THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO.11 OF 2021

TECX LUBRICANTS UGANDA LIMITED.....APPLICANT

VERSUS

UGANDA REVENUE AUHTHORITY.....RESPONDENT

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

RULING

This application is in respect of the correct valuation method to be used to assess the applicant's importation of lubricants.

The applicant carries on the business of importing lubricants. On the 11th November 2020, the applicant imported lubricants into Uganda and made a self –assessment of taxes of Shs. 36,687,543 which it paid. The respondent queried the applicant's self-assessment and issued an import duty assessment of Shs. 118,362,443 on the ground that the valuation method used by the applicant was not the correct one. The applicant relied on the transaction method while the respondent insists it should be the fall back method.

Issues

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

The applicant was represented by Mr. Joseph Luswata and Mr. Philbert Mpirirwe while the respondent by Mr. Tony Kalungi.

The applicant's witness, Mr. Elvis Boamah, its director, stated that the applicant is sole distributor of lubricants of Oiltec FZ LLC, a company based in the United Arab Emirates (UAE). The lubricants are designed by Oiltec but manufactured on its behalf by Regal Lubricants and Grease Manufacturing under the brand "TECX". In October 2020, the

applicant purchased a consignment from Oiltex. The lubricants were transported by Bollore which declared them in the Asycuda system of the respondent. A self- assessed tax by the applicant of Shs. 36,687,543 was paid. The respondent declined the self-assessment on the ground that it was lower than the value of similar imports. The respondent fixed the custom value at Shs. 118,362,443 and required the applicant to pay an additional Shs. 81,674,900. On 30th November 2020, the applicant objected. On 23rd December 2020, the respondent rejected the objection. Mr. Elvis Boamah stated that the lubricant is 98% base oil. He stated that a manufacturer who stocked large quantities of base oil when prices were low would have a low cost of production which affects the price of the lubricants. The applicant imported lubricants for engines of vehicles. These included Automatic Transmission Fluid (ATF), Continuous Vehicle Transmission (CTV) and brake fluid. Havoline Oil and Caltex are similar to the lubricants imported by the applicant but not of the same brand.

The respondent's witness, Mr. Elimeleki Acidri, a supervisor working in its custom department, stated that on 16th November 2020, the applicant imported lubricants into Uganda and made a self- assessment of Shs. 36,687,543. On 18th November 2020, the respondent queried the applicant's entry of on grounds of insufficient documents and significantly low values. The applicant failed to justify the declared values. The respondent appraised the entries and demanded the applicant to pay Shs. 118,362,443 as taxes. He stated that the respondent rightly disregarded the transaction value of the applicant and used the fallback method (Method 6) to appraise the values of the imports.

The respondent's second witness, Mr. Isaac Balya Winyi, a Supervisor in its customs department stated that the respondent queried the applicant's entry on grounds of accuracy and significantly low values. The respondent used the lowest value of US$ 1.12 per litre and uplifted the applicant's values. He testified that there were no identical goods and similar lubricants imported around the same time, hence methods 2 and 3 of transaction values of identical goods and similar goods respectively could not be applied. He also contended that the Deductive Value Method, Method 4, could not apply because the applicant was the 1st importer of the lubricants in Uganda. The Computed Value Method, Method 5, could not apply because the respondent did not have information on

the lubricants from the country of origin. He stated that the respondent was justified to use Method 6, the fall back method, which was applied with reasonable flexibility. The only values that could be considered under the fall back Method were for goods imported by Hass Petroleum (U) Limited which had the lowest value of US$ 1.1 per litre.

The applicant submitted that it is not liable to pay the tax assessed because the method relied on by the respondent to determine the customs value of the lubricants was unlawful, discriminative and contrary to S.122 of the East African Community Customs Management Act (EACCMA), the World Trade Organization Agreement on Tariffs and Trade, and internationally established principles. It submitted that S. 122 provides that the value of imported goods for purposes of import duty is to be determined in accordance with the Fourth Schedule of the Act. The methods of determination of customs value in the Fourth Schedule are set out sequentially and apply as follows: (a) Transaction value, method 1: (b) Transaction value of identical goods, method 2; (c) Transaction value of similar goods, method 3; (d) Deductive value, method 4; e) Computed value, method 5; (f) Fallback value, method 6. Paragraph 5 provides that it is only after the customs value of imported goods cannot be determined under methods 1, 2 and 3 that it should be determined under 4, and if not, under method 5. The applicant cited *Testimony Motors Ltd v Commissioner of Customs URA* Civil Suit 212 of 2012_where Justice Madrama stated that S. 122 is couched in mandatory terms, and the transaction value method is the first and primary method of valuation.

