THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

TAT APPLICATION NO. 22 OF 2018

MINERAL OIL COMPANY LTD …….. APPLICANT

VERSUS

UGANDA REVENEU AUTHORITY …… RESPONDENT

BEFORE DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE.

RULING

This ruling is in respect of an application contesting a tax liability of Shs. 529, 426,889.56 levied on 208,160 liters of base oil by the respondent.

The facts of the case are: The applicant imports base oil as a raw material and produces lubricants. Sometime in March 2018, the respondent seized two containers of the applicant. The respondent subjected items of the applicant to testing. Basing on the results of the testing, the respondent issued an assessment of Shs. 529,642,889.56 on the applicant.

The parties agreed on the following issues:

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

The applicant was represented by Mr. Cephas Birungyi and Mr. Martin Mbanza while the respondent by Mr. Ronald Baluku and Mr. Tonny Kalungi.

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The applicant's first witness, Mr. Yogesh Modi, its Managing Director, testified that it obtained an operational licence from the Ministry of Energy and Mineral Development in January 2015 after an audit and a test of its products. Likewise, the applicant passed the audits and tests of the Uganda National Bureau of Standards. The applicant was gazetted under Legal Notice EAC/112/2017 dated 14th July 2017 of the East African Common Customs Management Authority Act

(EACCMA), to import base oil at 0% rate of import duty. On 22nd of March 2018, the applicant's clearing agent, Chickways Uganda Limited, informed him that the respondent had intercepted two of the applicant's containers in transit from Mombasa. On 23rd March 2018, the respondent wrote to the clearing agent explaining that two of the applicant's containers had been intercepted for purposes of verifying the applicant's production process and ascertaining whether the products still qualified for tariff treatment. The Customs officials took samples from the intercepted containers for purposes of testing. The witness requested for the sealing of the samples and to be given chance to witness the testing process. The samples were not sealed nor was he allowed to witness the testing. On 11th May 2018, the respondent communicated to the applicant the results of the testing which was that there was no difference between the raw materials imported and the finished products. Consequently, the respondent issued an assessment of Shs. 529, 642,889.56.

The respondent's first witness, Ms Lucille Adokorach, a government analyst in Ministry of Internal Affairs testified that she participated in the sampling of items in the analysis report and in writing it. She testified that the respondent requested the laboratory to verify whether the products produced by the applicant were different from the raw materials it imports. She testified that the respondent first submitted finished products and then asked the government analytical laboratory to send a team to the applicant to sample the raw materials it uses and the finished products it sells. Accordingly, a team from the government analytical laboratory with a team from the respondent went to the applicant's premises and picked samples and took them to the laboratory for analysis and compared the results with what the respondent had bought from the market. The report of 4th May 2018 indicated that there was no significant difference between raw materials and the finished products analyzed. The samples were picked on 24th March 2018, received on 6th April, 2018 while the base oil was received on 26th March 2018.

The respondent's second witness, Mr. Bandali Akile, a Customs officer testified that they received intelligence information that the applicant did not manufacture but imported finished products. The Intelligence section started investigations. Their enforcement team intercepted a consignment of the applicant. The respondent requested for samples from the intercepted consignment. The applicant requested the consignment to be taken to its premises to which the Commissioner

agreed. On 24th March 2018, a team, including the witness, travelled to the applicant's premises in Namanve to pick samples. After picking the samples the witness signed on behalf of the respondent while the Managing Director signed on behalf of the applicant. The witness purchased finished products from Mukisa Investments, a distributor and was given a receipt. The said items were sent for analysis.

