Greenlife Crop Protection Africa Ltd v Commissioner of Customs and Border Control (Tax Appeal E691 of 2023) [2024] KETAT 1150 (KLR) (1 August 2024) (Judgment)

Neutral citation: [2024] KETAT 1150 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

TAX APPEAL E691 OF 2023

RM MUTUMA, CHAIR, B GITARI, EN NJERU, M MAKAU & AM DIRIYE, MEMBERS

AUGUST 1, 2024

BETWEEN

GREENLIFE CROP PROTECTION AFRICA LTD ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... RESPONDENT

JUDGMENT

Background

1. The Appellant is a limited liability company incorporated under the Companies Act and carrying on business in Athi River at Athi 55 Complex.

2. The Respondent is an officer of Kenya Revenue Authority, Statutory Corporation duly established under the provisions of the Kenya Revenue Authority Act (CAP. 469 of the Laws of Kenya) as the sole agent of the government for the assessment and collection of all government revenue. In exercise of his mandate, the Respondent enforces provisions of law set out in the first schedule to the KRA Act, among them the Excise Duty Act No.23 of 2015.

3. The Appellant imported liquid Lavender Total Fertilizer and vide its clearing agent declared the product in HS Code 3105.90. 00 under entry number 23EMKIM400252899 dated 8th March 2023 on the basis of a tariff ruling reference no. CUSN&T/TARI/RUL/212/2015 dated 16th April 2015.

4. On 11th April 2023, the Respondent issued a Tariff Guidance Ruling reference no. KRA/C&BC/BIA/THQ/227/04/2023 classifying the product Lavender Total fertilizer under 2022 EAC/CET code 3824.99.90

5. The Appellant vide letter dated 27th April 2023 disputed the Tariff Ruling KRA/C&BC/BIA/THQ/227/04/2023 affirming that the fertilizer was classifiable under HS code 3105.20.00 however

the Respondent maintained the classification vide a letter dated 26th May 2023, Ruling reference no. KRA/CBC/BIA/THAQ/APPEAL/058/05/2023.

6. The Appellant Objected to the review of tariff classification by the Respondent on 26th June 2023 and availed additional information on or between 5th and 11th July 2023 to back its stand.

7. The Respondent issued a demand notice dated 8th August 2023 for Kshs. 12,416,142.00 being short levied duties arising from the re-classification of Lavender Total fertilizer from 2022 EAC/CET Code 3105:20:00 to 2022 EAC/CET Code 3824.99.90 and covering Lavender Total fertilizer imports from August 2018.

8. On 14th August 2023 the Appellant applied for review of the demand for short levied duties citing the 16th April 2015 Ruling which classified the product under tariff 3105.20.00.

9. On 15th September 2023, the Respondent issued an Objection Decision which expunged the short-levied duties prior to 2023 and subsequently reduced the Tax demanded to Kshs. .3,433,163.73 and still confirmed that Lavender Total fertilizer is classified as 2022 EAC/CET Code 3824.99.90 based on 2015 Tariff Ruling of the product.

10. The Appellant being dissatisfied with the Respondent's ruling sought respite by filing a Notice of Appeal before the Tribunal on 18th November 2023.

The Appeal

11. The Appeal is premised on the following grounds as stated in the Memorandum of Appeal dated 15th October 2023 and filed on 18th October 2023 as follows; -

    a. That KRA erred in law and fact by classifying Lavender Total fertilizer under 2022 EAC/CET tariff number 3824:99:90, yet the fertilizer is mainly composed of Nitrogen 24%, Phosphorous 24% and Potassium 18%.

    b. That KRA erred in law and fact by classifying Lavender Total fertilizer under Heading 3824:99:90 as guided by GIR 1 & 3 (c).

    c. That KRA erred in law and fact by classifying Lavender Total fertilizer under 2022 EAC/CET tariff number 38 24, yet there was a legitimate ruling issued on 16th April 2015 affirming Lavender Total fertilizer to be under 2022 EAC/CET Code 3105 20 00.

    d. That KRA erred in law and fact by classifying Lavender Total fertilizer imported under custom entry no. 23EMKIM400252899 dated 8th March 2023 under 2022 EAC/CET tariff number 38.24 which covers classification of chemical products and preparations of chemicals or allied industries not elsewhere specified or included.

    e. That KRA erred in law and fact by concluding that Lavender Total fertilizer is enriched with trace elements used to collect deficiencies.

    f. That KRA erred in law and fact by concluding that Lavender Total fertilizer is an organic nutrient preparation for agricultural application classifiable under HS Code 3824.99.90.

    g. That KRA erred in law and in fact by subjecting Lavender Total fertilizer to VAT liability of Kshs. 3,433,163.73 on import entry no. 23EMKIM400252899 yet the fertilizer is exempt from VAT as per the provisions of First Schedule of VAT Act, 2013 paragraph 26.

The Appellant's Case

12. The Appellant's case is premised on the following documents:

    a. Statement of Facts dated 15th October 2023 and filed on 18th October 2023 together with the documents attached thereto; and,

    b. Written submissions dated 3rd June 2024 and filed on 5th June 2024 together with the authorities attached together with the authorities attached thereto.

13. The Appellant averred that it imported Lavender Total fertilizer and vide its clearing agent and declared the product in HS Code 3105.90.00 under entry number 23EMKIM400252899 dated 8th March 2023 on the basis of a Tariff Ruling reference no. CUSN&T/TARI/RUL/212/2015 dated 16th April 2015.

14. The Appellant stated that the Respondent customs officers disputed the declared HS Code of 3105.90.00 on the product and allowed provisional clearance through the customs awaiting the outcome of laboratory analysis on sample drawn by the Respondent.

15. The Appellant averred that on 11th April 2023, the Respondent issued a Tariff Ruling reference no. KRA/C&BC/BIA/THQ/227/04/2023 classifying the Lavender Total fertilizer under 2022 EAC/CET Code 3824.99.90 which the Appellant disputed vide letter dated 27th April 2023, affirming that the fertilizer was classifiable under HS Code 3105.20.00.

16. The Appellant posited that the Respondent proceeded to confirm and issue a review of the tariff classification reference no. KRA/CBC/BIA/THQ/APPEAL/058/05/2023 on 26th May 2023 classifying Lavender Total fertilizer under 2022 EAC/CET Code 3824.99.90.

17. Subsequently on 26th June 2023 the Appellant objected the review of tariff classification reference no. KRA/CBC/BIA/THQ/APPEAL/058/05/2023 and reiterated that Lavender Total fertilizer was classifiable under 2022 EAC/CET Code 3105 20 00.

18. In support of its objection the Appellant availed additional information which included the Lavender Total 100ML sample, Certificate of Analysis (COA), Material Safety Data Sheet (MSDS), Test report, Certificate of Conformity (COC), and Technical Guide. on 11th July 2023, relating to Lavender Total fertilizer to support its classification under 2022 EAC/CET Code 3105 20 00.

19. The Appellant stated that on 8th August 2023, the Respondent issued a notice of demand for Kshs.12,416,142.00 being short levied duties arising from the re-classification of Lavender Total fertilizer to 2022 EAC/CET Code 3824.99.90 covering Lavender Total fertilizer imports from August 2018 to the date of the demand.

20. The Appellant posited that the Respondent's revised tariff ruling reference no. KRA/C&BC/BIA/THQ/227/04/2023 dated 11th April 2023 contradicted the Respondent's Tariff Ruling reference No. CUS/V&T/TARI/RUL/212/2015 dated 16th April 2015 classifying Lavender Fertiliser under HS Code 3105.90.00.