The applicant submitted that S. 122(6) of the EACCMA requires that in determining the customs value, due regard must be taken of the decisions, rulings, opinions, guidelines and interpretations given by the Directorate, the World Trade Organization (WTO), or the Customs Cooperation Council. Valuation for customs purposes is also governed by Article VII of the 1986 General Agreement on Tariffs and Trade ("GATT"). Paragraph 2(a) of the said Article provides that;

> "The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values".

The applicant submitted further that it is only where the actual value is not ascertainable that the value for customs purposes is based on the nearest ascertainable equivalent of such value in accordance with Article VII(2)(c) of the GATT and Article 4 of the 1994 WTO Agreement (WTO Agreement) on Implementation of Article VII of the GATT. The applicant submitted that therefore, under both the EACCMA and the GATT, the fallback value method is the last alternative method to be applied to determine the customs value of imported goods. The applicant submitted that the respondent wrongly relied on the fallback value method to determine the applicant's tax liability without first resort to the first applicable methods of valuation.

The applicant submitted that the first and primary method of determination of customs value for purposes of import duty is the transaction value, which was applied by it for its self-assessment. It submitted that Paragraph 2(1) of the Fourth Schedule to the EACCMA provides that;

> "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".

The applicant submitted that the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller of the imported goods. This is reiterated by Article 1(1) of the WTO Agreement. Similarly, Article VII(2)(b) of the GATT provides that the

> "actual value for purposes of determining customs value is the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions."

The applicant submitted that in determining the transaction value of the lubricants, it relied on the transaction documents for the goods. It provided all the necessary documentation to customs for assessment including the Export Declaration Form, the Commercial Invoice, and the Certificate of Origin. They were also attached to the request for appeal on the assessed values made to the respondent on 27th November 2020. The applicant's export declaration was issued by the Dubai Export Authority and a certificate of origin issued by the Chamber of Commerce in Dubai. The applicant availed additional

documents to the respondent for review including a copy of the supplier's invoice from the toll blender, Regal Lubricants and Grease Manufacturing LLC.

The applicant did not dispute that the respondent has powers under S. 122(4) of the EACCMA when dealing with determination of customs value to satisfy itself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

The applicant submitted that the Tribunal recognized that where customs value cannot be determined under the transactions value method, there should be consultation between the customs administrator and the importer. In *Kanoni Trading Company Ltd v Uganda Revenue Authority* Application 11 of 2003, the Tribunal stated that:

> "The respondent merely doubted the invoice value and proceeded to investigate rather than consult with the importer which investigation did not contradict the price actually applied by the importer".

It concluded that the information adduced by the importer should have been accepted as providing a basis for valuation of its goods under the transaction value method.

The applicant submitted that the respondent in a letter of 23rd December 2020, Exhibit AE7, declared that the value declared by the applicant based on the transaction documents was not acceptable because customs had doubts as their truth and accuracy. It stated as follows:

> "We have scrutinized the documents you have provided relating to the transaction with the view of verifying the truth and accuracy of your documents presented to customs for valuation purpose as provided for under S. 122(4) of the EACCMA 2004. We have observed that the value you declared based on your transaction documents of US 0.392/liter is far less than the international market price of recycled based oil used as raw material for making inferior quality lubricating oils."

The respondent in its letter of 11th January 2021 stated that:

> "the declared value Cost and Insurance and Freight (CIF), USD 0.392 per litre of lubricants is far less than the international market price of recycled base oil used as raw material for making inferior quality lubricants."

The applicant submitted that this position was erroneous because the transaction method is based on the price actually paid and not the international market price for goods.

The applicant submitted that the interpretative note to Paragraph 2 of the EACCMA defines 'the price actually paid or payable as; "the total payment made or to be made by the buyer to, or for the benefit of the seller for the imported goods". The applicant submitted that in the *Testimony* case (supra) the court defined the transaction value as the price paid for the goods by the buyer or importer which forms the basis for assessing the customs duty payable on the goods. It submitted that it supplied the respondent with all the transaction documents necessary to enable it determine the transaction value on which its self-assessment was based.

