Commissioner of Customs & Border Control v Sai Pharmaceuticals Limited (Customs Tax Appeal E048 of 2023) [2025] KEHC 12267 (KLR) (Commercial and Tax) (29 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12267 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E048 OF 2023

PJO OTIENO, J

AUGUST 29, 2025

BETWEEN

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

AND

SAI PHARMACEUTICALS LIMITED ..... RESPONDENT

(Being an Appeal from the Judgement of the Tax Appeals Tribunal at Nairobi delivered on the 6th October, 2029 in the Nairobi TAT No. 731of 2022 BETWEEN SAI PHARMAECUTICALS LIMITED-VERSUS- COMMISSIONER OF CUSTOMS &BORDERCONTROL)

JUDGMENT

Background of the Appeal

1. The Appellant is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, CAP 469 of Kenya's Laws. Under Section 5 of the Act, the Kenya Revenue Authority is created as an agency of the Government for the collection and receipt of all tax revenue and mandated to administer and enforce all provisions of the written laws as set out in Parts 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

2. The Respondent on the other hand is a limited liability company registered under the *Companies Act*, Cap 486 of the Laws of Kenya and engages in the business of pharmaceuticals and related products.

3. This is a second Appeal provoked by the judgment of the Tax Appeals Tribunal (TAT) at Nairobi, delivered on 6th October 2023, in Nairobi TAT No. 731 of 2022. The dispute discloses a disagreement over the tariff classification of imported products, described as EVIT 200 and EVIT 400 CAPSULES. It was maintained by the respondent that at declaration stage, it classified the products

as "medicaments" under HS Code 3004.50.00, in accordance with the Appellant's own prior rulings of 22nd July 2016 and 3rd August 2016.

4. The Respondent, on or around 7th May 2021, imported a consignment of EVIT 200 and EVIT 400 CAPSULES, import entry form C17C number 21NBOIM404216706, declaring them under the HS Code 3004.50.00 as previously established. However, contrary to its said rulings, the Appellant issued the letter referenced as CUS/V&T/TARI/RUL/331/2021) on 24th June 202, declaring that HS Code 3004.50 for EVIT 200 capsule was at variance with the laboratory findings and as such, it reclassified the products under tariff HS Code 2106.90.91 categorizing it a "food supplement" as opposed medicament.

5. The Respondent was aggrieved and appealed the reclassification on 9th July 2021. In support of their classification claim of EVIT 200 and EVIT 400 as medicaments and not food supplement, the respondent relied on array of evidence including the manufacturer's drug license, Certificate of Pharmaceutical product, Food Safety and Standards Authority Guideline, Clinical trials, Approved Export forms of EVIT 200 and 400, prescriptions from physicians and the manufacturer's literature.

6. The Appellant dismissed the appeal on 21st October 2021 and upheld its reclassification decision of 24th June 2021 solely basing its decision on amendments to the Explanatory Notes.

7. The Respondent was once again aggrieved and re-appealed by the letter of 8th November 2021 challenging the commissioner's decision on the grounds that the manufacturer's export classification consistently categorized the products under pharmaceuticals (HS Code 30.04), that the composition of the product had not changed and thus requested for the Appellant's laboratory test reports to enable comparison with the manufacturer's data.

8. The laboratory reports were however, never provided to the Respondent but the Appellant, nevertheless, issued a demand for additional taxes in the sum of Kshs. 1,427,496, comprising Excise Duty, VAT and penalty based on the new tariff ruling. The Respondent objected to this demand on 22nd March 2022 on grounds that the Appellant's previous tariff rulings of 2016 had not been invalidated or withdrawn as required under Sections 67, 68, and 69 of the Tax Procedure Act, 2015 and further that it had not been furnished with laboratory test report.

9. On the 31st of March 2022, the Respondent filed Miscellaneous Application No. 106 of 2022 at the Tax Appeals Tribunal (TAT) for an extension of time to appeal the Appellant's ruling of 21st October 2021 but which application was subsequently withdrawn on 22nd April 2022 to facilitate a potential out-of-court settlement negotiations. However, no settlement was reached between the parties and on the 3rd June 2022, the Appellant through letters KRA/CBC/BIA/TQH/ADV/388/2022 and KRA/CBC/BIA/TQH/ADV/389/2022, upheld its decision of 21st October 2021 classifying EVIT 200 and 400 CAPSULES as food supplements. It termed the decision as an advance ruling under section 248A of the EACCMA 2004 with directions that it was only to be valid for a period of 12 months from the date of issue.