21. Further the Appellant stated that the Respondent affirmed in its objection decision that Lavender Total fertilizer was in Chapter 31 and this assertion by the Respondent that the existence of the 2015 tariff ruling issued by it created a legitimate expectation on the part of the Appellant that the applicable tariff code on Lavender Total fertilizer was 3105.90.00 and the Respondent could not therefore demand the taxes retrospectively.

22. The Appellant stated that, subsequently, in affirming the product to be in Chapter 31, the Respondent revised the tax workings and that all the importations of the product that were included in the KRA demand notice before the new ruling ref: KRA/C&BC/BIA/THQ/227/04/2023 dated 11th April 2023 but excluding the importation to which the sample was drawn and ruling issued were vacated. However, the Respondent did not provide any evidence or explanation as to why the duties were expunged nor provide evidence of the variance in the test results carried out in 2015 and 2023 to warrant the change in the classification.

23. The Appellant therefore averred that the Respondent in its revised ruling affirmed that the Respondent was using variable standards to classify the same product in Chapter 31 and in Chapter 38. The selective application of standards to classify products at convenience of the Respondent was unlawful, unreasonable and not procedurally fair.

24. Further the Appellant stated that on 15th September 2023, the Respondent communicated the final objection decision which reduced the Tax demanded to Kshs. 3,433,163.73 affirming Lavender Total fertilizer imported prior to 2023 was classifiable under 2022 EAC/CET Code 3105.20 00 based on 2015 Tariff Ruling of the product. Therefore, the Appellant stated that the Respondent issued a contradictory ruling re-classifying Lavender Total fertilizer imported in 2023 under 2022 EAC/CET Code 3824.99.90.

25. The Appellant stated that Lavender Total is an inorganic NPK foliar fertilizer and contains 66% macronutrients as follows: Nitrogen (N) 24%, Phosphorous (P) 24% and Potassium (K) 18% as essential and primary nutrients. The micronutrients make up 0.75% of total content in contrast to the Respondent's assertion that the trace elements are the essential nutrients. The Appellant provided a table showing an extract of the test results from an accredited laboratory (Bureau Veritas) of Lavender Total fertilizer confirming NPK as the essential and primary nutrients. The Appellant provided a table showing the composition of Lavender Total in the statement of facts.

26. The Appellant stated that Lavender Total fertilizer is used to correct NPK nutrient deficiency in coffee, vegetables, fruits, ornamentals and cereals and not used to correct micronutrients deficiency by farmers as deemed by the Respondent who misguided itself in concluding that Lavender Total Fertilizer is a micronutrient corrector used by farmers.

27. Moreover, the Appellant stated, Lavender Total fertilizer cannot be used to correct the deficiency of micronutrients since the composition of the micronutrients elements is very low at 0.75%. The main component which gives Lavender Total fertilizer its essential character is NPK which makes up to 66% of the ingredient in the Lavender fertilizer which falls under Chapter 31 of EAC CET.

28. The Appellant reiterated that the use of Lavender Total Fertilizer is well stipulated in the product technical guide and label and that the classification of products under the East Africa Community Customs Management Act, 2004 (EAC CET) is based on the major primary component and not the micronutrient content.

29. The Appellant posited that the Respondent erred by classifying Lavender Total fertilizer under tariff line 3824.99.90 as guided by GIR 1 & 3c for the following reasons

    a. The Respondent in this case misguided itself in classifying Lavender Total Fertiliser under Heading 3824 on the basis of GIR 1.

    b. In determining the classification of a product, the guiding instruments are the East African Community Customs Management Act.2014 (EACCMA) and the East African Community Common External Tariff, 2017 (EACCET).

c. The CET provides for the respective tariff rates applicable to various products and the same must be interpreted in accordance with the WCO's General Interpretation Rules for the classification of Goods (GIR's) and that the GIR's ought to be interpreted sequentially. GIR 1 provides that:

> " The Titles of Sections, Chapter and Sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the heading and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions''

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

e. Consideration must be made of the terms of the headings in line with GIR 1, that is, whether Lavender Total fertilizer fits the Heading 38.24 as used by the Respondent and which covers: - "Prepared binders for foundry mounds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included."

f. On the basis of GIR 1, Lavender Total fertilizer ought to be classified under 3105 which states: -

> " Mineral or chemical fertilizers containing two or three of the fertilizing elements nitrogen, phosphorus and potassium; other fertilizers; goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10kg"

30. Therefore, the Appellant affirmed that on the basis of GIR 1 terms of heading, Lavender Total fertilizer is classifiable under Heading 31.05 in line with the description in number (f) above.

31. The Appellant stated that the Respondent cited the General notes to Chapter 31 as the grounds of classifying Lavender Total fertilizer under Heading 38.24. The General Notes to Chapter 31 provides as follows: "This Chapter also excludes micronutrient preparations which are applied to seeds, to foliage or to soil to assist in seeds germination and plant growth. They may contain small amounts of the fertilizing elements nitrogen, phosphorus and potassium, but not as essential constituents (e.g., heading 38.24)" However;

a. The Respondent misguided itself in concluding that Lavender Total fertilizer merits to be classified as a micronutrient preparation Chapter 38.24 since the trace elements constituent is at a rate of 0.75%, which is too low to be used as a micronutrient corrector by farmers, thus cannot be used to categorize Lavender Total fertilizer under Chapter 38.24. Lavender Total Fertilizer is not a macronutrient preparation to fit in the exclusion clause of General Notes to Chapter 31 as evidenced by Test Results, Material Safety Data Sheet and product Technical Guide (Provided).

b. When determining the classification of Lavender Total fertilizer, if the Respondent had considered its chemical composition in arriving at its classification it would have found that

Lavender Total fertilizer falls under Chapter 31, specifically under Heading 3105 and not under Heading 3824 for the following reasons:

i. The information in the Material Safety Data Sheet (MSDS) describes Lavender Total fertilizer as an inorganic foliar fertilizer with chemical ingredients Nitrogen (N) 240.00g/L, Phosphate (Phosphorous) (P2Os) 240.00g/L, Potash (Potassium) (K2O) 180.00g/L.

ii. The product technical guide describes Lavender Total fertilizer as 24:24:18+TE water soluble NPK foliar fertilizer.

iii. The Test results describes the product as inorganic foliar fertilizer with 66% essential elements and 0.75% trace elements.

c. When establishing the classification of Lavender Total fertilizer, the Respondent must have given due regard to the purpose and intended use of Lavender Total fertilizer by farmers. Lavender Total is used as an NPK deficiency corrector fertilizer by farmers but not as a micronutrient corrector as deemed by the Respondent.

d. The Appellant stated that the Respondent misguided itself in concluding that Lavender Total Fertilizer is a micronutrient corrector used by farmers. This assertion is contrary to the manufacturer's prescription for the use of as an NPK fertilizer. Moreover, Lavender Total fertilizer cannot be used to correct the deficiency of micronutrients since the composition of the micronutrients elements is very low at 0.75%. The main component which gives Lavender Total fertilizer its essential character is NPK which makes up to 66% of the ingredient in the Lavender fertilizer which falls under Chapter 31 of EAC CET and hence used by farmers to correct N-P-K nutrient deficiency.

32. The Appellant stated that furthermore, the Respondent used GIR 3 (c) as the basis of classifying Lavender Total fertilizer under Heading 3824. Rule 3 of the General Rules of interpretation of the harmonized system provides that:

> " When by application of Rule 2 (b) or for any other reason, goods are prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> a. The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the material or substances contained in mixed or composite goods or to part only of the items in a set up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> b. Mixtures, composite goods consisting of different materials or made up of different components, and goods put up on sets for retail sale, which cannot be classified by reference 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> c. When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration."