The applicant submitted that the fallback value method was not the next applicable alternative. S. 122 of the EACCMA read together with the 4th Schedule to the Act and Articles VII(2) and (3) of the GATT require that the other available methods are applied in sequential order before the fallback value method can be used as a last resort. It contended that in the event that the transaction value was rightly deemed inapplicable, the respondent was then required to apply the transaction value of similar goods under Paragraph 4 of the 4th Schedule to the EACCMA and Article 3 of the WTO Agreement. It submitted that similar goods are defined in Paragraph 1(1) of the 4th Schedule of the EACCMA and Articles 15(2)(b) of the WTO Agreement as:

> "although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable."

It submitted that the factors relevant in determining whether goods are similar include their quality, reputation, and the existence of a trademark. The applicant submitted that Paragraph 2 of the commentary to the WTO Agreement provides that where the customs value cannot be determined by the transactions value method, there should be a process of consultation between the customs administration and the importer with a view to arriving at a basis of value under method 2 or 3. The applicant submitted that it adduced evidence to show that at in a meeting between itself and the respondent, the latter's data system reflected records of imports of other lubricants from the UAE and from South

Africa that were priced like the applicant imports. These included Havoline and Caltex. The data sheet of Tecx lubricants, exhibit AE13 while that of Havoline, exhibit AE14 show that the product composition and character of the two products is the same. The applicant submitted that these are similar goods within the meaning of Paragraph (1) of the 4th Schedule of the EACCMA.

The applicant submitted that similar goods are not identical goods. According to Paragraph 1(1) of the 4th Schedule, identical goods are the same in all respects including physical characteristics, quality and reputation. Minor differences in appearance do not preclude goods that otherwise conform to the definition from being identical. Similar goods as noted earlier are those which "although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable." The applicant submitted that since there are similar goods within the meaning of the EACCMA evidence of which was supplied to the respondent and to court, the respondent should have used the transaction value of similar goods method to determine the customs value of the lubricants after ruling out the transactions value method rather than resorting to the fallback value method.

In reply, the respondent raised a preliminary objection. It submitted that Order 15 Rule 2 of the Civil Procedure Rules provides that the court may try the issues of law if it of the opinion that the case or any part of it may be disposed of on the issues of law only. It submitted further that a preliminary objection can be raised at any time and consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. It cited *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 per Sir Charles Newbold.

The respondent submitted that the applicant's application for review to the tax appeals tribunal is time barred and ought to be dismissed with costs. The respondent cited *Uganda Revenue Authority v Uganda Consolidated Properties Ltd Court of Appeal* Civil Appeal No. 31 of 2000 where the Court of Appeal stated that "Timelines set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with".

It submitted that S. 230 of the EACCMA provides that a person dissatisfied with the decision of the commissioner shall lodge an appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the commissioner. It submitted further that S.16(2) and (7) of the Tax Appeals Tribunal Act provides for applications for extension of time. It states that a tribunal may, upon application in writing, extend the time for the making of an application to the tribunal for review of a taxation decision. An application for review of a taxation decision shall be made within six months after the date of the taxation decision. The respondent submitted that it communicated its decision to the applicant on 23rd December 2020. On 4th January 2021, the applicant responded to the respondent requesting it to use the transactional value of identical goods or those of similar goods, instead of filing an application in the Tax Appeals Tribunal within the statutory time of 45 days by 6th February 2022. On 11th January 2021, the respondent reiterated its position in its decision of 23rd December 2021 by stating that "Customs Values appraised based on fall back method earlier communicated to you have been maintained". The respondent submitted that the applicant filed this application in the Tax Appeals Tribunal on 23rd February 2021 but ought to have filed the same by 6th February 2021 delaying by 17 days without any extension of time being granted by the Tribunal. It cited *Cable Corporation (U) Ltd. v URA* HCCA 1 of 2011 where the High Court stated that; "the tribunal was lenient by allowing further communication to extend the time for filing an application". The High Court stated that once the Commissioner has made an objection decision(s) he becomes functus officio. It also cited *Game Discount v URA* Application. 25 of 2020 where the Tribunal stated that; "Where there is more than one decision, the last decision is considered if it reopened the matter or was a new decision by reducing or varying the taxes. This decision by the Tribunal was upheld on appeal by Mubiru J. in *Game Discount v URA Civil Appeal No. 39 of 2021.*

The respondent submitted further that its communication of 23rd December 2021 constituted a taxation decision and time started running from that date. It submitted that S. 1(1)(i) of the Tax Appeals Tribunal Act defines a taxation decision to mean; any assessment, determination, decision or notice. The respondent cited *Cable Corporation (U) Ltd. v Uganda Revenue Authority,* (supra) where the Court held that; "a taxation decision means any assessment, determination, decision or notice. The respondent

submitted, this application was filed after inordinate delay and no attempt was made by the applicant to seek extension of time. The respondent submitted that this application ought to be dismissed with costs to the respondent.

