

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.57 OF 2016

HEALTHCARE DIRECT (K) LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS SERVICES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company carrying on business of importing and supplying hospitals with sanitary products, gloves and related products.
2. The gloves imported were for the purposes of taxation under the East Africa Community Customs and Management Act (EACCMA) 2004 classified under various universally recognized tariffs depending on the material component of the manufacture of the particular gloves under importation.
3. The Respondent through a private Tariff Ruling issued to a different company equally dealing in the importation of gloves dated the 2nd day of July, 2015 found on the basis of laboratory analysis that cream hand gloves were articles of rubber with physical and chemical properties corresponding to those of natural rubber and therefore were not zero rated for import duty.
4. The Respondent in the said private Tariff Ruling clarified with regard to the classification of the gloves as follows:-
 - a) That the Heading 40.15 under the Harmonized System of Tariff Code covers the classification of articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes of vulcanized rubber other than hard rubber;
 - b) That the Tariff Code 4015.11 covers the classification of surgical gloves; and
 - c) That the Tariff Code 4015.19 covers the classification of other gloves.



5. The Respondent on the basis of the foregoing classification found in the aforesaid private Tariff Ruling that powdered latex surgical gloves are considered to be other gloves classifiable under Tariff Code 4015.19 of the Common External Tariff.
6. The Respondent subsequent to the aforesaid private Tariff Ruling conducted a post clearance audit in pursuant to the provisions of the East Africa Community Customs Management Act (EACCMA) 2004 in which it was found that the Appellant had been wrongfully classifying surgical latex examination gloves under HS Tariff Code 4015.11.00 instead of the correct HS Code 4015.19.00. The HS Tariff Code 4015.11.00 attracts 0% import duty while HS Tariff Code 4015.19.00 attracts 10% import duty.
7. The Respondent following the post clearance audit issued on the 2nd day of November, 2015 a demand notice on Entry Nos. 2010 MSA 2419599 and 2010 NBI 70746 for the additional tax which was found to be due and payable as a consequence of what the Respondent indicated to bemis-declarations in the sum of **Kshs.1,824,032/=** (erroneously computed by the Respondent as **Kshs.1,824,034/=**) made up as under:-

Import duty	- Kshs. 660,881.00
VAT	- Kshs. 1,163,151.00
TOTAL	<u>- Kshs.1,824,032.00</u>

8. The Appellant at the instance of receipt of the aforesaid demand notice for additional tax assessment proceeded to object to the assessment vide its letter dated the 10th day of November, 2015 on the basis that the Respondent erred in reaching at the decision for additional tax assessment using tariff classification that attracts tax liability while surgical latex examination powdered gloves had always been zero rated for both import duty and VAT on the basis of use in accordance with the provisions of Legal Notice No. EAC/13/2010, the Value Added Tax Act, CAP 476 of the Laws of Kenya (Now Repealed) and letters from both Customs and Excise Department and Domestic Tax Department clearing the goods on zero rate basis for import duty and confirming zero rating for VAT, respectively.
9. The Respondent confirmed the additional tax assessment vide its letter dated the 4th day of April, 2016 following failed engagement with the Appellant's Tax Consultant thereby prompting the

commencement of the Appeal process as against the additional tax assessment on the part of the Appellant.

10. The Appellant issued a Notice of its intention to appeal against the confirmation of the additional tax assessment vide a letter dated the 3rd day of May, 2016 addressed to the Respondent by the Appellant's Tax Consultant to wit, M/s Galaxy Fiscal Solutions Limited.
11. The Appellant filed the Memorandum of Appeal and the Statement of Facts before the Tax Appeals Tribunal on the 16th day of May, 2016.

