the earlier tariff ruling relied on by the respondent related to a different importer and referred to a different product from the Respondent's and that the Commissioner's tariff rulings are based on material facts presented including laboratory analysis of the individual product. Therefore, the Commissioner upheld its earlier position in the tariff ruling of May 22, 2012.

4. The respondent further appealed against this decision by the commissioner through its letter dated July 9, 2012. The respondent presented that even though its plea was backed by a ruling given to another importer and its competitor, the subject products had the same chemical composition but it was marketed under a different trade name and from a different supplier. The Respondent maintained that from the Commissioner's analysis report, the tablets had therapeutic properties and coupled by the fact that it was a prescription drug it had more medicinal value. The respondent referred the Commissioner to the Harmonised System Explanatory Notes more so Chapter 21.06 where item (16) excludes supplements "intended for the prevention or treatment of diseases or ailments (heading 30.03 or 30.04)" and that in the foregoing, the tablets are medicine and ought to be classified under HS code 30.04". The respondent also urged the Commissioner to apply the classification rule which states that "in case an item appears to fall in two or more 'T.Is, it should be classified under the T.I that comes last". Therefore, the Respondent once again urged the Commissioner to reconsider its position and review the Tariff Ruling in its favour.

5. The Commissioner responded to the respondent's further appeal though the letter dated July 16, 2012. The Commissioner stated that from the additional information provided, the tablets are said to be a preparation containing glucosamine and chondriotin sulphate with indications for sports injury, bursitis, osteoporosis and tendonitis and it is also used to treat several physical disorders like arthritis and psoriasis. The Commissioner went on to state that Heading 21.06 covers the classification of food preparation not elsewhere specified or included and that Heading 30.04 covers the classification of medicaments consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale.

6. The Commissioner further held that the Explanatory Note to Heading 21.06, item (16), excludes the classification of food supplements intended for the prevention or treatment of diseases or ailments (30.03 or 30.04) and that based on this information, the tablets are considered to be a medicament put up in measured doses for therapeutic use in human beings classifiable under HS Code 3004.90.00.

In this regard the Commissioner reviewed its earlier tariff ruling of May 22, 2012 by stating that the declared HS Code 3004.90.00 is in agreement with the tariff findings.

7. On January 7, 2019, the respondent through its clearing agent imported the tablets and declared the same under HS Code 3004.90.00. Upon verification, the customs officer held that the tablets had been classified incorrectly and suggested HS Code 2106.90.91. The Respondent requested for a laboratory analysis and the Commissioner communicated its findings and ruling through the letter dated January 22, 2019 and referenced as CUS/V&T/TARI/RUL/022/2019 where its findings mirrored that of the tariff ruling of 22nd May 2012 as the Commissioner opined that the tablets were considered to be a food supplement classified under HS Code 2106.90.91 and that the declared HS Code 3004.90.00 was at variance with the laboratory findings.

8. The respondent appealed this tariff ruling through its letter dated January 29, 2019 where it also reiterated the grounds of its earlier appeals stating that the tablets were prescription medicines and not food supplements which could only be administered by a healthcare practitioner. The respondent thus urged the Commissioner to review its ruling and have the tablets classified under the appropriate and declared HS Code 3004.90.00. The Commissioner responded to the respondent's appeal through its letter dated February 25, 2019 where it maintained that Heading 21.06 covers the classification of food preparations not elsewhere specified or included and the heading includes the classification of preparations, often referred to as food supplements, based on extracts from plants, fruit concentrates, honey, fructose etc, and containing added vitamins and sometimes minute quantities of iron compounds. That these preparations are often put up in packaging with indications that they maintain general health or well-being and based on this information, the tablets are therefore considered to be a food supplement, classified in HS Code 2106.90.91. Thus, the Commissioner upheld its tariff ruling of January 22, 2019. After a meeting of the parties' representatives on March 21, 2019, the Commissioner, in a letter and Tariff Ruling dated March 29, 2019, maintained its earlier position that the tablets are considered food supplements and thus classified under HS Code 2106.90.91.

