THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 18 OF 2018

NOORBROOK UGANDA LTD ==========APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ==========RESPONDENT

BEFORE DR. ASA MUGENYI, MRS. CHRISTINE KATWE, MR. SIRAJ ALI

RULING

This ruling is in respect of the treatment of purported medicaments and food supplements imported by the applicant under the East African Community Customs Management Act (EACCMA).

The applicant imports Alamycin Egg, Alamycin Chick, Colvasone, Multiject IMM, Calciject and Multivitamins Injection for animals. The respondent informed the applicant that it should classify the imports as supplements. The respondent assessed the applicant customs duty of Shs. 3,521,294,144 for the period 2012 to 2017 on the ground that the purported medicaments imported were allegedly food supplements and the latter objected.

The following issues were set down for determination;

1. Whether the items in contention can be considered as medicaments under the customs laws?
2. Whether the respondent is bound by the letters issued in respect of the classifications?
3. Whether there are any remedies available?

The applicant was represented by Mr. Bruce Musinguzi and Mr. Thomas Kato while the respondent was represented by Mr. Tony Kalungi, Ms. Barbara Ajambo Nahone, Ms. Tracy Basiima and Mr. Daniel Kasuti.

The dispute between the parties revolves around the treatment of imported veterinary products under the East African Community Customs Management Act (EACCMA). The applicant contends that the said items are medicaments which the respondent objects and contends that they are food supplements. As a result the respondent contends that the applicant misclassified the imports.

The applicant's first witness, Mr. David Rutere, a pharmacist and the Regional Director of Regulatory Affairs and Quality Assurance of Norbook Kenya, testified that the applicant is engaged in the distribution of veterinary pharmaceuticals used in the treatment and prevention of animal diseases. Some of the drugs imported and distributed are classified as medicaments. The contention between the applicant and the respondent revolves around some imports namely: Multivitamin Injection, Alamycin Egg and Chic Formula, Colvasone, Multiject and Calciject. The respondent contended that the said products are food supplements on which import duty, withholding tax and Value Added Tax (VAT) is payable. The applicant contended the said products are medicaments which are exempt from the said taxes. The respondent issued an assessment of Shs. 3,521,294,144 which the applicant objected thereto.

Mr. Rutere testified that Norbook Kenya imported Alyamcin Chick, Calciject LV, Alamycin Egg and Chick into Kenya the said products were cleared under HS Code 3004.90.00 which applies to medicaments under the EACCMA. In Kenya the Ministry of Health has classified Alamycin Egg and Alyamcin Chick as drugs. In Tanzania the Tanzania Foods and Drug Authority has classified Alamycin Egg and Alaymcin Chick as drugs. The Irish Medicine Board has classified Multivitamin Injection as a veterinary medicine. He argued that since the products were cleared as medicaments in Kenya and Tanzania, they should be given the same treatment in Uganda. He contended that the said products treat diseases and prevent ailments and disorders in animals.

The applicant's second witness, Ms. Josephine Nanyanzi, a veterinary surgeon working as a Principal Regulatory Officer of the National Drug Authority (NDA) testified that, on the 19th October 2017, the applicant wrote to the NDA to provide an explanation as to whether the following imports were drugs: Acaricides, Multivitamin Injection, Life- Aid Extra, Combvit, Calciject LN and Calciject 40. On 27th October 2017, NDA wrote to the Commissioner Customs explaining that the said products belong to two groups; Acaricides/Ectoparasiticide and metabolic regulators in accordance with the Essential Veterinary Drugs list for Uganda. Ectoparasiticides are drugs used in the treatment of external infestations in animals such as ticks, lice, mites, flies and fleas. It also referred to the definition of drugs under the National Drug Policy and Authority Act. She also testified that the imports in contention are listed in the register of drugs which lists all veterinary medicines. She contended that a medicament is a drug used to treat disease, to prevent disease or improve physiological functions. Food supplements are added to food when they are insufficient ingredients.

