

REPUBLIC OF KENYA  
TAX APPEAL TRIBUNAL  
AT THE NAIROBI REGISTRY  
TAX APPEAL NO.1573 OF 2022

BAMBURI CEMENT PLC..... APPELLANT

-VERSUS-

COMMISSIONER OF CUSTOMS AND BORDER CONTROL..... RESPONDENT

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## JUDGMENT

### BACKGROUND

1. The Appellant is a private limited liability company licensed to manufacture cement and other cement related products.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, the Authority is charged with the responsibility of among others, assessment, collection, accounting, and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent issued the Appellant with a demand notice dated 30<sup>th</sup> September 2022.
4. The Appellant lodged an application for review dated 19<sup>th</sup> October 2022. Subsequently, the Respondent issued its review decision vide a letter dated 17<sup>th</sup> November 2022.
5. The Appellant being aggrieved by the decision filed a Notice of Appeal on 16<sup>th</sup> December 2022.

## THE APPEAL

6. In its Memorandum of Appeal dated 22<sup>nd</sup> December 2022 and filed on 23<sup>rd</sup> December 2022 the Appellant cited the following grounds of appeal;

- i. That the Respondent erred in law and in fact by seeking to collect customs duties amounting to Ksh 94,428,706.00 on structural steel supplies and failed to acknowledge that the structural steel supplies had been imported as components of a Vertical Cement Grinding Plant (VCGP) imported in an unassembled/disassembled parts upon obtaining approval to so import.
- ii. That the Respondent erred in law and in fact by reclassifying electrical ancillaries, cabling, grounding, and lighting protection which had been imported with approval, as part of the VCGP and thus seeking to collect Ksh 30,270,963.00 in taxes.
- iii. That the Respondent erred in law and in fact by demanding taxes amounting to Ksh 5,231,643.00 on parts allegedly imported without approval for partial shipment despite the items being part of the master list approved by the Respondent for importation.
- iv. That the Respondent erred in law and in fact by demanding additional taxes amounting to Ksh 4,378,090 based on the difference between the Cost and Freight ("CFR") value per Import Declaration Forms lodged and the CFR value in the contract for supply of the VCGP.
- v. That the Respondent erred in law and in fact by subjecting engineering and design fees to Customs duties of Ksh 2,709,800.
- vi. That the Respondent erred in law and in fact by demanding additional taxes of Ksh 5,453,916.00 on allegedly undeclared clinker quantities based on draft surveys rather than Bills of Lading and other supporting import documents.

- vii. That the Respondent erred in law and in fact by demanding additional taxes of Ksh 46,908,858.00 on allegedly undeclared coal quantities based on draft surveys rather than Bills of Lading and other supporting import documents.
- viii. That the Respondent erred in law and in fact by demanding VAT of Ksh 6,398,147.00 on exported goods on the basis that there was no evidence of export.

## **APPELLANT'S CASE**

7. The Appellant's case is premised on the following documents and proceedings before the Tribunal:-
- a) The Appellant's Statement of Facts dated 22<sup>nd</sup> December 2022 and filed on 23<sup>rd</sup> December 2022 together with the attachments thereof.
  - b) The Appellant's Written Submissions dated 11<sup>th</sup> December 2023 and filed on the same date.
  - c) The Appellant's witness statement of Martin Ikuthu dated 10<sup>th</sup> August 2023, filed on 11<sup>th</sup> August 2023 and admitted in evidence under oath on 28<sup>th</sup> November 2023.
  - d) The Witness statement of Jackson Molo dated 28<sup>th</sup> July 2023, filed on 31<sup>st</sup> July 2023 and admitted as evidence under oath on 28<sup>th</sup> November 2023,
8. The Appellant expounded on each of the grounds of Appeal as hereunder;
- i. **The Respondent erred in law and in fact by seeking to collect Customs duties amounting to Kshs 94,428,706.00 on structural steel supplies and failed to acknowledge that the structural steel supplies had been imported as components of a Vertical Cement Grinding Plant imported in an unassembled/disassembled parts upon obtaining approval to so import.**

9. The Appellant stated that through a letter referenced ATBK/05/03/17 and dated 3<sup>rd</sup> March 2017, Bollore Transport & Logistics Kenya Limited ("Bollore"), acting on its behalf, wrote to the Respondent indicating that the Appellant was in the process of putting up a Vertical Cement Grinding Plant ("VCGP"). That Bollore thus sought the Respondent's approval to import the "plant, machinery, equipment and auxiliaries" in several consignments over a period of time. That further, Bollore sought permission to classify the items under tariff subheading 8474.20.00.
10. That this application was made pursuant to the provisions of Additional Note 2 to Section XVI of the East African Community Common External Tariff ("CET").
11. It submitted that in the application, pursuant to the aforementioned provisions, Bollore, on behalf of the Appellant, attached a master list of items to be imported under the purchase contract number NA1030 EP dated 8<sup>th</sup> December 2016. That further, Bollore attached a site plan showing the plant layout as well as copies of photographs showing the equipment and station.
12. That in response, the Respondent by a letter referenced CUS/V&T/TARUGEN/055/2017 and dated 24<sup>th</sup> March 2017, stated that the importer was allowed to declare the part shipments/CKD as a complete cement grinding plant under HS code 8474.20.00.
13. That further, the Respondent advised that the Appellant's clearing agent, Bollore, was to submit to the Customs managers at the entry points a detailed packing list showing all parts to be imported and their quantities for proper and accurate stock keeping.
14. That in volte face, in its demand notice and now in its review decision, subject of this Appeal, whereas the Appellant had hitherto been granted authority for the importation of the VCGP under tariff subheading 8474.20.00, the

Respondent now purported to stipulate certain qualifying conditions for the importation to have been done under the appropriate class.

15. The Appellant contended that it was the Respondent's view that for a plant to be classified under Chapters 84 and 85 of the East Africa Community Common External Tariff, 2017(EAC CET"), ie., the qualifying condition, it must be cited in the headings of Chapter 84 or 85 based on the provisions of Note 5 of the Section Notes for Section XVI of the EAC CET.
16. That in its review decision, the Respondent stated that the Appellant had imported two cement silos of capacity 1500 tonnes for USD 1,381,078 (Ksh 169,941,647.90) and steel structure supplies for the cement mill workshop that excluded the vertical cement mill (VCM) worth USD 600,214 (Ksh 7,385,632.70).
17. That the Respondent also stated that the Appellant imported structural steel for utility pipe support, cable trenches, and weigh bridges amounting to USD 37,052.(Kshs 4,559,248.60). That according to the Respondent, the cement silos and the steel structures for the cement mill workshop did not meet the qualifying conditions for classifying them under Chapters 84 and 85 and the authorization to import the plant under tariff subheading 8474.20.00, issued by the Respondent, did not apply to the two items.
18. The Appellant averred that in the Respondent's view, the items did not qualify as machines and therefore Section Note 4 of Section XVI did not thus apply to them. That it was also the Respondent's view that the cement silos and steel structure supplies ought to have been classified under tariff code 9406.90.90 relating to other kinds of prefabricated buildings.
19. That in addition thereto, it was the Respondent's view that the structural steel for the utility pipe and cable trenches were classifiable under tariff code 7308.90.99 while the structural steel for the weighbridge be classified under tariff code 7308.10.00. The Respondent thus subjected the goods to import

duty (at the rate of 25%) and VAT (at the rate of 16%) thus demanding taxes in the sum Kshs 94,428,706.00.

20. That the Respondent subsequently reviewed the earlier approved master list (an additional supporting document supplied to support the application for importation in part shipments) and sought to reclassify some imported items into new tariff numbers notwithstanding the Respondent's directive vide an approval letter dated 24<sup>th</sup> March 2017 and referenced CUS/V&T/TARI/GEN/055/2017 wherein the Respondent had instructed the Appellant to declare imported items in the approved master list under tariff number 8474.20.00.
21. That in light of these facts, it was the Appellant's view that the Respondent's attempt to renege on its previous position as expressed in its approval letter dated 24<sup>th</sup> March 2017 by purporting to reclassify the VCGP goes against the doctrine of legitimate expectation and the need for public authorities to be held accountable to their promises and undertakings.
22. That the High Court of Kenya at Nairobi *in Miscellaneous Application No 257 of 2019; Republic of Kenya-vs-Kenya Revenue Authority ex parte Majid Al Futaim Hypermarkets Limited*, was faced with similar circumstances and facts akin to this matter. That in that case, Majid Al Futaim made a similar application under Additional Note 2 of Section XVI of the CET seeking to import cooling systems in completely knocked down form and the application was granted by the Respondent who later issued a demand for additional customs duty based on a change in tariff classification. That the Court observed as follows;

*“A plain reading of these conditions is that the Respondent was providing the classification under which the components of the complete Industrial cooling plants in partial shipments that were being imported by the ex parte Applicant would be classified. The*

*Respondent has not provided any evidence of changes to the applicable schedules of the East African Community Common External Tariff it relied on at the time, or reasons why it considers its previous decision on the applicable classification of the machines imported by the ex parte Applicant to have been erroneous...*

*...this Court having found that there was no legal and reasonable basis for the Respondent to find that the HS Code 8418.69.20 was no longer applicable to the ex parte Applicant's subject imports, a legitimate expectation was thereby created by the approvals given by the Respondents in the letters dated 11th January 2019 and 6th February 2019 to the ex parte Applicant in addition, the ex parte Applicant's actions have been demonstrated to have been made pursuant to the applicable rules and procedures, a fact expressly acknowledged by the Respondent in the said approvals."*

23. That it was therefore the Appellant's view that the Respondent is estopped from reneging from its representation made *vide* the approval letter dated 24<sup>th</sup> March 2017, a legitimate expectation having been created as to the treatment of the consignments imported on the advice of the Respondent. That in the circumstances, the taxes demanded in connection thereto are irregular and unlawful and ought to be vacated forthwith.
24. It added that, be that as it may and without prejudice to the submissions on legitimate expectation, the Appellant further submits that the Respondent's position expressed in the Review Decision is technically faulty for the following reasons:
  25. That to begin with, Section Note 5 to Section XVI of the EAC CET provides a wide definition of the term "machine" as follows;

*“For the purposes of these Notes, the expression 'machine' means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.”*

26. That it is imperative to note that a machine may, upon approval, be imported in the disassembled or unassembled state as provided under Additional Note 2 to Section XVI of the EAC CET and its component parts recognized as a machine within a singular tariff subheading.
27. That as such, the Respondent erred in attempting to break the constituent parts of the VCGP and then arguing that those parts, standing alone, could not be cited within Chapters 84 and 85 read together with the Note 2.
28. The Appellant submitted that the Respondent was misguided in its application of Note 5 and that the cement silos and the steel structures for the cement mill workshop qualified as machines, the approval for importing the same as parts of unassembled VCGP and therefore classified under tariff subheading 8474.20.00.
29. The Appellant reiterated that these items were classifiable under tariff number 8474.20.00 based on the provisions of Note 4 of Section XVI of the EAC CET.
30. The Appellant further relied on the World Customs Organization's ("WCO") Explanatory Notes, particularly General Note VII on Functional Units under Section XVI, which refers to Note 4.
31. It averred that the General Note VII of the WCO Explanatory Notes proceeds to provide an array of examples at the number (7) thereof as follows:

*“Asphalt plant consisting of separate components, such as feed hoppers, conveyors, dryers, vibrating screens, mixers, storage bins, and control units, placed side by side (heading 84.74)”*
32. That from the above example, it was crucial to point out that an Asphalt Plant is classified under 84.74 yet it is not specifically cited in Chapter 84. That

further it consists of constituents that could be classified elsewhere, standing alone, e.g., the storage bins and control units.

