Lionpro Group K. Limited v Commissioner of Customs & Border Control (Tax Appeal 426 of 2022) [2023] KETAT 561 (KLR) (Commercial and Tax) (29 June 2023) (Judgment)

Neutral citation: [2023] KETAT 561 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

COMMERCIAL AND TAX

TAX APPEAL 426 OF 2022

RM MUTUMA, CHAIR, RO OLUOCH, EN NJERU & D.K NGALA, MEMBERS

JUNE 29, 2023

BETWEEN

LIONPRO GROUP K. LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... RESPONDENT

JUDGMENT

1. The Appellant is a limited liability company duly incorporated under the *Companies Act* of the laws of Kenya, and is in the business of distributing international high-quality feed products for animal feed, aquaculture and pets, manufactured by Lionpro PTE Ltd.

2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, and the Authority is charged with the responsibility of among others, assessment, collection, receipting and accounting for all tax revenues as an agency of the Government of Kenya, and the administration and enforcement of the statutes set out under the schedule to the Act.

3. The Respondent conducted a post clearance audit on the importation of the Appellant for the period 2020 and 2021. Almost all the consignments imported by the Appellant are high concentrated protein mixtures.

4. The Respondent stated that the audit established that the Appellant had misclassified the product under Tariff Code 2309.90.10 instead of Tariff Code 2309.90.90. Consequently, on 15th December, 2021, the Respondent issued an assessment of Kshs 1,653,809.00 to the Appellant based on that audit finding on the classification.

5. The Appellant on 24th January, 2022 lodged an objection letter seeking a review of the Commissioner's decision and detailed the grounds justifying the review.

6. On 26th January, 2022, the Commissioner issued a review decision on the Appellant's objection maintaining its decision for the demand of the additional taxes amounting to Kshs 1,653,809.00.

7. On 15th February 2022, the Commissioner withdrew the Review Decision of Kshs 1,653,809 dated 16th December, 2021. Subsequently vide a letter dated 16th February 2022 the Commissioner issued a new notice for additional tax of Kshs 12,983,684.00 on the basis of the misclassification and undervaluation under Section 124 and the Fourth Schedule of *EACCMA*, 2004.

8. The Appellant vide a letter dated 18th February 2022 applied for a review of the Commissioner 's decision, and the Commissioner vide its letter of 7th March, 2022, upheld its decision and maintained that the additional tax of Kshs 12,983,684.00 stood.

9. The Appellant aggrieved by the Respondent 's review decision preferred the Appeal herein to the Tribunal.

The Appeal

10. The Appellant filed its Memorandum of Appeal on the 27th April, 2022, and set out the following grounds of Appeal;

    i. That the Commissioner erred in fact and law by failing to hold that the product was properly classified under HS code 2309.90.10.

    ii. That the Commissioner erred in fact and law by holding that the product is a supplement designed to compensate for protein deficiency in animals classifiable under HS code 2309.90.90.

    iii. That the Commissioner erred in failing to hold that the product is a premix used in the manufacture of animal feeds.

    iv. That the Commissioner erred in failing to classify the premix as 2309.90.10 as the same specifically conforms with the terms of the General Interpretation rules 1 and 6.

    v. That the Commissioner erred in fact and law in disregarding the scientific evidence adduced by the Appellant to demonstrate that the premix should be classifiable under HS code 2309.90.10.

11. By reason of the foregoing grounds, the Appellant prayed that its Appeal be allowed and the Respondent's Review Decision be set aside.

THe Appellant's Case

12. The Appellant has set out its case on the Statement of Facts filed on 27th April 2022 and the Written Submissions filed on 17th December 2022.

13. The Appellant stated that the basis of the dispute arises out of the Respondent's contention that the products are not a premix used in the manufacture of animal feed but rather a supplement designed to compensate for protein deficiencies in animals. The former is classified under HS code 2390.90.10, which attracts 0 % duty, while the latter falls under HS code 2309.90.90.

14. The Appellant stated that under the world Customs Organization Interpretative Rules, the products are classifiable under HS code 2309.90.10 as they are a premix used in the manufacture of animal feeds.

