REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

TAX APPEAL NO 1 OF 2012

PROCTOR & ALLAN (E.A) LIMITED…….APPELLANT

VERSUS

COMMISSIONER OF INCOME TAX……..…….RESPONDENT

JUDGEMENT

(Appeal from Ruling of Customs & Excise Appeal Tribunal delivered and issued on 28th August 2012 in the Customs and Excise Appeals Tribunal at Nairobi Appeal No 8 of 2011 Proctor & Allan (E.A) Limited versus Commission of Customs Services)

INTRODUCTION

1. A detailed background of the case was set out in the parties' respective submissions. This court does not deem it necessary to set out the same in detail as the circumstances leading to the matter coming to this court were not disputed.
2. However, by way of a brief synopsis of this matter, the Respondent conducted an audit of the Appellant for the income years between 2004- 2009 whereupon the Respondent notified the Appellant that at the time of its declaration to customs, the Appellant had misclassified a product known as "vitamin premix" under the Heading 29.36.
3. After an analysis of a sample of the vitamin premix, the Respondent reclassified the same as 2106.90.90 and demanded a sum of Kshs 5,111,350/= from the Appellant. The Appellant disputed the said classification of the vitamin premix. The dispute was determined by the Customs & Excise Appeal Tribunal.
4. In a ruling by the said Tribunal delivered and issued on 28th August 2012, it was held that:-

"The Appellant misclassified vitamin premix in the wrong tariff nos 2936.10.10 and 2936.29.90. The Appellant did not provide adequate documentary evidence for the vitamin premix to be reclassified under tariff no 2936.90.00 or against reclassification of vitamin premix under tariff no 2106.90.90 and the Respondent (sic) classification of vitamin premix under tariff no 2106.90.90 is therefore sustained.

The upshot of the above is that the appeal by Proctor & Allan E.A. Limited against Commissioner of Customs Services on the demand of payment of extra taxes amounting to Kshs 5,111,350 arising from post clearance audit fails and is hereby dismissed."

5. It is this ruling that the Appellant sought to have overturned by this court. Its Record of Appeal dated 30th January 2013 was filed on the same date. It relied on ten (10) grounds that were set out in its Memorandum of Appeal dated 30th October 2012 and filed on 31st October 2012. The Respondent's Response was dated and filed on 17th April 2013.
6. The Appellant's written submissions were dated and filed on 13th March 2014 while the Respondent's written submissions were dated and filed on 18th February 2014. The Respondent also filed Further Submissions on 2nd April 2013.
7. The Appellant identified the following as the issues for determination:-

a. **Whether the vitamin premix was classifiable under tariff 2936.10.00 and 2936.29.00 or 2106.90.90 of the Common External Tariff;**
b. **Whether the results from Kenya Revenue Authority (KRA) were admissible;**
c. **Whether failure on the part of the Commissioner of Customs to respond to the issues raised by the Appellant constituted acceptance of the application for review;**
d. **Whether the demand for extra taxes by the Commissioner of Customs amounting to Kshs 5,111,350/= arising from the post clearance audit was payable.**

8. On its part, the Respondent identified the following as the issues for determination:-

a. **Whether the classification of the vitamin premix under tariff code 2106.90.90 was in line with the classification provided by the World Customs Organisation (WCO);**
b. **Whether the classification of the vitamin premix under tariff code 2936.90.90 was in line with the classification provided by the WCO;**
c. **Whether the vitamin premix by a core ingredient in the unimix was rated tax exempt;**
d. **Whether the analysis carried out was proper and whether the Respondent's lab had capacity to carry out the analysis and determine the ingredient's in the Appellant's (sic);**
e. **What consignment was tested and the veracity of the tests;**
f. **Whether there had been a previous tariff ruling which classified vitamin premix under tariff code 2106.90.90;**
g. **Whether an objection was received and considered in accordance with Section 229 (1) and (5) of the East African Community Customs Management Act (hereinafter referred to as " the EACCM");**
h. **Whether the Respondent failed to respond within the period set out under Section 229 (4) and (5) of the EACCMA;**
i. **Whether the Tribunal erred in law in finding that the Respondent had discretion to reject an agent of the Appellant.**

