THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 55 OF 2020

KIKAGATI POWER COMPANY LIMITTED ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ..... RESPONDENT

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

RULING

This ruling is in respect of classification of a gear box imported by the applicant which it sought to classify under HSC 8410.90 that attracts a custom duty rate of 0% which the respondent re-classified under HSC 8483.90 that attracts a custom duty rate of 10%.

The applicant is a developer of Kikagati Hydro electricity power project along River Kagera on the Uganda –Tanzania border. It holds a power generation and sale license for the p oject. Voith Hydro PJT Limited imported turbine gear box assemblies on its behalf for the project. On 17th April 2020, the applicant classified the imported gear box assembles under HSC 8410.90 that attracts a custom duty rate of 0%. The respondent rejected the classification and classified them under HSC 8483.90 that attracts a custom duty rate of 10%. The applicant objected to the respondent's re-classification, but the latter maintained its position.

Issues

1. Whether the ruling of the World Customs Organization is binding on the applicant?
2. What is the proper HSC applicable to the imported items?
3. What remedies are available?

The applicant was represented by Ms. Jemimah Mushabe while the respondent by Ms. Diana Mulira Kagonyera.

During the hearing the parties resolved to get a decision from the World Customs Organization (WCO). However, the applicant was not agreeable to it. It prayed that the application be determined on its merit before the Tribunal.

The first dispute between the parties revolves around whether the decision by the WCO is binding. If not, the Tribunal has to resolve under which HSC the imported gear boxes by the applicant should be classified.

The applicant's first witness, Mr. Abatneh Mnuye, an engineer working with it, testified that the applicant contracted Voith Hydro OVT Limited to manufacture a Kaplan pit type hydraulic turbine for Kikagati project. The turbine consisted of rotating and stationary parts. The rotating part included a runner, shaft, coupling and a gear box. The stationary part includes a distributor, steering tube, guide bearing, and a shaft seal. He stated that the Kikagati Kaplan pit type turbine cannot operate without a gear box. It cannot transfer waterpower to the generator to produce electricity. He further stated that the gear boxes imported by Voith Hydro PVT Limited are part of the turbine that are custom made. They cannot be used to operate any other turbine. They are imported in a dissembled form and in separate consignments due to their size and weight.

The applicant's second witness, Mr. Samba Divine Moforof, its Financial Controller, confirmed that the applicant contracted Voith Hydro PVT Limited to manufacture and provide the applicant with all machinery for the Kikagati dam. One of the machines to be manufactured was a Kaplan pit type hydraulic turbine. The turbine was manufactured in India and imported into Uganda in a dissembled form. Among the parts of the turbine were gear boxes. The applicant applied for classification of gear boxes under HSC 8410.90 that attracts a customs duty rate of 0%. The respondent rejected the classification and re-classified them under HSC 8483.90 which relates to toothed wheels, chain sprockets and other transmission elements presented separately that attracts a custom duty rate of 10%. He stated that the gear boxes were not imported separately.

The applicant's third witness, Mr. Jimmy Collins Omona, a hydromechanical engineer of the applicant, testified that the gearbox multiplies the speed of the turbine to match that of the generator to easily transmit energy from water to produce electricity. He admitted that in some cases the turbine can operate without a gearbox but not the design of the Kikagati project. He stated that he was not aware that the manufacturer separated the turbine from the gearbox.

The respondent's witness, Mr. Brian Kiiza, a customs tariff officer working with respondent testified that the gear box is part of the hydro power turbine which can fall either under HSC 84.10 or HSC 84.33. He stated that parts of the turbine are classified in their respective headings and not under the turbine heading of 84.10. He stated that the gear box is independent from the turbine and the functions differ.

On 10th February 2023, the tribunal visited the locus in quo, the power dam at Kikagati. It was able to see the turbine, the shaft, and the gear boxes. Mr. Patrick Akena a mechanical engineer with the applicant at Kikagati Power Company Limited, described the Kaplan pit type turbine as a horizontal one which has a draft tube, the runner turbine bearing, wicket gates, turbine shaft, speed increasing gear box. He stated that a shaft joins the gear box to the generator. The respondent's witness, Mr. Brian Kiiza stated that the production line has 3 machines: the turbine, the generator and the gear box.

On the first issue, the applicant submitted that an opinion of the WCO the respondent relies on is not binding. It cited *Commissioner of Customs and Excise v SmithKline Beecham plc* case c206/03 for the contention that opinions of the WCO do not have legal binding force. It submitted that the Tribunal should disregard the opinion of the WCO and form its own opinion based on the evidence before it. In the alternative it argued that an opinion of the WCO amounts to expert evidence. It submitted that it is trite law that evidence of experts is not binding on courts. It cited *Kimani v the Republic (2000) EA 417*, where it was held that:

> "...it is now trite law that while the courts must give proper respect to the opinion of expert, such opinions are not as if were, binding on the courts...such evidence must be

considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."

The applicant submitted that the WCO did not have the opportunity to examine all the facts and evidence relating to this application. The opinion of the WCO was made in abstract and cannot be relied on as a conclusive opinion on the classification of a speed-increasing gearbox that is integral to the turbine. It submitted that unlike the WCO, the Tribunal has been provided with evidence regarding the application.

