

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 83 OF 2017

TETRA PAK LIMITED.....APPELLANT

-VERSUS-

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is an international Company which is also registered in Kenya and principally manufactures materials for long life packaging of different kinds of liquids including but not limited to milk and fruit juices.
2. The Respondent's office is created by Section 3 of the Kenya Revenue Authority Act and is empowered by Section 5 of the same Act to assess and collect taxes for the government and to administer various tax laws in Kenya.
3. The Appellant is a registered tax payer and imports materials for use in production of the packaging materials and does pay various taxes levied in respect of the goods so imported relating to its business.
4. By a Single Administrative Document (SAD) Entry Number 2016 MSA 6043252, "the Entry" the Appellant imported goods described as

"1x20 CONT.16PALLET'S MED ACID ADH POLYMER DPO MA 197 (DUPONT POLYOLEFIN MA 197 RESIN) FOR THE MANUFACTURE OF TETRA PAK LIQUID PACKAGING MATERIAL TO MOMBASA ISLAND CARGO TERMINAL CFS"

In the said Entry, **M/s UNITED CLEARING COMPANY LIMITED** of Mombasa was named as the Agent and was the declarant thereof.

5. For the reasons that will be stated later in this judgment, it is important to note that the imported consignment had a total of sixteen (16) packages weighing 11055 kgs.
6. Notwithstanding the description of the consignment in the Entry as stated hereinabove, described as **DUPONT POLYOLEFIN MA 197 RESIN** (hereinafter called "**DPMa**"), the United Clearing Company Ltd submitted a sample of the same to the Respondent's appropriate laboratory for analysis.

7. The Tribunal gleaned through the documents submitted by the parties and was unable to find a copy of the request for laboratory analysis made by the Appellant or its clearing agent. It can however be deciphered from the Respondent's communication dated **15th September 2016** addressed to the Appellant that a Tariff Ruling was made pursuant to a request for laboratory analysis.
8. From what is stated in the Appellant's appeal, which is not contested by the Respondent, the request for laboratory analysis was made by United Clearing Company Limited, the Appellant's clearing agent. The Tribunal would have wished to see a copy of the request for laboratory analysis in order that it can understand the form and content thereof. It is important for the parties to note that availing such documentation assists the Tribunal in understanding the intention of the person or entity making such a request which aids in decision making.
9. Be that as it may, the Tariff Ruling aforesaid declared that DPMa was:-
- i) Specified to be **ethylene-methacrylic resin**.
 - ii) The colourless pellets tested contained **polymeric organic** compound identified as **acrylic polymer**.
 - iii) The sample tested was considered to be **suitably prepared adhesives** containing **ethylene-methacrylic acid copolymers** classifiable in **H.S Code 3506.91.00** of the East African Community Common External Tariff.
 - iv) **H.S Code 3506.91.00** declared by the Appellant and or its agent in the import Entry was at variance with the laboratory findings.
10. By a letter dated **26th January 2017**, the Respondents Commissioner Customs and Border Control issued a demand for under paid taxes to the Appellant. The demand quoted the Tariff Ruling of **15th September 2016**. In a nutshell, the Respondent stated that pursuant to the Tariff Ruling, classifying the Appellants imported goods as suitably prepared adhesives under **H.S Code 3506.91.00** as opposed to the declared **H.S Code 3901.90.00** the same attracted Import Duty and additional VAT.
11. It should be noted that the declared value for the goods was **Kshs. 3,169,569/=** and under H.S Code 3901.90.00 attracted 0% (zero percent) Import Duty but had a VAT liability of **Kshs. 507,131/=**. The Respondent's ruling declaring the goods and falling under **H.S Code 3506.91.00** attracted additional Import Duty at 25% of the declared value together with VAT at 16% on the gross.

The Appellant was therefore required to pay an additional sum of Kshs. 919,175/= being the under paid taxes due on the consignment within thirty (30) days and further appear before the Respondent's officials for suspected commission of an offence details whereof are contained in the said letter of demand.