15. The Appellant stated that the definition of a premix by the Kenya Bureau of Standards is as follows: -

> " Premix is a concentrated mixture of vitamins, trace minerals and diluents. It may contain other feed additives such as amino acids or medicaments." as per - KS 2500:2014 (KEBS).
>
> Premix - Compound compositions consisting of a number of substances (sometimes called additives) the nature and proportions of which vary according to the animal production required."

16. The Appellant stated that the agreed position was that the dispute ultimately hinged on whether the product is a premix used in the manufacture of animal feed or a supplement designed to compensate for protein deficiency in animals.

17. The Appellant stated that it has been established that the product in question is imported as per Kenya Bureau of Standards' standard and description and conforms to that Kenyan standard definition of a premix, which is a mixture of vitamins, trace minerals and diluents and may contain other feed additives such as amino acids or medicaments.

18. The Appellant further stated that it has attached a production process chart of the product, to demonstrate how different ingredients including minerals and vitamins are mixed and processed to make a premix.

19. The Appellant also stated that the Respondent's assessment report insinuates that the product is purely designed to compensate for protein deficiency in animals and totally disregarding other components of the product, for example, the product is also rich in calcium and phosphorous which make up 15.5 % of the product not forgetting other minerals which make up more than 30 % of the product.

20. The Appellant in its submissions on whether the product is a premix used in the manufacture of animal feed or a supplement designed to compensate for protein deficiencies in animals, stated that the product is processed from the following ingredients; fish products, vegetable by-products, poultry by-products, minerals vitamins, extracted amino acids, anti-oxidants and salmonella stopper.

21. The Appellant also submitted that the Kenya Bureau of standards (KEBS) has standardized and gazetted the Kenya standard on animal feed serialized as DKS 2500:2021 and titled:

> " Dairy animal feed pre-mix specification" and defines a pre-mix as-, "a concentrated mixture of vitamins, trace minerals and diluents. It may contain feed additives such as amino acids or medicaments."

22. It was a submission of the Appellant that based on the definition provided the extrinsic aid, that is the Kenya standard, the Appellant has on numerous occasions submitted that the product is not a complete animal feed but a concentration of different implements which are included to fortify animal feed, the exact definition of a pre-mix.

23. The Appellant further stated that Harmonized Commodity Description and Coding System Explanatory Note to Heading 2309 provides that;

> " ...Premixes are generally speaking compound compositions consisting of a number of substances (sometimes called additives) the nature and proportion of which vary according to the animal production required, these substances are of three types;

i. Those which improve digestion and more generally, ensure that the animal makes good use of the feeds and safeguard its health; vitamins or pro-vitamins, amino acids ...

ii. Those designed to preserve the feeding stuffs (particularly fatty components) until consumption by the animals; stabilizers, anti-oxidants, etc.

iii. Those which serve as carriers and which may consist either of one or more organic nutritive substances (manioc or soya flour or meal ...or organic substances. :

24. That this Note further provides that provided they are of a kind used in animal feeding, this group also includes preparations consisting of several mineral substances. The Appellant therefore asserted that its product meets the criteria set out in the Explanatory Note to the Heading.

25. The Appellant submitted that in the cascade of rules provided in the General Rules for the Interpretation of the Harmonized System (GIR), the Appellant's product consisting of more than one material or substance, the appropriate rule to be considered by the Honourable Tribunal is Rule 3 (a), which provides that:

> "...the heading which provides the most specific description shall be preferred to headings providing a more general description."

26. In addition to the foregoing, the Appellant submitted that it has adopted the heading that corresponds to the definition of a premix pursuant to the Kenyan standard whereas the Commissioner has reclassified the product to a heading that not only disregards composition of the product, but also does not provide a specific description of the product.

27. On whether the Commissioner was justified in applying the transaction value method of valuation, the Appellant submitted that pursuant to Section 122 (1) of the EACCMA, 2004, where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value.

