

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
AT NAIROBI REGISTRY
APPEAL NO E140 OF 2023

ORANGE PHARMA LIMITED..... APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS &

BORDER CONTROL.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a company incorporated in Kenya whose principal activity is a distributor and retailer of pharmaceutical products and other household goods within the Republic of Kenya.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, and KRA 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 Tariff Rulings dated 5th December 2016 for Sonacof tablets and further on 6th July 2018 it issued Tariff Ruling in respect of Kaluma King Lozenges both being products imported by the Appellant. In both instances the Respondent classified the Appellant's imported products under Heading 3004.
4. The Respondent on 2nd September 2018 issued a letter of withdrawal of Tariff Ruling for Kaluma King Lozenges.
5. The Respondent carried out a desk audit of the Appellant and communicated its findings *vide* a letter dated 19th December, 2022.

6. On 28th December, 2022, the Respondent issued a demand letter to the Appellant demanding taxes of Kshs 22,943,272.30.
7. The Appellant responded through a letter dated 4th January, 2023. On 16th January, 2023, the Respondent wrote to the Appellant requesting the Appellant to avail relevant samples to the Respondent.
8. The Respondent issued a review decision to the Appellant on 15th February, 2023 confirming taxes due of Ksh 25,288,102.82.
9. Dissatisfied with the Respondent's review decision, the Appellant filed a Notice of Appeal dated 29th March 2023.

THE APPEAL

10. In its Memorandum of Appeal dated 12th April 2023 and filed on 13th April 2023 the Appellant raised the following grounds of Appeal:

- a) That the Respondent erred in law and fact by issuing a demand of Kshs 25,288,102.82 arrived at by improperly classifying the Appellant's imported medicaments under Tariff Heading 2106.90.99 and 1704.90.00 instead of the most appropriate classification of HS Code 3004.90.00.
- b) That the Respondent erred in law and in fact in finding that the Appellant's product fell under HS 2106.90.99 and 1704.90.00, despite the fact that the products do not fit within the Heading, Sections, and Explanatory Notes of the previously mentioned classification.
- c) That the Respondent erred in law and in fact by issuing tariff rulings in favor of the Appellant's declared HS Codes and then proceeding to unilaterally revoke the same despite the composition, character, and nature of the product
- d) That the Respondent erred in law and in fact by selectively interpreting and applying Explanatory Notes to Heading 21.06. Manifestly, in the application of the Explanatory Note, the Respondent conveniently failed to appreciate

the fact that the proviso to the Note precludes products intended for therapeutic use from Heading 21.06 and instead classifies the same under Heading 30.04.

- e) That the Respondent erred in law and in fact by failing to appreciate that where the active ingredients in the medication are meant for the treatment of specific ailments when taken in therapeutic or prophylactic dosage, the same should be classified in Heading 30.03 or 30.04.
- f) That the Respondent erred in law and in fact by selectively interpreting and applying the Explanatory Notes to Heading 17.04. The Respondent erroneously stated that as the Appellant's products had menthol and eucalyptus, those ingredients constitute flavoring agents as per the Explanatory Note to Heading 17.04. The Respondent's interpretation is however erroneous as the menthol and eucalyptus oil are active ingredients intended for therapeutic use and not as flavoring agents.

APPELLANT'S CASE

11. The Appellant premised its case on the following documents:

- a) The Appellant's Statement of Facts dated 12th April, 2023 and filed on 13th April, 2023 together with the documents attached thereto.
- b) The Appellant's written submissions dated 20th February, 2023 and filed on 24th February, 2023.
- c) The Appellant's Supplementary list of documents dated 5th February 2024 and filed on 8th February 2024.

12. The Appellant stated that the Respondent conducted a desk audit on its pharmaceutical importations from 2018. That upon conducting the audit, the Respondent stipulated that the Appellant misdeclared cough lozenges under Heading 3004 instead of HS Code 2106.90.99.

