

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO. 8 OF 2018

ROSE OF SHARON ENTERPRISES 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 an additional assessment of Shs. 284,745,623 as import duty arising from the purported misuse of incoterms on imports.

The applicant is a body incorporated in Uganda. It deals in the manufacture of hair products. Between May 2016 and June 2017, it imported raw materials for the manufacture of hair products. Sometime around 29th November 2017, the respondent carried out a post clearance audit on the applicant where the latter's import documents were challenged because of its use of incoterms resulting in additional assessment of Shs. 284,745,623. The respondent contended that the applicant's use of incoterms resulted in under declaration of taxes.

The following issues were set down for determination.

1. Whether the taxes paid by the applicant on the import of the goods were proper and lawful?
2. What remedies are available to the parties?

The applicant was represented by Ms. Sarah Cherop, Mr. Cephas Birungyi and Mr. Martin Mbanza while the respondent by Mr. Daniel Kasuti, Mr. Ronald Baluku, and Ms. Franca Atto Okello.

This dispute arises from incoterms that were used in the import of goods into Uganda. The applicant argued that though the incoterms in the import document were inconsistent it paid the proper taxes due.

The applicant's first witness, Serungjae Yang, its managing director testified that the applicant is a private limited company that deals in the manufacture of synthetic hair. From May 2016 to June 2017, the applicant imported synthetic fibre used in the manufacture of hair extensions, from China, South Korea and South Africa. The goods were cleared by the applicant's clearing agents, Freight Forwarders Limited and the applicant paid the taxes due. In July 2017, the respondent carried out a customs post clearance audit on the applicant for the period May 2016 to June 2017. As a result of the audit the respondent issued an assessment of Shs. 284,745,623. The additional assessment was based on allegations that there were inconsistencies on the incoterms in the supporting documents declared on the imports. The applicant objected to the assessment. The applicant's suppliers wrote clarifying on the incoterms used and confirmed that the applicant had not tampered with the documents. The imports were declared to the South African Revenue Authority. He contended that the terms on the most invoice were "Cost and Freight" Mombasa or Kampala. He testified that different incoterms were used in the import.

The applicant's second witness was Mr. Isaac Byaruhanga who cleared its goods on import after declaring them. Insurance was paid before clearing. He relied on the commercial invoices, packing lists, sea way bills to clear the goods. The words 'rubber' and 'fibre' were used interchangeably. It did not have any effect on the taxes payable. He testified that what was declared in South Africa was declared to the respondent. Where insurance was not paid the applicant added 1.5%.

The respondent's witness, Mr. Paul Higenyi, a customs officer working with it, testified that the audit carried out involved examining the applicant's documents for imports from South Africa. The audit showed some inconsistencies in the documents, the commercial invoices, packing lists and others. Some of the invoices had incoterms such as "Cost and

Freight” which was broken down as “Free on Board” which was on other documents. He testified on consignments C20418, C31098 and C45121. He contended that the applicants by declaring the consignments using incoterms “Cost and Freight (CFR) Kampala or “Delivered at Place” (DAP) Kampala instead of FOB as stated in the export documents, the imports were under-valued.

He testified that the respondent established that the applicant’s goods were transported from Mombasa to Kampala by a third party which was Sino Trans Logistics Limited. He testified further that the inland freight charges to transport goods from Mombasa to Kampala ranged between US\$ 2,000 to US\$ 2,300. This was below what was quoted by another supplier Afriq Fiber Co Pty Limited which ranged from US\$ 3,600 to US\$ 3,800. He also testified that the following consignments were transported from Mombasa to Kampala at a lower rate; C2637, C58109, C75559, C20418 and C31098. Basing on their observations the respondent rejected the applicant’s documents which presented fresh set of invoices. The audit team considered all the applicant’s consignments as FOB and not “Cost and Freight” as indicated in the commercial invoices. It adjusted the amount on the invoices to “Cost, Freight and Insurance” and computed a tax liability of Shs. 284,745,623.

