THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 40 OF 2022

COLAS EAST AFRICA LIMITED .... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY .... RESPONDENT

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. SIRAJ ALI.

RULING

This ruling is in respect of what should be the proper valuation method to be applied to assess custom duty on the applicant's imports.

The applicant imports road construction materials. On 20th August 2020, the respondent did a post custom clearance audit on the applicant. The audit revealed that the applicant made 222 import entries using Method 1 of the General Agreement of Trade (GATT) Valuation Agreement. As a result, the respondent issued an assessment of Shs. 694,037,728 on the applicant on the ground that Method 2 of the GATT Valuation Agreement should have been used. The applicant objected and the respondent disallowed the objection.

Issues

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

The applicant was represented by Ms. Diana Banduru while the respondent by Mr. Tony Kalungi.

Ms. Esta Musoke, the applicant's former finance and administration manager testified that the applicant is a sole distributor of bitumen products for road construction. It set up a branch in Uganda to sell the bitumen products. She testified that the price sold to the

branch is lower that than the sale price. She further testified that the respondent carried out a customs post clearance audit on the import transactions of the applicant for the period of January 2015 to December 2019. Thereafter, it wrote to the applicant demanding additional tax of Shs. 694,037,728. The respondent did not apply the transaction value method used by the applicant but that of identical goods. The applicant objected on the ground that the respondent did not consider the commercial relationship between the applicant and its branch vis-à-vis other unrelated importers. The branch pays corporate tax and VAT from its sales. She confirmed that the company in Uganda is a branch of the applicant in Kenya and is a sole distributor of colas products in Uganda. She also testified that the branch is not in the business of construction.

The respondent's witness, Ms. Caroline Yamanye, an officer in its custom's department testified that the applicant is a company incorporated in Kenya and registered in Uganda. The applicant imports and sells road construction materials. Between 2015 to 2019, the applicant imported bitumen products from Kenya and United Arab Emirates (UAE). She contended that Method 1 under the 4th Schedule of the East African Community Customs Act, of transaction value, used by the applicant does not apply where goods are imported by branches. She stated that the respondent examined imports of identical bitumen products from the same importer in Kenya to Uganda for the period 2015 to 2019 and was justified to use Method 2 of identical goods. The respondent realized that for the period 2015 to 2019 other importers of identical goods declared different prices. The respondent carried out a payable test to confirm the amounts declared in the Asycuda system and it realized that there was a net variance of Shs. 526,456,542 between the declared values and the expected values. It also carried out a ledger analysis to confirm whether the valued declared in the ledger matched those in the commercial invoices and realized that there was a variance of Shs. 53,458,341 leading to payable taxes of Shs. 12,830,023. The respondent used Method 2 to assess the applicant tax which were adjusted to Shs. 694,037,728 of which Value Added Tax (VAT) was Shs. 520,528,296 and Withholding Tax was Shs. 173.549,432.

The applicant submitted that S. 122 of the East African Community Customs Management Act (EACCMA) provides that the value of imported goods shall be

determined in accordance with the Fourth Schedule. The Fourth Schedule requires that the customs value of imported goods be determined using one of the six methods prescribed. The applicant cited *Uganda Revenue Authority v Kajura* SCCA 9 of 2015 where the court relying on *Cape Brandy Syndicate v Inland Revenue Commission [1920] 1 KB 64* held that in a taxing act one has to merely look at what is clearly said. The applicant submitted that the respondent disregarded the issue of commercial levels and did not address itself to the necessary adjustments required under the law to cater for the commercial levels and quality levels as provided in the 4th Schedule of the EACCMA. It submitted that in applying Methods 1 and 2 in the provisions under Paragraphs 2 and 3 of the Fourth schedule, it is required that due account shall be taken of demonstrated differences in commercial levels and quantity levels and the necessary adjustments made. The applicant submitted that according to the EAC Customs Valuation Manual, the adjustments for different commercial levels consider trade level differences, quantity differences and transport costs.

The applicant submitted it was the sole distributor of the subject goods in Uganda. The applicant was not in the construction business. The persons in the respondent's study were end users who engaged in the business of construction. It is evident that the applicant and the said companies are at different commercial levels. The applicant submitted that the respondent was wrong in selecting constructions companies as there were differences in the trade levels. The applicant submitted that the World Customs Organization Guide to Customs Valuation and Transfer Pricing, provides that.

