THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 82 OF 2021

WEZ TYRES COMPANY LIMITED..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MS. CHRISTINE KATWE

RULING

This ruling is in respect of an application challenging a customs duty assessment of Shs. 657,881,961 arising from the valuation methods used by the parties.

The applicant imports, distributes and sells motor vehicles tyres and other car accessories. The respondent conducted an audit on the applicant which showed that the latter purportedly has a tax liability of Shs. 876,291,671 arising from non-declaration of freight insurance and other incidental costs during the importation of its goods and inconsistencies in import documents on 15th July 2021. The applicant objected to the assessment and the respondent disallowed it. On 1st October 2021, the respondent issued an adjusted tax liability of Shs. 657,881,961.

Issues

1. Whether the respondent's decision was time barred?
2. Whether the applicant is liable for the tax of Shs. 657,881,961?
3. What remedies are available?

The applicant was represented by Ms. Mbekeka Vanessa Irene while the respondent by Mr. Barnabas Nuwaha.

The applicant's first witness, Mr. Joseph Aine, its proprietor and managing director, testified that the applicant imports tyres. It declares its imports based on the actual cost of goods, Free on Board (FOB), insurance and freight charges to Mombasa. It presented original import documentation to the respondent. Taxes were paid before goods were released to it. He stated that it was not the responsibility of the seller to pay insurance and freight.

He stated that the respondent conducted an audit and issued a tax liability of Shs. 876,291,647 arising from alleged non-declaration of sea freight to Mombasa. The respondent alleged that its freight rates were different from other taxpayers. The applicant purportedly under declared freight of Shs. 1,582,334,94 from various ports to Mombasa. He stated that the Commissioner used GATT Valuation Method 3 (transaction value of similar goods). The Commissioners methodology for deriving the variance is shown as follows.

TABLE A

YEAR	**2016-17**	**2017-18**	**2018-19**
Declared Value	3,491,687,808	3,916,450,380	4,440,895,426
Derived value using GATT Method III	3,780,102,063	4,187,392,350	5,102,665,814
Variance	288,414,255	270,941,966	661,770,387
Taxes Payable	155,383,180	145,969,984	356,528,796

Mr. Jospeh Aine stated that the Commissioner did not provide details of his computation. No disclosure was made on what similar goods he used for comparison. No disclosure was made on when and where the similar imports were purchased and which ports were used to import them.

Mr. Joseph Aine stated that the applicant objected on 15th July 2021. The respondent did not issue an objection decision in time. On 1st October 2021, the applicant wrote to the respondent stating that the Commissioner having failed to comply with S. 229(4) of the East African Community Customs Management Act (EACCMA), it had elected to have its objection allowed under S. 229(5) of the Act. On the same day, the respondent refused

its election and sent a final decision revising the assessment to Shs. 657,881,961 which the applicant alleged was based on fictitious values. He stated that on 2nd August 2021, the respondent requested the applicant to provide documentary evidence in support of its objection. It was provided on 9th August 2021. The applicant received communication from the respondent on 2nd September 2021.

The respondent's witness, Ms. Stella Maris Nsaba, a tax auditor in its customs audit department, testified that the applicant imported 111 containers from China and India; 17 containers through the port of Nhava Sheva in India, 14 (20ft) containers and 81 (40ft) containers through the port of Qingdao in China. However, the applicant declared low freight values for the imported consignments which were lower than those declared for other consignments discharged from the same ports in a similar period by other importers of similar items. The audit revealed inconsistencies in the declaration documentation. The applicant used incoterms which were inconsistent with the correspondences. She stated that the applicant also misclassified wheel weights in C26198 of 2018, C27067 of 2017 under HSC 87089900000 as parts of the motor vehicle yet they supposed to be classified under Chapter 732690000. They were reclassified and taxes of Shs. 6,007,406 paid. The audit findings were communicated to the applicant in letter dated 9th July 2021. In a letter dated 15th July 2021 the applicant responded to the audit findings. A review meeting was held between the parties on 2nd August 2021. The applicant provided additional information in a letter dated 2nd September 2021. In a letter of 1st October 2021, the respondent provided the applicant with a breakdown and communicated a reconciled tax of Shs. 657,881,961.

The respondent's second witness, Mr. Nicholas Jjengo, a customs officer in its customs department, testified that the applicant's import documents were doubtful. Hence the respondent considered the transaction value method used by the applicant was not applicable and applied the transaction value of similar goods. He contended that the applicant's declared freight values were lower than those of other importers plying the same routes. The audit revealed inconsistencies in documentation. For instance, bills of ladings and commercial invoices had the same dates. He stated that though the applicant

used the incoterm CIF it presented correspondences where freight was negotiated. The respondent reclassified the imports, and taxes computed accordingly.

In respect of a preliminary objection; the applicant submitted that S. 229 of the EACCMA states.

> "(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs shall within thirty days of decision or omission lodge an application for review of that decision or omission.
>
> (2) The application referred to under subsection I shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged."