13. That the Respondent then proceeded to stipulate the payment assessment of extra taxes surmounting to Kshs 22,943,272.30 from the Appellant and concurrently sent the demand for the aforementioned amount on the same even date.
14. It submitted that the Appellant objected to the audit findings and the subsequent demand on 4th January 2023. That in the objection, it highlighted that the decision to classify the lozenges and cough drops under HS 3004.90.00 was premised on earlier rulings issued by the Respondent confirming that HS Code 3004.90.00 was the most appropriate HS Code for the Appellant's imports.
15. That in the said objection, it made reference to the following tariff rulings:-
- i. For the Kalumacof tablets, the Appellant referred to the tariff ruling dated 5th December 2016, (CUS/V&T/TARI/RUL/628 of 2016) wherein the Respondent highlighted that the proper classification for the Kalumacof tablet was HS Code 3004.90.00.
 - ii. That equally, for the Sonacof tablets, the Respondent had issued a tariff ruling in support of the Appellant's classification on 5th December 2016 in tariff reference number CUS/V&T/TARI/RUL/626/2016.
 - iii. For Chestone, a ruling was issued in CUS/V&T/TARI/RUL/627/2016 on 5th December 2016, and lastly for Kaluma King, a ruling issued in CUS/V&T/TARI/RUL/176/2018 on 6th July 2018.
16. That despite having issued the rulings in favour of the Appellant's declared tariff code HS 3004.90.00, the Respondent proceeded to unilaterally revoke the same and proposed two different classifications for the products, that is HS Codes 2106.90.99 and 1704.90.00.
17. The Appellant averred that the medicine serves the following purposes: Kalumacof, Chestone and Sonacof are tablets for the treatment of cough, colds and sore throats while the Kaluma King lozenges are herbal cough lozenges for the throat.

18. That despite the Appellant having rightfully classified the imported items as medicaments of Heading 30.04, the Respondent was now erroneously demanding a classification under the HS Codes 2106.90.99 for the Chestone, Sonacof and Kalumacof tablets, and 1704.90.00 for the Kaluma King Lozenges.
19. Regarding classification under Heading 21.06, the Appellant stated that in the four tariff rulings dated 8th February 2023 wherein the Respondent reclassified the items from Heading(s) 30.04 to 21.06, the Respondent took an erroneous and very selective interpretation of the Explanatory Notes in order to justify its basis for the reclassification.
20. That from an even cursory look at the findings, it can be noted that the Respondent had stated that its decision to reclassify the product was based on the fact that the tablets comprise of different plant extracts to offer relief for cough, colds, and sore throats.
21. That the Respondent then proceeded to rely on the Explanatory Notes to Heading 21.06 to justify its classification. That in particular, the Respondent relied on Note 14 to the Heading which provides as follows:
- “ Products consisting of a mixture of plants or parts of plants (including seeds or fruits) of extracts, which are not consumed as such, but which are of a kind used for making herbal infusions or herbal" teas", (c.g., those having laxative, purgative, diuretic or carminative contribute to general health and well-being.*
- The heading excludes products where an infusion constitutes a therapeutic or prophylactic dose of an active ingredient specific to a particular ailment (heading 30.03 or 30.04).*
- The heading also excludes such products classifiable in heading 08.13 or Chapter 9.”*
22. The Appellant submitted that while the Respondent quoted the first part of the Explanatory Note very prominently in the tariff ruling, it conveniently failed to

capture the proviso to the note which excludes products intended for therapeutic use such as the Appellant's medicaments.

23. It posited that this ideally means that where the active ingredients in the medication are meant for the treatment of specific ailments when taken in therapeutic or prophylactic dosage, the same will be classified in Heading 30.03 or 30.04.
24. The Appellant explained that prophylactic refers to medication or treatment designed and used to prevent a disease from occurring. That therefore, if the drug is administered before disease onset, it is considered prophylactic, otherwise, it is considered therapeutic. That therapeutic medications are for the treatment of existing diseases, while prophylactic medications are for prevention of diseases.
25. That generally speaking, the tablets comprise of the following ingredients;

Kalumacof

Vibhitaka	20mg
Clove oil (syzgium Aromaticum)	2.3ml
Katha(Acacia Catechu)	40mg
Sunthi(Zingiber Officinale)	7.8mg
Liquorice Liquid Extract (Glycyrrhiza Glabra)	35mg
Menthol(Mentha Piperita)	10mg
Anise Oil (Pimpinella Anisium)	0.001ml
Mint Oil(Mentha Piperita)	0.001ml
Eucalyptus Oil(Eucalyptus Globulus)	0.002ml
Excipients	q.s

Sonacof

Menthol (Mentha Piperita)	10.0mg
Camphor (Cinnamomum Camphora)	0.15mg

Thymol (Ptychotis Ajowan)	0.2mg
Eucalyptus Oil (Eucalyptus Globulus)	2.0mg

Chestone

Liquorice Liquid Extract(Glycyrrhiza Gabra)	35mg
Anise Oil (Pimpinella Anisium)	0.001ml
Dementholised Mint Oil (Mentha Piperita)	0.001ml
Eucalyptus Oil (Eucalyptus Globulus)	0.002ml
Pumilo Pine Oil (Abies Sibirica)	0.001ml
Menthol(Mentha Piperita)	10mg
Capsium Tincture (Capsium annum)	0.020ml