12. The Appellant through its agents PricewaterhouseCoopers Ltd (PWC) lodged an Application for Review which was also a Notice of Objection of Assessment dated 24th February 2017 in which elaborate representations were made for the Appellant.
13. In the said Application for Review and Objection, PWC challenged the Respondent's demand and went on to provide grounds upon which the demand for Kshs. 919,175/= was erroneous and should be withdrawn. In their submission, the Respondent's classification of DPMA under Heading 35.06 was grossly erroneous and the correct tariff classification is 3901.90.00 and the demand for additional revenue was unnecessary and should be reviewed and withdrawn *in toto*.
14. In the penultimate paragraph of the PWC letter, the Appellant in order to avoid payment of penalties and other severe consequences decided to pay the additional duty demanded under protest as the outcome of the review application was awaited.
15. The Respondent responded to the review application by a decision contained in a letter dated 6th April 2017 addressed to the Appellant. The Respondent's decision can be summarized as follows:-

“Based on the above information, Dupont Polyolefin MA 197 is therefore considered to be suitably prepared adhesive based on ethylene-methacrylic acid copolymer, and containing 4.2% acrylic comonomer, classified in HS code 3506.91.00 of the Common External Tariff.

The Tariff Ruling communicated to your office referenced CUS/V&T/TARI/RUL/481/2016 dated 15th September 2016 is hereby upheld. Further, kindly arrange to settle demand CUS/V&T/TARI/DEM/014/2017 dated 26th January 2017”.
16. Being dissatisfied with the Respondent's decision, PWC on 5th May 2017 issued a Notice of Appeal and subsequently filed the present Appeal on 19th May 2017.
17. The Appellant's Grounds of Appeal are as follows:-

- a) That the Respondent erred in fact and in law by ruling that Dupont Polyolefin MA 197 Resin is considered to be suitably prepared adhesive and should therefore be classified under **HS Code 35.06.91.00** of the Common External Tariff.
- b) That the Respondent erred in fact and in law by failing to recognize that the product, Dupont Polyolefin Ma 197 resin, does not qualify for classification under heading 35.06 of the Common External Tariff. The product is not classifiable under the first description of this heading: “*prepared glue and other prepared adhesives, not elsewhere specified or included*”, since it is specified elsewhere under heading 3901.90.00. Further, the product is not classifiable under the second description in heading 3506: “*products suitable for use as glues or adhesives, put up for retail sale*” because, at importation, it is in granular form and must undergo further processing before it can be used as an adhesive.
- c) That the Respondent erred in fact and in law by failing to recognize that Heading 39.01 covers “polymers of ethylene, in primary forms” and Note 6 defines primary forms to include, among others, granules such as is the case with Dupont Polyolefin Ma 197 resin.
- d) That the Appellant has correctly classified Dupont Polyolefin Ma 197 resin under **HS Code 3901.90.00** based on the products specific descriptions and characteristics.
- e) That the Appellant paid all the taxes due at the importation of Dupont Polyolefin MA 197 Resin being import duty at 0% and VAT at 16% and is therefore not liable to any additional tax as demanded by the Respondent.

18. The Appellant prayed that the Respondent’s decision be annulled or amended in such manner as the Tribunal considers just and reasonable.

19. The Respondent filed its Statement of Facts dated 16th June 2017 and in the relevant paragraphs stated as follows:-

- a) In response to grounds 10.1 to 10.5 the Respondent avers that the single contention is whether the correct classification for Dupont Polyolefin MA 197 Resin is EAC/CET Code 3506.91.00 or as declared H.S Code 3901.90.00 by the Appellant which attracts 0% VAT on Import. The

Respondent reiterates its finding that Dupont Polyolefin MA 197 Resin is considered to be suitably prepared adhesive based on ethylene-methacrylic acid copolymer and containing 4.2% acrylic comonomer classified in EAC/CET Code 3506.91.00.

- b) The Respondent avers that when issuing the tariff ruling dated 15th September 2016 the laboratory analysis established that Dupont Polyolefin MA 197 Resin is specified to be ethylene-methacrylic resin that acts as a foil and heat sealant for beverage packing condiment and spice oil sachets as well as non-food products including toothpaste tubes and cable shielding.
- c) Further the colorless pellets tested were found to be chemical preparations containing polymeric organic compound identified as acrylic polymer.
- d) The Respondent avers that the heading 35.06 covers the classification of prepared glue and other prepared adhesives not elsewhere prepared specified or included; products suitable for use as glue adhesives, put up for retail, sale as glues or adhesives not exceeding a net of 1kg.
- e) The heading includes the classification of preparations specially formulated for use as adhesives consisting of polymers or blends thereof.
- f) It therefore follows that the sample received for analysis indicated that the product is an ethylene-methacrylic acid copolymer suitably prepared for use as an adhesive classified in EAC/CET Hs code 3506.91.00. **(see Respondent Bundle of Documents marked appendix 1(tariff ruling))**
- g) The additional information provided by the importer indicates that, this product is an ethylene-methacrylic resin that acts as a foil adhesive and heat sealant for beverage packaging, condiment and spice oil sachets, as well as non-food products including toothpaste tubes and cable shielding.
- h) The Respondent avers that Chapter 39 excludes the classification of preparations specifically formulated for use as adhesives, consisting of polymers or blends thereof of headings 39.01 to 39.13 which, apart from any permitted additives to the products of this chapter, contain other added substances not falling in this heading.

