

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. E481 OF 2023

PHILIPS THERAPEUTICS LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER CUSTOMS AND BORDER CONTROL.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a private limited liability company registered and incorporated in Kenya under the Companies Act Laws of Kenya No. 17 of 2015. The Appellant markets and distributes a wide range of pharmaceuticals, diagnostic equipment and medical devices from over 100 of the World's leading pharmaceutical companies.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, CAP 469 of Kenya's Laws. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

3. Following a compliance audit covering the 2018 to 2023 period, the Appellant was issued with notice of demand for import duty and VAT amounting to Ksh 1,795,534.00 in relation to four (4) products vide a letter dated 23rd June 2023. This was countered by the Appellant wherein it provided more information and clarification on customs entries vide a letter dated 14th July 2023.
4. The Respondent's review decision dated 18th July 2023 revised the assessment downwards to Ksh 1,232,383.00 and vacated additional assessments for three products leaving one i.e. *Andolex^R -C Anti-Bacterial Mouthwash*. The Appellant's letter dated 19th July 2023 was a challenge to this decision.
5. Additionally, in a letter dated 20th July 2023, the Appellant further objected to the re-classification of *Andolex^R -C Anti-Bacterial Mouthwash* from tariff code 3004.90.00 [*which would have attracted a 0% import duty*] to tariff code 3306.90.00 [*which would have attracted an import duty of 25% and VAT of 16%*] of the East Africa Community Common External Tariff, 2017 (EACCET) supported by its two witness statements.
6. On 21st July 2023, the Respondent rendered a review decision upholding the re-classification of *Andolex^R -C Anti-Bacterial Mouthwash* from tariff code 3004.90.00 to code 3306.90.00 and demanded total taxes amounting to Ksh 303,177.00 i.e. import duty and VAT of Ksh 168,343.00 and Ksh 134,834.00 respectively.
7. Aggrieved by the Respondent's review decision, the Appellant filed a notice of appeal dated 15th August 2023 at the Tribunal on the same date.

THE APPEAL

8. The Appeal was premised on the following grounds as laid-out in the Memorandum of Appeal dated 15th August 2023 and filed on even date:

- (a) That the Respondent erred in fact by failing to recognize *Andolex^R -C Anti-Bacterial Mouthwash* as a pharmaceutical therapeutic and prophylactic product.
- (b) That the Respondent erred in fact by failing to recognize that the active ingredient (chlorhexidine gluconate) in *Andolex^R -C Anti-Bacterial Mouthwash* was an active cation having antiseptic, disinfectant, bacterial or germicidal properties.
- (c) That the Respondent erred in fact and in law by failing to recognize that *Andolex^R -C Anti-Bacterial Mouthwash* has only subsidiary (if any) value or use as a perfumery, cosmetic or toilet preparation.
- (d) That the Respondent erred in law by reclassifying *Andolex^R -C Anti-Bacterial Mouthwash* from tariff code 3004.90.00 to 3306.90.00 contrary to the express provisions of the EACCET.
- (e) That the Respondent erred in law by assessing import duty on *Andolex^R -C Anti-Bacterial Mouthwash* at 25% and VAT at 16%.

APPELLANT'S CASE

9. The Appellant's Statement of Facts were dated and filed on 15th August 2023.

10. The Appellant averred that *Andolex^R -C Anti-Bacterial Mouthwash* was a prescription mouthwash packaged in 100ml and 200ml PET plastic bottles with active pharmaceutical ingredient, chlorhexidine gluconate 0.12% m/v and other ingredients serving as in-active excipients being sorbitol solution(sugar) 3.75/15ml, aniseed flavor, polyoxyl 40 hydrogenated castor oil, peppermint oil, purified water, quinone yellow color, and sunset yellow color. The Appellant insisted that the dosage and directions for use should be as advised by a medical professional.
11. The Appellant averred that the active ingredient in *Andolex^R -C Anti-Bacterial Mouthwash* had been clinically proven for prescription oral use during and after dental procedures and operations to treat and prevent the recurrence of dental and oral conditions such as periodontitis and gingivitis. The major adverse effect of the product being tooth staining.
12. The Appellant stated that chlorhexidine gluconate could be administered as gels, chips and vanishes but had been clinically proven that mouthwash formulation was the most effective for therapeutic and prophylactic purposes with its in-active excipients serving the purpose of diluting, stabilizing and encouraging patient compliance.
13. The Appellant further declared that whereas *Andolex^R -C Anti-Bacterial Mouthwash* was a registered drug with the Pharmacy and Poisons Board, chlorhexidine gluconate was classified as an essential medicine for therapeutic and prophylactic uses by the World Health Organization (WHO), the US Food and Administration (FDA) as well as the Kenya Ministry of Health (MOH).

