THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 10 OF 2021

REGAL PAINTS 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 a purported misclassification of imports by the applicant and the failure to obtain preferential treatment from the respondent for goods imported under the Common Market of Eastern and Southern Africa (COMESA) and the East African Community (EAC) treaties.

The applicant imports raw materials for manufacture of decorative paints. In 2020, the respondent conducted a customs post clearance audit on it for January 2017 to December 2019. As a result, the respondent issued additional assessments of Shs. 3,741,720,936.12. The additional assessments were a result of re-classifying the following imports and or revoking certificates of origin.

i) Pigments were re-classified by the respondent to HSCs 3214 and 3212 resulting in a tax liability of Shs. 194,709,262.

ii) An import known as "Dr. Fixit" was re-classified by the respondent under HSC 3214 resulting in a tax liability of Shs 570,642,674.

iii) Sadolin paint which the applicant claimed was imported from Crown Paints Kenya Limited was disputed by the respondent. The respondent issued an additional tax assessment of Shs. 2,628,320,440.80.

iv) Alkyd resins which the applicant claimed were manufactured and imported from within the EAC was disputed by the respondent which issued a tax assessment of Shs. 348,048,559.

On 29th October 2021, the applicant objected which was disallowed by the respondent.

Issues

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

The applicant was represented by Mr. Cephas Birungi Mr. Jonathan Rukikaire, Ms. Belinda Kenjura and Ms. Belinda Nakiganda while the respondent by Mr. Alex Sali Aliddeki, Mr. Ronald Baluku, Ms. Barnabas Nuwaha. Mr. Sam Kwerit, and Mr. Samuel Oseku.

EVIDENCE ADDUCED AT TRIAL

The applicant's first witness, Mr. Patrick Murage, its financial controller testified that the applicant is a subsidiary of Crown Paints Kenya Limited. He stated that the dispute with the respondent was in respect of Sadolin paint, Dr. Fixit, Alkyd resins and pigments.

i) In respect of the Sadolin paints, he stated that the dispute was on Rules of Origin which gave a preferential tax rate to goods manufactured within COMESA and the EAC. He testified that Sadolin paint was imported from Crown Paints Kenya which manufactures it and certificates of origin were issued. During the audit the respondent ignored the certificates of origin. It relied on a tolling and manufacture agreement between the applicant and Akzo Nobel and contended that the applicant would not manufacture items in its Schedule 1 which included paints. He stated that the respondent ignored evidence that the paint was manufactured in Kenya and insisted that Crown Paints imported finished products from inter alia England and Portugal. The respondent refused to share the source of its information and imposed a tax liability of Shs. 2,628,320,440.80. He stated that the applicant manufactures some Sadolin brands and imports others from Crown Paints Kenya Limited.

ii) In respect of 'Dr. Fixit', the witness stated that the applicant classified its goods under HSC 3824.10 and CPC 400. The respondent refused and re-classified them under

HSC 3214 and CPC attracting a tax rate of 25% without giving reasons. It attracted a tax liability of Shs. 579,642,674.

iii) The dispute on alkyd resins was also in respect of Rules of Origin. The applicant imported resins from Egypt and Saudi Arabia and paid taxes. It also imported resins manufactured in Kenya which were issued certificates of origin and were cleared. The respondent claimed that there was a misdeclaration of the country of origin by the applicant. The respondent requested the applicant to provide minutes and reports of the visits of its staff to Kenya which the applicant failed to provide. The respondent also tasked the applicant to provide certificates of production, manufacture and analysis made in Kenya. The respondent issued an assessment of Shs. 348,048,559.

iv) The dispute in respect of the pigments was also on certificates of origin. The respondent reclassified surface primers, sealants, strainers, hardeners, aluminium paste, duxone brands. It issued an assessment of Shs 194,709,262. The applicant disputes the assessment on the basis of wrong computation, wrong misclassification and certificate of origins.

The applicant's second witness, Mr. Shailesh Patel, the manufacturing head at Crown Paints Kenya Limited, testified that the applicant is a subsidiary of the former which manufactures paints. He stated that Crown Paints Kenya Limited had a licence from Akzo Nobel to manufacture Sadolin paint. He stated further that the respondent's officials visited the manufacturing plant of Crown Paints Kenya in Kenya which showed them the manufacturing process. The raw materials are sourced inter alia from Kenya, Egypt, South Africa and Canada. He stated that Akzo Nobel owns the Sadolin brand and entered into a tolling agreement with the applicant. He stated that AkzoNobel allowed Crown Paints to manufacture Sadolin paint on behalf of the applicant. The applicant did not have capacity to manufacture Sadolin paint until 2018. That is when it stopped importing paint from Crown Paints Kenya Limited. The applicant imported paints and relevant certificates of origin are issued. He stated that Crown Paints Kenya Limited manufactured the alkyd resins imported by the applicant. He stated that alkyd resins are stored for Internal use at the premises of Crown Paints Kenya Limited.

The applicant's third witness, Mr. Gideon Pieter Niuewouldt, the sales manager for AkzoNobel South Africa (Pty) Limited, testified that the applicant entered into a toll, manufacturing, distribution and trademark agreement with Akzo Nobel for the manufacture of Sadolin paint and related products. He stated that Akzo Nobel is aware that the applicant is importing Sadolin paints from Crown Paints Kenya Limited. Akzo Paints confirmed the said position to the respondent. He stated that at the time of the agreement the applicant did not have a capacity to manufacture the paints and related products The agreement allowed the applicant not only to import from Akzo Noble but from other companies.

The respondent's witness, Mr. Nicholas Jjengo, a tax auditor in its custom audit unit testified that the respondent conducted an audit on the applicant for the period January 2017 to December 2019. It established the applicant's tax liability of Shs. 5,399,638,350.20 which was reduced to Shs. 3,741,720,936.12. He stated that automotive paint was misclassified under HSC 3212 attracting 0% import duty instead of HSC 3208 at a rate of 25%. He testified that the applicant entered into a toll, manufacturing, distribution and trade mark licensing agreement with Akzo Nobel South Africa (Pty) Ltd which owns the Sadolin brand listing products to be manufactured by the applicant and its counter parts. He stated that the Sadolin products under Schedule 1(b) were not among the products to be manufactures by the applicant but to be supplied by Akzo Nobel South Africa Limited. He stated that AkzoNobel confirmed that products under Schedule 1(a) of the agreement were manufactured by Crown Paints Kenya Limited but not those under Schedule 1(b). He further stated that the respondent conducted a factory visit of the plant of Crown Paints Kenya Limited and established that no Sadolin branded paints were manufactured by it. He stated that items such as surface primers, silicon sealants, red oxides, duoxone branded paints, strainers, hardeners and aluminium paste were misclassified under HSC 3204.19.00, 3204.17.00, 3213,.90.90 and 3212.90.10 as pigments instead of HSC 3214 and 3208. He testified that Dr. Fixit was misclassified by the applicant under HSC 3212.90.90, 3824.40.4002.11.00 and 2530.90.00 instead of HSC 3214 which attracts a rate of 25%. The applicant sought a classification opinion from the trade division of the respondent. It submitted Dr. Fixit products not in packages but in tins labelled by markers, hence it could not facilitate proper classification. The

respondent having seen the proper packaging of the finished products reclassified Dr. Fixit to HSC 3214. He stated that it established that alkyd resins were imported to Kenya from other countries and were stored outside customs control with those manufactured in Kenya. He stated that for imports to enjoy COMESA preferential treatment when re-exported they have to remain in customs control which was not the case. Mr. Nicholus Jjengo stated that the respondent reclassified the applicant's imports under the right HSCs and amended the country of origin of the paints declared hence the assessments.