Without prejudice, the respondent submitted that S.122 of the EACCMA provides for the value of imported goods for purposes of import duty to be determined in accordance with the 4th Schedule to the Act. It agreed that the methods of determination of the customs value in the 4th schedule to the EACCMA are applied sequentially from Method 1-Transaction value; Method 2 transaction value of identical goods; Method 3-Transaction value of similar of goods; Method 4-deductive method, Method 5-computed value, and Method 6- Fall back method. The respondent submitted that it correctly relied on the fall back Method-Method 6, after having sequentially applied Methods 1, 2, 3, 4, and 5 which were not applicable to this case as illustrated below:

The respondent submitted that documents submitted by the applicant had inconsistencies. The supplier invoice was issued later than the exporter invoice. Invoice No: RIG/EXP 30535/20 of 6th October 2020 and that of the supplier issued to the exporter for the goods, contradicted invoice 202010-001 of 4th October 2020 issued by the exporter Oil Tee Global for the same goods to applicant. The respondent submitted that whereas the applicant did not declare in Customs form C36 its relationship to the supplier the latter gave it a payment period of 90 days. The respondent submitted that the applicant submitted that it imported goods using the incoterm 'Cost, Insurance and Freight' (CIF), it failed to avail cargo insurance documents whereas it had an obligation to insure cargo. The respondent submitted that whereas the invoice is in United States dollars (US$) the applicant paid by cheque in UAE Dirhams. The respondent submitted that there is no evidence to show the terms of payment of 90 days in the invoice was quoted in error. There are no correspondences changing terms of payment and currency from US$ to AED Dirhams. The respondent submitted that the price of base oil, a raw material used for the manufacture of the lubricants of US$ 0.72 per litre in UAE is much higher than CIF US$ 0.289/litre for the finished products gasoline engine oil and diesel engine oil declared by the applicant to the respondent. The respondent submitted that the applicant's witness AW1 acknowledged that he never provided proof of payment of the goods. He agreed

that he made payments from his personal funds and submitted a cheque yet the applicant is a separate legal entity from him and there was no resolution by the applicant authorizing or rectifying the payment.

The respondent submitted that there were no identical lubricants imported in the country at or around the same time as the imported goods. The respondent stated that the applicant's witness AW1 testified that the applicant was the only importer of UAE gasoline engine oil SAE 20W-50 for the period July 2020 to December 2020. From July to December 2020 which there were no imports of identical goods. The respondent contended that Method 2 is not applicable in the circumstances.

The respondent further submitted that there were no similar lubricants imported into the country at or about the same time and therefore the transaction value on similar goods (Method 3) could not apply. According to the Agreement on Implementation of Article VII of the General Agreement On Tariffs and Trade 1994, the term "similar goods" means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. In the respondent's letter to the applicant dated 4th February 2021, the former stated that there were no similar goods imported at or about the same time.

The respondent submitted that the method 4- the deductive value method could not apply because the applicant was the 1st importer of the said lubricants in the Uganda. The respondent submitted that the computed value method also could not apply because it didn't have information on the lubricants from the country of export. The respondent was only left with Method 6- fall back method. The respondent submitted that it examined all imports of Lube Oil SAE 15W-40 and SAE 20W-50 from July 2020 to December 2020. The only values that could be considered under the fallback method for similar goods were imports by Africa Fuels and Lubricants Limited vide entry UGMAL C11707 of 21st September 2020 valued at CIF US$ 1.71 per litre and imports by Hass Petroleum (U) Ltd vide entry KEMBA C28818 of 18/09/2020 valued at CIF US$ 1.12 per litre which were the lowest value as required under the WTO Customs Valuation agreement.

The respondent submitted that applicant submitted that part of the assessment contained domestic VAT which was declared unlawful in *Margaret Akiiki v URA Civil Appeal No. 98 of 2015*. The respondent submitted that RW1 rightly testified that this was because the assessment in this case was raised before the above case was decided.