33. The Appellant posited that in reference to GIR Rule 3 (c), the Respondent misguided itself that Lavender Total fertilizer was potentially classifiable under Chapter 31 and Chapter 38 and therefore, pursuant to GIR 3(c), it was classifiable under Chapter 38 because it occurs last in numerical order among those equally merit consideration thus excluding Lavender Total fertilizer from Chapter 31. Even if Lavender Total fertilizer was potentially classifiable in two headings, then it could not be classified under Heading 3824 on the basis of GIR 3 (c) since it would have been specified elsewhere. Moreover, fertilizers are specified in Chapter 31, Nitrogen is specified under Chapter 28, Zinc is specified under Chapter 79, and Potassium oxide is specified under Chapter 28.

34. The Appellant posited that Heading 38 24 is a residual heading which covers prepared binders for foundry moulds or cores: chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.

35. The Appellant averred that the trace elements in Lavender Total fertilizer constitute micronutrients component at a rate of 0.75%, which is too low to be used to categorize the fertilizer under HS Code 38.24. A market comparison of similar fertilizers with at least one of the fertilizing elements- nitrogen, phosphorous or potassium, as the main essential constituent, and containing trace elements at levels similar to that of Lavender Total fertilizer depicted that, such fertilizers are classified under Chapter 31 and this the appellant stated was a selective application of the law by the Respondent which is unlawful, unreasonable and not procedurally fair.

36. The Appellant provided the following examples of fertilisers classified under Chapter 31 whose composition is similar to Lavender Total Fertiliser and which were all classified under Chapter 31. This included Wuxal;(66% and 0.41%); Macromix 52% and 0.5%); Durnmon (66% and 0.75%)- TAT Appeal No 160 of 2019; and Omcx (66% and 0.75%).

37. The Appellant stated that the Fair Administrative Actions Act, 2015 Section 4 (1) provides that "Every person has the right to administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair".

38. The Appellant posited that in reference to the table in No. 27, the Respondent was using variable standards to classify similar products in the same market in Chapter 31 and re-classified Lavender Total fertilizer in Chapter 38 making the product uncompetitive. The selective application of standards to classify products at convenience of the Respondent is unlawful, unreasonable and not procedurally fair.

39. In their submissions the Appellant stated that there was only one issue for determination which is;

Whether the Respondents demand for Kshs. 3,433,163.73 is justified.

40. The Appellant submitted and reiterated the contents of the Memorandum of Appeal and their statement that from the onset and regardless of the classification of the Product, the demand by the Respondent is untenable. This is for the mere reason that in the entirety of the audit period, that is from 2018 to 2023, the Appellant was acting under the explicit guidance of the Respondent Tariff Ruling issued to the Appellant on 16th April 2015 indicating that HS Code 3105.90.00 was the most appropriate HS Code for its imported Lavender Fertilizer product.

41. That following the issuance of the 2015 Ruling, the Appellant declared all its subsequent importations under HS Code 3105.90.00. Thus, when the Appellant imported its lavender products in entry number 22EMKIM400252899 on 8th March 2023, the Respondent's ruling was in effect as there was no its product from Heading 3105 to 3824 would not be issued by the Respondent until 11th

April 2023. Consequently, from 16th April 2015 all the way until 10th April 2023, the only ruling in subsistence was the one dated 16th April 2015.

42. The Appellant submitted that what is at hand is a situation where the Respondent asks a taxpayer to classify its product under a certain tariff code. In an attempt to be compliant, the Appellant declares all its future imports on the basis of that ruling, only to thereafter be punished with a demand for following a ruling that the Respondent itself issued.

43. The Appellant posited that indeed, this is a manifest breach of the Appellant's right to legitimate expectation, fair administrative action and the presumption of regularity and it shall look at how the Respondent's demand breaches each of the aforementioned fundamental doctrines in seriatim.

Breach of legitimate expectation

44. The Appellant submitted that sudden and erratic change in tariff classification of the Lavender Fertilizer constitutes a fundamental breach of the Appellant's legitimate expectation.

45. The Appellant cited the English case of Council of Civil Service Unions vs. Minister for Civil Service (1995) AC 374 where legitimate expectation was defined.

46. In the case at hand, the Appellant submitted, a legitimate expectation was created upon issuance of the Tariff Ruling in 2015 which informed the basis of all the Appellant's subsequent importations.

47. In its submissions the Appellant relied strongly on the sentiments of the courts in in the case of Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240 where the court pronounced itself clearly on the issue of legitimate expectation in the following manner:

> " ..... legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power....
>
> In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.... In order to ascertain whether or not the respondent's decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the quantum of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus, I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power.....
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> The Appellant submitted that the unilateral change of tariff indicate that this change was done nearly nine (9) years after its use by the applicant company with its predecessors who shared the same license that was based on tariff 22.04. The applicant has over this period arranged its business affairs in reliance with the principle of certainty of law – and that should there be a change it will only apply to the future. I hold that the applicant is entitled to hold the taxman to its bargain and its business expectations based on the principle of

legality ought not to be thwarted. The respondents should have exercised their power to change the tariff ....in a spirit of legality and fairness."

48. Further the Appellant quoted The Supreme Court in the case of: Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others where the court elaborated upon how a legitimate expectation can be formed and stated that:

> " Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation"

49. Additionally, the Appellant submitted that the Respondent in the case at hand is retrospectively applying the tariff ruling dated 11th April 2023 on the Appellant's importation made on 8th March 2023 and on this issue of retrospective application of the Law the Appellant cited Supreme Court case of Samuel Kamau Macharia & And. vs. Kenya Commercial Bank Ltd & 2 Others, [2012] eKLR wherein it was held:

> " As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature".

50. Similarly, the Appellant cited the case of Mzuri Sweets Limited vs. Commissioner of Investigations & Enforcement Appeal No. 574 of 2020 that as a general rule, the law abhors the retrospective application of legal provisions. This is because the retrospective application of the law raises fundamental concerns with regard to the fair administration of statutory authority and effectively imposes a liability when it is already too late for the regulated parties to alter their behavior or take remedial action. Therefore, the Respondent's action in applying the Tariff Ruling retrospectively in order to demand Kshs. 3,433,163.73 from the Appellant constitutes a manifest illegality and a breach of the Appellant's right to legitimate expectation.

51. The Appellant also responded to the Respondent's assertion that the tariff decision dated 26th May 2023 has not been appealed against as hereunder:

    a. That assuming even for the sake of argument that the decision dated 26th May 2023 was to be considered the Appealable Decision, the demand for the Kshs. 3,433,163.73 would still be untenable as the decision could only applying going forward. That is to say, it would apply from the date of 26th May 2023 going forward and cannot be applied retrospectively to the Appellant's imports made on 8th March 2023 as at that point the Appellant was still acting under the 2015 Tariff Ruling.

    b. That after the decision dated 26th May 2023 was issued, the Respondent continued engaging the Appellant culminating in the Appellant drafting another letter dated 26th June 2023 attaching information necessary by the Respondent for the determination of the Appeal.

    c. That following these discussions with the Respondent the demand dated 8th August 2023 was issued. It should be noted that the demand did not refer to the earlier Tariff Ruling in any way leading the Appellant to rightfully believe that the Post Clearance Audit was in its own capacity raising the classification issue and not pegging the same on the earlier rulings issued by its sister department within the Customs Authority.

52. That having raised the issue of the appropriate classification in their demand dated 8th August 2023, the Appellant was mandated and obliged to respond to it.