- i) Further the heading 35.06 covers the classification of prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg.

The heading includes the classification of preparations specifically formulated for use as adhesives, consisting of polymers or blends thereof.

- j) Based on the above information, Dupont Polyolefin MA 197 RESIN is therefore considered to be suitably prepared adhesive based on ethylene-methacrylic acid copolymer and containing 4.2% acrylic comonomer classified in EAC/CET Code 3506.91.00. (lab test results)
- k) In this regard the declared **H.S Code 3901.90.00** was at variance with the lab finding and amounts to mis declaration and the same should be properly classified under 3506.91.00.
- l) The Respondent states that the HS Code explanatory notes on tariff classification under Tariff 3901 and 3506 provides that:

Notes to chapter 39 declared by the importer

Chapter 39, plastics and articles thereof. Chapter note 1 stated 'Throughout the Nomenclature the expression "plastics" means those materials of heading 39.01 to 39.14 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence'.

- m) According to note 3 (a) to chapter 39, Headings 39.01 to 39.11 apply only to goods of a kind produced by chemical synthesis, falling in the following categories: Liquid synthetic polyolefin of which less than 60% by volume distils at 300 degrees Centigrade, after conversion to 1,013, millibars when a reduced-pressure distillation method is used.
- n) The Respondent further avers that note 6 to chapter 39 states "In headings 39.01 to 39.14, the expression "primary forms" applies only to the following forms:

- (a) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions;
 - (b) Blocks of irregular shapes, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.
- o) It therefore follows that DPMA cannot be classified under 39.01 to 39.14 and the correct section would be chapter 35.
- p) The Respondent states that the chapter notes to chapter 35 states that:

Notes to chapter 35.

Chapter 35, Albuminoidal substances; modified starches; glues; Enzymes
Heading 35.06 covers prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1kg. Sub-heading 3506.91.00 covers adhesives based on polymers of heading 39.01 to 39.13 or on rubber.

20. All in all the Respondent prayed that the classification of DPMA under Code 3506.91.00 in the ruling dated 6th April 2017 was correct; and that the Appellant was not eligible for a refund of the Kshs. 919,175/= paid as additional taxes and finally that the Appeal be dismissed with costs.
21. The Appellant filed a Witness Statement of George Kinoti, its Quality Assurance Manager, while the Respondent filed two (2) witness statements of Judy Wewa and Benard Odhiambo Oyuchio.
22. Each of the Parties filed their respective submissions which are all on the Tribunal's record.

SUMMARY OF APPLICANT'S CASE

23. The Appeal came up for hearing on 8th October 2019. The Appellant represented by M/s Imelda Mutiso presented its case and called its witness George Kinoti who adopted his witness statement and then proceeded to cross-examine the Respondent's witness Benard Oyuchio.

24. The Appellant reiterates its contention that it imported DPMA, which is a medium acid polymer used in packages for milk and dairy products. It is however, not nucreal which is a high acid Polymer used for juice packages.
25. The Appellant further states that DPMA is imported in pellet/granular form. Indeed the Tribunal was shown some white substance in granular form.
26. According to the Appellant, this is in "primary" form and has to be taken through a further industrial process and mixed with other substances before it can be used as a protective layer on the tetra pak packages. This, not being a finished product, should be classified under **H.S Code 3901.90.00** and attracts 0% duty and VAT.
27. In the Appellants submissions, DPMA is not a "suitably prepared adhesive containing ethylene-methacrylic acid copolymers....." which can be within tariff classification **H.S Code 3506.91.00**.
28. The Appellant is in effect asking the Tribunal to declare that DPMA's correct classification is **H.S Code 3901.90.00** attracting 0% import duty and VAT and that the sum of Kshs. 919,175/= it paid to the Respondent in protest be refunded.