9. Being dissatisfied with the Commissioner's tariff ruling, the respondent preferred an appeal to Tax Appeals Tribunal ("the tribunal") where it sought an order setting aside the Commissioner's ruling of March 29, 2019 and validating its earlier decision of July 16, 2012. Having considered both parties' pleadings, documentation and submissions, the tribunal was of the view that the issues for its determination were whether the Commissioner erred in law and fact by deviating from its July 16, 2012 ruling by issuing another ruling on March 29, 2019 on the same product and whether the tablets are a food supplement under HS Code 2106.90.91 or a medicament under HS Code 3004.90.00.

10. The tribunal held that the while Commissioner is allowed under the law to make and withdraw rulings, it has to follow the laid down procedure in sections 65, 67 and 68 of the *Tax Procedures Act*,2015 ("the TPA"). It concluded that the Commissioner failed to apply the proper procedures in withdrawing the ruling of July 16, 2012 meaning that the said Ruling was still binding on the Commissioner as it had not been withdrawn in accordance with the relevant provisions. Consequently, the Tribunal found that the Commissioner erred in law and fact by deviating from its July 16, 2012 ruling by issuing another ruling on March 29, 2019 on the same product.

11. On the classification of the tablets, the tribunal addressed two sub-issues; whether the tablets are based on extract from plants, fruit concentrate, honey or fructose and whether the package has indications that the tablets maintain the general health or well-being or; whether it is intended for prevention or treatment of diseases or ailments thus making it an exclusion under Heading 30.03.

12. The tribunal held that there was no evidence on record showing that the tablets contain extracts from plants, fruit concentrate, honey or fructose as the analysis report indicated that the tablets contain Glucosamine Sulphate (500mg) and Chondroitin Sulphate (400mg) which relieves pain, helps repair and replenish damaged cartilage thereby improving mobility. That it had not been shown that these ingredients are extracts from plants, fruit concentrate, honey or fructose and it had also not been shown that the tablets contain vitamins in minute quantities or iron compound.

13. On the second sub-issue, the tribunal held that HS Code 30.04 covers "medicaments (excluding goods of heading 30.02.30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses {including those in the form of transdermal administration systems) or in forms of packaging for retail sale" with the emphasis being that it covers medicaments consisting of mixed or unmixed products provided they are put up in measured doses or informs such a tablet for use either for direct treatment of certain diseases or as a solvent for the preparation of injectable medicinal solution or medicaments in the form of transdermal administration systems or small quantities of powder ready for taking as single dose for therapeutic or prophylactic use.

14. The tribunal held that from the above, medicaments may consist of mixed or unmixed products for therapeutic or prophylactic uses put up in measured doses and it may be in the forms indicated above. The tribunal stated that FreeFlex Forte is in the form of tablets and consists of mixed products and the question that followed then was whether it is for therapeutic or prophylactic use. The tribunal relied on Black's Law Dictionary definition of 'therapeutic' as a term describing drugs for treatment of a condition the same way as other usually used drugs and 'prophylactic' as an adjective meaning 'formulated to prevent something" and that this definition mirrors the use of the term in medicine to describe measures taken to prevent disease.

15. The tribunal noted that the Commissioner found that the samples tested were found to contain glucosamine sulphate (500 mg) and chondroitin sulphate (400mg) and that Glucosamine contributes to strength of joint structures and also acts as a shock absorber while chondroitin sulphate is one of the main glucosaminoglycon found in human and animal cartilage and is used to maintain arthritis and psoriasis. That this was found to be synergistic combination and comprehensive supplement recommended for essential collagen formation and tissue repair function providing long-term nutritional joint function, promoting overall health of the structural system.

16. The tribunal found that the manufacturers packaging note/leaflet indicated that the tablets have therapeutic indications and are recommended for treating sports injuries, bursitis osteoporosis and tendinitis and that in the Memorandum DIO 14-30 of Canada Border Services Agency on tariff classification of medicaments including natural health products states that "if a vitamin or vitamin preparation, is in injected to reverse or prevent (therapeutic or prophylactic) a deficiency that may lead to a disease, illness or ailment, it follows that the purpose of injecting the product is to reverse or prevent that malady. it is suggestive though not conclusive in all such cases that such vitamin products intended for human or animal use, are medicaments"

17. From the foregoing analysis, the tribunal concluded that the tablets can be used both for therapeutic or prophylactic effects but it noted that from the certificate of the Pharmacy and Poisons Board, under the Ministry of Health, the tablets are registered as a drug and consequently, the tribunal found that the tablets are not a food supplement under HS Code 2106.90.91 but a medicament under HS Code 3004.90.00.