33. That it was therefore its submission that the cement silos and the steel structures for the cement mill workshop were components intended to be used with the plant as they contributed to a clearly defined function of the VCGP, in that the VCGP could only be said to be complete with the cement silos and steel structures. That in any event, the Respondent having participated in the approval, verification and release of the consignment at the port of entry, it cannot now turn around and claim otherwise as it purports in the review decision.
34. That notably, the cement silos and the steel structures contribute together to the VCGP's function, of crushing cement, without which the plant cannot function. For instance, the cement silos are for the temporary storage of the product after the crushing process prior to the product being dispatched in bulk or in bags, while the steel structure is part and parcel of the machine and hence appropriately classified under tariff code 8474.20.00 as guided in the Respondent's approval.
35. That it is also crucial to note that at the material time, the Plant imported was exempt from VAT pursuant to the provisions of Paragraph 27 of the First Schedule to the VAT Act, 2013 (which was repealed by the Tax Laws Amendment Act, 2020) which exempted: Plants and machinery of Chapters 84 and 85. That in the circumstances, it was not open in law for the Respondent to demand VAT in connection with the machinery subject hereto, the Commissioner having approved the importation of the Plant under Chapter 84 of the CET. That in any event, even without the Respondent's approval, the Plant squarely fell under the said Chapter 84 and accordingly, was automatically exempted from VAT.

36. The Appellant posited that it was for these reasons that the Appellant prayed that the taxes demanded in the sum of Kshs 94,428,706.00 by the Respondent on this fundamental misdirection in law and in fact, be vacated forthwith and the review decision be set aside.
- ii. The Respondent erred in law and in fact by reclassifying electrical ancillaries, cabling, grounding, and lighting protection which had been imported with approval, as part of the VCGP and thus seeking to collect Ksh 30,270,963.00 in taxes.
37. The Appellant stated that the Respondent identified electrical ancillaries valued at USD 1,178,848 (Ksh 145,057,246.40) and cabling, grounding, and lighting protection valued at USD 114,161(Kshs 14,047,511.05) in the master list submitted to Respondent as part of the application for approval for part shipment.
38. That the Respondent held the view that the cabling and electrical ancillaries provided the necessary support (auxiliary) to the primary operations of the VCGP and that by their nature and description, they were not required for the individual machinery to be completed on assembly.
39. The Appellant submitted that according to the Respondent, these items did not, therefore, qualify as parts of the machinery by virtue of Section Note 2 read together with General Note II of the Explanatory Notes to Section XVI.
40. That having lodged an objection against this finding, in its review decision, the Respondent reiterated its position expressed in the demand notice save that it partially allowed the review application on this ground of appeal by vacating the assessment of Kshs 5,317,107.00 on insulation wires based on the provisions of General Explanatory Note C to Chapter 84 that excludes insulated wires of tariff heading 85.44 thereby revising the tax assessment in connection thereto downwards to the sum of Kshs 30,270,963.00.

41. The Appellant averred that on this ground of appeal, it wished to reiterate that having created an expectation in its approval letter that the consignment would be treated in the manner and as advised by the Respondent in its approval letter, it was not open in law for the Respondent to renege on this position.
42. That the Respondent's claim in its review decision that there was no breach of the Appellant's legitimate expectation on a disguise that the Appellant had imported the electrical ancillaries in excess of what was required contrary to the express condition set in the approval letter, it wished to clarify that contrary to the Respondent's assertion, the electrical components were not in excess of what was required for the operation of the machine. That the items were imported in a quantity just sufficient for installation of the plant and as such, no excesses were available to be classified as parts.
43. The Appellant held the view that the excuse invoked by the Respondent is merely meant to disenfranchise the Appellant of its right to a legitimate expectation already created. That in this respect it relied on the dictum of the High Court of Kenya in *Republic v Kenya Revenue Authority Ex Parte MKopa Kenya Limited [2018] eKLR* wherein the Court expounded on the principle of legitimate expectation as was appreciated in *Keroche Industries Limited vs Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240*.
44. The Appellant therefore reiterated that there was created a legitimate expectation that in the event that the Appellant imports the electrical ancillaries as components of the Plant, then the same would not attract any taxes thereon. That this legitimate expectation was relied upon by the Appellant and in the circumstances, the Respondent was not permitted to renege on the same, most so on speculation that the electrical ancillaries were

in excess of what was needed without any proof in support thereof. On this ground alone, the Appellant prayed that this ground be allowed.

45. That notwithstanding the foregoing, it wished to submit that the electricals referred to were classifiable under tariff number 8474.20.00 in line with the provisions of Section Note 4 of Section XVI of the EAC CET. That the electrical ancillaries, cabling, grounding, and lighting protection were intended to ensure the functionality of the plant without which the plant cannot be operational.
46. The Appellant in addition submitted that the Respondent erred in applying General Explanatory Note C to Chapter 84 which provides that separately presented electrical parts fall in one of the headings of Chapter 85, when as a matter of fact, the Appellant had not presented the electrical ancillaries, cabling, grounding, and lighting protection separately to the Respondent's Custom Officers but rather that the same were incorporated with other parts of the machinery classified under 8474.20.00.
47. That further, in its review decision, the Respondent relied on Section Note 4 of Section XVI of the EAC CET and WCO Explanatory General Note II and found that: the consignment must be *"intended to contribute together to a clearly defined function"..... and thus excludes machines or appliances fulfilling auxiliary functions and which do not contribute to the function of the whole.*" That the Respondent, therefore, claimed that since the synonym of: ancillary is auxiliary", automatically, electrical ancillaries provide a support function to the plant and not a primary function and as such, the same ought to have been excluded.
48. The Appellant stated that it wished to clarify that the electrical ancillaries play a pivotal role in the performance of the Plant. That it was common knowledge, for which it invited the Tribunal to take judicial notice of the fact that the Plant operates using electricity and such, without the electrical

ancillaries, cabling, grounding, and lighting protection, then the Plant might as well not function.

49. That further, it must be borne in mind that emphasis must be given to the functionality and the intended use of the consignment as a basis of classifying the same and not a superficial dictionary definition of ancillaries to mean auxiliary as purported by the Respondent.

50. It supported this position with the sentiments of the Tribunal in the case of **Kenya Breweries Limited vs. Commissioner of Customs & Border Control TAT No. 282 of 2020**, [Paragraph 108 thereof] (*a decision that was upheld by the High Court (Justice Majanja) in HC. ITA No. E157 of 2021*) wherein the Tribunal held that emphasis must be given to the purpose for which a consignment is being imported as a basis of determining the appropriate classification. That in this respect, the Tribunal relied on the decision of the High Court in **Proctor & Allan (E.A) Limited v Commissioner of Income Tax [2014] eKLR**.

51. According to the Appellant, if the intended purposes for which the electrical ancillaries, cabling, grounding, and lighting protection were to be considered then this Tribunal would arrive at the impeccable conclusion that the same was intended to enable the Plant to operate.

52. That this fact is cemented by the Respondent's own admission in paragraph (q) of its review decision, wherein the Respondent admitted that: "We agree that the electrical ancillaries were designed for use with the cement grinding machine." This admission is a testimonial to the fact that the Respondent was satisfied that the very nature of the consignments (the electrical ancillaries) made them fit for no other purpose but for use with the Plant and as such, were imported for that purpose.

53. The Appellant therefore submitted that the goods were correctly classified under tariff subheading 8474.20.00 that as such the demand of Kshs

30,270,963.00 ought to be vacated in its entirety and the review decision set aside.

- iii. **The Respondent erred in law and in fact by demanding taxes amounting to Kshs 5,231,643.00 on parts allegedly imported without approval for partial shipment despite the items being part of the master list approved by the Respondent for importation.**

54. The Appellant stated that the Respondent held the view that the Appellant was, following the expiry of the initial period of importation, granted a further period of six months within which to import all the remaining components of the VCGP. That further, this approval was issued via a letter referenced CSD/PP/GEN/1 and dated 9<sup>th</sup> November 2017.

55. That the Respondent therefore averred that the six months granted to the Appellant having lapsed on 8<sup>th</sup> May 2018, the five consignments imported by the Appellant after 8<sup>th</sup> May 2017 which had a Cost and Freight ("CFR") value of USD 346,521 ought to have been brought to charge.

56. That it was also the Respondent's finding that the VCGP having been commissioned and became operational in May 2018, the imported items could only have played an auxiliary role and could therefore not be classified under tariff code 8474.20.00.

57. The Appellant in response to the Respondent's assertions and the taxes demanded, stated as follows:

- a) That it wished to clarify that the Grinding Station Project performance test ended on 9<sup>th</sup> July 2018 and that several tests were conducted thereafter.
- b) That the final takeover was actually on 12<sup>th</sup> July 2019. It asserted that contrary to the Respondent's assertions, the Appellant did provide documentary evidence in connection with this issue, as seen from the

email dated 17<sup>th</sup> November 2022 sharing this information with the Commissioner. In support of its arguments the Appellant annexed the email of 17<sup>th</sup> November 2022 attaching the Normal Operations Conditions Period Test Certificate dated 2<sup>nd</sup> July 2018; the Performance Test Certificate dated 9<sup>th</sup> July 2018, and the Final Takeover Certificate dated 12<sup>th</sup> July 2019.

58. That the Appellant made an application for partial shipment of the VCGP under the provisions of Additional Note 2 to Section XVI of the EAC CET. The Respondent approved the partial shipment under H.S. Code 8474.20.00 having satisfied itself that the Appellant had met the conditions stipulated under the said Additional Note 2 to Section XVI of the CET.
59. The Appellant held the view that Note 2 anticipates that goods may be imported over a period exceeding the initial importation period granted and allows for the extension of time. That in the case of the Appellant, the items imported were key components being part of the master list approved by the Respondent for importation as part of shipments for the VCGP. That they were not auxiliary as alleged by the Respondent.
60. That without prejudice to the approval granted, it wished to dispute the Respondent's assertion that the importation outside the timeline proves that the flagged imports served an auxiliary function to the plant.
61. In this regard, it wished to clarify that the real test of determining *as* to whether or not the consignment fits within a particular tariff heading is well laid down in the General Rules of Interpretation to the CET. That as such, whether or not the same had been imported within time or out of time as claimed herein by the Respondent cannot be said to be the yardstick for determining classification of the consignments or determining whether or not the consignment played a primary or an auxiliary role to the operation of the

Plant. That accordingly, the Respondent's assertions in this regard are not founded in law and as such, cannot stand the test of legality.