26. That as indicated in the medication guides, the drugs in question are for the treatment and/or the offering of relief from cough, cold and sore throats. That accordingly, the ingredients contained in the medicaments are specifically tailored for the treatment of the ailments.
27. That as examples, while the three medications may contain different ingredients, Menthol (Mentha Piperita) is common among all three. That as indicated in all the medication guides, Menthol as an active ingredient in the medication serves the specific purpose of treating/relieving the ailing person from cold, cold-related coughs and sore throats.
28. It added that other active ingredients in the medicine serve varying purposes including stimulating the respiratory centre for purposes of broncho spasmolytic action. The Appellant averred that bronchospasm is the sudden constriction of muscles in the walls of the bronchioles which causes difficulty in breathing. That camphor as an ingredient contained in the medication induces broncho spasmolytic action. That this refers to the ability of a drug to relax the smooth muscles of the bronchi and bronchioles to relieve bronchospasm and improve breathing.

29. That equally, Anise Oil, Dementolised Mint Oil, and Capsicum Oil as contained in a number of the medication imported by the Appellant are used for their carminative action and expectorate properties. That generally, carminative refers to a herb or preparation intended to either prevent the formation of gas in the gastrointestinal tract or facilitate the expulsion of said gas, thereby combatting flatulence. That expectorant properties refer to a substance that promotes the secretion of sputum by the air passages, used especially to treat coughs.

30. That accordingly, the Appellant's medicaments contain active ingredients specific to the treatment of ailments, which medication is to be administered in therapeutic doses i.e., for the treatment of colds, coughs, and sore throats.

31. It stated that the proper classification of the Appellant's Chestcof, Sonacof, and Kalumacof medications is HS Code 3004,90.00. That it was worth remembering that the Respondent had indeed confirmed this position in the tariff rulings dated 5th December 2016 wherein they stated that:

“Methanol and Eucalyptol oil are plant extracts used as ingredients in preparation of medicaments for treatment for many respiratory tract orders (Martindale 37th Edition, pg 1915 & 2521)

Heading 30.04 covers the classification of medicaments consisting of mixed or unmixed products of therapeutic or prophylactic use, put up in measured dose or in forms or packings for retail sale.

This heading includes the classification of throat pastilles or cough drops containing substances having medicinal properties (such as methol and eucalyptol) other than flavoring agents put up in measured doses or in forms or packaging for retail sale, provided that the preparation of those substances in each pastille or drop is in such that they are thereby given therapeutic or prophylactic uses.

Based on the above information, the samples examined is therefore considered to be prepared consisting if mixtures of plants extracts claimed to offer relief from coughs, sore throat and nasal congestion classifiable in HS Code 3004.90.00 of the Common External Tariff"

32. It submitted that considering that the Appellant's imported medication had not changed in composition, character, and nature, it was baffling as to why the Respondent would issue a reclassification of the same. That indeed, it is still the Appellant's unwavering contention that the proper classification of the products is under HS 3004.90.00.

33. That the relevant part to the Explanatory Notes to the above Heading equally provide as follows:

"(b) In packings for retail sale for therapeutic or prophylactic use. This refers to products (for example, sodium bicarbonate and tamarind powder) which, because of their packing and, in particular, the presence of appropriate indications (statement of disease or condition for which they are to be used, method of use or application, statement of dose, etc.) are clearly intended for sale directly to users (private persons, hospitals, etc.) without repacking, for the above purposes,"

34. That accordingly, the Explanatory Notes of 21.06 as read together with Notes of 30.04, provides that products where an infusion constitutes a therapeutic or prophylactic dose an active ingredient specific to a particular ailment, then the product is to be classified in Heading 30.04.