10. Accordingly, the Respondent appealed the Commission's decision at the Tax Appeals Tribunal, Nairobi TAT No. 731 of 2022. The Tribunal delivered its judgment in on 6th October 2023 setting aside the Commissioner's review decision of 3rd June 2022. The Tribunal held that EVIT 200 and EVIT 400 capsules are indeed medicaments classifiable under HS Code 3004.50.00. Aggrieved by the Tribunal's decision, the Appellant lodged this present appeal against the whole of Tribunal's decision of 6th October 2023.

The Appeal

11. The memorandum of appeal dated 20th December 2024 lists the grounds of the appeal to be :

    i. The Tribunal erred in law and in fact in its findings at paragraph 79 by implying that the two products (EVIT 200 & EVIT 400) were similar to another product "neuroforte" that was subject of tariff classification dispute under TAT Case Number 732 of 2022 in which parties settled by way of consent.

    ii. The above finding by the Tribunal is a misrepresentation of facts since the composition, the active ingredients and the pharmacological indications of the two products are very different.

    iii. Whereas the two products EVIT 200 and EVIT 400 are indicated by the manufacturer in the product insert as antioxidant that provides specified wellness benefits, the other product "NEUROFORTE" considered by the Tribunal as similar to the two products are indicated as adjuvant for treatment of chronic rheumatoid and neuropathies associated with diabetes.

    iv. The Tribunal failed to appreciate that the ingredients of the products are different in terms of their nature and quantities: EVIT 200 - Vitamin E 20omg; EVIT 400- Vitamin E 400 mg: Neuroforte Vitamin B1 200mg, Vitamin B6 50mg and Vitamin B12 10000mcg.

    v. The Tax Appeals Tribunal failed to appreciate that the two products are specified to be EVIT 200o and EVIT 400 antioxidants which confer health benefits to user and are not products put for prophylactic or therapeutic uses as per the terms of heading 30:04 state as follows: "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 I measured doses including those in form of transdermal administration systems) or in forms or packaging for retail sale.

    vi. Further the Tribunal failed to appreciate that terms of heading 30.04 covers only products which are intended for healing of a disease (therapeutic) and those that intended for treatment of a disease (prophylactic). In this regard, there are no disease (s) to which products are intended to cure or treat but when one takes the two products they confer health benefits as indicated by the manufacturer.

    vii. The Tribunal failed to infer to the definition of food supplements as provided for under the Harmonised system wherein the food supplements are considered to be products which one would ordinarily get from daily diets.

    viii. The Tribunal erred in its analysis for the- need-of a laboratory report. There was no need of laboratory analyses of the two products since the contention was not on whether the products contained vitamin E or on the quantities of the same but on whether the two products have been put up for therapeutic or prophylactic purposes as per the terms of heading: 30.04 or food supplements as defined under heading 21.06.

    ix. The Tribunal erred in Jaw and in fact in its interpretation of "food supplements" and to confirm which purpose for which the two products are put in use. The Tribunal's decision contradicts the Harmonised System Convention and the General Interpretation Rules that governs classification of goods for trade purposes.

12. On those grounds, the appellant prays that the Honourable Court allows the Appeal and set aside the judgment of the Tax Appeals Tribunal. The Appellant's further prays that it's review decision issued on 3rd June, 2022 classifying EVIT 200 and EVIT 400 imported by the Respondent under HS Code 2106.90.91 be upheld. The Appellant further claims costs of the Appeal.

Appellant's Submissions

13. On whether the Tribunal erred in implying similarity between EVIT 200 & EVIT 400 and Neuroforte which was the subject of TAT Case Number 732 of 2022, it is the Appellant's submission that such finding constitutes a misrepresentation of facts due to significant differences in composition, active ingredients, and pharmacological indications between the two product types.

14. It is presented that the EVIT products are presented as antioxidants for general wellness benefits, whereas Neuroforte is indicated as an adjuvant for chronic rheumatoid and neuropathies associated with diabetes. The Appellant further highlights the distinct ingredients and quantities; EVIT contains Vitamin E (200mg/400mg), while Neuroforte contains Vitamin B1 (200mg), B6 (50mg), and B12 (10000mcg). It is submitted that tariff classifications are determined on a case-by-case basis hence the Tribunal's assumption of similarity was erroneous given the shown distinct compositions and indications.

15. On the classification of EVIT products, it is the Appellant's case that the Tribunal failed to appreciate that EVIT products are not for prophylactic or therapeutic uses as per Heading 30.04. It is submitted that Heading 30.04 covers products specifically for healing or treating diseases, and that EVIT only confers general health benefits rather than specific cures or treatments.