The applicant submitted that respondent's application to the WCO for classification advice was only supported by a commercial invoice. The question posed by the respondent to the WCO was not sufficient to address the issue at hand. The question referred to the WCO was on the classification of gearboxes whereas the matter at hand goes beyond that. It relates to the classification of the speed-increasing gearbox that was uniquely designed as an essential component of a Kaplan turbine. The WCO was not provided with sufficient information regarding the matter to enable it to make a conclusive opinion.

In respect of the second issue, the applicant submitted that the imported gearbox is an integral component of the turbine, and ought to be classified under HSC 8410.90. It contended that the respondent's classification of the gearbox under HSC 8483 should be set aside. It submitted that it imported a hydraulic turbine in a disassembled form. Individual parts were imported in separate consignments. The applicant submitted that the turbine was custom-made. Without the gearbox, the turbine cannot transfer waterpower (kinetic energy) to the generator to produce electricity. The applicant's witness, Abatneh Mnuye, testified that the Kaplan pit turbine consisted of a rotating and a stationery part. The rotating part included a runner, shaft, coupling and the gearbox. The Kaplan pit turbine is a low-speed turbine that runs at a speed of 155 rpm (Revolution per minute), and it requires a gearbox to increase its speed and harmonize it with that of the generator which runs at 600 rpm. This was confirmed by the applicant's third witness, Mr. Jimmy Collins Omona. The Independent Engineer's Report, exhibit A9 confirmed that a gearbox is universally accepted as a component of a turbine. The report stated that:

> ... in the case of the Kikagati turbine, the low head turbine runs at 155RPM while the generator runs at 600RPM. Since the generator must be coupled to the generator for energy conversion to take place, the only way to have the turbine and generator run in synchronism is by use of the gearbox. The Gearbox (speed increaser or multiplier) becomes a necessary part of the turbine by dictates of prevailing factors (page 4)."

The applicant contended that based on this unique design, the speed-increasing gearbox should be classified under HS Code 8410.90 as part of the turbine.

The applicant further submitted that the respondent's assertion that the gearbox should be classified as goods based on Note 2 of Section XVI of the East African Community Common External Tariff (EAC CET) is not tenable because the imported gearbox is not capable of operating as a good in its own right. It witnesses, Akena and Abatneh Mnuye testified that the speed-increasing gearbox cannot be used to operate any other turbine. The applicant submitted that whereas the explanatory notes are an important aid in interpretation of the HS Codes, they have no legal binding force. The explanatory notes did not take into consideration circumstances where a turbine design would require gearbox as a component of it. Whereas the explanatory notes can be a starting point in understanding the parts of a turbine, the notes are not conclusive and should be considered alongside other texts that are more instructive on turbine designs.

The applicant submitted that the respondent relied on General Interpretation Rule 1 (GIR 1) of the EAC CET in its classification of the applicant's gearboxes. The applicant contended that the respondent ought to have considered GIR 2 of the EAC CET which provides:

> "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".

The applicant submitted that basing on GIR 2 of the EAC CET, the speed- increasing gearbox which forms part of the imported turbine in a disassembled form has the same character of a turbine and therefore takes the same classification as it.

In reply, the respondent submitted that the World Customs Organization (WCO) has the responsibility to develop international standards, foster cooperation and build capacity to facilitate legitimate trade, secure a fair revenue collection, protect society, provide leadership, guidance, and support to customs administrations.

The respondent contended that the customs administrations are supposed to comply with the International Convention on the Harmonized Commodity Description and Coding System (HS Convention), which is administered by the WCO's Harmonized System Committee. The respondent submitted that the Harmonized Commodity Description and Coding System is a multipurpose goods nomenclature used as the basis for classification for customs tariffs. The Harmonized System is a structured nomenclature comprising of a series of 4-digit headings, most of which are further subdivided into 5 and 6-digit subheadings. The HS Convention was designed and developed as a "core" system so that countries and organizations adopting it could make further subdivisions (national subdivisions) according to their needs.

The respondent submitted that S. 122(6) of the East African Community Customs Management Act (EACCMA) provides that.

> "In applying or interpreting this section and the provisions of the 4th Schedule, due regard shall be taken of the decisions, rulings, opinions, guidelines, and interpretations given by the Directorate, the World Trade Organization or the Customs Cooperation Council [now World Customs Organization]"

S. 122 and the 4th Schedule of the EACCMA provide for determination of value of imported goods liable to ad valorem import duty. The respondent submitted that the parties agreed to apply for a ruling to the WCO in respect of the tariff classification of the gear box. The decision of the WCO Committee stated inter alia as follows:

> "Looking at the information you supplied, including the invoice, the Secretariat believes that the unit anchorage is, in fact, the "gear unit anchorage". The gear box assembly and the gear unit anchorage make up the helical-type gear box. This being the case, the Secretariat is of the opinion that the gear box assembly with the gear unit anchorage is a good of heading 84.83.

It concluded that.