In its submissions, the applicant gave a breakdown of its imports and taxes paid on 14 entries. The applicant contended that the respondent imposed an additional tax assessment of Shs. 111,207,519 on the basis that the values declared to customs were FOB and not CIF. The respondent also imposed a penalty of US\$ 3,000 per custom entry at exchange rate of Shs. 3,655.25 for a dollar. The respondent assessed interest of Shs. 20,017,604. The applicant submitted that the exporter wrote a letter to the respondent clarifying on some of the errors. Upon request, the supplier amended some of the documents which were sent to the applicant and the respondent. The supplier explained the incoterms used and confirmed that the applicant had not tampered with the documents. The respondent ignored the reasons and alleged that the documents had not been endorsed by the South Africa Revenue Service. The respondent claimed that the applicant altered with terms of an invoice and had committed an offence under S. 203 of

the East African Community Customs Management Act (EACCMA). It issued an assessment of Shs. 284,745,623 on the applicant which objected.

The applicant contended that S. 101 of the Evidence Act places the burden of proof on the one who wants court to depend on an existence of facts. The applicant cited *Francis Lukooya Mukoone and another v The Editor in Chief of Bukedde Newspaper, New Vision Printing and Publishing Limited and another* CS 351 of 2997 where it was stated that the burden lies on the party who asserts the affirmative of the issue or question in dispute. The applicant also cited S. 233 of the EACCMA which provides that the onus of proving the place of origin of any goods or the payment of proper duties shall be on the person prosecuted or claiming anything seized under the Act. The applicant also cited *Noorbrook Uganda Ltd. v URA TAT* Application no. 18 of 2918 where the Tribunal held that the burden of proof shifts where the applicant has stated its case to the respondent to controvert it.

The applicant submitted that S. 31(1) of the Act provides that a person arriving overland if he or she has any goods in his or her possession shall before disposing of the goods furnish on the prescribed form such information as may be required concerning the goods. S. 34(2) provides that the owner shall furnish with the entry full particulars supported by documentary evidence of the goods. S.41 provides that the goods entered shall be examined by the proper officer to take account and determine the accuracy of the entry made. S.122 of the Act provides that where goods are liable to import duty and ad valorem, the value shall be determined in accordance with the Fourth Schedule. Paragraph 2(1) of Part 1 of the 4th Schedule provides that the customs value of the imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export adjusted in accordance with the provisions of Paragraph 9. Paragraph 9 provides that the value for duty imported goods shall be the price actually paid or payable for the goods, the cost of transport, loading, unloading and handling charges and the cost of insurance. The note of Paragraph 2 in Part II of the Interpretative Notes of the EACCMA further provides that the price actually paid or

payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods.

The applicant submitted that Cost and Freight (CFR) requires the seller to transport goods by sea to the buyer's destination. The cost is borne by the seller. The agreement does not require the seller to purchase marine insurance against loss, destruction, or damage to goods during transit. In CIF (Cost, Insurance and Freight), there is an additional requirement on the shipper (seller) to provide marine insurance on goods being shipped. DAP (Delivered at Place) is an international trade term used to describe a deal in which a seller agrees to pay all costs and suffer any potential losses of moving goods sold to a specific location. The buyer is responsible for paying import duties and any taxes including clearance, once the shipment has arrived at the specified destination. The applicant gave a breakdown of the imports and duties paid. The applicant prayed that the Tribunal holds that the taxes it paid were proper and lawful. The applicant also submitted that imposition of the penalty was unlawful and the interest on the VAT was unfounded.

