Laborex Kenya Limited v Commissioner of Customs and Border Control (Tax Appeal E570 of 2023) [2024] KETAT 1582 (KLR) (Commercial and Tax) (11 October 2024) (Judgment)

Neutral citation: [2024] KETAT 1582 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

COMMERCIAL AND TAX

TAX APPEAL E570 OF 2023

E.N WAFULA, CHAIR, G OGAGA, JEPHTHAH NJAGI & E NG'ANG'A, MEMBERS

OCTOBER 11, 2024

BETWEEN

LABOREX KENYA LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... RESPONDENT

JUDGMENT

Background

1. The Appellant is a company incorporated in Kenya and its principal activity is importation, distribution, and marketing of pharmaceuticals in East Africa.

2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, Cap 469 of the laws of Kenya. The Authority is an agency established for the purposes of assessing, collecting and accounting for tax revenues.

3. The Appellant imported Clostridium Botulinum Toxin Type A (BOTOX) and declared it under Tariff Code 3004.90.00 and the Respondent reclassified the BOTOX under Tariff 3304.99.00 and issued a Ruling on the same dated 21st June 2023.

4. The Appellant objected to the classification in a letter dated 4th July 2023 and on 24th July 2023 the Respondent issued its review decision upholding the tariff reclassification.

5. The Appellant aggrieved by the decision lodged its Notice of Appeal dated and filed on 7th September 2023.

The Appeal

6. The Appeal is premised on the Memorandum of Appeal dated and filed on 7th September 2023 setting out the grounds hereunder:

    a. The product Botox imported by the Appellant is a medicinal product that is correctly classifiable in tariff code 3002.90.00.

    b. The Respondent erred in fact by implying that BOTOX is a beauty or make-up preparation for the care of the skin having subsidiary therapeutic or prophylactic properties.

    c. The Respondent erred in fact by misinterpreting the usage of GIRS 1 and 6 to reclassify BOTOX in tariff code 3304.99.00.

    d. There are Binding Tariff Information (BTI) Rulings issued by the Respondent, as well as other WCO jurisdictions classifying Bo under Chapter 30.

The Appellant's Case

7. The Appellant's case was premised on:

    a. The Statement of Facts dated and filed on 7th September 2023.

    b. The witness statements of Tony Chammah and Dr. Manaal Bajaber dated 11th March, 2024 and 12th March, 2024, respectively, that were both filed on 14th March, 2024 and admitted in evidence on oath on the 16th May 2024 with witnesses cross-examined.

    c. Written Submissions dated 30th May 2024.

8. The Appellant averred that Botox is used as a prescription medicine principally created and marketed for the treatment of neurological, bladder, and skin disorders, with its therapeutic properties being harnessed for subsidiary cosmetic uses. That it is correctly classifiable under tariff code 3002.90.00.

9. That it is presented as 50U, 100U, or 200U vials and in terms of the composition, each vial contains botulinum toxin type A (active ingredient) and human albumin and sodium chloride as the other ingredients.

10. That according to the manufacturer's product information and the patient information leaflet BOTOX (Botulinum toxin type A) is a sterile, vacuum-dried form of purified Botulinum toxin type A, produced from a culture of Clostridium botulinum.

11. The Appellant submitted that BOTOX is a muscle relaxant used to treat several conditions within the body. It is injected into either the muscles, the bladder wall, or deep into the skin thereby reducing excessive contractions of these muscles and producing a localised chemical denervation effect that results in temporary muscle paralysis.

12. That it is a prescription medicine indicated for the treatment and/or management of neurologic disorders, bladder disorders, and skin and skin appendage disorders.

13. That it is a prescription medicine that should be administered only by a suitably qualified and registered medical practitioner. It is in the form of a white vacuum-dried powder. Prior to injection, the powder is dissolved in a sterile, unpreserved saline solution. It is for single patient use only and once opened and reconstituted in the vial, the medicine is to be used within twenty-four (24) hours since the product and diluent contain no preservative.