18. As a result, the tribunal made the final decision to allow the respondent's appeal and declare that the Commissioner's ruling of July 16, 2012 binding on the Commissioner and therefore set aside the

ruling dated March 29, 2019. The Tribunal further held that the FreeFlex Forte tablets qualify as a medicament under HS Code 3004.90.00 and each party was ordered bear its own costs of the appeal.

19. The Commissioner has appealed against the Tribunal's decision based on the grounds in the memorandum of appeal dated June 21, 2021. The respondent filed the statement of facts dated September 1, 2021. The parties filed written submission which, in summary, regurgitate their positions before the Tribunal.

Analysis and Determination

20. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the TPA which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". An appeal limited to matters of law does not permit the appellate court to substitute the tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. This position affirmed by the Court of Appeal in *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR which summarised what amounts to "matters of law" as follows:

> [T]he interpretation or construction of the *Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.

21. The Commissioner's appeal raises three grounds of appeal which mirror the findings of the Tribunal. First, that the Tribunal erred in law and fact by finding that the tablets are a medicament having prophylactic and therapeutic uses. Second, the tribunal erred in law and fact by finding that it did not withdraw its ruling of July 16, 2012 and last, the Tribunal erred in law and fact by relying on the TPA where the East African Community Customs Management Act (EACCMA) is applicable. I shall consider each issue separately.

Classification of the tablets

22. The issue of how the tablets ought to be classified was the main point of contention by the parties before the Tribunal and this court. It is not in dispute that the world community, in an effort to facilitate international trade, has over the years developed a common and harmonized classification system as a means for a systematic naming or enumerating of all goods found in international trade along with international rules and interpretations. This classification system currently in use is called the Harmonized Commodity Description and Coding System ("the Harmonized System") and the EAC partner States agreed to adopt it when they signed the Treaty for the establishment of the EAC on November 30, 1999.

23. The Harmonized System comprises of 21 Sections divided into 99 Chapters and the arrangement of sections is based three principles; articles made of same material, goods of the same use and the stage of processing or degree of manufacturing. It comprises of a Tariff structure where a tariff number is identified by an eight-digit code, for example, 3004.90.00 assigned to a good or service (HS code) and the tariff number is based on the general category that describes the item that is, use of the item or the materials making it. The Harmonized System is also supported by, inter alia, Explanatory Notes

which provide commentary on the intent and scope of provisions and as approved by the Customs Co-operation Council. These notes constitute the official interpretation of the Harmonized System at the International level and are an indispensable complement to the System.The EAC partner states have since developed a customized EAC Common External Tariff, 2017 Version (EACCET) which is currently applicable to the partner states including Kenya as a basis for classification of goods and services.

24. The parties' dissension was on how and where to classify the FreeFlex Forte tablets. The Commissioner maintains that it ought to be under HS Code 2106.90.91, under the Heading "Food preparations not elsewhere specified or included" and under the Sub-heading "Food supplements". On its part, the respondent argues that the tablets ought to be classified under HS Code 3004.90.00 under the Heading "Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale" and under the Sub-Heading "Other".

25. The Explanatory Notes to HS Code 21.06 under item (16) provides that, "preparations often referred to as food supplements based on extracts from plants, fruit concentrates, honey and fructose etc. and containing vitamins and sometimes minute quantities of iron compounds. These preparations are often put up in packages with indications that they maintain the general health or well -being. Similar preparations however, intended for the prevention or treatment of diseases or ailments are excluded under heading 30.03 or 30.04"

26. Under section 56 of the *TPA*, it was incumbent upon the respondent to demonstrate that the Commissioner's classification was wrong and that the tablets ought to be classified under HS Code 3004.90.00 as they were medicaments consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale. This determination was a factual one and was within the province of the Tribunal and all this court, dealing with only matters of law, needs to do is determine whether the Tribunal apprehended the law, facts and evidence on record and whether it came to a determination that was judicious and not perverse in light of the evidence and record.