62. That a critical consideration of the General Rules of Classification to the CET and a plain reading of the provisions of the CET relevant hereto demonstrates that indeed the machinery property fits within the provisions of Chapter 84 of *the* CET, subject to customs duty at zero (0)% and exempt from VAT. That in the circumstances, no taxes are payable in this respect.
63. That in any event, as held by the Tribunal in the case of Kenya Breweries Limited (*supra*), emphasis must be given to the purpose for which the consignments were imported. In applying this test to the facts herein, it is evident that considering the purpose for which the electrical ancillaries were imported were for the functionality of the Plant.
64. Based on the above arguments, the Appellant submitted that the items were correctly classified under tariff no. 8474.20.00 and therefore prayed that the demand for taxes amounting to Ksh 5,231,643.00 and the review decision subject be set aside.
- iv. **The Respondent erred in law and fact by demanding additional taxes amounting to Kshs 4,378,140.00 based on the difference between the CFR value per Import Declaration Forms lodged and the CFR value in the contract for supply of the VCGP.**
65. The Appellant submitted that the Respondent noted that a total CFR value of USD 22,877,483.00 of the total contract value attributable to the VCGP was imported during the period between 19<sup>th</sup> April 2017 and 3<sup>rd</sup> October 2018 under Import Declaration Form numbers E1702518047. E1703534729, E1705587561 and E1705587581.
66. That the Respondent further noted that since the contract CFR value was USD 23,100,000.00 there was an unaccounted balance, being the difference

between the CFR value per Import Declaration Forms and per contract, of USD 222,517. That the Respondent therefore sought to subject the difference to IDF and RDL at the rate of 2% and 1.5%, respectively, together with VAT at the rate of 16% resulting in a tax liability of Ksh 4,378,140.00.

67. The Appellant submitted that according to Section 5 (1)(b) of the Value Added Tax Act, 2013("VAT Act"), VAT is a tax charged on the importation of taxable goods. That further, according to Sections 7(1) and 8(1) of the Miscellaneous Fees and Levies Act, 2016 ("MFLA"), IDF and RDL are levies paid on goods imported into the Country for home use.
68. That Section 2(2)(c) of the EACCMA states that the time of importation of goods shall be deemed to be the time at which the goods come within the boundaries of the Partner States. That Section 2(2)(b) provides that goods shall be deemed to be entered for home consumption (use) when they have been declared for use in a Partner State (read Kenya), other than temporary use, and the provisions of an earlier paragraph (a) have been fulfilled, i.e., the goods shall be deemed to be entered when the entry in the prescribed manner is made and lodged by the owner. The Appellant emphasized that any duty due in respect of the goods is based on the entry lodged.
69. That further, according to Section 34 (1) and (2) of the EACCMA, the owner of goods has an obligation to enter the goods within a specified period for home use and to furnish with the entry, the full particulars supported by documentary evidence of the goods referred to in the entry.
70. The Appellant submitted that an Import Declaration Form is merely a document that is lodged in order to notify the Customs authorities of an intention to import goods and does not always translate into an actual importation which is typically signalled by the lodgement of a Customs entry (Form C17A or C17B).

71. The Appellant averred that it is important to note that the Import Declaration Form is usually lodged way before the goods come within the boundaries of Kenya, sometimes even before they leave the port of export, such as was the case of the VCGP.
72. That in addition, it is not uncommon for the information on the Import Declaration Form to be informed by a pro-forma invoice whilst the information on a Customs entry must be informed by the commercial invoice issued by the supplier.
73. That in this regard, it was the Appellant's view that the Respondent's demand for Ksh 4,378,140.00 was not only impractical but flawed as taxes are payable on importation of goods based on the Customs value (Cost, Insurance and Freight) derived from the supplier's commercial invoice(s). That the goods the Appellant actually imported are those which it declared on the import entries and supported by way of commercial Invoices, packing lists and Bills of Lading.
74. In relation to the Respondent's assertions at Clause (j) of their decision that it would be risky for either party to undertake such a project without a pricing/payment clause, it submitted that the Respondent had no obligation in law or elsewhere to dictate and rewrite the contractual terms. That the Customs value was derived from the supplier's invoice and that was the basis upon which the taxes were paid.
- v. The Respondent erred in law and fact by subjecting engineering and design fees to Customs duties of Kshs 2,709,800.00**

75. It was the Appellant's contention that in the review decision, the Respondent noted that engineering and design services were indirect costs to the contractor (CBMI Construction Co. Ltd.) as the services were provided by

Holcim technology Limited. That the Respondent averred that Appellant had not provided the audit team with the engineering and procurement contract that expounded on the basis for the WHT payments to the Commissioner of Domestic Taxes.

76. That the Respondent subjected the fees of USD 100,000 to tax on the basis that engineering and design fees are subject to tax under Paragraph 9 (1)(b)(iv) of the Fourth Schedule to the EACCMA.

77. That the Respondent held its view and proceeded to find that the taxes in the sum of Kshs 2,709,800.00 were payable being IDF at 2%, RDL at 1.5%, import duty at 25% in two ("Structural Steel and Others" & "Electrical and Process Control Equipment") out of four instances, as well as VAT at 16%.

78. The Appellant in response submitted that, contrary to the Respondent's allegation, the Engineering and Procurement contract was actually provided to the audit team and is the basis of the Respondent's demand notice. That the decision having been predicated on factual inaccuracies, on this basis alone, the taxes demanded in this regard stand vacated.

79. That further, the Appellant wished to clarify that it accounted for withholding tax ("WHT") on the engineering fees at the non-resident rate of 20% and remitted the same to the Commissioner of Domestic Taxes in line with the contract clause 14.1. That no VAT was due on supply of imported services.

80. The Appellant submitted that the Respondent's assertion that Customs duties are applicable on the fees on the basis of Paragraph 9 (1)(b)(iv) of the Fourth Schedule to EACCMA is erroneous as the said provisions states that:

*"in determining the Customs value of a good using the Transaction Value method, there shall be added to the price actually paid or payable for the imported goods "the value, apportioned as appropriate, of the... services where supplied directly or indirectly by*

*the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable as follows:...engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Partner State and necessary for the production of the imported goods".*

81. That without prejudice to the ground that WHT was appropriately accounted for, the Appellant noted that even if Customs duty were lawfully due, the duties applicable would have been determined based on the taxes applicable on the machinery whose constituents were correctly classifiable under tariff no 8474.20.00. That items classified under 8474.20.00 attracted import duty at the rate of 0% and were VAT exempt at the time of importation by dint of the provisions of Paragraph 27 (repealed by the Tax Laws Amendment Act, 2020) of the First Schedule to the VAT Act, 2013.
82. That accordingly, it was apparent that the taxes demanded thereon were founded on a misapplication of the law to the facts herein. That it was for this reason that the Appellant prays that the Tribunal set aside the tax demand of Ksh 2,709,800.00 on engineering and design in its entirety.
- vi. That the Respondent erred in law and in fact by demanding additional taxes of Kshs 5,453,916.00 on allegedly undeclared clinker quantities based on draft surveys rather than Bills of lading and other supporting import documents.
83. The Appellant stated that the Respondent sought to rely on draft surveys to determine the quantity of clinker imported by the Appellant. That the Respondent compared the quantities in the draft surveys to the quantities

declared by the Appellant based on the Bills of Lading and charged the variances noted to IDF at the rates of 2% or 3.5%, RDL at the rates of 1.5% or 2% and VAT at the rate of 16%, respectively.

84. That the Respondent indicated that according to [observator.com](http://observator.com), a draft survey is a calculation of the loaded or unloaded cargo weight to or from a ship from measurements of changes in water displacement per unit cargo loaded or discharged, a technique based on the Archimedes principle. That according to the Respondent, the draft survey procedure is standardized by the United Nations Economic Commission for Europe for measurement of bulk cargo such as clinker and coal and liquid cargo.
85. That the Respondent noted that an accurately performed draft survey has an acceptable error margin of +/- 0.5% and that to minimize error, the website, [myseatime.com](http://myseatime.com) confirms that a mean draft is subsequently entered in the trim and stability booklet.
86. That the Respondent alleged that the Appellant enjoyed the pre-clearance program of Customs declaration in order to fast-track clearance of the clinker. It averred that in consequence, the Respondent relied on the Bill of Lading to ascertain the quantity of the clinker but was not precluded from establishing the actual weight of the clinker discharged from the vessels using any other objective means, such as draft surveys.
87. That the Respondent found that draft surveys are scientific and that the Appellant could not question the integrity of the qualified and experienced surveyors to justify the usage of the weights in the Appellant's Goods Received Notes ("GRNs").
88. That the Respondent further asserted that the Appellant had not provided the weight records for review during the audit and that even so, the Respondent could not use the records because of a lack of integrity in the transportation from the port to the Appellant's business premises. That

according to the Respondent, there were bound to be variances due to spillages.

89. In Response to this issue, the Appellant highlighted the following description of a draft survey as recorded on (*WÄRTSILÄ Encyclopedia of Marine and Energy Technology, 2022*) for ease of reference:

*“Draft surveys are used to determine the weight of bulk cargo such as iron ore, coal, steel scrap, grain and some specific quantities of liquid cargo loaded on to, or discharged from, a vessel.*

*Draft surveys are convenient and economical means of ascertaining the quantity of cargo loaded or discharged from a ship by reading the vessel's drafts, measuring the ballast water, fuel and diesel oil and other liquids on board, and calculating the final quantity by using the vessel's approved deadweight scales and tank tables, etc.*

*In principle, draft surveys require only a measurement of the water displaced by the vessel before and after the cargo is transferred, along with a measurement of the water's density. Water displacement is measured through draft marks on the ship and converted to a volume using draft tables. The weight of displaced water is calculated by multiplying its volume (displacement) by its density. The difference between the weights of water displaced before and after the cargo transfer will equal the weight of the cargo within measurement accuracy limits.*

*Ideally, while the survey is in progress, the ship should be upright with a trim of not more than one meter by stern and lying still in water, ballast tanks either full (pressed) or empty. Any other conditions give rise to a host of corrections, which increase the probability of errors. In practice,*

*draft surveys are complicated procedures that require a highly qualified draft surveyor.”*

90. The Appellant noted that the Respondent had quoted a reference from observater.com stating that a draft survey is a calculation of the loaded or unloaded cargo weight to or from a ship from measurement of changes in water displacement per unit of cargo loaded or discharged, based on the Archimedes principle.
91. That unfortunately, the Archimedes principle only gives accurate readings in a laboratory setting where the water displaced is collected in a container and can be weighed to get the exact weight of the body that was immersed in the liquid. This does not apply in real life situations, and most so for consignments that are being transported on a ship sailing in an ocean, where displaced water cannot be collected and weighed.
92. The Appellant submitted that there are many factors which lead to errors in draft surveys, that contribute to the considerable differences in the cargo figures derived from the draft surveys including:
- a) Use of a wrong hydrometer. For instance, according to the observater.com, where a zeal hydrometer reads 1.022 a hydrometer at the temperature of 20°C is likely to read 1.026 this will usually give the ship higher cargo arrival figures (if the density for the hydrometer at 20°C is used).
  - b) Sea waves make draft surveys challenging as well as water density between the load port and discharge port;
  - c) At times, unclear draft marks due to rust on the vessel also contribute to errors in the surveys;
  - d) There could be some forgotten weights which may contribute to the errors between the draft survey and Bill of Lading figures such as:

- i. Bilge water may be present in the cargo holds, machinery spaces, duct keel, void spaces and the chain lockers;
  - ii. Anchor and anchor cable on the seabed when the vessel is at the berth alongside and an anchor has been deployed as part of the mooring arrangement. This is always the case for the vessels that deliver the Appellant's clinker and coal since draft survey is done when the vessel is berthed; and
  - iii. Silt and mud can accumulate in the double bottom tanks of vessels which are regularly ballasted in the port to balance the vessel trim position during discharge. The extra weight can give rise to an apparent increase in the cargo loaded.
- e) Vessel squat which is the bodily sinkage and trimming of a vessel making way with limited under keel clearance. This occurs in vessels at berth since there is limited space for the water to flow between the vessel and the seabed. Take note that vessels mostly arrive with a Saltwater Arrival Draft ("SWAD") of 11.50, which is equal to the draft at the Kenya Ports Authority's ("KPA") Berth 9 where the Appellant discharges its vessels. That the Appellant berth at high tide to get tide clearance and rely on fast discharge before low tide to avoid vessels sitting on the seabed.