14. The Appellant submitted that the most appropriate tariff code for the product is 3002.90.00 which covers:

> " other Human blood; animal blood prepared for therapeutic, prophylactic or diagnostic uses; antisera and other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes; vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products; cell cultures, whether or not modified."

15. That tariff classification of goods is guided by the EAC Common External Tariff (EACCET) 2022 which contains a set of six (6) principles known as General Interpretation Rules (GIRS) to be applied in the classification sequentially.

16. That GIR 1 provides that the titles of Sections, Chapters and sub-Chapters are provided for ease of reference only and 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 provisions of Rules 2,3, 4, and 5.

17. That the provisions of GIR 1 therefore imply that for purposes of determining classification of goods, the terms of headings and any relative Section or Chapter Notes are paramount and are the first consideration.

18. That BOTOX is a medical product that contains the botulinun toxin type A and human albumin and the active ingredient in the product is botulinum toxin type A, a lethal połypeptide and protein neurotoxin. That the other ingredient is human albumin, a blood fraction obtained from the plasma of human blood, which is used to stabilize the botulinum toxin at high dilutions. That therefore BOTOX is adequately covered by the terms of Heading 3002, and is classifiable under the Heading.

19. That in determining the most appropriate classification at the subheading level, the Appellant relied on GIR 6 which states:

> " For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply unless the context otherwise requires.

20. That the Appellant also relied on the World Customs Organization (WCO) Harmonized System (HS) Explanatory Notes (ENs) which constitute the official interpretation of the Nomenclature at the international level and argued that the same are an indispensable complement to the HS.

21. That Explanatory Note (C) (1) to Heading 3002 provides that the Heading covers antisera and other blood fractions, whether or not modified or obtained by means of biotechnological processes and in particular the Heading includes blood albumin (e.g., human albumin obtained by fractionating the plasma of whole human blood), prepared for therapeutic or prophalactic uses. That Explanatory (C) (1) to Heading 3302 provides:

C. Antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes. These products include:

> " Antisera and other blood fractions, whether or not modified or obtained by means of biotechnological processes. Sera are the fluid fractions separated from

> blood after clotting. The heading covers, inter alia, the following products derived from blood (including vascular endothelial cells): "normal" sera, human normal immunoglobulin, blood fractions and truncated variants (parts) thereof with enzymatic properties/activity, plasma, thrombin, fibrinogen, fibrin and other blood coagulation factors, thrombomodulin, blood globulins, serum globulins, and haemoglobin. This group also includes modified thrombomnodulins and modified haemoglobins obtained by means of biotechnological processes, e.g, sothrombomodulin alfa (INN) and thrombomodulin alfa (INN), as well as cross-linked haemoglobins such as hemoglobin crosfumaril (NN), hemoglobin glutamer (INN) and hemoglobin raffimer (INN).
>
> The heading further includes blood albumin (e.g., human albumin obtained by fractionating the plasma of whole human blood), prepared for therapeutic or prophylactic uses. That botox contains human albumin as an ingredient.

22. That Explanatory Note (D) (2) provides that Heading 3002 also covers toxins (poisons), toxoids, crypto-toxins, pro-toxins e.g. topsalysin (INN) and anti-toxins. The toxins of this Heading are peptides or proteins. That Botulinum toxin type A, the active ingredient in BOTOX is a polypeptide and a protein toxin that has therapeutic applications.

23. That Explanatory Note (D) (2) to Heading 3002 provides:

    D. Vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products. These products include:

    > Toxins (poisons), toxoids, crypto-toxins, protoxins (e.g. topsalysin (INN) and antitoxins. Toxins of this heading are peptides or proteins. These toxins do not include alkaloids (heading 2939).

24. That the active ingredient in BOTOX is botulinum toxin type A, a lethal polypeptide and protein neurotoxin that has been developed for therapeutic applications.