"Therefore, the Secretariat would classify the product at issue in heading 84.83 (subheading 8483.40), by application of General Interpretative Rules 1 (Note 2 (a) to Section XVI) and 6."

The respondent contended that the Harmonized System originates from the WCO and is administered by the supreme body of the WCO's classification committee. As such, a ruling of the committee ought to be treated with the utmost importance that it deserves. It contended that the applicant's submission that the opinion of WCO is not binding should be disregarded. The respondent cited *Commissioners of Customs & Excise v Smithkline Beecham* Plc Case c206/03 where the court stated the circumstances under which opinions of the WCO can be disregarded. It stated that the classification opinion of the World Customs Organization is to be disregarded if such opinion is contrary to the wording of the heading in the Combined Nomenclature. It submitted that this is not the case since the opinion of the WCO is not contrary to the heading but rather meets all the requirements in the EAC CET.

The respondent submitted that though the applicant contended that the WCO was not availed with sufficient information to arrive at a conclusive opinion, it attached a commercial invoice of the imports which had their description which is sufficient to guide the WCO in making a ruling. It contended that in *Royal Electronics Assembling Group Limited v Uganda Revenue Authority* Application 37 of 2017, it was held that the most reliable source of information on imports are the import documents. The respondent requested the Tribunal to give the ruling of the WCO Classification Committee the weight and due regard that it deserves and finds that the gear should be classified under HSC 8483.40.

The respondent submitted that the East African Community Customs External Tariff (EAC CET) is Annex 1 to the Protocol on the Establishment of the East African Community Customs Union. According to Article 8(2) of the Protocol, the Partner States adopt the Harmonized Commodity Description and Coding System specified in Annex 1. The respondent submitted that it classified the applicant's import under HSC 84.83 attracting a duty rate of 10%. The applicant contended that the said gear should have been

classified under HSC 8410.90 under parts of a hydraulic turbine, which attract a duty rate of 0%. The respondent submitted that none of the applicant's witnesses had any experience or expertise in customs classification. On the other hand, its witness is a customs classification officer who holds a Master of Science degree in public finance majoring in customs practicum from the Graduate Institute of Policy Studies in Japan.

The respondent submitted that the EAC CET is governed by six (6) rules of interpretation called the General Interpretation Rules (GIR). These rules are applied in a hierarchical order. This implies that you can only apply Rule 2 if you have exhausted Rule 1 and the same has been found inapplicable. One can only apply GIR 3 where GIR 1 and GIR 2 are inapplicable. This applies to the subsequent rules, *mutatis mutandis*. The respondent submitted that GIR 1 provides that:

> "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 require, according to the following provisions".

The respondent submitted that the Explanatory Notes to the Harmonized System give more detailed explanations of the provisions. It cited *Solutions Medical Systems Limited v Commissioner of Customs and Border Control* Appeal 472 of 2020 where the Tax Appeals Tribunal of Kenya held that although the explanatory notes are not legally binding, they provide a commentary on the scope of each heading and are generally indicative of the proper interpretation of the EAC CET. In that case, the Kenyan Tax Appeals Tribunal relied on Rule 1 and Note 2(a) to Chapter 90 of the EAC CET. The Tribunal also relied on the Explanatory Notes and an opinion from the WCO to find that a hemodialysis apparatus which was imported for use with an artificial kidney dialysis apparatus should be classified in heading 8421.29.00 where it is specifically mentioned but not as part of the hemodialysis apparatus.

The respondent submitted that the imported gear falls under HSC 84.83 which specifically provides r gears. It provides as follows:

> "Transmission shafts (including cam shafts and crank shafts) and cranks; bearing housings and plain shaft bearings; gears and gearing; ball or roller screws; gear boxes

and other speed changers, including torque converters; flywheels and pulleys, including pulley blocks; clutches and shaft couplings (including universal joints)."

The respondent submitted that the Explanatory Notes to Heading 84.83, specifically in relation to gears and gearing provides:

"The basic gear is the toothed wheel, cylinder, cone, rack or worm, etc. In an assembly of such gears, the teeth of one engage with the teeth of another so that the rotary movement of the first is transmitted to the next, and so on. According to the relative number of teeth in the separate units, the rotary movement may be transmitted at the same rate, or at a faster rate or slower rate; according to the type and the angle at which it meshes with the next, the direction of transmission may be changed, or a rotary movement converted into a linear movement or vice versa (as with a rack and pinion)".

The respondent submitted that this group covers all types of gears including simple cog wheels, bevel gears, conical gears, helical gears, worms, rack and pinion gears, differential gears, assemblies of such gears etc. It covers toothed and similar wheels for use with transmission chains. It also covers friction gears. These are wheels, discs, or cylinders, which when mounted on the driving shaft, transmit movement by friction between them. They are usually of cast iron, in certain cases being covered with leather, wood, bonded fibers or other material to increase the friction.

The respondent submitted that in respect of gear boxes and other speed changers, the Explanatory Notes further provide that:

"These provide a range of speeds which can be varied, either by hand or automatically, according to the requirements of the machine. They include, inter alia:

(1) Gear-boxes consisting of assemblies of gears which can be selected in alternative arrangements; the speed of transmission can thus be varied according to the arrangement of gears set."

