



Basf East Africa Limited v Commissioner of Customs and Border Control (Tax Appeal E686 of 2024) [2025] KETAT 128 (KLR) (Commercial and Tax) (7 February 2025) (Judgment)

Neutral citation: [2025] KETAT 128 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
COMMERCIAL AND TAX
TAX APPEAL E686 OF 2024
RM MUTUMA, CHAIR, M MAKAU, JEPHTAH
NJAGI, D.K NGALA & T VIKIRU, MEMBERS
FEBRUARY 7, 2025**

BETWEEN

BASF EAST AFRICA LIMITED APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL RESPONDENT

JUDGMENT

Background

1. The Appellant is a limited liability company duly incorporated under the *Companies Act* of the laws of Kenya and is involved in the business of marketing and distribution of a wide range of chemicals manufactured by its parent company a global manufacturer of chemical products.
2. The Respondent is the principal officer appointed under section 13 of the *Kenya Revenue Authority Act* and mandated with the responsibility for the assessment, collection, receipting and accounting for all tax revenue as an agent of the Government of Kenya. The Respondent is also mandated with the responsibility for the administration and enforcement of the statutes set out under the schedule to said Act.
3. The Appellant lodged an entry NO. 23EMKIM40136858 in the Integrated Customs Management System (ICMS) on 27th December 2023 and declared the product as ISO 145/8, 1A1-Isocyanate Component 200 kg in the 2022 EAC/CET Code 3824.99.90, that provides for prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included.
4. Processing of the entries was stopped to confirm the declared HS Code, upon which HS Code EAC/CET 3909.50.00 that provides for amino-resins, phenolic resins, and polyurethanes, in primary forms



was advised. The HS Code was disputed by the Appellant, and the matter was escalated to the Tariff Section for determination.

5. The Respondent's Tariff Section identified the product to be a polyisocyanate traded as one part of a multi-component system or set classified in 2022 EAC/CET HS Code 3909.50.00 and communicated to the Appellant on 25th January 2024.
6. The Appellant dissatisfied lodged an Appeal on 20th February 2024 objecting the Commissioner's decision dated 25th January 2024.
7. The Respondent reviewed the additional information and submissions during a consultative engagement and confirmed the Appellant's product ISO 145/8 1A1 – Isocyanate Component 200 kg to be a polyisocyanate component of a two-component polyurethane form system consisting of a polyol and polyisocyanate traded as one part of multi-component system or set and classified under 2022 EAC/CET HS Code 3909.50.00. The Respondent upheld the Tariff section's decision that classified the product in 2022 EAC/CET HS Code 3909.50.50 on 13th May 2024.
8. Being aggrieved by the Respondent's Review Decision the Appellant dated 13th May 2024, filed the Appeal vide the Notice of Appeal dated and filed 6th June 2024.

The Appeal

9. The Appellant filed its Memorandum of Appeal dated and filed on 20th June 2024 and set out the following grounds of appeal:
 - a. The Respondent erred in fact by failing to recognize that ISO 145/8 Isocyanate component is a preparation of isocyanate namely 4,4'-diphenylmethane diisocyanate (MDI) and 2,4'-diphenylmethane diisocyanate (MDI);
 - b. The Respondent erred in fact by finding that ISO 145/8 Isocyanate component is a polyurethane in primary form;
 - c. The Respondent erred in fact and in law by finding that ISO 145/8 Isocyanate component was entered and presented for customs purposes as a constituent of a set;
 - d. The Respondent erred in law by failing to recognize that the rule on sets under Section vii Note 1 does not apply to products put in sets for further industrial manufacture;
 - e. The Respondent erred in law by reclassifying ISO 145/8 Isocyanate component from Tariff Code 3824.99.90 to Tariff HS Code 3909.50.00 contrary to the provisions of the EAC/CET; and,
 - f. The Respondent erred in law by assessing Customs Duty on ISO 145/8 Isocyanate component under the revised Customs Declaration No. 23EMKIM401368658 at the rate of 10 % amounting to Kshs. 126,599.00.