The applicant's third witness, Mr. Abbey Mukasa, its country manager testified that the applicant is engaged in the distribution of veterinary pharmaceuticals used in the treatment and prevention of animal diseases. He testified that the contention between the parties revolves on the customs duties assessed on specific products namely Multivitamin Injection, Alamycin Egg and Chic Formula, Colvasone, Multiject and Calciject. When the respondent insisted the applicant's imports were supplements, the applicant wrote to NDA on 19th October 2017 to clarify as to whether the products were drugs or supplements. On 27th October 2017, NDA wrote to the Commissioner General and informed her that the applicant's products were drugs. It stated that Calciject 40 and Calciject LV were used in the treatment of hypocalcaemia in cattle. Multivitamin Injection was used to treat and prevent vitamin deficiencies in cattle, sheep or pigs. NDA recommended that the said products be exempted from VAT.

Mr. Mukasa testified that the respondent had on 4th October 2011 classified Multivitamin injection under HSC Code 3004.50. It had also issued a ruling on the 23rd December 2011 classifying Alamycin Chick Formula under HSC Code 3004.20. He testified that technical information was availed to the respondent on the various functions of the

products; Alamycin Chick and Alamycin Egg treat bacterial infection, Colvasone treats shock and circulatory collapse etc. Calciject treats life threatening conditions such as fever, Multiject treats mastitis and inflammation while Multivitamin Injection prevents vitamin deficiency in cattle.

The respondent's witness, Dorah Ainembabazi, an officer in the customs department testified that the respondent carried a post clearance audit on the applicant for the period July 2012 to June 2017. The audit revealed that it had cleared imports of the applicant which do not qualify as drugs under the EACCMA. The applicant is liable to pay taxes of Shs. 3,521,294,144.04 in respect of the products namely; Multiject IMM, Calciject, Colvasone Injection, Alamycin Egg and Chick Formula and Multivitamin injection. She admitted that she was aware that the National Drug Authority had classified the products as medicaments and not supplements.

The applicant submitted that it imported Multivitamin Injection, Alamycin Egg and Alamycin Chick, Colvasone, Multiject and Calciject. The respondent classified them as supplements and assessed customs duty, VAT and WHT on them. The applicant contended that the said products are drugs/medicaments and not supplements. The applicant submitted that S. 24(4) of the VAT Act provided that supplies specified in the Third Schedule which lists drugs and medicine pay VAT at the rate of zero. The applicant submitted that thought the VAT Act does not define drugs and medicine, the interpretation can be found in Uganda Revenue Authority Practice Note 2007. S. 2 of the Note defines them to mean any substance, preparation, or mixture of substance used or intended for use in diagnosing or treating disease, disorder, or abnormal physical state or the symptoms in human beings or animals. The applicant also referred to S 2(k) of the National Drug Policy and Authority Act which has almost a similar definition. The applicant argued that its imports are used for the treatment of animals.

The applicant submitted that the said products are classified as drugs in Tanzania and Kenya. Multivitamin Injection, Alamycin Egg and Chic Formula are classified as drugs in Tanzania. Multivitamin Injection, Alamycin Egg and Chic Formula are classified as

drugs in Kenya. The applicant further submitted that the Pharmacy and Poisons Board in Kenya has classified Alamycin Egg and Chick Formula as drugs.

The applicant contended that HSC Code 2309.90 which the respondent used to classify the imports does not apply to its products. The said Code provides for products used in animal feeds, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material other than vegetable waste, vegetable residues and byproducts of such processing. On that basis alone, the Tribunal should find that HSC 2309.90 does not apply to the applicant. The applicant also cited Rule 3(a) of the General Rules for The Interpretation of the Harmonized System which states that the heading which provides the most specific description shall be preferred to headings providing a more general description. The applicant submitted that HS Codes 3004.20 and 3004.50 specifically cover the imported products.

The applicant submitted that on 23rd December 2011, it sought clarification from the respondent on how to classify its imports. On the 4th October 2011, the respondent informed the applicant to classify the imports under HSC Codes 3004.20 and 3004.50 which attracted 0% import duty. By informing them what Code to use, the respondent created a legitimate expectation in the applicant. The applicant cited **Akaba Investments Limited v Kenya Revenue Authority** [2000] eKLR 5 where it was held that "Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue". The applicant also cited **Solar Now Services Ltd v Uganda Revenue Authority** TAT 13 of 2017 where the Tribunal held that: "… where an assurance or representation is made on facts and a complete disclosure of facts made, a statutory body can be stopped from altering its position regarding the representation." The applicant also cited **M-Kopa Uganda Ltd v Uganda Revenue Authority** TAT 15 of 2017. The applicant contended that the representation made by the respondent was on facts. The respondent did not adduce evidence to show that the information given by the applicant before the issuance of the letter was false.