The applicant admitted that the gearbox is needed to increase the speed of the turbine to match it with that of the generator. The respondent contended that all types of gears including helical gears should be classified under HSC 84.83. It noted that in Exhibit A1 the supplier indicated that the imported gear was a helical type. The respondent submitted that since the Heading and the terms of the said heading specifically provide for gears, the imports must be classified under HSC 84.83.

The respondent submitted that HSC 84.10 clearly indicates hydraulic turbines, water wheels, and regulators thereof. Since gears are not mentioned under the terms of 84.10 but are specifically mentioned under the terms of heading 84.83, then they must be classified under the latter in accordance with GIR. It submitted further that Note 2(a) to Section XVI provides:

> "Parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 84.09, 84.31, 84.48, 84.66, 84.73, 84.87, 85.03, 85.22, 85.29, 85.38 and 85.48) are in all cases to be classified in their respective headings,"

Therefore, since the gear is included in heading 84.83 of Chapter 84, it should, for all intents and purposes, be classified under its specific heading. The respondent submitted further that the Explanatory Notes in respect of Note 2 to Section XVI further provides.

> "... parts which are suitable for use solely or principally with particular machines or apparatus (including those of heading 84.79 or heading 85.43), or with a group of machines or apparatus falling in the same heading, are classified in the same heading as those machines or apparatus subject, of course, to the exclusions mentioned in Part (1) above..."

The respondent submitted that the Explanatory Notes go ahead to provide that:

> "The above rules do not apply to parts which in themselves constitute an article covered by a heading of this Section (other than headings 84.87 and 85,48); these are in all cases classified in their own appropriate heading even if specifically designed to work as part of a specific machine. This applies in particular to:
>
> (6) Transmission shafts, cranks, bearing housings, plain shaft bearings, gears, and gearing (including friction gears and gear boxes and other speed changers), flywheels, pulley and pulley blocks, clutches, and shaft couplings (heading 84.83)".

The respondent submitted that pursuant to Note 2(a) to Section XVI, the gear is not an exclusion (84.09, 84.31, 84.48, 84.66, 84.73, 84.87, 85.03, 85.22, 85.29, 85.38 and 85.48), but rather is specifically mentioned as one of the items which must be classified in its specific heading even if it is suitable for use solely or principally with A turbine. This implies that it must always and in all cases be classified in its heading of 84.83.

The respondent submitted that a gear is not part of a turbine. Although a turbine may be disassembled, it cannot be said that the gear is part of it. It cited *Elgon Hydro Siti Limited*

v URA, Application 125 of 2019, where the Tribunal defined a turbine using *Cambridge's Advanced Learner's Dictionary,* 4th edition p. 1691 as a type of machine through which liquid or gas flows and turns a special wheel with blades in or to produce power. The respondent submitted that a Kaplan turbine is one which has adjustable blades to achieve efficiency over a wide range of flow and water level. It was an evolution of a Francis turbine. The Engineering Dictionary defined a gearbox as a transmission device that gears to transfer speed and torque from a rotating component to another component. The respondent submitted that a turbine is machinery while a gearbox is a mechanical appliance and as such, the characters are not the same. The functionality of the turbine and the gearbox clearly differ. It submitted that the function of the gear is to transfer speed while the function of the turbine is to use the flow of water to turn the wheel to create power. There is no indication whatsoever of a gearbox as being part of the turbine.

The respondent contended that the supplier referred to a turbine and associated equipment in the billing breakup contract, exhibit A1. It contended that a gear is noted as associated equipment but not as part of the turbine. Under Clause 1(a) of the agreement the supplier provided for items that make up the horizontal pit type turbine. They do not include the gearbox. Under Clause 1(b), the supplier listed the items that make up the "Helical Type Gear Box" which include a gearbox assembly and the gear unit anchorage. This clearly indicates that even the supplier treated the gearbox as a separate item from the horizontal pit type turbine. This was collaborated by the respondent's witness and visit at the locus, which showed that the gear is separate from the turbine. The turbine was joined to an orange gearbox by a shaft.

The respondent submitted that despite the gear box being "uniquely and exclusively" designed for the turbine, does not change that it specifically provided for in a different heading in the EACCET. This does not make the gear part of the turbine. It cited *Elgon Hydro Siti* (supra) where the Tribunal reasoned that "the fact that a bulb holder holds a bulb for it to light does not make the holder a bulb". It further submitted that despite gearbox increasing the speed of the turbine to make a generator produce more power it does not make the gearbox a turbine.

In rejoinder, the applicant reiterated that GIR 1 is inapplicable to the applicant's gearbox, which was uniquely and exclusively custom designed and manufactured to be used as an integral component of its hydraulic turbine. It reiterated that the respondent should have considered GIR 2 because the speed-increasing gearbox is part of the turbine.