16. The Appellant further submits that the Tribunal failed to refer to the Harmonised System's definition of food supplements, which are considered products ordinarily obtained from daily diets. It is asserted that EVIT 200 and EVIT 400 are dietary supplementary preparations based on Vitamin E, used to prevent oxidation and manage deficiency, primarily for maintaining general health and well-being, not for treating ailments.

17. The Appellant maintains that the products do not contain an active substance with a curative or prophylactic effect against a particular ailment or disease. The Appellant relies on Explanatory Notes to HS Code 2106, item (16), which describe food supplements as preparations for general health or well-being. It is also claimed that the manufacturer's packaging and data sheet clearly stated "food supplements".

18. On Ground eight on the laboratory report, the Appellant argues that the Tribunal erred regarding the necessity of a laboratory report, asserting that it was unnecessary because the dispute centered on the purpose of the products (therapeutic/prophylactic vs. food supplement), not the presence or quantity of Vitamin E.

19. Finally, the Appellant submits that the classification by the Pharmacy and Poisons Board is for a different purpose than customs classification and should not bind the Commissioner seeking reliance in the case of Republic vs. KRA ex parte Beta Healthcare International Ltd to support this contention.

20. The Appellant thus prays that the Appeal be allowed, the judgment of the Tax Appeals Tribunal be set aside, the Appellant's review decision of 3rd June 2022 be upheld, and costs be borne by the Respondent.

Respondent's Case

21. The Respondent opposed the appeal by the Statement of Facts dated 24.01.2024 in which it averred that during the period 2016 to 2021, on the strength of the Appellant's ruling dated 22nd July and 3rd August for the EVIT 200 and EVIT 400 capsules respectively it imported the subject products and treated same as medicament because same were so registered by the pharmacy and poisons board.

22. On or around 7th May 2021, through the Respondent's clearing agent, Continental logistics Networks Limited, it imported EVIT 200 and EVIT 400 CAPSULES from GELTEC PRIVATE LIMITED vide entry form C17C entry number 21NBOIM404216706 under HS Code 3004.50,00, but in a complete turn of events the Appellant through his letter date 24 June 2021 referenced CUS/V&TTARIRUL/331/2021 found the declared HS Code 3004.50 for EVIT 200 capsule to be at variance with the laboratory findings and proceeded to classify the product in tariff HS Code 2106.90.91 of the East Africa Community Common External Tariff (EAC/CET).

23. The Respondent by its letter dated 9th July 2021 appealed the Commissioner's ruling of 24th June 2021 and enclosed the manufacturer's drug license, Certificate of Pharmaceutical product, Food Safety and Standards Authority Guideline, Clinical trials, Approved Export forms of EVIT 200 and 400 and prescriptions from physicians and the manufacturer's literature as evidence that the EVIT 200 and EVIT 400 are medicaments.

24. The respondent accuses the Appellant in only relying on the amendments to the Explanatory Notes HS Committee 64th Session, by the letter referenced KRA/C&BCIBIATHO/APPEAL/69/10/2021 of 21st October 2021 to uphold its decision of 24th June, 2021.

25. The Respondent appealed to the Appellant through its letter of 8th November 2021 and argued that the manufacturer's material composition export classification was under pharmaceuticals and that all process of documentation and permit approvals had been given before the exportation from the Manufacturer's Authority which classified EVIT 200 and 400 CAPSULES under the HS Code heading 30.04. The Respondent requested the Appellant for laboratory test reports to enable the manufacturer to compare the analysis from the Appellant's findings with the manufacturer's data report but the report was never issued.

26. That on or around 15th March 2022, the Appellant demanded from the Respondent, in respect of Excise Duty VAT and penalty, the payment of additional taxes in the sum of KSHS. 1, 427, 496 which Sum the Appellant stated in the said demand to be based on tariff ruling Reference CUS/V&T/GEN/MEM135/2021 dated 16th June 2021 KRA/C&BC/BIATHO/APPEAL69/10/2021 dated 21st October 2021 and also made against entry numbers 22NBOIM404216706 and 21NBOIM408847511.