35. That furthermore, in line with the Explanatory Notes to Heading 30.04, the Appellant's medication indicates the dosage and method of administration. It averred that in essence, looking at the package of the products, it will be noted they contain the terms *"One tablet to be sucked 3-4 times daily or when necessary. Do not use more than 8 tablets in 24 hours."*

36. That the packaging further unequivocally provides that the tablets are “*for cough, colds and sore throats*” indicating disease or ailment for which they are to be used further reinforcing their classification under heading 30.04.
37. Regarding classification of Kaluma King Lozenges under HS Code 1704.90.00, the Appellant stated that the Respondent in the Objection decision dated 15th February 2023 stated that the Appellant’s Kaluma king Lozenges were to be classified in HS Code 1704.90.00 instead of HS Code 3004.90.00. That the Respondent's preferred code attracts an import duty rate of 35% and an Excise duty rate of Kshs 42.91/KG.
38. That this heading provides as follows:
- “17.04 Sugar confectionery (including white chocolate), not containing cocoa.*
- | | | | |
|-------------------|---|-----------|--------------|
| <i>1704.10.00</i> | <i>- Chewing gum, whether or not sugar-coated</i> | <i>kg</i> | <i>25%</i> |
| <i>1704.90.00</i> | <i>-Other</i> | <i>kg</i> | <i>25%</i> ” |
39. That the Explanatory Notes to Heading 17.04 equally provide under Note 5 that:
- “ Preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol, menthol, eucalyptol and tolu balsam). However, throat pastilles or cough drops which contain substances having medicinal properties, other than flavoring agents, fall in Chapter 30, provided that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses. ”*
40. It averred that while the Respondent quoted the first part of the Explanatory Note very prominently in the review decision stating that because the Appellant’s products had menthol and eucalyptus, then those are the flavouring agents. That the Respondent's interpretation was however erroneous as the Menthol and Eucalyptus oil are active ingredients intended for therapeutic use.

41. That it cannot be overstated that the Explanatory Note to Heading 17.04 cannot be read in isolation and has to instead be read together with the Explanatory Note to Heading 30.04.

42. That the EN to Heading 17.04 further stipulates that for cough drops or throat pastilles to be classified under Heading 17.04, it should consist essentially of sugar. It explained that in other words, the essential character of the cough drop should be comprised of sugar. That accordingly, where the product contains no sugar, or a negligible amount of sugar, it cannot be classified under Heading 17.04.

43. That as per the medical guide, Kaluma King Lozenges comprise of the following components:

Menthol (Mentha Piperita)	0.034%W/W
Eucalyptus Oil (Eucalyptus Globulus)	0.024%W/W
Excipients	q.s
Colour:	Titanium Oxide

44. The Appellant submitted that notably, the Kaluma King Lozenges does not contain sugar, and assuming it did, it was not substantial enough to make the essential character of the product to be sugar. That accordingly, the lozenges cannot be classified under Heading 17.04 as proposed by the Respondent.

45. That in fact, the proper classification of the Kaluma King Lozenges is equally Heading 30.04 of the East African Community Common External Tariff. To support its case, the Appellant cited Heading 30.04 of the EACCET and the Explanatory Notes to this Heading.

46. That accordingly, the Explanatory Notes of 17.04 read together with Note of 30.04, provides that where menthol and eucalyptus oil are used for medicinal purposes, as in the case of Kaluma King, then the same is to be classified under Heading 30.04.

47. The Appellant stated that the Respondent was further providing that the Kaluma King lozenges attract Excise duty at the rate of Kshs 42.91/KG. That in relation to this, the Appellant was hard-pressed to understand how Excise duty will be charged since when lozenges are packaged, no weight is included and what is instead provided is the number of tablets.
48. That accordingly, the Respondent's actions and subsequent review decision constitute a breach of the Appellant's right to fair administrative action, legitimate action and presumption of regularity.

Appellant's Prayers

49. Appellant prayed that the Tribunal grants the following prayers:-
- a) That this Appeal be allowed.
 - b) That the Respondent's Objection decision dated 15th February 2023 be set aside.
 - c) That the Appellant's medicaments namely: Chestone tablet, Kalumacof tablet, Kaluma King Lozenges and Sonacof tablets be classified under HS Code 3004.90.00.

THE RESPONDENT'S CASE

50. The Respondent's case is premised on the following documents and proceedings before the Tribunal:-
- i. The Respondent's Statement of Facts dated 5th May 2023 and filed on 12th May, 2023 together with the documents attached thereto.
 - ii. The Respondent's written submissions dated 29th December, 2022 and filed on the same date.
 - iii. The Respondent's witness statement of Stella Wangechi Mwangi dated filed on 13th December 2023 and admitted as evidence on oath on 6th February 2024.

51. The Respondent submitted that it carried out a desk audit of the Appellant covering the period 2017-2022. That the audit revealed a short levy of taxes of Kshs.22,943,272.30 which was as a result of misclassification of tariff on cough lozenges and syrups.

52. That the Appellant classified cough lozenges and syrups under tariff 3004.90.00 which attracts import duty at 0% and is VAT exempt. The Respondent pleaded that the same ought to be classified under tariff code 2106.90.99 which attracts import duty at 25%.