25. That the ENs further provide that the products of Heading 3002 remain classified there whether or not in measured doses or put up for retail sale and whether in bulk or in small packings. That botox is a product put up in measured doses, presented as 50 U, 100 U. or 200 U vials.

26. That the active ingredient in BOTOX is the botulinum toxin type A which is a protein toxin prepared for therapeutic uses. Toxins are classifiable under Heading 3002. That the product also contains human albumin which acts as a stabilizer for the toxin during dilution. That human albumin prepared for therapeutic purposes is also classifiable under Heading 3002.That the subheading that encompasses all the ingredients would be 3002.90.00. That this is the most appropriate tariff code for the product BOTOX.

27. The Appellant submitted that it sought a review of tariff classification from 3004.90.00 to 3002.90.00 because the terms of Heading 3004 expressly exclude products of heading 3002.That the essential character of BOTOX is its active ingredient botulin toxin type A which is a toxin classifiable under Heading 3002.

28. That the Respondent erred in fact in the application of GIRs 1 & 6 to classify BOTOX under Tariff Code 3304.99.00. That in upholding the tariff review of BOTOX to HS Code 3304.99.00, the Commissioner reportedly relied on GIRs 1& 6. That on GIR 1, the Respondent relied on a flawed interpretation of Note 1(e) to Chapter 30, terms of Heading 3304 and the HS Explanatory Notes to Hheading 3304.

29. That Note 1 (e) to Chapter 30 holds that Chapter 30 does not cover "preparations of headings 3303 to 3307, even if they have therapeutic or prophylactic properties". That for context, Note 1(e) is to be considered together with the terms of heading 3304.

30. That the terms of Heading 3304 provide for "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.

31. That the Commissioner's interpretation is that BOTOX is primarily a beauty or make-up preparation and preparation for the care of the skin, albeit with subsidiary medicinal uses. That this is based on a flawed premise. That the inverse is true that BOTOX İs a medicinal preparation with primary therapeutic or prophylactic properties, albeit with subsidiary cosmetic uses. It is a protein toxin whose principal use is as a medicine.

32. That based on the foregoing, Note 1(e) to Chapter 30 is not applicable to BOTOX since it is not a beauty or make-up preparation, but rather a medicinal preparation, whose medical properties also find subsidiary cosmetic applications.

33. That at the same time, the terms of Heading 3304 do not in any way describe the product as the heading covers beauty or make-up preparations and preparations for the care of the skin (other than medicaments). That in addition, the terms of Heading expressly exclude medicaments from Heading 3304.

34. That Note 3 to Chapter 33 clarifies that headings 3303 to 3307 apply, inter alia, to products whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use.

35. That further the General Explanatory Note to Chapter 33 holds that products of Headings 3303 to 3307 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.

36. That the General Explanatory Note to Chapter 33 provides:

> " Headings 33.03 to 33.07 include products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use. 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 (see Note 1 (e) to Chapter 30). However, prepared room deodorisers remain classified in heading 33.07 even if they have disinfectant properties of more than a subsidiary nature."

37. That the test here is whether the product's use for either medical or cosmetic purposes is the primary or subsidiary function. That if the primary function is medical, then it is classifiable under Chapter 30 even if it has a subsidiary cosmetic application. That botox's principal function is therapeutic as highlighted above and, in the manufacturer's technical data sheet and its cosmetic uses are subsidiary, and that they too are a form of prescribed medical treatment that must be administered by a registered medical practitioner. That for this reason, BOTOX is not classifiable under Chapter 33.

38. That this is further implied and emphasized by EN (b) to Chapter 33 which provides that the Chapter does not cover medicinal preparations having a subsidiary use as perfumery, cosmetic or toilet preparations. That the implication of this note is that medicinal preparations that have subsidiary cosmetic applications are excluded from Chapter 33 and are to be classified under Chapter 30.