27. In response to the Appellant's demand the Respondent vide a letter dated 22nd March, 2022 objected to the demand of KSHS. 1427496/= and argued that;

    a. The tariff ruling CUS/V&TITARI RUL/372/2016 dated 3d August 2016 and tariff ruling CUSV&T/TARITARVRUL353/2016 dated 22 October July 2016 classifying EVIT 400 and EVIT 200 Capsule as medicament had not been invalidated or withdrawn as required under Section 67, 68 and 69 of the Tax Procedure Act, 2015.

    b. That the Respondent had appealed the Appellant's tariff ruling KRACRBCBIATHQJAPPEAL/69/10/2021 of 21st October 2021 and requested the Respondent to provide the Laboratory test report from sample entry no. 21NBOIM404216706 which has not been released.

    c. That the manufacturer's report sent on 8 July 2021 to the Commissioner confirmed EVIT 200 and EVIT 400 were exported as medicine batches.

    d. That the Appellant intended to file its appeal to the Tax Appeal Tribunal. Annexed hereto and marked "PKBS" are the demand letter dated 15th March 2022 and Appellant's letter SAI/O 1/2022 of 22nd March 2022.

28. It is the Appellant's case that it was wrong for the Appellant to demand additional tax and penalties in product EVIT 400 imported on 21st September, 2021 vide import Entry Form C17C number 21NBOM408047511 in which the declared commodity tariff HS Code 30045000 had not been varied.

29. On 31st March 2022 the Respondent filed Miscellaneous Application no. 106 of 2022 at Tax Appeals Tribunal for extension of time to enable the Respondent appeal against the Appellant's ruling of 21st October, 2021 which application was withdrawn on 22nd April, 2022 to allow parties to engage in out of Court settlement.

30. The Respondent asserts that despite the Respondent holding meetings, no settlement was reached instead in his letters referenced KRA/CBCBIA/TQH/ADVI388/2022 and KRA/CBCBLA/TQH/ADV/389/2022 of 3rd June 2022 the Appellant upheld his decision of 21st October 2021 that classified EVIT 200 and 400 Capsules as food supplements. The Appellant termed the decision an advance ruling under section 248A of the EACCMA 2004 that would be valid for a period of 12 months from the date of issue.

Submissions by Respondent

31. The Respondent urges for the upholding of the Tax Appeals Tribunal's decision and views the appeal as meritless and deserving dismissal. Addressing the grounds related to the judicial notice of the Neuroforte case under Grounds 1, 2, 3, 4 of the Memorandum of Appeal, the Respondent submits that the Tribunal did not err in its decision in that while the chemical compositions may differ, the context of the cases was similar, as both involved the Commissioner's pattern of initially classifying products as medicaments based on laboratory analysis and subsequently reclassifying them as food supplements, leading to disputes.

32. The Respondent emphasize that the Tribunal correctly emphasized that not all products containing vitamins must necessarily be food supplements. It is presented that the Appellant wrongly applied amendments to the Explanatory Notes by the HS Committee's 64th Session, as the advisory notes from this session do not list products with active Vitamin E as an ingredient. The Commissioner is further accused of arbitrarily withdrawing earlier tariff rulings (from 2016) contrary to Sections 68 and 69 of the Tax Procedure Act, 2015, which stipulate the proper process for withdrawing private rulings.

33. It is the Respondent's submissions that the Appellant disregarded the findings of the Pharmacy and Poisons Board, which is the expert authority in identifying drugs and ignored the Respondent's valid licenses and certificates issued by the Board for the importation of these drugs. The Appellant's "advance rulings" of 3rd June 2022 are challenged as not meeting the requirements of Section 248A (1) (a) of the EACCMA (Amendment) Act, 2019 given they were issued after the imports were already subject to the 2016 rulings and not within the stipulated 30 days of request.

34. Regarding the reclassification of EVIT as a food supplement as under Grounds 5, 6, 7 & 9 of the Memorandum of Appeal, the Respondent maintains that the Tribunal's finding was correct being classification of goods for customs duty is governed by the International Convention of Harmonized Commodity Description and Coding System, specifically Article 7 and Part 8 of the EAC Protocol, along with the World Customs Organization (WCO) Explanatory Notes.

35. It is submitted that the Tribunal correctly concluded that EVIT 200 and EVIT 400 capsules, with alpha-tocopherol as the active ingredient at their given dosages, prevent, relieve, and cure medical conditions as per the manufacturer's information, thereby falling under HS Code 3004.50.00 (medicament). The Appellant presents that EVIT products align with HS Code 30.04, which covers medicaments for "therapeutic" (treatment of a condition) or "prophylactic" (formulated to prevent

something) uses, put up in measured doses or retail packaging. Citing various forms of evidence relied upon by the Tribunal, it is submitted that the Tribunal established criteria for a medicament under HS Code 30.04 were fully satisfied.

