

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA
APPLICATION NO. 101 OF 2021

SHURIK LIMITED ===== APPLICANT
VERSUS
UGANDA REVENUE AUTHORITY ===== RESPONDENT

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. SIRAJ ALI.

RULING

This ruling is in respect of an application challenging the customs classification of Ketomac Dandruff Treatment Shampoo (Ketomac) by the respondent as a shampoo under Harmonized Commodity Description and Coding System (HSC) 3305.10.00.

The applicant deals in medicaments and medical equipment. The respondent conducted a customs post clearance audit on the applicant and established a tax liability of Shs. 41,183,200 arising from the misclassification of Ketomac Shampoo as a pharmaceutical product. The applicant objected to the above classification and the respondent disallowed the objection.

The following issues were set down for determination.

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

The applicant was represented by Mr. Aggrey Mpola Mushagara while the respondent by Ms. Gloria Twinomugisha and Ms. Charlotte Katuutu.

The applicant's sole witness was Prof. Richard Odoi Adome, a professor of pharmacy-pharmacology at Makerere University who testified as an expert witness. He stated that the applicant's product, Ketomac-Ketoconazole was wrongly classified by the respondent as a cosmetic instead of a drug or medicine. He testified that he has worked as a

consultant for the last twenty years and can confirm that the applicant's product was registered with the National Drug Authority (NDA) as a scheduled drug/medicine. He testified that in 2021, NDA clarified that Ketomac-Ketoconazole was a drug and not a cosmetic. The witness testified further that a shampoo can be applied like tablet, capsule, syrup. Ketomac it is 2% shampoo. The application of Ketomac does not make it a cosmetic like other shampoos. He testified that Ketomac is a scheduled drug sold under prescription for treatment of fungal infection in the scalp and pubic areas. He stated that the respondent had misclassified Ketomac as a cosmetic instead of a drug under HSC 33.04 and 33.05 instead of 30.04, as Ketomac is not a preparation for use on hair but rather the skin and the scalp.

The witness testified that the product is for therapeutic and prophylactic uses in measured doses as per the United States Food and Drug Authority dosage forms. He stated further that for any product to qualify as a drug or medicine, it must contain preventive or curative ingredients which Ketomac contains. Ketomac is applied topically as a 2% cream in the treatment of candida or dermatophyte infections of the skin or of pityriasis versicolor as stated in the Bible of pharmacology. Ketomac is manufactured by Torque Pharmaceuticals PVT. Ltd a pharmaceutical company in India and by law, a cosmetic product cannot be manufactured in the same industry with a drug.

The respondent's witness, Mr. Jude Ochieng, an officer in its Customs tariff unit testified that Uganda is a signatory to the World Customs Organization Harmonized System Convention. He stated that the East African Community Common External Tariff is based on the World Customs Organization harmonized system. He stated that all goods imported into Uganda are required to be declared under the East African Community Common External Tariff and all signatories to the Convention are required to apply the six-digit Harmonized System Code uniformly. He testified that in interpreting the Harmonized System Code member states are required to employ the legal notes. He testified further that World Customs Organization members are bound by the decisions of the World Customs Organization's Harmonized System Committee, which is comprised of representatives from member states. He stated that while Ketomac has therapeutic or prophylactic properties its correct classification is under HSC 3305:100 due

to Note 1(d) of Chapter 30 of the HSC which states that preparations of HSC 33.03 to 33.07 will not be classified under Chapter 30 (pharmaceutical products) even if they have therapeutic or prophylactic properties.

The applicant submitted that Article 12(4) of the Protocol on the Establishment of the East African Customs Union provides that Partner states shall use the Harmonized Customs Commodity Description and Coding System Specified in Annex 1 of the Protocol, that is East African Community Common External Traffic (EAC CET) which is used to determine import duty on goods that Originate from outside the East Africa Community (EAC). The classification of goods in the HS nomenclature are governed by General Interpretative Rules (GIR). GIR 1 provides that.

“The titles of Sections, Chapters and Subchapters are provided for ease of reference only for legal purposes, Classification shall be determined according to the terms of the heading.”

The applicant submitted the EAC CET read together with the rules of interpretation clearly show that Ketomac (2% Ketoconazole) Shampoo falls in the class of medicaments under HSC 30.04 not cosmetic under HSC 33.05 and as such it is zero rated for tax.