The Appellant's Case

10. The Appellant has premised its case on the following;
 - a. Statement of Facts dated and filed on 20th June 2024 together with the documents attached thereto;



- b. Witness Statement of Nickson Njenga Ng'ang'a signed & dated on 20th September 2024 and filed on 25th September 2024 which was admitted in evidence at the hearing on 12th November 2024; and,
 - c. Written submissions dated 27th November 2024 and filed on 3rd December 2024.
11. The Appellant stated that on 27th December 2023 it imported into Kenya and self-declared for customs purposes 28 drums of ISO 145/8 Isocyanate Component under customs declaration No. 23MKIM401368658 and entered the same under Tariff HS Code 3824.99.90.
 12. On 27th December 2023, after customs verification exercise, the Respondent revised the product classification from HS Tariff Code 3924.99.90 to HS Code 3909.50.00.
 13. It was further stated that on 25th January 2024 following a review of the product technical data sheet, safety datasheet, and laboratory testing of the product sample, the Respondent issued a Tariff Classification Ruling classifying the product under HS Tariff Code 3909.50.00 on the following basis;
 - i. That the datasheets specified the product to be a preparation of methylene diisocyanate (isocyanic acid, polymethylenepolyphenylene ester (P-MDI) recommended to be used as a polyurethane component;
 - ii. That the data sheets specified the product to be a polyisocyanate component for a two-component polyurethane foam system consisting of polyol and polyisocyanate. The product is used in a wide range of industrial products, including paints, glues and resins;
 - iii. That lab analysis of the sample of the product confirmed it to be a polymeric organic compound with typical isocyanate functional groups;
 - iv. That the product is traded as one part of a two-component polyurethane foam system consisting of polyisocyanate;
 - v. That polyurethanes in primary form of Heading 39.09 are produced by the reaction of polyfunctional isocyanates with polyhydroxy compounds consisting of polyols traded as part of a multi-component system or set; and,
 - vi. That ISO 145/8 Isocyanate component, being a polyisocyanate component of a two-component polyurethane foam system is therefore classified under 2022 EAC/CET HS Code 3909.50.00 (Polyurethanes) guided by rules 1 and 6 of the GIRs.
 14. The Appellant objected to the Respondent's Tariff classification Ruling on 20th February 2024, on the basis that;
 - a. Tariff Code 3909.50.00 applies to polyurethanes (polymers) with an average of at least 5 monomer units and produced by chemical synthesis, iso 145/8 does not meet this description and is therefore not a polymer.
 - b. Iso 145/8 is a mixture of two monomeric products of Chapter 29 of 2022 EAC/CET namely: 4,4' – diphenylmethane diisocyanate (MDI) and 2,4'-diphenylmethane diisocyanate (MDI) and the appropriate classification is therefore Tariff Code 3824.99.90.
 - c. The rule on sets under Section VI, Note 3 and Section V II note 1 was not applicable in this case on the basis that;
 - i. ISO 145/8 was presented and entered singly, not in a set with a polyol component;



- ii. The rule applies to goods set up for final use, whereas ISO 145/8 is set up for industrial use through further manufacturing to produce desired products.
15. The Appellant and the Respondent on the 2nd April 2024 held a consultative meeting whereby the Appellant highlighted the product specifications, material composition and the basis for classifying the product under Tariff Code 3824.99.90.
16. The Respondent issued its Review Decision on 13th May 2024 and upheld the Tariff Classification Ruling dated 25th January 2024. The Appellant appealed the Review Decision on 6th June 2024 grounded on the product description, and the Tariff classification of ISO 145/8 under the EAC/CET 2022.
17. The Appellant stated that ISO 145/8 is a brand name for a preparation of Isocyanate component manufactured by the BASF Group of Companies, and marketed and sold in Kenya by the Appellant. The product is a brown liquid sold in red steel drums each weighing 200kgs.
18. It stated that the chemical composition of the product is a solvent free mixture of two monomeric organic compounds namely: 4,4'-diphenylmethane (MDI) and 2,4'- diphenylmethane (MDI). It was also stated that Isocyanates are organic chemicals that contain at least one functional reactive group abbreviated NCO.
19. It was also stated that the product is applied the industrial manufacture of a wide range of polyurethane products including high resilience (HR) foams, viscoelastic (memory foams) and molded foams: typically, mattresses, pillows, car seats and footwear soles. The same is achieved through a chemical reaction (rearrangement of polymerization) of the Isocyanate component reactive group NCO with polyhydroxy (OH) compounds consisting of polyols.
20. The Appellant stated that it is trite law that under the EAC/CET, goods are classified according to the 6 General Interpretation Rules for the classification of goods. The Primary Rule (Rule 1) is that goods should be classified according Headings and relative Section and Chapter Notes. Where the Primary Rule is not appropriate, goods should be classified according to the principles of Rules 2,3,4 and 5 applied sequentially. Rule 6 applies a similar approach to classification at the subheading level with the condition that only subheading is level are comparable. Additionally, World Customs Organization Explanatory Notes (WCO Explanatory Notes) are applied in interpreting the EAC/CET.
21. It was stated that considering the product description, a reading of Heading 38.24 and 39.09; Section VI Note 3 and Section VII Note 1; Chapter 39 Notes 3 (c) & 6; the General Explanatory to Chapter 38; and the Explanatory Notes thereto support a classification of the product under Tariff Code 3824.99.90 rather than Tariff Code 3909.50.00.
22. The Appellant further averred that ISO 145/8 Isocyanate component is a preparation of 4,4'-diphenylmethane diisocyanate (MDI) and 2,4'-diphenylmethane diisocyanate (MDI). In the circumstances, the appropriate classification is Chapter 38 on the basis of the General Explanatory Note to Chapter 38, which designates Chapter 38 as a catch all classification for chemical products that are not separate chemically defined elements or compounds, as follows;