In reply, the respondent submitted that three invoices in respect of consignments C20418, C31098, C45121 revealed inconsistencies which resulted in under valuation. The respondent contended that by using incoterms "Cost and Freight (CFR) Kampala" or "Delivered at Place Kampala" instead of FOB the applicant under declared the customs value as inland freight was not considered in the values. Inland freight from Mombasa to point of destination is not considered. The respondent submitted that a third party, Sino Trans Logistics Uganda Limited transported the applicant's goods from Mombasa to Kampala at prices ranging from US\$ 2,000 and US\$ 2,300 and not US\$ 3,600 to 3,800. The respondent contended that it rejected the applicant's documents which in turn presented a fresh set of invoices from the supplier with altered incoterms.

The respondent contended that the burden of proof in tax disputes is on the taxpayer. The respondent contended that S. 18 of the Tax Appeals Tribunal Act states that the applicant has the burden of proving that an assessment is excessive or should have been made differently. The respondent contended the applicant has failed to discharge the

burden. The respondent cited *Auto Express Limited v Commissioner Customs and Border Control* Appeal 119 of 2018 the Kenya Tribunal held that where tax authority presents evidence as to the truth and accuracy of an invoice it can rely on text 1.2 of Article 17 of the WTO customs valuation agreement that provides that the customs authority shall seek further explanation from the taxpayer.

The respondent submitted that *Black's Law Dictionary* 11th Edition defines an incoterm as a standardized shipping term defined by International Chamber of Commerce that apportions the costs and liabilities of international shipping between buyers and sellers. The respondent further submitted that S. 122 of the EACCMA provides that where imported goods are liable to import duty the value shall be determined in accordance with the Fourth Schedule. 122(4) provides that nothing shall restrict the rights of a proper officer to satisfy himself to the truth or accuracy of any statement, documents or declaration.

In rejoinder, the applicant submitted that the respondent's submissions are restricted to only 3 of the 14 consignments. The applicant that though the documents mistakenly came with different incoterms but when it came to pay the respective taxes it paid taxes based on the CIF values. The applicant contended that it did not make any inconsistencies in the values of the consignment as alleged by the respondent. It undertook all the necessary custom procedures and provided all the documents required under the law. The applicant gave a breakdown of taxes it felt were due using the export documents and incoterms used.

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

The applicant imports raw materials for the manufacture of hair fibre. Sometime in 2017, the respondent carried a post clearance audit on the applicant where it challenged the latter's import documents. The respondent claimed that the applicant under declared the value of its imports by using incoterms such as "Cost and Freight (CFR) Kampala" or

“Delivered at Place (DAP) Kampala instead of “Free on Board” (FOB) in the import documents. The respondent adjusted the amount on the applicant’s invoices to cater for ocean freight and insurance and computed a tax liability of Shs. 284,745,623. The applicant contended that it paid the proper taxes due.

In order to understand what the dispute is about, one has to comprehend the use of incoterms. An “incoterm” is defined by *Black’s Law Dictionary* 10th Edition p. 584 as “A standardized shipping term, defined by International Chamber of Commerce that apportions the costs and liabilities of international shipping between buyers and sellers.” Incoterms are used in international trade to avoid conflicts and difficulties between importers and exporters in respect of their obligations and responsibilities for transportation. They specify the point when responsibilities for transportation and risk shift from seller to buyer. The main purpose of incoterms is to facilitate international trade and not collection of taxes. A revenue collecting body cannot dictate which terms a buyer and seller should use. A tax collector should merely comprehend them and use them to compute the custom values of goods for taxation purposes.

The incoterms that were used in this dispute include; “Free on Board” (FOB) which means that the seller delivers when the goods pass the Ship’s rail at the named port of shipment. This means that the buyer has to bear all costs and risk or loss or damage to the goods from that point. The buyer bears all expenses and risks of goods from the time they have effectively passed the ship’s rail. The term “FOB” requires the seller to clear the goods for export. Another term used, “Cost and Freight” (CFR) is a legal term that specifies that a seller of goods is required to arrange the carriage of goods by sea to a port of destination and provide the buyer with documents necessary to obtain the items from the carrier. It means that the seller must contract for the carriage of goods to the port of destination of a sea- going vessel, by the usual route unless otherwise stipulated in the contract of sale. In “Costs, Insurance and Freight” (CIF), the duties of the seller and buyer are at same as those of CFR, with the addition of insurance coverage. “Cost, Insurance and Freight” is an expense paid by the seller to cover cost, insurance and freight of a buyer’s order while in transit. The goods are exported to a port named in the sales contract. Once the freight