In rejoinder, the applicant submitted that the law requires that 45 days be counted from the date of service of the objection decision upon the taxpayer. It submitted that there is need for evidence to be adduced to decide the point of law raised by the respondent on the date of service of the objection decision. The applicant contended that it was prejudiced by the respondent's inordinate delay to raise its objection as it denied it an opportunity to adduce evidence on service.

In the alternative, the applicant submitted that there were three objection decisions namely one of 23rd December 2020, one of 11th January 2021 and the last one of 4th February 2021. The applicant submitted that time is counted from the date of the last decision. The applicant submitted it filed its application in time. The applicant submitted that the last decision which used the fall back method differed from the first two.

Lastly, the applicant submitted that the assessment is riddled with illegality, where domestic Value Added Tax (VAT) was imposed on the applicant without any legal basis. A court cannot ignore an illegality once brought to its attention.

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

It is trite law that preliminary objections are resolved before others issues. O. 15 r. 2 of the Civil Procedure Rules provides that:

> Where issues of both law and of fact arise in the same suit, and the court is of the opinion that the case or any part of it may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined

In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* [1996] EA 696 Sir Charles Newbold stated that.

> "A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".

Therefore, the Tribunal will dispose of the preliminary objection before it may determine any other issue on the merit of the application.

The respondent raised a preliminary objection that this application was time barred. The respondent submitted that it communicated its decision to the applicant on 23rd December 2020. On 4th January 2021, the applicant requested the respondent to use the transactional value of identical goods or transactional values of similar goods. On 11th January 2021, the respondent reiterated its position stated in its decision of 23rd December 2020

In *Uganda Revenue Authority v Uganda Consolidated Properties Ltd*, Court of Appeal Civil 31 of 2000 it was held that "Timelines set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with". Times limits are set out in both the EACCMA and the Tax Appeals Tribunal Act. S. 230 of the EACCMA provides that;

> "(1) a person dissatisfied with the decision of the commissioner under S. 229 may appeal to a tax appeals tribunal established in accordance with section 231.
>
> (2) a person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the commissioner."

S. 14(1) of the Tax Appeals Tribunal Act provides that any person who is aggrieved by a decision made under a taxing act by the Uganda Revenue Authority may apply to the tribunal for a review of the decision. S. 16(1)(c) of the Tax Appeals Tribunal Act provides that an application to a tribunal for review of a taxation decision shall be lodged with the tribunal within thirty (30) days after the person making the application has been served with notice of the decision. While the EACCMA puts the timeline at 45 days, the Tax Appeals Tribunal Act prescribes 30 days. Since the EACCMA is more specific to custom

matters, and this matter being a custom dispute, the EACCMA takes precedence over the Tax Appeals Tribunal Act.

So, the question is, did the applicant file its application out of time? According to the evidence on record, this application was filed on the 23rd February 2021. The applicant in its application indicates 4th February 2021 as the date of service of the taxation decision. The respondent's decision was dated 23rd December 2020. On 11th January 2021 and 4th February 2021, the respondent wrote other letters which it claims were not new decisions. In *Cable Corporation (U) Ltd. v URA* HCCA 1 of 2011 though the High Court stated that; "the tribunal was lenient by allowing further communication to extend the time for filing an application", it did not state that the Tribunal was wrong in doing so. Of course, the Tribunal shares the concern with the High Court that re-opening a matter where the respondent has already decided can give way to corrupt practices. S. 1(1)(i) of the Tax Appeals Tribunal Act defines a taxation decision to mean any assessment, determination, decision or notice. Section 3 of the Tax Procedures Code Act also defines a tax decision as

> "a tax assessment, or a decision on any matter left to the discretion, judgment, direction, opinion, approval, satisfaction, or determination of the Commissioner, other than a decision made in relation to a tax assessment".