“This chapter covers a large number of chemical and related products. It does not cover separate chemically defined elements or compounds (usually classified in chapter 28 or 29), with the exception of the following ...”



23. It was further stated that because of the product description and overt reading of the EAC/CET, “Heading 38.24” is the appropriate classification for ISO 145/8 on the basis that the product is not described anywhere else in the nomenclature. The heading reads;
- “Prepare binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included.”
24. The Appellant stated that Heading 39.09; “Amino-resins, phenolic resins and polyurethanes, in primary forms,” is not an appropriate heading classification for ISO 145/8 for three reasons: First, Heading 39.09 applies to synthetic polymers produced by chemical synthesis with an average of at least 5 monomer units, secondly, the Heading applies to polymers in primary form i.e., liquid and pastes for casting and extrusion; powder, granules and flakes for moulding ;and blocks of irregular shape, lumps and similar bulk forms. Lastly, Heading 39.09 Explanatory Note expressly states that the goods must have polyurethane bonds either as a result of reaction of polyfunctional isocyanates with polyhydroxy compounds or of mixing polyurethane and unreacted polyfunctional diisocyanate. ISO 145/8 is a mixture of unreacted (non-polymerized) monomeric compounds and does not contain any polyurethane bonds. It is therefore excluded from Heading 39.09.
25. It was contended that the facts of this case do not support the classification of ISO 145/8 under Tariff code 3909.50.00 upon the interpretation of Section VII Note 1 (identical to Section VII Note 3), as under these Section Notes, goods only qualify to be classified in the same tariff as the final product if the constituent parts are presented together, are used together without further repackaging or manufacture, and are complimentary to each other. It was however asserted that ISO 145/8 was presented singly rather than as the constituent of a set and is subject to further manufacturing process by reacting with polyols to form polyurethanes. It does not therefore qualify to be classified under Tariff code 3909.50.00.
26. Section vii Note 1 reads;
- “Goods put up in sets consisting of two or more separate constituents, some or all of which fall in this section and are intended to be mixed together to obtain a product of section vi or vii are to be classified in the heading appropriate to that product, provided that the constituents are:
- a. Having regard to the manner in which they are put up, clearly identifiable as being intended to be used together without first being repacked;
 - b. Presented together; and
 - c. Identifiable, whether by their nature or relative proportions in which they are present, as being complementary one to another.”
27. It was also stated that the Explanatory Note to Section vii Note 1 further elaborates that the rule on constituent sets is not applicable for industrial goods, in which case the constituents should be classified separately.



28. The Appellant stated that the Explanatory Note to General Rules of Interpretation 3 (b) further clarifies that the rule on mixtures does not apply to goods put up in sets for industrial manufacture:

“This Rule does not apply to goods consisting of separately packed constituents put up together, whether or not in a common packing, in fixed proportions for the industrial manufacture of, for example, beverages.”

29. The Appellant presented one witness, Nickson Njenga Ng’ang’a, an industrial chemist, during the hearing on 12th November 2024 who gave his evidence in chief, cross-examined and re-examined. The witness testified that ISO 145/8 is a mixture of two monomeric organic compounds namely; 4,4’-diphenylmethane diisocyanate (“Iupranate M”) and 2,4”-diphenylmethane diisocyanate (“Iupranate M1”). He testified that although ISO 145/8 Isocyanate is often sold together with polyhydroxy /(OH) compounds depending on customer orders, the consignment presented for customs declaration in the instant case was exclusively made up of ISO 145/8 Isocyanate.