27. I have gone through the record and Tribunal findings which I have set out above and I hold that the Tribunal relied on the correct provisions of the Harmonized System, the Explanatory Notes and the evidence on record to come to the conclusion that there was no evidence showing that the tablets contained extracts from plaints, fruits concentrate, honey or fructose. Indeed, the Commissioner's laboratory analysis does not make any mention of the two ingredients of the tablets; Glucosamine Sulphate (500mg) and Chondroitin Sulphate (400mg) containing any of the aforementioned extracts, vitamins in minute quantities or iron compounds so as to qualify the tablets as food supplements. Further, in determining whether the tablets were actually medicaments, the Tribunal considered whether the tablets were of therapeutic and prophylactic use. In short, the Tribunal arrived at a conclusion that any other reasonable Tribunal sitting in its place would have come to.

28. The tribunal further found that the tablets' packaging indicated that they were recommended for treatment purposes more so sports injuries, bursitis osteoporosis and tendinitis.

29. I am therefore satisfied that the tribunal arrived at the correct conclusion that the tablets were medicaments under HS Code 3004.90.00 and not food supplements under HS Code 2106.90.91.

Whether the Ruling of 16th July 2012 was withdrawn

30. As stated in the introductory part, the Commissioner delivered a ruling on July 16, 2012 where it stated that it had reviewed its earlier tariff ruling of May 22, 2012 by stating that the HS Code 3004.90.00 declared by the respondent was in agreement with the Commissioner's findings. However, when the Commissioner delivered rulings on January 29, 2019, February 25, 2019 and March 29, 2019 nothing was mentioned about the Ruling of 16th July 2012 which begged the question whether the said Ruling was ever withdrawn by the Commissioner. The Commissioner submitted before the Tribunal that the issuance of a later ruling withdraws the earlier one and it relied on, inter alia, section 67(4) of the *TPA* which provides that, 'A private ruling shall take effect when the applicant is served with written notice of the ruling and the ruling shall remain in force until it is withdrawn."

31. While it is true that a ruling remains in force until it is withdrawn, section 68 of the TPA provides for the procedure of withdrawal of a private ruling as follows:

> Withdrawal of a private ruling
>
> (1) The Commissioner may, for reasonable cause, withdraw a private ruling, in whole or part, by notifying the applicant in writing.
>
> (2) If a law is enacted or the Commissioner makes a public ruling that is inconsistent with a private ruling, the private ruling shall be withdrawn to the extent of the inconsistency of the private ruling with the law or the public ruling.
>
> (3) The withdrawal of a private ruling, in whole or part, shall take effect from—
>
> a. the date specified in the notice of withdrawal if subsection (1) applies; or
>
> b. the date of the enactment of the inconsistent law or inconsistent public ruling if subsection (2) applies.
>
> (4) A private ruling that has been withdrawn—
>
> a. shall continue to apply to a transaction by the applicant that commenced before the ruling was withdrawn; and
>
> b. shall not apply to a transaction of the applicant that commenced after the ruling was withdrawn to the extent the ruling is withdrawn.

32. From the provisions above and in the circumstances of this case, withdrawal only takes place when the Commissioner notifies a tax payer of the withdrawal and the notification has to be in writing and only takes effect from the date of the notification. There is no evidence that the Commissioner ever notified the respondent that the ruling of July 16, 2012 had been withdrawn, meaning that the said ruling has not been withdrawn and in accordance with section 65(4) of the *TPA*, is still binding on the Commissioner. I therefore agree with the tribunal's finding that the Commissioner erred in law and fact in deviating from its July 16, 2012 ruling as the same had not been withdrawn and was still binding upon it.

Whether the Tribunal erred in applying the provisions of the TPA as opposed to the EACCMA

33. Even though the Commissioner raised this issue in its memorandum of appeal, I find that the Commissioner did not make any submission on it hence I can only assume that it abandoned this ground. However, and for the sake of completeness I will consider it. In summary I do not find

any merit in this ground first, because the Commissioner relied on the *TPA* when putting forth its argument before the tribunal for withdrawing the previous Ruling and cannot now make an about turn on its application in this appeal. Second, neither the *TPA* nor the EACCMMA exclude the other in their application. Third, the preamble to the *TPA* provides that it was a law meant to, ''harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected purposes''. Thus all matters procedure in respect of the administration of tax laws, including EACCMA fall under the *TPA* unless excluded by the specific tax statute.

Disposition

34. For the reasons I have set out above, I find that the Commissioner's appeal lacks merit. It is now dismissed.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango

Ms Muruka, Advocate instructed by Kenya Revenue Authority for the Commissioner of Customs and Border Control.

Ms Ndungu instructed by P. M. Ndungu and Company Advocates for the Respondent.