SUBMISSIONS OF THE PARTIES

A) THE APPLICANTS' SUBMISSIONS

i) Pigments

The applicant submitted that the pigments it imports include primers, sealants, strainers, hardeners, silicon sealers, red oxides, aluminium paste and Duxone brands. It submitted that a pigment is defined *by Merrian - Webster* Dictionary as a "substance that imparts black or white or a colour to other materials especially; a powdered substance that is mixed with a liquid in which it is relatively insoluble and used specially to impart colour to coating materials (such as paints) or to inks, plastics and rubber". Thus, pigments are raw material used in paints to impart colour and are not finished products

The applicant submitted that the respondent did not give reasons for reclassifying the pigments. The applicant submitted that primers, sealants, hardeners, red oxides and Aluminum Paste should be classified under HSC 3212.90.90, 3204.19.00, 3204.17.00 and 3212.90.10. This is because the pigments are used to impact colour to the paints and/or used as top coating thus more of raw materials and not finished products. It submitted that HSC 3212.90.10 defines pigments to include metallic powders and flakes, dispersed in non-aqueous media, in liquid or paste form, of a kind used in the manufacture of paints (including enamels). HSC 3204.19.00 describes pigments to include mixtures of coloring matter of two or more under subheadings 3204.11 to 3204.19. HSC 3204.17.00, pigments and preparations based thereon. HS Code 3212.90.90. The applicant submitted

that the respondent therefore wrongly misclassified the pigments under HSCs 3214 and 3212.

The applicant submitted that the respondent erred in not considering certificates of origin for the strainers yet they were manufactured and imported from Kenya. It submitted that said products should be given preferential treatment under the COMESA and EAC Rules of Origin. S. 111 of the East African Community Customs Management Act (EACCMA) states that;

> "Goods originating from the partner states shall be accorded community tariff treatment in accordance with the Rules of Origin provided under the Protocol. Customs shall require production of a Certificate of Origin and other documents as proof of origin on goods."

The applicant submitted that Article 14 of the EAC Protocol on the establishment of the East African Customs Union on Rules of Origin provides that,

> "For the purposes of this protocol, goods shall be accepted as eligible for community tariff treatment if they originate in the partner states, meet the criteria set out in the rules of origin per Annex III to this Protocol."

The applicant submitted that Annex III of the Protocol Rule 2 states that;

> "The purpose of these Rules is to implement the provisions of Article 14 of the Protocol and to ensure that there is uniformity among Partner States in the application of the Rules of Origin and that to the extent possible the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol."

The applicant submitted that if a taxpayer provides certificates of origin, bills of lading and other required import documents for goods from a partner state, then they should be given preferential treatment. It submitted that its certificates were never queried nor was there any request for verification made by the respondent to Kenya Revenue Authority. Therefore, the respondent has no basis not to consider the certificates of origin.

The applicant submitted that Rule 4(1) of Annex III sets out the origin criteria that goods shall be accepted as originating in a Partner State where they are consigned directly from a Partner State to a consignee in another Partner State where;

> "(a) they have been wholly produced as provided for in Rule 5 of these Rules; or

(b) they have been produced in a Partner State wholly or partially from materials imported from outside the Partner State or of undetermined origin by a process of production which effects a substantial transformation of those materials such that

(i) The C.I.F value of those materials does not exceed sixty per centum of the total cost of the materials used in the production of the goods;

(ii) the value added resulting from the process of production accounts for at least thirty-five per centum of the ex-factory cost of the goods as specified in the First Schedule to these Rules; and

(iii) The goods are classified or become classifiable under a tariff beading other than the tariff beading under which they were imported as specified in the Second Schedule to these Rules"

The applicant submitted that Rule 5 provides that products shall be regarded as wholly produced in a Partner state if, "Products manufactured in a factory of a Partner State..." The strainers are manufactured in Kenya at Crown Paints and within Rule 4 of the EAC Annex III Protocol.

The applicant submitted that Kenya and Uganda are member states of the COMESA and their goods should be given preferential treatment. Rule 1.5 of the COMESA Protocol on Rules of Origin states,

> "Under the COMESA trade regime, goods qualify for preferential tariff treatment if they originate in the Member States. This means that all goods that meet the requirements of the COMESA Rules of Origin qualify for preferential tariff treatment when they are traded within COMESA."

The applicant submitted that in *Tata Uganda Limited v Uganda Revenue Authority* Application 111 of 2020 it was stated that

> "In other words, if there is a change in tariff healing, there is need to show the goods classified under a tariff heading ether than the tariff heading under which they were imported did not originate from COMESA for a party to be denied preferential treatment."

This implies that for a taxpayer to be denied preferential treatment, the respondent has to show that the goods did not originate from a COMESA country, it asked for verification or queried the goods from the competent authority. The applicant submitted that therefore the respondent was wrong not to consider the certificates of origin as declared at import and thus wrongly assessed tax of Shs.194, 709,262.

ii) Dr. Fix it.

The applicant contested the assessment of Dr. Fixit on two grounds namely misclassification and legitimate expectation. Dr. Fixit products are materials that help prevent water leakages and seepage. They make concrete more cohesive, reduces shrinkage, and crack developments in plaster and concrete. The applicant submitted that it was imported Dr. Fixit from Crown Classics Limited in Nairobi who in turn imported them from Pidilite Industries Limited in India. It submitted that the Assistant Commissioner Trade on 17th December 2020, revised its ruling re-classifying Dr. Fixit from HSC 3824.40.00 to 3214.10.00. The letter of 14th October 2020 did not make changes to any other Dr. Fixit product. The applicant submitted that though the respondent stated that several brands of Dr. Fixit were misclassified, the letter of the Commissioner of 17th December 2020 which revised the classification of only one brand. The audit team assessed the applicant without consulting the Assistant Commissioner Trade office. It did not conduct technical analysis nor verification of Dr. Fixit products. The applicant argued that the assessment by the respondent on the Dr Fixit brands was contrary to the technical descriptions provided by the applicant and the certificates of analysis. The applicant insisted that Dr. Fixit falls under HSCs 3214.90. 3824.40, 3824.50, 3214.90, 4002.11 and 6807.10.

The applicant relied on the doctrine of legitimate expectation. It submitted that it made a full disclosure to the respondent on its import. It argued that the communication from the Commissioner Trade Office analyzed the products and confirmed the HSC. The communication has never been revoked nor recalled. The applicant cited *DMW (U) Ltd v Attorney General & Anor* CS 24 of 2019, where the court held that legitimate expectation may be based on some statement or undertaking by or on behalf of a public authority which has the duty of making the decision. In *NSSF v URA* Civil Appeal 29 of 2020 Justice Boniface Wamala examined the mandate and powers of the respondent to establish whether the expectation was lawful and within the confines of URA's statutory authority. The court held that the respondent,

> "In the course of execution of the said mandate and specific function, the authority has power and mandate to interpret the relevant laws...it is therefore not a correct position of the law that if the authority later on discovers that it was wrong in a previous interpretation

of the law, and as a result changes its position, that the earlier position is deemed illegal and unreliable...The authority has the right and power to change its position on a particular interpretation, but when it does so, their position takes effect from the time it made and don't render the earlier position illegal or unreliable."

The applicant submitted that it is not in dispute that the letters of 14th October and 17th December 2020 created an expectation on it

iii) Sadolin paint

The applicant submitted that Sadolin paint was manufactured by Crown Paints Kenya Limited in Kenya and imported into Uganda and thus should have preferential treatment under the EAC and COMESA Rules of Origin. Akzo Nobel owns the brand "Sadolin" and entered into a tolling agreement with the applicant which is a subsidiary of Crown Paints Kenya Limited to manufacture paint in Uganda. All Sadolin paint in dispute was imported from Crown Paints Kenya Limited and certificates of origin for all the imports were attached in Volume III of the joint trial bundle; which were the basis of 0% import duty and 0% WHT. The applicant submitted that the respondent imposed taxes at the rate of 25%. It contended that the respondent unlawfully revoked its certificates of origin.