53. The Appellant submitted that assuming the issue of classification had been settled as the Respondent is suggesting in its written submissions, the Post Clearance Audit would have merely stated that "in light of the rulings in place, the demanded amount was payable." Yet this was not the case, in issuing the demand, the Respondent in essence reopened the dispute and asked the Appellant to object to its findings in relation to the classification of the product.

54. The Appellant therefore posited that the Respondent having raised and stated the classification issue in the demand, the Appellant was mandated to respond to the same. Accordingly, the Appellant objected to the Respondent's findings on 14th August 2023 and the Respondent proceeded to address the issue of the appropriate classification of the product in its Review Decision dated 15th September 2023.

Whether the Respondent's product is appropriately classifiable under Heading 3105 or 3824.

55. The Appellant submitted that Heading 3105 provides for "Mineral or chemical fertilisers containing two or three of the fertilising elements nitrogen, phosphorus and potassium; other fertilisers; goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg."

56. That manifestly, the aforementioned provision provides for fertilizers, specifically, it provides for fertilizers containing Nitrogen, Phosphorous and Potassium commonly referred to as NPK fertilizers.

57. The Appellant submitted that It should be noted from the onset that the aforementioned elements are what are referred to as macro nutrients which are the primary nutrients that plants require in relatively large quantities for their growth and development.

58. That its classification under Heading 3105 is premised primarily on the fact that the main constituents in the Appellant's products are the NPK Macronutrients and the same has been evidenced by the inter alia Certificate of Analysis, Material Data Safety Sheet, Test Report, Certificate of Conformity and the Product technical guide attached to the Appeal

59. The Appellant submitted that despite the aforementioned, the Respondent has taken the position that the Appellant's fertilizer is instead a micronutrient preparation classifiable under Heading 3824.

60. The Appellant submitted that it should be appreciated that despite the Respondent alleging that the Appellant's product contains hormones, it has not provided a shred nor iota of evidence to back that assertion.

61. That the Respondent witness averred on the stand that the hormones in question were detected upon the Respondent conducting its own analysis of the product and the same witness stated that the findings cannot be shared. The Appellant's posited its unequivocal assertion that its products do not contain hormones, as was evidenced by the attached lab results from Bureau Veritas, an accredited laboratory that conducted a thorough analysis of the Appellant's product. Indeed, as provided in the Appellant's lab results, Lavender Total is an inorganic NPK foliar fertilizer, comprising 66% macronutrients, specifically 24% nitrogen, 24% phosphorus, and 18% potassium, which are essential primary nutrients. Micronutrients constitute only 0.75% of the total content, contrary to the Respondent's claim that micronutrients are the primary component of the fertilizer.

62. The Appellant referred the Tribunal to the product technical guide, which noted that the Lavender Total Fertilizer is used to correct NPK nutrient deficiency in coffee, vegetables, fruits, ornamentals and cereals in light of the high macronutrient count in the fertilizer.

63. During cross-examination, the Appellant's counsel showed the Respondent's witness and this Honorable Tribunal "Microfood Maize Fertilizer" which is a micronutrient preparation currently in the market. As was demonstrated, the product Microfood Maize Fertilizer was described as a micronutrient preparation by the manufacturer, and crucially, the main ingredients in the product were Zinc, Boron, Manganese, Iron, Copper and Molybdenum. In the Microfood Maize Fertilizer product, the manufacturer clearly articulated that the item was a micronutrient preparation, with the main ingredients being the micronutrients. On the contrary, the Appellant products have been defined as a macronutrient preparation with the main ingredients being the Macronutrients Nitrogen, P

64. The Appellant submitted that it is indeed baffled as to how the Respondent is ignoring the manufacturers specifications, the lab reports, the material datasheet and the certificate of conformity all of which have deemed the product as a macronutrient fertilizer; and instead is proposing that the same is a micronutrient fertilizer based on a lab analysis they refused to share and the fact that the product has 0.75% micronutrients.

65. The Appellant submitted that the Respondent has indeed cited the general note to Chapter 31 as a basis for the reclassification. The note states as follows:

> " This chapter also excludes micronutrient preparations which are applied to seeds, to foliage or to soil to assist in seeds germination and plant growth. They may contain small amounts of fertilizing elements Nitrogen, Phosphorous and Potassium but not as the essential constituents (e.g heading 38.24)"

66. In quoting the above the Appellant submitted that the Respondent is deeming the Appellant's product a micronutrient preparation not classifiable under Heading 3105 on the basis of the aforementioned heading. In averring as such, the Respondent has failed to appreciate the wording of the Note wherein it provides that "They may contain small amounts of fertilizing elements Nitrogen, Phosphorous and Potassium but not as the essential constituents" The composition of the Appellant's products, the Macronutrients are in fact the essential constituents, making up 66% of the Total product composition.

67. The Appellant reiterated that Heading 38.24 is a residual heading which covers Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included. The trace elements in Lavender Total Fertilizer constitute micronutrient component at a rate of 0.75% which is too low to be used to categorize the fertilizer under HS Code 38.24. A market comparison of similar fertilizers with at least one of the macronutrient Nitrogen, Phosphorous or potassium as essential elements, and trace elements at levels similar to that of the lavender total fertilizer depicted that such fertilizers are classifiable under Chapter 31. We have listed some of these products for your consideration.

68. The Appellant quoted the Tribunal recently issued ruling in TAT Appeal No 1317 of 2022 Coffee Management Services Ltd vs. The Commissioner of Customs & Border Control wherein it was stated that:

> " The Tribunal takes note of the Respondent's assertion of the existence of an exclusionary criterion in describing the product under Heading 31.05 of EACCET especially in consideration of the content of nitrogen, phosphorus and potassium (NPK) vis-à-vis other contents of the products. However, the Respondent did not provide a laboratory analysis to elucidate the percentage composition of the elements not allowable in each of the two products. The Tribunal further takes note that in accordance with the certificate of

analysis, the two products in question constitute boron, copper, iron, manganese and zinc in addition to nitrogen, phosphorus and potassium. The three fertilizing elements of nitrogen, phosphorus and potassium (NPK) constitute approximately 45% in Biofol Triple Max while in Biofol Boron Max they constitute 18%. It is the Tribunal's view that the inclusion of boron and zinc in Biofol Triple Max and Biofol Boron Max as part of the fortification for the fertiliser does not change the use of the products The Respondent has not adduced evidence to controvert the Appellant's assertion that Biofol Triple Max and Biofol Boron Max are fertilisers. The Tribunal is of the further view that GIR1 should be used to classify both products as fertilizers by the terms of Heading 31.05 of EACCET namely: -

"Mineral or chemical fertilisers containing two or three of the fertilising elements nitrogen, phosphorus and potassium; other fertilisers; goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10kg" Based on the foregoing, the Tribunal finds that the Respondent was not justified in re- classifying both Biofol Triple Max and Biofol Boron Max under HS Code 3824.99.90."

69. The Appellant submitted that similar to the aforementioned case, the Respondent has still failed to provide a lab analysis even in the case at hand.

70. The Appellant posited that the General Rules of Interpretation (GIR) is clear as to how classification of products under the Common External Tariff is to be undertaken. Generally speaking, the Rules specify that GIR 1 - 6 are to be applied sequentially, and it is only where classification is improbable with the preceding rule, that the next in the sequence is to be applied. In the case at hand, it is the Appellant's assertion that GIR 1 is sufficient for the classification of its Lavender Total Fertilizer.

71. Bearing the aforementioned, the Appellant submitted it should be noted that the terms of heading to Heading 3105 provide:

> " Mineral or chemical fertilisers containing two or three of the fertilising elements nitrogen, phosphorus and potassium; other fertilisers; goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg."