The applicant submitted that S. 119(3) of the Income Tax Act imposes withholding Tax on importation of goods. However this Section does not apply to imports by organisatons or persons who are exempt from income tax. S. 119(5) of the Income Tax Act provides that WHT did not apply to the supply or importation of human or animal drugs. After the repeal of the said Section, the applicant was listed on the Withholding Exemption list.

In reply, the respondent submitted that the NDA did not carry out tests on all the products in contention. The explanation from NDA covered only 2 of the 6 products. It did not cover Alamycin Egg, Alamycin Chick, Colvasone and Multiject.

The respondent argued that even if a product is presented by the manufacturer as a medicament, it can still be classified as a food supplement. The respondent cited **LEK farmacevtska druzba d.d v Republika Slovenija, 1EN** [2016] EUECJ C-700/15. According to World Customs Organization Ruling vide 1704.90, File Reference LO8641EN (LETTER 05.NL.0827) a product known as 'Vicks King' was for long registered as medicine, It was held to be a sugar confectionary. It did not contain sufficient active substances that provide curative effects. The respondent also cited **Laboratories de Therapeutique modern (LTM) v Fonds d'Intervention et de Regularisation du Marche du Sucre (FIRS)** [1997] EUECJ C-201/96 where it was stated that that fact that a product has been given a marketing authorization issued by competent authorities and that it is distributed exclusively in pharmacies does not compensate for the lack of essential characteristics of a medicine. In that case a product called 'Altyl & Stongenol' was regarded as medicament under French legislation. The court held it to be a food supplement. The respondent argued that products classified by NDA as medicaments may be classified differently under the Harmonized System Code.

The respondent contended that the applicant should not rely on classifications by Tanzania and Kenya to bind Uganda. Without prejudice, there is no communication from the Kenya Revenue Authority and the Tanzania Revenue Authority to that effect. The respondent cited **Case C-369/88 Delatte** [1991] ECR 1-1487 where the court held

that the fact a product is classified as a foodstuff in another member state cannot prevent its being classified as a medicinal product in another state when it displays the characteristics of such a product. The court noted that so long as harmonization of the measures to ensure protection of health is not complete, the differences in the classification of products between member states will continue to exist.

The respondent contended that there were inconsistencies in the testimonies of the applicant's witnesses. Though the applicant admitted that the Tanzania and Kenya considered the products as medicines there was no documentation. The applicant's second witness, Ms. Josephine Nanyanzi admitted she is not a nutritionist and is incapable of distinguishing between a food supplement and a drug. She admitted that the NDA did not carry out tests on the products in issue before concluding that there are drugs. NDA looked at the National Drug Policy and Authority Act which is not the law applicable but the HS Code. The applicant's third witness, Mr. Abby Mukasa gave false testimony. He testified that some of the products were administered by injection yet there are actually administered orally and vice versa. The respondent argued that inconsistencies and ambiguities in the evidence of the applicant should be interpreted to its benefit. The applicant cited **Constantion Okwel alias Magendo v Uganda** SCCA 12 of 1990 where the court stated that inconsistencies unless satisfactory explained will usually result in the evidence of the witness being rejected. The respondent also cited the principle of equity: 'he who seeks equity must come with clean hands'.

In respect of legitimate expectation, the respondent contended that it does not apply to Uganda as it was developed abroad in 1969 after Uganda had obtained independence. The respondent cited **Tullow Uganda Limited and another v Uganda Revenue Authority** TAT 4 of 2011. The respondent also quoted Joseph Okua *"Domestic & International Taxation in Uganda: The Law, Principles and Practice*" 2nd Edition p. 54-55 where he stated that "There cannot be legitimate expectation on something which would involve violation of a statute." The respondent submitted further that it did not make any representations to the applicant.