14. The Appellant stated that it was trite law that under EACCET, goods were classified according to the six (6) General Interpretative Rules (GIR) for classification of goods; with the primary rule (Rule 1) being that goods should be classified according to Headings; Section and Chapter Notes where the primary rule was not appropriate, goods should be classified according to the principles of Rule 2,3,4 and 5 applied sequentially.
15. The Appellant stated that in view of product description and overt reading of the headings, the appropriate classification for *Andolex^R -C Anti-Bacterial Mouthwash* was heading 30.04 which read as follows:

“Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale.”
16. The Appellant opposed the Respondent’s classification under heading 3306 which reads; *“Preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages”* Stating that headings 33.03 to 33.07 apply to goods suitable for cosmetic, makeup and personal grooming purposes since adverse effects of chlorhexidine gluconate make unprescribed *Andolex^R -C Anti-Bacterial Mouthwash* not suitable as a preparation for routine.
17. Further, the Appellant averred that it was clear from Note 3(a)(2) of Chapter 30 of EACCET that goods under Chapter 29 were treated as unmixed products if used as medicaments for therapeutic or prophylactic uses thus *Andolex^R -C Anti-Bacterial Mouthwash* should be classified under Chapter 30 by virtue of

Chlorhexidine gluconate- a Chapter 29 product as the only active ingredient other ingredients being in-active excipients.

18. To further buttress this position, the Appellant stated that WCO explanatory notes support the classification of *Andolex^R -C Anti-Bacterial Mouthwash* under heading 30.04 as the heading covers;

“...organic surface-active products and preparations, with active cation (e.g. quaternary ammonium salts), having antiseptic, disinfectant, bacterial or germicidal properties.”

19. The Appellant further stated that WCO Explanatory Notes to Chapter 33 support classification of *Andolex^R -C Anti-Bacterial Mouthwash* under heading 30.04 by making it clear that if in doubt on classification of a product under Chapter 30 or Chapter 33, the ultimate test was the primary/essential value or use vis-à-vis the subsidiary value or use. The Explanatory Note reads as follows;

“The products of headings 33.03 to 33.07 remain in these headings whether or not they contain subsidiary pharmaceutical or disinfectant constituents, or are held out as having Subsidiary therapeutic or prophylactic value...”

...

This Chapter does not cover;

...(b) Medicinal preparations having a subsidiary use as perfumery, cosmetic or toilet preparations (heading 30.03 Or 30.04)..”

20. The Appellant’s made the following prayers to the Tribunal:

- (a) The Tribunal declares *Andolex^R -C Anti-Bacterial Mouthwash* as classifiable under tariff code 3004.90.00 and sets aside the Respondent’s reclassification under tariff code 3306.90.00 with costs.

- (b) The Tribunal sets aside the Respondent's demand for import duty and VAT.

THE RESPONDENT'S CASE

21. The Respondent replied to the Appeal through its Statement of Facts dated 14th September 2023 and filed on 15th September 2023:
22. The Respondent stated that it is mandated to issue the correct tariff rulings and that laboratory analysis conducted gave correct classification under 3306.90.00 of EACCET and that the decision rendered was done within the timelines provided for under Section 229 of East African Community Customs Management Act ,2004 (hereinafter "EACCMA").
23. The Respondent disputed Appellant's classification under heading 30.04 of the EACCET stating that it covers medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed and unmixed products for therapeutic or prophylactic uses put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale.
24. The Respondent asserted that heading 33.06 of the EACCET covers preparations for oral or dental hygiene including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages and that Note 1(e) of Chapter 30 of EACCET does not cover preparations of heading 33.03 to 33.07 even if they have therapeutic or prophylactic properties. That based on this explanation, the mouthwash was considered classifiable under tariff code 3306.90.00 of the EACCET attracting 25% import duty and 16% VAT.