53. The Respondent pleaded that it carried out classification based on product composition and issued advance rulings as follows:-

- a) Chestone tablets; were specified to be mouth dissolving preparation in tablet form with an average weight of 0.65g per tablet containing 0.6gm sucrose per tablet and monoterpenes of camphor, eucalyptol and menthol for human consumption. That the product contains liquorice liquid extract, menthol, anise oil, dementholised mint oil, eucalyptus oil, capsicum tincture and pumilio pine oil. That these ingredients comprised of different plant extracts to offer relief for coughs, colds and sore throats. That Heading 21.06 covers food preparations not elsewhere included or specified.
- b) Sonacof Tablets; are specified to be mouth dissolving preparation in tablet form with an average weight of 0.64g per tablet containing 0.6gm sucrose per tablet, creosol (anti-pruritic) and monoterpenes of camphor, eucalyptol and menthol for human consumption. The product contains menthol, camphor, thymol, eucalyptus oil. That the ingredients comprised of different plant extracts to offer relief for coughs, colds and sore throats.
- c) Kalumacof tablets; are specified to be mouth dissolving preparation in tablet form with an average weight of 0.64g per tablet containing 0.05gm

sucrose per tablet and monoterpenes of camphor, eucalyptol and menthol for human consumption. The product contains vibhitaka, clove oil, kata, sunthi, menthol, anise oil, mint oil and eucalyptus oil. That the ingredients comprised of different plant extracts to offer relief for coughs, colds and sore throats.

54. That the Respondent applied Heading 21.06 which covers food preparations not else where specified or included.
55. On proper tariff classification, the Respondent pleaded that Heading 30.04 excludes preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such gelatin, starch or flour) and flavouring agents (including substances having medicinal properties such as benzyl alcohol, menthol, eucalyptol and tolu balsam). That the same falls under Heading 17.04.
56. The Respondent pleaded that Heading 21.06 covers food preparations not elsewhere specified or included. It further pleaded that the heading includes classification of products consisting of a mixture of plants or parts of plants (including seeds of fruits) of different species or consisting of plants or parts of plants (including seeds or fruits) of a single or of different species mixed with other substances such as one or more plant extracts, which are not consumed as such but which are of a kind used for making herbal infusions of herbal “teas” e.g. those having laxative, purgative, diuretic or carminative properties, including products which are claimed to offer relief from ailments or contribute to general health and well-being.
57. The Respondent pleaded that it was thus right to apply HS Code 2106.90.99. The Respondent submitted that the Appellant has not demonstrated why HS Code 3004.90.00 is the most appropriate classification.
58. That Sections 235 and 236 of the East African Community Customs Management Act (EACCMA), 2004 gives the Respondent powers to call for documents and

- conduct a Post Clearance Audit (PCA) on the import and export operations of a taxpayer within a period of five years from the date of importation or exportation.
59. That further, Sections 135 and 249(1) of the East African Community Customs Management Act (EACCMA), 2004 empowers the Respondent to recover any such amount short levied or erroneously refunded with interest at a rate of two percent per month for the period the taxes remain unpaid.
60. That Section 229 of the East African Community Customs Management Act (EACCMA), 2004 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 legal timelines to be observed.
61. The Respondent stated that the Appellant does not have any reasonable cause of action against it.

Respondent's Prayer

62. The Respondent prayed that the Appellant's Appeal be dismissed with costs.

ISSUES FOR DETERMINATION

63. The Tribunal having carefully reviewed the pleadings, documents, witness testimony and submissions filed herein is of the considered view that the Appeal distils into two issues for determination namely;
- a) Whether the Respondent erred in reclassification of the Appellant's products Chestcof, Sonacof, and Kalumacof from HS Code 3004.90.00 to HS Code 2106.90.99.
 - b) Whether the Respondent erred in reclassification of the Appellant's Kaluma King Lozenges imports from HS Code 3004.90.00 to HS Code 1704.90.00

ANALYSIS AND FINDINGS

64. Having identified the issues falling for its determination, the Tribunal wishes to separately analyse each as hereunder.

a) Whether the Respondent erred in reclassification of the Appellant's products Chestcof, Sonacof, and Kalumacof from HS Code 3004.90.00 to HS Code 2106.90.99.

65. The genesis of this dispute is the Appellant's imported products namely, Chestcof, Sonacof, and Kalumacof in tablets form which it classified under tariff HS Code 3004.90.00 being the tariff for medicament products which attracts import duty at the rate of 0% and exempt from VAT. The Respondent sought to reclassify the products under HS code 2106.90.99 which attracts import duty at the rate of 25%.