The applicant submitted that the Legal Notice EAC/112/2017 issued on 14th July, 2017 of EACCMA approved it to import base oil, its raw material, at 0% rate of import duty up to 30th June 2018. It presented analytical test reports contradicting the one from the government analytical laboratory. The Uganda National Bureau of Standards laboratory report and its letter clearly proved that it imported base oil, the raw material used in processing the finished products and not finished products. The applicant objected to the manner these samples were handled. The samples drawn from the containers were left unsealed. Other samples were taken from a street shop without its knowledge or involvement. The samples were transported unescorted and delivered at the government analytical laboratory after several days. The sampling form and the analysis report show that the samples were collected from Nakawa on 24th March 2018 and were delivered after two weeks to Wandegeya on 6th April 2018. The samples reached the government analytical laboratory unaccompanied by either of the parties.

The applicant further submitted that samples 1, 2, 8, 10,11,12,13 and 14 on respondent's exhibit REX.9, pages 110-111 as noted in the analysis report were different from samples 3, 4, 5, 6 and 7 of the sampling form for laboratory analysis REX.6, p. 106. In addition, the government analytical laboratory, General Case File REX.14 at page137 depicts only unspecified samples made to the laboratory on 6th April 2018.

During cross-examination, the respondent's expert witness, RW1, testified that at the time of conducting the tests, the laboratory was not equipped to conduct the tests requested by the respondent. The witness also testified that the respondent brought its samples and the laboratory also got its samples.' She admitted that she did not know the density of base oil. She also did not know the properties of a finished product. She disowned some of the documents tendered by the respondent. The applicant further submitted that the witness did not have any knowledge of the standard procedures she ought to have in taking and testing the subject samples.

The applicant submitted that Mr. Bandale Akile, the respondent's second witness an investigation officer who handled the whole process, never produced any report to court. The witness was not sure whether a report was ever made. The witness also testified that he did not take the collected samples to a chemist. The witness conceded that the respondent never audited the applicant's production process. It could have come to the conclusion that the applicant imported finished products.

The applicant cited Rule 3 of the Standard Operating Procedure for Sampling, Transport and Storage of the government analytical laboratory to argue that a sample has to be taken immediately by the Division Government Analytical Laboratory staff for analysis. The samples were kept from 24th March to 6th April 2018 and were transferred by the respondent contrary to the Standard Operating Procedure guidelines. Rule 4 is clear on compliance with the Standard Operating Procedure REX.14. The applicant concluded that first, it imported base oil as per the Legal Notice of the EACCMA and manufactured lubricant oils from the same. Secondly, the respondent, in carrying out its sample analysis, failed to adhere to the policies outlined in the Standard Operating Procedure for Sampling, Transport and Storage and the Customs guidelines. The respondent has failed to prove that the base oil was actually a finished product.

The applicant submitted that S. 18 of the Tax Appeals Tribunals Act places the burden of proof on the applicant to show that the decision should not have been made or should have been made differently. The applicant prayed that the Tribunal finds that it had proved its case on the balance of probabilities. The burden shifts to the respondent to rebut the evidence.

The applicant cited *Onek and another v Omona* Civil Appeal N0 0032 of 2016 and *Kimani v Republic (2000) EA 417* where the Court held ''it is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not as it were binding on the courts... such evidence must be considered along with all other available evidence and if a proper and cogent basis for rejecting the expert opinion will be perfectly entitled to do so'' The applicant argued that the expert witness did not have the basic knowledge of a person of such class of expertise as she did not know the definition of the Standard used in determining the difference

between the base oil components and the finished product during cross-examination. The government analytical laboratory never had the equipment to conduct such tests. There are two reports one from UNBS and another from the manufacturers of base oil contradicting her findings. Her evidence should be disregarded because of the glaring inconsistencies of her testimony and failure to follow the established procedures in sampling and testing of the subject samples.

The applicant prayed for general damages of Shs. 583, 727,800, interest on the 30% deposited at the rate of 2% compounded per month from the date of accrual until payment in full and costs to the applicant.