Further General explanatory Note to Chapter 33. This Chapter does not cover:

a. Petroleum jelly, other than that suitable for use for the care of the skin put up in packings of a kind sold by retail for such use (heading 27.12).

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

c. Gel preparations designed to be used in human or veterinary medicine as a lubricant for parts of the body for surgical operations or physical examinations or as a coupling agent between the body and medical instruments (heading 30.06).

39. That the Commissioner also relied on Explanatory Note (A) (3) to Heading 3304 which states in pertinent part: (3) Other beauty or make-up preparations and preparations for the care of the skin (other than medicaments), such as : face powders ...etc.

40. That in the aforesaid provision there is particular emphasis on injectable intracutaneous gels for wrinkle elimination and lip enhancement (including those containing hyaluronic acid), with the Respondent using the statement as a justification to re-classify BOTOX under Heading 3304. That this too is flawed on the ground that botox is not a gel.

41. The Appellant also argued that the preparations implied by the statement in the paragraph above are injectable dermal fillers which are cosmetic preparations that enhance appearance. That botox is different from the said preparations in that it capitalizes on its medical application in its treatment of weak facial muscles.

42. The Appellant also argued that KRA in its Tariff Ruling dated 22nd August 2013 ruled that BOTOX is a medicinal preparation put up in measured doses for retail sale that is classifiable under HS Code 3004.90.00 based on the terms of Heading 3004.

43. The Appellant also leaned on the United States Customs & Border Protection (CBP) Ruling HQ227295 (06 August 2014) Revoking earlier CBP New York Ruling N209720 (09 April 2012) on BOTOX and determined that under authority of GIR 1 via Note 1 to Chapter 30, HTSUS, and Explanatory Notes (ENs) to Headings 3002 and 3304, BOTOX Cosmetic was a toxin that was properly classifiable under subheading 3002.90.51, HTSUS.

44. The Appellant also relied on the BTI Ruling no. TR340000230047 issued by lstanbul Customs and Foreign Trade Regional Directorate which stated while relying on GIRs 1 and 6,ENs to heading 3002 and a laboratory analysis report classified the product under heading 3002 effective 16th January 2023.

45. The Appellant in support of its case relied on the holding in Keroche Industries Ltd vs KRA & 5 Others [2007] eKLR.

Appellant's prayers

46. The Appellant prayed for the Tribunal to:

a. Find that the product BOTOX imported by the Appellant is a medicinal product that is correctly classifiable under tariff code 3002.90.00

b. Set aside the Commissioner's tariff decision referenced KRA/CBC/BIA/THQ/APPEAL/105/07/2023 and dated 24th July 2023 re-classifying BOTOX in tariff code 3304.99.00.

c. Sets aside the extra taxes amounting to ksh.3,141,734.00 assessed on customs entry 23NBOIM406395031 based on the reclassification of BOTOX in tariff code 3304.99.00 by the Respondent

d. Awards costs to the Appellant

Respondent's Case

47. The Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal:

a. The Statement of Facts dated 5th October 2023 and filed on the same date.

b. The evidence of its witness, Stella Wangechi Mwangi as per her witness statement dated 22nd March 2024 and filed on 4th April 2024 and which was admitted in evidence under oath on 16th May 2024.

c. The written submissions dated 30th May 2024

48. The Respondent stated that the product's description was "Botox 100 and Botox 50" whose intended cosmetic use is care of the skin by reducing the appearance of skin wrinkles as well as an injectable for several medical purposes.

49. The Respondent contended that the test on classification is whether or not the into the skin and works by partially blocking the nerve impulses to the muscles that have been injected and reduces excessive contradictions of concerned muscles.

product is primarily used for cosmetic or medical purposes. That Botox is a muscle relaxant which is injected into the muscles, bladder wall or deep

50. That Rule 1 of the General Interpretation Rules provides:

> " 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."