The respondent contended that WHT should be paid because the applicant's products are not classified as medicaments. The respondent contended further that the burden of proof is on the applicant under S. 18 of the Tax Appeals Tribunal Act. The applicant has failed to discharge the burden. The respondent invited the Tribunal to look at the evidence on the various products. Multivitamin injection is used in the prevention of vitamin deficiencies. Alamycin Egg and Chick Formula improves egg production. Colvasone injection is used for treatment of shock and certain infections and burns. Calciject is used to restore normal serum levels to avoid muscle and nerve damage. Multiject IMM is used in the treatment of mastis in milking cows. The applicant submitted that taxes are due and payable in respect of 5 of the products.

The responder argued that though Alamycin Chick Formula had 5 vitamins its package does not show that it can be used to combat specific deficiencies. The respondent cited **Laboratories de Therapeutique modern (LTM) v Fonds d'Intervention et de Regularisation du Marche du Sucre (FIRS)** (supra) where a product known as Alvityl was held not to be a medicament because inter alia it was clear it could not be used to combat specific deficiencies of a particular vitamin. The respondent contended that the applicant has failed to prove that Alyamcin Chick Formula has clearly defined therapeutic or prophylactic characteristics. The respondent contended also that for Alamycin Egg, though it can be used for producing more eggs during stress, there is no evidence that it is used to combat specific deficiencies of a particular vitamin or prevent a particular disease. The respondent submitted that Ms. Josephine Nanyanzi admitted that the advice of NDA did not cover all the products in issue such as Alamycin Egg. The respondent contended that the package of Multivitamin Injection showed that it can be used during stress and at times for unthriftiness, debility and convalescence, there is no evidence that it can be used to combat specific deficiencies of a particular vitamin or prevent a particular disease.

The respondent contended that the applicant ought to pay the taxes as stated below for the impugned products. The said taxes are admitted in the applicant's letter to the respondent dated 12th April 2018, exhibit A8, p. 105 of the joint trial bundle.

TABLE 1

PRODUCT	IMPORT DUTY	VAT	WHT	TOTAL TAX
Multivitamin	923,966,690.54	1,829,454,047.27	165,673,479	2,919,094,217.51
Alamycin Egg & Chick Fomula	176,427,344.15	349,326,141.41	25,980,920.49	551.734,406.04
Colvasone				33,771,459.35
Multiject 1MM				1,837,064.32
Calciject LC and 40CM				1,837,064.32
				3,521,291,144.04

In rejoinder, the applicant argued that the respondent's submission that the Tribunal should not rely on the classification in Tanzania and Kenya to bind Uganda contravenes the spirit of the Customs Union as envisaged under Articles 2(2) and 4(2) the East African Community Treaty. The applicant submitted that Uganda is a member state of the East African community and a signatory to the East African Treaty and Customs Union Protocol. It submitted that Uganda is bound by the provisions of the above treaty.

In respect of the doctrine of legitimate expectation, the applicant submitted the Tribunal did not clearly state that it was not applicable in Uganda in **Tullow Oil and another v Uganda Revenue Authority** (supra). It has been applied in **M-Kopa v URA** (supra) and **Solar Now Services v URA** (supra). The applicant reiterated its position that the doctrine of legitimate expectation applied.

As regards the respondent's submission that Alamycin chick formula is not a drug because it contains vitamins, the applicant contended that it's most active ingredient is Oxytetracyline Hydrochloride, an anti-biotic. The applicant contended further that Alamycin Egg and Chick Formula provide for warnings which indicate in capital letters that the products are "FOR ANIMAL TREATMENT ONLY".

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

The applicant imports veterinary products namely: Alamycin Egg Formula, Alamycin Chick Formula, Colvasone, Multivitamin Injection, Muliject IMM and Calciject whose uses are in contention. It classified them under the HS Codes 3004.20 and 3004.50 as medicaments. The respondent informed the applicant that it should reclassify them as supplements.