Further S. 229 states

> (4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.
>
> (5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application".

The applicant submitted that it is mandatory for the Commissioner to issue a decision within 30 days. It also allows for a party to provide further information.

The applicant cited *Uganda Revenue Authority v Uganda Consolidated Properties Limited* Appeal 75 of 1999 where it was stated that "Time limits set by statute are matters of substantive law and not mere technicalities and must be strictly complied with." It further cited *Republic v the Commissioner of Customs Services, Ex parte Tetra Pak Limited MA* 221 of 2010 where the court stated that S. 229(4) of the EACCMA states that

> "The Commissioner must make a decision to the affected taxpayer within 30 days. If no decision is made and communicated within 30 days, the respondent under section 229(5) is deemed to have made a decision allowing the application for review".

The applicant submitted that it objected to the audit findings of the respondent on 15th July 2021. It provided required information by 9th August 2021 and no further request was made by the respondent hence the days started to run. On 2nd September 2021, the

respondent wrote.

> "Based on the above, your goods did not qualify to be declared under transaction method valuation. Therefore, the committee decision is that alternative methods of valuation shall be applied, and the results shall be communicated to you in due time".

On 27th September 2021, the applicant wrote to the respondent requesting for the results of the alternative valuation. Having received no response, the applicant elected that its objection was allowed as no communication was given within the stipulated 30 days under S. 229(5) of the EACCMA. It stated that upon receipt of the election letter on 1st October 2021 the respondent served a final objection decision on the applicant where a revised liability was communicated. The applicant cited *Crown Beverages Limited v Uganda Revenue Authority* Application 16 of 2020 where the Tribunal noted that.

> "An objection decision should be final on all issues pending. Therefore, the Tribunal cannot consider the letter dated 29 August as an objection decision. It was a correspondence in the ordinary course of business or interaction of parties".

The applicant submitted that the respondent's letter issued of 2nd September 2021 was a mere correspondence highlighting its ongoing review. It contended that no objection decision was issued until 1st October 2021 which was approximately 51 days from receipt of additional Information. The applicant submitted that by law it is not required to formally elect considering the law is clear that where a decision has not been communicated within thirty days, it shall be deemed allowed. It contended that the decision issued by the respondent on 1" October 2021 demanding taxes of Shs. 657,881,961 is baseless and illegal.

On the merit of the main application, the applicant submitted that the respondent, during a post customs clearance audit disregarded the transaction value method and applied transaction value method of similar goods. The respondent reviewed the declared values of Shs. 3,491,687,808 for May 2016 to April 2019. The respondent appraised the value using GATT valuation method 3 to Shs. 3,780,102,063.24. The revised tax liability of Shs. 657,881, 961 was based on a variance of Shs. 288,414,255 arising from the uplifted freight values.

The applicant submitted that the tax liability arising from the respondent's objection

decision is arbitrary and cannot stand the test of a valid tax assessment. It submitted that the process undertaken by the respondent to arrive at the derived freight and additional tax is procedurally unfair, arbitral and an abuse of statutory power. The applicant cited *Republic v Institute of Certified Public Accountants of Kenya ex parte v* Vipichandra *Bhatt t/a JV Bhatt and Company Nairobi* HCMA 285 of 2000 where the court noted that.

> "In the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers power to exercise such power arbitrarily and capriciously or in bad faith."

The applicant cited *Warid Telecom (U) Ltd v Uganda Revenue Authority*, High Court Comm. Div. CS 24 of 2011 where it was stated that.

> "In determining the actual tax position, the relevant provisions of the taxing statute should be considered. Any tax imposed in a manner not authorized by an Act of Parliament is contrary to the constitutional principles for the imposition of tax".

The applicant also cited *Salanah Tea Company Ltd v Superintendent of Taxes*, Ongoing (AIR 1990 SC 772) [1988 (33) ELT 249 (SC) where it was stated that.

> "In a society governed by rule of law, taxes should be paid by citizens as soon as they are due in accordance with the law. Equally as a corollary of the said statement of law, it follows that taxes collected without the authority of law should be refunded because no state has the right to receive or to retain taxes or monies realized from citizens without the authority of law."

The applicant submitted that the respondent's decision relied on freight values which were simply estimates which the latter never disclosed to it despite several requests.

The applicant submitted that the respondent does not dispute the actual costs of the goods, but the freight paid for their international transit to Mombasa. It submitted that it declared the actual costs and freight. The applicant further contended that the respondent did not provide justification for applying the transaction method of similar goods. Instead, the respondent compared items like glass, heavy duty construction tyres of unrelated periods. No evidence of the freight charges was given to the applicant.

The applicant submitted that S. 122 of the EACCMA states that.