93. That the Respondent further acknowledged that even an accurately performed draft survey has an acceptable error margin of +/-0.5%. That in fact, the error can be as much as up to 1%. That in this regard, all variances summarized by the Respondent between the Bills of Lading and draft survey figures fall within the acceptable error margin of +/- 0.5% up to 1%.

94. The Appellant in support of its arguments further attached a summary of the variances noted and their error margins. It stated that it is these errors in

the draft surveys that misled the Respondent to assume there was excess cargo received.

95. The Appellant averred that the Bill of Lading is the document against which the supplier of the cargo and ship owners are paid. That certainly, none of these parties would wish to rely on Bills of Lading if draft surveys were more superior. That it was important to note that even at the port of loading, any demurrage or dispatch is calculated based on the Bills of Lading and not on the draft survey figures.
96. That the Customs valuation of cargo for purposes of duty calculations on importation is based on the Bill of Lading, commercial invoice and Certificate of Conformity ("CoC"). That the CoC is issued by an independent body who rely on the Bills of Lading tonnage when issuing the document.
97. The Appellant noted that the Respondent further stated that to minimize errors, its reference to *myseatime.com* confirms that a mean of means draft is subsequently entered in the trim and stability booklet.
98. That this introduces the averaging approach in estimating the figures and further departs from the objective Bills of Lading tonnage. The Appellant submitted that indeed, the Respondent's claim that the Appellant has unjustly questioned the integrity of qualified and experienced surveyors was incorrect. It was the Appellant's position that draft surveys do have an error margin which renders them an inaccurate basis for calculation of taxes. That the Respondent's assertion that the draft surveys are scientific departs from its admission that draft surveys do have a margin of error.
99. The Appellant submitted that contrary to the Respondent's allegation that the Appellant enjoyed a pre-clearance program of customs declaration in order to fast track the clearance of clinker and coal, the Appellant averred that it did not actually enjoy the said pre-clearance program of customs declaration. That instead, normal Customs clearance was carried out to completion, taxes fully

paid, and all procedures completed until the Customs entry was passed before discharge of the cargo starts.

100. The Appellant noted that the Respondent's mention in the demand notice that the draft survey analogy applied is used for wet goods, for example petroleum products, where the Respondent relied on the outturn reports by credible and professional bodies like Société Générale de Surveillance SA ("SGS") to objectively ascertain the quantities discharged.

101. The Appellant submitted that the analogy applied by the Respondent is inappropriate as it differed in all manner with the procedure for the Appellant's type of cargo -coal and clinker were categorized as dry bulk cargo.

102. In response to the Respondent's allegation that the Appellant had not provided the weight records for review during the audit. the Appellant submitted that during the audit process which started on 13<sup>th</sup> June 2022, the audit team asked for specific documents which were availed as per the request. That at no time did the audit team request for the weight records which were readily available in its records.

103. The Appellant further noted that the Respondent's position that even if the audit team had reviewed the records, the Respondent could not rely on them because of lack of integrity in the transportation from the port to the Appellant's business premises owing to variances occasioned by spillages. The Appellant submitted that the port is located 12 km away from the plant and that cargo discharged could only reach its premises via trucks.

104. Based on the above grounds, the Appellant submitted that a Bill of Lading is a globally accepted document for ascertaining the quantities of goods imported and that it is on the back of this document against which other independent third parties are paid.

105. That further, for purposes of assessing taxes and other levies, Customs authorities globally rely on the weights indicated in the Bills of Lading. The

Appellant further submitted that in cases where there is excess or less cargo being discharged, it is the mandate of the Kenya Ports Authority to issue either a short-landing or excess landing certificate, which was not issued in this instance.

106. The Appellant, therefore, submitted that it is grossly unfair to the Appellant for the Respondent to use draft surveys, a method that is not only novel but has not been communicated to the shipping industry, to levy taxes on its consignments.

107. The Appellant therefore prayed that the Tribunal vacates in full the tax demand, as confirmed in the review decision, amounting to Kshs 5,453,916.00.

vii. **The Respondent erred in law and in fact by demanding additional taxes of Kshs 46,908,858 on allegedly undeclared coal quantities based on draft surveys rather than Bills of Lading and other supporting import documents.**

108. The Appellant stated that the Respondent sought to rely on draft surveys to determine the quantity of coal imported by the Appellant. That the Respondent compared the quantities in the draft surveys to the quantities declared by the Appellant based on the Bills of Lading and charged the variances noted to IDF at the rates of 2% or 3.5%, RDL at the rates of 1.5% or 2% and VAT at the rate of 16%, respectively. That the total tax liability amounted to Kshs 46,908,858.00 which the Respondent sought to collect on the same.

109. That similar to the detailed grounds laid out in the issue of clinker, the Appellant submitted that a Bill of Lading is a globally accepted document for

ascertaining the quantities of goods imported, and that it is on the back of this document against which other independent third parties are paid.

110. That further, for purposes of assessing taxes and other levies, Customs authorities globally rely on the weights indicated in the Bills of Lading.

111. The Appellant submitted that it is grossly unfair to the Appellant for the Respondent to use draft surveys, a method that is not only alien in law but has not been communicated to the shipping industry, to levy taxes on its coal consignments. That this was undoubtedly contrary to the provisions of Article 210 of the Constitution that is emphatic that: "(1) No tax or licensing fees may be imposed, waived or varied except as provided for in legislation."

112. Thus the Appellant prayed that the tax demand, as confirmed in the review decision, for taxes in the sum of Kshs 46,908,858.00 should be vacated in full.

**viii. That the Respondent erred in law and in fact by demanding VAT of Kshs 6,874,307 on exported goods on the basis that there was no evidence of export.**

113. The Appellant contended that the Respondent assessed the VAT on the basis that the Appellant's exports lacked certificate of exports or rotation numbers to prove exit out of the Country.

114. The Appellant submitted that it is the Respondent's responsibility to issue Certificates of Export ("CoE") to exporters. That the practice at border stations however has been to endorse the export documents and issue a CoE later on in order to minimize delays and queues at the border. That where a CoE is not issued to an exporter, one can only rely on the endorsed copies in their possession. That it was therefore the Appellant's view that demanding for CoE's from the Appellant is neither acceptable nor fair since the same are system-generated internal documents issued by the Respondent and the Appellant has no control over them.

115. The Appellant further submitted that all the consignments in question were exported and that it provided supporting evidence to this effect, including export entries, truck numbers and rational numbers issued by the Respondent.

116. The Appellant averred further that it provided samples of material evidence in support of the export during the course of the audit. That the supplies were made to enterprises within the Export Processing Zone to demonstrate that the exports did take place contrary to the Respondent's assertions.

### **Appellant's Prayers**

117. The Appellant prayed that;

- a) This Appeal be allowed.
- b) The Respondent's review decision dated 17<sup>th</sup> November 2022 and the taxes demanded in connection thereto be vacated and set aside in their entirety.
- c) The costs of and incidental to this Appeal be awarded in favour of the Appellant.
- d) Any other orders that the Tribunal may deem fit.

### **RESPONDENT'S CASE**

118. The Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal: -

- i. The Respondent's Statement of Facts dated 23<sup>rd</sup> January 2023 and filed on the same date together with the documents attached thereto.
- ii. The Respondent's witness statement of Wafullah Stephen dated and filed on 11<sup>th</sup> August 2023 and admitted as evidence under oath on 28<sup>th</sup> November 2023.

- iii. The Respondent's written submissions dated 11<sup>th</sup> December 2023 and filed on 13<sup>th</sup> December, 2023.

119. The Respondent responded to each of the Appellant's grounds of Appeal as hereunder;

- i. That the Respondent erred in law and in fact by seeking to collect custom duties amounting to Kshs. 94,428,706.00 on structural steel supplies and failed to acknowledge that the structural steel supplies had been imported as components of a Vertical Cement Grinding Plant(VCGP) imported in an unassembled/ disassembled parts upon obtaining approval to so import.

120. It was the Respondent's view that there was no legitimate expectation on the Respondent in correcting the tariff non-compliance committed by the Appellant during importation. It averred that in the said authorization letter dated 24<sup>th</sup> March 2017 referenced as CUS/V&T/TARI/GEN/055/2017 the Respondent gave the Appellant the qualifying conditions for importation. Under condition No. 3, the Respondent stated that there will be a follow-up audit on the machinery to be imported to ensure compliance with customs laws and procedures. That the letter further stipulated that if the unassembled components of the machinery were brought in excess of the number required for the machinery to be complete, the excess components shall be classified separately in their respective codes.

121. That the Appellant's averment that the two items were checked, physically verified and released at the port of entry after being confirmed to be compliant is incorrect. That the items were bulky in nature and were imported in part shipment/CKD condition. That the Respondent did not assemble the VCGP at the time of importation to establish if there was any non-compliance. That this could only have been done after assembly, hence the reason for the follow up audit.

122. The Respondent submitted that it would also like to confirm that there could not have been any photographs of the actual components/assembly of the VCGP at the time of application for partial shipment as alleged in the Appellant's application for review.
123. The Respondent stated that Section Note 5 to Section XVI of the Common External Tariff (CET) describes the expression "machine" for the purposes of Section XVI of the CET to mean any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapters 84 or 85.
124. That Additional Note 2 to Section XVI allows the Appellant to import the machinery in unassembled/disassembled state in several consignments over a period of time if it is deemed necessary for convenience of trade or transport. That it further stipulates the conditions to adhere to.
125. That Section Note 4 to Section XVI read together with the WCO Explanatory General Note VII on Functional Units, relates to machines (including combination of machines) that consist of separate components which are intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84, or more frequently, Chapter 85. That the whole then falls to be classified in the heading appropriate to that function, whether the various components (for convenience or other reason) remain separate or are interconnected by piping, by devices used to transmit power, by electrical cables or by other devices.
126. That it further stated that for the expression "intended to contribute together to a clearly defined function" covers only machines and combination of machines essential to the performance of the function specific to the functional unit as a whole, and excludes machines or appliances fulfilling auxiliary functions and which do not contribute to the function of the whole.
127. It was the Respondent's submission that the condition stipulated in the authorization letter refers to machinery cited in Chapters 84 or 85 within the

meaning of Section Note 5 and Section Note 4 to Section XVI of the CET. That anything falling outside this meaning of machinery is what constitutes excesses that should be classified in their own appropriate heading as per the Respondent's approval letter.

128. That the Respondent expressly guided that any unassembled components in excess of the number required for the machinery to be complete shall be classified in their respective tariff codes.