LEGAL ANALYSIS

9. After a careful analysis of the pleadings and submissions in support of the parties' respective cases, the court finds that the bottom line of this matter is really whether or not the vitamin premix was correctly classified by the Respondent and if not, whether or not the Appellant was entitled to a refund of the taxes it paid to the Respondent in the sum of Kshs 5,111,350/=.
10. The court merged the issues that were identified by both the Appellant and the Respondent and will deal with similar grounds of appeal under the headings shown hereunder.

CLASSIFICATION OF THE VITAMIN PREMIX

11. Grounds 3, 7 and 10 will be dealt with together.
12. The Appellant hinged its classification of the vitamin premix on the aforesaid ruling that was made by the Respondent on 26th August 2009 (ref no 2009/V&T/184) on page 163 of its Record of Appeal. Its case was that it had rightfully classified the vitamin premix under tariff code no 2936.10.00 and 2936.29.00 of the Common External Tariff.
13. It attached a copy of the analysis from Fortitech Strategic Nutrition (hereinafter referred as "the Supplier")which showed that it used two (2) types of vitamin premix, BHN 1821 and 2165, which

it said were appropriately indicated and analysed by the said Supplier.

14. It stated that the Respondent delivered a ruling vide a letter dated 11th August 2010 (on page 14 of the Appellant's Record of Appeal) wherein the Respondent classified the sample as 2106.90.90 to which it objected to in its letters dated 7th December 2009, 5th October 2010 and 14th March 2011. It said that the Respondent responded in its letter of 23rd August 2010 (on page 15 of the Appellant's Record of Appeal) in which it indicated that the vitamin premix was specified to be a premix that had been custom formulated to fortify a nutritional product.
15. It argued that the analysis by the Respondent was flawed as it failed to recognise key vitamin components that had been reflected in the Supplier's Certificate of Analysis. It stated that the vitamin premix under the WCO was classified as vitamin intermixtures under code 29.36.It maintained that the sample vitamin premix was defective as it had been obtained locally, the actual consignment having been disposed to third parties. It therefore argued that it could not be linked to the consignment the subject of the audit that was carried out by the Respondent.
16. Its submission was that the analysis and test of the vitamin premix ought to have been based on the vitamin contents and not all components including the carriers for the reason that adopting the results cumulatively would be misleading. It referred the court to a ruling of 26th August 2009 where the Respondent qualified unimix Vitamins Pre-Mix containing 78.41% carbohydrates, 5.68% m/m protein and 0.69% inorganic matter (ash) also considered as vitamins under tariff no 2936.90.00.
17. On the other hand, the Respondent's case was that it tested a sample of vitamin premix that the Appellant had imported which was found to have been an organic preparation containing 47.72% m/m carbohydrates, 10.5 m/m protein, vitamin and minerals (iron) a premix that had been custom formulated for high nutrition meant to form a nutrition product which finding it communicated to the Appellant on 11th and 23rd August 2011.
18. It said that for a product to fall under Chapter 29 of the World Customs Explanatory Notes handbook, it had to contain no or minimal carbohydrates so as not to change the basic character of the product. It submitted that vitamin premix was not among the items that were set out in Part A of the Fifth Schedule of the EACCMA. It denied that there had ever been prior classification of vitamin premix under 2936.90.01 because the correct tariff code was 2936.29.00.
19. It is evident from page 58 of the Appellant's that Record of Appeal that the Invitation to Tender from World Food Programme (WFP) Kenya dated 7th November 2008 was for a product known as "unimix". In Clause 3 of the said Tender, WFP required the blended food to be **enriched** (emphasis court) with vitamin/mineral supplement.
20. The Technical Specifications contained in Annex I (for 300 MT Sweetened CSB) on page 62 of the Appellant's Record of Appeal were indicated as follows:-

