TAX APPEALS TRIBUNAL

IN THE TAX APPEALS TRIBUNALOF UGANDA AT KAMPALA

APPLICATION NO. 62 OF 2019

BRITISH AMERICAN TOBACCO UGANDA LIMITED. :::::::::::::::::::::::: APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY:: RESPONDENT

BEFORE DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. GEORGE MUGERWA

RULING

This ruling is in respect of an application challenging an assessment of Shs. 15,118,486,629 arising from purported misclassification of goods on certificates of origins issued under the East African Community Customs Management Act (EACCMA).

Sometime in 2016 and 2017, the applicant imported cigarettes into Uganda. It declared them as originating from Kenya and classified them as 'M' on the certificates of origin. In 2019, the respondent carried out a post clearance audit and issued an assessment on the applicant of Shs. 15,118,486,629 on the ground that the goods should have been classified as "C".

The following issues were agreed upon.

1. Whether the applicant is liable to pay the tax assessed?
2. What remedies are available to the patties?

The applicant was represented by Mr. Peter Kawuma while the respondent by Mr. Ronald Baluku and Mr. Alex Ssali Aliddeki.

The dispute revolves around the classification of goods on the certificates of origins under the EACCMA.

The applicant's witness, Mr. Zedekiah Ochieng Odago, a Logistics Executive Officer of the BAT Kenya testified that the company supplies cigarettes to the applicant for sale. He testified that he prepares and files certificates of origin for the cigarettes manufactured in Kenya which are certified and issued by Kenya Revenue Authority. He stated that in filing the certificates of origin the letter 'M' is sometimes used in box 7 while at other times the letter' C'. At all times the certificates of origin were approved by Kenya Revenue Authority. He thought the use of the letter 'M' or 'C' had no effect whatsoever on the origin or character of the cigarettes. There was no benefit or advantage to be derived by using one letter instead of the other. He testified further that inspections were done by Kenya Revenue Authority where it confirmed that the cigarettes were produced by BAT Kenya and met the criteria for products originating from Kenya. He contended that the misapplication of the letters does not change the manufacturing process or origin of the cigarettes. He admitted that the cigarettes from Kenya may have non-originating materials.

The respondent's witness, Mr. Edwin Kikule, a customs officer, testified that the respondent carried out a system audit on declarations made by the applicant for the years 2016 and 2017. The audit established that the during 2016 and 2017 the declarations showed that the applicant was erroneously accorded preferential tariff treatment. The certificates of origin specifying origin criterion "Material Content" in Box 7 were marked 'M' instead of 'C'. On 10th April 2019, the respondent demanded Shs. 15,118,486,629 arising from the purported mis- declarations. He contended that the East African Community Customs Union (Rules of Origin) Rules provide that for cigarettes originating from Partner States for purposes of tariff treatment should be presented by the letter 'C'. He contended that a certificate of origin is a conclusive proof of origin of the goods in international trade. An error on the certificate renders it invalid and it cannot confer any advantage or preferential treatment.

The applicant contended that the certificates of origin it relied on are valid and it is entitled to preferential treatment under the EACCMA. The certificates indicate that the cigarettes originate from Kenya. The applicant cited S. 111(1) of the EACCMA which provides that

goods from the Partner States shall be accorded community tariff treatment in accordance with Rules of Origin under the Protocol. S.111(2) of EACCMA Act states that customs shall require a certificate of origin and other documents as proof of origin. The applicant submitted that Article 14 of the Customs Union Protocol provided that goods shall be accepted as eligible for community tariff treatment if they originate in the Partner States. Goods shall be considered to originate in the Partner States if they meet the criterial set out in the Rules of Origin.

The applicant submitted that the East African Community Customs Union (Rules of Origin) Rules makes provision for determination of origin of goods. The applicant submitted that Rule 4 of the Rules provides for two broad categories of goods accepted as originating in a Partner State and these are goods are (1) those wholly produced in the Partner State as provided for in Rule 5, or (2) those produced in the Partner State incorporating materials which have not been wholly obtained but have undergone sufficient working or processing in the Partner State as provided for in Rule 6. The applicant submitted that cigarettes are provided under Schedule 1 of Chapter 24. The applicant submitted that its witness, Zedekiah Ochieng Odago confirmed that the applicant's cigarettes met the criteria as originating from the East African Community. The said evidence was not disputed.

The applicant submitted that the certificates of origin were rightfully issued. The applicant submitted that Rule 17(1) of the Rules of Origin provides that any exporter who claims that goods originate from a Partner State shall make an application by filing the relevant form prescribed in the Second Schedule. Rule 17(5) provides that a competent authority of the Partner State shall verify the application and has the right to call for any other evidence and carry out any inspection or any other check considered appropriate. Rule 17(6) of the Rules provide that the competent authority if satisfied shall issue a certificate of origin to the exporter before actual exportation is effected.

The applicant submitted that the Second Schedule to the Rules of Origin contain instructions on how the letters should be used against each item.

"P" for goods wholly produced;
"M" for goods to which material content criterion applies
"C" for goods where the 4-digit Harmonized System heading, or 6-digit Harmonized System sub-heading of the manufactured products becomes different from the 4-digit Harmonized System heading or 6-digit sub-heading respectively of the materials used.
"S" for goods where specific working or processing is carried out.