> "Where the transaction value is disregarded for failing one or more conditions, it is important to note that in using the alternate methods there should be a process of consultation between Customs administration and the importer with a view to determining a proper basis of value for customs purpose".

The applicant submitted that the consultative meeting arbitrarily disregarded the differences in the commercial terms of the respective transactions. The rates provided to third party importers were delivery rates which included other support services such as transport of the products from the COLAS factory headquarter. However, the commercial terms agreed upon between COLAS Kenya and its branch in Uganda were at ex-factory rates.

The applicant submitted that the respondent disregarded the valuation addition functions and support services performed by the headquarters for third parties and the risks undertaken therein. The branch in Uganda was intended to act as a link between the headquarters and the final consumers in Uganda. The commercial terms for transactions between COLAS Kenya and COLAS Uganda were different vis-a-vis those between COLAS Kenya and third-party users. The applicant submitted that it was necessary for the respondent to address itself to the differences in commercial terms.

The applicant cited *Samsung Electronics E.A Limited v URA* Application 31 of 2019 where the Tribunal noted "A company is not a different legal entity from its head office and branch. A head office and branch are places where the company operates from." The applicant submitted that although the branch appears as consignee for the said goods, they were imported by the headquarters on behalf of the branch.

In reply, the respondent submitted that the applicant imported bitumen from UAE to Uganda. For the period 2015 to 2019, the applicant was incorrectly/wrongly declaring the foregoing imports from UAE to have been imported from Kenya whereas not, thus benefiting from the origin criteria by not paying import duty. The respondent submitted that it corrected the origin criteria to be UAE and not Kenya. It assessed the applicant taxes of Shs. 27,295,901 arising from misuse of the origin criteria. It submitted that it correctly relied on Method 2 as the transaction value.

The respondent submitted that it examined the applicant's imports declared in Asycuda for the period 2015 to 2019.The applicant's audited books of account for the period 2015 to 2019 indicated that it had debts to pay for the imports. The applicant declared total imports of Shs. 7,644,149,264 for the period 2015 to 2019, Shs. 2,146,868,858 for 2015, Shs. 1,262,422,174 for 2016, Shs. 949,277,507 for 2017, Shs. 1,345,951,784 for 2018 and Shs. 1,939,628,941 for 2019. The respondent carried out a payables test to confirm that the amounts the applicant declared in Asycyda as imports were the true prices paid or payable for customs purposes and the respondent realized a net variance of Shs. 526,456,542 between the declared values and the expected values. The respondent submitted that it carried out a ledger analysis to confirm whether the values the applicant

posted in its ledger matched those declared in the commercial invoices, realizing a variance of Shs. 53,458,341 leading to payable taxes of Shs. 12,830.002.

The respondent found that Method 1 was not applicable. The respondent submitted that S. 122(6) of the EACCMA provides that in applying this Section and the provisions of the Fourth Schedule, due regard shall be taken of the decisions, rulings, opinions, guidelines, and interpretations given by the Directorate, the WTO, or the Customs Cooperation Council. It submitted that it is not in dispute that the applicant is a branch and it imported goods from its head office in Kenya to Uganda and that the two are not separate legal entities. The respondent submitted that Advisory opinion 1.1 of the WTO was considered when applying the S/122 and the Fourth Schedule of the EACCMA. The Advisory Opinion 1.1 of the WTO states that Method 1 does not apply to transactions where goods are imported by branches which are not separate legal entities. Advisory opinion 1.1 of the WTO provides as follows:

> "IV. Goods imported by branches which are not separate legal entities. In cases where a branch cannot be regarded as a separate legal entity under legislation concerned, there can be no sale, bearing in mind that a sale necessarily involves a transaction between two separate persons."

The respondent submitted that Advisory Opinion 1.1 of the World Trade Organization (WTO) states that Method 1-transaction value does not apply to transactions where goods are imported by branches which are not separate legal entities, the respondent rightly rejected the applicant's transaction value.