Before we can go to the relevant HS Codes it is important to look at Code that has the heading which deals with medicaments that is HSC 30.04 which reads:

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

In order to understand the rest of the HSC, it is important to begin with HSC 3004.10.00 which reads:

> " – Containing penicillins or derivatives thereof, with a penicillanic acid structure or streptomycins or their derivatives. kg 0% "

The applicant imported its products under HSC 3004.20.00 which reads:

> " – Other, containing antibiotics kg 0%"

The applicant also imported products under HSC 3004.50.00 which reads:

> " – Other, containing vitamins or other products of heading 29.36 kg 0%"

A careful and simple reading of the said HSC 30.04 means for a product to fall under its description it ought to be a medicament for therapeutic and prophylactic uses. Therapeutic refers to the healing of disease. It is a branch of medicine concerned with treatment of diseases. Prophylactic refers to measures intended to prevent diseases. It is medicine or course of action used to prevent disease. To fall under 3004.20 it must be a medicament containing anti-biotic and under 3004.50 it must be a medicament containing vitamins. The said products should be put in measured doses or in forms or packing for retail use. Therefore a party has to show that the product has therapeutic or prophylactic properties.

Paragraph 1(c) of the Third Schedule of the Value Added Tax (VAT) Act provides that a supply of drugs and medicines is a zero- rated supply. However, drugs and medicines are not defined. *Black's Law Dictionary* 10th Edition p. 1131 defines medicine as a "substance possessing or thought by professionals to possess curative or remedial properties; a preparation used in treating disease or other illness." A drug is defined on p. 606 as "1. A substance intended for use in the diagnosis, cure, treatment or prevention of disease." The HS Code mentions medicament. The HS Code and the Common External Tariff do not define medicament. A medicament is a substance used for medical treatment. In other words it is a medicine. The HS Code mentions prophylactic uses. Therefore a medicament not only cures but also prevents diseases.

The NDA regulates and controls the use of drugs in Uganda. The word "drug" is defined by the National Drug Policy and Authority Act to mean:

> "any substance or preparation used or intended to be used for internal or external application to the human or animal body either in the treatment or prevention of disease or for improving physiological functions, or for agriculture or industrial purposes."

Physiological relates to the way in which a living organism or bodily part functions. The said definition is wide. NDA being a government institution, the respondent ought to coordinate and work with it harmoniously to promote government goals and policies.

On 18th June 2007, the respondent passed Practice Notes 2007 which is very instrumental in defining medicines, drugs and medicaments. The relevant portions of Note 2 in the said Practice Note reads:

"**2. Definition of Medicine and Drugs for VAT purposes**

(a) Paragraph 1(c) of the Third Schedule VAT Act provides that the supply of drugs and medicines is a zero- rated supply. However, drugs and medicines are not defined.

(b) Medicines and drugs shall be interpreted to be any substance or article (not being an equipment/device, instrument, apparatus or appliance) which is for use wholly or mainly in either or both of the following ways:

(i) by being administered to human beings or animals internally or externally for medical purposes; or

(ii) as an ingredient in the preparation of a substance or article to be so administered.

(c) Therefore, medicines and drugs are any substance, preparation or mixture of substances used or intended for use in diagnosing, or treating of disease, disorder or abnormal physical state or the symptoms thereof in human beings or animals.

(d) The World Customs Organization (WCO) uses the term "medicament" in reference to medicines and drugs.

(e) A medicament is an agent that promotes recovery from injury or ailment. Medicaments are impregnated or coated with pharmaceutical substance for therapeutic and prophylactic use in medical, surgical, dental or veterinary purposes.

(f) For purposes of VAT and clarity, medicines and drugs shall include surgical dressings, biological products such as vaccines and blood products, as well as items under headings 2004 and 3005 of the HS Code."

The said Practice Note binds the respondent. It recognizes drugs for veterinary purposes as products covered under the VAT Act and the HSC.

However, it is a portion of the exclusion part of the Practice Note that breeds discontent. It reads:

> "Nutrition/Food Supplement are not drugs or medicines for VAT purposes because they are intended to supplement one's dietary requirements and do not contain active pharmaceutical substances and as such shall be treated as taxable supplies for VAT purposes."

One of the major causes of customs disputes in respect of drugs is the distinction between drugs and food supplement. The Practice Note does not define what a nutrition and or food supplement is. At times the line between a food supplement and a drug is so thin that one may not be able to notice the difference.