36. On the duty to supply the laboratory report under Ground 8 of the Memorandum of Appeal, the Respondent contends that the Appellant was indeed obligated to provide the same. It is submitted that the Tribunal observed that the report was neither shared with the Respondent nor adduced as evidence despite the Appellant's witness claiming confidentiality. The Respondent further submits that it is ordinary practice for the Commissioner to examine samples and produce a certificate of analysis.

37. It is submitted that the Appellant's 2021 reclassification letters cited "laboratory findings" were unclear on samples examined and the Respondent's repeated requests for the report were denied. It is presented that the Appellant failed to produce a certificate of analysis by a government analyst, government chemist, or designated laboratory as prima facie evidence, as required by Section 223(c) EACCMA, 2004. The Respondent prays for the appeal to be dismissed with costs, and for the Tribunal's decision to be upheld.

Issues for Determination

38. Notably, the Appellant raised 9 grounds in its Memorandum of Appeal but during its submission condensed them to three main issue for determination being whether EVIT 200 and EVIT 400 are similar products to Neuroforte; the classification of EVIT 200 and EVIT 400; and whether the Appellant is bound by the decision of Pharmacy and Poisons Board.

39. The Respondent in response to the Appeal similarly raised three main issues for determination from the Appellant's grounds in the Memorandum of Appeal into being whether the Appellant had a duty to supply the laboratory report analysis as evidence to the TAT; the classification of EVIT 200 and EVIT 400; and, whether the Tribunal erred by Taking judicial notice of TAT No. 732 of 2022 involving similar parties.

40. The Court having anxiously considered the grounds enumerated in the Memorandum of Appeal, the Respondent's Statement of Facts, both parties' submissions, the Tribunal's decision vis a vis all the evidence presented, and in line with the issues submitted on by the parties, it identifies four main issues pertinent for its determination to be;

    i. Whether the Tax Appeals Tribunal erred in law and/or in fact in finding that EVIT 200 and EVIT 400 CAPSULES are medicaments classifiable under HS Code 3004.50.00.

    ii. Whether the Appellant had a duty to supply the laboratory analysis report as evidence to the Tax Appeals Tribunal.

    iii. Whether the Tax Appeals Tribunal erred in its assessment of the similarity between EVIT 200/400 and Neuroforte and the relevance of TAT No. 732 of 2022.

    iv. Whether the Appellant is bound by the classification of the said products by the Pharmacy and Poisons Board.

Analysis And Determination

41. The Court, in exercising its appellate jurisdiction from the Tax Appeals Tribunal, operates within legal confines under Section 56(2) of the Tax Procedure Act which stipulates that an appeal to the High Court and Court of Appeal shall be on a question of law only.

42. The Court is cognizant of its mandate and obligation to give due deference to the findings of the fact by the Tax Appeal Tribunal and only depart from them if they were perverse as was reiterated in Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 Others (2013) eKLR where the Court of Appeal held as follows:

> " What are the points of law raised in this appeal? An appellant Court will not ordinarily differ with the findings on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law."

43. Flowing from the foregoing, the court proceeds to determine whether there are demonstrated errors by the Tribunal on points of law that may justify the interference by it.

a. Whether the Tax Appeals Tribunal erred law in its assessment of the similarity between EVIT 200/400 and Neuroforte, and the relevance of TAT No. 732 of 2022.

44. The Appellant contends that the Tribunal erred by implying a similarity between EVIT 200/400 and Neuroforte, arguing that their composition, active ingredients, and pharmacological indications are very different. The Appellant highlights the distinct nature of EVIT (Vitamin E 200mg/400mg, an antioxidant for wellness benefits) versus Neuroforte (Vitamin B complex, an adjuvant for chronic rheumatoid and neuropathies associated with diabetes). The Appellant's position is that tariff classification should be determined on a case-by-case basis, strictly on the product's specific characteristics. On the other hand, the Respondent acknowledges the factual differences in the products' chemical composition and active ingredients, then argues that the Tribunal was right by taking judicial notice of TAT No. 732 of 2022. The Respondent's position is that the context of the cases was similar, specifically pointing to the pattern of the Commissioner's actions.

45. The Court upholds the Tribunal's decision to apply judicial notice in this context for being appropriate. While the chemical compositions and specific medical indications of EVIT products and Neuroforte tablets are indeed distinct, the Tribunal's decision to take judicial notice was not based on a factual equivalence of the products themselves. Instead, it was based on the procedural and contextual similarity of the disputes.