129. It was the Respondent's submission that under the context of the earlier explanation clearly defined the function of the VCGP is cement grinding. That in this regard, all the machines or combination of machines essential to the performance of this function, specific to the functional unit as a whole, to be classified under tariff code 8474.20.00 as authorized by the Respondent in its letter.

130. That subsequently, all machines or appliances, performing auxiliary functions such as storage of cement in the cement silos, should be classified in their own tariff subheadings. That it was the Respondent's position that, at the point the cement grinding (specific function) has been done, all the completely assembled machines or combination of machines essential to this specific function will fall to be classified under tariff code 8474.20.00.

131. That any function or functions undertaken by machines or combination of machines after the cement grinding has been done are excluded.

132. It was the Respondent's assertion that the correct tariff code for the cement silos was 9406.90.90 as explained in the response to review application.

133. That under Schedule II therein referred to as the Executive Price Summary of the Contract Price and Payment of the supply contract between the Appellant and CBMI Construction Company Limited submitted with the application for review, the cement mill workshop is expressly provided for and clearly excludes the Vertical Cement Mill (VCM). That making inference, these items

would constitute excess components required for the machine (VCM) to be complete and should therefore be classified in their own appropriate heading. That important to note is that the VCM was the primary machinery conducting the clearly defined function of cement grinding. That therefore, all the other functions such as transportation and storage after grinding would not qualify under the meaning of VCGP machine.

134. That it was therefore the Respondent's position that the cement mill workshop is correctly classifiable under tariff subheading 9406.90.90 as explained in its response to review application.

135. That the auxiliary costs centers related to imported utility pipe support, cable trench, weight bridges which amounted to a total of US \$ 37,052.00. It averred that the correct HS Code is 7308.90.99 for the structural steel for the utility pipe and cable trench and 7308.10.00 for the structural steel for the weight bridge as explained in the response to review application. That this conclusion was based on the same analysis on excess components.

136. That the example of an asphalt plant cited under the General Note VII of the WCO Explanatory Note further qualifies the explanation by use of the words side by side. It was the Respondent's submission that the process of mixing aggregate, bitumen and filler material produces asphalt. That the clearly defined function is the making of asphalt. That unlike in the VCGP where the clearly defined function ends at the cement grinding stage, the clearly defined function in an asphalt plant ends at the point (storage bin) the asphalt is made. That looking at an asphalt plant it will be noted that the product (asphalt) is obtained immediately after weighing and mixing and not during weighing and mixing. That unlike in the VCGP where the storage silos are not side by side (the cement is transported using a belt conveyor to the silos located a distance away), the storage bin are directly side by side in the asphalt plant.

137. That the General Note VII of the WCO Explanatory Notes proceeds to provide another example at number 5 thereof as follows:

*“ Brewhouse machinery comprising, inter alia, sprouting or germination machines, malt crushing machines, mashing vats, straining vats (heading 84.38). Auxiliary appliances (e.g., bottling machines, label-printing machines), are however not included and should be classified in their own appropriate heading.”*

138. That from the above example, it was important to note that the machinery performing the auxiliary functions of bottling and label printing in a brewery cannot be classified under 84.38 (brewhouse machinery) because the function of brewing has already been completed. They only play a supporting role and not the primary role. This is the example that had been adopted in the Appellant's case.

ii. That the Respondent erred in law and in fact by reclassifying electrical ancillaries, cabling, grounding and lighting protection which had been imported with approval, as part of the VCGP and thus seeking to collect KES 30,270,963.00 in taxes.

139. The Respondent submitted that there was no legitimate expectation on the Respondent in correcting the tariff non-compliance committed by the Appellant during importation. That in the said authorization letter dated 24<sup>th</sup> March 2017 referenced as CUS/V&T/TARI/GEN/055/2017, it gave the Appellant the qualifying conditions for importation. That under condition No.3, the Respondent stated that there will be a follow-up audit on the machinery to be imported to ensure compliance with customs laws and procedures. That the letter further stipulated that if the unassembled components of the machinery were brought in excess of the number required for the machinery to be complete, the excess components shall be classified separately in their respective codes.

140. It was the Respondent's submission that the condition stipulated in the authorization letter refers to machinery cited in Chapters 84 or 85 within the meaning of Section Note 5 and Section Note 4 to Section XVI of the CET. That anything falling outside this meaning of machinery is what constitutes excesses that should be classified in their own appropriate heading as per the Respondent's approval letter.
141. It asserted that Section Note 4 to Section XVI read together with the WCO Explanatory General Note II on Functional Units, relates to machines (including combination of machines) that consist of separate components which are intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84, or more frequently, Chapter 85. That the whole then falls to be classified in the heading appropriate to that function, whether the various components (for convenience or other reason) remain separate or are interconnected by piping, by devices used to transmit power, by electrical cables or by other devices. That this Note envisages that the electrical materials/appliances providing the interconnection are not incorporated in the machinery. That they rather offer support to the machinery.
142. That for the expression "intended to contribute together to a clearly defined function" covers only machines and combination of machines essential to the performance of the function specific to the functional unit as a whole, and thus excludes machines or appliances fulfilling auxiliary functions.
143. That item E7, under the electrical equipment price breakdown sheet of the master list submitted by the Appellant with its application for review, made reference to electrical ancillaries valued at USD 1,178,848.00.
144. The Respondent submitted that the synonym for ancillary is auxiliary. That the electrical ancillaries provide the necessary support to the primary activities of the VCGP. That they were also not incorporated inside the machinery approved in the authorization letter.

145. It stated that the electrical ancillaries qualify as parts of the machinery by virtue of Section Note 2 read together with General Note II to Section XVI.
146. That furthermore, Section Note 2 read together with General Note II to Section XVI confirms that the rule of classifying parts solely suitable or principally designed for a particular machine in the same heading as the machine does not apply to parts in which themselves constitute an article covered by a Section of this heading; that these are in all cases classified in their own appropriate heading even if specifically designed to work as part of a specific machine. That this applies in particular to electric; transformers, capacitors, boards, panels, consoles, desks, cabinets, apparatus for switching and protecting electrical circuits, insulators of any material etc.
147. That the Respondent further took note of the General Explanatory Note C to Chapter 84 as read together with Section Note 2 of Section XVI which provides that separately presented electrical parts fall in one of the headings of Chapter 85.
148. The Respondent averred that the electrical ancillaries were designed for use with the cement grinding machines. That they were however not incorporated with other parts of the machinery as averred by the Appellant in its application.
149. That the resultant extra taxes assessed from the tariff non-compliance of electrical ancillaries was reviewed from Kshs. 35,588,070.00 to Kshs. 30,270,963.00. That the Respondent vacated the assessment of Kshs. 5,317,906.00 based on the provisions of General Explanatory Note C to Chapter 84 which excludes insulated wires of tariff heading 8544.
- iii. That the Respondent erred in law and in fact by demanding taxes amounting to KES 5,231,643 on parts allegedly imported without approval for partial shipment despite the items being part of the master list approved by the Respondent for importation.**

150. The Respondent stated the Appellant did not provide any documentary evidence to support the assertions made above. That the Appellant had initially confirmed that the VCGP was commissioned in May 2018 but the evidence of commissioning was yet to be provided to date.
151. That the authorization to import the machinery for the vertical grinding station project under tariff subheading 8474.20.00 had express timelines granted. That the authorization letter dated 9<sup>th</sup> November 2017 granted the Appellant a further period of six months within which to import all the remaining components of the VCGP. That the six months lapsed on the 8<sup>th</sup> May, 2018. That there was no further request for extension from the Appellant.
152. That the five consignments imported outside the authorized window (after 8<sup>th</sup> May 2018) had a total CFR of US \$ 346,521. That the Appellant misclassified some of them as machinery of tariff subheading 8474.20.00.
153. That to confirm that they were outside the window approved, the Appellant correctly declared board panels, fire valves etc. under tariff subheadings 8537.20.00, 8537.10.00 and 8481.90.00 and customs entry number 2018JKA3954929, 2018JKA4010463 and 2018JKA4020438 respectively.
154. It added, that had the items been critical components of the VCGP, the Appellant should have requested for an extension for authority to import them under tariff subheading 8474.20.00. That this did not happen and it explains why the Respondent deemed it fit to qualify them as auxiliary.
155. The Respondent submitted that it was critical to note that a master list is not the final determinant of compliance to customs laws and procedures. That there were administrative and legal qualifying conditions that were stipulated to the Appellant after their applications and extensions.

156. That furthermore, the Normal Operation Period Test commenced on 16<sup>th</sup> June 2018. The Respondent questioned whether this would have been possible without the assembly and installation of the critical components of the machines.
157. That the resultant extra taxes assessed from this non-compliance amounting to Kshs. 5,231,643.00 were therefore upheld.
- iv. **That the Respondent erred in law and in fact by demanding additional taxes amounting to KES 4,378,090 based on the difference between Cost and Freight ("CFR") value per Import Declaration Forms lodged and the CFR value in the contract for supply of the VCGP.**
158. It was the Respondent's position that the resultant taxes totaling to Kshs. 4,378,090.00 were upheld due to the reasons hereinunder.
159. That the Appellant contracted CBMI Construction company Limited for the supply of all mechanical, electrical and process control equipment, of structural steel and cladding, of civil engineering design, mechanical and electrical engineering, the supervision and commissioning required for a new cement grinding plant to be installed and put into operation in Athi River, Kenya.
160. The total contract CFR value for the mechanical, structural and electrical supplies as stipulated in Schedule 2 of the executive price summary was US \$ 23,100,000.00.
161. That a total CFR value of US\$ 22,877,483.00 of the total contract value attributable to the VCGP was imported during the period 19<sup>th</sup> April 2017 to 30<sup>th</sup> October 2018 under IDF numbers E1702518047, E1703534729, E1705587561 and E1705587581. The CFR contract value being US \$ 23,100,000 leaves an unaccounted balance of US\$ 222,517.00 which is chargeable to tax. That this unaccounted balance is as a result of undervaluation by the Appellant.

162. The Respondent stated that the Appellant did not have any adjustments to the contract value aforementioned. That the price in the contract of sale between the two parties was therefore fixed by the contract. That the Appellant did not provide any information relating to any goods that were not imported to warrant a possible adjustment to the contracted value.
163. That the Respondent concluded that the price payable as per Section 122 of EACCMA read together with Paragraph 2 of the Fourth Schedule and the contract CFR value was under declared during importation. That the Appellant did not prove otherwise.
164. The Respondent made reference to the spare parts lists for commissioning of the VCGP and for the two years in the operation manual for the mobile bulk loader submitted during the review stage. That there was no evidence of customs declaration of any of these spare parts during importation. That the Appellant did not provide the evidence of the latter.
165. That therefore, the resultant extra taxes assessed from this non-compliance amounting to Kshs. 4,378,090.00 was upheld by the Respondent.
- v. That the Respondent erred in law and in fact by subjecting engineering and design fees to customs duties of Kshs. 2,709,800.00.**
166. The Respondent stated that it was not furnished with the contract that expounded on the basis for the WHT payments. That the gross amount as indicated on the two WHT certificates amounted to a total of Kshs. 374,326,624.00. That the engineering and design fees indicated in the supply contract totaled to USD 100,000 (est. Kshs. 10,300,000 at the time)
167. That however, the Respondent charged the relevant duties and taxes on the basis of the tariff reclassification of the steel structures, electricals and the other components of the VCGP.
168. That the provision of the law the Respondent relied on is stipulated under Paragraph 9 (1) (b) (iv) of the Fourth Schedule of the EACCMA, 2004.