25. The Respondent prayed;

(a) That the Tribunal upholds the revised review decision dated 21st July 2023 as proper and in conformity with the law.

(b) That the Tribunal dismisses the Appeal with costs.

PARTIES' SUBMISSIONS

26. At the hearing of the matter on 27th March 2024, the Tribunal directed parties to file and serve upon each other with their written submissions on or before 10th April 2024 wherein also the Tribunal admitted under oath witness statements for both parties. Whereas the Appellant's written submissions were filed within the timeline set by the Tribunal, those of the Respondent were filed on 11th April 2024, outside the timeline directed by the Tribunal. Accordingly, the same have been expunged from the records.

27. The Appellant's written submissions dated 9th April 2024 were filed on 10th April 2024 together with Appellant's two witness statement by Dr. Abdulkadir Inayat and Dr. Mercy Oira both dated 18th January 2023 and filed on 24th January 2023. Both witness statements were admitted as evidence in-chief by the Tribunal on 27th March 2024. The Appellant submitted on four issues for determination as follows:

(i) **Whether *Andolex® - C AB Mouthwash* is a medicament for therapeutic or prophylactic uses; or a preparation for oral or dental hygiene.**

28. The Appellant averred that it adduced as evidence a sample of *Andolex® - C AB Mouthwash* showing that the product was a yellow liquid packaged in 100 ml or 200 ml PET plastic bottles. That this was accompanied by the product label and packaging material.
29. The Appellant stated the product's active ingredient chlorhexidine gluconate 0.12%*m/v* was the gold standard for periodontics, post-oral surgical procedures and prophylaxis as was expounded by its witness Dr. Mercy Oira. Further, that the active ingredient was used in treatment of oral conditions by killing or inhibiting the growth of bacteria, viruses and fungi as well as periodontitis and gingivitis as explained by the Appellant's witness.
30. The Appellant asserted that it adduced uncontroverted evidence that the product's active ingredient was a cationic molecule that bonds to negatively charged bacterial walls leading to destruction of bacteria. Moreover, that the product was to be administered in dosages of 5.00 ml-17.5ml and that it had express warnings for proper dosage and was not to be used for more than ten continuous days without a healthcare professional prescription owing to its adverse effects and was not for use for children under the age of six years. In buffering this position, the Appellant relied on the case of **Beta Healthcare international Limited vs Commissioner of Customs** where the Court held as follows:

"...Having evaluated the opposing positions taken by the Applicant and the Respondent in regard to whether the pharmaceutical products that are subject of this ruling are medicaments or food supplements, I am of the considered opinion that in determining whether the pharmaceutical products are medicines or nutritional supplements, what should be of paramount

consideration is the active ingredients that constitute the said pharmaceutical products...”

31. Further, the Appellant asserted that *Andolex® - C AB Mouthwash* was a medicament with chlorhexidine gluconate as an active ingredient. The Appellant relied on the definition of the term ‘active ingredient vide the case of **Sai Pharmaceuticals Limited v Commissioner of Customs & Border Control (Tax Appeal 731 of 2022) [2023] KETAT 976(KLR) (October 2023) (Judgement)** where the Court stated as follows;

“...any ingredient that provides biologically active or other direct effect in the diagnosis, cure, mitigation, treatment or prevention of disease or to affect the structure or any function of the body of humans or animals. An active ingredient in a medicament enables the medicament to act as it is presented to e.g. a paracetamol to relieve pain.”

32. The Appellant controverted Respondent’s assertion that *Andolex® - C AB Mouthwash* was a ‘preparation for oral or dental hygiene’ stating that it was classified as an essential medicine by the WHO, the FDA, MOH while the Pharmacy and Poisons Board legally registered it as a drug. Moreover, the Appellant stated that none of the materials adduced before the Tribunal showed the product as being suitable for dental hygiene purposes and the use by the Respondent was aimed at misleading the Tribunal. This is because *Andolex® - C AB Mouthwash* has adverse effects including killing of normal oral bacteria and staining of teeth which contradicted Respondent’s claim that *Andolex® - C AB Mouthwash* was of a category of mouthwashes that remove plaque and give lustre (shine) to teeth.