46. The Tribunal correctly identified a recurring pattern in the Appellant's administrative conduct concerning the reclassification of pharmaceutical or health-related products. This pattern includes the Appellant's initial classification of products as medicaments, followed by a subsequent reclassification to food supplements without transparent or adequately substantiated reasons and a failure to adhere to established procedures for withdrawing prior rulings or providing requested evidence being the laboratory report. Further, the Tribunal's emphasis that not all products containing vitamins must be food supplements is a correct statement in line with the Harmonized System which provides specific headings for medicaments containing vitamins (HS 3004.50.00) alongside headings for food supplements (HS 2106.90.91).

47. The rationale and purpose of judicial notice is to recognize certain facts or patterns that are commonly known or easily verifiable thereby streamlining proceedings. In this instance, the Tribunal's recognition of a similar modus operandi by the Appellant in a related case involving the same parties serves to underscore a need for administrative consistency and fairness. The implication then is that the Appellant's actions in the present case would be viewed through the lens of its past conduct in similar classification disputes. That is desirable for purposes of consistency so that tax payers are aware of what

to expect on custom when importing products. The court has not been persuaded that there was an error tainting the decision of the tribunal in its determination and thus answers the issue in the negative.

b. Whether the Tax Appeals Tribunal erred in law in finding that EVIT 200 and EVIT 400 CAPSULES are medicaments classifiable under HS Code 3004.50.00.

48. It is beyond debate that classification of goods for customs duty in Kenya is governed by the International Convention on the Harmonized Commodity Description and Coding System (HS Convention), as domesticated as Part 8 of the Protocol on the establishment of the East African Customs Union. Article 7 as read with Part 8 provides for interpretation aids including the World Customs Organization (WCO) Explanatory Notes.

49. The General Interpretation Rules (GIRs) specifically GIR 1 and GIR 6 are also important in this process as they guide on how headings, subheadings and notes are to be applied. The General Interpretation Rules 1 (GIRI) for the classification of goods provide that the classification of goods shall be governed by the following principles;

> " 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 required according to the following provisions..."

The General Interpretation Rule 6 further provides;

> " For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheadings. Notes and mutatis mutandis to the above rules on the understanding that only subheadings at the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply unless the context otherwise."

50. Because the Appeal revolves around the distinction between "medicament" (HS Code 30.04) and "food supplement" (HS Code 21.06), the Court duty is to discern, on a balance of probabilities, if the decision of the Tribunal is in tandem with the classification codes or if there is a wholly unsupportable departure from the dictates of that law. That however call for evaluation of the facts presented to see if the decision flies on the face of the facts as far as the description of the products was availed to the tribunal. With that approach, the answer must be in the question whether the products were shown to be "medicaments" consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packaging for retail sale, so as to fall under HS Code 30.04, or "food preparations" not elsewhere specified or included, including "Food Supplements fall under HS Code 21.06.

51. The court in applying the above definitions to EVIT 200 and EVIT 400 products notes several facts in strong support their classification as medicaments. The following are some of the facts drawn from the record availed

    a. The EVIT products were registered as medicaments by the Pharmacy and Poisons Board in 2008 under certificates H2005/337 and H2005/338. The Respondent is licensed by this Board to distribute these products as medicament and dealing in food supplements under such a license would constitute an infringement.

    b. The Appellant's own tariff rulings of 22nd July 2016 and 3rd August 2016 all classified EVIT 200 and EVIT 400 as medicaments. The rulings were based on samples examined, laboratory

analyses as well as reference to the Martindale 37th Edition. The rulings were also not withdrawn in accordance with Sections 68 and 69 of the Tax Procedure Act, 2015. This prior classification by the Appellant itself let alone the inconsistency and alleged procedural non-compliance in withdrawing the said ruling greatly questions the Appellant's reclassification.

c. The manufacturer, Geltec Private Limited, provides literature that details specific therapeutic indications for EVIT 200 and EVIT 400. These include strengthening body defense against muscle damage, preventing cataract formation, improving glucose tolerance in diabetics, relieving fibrocystic breast lumps, easing fibromyalgia pain, reducing menorrhagia, reducing menopause symptoms, reducing liver damage, increasing fertility, reducing joint deterioration, and easing rheumatoid arthritis symptoms.