169. That therefore, the resultant extra taxes assessed from this adjustment amounting to Kshs. 2,709,800.00 were upheld.

vi. That the Respondent erred in law and in fact by demanding additional taxes of Kshs. 5,453,916.00 and Kshs. 46,908,858.00 on allegedly undeclared clinker and coal quantities based on the draft surveys rather than Bills of Lading and other supporting documents.

170. It was the Respondent's contention that a Bill of Lading is a legal document issued by a carrier to a shipper that details the type, quantity and destination of the goods being carried.

171. That the relevant coal and clinker Bills of Lading clearly stated, in one of their clauses, that the weight, measure, quality, condition, contents and value are unknown.

172. That the Respondent was of the view that the delivery of bulk cargo is governed by the terms of the contract of carriage, and, in their absence, by the port of discharge.

173. It averred that in the case of bulk cargo, it was the Respondent's view that, the Bill of Lading does not constitute *prima facie* evidence of the quantity of the cargo loaded or discharged from the port. That it does not preclude the Respondent from ascertaining the quantities of cargo using any other objective means.

174. That the draft surveys in the Appellant's custody were conducted by a competent surveyor contracted by Appellant to ascertain the quantities of cargo discharged. That it would be impractical for the Appellant to disown an exercise fully approved by themselves. That the main question that arises in this circumstance is why then would the Appellant contract a surveyor to conduct a draft survey if they truly believed that the bills of lading weight were correct?

175. That the Appellant wanted the Respondent to believe its assertions on the usage of the quantities of bulk cargo in the bills of lading. That the Appellant

being a subsidiary of Lafarge consigns 99% of all their bulk cargo from its related parties. That the Respondent believes that the shipper only captures the weight as is drafted in the commercial invoice by the Appellant's related parties. That it was abnormal to load and unload exact quantities as averred by the Appellant when it comes to bulk cargo. That there's bound to be certain variances as seen in the draft survey.

176. The Respondent stated that at no point did the Appellant demonstrate how its supplier (a related party) arrived at the weights declared in its commercial invoices and subsequently adopted by the shippers in the bills of lading.

177. The Respondent submitted that all the draft surveys were conducted when the sea condition was calm.

178. The Respondent stated that the Working Party on coal, a subsidiary of the United Nations Economic Commission for Europe, agreed in 1989 to make proposals for harmonizing draught survey results. That the use throughout the world of uniform standards and procedures for the performance of draught surveys was suggested for enhancing their accuracy. That the resulting code of uniform standards and procedures for performance of draught surveys of bulk cargoes (e.g., coal) intended to make the procedures reasonably uniform, provide a professional standard for the work the draught surveyors and provide a source of information and serve as a reference for those who make use of draught survey reports or equivalent weight certificates in the routine accomplishment of their trade pursuits. That the code did not dispute the use of draught surveys in the determining the weight of seaborne bulk cargo.

vii. That the Respondent erred in law and in fact by demanding VAT of Kshs. 6,874,307.00 on exported goods on the basis that there was no evidence of export.

179. The Respondent posited that the audit team was very fair in the retrieval exercise of the proofs of exit for the queried exports. That the rotation numbers provided by the Appellant were used as a basis of proving export due to the alleged delays that could have taken place in issuing the certificates of export. That the Respondent allowed the Appellant to provide the rotation numbers/endorsed customs documents for the queried exports. That the Appellant's submission that its methodology in ascertaining compliance was unfair and not in good faith was therefore incorrect.
180. That the Respondent requested the Appellant to provide proof of exit of the exports out of Kenya or into the Export Processing Zones. That the Respondent did not restrict the Appellant to the CoEs. It averred that the samples provided were not adequate enough to warrant a review of those without proof of exit.
181. That it was the Appellant's responsibility as an exporter to secure its supply chain due to the dumping that occurs with regards to exports. The Respondent contended that it had a responsibility to grant the Appellant exit upon their arrival at the exit points. That the evidence for the exit granted is the endorsed customs documents and/or the certificates of exports.
182. That the Appellant provided additional proof of entry into the EPZ/exit out of Kenya for a number of the exports where the VAT had been assessed. That the Respondent therefore reviewed the VAT payable from Kshs. 6,874,307.00 to Kshs. 6,398,147.00.
183. That further, Sections 235 and 236 of the East Africa Community Common Market Act (EACCMA) gives the Respondent powers to call for documents and conduct a Post Clearance Audit on the import and export operations of a taxpayer within a period of five years from the date of importation or exportation. That where the PCA reveals that taxes were short levied, or erroneously refunded, Section 135 of the Act empowers the Respondent to

recover any such amount short levied or erroneously refunded by means of a demand notice.

184. That Section 229 of the EACCMA provides for application for review by any person affected by the decision or omission of the Respondent on matters relating to Customs and provides the statutory timelines to be observed.

### **Respondent's Prayers**

185. The Respondent prayed that the Tribunal;
- a) Finds that this Appeal lacks merit.
  - b) Upholds the Respondent's review decision
  - c) Dismisses the Appeal with costs to the Respondent.

### **ISSUES FOR DETERMINATION**

186. Upon due consideration of the pleadings and submissions filed by the parties and hearing the evidence adduced on the part of both parties the Tribunal finds that the issues crystallizing for its determination are as follows;
- a) Whether the Respondent erred in re-classifying the cement silos, steel structures and electrical items imported by the Appellant.
  - b) Whether the Respondent erred in demanding taxes on parts allegedly imported without approval for partial shipment.
  - c) Whether the assessment arising from the differences between the CFR value as per IDF lodged and the CFR value in the contract was justified.
  - d) Whether the Respondent was justified in charging customs duties on engineering and design fees.
  - e) Whether the Respondent was justified in demanding taxes on alleged undeclared imports of clinker and coal.

- f) Whether the Respondent was justified in demanding VAT on exported goods by the Appellant.

## ANALYSIS AND FINDINGS

187. Having identified the issues falling for determination, the Tribunal proceeds to analyze the same separately as hereunder: -

- a) Whether the Respondent erred in re-classifying the cement silos, steel structures and electrical items imported by the Appellant.

188. It was the Appellant's submission that the Respondent erred in attempting to break the constituent parts of the VCGP and then arguing that those parts, standing alone, could not be cited within Chapters 84 and 85 as read together with the Notes stated thereunder.

189. The Appellant submitted that the Respondent was misguided in its application of Note 5 and that the cement silos and the steel structures for the cement mill workshop qualified as machines, the approval for importing the same as parts of unassembled VCGP and therefore classified under tariff subheading 8474.20.00.

190. The Appellant reiterated that these items were classifiable under tariff number 8474.20.00 based on the provisions of Note 4 of Section XVI of the EAC CET.

191. The Appellant further relied on the World Customs Organization's ("WCO") Explanatory Notes, particularly General Note VII on Functional Units under Section XVI, which referred to Note 4.

192. That the cement silos and the steel structures for the cement mill workshop were components intended to be used with the Plant as they contributed to a clearly defined function of the VCGP, in that the VCGP could only be said to

be complete with the cement silos and steel structures. That in any event, the Respondent having participated in the approval, verification and release of the consignment at the port of entry, it cannot now turn around and claim otherwise as it purports in the review decision.

193. That notably, the cement silos and the steel structures contribute together to the VGCP's function, of crushing cement, without which the Plant cannot function. For instance, the cement silos are for the temporary storage of the product after the crushing process prior to the product being dispatched in bulk or in bags, while the steel structure is part and parcel of the machine and hence appropriately classified under tariff code 8474.20.00 as guided in the Respondent's approval.

194. The Respondent on its part stated that Section Note 5 to Section XVI of the Common External Tariff (CET) describes the expression "machine" for the purposes of Section XVI of the CET to mean any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapters 84 or 85.

195. That Additional Note 2 to Section XVI allows the Appellant to import the machinery in unassembled/disassembled state in several consignments over a period of time if it is deemed necessary for convenience of trade or transport.

196. That Section Note 4 to Section XVI as read together with the WCO Explanatory General Note VII on Functional Units, relates to machines (including combination of machines) that consist of separate components which are intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84, or more frequently, Chapter 85. That the whole then falls to be classified in the heading appropriate to that function, whether the various components (for convenience or other reason) remain separate or are interconnected by piping, by devices used to transmit power, by electrical cables or by other devices.

197. It further stated that for the expression “intended to contribute together to a clearly defined function” covers only machines and combination of machines essential to the performance of the function specific to the functional unit as a whole, and excludes machines or appliances fulfilling auxiliary functions and which do not contribute to the function of the whole.
198. It was the Respondent's submission that the condition stipulated in the authorization letter refers to machinery cited in Chapters 84 or 85 within the meaning of Section Note 5 and Section Note 4 to Section XVI of the CET. That anything falling outside this meaning of machinery is what constitutes excesses that should be classified in their own appropriate heading as per the Respondent's approval letter.
199. That the Respondent expressly guided that any unassembled components in excess of the number required for the machinery to be complete shall be classified in their respective tariff codes.
200. It was the Respondent's submission that under the context of the earlier explanation clearly defined the function of the VCGP is cement grinding. That in this regard, all the machines or combination of machines essential to the performance of this function, specific to the functional unit as a whole, to be classified under tariff code 8474,20.00 as authorized by the Respondent in its letter.
201. That subsequently, all machines or appliances, performing auxiliary functions such as storage of cement in the cement silos, should be classified in their own tariff subheadings. That it was the Respondent's position that, at the point the cement grinding (specific function) has been done, all the completely assembled machines or combination of machines essential to this specific function will fall to be classified under tariff code 8474,20.00.
202. Regarding the electrical items reclassified by the Respondent which included electrical ancillaries, cabling, grounding and lighting protection, the Appellant

stated that these items play a pivotal role in the performance of the Plant. That it was common knowledge, for which it invited the Tribunal to take judicial notice of the fact that the Plant operates using electricity and such, without the electrical ancillaries, cabling, grounding, and lighting protection, then the Plant might as well not function.

203. That further, it must be borne in mind that emphasis must be given to the functionality and the intended use of the consignment as a basis of classifying the same and not a superficial dictionary definition of ancillaries to mean auxiliary as purported by the Respondent.

204. The Respondent on its part averred that the condition stipulated in the authorization letter refers to machinery cited in Chapter 84 or 85 within the meaning of Section Note 5 and Section Note 4 to Section XVI of the CET. That anything falling outside this meaning of machinery is what constitutes excesses that should be classified in their own appropriate heading as per the Respondent's approval letter.

205. The Respondent submitted that the synonym for ancillary is auxiliary. That the electrical ancillaries provide the necessary support to the primary activities of the VCGP. That they were also not incorporated inside the machinery approved in the authorization letter.

206. The Respondent averred that the electrical ancillaries were designed for use with the cement grinding machines. That they were however not incorporated with other parts of the machinery as averred by the Appellant in its application.

207. The Tribunal notes that the dispute here is whether these items formed part of the Vertical Cement Grinding Plant (VCGP) which the Appellant had applied and obtained approval to import in unassembled/disassembled form.