In *Cable Corporation (U) Ltd v Uganda Revenue Authority* High Court Civil Appeal 1 of 2011, Court held that; "a taxation decision means any assessment, determination, decision or notice". The Tribunal was faced with the challenge of how to handle the respondent's practice of continuing to correspond with taxpayers even when it has made an objection decision. Further correspondence may prejudice a taxpayer. For instance, a new correspondence may increase tax liability. In order to avoid a taxpayer filing a multiplicity of suits to address new decisions, the Tribunal held the time runs for those correspondence which vary the taxation or objection decision. A correspondence stating a new liability is still a new assessment, determination, or decision under the Tax Appeals Tribunal Act and the Tax Procedure Code Act. It is only when there is a restatement of a decision in a previous letter then one can say there is no new decision. In *Game Discount v URA* Application. 25 of 2020 the Tribunal stated that; "Where there is more than one decision, the last decision is considered as if it reopened the matter or was a new decision

by reducing or varying the taxes". The Tribunal cited *Uganda Revenue Authority v Uganda Consolidated Properties* (supra) where it was stated that:

> "In the law of limitation, as I know it, writing letters even those with negative contents, may have the undeserved effect of reviving an otherwise stale cause. In this case it did just that and we up-date the decision to mid-June 1999."

A careful perusal of the letters of 11th January 2021 and 4th February 2021, shows that they do not vary the one of 23rd December 2020. All the letters indicate that Customs used the fall back method. The tables showing the tabulation of the rate in the letters are the same or similar. There was no new decision nor new tax position in the letters of 11th January 2021 and 4th February 2021. Therefore, time begins to run from the decision of 23rd December 2020. If the respondent had served the applicant on 23rd December 2020, time would expire on 7th February 2020. The application filed on 23rd February 2021 would be time barred. However, there is no evidence showing that the respondent served the applicant on 23rd December 2020.

The applicant contended that the preliminary objection was brought at the end of the trial denying it a chance to present evidence on time of service. The respondent has bad manners where it seeks to ambush its opponents, getting them off guard without giving them adequate notice of its preliminary objection. However, this does not stop the Tribunal from determining the preliminary objection. The Tribunal notes that both parties filed a joint trial bundle. In short, they agreed on the evidence that is going to be presented to the Tribunal. The only way the Tribunal can ascertain when time begins to run is by looking at the evidence on record. The letter of the applicant dated 4th January 2021, exhibit AE8, admitted by both parties in the joint trial bundle, acknowledge receipt of the letter of 23rd December 2020 but it does not indicate the date of receipt. If we take the last day the applicant received the letter of 23rd December 2020 as 4th January 2021, the day it replied the said letter, time would start running from then. The applicant could not have replied a letter it did not receive. If we are to assume that the applicant replied the letter on the day it received it, time would begin running from 4th January 2021. 45 days from 4th January 2021 taking into consideration the two public holidays, of 26th January 2021 and 16th February 2021, the last day would be 19th February 2021. The applicant when it filed this application on 23rd February 2021, it was four days late. The axe fell on 19th

February 2021. The applicant should have appealed to the tribunal after the first taxation decision instead of appealing to the respondent. Timelines should be complied with strictly. As stated in *Uganda Revenue Authority v Uganda Consolidated Properties Ltd* (supra) by the Court of Appeal "Timelines set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with". Therefore, this application is time barred. For the said reason, it is struck out with costs to the respondent.

If by any chance, the Tribunal erred in striking out the application for being time barred, which we do not believe we did, it shall delve into the merits of the application. In the event the losing party on the preliminary objection is successful on appeal, it does not need to have the matter remitted back to the Tribunal for retrial. Without prejudice to the preliminary objection, the Tribunal addresses the issues on merit as follows.

The applicant imported lubricants. It used the transaction value method which the respondent objected to. The respondent submitted that, under both the EACCMA and the GATT, the fallback value method is the last alternative method to be applied to determine the customs value of imported goods. It is only where all the other methods cannot be applied that the fallback value method maybe applied. The law relevant to this application is to be found in the East African Community Customs Management Act (EACCMA). S. 122(1) reads.

> "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."

The outstanding portions of Part 2 of the Fourth Schedule of the EACCMA state:

2(1) 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.

3(1)(a) Where the customs value of the imported goods cannot be determined under the provisions of paragraph 2, the customs value shall be the transaction value of identical goods sold for export to the Partner State and exported at or about the same time as the goods being valued.

4(1)(a) Where the customs value of the imported goods cannot be determined under the provisions of Paragraph 2 and 3, the customs value shall be the actual value of similar goods sold for export to the Partner State and exported at or about the same time as the goods being valued.

5. Where the customs value of the imported goods cannot be determined under the provisions of paragraphs 2, 3 and 4, the customs value shall be determined under the provisions of paragraph 6 or when the customs value cannot be determined under that paragraph, under the provisions of paragraph 7 save that, at the request of the importer, the order of application of paragraphs 6 and 7 shall be reversed.