72. In conclusion the Appellant submitted that they have demonstrated that;

    a. The Respondent erred in law and fact by classifying the Appellant's product under HS Code 3824.99.90 yet the fertilizer is mainly composed of Nitrogen 24%, Phosphorous 24% and Potassium 18%.

    b. The applicable classification of the product is under HS Code 3105.90.00 which provides for fertilizers composed of the macronutrients Nitrogen, Phosphorous and Potassium.

    c. The Respondent erred in law and fact by retrospectively applying the Tariff Ruling dated 11th April 2023 on the Appellants imports made on 8th March 2023.

    d. The Respondent erred in law and fact demanding Kshs. 3,433,163.73 despite the Appellant having imported its products as guided by the Respondents tariff ruling 16th April 2015.

Appellants' Prayers

73. The Appellant Prayers are as follows

    a. That this Honourable Tribunal be pleased to allow the Appellant's Notice of Appeal and set aside the Assessment under review herein;

b. That this Honourable Tribunal be pleased to find and order that the Appellant is not liable to pay the taxes raised and demanded by the Respondent on 8th August 2023 and which was confirmed by the Respondent's Review Decision issued on 15th September 2023;

c. That this This Honourable Tribunal be pleased to find that the correct tariff description for Lavender Total fertilizer under Heading 31 05;

d. That this Honourable Tribunal be pleased to order the Respondent to pay the costs of this Appeal; and,

e. That this Honourable Tribunal be pleased to issue any other favorable order it deems just.

The Respondent Case

74. The Respondent case is premised on its;

a. Statement of Facts dated 17th November 2023 and filed on 20th November 2023 together with the documents attached;

b. Supplementary Statement of Facts 25th April 2024 and filed on 9th May 2024 together with the documents attached thereto;

c. Witness statement of Donata Nanyukia signed, dated and filed with this Tribunal on 9th April 2024, and adopted in evidence in chief on 15th May 2024.

d. Submissions dated and filed on 30th May 2024.

75. The Respondent stated that the Appellant imported liquid lavender agricultural nutritional product under import Entry Number 23EMKIM400252899 and declared the product under the 2022 EAC CET HS Code 3105.90.00 that provides for other fertilisers. The Appellant had been classifying its product, Lavender Total, under Tariff Code 3105.90.00 which does not attract import duty or Value Added Tax (VAT). This Chapter 31 covers classification of chemical fertilisers as specified in the limits of Heading 3102, 3103, 3104 and 3105.

76. The entry was profiled for possible mis-declaration of HS Code and a sample of product was obtained from the consignment and submitted to the Tariff Unit for review of the material information regarding the product for purposes of tariff classification of the product.

77. The Respondent averred that the product, Lavender Total was presented in 100ml plastic bottle bearing product description, indication of usage and the composition. The technical data sheet & the certificate of analysis of the product indicated the composition as follows: -Available Potassium= 240 grams per litre;Available Nitrogen= 240 grams per litre;Available Phosphorus= 180 grams per litre;Boron = 0.15% mass by mass;Calcium = 0.248% mass by mass;Cobalt = 0.0003% mass by mass;Copper= 0.001% mass by mass;Iron = 0.007% mass by mass;Magnesium= 0.003% mass by mass;Manganese= 0.037% mass by mass;Molybdenum = 0.0002% mass by mass;Sulphur= 0.23% mass by mass;Zinc= 0.078% mass by mass;

78. The Respondent posited that the product was further specified to contain hormones that promote vegetative growth. Therefore, based on the above composition the product was identified as mixtures of chemical products intended for agricultural nutritional application containing: -Macronutrients (Potassium, Nitrogen and Phosphorus);Micronutrients (Zinc, boron, manganese, magnesium, iron, molybdenum, copper, cobalt and calcium);Hormones.

79. The Respondent stated that it noted that the product was intended to provide macronutrients, micronutrients and hormones to the plants to promote growth as well as to correct micronutrient deficiencies.

80. The Respondent posited that Chapter 31 covers classification of chemical or mineral fertilizers based on nitrogenous products, phosphatic products and potassic as specified in the limitive tests in Heading 31.02, 31.03, 31.04. Furthermore, Heading 31.05 covers the classification of 'other fertilisers' as specified in Explanatory Note 6 to Chapter 31.

81. It further stated that Chapter 31 also excludes micronutrient preparations which are applied to seeds, to foliage or to soil to assist in seed germination and plant growth. They may contain small amounts of the fertilizing elements nitrogen, phosphorus and potassium, but not as essential constituents. Therefore, based on the chemical composition of the product, the intended application and the above provisions of the Explanatory notes as well as Note 6 of Chapter 31, Lavender Total was considered to be chemical agricultural nutritional product classified under 2022 EAC CET HS Code 3824.99.90.

82. The Respondent averred that the Appellant mis declared Lavender Total by not adhering to the Legal Text (Note 6 to Chapter 31) of the Harmonized System when classifying the disputed product Lavender Total under Chapter 31. Further not all agricultural nutritional products containing nitrogen, phosphorus and potassium are considered as fertilizers except those specified in limitive lists specified in Headings 31.02, 31.03 and 31.04. Lavender Total did not contain any chemical or mineral fertilizers specified in the limitive list in Headings 31.02, 31.03 and 31.04.

83. In considering the classification of the product under HS Code 3824.99.90 the Respondent stated that all the ingredients were considered and General Rules of Interpretation applied adequately. Furthermore, Heading 3105 covers the classification of 'other fertilizers' as specified in Explanatory Note 6 to Chapter 31 as follows:

> " For the purposes of heading 3105, the term "other fertilisers" applies only to products of a kind used as fertilisers and containing, as an essential constituent, at least one of the fertilising elements nitrogen, phosphorus or potassium"

84. The Respondent stated that the product provides the following important constituents of agricultural nutrition that merit consideration in classification of the product:Macronutrients (Potassium, Nitrogen and Phosphorous);Micronutrients (zinc, boron, manganese, magnesium, iron, molybdenum, copper, cobalt and calcium);Hormones.

85. Therefore, the product was correctly classified under 2022 EAC CET HS Code 3824.99.90 that provides for chemical preparations that are not elsewhere classified or includes in the harmonised System Nomenclature. The ruling issued on the product was based on the information that was available at the time and did not bar the commissioner from undertaking a verification as clearly indicted in the ruling. The Respondent stated that it explained to the Appellant in detail the reason for arriving at the tariff classification 3824.99.90.

86. In the Review of Tariff Classification dated 26th May 2023 the Respondent informed the Appellant that the ruling shall be upheld in case of any other contradictory tariff ruling issued before pursuant to Section 135 (1) of EACCMA Act on the issue of short levied taxes.

87. In the supplementary statement of facts, the Respondent stated that the Post Clearance Audit section of the Respondent issued a demand for short levied duties vide a letter dated 8th August 2023 and referenced KRA/CBC/RMD/PCA/390/2023 (NOD) for Kshs. 12,416,142.00. The Appellant

applied for review of the demand for short levied duties on 14th August 2023. In the Appellant's review application, the Appellant cited a Tariff Ruling referenced CUS/V&T/TARI/RUL/212/2015 which was issued on 16th April 2015 for its product, Lavender Total, which was classified under Tariff 3105.20.00

88. The Respondent stated that in the Review Decision, the Respondent expunged from the assessment those entries that were covered by the previous ruling. However, taking into consideration that a sample was drawn from the goods entered vide entry number 23EMKIM400252899 and a tariff ruling delivered vide a letter dated 11th April 2023 and referenced KRA/C&BC/BIA/THQ/227/04/2023, Post Clearance Audit (PCA) assessed short levied duties of Kshs. 3,433,163.73.