The applicant submitted that the used of the letters "C", "M", "P", or "S" only specify the different originating criterion under Rule 4(1) of the Rules of Origin but does not create different tax rates to be paid for the goods specified under the different categories. It contended that goods acquire originating status by virtue of the origin criteria in Rule 4 and not by virtue of the letter applied in the certificate of origin. It contended that it is not the letter "C" or "M" that confers originating status but the fact that the cigarettes inherently meet the origin criteria. The applicant contended that therefore, goods under the class "C" or "M" attract the same treatment for payment of tax as long as the goods originate from the EAC. The use of the letter "C" or "M" does not affect preferential treatment.

The applicant submitted that the respondent contended that for cigarettes classified under Heading 24.02 to qualify to be originating in the Partner State for purposes of preferential tariff treatment, they must meet a change in tariff heading criterion represented by the letter "C". The respondent contended that the letter "M" was wrongly applied to the certificates rendering them invalid which letter led to a short payment of tax of Shs. 15,118,486,629.10. The applicant contended that this raised the issues: whether the letter "M" rather than "C" was wrongly applied to the certificates of origin? If so, whether such application rendered them invalid? If not, whether the respondent can retrospectively remove the special tariff treatment already granted.

The applicant contended that Kenya Revenue Authority in Box 11 stamped and certified that its goods are of Kenyan origin. The applicant further submitted that the Manual developed by the Secretariat under Rule 27 of the Rules of Origin in Paragraph 3.3.2 (b) states that if the customs authorities in the importing Partner State are satisfied that the

goods to which the document relate are eligible for tariff treatment they will be admitted. The applicant contended that the certificates of origin have not been revoked. It submitted that it is the Kenya Revenue Authority as issuing authority should be the proper authority to invalidate the certificate. It cited *Commissioner SARS v Levi Strauss SA (Pty) Ltd* [2021] 2 ALL SA 645(SA). The applicant submitted further that if the respondent was dissatisfied with the certificate it should have sought verification under Rule 24 of the Rules of Origin.

The applicant submitted further that its goods quality under both class "M" and "C". The applicant submitted that origin criterion for cigarettes is provided under the First Schedule of the Rules of Origin under heading 24.02 which provides for the use of non-originating oriental tobacco not exceeding 30% of the weight of the final product. The applicant submitted that the respondent wrongly contends that the raw materials used for cigarettes must be wholly produced. The applicant submitted that the reading of the criterion listed in heading 24.02 the classifications "M" and "C" could both apply.

The applicant contended that if there is any ambiguity in the application of the letters "M" and "C", it should be construed in farvour of the taxpayer. The applicant submitted that ambiguity is defined by *Black's Law Dictionary* 8th Edition p. 249 as "An uncertainty of meaning or intention, as in a contractual term or statutory provision". The applicant cited *Stanbic Bank Uganda Ltd. And 7 others v Uganda Revenue Authority* HCCS 170 of 2007 where the court noted that by the Stamps Act providing two duties for the same item there was an error. This made the law unclear and ambiguous

The applicant submitted that the respondent is required to consider the principles under the East African Community Law. It contended that Article 8(1)(c) of the Treaty establishing the East African Community provides that the Partner States shall abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of the Treaty. Article 75(1)(b) provides that the Partner States shall establish a Customs Union which inter alia will be charged with the elimination of internal tariff barriers. Article 75(5) of the Treaty provides that the Partner States agree

to remove all existing non-tariff barriers on the importation into their territory of goods originating from other Partner States and to refrain from imposing any further non-tariff barriers. Article 75(6) provides that the Partner States shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Partner States. Article 127 provides for an enabling environment and under Article 127(2) the Partner States undertook to stimulate market development through infrastructure linkages and the removal of barriers. The applicant submitted that the denial of preferential treatment to its cigarettes would not be in line with treaty provisions. The applicant submitted Article 26 of the Treaty of Vienna provides for the principle of "*Pact Sunt Servanda*" i.e., "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." It also cited Article 31(1) which provides that "A treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The applicant also cited *BATU v Attorney General* Reference 7 of 2017 where the East African Court of Justice (EACJ) stated that a treaty is binding upon the parties to it. Article 8(1)(C) of the EAC treaty enjoins Partner States to abstain from any measures that are likely to jeopardize the achievement of the Treaty objectives. The applicant also cited *Burundian Journalists Union v Attorney General* Reference No.7 of 2013 where the EACJ held that Article 6 and 7 of the Treaty are justifiable and binding on the Partner States. The applicant cited *Kinyara Sugar Limited v Commissioner General* URA HCCS 73 of 2011 where the court dealt with the principles of interpretation of tax statutes. Words should be given their ordinary meaning. One has to look at what is clearly said; the object of the construction of the statue to ascertain the will of the legislature; the history of an enactment and the reasons to aid its construction. The applicant contended that the Tribunal should consider the objectives of the treaty