51. The Respondent averred that the Headings and relevant Section and Chapter Notes are the first consideration in classification of any product.

52. That Chapter 30 provides for pharmaceutical products as follows:"human blood; animal blood prepared for therapeutic, prophy: lactic or diagnostic uses; antisera and other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes; vaccines, toxins, cultures of micro- organisms (excluding yeasts) and similar products; cell cultures, whether or not modified."

53. That Chapter 30 does not cover preparations of Headings 33.03 to 33.07, even if they have therapeutic or prophylactic properties

54. The Respondent contended that from the strict interpretation of Chapter 30, any preparations under Headings 33.03 to 33.07 cannot be classified under Chapter 30.

55. That Chapter 33 provides for:

> "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."

56. The Respondent contended that Botox is primarily a cosmetic used for skin routine. It follows therefore that having established that Botox's primary use is cosmetic use, the correct Tariff classification is in Chapter 33.

57. The Respondent contended that to determine the subheading, under which a product can be classified, the terms of the subheading and the subheadings notes are considered.

58. That Chapter 33 Heading 3304.99.00 provides for:

> "Other Beauty or make-up preparations .....toilet vinegars which are mixtures of vinegars or acetic acid and perfumed alcohol."

59. The Respondent contended that Botox is injected into the muscles, bladder wall or deep into the skin as a skin care which reduces excessive contradictions of concerned muscles.

60. The Respondent stated that Botox falls under other beauty or make up preparations which are not provided for elsewhere in the Chapter and the correct Classification is HS Code 3304.99.00.

61. That Rule 3 of the General Interpretation Rules provides:

> "When goods cannot be classified by reference to 3 (a) or 3 (b),they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

62. The Respondent further contended that where goods are prima facie classified under two or more Headings, classification shall be effected under the Heading which occurs last in numerical order among those which equally merit consideration as provided under the aforementioned Rule 3 (c).

63. The Respondent further contended that between Heading 30 and 33, Heading 33 is the last in the numerical order and Botox is therefore classified under Heading 33.

64. The Respondent stated that based on the goods description, the intended use and Explanatory Notes to Heading 33.04,Botox is therefore classified as a product under Chapter 3304.99.00.

65. The Respondent averred that the Appellant declared Botox under Heading 3002.90.00 which provides for tax at 0%. That the Respondent established that the Appellant had declared BOTOX under the wrong Heading and reclassified the same under Heading 3304.99.00 which attracts tax at the rate of 35%.

66. The Respondent stated that it is mandated to classify products for taxes purposes irrespective of how they are classified and/or registered in other jurisdictions as long as the classification is done in accordance with the applicable Common External Tariff.

67. The Respondent averred that reclassification and departure from a previous Ruling is allowed to correct an innocent mistake previously made in and/or where new and/or additional information has come to light.

68. That it is imperative to note that tariff classification in Kenya is governed by the East Africa Community Customs, Common External Tariff read together with its Explanatory Notes, guided further by the General Interpretation Rules of classification and also based on the sample material presented and the material information availed.

69. The Respondent averred that the Appellant's allegations in the Appeal are unfounded in law and not supported by any evidence.

70. The Respondent in support of its case relied on the holdings in Wiener S.I. GmbH vs Hauptzollamt Emmerich and Commissioner of Customs & Border Control vs Kenya Breweries Ltd [2022] KEHC 14750 [KLR].

Respondent's prayers

71. The Respondent prayed for the Tribunal to find that:

    a. The Respondent's review decision be upheld.

    b. The Appeal be dismissed with costs.

Issue For Determination

72. After studying the submissions and documents tendered by both parties, the Tribunal has determined that the issue falling for its determination is only one as stated here below.

    1. Whether the Respondent erred in reclassifying the Appellant's product under HS Code 3304.99.00

Analysis And Findings

73. The genesis of this dispute is the Appellant's imported product namely, BOTOX, which the Appellant classified under tariff HS Code 3004.90.00 being the tariff for medicament products which attracts import duty at the rate of 0% and exempt from VAT. The Respondent sought to reclassify the products under HS code 3304.99.00 which attracts import duty at the rate of 35%.