The applicant submitted that the respondent's reliance on the WCO explanatory notes to HS Code 8483 for its submission that gearboxes are to be classified under HSC 84.83 does not help. Explanatory notes are not legally binding on the interpretation of the EAC CET. It submitted that whereas the explanatory notes provide a useful aid in the interpretation of the HS Codes, they are not an end in themselves and should not be taken as determinative in respect of this case which involves a customs classification of a uniquely designed and custom-made gearbox. The applicant submitted that its gearbox cannot be used as a stand-alone machine and can only be coupled to its hydraulic turbine. Its witnesses testified that its gearbox cannot be used to operate any other turbine as it was specifically and uniquely designed to fit the specifications of the Kaplan turbine.

The applicant submitted that thought the respondent refers to the WCO Opinion as a ruling it is a mere classification advice. It was disclaimed by the WCO. It states, inter alia:

> "The Secretariat would draw your attention to the material in the enclosed disclaimer. We note that the advice itself is a confidential service from the Secretariat to its Members and not for public use. While attribution of the advice to the Secretariat is not allowed, Members are welcome to use any text presented in the letter as if it is their own words in their submissions to any hearings as they see fit."

The applicant submitted that the WCO insisted that the advice should not be attributed to it. It contended that if the Tribunal finds the WCO opinion admissible, it should treat it as an expert opinion and consider it alongside other evidence.

The applicant submitted that S. 122 (6) of the EACCMA relates to the determination of the customs value of imported goods liable to ad valorem import duty. The matter before the Tribunal relates to customs classification of the applicant's gearbox and not customs valuation. There is no provision under the EACCMA which specifically provides that

opinions of the WCO are binding in matters of customs classification. It submitted that it is trite law that in interpretation of tax statutes, words should be given their ordinary and literal meaning. It cited *Rowlatt in Cape Brandy Syndicate v IRC (1921) K.B 64* where it was held that.

> "In a Taxing Act, clear words are necessary in order to tax the subject. In a taxing Act, one has merely to look at what is clearly said, no room for an intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in it, nothing is to be implied. One can only look fairly at the language used".

The applicant submitted that S. 122 of the EACCMA is clear and unambiguous in as far as it applies to customs valuation and not customs classification.

The applicant submitted that the commercial invoice did not provide exhaustive information to enable the WCO appreciate the uniqueness of its gearbox. The WCO did not have the opportunity to review all the information relating to the gearbox and as such could not make an informed decision.

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

The applicant is a developer of Kikagati Hydro Power project. Voith Hydro PJT Limited imported turbine gear box on its behalf for the project. The applicant classified the imported gear box under HSC 8410.90 which attracts a custom duty rate of 0% which the respondent rejected and re-classified under HSC 8483.90 that attracts a rate of 10%.

During the trial, the parties agreed to refer the matter to the World Customs Organization (WCO) for a decision. As noted by the respondent, the WCO has the responsibility to develop international standards, foster cooperation and build capacity to facilitate legitimate trade, to secure a fair revenue collection and support custom administrations. Uganda is a member of the WCO. The WCO is supposed administer the International Convention on the Harmonized Commodity Description and Coding System (HS Convention) which allows goods moving across borders to be assigned a class in a

uniform manner. Uganda is a party to the HS convention. Its customs tariff and statistical nomenclatures to a large extent conform to the Harmonized System.

To ascertain the correct duty payable to the applicant imported gear boxes one has to read the East African Community Customs Management Act (EACCMA). S. 122 of the said Act provides that where imported goods are liable to import duty *ad valorem,* then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value. S. 122(6) of the EACCMA provides that.

> "In applying or interpreting this section and the provisions of the 4th Schedule, due regard shall be taken of the decisions, rulings, opinions, guidelines, and interpretations given by the Directorate, the World Trade Organization or the Customs Cooperation Council [now World Customs Organization]."

The parties in line with S. 122(6) of the EACCMA referred their dispute to WCO.

The findings of the WCO are stated in a letter to the respondent's supervisor tariff, Mr. Elinathan Masiko dated 14th October 2021. The applicant contended that WCO relied on a commercial invoice. Extracts from the said letter state.

> "The secretariat would first like to thank you for the additional technical information received on 3 September 2021."

The tribunal does not think that a commercial invoice is technical information. The letter has a product description of the gearbox imports in Figure 1 which is a hydro power turbine with a generating system schematic diagram. The invoice did not have a diagram. The said letters continue to state.

> "Looking at the information supplied, including the invoice, the secretariat believes that the unit anchorage is, in fact, the gear unit anchorage. The gear box assembly and the gear unit anchorage make up the helical -type gear box. This being the case, the Secretariat is of the opinion that the gear box assembly with the gear unit anchorage is a good of heading 84.83."

This clarifies that the information supplied includes the invoice. In short, there was other information supplied which included technical one. The letter concludes.

"Therefore, the Secretariat would classify the product at issue in heading 84.83 (subheading 8483.40), by application of General Interpretative Rules 1 (Note 2(a) to Section XVI) and 6."

WCO's decision meant the applicant was liable to pay an import duty of 10%.

The applicant was not agreeable to the WCO decision. It contended that the decision had a disclaimer The said decision inter alia stated.