30. In its submissions, which is largely a rehash of the averments, the Appellant reiterated that its product ISO 145/8 in its nature and composition is a mixture of monomeric organic compounds 4,4’-Lupranate M and 2,4’-Lupranate MI.

31. It was submitted that the Respondent did not avail the alleged Laboratory tests and analysis to prove the nature and contents of ISO 145/8. The Respondent therefore did not adduce any evidence to support its assertions that that the product is a polymeric organic compound and or that the product contains polyurethane linkages and in the circumstances the averments of the Respondent lacked evidentiary weight.

32. The Appellant cited the case of Sai Pharmaceuticals Ltd vs. Commissioner of Customs & Border Control [2023] KETAT 976 (KLR), where the Tribunal stated;

“...It is noteworthy that the laboratory analysis report was neither shared with the Appellant nor adduced before this Tribunal as the Respondent’s witness testified that the analysis and its report was confidential and could not even be shared with the court. This conduct draws an adverse inference on the part of the Respondent from the Tribunal.”

33. The Appellant also cited the case of Kaish Mering Plastic Company Ltd vs. Commissioner Customs and Border Control [2024] KETAT 569 (KLR), where the Tribunal stated;

“The Tribunal notes that the Appellant had raised an issue with the fact that the Respondent’s laboratory report was not availed to it... the determination of the applicable classification is dependent on the laboratory analysis. Whereas the Respondent was entitled in law to undertake the laboratory analysis in order to determine the true nature of the chemical composition of the product and to determine the correct classification of the product based on such results. The Tribunal finds that since the Respondent did not provide its detailed laboratory analysis report as ordered by the Tribunal, it lost the opportunity to rebut the evidence adduced by the Appellant the Respondent’s decision to reclassify was not justified.”

34. The Appellant further submitted that the Respondent’s basis for re-classifying the product from HS Code 3824.99.90 to HS Code 3909.50.00 is ambiguous. It stated that the Respondent states that ISO 145/8 is a polymeric organic compound i.e. poly (methylene phenyl isocyanate) (crude MDI, Polymeric MDI) which is classified under HS Code 3909.31.00. It also stated that the Respondent also



states that ISO 145/8 is a polyurethane which is classified under HS Code 3909.50.50. It was submitted that it is trite law that an item cannot be classified under two subheadings.

35. The Appellant also submitted that the Respondent misconstrued the product technical sheets provided by the Appellant by stating as follows at paragraph 12 (Ground 1) of the Respondent's Statement of Facts;
- “According to the technical data sheets submitted, the product is a polymer (99%) with isocyanate as the repeating unit. The product is not mixture of 4,4'-diphenylmethane diisocyanate (MDI) and 2,4'-diphenylmethane diisocyanate (MDI).”
36. The Appellant submitted that the correct construction of the technical sheets is that the product is comprised of not less than 10% and not more than 99 % weight in weight of the two monomeric compounds.
37. The Appellant also submitted that it has been reiterated by the Tribunal that GIRs are the substantive rules for classification of goods under the EAC/CET in Phillips Therapeutics Ltd vs. Commissioner of Customs and Border Control.
38. It further submitted that to arrive at a proper classification of ISO 145/8 under the EAC/CET, it is necessary to conduct a three-step analysis of the language of the Headings; any exclusions under the Section and Chapter Notes; and Confirmations under the Explanatory Notes, as hereunder; What heading languages does ISO 145/8 fit? Whether there are any Exclusions under Section and Chapter Notes that preclude ISO 145/8 from being classified under Headings 38.24 or 39.09? Whether classification opinions and Explanatory Notes confirm classification of ISO 145/8 in Headings 38.24 or 39.09?
39. It was a submission of the Appellant that considering its uncontroverted evidence on the product description of ISO 145/8, a proper reading of Headings 38.24 and 39.09, Section VI Note 3 and Section VII Note 1; Notes 3 (c) & 6 to Chapter 39; the General Explanatory to Chapter 38; and the Explanatory Notes thereto support a classification of the product under Tariff Code 3824.99.90 rather than Tariff Code 3909.50.00. Therefore, it submitted that the Respondent does not have cogent basis for reclassifying ISO 145/8.
40. The Appellant submitted that the Respondent erred in its description of ISO 145/8 as well as the classification of the product under the EAC/CET and urged the Tribunal to find the appeal meritorious on grounds that;
- i. Based on the uncontroverted evidence tendered by the Appellant to the Tribunal, the Respondent erred in its description of ISO 145/8 Isocyanate component;
 - ii. The Respondent erred in asserting that ISO 145/8 was presented and entered for customs purposes as a constituent of a set;
 - iii. The Respondent erred in asserting that the rule of sets applies to goods entered as raw materials for industrial manufacture;
 - iv. The Respondent erred by reclassifying ISO 145/8 Isocyanate component from Tariff Code 3824.99.90 to Tariff Code 3909.50.00 contrary to the provisions of EAC/CET; and,
 - v. The Respondent erred in assessing additional customs duty on revised customs Declaration No. 23EMKIM401368658 at the rate of 10% amounting to Kshs 126,599.00.