74. The parties had a differing description of the import. The Appellant described Botox to be a medicament with peripheral cosmetic value whereas the Respondent described the same to be a beauty and cosmetic product albeit containing some medical application. In essence the parties agree that the product serves the two purposes but in different degrees.

75. The description of the product is an essential part in determining the applicable classification for a product. In this realm the Appellant brought forth several documents attached to its Statement of Facts to support its description of Botox as a medicament principally.

76. The Appellant attached to its Statement of Facts the manufacturer's product information covered in pages 27-82 of the document. The information is very detailed and describes the product to be a vacuum dried injection in a powder form to be reconstituted as per the instructions therein provided.

77. The same document gives details on the uses of the product which include treatment of neurological disorders, bladder disorders, skin and skin appendage disorders (which interferes with the activities of daily living and is resistant to topical treatment) and moderate to severe glabbelar lines.

78. The document's literature also gives information on what to expect on interaction of the product with other medicines (thereby recognizing it as a medicine) and states categorically that the administration of the product has to be done by a suitably qualified and registered medical practitioner.

79. The Appellant also attached to its Statement of Facts on pages 83-92 the "Patient information leaflet" which indicated the uses of the product to be as a muscle relaxant to treat a number of conditions in the body and works by blocking the nerve impulses to any muscles that have been injected and reduces excessive contractions in these muscles. In this way it gives relief(s) to the patients for the different ailments.

80. The manufacturer's product information and the Patient's information leaflet above clearly indicate that BOTOX is a medicament and the cosmetic usage of the same is minimal in comparison to the medical application. The Respondent on his part has not brought forth any evidence to categorically rebut the Appellant's evidence in the documents aforementioned.

81. The Tribunal has also taken into consideration the earlier tariff ruling issued by the Respondent on 22nd August 2013. This is covered on page 146 of the Appellant's attachments in its Statement of Facts. The same was issued after the Appellant had requested for the same. The Ruling was made upon the Respondent testing the product and stated that Botox is considered to be a medicinal preparation.

82. The Tribunal taking all the above into consideration determines that Botox was a medicinal product principally and minimally a cosmetic product and proceeded on the classification of the same.

83. The Respondent pleaded that Botox is primarily a cosmetic used for skin care routine and that Chapter 33 provides for "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".

84. It was the Appellant's case that the Respondent took an erroneous interpretation and application of GIRs 1 & 6 in reclassifying BOTOX in tariff code 3304.99.00.

85. That looking at the findings, it can be noted that the Respondent had stated that its decision to reclassify the product was based on the fact that it considered Botox to be a beauty or make up preparation other than a medicament.

86. That the Respondent then proceeded to rely on the Explanatory Notes 1 (e) to Chapter 30 to justify its classification and stated that the Chapter does not cover: Preparations of Headings 33.03 to 33.07 even if they have therapeutic or prophylactic properties.

87. In determining the applicable HS Code the Tribunal is guided by the General Rules of Interpretation of the Harmonized Code reproduced hereunder:

> " General Interpretation Rules For The Classification Of Goods
>
> Classification of goods in the Nomenclature shall be governed by the following principles :
>
> 1. 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:
>
> 2. .....

(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up 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, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein :

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for

which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character.

(b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply unless the context otherwise requires."

88. The Appellant had described its products as medicaments and classified them under Heading 3004. In particular the Appellant had classified its product under HS Code 3004.90.00 in the import declarations but upon the Respondent reclassifying it under 3304.99.00 the Appellant argued that the right classification is under 3002.90.00 in its application for review.

89. Heading HS 3002 provides for the following items:

" 3002- Human blood; animal blood prepared for therapeutic, prophy- lactic or diagnostic uses; antisera and other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes; vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products; cell cultures, whether or not modified.

- Antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes:

3002.12.00 -- Antisera and other blood fractions

3002.13.00 -- Immunological products, unmixed, not put up in measured doses or in forms or packings for retail sale

3002.14.00 -- Immunological products, mixed, not put up in measured doses or in forms or packings for retail sale

3002.15.00 -- Immunological products, put up in measured doses or in forms or packings for retail sale

- Vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products:

3002.41.00 -- Vaccines for human medicine

3002.42.00 --Vaccines for veterinary medicine

3002.49.00 -- Other

- Cell cultures, whether or not modified :

3002.51.00 -- Cell therapy products

3002.59.00 -- Other

3002.90.00 - Other"

90. While Heading HS 3304 provides for the following items:

> 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.
>
> 3304.10.0
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> - Lip make-up preparations
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> 3304.20.0
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> --Eye make-up preparations
>
> 3304.30.00
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> --Manicure or pedicure preparations
>
> - Other:
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> 3304.91.00
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> Powders, whether or not compressed
>
> 3304.99.00
>
> -- Other

91. The Tribunal determines that the Respondent's classification based on HS Code 3304 is erroneous as the same is based on the determination that the product is a cosmetic principally and which determination is wrong as per the documents produced by the Appellant.

92. The Tribunal also notes that in its Tariff Ruling of 22nd August 2013 the Respondent had indicated that the decision was based on the sample examined and the laboratory analysis. In the Tariff Rulings of 21st June 2023 where it sought to reclassify the Appellant's products, the Respondent stated that the tariff classification was based on material information without testing any samples. The material information in issue was neither presented to the Appellant in the review decision nor to the Tribunal for consideration.

93. The Tribunal has taken into consideration, with reference to the purpose or use of the product, the holding in TAT 124 of 2021 Bidco Africa Limited Vs Commissioner Customs and Boarder Control where the Tribunal explained as follows;

> " 65. The criteria for classifying products according to intended purpose is used to classify over 60 products copiously spread across the EAC nomenclature for example:
>
> a. Plasters specially calcined or finely ground for use in dentistry (Heading 25.20)
>
> b. Preparations with a basis of plaster for use in dentistry (Heading 34.07).
>
> c. Preparations for use on the hair (Heading 33 05).

d. Shapes, sections, tubes and the like, prepared for use in structures, of iron or steel (Heading 73 08).

66. The intended use is indeed one of "the terms of the headings" envisaged in GIR 1 which provides 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:"

94. In the instant case, the Tribunal notes that the Appellant had attached detailed product descriptions indicating the contents of the product and its usage. From this information by the Appellant it is evident that the product is a medicament which contains active ingredients specific to the treatment of certain ailments, which medication is to be administered in specific therapeutic doses, that is, for the treatment of various disorders.

95. Looking at the classification there above therefore the fit description is under Heading 3002 (medicaments) and therefore as provided under GIR 1 the same can only fall under Heading 3002 and most specifically HS Code 3002.90.00.

96. Consequently, the Tribunal finds that the Respondent erred in its decision to reclassify Appellant's products from HS Code 3004.90.00 to HS Code 3304.99.00. The correct HS Code for the product is 3002.90.00 and in the circumstances the Appeal succeeds.

Final Decision

97. Based on the foregoing analysis the Tribunal finds that the Appeal is merited and accordingly the Orders that recommend themselves are as follows:

a. The Appeal be and is hereby allowed.

b. The review decision dated 24th July 2023 be and is hereby set aside.

c. The proper classification for Botox is correctly under HS Code 3002.90.00

d. Each party to bear its own costs.

98. It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

ERIC NYONGESA WAFULA -CHAIRMAN

GLORIA A. OGAGA - MEMMBER

JEPHTHAH NJAGI - MEMMBER

EUNICE N. NG'ANG'A - MEMBER