Composition

Whole maize	**70%**
Whole soya beans	**20%**
Sugar	**10%**
Vitamin premix	**Amount for 1 Kg of finished unimix**
Thiamine mononitrate	**2.8mg**
Riboflavin	**8.2 mg**
Vitamin C (stabilized ethyl-cellulose coated)	**1595mg**
Pyridoxine hydrochloride	**1.65mg**
Niacin	**50 mg**

Ca, d-pantothenate	**28mg**
Folic acid	**2 mg**
Vitamin B-12	**13mcg**
Vitamin A palmitate (stabilised)	**23000TU**
Vitamin D (stabilized)	**2000TU**
Vitamin E (as tocopherol)	**75IU**
Soy floor defatted (toasted) or starch to reach to total weight (additional soy may be added as a carrier, if desired) to make total weight to	**1000 mg**

21. Annex II (for 203 MT Regular CSB) on page 66 of the Appellant's Record of Appeal showed that the Unimix was to be fortified to the extent that to each Metric Tonne of finished product, 1 kg Unimix vitamin premix and 3 kg Unimix mineral premix were to be added. It was to be manufactured according to the following recipe:-

Whole maize	**80% by weight**
Whole soya beans	**20% by weight**

Net micronutrient supplement

Micronutrient	**Per 100g of finished product**
Vitamin A	**1664 I.U**
Thiamine	**0.128mg**
Riboflavin	**0.448mg**
Niacin	**4.8 mg**
Folate	**60mg**
Vitamin C	**48mg**
Vitamin B-12	**1.3mcg**
Iron ++	**8mgas Ferrous Fumarate**
	Calcium 100mg as Calcium Carbonate
Zinc ++	**5mg as Zinc Sulphate**

22. Upon testing several samples, KRA found the same to contain high percentages of carbohydrates which were in line with the composition of the unimix shown hereinabove. It was for this reason

that it classified the product as tariff no 2106.90.90 and indicated that tariff no 2936.90.90 adopted by the Appellant was at variance with its laboratory findings.

23. The Certificate of Analysis by the Supplier was for the vitamin premix. It excluded other components. The Appellant argued that that was the correct way of analysing the sample. It is this composition of vitamin premix that it relied upon and submitted that the unimix was to be classified as Provitamins under tariff no 2936.90.00 of Annex I to the EAC Customs Union Protocol and not under tariff no 2106.90.90 of the said Protocol as had been contended by the Respondent.
24. The details of tariff nos 2936.10.00, 2936.29.00 and 2936.90.90 which were referred to by the Appellant in their written submissions wereas follows:-

HS Code/ Tariff No	**Description**
2936.10.00	**Provitamins, unmixed**
	Vitamins and their derivatives, unmixed
2936.29.00	**Other vitamins and their derivatives**
2936.90.00	**Other, including natural concentrates**

25. While the court noted the Appellant's submissions that Heading 29.36 included Provitamins, whether natural or reproduced by synthesis, and derivatives thereof used primarily as vitamins and intermixtures of the foregoing, whether or not in any solvent, the Certificates of Analyses by the Appellant's Supplier could not have been the basis of classifying the unimix under tariff no 2936. 10.00 and 2936.29.00 as had been contended by the Appellant. This is because the core component was whole maize and whole soya beans. The purpose of the vitamin premix was merely to fortify the unimix. The court was thus not persuaded by this assertion as the analysis of sample could not be separated and had to be analysed as a whole component.
26. The Appellant's argument that the carbohydrates in the vitamin premix was for purposes of preservation could not have been further from the truth bearing in mind that the real tender of WFP was for. It did not also provide sufficient proof to this court to demonstrate that the carbohydrates in the sample were merely a transportation agent as it had alleged. A distinction must be made between pure vitamins and intermixtures, details of which have been clearly set out under Heading 29.36.Notably, vitamin premixes do not appear in that classification.
27. The court observed that the vitamin premix was actually calculated in milligrammes. The court finds that the sample containing minimal percentages of vitamins, if their intention was to fortify other products, could not be classified under tariff no 2936.10.00. Indeed, Note 1 (b) of Chapter 38 of the Explanatory Notes of the Harmonised Commodity Description Fourth Edition Vol 1 dealing with miscellaneous chemical products stipulates as follows:-

"Mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs (generally heading 21.06)."

