



REPUBLIC OF KENYA



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**Commissioner of Customs & Boarder Control v Tetra Park Limited (Tax Appeal E031 of 2020)
[2021] KEHC 62 (KLR) (Commercial and Tax) (24 September 2021) (Judgment)**

Neutral citation: [2021] KEHC 62 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E031 OF 2020
A MABEYA, J
SEPTEMBER 24, 2021**

BETWEEN

COMMISIONER OF CUSTOMS & BOARDER CONTROL APPELLANT

AND

TETRA PARK LIMITED RESPONDENT

*(Being an appeal from the Judgment of the Tax Appeals Tribunal
made on 26/2/2020 in the Tax Appeals Tribunal No. 83 of 2017)*

JUDGMENT

1. Pursuant to the International Convention on the Harmonized Commodity Description and Coding System, the East African Community Customs Union has established a Harmonized Commodity Description and Coding System (2017) for Common External Tariff rates.
2. Chapter 35 thereof provides for 'Arbuminoidal substances: modified starches; glues; enzymes'. Heading H.S Code/Tariff No. 35:06, provides that 'Prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives put up for retail sale as glues or adhesives, not exceeding a net weight of 1kg' attracts Import Duty at the rate of 25%.
3. On the other hand, Chapter 39 thereof provides for 'Plastics and articles thereof'. Heading H.S Code/Tariff 39:01 provides that 'Polymers of ethylene, in primary forms' are to attract 0% Import Duty.
4. The respondent imports material for use in production of packaging materials. In or about 2016, the respondent imported goods under entry number 2016 MSA 6043252 which goods were described as DUPONT POLYOLEFIN MA 197 RESIN ("DPMa"). Its clearing agent submitted a sample thereof to the appellant's laboratory for analysis. After tests and analysis, the appellant made a tariff ruling



- dated 15/9/2016 declaring DPMA as classifiable under H.S Code 3506:91 as opposed to the declared H.S Code 3901:90:00.
5. Pursuant thereto, on 26/1/2017, the appellant demanded from the respondent additional taxes amounting to Kshs. 919,175/- as the under paid taxes. This was based on the allegation that DPMA was classified under H.S Code 3506:91 thereby attracting Import Duty at 25% and additional VAT at 16% and not under H.S Code 3901:90:00 as declared by the respondent.
 6. The respondent objected to the assessment on the ground that the appellant's classification of DPMA under Heading 35.06 was erroneous and that the correct classification was 3901.90. On 15/9/2021, the appellant gave his objection decision upholding his assessment which provoked an appeal by the respondent to the Tax Appeals Tribunal ("the Tribunal"). In the meantime, in order to avoid penalties, the respondent paid the demanded tax under protest.
 7. By its judgment of 26/2/2020, the Tribunal made a finding that the matter was not res judicata and that DPMA is under H.S Code 3901:90:00. It ordered the appellant to refund the additional tax of Kshs. 919,175/- paid by the respondent under protest.
 8. Aggrieved by the said decision, the appellant preferred this appeal setting out 7 grounds of appeal. The grounds may be summarized into two; that the Tribunal erred in failing to hold that the matter was res-judicata and in holding that DPMA is classifiable under H.S Code 3901:90:00.
 9. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses. *See Selle & Another v Associated Motor Boat Co. Ltd. & Others*.
 10. The respondent's case before the Tribunal was that DPMA was a product that fell under H.S Code 3901:90 in that, it was not suitable as glue or adhesive as described in HS Code 35:06:91. This is so because it was imported in granular form and needed further processing before it was put to use as an adhesive.
 11. On his part, the appellant contended that he had undertaken laboratory tests as well as factory visit and the results were that DPMA had the properties of an adhesive. That the product was being used as a binder and therefore an adhesive falling under H.S Code 35:06:91. That the product was not a raw material and it never underwent any process before being put to use.
 12. At the hearing, each party presented one witness. George Kinoti, a Quality Assurance Officer with the respondent told the Tribunal that DPMA was a medium acid polymer used in packages for milk and dairy products. That it was imported in pellet/granular form. He produced a white substance in granular form before the tribunal.
 13. He further testified that the product was imported in a primary form and needed further industrial process and mixture with other substances before it could be used as a protective layer on the milk packages. That it ought to have been classified under H.S Code 3901.90.00 as it was not a finished product.
 14. On the other hand, George Oyicho testified on behalf of the appellant. He maintained that DPMA was classified under HS Code 35:06:91 as it was within the classification of 'prepared glue and other prepared adhesives not elsewhere prepared specified or included...'. That the decision was arrived at after laboratory tests on the product.
 15. He disagreed with the respondent's position that the product in granular form was not a glue or adhesive. That the product was used as a binder joining the Polymer to the Alufoil in the tetra-park packages. That the process of passing it through a laminator machine only changed the physical form