The applicant submitted that Crown Paints Kenya Limited issued authenticated certificates of origin to the applicant which were never queried. There was no request for verification made by the respondent to Kenya Revenue Authority. Therefore, the respondent has no basis to ignore the certificates of origin. The applicant cited Rule 4(1) of Annex III which sets the origin criteria. It also cited *British American Tobacco Uganda Limited v Uganda Revenue Authority* Application 62 of 2019, where the Tribunal observed that; "Many countries may participate in the manufacturing of a good, but there must be only one country of origin".

The applicant submitted that the *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 goods are included, to be certified by a customs officer. It submitted that the Rules of Origin under COMESA and EAC allow

for preferential treatment of goods imported between members. It submitted that Kenya and Uganda are member states and thus goods from them should be given preferential treatment. Rule 1.5 of the COMESA Protocol on Rules of Origin states;

> "Under the COMESA trade regime, goods qualify for preferential tariff treatment if they originate in the Member States. This meant that all goods that meet the requirements of the COMESA Rules of Origin qualify for preferential tariff treatment when they are traded within COMESA."

The applicant cited *Tata Uganda Limited v Uganda Revenue Authority* (supra) and contended that for a taxpayer to be denied preferential treatment, the respondent had to show that these goods did not originate from COMESA country, it asked for verification or queried the goods from a competent authority.

iv) Alkyd resins

The applicant submitted that it imported alkyd resins and Syneresis from Crown Paints Kenya Limited. They should be given preferential treatment. It submitted that alkyd resins are organic polyesters and are film-forming agent in some paints and clear coatings. Alkyd resins are raw materials for manufacturing paint. The certificates of origin implied that tax is 0%. Yet. the respondent classified them under HSC 3907.50.00 attracting import duty of 10%. The respondent reviewed import information of Crown Paints Kenya Limited which revealed that it imported the same alkyd resins into Kenya which were exported to the applicant. The respondent assessed tax of Shs. 348,048,559.51 as a misdeclaration of a country of origin.

The applicant submitted that it complied with S. 235 of the Act by presenting import documents such as commercial invoices, packing lists, bill of lading etc. to show that the goods were properly classified. Preferential treatment should have been given to the goods. This is premised on the fact that the finished alkyd resins manufactured by crown paints in Kenya is not repackaged and transferred to Uganda. It concluded that it is not liable to pay tax of Shs. 348,048,559.

B) THE RESPONDENT'S SUBMISSIONS

In reply, the respondent submitted that the World Customs Organization (WCO) has the responsibility, inter alia, to secure a fair revenue collection. Uganda is a member of the WCO. One of the international treaties under the auspices of the WCO is the International Convention on the Harmonized Commodity Description and Coding System (HS Convention). It cited Article 3(1) of the HSC Convention which states that.

"(a) Each Contracting Party undertakes, except as provided in subparagraph (c) of this paragraph that from the date on which this Convention enters into force in respect of it, its Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System. It thus undertakes that, in respect of its Customs tariff and statistical nomenclatures:

(i) it shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes

(ii) it shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System; and

(iii) it shall follow the numerical sequence of the Harmonized System;

(b) Each Contracting Party shall also make publicly available its import and export trade statistics in conformity with the six-digit codes of the Harmonized System, or, on the initiative of the Contracting Party, beyond that level, to the extent that publication is not precluded for exceptional reasons such as commercial confidentiality or national security:

(c) Nothing in this Article shall require a Contracting Party to use the subheadings of the Harmonized System in its Customs tariff nomenclature provided that it meets the obligations at (a)(i). (a)(ii) and (a)(iii) above in a combined tariff/ statistical nomenclature.

The respondent submitted that Article 2(4) of the Protocol on the Establishment of the East African Customs Union provides that a Common External Tariff in respect of all goods imported into the Partner States from foreign countries shall be established and maintained. The respondent submitted that the Common External Tariff applies to pigments, Dr. Fixit, Sadolin branded paints, alkyd resins, surface primers, silicon sealants, red oxides, duoxone branded paints, strainers, hardeners and aluminum.

The respondent submitted that Article 12(4) provides that the Partner States shall use the Harmonized Customs Commodity Description and Coding System adopted under Article 8 of the same Protocol. It submitted that in *Shurik Limited v Uganda Revenue Authority* Application 101 of 2021, the Tribunal held that;

> "... in order to determine the veracity of this claim, we need to look at the HS System. The HS System or to use its full name, the Harmonized Commodity Description and Coding System is a goods nomenclature developed and maintained by the World Customs Organization and governed by the International Convention on the Harmonized Commodity and governed by the International Convention of the Harmonized Commodity Description and Coding system..."

The respondent proceeded to apply HS Codes to the different imports of the applicant.

i) Pigments

The respondent submitted that the applicant misclassified pigments under HSCs 3204.19.00, 3212.90.90 and 3212.90.10. It submitted that the proper heading for pigments is Chapter 32 which relates to tanning or dyeing extracts; tannings and their derivatives; dyes, pigments, and other coloring matter; paints and varnishes; putty and other mastics; inks. The applicant applied HSCs 3212.90.10, 3204.19.00, 3204.17.11 and 3212.90.90 which relate to pigments that include metallic powders and items used in the manufacture of paints and pigments used to include mixtures of coloring matter among others. The respondent contended that the items imported were automotive paints. It submitted that automotive paints are defined as; "A liquid mixture, usually of a solid pigment in a liquid vehicle, used as a decorative or protective coating." It submitted that surface primers, silicon sealants, red oxides, duoxone branded paints, strainers, hardeners and aluminum paste were automotive paints. The applicant classified them as such when it imported them into Kenya. It wondered how items imported into Kenya at a duty rate of 25% would be classified at an import duty rate of 0% under a different HSC in another country.

The respondent submitted that Article 3(a) of the HS Convention states that:

"It shall apply the General Rules for interpretation of the Harmonized System and all the Section, Chapter and subheading Notes, and shall not modify the scope of the Section, Chapters, headings or subheadings of the Harmonized System; and it shall follow the numerical sequence of the Harmonized System."

It further submitted that the use of the General Rules of interpretation (GIRS) were applied in *Export Trading Company Limited v The Commissioner of Customs and Excise Income Tax Appeal* 8 of 2015 where it was stated that;

"The role of a member state is to make the correct interpretation through its tax authority guided by General Interpretation Rules (GIR) of the Harmonized System (HS) and to ensure that correct classification of a product has been made".

The respondent submitted that GIR1 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."

GIR 2(b) provides;

"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."

GIR 3 provides that;

"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 affected 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".

GIR 4 provides that;

"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".

The respondent submitted that HSC 32.04, under which the applicant classified the pigments relates to;

"Synthetic organic colouring matter, whether or not chemically defined; preparations as specified in Note 3 to this Chapter based on synthetic organic colouring matter; synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined."

The heading for Chapter 32.08 specifically relates to paints. It provides that;

"Paints and varnishes (including enamels and lacquers) based on synthetic polymers or chemically modified natural polymers, dispersed or dissolved in a non-aqueous medium; solutions as defined in Note 4 to this Chapter."

HSC 32.14 provides for;

"Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings; no refractory surfacing preparations for façades, indoor walls, floors, ceilings or the like."

The respondent contended that the items in question are closely akin to paints and would be classified under HSCs 32.08 and 32.14 and not 32.04 or 32.12.

The respondent argued that the explanatory notes should be used in interpreting the HSC. It submitted that in *Power Company Limited v Uganda Revenue Authority* Application 55 of 2020, which cited *Commissioner of Customs and Excise v SmithKline Beecham* Plc with approval it was held that;

"It is settled case law that the explanatory notes drawn up by the W.C.O are an important aid to the interpretation of the scope of the various tariff headings..."

The respondent further cited *Solutions Medical Systems Limited v Commissioner of Customs and Border Control* Appeal 472 of 2020 where the Tax Appeals Tribunal of Kenya held that:

> "Although the explanatory notes are not legally binding, they provide a commentary on the scope of each heading and are generally indicative of the proper interpretation of the EAC-CET."