THE APPEAL

12. The Appeal against the confirmation of the additional tax assessment was premised on the grounds set forth in the Memorandum of Appeal dated the 10th day of May, 2016 as hereunder:-
 - i) **THAT** the Respondent erred in law and fact by demanding the tax from the Appellant while the sample was for a different tax payer.
 - ii) **THAT** the Respondent erred in law and fact in applying the ruling in retrospect.
 - iii) **THAT** the Respondent erred in law and fact by demanding the tax while the period for the Commissioner to respond had already elapsed as provided under Section 50(7) of the Value Added Tax 2013 and Section 51(11) of the Tax Procedure Act 2015.
 - iv) **THAT** the Respondent erred in law and fact in calculating the duty while the items are already exempted under the East Africa Community Customs Management Act.
 - v) **THAT** the Respondent erred in law and fact by applying the standard rate of tax while the items have been zero rated under the Eighth Schedule Part B, Paragraph 6 of the Value Added Tax Act, Cap 476.
13. The Appellant in the Memorandum of Appeal prays for the orders that this Honourable Tribunal to:-



- i) Quash and set aside the decision of the Respondent since the sample referred in their ruling was not drawn from the Appellant and rule that the private ruling was only applicable to the taxpayer whose sample were drawn.
- ii) Quash and set aside the decision of the Respondent since their reply is already time barred under the Tax Procedure Act.
- iii) Quash and set aside the decision of the Respondent and rule that the ruling cannot be applied in retrospect.
- iv) Quash and set aside the decision of the Respondent and rule that the items are zero rated under the East Africa Community Customs Management Act and The Value Added Tax Cap 476.
- v) To award the Appellant the costs of this Appeal.

THE RESPONSE

14. The Respondent subsequent to being served with the Memorandum of Appeal and the Statement of Facts filed proceeded to file before the Tribunal on the 16th day of June, 2016 the Respondent's Statement of Facts dated the same day.
15. The Respondent's Statement of Facts dated the 16th day of June, 2016 filed on behalf of the Respondent by Diana A. Almadi Advocate sets out the Respondent's material contentions as against the Appeal being that:-
 - i) The Respondent did not err in issuing the demand as tariff rulings issued are posted unto the Respondent's website for use by all parties including the Appellant;
 - ii) Taxpayers do a self-assessment declaration and the Respondent's Post Clearance Audit's mandate is to check compliance and collect any unpaid taxes in accordance with Section 135 of East Africa Community Customs Management Act (EACCMA) 2004;
 - iii) The audit contested by the Appellant was in respect of imported goods therefore the demand was under East Africa Community Customs Management Act (EACCMA) 2004;



- iv) The exemption under the 5th Schedule of East Africa Community Customs Management Act (EACCMA) 2004 had to be applied for as advised in the Respondent's letter dated 8th October, 2010 to the Pharm Lobby Group;
- v) The correct HS. Code for examination gloves covers other items not zero rated hence the need to apply for an exemption code at the Customs Exemption office; and
- vi) The demand for outstanding taxes to the Appellant was not issued in retrospect as this was due to audit findings.

HEARING

- 16. When the matter came up for hearing on the 25th day of August, 2016 the parties with due regard to the nature of the dispute informing the appeal opted not to call for any oral testimony through witnesses but rather opted for the determination of the appeal through oral submissions.
- 17. The parties were subsequent to the hearing of the appeal by way of oral submissions directed at the instance and consent of the very parties to file and serve upon each other with written submissions. The Appellant duly filed its Written Submissions before the Tribunal while the Respondent did not at all comply with the direction on filing of written submissions.

ANALYSIS

- 18. The Appellant severally applied for exemption certificates from import duty and Value Added Tax on medical latex examination gloves with the Commissioner of Customs and Excise prior to the processing of importation documents in respect of any consignment imported on its part. The prior application for the said exemption on the part of the Appellant is manifested by the letters of the Commissioner of Customs and Excise addressed to the Deputy Commissioner, in charge of Southern Region directing the acceptance of the processing of import documents in accordance with the provisions of the *3rd Schedule Part B, Item 10 of the Customs and Excise Act*. The letters are dated 10th December, 2001, 5th December, 2001 and 21st August, 2001 marked as "F" and appearing at Pages 23, 24 and 25, respectively, of the Appellant's Record of Appeal.