load, the buyer becomes responsible for all other costs. “Delivered at Place” (DAP) means that the seller is responsible for the cost of packing the goods as well as arranging the delivery of the goods at the named place agreed with the buyer. [See Shipping and Incoterms: Practice Guide. UNDP Practice Series]

The applicant and its suppliers used the terms interchangeably. At times there are inconsistency in the use of the terms. However the law is silent on which incoterms should be officially used. If the terms are used wrongly there can result in under declaration of import taxes. There are some incoterms which have almost the same effect. For instance “cost and freight” is almost similar to “Free on Board.” If one adds insurance to cost and freight he would get “cost, insurance and freight.” At times, one can look at the values and incoterms used on the invoices and determine what the appropriate taxes are.

Having stated the incoterms, one has to ask on what items importers are required to pay taxes on. S. 122 of the East African Community Customs Management Act (EACCMA) 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.”

Paragraph 2(1) of Part (1) of the 4th Schedule of the EACCMA provides that:

“The custom value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State adjusted in accordance with the provisions of Paragraph 9.”

Paragraph 9(2) of Part 1 of the 4th Schedule of the EACCMA further provides that:

“In determining the value for duty purposes of any imported goods, there shall be added to the price actually paid or payable for the goods:

- a) the cost of transport of the imported goods to the port or place of importation into the Partner State; provided that in the case of import by air no freight costs shall be added to the price paid or payable;
- b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation into the Partner State; and
- c) the cost of insurance.”

Applying the EACCMA and the incoterms discussed to the invoices issued, the custom value of the goods can be discerned for taxation purposes. Taxes under the EACCA are paid similar use of CIF incoterms. For instance documents showing CFR, would require the importer to pay insurance for purposes of computing the custom values taxable.

Having stated the law and meaning of the incoterms the Tribunal is going to look at each of the transactions. The Transactions in dispute are 14 entries. The applicant submitted that the respondent's submissions are restricted to only 3 of the 14 consignments

The first transaction is in respect of customs entry Ref. C42637 for invoice AFU-1607 dated 7th July 2016. The commercial invoice showed that the goods were sold CFR Kampala. This means that the goods were transported to Kampala but no insurance was paid. The price was US\$ 48,040. The incoterm shows that the applicant met costs of inland travel worth US\$ 3,600. Insurance is computed at 1.5%, at US\$ 666.6. If inland travel is removed ocean freight and costs would be US\$ 44,440.8. CIF would be US\$. 45,107.94, which is the amount declared in the import documents. The tax dues was Shs. 36,024,172 which was paid by the applicant. There is no additional tax payable.

The second transaction is in respect of custom entry Ref.52501 for invoice AFU-1608 dated 21st July 2016. The invoice shows that goods were sold under the incoterm DAP, Kampala. The goods were delivered at Kampala. No insurance was paid. The price was US\$ 51,514. The applicant met costs of inland travel to Kampala of US\$ 3,600. If inland travel cost of US\$ 3,600 is removed and insurance added CIF would be US\$ 47,914. The tax dues are Shs. 39,678,809 which was declared by the applicant and paid. There is not additional tax payable.

The third transaction is in respect of custom entry Ref. C58109 for invoice AFU-1610 dated 11th August 2016. The invoice shows that the goods were exported DAP Kampala. The applicant met the costs of inland travel of US\$ 3,600. If the cost of inland travel are removed and insurance is added, the taxable value is US\$ 48,568.1. The taxes payable

is Shs. 39,503,632 which was on the value declared, and paid by the applicant. There is no additional tax payable.