The Tribunal went on to hold that;

> "The EAC-CET is a highly technical document. It cannot be implemented effectively without the need for some explanations of the technical items. The Tribunal cannot for the sake of it disregard explanatory notes. It would be like a blind man groping in darkness without a guiding stick..."

The respondent submitted that the EAC-CET Chapter 32 explanatory indicate that;

> "Headings. 32.03, 32.04, 32.05 and 32.06 apply also to preparations based on colouring matter (including, in the case of heading 32.06, colouring pigments of heading 25.30 or Chapter 28, metal flakes and metal powders), of a kind used for colouring any material or used as ingredients in the manufacture of coloring preparations. The headings do not apply, however, to pigments dispersed in non-aqueous media, in liquid or paste form of a kind used in the manufacture of paints, including enamels (heading 32.12), or to other preparations of heading 32.07, 32.08, 32.09, 32.10, 32.12, 32.13 or 32.15."

The respondent submitted that pigments referred to in Headings 32.04, 32.12 do not apply to pigments used in the manufacture of paints. Therefore, the applicant was wrong to classify them under heading 32.04 and 32.12.90, 32.12.9010. The respondent contended that the proper classification for the items should have been under 32.14 and 32.08.

ii) Dr. Fixit

The respondent submitted that though the applicant classified Dr. Fixit under HSCs 3212.90.90, 3824.40.00, 4002.11.00, 2530.90.00 the proper HSC was 3214. The respondent submitted that Dr. Fixit was imported from Crown Classics Limited in Kenya which imported it from Pidilite Industries Limited in India. The product was classified for import at a duty rate of 25% at importation into Kenya. It submitted that it is only at importation into Uganda that the product was misclassified under import duty rate of 0%.

The respondent submitted that the applicant provided samples to it when it visited the former's factory. A perusal of the product established that it was supposed to be classified under HSC 3214. Dr. Fixit contained waterproofing compound of plasticizing agents, polymers and additives. The applicant classified it under HSC 3824.40 which relates to cement concretes. The respondent contended that product does not relate to cement concretes and cannot be classified as such. It stated that this also applies to Dr. Fixit Piditop 333, Dr. Fixit Super latex and Dr. Fixit waterproof which the applicant erroneously classified under HSCs 38245090, 40021100, 38244010. The proper classification for the products was 3214 at a duty rate of 25% attracting taxes of Shs. 570,642,674.

The respondent submitted that when the applicant classified its imports it relied on a communication from the Assistant Commissioner Trade, giving rise to the principle of legitimate expectation. The respondent submitted further that it could not be bound by a classification ruling that was granted on incomplete information as the samples presented were in white tins labelled Dr Fixit as opposed to those put on the market. The respondent submitted that the principle of legitimate expectation does not override a statutory obligation. It cited R*epublic v Kenya Revenue Authority Ex parte Shake Distributors Limited*, (2012) eKLR, where the court stated:

> "...It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner, For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law. In the case before me there is no evidence of a written or verbal promise made to the applicant that its goods would be allowed in Kenya once he obtained the necessary licenses. One may argue that the legitimate expectation was based on the understanding that goods from Uganda would be admitted into Kenya at a duty rate of 0%. However, that argument cannot hold when one considers the fact that the respondent has a statutory duty to ensure that all the necessary taxes for goods entering Kenya have been paid. The applicant's argument that its legitimate expectation was breached therefore fails..."

The respondent submitted that in order to rely on the doctrine of legitimate expectation, the expectation has to be legal. It cannot be used to legalize an illegality.

The respondent submitted that it is a public body charged with collection of tax under S. 3 of the Uganda Revenue Act. Article 152(1) of the Constitution of Uganda states that, "No tax shall be imposed except under the authority of an Act of Parliament. It submitted further that it has no power to excuse anyone from tax. It cited R*epublic v Kenya Revenue Authority Ex parte Aberdare Freight Services Limited* (2004) KLR 530 where the court stated that.

> "The respondent has no power to decide that a certain tax will or will not be imposed. That is a preserve of parliament and as such when the respondent makes a representation that it has no power to make, it is not precluded from asserting the correct position which is within its power to make since it is charged with the obligation of administering tax Acts. This is what the Tribunal meant by ruling that; "the expectation has to be legal. it cannot be used to legalize an illegality."

The respondent submitted that if it presented facts which the applicant acted on, it can only correct its position and collect the tax due. In *R v Inland Revenue Commissioners Ex parte MFK Underwriting Agents Limited* [1989] STC 873, the court stated that;

> "Every ordinary sophisticated tax payer knows that the Revenue is a tax- collecting agency, not a tax -imposing authority. The tax payer's only legitimate expectation is, prima facie that he will be taxed according to statute, not concession or wrong view of the law... One should be taxed by law and not be untaxed by concession."

The respondent submitted that in essence, even when the taxing authority erroneously communicates that certain goods fall under particular HSC classifications when they don't, those imports will remain classifiable under the appropriate classifications as long as they can be verified. The doctrine of legitimate expectation does not arise.

iii) Sadolin

The respondent submitted that the applicant presented paint purportedly manufactured in Kenya. The respondent contended that there is no conclusive evidence that the goods were manufactured by Crown Paints Kenya Limited. It submitted that S. 111 of the EACCMA states.

> "Goods originating from the partner states shall be accorded community tariff treatment in accordance with the rules of origin provided under the Protocol. Customs shall require production of a certificate of origin and other documents as proof of origin on goods".

The respondent submitted that during customs clearance it is necessary to ascertain the origins of the imports.

The respondent submitted that "goods" are defined to be those commodities classifiable under the Harmonized System (HS). Preferential rules of origin according to Paragraph 2, Annex II of the World Trade Organization agreement on Rules of Origin are:

> "Those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article 1 of GATT 1994".

The respondent submitted that the first step in determining whether a person is entitled to a community tariff treatment is that the goods must be originating from partner states under S. 111 of the EACCMA. The EAC Protocol on the establishment of the East African Customs Union. Rule 4(1) of the Annex III sets out the origin criteria that,

> "Goods shall be accepted as originating in a partner state where they are consigned directly from a partner state to a consignee in another Partner State and where:
> (a) they have been wholly produced as provided for in Rule 5 of these rules; or..."

The respondent submitted that Rule 5 provides that:" products shall be wholly produced in a Partner state if *products manufactured in a factory of a Partner State..." Rule 3 of the COMESA Protocol on Rules of Origin provides for goods wholly produced in the Member States.

The respondent submitted that Rule 2(1)(b)(iii) of the COMESA Protocol on Rules of Origin provides for the application of the origin criterion. Uganda and Kenya are members of COMESA. Rule 1.5 of the COMESA protocol on Rules of Origin indicates that;

> "Under the COMESA trade regime, goods qualify for preferential tariff treatment if they originate in the Member States. This means that all goods that meet the requirements of the COMESA Rules of Origin qualify for preferential tariff treatment when they are traded within COMESA."

The respondent submitted that in *Century Bottling Company v Uganda Revenue Authority* Application 24 of 2022, the Tribunal held that;

"However, the Tribunal notes that a certificate does not grant preferential treatment. A certificate of origin may enable the holder to seek for preferential treatment sought under the Protocol. The preferential treatment sought is not automatic."