208. The Tribunal first looks at the Appellant's application to import the VCGP in disassembled form dated 3<sup>rd</sup> March 2017. The letter stated in part as follows;

*“Our client, Bamburi Cement Ltd is in the process of putting up a Vertical Cement Grinding Station. This is a large industrial unit comprising of rebars, steel structures, civil works, various parts electrical and mechanical equipment that performs the function of cement clinker grinding to appropriate size. This is to ensure grain size distribution, increase of hydration area, acceleration of the hydration speed, satisfaction of condensation of water slurry and hardening requirements of the final cement product.  
...”*

209. The Tribunal further notes that under the scope of works as described in the agreement between the Appellant and the supplier dated 8<sup>th</sup> December, 2016, it states in part as follows;

*“The Scope of this contract is the supply of all mechanical, electrical and process control Equipment, of structural Steel and Cladding, of Civil Engineering Design, Mechanical and electrical Engineering, supervision of Erection and Commissioning required for a new cement grinding plant to be installed and put into operation in Athi River, Kenya as further defined in this contract.”*

210. From the above, it is clear to the Tribunal that the Appellant imported a complete Plant and the contract included erection and commissioning. This typically refers to the installation of and professional oversight over major industrial facilities and large equipment installation by qualified design engineering companies.

211. Section Notes 4 and 5 to Section XVI of the CET provides as follows regarding description of machine;

*“4- Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended*

*to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.*

*5.- For the purposes of these Notes, the expression “machine” means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85”*

212. Further Rule 2 (a) of the General Rules of Interpretation of the HS code provides that:

*“ Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.”*

213. The Tribunal observes that the Appellant had imported a disassembled cement milling plant which included the cement storage silo, the steel structures and the electrical items which were to be installed to form a running plant which the Respondent approved. However, the Respondent in its post clearance audit set to reclassify these items arguing that they were not part of cement grinding process.

214. The Appellant’s argument was however that the items were components intended to be used with the Plant as they contributed to a clearly defined function of the VCGP, in that the VCGP could only be said to be complete with these items. Further, on electricals the Appellant had argued that the Plant runs on electricity and therefore required for the plant to operate.

215. From the description as stated in the contract between the Appellant and its contractor, together with the Plant layout, and the photographs provided by the Appellant, the Tribunal is of the view that these were individual components intended to contribute together to make a complete cement mill plant. It was therefore the finding of the Tribunal that the description meets the description as provided under Section Note 4 to Section XVI of the EAC CET.

216. The Tribunal is thus persuaded that these items were indeed components intended to be used with the Plant and from the explanation provided the same contributed directly to the functioning of the VCGP.

217. Accordingly, the Tribunal holds that the Respondent erred in reclassifying the cement silos, steel structures and electrical items imported by the Appellant.

**a) Whether the Respondent erred in demanding taxes on parts allegedly imported without approval for partial shipment.**

218. The Appellant disputes that it imported any items outside the approved period. It explained that the grinding station project performance test ended on 9<sup>th</sup> July 2018 and that several tests were conducted thereafter.

219. That the final takeover was actually on 12<sup>th</sup> July 2019. It asserted that contrary to the Respondent's assertions, the Appellant did provide documentary evidence in connection with this issue, as seen from the email dated 17<sup>th</sup> November 2022, sharing this information with the Commissioner. In support of its arguments the Appellant annexed the email of 17<sup>th</sup> November 2022 attaching the Normal Operations Conditions Period Test Certificate dated 2<sup>nd</sup> July 2018; the Performance Test Certificate dated 9<sup>th</sup> July 2018, and the Final Takeover Certificate dated 12<sup>th</sup> July 2019.

220. The Appellant stated that it made an application for partial shipment of the VCGP under the provisions of Additional Note 2 to Section XVI of the EAC CET. It averred that the Respondent approved the partial shipment under H.S.

Code 8474.20.00 having satisfied itself that the Appellant had met the conditions stipulated under the said Additional Note 2 to Section XVI of the CET.

221. The Appellant held the view that Note 2 anticipates that goods may be imported over a period exceeding the initial importation period granted and allows for the extension of time. That in the case of the Appellant, the items imported were key components being part of the master list approved by the Respondent for importation as part of shipments for the VCGP. That they were not auxiliary as alleged by the Respondent.

222. The Respondent stated that the Appellant did not provide any documentary evidence to support its assertions. That the Appellant had initially confirmed that the VCGP was commissioned in May 2018. That the evidence of commissioning has yet to be provided to date.

223. That the authorization to import the machinery for the vertical grinding station project under tariff subheading 8474.20.00 had express timelines granted. That the authorization letter dated 9<sup>th</sup> November 2017 granted the Appellant a further period of six months within which to import all the remaining components of the VCGP. That the six months lapsed on the 8<sup>th</sup> May, 2018. That there was no further request for extension from the Appellant.

224. That the five consignments imported outside the authorized window (after 8<sup>th</sup> May 2018) had a total CFR of US \$ 346,521. That the Appellant misclassified some of them as machinery of tariff subheading 8474.20.00.

225. That to confirm that they were outside the window approved, the Appellant correctly declared board panels, fire valves etc. under tariff subheadings 8537.20.00, 8537.10.00 and 8481.90.00 and customs entry number 2018JKA3954929, 2018JKA4010463 and 2018JKA4020438, respectively.

226. It added that had the items been critical components of the VCGP, the Appellant should have requested for an extension for authority to import them under tariff subheading 8474.20.00. That this did not happen. That this explains why the Respondent deemed it fit to qualify them as auxiliary.

227. The Tribunal notes that the Appellant had applied for extension of time to import items as partial shipment of its VCGP and the Respondent granted it additional six months period vide a letter dated 9<sup>th</sup> November 2017. The six months extended period therefore lapsed on 8<sup>th</sup> May 2018. The Appellant does not dispute this. It also does not dispute that the amount in dispute related to importation after this date. However, it argued that the grinding station project performance test ended on 9<sup>th</sup> July 2018 and the final takeover was on 12<sup>th</sup> July 2019.

228. To support its case, the Appellant attached the Normal Operation Conditions Period Certificate dated 2<sup>nd</sup> July 2018 and Final Take-Over Certificate dated 12<sup>th</sup> July 2019.

229. The Tribunal has perused through the documents presented to it and notes that the approval for the extension of time to import the remaining components for the Appellant's VCGP dated 9<sup>th</sup> November 2017 stated in part as follows;

“... ”

*Having considered the balance of the items pending to be imported, authority is hereby granted to import the remaining components in partial shipments subject to the following conditions;*

- 1. All the remaining components shall be imported within six months from the date of this letter through the port of Mombasa to ensure easy monitoring*

2. ...”

230. The Tribunal reiterates its decision in **TAT No 296 of 2020 Kapa Oil Refineries Ltd Vs Commissioner Of Customs & Border Control** where it held that;

*“136. In the instant case, given that the Appellant’s first consignment arrived on 20<sup>th</sup> August 2019, the Appellant ought to have provided evidence that it made the application to the Commissioner not later than the date of arrival of this consignment which it did not provide. The Appellant’s attempt to rely on the IDFs is not supported by the relevant law.”*

231. Given that the this first condition for extension of time was couched in mandatory terms, the Appellant ought to have provided any evidence that the imports in dispute fell within the six months time-line given or in the alternative prove that it obtained a further extension to cover the period the imports were made. The fact that the commissioning may have been done later did not automatically extend the time for importation.

232. The Tribunal therefore finds that the Respondent did not err in demanding taxes on parts allegedly imported without approval for partial shipment.

**b) Whether the assessment arising from the differences between the CFR value as per IDF lodged and the CFR value in the contract was justified.**

233. It was the Appellant’s contention that the Respondent noted that a total CFR value of USD 22,877,483 of the total contract value attributable to the VCGP was imported during the period between 19<sup>th</sup> April 2017 and 3<sup>rd</sup> October 2018 under Import Declaration Form numbers E1702518047. E1703534729, E1705587561 and E1705587581.

234. That the Respondent further noted that since the contract CFR value was USD 23,100,000 there was an unaccounted balance, being the difference

between the CFR value per Import Declaration Forms and per contract, of USD 222,517. That the Respondent therefore sought to subject the difference to IDF and RDL at the rate of 2% and 1.5%, respectively, together with VAT at the rate of 16% resulting in a tax liability of Ksh 4,378,140.00.

235. The Appellant submitted that an Import Declaration Form is merely a document that is lodged in order to notify the Customs authorities of an intention to import goods and does not always translate into an actual importation which is typically signalled by the lodgement of a Customs entry (Form C17A or C17B).

236. The Respondent on the other hand stated that the Appellant did not have any adjustments to the contract value. That the price in the contract of sale between the two parties was therefore fixed by the contract. That the Appellant did not provide any information relating to any goods that were not imported to warrant a possible adjustment to the contracted value.

237. That the Respondent concluded that the price payable as per Section 122 of EACCMA read together with Paragraph 2 of the Fourth Schedule and the contract CFR value was under declared during importation. That the Appellant did not prove otherwise.

238. The Respondent referred to the spare parts lists for commissioning of the VCGP and for the two years in the operation manual for the mobile bulk loader submitted during the review stage. That there was no evidence of customs declaration of any of these spare parts during importation. That the Appellant did not provide the evidence of the latter.

239. The Tribunal notes that this dispute revolves around what constitutes an import that is subject to tax in Kenya.

240. Section 5(1)(b) of the VAT Act provides as follows regarding chargeability to tax;

*“(1) A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on—*

*(a) ...*

*(b) the importation of taxable goods;”*(Emphasis added)

241. Further, Section 7(1) of the Miscellaneous Fees and Levies Act provides as follows regarding IDF;

*“There shall be paid a fee to be known as the import declaration fee, on all goods imported into the country for home use.”*

242. Section 2(2)(c) of the EACCMA provides as follows regarding importation;

*“the time of importation of goods shall be deemed to be the time at which the goods come within the boundaries of the Partner States;”*

243. The Appellant’s contention was that Customs value was derived from the supplier's invoice and that was the basis upon which the taxes were paid which is consistent with the above provision of the law.

244. Flowing from the above provisions of the law, it follows that there has to be an import of goods entered into the territory (Kenya) for the charge of tax to crystalize. In the instant case the Tribunal notes that it was not demonstrated that there were any goods imported into Kenya for such levies and VAT to be charged on.

245. The Tribunal is guided by the Court in **Keroche Industries Limited V Kenya Revenue Authority & 5 Others [2007] eKLR** in which it was stated that:

*“...Taxes are imposed on subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined. ”*

246. Accordingly, the Tribunal finds that the assessment arising from the differences between the CFR value as per IDF lodged and the CFR value in the contract was not justified.

c) Whether the Respondent was justified in demanding taxes on alleged undeclared imports of clinker and coal.

247. It was the Respondent's contention that the relevant coal and clinker Bills of Lading clearly stated, in one of their clauses, that the weight, measure, quality, condition, contents and value were unknown.

248. The Respondent was of the view that the delivery of bulk cargo is governed by the terms of the contract of carriage, and, in their absence, by the port of discharge.

249. It averred that in the case of bulk cargo, the Respondent's view was that, the bill of lading does not constitute prima facie evidence of the quantity of the cargo loaded or discharged from the port. That it does not preclude the Respondent from ascertaining the quantities of cargo using any other objective means.