The applicant submitted that the Manual developed by the Secretariat under Rule 27 of the Rules of Origin provides for instances where preferential treatment may be refused; these include the goods are not eligible for preferential treatment, where the description of the goods in Box 5 is not filled in, where the proof of origin contains erasures showing that it has been tampered with, where the proof of origin has been submitted after the

expiry period. The applicant submitted that said instances do not apply to its case. The applicant cited *Commissioner SARS v Levi Strauss* SA (supra) where the Supreme Court of South Africa while dealing with an issue containing validity of certificates of origin stated that these certificates have never been queried by SARS and it has accepted vouchers of correction and the payment of duties and VAT in accordance with those vouchers. There is nothing to indicate that an inadvertently incorrect reference to the invoice number invalidates the certificate, or that a reference to the invoice to Levi GTC, would result in a certificate being withheld. The applicant contended that an incorrect reference to a classification letter in a certificate of origin cannot invalidate the origin in the same way an incorrect invoice would not.

The applicant submitted that the Manual on the application of the EAC Custom Union (Rules of Origin) provides how misdescriptions can be treated. Paragraph 3.3.3 provides that that minor inaccuracies or omissions of a clerical or similar nature detected on a proof of origin or insertion of an incorrect Customs tariff number may be allowed to be put right by the importer without rejection of the claim to EAC preferential tariff treatment. Paragraph 3.3.4 deals with treatment of a more serious nature. The applicant submitted that serious queries are treated by a verification exercise in accordance with Rule 24. A competent authority may require further verification. The verification may be made within three months of the request. The applicant cited *Kuku Foods Uganda Limited v Uganda Revenue Authority* Application 94 of 2019 where the Tribunal stated that the matters set out as minor are all matters which have no bearing on the origin of the goods e.g., weight or other quantity or insertion of an incorrect tariff number. The applicant submitted that misdescription of a letter is a minor query.

The applicant submitted that under Paragraph. 3.4(a) of the Manual on the application of the Rules of Origin where the custom authorities in an importing Partner State are in doubt about the correctness of the proof of origin, they may request the submission of supporting evidence. Under Paragraph 3.4(a)(i) the query may be such to require the importer to contact the exporter for the evidence or other information called for by the custom authorities of the importing Partner State. Under Pararagraph.3.4(a)(ii) the

custom authorities of the importing Partner State may decide to refer the query directly to the authority of the exporting Partner State. The applicant submitted that the respondent has not sought any verification of the certificate of origin.

In reply, the respondent submitted that it audited the applicant's declarations for 2016 and 2017 which purportedly established that the applicant had been erroneously accorded preferential treatment. On 10th April 2019, the respondent raised a demand notice of Shs. 15,118,486,629 on the applicant arising from misdeclaration of the origin criterion. The respondent submitted that the declaration of wrong criterion led to a short levy under S. 135 of EACCMA. The respondent submitted that S. 111(1) of the EACCMA provides that goods originating from Partner States shall be accorded community tariff treatment in accordance with the rules of origin provided for under the protocol on the establishment of the East African Customs Union. Article 14(2) of the Protocol provides that goods shall be considered to originate in the Partner State if they met the criteria set out in the Rules of Origin. The respondent submitted that according to paragraph 1(e) of the World Customs Organization (WCO) guidelines "Origin criteria" means conditions regarding the production of goods which must be fulfilled for the goods to considered as originating under applicable rules of origin. Under paragraph 1(c) "proof of origin" means a document or statement (either in paper or electronic format) which serves as a prima facie evidence to support that the goods to which it relates satisfy the origin criteria under applicable rules of origin. Paragraph 1(c)(ii) states a certificate of origin means a specific form which expressly certifies that the goods to which it relates origin according to applicable rules of origin. The respondent submitted that the only way one can prove origin of goods is producing a valid, correct and authentic certificate of origin. The respondent further submitted that a certificate of origin is conclusive proof of origin of goods.

The respondent submitted that Rule 4(1)(b) of the East African Community Customs (Rules of origin) Rules provides that goods shall be accepted as originating in a Partner State where the goods are produced in a Partner State incorporating materials which have been wholly obtained there, provided that such materials have undergone sufficient working or processing in the Partner State as provided for in Rule 6. The respondent

submitted that its witness testified that the cigarettes in issue are not wholly produced in Kenya since the main raw material is sourced from Uganda which is evidenced in Exhibit A1 and was confirmed by the applicant's witness.

The respondent submitted that Rule 6(1) of the East African Community Customs Union [Rules of origin] Rules provides that for purposes of Rule 4(b) a product is considered to be sufficiently worked or processed when the product listed in the second column of part 1 of the first schedule fulfils the corresponding origin criteria in the third column. The respondent contended that it is only the working or processing carried out on non-originating materials that confer originating status. The respondent submitted that the applicable origin criterion for cigarettes is heading 24.02. The respondent contended that cigarettes qualify under the change in tariff heading criterion where the raw material used are classified under heading 24.01 while finished products are classified under the heading 24.02. The respondent contended that the applicant mis declared by specifying the Material Content criterion for cigarettes under Heading 24.02 represented by letter "M" instead of a Change in Tariff heading criterion represent by letter "C". The respondent submitted that 137 declarations by the applicant did not satisfy the requirement of originating status under Rule 4(b) and 6(1) of the East African Community Customs Union (Rules of origin) Rules. The respondent contended that the certificates of origins declared by the applicant were invalid as they were specified the wrong origin criteria. It was not a minor error. The respondent contended that Kenya Revenue Authority had provided guidance to the exporter on the specific criterion applicable for the cigarettes traded within the EAC region in its letter of 25th May 2017, exhibit A2.