66. The Respondent pleaded that Heading 21.06 covers food preparations not elsewhere specified or included. It further pleaded that the Heading includes classification of products consisting of a mixture of plants or parts of plants (including seeds of fruits) of different species or consisting of plants or parts of plants (including seeds or fruits) of a single or of different species mixed with other substances such as one or more plant extracts, which are not consumed as such but which are of a kind used for making herbal infusions of herbal "teas" e.g. those having laxative, purgative, diuretic or carminative properties, including products which are claimed to offer relief from ailments or contribute to general health and well-being.

67. It was the Appellant's case that the Respondent took an erroneous and very selective interpretation of the Explanatory Notes in order to justify its basis for the reclassification.

68. That even from a cursory look at the findings, it can be noted that the Respondent had stated that its decision to reclassify the product was based on the fact that the

tablets comprise of different plant extracts to offer relief for cough, colds, and sore throats.

69. That the Respondent then proceeded to rely on the Explanatory Notes to Heading 21.06 to justify its classification. That in particular, the Respondent relied on Note 14.
70. The Appellant submitted that while the Respondent quoted the first part of the Explanatory Note very prominently in the tariff ruling, it conveniently failed to capture the proviso to the Note which excludes products intended for therapeutic use such as the Appellant's medicaments.
71. It posited that this ideally meant that where the active ingredients in the medicament are meant for the treatment of specific ailment, that is when taken in therapeutic or prophylactic dosage, the same will be classified in Heading 30.03 or 30.04
72. In determining the applicable HS Code the Tribunal was guided by the General Rules of Interpretation of the Harmonized Code reproduced hereunder:

“GENERAL INTERPRETATION RULES FOR THE CLASSIFICATION OF GOODS

Classification of goods in the Nomenclature shall be governed by the following principles :

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions :

2. (a) 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.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows :

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein :

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character.

(b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply unless the context otherwise requires.”

73. The Appellant had described its products as medicaments and classified them under Heading 3004. In particular the Appellant had classified its product under HS Code 3004.90.00 while the Respondent sought to reclassify Chestone, Sonacof and Kalumacof tablets under Heading 2016.

74. Heading HS 3004 provides for the following items;

“Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale.

3004.10.00 - Containing penicillins or derivatives thereof, with a penicillanic acid structure, or streptomycins or their derivatives *kg 0%*

3004.20.00 - Other, containing antibiotics *kg 0%*

- Other, containing hormones or other products of heading 29.37:

3004.31.00 -- Containing insulin *kg 0%*

3004.32.00 -- Containing corticosteroid hormones, their derivatives or structural Analogues *kg 0%*

3004.39.00 - Other *kg 0%*

- Other, containing alkaloids or derivatives thereof:

3004.41.00 -- Containing ephedrine or its salts *kg 0%*

3004.42.00 -- Containing pseudoephedrine (INN) or its salts
kg 0%

3004.43.00 -- Containing norephedrine or its salts
kg 0%

3004.49.00 -- Other
kg 0%

3004.50.00 - Other, containing vitamins or other products of heading 29.36
kg 0%

3004.60.00 - Other, containing antimalarial active principles described in

Subheading Note 2 to this Chapter kg 0%

3004.90.00 - Other
kg 0%

75. While Heading HS 2016 provides for the following items;

“Food preparations not elsewhere specified or included.

2106.10.00 - Protein concentrates and textured protein substances kg 10%

- Other:

2106.90.10 --- Specially prepared for infants kg 10%

2106.90.20 --- Preparations of a kind used in manufacturing of beverages kg
10%

--- Other:

<i>2106.90.91 ---- Food supplements</i>	<i>kg 0%</i>
<i>2106.90.92 ---- Mineral premix used in fortification</i>	<i>kg 0%</i>
<i>2106.90.99 ---- Other</i>	<i>kg 25%”</i>

76. The Tribunal perused through the documents presented by the parties and noted that in one of its earlier Tariff Rulings dated 5th December 2016 the Respondent had classified the Appellant products as medicaments under Heading 3004 when it stated in part as follows;

“...

Based on the above information, the sample examined is therefore considered to be preparation consisting of mixtures of plant extracts claimed to offer relief from coughs, sore throat and nasal congestion classifiable in HS Code 3004.90.00 of the Common External Tariff.

...”

77. In its Advance Rulings dated 8th February 2023 in which it classified the Appellant’s products under Heading 21.06 the Respondent states in part as follows;

“...