Appellant's Prayers

41. By reason of the foregoing, the Appellant prayed the Tribunal for orders;
 - a. A declaration to issue that ISO 145/8 Isocyanate does not meet the requirements of Section VII Note 1 to be considered a component of a set;
 - b. A declaration to issue that ISO 145/8 Isocyanate be and is classifiable under Tariff Code 3824.99.90 of the EAC/CET;
 - c. That the Respondent's reclassification of ISO 145/8 Isocyanate component from Tariff Code 3824.99.90 to 3909.50.00 of the EAC/CET is hereby set aside;
 - d. That the demand for customs duty of Kshs. 126,599.00 is hereby set aside;
 - e. The costs of and incidental to this Appeal be awarded to the Appellant; and,
 - f. Such other, further, incidental, alternative and or consequential orders or reliefs as the Tribunal may deem just and expedient.

The Respondent's Case

42. The Respondent's case is premised on its Statement of Facts dated 19th July 2024 and filed on 25th July 2024.
43. The Respondent stated that the Appellant lodged an entry in the Integrated Customs Management System (ICMS) being entry number 23EMKIM40146858 on 27th December 2023 and declared the product as ISO 145/8 1A1-Isocyanate component 200 kg in the 2022 EAC/CET HS Code 3824.99.90 that provides for prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included.
44. It stated that the processing of the entry was stopped at the release station to confirm the declared HS Code, upon which EAC/CET 3909.50.00 that provides for amino-resins, phenolic-resins and polyurethanes, in primary forms was advised. This was disputed by the Appellant and the matter was escalated to the Tariff Section for determination.
45. The Respondent's Tariff Section upon review, the Appellant's product was identified to be a polyisocyanate component of a two-component polyurethane form system consisting of polyol and polyisocyanate traded as one part of a multi-component system or set classified in 2022 EAC/CET HS Code 3909.50.00. The Tariff Section issued this tariff classification decision on 25th January 2024.
46. The Appellant lodged an application for review on 24th February 2023, and upon review, the product ISO 145/8 1A1 Isocyanate component 200kg, was confirmed to be a polyisocyanate component of a two-component polyurethane form system consisting of polyol and polyisocyanate traded as one part of a multi-component system or set classified in 2022 EAC/CET HS Code 3909.50.00, and therefore upheld the Tariff section's classification on 13th May 2024.
47. The Respondent refuted the Appellant's contentions and responded to the issues raised as hereunder;
 - i. That Chapter 39 covers the classification of plastics and articles thereof;
 - ii. Note 6 to Chapter 39 provides that in Headings 39.01 to 39.14, the expression "primary forms" applies only to the following forms; Liquids and pastes, including dispersions



(emulsions and suspensions) and solutions; Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.