The fourth transaction is in respect of customs entry Ref. C63488 for invoice AFU– 612 dated 29th August 2016. The invoice show transport costs to Kampala as US\$ 2,100. The total charges were US\$ 25,715. The incoterm used was CFR, Mombasa. If the costs of transport are removed and insurance is added, the taxable value would be US\$ 23,969. The tax was Shs. 19,495,891 which was declared and paid by the applicant. There is no additional tax payable.

The fifth transaction is in respect of customs entry Ref. C65341 for invoice AFU- 611 dated 8th September 2016. The incoterm used was CFR Kenya, Mombasa. It has costs for inland travel to Kampala at US\$ 3,600. The total value of the invoice was US\$ 49,797.6. If the costs for inland travel are removed and insurance is included CIF would be US\$ 46,890.5. The tax due would be Shs. 38,276,427 which was the amount paid by the applicant. The amount declared was US\$ 16,890.5 which was in error as was noted. No additional tax is payable.

The sixth transaction is in respect of customs entry Ref. C72323 for invoice AFU- 1613 dated 7th October 2016. The incoterm used was CFR, Kenya, Mombasa. It had transport costs of US\$ 3,600, Mombasa to Kampala. The value of the invoice was US\$ 51,450.4. If the inland transport costs are removed and insurance added, the CIF value is US\$ 48,568.1. The taxes payable are Shs. 39,648,032 which was declared and paid by the applicant. No additional tax is payable.

The seventh transaction is in respect of customs entry C75559 for invoice AFU-1614 dated 28th October 2016. The incoterm used was CFR, Kenya. The final destination was Kampala. Inland transport was US\$ 3,600. The invoice amount was US\$ 53,250. When inland transport is removed, insurance added CIF value is US\$ 50,395.1. The taxes payable is Shs. 42,582,806 Which was the amount declared and paid by the applicant. No additional tax is payable.

The eighth transaction is in respect of customs entry C80414 for invoice AFU – 1615 dated 10th November 2016. The incoterm used was CFR, Kenya, Mombasa. The final destination was Kampala. Inland transport cost charges were US\$ 3,600. The value of the invoice was US\$ 51,693. If transport charges are removed and insurance added the CIF value is US\$ 48,815. The taxes payable are Shs. 41,752,407 which was declared and paid by the applicant. No additional tax is payable.

The ninth transaction is in respect of customs entry C5155 for invoice AFU- 1616 dated 20th December 2016. The incoterm used was CFR, Kenya, Mombasa. The final destination was Kampala. Inland transport cost charges were US\$ 3,600. The value of the invoice was US\$ 52,764. If inland transport cost charges are removed and insurance added the CIF value is US\$ 49,901.4. The taxes payable is Shs. 44,285,038 which was declared and paid by the applicant. No additional tax is payable.

The tenth transaction is in respect of customs entry C11266 for invoice AFU-1701 dated 19th January 2017. The incoterm used was CFR, Kenya, Mombasa. The final destination was Kampala, Uganda. Inland transport charges were US\$ 3,600. The value of the invoice was US\$ 53,315.2. If inland transport charges are removed and insurance charges added the CIF value is US\$ 50,460.9. The taxes payable is Shs. 44,760,703 which was declared and paid by the applicant. No additional tax is payable.

The eleventh transaction is in respect of customs entry C18173 for invoice AFU- 1702 dated 3rd February 2017. The incoterm used was CFR Kenya, Mombasa. The final destination was Kampala. Inland transport charges to Kampala was US\$ 3,600. The total amount of the invoice was US\$ 52,788. If the transport charges are removed and insurance added the CIF amount is US\$ 49,925.8. The taxes payable is Shs. 43,199,415 which was declared and paid by the applicant. No additional tax is payable.