6(1)(a) Where the imported goods or identical or similar goods are sold in the Partner State in the condition as imported, the customs value of the imported goods under the provisions of this paragraph shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

7(1) The customs value of imported goods under the provisions of this paragraph shall be based on a computed value which shall consist of the sum of: (a) the cost or value of materials and fabrication or other processing employed in producing the imported goods: (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the Partner State.

8(1) Where the customs value of the imported goods cannot be determined under the provisions of paragraphs 2,3,4,5,6 and 7, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Schedule and on the basis of data available in the Partner State."

Paragraph 2(1) deals with the transaction value which was applied by the applicant. The methods set out should be applied sequentially.

The first method is the transaction value method. In *Testimony Motors Ltd v Commissioner of Customs URA* Civil Suit 212 of 2012 Justice Madrama stated that; S. 122 is couched in mandatory terms, and the transaction value method is the first and primary method of valuation. The court stated as follows:

"I agree with the plaintiff's submission that S. 122 of the East African Community Customs Management Act, 2004 subsection 1 thereof, is couched in mandatory terms. It provides that the value of such goods shall be determined in accordance with the fourth schedule and import duty shall be paid on that value. It does not give any discretionary powers on the Commissioner to rely on alternative methods without following the procedure or directives laid out in the fourth schedule. The primary method which was agreed upon is the method that must first be attempted. It is only upon failure of the primary method that alternative methods can be applied."

In order for the respondent to reject the transaction value given by the applicant, it has to show that it was justified in doing so.

In order to confirm the transaction value, one has to look at the import documents. In *Royal Electronics Ltd. v Uganda Revenue Authority* Application 37 of 2017 the tribunal stated that the most reliable source of information on imports is the import documents. Under S. 122(4) of the EACCMA when dealing with determination of customs value Customs has to satisfy itself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes. Documents presented at importation should include a bill of lading, receipts, invoices, packing list. The respondent doubted the invoices presented by the applicant. It contended that the supplier invoice was issued later than the exporter invoice. Invoice No: RIG/EXP 30535/20 of 6th October 2020 and that of the supplier issued to the exporter for the goods, contradicted invoice 202010-001 of 4th October 2020 issued by the exporter Oil Tee Global for the same goods to applicant. The invoices having different currencies in not a ground of rejecting the invoices especially when both currencies are used in the United Arab Emirates. If one was to compare the prices in both invoices it is clear that an exchange rate of US$ 1 to UAE Dirhams 3.498 was used. The quantity and items in both invoices were similar. The transaction method is based on the price actually paid and not the international market price for goods. However, where there are two invoices issued, a query arises as to who the actual supplier or exporter is. Oiltec and Regal Lubricants and Grease Manufacturing are two different entities if where one is an agent of the other. In this case it is not clear who supplied the applicant. A manufacturer supplies goods at factory price which is usually lower than that of a supplier. The second invoice dated 6th October 2020 does

not does not mention the applicant nor does it have its details. It has promotional uniforms and freight charges which are stated in the invoice of 4th October 2021. The payment terms differ. The invoice of 4th October 2020 states that payment is due 90 days after the invoice date. The invoice of 6th October 2020 states that payment date is by 40% in advance and balance before loading. Such discrepancies in the invoices may give ground to them being rejected.

Invoices maybe good in establishing the quantity and nature of imports but they may not confirm the price actually paid. Importers are at liberty to ask and obtain discounts from the exporters or suppliers. An invoice does not stop further negotiations on the price. A receipt on the other hand, is a commitment by the supplier on the final or actual price paid by the purchaser. Paragraph 2(1) of the Fourth Schedule to the EACCMA provides that;

> "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".

Article VII of Paragraph 2(a) of the GATT provides that;

> "The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values".

In *Testimony Motors Ltd. v URA* (supra) the court defined the transaction value as the price paid for the goods by the buyer or importer which forms the basis for assessing the customs duty payable on the goods. A receipt shows who the importer or purchaser is. In this application, the purchase price was paid by cheque by a person, other than the applicant. A receipt would verify who the actual purchaser is.

Where invoices are queried, resort can be made to a receipt. In *Kanoni Trading Company Ltd v Uganda Revenue Authority* Application No. 11 of 2003, the Tribunal held that;

> "The respondent merely doubted the invoice value and proceeded to investigate rather than consult with the importer which investigation did not contradict the price actually applied by the importer".