The respondent submitted that it is not mandatory for it to conduct a verification of proof of origin as it is done in exceptional circumstances under the East African Community Customs Union [Rules of Origin] Rules. The respondent cited *Mahadev Metaliks PVT. Ltd. v Union of India, Ministry of Finance* Writ petition 21399 of 2015 where a court in India emphasized the importance of a certificate of origin as the only proof of the origin of goods and it ordered the petitioner to deposit a percentage of taxes as the authorities verified them. The respondent contended that there was no need to verify certificates as

the Kenya Revenue Authority had guided BAT Kenya. The respondent further contended that it is not bound to accept a wrongful claim for preferential treatment simply because Kenya Revenue Authority issued incorrect certificates of origin. It submitted that a wrong criterion on a certificate of origin renders the goods specified ineligible for community tariff treatment. The respondent submitted that the issue of contention is not filling in an incorrect letter but a wrong declaration of origin criterion on the certificate of origin. The respondent submitted that Paragraph 3.33 of the Manual on the application of the EAC rules of Origin highlights minor inaccuracies or omissions to be clerical in nature on proof origin and these would include weight and other quantities. The respondent submitted that the mis-declaration on 137 certificates of origin after guidance cannot be a clerical error. The respondent also submitted there was no ambiguity since the instructions for completing a certificate of origin are clear.

In rejoinder, the applicant submitted the respondent is misleading when it states that a declaration of a wrong criterion led to a short levy under S. 135 of the EACCMA. It contended that it was not liable to a charge of duty. The applicant also contended that the respondent's reliance on the provisions of the Guidelines on Certification of Origin by the World Customs Organization was irrelevant. They are not binding and cannot take precedence over the East African Community Customs Union (Rules of Origin) Rules and its Manual.

The applicant contended that its goods met the Origin criterion under Rules 4 and 6 of the Rules of Origin. What is in contention is the application of the letter in Box 7. The applicant contended that use of raw tobacco from either Kenya or Uganda does not affect the origin of the final product. The applicant contended that the use of the letter "M" and "C" is not the determining factor as to whether the products meet the origin criterion. The applicant submitted that Paragraph 3.3.3 of the Manual identifies minor inaccuracies which do not lead to rejections of claims for preferential treatment. The applicant reiterated that its goods were rightfully classified as originating from the East African Community Partner States.

The applicant submitted that Rule 21 does not provided for revocation of certificates. It states that a certificate of origin shall be valid for six months from the date of issuance. Rule 26(2) provides for a resolution mechanism between Partner States where is a false claim which refers to a claim that the good origin from a country other than the actual one. The applicant submitted that this is different from when there is a clerical error on a certificate of origin. The applicant submitted that if the respondent doubts the origin of an importer's goods its recourse is not to deny preferential treatment but allow the importer to deliver the goods and pay security or other charge as it obtains evidence under the verification process under Rule 24(3) of the Rules of Origin.

Having listened to the evidence of both parties, perused their exhibits and read the submissions this is the ruling of the tribunal.

The applicant imported goods which it declared as originating from Kenya. It classified them as 'M' on the certificates of origin under the EACCMA. The respondent did an audit on the applicant where it purportedly found that the latter ought to have classified the goods under the letter 'C'. Thereafter, the respondent issued the applicant a customs duty assessment of Shs. 15,118,486,629 which the latter disputes.

In order to understand the dispute, one needs to know what rules of origin are about. The starting point is 'origin' is about being born from a particular place or ancestor or the act or fact of beginning from something or somewhere, the starting point. Many countries may participate in the manufacturing of a good, but there must be only one country of origin. A rule is needed to identify that country. Rules of Origin are the rules that determine where goods have been obtained or manufactured, their economic nationality. They set the conditions under which a good may be considered as having "originated" in a certain country. They set up the criteria to determine where a good has been made for the purpose of ensuring that only the products of countries party to a preferential trade agreement (PTA) obtain concessional entry or preferential treatment. Paragraph 1(e) of the World Customs Organization (WCO) guidelines defines "Origin Criteria" to mean 'conditions regarding the production of goods which must be fulfilled for the goods to be

considered as originating under applicable rules of origin.' Paragraph 1(c) of the said guidelines define "proof of origin" to mean 'a document or statement (either in paper or electronic format) which serves as a prima facie evidence to support that goods to which it relates satisfy the origin criteria under applicable rules of origin. Once it is established that goods originate from a certain country a certificate is issued. *Black's Law Dictionary* 10th Edition p.272 defines a certificate of origin as "An official document required by some countries upon the entry of imported goods, listing the place of production and what the goods are included, to be certified by a customs or consular officer." Paragraph 1(c)(ii) of the WCO guidelines defines a certificate of origin to mean 'a specific form, whether on paper or electronic, in which the government authority or body empowered to issue it expressly certifies that the goods to which the certificate relates are considered originating according to the applicable rules of origin; ...' Preferential trade agreements facilitate trade among countries by reducing or eliminating customs duties. As a result of certification, if the good is deemed to originate in a preferential country, it is imported duty free. If it originates in a non-preferential country, it may have to pay import duties to be imported. The certificate of origin is what attests of the origin of a good.