The tariff classification is based on the material information and does not absolve the importer from any liability that may arise at the time of importation, Customs verification and clearance of goods.

...”

78. The Appellant in its pleadings provided the product description and the product contents for each product as well as the use. The Respondent has not challenged these descriptions or use. Indeed, the Tribunal noted that in its Tariff Ruling of 5th December 2016 the Respondent had indicated that the decision was based on the sample examined. Curiously in its Tariff Rulings of 8th February 2023 where it sought to reclassify the Appellant’s products, the Respondent

stated that the tariff classification was based on material information without testing of any samples..

79. Additionally, the Explanatory Notes to Heading 2016 at Note 14 states in part as follows;

“

...

The heading excludes products where an infusion constitutes a therapeutic or prophylactic dose of an active ingredient specific to a particular ailment (heading 30.03 or 30.04).

...”

80. It was further the view of the Tribunal that since the Respondent had initially examined samples of the product in 2016, it ought to have done the same in 2023 and provide any information where there is any change in the essential character of the product that could warrant a change in classification.

81. Further, the Respondent should also have considered first the purpose or use of the product prior to arriving at its decision. This was the finding **TAT 124 of 2021 Bidco Africa Limited Vs Commissioner Customs and Boarder Control** where the Tribunal explained as follows;

“65. The criteria for classifying products according to intended purpose is used to classify over 60 products copiously spread across the EAC nomenclature for example:

- *Plasters specially calcined or finely ground for use in dentistry (Heading 25.20)*
- *Preparations with a basis of plaster for use in dentistry (Heading 34.07).*
- *Preparations for use on the hair (Heading 33 05).*
- *Shapes, sections, tubes and the like, prepared for use in structures, of iron or steel (Heading 73 08).”*

66. *The intended use is indeed one of “the terms of the headings” envisaged in GIR 1 which provides as follows;*

*“The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to **the terms of the headings** and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:” (emphasis added)”*

82. In the instant case, the Tribunal notes that the Appellant had attached detailed product descriptions indicating the contents of each product and use. From this information by the Appellant it was evident that the products were medicaments which contain active ingredients specific to the treatment of certain ailments, which medication is to be administered in specific therapeutic doses i.e., for the treatment of colds, coughs, and sore throats. The products therefore fit the description under Heading 3004 (medicaments) and therefore as provided under GIR 1 the same can only fall under Heading 3004 and most specifically HS Code 3004.90.00.

83. Consequently, the Tribunal finds that the Respondent erred in its decision to reclassify Appellant’s products Chestcof, Sonacof, and Kalumacof from HS Code 3004.90.00 to HS Code 2106.90.99

b) Whether the Respondent erred in reclassification of the Appellant’s Kaluma King Lozenges imports from HS Code 3004.90.00 to HS Code 1704.90.00

84. It was the Respondent’s case that Heading 30.04 excludes preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such gelatin, starch or flour) and flavouring agents (including substances having medicinal properties such as benzyl alcohol, menthol, eucalyptol and tolu balsam). That the same falls under Heading 17.04.

85. That Sections 235 and 236 of the East African Community Customs Management Act (EACCMA), 2004 gives the Respondent powers to call for documents and conduct a Post Clearance Audit (PCA) on the import and export operations of a taxpayer within a period of five years from the date of importation or exportation.
86. That further, Sections 135 and 249(1) of the East African Community Customs Management Act (EACCMA), 2004 empowers the Respondent to recover any such amount short levied or erroneously refunded with interest at a rate of two percent per month for the period the taxes remain unpaid.
87. The Appellant submitted that the Respondent's interpretation was erroneous as the Menthol and Eucalyptus oil were active ingredients intended for therapeutic use.
88. That it cannot be overstated that the Explanatory Note to Heading 17.04 cannot be read in isolation and has to instead be read together with the Explanatory Note to Heading 30.04.
89. That the EN to Heading 17.04 further stipulates that for cough drops or throat pastilles to be classified under Heading 17.04, it should consist essentially of sugar. It explained that in other words, the essential character of the cough drop should be comprised of sugar. That accordingly, where the product contains no sugar, or a negligible amount of sugar, it cannot be classified under Heading 17.04.
90. That as per the medical guide, Kaluma King Lozenges comprise of the following components:

Menthol (Mentha Piperita)	0.034%W/W
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Eucalyptus Oil (Eucalyptus Globulus)	0.024%W/W
--------------------------------------	-----------

Excipients	q.s
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Colour:	Titanium Oxide
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91. The Appellant submitted that Kaluma King Lozenges does not contain sugar, and assuming it did, it was not substantial enough to make the essential character of the product to be sugar. That accordingly, the lozenges cannot be classified under Heading 17.04 as proposed by the Respondent.