250. The Appellant on its part averred that there are many factors which lead to errors in draft surveys that contribute to the considerable differences in the cargo figures derived from the draft surveys including:

- i. Use of a wrong hydrometer. For instance, according to the observater.com, where a zeal hydrometer reads 1.022 a hydrometer at the temperature of 20°C is likely to read 1.026 this will usually give the ship higher cargo arrival figures (if the density for the hydrometer at 20°C is used).
- ii. Sea waves make draft surveys challenging as well as water density between the load port and discharge port;
- iii. At times, unclear draft marks due to rust on the vessel also contribute to errors in the surveys;
- iv. There could be some forgotten weights which may contribute to the errors between the draft survey and Bill of Lading figures such as:

- a) Bilge water may be present in the cargo holds, machinery spaces, duct keel, void spaces and the chain lockers;
  - b) Anchor and anchor cable on the seabed when the vessel is at the berth alongside and an anchor has been deployed as part of the mooring arrangement. This is always the case for the vessels that deliver the Appellant's clinker and coal since draft survey is done when the vessel is berthed; and
  - c) Silt and mud can accumulate in the double bottom tanks of vessels which are regularly ballasted in the port to balance the vessel trim position during discharge. The extra weight can give rise to an apparent increase in the cargo loaded.
- v. Vessel squat which is the bodily sinkage and trimming of a vessel making way with limited under keel clearance. This occurs in vessels at berth since there is limited space for the water to flow between the vessel and the seabed.

251. That the Respondent further acknowledged that even an accurately performed draft survey has an acceptable error margin of +/-0.5%. That in fact, the error can be as much as up to 1%. That in this regard, all variances summarized by the Respondent between the Bills of Lading and draft survey figures fall within the acceptable error margin of +/- 0.5% up to 1%.

252. The Appellant averred that the Bill of Lading is the document against which the supplier of the cargo and ship owners are paid. That certainly, none of these parties would wish to rely on Bills of Lading if draft surveys were more superior. That it was important to note that even at the port of loading, any demurrage or dispatch is calculated based on the Bills of Lading and not on the draft survey figures.

253. That the Customs valuation of cargo for purposes of duty calculations on importation is based on the Bill of Lading, commercial invoice and Certificate

of Conformity ("CoC"). That the CoC is issued by an independent body who rely on the Bills of Lading tonnage when issuing the document.

254. The Tribunal notes that the dispute herein relates to whether the Respondent could charge tax based only on draft survey.

255. It was not in dispute that the quantities of these materials as stated in the bills of lading may differ in many occasions once offloaded from the ship with the actual quantities received. The Tribunal further notes from the pleadings of the parties that there were other measurements such as the draft survey taken at the vessel and actual weighing of the materials offloaded.

256. The Tribunal further notes that while the Respondent preferred to use the draft survey, the Appellant averred that actual weights were available for confirmation. The Appellant had further stated that an additional measure was KPA who would issue either a short-landing or excess-landing certificate in cases of variances which it asserted were not issued. That at no time did the audit team request for the weight records which were readily available in its records.

257. It was further not in dispute that there are variances that occur between the quantities in the bill of lading and the actual quantities offloaded as captured in the contract between the supplier and the Appellant. Further, from the description provided, the draft survey used in ascertaining the material offloaded from a vessel is equally an estimate that can easily be affected by several factors. Although the Respondent had indicated that the offloading was done when the sea was calm, the Tribunal notes that there were many other factors that can affect the accuracy of a draft survey method. These other factors were not specifically addressed by the Respondent in its pleadings.

258. It was the view of the Tribunal that the use of draft survey to determine the imported quantities of coal and clinker was not appropriate given that weights

captured are mere estimates as they can be affected by many factors prevailing during offloading of the vessels.

259. The Tribunal reiterates the finding in **Cape Brandy Syndicate V Inland Revenue Commissioners (1920) 1KB** as applied in **TM Bell V Commissioner of Income Tax (1960) EALR 224** where Roland J stated:

*“...If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case may otherwise appear to be...”*

260. Consequently, the Tribunal finds that the Respondent erred in demanding taxes on alleged undeclared imports of clinker and coal.

**d) Whether the Respondent was justified in charging customs duties on engineering and design fees.**

261. It was the Appellant’s position that contrary to the Respondent's allegation, the Engineering and Procurement contract was actually provided to the audit team and is the basis of the Respondent's demand notice. That the decision having been predicated on factual inaccuracies, on this basis alone, the taxes demanded in this regard stand vacated.

262. That further, the Appellant accounted for withholding tax ("WHT") on the engineering fees at the non-resident rate of 20% and remitted the same to the Commissioner of Domestic Taxes in line with the contract clause 14.1.

263. That be that as it may, the Appellant submitted that the Respondent's assertion that Customs duties are applicable on the fees on the basis of Paragraph 9 (1)(b)(iv) of the Fourth Schedule to EACCMA was erroneous.

264. That without prejudice to the ground that WHT was appropriately accounted for, the Appellant noted that even if Customs duty were lawfully due, the duties applicable would have been determined based on the taxes applicable on the machinery whose constituents were correctly classifiable under tariff no 8474.20.00. Items classified under 8474.20.00 attracted import duty at the rate of 0% and were VAT exempt at the time of importation by dint of the provisions of Paragraph 27 (repealed by the Tax Laws Amendment Act, 2020) of the First Schedule to the VAT Act, 2013.

265. The Respondent on its part stated that it was not furnished with the contract that expounded on the basis for the WHT payments. That the gross amount as indicated in the two WHT certificates amounted to a total of Kshs. 374,326,624.00. That the engineering and design fees indicated in the supply contract totaled to USD 100,000 (est. Kshs. 10,300,000 at the time)

266. The Respondent submitted that it charged the relevant duties and taxes on the basis of the tariff reclassification of the steel structures, electricals and the other components of the VCGP.

267. That the provision of the law the Respondent relied on is stipulated under Paragraph 9 (1) (b) (iv) of the Fourth Schedule of the EACCMA, 2004.

268. It was not in dispute that the Appellant had accounted for the withholding tax on engineering and design fees. The only basis advanced by the Respondent in charging customs duties was because it had reclassified the steel structures, electricals and the other components of the VCGP.

269. The Tribunal having determined that the Respondent erred in reclassifying the steel structures, electricals and other components of the VCGP imported by the Appellant, hereby finds that the Respondent further erred in charging the resultant customs duties on engineering and design fees.

**e) Whether the Respondent was justified in demanding VAT on exported goods by the Appellant.**

270. The Appellant submitted that it is the Respondent's responsibility to issue Certificates of Export ("CoE") to exporters. That the practice at border stations however has been to endorse the export documents and issue a CoE later on in order to minimize delays and queues at the border. That where a CoE is not issued to an exporter, one can only rely on the endorsed copies in its possession. That it was therefore the Appellant's view that demanding for CoE's from the Appellant is neither acceptable nor fair since the same are system-generated internal documents issued by the Respondent and the Appellant has no control over them.

271. The Appellant averred further that it provided samples of material evidence in support of the export during the course of the audit. As an example it provided a schedule of 34 entry numbers which it averred were supplies made to enterprises within the Export Processing Zone to demonstrate that the exports did take place contrary to the Respondent's assertions.

272. On the other hand, the Respondent averred that the Appellant was requested to prove exit of the exports out of Kenya or into the Export Processing Zones. That the Respondent did not restrict the Appellant to the CoEs. It averred that the samples provided were not adequate enough to warrant a review of those without proofs of exit.

273. That it was the Appellant's responsibility as an exporter to secure its supply chain due to the dumping that occurs with regards to exports. The Respondent contended that it had a responsibility to grant the Appellant's suppliers exit upon their arrival at the exit points. That the evidence for the exit granted is the endorsed customs documents and/or the certificates of exports.

274. That the Appellant provided additional proofs of entry into the EPZ/exit out of Kenya for a number of the exports where the VAT had been assessed. That the Respondent therefore reviewed the VAT payable from Kshs. 6,874,307.00 to Kshs. 6,398,147.00.

275. The Tribunal perused through the documents presented and noted that the Appellant had attached a summary of entries of the disputed consignments purported to have been exported. However, there were no other supporting documents attached in support of any of the consignments in question.

276. Further the Tribunal notes that although the Appellant had argued that the consignments had been charged VAT because of lack of Certificates of Exports, it was noted from the Respondent's review decision letter dated 17<sup>th</sup> November 2022 that the Respondent had stated in part as follows;

“...

*e. The Commissioner requested you to prove exit of the exports out of Kenya or into the EPZs. The Commissioner did not restrict you to CoEs. The samples provided were not adequate enough to warrant a review of those without proofs of exit.”*

277. From the above extract of the Respondent's letter it was evident that the Appellant was to provide any other document it kept as proof of exit of the consignments and not just the CoEs as alleged by the Appellant. It was the Tribunal's view that the Appellant ought to have provided any document it had kept as prove of exports at the application for review stage and at the Appeal in order to prove its case.

278. The provision of documents as evidence is well stated under Section 30 of the Tax Appeals Tribunal Act which provides as thus:-

*“In a proceeding before the Tribunal, the appellant has the burden of proving-*

*Where an appeal relates to an assessment, that the assessment is excessive;*

*or*

*In any other case, that the tax decision should not have been made or should have been made differently.”*

279. Additionally, the Tribunal finds it appropriate to rely on the provisions of Section 107 of the Evidence Act which provides that:

*“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*

280. The Tribunal reiterates its position in the case of **Boleyn International Ltd Vs Commissioner of Investigations and Enforcement, Nairobi TAT Appeal no.55 of 2018-** where it held that:-

*“We find that the Appellant’s at all times bore the burden of proving that the Respondent’s decisions and investigations were wrong. The tribunal is guided by the provisions of Section 56(1) of the TPA, 2015 which states: “In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”*

281. Consequently, the Tribunal finds that the Appellant failed to discharge the burden of proof placed upon it in demonstrating that the Respondent was not justified in demanding VAT on the export of its consignments.

## **FINAL DECISION**

282. The upshot of the foregoing analysis is that the Tribunal finds that the Appeal is partially merited and accordingly proceeds to make the following Orders:

- a) The Appeal be and is partially allowed.
- b) The Respondents review decision dated 17<sup>th</sup>

November 2022 is hereby varied as follows;

- i. The Respondent’s confirmed assessment in relation to reclassification of cement silos, steel structures and electricals is hereby set aside.

- ii. The confirmed assessment regarding taxes on parts imported by the Appellant without approval for partial shipment is hereby upheld.
  - iii. The Respondent's confirmed assessment on the differences between CFR value as per IDF & the CFR is hereby set aside.
  - iv. The Respondent's confirmed assessment for customs duties on engineering and design fees is hereby set aside.
  - v. The Respondent's assessed taxes on undeclared imports of clinker and coal are hereby set aside.
  - vi. The VAT confirmed assessment on alleged exported goods is hereby upheld.
- c) Each party to bear its own costs.

283. It is so ordered

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of June, 2024**

**ERIC NYONGESA WAFULA  
CHAIRMAN**

**DR. RODNEY O. OLUOCH  
MEMBER**

**CYNTHIA B. MAYAKA  
MEMBER**

**TIMOTHY B. VIKIRU  
MEMBER**

**ABRAHAM K. KIPROTICH  
MEMBER**