In reply, the respondent submitted that the applicant was liable to pay the tax assessed because the report from the National Analytical Laboratory did not find any difference between the applicant's items in the container and its finished products. The respondent contended the UNBS report and that from the supplier contradicted the findings of the one from the National Analytical Laboratory, because their reports were not based on the samples obtained from the two containers seized by it. There was no witness from UNBS and the supplier to testify and tender their samples to the Tribunal. The applicant's Managing Director, is not an expert in sampling and does not work with the Government Analytical Laboratory to be competent to testify on sampling. The applicant is not an expert in sampling and cannot state that samples were different from those in the sampling form for the laboratory analysis. The respondent submitted that there was no photograph or independent corroborative evidence to prove that the samples were drawn from the containers and left unsealed.

The respondent submitted that the burden of proof falls on the applicant to prove that base oil was not a finished product as reported by the government analytical laboratory. It argued that the applicant did not adduce evidence of an expert to guide the tribunal on the established procedures in sampling and testing of the subject samples. The respondent further argued that that in case of inconsistencies and ambiguities in the evidence of a witness, the evidence cannot be totally rejected. It cited *Constantino Okwel alias Magendo v Uganda* SCCA No. 12 of 1990.

The respondent submitted that there was no difference between the imported products and the finished products; therefore, the applicant is liable to pay the taxes assessed. The respondent submitted the applicant's claim for general damages and demurrage costs should be allowed as the containers were lawfully seized, subjected them to testing and finally released to the applicant.

In rejoinder, the applicant submitted the respondent's claim that the samples by UNBS and a team led by the Ministry of Energy and Mineral Development were not from the same containers is not correct. The respondent submitted that the UNBS report was a certified true copy, public documents and are part of the Joint Trial Bundle.

The Tribunal having listened to the evidence, perused the exhibits and read the submission of the parties make this ruling.

The Ministry of Energy and Mineral Development issued the applicant with an Operational License in January 2015 after carrying out an audit and tests on its facilities. The Uganda National Bureau of Standards approved the applicant's products in 2015 after conducting a series of audits and tests. The applicant was approved under the Legal Notice EAC/112/2017 of 14th July 2017 under the EACCMA to import base oil, its raw material, at 0% rate of import taxes till 30th June 2018.

The respondent basing on intelligence information that the applicant was suspected of importing finished products instead of raw materials, intercepted two of the applicant's containers enroute to Kampala. The respondent wrote to the applicant in a letter of 23rd March 2018 informing it of the former's intention to verify the production process of the applicant and to ascertain whether the applicant still qualified for the tariff treatment. On 24th March 2018, a team from the respondent and the government analytical laboratory visited the applicant's premises and took samples. The Managing Director of the applicant and a representative of the respondent witnessed the choosing of the samples.

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In a letter of 11th May 2018, the respondent communicated to the applicant the findings of the analysis, that there was no significant difference among the raw materials imported and the

finished products analyzed. Consequently the respondent levied import duty of Shs. 529,645,889.56 on 208,160 liters of base oil consigned on Bill of Lading N0.300800008212 dated 20th February 2018.

The applicant submitted that its own analysis, (Exhibit AEX.10), the analysis of the Uganda National Bureau of Standards (Exhibit AEX.10 (b)), the finding of the Ministry of Finance, Planning and Economic Development and the analysis from the exporter contradicted the findings of the government analytical laboratory. The applicant disputed the results of the analysis report on the sampling on two grounds namely the handling of the samples and the capability of the government analytical laboratory to conduct the analysis. The task of the tribunal is accordingly to examine the process of handling the samples, their analysis and the results that formed the basis for the respondent's decision.

The Tribunal will first examine the handling of the samples. The respondent basing on intelligence information received, intercepted two containers. A team from the respondent and the government analytical laboratory went to the applicant's premises and obtained samples which were tested. Later the respondent issued an assessment stating that taxes were due on the raw material imported on Bill of Lading N0.300800008212 dated 20th February 2018. The queries the actions of the respondent raise are. If the respondent intercepted two containers, why did the respondent need to go to the applicant's premises to obtain samples? The respondent ought to have tested samples from the containers. The containers ought to have been imported under the Bill of Lading N0.300800008212 dated 20th February 2018. It is not clear whether the samples tested were under the said bill of lading in order for the respondent to levy import duty of the said amount. They could have been from another bill of lading. In order for the respondent to raise an assessment using the bill of lading, there ought to be a link between the samples obtained, the containers and the bill of lading.