89. In its submissions the Respondent's stated that in its view the main issue for determination is: -

Whether the Respondent acted within its mandate by demanding duties of Kshs. 3,433,163.73.

90. The Respondent posited that the genesis of this matter is that the Appellant imported Liquid Lavender agricultural nutritional product under import entry number 23EMKIM400252899 and declared the product under the 2022 EAC CET HS Code 3105.90.00.

91. The Respondent thereafter issued the Appellant with a tariff classification ruling dated 11th April 2023 wherein the Respondent informed the Appellant that the Appellant's product should be classified under the 2022 EAC CET HS Code 3824.99.90.

92. The Appellant being affected by the Respondent's decision acted pursuant to Section 229 (1) of the East Africa Community Customs Management Act which states as follows: - A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission. The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

93. The Respondent stated that the Appellant lodged the application for review on 27th April 2023 and provided four grounds for why it was seeking a review of the Respondent's decision.

94. The Respondent issued the Appellant with a Review of Tariff Classification for Lavender Total 100 ml referenced KRA/CBC/BIA/THQ/APPEAL/058/05/2023 dated 26th May 2023 wherein the Respondent explain to the Appellant the reason for upholding the earlier tariff classification 2022 EAC/CET HS Code 3824.99.90.

95. The Respondent issued the Review of Tariff Classification pursuant to Section 229 (4) of the East Africa Community Customs Management Act which states as follows: -

> "(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision."

96. The Respondent's analysis of the Appellant's product and reasoning for classifying the product under EAC CET HS Code 3824.99.90 was brought out in the Respondent's witness statement by Ms. Donata Nanyukia.

97. It is the Respondent's position that if the Appellant was not satisfied with the Respondent's Review Decision, then the Appellant should have moved the Tax Appeals Tribunal under Section 230 of the East Africa Community Customs Management Act which states as follows: -

> "(1) 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."

98. A person intending to lodge an appeal under this section shall lodge the Appeal within forty-five days after being served with the decision and shall serve a copy of the appeal on the Respondent.

99. The Respondent posited that failure by the Appellant to move to the Tribunal as required under Section 230 of the East African Community Customs Management Act meant that the Appellant had acquiesced or agreed with the Respondent's decision on the issue of tariff classification for the Appellant's product Lavender Total.

100. The Respondent submitted that it then issued a notice of demand for short levied duties amounting to Kshs. 12,416,142.00 vide a letter dated 8th August 2023 referenced KRA/CBC/RMD/PCA/390/2023 (NOD) pursuant to Section 135 of the East Africa Community Customs Management Act which states as follows: -

> "(1) Where any duty has been short levied ..., then the person who should have paid the amount short levied ... shall, on demand by the proper officer, pay the amount short levied ...; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied ..., were liable."

101. The Respondent stated that the Appellant, aggrieved by the Respondent's demand for short levied duties, proceeded to lodge an application for review dated 14th August 2023 pursuant to Section 229 (1) of the East African Community Customs Management Act. One of the grounds that the Appellant sought a review of the Respondent's demand for short levied taxes was that there was a 2015 tariff ruling that existed which created a legitimate expectation that the applicable Tariff Code was 3105.90.00 and that the Respondent cannot therefore demand the taxes retrospectively.

102. The Respondent posited that it issued its Review Decision vide a letter dated 15th September 2023 referenced KRA/CBC/RMD/PCA/390/2023 (CR) pursuant to Section 229 (4) of the East Africa Community Customs Management Act. In the Respondent's Review Decision, the Respondent referred to the earlier Review Decision dated 26th May 2023 which the Respondent classified the Appellant's product under HS Code 3824.99.90. The decision that the Appellant failed to appeal before the Tribunal as required under Section 230 of the East Africa Community Customs Management Act if it were aggrieved with the Respondent's decision. However, since the decision that the Appellant sought review of was the demand of short levied taxes, the Respondent took note of the ruling dated 16th April 2015 referenced CUS/V&T/TARI/RUL/212/2015 which classified the Appellant's product under HS Code 3105.20.00.

103. The Respondent averred that it revised its workings and all the importations of the Appellant's product that were included in the Respondent's demand before the ruling referenced KRA/CBC/BIA/THQ/227/04/2023 dated 11th April 2023 but excluding the importation to which sample was drawn and ruling issued were vacated. Consequently, short levied duties were revised and the principal taxes that were due because of tariff misclassification were Kshs. 3,433,163.73. It is clear from the

Appellant's Notice of Appeal filed before this Tribunal that it is dissatisfied with the Respondent's decision given on 15th September 2023. However, the Appellant has not controverted or disputed the Respondent's demand for short levied duty amounting to Kshs. 3,433,163.73. The Appellant has not provided any evidence to disprove the Respondent's demand for short levied taxes The Respondent urged the Honourable Tribunal not to have any difficulty in the circumstances in finding in the affirmative, in favour of the Respondent.

104. The Respondent concluded that the Appellant having under declared his tax obligations, leading to short levied duty being partially confirmed, and having fatally failed to demonstrate the same to be erroneous, then the said Review Decision dated 15th September 2023 referenced KRA/CBC/RMD/PCA/390/2023 (CR) demanding principal short levied taxes amounting to of Kshs. 3,433,163.73, remains valid in law, ought to be upheld and the Appeal dismissed with costs.

Respondent's Prayers

105. The Respondent prays that this Honourable Tribunal: -

a. Finds that this Appeal lacks merit;

b. Upholds the Respondent's decision dated 26th May 2023; and

c. Dismiss the Appeal with costs to the Respondent.

Issues For Determination

106. After perusing submissions, prayers and documentation from both the Appellant and the Respondent in the dispute, the Tribunal is of the opinion that the following are main issues for determination:

i. Whether the Respondent's Review Decision of Tariff Classification letter dated 26th May 2023 is an appealable decision before the Tribunal;

ii. Whether the Respondent was justified in reclassifying the Appellant's goods under HS Code 3824.99.90 "Other"; and,

iii. Whether the Respondent was justified in demanding short levied duties amounting to Kshs. 3,433,163.73.

Analysis And Findings

107. The Tribunal wishes to analyse the issues as herein-under:

i. Whether the Respondent's Review Decision of Tariff Classification letter dated 26th May 2023 is an appealable decision before the Tribunal;

108. The Appellant's Appeal is against the decision of the Respondent dated 15th September 2023 which confirmed the Tariff Ruling of 11th April 2023 of its product imported as Lavender Total Fertilizer under import entry number 23EMKIM400252899 dated 8th March 2023 as HS Code 3824.99.00 and the corresponding short levied duties of Kshs. 3,433,163.73.

109. The genesis of this dispute is that the Appellant imported a product described, as 'Lavender Total' vide Entry No. 23EMKIM400252899 on 8th March 2023 and declared it under 2022 EAC CET HS Code 3105.90.00 that provides for the classification of "other" fertilisers. This classification was based on previous tariff ruling by the Respondent reference CUS/V&T/TARI/RUL/212/2015 and which was issued on 16th April 2015.

110. The Respondent further stated that after verification it issued the Appellant with a tariff classification guidance for the product identified as Lavender Total 100ML Import Entry 23EMKIM400252899 sample 0183 on 11th April 2023.

111. The Appellant objected to the tariff guidance in a letter dated 27th April 2023 and stated four grounds and in particular brought to the attention of the Respondent the letter dated 16th April 2015 Ref: CUSN&T/TARI/RUL/212/2015.