The respondent submitted that the applicant declared imports of Sadolin paints as manufactured by Crown Paints Kenya Ltd whereas the same were imported as finished paints into Kenya. It submitted further that in the toll manufacturing agreement, the applicant and its counterpart in Kenya were not mandated to manufacture Sadolin paint but to import it from AkzoNobel Pty South Africa. The respondent contended that the products that the applicant claims to have been manufactured by Crown Paints Kenya Limited are products that fall under Schedule 1(b) of the agreement which could not be manufactured by it. These include 'vinyl silk ready mixed colours', 'weather guard ready mixed colours', 'super gloss ready mixed colours', wood and other specialist products. The respondent submitted that products were supplied as finished paint by AkzeNobel from outside the East African region and they were imported and distributed to the applicant. It further submitted that it carried out an inspection of the applicant's counterpart premises in Kenya. From the inspection, it was established that the applicant does not manufacture the said products and does not even have the capacity to manufacture them. It was also established that Crown Paints Kenya Limited imports various finished products from England, Belgium, Italy, Portugal, India, Malaysia and Denmark and re-exports them to its counterparts which include the applicant.

The respondent submitted that AkzoNobel wrote a letter dated 8th September, 2020 where it confirmed that;

"We are aware that the agreement refers to certain imported products (see Schedule 1b) and we suspect that this may have caused some confusion. We hereby clarify and confirm that these 'imported products' do not relate to the products manufactured by Crown in Kenya fall under Toll manufactured products' (see schedule la). We further confirm that none of the products imported from Crown were initially imported from AkzoNobel South Africa."

The respondent submitted that the goods were not entitled to preferential treatment and therefore the assessment of Shs. 2,628,320,440 should be upheld.

iv) Alkyd resins

The respondent submitted that Rule 3.9 of the COMESA Protocol on Rules of Origin provides that goods originating from COMESA countries re-exported to a partner state qualify for preferential treatment only where the goods remain under customs control. S. 16 of the EACCMA provides for goods subject to customs control. The import of Rule 3.9 is that goods that have left the customs control are not entitled to preferential treatment. Rule 3.9 of the COMESA Protocol on Rules of Origin states that;

> "Re-exportation of COMESA originating goods shall be allowed only when the goods remain under customs control and do not undergo any operations except those meant to preserve the goods and loading and reloading."

The respondent submitted that its inspection of the premises of Crown Paints Kenya Limited established that it had one storage facility that houses both alkyd resins and other goods. It also submitted that a letter dated 27th January 2020, showed stock movement of imports from Egypt and United Arab Emirate into Kenya. The respondent contended that the goods were not under customs control as they all stored in one storage facility before being re-exported to the applicant. Hence the alkyd resins were taxable at the applicable EAC-CET rates of 10% under HSC 3907.50.00 as goods originating from outside COMESA. The respondent submitted that it has the powers to deny preferential treatment provided to a certificate under Article 3.12 of the COMESA Protocol which provides that;

> "The customs authorities of the importing Member State may refuse a claim of COMESA tariff treatment if there is reason to doubt the correctness of the particulars declared to them."

The respondent submitted that tax of Shs. 348,048,559 is lawful.

v) Xylenes

The respondent submitted that the applicant imported Xylenes from Kenya through Crown Paints Kenya Limited which also imports them from several countries such as Taiwan, Japan, Thailand, Portugal, India and Netherlands. These products were properly classified under Chapter 2707.30 and duties paid at 10%. The applicant, however,

imported the same xylenes from Crown Paints but misclassified them under HSC 2902.90 that attracts a duty rate of 0%. The respondent submitted that the correct heading HSC for these products ought to have been 2707.30 attracting an import duty rate of 10%. The respondent was justified to impose an assessment of Shs. 9,767,616 and they prayed that the same is upheld by this Tribunal.

The respondent submitted that the entitlement to general damages must be proven. A party has to demonstrate that they suffered loss, injury and or damage. This was an afterthought and must be rejected. The respondent prayed that the tribunal dismisses this application with costs to the respondent.

C) THE REJOINDER BY THE APPLICANT

In rejoinder, the applicant submitted that a perusal of documents shows that the products were imported into Kenya and not Uganda. The applicant is not the importer or mentioned anywhere in the documents. That the respondent should only consider the products imported to Uganda by the applicant and relate them to the HSC. The applicant submitted that those destined to Uganda should be given preferential treatment.

The applicant submitted that its witnesses are experts in paints and have been in the industry for more than 10 years. The strainers were manufactured and imported from Kenya and the applicant had certificates of origin. It submitted that the pigments in issue are primers, sealants, hardeners, red oxides and aluminum paste. It submitted further that the said pigments are different from automotive paints as alleged by the respondent. The applicant submitted that it imported Dr. Fixit from different countries and made declarations on the advice by the respondent. The respondent does not deny the advice. The applicant objected to the samples presented to the tribunal by the respondent.

The applicant submitted that its certificates of origin have never been queried. If they are to be queried it should be at the time of import. The applicant submitted that the imported Sadolin paints were manufactured in Kenya. In 2018 the applicant started to manufacture it in Uganda. The respondent was wrong not to consider its certificates of origin.

The applicant further stated that it stated that they imported alkyd resins from different countries. For the alkyds from non EAC and COMESA partners, it paid taxes. The applicant submitted that the respondent considered xylenes imported by it from Crown Paints Kenya Limited as imported from Taiwan, Japan, Thailand, Portugal and Netherlands and wants the applicant to pay taxes. The applicant submitted that this issue was resolved at objection and the taxes were paid.

FINDING OF THE TRIBUNAL

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

The applicant imports raw materials into Uganda for manufacture of decorative paints. Sometime in 2020, the respondent conducted a customs post clearance audit on it for January 2017 to December 2019. As a result of the said audit, the respondent issued an additional assessment of Shs. 3,741,720,936.12. There are many products, the tribunal will address them one by one.

i) Pigments

The applicant's argument is two- fold. The first one is that the pigments imported attract a customs duty rate of 0% under the HSC. The second argument is that the respondent ignored the certificates of origin issued in respect of imported stainers.

The applicant submitted that it imports primers, sealants, hardeners, red oxides and aluminum paste which it classified under HSCs 3212.90.90, 3204.19.00, 3204.17.00 and 3212.90.10. HSC 3204.11.00 reads

"-- Disperse dyes and preparations based thereon kg 0%"

HSC 3204.19.00 reads

"-- Other, including mixtures of colouring matter of two or more of the subheadings 3204.11 to 3204.19 kg 0%"

HSC 3212.90.10 reads:

"Pigments (including metallic powders and flakes) dispersed in non-aqueous media, in liquid or paste form, of a kind used in the manufacture of paints (including enamels) ... kg 0%"

The applicant contended that pigments add colour to paints and are used as top coating. It contended that pigments are raw materials rather than finished products. If it was finished product then the pigments should not be mixed in anything.

The respondent submitted that the Note 3 of the EAC-CET Chapter 32 Explanatory notes reads

> "Headings. 32.03, 32.04, 32.05 and 32.06 apply to preparations based on colouring matter (including, in the case of heading 32.06, coloring pigments of heading 25.30 or Chapter 28, metal flakes and metal powders), of a kind used for coloring any material or used as ingredients in the manufacture of coloring preparations. The headings do not apply, however, to pigments dispersed in non-aqueous media, in liquid or paste form of a kind used in the manufacture of paints, including enamels (heading 32.12), or to other preparations of heading 32.07, 32.08, 32.09, 32.10, 32.12, 32.13 or 32.15."

The respondent submitted that the pigments referred to in headings 32.04, 32.12 do not apply to pigments used in the manufacture of paints. The applicant was therefore wrong to classify them under heading 32.04 and 32.12.90, 32.12.9010. The proper classification for the items should have been under HSCs 32.08 and 32.14. HSC 32.08 reads

> **"Paints and varnishes (including enamels and lacquers) based on synthetic polymers or chemically modified natural polymers, dispersed or dissolved in a non-aqueous medium; solutions as defined in Note 4 to this Chapter."**

HSC 32.14 reads.

> **"Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings; nonrefractory surfacing preparations for façades, indoor walls, floors, ceilings or the like".**

Both attract at a duty rate of 25%.

The applicant's import documents show it imported different items. Exhibit A37 of the Joint Trial bundle VI at p. 1417 shows that it imported pigments and preparation therefor. At p. 1419 it shows pigments dispersed in a non- aqueous media and in liquid/ paste form.