The applicant submitted that HSC 33.05 to which the respondent classified the applicant's pharmaceutical product Ketomac (2% Ketoconazole) Shampoo is not only wrong but inapplicable. Chapter 33 of the East African Community Common External Tariff Book (EAC-CET) provides for Essential Oils and resinoids; Perfumery, cosmetic or toilet preparations. Similarly, Chapter 33.05 of the same EAC-CET provides that for preparation for use on hair. The product Ketomac (2% ketoconazole) Shampoo is a medicament consisting of therapeutic or prophylactic uses, put in measured doses for transdermal treatment of severe fungal infections on the skin and scalp. It therefore follows that this product should be classified under Chapter 30 of the EAC-CET not Chapter 33.

The applicant submitted that to classify Ketomac (2% Ketoconazole) Shampoo under Chapter 33.05 of EAC-CET would make it a cosmetic whereas it is not. It submitted that the product is a 'Scheduled drug' sold only under prescription of a registered medical doctor. Its witness, AWI Professor Richard Odoi Adome, a pharmacologist testified that

Ketomac (2% Ketoconazole) is a drug not a cosmetic and is registered with NDA like all other drugs. The applicant submitted therefore it is not liable for the tax assessed by the respondent for misclassification of the said product because the same is a registered drug that attracts zero tax.

The applicant submitted, its witness AW1 testified that the issue of the classification of Ketomac (2% Ketoconazole) Shampoo arose in 2010 and the NDA in consultation with the respondent in a letter to the Commissioner Customs dated 21st May 2010 gave a clear position where the applicant has since imported that product as a registered drug for which it pays license and other fees annually in the same category.

The applicant submitted that the World Customs Organization (WCO) is the world governing body in relation to customs matters. It develops international standards to secure fair revenue collection, guidance, and support to customs administrations. Uganda subscribes to the World Customs Organization and is a party to the international Convention on the Harmonized Commodity Description and Coding System which lay down the rules and regulation governing its application. It submitted that the respondent's witness RW1 testified that WCO under its classification advice held and or treated Ketomac to be classified under Chapter 33.05 of EAC –CET. The applicant submitted that the classification advice refers to products completely different from Ketomac. It submitted that even though the other products were all shampoos with therapeutic and prophylactic values, none of them was a Scheduled drug sold under prescription. The applicant submitted that Ketomac should therefore be classified under HSC 30.04 not 33.05 of EAC-CET.

In reply, the respondent submitted that Uganda is a member of the World Customs Organization since 3rd November 1964. One of the international treaties under the auspices of the WCO is the International Convention on the Harmonized Commodity Description and Coding System (HSC). It submitted that Ketomac Shampoo should be classified under HSC 33.05.10 which provides for a duty rate of 25% and does not exclude shampoos which may have therapeutic content. The respondent submitted that Ketomac

Shampoo is a shampoo. It is labelled Ketomac Dandruff Treatment Shampoo. It controls flaking scaling and itching.

The respondent contended that Ketomac cannot be classified under Chapter 30. It submitted that though the evidence of AW1 Prof Richard Odoi Adome that Ketomac Shampoo is a scheduled drug sold under prescription what is in contention is not the medicinal contents or use of the product but rather the customs classification of the product under the law. The respondent submitted that AW1 has no qualification nor expertise in customs classification. The respondent submitted that Chapter 30 under note 1 (d) provides that this chapter does not cover preparations of headings 33.03 to 33.07 even if they have therapeutic or prophylactic properties. The respondent maintained that EACCET is very clear about classification of shampoos.

The respondent cited S. 122(6) of the East African Community Customs Management Act 2004, which provides that.

"In applying or interpreting this section and the provisions of the Fourth 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 also cited *Commissioner of Customs and Excise v Smithkline Beecham Plc* Case 206/03. It submitted that though the applicant relied on payment of license or other fees this does not affect the customs classification of a product.

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

This dispute relates to the customs classification of Ketomac Dandruff Treatment Shampoo. A sample submitted to the tribunal by the applicant shows that it is manufactured in India by Torque Pharmaceuticals PVT. Ltd and is imported into the country by the applicant. The case for the applicant is that Ketomac is a pharmaceutical

product as it has therapeutic and prophylactic properties. During the trial the applicant led evidence to show that Ketomac was classified by the National Drug Authority as a drug for the reason that it contains a medical ingredient, Ketoconazole 2%, which has therapeutic and prophylactic properties. The respondent's argument on the other hand is that the National Drug Authority has no role to play in the customs classification of goods and that the Notes to Chapter 30 of the HSC expressly excludes Ketomac as a pharmaceutical product.