112. In its supplementary statement of facts and submissions in particular paragraph 10 the Respondent stated that it issued the Appellant with a Review of Tariff classification for Lavender Total 100ML referenced as KRA/CBC/BIA/THQ/APPEAL/058/05/2023 dated 26th May 2023 wherein the Respondent explained to the Appellant the reason for upholding the earlier tariff classification 2022 EAC/CET HS Code 3824.99.90 dated 11th April 2023. The said Review was issued pursuant to Section 229 (4) of the East Africa Community Customs Management Act which states as follows: -

> "(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision."

113. The Respondent's position is therefore that if the Appellant was not satisfied with the Respondent's Review Decision dated 26th May 2023, then, the Appellant should have moved to the Tax Appeals Tribunal under Section 230 of the East Africa Community Customs Management Act which states as follows: -

> "(1) 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.
>
> (2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision and shall serve a copy of the appeal on the Commissioner."

114. The Appellant failure to appeal to the Tribunal within the stipulated timelines that is by 11th of July 2023 it had acquiesced or agreed with the Respondent's decision on the issue of tariff classification for the Appellant's product Lavender Total.

115. In its response the Appellant stated that even if the decision dated 26th May 2023 was to be considered as the Appealable Decision, the demand for the taxes amounting to Kshs. 3,433,163.73 would still be untenable as the decision could only apply going forward. That is to say, it would apply from the date of 26th May 2023 going forward and cannot be applied retrospectively to the Appellant's imports made on 8th March 2023 as at that point the Appellant was still acting under the 2015 Tariff Ruling.

116. Further the Appellant stated that after the decision dated 26th May 2023, the Respondent continued engaging the Appellant culminating in the Appellant letter dated 26th June 2023 attaching information necessary for the Respondent to determine the objection. Following these discussions with the Respondent the Appellant received an advance Tariff Ruling dated 7th August 2023 followed by demand for taxes dated 8th August 2023 and which the Appellant stated did not refer to the earlier Tariff Ruling of 26th May 2023 leading the Appellant to rightfully believe that the Post Clearance Audit

was in its own capacity raising the classification issue and not pegging the same on the earlier rulings issued by the Customs & Border Control Department.

117. Further as the Respondent continued to raise the issue of the appropriate classification in their demand dated 8th August 2023, the Appellant was mandated and obliged to respond to it. Accordingly, the Appellant objected to the Respondent's findings on 14th August 2023 and the Respondent proceeded to address the issue of the appropriate classification of the product in its Review Decision dated 15th September 2023.

118. Taking into the account the sequence of events as stated above the Tribunal is therefore called to determine if the Respondent letter of Review of Tariff Classification dated 26th May 2023 and which the Appellant objected to on 27th April 2023 after the Respondent had issued its tariff classification guidance on 11th April 2023 is an appealable decision before the Tribunal.

119. The Respondent argues that the Appellant should have appealed to the Tribunal the decision of 26th May 2023 within 45 days of receipt of the letter that is by 15th July 2023. The Appellant averred that the Respondent did not respond to the Appellant letter of 26th June 2023 and which was issued before the expiry of the 45 days stipulated under Section 229 of EACCMA but instead made a demand of taxes on 8th August 2023 for what the Respondent termed as short levied duties.

120. The Tribunal notes that it is in the Notice of Demand of 8th August 2023 the Respondent informed the Appellant that it can appeal against the same according to the provisions of Section 229 (1) of the East African Customs Management Act. The Appellant still objected to this demand vide a letter dated 14th August 2023 and the Respondent issued Objection Decision dated 15th September 2023.

121. The Tribunal is persuaded that indeed the provisions of the EACCMA are clear that an aggrieved person is to apply for review to the Respondent within 30 days and appeal to the Tax Appeals Tribunal for the Review Decision within 45 days. However, it is worth noting that after 26th May 2023 the Respondent ignored the Appellant letter dated 26th June 2023 but went ahead to issue an Advance Tariff Ruling dated 7th August 2023 and followed it with an assessment of short levied duties amounting to Kshs. 12,416.142.73 the following day on 8th August 2023. In the Demand, the Respondent appeared to be further explaining its basis of classification as if the letter of 26th May 2023 did not exist

122. The Tribunal has also perused the bundle of documents attached to the Appellant pleadings and noted that the Appellant submitted documents and a sample of the product which was received by the Respondent's officers on 11th of July 2023.

123. It is therefore the Tribunal's finding that subsequent to issuing the Review of Tariff Classification letter dated 26th May 2023, the Respondent continued to engage with the Appellant and to receive further information and documentation culminating to the Objection Decision dated 15th September 2023 thus sanitizing the Appellant obligations as stated in Section 229 and 230 of ECCMA. Further the Respondent even vacated the short-levied duties before 8th March 2023 thus confirming the 2015 Tariff Ruling.

124. Therefore, the letter of 26th May 2023 was overtaken by events leading to the Review Decision dated 15th September 2023 which is challenging both the classification of "Lavender Total" and the short-levied duties demanded by the Respondent and is therefore proper before the Tribunal.

125. Consequently, the Tribunal finds that the Respondent's letter of 26th May 2023 was not the appealable decision in the instant Appeal.

ii. Whether the Respondent was justified in reclassifying the Appellant's product Lavender Total under HS Code 3824.99.90 "Other."

126. The Appellant classified the import of Lavender Total Fertilizer under import entry number 23EMKIM400252899 dated 8th March 2023 HS Code 3105.90.00. This classification was based on previous Tariff Ruling by the Respondent reference CUS/V&T/TARI/RUL/212/2015 and which was issued on 16th April 2015. The ruling stated in part that;

> " Lavender Fertilizer is therefore considered to be a mineral or chemical fertilizer containing three of the fertilizing elements nitrogen phosphorous and potassium classifiable in HS Code 3105.20.00 of the common external tariff."

127. The Respondent on the other hand states that the product was presented in 100ML bottles. It also obtained a sample of the import entry number 23EMKIM400252899 dated 8th March 2023 and based on the laboratory test and the technical data sheet & the certificate of analysis of the product it indicated the composition as follows: -

i. Available Potassium= 240 grams per litre;

ii. Available Nitrogen= 240 grams per litre;

iii. Available Phosphorus= 180 grams per litre;

iv. Boron = 0.15% mass by mass;

v. Calcium = 0.248% mass by mass;

vi. Cobalt = 0.0003% mass by mass;

vii. Copper= 0.001% mass by mass;

viii. Iron = 0.007% mass by mass;

ix. Magnesium= 0.003% mass by mass;

x. Manganese= 0.037% mass by mass;

xi. Molybdenum = 0.0002% mass by mass;

xii. Sulphur= 0.23% mass by mass;

xiii. Zinc= 0.078% mass by mass;

128. The product was further specified to contain "hormones" that promote vegetative growth.

129. The Respondent therefore stated that based on the above composition the product was identified as mixtures of chemical products intended for agricultural nutritional application containing: -

i. Macronutrients (Potassium, Nitrogen and Phosphorus);

ii. Micronutrients (Zinc, boron, manganese, magnesium, iron, molybdenum, copper, cobalt and calcium); and,

iii. Hormones.

130. Therefore, based on the chemical composition of the product, the intended application and the provisions of the Explanatory notes as well as Note 6 to Chapter 31, Lavender total was considered to be a chemical agricultural nutritional product classified under 2022 EAC CET HS Code 3824.99.90.

131. The Respondent argued that in classifying the product it was guided by the harmonized commodity description and coding system in arriving at the Tariff Code of 3824.99.90 and that Chapter 31 as applied by the Appellant excludes micro nutrient preparations that are applied to seeds, foliage or soil to assist in seed germination and plant growth, adding that they may contain small amounts of fertilizing elements; nitrogen, phosphorous and potassium, but not as essential constituents.