At p. 1460 the customs declaration indicates pigments of a kind used in the manufacture of paints, aluminium paste. It cannot be disputed that the applicant imported pigments. *Cambridge Advanced Learner's Dictionary* 4th Edition p. 1156 defines a 'pigment' as; "a substance which gives something a particular color when it is present in it or added to it;" According to the applicant the pigments are used to impact colour to the paints. The respondent does not dispute this. Our analysis is that a pigment is substance that impacts colour and maybe used in the manufacture of paint.

Uganda as a member of the World Customs Organization is required to apply to the International Convention on the Harmonized Commodity Description and Coding System (HS Convention). Article 3(1) of the HS Convention states that.

"(a) Each Contracting Party undertakes, except as provided in subparagraph (c) of this paragraph that from the date on which this Convention enters into force in respect of it, its Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System. It thus undertakes that, in respect of its Customs tariff and statistical nomenclatures:

(i) it shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes

(ii) it shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System; and

(iii) it shall follow the numerical sequence of the Harmonized System;

The General Rules of Interpretation (GIR) requires the use of headings and subheading for classification under the HS Convention and Common External Tariff. GIR1 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."

GIR 3 provides that;

"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 affected 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.

GIR 4 provides that;

"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".

The Tribunal is required to look at the East African Comment External Tariff (CET)

Chapter 32 of the CET deals with

"Tanning or dyeing extracts; tannins and their derivatives; dyes, pigments and other colouring matter; paints and varnishes; putty and other mastics; inks."

HSC 3212.90.10 deals with

"Pigments (including metallic powders and flakes) dispersed in non-aqueous media, in liquid or paste form, of a kind used in the manufacture of paints (including enamels) ..."

Both attracts a duty rate of 0% which may apply to the applicant's pigments. The applicant tendered in a technical data sheet, Exhibit A4 at pages 1785 to 1814 of the Joint trial bundle Volume VIII which confirmed the applicant's imports as pigments. The applicant deals in the manufacture of paints. The evidence is that it imported pigments for the manufacture of paint. Therefore, the imported pigment most likely fell under HSC 3212.90.10. The explanatory notes do not mention HSC 3212.90.10 so as to exclude the duty rate of 0% applying to them. The respondent contended that the applicant imported automotive paints. The respondent did not adduce evidence to show that the items were automotive paints and not pigments used in the manufacture of paints.

The respondent alleged that the applicant when importing the pigments into Kenya paid duty at a rate of 25%. Then it should not pay a duty rate at 0% in Uganda because the items were automotive paints when it imported them into Kenya. This is not clear. If the applicant is located in Uganda, how could it be importing items into Kenya? Maybe the respondent was referring to Crown Paints Kenya Limited. The applicant and Crown Paints

Kenya are two different entities. There should be a link between what Crown Paints Kenya Limited imported, and what was imported in Uganda. This is made difficult where the custom entries attached bear scientific names or technical terms for instance at p. 1460 of the Joint trial bundle VI, the customs declaration show that the applicant imported pigments which it mentions as aluminium paste. The invoice at p. 1459 mentions in addition to aluminium paste, colanyl red, acrylic polymers, pigment red oxide, pigment lemon chrome. Because the customs entries mostly use technical terms, there is no evidence that the said items are not pigments when the applicant say so. Under the Common External Tarriff, pigments appear in different headings and sub headings where they attract different duty rates. In some cases, they attract duty rate of 0% while in others 25%. Maybe the pigments imported by Crown Paints Kenya Limited into Kenya attracted 25% while those imported by the applicant into Uganda attracted 0%. There is no evidence that what Crown Paints Kenya Limited imported into Kenya was what the applicant imported into Uganda. If the applicant contends that its pigments fall under HSC 3212.90.10 attracting a custom duty rate of 0%, which the respondent disputes the latter has to adduce evidence to show the said pigments fell under other HSCs which attract a duty rate of 25% or the explanatory notes excludes the pigments from falling under the HSC which attract 0%. Since there were different headings affecting pigments, some giving different rates, in order to ascertain under which headings, the applicant's imports actually fell, there was need to take them to a laboratory to analyse them so as to ascertain which pigments, they are actually were. This would be difficult especially when they were imported over 2 years ago and were sold.

The second argument was in respect of stainers the applicant imported. The applicant submitted that the strainers are manufactured by Crown Paints Kenya Limited, a company in Kenya. It contended that these products should therefore be should be given preferential treatment under the COMESA and EAC Rules of Origin. S. 111 of the EACCMA states that;

> "Goods originating from the partner states shall be accorded community tariff treatment in accordance with the Rules of Origin provided under the Protocol. Customs shall require production of a Certificate of Origin and other documents as proof of origin on goods."

Article 14 of the EAC Protocol on the establishment of the East African Customs Union on rules of origin provides that,

> "For the purposes of this protocol, goods shall be accepted as eligible for community tariff treatment if they originate in the partner states, meet the criteria set out in the rules of origin per Annex III to this Protocol."

Rule 1.5 of the COMESA Protocol on Rules of Origin states,

> "Under the COMESA trade regime, goods qualify for preferential tariff treatment if they originate in the Member States. This means that all goods that meet the requirements of the COMESA Rules of Origin qualify for preferential tariff treatment when they are traded within COMESA."

The applicant had certificates of origin to show that the goods originated from the EAC. The respondent did not seek verification from a competent authority. The respondent was wrong not to consider the certificates of origin as declared at import. Therefore, the assessed tax of Shs.194, 709,262 was wrong.

ii) Dr. Fixit

The applicant contested the assessment of Dr. Fixit on two grounds namely misclassification and the doctrine of legitimate expectation. The applicant classified its goods under HSC 3824.10 and CPC 400. This was after it received a letter from the Assistant Commissioner, Trade on 5th October 2020. The respondent revised the assessment of Dr. Fixit to HSC 3214.90.00 attracting tax of Shs. 579,642,674.

One needs to look at the headings and subheading the parties are relying on. The applicant classified Dr. Fixit under Heading 38.24 which relates to

> **"Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures or natural products), not elsewhere specified or included."**

The applicant relied on HSC 3824.40.00 which relates to prepared additives for cements, mortars or concretes which attracts a duty rate of 0%, while the respondent relied on Heading 32.14 which relates to

"Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings; nonrefractory surfacing preparations for façades, indoor walls, floors, ceilings or the like."

The subheading the respondent relied on HSC 3214.10.00 relates to "Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings" which attracts a rate of 25%. The respondent also relied on HSC 3214.90.00 which relates to others also attracting 25%

The applicant stated that it imported the items from Crown Classics Limited which in turn imported them from Pidilite Industries Limited in India. It submitted that Dr. Fixit products are materials that help prevent water leakages and seepage. It makes concrete more cohesive, reduces shrinkage and crack development in plaster and concrete. On the other hand, the respondent contended that product does not relate to cement concretes and cannot be classified as such. It argued that the proper classification for the products was HSC 3214 attracting a duty rate of 25% and taxes of Shs. 570,642,674.