It is hard to investigate when there is no receipt by the exporter or supplier. In *Airtel v Uganda Revenue Authority* Application 39 of 2019 the Tribunal noted that the only way

an importer can show the transaction value it actually paid is by adducing a receipt. A receipt not only shows the transaction value but also confirms that it was paid. The respondent submitted that the applicant did not present a receipt. The applicant did not present sufficient grounds as to why it did not avail the respondent with a receipt. In most countries abroad, including the United Arab Emirates, receipts are issued to enable customers claim VAT refunds for items purchased. At times they bear stamps which are difficult to forge or if so, it may be easily detected. A receipt has the address of the exporter or supplier, which makes it easier for a Revenue Authority to investigate the price or cross-check with the supplier or exporter. There has to be a good reason why an importer cannot present a receipt of its imports. In the absence of a receipt, the respondent was justified in rejecting the transactional value presented by the applicant. The Tribunal is only required to look at whether the decision of the respondent in rejecting the transactional value was irrational. In this case, the Tribunal does not find it irrational.

Where the respondent rejects the transactional method and shows that there are no other alternative methods other than the one it used to arrive at the custom value, the onus is on the applicant to prove that the former should have used another method under the 4th Schedule of the EACCMA other than the one it applied. S. 18 of the Tax Appeals Tribunal Act puts the burden of proof on the applicant to show that the decision of the respondent should have been made differently.

In this application, the applicant submitted that on rejection of the transactional value under method 1, the respondent ought to have applied the transaction value method of similar goods under method 3. Similar goods are defined in Paragraph 1(1) of the 4th Schedule of the EACCMA and Articles 15(2)(b) of the WTO Agreement as:

> "although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable."

The factors relevant in determining whether goods are similar include their quality, reputation, and the existence of a trademark. The applicant contended that the similar goods were Havoline and Caltex. The data sheet of Tecx lubricants, exhibit AE13 and that of Havoline, exhibit AE14 show that the product composition and character of the two

products are the similar to the applicant's imports. The applicant submitted that they are similar goods within the meaning of Paragraph (1) of the 4th Schedule of the EACCMA. Though the goods maybe similar, there is no evidence that they were imported at the same time the applicant imported its lubricants. There is also no evidence on the prices of Havoline and Caltex or that their prices were similar to that of the applicant's imports. There is no evidence that if the prices of the similar goods were applied to the applicant's imports what the custom duties would be payable. If the Tribunal was to agree with the applicant that its goods are similar to those stated, it would be difficult to decide on its tax liability where the prices have not been disclosed.

When the respondent rejected the transaction value, both parties ought to have gone into consultation on how to apply method 2 and 3. Paragraph 2 of the commentary to the WTO Agreement provides that where the customs value cannot be determined by the transactions value method, there should be a process of consultation between the customs administration and the importer with a view to arriving at a basis of value under method 2 or 3. It states as follows:

> "It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged subject to the requirements of commercial confidentiality with a view to determining a proper basis of value for customs purposes."

It seems there was no conclusive consultation on how method 2 and 3 on identical goods and similar goods respectively should be used. Though the applicant stated it had a meeting where similar goods like Havoline and Caltex were identified. It seems there was no agreement as to whether the similar good were imported almost at the same time as the applicant's imports. The prices of the similar goods were not disclosed. What happens if the prices are disclosed, but their effect would be to increase the applicant's tax liability. A dispute has to come to an end, which requires all relevant information should be availed during the hearing to make the Tribunal decide.

The respondent stated that it exhausted all the options in the sequential order and that the only method that could apply is the fall back method. The respondent submitted that there were no similar goods imported at the same time with the applicant's imports. The applicant was the first and only importer of its lubricants. Though the Tribunal may not believe that the fall back method was the best method the respondent ought to have applied, the onus is on the applicant to show that the respondent ought to have used another method. The applicant has failed to discharge the burden that the respondent ought to have applied another method. The tribunal cannot dismiss this application as it has already struck it out on a preliminary point of law.

Taking into consideration the circumstances as stated above, this application is struck out with costs to the respondent.

Dated at Kampala this 25th day of August 2022.

DR. ASA MUGENYI
CHAIRMAN

DR. STEPHEN AKABWAY
MEMBER

MR. GEORGE MUGERWA
MEMBER