SUMMARY OF RESPONDENT'S CASE

29. The Respondent represented by M/s Carol Mburugu opposed the Appeal and relied on the witness statement of Mr. George Oyucho which had been adopted. The Tribunal having allowed each party to call a single witness, Miss Mburugu had earlier re-examined Mr. Oyucho and also cross examined Mr. George Kinoti, the Appellant's witness.
30. The Respondent's case is that the DPMA imported by the Appellant is classified under tariff H.S Code 35.06 which brings it within the classification of "*prepared glue and other prepared adhesives not elsewhere prepared specified or included; products suitable for use as glue, adhesives, put up for retail sale as glues or adhesives not exceeding a net weight of 1kg*".
31. The Respondent disagrees with the Appellant's classification of the DPMA in granular form as not being a glue or adhesive.
32. The Respondent contends that its purpose is for use as a binder joining the Polymer to the Alufoil in the tetra-pak packages and further that the process of passing it through a laminator machine does not change its chemical composition

i.e it merely changes from granular form into another form that is able to stick items together. It is therefore a glue or adhesive.

33. The laboratory analysis that had been carried out on the material submitted returned a verdict that the DPMA is a suitably prepared adhesive based on ethylene-methacrylic acid copolymer and containing 4.2% acrylic comonomer. The Respondent therefore classified it in Code 3506.91.00 of the East African Community Common External Tariff.
34. By reason of the said Classification under Code 3506.91.00 the Appellant's import attracted 25% import duty of Kshs. 792,392 and 16% VAT of Kshs. 633,914/= all amounting to Kshs. 1,426,306/=. The Appellant having paid 16% VAT of Kshs. 507,131/= on the declared value of Kshs. 3,169,569/= the additional tax of Kshs. 919,175/= was therefore due and payable.
35. The Respondent also contended that the Appeal before the Tribunal was *res-judicata*. The Respondent's submission is premised on the Ruling between the Appellant and the Respondent in **CUSTOMS & EXCISE APPEAL TRIBUNAL APPEAL NO. 12 OF 2014 – TETRA PAK LTD – vs- COMMISSIONER OF CUSTOMS SERVICES**.
36. The Respondent prays that the Appeal be dismissed with costs.

AGREED MATTERS

37. From the documents filed by the parties, the oral testimony given by the witnesses, the following matters are common ground to the parties:-
- (a) That the DPMA aforesaid is based on "ethylene methacrylic acid copolymer".
 - (b) That the Appellant did not use the same for retail sale.
 - (c) That the DPMA imported by the Appellant was in granular form.
 - (d) That the DPMA granules had to be processed by the Appellant through a laminator into another form in order that it can stick the polymer and alufoil together.
 - (e) That indeed **CUSTOMS & EXCISE APPEAL NO. 83 OF 2017 TETRA PAK LIMITED-Vs-THE COMMISSIONER OF DOMESTIC TAXES** was a case between the Appellant and the Respondent.

ISSUES FOR DETERMINATION

38. The Tribunal has considered following issues fall for determination in this matter:-

- (i) Whether the Appeal is *res-judicata*.
- (ii) Under which classification of the Common External Tariff does DUPONT POLYOLEFIN MA197 RESIN fall?

ISSUE NO. 1: WHETHER THE APPEAL IS RES JUDICATA

39. The Respondent has prayed that the Tribunal dismisses the appeal on grounds that the same is *res-judicata*.

The Appellant protested that the Respondent did not raise this plea in its Reply in the Statement of Facts.

40. It is true that the Respondent did not plead *res-judicata* while replying in the Respondent's Statement of facts. This omission would not be necessarily fatal as *res-judicata* it is a matter of law and can be raised at any time in the proceedings as long as the party against whom it is pleaded has an opportunity to respond.

41. This notwithstanding the Tribunal has noted that indeed in Customs and Excise Tribunal Appeal No. 12 of 2014, the Appellant herein Tetra Pak Ltd was the Appellant while the Commissioner of Customs Services was the Respondent. The Respondent in this appeal is the Commissioner of Domestic Taxes. The Office of Commissioner of Customs Services was collapsed together with other offices into the office of the Commissioner of Domestic Taxes which is an office within the Kenya Revenue Authority (KRA) so to speak, KRA is the Respondent in both appeals.

42. The Respondent has relied on Independent **ELECTORAL AND BOUNDARIES COMMISSION –vs- MAINA KIAI & 5 OTHERS** (2017) eKLR as follows:-

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are not in disjunctive, but conjunctive terms:-

- (a) The suit or issue was directly and substantially in issue in the former suit.*
- (b) That former suit was between the same parties or parties under whom they or any of them claim.*

(c) Those parties were litigating under the same title.