The respondent submitted that Method 2- Transaction Value of Identical goods was applicable. The respondent examined imports of identical Bitumen products from the same exporter (the applicant) in Kenya to Uganda for the period 2015 to 2019. It looked at a unit value analysis of other importers, that is, Dott Services Ltd, General Nile Company for Roads & B, and Zhongmei Engineering Group Limited) from the Applicant in Kenya. (Exhibit REX 7).

The respondent submitted that it used Method 2 to assess the applicant tax of Shs. 706,958,865, VAT of Shs. 530,219,149 and WHT of 176,739,716. The applicant objected

and the respondent adjusted the tax to Shs. 694,037,728, VAT of Shs. 520,528,296, and WHT of Shs. 173,549,432 after considering the lowest amount of KShs. 73 per Kg as opposed to KShs. 78 per Kg.

In rejoinder, the applicant submitted that the application of a uniform exchange rate was not proper and as it could not have been the same from 2015 to 2019. It contended that the commercial invoices are in Kenya Shillings while the ledger is in Uganda Shillings with the exchange rate difference differing at the time of the ledger entries. It also contended that the uniform rate applied for the four years in issue is unrealistic. The applicant submitted that the payables and ledger analysis were improperly done resulting in wrong assessments of the applicant.

Having heard the evidence, perused the exhibits and read the submissions of the parties, this is the ruling of the tribunal.

It is not in dispute that the applicant imported bitumen into Uganda. What seems to be in dispute is whether it was liable to tax. The applicant used the transaction value for goods in assessing the tax payable. On the other hand, the respondent contends that the goods were from United Arab Emirates (UAE). It issued an assessment of Shs. 694,037,728 on the applicant on the ground that Method 2 of the GATT valuation Agreement should have been used. The applicant contended that the respondent in not applying the transaction value method did not consider that the commercial levels were different from other importers in Uganda from the branch who buy directly from it.

The law on customs valuation is provided for in S. 122 (1) of the East African Community Customs Management Act (EACCMA) provides that.

> "Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value."

Paragraph 2(1) of the Fourth Schedule of the EACCMA states as follows:

"The customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State adjusted in accordance with the provisions of Paragraph 9".

Paragraph 2(1) states that where the buyer and seller are related the transaction value is acceptable for customs purposes under the provisions of subparagraph 2 (b) of the Fourth Schedule of the EACCMA which states as follows:

"(2)(a) In determining whether the transaction value is acceptable for the purposes of subparagraph (1), the fact that the buyer and the seller are related within the meaning of Paragraph (1) shall not in itself be a ground for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided the relationship did not influence the price. If, in light of information provided by the importer or otherwise, the proper officer has grounds for considering that the relationship influenced the price, he shall communicate his grounds to the importer and such importer shall be given reasonable opportunity to respond and where the importer so requests, the communication of the grounds shall be in writing;

(b) In the sale between related persons, the transaction value shall be accepted, and the goods valued in accordance with the provisions of subparagraph (1) whenever the importer demonstrates that such value closely approximates to one of the following accruing at or about the same time.

(i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the Partner State.

(ii) the customs value of identical or similar goods as determined under the provisions of Paragraph 6.

(iii) the customs value of identical or similar goods as determined under the provisions of Paragraph 7.

Provided that, in applying the provisions under of this subparagraph 2(a) and (b)of this Paragraph, due account shall be taken of demonstrated differences enumerated in commercial levels, quantity levels, the elements enumerated in paragraph 9 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related."

The applicant contended that it transactions were of those of related parties as the goods were sold to a branch. It also contended that the commercial levels between the applicant and its branch are different from the applicant and third parties.

The dispute between the parties has complexities. The applicant states that it imported goods from Kenya and UAE. Goods imported from the Kenya are within the East African Community and do not attract custom duty. Goods from the UAE attract custom duty when they enter the East African Community. However, the applicant states that it is located in Kenya and not the UAE. Therefore, if the goods came from the UAE, they must have come from a third party. There is no evidence that the third party who sold to the applicant or its branch in Kampala were related. Therefore, if the applicant imported the goods from the UAE and it contends that it is liable to pay the transaction value of the goods, the import documents become suspect. The invoices show that the applicant bought the goods from Kenya. As already stated, if the goods were from Kenya no custom duty was due as it is in the East African Community. The applicant would not insist paying custom dues using the transaction value if the goods originated from Kenya. In a letter dated 8th January 2021 to the Assistant Commissioner, Customs Audit, of the respondent from Esta Musoke, the applicants by then finance and administration manager (p.154 of the Joint Trial bundle, states.