In order to resolve this dispute, we need to determine the following questions. Firstly, the role of the National Drug Authority (NDA) in the customs classification of pharmaceutical products and secondly, the proper customs classification of Ketomac.

The NDA is established under the National Drug Policy and Authority Act. The powers given to the authority in relation to the importation of pharmaceutical products are to be found in Sections 5(d) and 44 of the Act. S. 5(d) mandates the authority, to control the importation, exportation and sale of pharmaceutical products while S.44 prohibits the importation of any drug into Uganda without a license from the authority. It is clear from a perusal of these two provisions that no power has been granted to the authority to determine the customs classification of pharmaceutical products. In answer to the first question, we find that the National Drug Authority has no powers to determine the customs classification of pharmaceutical products.

In respect of the second question, the respondent has submitted that the Notes to Chapter 30 of the HSC expressly excludes shampoos, with the result that Ketomac cannot be classified as a pharmaceutical product under the HS System in spite of its therapeutic and prophylactic properties.

In order to determine the veracity of this claim we need to look at the HS system. The HS System or to use its full name, the Harmonized Commodity Description and Coding System, is a goods nomenclature developed and maintained by the World Customs Organization and governed by the International Convention on the Harmonized Commodity Description and Coding System. Uganda subscribes to, and is a Contracting

party to the International Convention on the Harmonized Commodity Description and Coding System. The HS System has been adopted by the East African Customs Union as the Common External Tariff.

The Notes to Chapter 30 alluded to by the respondent has been reproduced below:

"Chapter 30

Pharmaceutical products

Chapter Notes.

1.- This Chapter does not cover:

- (a) Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (Section IV);
 - (b) Preparations such as tablets, chewing gum or patches (transdermal systems), intended to assist smokers to stop smoking (heading 21.06 or 38.24);
 - (c) Plasters specially calcined or finely ground for use in dentistry (heading 25.20);
 - (d) Aqueous distillates or aqueous solutions of essential oils, suitable for medicinal uses (heading 33.01);
 - (e) Preparations of headings 33.03 to 33.07, even if they have therapeutic or prophylactic properties;**
 - (f) Soap or other products of heading 34.01 containing added medicaments;
 - (g) Preparations with a basis of plaster for use in dentistry (heading 34.07); or
 - (h) Blood albumin not prepared for therapeutic or prophylactic uses (heading 35.02).
- (Emphasis added on bold prints)"

The headings 33.03 to 33.07 referred to under Chapter Note 1(e) are set out below;

"33.03	3303.00.00	Perfumes and toilet waters.
33.04		Beauty or make-up preparations for the care of the skin (other than medicaments), including sunscreen or sun tan preparation; manicure or pedicure preparations.
33.05		Preparations for use on the hair.
	3305.10.00	-Shampoos.
	3305.20.00	-Preparations for permanent waving or straightening.
	3305.30.00	-Hair lacquers.
	3305.90.00	-Other.

33.06

Preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages.

33.07

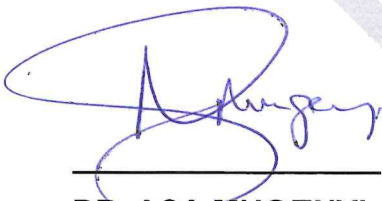
Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorisers, whether or not perfumed or having disinfectant properties."

A careful study of the Notes to Chapter 30 and the headings 33.03 to 33.07 shows that the proper classification of Ketomac, is under subheading 3305.10.00. This is because Shampoos have been expressly excluded from Chapter 30 under which pharmaceutical products are classified even if they have therapeutic and prophylactic properties.

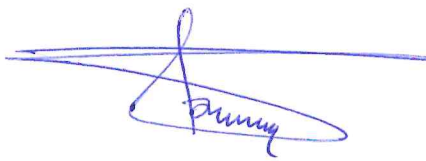
General Interpretative Rule 1 (GIR1) which is the foremost rule of classification in the HS System states that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. In the instant case the Notes to Chapter 30 are clear as to the products not covered under Chapter 30. Relying on the provisions of the above stated Chapter Note we find that Ketomac is not a pharmaceutical product, but a cosmetic one.

For the above reason this application is dismissed with costs to the respondent.

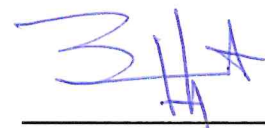
Dated at Kampala this 14th day of June 2023.



DR. ASA MUGENYI
CHAIRMAN



DR. STEPHEN AKABWAY,
MEMBER



MR. SIRAJ ALI
MEMBER