- iii. Heading 39.09 specifically covers amino-resins, phenolic resins and polyurethanes, in primary forms.
 - iv. The heading includes the classification of poly (methylene phenyl isocyanate) (often referred to as “crude MDI”, “polymeric MDI” or “poly (diphenylmethane diisocyanate) is an opaque, dark brown to clear, light brown liquid and is synthesized by reaction of aniline and formaldehyde to form a mixture of (methylene phenylamine) oligomers which is subsequently reacted with phosgene and heat to form free isocyanate functions. The product is chemically modified polymer of aniline and formaldehyde (a chemically modified amino-resin containing pure MDI and MDI oligomer mixtures);
 - v. According to the safety data sheet presented, the product ISO 145/8 is identified as isocyanate “component” and its recommended use is described as polyurethane component, denoting that this product is to be used with another or other products;
 - vi. The certificate of analysis presented by the Appellant, further confirms that the product imported is identified as ISO 145/8 Isocyanate component in 200 kgs steel drums. The contents of the product is given as isocyanate component 32.4 % m/m;
 - vii. The two technical documents confirm that the product in question is actually a component; and,
 - viii. From the laboratory tests conducted, the product was found to be a polymeric organic compound with typical isocyanate groups.
48. The Respondent contended that according to the technical data sheet submitted, the product is a polymer (99%) with isocyanate as the repeating unit. The product is not a mixture of 4,4'-diphenylmethane diisocyanate (MDI) and 2,4'-diphenylmethane diisocyanate (MDI). The monomers in the polymer formed are the diphenyl methane diisocyanate monomers viz two isomers.
49. It stated that based on the laboratory tests conducted, the isocyanate component being a polymer was found to be urethane linkage indicating the presence of polyurethane.
50. The Appellant further stated that the product ISO 145/8 Isocyanate component is specified to be a component of polyurethane system intended to be used together with polyol component to produce polyurethane.
51. It also stated that according to the Explanatory Notes to Heading 39.09, polyurethanes covered in the terms of the heading includes products that are often traded as one part of a multi-component system or set.
52. The Respondent also averred that it enforces the provisions of the Harmonized Systems Convention on Commodity Description and Coding System (HS), and as per Article 2 (6) of *the Constitution* of Kenya, 2010, any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution and therefore the Commissioner acted accordingly.
53. The Respondent also reiterated that it is mandated to give correct tariff rulings, and the product ISO 145/8 Isocyanate component polyisocyanate component is part of a two-component polyurethane form system consisting of polyol and polyisocyanate traded as one part of a multi-component system or set and properly classified in 2022 EAC/CET HS Code 3909.50.00.



Respondent's Prayers

54. By reason of the foregoing, the Respondent prayed that;
- a. Dismiss the Appeal with costs; and,
 - b. Uphold the Review Decision dated 13th May 2024.

Issues For Determination

55. The Tribunal having carefully considered the pleadings filed, evidence adduced and submissions made by the parties, is of the view that the Appeal crystallizes into one issue for determination as follows;

Whether the Respondent erred in reclassifying the Appellant's imported product ISO 145/8 from HS Code 3824.99.90 to HS Code 3909.50.00 of the 2022 EAC/CET.

Analysis And Determination

56. The Tribunal having established the sole issue for determination, proceeds to analyze and determine the same as hereunder;
57. The thrust of the issues underlying the classification dispute herein is faceted on the twin substratum of whether the Respondent erred in its description of the nature and composition of the Appellant's product ISO 145/8, and consequentially, whether the Respondent erred in reclassifying the said product from HS Code 3824.99.00 to Hs Code 3909.50.00.
58. It has been submitted that the manner of importation, and the use/application of the product is not disputed, and the import was made and declared in 28 drums of ISO 145/8 and was presented without any other product. It was averred that the product is sold to industrial customers for further reaction with polyols to produce the desired polyurethane products.
59. The Appellant through documentary, oral and physical evidence adduced evidence of the nature and composition of the product ISO 245/8. Its witness, one Nickson Ng'ang'a testified that ISO 145/8 is a mixture of two monomeric organic compounds namely; 4,4'-diphenylmethane diisocyanate (Lupranate M), and 4,2'-diphenylmethane diisocyanate (Lupranate MI). The Appellant averred that its product is therefore is a mixture comprised of not less than 10% and not more than 99 % in weight of the two monomeric compounds.
60. The Appellant has therefore asserted that the Respondent erred in failing to recognize that ISO 145/8 Isocyanate component is a preparation of two isocyanates namely, 4,4'-diphenylmethane diisocyanate (MDI) and 2,4'-diphenylmethane diisocyanate (MDI), and, in concluding that the product ISO 145/8 Isocyanate component is a polyurethane in primary form. It also contended that the Respondent consequently erred in finding that ISO 145/8 Isocyanate component was entered and presented for customs purposes as a constituent of a set, and, failing to recognize that the rule on sets under Section VII Note 1 does not apply to products put in sets for further industrial manufacture, thus making an erroneous reclassification decision.
61. The Respondent on the other hand, the Respondent in its reclassification decision stated;
- “ISO 145/8 Isocyanate component, is considered to be a polyisocyanate component of a two-component polyurethane form system consisting of polyol and polyisocyanate, traded



as one part of a multi-component system or set, classified in 2022 EAC/CET HS Code 3909.50.00 as guided by GIRs 1 & 6.”