"We would note that the advice itself is a confidential service from the Secretariat to its Members and not for public use. While attribution of the advice to the Secretariat is not allowed, Members are welcome to use any text presented in the letter as if it is their own words in their submissions to any hearing as they see fil."

The letter further stated.

"Advice letters from the Secretariat remain the property of the WCO and may not be shared with a third party with the permission of the WCO.

It is not clear whether the respondent sought permission to use the advice letter.

The question the Tribunal has to ask itself is whether the decision of WCO is binding. S. 122(6) of the EACCMA provides that in applying or interpreting this section and the provisions of the 4th Schedule, due regard shall be taken of the decisions, rulings, opinions etc. The word 'due' is defined by *Black's Law Dictionary* 10th Edition p. 609 as "1. Just, proper, regular, and reasonable." 'Regard' is defined at p. 1473 as "1. Attention, care, or consideration." A plain reading of the said Section, taking into consideration the above definitions, one cannot fail to discern that the Act requires the Tribunal to just consider the decision of WCO reasonably. It must determine whether it is just and reasonable in the circumstances before it. The communication from WCO indicates that it is an 'advice' letter. There is no advice that is binding on the party to who it is presented. In *Commissioners of Customs and Excise v SmithKline Beecham* plc C-206/03 the court stated that.

"It is to be observed that classification opinions issued by the WCO do not bind the contracting parties, but they do have a bearing on interpretation...they must be set aside if their interpretation appears incompatible with the wording of the heading of the CN in question or if it goes manifestly beyond the discretion conferred on the WCO."

The Tribunal notes that though the decision of the WCO is not binding, it should be given a lot of weight. This is because the WCO helps in regulating and setting standards in international trade. There would be a distortion in international trade if some countries were charging duties on certain imports while others are not when using the same nomenclatures. The guidance from the WCO aims at having a harmonious classification of imports by countries to avoid distortions in international trade. The Tribunal has to ask itself if the decision of the WCO was incompatible with the custom nomenclatures applied by Uganda or if it was beyond the discretion conferred on it.

It is not disputed that the applicant imported a gear box. The applicant contends that the gear box is part of the turbine. A gear is defined in the *Cambridge Advanced Learner's Dictionary* 4th Edition p. 642 as; "a device , often consisting of connecting sets of wheels with teeth (points) around the edge , that controls how much power from the engine goes to the moving parts of a machine" The same Dictionary at p.1691 defines a turbine as; "a type of machine through which liquid or gas flows and turns a special wheel with blades in order to produce power." The Explanatory Notes to Heading 84.83, describe gears as:

> "The basic gear is the toothed wheel, cylinder, cone, rack or worm, etc. In an assembly of such gears, the teeth of one engage with the teeth of another so that the rotary movement of the first is transmitted to the next, and so on. According to the relative number of teeth in the separate units, the rotary movement may be transmitted at the same rate, or at a faster rate or slower rate; according to the type and the angle at which it meshes with the next, the direction of transmission may be changed, or a rotary movement converted into a linear movement or vice versa (as with a rack and pinion)".

The Explanatory Notes further states that:

> "These provide a range of speeds which can be varied, either by hand or automatically, according to the requirements of the machine. They include, inter alia:
>
> (2) Gearboxes consisting of assemblies of gears which can be selected in alternative arrangements; the speed of transmission can thus be varied according to the arrangement of gears set."

From the said definitions one cannot fail to notice that the function of the gear is to control or increase speed while the function of a turbine is to use the flow of water to turn a wheel to create power. The functions differ. So, the dispute is whether the gear box the

applicant imported was part of the turbine. This is because if it is separate, it would attract a different tax rate.

The relevant chapter under the East African Community Common External Tariff dealing with turbines is Chapter 84. HSC 84.10 reads.

"84.10 Hydraulic turbines, water wheels, and regulators therefor.

- Hydraulic turbines and water wheels:

8410.11.00 -- Of a power not exceeding 1,000	kW u 0%
8410.12.00 -- Of a power exceeding 1,000 kW but not exceeding 10,000	**kW u 0%**
8410.13.00 -- Of a power exceeding 10,000	kW u 0%
8410.90.00 - Parts, including regulators	kW u 0%"

The applicant's case relies on 8410.90.00 which states "8410.90.00 - Parts, including regulators attracting 0% ". The respondent's case relies on HSC 84.83 which reads.

> "84.83 Transmission shafts (including cam shafts and crank shafts) and cranks; bearing housings and plain shaft bearings; gears and gearing; ball or roller screws; gear boxes and other speed changers, including torque converters; flywheels and pulleys, including pulley blocks; clutches and shaft couplings (including universal joints)".

HSC 84:83.40 states.

> "8483.40.00 - Gears and gearing, other than toothed wheels, chain sprockets and other transmission elements presented separately; ball or roller screws; gear boxes and other speed changers, including torque converter u 10 %."

Under HSC 84.83 gears attract a rate of 10%. The respondent submitted that since gears are not mentioned under HSC 84.10, but are specifically mentioned under HSC 84.83, then they must be classified under HSC 84.83 in accordance with General Interpretation Rule 1.