The respondent's argument that because some products have vitamins, there are intended to maintain general health and therefore should be considered as food supplements and not medicine is lacking. If one was to go back to basic science taught in primary schools or biology in secondary schools one cannot forget that vitamins are protective foods. Vitamins are taken to fight and prevent diseases. If the human or

animal body does not have sufficient vitamins or there is a deficiency it will get a disease. In the human body, lack of vitamin A causes poor eyesight and night blindness, lack of vitamin B causes beri-beri a nervous disease, lack of vitamin C causes scurvy, a skin disease, lack of vitamin D causes rickets a deformation of bones. It is not uncommon for parents to tell children to eat fruits as they contain vitamins which prevent and fight diseases. Vitamins are needed in small amounts and if there are not present in our food one becomes unhealthy and catches certain diseases. In **Dabur India limited v Commissioner of Central Excise** 2005 (100) ECC 396 it was noted that a serious deficiency of Vitamin A makes animals subject to diseases of the respiratory tract and they often die of pneumonia. A deficiency of Vitamin D causes serious bone diseases such as rickets in young growing animals. It was noted that various kinds of vitamins are added to commercially mixed feeds for poultry swine and to a limited extent for calves.

One does not need to be a highly qualified doctor from the World Health Organization or a specialist from National Drug Authority to notice that food nutrients namely vitamins may have medicinal value especially in the prevention of disease Therefore the fact that a product has vitamins should not be the test as to whether it is a drug or food supplement. To say so, would be to contradict HSC 3004.50 which covers medicaments containing vitamins. It is not by accident that HSC 3004.50 covers medicaments that have vitamins. Products that have vitamins maybe considered as food supplements yet there are medicaments. The Tribunal is not trying to say that once a product has vitamins it is a medicament. What we are saying is that a product with vitamins should be examined to see if it has medicinal effect, if it has therapeutic or prophylactic uses. Where a product has nutritional elements, this does not disqualify it from being a medicine or drug. In **Tetragon Chemie v CCE Bangalore** *2001 (138) ELT 414 (t-LB)* some of the disputed products were sought to be classified as medicaments as they contained vitamins and provitamins in substantial quantities. In **Dabur India limited v Commissioner of Central Excise 2005** (supra) court noted that it has to examine as to how the product is used. One has to look at the impugned products and examine its therapeutic and prophylactic uses.

The Tribunal finds also lacking the testimony of Josephine Nanyanzi, a veterinary officer with NDA when asked what advantages food supplement have and she answered she is not a nutritionist. A veterinary officer should know the difference between products for treatment of animals and food supplements. How can a veterinary officer treat animals when she does not know the difference between a drug and a food supplement?

The Tribunal has perused a number of decisions from outside jurisdiction in respect of animal food supplement. In the Supreme Court decision of India In **Dabur India v Commissioner of Central Excis**e (supra) the court noted that farm produce is usually rather low in proteins, minerals or vitamins. It looked at the preparation devised to compensate for these deficiencies so as to ensure a well-balanced animal diet. These preparations had the same composition as 'Complete Feeds'. In **Sun Export Corporation v The Collector of Customs, Bombay** (7th July 1997) the court stated:

> "The preparations in question are used to supplement animal feed. Sometimes animal food or poultry feed is already fortified with these vitamins when sold. Sometimes, however, farmers prefer to add the vitamin either to animal feed or to poultry feed separately. These products strengthen the nutritional quality of animal feed."

In **Tetragon Chemie (P) Ltd and others v CCE and others** the court cited a decision of **Aries Agro-vet Industries Limited** where it was observed that:

> "We think, however that the right direction is the one in which an animal feed is understood to be a complete feed or as complete a feed as such feeds can be made to be by human ingenuity and that feed can never be only one or another of the various ingredients, elements that an animal needs in a balanced feed."

Therefore the Tribunal notes the expression animal feed supplement would connote an ingredient or combination of ingredients, to be added to the basic feed mix or parts thereof to fulfill a specific need for animals, using human ingenuity.

The burden is on the applicant to prove that the products it imported are drugs or medicines. The burden of proof shifts. Where an applicant states its case, the burden shifts to the respondent to controvert it. The standard of proof is on a balance of probabilities. Balance of probabilities does not mean the Tribunal has to establish the absolute truth. It merely means that the party which adduces evidence with the most convincing force is successful. **In Dabur India v Commissioner of Central Excise**

(supra) it was held that “The Revenue, thus has not succeeded in proving that the impugned product have therapeutic or prophylactic properties. Accordingly, these products are not Ayurvedic Medicament.” In India unlike Uganda taxes are imposed on medicaments and not food supplements. In other words, the importer has to show that it imported medicaments. The burden is on the respondent to prove that the impugned imported products seeking to be classified under the HS Code are not medicaments, medicines or drugs as alleged by the importer. The respondent has to adduce evidence to show that the products do not serve the use alleged by the importer and or the ingredients in the product are not as stated. The Tribunal has to weigh the evidence from each party and determine which is more convincing. In order to do this the Tribunal shall look at each product imported by the applicant and make a determination.