The twelfth transaction was in respect of customs entry C20418 for invoice AFU – 1703 dated 24th February 2017. The incoterm used was DAP, Kampala. Road freight charges

from Mombasa to Kampala were US\$ 3,600. The total amount of the invoice was US\$ 50,160. If the inland transport costs are removed and insurance added the CIF value is US\$ 47,259.2. The tax payable is Shs. 40,892,261 which was declared and paid by the applicant. No additional tax is payable.

The thirteenth transaction was in respect of customs entry C31098 for invoice AFU-105 dated 5th April 2017. The incoterm used was CFR, Kenya, Mombasa. The final destination of goods was Kampala. It had inland transport costs of US\$ 3,800. The invoice amount was US\$ 53,596. If the inland transport costs are removed and insurance added, the CIF value is US\$ 50,542.9. The taxes payable is Shs. 44,022,213 which was declared and paid by the applicant. No additional tax is payable.

The fourteenth transaction was in respect of customs entry C45121 for invoice AFU- 1706 dated 19th May 2017. The incoterm used was CFR Kenya, Mombasa. The road freight charges from Mombasa to Kampala was US\$ 3,800. The value for the invoice was US\$ 54,284. If inland transport charges are removed and insurance added the CIF value is US\$ 50,584. The taxes chargeable is Shs. 45,683,535 which was declared and paid by the applicant. No additional tax is payable.

The above transactions are summarized in the table below.

No.	Customs Ref:	Commercial invoice	Incoterm	Invoice Amount (\$)	Less inland transport (\$)	CIF (\$)	Taxes paid	Tax due
1.	C42637	AFU-1607	CFR	48,040	3,600	45,107.4	36,878.05	Nil
2.	C52501	AFU-1608	DAP	51,514.4	3,600	47,914.4	39,678,809	Nil
3	C58109	AFU-1610	DAP	51,450.4	3,600	48,568.1	39,503,632	Nil
4	C63488	AFU-1612	CFR	25,715	2,100	23,969.	19,495,891	Nil
5	C65341	AFU-611	CFR	49,797.5	3,600	46,890.5	38,276,427	Nil
6	C72323	AFU- 1613	CFR	51,450.4	3,600	48,568.1	39,648,032	Nil
7	C75559	AFU-1614	CFR	53,250	3,600	50,395.1	42,582,806.	Nil
8	C80414	AFU-1615	CFR	51,693	3,600	48,815	41,752,407	Nil
9	C5155	AFU- 1616	CFR	52,764	3,600	49,901.4	44,285,038	Nil
10	C11266	AFU-1701	CFR	53,315.2	3,600	50,460.9	44,760,703	Nil
11	C18173	AFU- 1702	CFR	52,788	3,600	49,925.8	43,199,415	Nil

12.	C20418	AFU- 1703	DAP	50,160	3,600	47,259.2	40,892,261	Nil
13.	C31098	AFU -105	CFR	53,596	3,800	50,542.9	44,022,213	Nil
14.	C45121	AFU- 1706	CFR	54,284	3,800	50,584.	45,683,535	NIL

Though the applicant and its suppliers were not consistent in the use of the incoterms, the respondent did not show how it resulted in loss of taxes. The respondent did not show how as a result of the purported misuse of incoterms how it arrived at the additional tax. The respondent contended that the applicant used different incoterms when exporting from South Africa. Since the law does not dictate which incoterms should be used on imports into Uganda, it is difficult to state that the applicant acted unlawfully and or fraudulently. Therefore the imposition of penal tax and interest did not arise. All the respondent is required to do is use the incoterms on the import documents and compute the taxes liable under the EACCMA. Also, the evidence of the respondent's witness Paul Higenyi on the transport charges which were not used by the applicant was based on hearsay. He did not disclose the source of his information. On a balance of probability, the Tribunal is comfortable with the computation of the applicant and it will go by it.

This application is allowed with costs to the applicant.

Dated at Kampala this 14th day of December 2021.

DR. ASA MUGENYI
CHAIRMAN

DR. STEPHEN AKABWAY
MEMBER

MR. SIRAJ ALI
MEMBER