28. The Appellant also submitted that the Fourth Schedule to *EACCMA* provides a binding sequential method in the determination of the customs value of imported goods. The first method required to be applied is the transaction value method and it is mandatory that the customs value of imported goods shall be the transaction value unless there are certain exceptions that are clear and apparent, (relevant to the case at hand) is; the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of subparagraph (2).

29. The Appellant submitted that the Respondent erred in considering the buyer and seller as related contrary to subparagraph 1 of Paragraph 1 of the Fourth Schedule to *EACCMA*, in that the buyer and seller;

a. Are not officers or directors of one another's business,

b. They are not legally recognized as partners in the business,

c. They do not have an employer / employee relationship,

d. None directly or indirectly own, controls 5 % or more of the outstanding voting stock or shares of both of them,

e. None of them directly or indirectly control the other.

f. They are not both controlled directly or indirectly by a third person,

g. They do not together directly control a third person,

h. They are not members of the same family.

30. The Appellant submitted that the Respondent erred in failing to consider the factors as prescribed in the Fourth Schedule and failed to properly establish the relationship between the Appellant and the seller and also erred in law by not communicating his grounds that the value of the product has been influenced by the alleged relationship between the buyer and the seller.

31. It was a submission of the Appellant that it is trite law pursuant to Section 112 of the *Evidence Act*, that:

> " ... when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

32. The Appellant therefore submitted that the Respondent failed to prove the relationship between the buyer and seller, and secondly, failed to consider the circumstances surrounding the sale, and lastly, failed to conclusively communicate (in light of all the components that affect such a decision) the grounds by which the Transactional value method is inapplicable.

33. The Appellant submitted that in light of the foregoing submission, it further emphasizes that the conduct and actions of the Respondent in this regard ought to be guided by the principle of the rule of law.

34. To buttress its argument, the Appellant cited the case of *Republic v Kenya Revenue Authority; Ex-parte Proto Energy ltd* JR E023 of 2021 where it was stated that:

> " The rule of law principle requires that all Government action must comply with the law. Government action includes the exercise of public power. As such the exercise of all public power is subject to the *Constitution*.... The standards demanded by the *constitution* for the exercise of public power are that it should not be arbitrary. Decisions must be rationally related to the purpose for which public power was given. "

35. The Appellant submitted that the Respondent acted arbitrarily by failing to follow due procedure and subsequently concluding a relationship between the buyer and the seller. The Appellant further submitted that the EAC Customs Valuation Manual at Chapter 5 Sub-Chapter 5.1.1 provides that in order to establish a relationship, the Commissioner is required to;

a. Inform the importer that the circumstances surrounding a sale are being examined and provide a formal request for relevant information concerning the sale;

b. Obtain full details of the nature of the relationship and what relationship the buyer has with the seller. Which facts did not occur.

36. The Appellant further submitted that the Respondent acted arbitrarily in misapplying the procedure provided for in the *EACCMA* in disregarding the transaction value method. The standards by which the *Constitution* confers powers to the Commissioner are not based on mere discretion but strictly indicated legal procedure.

37. To buttress its case the Appellant cited the case of BASF East Africa Ltd v Commissioner of Customs & Boarder Control TAT 115 OF 2020 , where the Tribunal ruled that in order to determine that a relationship between a buyer and a seller influenced the price , the circumstances of sale test must be

adequately applied. The Appellant asserts that this was never applied and the Commissioner arbitrarily and unilaterally made a conclusion.

38. It was also a submission of the Appellant that the WCO's Technical Committee of Customs Valuation advises that customs administration should not prejudice legitimate commercial interests of the importer, and submitted that the Respondent's assessment is prejudicial to its commercial interests.

39. By reason of the foregoing submissions, the Appellant prayed that its Appeal be allowed and the Respondent's review decision be set aside.

The Respondent's Case

40. The Respondent has set out its response in the Statement of Facts filed on 25th May, 2022, the Written Submissions filed on 9th December, 2022, and the amended Statement of Facts filed on 28th November, 2022.