19. That the Commissioner of Customs and Excise for undisclosed reasons but manifestly for the purposes of reducing the documentation process involved in the regular application for exemption certificates by importers for disposable examination gloves directed that no written authority of the Commissioner of Customs and Excise was required for the regional heads of Customs and Excise entry points to accept the processing of importation documents on duty free basis. The purport of the direction was that the importers of disposable examination gloves were no longer required to apply for the exemption certificates prior to processing importation documents for such products. The unequivocal direction by the Commissioner of Customs and Excise is contained in the letter dated 23rd April, 2002 addressed to Bakpharm Limited that clearly confirms that all regions had been advised on the procedure and the Commissioner did not expect any importer to have any problem. The letter is at Page 26 of the Record of Appeal and for its proper understanding it is reproduced as hereunder:-

HQ/DUTY/15

23rd April, 2002

*Bakpharm Limited,
P.O. Box 53442,
NAIROBI.*

REMISSION OF DUTIES ON DISPOSABLE EXAMINATION GLOVES

Reference is made to your letter dated 22nd February, 2002 on the above subject.

Please be advised that its no longer a requirement that you produce LPOs as an evidence that the goods are for hospital use and therefore no written authority is to be issued in order for the regions to process documents on duty free basis.

You are accordingly advised to lodge the documents in the usual manner at the region where the goods are to be released.

All regions have been advised on the new procedure and we do not expect you to have any problem.



20. The letter though not addressed to the Appellant but it is manifestly calculated to relate to and affect all importers of disposable examination gloves. In fact the Appellant subsequent to the letter lodged and processed its importation documents for the disposable examination gloves on duty free basis without the Deputy Commissioner of Southern Region based at Mombasa requesting for exemption certificates from the Commissioner of Customs and Excise in respect of any such imports.
21. That in pursuant to the ***Legal Notice No. EAC/13/2010*** published in the East African Community Gazette of the 29th June, 2010 that came into force on the 1st day of July, 2010 there were amendments to Part B of 5th Schedule (Exemption Regime) of the East African Community Customs Management Act, 2004 that introduced a new Paragraph 33 ***examination gloves for laboratory and medical use*** under the exemption regime.
22. That the Commissioner of Customs Services vide a letter dated 8th October, 2010 addressed to Pharm Lobby Group clarified that in pursuant to the ***Legal Notice No. EAC/13/2010*** examination gloves for laboratory and medical use qualify for exemption that had to be applied for at the Exemption/Remissions office on the 1st Floor of Times Towers. The purport of this letter was that the Respondent now expected all importers of examination gloves for laboratory and medical use to specifically apply for exemption certificates and the previously obtaining procedure for processing importation documents for such products on duty free basis without production of exemption certificate was lifted and/or accordingly reviewed.
23. That it is important to highlight at this point that the Appellant abandoned Ground 3 of its Appeal in regard to the Respondent's compliance with the provisions of the Value Added Tax Act, 2013 and the Tax Procedures Act in regard to confirmation of the assessment following the objection to the assessment by Appellant as it is now conceded that the lapse was occasioned by the negotiations that took place between the Respondent and the Appellant's Tax Consultant subsequent to the Appellant raising an objection to the additional tax assessment (See Paragraph 7 of the Appellant's Written Submissions dated 30th August, 2016).



24. That the post clearance audit carried out by the Respondent in respect of the Entry Nos. 2010 MSA 2419599 and 2010 NBI 70546 processed by the Appellant that occasioned in the additional tax assessment of **Kshs.1,824,032/=** forming the basis of this Appeal was manifestly precipitated by the Tariff Ruling issued on the 2nd day of July, 2015 in a letter addressed to M/s Suken International Limited by the Respondent.
25. That on the basis of the pleadings and documents filed before the Tribunal and on the submission tendered by the parties the issues for the due determination by the Tribunal are:-
- a) *Whether the Tariff Ruling in the Respondent's letter of 2nd day of July, 2015 addressed to M/s Suken International Limited formed a reasonable basis for the post clearance audit of the importations by the Appellant?*
 - b) *Whether the Appellant mis-declared the appropriate tariff classification for the powdered latex surgical gloves in the Entries under review during the post clearance audit?*
 - c) *Whether the Appellant is liable for the additional import duty and Value Added Tax demanded by the Respondent?*

The issues shall be analyzed separately as hereunder:-

Whether the Tariff Ruling in the Respondent's letter of 2nd day of July, 2015 addressed to M/s Suken International Limited formed a reasonable basis for the post clearance audit of the importations by the Appellant?