The dispute between the parties is not about the origin of the goods, but the certificate of origin. The respondent contends that because the certificate contains the wrong letter, there was a misclassification, hence rendering the certificate invalid. The applicant disputes this. The Tribunal needs to look at the law applicable to the dispute.

The law governing taxation of imports between the East African Partner States is the East African Community Customs Management Act (EACCMA). S.111 of the Act states:

> "(1) Goods originating from the Partner States shall be accorded Community tariff treatment in accordance with the Rules of Origin provided for under the Protocol.
>
> (2) Customs shall require production of a Certificate of Origin and other documents as proof of origin on goods referred to in subsection (1) above."

Therefore, for one to be accorded preferential treatment under the EACCMA, goods must originate from the Partner States and treatment shall be in accordance with the Rules of Origin provided under the Protocol. There is need to provide a Certificate of Origin and

other documents as proof of origin. The dispute is whether the Certificate of Origin was made in accordance with Rules of Origin.

The East African Community Customs Union (Rules of Origin) 2015 makes provision for determination of rules of origin. Article 14 of the Customs Union Protocol provides that goods shall be accepted as eligible for community tariff treatment if they originate in the Partner States. Goods shall be considered to originate in the Partner States if they meet the criteria set out in the Rules of Origin. Partner States are defined in Article 3 to mean "the Republic of Burundi, the Republic of Kenya, The Republic of Rwanda, the United Republic of Tanzania, the Republic of Uganda, and other country granted membership of the Community under Article 3 of the Treaty. Though the respondent contends that the raw materials was from Uganda, it is not disputed that the goods originate from a Partner State.

The Customs Union Protocol Article 14(3) states that The Partner States hereby adopt the East African Community Rules of Origin specified in Annex III to this Protocol. The Protocol was signed on 2nd March 2004. On 1st January 2005 the East African Union became operational. It is most likely that new Rules of Origin were passed which were revoked by the EAC Rules of Origin of 2015.

The East African Community Customs Union (Rules of Origin) 2015 makes provision for determination of rules of goods. Rule 4 of the Rules of Origin provide that;

"1. Goods shall be accepted as originating in a Partner State where the goods are-
(a) Wholly produced in the Partner State as provided for in rule 5; or
(b) Produced in the Partner State incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the Partner State as provided for in rule 6.
2. For purposes of implementing these Rules, the Partner States shall be considered as one territory."

Rule 4(2) states that Partner State shall be considered as one territory. This implies that goods from another Partner State may be considered as coming from one territory.

Rule 5 of the Rules of Origin 2015 provides for goods wholly produced in a Partner State. The relevant portion in respect to cigarette manufactured in Kenya may be Rule 5 (1)(n) which states:

> "goods produced within the Partner State exclusively or mainly from the following --
>
> (i) Products referred to in this paragraph; and
>
> (ii) Material which do not contain elements imported from outside the Partner State or which are of undetermined origin."

For one to qualify for goods wholly produced in a Partner State it must not contain elements imported from outside the Partner State or which are of undetermined origin.

Rule 6 of the Rules of Origin 2015 provides for goods produced using materials not wholly obtained from a Partner State. It reads:

> "For the purposes of rule 4(b), a product is considered to be sufficiently worked or processed when the product listed in the second column of Part 1 of the First Schedule fulfils the corresponding origin criteria in the third column."

Cigarettes are in Chapter 24.02 under Part 1 of the First Schedule. The Origin Criteria (Working or processing carried out on non-originating materials that confer originating status) for cigarettes in the Third column is:

> "Manufacture from materials of any heading, except that of the product, in which the weight of non- originating materials used does not exceed 30% of the weight of the final product."

For cigarettes to qualify as originating from the East African region where there are non-originating materials, the ingredients must be manufactured from materials of any heading, except that of the product. All unmanufactured tobacco and tobacco refuse of heading 24.01 used should be wholly produced must be from the Community. The use of oriental tobacco and any other tobacco not produced in the region should not exceed 30% of the weight of the final product.

Having stated the rules, the Tribunal must ask itself whether the cigarettes met the origin criteria by looking at the materials that made them. A cigarette is a narrow cylinder containing burnable material, tobacco, that is rolled into thin paper for smoking. It also has other ingredients, including substances to add different flavors. Cigarettes come in packages. Rule 7 of the Rules of Origin 2015 provide for processes that do not confer

origin. These include the packaging operations. Therefore, the origin of the packages in not of relevance. What is in question is the tobacco, the ingredients like adhesive, filters, plasticizers, flavour and paper. The cigarettes in question were imported in 2016 and 2017. They must have been smoked. No exhibit was tendered in court. There was no lab report on the constitution of the cigarettes. Therefore, we will look at the other evidence adduced.