- of the granules into another form, but it did not change the chemical composition, thus it was a glue or adhesive.
16. The parties filed their respective submissions which the Court has considered. The appellant submitted that the appeal before the Tribunal was *res judicata*. That the chemical substance in Nucreal T-100 and DPMA was the same. That both Nucreal T-100 and DPMA were used by the respondent to manufacture packaging products as a protective layer. That the parties, issues and subject matter in Appeal Number 12 of 2014 were similar to those in the appeal before the tribunal, hence the appeal was *res judicata*. That in Appeal Number 12 of 2014, the Tribunal had correctly found that Nuclear T-100 was classified under HS Code 35:06:90:00.
 17. On the second ground of appeal, the appellant maintained that the findings of the laboratory analysis correctly classified DPMA under HS Code 3506.91.00. That it was also found that the further factory process on the DPMA compromised only lamination and no other chemical transformation. That even at the time of importation, DPMA was not a raw material as it was a polymer obtained by fusing together monomers.
 18. For the respondent, it was submitted that DPMA was imported in granular form and hence was not a final product capable of being used on its own. That it required further processing through extrusion. That it was thus a primary form as per HS Code 3901:90:00. That chapter note 39 placed DPMA within the definition of plastics and within headings 39:01 to 39:14 since the product underwent polymerization after importation through external pressure by extrusion.
 19. On *res judicata*, the respondent relied on the testimony of its witness to the effect that Nucreal TP-100 was processed under different parameters and had a different chemical composition. The court has carefully considered the cases of the respective parties.
 20. The first ground of appeal was that the tribunal failed to find that the appeal in the tribunal was *res judicata*. This was on the ground that the parties herein had been engaged in Appeal No. 12 of 2014. That the parties, issues and subject matter were similar to those before the tribunal.
 21. The dispute in Appeal No. 12 of 2014 related to the classification of a product known as Nucreal TP-100. The appellant submitted that it was not different to DPMA. However, from the submissions and evidence tendered before the Tribunal, it is clear that Nucreal TP-100 was a high acid copolymer whereas DPMA was a medium acid copolymer. Those are clearly different products.
 22. Their chemical composition was said to be different. Nucreal was said to be processed under different parameters and had different chemical composition from DPMA. In terms of the final use of the product, Nucreal was said to be used to package fresh juices and the like while DPMA was said to be used to package milk and like products. These two products cannot be said to be exactly the same.
 23. Consequently, I find that the subject matter between Appeal 12 of 2014, and the appeal before the tribunal, was different. The appeal was not *res judicata*. I will not interfere with the tribunal's decision on this ground. Ground 1 of the appeal thereby fails.
 24. The second ground was that the Tribunal erred in its classification of DPMA under H.S 3901:90:00. The appellant's case was that based on the laboratory analysis and subsequent tariff ruling, the product fit the category in HS Code 3506:91:00. That the product was an adhesive.
 25. On the other hand, the respondent's case was that the product was imported in granular form hence it was a raw material. That it needed further processing before it could be used as an adhesive hence the proper classification ought to have been HS Code 3901:90:00.



26. At the beginning of this Judgment, the Court set out what Heading No. 35:06 of the East African Community Customs Tarriff (EACCT) applies to. It applies to 'Prepared glues and other prepared adhesives, not elsewhere specified or included, product suitable for use as glues or adhesives, put for retail sale as glues or adhesives not exceeding a net weight of 1kg'.
27. It is clear from the foregoing that for a product to fall under this classification, it must satisfy the following; it be a prepared glue or adhesive, it must be suitable for use as glue or adhesive, it must be put up for retail sale as glue or adhesive, and it must not be exceeding a net weight of 1kg.
28. It was common ground that DPMA was imported in granular form for the purpose of packaging the respondent's milk and related products. At the time of importation, it could not be used as glue. Further, the purpose of its importation was not to be put up for retail sale as glue or adhesive, but rather for use as a protective layer in the packaging of the milk and dairy products processed by the respondent.
29. Further, the respondent imported 16 packages weighing 11055kgs. This is at variant with the weight provided for under H.S Code 3501:91:00 aforesaid.
30. Further, the explanatory notes of Chapter 39 of EACCT, which the appellant itself relied on, covers polymers of propylene or of other olefins, in primary forms. It provides for products that are in their primary forms. Primary forms include blocks of irregular shape and granules.
31. The evidence before the Tribunal was that in order for it to be used as a final product, DPMA had to undergo a process of oxidation. This constituted heating at a temperature of over 265 degrees in a laminator and being dropped from a height for it to come into contact with oxygen and undergo the process of oxidation.
32. In view of the foregoing, the view the court takes is that the process undertaken meant that DPMA was not a final product at the time of importation. It may have been processed from its country of origin but was definitely not a finished product to which H.S Code 3506:91:00 applies. It had to undergo an additional process in order to be used as a binder. Definitely, it is not a final product.
33. In this regard, I find no reason to interfere with the Tribunals decision.
34. The upshot is that the appeal is unmerited and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE