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

The applicant submitted that the 4th Schedule provides for six methods of valuation in determining customs value of imported goods. They are set out in sequential order of application as follows:

1. The Transaction Value Method (Method 1/ the Primary Method)
2. The Transaction Value of Identical Goods Method (Method 2)
3. The Transaction Value of Similar Goods Method (Method 3)
4. The Deductive Value Method (Method 4)
5. The Computed Value Method (Method 5)
6. The Fall-back Value Method (Method 6)

The applicant submitted that the Interpretative Notes in Part II of the 4th Schedule ("Interpretative Notes") set out the applicability of the valuation methods, i.e., that they must be applied in their sequential order. The applicant cited *John Kamanyire v URA* Application 7 of 2015, where the Tribunal stated that.

> "The Schedule is clear. In order to determine the customs values of Imported goods, the taxing authority should apply the methods provided in the schedule in a sequential order. The taxing authority cannot apply the fall-back method when the transaction option is available".

The applicant submitted that in *Agaba Henry v URA* Application 83 of 2021 the Tribunal stated that.

> "The respondent was not justified in uplifting the customs value of the applicant's motor vehicle without sequentially applying the valuation methods set out in part 2 of the Fourth Schedule".

The applicant submitted Paragraph 2(1) of the 4th Schedule of the EACCMA states.

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

Paragraph 3(1)(a) of the same Schedule provides that.

"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 to or about the same time as the goods being valued."

The applicant submitted that under Paragraph 9 of the 4th Schedule, the price actually paid or payable may be adjusted to include the cost of transport up to the partner state. Under Paragraph 9(3) additions to the price actually paid or payable shall be made under this Paragraph only on the basis of objective and quantifiable data. The applicant submitted it must not be arbitrary.

The applicant submitted that its imports were declared under transaction value method based on the cost, insurance and freight invoiced and actually paid. It submitted that the price actually paid or payable is described in "*A handbook on the WTO Customs Valuation Agreement*" by Sheri Rosenow and Brian J O'Shea p. 27 states that:

"Transaction value is whatever amount the buyer agrees to pay the seller to obtain the goods. In other words, the buyer and seller themselves determine the customs value for imported goods. Given this definition, customs cannot reject an importer's declared price on the grounds that it is lower than prevailing market prices. It is lower than prices for identical goods in other transactions, it is a sale at a discount."

The applicant submitted that in *Agaba Henry v Uganda Revenue Auth*ority Application 23 of 2021 the Tribunal noted that:

"It may be difficult to apply other methods to used goods but not the transaction method. in this case the applicant provided proof of payment of the transaction value. There is no evidence that the proof presented a challenge or complexity to customs if the applicant had failed to provide evidence of payment or presented false documents or those that are not authentic or there is doubt as to the actual purchase price paid, that is a challenge the Tribunal may entertain".

The applicant submitted that it presented the commercial invoices, sale contracts, freight Invoices and proof of payments to the respondent. It cited *Testimony Motors Limited V. The Commissioner of Customs (Uganda Revenue Authority)* (2012) HCCS 4 of 2011, where the Commissioner of Customs suspended the operation of the transaction value method for all used vehicles and opted for an alternative method. The High Court,

however, affirmed the position that the transaction value method must always be used except in very exceptional circumstances. The court stated that:

> "...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...."

The applicant also cited *Bidco Oil Refineries Limited v Commissioner of Customs Services* Application 150 of 2015 where the Tribunal stated that.:

> "The Commissioner failed to apply the valuation methods sequentially as envisaged in law resulting into a holding that the customs values were not procedurally uplifted. The respondent failed to demonstrate to the Tribunal to its satisfaction which valuation method it applied in adjustment of the customs values in issue. Furthermore, the Tribunal determined that the adjustment done by the respondent on the price actually paid was not done on the basis of objective and quantifiable data as prescribed in Rule 3 of the 4th schedule to the EACCMA. The respondent was bound to apply Rule 2 of the 4th schedule to the EACCMA in accordance with Rule 3 instead of ignoring Rule 2 and purport to applying Rule 3 as it did in complete disregard of the material provision of Rule 2".

The applicant submitted that the respondent erred in law by departing from the transactional value method in valuing the applicant's goods without any justifiable reason.

The applicant submitted that the respondent's decision to compute the customs value of imported goods using a different method without following the sequence outlined above contravenes S. 122(1) of EACCMA and Paragraph 2(1) and 9 of the Fourth Schedule. Method 1 should be applied in the first instance and the succeeding methods may only be considered where the value cannot be determined using the first method, a position that is consistent with the provisions of the Fourth Schedule of EACCMA. The applicant submitted that the valuation method 3 is not justifiable as the transaction value method is the primary method of valuation and the applicant's imports do not fall under any of the exceptions as to which the said transaction value method would be disregarded. Under

Paragraph 9 of the 4th Schedule to EACCMA, the price actually paid or payable may be adjusted to include the cost of transport up to the partner state. Under Paragraph 9(3), additions to the price actually paid or payable shall be made under this Paragraph only on the basis of objective and quantifiable data. The applicant contended that the respondent sought to collect taxes that are not due or payable by it by raising arbitrary tax assessments, disregarding transaction value method on the basis that the freight declared by other importers of various goods ranging from weight, class, period of import is higher than the freight declared by the applicant.

The applicant submitted that Paragraph 4 of the 2nd Schedule of the EACCMA states:

> 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 transaction value of similar goods sold for export to the Partner state and exported at or about the same time as the goods being valued.

It contended that in applying this Paragraph, the transaction value of similar goods in a sale of the same commercial level and in substantially the same quantity as the goods being valued should be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at different commercial level and or in different quantities, adjusted to take account of differences attributable to commercial level and /or to quantity, shall be used, provided such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or decrease in the value.

The applicant submitted that even in applying valuation method 3, the respondent erred by considering imports that were out of scope, goods that were not in the slightest way similar to the tyres for example tampered glass which requires special purpose containers and costs a lot more than freight for rubber tyres. The applicant submitted that the respondent applied periods of comparison which were out of the scope of audit period. It used a uniform exchange rate all through the entire period. Similar goods claimed by the respondent could never have similar freight charges due to their nature. The applicant contended that the respondent did not prove how much freight was actually paid by the

various importers. Most invoices exhibited do not correspond to the comparable data. For example, on p. 308, C1694 has a CIF value of US$ 21,177 while the invoice attached has a CIF of US$ 34,225.60. Entry on p. 312 for Arrow Centre U Ltd C13697 has a CIF of US$ 33,029.880 while the invoice on p. 316 has a CIF of US$ 34,949.32. The entry for SRS Uganda Limited on p. 322 C1866 has a CIF of US$ 16,586 while the invoice on p. 324 has a CIF of US$ 47,254.2. It submitted that there are inconsistencies in most of the documents. This makes this data unreliable and cannot be a basis for uplifting the applicant's freight values.

The applicant submitted that the respondent highlighted import documents which had inconsistencies. RW2 Nicholas Jjengo testified that;

> "That the audit further revealed inconsistencies in the documentation used in the applicant's declarations vide C34251 of 2018, C26795 of 2018, C26149 of 28/06/2016 C12153 of 2018, C33541 of 2018 whereby the bill of lading and commercial Invoices had same dates, whereas sales contracts stipulated terms of payment being advance payment of commercial invoice before shipment. (Refer to inconsistent documents marked R10 of the respondent's exhibits bundle)".

The applicant submitted that the existence of a similar date on the bill of lading and commercial invoice is not an inconsistency or irregularity because that is the start date for computing the due date of payment. Once a contract of sale is entered, the supplier determines the mode of issuing documents and the importer can have commercial Invoices with date issued either before, on the same date or after the date on the bill of lading. The applicant submitted that it is common for commercial invoices to be issued before, or on the date of bill of lading, or thereafter. In practice commercial Invoices are only issued to the taxpayer after the proof of shipping, being the bill of lading, because credit arrangement starts once the container is boarded on the vessel.

The applicant submitted that the respondent further queried why the freight invoices were issued to the applicant with a contradicting incoterm CIF. The applicant submitted that the issuance of a separate invoice whose amount tallies with the commercial Invoice freight value posted cannot be a ground to invalidate the use of transaction value method. It submitted that Paragraph 2 of the 4th Schedule of the EACCMA states 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 adjusted in accordance with its provisions. The paragraph makes no mention of how the dates on bill of lading and commercial invoice should differ nor does it require that an importer must have the same freight as other importers.

The applicant submitted that the freight rates which the respondent compared related to goods that have special requirements in terms of weight, size, fragility among others. Most invoices and bills of ladings related to periods outside the audit scope, and no proof of payment was presented. The applicant submitted that there are many factors that could influence freight paid by various imports are.

a. Distance and transportation mode: The distance between the origin and destination plays a significant role in determining freight charges. Generally, longer distances result in higher shipping costs. Additionally, the chosen transportation mode, such as air, sea, or land, will impact the charges. Each mode has its own associated costs, with air freight being generally more expensive than sea or land transportation.
b. Freight, weight and volume: The weight and volume of the goods being imported affect the freight charges. Heavier and bulkier shipments require more space and may incur additional handling and transportation costs. The applicant submitted that by comparing freight paid by rubber tyres to freight paid by tempered glass is quite farfetched and cannot be comparable despite having similar ports of exit.
c. Packaging and handling: The way goods are packaged and handled can influence freight charges. Proper packaging that ensures safety and security of the cargo may result in lower charges, as it reduces the risk of damage or loss during transit.
d. Fluctuations in fuel prices directly impact transportation costs. When fuel prices rise, freight charges may increase to compensate for the higher operational expenses incurred by the carrier's market demand and seasonality, exchange rate fluctuations.

The applicant submitted that these factors were not considered by the respondent.

The applicant prayed that this Tribunal finds that the objection decision was time barred, and that the respondent was not justified in uplifting the freight charges when it

disregarded the transaction value method. It concluded that the tax assessed is not due or payable by the applicant. It prayed for costs of this application. The applicant also prayed that the 30% paid by it be refunded with interest from date of payment.

In reply of the preliminary objection, the respondent submitted that upon the applicant providing additional information to it in a letter dated 9th August 2021, the latter had 30 days within which to decide. A calculation of the days would mean the thirty (30) days elapsed on 9th September 2021. The respondent reviewed the additional information by the applicant and replied in a letter dated 24th September 2021 before the lapse of the thirty days stipulated under S. 229(4) and (5). The respondent submitted that upon issuance of the letter dated 2nd September 2021, it became functus officio and did not have further powers to adjust its objection decision. It cited *Cable Corporation Limited v Uganda Revenue Authority* Civil Appeal 1 of 2011 where it was held that.

> "After the objection decision is made, it shall be communicated to the taxpayer who may accept it or take further measures to oppose the same. Generally, the commissioner would after communicating the objection decision exhausted its jurisdiction on the matter and further jurisdiction is vested in the High Court or the Tax Appeals Tribunal."

The respondent submitted that its letter dated 1st October 2021 was prompted by the applicant's letter of 27th September 2021 where the latter made clarifications and pointed errors for correction by the respondent. The respondent in the letter of 10th January 2021 merely reiterates and confirms the position in the letter of 2nd September 2021. The respondent submitted that upon issuing the objection decision on 2nd September 2021, it exercised its mandate under S. 229(4) of the EACCMA.

The respondent submitted that the regime of election under the domestic tax laws is inapplicable to the provisions of the EACCMA. S. 2 of the Tax Procedure Code Act 2014 provides that the Act shall apply to every tax law specified in Schedule 2. Among the tax laws that the Tax Procedure Act applies to, the EACCMA is not among them. The election is restricted to acts to which the Tax Procedure Code Act is applicable. The regime of election under the domestic laws is not applicable to the EACCMA. The respondent submitted that the contention of the applicant that the respondent's decision of 1st October

2021 is time barred is misconceived and devoid of merit.

In reply to the merits of the application, the respondent submitted that the applicant is liable to pay the tax of Shs. 657,881,961. It submitted that, the dispute before the tribunal is whether the respondent was justified in rejecting the transaction value method of valuation and instead apply the transaction value of similar goods due to grave inconsistencies in the applicant's declarations.

The respondent submitted that the applicant is liable to pay taxes under the 4th Schedule of the EACCMA. S.122(4) of the EACCMA provides that:

> "Nothing in the fourth schedule shall be construed as restricting the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document, or declaration presented for customs valuation process."

The 4th Schedule Para. 2 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, but where- (b) the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued."

The respondent submitted that under the 4th Schedule to the EACCMA Paragraph 2(1), the customs value of imported goods shall be the transaction value, which is the price actually paid or payable for goods when sold for export to the partner state. The transaction value to be applied, must first and foremost, be based on the price actually paid or payable. The actual value must be based on the price at which such or like goods are sold or offered for sale in the ordinary course of trade under fully competitive conditions.

The respondent submitted that it is trite that the first and primary method of valuation is the transaction value method; the 2nd is the transaction value of identical goods, the 3rd is the transaction value of similar goods method, the 4th is the deductive value method, the 5th is computed value method, and the 6th is the fallback value method.

The respondent submitted that Article VII (2)(c) of the General Agreement on Tariffs and Trade 1994 states that.

> "When the actual value is not ascertainable in accordance with sub: paragraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value."

The respondent submitted that where the actual value cannot be ascertained, the customs administration is allowed to choose a method compatible with the principles and general provisions of the Agreement and Article VII of the General Agreement, so that account can be taken of its specific circumstances. The same law allows the respondent to be guided by Article 17 of the Customs Valuation of the World Trade Organization in applying the 4th Schedule of the EACCMA. The implication of the above provisions is that where customs administration has reasons to doubt the truth or accuracy of a declared value, it may ask the importer to provide further explanation including documents or other evidence, that the declared value represents the total amount actually paid or payable for the imported goods, adjusted in accordance with the Article.

The respondent quoted *A Handbook on the WTO Customs Valuation Agreement* by Sheri Rosenow and Brian J O'Shea, which stated that.

> "Customs valuation based on the transaction value method is largely based on documentary input from the importer. Article 17 of the Agreement confirms that customs administrations have the right to "satisfy themselves as to the truth or accuracy of any statement, document or declaration." A "Decision regarding cases where customs administrations have reasons to doubt the truth or accuracy of the declared Value" taken by the Committee on Customs Valuation pursuant to a Ministerial Decision at Marrakesh spells out the procedures to be observed in such cases. As a first step, customs may ask the importer to provide further explanation that the declared value represents the total amount actually paid or payable for the imported goods".
>
> If the reasonable doubt still exists after reception of further information or in absence of a response, customs may decide that the value cannot be determined according to the transaction value method. Before a final decision is taken, customs must communicate its reasoning to the importer, who, in turn, must be given reasonable time to respond. In addition, the reasoning of the final decision must be communicated to the importer in

writing."

The respondent submitted that its witnesses Nicholas Jjengo and Stella Nsaba testified that while the applicant applied transaction value method in computing customs duties for his declarations, the documents in support of the imports had the incoterm CIF (Costs, Insurance, Freight) which was deemed inconsistent with the incoterm because the applicant presented correspondences where it negotiated for freight with the shipper or exporter. The correspondences showed that the applicant was benefitting from special freight prices. It was unable to demonstrate that the importers importing goods from Qingdao were benefiting from the special prices, thus contradicting the CIF Incoterm. The respondent submitted that the negotiations for freight can reasonably be seen to distort the prices paid or payable for the goods imported which renders it impossible to determine the accuracy of the applicant's declarations.

The respondent submitted that *Black's Law Dictionary* 11th Edition p. 916 defines 'incoterm' as.

> "A standardized shipping term, defined by the International Chamber of Commerce that apportions the costs and liabilities of international shipping between buyers and sellers."

It cited *Contship Container Lines Ltd v D.K Lall & others* 2010 4 SCC 256 where the Indian Supreme Court held that.

> "The distinction between CIF (Cost Insurance and Freight) and FOB (Free on Board) contracts is well recognized in the commercial world. While in the case of CIF contract the seller in the absence of any special contract is bound to do certain things like making an invoice of the goods sold, shipping the goods at the port of shipment, procuring a contract of insurance under which the goods will be delivered at the destination etc., in the case of FOB contracts the goods are delivered free on board the ship. Once the seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship in terms of the Bill of Lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer."

The respondent submitted that under CIF a seller delivers the goods, cleared for export, onboard the vessel at the port of shipment, pays for the transport of the goods to the port

of destination, and also obtains and pays for minimum insurance coverage on the goods through their journey to the named port of destination. The buyer assumes all risk once the goods are on board the vessel for the main carriage; however, they don't take on any costs until the freight arrives at the named port of destination. The respondent submitted that essential to the incoterm CIF is that the cost insurance and freight are borne by the seller and the buyer only pays for the goods upon delivery of the same at the named port of destination.

The respondent submitted that the applicant's incoterm for trade and importation purposes was declared as CIF. The implication being the only duty of the applicant was to pay for the goods on them reaching the port of destination in Mombasa. The seller was to bear the costs, insurance and freight. It cited *Auto Express limited v Commissioner Customs and Border Control* Appeal 119 of 2018, where the Kenyan Tribunal held that where the tax authority presents evidence as to the truth and accuracy of an invoice or documentation presented to it, under text 1.2 of Article 17 of the WTO customs valuation agreement customs authority can seek further explanation from the taxpayer. In this case, the incoterm declared in the applicant's documents is CIF. The respondent submitted that a perusal of exhibits R12 in volume 2 of the joint, pages 1 to 58, entries C6186, C39179, C48290, invoices for freight and declaration forms C36 were directly invoiced to the applicant, contrary to the operations of the incoterm. Under the CIF incoterm, the responsibility to make payments for freight is borne by the exporter. The applicant negotiated for freight charges contrary to the application of the CIF incoterm. Therefore, the truth and accuracy on the documentations was doubtful. Thus, the transaction value method was not applicable and methods transaction value of similar goods was applied.

The respondent submitted that its witness (RW3) Cossy Nasimbwa testified that the respondent did not use customs valuation Method 2 of identical goods because the applicant was the only importer of that particular brand. In order to determine comparable, they had to apply the transactional value of imports of other importers. This evidence was never controverted.

The respondent submitted that the failure of the applicant to offer genuine explanation as to why its declaration bore low freight values compared to other importers of similar goods from the same point was a clear justification for the respondent to disregard the transaction value method and instead apply the transaction value of similar goods to the applicant's imports. The respondent submitted that In *Royal Electronics Limited v Uganda Revenue Authority* Application 37 of 2017, the tribunal ruled that.

> "If there are any discrepancies in the import documentation, the importer should explain them as it is the one who deals with the issuing authorities. Where the documents contradict another, such documents become suspect and are considered incorrect."

The respondent submitted that S. 122(2) of the EACCMA provides that;

> "Upon written request, the importer shall be entitled to an explanation in writing from the proper officer as to how the customs value of the importer's goods was determined."

The respondent submitted that it doesn't have the power under the EACCMA to decide which inconsistencies are material and which ones are minor. It cited *Uganda Revenue Authority v Golden Leaves and Resorts Limited HCCS* 12 of 2007 where Justice Egonda Ntende cited *York Corporation v Henry Leetham & Sons Limited* [1924] All ER 477 where it was held that; "A body charged with statutory powers for public purpose is not capable of divesting itself of those powers or of fettering itself in their use." The respondent submitted that once it has reasonable grounds to regard information or documentation presented by a taxpayer as inaccurate and misleading. it is by law mandated to reject them, which in this case it did.