These explicit claims of preventing, relieving, or curing medical conditions directly align with the "therapeutic" or "prophylactic" uses criterion of HS Code 30.04. The method of use (one to two capsules daily) and presentation (soft gelatin capsules in packs of 3x10's) also align with typical medicament characteristics. The Appellant claimed the manufacturer's packaging "clearly stated that the tablets were food supplements". However, the detailed therapeutic claims quoted by the Respondent from the manufacturer's literature directly contradict this general assertion by the Appellant. The specificity of the therapeutic indications provided by the Respondent carries greater weight in determining the product's intended use.

d. The Tribunal observed that the recommended daily amount (RDA) of Vitamin E is 40/50mg, whereas EVIT 200 and EVIT 400 CAPSULES contain significantly higher dosages of 200mg and 400mg, respectively. The presence of physician prescriptions for these products also supports their therapeutic use as medicine.

e. EVIT products are intended for the prevention or treatment of diseases as shown by the manufacturer's literature and high dosage, then by the very terms of these notes, they cannot be classified under 21.06 and must fall under 30.03 or 30.04. the court finds no basis to fault the Tribunal on its findings on the classification.

52. Flowing from the above, the court upholds the Tribunal decision to have correctly determined that EVIT 200 and EVIT 400 CAPSULES are medicaments classifiable under HS Code 3004.50.00 and not food supplements.

c. Whether the Appellant had a duty to supply the laboratory analysis report as evidence to the Tax Appeals Tribunal.

53. The Appellant asserts that there was no need for a laboratory analysis report because the contention was solely on whether the products were for therapeutic/prophylactic purposes or food supplements, not on their composition or quantity.

54. This has been countered by the Respondent's argument that the Appellant had a duty to supply the laboratory report analysis as evidence having been the alleged basis of its determination. The Respondent submits that it is ordinary practice for the Commissioner to obtain and produce laboratory test reports from government chemists or designated laboratories for classification rulings. Crucially, the Appellant's own initial rulings for EVIT 200 and EVIT 400 CAPSULES in 2016 were based on samples examined and analyzed. It is the Respondent's case that the Tribunal correctly found that the Appellant's letters of 24th June 2021 and 21st October 2021 not only communicated the reclassification but also indicated that the decision was informed by "laboratory findings" with no clarity on the examined samples.

55. As a matter of fact, it is not in dispute that the impugned laboratory analysis report was neither shared with the Respondent nor adduced before the Tribunal. The only reason advanced for such holding back is that the report was confidential. While the right to a fair determination of legal disputes by application of the law obviously frowns upon trial by ambush, it is equally unacceptable that a party would conceal a document used to find in its favour from the court. The Court holds that the Appellant having used the alleged laboratory test as the very basis for the reclassification, such findings became indispensable for any party seeking to understand, verify, or challenge the decision. Imperatively, the same ought to have been disclosed to the taxpayer and the adjudicating body.

56. In the present day under the current constitution, it cannot be expected of a public body that it determines the rights of a citizen, in a quasi-judicial process, in a manner that cannot be verifiable or interrogated by a supervising authority, even on appeal. If an adjudicating body was to be allowed to make determination based unverifiable facts and evidence, we could be encouraging the reintroduction of the long-abandoned trial by ordeal. Because the Tax Appeals Tribunal sits as a first appellate court, with the mandate to review and reappraise the entire evidence tendered before the trial body, what was availed at trial but concealed from it was being shielded from being reappraised. When so concealed, the Tribunal could not be expected to believe in its existence but was allowed to draw an adverse inference that if availed, I t could have turned adverse to the appellant's case.

57. The value and stature of the laboratory test report touches upon fundamental principles of procedural fairness and the burden of proof in tax disputes. Section 223(c) of the EACCMA, 2004, provides that certificate purporting to be signed by the Government analyst, the Government Chemist or any designated laboratory shall be admissible in evidence and shall be prima facie evidence of the matters recorded in the certificate. Similarly, Section 15(1) of the Tax Appeal Tribunal Act, 2013, imposes a clear obligation on the Commissioner to submit a statement of facts including the reasons for the tax decision and; any other document which may be necessary for review of the decision by the Tribunal. It is not clear why a creature of the law chose to proceed as if the law did not matter.

58. The court finds guidance and concurrence in the decision in Kenya Revenue Authority vs Man Diesel & Turbo Se, Kenya (2021) eKLR where the court said:

> " The uniqueness of tax laws is underscored by the fact that even where the constitutionality of such provisions has been challenged, courts have consistently held that placing the burden upon the taxpayer is not unconstitutional nor is it contrary to Parliament's intent. This is because there is a distinction between the legal burden of proof and the evidential burden of prove. These are two different concepts. The *Evidence Act* places the burden of proving the existence any fact in issue on the party who asserts. The evidential burden exists in the form of a tactical onus to contradict, weaken, or explain away the evidence that has been led. It is the latter form of burden which may shift from one party to the other."