So how to the General Rules of interpretation come in? We already stated that Uganda is a party to the HS Convention and Its customs tariff and statistical nomenclatures are required to conform with the Harmonized System. Article 3(1) of the HS Convention provides.

> "(a) Each Contracting Party undertakes, except as provided in subparagraph (c) of this paragraph that from the date on which this Convention enters into force in respect of it, its Customs tariff and statistical nomenclatures shall be in conformity with the

Harmonized System. It thus undertakes that, in respect of its Customs tariff and statistical nomenclatures:

(i) it shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes.

(ii) it shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings, or subheadings of the Harmonized System; and

(iii) it shall follow the numerical sequence of the Harmonized System.

(b) Each Contracting Party shall also make publicly available its import and export trade statistics in conformity with the six-digit codes of the Harmonized System, or, on the initiative of the Contracting Party, beyond that level, to the extent that publication is not precluded for exceptional reasons such as commercial confidentiality or national security:

(c) Nothing in this Article shall require a Contracting Party to use the subheadings of the Harmonized System in its Customs tariff nomenclature provided that it meets the obligations at (a)(i), (a)(ii) and (a)(iii) above in a combined tariff/statistical nomenclature".

Article 3 allows for the application of the General Rules of Interpretation (GIR) and the sue of headings and subheadings of the Harmonized System and its numerical codes. So, the dispute revolves around whether the imported gearboxes should have been classified under HSC 84.10 or 84.83.

The WCO and the respondent relied on General Rules of Interpretation Rule 1 (GIR 1) which states that.

> "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 require, according to the following provisions".

The respondent and WCO choose a heading that mentions gears and attracts a duty rate of 10%. According to the respondent and WCO the imported gears were helical -type and should fall under HSC 84.83. The respondent also relied on the explanatory notes.

The applicant contended that the gears are part of the turbine since they were custom made to suit only this turbine and not any other. The applicant contended that it imported a hydraulic turbine in a disassembled form. Individual parts were imported in separate consignments. The applicant contended that the proper heading should be HSC 84.10.90 which provides for other parts and attracts a rate of 0%. The applicant contended that the explanatory notes the responded relied on were not binding. Whereas the explanatory notes can be a starting point in understanding the parts of a turbine, they are not conclusive and should be considered alongside other texts that are more instructive on turbine designs. It requested the tribunal to disregard the explanatory notes in the determination of the matter at hand.

The starting point for the Tribunal would be to determine whether explanatory notes should be disregarded. In *Commissioners of Customs and Excise v SmithKline Beecham* plc (supra) the court noted that.

> "... it is settled case-law, that the explanatory notes drawn up by the W.C.O are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force."

In *Solutions Medical Systems Limited v Commissioner of Customs and Border Control* Appeal 472 of 2020 where the Tax Appeals Tribunal of 20 Kenya held that although the explanatory notes are not legally binding, they provide a commentary on the scope of each heading and are generally indicative of the proper interpretation of the EAC CET. The EAC CET is a highly technical document. It cannot be implemented efficiently without the need for some explanations on the technical items. The Tribunal cannot, for the sake of it, disregard explanatory notes. It would be like a blind man groping in darkness without a guiding stick. There must be alternative explanations, or the applicant should give reasons as to why the notes should be disregarded. Apart from the applicant arguing that a gearbox is part of the turbine, there is no other reason given by it as to why the explanatory notes should be ignored. Moreso, where the notes indicate that the gearbox should not be considered in the heading specifically dealing with turbines. The Tribunal will weigh the evidence before it to see any reason why the explanatory notes should be ignored.

Mr. Brian Kiiza, a customs tariff officer with the respondent, stated that while the gear box may fall under hydro power turbine HSC 84.10 it may also fall under HSC 84.33. Where an import falls under two or more headings the General Rules of interpretation provide how such a situation may be remedied. The General Interpretation Rules for Interpretation of the Harmonized System, Rule 3(a) provides that.

> "... 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".

In this case, while HSC 84.10.90 mentions parts which are general, HSC 84.83 specifically addresses gear boxes. Therefore, if one was to use GIR 3(a), HSC 84.83 would prevail. The Tribunal will address later whether the gearbox was part of the turbine. .

Explanatory Note 2(a) to Section XVI provides as follows:

> "Parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 84.09, 84.31, 84.48, 84.66, 84.73, 84.87, 85.03, 85.22, 85.29, 85.38 and 85.48) are in all cases to be classified in their respective headings,"

Note 2 to Section XVI further provides.

> "... parts which are suitable for use solely or principally with particular machines or apparatus (including those of heading 84.79 or heading 85.43), or with a group of machines or apparatus falling in the same heading, are classified in the same heading as those machines or apparatus subject, of course, to the exclusions mentioned in Part (1) above..."

The Explanatory Notes further provide that:

> "The above rules do not apply to parts which in themselves constitute an article covered by a heading of this Section (other than headings 84.87 and 85,48); these are in all cases classified in their own appropriate heading even if specifically designed to work as part of a specific machine. This applies in particular to:
>
> (6) Transmission shafts, cranks, bearing housings, plain shaft bearings, gears, and gearing (including friction gears and gear boxes and other speed changers), flywheels, pulley and pulley blocks, clutches, and shaft couplings (heading 84.83)".