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

The respondent conducted an audit on the applicant which showed that the latter had a purported tax liability of Shs. 876,291,671 arising from non-declaration of freight costs, insurance and other incidental costs during the importation of its goods. It also had inconsistencies in its import documents. The applicant challenged the assessment.

The applicant raised an objection that the respondent submitted its objection decision after it had elected. Order 6 Rule 28 of the Civil Procedure Rules states that.

"Any party shall be entitled to raise by his or her pleadings any point of law, and any point so raised shall be disposed of by the court or after the hearing; except that by consent of the parties, or by order of court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing".

Sir Charles Newbold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 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".

In *Gakou & Brothers Enterprises Limited v Uganda Revenue Authority* Application 29 of 2020 the tribunal noted:

"Without going through a long discussion, it is trite law that a preliminary objection on a point of law can be raised at any time during a trial."

Order 15 Rule 2 of the Civil Procedure Rules states that.

"Where issues both of 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 that purpose may, if it thinks fit, post pone the settlement of the issues of fact until after the issues of law have been determined".

We will first address the objection before we delve into the merits of the application.

The applicant submitted that it objected to the audit findings of the respondent on 15th July 2021. It provided all the additional information as requested by the respondent on 9th August 2021. On 2nd September 2021, the respondent concluded as follows.

"Based on the above, your goods did not qualify to be declared under transaction method valuation. Therefore, the committee decision is that alternative methods of valuation shall be applied, and the results shall be communicated to you in due time."

On 27th September 2021, the applicant wrote to the respondent requesting the results of the alternative valuation. Having received no response, the applicant elected that its objection was allowed as no communication was given to it within the stipulated 30 days under S. 229(5) of the EACCMA. Upon receipt of the election letter on 1st October 2021 the respondent served a final objection decision on the applicant's representative wherein a revised liability was communicated. The applicant submitted that the letter issued on

2nd September 2021 was a mere correspondence from the respondent highlighting its ongoing review. No objection decision was issued until 1st October 2021 which was approximately fifty-one days from receipt of additional Information. The applicant contends that the decision issued by the respondent on 1st October 2021 is illegal.

S. 229 of the EACCMA states that.

> "(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.
>
> (2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

S. 229(4) further states that

> "The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision."

S, 229(5) of the EACCMA states that

> "Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the commissioner shall be deemed to have made a decision to allow the application."

S. 24 of the Tax Procedure Code Act provides for objections. It states that.

> "(6) The Commissioner shall serve notice of an objection decision on the person objecting within ninety days from the date of receipt of the objection.
>
> (7) Subject to subsection (9), where an objection decision has not been served within the time specified under subsection (6), the person objecting may, by notice in writing to the commissioner, elect to treat the commissioner as having made a decision to allow the objection".

While the EACCMA provides for custom matters. The Tax Procedure Code Act provides for objections in domestic matters. The Tax Procedure Code Act mentions objection decision, while the EACCMA talks of a decision. S. 24(7) of the Tax Procedure code ACT clearly states that "by notice in writing to the commissioner, elect". However, we notice

that the provision in the ECCMA does not provide for election in writing. S. 229(5) states that where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified the Commissioner shall be deemed to have made a decision to allow the application. Therefore, the person under S. 229(5) does not need to elect where there is no decision, the commissioner is deemed to have allowed the application.

The applicant objected on 15th October 2021. It provided further information by 9th August 2021. If The tribunal has to consider that the 30 days began to run from the date the applicant provided further information, it would mean the time should have expired on 9th September 2021. However, on 2nd September 2021, the Commissioner wrote to the applicant where he concluded that.

> "Based on the above, your goods don't qualify to be declared under transaction method valuation. Therefore, the committee decision is that alternative methods of valuation shall be applied, and the results shall be communicated to you in due time."

It is difficult for the Tribunal to state that the said letter did not constitute a decision. S. 229(4) and (5) require the Commissioner to communicate a decision. The said letter made it clear that the transaction valuation method used by the applicant was not accepted by the Commissioner. Though the decision did not state the tax liability of the applicant it clearly stated that the method used by the applicant was not accepted. It was in the email of 1st October 2021 after the applicant's purported election, that the respondent wrote what it called an 'objection reconciliation' which stated.

> "Therefore, based on the above customs is now moving to enforce collection of this Tax and by a copy of this letter, the Assistant Commissioner Compliance and Business analysis is requested to enforce collection of the said taxes amounting to Ushs. 657,881,961."

While the letter of 2nd September 2021 cannot be called in strict terms an objection decision, it was still a decision of the Commissioner. S.229 of the EACCMA mentions a decision of the Commissioner. Likewise, the letter of 1st October 2021 stating the tax liability of the applicant was a decision of the Commissioner. The applicant was free to file an application after any of the decisions were made. In this case, it filed after the 2nd decision. To ignore the 1st letter of 2nd September 2021 as a decision would be just a

question of semantics. The Tribunal will be focusing on form rather than substance. The Tribunal will consider the first letter of 15th July 2021 objected to the audit findings required the Commissioner to make a decision. The Commissioner made the decision in its letter of 2nd September 2021 as under S. 229(1) of the EACCMA. The Commissioner omitted to provide information on the tax liability. The applicant was within the time prescribed of 30 days under S. 229(1) of the EACCMA when it wrote a letter objecting to the omission of the Commissioner to include the tax liability and purporting to elect. The Commissioner made its decision of review in the letter of 1st October 2021 stating the tax liability of the applicant which was the final decision of the Commissioner under S. 229(4) of the EACCMA. The Tribunal will overrule the objection and proceed to the merit.

The Commissioner made its decision on 2nd September 2021. The applicant affected by the omission, applied for an election or a review in its letter of 1st October 2021 which was within the prescribed time. On the same day, the respondent revised the assessment to Shs. 657,881,961. The second letter was the final communication and decision empowering the applicant to file an application in the Tribunal. The said preliminary objection is overruled.

The applicant contends that it declared its imports based on the actual cost of goods, insurance and freight charges to Mombasa. It presents original import documentation to the respondent. Taxes were paid before the goods were released to it. It used the transaction value method. The respondent conducted an audit and issued a tax liability of Shs. 876,291,647 arising from alleged non-declaration of sea freight to Mombasa. The respondent alleged that the freight rates were different from other importers. The applicant purportedly undeclared freight of Shs. 1,582,334,94 from various ports to Mombasa. The respondent also alleged that the documents for the applicant had inconsistencies. The respondent used the transaction value to similar goods. The dispute before the tribunal is whether the respondent was justified in rejecting the transaction value method used by the applicant and instead applying the transaction value of similar goods.

The applicant submitted that the respondent did not disclose the source of its recommended rates. It applied periods which were out of scope with the audit period. It used a uniform exchange rate throughout the entire period. The similar goods could not have similar freight charges due to their nature. The applicant highlighted the inconsistencies in the comparable data presented by the respondent.

The law relating to valuation of imported goods is in S. 122(1) of the EACCMA which states.

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

Paragraph 2(1) of Part 2 of the 4th Schedule of the EACCMA states:

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

Paragraph 3(1)(a) provides that.

> "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".

Paragraph 4(1) (a) provides that.

> "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".

The commissioner is supposed to apply the valuation method sequentially. Where he cannot apply the transaction value of the imports, he has to apply that of identical goods, then that of similar goods.

The first question the Tribunal has to determine was whether the Commissioner was justified to query the applicant's documents. The respondent submitted that its witness (RW3) Cossy Nasimbwa testified that the respondent did not use customs valuation

method 2 of identical goods because the applicant was the only importer of that particular brand. The respondent contends that the applicant declared low freight values for imported consignments which were lower than those declared for other consignments discharged from the same ports in a similar period by other importers of similar items. The respondent contended that the audit revealed inconsistencies in the documentation used in declaration. The applicant used incoterms which were inconsistent with the correspondences. According to the applicant, the Commissioner did not provide any further details to the applicant with respect to the computations he used. No disclosure was made on what similar goods were used to compare to the applicant's imports. No disclosure was made with respect to when the said imports were purchased or from where they were purchased. No disclosure is made as to which ports they came from.

The tribunal, having perused the documents, notes that though the respondent alleges that the applicant declared low freight values compared to other consignments from the same ports in a similar period by other importers of similar items. The respondent did not attach or adduce information in respect of the other consignments from the same ports in a similar period. Though the respondent contends that the documentation had inconsistencies, there is no evidence that they were not genuine. Whereas the respondent was justified to query the documents, it did not show that the applicant paid lower taxes. While the applicant may have used the wrong incoterm, it may have paid the actual freight charges. Whether the freight charges were borne by the exporter or importer does not make a difference where the charges were the amounts actually paid. The respondent's displeasure seems to stem from the applicant having negotiated the freights costs and not that they paid the actual freight costs. If the freight charges were the amounts actually paid, the applicant was justified to use the transaction value method. It is without prejudice, difficult for the Tribunal to say that the applicant paid lower freight charges when the import documents of importers of similar items were not adduced as evidence.

The respondent contended that the applicant did not declare freight insurance and other incidental costs. A perusal of exhibit A32 shows that the applicant paid sea freight and

insurance costs. The respondent did not provide a breakdown of the imports where the applicant did not pay freight and insurance costs for importation of its goods. The respondent further stated that freight value was computed by comparison of freight rates for other companies vying the same route and carrying similar goods around the same time the applicants imported their goods. This is a contradiction that the applicant did not declare freight costs.

The tribunal notes that although the respondent says that the applicant did not avail additional information to clarify on the transactions to reach the correct assessments, the respondent does not show us where its assessments emanated from.

Taking the above into consideration, this application is allowed with costs. The respondent to refund to the applicant the 30% of the tax in dispute, if paid.

Dated at Kampala this 24th day of October 2023.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MS. CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**