59. A laboratory report that forms the very premise of a contested tax decision is, without question, a necessary and mandatory document for a fair and comprehensive review by the Tribunal and by this court on appeal as a basis of testing how well the reclassification decision was arrived at.

60. This omission weakened the Appellant's case and deprived the Respondent of a fair opportunity to challenge the reclassification. The omission paints the appellants process as an opaque decision-making process as much as it denied the Respondent the fundamental right to scrutinize the factual basis of the reclassification and to effectively challenge the factual basis of the reclassification in its defense.

61. The inconsistency in the Appellant's conduct using laboratory reports for initial classification but refusing to provide them for reclassification was never a mere technicality. It directly impacted on

the principles of fair administrative action and due process in tax disputes. The onus rested on the Commissioner to justify a change in classification hence the lack of transparent and verifiable evidence was procedurally infirm and susceptible to being set aside on this ground alone. Therefore, the Tribunal's finding that the Appellant had a duty to supply the laboratory report analysis was therefore a correct application of the law and beyond legal challenge.

d. Whether the Appellant is bound by the classification of the said products by the Pharmacy and Poisons Board.

62. The Appellant in citing the case of Republic vs. KRA ex parte Beta Healthcare International Ltd argues that the classification made by the Pharmacy and Poisons Board is for a different purpose (registration) than customs taxation, and therefore the Appellant is not bound by it. The Respondent on the other hand even when not insisting on the binding nature of the decision by the Pharmacy and Poisons Board contends that the Appellant ignored such findings and which are recognized as experts and authority in identifying drugs. The Respondent further points out the practical implication of such disregard to be that dealing in food supplements under a Pharmacy and Poisons Board license for poisons/ pharmaceuticals would constitute an infringement of the law.

63. To start with, the Court acknowledges the law in Republic vs. KRA ex parte Beta Healthcare International Ltd, cited by the Appellant, that the registration of a product as a medicament by the Pharmacy and Poisons Board does not automatically bind the Commissioner of Customs for purposes of tariff classification under customs law. That decision is well grounded on the basis that the mandates of the two bodies are distinct in that the Pharmacy and Poisons Board focuses on public health, safety and drug regulation, while the Kenya Revenue Authority focuses on revenue collection and trade facilitation through tariff classification.

64. However, while not legally binding, the court notes that the classification by the Pharmacy and Poisons Board, being a statutory regulatory body, must be left to carry the due evidentiary weight. The determination by the Pharmacy and Poisons Board, as the statutory body responsible for regulating pharmaceutical products in Kenya, that a product is a "medicine" or "medicament" remains an expert opinion based on its composition, intended use, and pharmacological effect, and may only be disregarded for a valid and plausible reason.

65. The Court view the disregard of such an expert determination without providing compelling, scientifically sound and transparent reasons was an arbitrary approach that lacks judicious consideration of the product's established regulatory status and intended use. As such, the Appellant's failure to adequately address or rebut the Pharmacy and Poisons Board's classification alongside the extensive manufacturer's literature demonstrates failure to consider a relevant matter the appellant was bound to consider. That was thus a valid and legal basis for the tribunal to reverse the appellant.

66. Moreover, the Respondent's argument that classifying the product as a food supplement would lead to a legal infringement under their Pharmacy and Poisons Board's license highlights the practical implications of a regulatory inconsistency. To this extent, the Court holds that while the decision by the Pharmacy and Poisons Board is not strictly binding, it carried substantial persuasive evidentiary weight as an expert opinion from a relevant regulatory authority in the circumstances hence the Appellant should have given due consideration and provided a robust justification for deviating from it.

67. In upshot, the court finds no merit in the appeal dismisses same and gives the appropriate orders that:

    i. The Appeal by the Commissioner of Customs & Border Control against the judgment of the Tax Appeals Tribunal delivered on 6th October 2023 is hereby dismissed.

ii. 3The judgment of the Tax Appeals Tribunal in Nairobi TAT No. 731 of 2022, which set aside the Commissioner's review decision dated 3rd June 2022, is hereby upheld with the inevitable consequence that the Appellant's review decision issued on 3rd June 2022 classifying EVIT 200 and EVIT 400 imported by the Respondent under HS Code 2106.90.91 is hereby set aside.

iii. The costs of this Appeal shall be borne by the Appellant and paid to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF AUGUST, 2025

PATRICK J O OTIENO

JUDGE