28. In the absence of a clear classification of vitamin premix under tariff no 2936.10.00 or 2936.29.00, the product could only be classified as **"Other"** under tariff no 2106.09 which provides as follows:-

"Additive for cereal flours, containing vitamin B1, nicotinic acid, iron (ferrum) and wheat flour, the product is for addition, in very small quantities… to cereal flours to improve their vitaminic properties."

29. In view of the very scanty information given by the Appellant, it was not clear in what matter the ruling of 26th August 2009 related to. The Appellant did not elucidate under what circumstances the said ruling was delivered or indicate where it obtained the same. The court therefore finds it

difficult to attach any weight to the same.

30. Suffice it to state that the proceedings before Customs and Excise Appeals Tribunal show that RW 2 testified that the vitamin premix in that ruling related to a premix used for fortifying animal products hence the classification under Heading 23.09. He had told the said Tribunal that the difference between that ruling and that of the Appellant was that in this case, the vitamin premix was for fortifying products that were to be used for human consumption hence classification under Heading 21.09.
31. In the absence of further evidence by the Appellant that the said ruling was applicable in its case, the court is not persuaded that the Appellant could rely on the ruling to advance its case. If indeed, there was such a ruling, the same did not represent the correct position of the law. The Appellant could therefore not purport to benefit from such an illegality. The court therefore agrees with the Respondent's submissions in this regard.
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.
33. In the circumstances, the Appellant was not successful in Grounds 3, 7 and 10 of its Appeal.

COMPETENCE OF KENYA REVENUE AUTHORITY (KRA) TO ANALYSE SAMPLE

34. Grounds 2 and 4 of the appeal will be handled under this head.
35. The competence of KRA to conduct the analysis was an issue that was raised in the proceedings before the said Tribunal. Mwai Mbuthia from UHY Kenya, testifying on behalf of the Appellant told the said Tribunal the report by KRA did not give them details so they make a comparison.
36. The Appellant had sought to demonstrate that the test conducted by (KRA) on the sample vitamin premix it furnished the Respondent on 7th May 2010 was not admissible. It contended that based in the analysis report that was tendered and that the samples of vitamin premix were obtained locally, KRA had no capacity to carry out laboratory analysis for vitamins as they were unable to determine the type of vitamins and composition of the sample provided.
37. The Respondent argued that it had a state of the art laboratory with qualified personnel to test any samples and that in any event, the Appellant did not object to the said testing when it submitted its sample.
38. In its letter of 7th May 2010 (page 13 of the Appellant's Record of Appeal), the Appellant submitted samples to the Respondent. This was in response to the Respondent's letter dated 30th April 2010 (page 12 of the Appellant's Record of Appeal) which had sought the said sample.
39. The court carefully considered the proceedings before the said Tribunal and did not find any evidence that the Appellant objected to the competence of KRA to conduct laboratory analysis. The point of divergence appeared to have been that Respondent did not have capacity to carry out lab analysis for vitamins and that it erred when it based the analysis on all the ingredients/components of the products rather than the vitamin content and composition and level of other components. Notably, on page 190 of the Appellant's Record of Appeal, the witness testified that he was told to analyse and not to test for vitamins. This court is unable to test the veracity of this assertion or otherwise as the proceedings were not detailed in this regard.
40. Whist the court noted that the said Tribunal found that the Respondent did not have capacity to carry out lab analysis for vitamins, it did not address the question of whether or not KRA had that capacity. This omission or discrepancy did not escape the court's attention as on page 221 of the Appellant's Record of Appeal, it was indicated that one of the areas of agreement was that KRA did not have capacity to carry out lab analysis.
41. The court is also not sure whether the said Tribunal intended to state that the Respondent did not have capacity to carry out the said lab analysis. This is, however, not an issue that can be addressed at this appellate stage as the court would be speculating as to what was intended.
42. Notably, the Appellant furnished the Tribunal with a Certificate of Analysis for vitamins only while the Respondent gave a Certificate of Analysis showing other components excluding vitamins.
43. However, having found that the unimix contained more carbohydrates merely by looking at the

tender by WFP and that vitamins could not be analysed in isolation, the court is unable to find that the said Tribunal made an erroneous decision on the classification of the unimix under tariff 2106. 90.90.