41. The Respondent stated that it conducted a post clearance audit on the importation of the Appellant for the period 2020 and 2021. Almost all the consignments imported by the Appellant are for high concentrated protein mixtures. The audit established that the Appellant misclassified the product under Tariff code 2309.90.10 instead of Tariff code 2309.90.90.

42. The Respondent stated that on 15th December, 2021, it issued an assessment of Kshs 1,653,809.00 to the Appellant based on the misclassification.

43. The Appellant filed an objection letter dated 10th January 2022 stating that the issue of classification was affecting clearance of its inputs. The Appellant requested the post clearance unit to withhold any precipitate action pending resolution with the Tariff and Valuation Unit after paying for consignment under protest at ICDN under entry number 21EMKIM4007400785864 whereby the sample was drawn for lab testing to determine the appropriate classification of the high concentrated protein mixtures.

44. The Respondent further stated that the Appellant further wrote to the Respondent on 24th January, 2022, requesting for determination of the issue of valuation and classification on the imports of High Concentrated protein mixtures. On 25th January, 2022, the Respondent issued a decision on the Appellant's review maintaining its decision for the demand of additional tax amounting to Kshs 1,653, 809.00.

45. The Respondent further stated that on 15th February, 2022, it withdrew the review decision of KSHS 1,653,809.00 dated 15th December, 2021.

46. That subsequently by a letter dated 16th February, 2022, the Respondent issued a new demand notice for additional tax of Kshs 12,983,684.00 as a result of the misclassification and valuation of the imports.

47. The Appellant responded on 18th February 2022 requesting for the review of the decision of the Respondent for the demand of Kshs 12,983,684.00.

48. The Respondent stated that via its letter dated 7th March, 2022, it upheld its decision for additional tax of Kshs 12,983,684.00.

49. The Respondent stated that the Appellant's grounds of Appeal do not hold water because the Respondent in accordance with the provisions of Section 241 of *EACCMA*, 2004 and the guidance by the General Interpretation Rules (GIRs) 1 and 6 of EAC/CET, 2017; took a sample from the imported consignment of the Appellant for lab test to ascertain the appropriate classification of the imported product described as high concentrated protein mixtures.

50. The Respondent also stated that the Commissioner communicated the results to the Appellant that the declared HS code 2309.90.10 was at variance hence the correct classification of the product is HS code 2309.90.90, thus the Commissioner used the outcome from the lab analysis to determine the ruling in accordance with the law.

51. The Respondent further stated that the product in question is high concentrated protein mixtures.

According to EAC/CET, 2017;

"2309: Preparations of a kind used in animal feeding.

2309.90.00: Dog or cat food put up for retail sale.

2309.90.10: Premixes used in in the manufacture of animal and Poultry feeds.

2309.90.90: other.

52. The Respondent further stated that the content of the sample presented for lab analysis was identified as a mixture containing 44.80% protein substances and 28.90% of minerals such as phosphorous, iron, and calcium intended for use as supplementary for animal feeding products. It further averred that the technical information also revealed that the product is incorporated in animal feeds to enrich or to achieve protein and mineral requirements of such feeds prior feeding the animals.

53. The Respondent stated that Heading 2309 includes the classification of prepared animal feed consisting of a mixture of several nutrients designed to provide the animal with a rational and balanced diet and also achieve a suitably daily diet by supplementing the basic farm produced feed with organic or inorganic substances (supplementary feeds) or for use in making complete or suppletory feeds. The Respondent added that these products are not complete feeds but are to be distinguished from such feeds by a relatively high content of one particular nutrient like protein content, carbohydrates content etc.

54. The Respondent also stated that HS code 2309.90.10 covers classification of preparations known in trade as premixes which are generally compound compositions consisting of a number of substances sometimes called additives of which, the nature and proportion varies according to the animal production required.

55. It was a submission of the Respondent therefore that the high concentrated protein mixture is considered to be prepared for animal feed consisting of protein substances and mineral nutrients designed to compensate for protein and mineral deficiencies of animal feeds classified according to GIR 1 and 6 (EAC/CET) under HS code 2309.90.90.