(d) The issue was heard and determined the issue was competent to try the subsequent suit of the suit in which the issue is raised.

43. The Tribunal has had occasion to peruse the ruling in Appeal No. 12 of 2014 between the Appellant and the Respondent sued through its different offices.
44. The dispute in the Appeal 12 of 2014 related to Classification of **Nucreal TP-100** and whether it was under **HS Code 3506.91.00** as determined by the Respondent or whether the same was under **HS Code 3901.90.00** as stated by the Appellant.
45. There are similarities in the parties in the present appeal before this Tribunal and those in Appeal No. 12 of 2014 aforesaid. Determination of classifications **HS Code 3506.91.00** and **HS Code 3901.90.00** is also common ground.
46. The Customs and Excise Appeal Tribunal (as it then was) in Appeal No. 12 of 2014 proceeded to frame as one of the issues to be decided the following issue:-
What is the correct Tariff Classification for Nucreal TP100.
47. By dint of the above issue as framed by the Customs and Excise Appeal Tribunal, the subject matter in that appeal is substantially different from the subject matter in this appeal.
48. Plainly and simply, Nucreal TP 100 is a totally different product from Dupont Polyolefin MA 197 Resin which is the subject matter of the present appeal. It will be wholly erroneous for this Tribunal to hold the two to be one and the same thing.
49. The Respondent had this to say in its written submissions at paragraph 8

“It is not in dispute that the parties in customs & Excise APPEAL Tribunal Appeal Number 12 of 2014 are that same parties in the current appeal, i.e. Tetra Pak Limited vs Commissioner of Customs Services. It is also not in dispute that the issue in the said Appeal Number 12 of 2014 was the classification of the product known as Nucreal T-100, which is the same issue in the current appeal. Both Nucreal T-100 and DPMA are used by the Appellant to manufacture packaging products as a protective layer. Nucreal T-100 is a high acid polymer used in packaging of fruit juices and the like, while DPMA is a medium acid polymer. The Customs & Excise Appeals Tribunal in Appeal Number 12 of 2014 found and held that “the Respondent was correct

in classifying the product NECREAL TP 100 under HS Code 35.06.90.00". The decision was arrived at on 20th June 2015".

50. The Tribunal does not agree with the Respondent that Nucreal T-100 and DPMA are the same. In the submissions it is clearly stated that Nucreal T-100 is a high acid polymer while DPMA is a medium acid polymer. Though the application of these products in the manufacture of packaging material is the same, the end products are different and for different uses.
51. The Tribunal is further unable to follow the decision in Appeal No. 12 of 2014 as the ruling did not give any laboratory analysis of Nucreal T-100 to enable it compare the same with DPMA.
52. The Respondent's correct application of the ruling in Appeal No. 12 of 2014 is as judicial precedent rather than an authority to demonstrate that the Appellant's appeal *is res judicata*.
53. It will also be difficult for the Respondent to raise the plea of *res-judicata* successfully where appellants lodge appeals against different rulings delivered in the different transactions. Regrettably every ruling delivered by the Respondent gives rise to a fresh cause of action.
54. A plea of *res judicata* by the Respondent will succeed if an appellant lodges a second appeal arising from a ruling on the same transaction the first appeal having been heard and determined on its merits excluding appeals which are "struck out" on technical grounds.

ISSUE NO. 2: UNDER WHICH CLASSIFICATION OF THE COMMON EXTERNAL TARIFF DOES DPMA FALL?

55. The Appellant did not provide its own laboratory analysis or report on the chemical composition of DPMA and does not object to the Respondent's analysis.
56. In the Respondent's Tariff ruling dated **15th September 2016** signed by **M/s P. Kipkulei**, the DPMA samples submitted by the Appellant's agents contained "ethylene-methacrylic acid copolymers". Upon the Appellant's agents PWC applying for review on **24th February 2017**, the Respondent in its refusal to allow a review dated **6th April 2017** stated that the product was an "ethylene-methacrylic resin".

57. The Appellant did not follow up this later analysis which amended the original findings and neither parties explained the difference between “ethylene-methacrylic acid copolymer” and “ethylene-methacrylic resin”. The parties however appear to have settled on the product being “ethylene-methacrylic acid copolymer”.