44. The presence of a high percentage of carbohydrate in the unimix was sufficient for the Respondent to have classified the vitamin premix under tariff code no 2106.90.90. It was not a product that could be classified under Heading 29.36 merely because it contained some vitamins. It was a preparation consisting of ingredients to improve the characteristics of unimix.
45. Failure by the Appellant to have provided an analysis of the whole component of the unimix before the Tribunal did not assist its case much as it was unable to demonstrate from the evidence it placed before the said tribunal and this court that the carbohydrates were a transport agent for the unimix.
46. The onus was on the Appellant to have provided the sample of the vitamin premix. It cannot approbate and reprobate. If it indeed submitted a different sample from that it had imported, blame could therefore be placed on the Respondent which analysed the samples that were voluntarily submitted by the Appellant.
47. The court agrees with the submissions by the Respondent that the Appellant could not submit samples and then deny that it was the same sample that it had imported when on page 172 of the Appellant's Record of Appeal, the Appellant's witness expressly admitted that that was the sample that was given to the Respondent.
48. 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.
49. 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.
50. In view of the foregoing, the Appellant was also not successful in Grounds 2 and 4 of its Appeal.

APPLICATION FOR REVIEW AND REFUND FOR THE SUM OF KSHS 5,111,350/=

51. Grounds 5, 6, 7, 8 and 9 were related and will be analysed under this head.
52. In his testimony before the said Tribunal, Mwai Mbuthia stated that the Respondent had no legal reason to reject the agent's appointment and that its letter was issued and served as a notice of objection as provided by Section 239 of EACCMA.
53. The Appellant was emphatic that the Respondent's failure to respond to its application for review dated 2nd June 2011 through its agent, UHY, within the statutory thirty (30) days was deemed to have been an acceptance with the meaning envisaged in Section 229 (5) of the EACCMA. It relied on the case of **Republic vs The Commissioner of Customs Service Ex Parte Unilever Limited [2012] eKLR** where the court therein upheld this position.
54. Section 229 (5) of EACCMA provides as follows:-

"Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4), the Commissioner shall be deemed to have made a decision to allow the application."

55. The Respondent denied that the Appellant filed an application within the period that had been stipulated under Sections 229 (4) and 229 (5) of the

EACCMA. The court did not find its submissions regarding the role of the agent to have been an issue that was placed before this court for appeal. What the court understood was that the Appellant had contended that its agent had written to the Respondent which did not respond to its application for review and was therefore deemed to made a decision to allow the application.

56. Section 230 (1) of the EACCMA provides as follows:-

"A person dissatisfied with the decision of the commissioner under Section 229 may appeal to a tax appeals tribunal established in accordance with Section 231."