56. The Respondent also stated that the preparations known as premixes are generally compound compositions consisting of a number of substances (sometimes called additives) the nature and proportion of which vary according to the animal production requirements, and the substances are of three types;

    a. Those which improve digestion and, more generally, ensure that the animal makes good use of the feeds and safeguard its health: vitamins or pro-vitamins, amino acids, antibiotics, coccidiostats, trace elements, emulsifiers, flavorings and appetizers etc.

    b. Those designed to preserve the feeding stuff (particularly the fatty components) until the consumption by the animal: stabilizes, antioxidants etc.

c. Those which serve as carriers and which may consist either of one or more organic nutritive substances manioc or soya flour or meal, middlings, yeast, various residues of the food industries etc.) or of inorganic substances e.g. Magnesium, chalk, kaolin, salt, phosphates.

57. The Respondent stated that the protein concentrate mixture by the Appellant does not meet any of the above three types, as it is a complete feed by itself and only needs to be added in animal feeds to supplement proteins. It further stated that the EAC/CET also distinguishes between those used for, manufacturing and given a duty incentive of 0%, while complete feeds attract duty at 10 % as they do not have to undergo any further manufacturing process to come up with a new animal feed.

58. The Respondent contended that the determination of the customs value of imported goods is guided by Section 122 of and the Fourth Schedule of *EACCMA*, 2004.

59. It stated that Section 122 of *EACCMA* provides that the importer shall offer explanations to the proper officer- upon request as to how the customs value of the importer's goods was determined. The proper officer is to be satisfied as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

60. The Respondent was in agreement that Text 1.2 of Article 17, affirms that the transaction value is the primary basis of valuation, but recommends that a proper officer should ask the importer to provide further explanations, if need be, to show that the declared value actually represents the correct transaction value.

61. It was asserted by the Respondent that the transaction value method is the primary method of valuation which must be exhausted before considering other methods. The Respondent in this case applied the second method, i.e. the transactional value of Identical goods, upon establishing a relationship between the exporter Lionpro PTE LTD and the Appellant. It stated that the relationship affects the valuation of the products as the declared FOB prices are not considered to be at arm's length.

62. The Respondent in its submissions stated that the HS Code 2309.90.10 covers premixes used in the manufacture of animal and poultry feeds.

63. The Respondent further asserted that Tariff code 2309.90.10 demands that the component in question be an ingredient in the manufacture of the animal or poultry feeds, such that by the time the end user purchases the feed, the- premixes are indistinguishable from the feed.

64. The Respondent equally submitted that the foregoing is contrary to the case in issue, as the product in question is itself a complete feed. It is merely added to the primary feed to act as a supplement, and the animals get the benefits of the primary feed as they are and then and then further gain the proteins that was deficient in the feed through the supplementary feed.

65. The Respondent further submitted that it correctly identified that the Appellant had incorrectly misclassified its imports under HS code 2309.90.10 and rectified the misclassification imports to the correct code 2309.90.90.

66. It was also a submission of the Respondent that the relationship between the exporter of the high concentrated protein mixtures, Lionpro PTE Ltd, and the Appellant was such that the transaction value method reliability was put into doubt, as the relationship between the Appellant and the exporter had been found to have influenced the valuation of the imports. That being the case, the Respondent could not rely on the Appellant's valuation.

67. To buttress its submission, the Respondent relied on the case of *Harleys ltd v Commissioner of Domestic Taxes* (TAT 449 of 2020), where the Tribunal stated; "... the Tribunal was of the view that customs

administration can depart from the use of primary method of valuation if it has doubted the correctness of accuracy of the declared value ..."

68. It was a submission of the Respondent that the foregoing being the case, it was at liberty to apply the most applicable method in accordance with the Fourth Schedule to determine the correct import duty payable.

69. By reason of the foregoing submissions, the Respondent prayed that the Appellant's Appeal be dismissed with costs , and its review decision be upheld.