58. It is the Respondent’s position that DPMa is classifiable in H.S Code 3506.91.00 of the Common External Tariff as follows:-

		<i>rate</i>	<i>Unit of Quantity</i>
<i>35.06</i>	<i>Prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1kg.</i>		
<i>35.06.10.00</i>	<i>products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1kg</i>	<i>25%</i>	<i>kg</i>
<i>Other 3506.91.00</i>	<i>Adhesives based on polymers of heading 39.01 to 39.13 or on rubber.</i>	<i>25%</i>	<i>kg</i>

59. The Appellant contends that the DPMa is classifiable in H.S. Code 39.01

I-PRIMARY FORMS

39.01 Polymers of ethylene, in primary forms

		<i>rate</i>	<i>Unit of quantity</i>
3901.10.00	polyethylene having a specific gravity of less than 0.94	0%	kg

60. The Appellant relied on the explanatory notes of Chapter 39

In headings 39.01 to 39.14, the expression “primary forms” applies only to the following forms:

- (a) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions;*
- (b) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.*

61. The Appellant states that the DPMa shown in the illustrations in the Witness Statement of **George Kinoti** fits the expression “primary form” the same being granules. As stated earlier in the judgment, the Tribunal was shown granules as samples of what the Appellant had imported.
62. The tribunal considers that the determination of this matter is important to the parties in settling of classification of DPMa and has taken time to consider this issue.

DETERMINATION

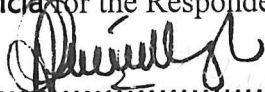
63. In deciding the category under which DPMa should be classified, the Tribunal has adopted the plain and simple meaning to be given to **HS Code 35:06** and **(3506:91: 00 thereunder)** and **HS Code 39:01 (3901:90:00 thereunder)** in interpreting the same. Reliance has been given to the General Interpretation Rules (GIRs).
64. The Tribunal finds that the Appellant’s declaration of DPMa under **H.S Code 3901.90. 00** to be the correct classification as opposed to the Respondent’s clarification under **H.S Code 3506:91:00**.
65. The Respondent’s classification of DPMa under Heading No. **35.06** which defines the category as:
“Prepared glues and other prepared adhesives, not elsewhere specified or included; product suitable for use as glues or adhesives, put for retail sale as glues or adhesives not exceeding a net weight of 1kg”.
66. For the DPMa imported by the Appellant to fit within **H.S Code 35:06** classifications, it must meet the following conditions:
- i) It must be a *“Prepared glue or adhesive”*
 - ii) It must be *“Suitable for use as glue or adhesive”*
 - iii) Put up for *“retail sale” as “glue or adhesive”*; and
 - iv) Must not be *“exceeding a net weight of 1kg”*
67. There is no doubt that the DPMa imported by the Appellant did not fall in the above category as it was not a prepared glue or adhesive and neither was it suitable for use as a glue or adhesive put up for retail sale in packaging not exceeding a net weight of 1kg.
68. The Respondent’s main argument was based on the Heading **35.06** but did not go further to elaborate its actual classification under sub-heading **3506.91.00** which for clarity purposes provides as follows:
“Adhesives based on polymers of heading 39:01 to 39:13 or on rubber”

69. The classification comes close to the DPMa imported by the Appellant by reason of the laboratory analysis which stated that it was and based on "*ethylene – methacrylic acid copolymer*" but fails when Heading 35.06 is applied.
70. Among the matters the parties hereto agreed as summarized by the Tribunal in this judgment was that the DPMa is imported by the Appellant was in granular form and that it is processed before use.
71. Going by the explanatory Notes under **Chapter 39.6** granules fall within substances described as "primary form" which come under heading **39:01 to 39:14**.
72. Whereas it is true that DPMa is a polymer, being in granules, and therefore primary form excludes it from the definition of an adhesive or glue under 3506.
73. For the reasons stated herein, the Tribunal allows the Appeal and makes the final orders as follows:
- a) *The Appellant's appeal be and is hereby allowed*
 - b) *The Appeal is not res-judicata*
 - c) *The correct classification of Dupont Polyolefin MA 197 Resin is under H.S Code 3901:90:00 of the East African Community Common External Tariff.*
 - d) *The Respondent do refund the sum of Kshs. 919,175/= being additional taxes paid by the Appellant.*
 - e) *Each party to bear its own costs.*

DATED and Delivered at Nairobi the 26th day of February 2020.

In the Presence of:-

Imelda Mutiso for the Appellant
Leparasha Patricia for the Respondent



.....
PATRICK LUTTA
CHAIRMAN



.....
HELLEN BILA
MEMBER

Mwai Kibaki

.....
MWAI MBUTHIA
MEMBER

Eli Njeru

.....
ELI NJERU
MEMBER

TAFI