The first two products are Alamycin Egg Formula and Alamycin Chick Formula. These are used to prevent and alleviate stress, increase egg production and to maintain appetite. Both products have 5 vitamins; Vitamins A, D3, E, B12 K and other ingredients. The respondent cited **Laboratories de Therapeutique modern (LTM) v Fonds d’Intervention et de Regularisation du Marche du Sucre (FIRS)** where a product known as Alvityl whose contents were vitamins was held not to be a medicament. In **Dabur India limited v Commissioner of Central Excise** (supra) the court noted that feed additives or animal feed supplements are added to animal feed. These additives/supplements comprise of proteins, vitamins etc. but the court held that it does not think that this by itself should tell against them. The court noted:

> “A perusal of all the recommended uses suggests that the impugned products are products are used to promote growth, maintaining and improving liver functions, for removing calcium and phosphorus deficiency for supplementation during pregnancy etc. and for preventing rickets, prolapse, milk fever, etc. These uses in our opinion do not show that the impugned products are meant for therapeutic or prophylactic uses… For any product to be classified as a medicament, it is pre-requisite that the product is for therapeutic or prophylactic uses.”

The applicant in this application contends that Alamycin Egg and Alamycin Chick are used to alleviate stress, improve appetite and increase egg production, which is clearly

indicated on the packages. In **Tetragon Chemie (P) Ltd and others v CCE and others** (supra) in respect of animal feeds the court noted

> "cattle-feed" and "poultry- feed" must include not only that food which is supplied to domestic animals or birds as an essential ration for the maintenance of life but also that food which is supplied over and above the maintenance requirements for growth or fattening and for production purposes, such as for reproduction, for production of milk, eggs, meat or feathers and in the case of animals also for efficient output of work."

In this case, the Tribunal notes that the Alamycin products are poultry feeds aimed inter alia to increase the production of eggs, reduce stress level and improve appetite. It is the opinion of the Tribunal that these are not therapeutic or prophylactic uses.

The Tribunal has to ask itself whether there are other ingredients of the Alamycin products have medicinal value. The applicant's witness, Mr. Abby Mukasa, a pharmacist but not a pharmacologist, testified that the above products contain Oxytetracycline hydrochloride an anti-biotic used in the treatment of bacterial infection in young chicks. The package of the said formulas tendered in as exhibits APE1 and APE2, do not show that it is used to treat bacterial infection in young chicks. The function of a drug should be clearly stated on its package so that consumer of a veterinary product or drug can make an informed choice. Though the extract, relied on by the witness states that oxytetracycline Hydrochloride is used for Tetracycline antibacterial. The said document was not in tendered in as an exhibit. It was listed as an identification document AID 10. The said extract does not disclose the person who made it. There is no link between Tetracycline antibacterial and young chicks. The extract does not state that bacterial infection is found in young chicks. A veterinary officer who treats animals and birds would be the best person to testify on this.

The applicant tendered in a certificate of drug registration (exhibit AID 26) in Tanzania where products were registered under S. 3(4)(ii) of the Tanzania Foods, Drugs and Cosmetics Act under Registration No. TAN 00,1944 JO1A Nor as drugs. Uganda is a member state of the East African community and a signatory to the East African Treaty and Customs Union Protocol. Article 2(4)(c) provides that a common external tariff in

respect of all goods imported into the Partner States from foreign countries shall be established and maintained. Article 4(2)(b) requires the Partner States to adopt a standard system of valuation of goods based on principles of equity, uniformity and simplicity of application in accordance with internationally accepted standards. In the spirit of the Customs Union as envisaged under Articles 2(2) and 4(2) the East African Community Treaty, all the member states when handling custom issues should act harmoniously. It would go against the spirit of the above Treaty, the EACCMA if each state treated imported products differently. However the Tribunal notes that the said certificate was issued to Norbook Kenya Limited, which is a different legal entity from the applicant. However that is not the problem. The ingredients indicated in the certificate of drug registration are different from the package of the products tendered in the Tribunal by the applicant. Therefore the products thought they have a similar name are different. Therefore the certificate of registration does not help.