Issues For Determination

70. The Tribunal having considered the pleadings, the documents and submissions filed by the parties, is of the considered view that the Appeal herein distils into three issues for determination as follows;

    i. Whether the Respondent was justified in re-classifying the Appellant's imported products from Tariff HS Code 2309.90.10. to HS Code 2309.90.90.

    ii. Whether the Respondent was justified in departing from the Transaction Value Method (the primary method), to the Transaction Value Method of similar goods and uplifting the import value of the Appellant's products.

    iii. Whether the Respondent's Assessment on the Appellant was justified.

Analysis And Determination

i. Whether the Respondent was justified in re-classifying the Appellant's imported products from Tariff HS Code 2309.90.10 to HS code 2309.90.90.

71. The dispute herein arose out of the parties' disagreement on whether the Appellant's imported product is an animal/poultry feeds premix for manufacture of the animal/poultry feeds, or a final product constituting a supplement designed to compensate for protein deficiencies in animals, thus justifying the re-classification of the product from HS code 2309.90.10 to HS code 2309.90.90.

72. The issue in dispute is therefore hinged on whether the subject product is a premix used in the manufacture of animal feed, or, a supplement designed to compensate for protein deficiency in animals.

73. The Appellant has submitted to this Tribunal that under the World Customs Organization's General Interpretative Rules (GIRs) and the EAC/CET, the products are classifiable under HS code 2309.90.10 which attracts duty at 0%, the basis being that the product is a pre-mix used in the manufacture of animal feeds. It further averred that the Kenya Bureau of Standards (KEBS), which is the body mandated to prescribe standards for all products imported and manufactured in the Country, has standardized premix products and defined the same in the Kenya Standard for "Dairy animals feed pre-mix specification "as;

> " A premix is a concentrated mixture of vitamins, trace minerals and diluents. It may contain other feed additives such as amino acids or medicaments." KEBS- KS 2500:2014.
>
> "Premix- compound compositions consisting of a number of substances (sometimes called additives) the nature and proportion of which vary according to the animal production needed".

74. The Appellant also submitted that the Respondent's assessment assumed without basis that the premix product is purely designed to compensate for protein deficiency in animals and totally disregarded other components of the product e.g. that the product is also rich in calcium and phosphorous which make up to 15 .5 % of the product , and other minerals which make up more than 30 % of the product. The Appellant further submitted that its premix product is processed from the following ingredients; fish products, vegetable by-products, poultry by-products, minerals, vitamins, extracted amino acids, antioxidants, and salmonella stopper.

75. In view of this the Appellant therefore asserted that its product is not merely a supplement designed to compensate for protein deficiencies as posited by the Respondent, and is not a final complete animal feed product, but a concentration of different ingredients which are included to fortify the final complete animal feed product, thus a premix.

76. The Appellant also submitted that in the cascade of Rules provided in the GIRs, its product constituting of more than one material or substance, the appropriate rule to be considered by the Tribunal is Rule 3(a), which provides that:

> " ...the Heading which provides the most specific description shall be preferred to headings providing a more general description."

77. . The Respondent also submitted that it has adopted the heading that corresponds to the definition of a premix pursuant to the Kenyan standard, whereas the Respondent has reclassified the product to a heading that disregards the composition of the product, and does not provide specific description of the product.

78. On the other hand, the Respondent has asserted that the products imported by the Appellant are high concentrated protein mixtures to supplement animals for protein deficiencies. It stated that a lab analysis of the product identified the content as a mixture containing 44.80% protein substances and 28.90 % minerals such as phosphorous, iron, and calcium intended as supplementary for animal feeding products. It further averred that the product is incorporated in animal feed to enrich or to achieve protein and mineral requirements of such animals.

79. The Respondent has also submitted that HS code 2309.90.10 covers classification of preparations known in trade as premixes which are generally compound compositions consisting of a number of substances sometimes called additives of which, the nature and proportion vary according to the animal production required.

80. The Respondent also contended that the high concentrated protein mixture is considered to be prepared for animal feed consisting of protein substances and mineral nutrients designed to compensate for protein substances and mineral deficiencies in animal feeds, classified according to GIR 1 and 6 (EAC/CET) under HS Code 2309.90.90.