It is not in dispute that Dr. Fixit products are used to prevent water leakages and seepages. The applicant submitted that it makes concrete more cohesive and reduces shrinkage. However, the applicant classified Dr. Fixit under HSC 3824.40.00 which relates to prepared additives for cements, mortars or concretes which attracts a duty rate of 0%. From the applicant's submission, a perusal of the certificates of analysis and the samples that were provided as exhibits, Dr. Fixit does not qualify to fall under HSC 3823.40. It may make concrete more cohesive but it is not concrete, nor cement or mortar. The certificates of analysis show that Dr. Fixit is a proofing compound for cement mortar and concretes. A view of the sample, "640 Raincoat 2 in 1" shows that it is used for waterproof roof and exterior wall. It resists water seepage and reinforces fibre. It is also used for coating. Another item, 2113 Fastlex, is a waterproofing liquid. It is applied to concrete, cement, or masonry surfaces, swimming pools, bathrooms, toilets, etc, (p. 245 of Joint Trial Bundle Volume V). One sample, "PIDITOP333" is a non- metallic hardener. The other samples provided were more of power form. Dr. Fixit Gapseal Tape (p. 241 of Joint Trial Bundle Volume V) is a self-adhesive waterproofing strip. It was for sealing leakage cracks and joints. It is also acts as a bond to metal, roof tiles, concrete. Whatever

form Dr. Fixit takes or the function it performs, it does not seem to fall under HSC 3823.40. Waterproofing material and hardeners should not be confused with, cement mortar or concrete. They may be additives but are not cements, mortars or concrete. The respondent classified Dr. Fixit under HSC 3214.10.00 which relates to "Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics. *Oxford Advanced Learner's Dictionary* at p. 928 defines mastics as "a substance that is used in buildings to fill holes and keep water." It is already noted that Dr. Fixit is a waterproofing expert. The others are sealants. Caulk is defined at p. 226 as "Something to fill the holes or cracks in something." Since there is no evidence rebutting the reclassification by the respondent, the tribunal finds that the respondent rightfully reclassified Dr. Fixit under HSC 3214.10.00 attracting a rate of 25% which led to a tax liability of Shs. 570,642,674. The tribunal wishes to state that the different types of Dr. Fixit do not affect the tax rate of each product since all products are the similar and serve the same purpose.

The applicant relied on the doctrine of legitimate expectation. It cited *NSSF v URA* (supra) where the court stated

> "In the course of execution of the said mandate and specific function, the authority has power and mandate to interpret the relevant laws...it is therefore not a correct position of the law that if the authority later on discovers that it was wrong in a previous interpretation of the law, and as a result changes its position, that the earlier position is deemed illegal and unreliable...The authority has the right and power to change its position on a particular interpretation, but when it does so, their position takes effect from the time it made and don't render the earlier position illegal or unreliable"

Before we can rely on the said doctrine, the Tribunal has to determine what expectation did the respondent give the applicant.

In order to determine the expectation, the Tribunal perused the letters. The letter of 14th October 2020 states inter alia that

> "Based on the availed documentation and samples provided, the items listed below shall be classified as follows under the East African Community Common External Tarriff (EAC-CET) and the applicable Customs Procedure Codes (CPCS) appended thereon."

The said letter continues to state

"Please take note that the classification above has been based on the availed information and may change based on the verification findings. Dr. Fixit crack powder and Dr. Fixit raincoat 2 in 1 could not be classified due to lack of sufficient information. Availability of information relating to the same will enable us to classify the products appropriately."

A closing reading of the letter shows it cannot create any legitimate expectation in any taxpayer who has an understanding of a common man on the street. The expectation was based on the information availed to the respondent. The respondent's witness, Mr. Nicholas Jjengo testified that the applicant submitted Dr. Fixit products not in packages but in tins labelled by markers, hence it could not facilitate proper classification. The respondent having seen the proper packaging of the finished products reclassified Dr. Fixit to HSC 3214. The applicant did not discredit the said evidence. If the information changed, the classification was bound to change. There was no fixed confirmation of the classification or expectation created. Therefore, the applicant's reliance on the concept of legitimate expectation is misconceived. The applicant is liable to pay the tax assessed on Dr. Fixit.

iii) Sadolin Paints

The applicant submitted that it imported Sadolin paint from Crown Paints Kenya Limited. The certificates of origin for the imports. exhibits in Volume III of the joint trial bundle were the basis of the goods having a preferential treatment of 0% rate import duty and withholding tax. In its letter of 30th June 2020, the respondent-imposed taxes at a rate of 25% on the imported Sadolin paints thereby revoking the certificates of origin. The applicant submitted that for a taxpayer to be denied preferential treatment, the respondent has to show that the imports did not originate from a COMESA country or the EAC. It also has to show that it asked for verification or queried the goods from a competent authority. On the other hand, the respondent submitted that the applicant declared imports of Sadolin branded paints as manufactured by Crown Paints Kenya Limited whereas they were imported as finished paints into Kenya from various countries. The respondent submitted that from the toll manufacturing agreement, the applicant and its counterpart in Kenya were not mandated to manufacture Sadolin paint. It was supposed to be imported from AkzoNobel Pty, South Africa. The products that the applicant claims to have been

manufactured by Crown Paints Kenya Limited are products that fall under Schedule 1(b) of the agreement which indicates that they should not be manufactured by it.

The applicant entered a toll and manufacturing agreement with AkzoNobel South Africa which took effect on 28th September 2017. Clause 2.2 of the agreement appoints the applicant as non-exclusive distributor, toll manufacturer and a licensee to use the trademark to manufacture, distribute, sell or supply the products on the terms of the agreement. Under Clause 2.3 AkzoNobel gave the applicant the right to import, produce, package and label the products under its trademarks. Schedule 1(a) of the agreement showed that products to be manufactured by the applicant while Schedule 1(b) dealt with the products it would import. The products under Schedule 1(b) included vinyl Silk Ready Mixed Colours, Weather guard Ready Mixed Colours, Super Gloss Ready Mixed colours and other volumes of wood and specialist products. The respondent submitted none of these products fall within the products that the Uganda Company and its counterpart were allowed to manufacture. The respondent concluded that the applicant and Crown Paints Kenya Limited were not granted any permission to manufacture Sadolin branded paint but to import them from South Africa. It contended that therefore the applicant could not have imported the crown paints from Kenya. The respondent argued that the products were supplied as finished products from outside East Africa.

The first hurdle the Tribunal encounters is that the respondent is relying on an agreement between AkzoNoble and the applicant to determine what Crown Paints Kenya could not manufacture. The agreement between the AkzoNobel and Crown Paints Kenya Limited was not tendered in as evidence. The Tribunal cannot work on assumptions. Mr. Shailesh Patel, the manufacturing head at Crown Paints Kenya Limited testified that that Akzo Nobel allowed Crown Paints Kenya Limited to manufacture Sadolin paint on behalf of the applicant. Mr. Gideon Pieter Niuewouldt, the sales manager for Akzo Nobel South Africa (Pty) Limited, testified that that Akzo Nobel was aware that the applicant was importing Sadolin paints from Crown Paints Kenya Limited. The said evidence was not discredited. If the parties to the Toll Agreement were in breach of it, it is not the mandate of the respondent to rectify or enforce agreements. Though the respondent submitted that the products were supplied as finished products by AkzoNoble outside from outside East

Africa, the import documents and the certificates of origin show the imports were from Kenya. The applicant tendered in production and batch records for 2018, exhibit A 20.2, which showed that the paint was manufactured in Kenya by Crown Paints Kenya Limited. The respondent is required to look at the certificates of origin as to the origin of imports and not agreements.

The respondent submitted that it conducted an inspection of Crown Paints Kenya Limited's premises in Kenya on 13th March 2020. The period the applicant alleges it imported Sadolin paint was from 2017 to 2019. The report says no Sadolin paint was found at the factory premises. The team was informed that production of Sadolin paint was stopped in 2018. This does not rule out that the applicant could have imported the paint from 2017 to 2018. Possibly even later if though production was stopped the paint could have still been in stock. The report relied on by the respondent actually states in Finding 4 that.

> "The company (Crown Paints Kenya PLC) claimed that the Sadolin paint they ever manufactured was exported to Regal Paints Uganda was just to help them (Regal Paints Uganda) meet the demand from the market. No details regarding the formulae were shared."

Therefore, the report does not deny that the applicant ever imported Sadolin paint from Crown Paints Kenya Limited. It is not specific about the time of import to Uganda. The report says that Crown Paints Kenya PLC has branches in Mombasa and Kisumu in Kenya. There is no evidence that the audit team visited the other branches to find out whether the applicant did not import its Sadolin paint from them. The said report is inconclusive. The Tribunal cannot rely on it to conclude that the applicant did not import Sadolin paint from Kenya.