(ii) Whether the Respondent's re-classification of *Andolex® - C Anti-Bacterial Mouthwash* from 2022 EACCET Tariff Code 3004.90.00 to Tariff Code 3306.90.00 was justified.

33. The Appellant stated that under EACCET, goods are classified according to the 6 GIRs for the Interpretation of the Harmonized System with the primary rule (Rule 1) providing that goods should be classified according to the headings and the section notes and chapter notes if not appropriate then goods should be classified according to the principles of Rule 2,3,4 and 5 sequentially. The Appellant submitted that Rule 3(b) was particularly important in the instant matter as the product had a component giving it their essential character. The Rule 3(b) provides as follows:

“Mixtures, composite goods consisting of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.”

34. The Appellant refuted Respondent's classification under heading 33.06 on the basis that this heading was limited to perfumery or cosmetic applications and that instead the most appropriate heading was 30.04 given the composition of the product, its proven clinical use in periodontics, post-oral surgical procedures and as a prophylaxis for multiple invasive procedures. Moreover, the Appellant's witness averred that although chlorhexidine gluconate could be formulated as gels, chips and vanishes, mouthwash formulation was the most effective treatment that inhibited plaque, it did not mean that it was suitable as a preparation for oral or dental hygiene.

(iii) Whether the Respondent's assessment and demand of Import Duty and VAT on Andolex® - C AB Mouthwash was justified?

35. The Appellant submitted that the Respondent did not have a justifiable basis to reclassify *Andolex® - C AB Mouthwash* on the strength of evidence adduced before the Tribunal and the provisions of EACCET as read together with WCO explanatory notes and judicial precedents.

36. The Respondent's witness statement by Ms. Stella Wangechi Mwangi was dated and filed on 5th February 2024. The same having been admitted under oath as evidence in-chief by the Tribunal on 27th March 2024.

37. The Respondent's witness averred that she had full knowledge and information concerning the matter before hand since her day-to-day work entailed classification of goods for customs purposes relying on the EACCMA based on the Harmonized System of Classification as reference.

38. The witness further stated that *Andolex® - C AB Mouthwash* was imported vide entry number 23NBOIM403517647 and classified under tariff code 3004.90.00 by the Appellant yet the code herein was for '*other medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put in measured doses (including those in the form of transdermal administration systems) or in forms or packaging for retail sale.*' The Respondent however reclassified the product under tariff code 33.06 which covers '*preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages.*'

39. The witness went ahead to state that a sample of the product presented for tariff classification was identified based on technical data sheet and packaging information which included indication of ingredients and usage and was specified to be anti-bacterial mouthwash-an oral rinse used as dental hygiene product. Further, that the packaging leaflet also specified that the product contained antiseptic ingredients that assist in reducing gingivitis by killing bacteria responsible for plaque formation.

40. The Respondent witness firmed its position by relying on the Compendium of Classification Opinions provided by the WCO that;

“an anti-plaque preparation in form of a liquid, intended to remove plaque and give lustre to the teeth; it is used in rinsing, before the teeth are brushed with a toothbrush and a dentifrice are classified under heading 33.06.”

41. The Respondent’s witness went further to state that the GIR rule 1 guides that 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.’* The Respondent buttressed this position by placing reliance of Legal Note 1(e) to Chapter 30 that;

“The chapter does not cover preparations of heading 33.03 to 33.07, even if they have therapeutic or prophylactic properties.”

42. The Respondent’s witness asserted that the appropriate classification for *Andolex® - C AB Mouthwash* was under HS Code 3306.90.00 which provides

for classification of products for oral and dental hygiene as was communicated in its tariff ruling which was arrived at pursuant to Section 220 of EACCMA.

ISSUES FOR DETERMINATION

43. The Tribunal having carefully considered the parties' pleadings, documentation and submissions notes two issues call for its determination as follows;

- (a) Whether the Respondent erred in reclassifying *Andolex® - C AB Mouthwash* under tariff code 3306.99.00.
- (b) Whether the Respondent's demand for additional taxes was merited.