> "We also agree to pay taxes UGX 27,295,901 arising from wrong declaration of country of origin as goods coming from the UAE were declared with Kenyan origin. Against this, it is regrettable and was not done with any intention to cheat the government of any taxes but it was not brought to our knowledge at the time of importation."

If the applicant imported the goods from the UAE, then the Tribunal would be interested in looking at the import documents from the said country to determine the transaction value. The said documents were not tendered in court. The exporter from the UAE is not known. The quantity of exports and the actual price paid is not known.

The second problem the Tribunal has in resolving the dispute is that the applicant states that it was dealing with a branch. The applicant cited *Samsung Electronics EA Ltd. v URA* Application 31 of 2019 where the Tribunal noted that

> "A company is not a different legal entity from its head office and branch. A head office and branch are places where the company operates from."

A branch is not a different legal entity from the company that sets it up. It therefore becomes difficult to understand how a company was selling to itself. It is easy to understand If the company was selling to another company which it is related to. A company cannot be related to a branch within our comprehension of the law as there are one and the same person though in different locations. Therefore, it becomes difficult to state how subparagraph 2(b) of the Fourth Schedule of the EACCMA applies when dealing with related persons. In this case we have one person. Advisory opinion 1.1 of the WTO provides as follows:

> "IV. Goods imported by branches which are not separate legal entities. In cases where a branch cannot be regarded as a separate legal entity under legislation concerned, there can be no sale, bearing in mind that a sale necessarily involves a transaction between two separate persons."

Method 1 does not apply to transactions where goods are imported by branches which are not separate legal entities

The respondent contends that the applicant misused a certificate of origin to show that the goods in dispute came from Kenya. The applicant does not deny that some of its imports came from the UAE. If the applicant used the certificate of origin for goods imported from the UAE, all the transactions become suspect. The import documents it relied on to insist that it should use the transaction value must have shown that the goods originated from Kenya as it had the intention of relying on the purported relationship. The import documents showing that the goods originated from United Arab Emirates were not presented.

S. 122(4) of the EACCMA states that.

> "Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

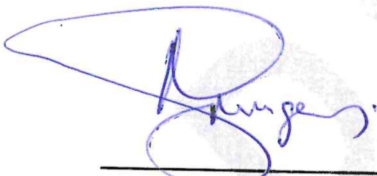
Since the applicant insists that it used the transaction value and the Tribunal has noted that there is no duty payable if the goods were from Kenya, but it is due from imports from

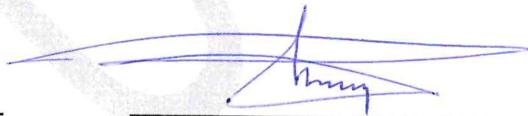
the UAE, the applicant ought to have presented documents from the exporter from the UAE. There is no evidence that the said exporter from the UAE is related to the applicant for it to insist on using Sub paragraph 2(b) of the Fourth Schedule.

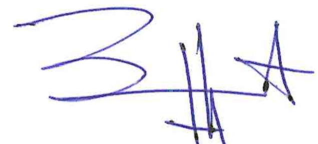
The evidence adduced before the Tribunal does not support the applicant's argument that the respondent ought to have used Method 1. There were no import documents to show that the imports from the UAE were from a related party. In the absence of evidence that the respondent ought to have used Method 1, the Tribunal holds that it was justified to use Method 2 which deals with the transaction value of identical goods. S. 18 of the Tax Appeals Tribunal places the burden on the applicant to show that the respondent ought to have made a different decision from the one taken. The said burden has not been discharged.

Taking the above into consideration this application is dismissed with costs to the respondent.

Dated at Kampala this 2nd day of September 2022.







DR. ASA MUGENYI	DR. STEPHEN AKABWAY	MR. SIRAJ ALI
CHAIRMAN	MEMBER	MEMBER