The respondent submitted that the applicant's imports were obtained as finished products from England, Belgium, Italy, Portugal, India, Malaysia and Denmark and are therefore not subject to preferential treatment. The said submission is not borne out by any evidence. The respondent referred to a letter of 8th September 2020, where AkzoNobel stated "We further confirm that none of the products imported from Crown were initially imported from AkzoNobel South Africa." The fact that Crown Paints Kenya Limited did

not import from AkzoNobel South Africa does not mean it could not manufacture paint that could be imported into Uganda.

The import documents and certificates of origin, Exhibits A 21.1 and A.21.2 show that the applicant's imports of Sadolin paint were from Kenya. S. 111 of the EACCMA 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."

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."

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 goods are included, certified by a customs 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; ...'

In *British American Tobacco Uganda Limited v Uganda Revenue Authority* Application 62 of 201t the Tribunal noted that

> "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 applicant tendered in certificates of origin that showed that its imports were from Kenya. In *Century Bottling Company v Uganda Revenue Authority* Application 24 of 2022, the Tribunal held that;

> "However, the Tribunal notes that a certificate does not grant preferential treatment. A certificate of origin may enable the holder to seek for preferential treatment sought under the Protocol. The preferential treatment sought is not automatic."

In this case, it is not denied that the certificates of origin issued entitled the beneficiary from receiving preferential treatment, which was a 0% rate of duty. The said certificates have not been annulled. There are still valid

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. The East African Community Customs Union (Rules of Origin) 2015 makes provision for determination of rules of origin. Goods shall be considered to originate in the Partner States if they meet the criteria set out in the Rules of Origin. Where there is doubt a party may seek clarification. 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 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. In *British American Tobacco Uganda Limited v Uganda Revenue Authority* Application 62 of 2019 the Tribunal stated that "If the respondent doubted the correctness of the particulars, it had an option to seek further verification before rushing to deny preferential treatment". In *Tata Uganda Limited v Uganda Revenue Authority* (supra) the Tribunal noted where there are queries the respondent should show that it asked for verification or queried the goods from a competent authority. If the respondent doubted whether the Sadolin paint originated from Kenya it should have sought clarification from the competent authority. In this case, there was no request for verification made by the respondent to Kenya Revenue Authority. Therefore, the respondent has no basis to ignore the certificates of origin.

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 may be 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."

In this case, the respondent queried that the goods to which the proof origin relates are not eligible for preferential treatment. It contends that the goods were finished products manufactured in countries other than Kenya. 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 paint were marked "inapplicable" and retained by the custom authority. There is also no evidence that the custom authorities of the exporting Partner State were informed. Taking the above into consideration, the assessment of Shs. 2,628,320,440.80 is set aside.

iv) Alkyd Resins

The applicant submitted that it imported alky resins from its parent company, Crown Paints Kenya Limited Kenya. Hence, they should be given preferential treatment. They have certificates of origin which granted it tax at 0% rate. On the other hand, the respondent contended that the parent company imported the goods from outside the region, from Egypt, United Arabe Emirates (UAE) amongst other. The respondent

submitted that at the inspection, it was established that the Crown Paints Kenya Limited premises had one storage facility that houses both Alkyd Resins and other goods. The applicant also submitted a letter dated 27th January 2020, indicating stock movement records from Crown Paints Limited from, Egypt and UAE into Kenya. The import data of the applicant in Asycuda indicated that the products were imported from Egypt and UAE. %. The respondent alleged that the goods left customs control before being re-exported to the applicant. It contends that since the imports left customs control the imports should be classified under HSC 3907.50.00 which attracts import duty at a rate of 10%

The respondent cited Rule 3.9 of the COMESA Protocol on Rules of Origin which reads.

> "Re-exportation of COMESA originating goods shall be allowed only when the goods remain under customs control and do not undergo any operations except those meant to preserve the goods and loading and reloading."

The respondent contended that under Rule 3.9 if goods left the customs control, they are not entitled to preferential treatment The respondent indicated that the alkyd resins were taxable at the applicable EAC-CET rates of 10% under HSC 3907.50.00 as goods originating from outside the COMESA region. Therefore, the assessment of Shs. 348,048,559 is lawful.

Rule 3.9 of the COMESA Protocol on Rules of Origin states that re-exportation of COMESA shall be allowed if originating goods were not under customs control and do not undergo any operations except those meant to preserve the goods and loading and reloading. The respondent has not adduced evidence to what amounts to customs control under the Protocol and how the applicant breached it. It is not stated anywhere that customs control refers to goods being in one store. It is not clear how the respondent determined that the applicant's imports left one storage in Kenya. No evidence to that effect was adduced.

S. 16(f) of the EACCMA states that goods declared for transfer to another Partner State should be subject to customs control. S. 61(2) of EACCMA provides that

> "(2) Where any goods are subject to Customs Control, then
>
> (a) Any officer may at any time examine such goods;

(b) Except with the authority of the Commissioner or in accordance with this Act, no person shall interfere with such goods."

The respondent did not adduce evidence to show that an officer of the competent authority would not at any time examine the alkyd resin imported in Kenya. It also did not adduce evidence to show that the said imports were interfered with.

Our understanding of Customs control is that it is a process where Customs inspects, verifies and examines inward and outward means of transport, goods, personal articles as well as mails and parcels according to the law to ensure the implementation of laws and regulations concerning entry and exit of means of transport, goods, personal. By housing alkyd resin with other goods in one storage facility may not mean that the goods were not subject to customs control. Customs may still control, the items that are in bonded warehouses. Customs may still regulate and examine different items in one store. The respondent also does not disclose the source of its information. It becomes difficult to rely on it. The applicant's witness Mr. Shailesh Patel testified that the alkyd resins stored at Crown Paints Kenya were for internal use.

The alkyd resins had certificates of origin entitling them to preferential treatment. The respondent has not provided sufficient evidence to show that the imports of alkyd resins were not subjected to customs control. Therefore, the assessment of Shs. 348,048,559 is set aside.

vi) Xylenes

The respondent submitted that the applicant imported xylenes from Kenya through Crown Paints Kenya Limited which imports from several counties such as Tawan, Japan, Thailand, Portugal, India, and Netherlands. The applicant purportedly misclassified the products under HSC 2909 that attracts a duty rate of 0%. The respondent submitted that the proper HSC is 2707.3 attracting a duty rate at 10% which imposes tax of Shs. 9,767,616. The dispute on the assessment of Shs. 9,767,616 was not part of what was stated during scheduling. As a result, the applicant did not adduce evidence on it or address it in its submissions. The respondent did not seek leave to include it as part of

the dispute. In rejoinder, the applicant submitted that the dispute on xylenes was settled at objection stage and taxes paid. Since it was resolved, and was not part of the dispute agreed during scheduling, the Tribunal can only set aside any outstanding assessment of. Shs. 9,767,616 on xylenes

In the circumstance the Tribunal makes the following orders.

1) The assessment of Shs. 194,709,262 on pigments is set aside.
2) The assessment of Shs 570,642,674 on 'Dr. Fixit' is upheld.
3) The assessment of Shs. 2,628,320,440.80 on Sadolin paint is set aside.
4) The assessment of Shs. 348,048,559 on alkyd resins is set aside.
5) Any outstanding assessment of Shs. 9,767,616 on xylenes is hereby set aside.
6) The applicant is award three quarters (4/5) of the costs.
7) The applicant is entitled to a refund of the 30% of the tax in dispute if it paid any after offsetting any tax payable under this order.

We so order.

Dated at Kampala this 31st day of August 2023.

DR. ASA MUGENYI
CHAIRMAN

DR. STEPHEN AKABWAY
MEMBER

MR. GEORGE MUGERWA
MEMBER