62. The Respondent submitted that according to the safety data sheet presented, the product ISO 145/8 is identified as isocyanate “component” and its recommended use is described as polyurethane component. This denotes that this product is to be used with another or other products.
63. The Respondent also stated that from the laboratory tests conducted, the product was found to be a polymeric organic compound with typical isocyanate functional groups.
64. The Respondent further submitted that the Respondent’s product is a 99% polymer with isocyanate as the repeating unit and not a mixture of 4,4’- MDI and 4,2’- MDI. It stated that the product ISO 145/8 Isocyanate component is specified to a component of polyurethane system intended to be used together with polyol component to produce polyurethane.
65. The Respondent submitted that according to the Explanatory Notes to heading 39.09, polyurethanes covered in the terms of the heading includes products that are often traded as one part of a multi-component system or set.
66. The Respondent further submitted that the product ISO 145/8 Isocyanate component polyisocyanate component is part of a two-component polyurethane form system consisting of polyol and polyisocyanate traded as one part of a multi-component system or set and properly classified in 2022 EAC/CET HS Code 3909.50.00.
67. It is pertinent that the Respondent attributes its assertions and conclusions on some laboratory tests and analysis of the product sample. However, it is noteworthy that the Respondent did not avail the said laboratory report to the Appellant nor adduce the same to the Tribunal to prove the nature and composition of the product ISO 145/8.
68. In *Sai Pharmaceuticals Ltd vs. Commissioner of Customs & Border Control* [2023] KETAT 976, this Tribunal stated;

“...it is noteworthy that the laboratory analysis was neither shared with the Appellant nor adduced before this Tribunal as the Respondent’s witness testified the analysis and its report was confidential and could not even be shared with the court. This conduct draws an adverse inference on the part of the Respondent from the Tribunal.”
69. In the instant case, the Respondent did not present any witness to fortify the averments made in its statement of facts with solid evidence to corroborate the same. That being the case the same remain as mere averments. The Respondent therefore did not adduce any evidence to support the averments that the product is a polymeric organic compound and/or that the product contains polyurethane linkages.
70. In view of the foregoing, the Tribunal is therefore satisfied that the evidence adduced by the Appellant as regards the nature and composition of the product remains unrebutted.
71. The basis for determination of the correct classification is that the product ISO 145/8 fits under Heading 38.24 on the basis that the product is a mixture of two monomeric organic products i.e. 4,4’-diphenylmethane diisocyanate (MDI) and 2,4’-diphenylmethane diisocyanate (MDI), which mixture is not classified elsewhere in the HS NOMECLATURE. The sub-heading 3824.99.90: Other, would be appropriate as the product ISO 145/8 is not specifically defined under any other subheading of Heading 34.24, as the product is not a polyurethane.



72. The Tribunal also associates with the submission that, the Explanatory Note to the General Rule of Interpretation 3 (b) clarifies the rule on sets and constituent parts does not apply to goods put up together for industrial manufacture;

“This rule does not apply to goods consisting of separately packed constituents put up together whether or not in a common packing, in fixed proportions for the industrial manufacture of, for example, beverages.”

73. In view of the above, the Tribunal is satisfied that the rule on constituent sets is not applicable to industrial raw materials such ISO 145/8, in which case the constituents ought to be classified separately. Accordingly, the Respondent ought not to have applied on the Appellant’s product a classification for goods presented in sets, but rather ought to have applied a classification for goods presented separately.

74. Flowing from the foregoing, the Tribunal finds and holds that the Respondent erred in reclassifying the Appellant’s imported product ISO 145/8 from HS Code 3824.99.90 to HS Code 3909.50.00 of the 2022 EAC/CET.

75. The upshot of the foregoing is that the Appellant’s Appeal is merited and hereby succeeds.

Final Determination

76. The Appellant’s Appeal having succeeded, the Tribunal makes the following orders;

- a. The Appellant’s Appeal be and is hereby allowed;
- b. The Respondent’s Review Decision dated 13th May 2024 be and is hereby set aside; and,
- c. The parties to bear their own costs.

77. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2025

ROBERT M. MUTUMA - CHAIRPERSON

MUTISO MAKAU - MEMBER

JEPHTHAH NJAGI - MEMBER

DELILAH K. NGALA - MEMBER

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