26. To appropriately understand the purport of the said Tariff Ruling it is necessary to reproduce the letter comprising of the said Ruling as under:-



2nd July, 2015

CUS/V&T/TARI/RUL/350/2015

*M/s Suken International Limited
P.O. Box 27515-00506,
Nairobi.*

Dear Sir/Madam,

**RE: TARIFF RULING FOR POWDERED LATEX SURGICAL
GLOVES ENTRY NUMBER 2015 MSA 5254881
SAMPLE NO. 009115**

This refers to a request for laboratory analysis dated 06/02/2015.

The article is specified to be Powdered Latex Surgical Gloves.

The cream hand gloves were found to be articles of rubber with physical and chemical properties corresponding to those of natural rubber.

Heading 40.15 covers the classification of articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber.

Subheading 4015.11 covers the classification of surgical gloves, while subheading 4015.19 covers the classification of other gloves.

Based on the above information the powdered latex surgical gloves are therefore considered to be other gloves, classifiable in HS Code 4015.19.00 of the Common External Tariff.

In this regard, the declared HS Code 4015.11.00 is at variance with laboratory findings.

This tariff ruling is based on material facts presented including laboratory analysis, and does not absolve the importer from any liability that may arise at the time of importation, customs verification and clearance of goods.



Yours faithfully,

P. Ahago (Mrs.)

For: Commissioner of Customs Services Department

vk/

cc. Chief Manager – (CSD/Southern Region).

27. That it is clear on the face of the contents of the foregoing letter that the said Tariff Ruling was reached at following laboratory analysis of powdered latex surgical gloves provided by M/s Suken International Limited and for this Tariff Ruling to be appropriately and reasonably applied against the products imported by the Appellant, it was desirable for the Respondent to clearly demonstrate that with due regard to the physical description, chemical properties and the sources of the products analyzed in the laboratory were the same as those imported by the Appellant. The material similarities in the products as between those analyzed by the Respondent at the instance of M/s Suken International Limited and those imported by the Appellant in the Entries under review were not addressed by the parties and that makes it difficult for the Tribunal to determine the general applicability of the Tariff Ruling to any party other than M/s Suken International Limited. The fast changing technological differences in the products and the time lapse between the date for the importation of the products in the Entries under review and the laboratory analysis of the samples provided by the third party coupled with the absence of material information on the similarities of the sources, manufacturers and packaging of the products, it cannot be possibly possible for the Tribunal to hold that the products were similar and to find that the Tariff Ruling could be reasonably applied by the Respondent as a basis for the post clearance audit of the importations by Appellant in the Entries under review and the resultant additional tax assessment.

Whether the Appellant mis-declared the appropriate tariff classification for the powdered latex surgical gloves in the Entries under review during the post clearance audit?

28. The Tribunal notes that Rule 3 (a) on the general interpretation of the harmonized system is the most applicable and appropriate rule



for this Appeal. In tariff classification Rule 3(a) of the General Interpretation of Harmonized System provides as follows;

Rule 3(a)

(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 materials or substances contained in mixed or composite goods or to part only of the items in a set put 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.*

29. The gloves are for purposes of determination of the applicable tariff for taxation classified under Tariff Code No. 40.15 of the universally recognized Harmonized System of Tariff (H.S. Tariff) that relate to articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes of vulcanized rubber other than hard rubber. The gloves are either classified as surgical that attracts 0% or other that attracts 10% import duty.
30. In pursuant to H.S Tariff Code No. 4015.11.00 surgical gloves are zero rated for tax purposes unless it is established by its physical and chemical properties that the glove falls in the other category that attracts 10% tax.
31. The Respondent in the absence of any laboratory analysis on the samples of the surgical gloves imported by the Appellant and for want of any specific information on the actual description of the components of the gloves imported by the Appellant the finding by the Respondent in its letter dated 2nd November, 2015 addressed to the Appellant that there was tariff mis declarations in the Entries of the imports by the Appellant has no basis.
32. The declaration of the surgical latex examination gloves under heading 401511.00 in the Entry Nos. 52010 MSA 2419599 and 2010 NBI 70546 was in the absence of any material finding on the part of the Respondent appropriate and the imports were properly zero rated for the purposes of import duty.