The applicant's witnesses testified that the purpose of the gear box is to increase the speed of the turbine. They testified that the Kaplan pit turbine is a low-speed turbine that

runs at a speed of 155 rpm (Revolution per minute). It requires a gearbox to increase its speed and harmonize it with that of the generator which runs at 600 rpm. This is in line with the explanatory notes. The applicant's suppliers indicated that the gears were helical which was confirmed by the WCO. There is no evidence that a helical gear is not a gear envisaged in the explanatory notes and should not be classified under HSC 84.83 which specifically deals with gears.

In E*lements Specialisties Inc v The Commissioner of Customs and Excise* COO 117 the court stated that "Various factors may therefore be considered including the appearance, composition, purpose, function or intended use and presentation of the product". On 10th February 2023, the tribunal visited the locus, the power dam at Kikagati, to determine the appearance, purpose, and function of the imported gear box. At the locus, the Tribunal noted there was a generator, a turbine and a gear box joined together by shafts. The said items are separate and independent. The purpose of the gear box is to increase the speed of the turbine. The Tribunal would equate the imported gear box to a gear in a vehicle and the turbine to an engine in a vehicle. While the gear box enables a vehicle to move smoothly in a vehicle it is not part of the engine. The gearbox the applicant imported is a separate item. Though it is part of hydraulic power plant, it is ancillary to and not part of the turbine. It would fall under HSC 84.83 which has a tax rate of 10%. If the Tribunal were wrong to say that a gear box was part of the turbine, it would still fall under HSC 84.83 because it specifically deals with and mentions gears.

While the legislature intended that the importation of turbines attract 0%, such treatment was not extended to gearbox. Rowlatt J in *Cape Brandy Syndicate v IRC (1921) K.B 64* stated that.

> "In a taxing Act, clear words are necessary in order to tax the subject. In a Taxing Act, one merely has to look at what is clearly said. There is no room for an intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in it, nothing is to be implied. One can only look fairly at the language used".

In *Barnes v. Jarvice 1953) 1 WLR 649*, Lord Goodard CJ said that:

> "A certain amount of common sense must be applied in constructing statutes.
> The object of the Act has to be considered."

In E*lgon Hydro Siti Limited v Uganda Revenue Authority* Application 125 of 2019 the tribunal stated that.

> "...the framers of the East African Community Common External Tariff made turbines attract a custom rate of 0%. However, they did not intend to extend it to other appliances used in a hydraulic power generating system. While ball valves are part of the hydraulic power generating system, they are not part of the pelton turbine".

The independent engineer's report, exhibit A9, contended that a gearbox is universally accepted as a component of a turbine. Even if a gearbox is believed to be a component of a turbine, the framers of the EAC CET could not have been mistaken when they decided to treat it separately for tax purposes. When classifying imports more consideration should be given to the designation of the import than the functionality. The commercial invoice exhibited by the applicant clearly indicates gear /gear box and not turbine. This means that the goods imported were clear. They were designated as gear boxes. HSC 84:83 clearly states gears. There is no need to classify it elsewhere where it is not mentioned. If an item is stated to be a gear box, why should it be called a turbine because it assists the latter. Call a spade a spade. Where an item is part of another item and the law specifically and clearly provides for taxation of the item, it should be taxed accordingly, and consideration should not be that it assists in the functioning of the other. Functionality may be important where the designation of an import cannot be clearly ascertained. For instance. if an item is called "Motorola", and one is not sure whether it is a turbine or a gearbox. Then one can look at the functions of the item. In this case, all the parties agree the applicant imported a gearbox.

Since gears are not mentioned under the terms of 84.10, but are specifically mentioned under the terms of 84.83, then they must be classified under 84.83 in accordance with GIR 1. The applicant argued that the respondent ought to have relied on the General Interpretation Rule 2 of the EAC CET which provides:

> "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".

There is no evidence that the Kaplan turbine is incomplete or unfinished without the gear box. The gear box, turbine and the generators are separate and complete machines used in the generation of power. Therefore, the respondent was justified not to rely on it.

The Tribunal does not find fault in the interpretation of the WCO. There is no evidence that it was not a correct interpretation of the nomenclature under which the applicant's imports were classified. Though the applicant contended that WCO relied on its commercial evidence, the communication from WCO shows that it also relied on additional information. The opinion of the WCO is not contrary to the wording of the heading in the combined nomenclature used by Uganda. The Tribunal cannot say that the WCO did not exercise the discretion vested in it properly. Likewise, the Tribunal does not see any reason why it should ignore the explanatory notes stated above. The opinion the Tribunal has made on its own does not differ from that of the WCO.

In the circumstances, the tribunal finds that the applicant should have classified its imported gear under Heading 8483, subheading 8483.40.00 that attracts a duty rate of 10%. This application is dismissed with costs to the respondent.

Dated at Kampala this 12th day of May 2023.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MR. GEORGE MUGERWA.**
CHAIRMAN	**MEMBER**	**MEMBER**