132. The Appellant on its part argued that HS Code 3824.99.90 applied by the Respondent is applicable to chemicals used in binding materials such as foundry and cement and ought not to apply to Lavender Total which contain the three fertilizing elements of nitrogen, phosphorous and potassium and are used for agricultural purposes to prevent the occurrence of macro and micronutrient deficiencies in plants.

133. In objecting to this classification, the Appellant stated that Lavender fertilizer cannot fall under this categorization as the product composes 66% Nitrogen, Phosphorous and Potassium, which form its main elements and 0.75% Micronutrients such as Zinc, boron, manganese, magnesium, iron, molybdenum, copper, cobalt and calcium. These Micronutrients are too little to qualify the product as a chemical composition as opposed to a liquid chemical fertilizer.

134. The Tribunal notes that in its 16th April 2015 Ruling the Respondent had classified the product under 3105:20:00 of Common External Tariff. In doing so, it termed it as 'Lavender fertilizer is water soluble Nitrogen (N). Phosphorous (P), and Potassium (K) foliar fertilizer enriched with trace elements, EDTA chelate. and growth hormones for use in coffee. vegetables, fruit crops, ornamentals and cereals for quality.' Further the same letter classified Lavender fertilizer to be mineral or chemical fertilizers containing three of the fertilizing elements nitrogen, phosphorous and potassium and classifiable in HS Code 3105.20.00 and that This tariff ruling is based on material facts presented including laboratory analysis.

135. Further the Appellant in its submission confirmed that it continued to import the same product under the classification 3105.00 from April 2015 until it was vacated in the Ruling of 11th April 2023, without explanation as to what changed in the composition. It also stated that the Respondent never attempted in all its subsequent rulings between April and September 2023 to explain the variance between the sample as taken in 2015 and the one it took in 2023, yet the definition of the product remained the same. Having made the Appellant act on the basis of its 2015 Ruling for 8 years the Appellant was right to legitimately expect that the product would be treated the same in 2023.

136. From the bundle of documents submitted by the Appellant in their pleadings the Tribunal noted that the Appellant provided information which included a sample of the product, a brochure, chemical analysis, the Respondent's 2015 ruling, Kenya Bureau of Standards analysis of the fertilizer, technical guide, and test results. These documents were received and signed for by an officer of the Respondent on 11th July 2023.

137. On the other hand, the Respondent did not avail any documents with their pleadings to support its claim that the 2023 test results were at variance with the 2015 test results. In particular the Respondent stated that the product was said to contain Hormones but did not avail any test result to confirm the existence of hormones and in what quantities. Indeed, the Respondent witness during cross examination did not confirm the averment that the product contained hormones.

138. In tax matters the burden of proof as enunciated in Section 30 of the Tax Appeals Tribunal Act is on the Appellant. Section 30 of the TAT Act relating to burden of Proof provides that;

> "(a) where an appeal relates to an assessment, that the assessment is excessive; or
>
> (b) in any other case, that the tax decision should not have been made or should have been made differently."

139. However, in certain instances the burden of proof shifts from the Appellant to the Respondent as stated in Justice Mativo's reasoning in Kenya Revenue Authority vs. Man Diesel & Turbo Se, Kenya [2021] eKLR where the learned judge held:

> "The shifting of the burden of proof in tax disputes flows from the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency.' The commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption created by the above provisions is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position. If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer.
>
> The Supreme Court of Canada in Johnston v Minister of National Revenue 118] decided that the onus is on the taxpayer to "demolish the basic fact on which the taxation rested." Also, the Supreme Court of Canada provided guidance on this issue in Hickman Motors Ltd. Canada if that the onus is met when Taxpayer makes out at least a prima facie case. Prima facie is another legal term that literally means "on its face." To prove a case "on its face" you must provide evidence that, unless rebutted, would prove your position. According to the said decision, g prima facie case is made when the taxpayer can produce unchallenged and uncontradicted evidence. Once the taxpayer has made out a prima facie case to prove the facts, the onus then shifts to the-Revenue Authority-to rebut the prima facie case. If-the Revenue-Authority cannot provide any evidence to prove their position, the taxpayer will succeed."

140. The Appellant produced unchallenged and uncontroverted evidence in the form stipulated hereinabove. On the other hand, the Respondent did not provide the laboratory test results it allegedly undertook and in particular it did not provide a laboratory analysis to elucidate the percentage composition of the hormones not allowable in the product.

141. The Kenya Fertilizers Act Cap 345 Laws of Kenya defines a fertilizer to mean any substance or mixture of substances which is intended or offered for improving or maintaining the growth of plants or the productivity of the soil, but does not include manure, compost, wood ash, gypsum or refuse when sold in its original condition and under the same name, nor does it include organic fertilizers, other than lime.

142. The Tribunal further notes that fertilizers are classified under Chapter 31 of the EAC CET 2017.

> "Heading 3105 provides for Mineral or chemical fertilizers containing two or three of the fertilizing elements nitrogen, phosphorus and potassium, other fertilizers and goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg."

143. The Tribunal, from the foregoing analysis, therefore is persuaded by the Appellants classification of the product Lavender Total using GIR 1 to classify the product as a fertilizer. GIR 1 states:

> " Rule 1
>
> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:
>
> The legal elements of classification are:
> • the terms of headings;• Section or Chapter Notes; and• if not prevented by the two elements above, the remaining General Interpretative Rules.
>
> For legal purposes classification is determined by the terms of the headings, the Section or Chapter Notes where relevant, and, if necessary and allowable, the other GIRs.
>
> Where the terms of the headings and any relevant Notes leave only one heading open for consideration, or they direct either the classification or the means of classification, then only GIR 1 is used at heading level."

144. In conclusion the Tribunal finds that the Appellant was justified in classifying the product Lavender Total as 2022 EAC/CET Code 3105.90.00 which states as follows;

> " Chapter 31 – Fertiliser.Heading 05 - Mineral or chemical fertilisers containing two or three of the fertilising elements nitrogen, phosphorus and potassium; other fertilisers; goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg.
>
> * 99.00 – 'Other'."

as opposed to the Respondent classification 2022 EAC/CET Code 3824.99.00 which states as follows

> " Chapter 38 - Miscellaneous chemical products.Subheading 24 - Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.
>
> * 99.00 which reads 'Other'."

145. The net effect is that the Tribunal finds that the Respondent was not justified in reclassifying the Appellant's goods under HS Code 3824.99.90 "Other" as opposed to the Appellant classification HS Code 3105.90.00.

iii. Whether the Respondent was justified in demanding short levied duties amounting to Kshs. 3,433,163.73.

146. Since the Tribunal has determined that the Responded erred in classifying the Appellants product Lavender total as HS Code 3824.00.90 as opposed to the correct classification HS Code 3106.99.00 the Respondent was not justified in demanding short levied duties amounting to Kshs. 3,433,163.73.

147. Consequently, the Appellant's Appeal succeeds.

Final Decision

148. In view of the foregoing analysis, the Tribunal finds that the Appeal is merited and accordingly makes the following Orders:

    a. The Appeal be and is hereby allowed;

    b. The Respondent Review Decision dated 15th September, 2023 be and is hereby vacated; and,

    c. Each Party to bear its own costs.

149. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF AUGUST 2024

ROBERT MUTUMA - CHAIRMAN

BERNADETTE GITARI - MEMBER

ELISHAH N. NJERU - MEMBER

MUTISO MAKAU - MEMBER

ABDULLAHI DIRIYE - MEMBER