Whether the Appellant is liable for the additional import duty and Value Added Tax demanded by the Respondent?



33. The Respondent's contention is that the post clearance audit was necessary to check on the compliance and collect any unpaid taxes on the part of the Appellant as the processing of import documents was based on self-assessment by the tax payer. The self-declaration in respect of products exempt from duty under the East African Community Customs Management Act (EACCMA) 2004 cannot be actualized without the involvement of the Respondent. The importation documents are ordinarily not lodged for processing by the Respondent in the absence of a tax exemption certificate unless the Respondent has relaxed the procedure for the processing of importation documents for surgical gloves meant for supply to hospitals as communicated in the letter dated the 23rd day of April, 2002 by the Commissioner of Customs and Excise addressed to Bakpharm Limited.
34. The Commissioner of Customs and Excise having directed by the letter dated the 23rd day of April, 2002 that the importation documents were to be processed on duty free basis without his written authority and that importers were not to have difficulties with the new procedure, the Respondent cannot subsequently expose the Appellant to suffer prejudice arising from its own laxity of enforcement of the procedure for availing benefit of tax exemption.
35. Though taxes are self-assessed by the importer through the entries prepared, the entries must be verified by the Respondent's officers who confirm that the taxes stated in the entries comply with the law and this must happen before goods can be cleared. The process involved with regard to the declaration and clearance of imported goods for the purposes of, inter-alia, levying taxes and approval of tax exemptions is an elaborate procedure in which the Respondent is involved significantly and it cannot be easily said that self-declared entries are passed or cleared on the face value as declared by an importer.
36. The surgical gloves which were included under the description of articles of apparel, clothing and equipment specifically designed for safety or protective purposes for use in registered hospitals and clinics were zero rated under Paragraph 6 of Part B of the 8th Schedule to the Value Added Tax Act, CAP 476 of the Laws of Kenya (now repealed). The surgical gloves were zero rated when imported or purchased before clearance through the Customs or purchased before payment of tax generally.



FINDINGS AND FINAL DETERMINATION

37. The Tribunal finds in the circumstances that the post clearance audit of entries on importations by the Appellant of surgical gloves on the basis of the Tariff Ruling addressed to a third party had no basis and the additional assessment of import duty and Value Added Tax was against the spirit and word of Part B of the 5th Schedule of the East African Community Customs Management Act (EACCMA) 2004 and of Paragraph 6 of Part B of the 8th Schedule to the Value Added Tax, CAP 476 of the Laws of Kenya (Now Repealed).
38. The Tribunal finds the Appeal to have merit and accordingly proceeds to dismiss the demand notice for additional taxes in the sum of **Kshs.1,824,034/=** in the Respondent's letter dated 2nd November, 2015.
39. The Tribunal hereby accordingly orders as follows:-
- a) The Appeal is hereby allowed as prayed.
 - b) Each Party shall bear it's own costs



DATED and DELIVERED AT NAIROBI this 7th DAY of December, 2016

In the presence of:-

PHILIP ODENY and
SAMMY MUTOYA for the Appellant

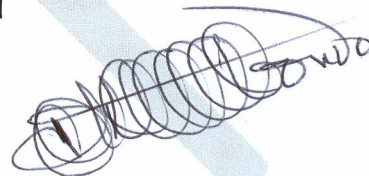
KENNETH KIRUGI and
ELIZABETH KAHINDI for the Respondent



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ERIC NYONGESA WAFULA
CHAIRPERSON



.....
JOSEPHINE K. MAANGI
MEMBER



.....
JOLAWI O. OBONDO
MEMBER



.....
BONIFACE A. DIMMO
MEMBER



.....
ABDULBASID AHMED
MEMBER