From the evidence the cigarettes were not wholly produced in a Partner State. The applicant testified that the cigarettes were manufactured in Kenya using tobacco from Kenya and Uganda. The respondent submitted that the tobacco was from Uganda. There is no evidence that there was oriental tobacco and any other tobacco not produced in the region used to manufacture the cigarettes. The cigarettes had other materials which may not have been wholly obtained from a Partner State. No evidence was led on the paper in which the tobacco is rolled or ingredients like the flavor. Though the origin of the tobacco is clear that of the other ingredients is not. However, the Tribunal notes that the parties do not dispute that the cigarettes originated from a Partner State because it had materials other than tobacco whose originate were not mentioned, the cigarettes must have fallen under Rule 6 of the Rules of Origin 2015.

The dispute between the parties is on what was declared in the Certificate of Origin. Rule 17 of the Rules of Origin 2015 states that:

> "(1) An exporter who claims that goods originate from a Partner State or an authorised representative of the exporter, shall make an application by filing in the relevant form prescribed in the Second Schedule."

Rule 17(5) of the Rules of Origin provides that:

> "A competent authority of a Partner State shall verify the application and the originating status of the product and shall have the right to call for any other evidence of originating status and to carry out any inspection of the accounts of the exporter or any other check considered appropriate."

Rule 17(6) of the Rules of Origin state that:

"A competent authority of a Partner State shall, if satisfied with the application and originating status, issue a certificate of origin to the exporter before actual exportation is effected."

The applicant obtained a Certificate of Origin from Kenya Revenue Authority before it exported its cigarettes from Kenya to Uganda. The first Rules of Origin, Annex III did not have Rule 17. The requirement to make an application was omitted.

The dispute between the parties is in respect of the letters indicated in Box 7 of the certificate of origin. The applicant declared the cigarettes as originating from Kenya and classified them as 'M' on the certificates of origin. The respondent carried out a post clearance audit and issued an assessment on the ground that the applicant ought to have classified the goods as "C".

The Second Schedule to the Rules of Origin of 2015 contain instructions for completing the certificates of origin. It is on which letters should be used against each item. Instruction 4 states that:

"In box 7 headed "origin criterion" the specific qualifying criterion under rule 4 paragraph 1 of the EAC Rules of Origin must be entered. For this purpose, the following letters should be used against each item entered in the form, as is appropriate

"P" for goods wholly produced;

"M" for goods to which material content criterion applies

"C" for goods where the 4-digit Harmonized System heading, or 6-digit Harmonized System sub-heading of the manufactured products becomes different from the 4-digit Harmonized System heading or 6-digit sub-heading respectively of the materials used.

"S" for goods where specific working or processing is carried out."

There is nothing to indicate that the use of a different letter will attract a different tax rate or preferential treatment.

Instruction 10 provides for penalties. However, it was not in respect of filling Box 7. It states

"Notwithstanding the provisions of Rule 19 and in accordance with Rule 18, the certificate must at all times accompany the goods.

NB. Any person who knowingly furnishes or cause to be furnished a document which is untrue in any material particular for the purpose of obtaining during the course of any subsequent verification of such certificate will be guilty of an offence and liable to penalties."

The respondent contended that the applicant issued 137 declarations that have misdeclarations regarding the origin criteria. However, there are some certificates exhibits A14, which bear the letter "C".

The Rules of Origin 2015 have some interpretations which maybe helpful in determining the dispute. Under Rule 3, "manufacturing" is defined to mean "any process that requires technology, infrastructure and manpower investment by which a commodity is finally produced. "Non-originating material" means material originating from outside the Partner States. "Value of non-originating materials" in the "list in Part 1 of the First Schedule means the custom value at the time of importation of the non-originating materials used, or, if this is not known and cannot be ascertained the first ascertainable price paid for the materials in a Partner State."

The respondent cited the "Change in tariff heading criteria" in the Rules of Origin means "the criterial according to which substantial transformation is deemed to have occurred when all the materials used in the production of a product are classified in a heading other than that of the product." The said interpretation is not in the Rules of Origin 2015. The said interpretation was in the first Rules of Origin, Annex III which were not applicable at the time the applicant imported its goods.

We already stated that cigarettes are manufactured from Tobacco. They also have other ingredients like flavour, filters etc. Cigarettes fall under HSC 24.02; unmanufactured tobacco falls under HSC 24.01 while other manufactured tobacco products fall under HSC 24.03. Cigarettes could have qualified under the Change in Tariff Heading if one is using the first Rules of Origin, Annex III. However, the said Rules of origin did not contain Rule

27 which provides for the Manual. In the said Rules of Origin there is no requirement to fill an application for a certificate of origin.

The letter of Kenya Revenue Authority dated 25th May 2017, exhibit A, stated that for exports in the East African Community for products of 24.02 the letter C should be used (as the cigarettes may contain elements that are imported). Under the Rules of Origin 2015, using the said letter and perusing the instructions, our understanding is that the letter 'C' is used where there are non-originating materials imported from outside the East African Community. If the letter 'C' refers to change in tariff heading as suggested by the respondent and also by looking at column 3 of Part 1 of the First Schedule and the instructions, it would imply that the ingredients imported follow under another HSC than from that of cigarette. To fall under another HSC would mean an import from outside the EAC. The letter 'M', in our understanding, would refer to where the goods are manufactured using material from other Partner States, i.e. not outside the EAC. The evidence on record does not show, apart from the tobacco, where the other materials came from. One cannot tell whether the said materials were originating or non-originating materials. Their composition in the manufactured product is not known. It is therefore difficult for the Tribunal to state which of the two letters 'C' or 'M' was applicable to the applicant's imports.