ANALYSIS AND DETERMINATION

(a) Whether the Respondent erred in law by reclassifying *Andolex® - C AB Mouthwash* under tariff code 3306.99.00.

44. The Tribunal notes that the dispute herein arose from a compliance audit by the Respondent on 23rd June 2023 that was conducted pursuant to Section 235 and 236 of EACCMA and the subsequent reclassification of the Appellant's product *Andolex® - C AB Mouthwash* from tariff code 3004.90.00 to tariff code 3306.99.00.

45. The Tribunal observes that the Appellant contested the Respondent's averments by stating that the active ingredient chlorhexidine gluconate had been clinically proven for prescription oral use during and after dental procedures and operations to treat and prevent the recurrence of dental and oral conditions such as periodontitis and gingivitis. Additionally, that the product had been registered as a drug with the Pharmacy and Poisons Board

and was classified as an essential medicine for therapeutic and prophylactic uses by the WHO, the FDA as well as the MOH.

46. The Tribunal notes that according to the six (6) GIRs for classification of goods, the primary rule (Rule 1) states; *“that goods should be classified according to Headings; Section and Chapter Notes where the primary rule is not appropriate, goods should be classified according to the principles of Rule 2,3,4 and 5 applied sequentially.”* Additionally, World Customs Organization Explanatory Notes (“the WCO Explanatory Notes”) are applied as an aid in interpreting the EACCET.

47. Following Rule 1 of the GIRs cited above, the Tribunal notes that whereas **Heading 30.04** of Chapter 30 covers the following:

“Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale”

Heading 33.06 of Chapter 33 covers the following:

“Preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages.”

48. In similar fashion, the Tribunal notes that application of the respective subheadings for the two Chapters bring to the fore the divergence between the parties since Subheading under Heading 30.04 is not definitive but a

reading or Note 1(e) to the Chapter reads; “*Preparations of headings 33.03 to 33.07, even if they have therapeutic or prophylactic properties.*” Whereas relevant Subheading under Heading 33.06 covers;

“*...dentifrices...yarn used to clean between the teeth (dental floss) ...*”

49. In order to appreciate the full extent of Note 1(e) it is important that the Tribunal list what is excluded in Chapter 30 i.e. what is excluded by Heading 33.03, 33.04, 33.05, 33.06 and 33.07 which are quoted as follows;

“ *33.03: Perfumes and toilet waters;*

33.04: Beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen or sun tan preparations; manicure or pedicure preparations.

33.05: Preparations for use on the hair.

33.06: Preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages.

33.07: Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties.”

50. The issue for determination before the Tribunal therefore is what is the most appropriate classification of *Andolex® - C AB Mouthwash* in the HS Code nomenclature, could it be that it is under tariff code 3004.90.00 by the Appellant or 3306.90.00 proposed by the Respondent? The Tribunal is guided

by the Court holding in **Puratos Canada Inc.-Vs- Canada (Customs and Revenue)**. 2004 Canlii 57069 (Cacitt) which was as follows:

“The General Rules for the Interpretation of the Harmonized System referred to in section 10 of the Customs Tariff originated in the International Convention on the Harmonized Commodity Description and Coding System. They are structured in cascading form so that, if the classification of the goods cannot be determined in accordance with Rule 1. then regard must be had to Rule 2 and so on. Rule 1 reads as follows:

“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 above legislation requires the Tribunal to follow several steps before arriving at the proper classification of goods on an appeal: first to examine the schedule to see if the goods fit prima facie within the language of a tariff heading; second, to see if there is anything in the chapter or section notes that precludes the goods from classification in the heading; and third, to examine the Classification Opinions and the Explanatory Notes to confirm classification of the goods in the heading.”