57. It is apparent from the Appellant's Record of Appeal that the Respondent gave the Appellant its decision of classification of the vitamin premix vide its letters dated 11th and 23rd August 2010. The Appellant responded to the Respondent's letter of 23rd August 2010 on 5th October 2010 (page 17 of the Appellant's Record of Appeal). The said agent took up the matter on behalf of the Appellant when it wrote to the Respondent vide its letter dated 2nd June 2011. This was in fact way after the Respondent had rendered its decision, issued an agency notice on 30th May 2011and commenced the enforcement mechanism.
58. The Tribunal seemed to have set the chronology of events when dealing with the question of the application for review. However, it did not appear to have made a determination of the parties' arguments in this respect. Be that as it may, from the evidence that has been placed before the court herein, the court nonetheless finds itself in agreement with the Respondent that the Appellant did not file an application for review within the time lines that had been set under Section 229 of the EACCMA.
59. Indeed, the latest the Appellant should have filed its application for review was 22nd September 2010, if at all it was contending that the Appellant's decision was rendered on 23rd August 2010.Evidently, the Appellant's letter and that of its agent were outside the mandatory and statutory thirty (30) days period an aggrieved party was expected to lodge an application for review of a decision by the Respondent.
60. The Respondent was therefore right in declining to consider or deem the agent's letter of 2nd June 2011 as the application for review as was envisaged in the provisions of the EACCMA. The said Tribunal did not appear to have made a specific finding that it had discretion to reject the Appellant's agent as had been contended by the Appellant and in the circumstances, the same could not have been an issue that this court could consider on appeal.
61. The Appellant had argued that vitamin premix was a core ingredient in the manufacture of a product by the name "unimix" and that since classification under tariff code no 2936.10.00 and 2936.29.00 attracted a duty rate of 0% while tariff code no 2106.90.90 attracted a duty rate of 25% under East Africa Community Customs Union Protocol.
62. On the other hand, the Respondent was categorical that the tax it levied on the vitamin premix was provided for under the law. After a careful perusal of Section 114 (1) of EACCMA and Part A of the fifth schedule, the court agrees with the Respondent's submission that that vitamin premix was not among items that were exempt from tax.
63. Consequently, having found that the Respondent had correctly classified the vitamin premix, it was entitled to levy the tax. The Appellant was therefore not entitled to a refund of the tax in the sum of Kshs 5,111,350/= as was provided for under Section 135 (1) of the EACCMA.
64. For the foregoing reasons, the grounds of appeal under this head therefore fail.

FINDINGS OF THE TRIBUNAL

65. As regards Ground 1 of the Appellant's Grounds of Appeal, the court is of the view that it would have deemed the findings of the tribunal regarding the areas of agreement to have been of consequence if they had impacted on the said Respondent's classification in any way. The Appellant did not demonstrate the nexus of the said finding and the conclusion that the tribunal arrived at. The court does not therefore find the same to have been of any consequence in the Appellant's appeal.

EXPUNGING OF THE RESPONDENT'S RESPONSE

66. The Appellant urged this court to expunge from the court record, the Respondent's Response, for having failed to conform to the Civil Procedure Rules on appeals to the High Court and allow its Appeal as prayed.
67. On its part, the Respondent urged this court not to expunge from the court record, its Response dated and filed on 17th April 2013, as Article 159 (2)(d) of the Constitution of Kenya, 2010

enjoined the court to administer justice without undue regard to procedural technicalities.

68. Notably, the Appellant did not elaborate the submission that the Respondent's Respondent did not conform to the Rules on Appeal to the High Court or demonstrate the relevance of its argument to Section 220 of EACCMA. This Section stipulated as follows:-

"…Provided that all proceedings of civil nature shall be filed and determined in accordance with the provisions of the relevant procedural legislation in the Partner State."

69. Although the court was unable to understand or completely discern the Appellant's submission on this point, the court disregarded the Respondent's Response dated and filed on 17th April 2013 for the reason that it was not required to be filed. Article 159 (2) (d) of the Constitution of Kenya, 2010 is not intended to excuse just any omission or technicality. The Respondent's written submissions would have been sufficient. The court did not therefore consider the said response in rendering its decision herein.

DISPOSITION

70. Accordingly, having considered the pleadings by the Appellant, the written submissions by both the Appellant and the Respondent and the supporting case law and relevant provisions of the law, the court finds that the Appellant did not succeed in any of the grounds set out in its Memorandum of Appeal. The court finds that the said Tribunal arrived at a conclusion that was legally sound and within the law. The court sees no reason to interfere with the same.

71. The upshot of this court's judgment is that the Appellant's appeal dated on 30th October 2012 and filed on 31st October 2012 failed in its entirety and the same is hereby dismissed with costs to the Respondent.

72. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 30th day of September 2014

J. KAMAU

JUDGE