The respondent contended that the certificate of origin differed from the letter of 25th May 2017 which advised BAT Kenya to use the letter "C" instead of "M". Kenya Revenue Authority issued both the certificate of origin and the letter. A mere letter cannot override a certificate of origin as the latter is the official proof of origin by a competent authority. In the absence of evidence to show where the materials other than tobacco originated from and their composition it is difficult for the Tribunal to say that the certificate of origin in Box 7 contained a wrong letter. The respondent ought to have called a witness from Kenya Revenue Authority to show why there was a change of heart. Did the origin of the materials other than tobacco used in the manufacture of cigarettes change?

The applicant raised many alternative arguments. In one argument, it admits that the letter "M" was used in error. If the Tribunal was to state that the applicant was in error, the question is: what is the effect of the error? To answer the said question the Tribunal will refer Rule 27 of Rules of Origin 2015 which provides for a Manual.

Rule 27 of the Rules of Origin state that the Secretariat shall develop and review manuals in respect of these Rules. The Manual developed by the Secretariat provides for instances where preferential treatment maybe denied. Paragraph 3.2.3 (b)states that:

> "The Custom Authorities may refuse a claim of EAC preferential treatment if there is reason to doubt the correctness of the particulars declared to them.
>
> Preferential treatment maybe refused for the following reasons, among others;
>
> (i) The goods to which the proof of origin relates are not eligible for preferential treatment;
>
> (ii) The description of the goods in Box 5 of the Certificate of origin is not filled in or refers to goods other than those presented;
>
> (iii) The proof of origin contains erasures or words written over one another showing that it may have been tampered with;
>
> (iv) If altered, unless any alterations are made by deleting the incorrect particulars, by adding any necessary corrections and such alterations are initialled by the person who completed the proof of origin and endorsed by the officer of the competent authority who signs the certificate.
>
> (v) The proof of origin has been submitted after expiry of its period of validity and there is no justification for its acceptance, as provided in Rule 25."

Though the above clause states that customs authorities may refuse preferential treatment for other reasons, the failure to fill Box 7 on origin criteria correctly is not among the reasons given for refusal to grant preferential treatment. For the Custom Authorities to refuse to grant EAC preferential treatment there must be reason to doubt the correctness of the particulars declared to them. In this case, the custom authorities do not seem to have doubted the correctness of the particulars given to them as they allowed the applicant to import cigarettes and accorded them preferential treatment. Paragraph 3.4 of the Manual on the application of the Rules of Origin state that where custom authorities of an importing State are in doubt about the correctness of the proof of origin

or origin declaration, they may refuse to grant preferential treatment. There is no evidence to show that at the time of import the custom authorities doubted the correctness of the particulars declared to them.

Rule 24 of the Rules of Origin allow a competent authority in exceptional circumstances to require further verification of the information contained in the certificate of origin or origin declaration. The Rule does not state the exceptional circumstances under which a customs authority may require further verification of a certificate of origin. Under Rule 24(1) the verification shall be made within three months of the request. Under Rule 24(3) an importing Partner State shall not prevent an importer from taking delivery of the import but may require security for any duty or charge. The respondent submitted that Kenya Revenue Authority had already guided the exporter on the correct origin criterion in its letter of 25th May 2017. That is why it did not verify the information in the certificate of origin. The actual reason the respondent did not verify the information on the certificate of origin is because at the time it did an audit on the applicant the certificates of origin had expired. If the respondent doubted the correctness of the particulars it had an option to seek further verification before rushing to deny preferential treatment. As already stated, it is not clear where the other material used to make the cigarettes originated from.

There are conditions that are to be met before preferential treatment can be denied. Clause 3.2.3(c) the Manual states that.

> "Where preferential treatment is refused, the proof of origin should be marked "inapplicable" and retained by the custom authorities of the importing Partner State to prevent further attempt to use it. The custom authorities of the importing Partner State should also inform the custom authorities of the exporting Partner State about the refusal to grant preferential treatment."

There is no evidence that the certificates of origin used by the applicant to import cigarettes were marked "inapplicable" and retained by the custom authority. The respondent did not mark "inapplicable" on the certificates of origin which means they were applicable. The word "inapplicable" would mean the certificates were invalid. The antonym of inapplicable which is applicable would mean the certificates were valid. There

is also no evidence that that the respondent informed Kenya Revenue Authority about a refusal to grant preferential treatment to the applicant's cigarettes. Rule 21 of the Rules of Origin state that a certificate of origin shall be valid for six months from the date of issue by the competent authority of the exporting Partner State. At the time the respondent is challenging them they have expired. One cannot correct or nullify something that has expired. It is like chasing the wind. There is need to exhaust all the remedies and processes under the EACCMA, the Rules of Origin and the applicable Manual before preferential treatment is denied. The respondent by denying the applicant preferential treatment when it has not stamped the certificate "inapplicable" and informed Kenya Revenue authority and when the certificates of origin have expired it is closing the stable doors after the horse has bolted.