51. The Tribunal notes that whereas the Appellant stated that *Andolex® - C AB Mouthwash* was a pharmaceutical therapeutic and prophylactic product whose active ingredient (chlorhexidine gluconate) was an active agent having antiseptic, disinfectant, bacterial or germicidal properties; the Respondent

countered this stating that the product was a '*Medicinal preparations having a subsidiary use as perfumery, cosmetic or toilet preparations.*'

52. Further, the Tribunal notes that although the Appellant averred that *Andolex® - C AB Mouthwash* could only be administered under the directions of a health professional due to its adverse effects such as tooth staining and was not suitable for children under the age of six years; the Respondent was of the opinion that the product was "*Preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages*" whose value or use was as a perfumery, cosmetic or toilet preparation.
53. The Tribunal notes that the Appellant asserted that what gives the product *Andolex® - C AB Mouthwash* its character is the active ingredient chlorhexidine gluconate. Further, that it is administered in dosages of 5.00 ml-17.5ml with express warnings for proper dosage and not to be used for more than 10 continuous days without the prescription of a healthcare professional owing to its adverse effects and was not for use for children under the age of six years. The Tribunal observes that the Respondent neither adduced sample laboratory results nor controvert the Appellant's assertions. Moreover, a casual reading of Heading 33 does not allude to product classification that require the intervention of a health professional whereas Heading 30.04 provides for "*...put up in measured doses...*" the implication of which is that a professional is involved in administering products under this category. The Tribunal reiterates the Court's decision in **Commissioner of Customs and Border Control v Kenya Breweries Limited (Tax Appeal E157 of 2021)[2022] KEHC 14570 (KLR)** where Majanja J held as follows:

“It was incumbent upon the Respondent, under section 56 of the TPA, to demonstrate that the Commissioner’s classification was wrong and that the Concentrate ought to be classified under HS Code 2106.90.20. From the record and evidence, I have highlighted above, I find that the Respondent discharged its burden of proof by demonstrating that the Commissioner was wrong in its classification.”

54. In the circumstances, the Tribunal’s finding is that the Respondent erred in re-classifying *Andolex® - C AB Mouthwash* under tariff code 3306.99.00 instead of the appropriate tariff code of 3004.90.00.

(b) Whether the Respondent’s demand for additional taxes was merited.

55. The Tribunal observes that the demanded principal taxes amounting to Ksh 303,377.00 arose from Respondent’s tariff re-classification of the Appellant’s product *Andolex® - C AB Mouthwash* from tariff code 3004.90.0 to tariff code 3306.99.00. The Tribunal notes that Section 135(1) of the EACCMA provides as follows:

“Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.”

56. Additionally, the Tribunal notes that both Section 235 and 236 of the EACCMA bestows powers upon the Respondent to assess and recover short levied or erroneously refunded taxes within the prescribed statutory timelines

of five years since importation date. Thus, the Respondent's powers to demand for short-levied taxes is couched in law. This was equally affirmed by the Court in **Republic vs Commissioner General & Another Ex-Parte Awal Ltd [2008] eKLR** where it was held as follows:

“In the end, I must conclude that looking at the material placed before me and the submissions tendered by learned counsels...the Respondent had the statutory duty to impose duty according to the tariff classification provided by law under the Customs and Excise Act and under the Harmonized Community Description and Coding system provided by the World Customs Organization explanatory notes in which Kenya is a signatory.”

57. This being the case, the Respondent is expected to exercise these powers as judiciously as possible. In the instant case however, the Tribunal is of the view that since the Respondent erred in the re-classification of the Appellant's imported product, the same cannot stand and the assessed taxes thereof are not due, payable or collectable as doing so would be in contravention of the very principles of taxation. The Tribunal reaffirms the Court holding in **Republic v Kenya Revenue Authority Ex-Parte Bata Shoe Company (Kenya) Limited [2014] eKLR** which was as follows:

“...payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obligated to pay a single coin more than is due to the taxman. The taxman on the other hand is entitled to collect up to the last coin that is due from a taxpayer.”

58. On this issue for determination, the Tribunal’s finding is that the Respondent’s review decision was not grounded in law and was therefore unmerited in the subsisting circumstances.

FINAL DECISION

59. The upshot of the foregoing is that the Appeal herein is meritorious 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 21st July 2023 be and is hereby set aside.
- (c) Each party to bear its own costs.

60. It is so ordered.

DATED and DELIVERED at NAIROBI on this 14th day of June, 2024.

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CHRISTINE A. MUGA
CHAIRPERSON

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DELILIAH K. NGALA
MEMBER

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BONIFACE K. TERER
MEMBER

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SPENCER S. OLOLCHIKE
MEMBER