The handling of the samples by joint team of the government analytical laboratory and the respondent raised concerns that the samples collected were unsealed and not escorted by either party. The Tribunal finds this a legitimate concern for the safety and security of the samples is important in order to prevent any possibilities of tampering with them.

Secondly the process of handling the sample was lacking. The respondent collected the samples from the applicant's premises on 24th March 2018.These were taken to the analytical laboratory on 26th March 2018 and registered. This is not a problem. The sample from Mukisa Investment, a purported distributor of the applicant, reached the Laboratory on 6th April 2018. What is lacking, is the respondent to choose the sample of the finished product from Mukisa Investment without the involvement of the applicant. All the interested parties ought to be involved. There are queries that can arise when a sample is sent for analysis without the consent and involvement of an interested party. The other party may suspect that the sample sent was not one of a finished product. Those fears can be allayed if all parties are involved. There is no evidence to show that Mukisa Investment was a distributor of the applicant. The receipt presented REX.1 merely indicates that Mukisa Investments deal in ''all types of lubricants and Motor Spares''. Where were samples being kept till 6th April 2018? Mr. Bandale Akile, RW2, testified that he took the samples he purchased from Mukisa Investments to the respondent's headquarters. The respondent is an interested party whose interests are averse to those of the applicant. The sample should have been picked by a neutral party and sent to the laboratory immediately.

On the testing the samples, there are concerns that affect the authenticity, credibility and legitimacy to the findings. The first concern was on the listing and marking of items that were obtained for sampling. A perusal of the sampling form and report of analysis does not indicate clearly the items sampled and tested. In the sampling form we have base oil, diesel oil, hydraulic oil, engine oil while the report of analysis mentions brown liquid, yellow liquid. It is not clear if there are mentioning the same items. One should be able to see the link between the sampling form and the report.

While the expert witness of the respondent admitted that they did not have the capacity to carry out some of the tests, the Tribunal notes that all what the respondent was required to establish is whether the raw materials imported or the base oil was the same as the finished product and explain its findings. It is not necessary to go into detailed laboratory tests. All the samples ought to have been tendered as exhibits which was not done.

Though the applicant tendered in a number of reports from other institutions, the Tribunal will not look at their credibility. This is because at times the goods imported may not be the ones addressed in the reports. Importers in order to avoid paying taxes may import finished products instead of raw materials. However if the respondent, may be after obtaining third party information, decides to test a sample of the goods imported it must be done in a transparent and fair way. There should be a link between the sample obtained from a container, packing list and the bill of lading. The sample should be obtained in the presence of both the taxpayer and the respondent and sent immediately to the government analytical laboratory. The finished product should be obtained in the presence of both parties and also immediately sent to the laboratory. The laboratory should test whether the raw material is similar to the finished product.

The Tribunal therefore finds that the respondent did not choose the samples and carry out the tests in a transparent and credible way. Article 42 of the Uganda Constitution provides for just and fair treatment in administrative decisions. Therefore the Tribunal finds by the government analytical laboratory in respect of this matter are found to be wanting. The assessment of shs. 529,645,889.56 is set aside. The respondent is ordered to refunds the 30% deposit with interest and costs to the applicant. The Tribunal will not award general damages and demurrage costs because it is on record that the two containers were released to the applicant. The government analytical laboratory staff and the respondent travelled to the applicant's premises to take samples. The applicant has not adduced any evidence to show that it suffered damages.

Dated at Kampala this …21 day of …January .2020.

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DR. ASA MUGENYI **MR. GEORGE MUGERWA** **MS. CHRISTINE KATWE**
CHAIRMAN **MEMBER** **MEMBER**