There is no clear rule that states that if a party fills a certificate of origin in Box 7 incorrectly it should be denied preferential treatment. In *Commissioner SARS v Levi Straus SA Pty Ltd* (509/2019) [2021] ZASCA 32; [2021] 2 All SA 645 (SCA) it was stated that where there is nothing to indicate that an inadvertently incorrect reference to an invoice number invalidates the certificate, or the reference to the invoice to Levi, would result in the certificate being withheld. For one to be punished or denied a privilege under a law there must be a clear rule that prescribes the offence and punishment. Under the rules of natural justice, one cannot be punished for an offence that is not written or clearly spelt out

The Manual addresses how minor inaccuracies should be dealt with. Clause 3.3.3 of the Manual reads

> "Minor inaccuracies or omissions of a clerical or similar nature detected on a proof of origin (for example the omission of the weight or other quantity, or insertion of an incorrect Customs tariff number), may be allowed to be put right by the importer without rejection of the claim to EAC preferential tariff treatment. Similarly, it may become necessary in some cases to direct that the goods be physically examined to dispel any doubt or uncertainty that may have arisen in the course of the processing of the import entry as regards the origin of the goods, without at that stage making a formal query or questioning eligibility for EAC preferential tariff treatment. Foreign markings on the goods or other physical

evidence (e.g. instructions in a foreign language, packaging of an unrelated kind) should not be overlooked in the Customs examination as these may point to the need for further enquiry into the claim to EAC preferential tariff treatment. "

The reason why the Tribunal is inclined to treat the mis-declaration of the letters in Box big7 as minor, is because if it was big error as the respondent alleges it ought to have rejected certificates of origin outrightly, which it did not. The said error is not included in clause 3.2.3 which states the ground where preferential treatment can be disallowed. Under Clause 3.3.3 minor inaccuracies of a clerical nature maybe allowed to be put right by the importer without rejection of the claim to EAC preferential tariff treatment. There is no limit in which an importer is allowed to put right an inaccuracy of a clerical nature before expiration of a certificate. The respondent is given an option to verify proof origins or make inquiries. The said should be done before a certificate of origin expires.

In *Kuku Foods Uganda Limited v Uganda Revenue Authority* Application 94 of 2019 the application was dismissed because the certificate of origin was not signed. A document that is not signed nor authenticated cannot be said to be valid. In this application, the certificates of origin were signed and issued by a competent authority.

Punishment meted out should be proportional to an offence committed. Under instruction 10 of the Manual, any person who knowingly furnishes or cause to be furnished a document which is untrue in any material particular for the purpose of obtaining during the course of any subsequent verification of such certificate will be guilty of an offence and liable to penalties. If a person is liable to penalties for knowingly furnishing a document which is untrue during subsequent verification, why should an importer who commits an error in the process of making a certificate of origin be denied preferential treatment? Using a wrong letter in Box 7 does not change the tax rate due. Knowingly giving false information in a subsequent verification is a graver offence than making an error in proof of origin. One cannot punish a toddler more than the mother who carrying it on her back when stealing a bunch of matoke. The gravity of the offence should be addressed. Under Rule 26 of the Rules of Origin a Partner State to which a false claim is made in respect of the origin of goods shall bring the matter to the attention of an exporting

Partner State for appropriate action. In this application, there is no evidence that the applicant made a false claim. Or if so, the respondent brought it to the attention of the exporting Partner State for appropriate action.

Benefits under an international agreement should rarely be sacrificed at the altar of revenue collection. Where Uganda has entered an international agreement, it is bound by the said agreement. In exceptional circumstances should a party be denied preferential treatment under an international agreement. Imports which receive preferential treatment or where tax is foregone, should be treated with the urgency they deserve because it means less tax collected. The documents should be verified or reviewed thoroughly expeditiously on import. An audit should not be carried out long after they have been allowed through customs authorities or where the certificates have expired. An importer should be given a chance to put right any inaccuracies immediately. The respondent has the option to verify the proof of origin where there is doubt.

The importer bears the responsibility to be accountable for the imported goods since the preferential origin of goods constitutes an element of determining the amount of customs duty payable. The importer should supply all the supporting documents and a certificate of origin. Where an exporter notices incorrect information it is required to inform the competent authority. Where there is doubt about the information on a certificate of origin, the customs authorities of the importing Partner State should raise queries. In exceptional circumstance the authority may request for further verification. The process should be followed as stated in the EACCMA, the East African Community Customs Union (Rules of Origin) Rules 2015, and the Manual and exhausted before preferential treatment is denied.

The Tribunal cannot award the applicant damages because it has not shown what damage it has suffered as a result of it using a different letter from what was perceived as correct. Its goods were released on presentation of the certificates of origin.

Taking the above into consideration, this application is allowed with costs to the applicant. The 30% deposit made by the applicant should be refunded.

Dated at Kampala this 16th day of August 2022

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MR. GEORGE MUGERWA**
CHAIRMAN	**MEMBER**	**MEMBER**