92. That accordingly, the Explanatory Notes of 17.04 read together with Note of Heading 30.04, provides that where menthol and eucalyptus oil are used for medicinal purposes, as in the case of Kaluma King, then the same is to be classified under Heading 30.04.

93. Heading 1704 covers the following items;

“Sugar confectionery (including white chocolate), not containing cocoa.

1704.10.00 - Chewing gum, whether or not sugar-coated kg 25%

1704.90.00 - Other kg 25%”

94. The Respondent had sought to classify the Appellant’s lozenges under HS Code 1704.90.00.

95. The Tribunal perused through the documents presented and noted that the Respondent had revoked its earlier tariff ruling on lozenges through letter dated 23rd September, 2018 titled *“WITHDRAWAL OF TARIFF RULING CUS/V&T/TARI/RUL/178/2018”* wherein it stated in part as follows;

“... ”

A recent review by our Policy Unit and re-analysis of similar samples by the Inspection & Testing Centre, concluded that the threshold of determining whether lozenges fall in Heading 17.04 or 30.04 is the presence or absence thereof of medical properties in the lozenges. Herbal Cough Lozenges are considered to be preparations for use as throat pastilles (containing flavouring agents e.g, eucalyptus and sugar) classified under HS code 1704.90.00 of the Common External Tariff.

... ”

96. The Tribunal notes that in the Respondent's letter it concludes that the decision was based on the presence or absence thereof of medical properties in the lozenges. That the herbal cough lozenges were considered to be preparations for use as throat pastilles (containing flavouring agents e.g. eucalyptus and sugar) classified under HS code 1704.90.00.

97. The Appellant in its pleadings provided the product description and the product contents for lozenges as well as the use. The Respondent has not challenged these descriptions or use, its only contention is that Heading 30.04 excludes preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents.

98. The Tribunal however notes from the Explanatory Notes to Heading 1704 that it states in part as follows;

“

...

However, throat pastilles or cough drops which contain substances having medicinal properties, other than flavoring agents, fall in Chapter 30, provided that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.”

...”

99. From the evidence adduced Kaluma King product contains substances that has medicinal properties as was presented as a medicament used as herbal cough lozenges for throat. This position is further corroborated by the tariff ruling of 6th July 2018 which was a result of a sample tested by the Respondent. In the subsequent tariff re-classification by the Respondent, it was not demonstrated that any samples were tested that indicated any change in the essential character of the product.

100. From the EN of Heading 1704, the product description provided and its use, the Tribunal was of the view that the Appellant's imported lozenges cannot be classified in Heading 1704.

101. It therefore follows that as provided for under the GIR 1 which provides that *"...classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, ..."* the Appellant's imported Kaluma King throat lozenges fits the description provided under Heading 3004.

102. The Tribunal reiterates the finding in the case of **Beta Health Care International Ltd -vs- Commissioner of Customs Services (Misc. App. No.4 of 2009)** where the court stated as thus:-

"Having evaluated the opposing positions taken by the Applicant and the Respondent in regard to whether the pharmaceutical products that are subject of this ruling are medicaments or food supplements, I am of the considered opinion that in determining whether the pharmaceutical products are medicines or nutritional supplements, what should be of paramount consideration is the active ingredients that constitute the said pharmaceutical products .."

103. Consequently, the Tribunal determined that the Respondent erred in reclassification of the Appellant's Kaluma King Lozenges imports from HS Code 3004.90.00 to HS Code 1704.90.00.

FINAL DECISION

104. Based on the foregoing analysis the Tribunal finds that the Appeal is merited and accordingly, the Orders that recommend themselves are as follows:

- a) Appeal be and is hereby allowed.
- b) The review decision dated 15th February 2023 be and is hereby set aside.

c) The Respondent's advance rulings dated 10th March 2022 and 8th February 2023 be and are hereby revoked.

d) Each party to bear its own costs.

2. It is so ordered

DATED and DELIVERED at NAIROBI this 28th Day of June, 2024.

**ERIC NYONGESA WAFULA
CHAIRMAN**

**CYNTHIA B. MAYAKA
MEMBER**

**DR RODNEY O. OLUOCH
MEMBER**

**TIMOTHY B. VIKIRU
MEMBER**

**ABRAHAM K.KIPROTICH
MEMBER**