81. It is noteworthy that from the technical documents submitted by the Appellant, its product has been described as a high concentrate protein mixture (premix) that should not be applied as an animal feed used in its current form, but is an ingredient for the manufacture of animal feeds.

82. The Respondent's lab findings more or less agree with the Appellant's description of its product , and the Respondent agrees that the product is an ingredient for incorporation in animal feed, but on the contrary to technical information choses to assert that the product is a final product added as a protein supplement to animal feed.

83. The Tribunal having taken judicial notice of the description of a premix as set out in the KEBS standard for animal feeds, is persuaded that the Appellant's product fits the description of a premix, and is not a final product to be fed to animals without a further process as contended by the Respondent.

84. According to the EAC/CET, 2017 HS classification, Heading 2103 is set out as follows;

> " 2309: Preparations of a kind used in animal feeding.
>
> 2309.90.00: Dog or cat food put up for retail sale.
>
> 2309.90.10: Premixes used in the manufacture of animal and poultry Feeds.
>
> 2309.90.90: Other."

85. . The Tribunal having found that the Appellant's animal feed product is a premix for preparation of animal feed, determines that the appropriate classification under Chapter 2309 would under tariff heading HS code 2309 .90.10.

86. In view of the foregoing finding, the Tribunal holds that the Respondent erred and was thus not justified in reclassifying the Appellant's imported products from Tariff HS code 2309.90.10 to HS code 2309.90.90.

ii. Whether the Respondent was justified in departing from the Transaction Value Method of Valuation (the primary method), to the Transaction Value Method of similar goods, and uplifting the import value of the Appellant's products.

87. . The Appellant has in its submissions raised the issue as to whether the Respondent was justified in applying the Transaction value method of similar goods, and submitted that pursuant to Section 122(1) of *EACCMA*, 2004, where the imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the fourth schedule, and import duty shall be paid on that value.

88. . This Tribunal has noted that the Memorandum of Appeal filed herein has set out five grounds of Appeal all related to the issue of reclassification, and none of which relates to this instant issue of valuation. This issue was also not canvassed in the Appellant's Statement of Facts. Though the issue was however subject of the Appellant's objection review and also subject of the Respondent's Review Decision, it was omitted in the Appeal pleadings, and was only introduced by the Appellant in its written submissions.

89. The Tribunal has considered this issue and concluded that the issue had not been pleaded in the Memorandum of Appeal and the Statement of Facts, basically the Appeal pleadings. In the case of *Malawi Railways Ltd v Nyasulu (*1998) MWSC 3, the court held that,

> " ... it is the parties themselves who set the agenda for the trial by their pleadings, and neither party can complain if the agenda is strictly adhered to."

90. The Tribunal on proper consideration therefore is of the view that the issue is not among the grounds of Appeal before it, and it would be improper to consider and determine the same on its merits, and consequently the issue is struck out.

iii) Whether the Respondent 's Assessment on the Appellant was justified.

91. The basis of the Respondent 's assessment was on account of the disputed classification of the Appellant's imported animal feeds premix.

92. The Appellant classified its product under the Tariff HS code 2309.90.10 attracting import duty at 0 %, while the Respondent reclassified the product under HS code 2309.90.90 attracting duty at 10 %.

93. The Tribunal having found that the Appellant had correctly classified its products, then the Respondent's reclassification cannot stand.

94. On the other hand, the issue of valuation and uplift has been rendered moot given the circumstances that the tariff code whereat the Appellant's product is classified attracts duty at 0 %.

95. The Tribunal therefore finds and holds that the Respondent's Assessment on the Appellant's products is not justified.

Final Decision

96. The upshot of the foregoing analysis is that the Appeal is merited and the Tribunal accordingly proceeds to make the following Orders:

    a. The Appeal be and is hereby allowed.

    b. The Respondent's review decision dated 16th March 2022 be and is hereby set aside.

    c. Each party to bear its own costs.

97. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2023.

ROBERT M. MUTUMA - CHAIRPERSON

RODNEY O. OLUOCH - MEMBER

ELISHAH N. NJERU - MEMBER

DELILAH K. NGALA - MEMBER