The licence issued by the Kenya Pharmacy and Poisons Board was issued to Norbook Kenya Limited in 2018. The Dispute before the Tribunal is for the period 2011 to 2017. The Tribunal is also persuaded by the case cited by the respondent of **Laboratories de Therapeutique modern (LTM) v Fonds d'Intervention et de Regularisation du Marche du Sucre (FIRS)** (supra) where it was stated that that fact that a product has been given a marketing authorization issued by competent authorities and that it is distributed exclusively in pharmacies does not compensate for the lack of essential characteristics of a medicine. The applicant has not adduced evidence to show that the above product is used as a medicament. It is important for the applicant to adduce evidence to show that the relevant revenue body in the East African Community, in this case Kenya Revenue Authority, acted on the certificate to consider the impugned product as a drug. This is because the Board may only be concerned with Pharmaceuticals and poisons and may consider all food supplements as drugs. Are the Acts in Kenya and in Uganda in pari materia?

The applicant contended that it sought clarification on the treatment of the Alamycin products and the respondent in its letter classified the products under HSC 3004.50. The respondent cited **Solar Now Services Limited v Uganda Revenue Authority**

(supra) where it was stated that "…where an assurance or representation is made on facts and a complete disclosure of facts made, a statutory body can be stopped from altering its position regarding the representation." In its letter of 23rd December 2011, the Commissioner states that: "The medicated drinking water is used for the control and treatment of the bacterial infections caused by oxy tetracycline susceptible organisms." The said representation is not on the package of the Alamycin products. The use of the products in the said letter are not on the package of the import. Though the products is for birds the Commissioner states that it is also for cattle, swine and sheep. We cannot say that there was a true and complete disclosure of facts to the Commissioner. The Commissioner must have been acting on a misapprehension of facts or misrepresentations when he classified the products under HSC 3004.50. The applicant did not attach its letter to the respondent of 21st December 2011 to show what it disclosed to the respondent. Therefore the Tribunal is not in a position to state the applicant can benefit from any assurance made for the doctrine of legitimate expectation and or estoppel to apply.

The third product imported by the applicant is Colvasone. It is used for animals such as cattle, dogs, cats and horses. According to the package, exhibit APE4, it is used for shock, circulatory collapse, fog fever, acute mastitis, burns and Acetonaemia in cattle. The said products indicate it is has therapeutic or prophylactic uses. There is no evidence adduced showing that the said product cannot do the prescribed functions. The active ingredients of the product on the package are Dexamethasone Sodium Phosphate and Benzyl Alcohol. There is nothing to suggest that they are food supplements. The respondent contended that the suitable code is HSC 3004.90 and CPC 478 because it can be administered by intravenous injection. In its Practice Note the respondent stated that medicines can be administered internally or externally. The HS Code should not be interpreted to suit the convenience of the taxing collecting authority especially where it is clear that a product falls in a particular HS code which provides for lower or zero tax.

The fourth product imported by the applicant is Multiject IMM. It is used for treating bovine mastitis in milking cows. Bovine mastitis is an inflammation of the udder in cows

resulting from bacterial introduced either during the milking process or from environmental contact. Its active ingredients include Procaine Benzyipenicillin. Special precautions for use state that penicillins and cephalsoporins may cause hypersensitivity following injection, inhalation, ingestion or skin contact. Its pharmadynamic properties show that Procain Penicillin exerts its effect on multiplying bacteria by interfering with the formation of the cell wall. Therefore it cannot be denied that the said product has penicillin. HSC 3004.10.00 covers medications that have penicillin or its derivatives. The respondent has not led evidence to show that Mulitject does not have the therapeutic uses indicated on the package.

The fifth product imported by the applicant which is in dispute is Calciject. It is used for the treatment of hypocalcaemia in cattle complicated by a deficiency in magnesium. Hypocalcaemia it a metabolic disease caused by a low blood calcium level. It is also known as milk fever. This product has therapeutic or prophylactic uses. It can be used to treat and prevent milk fever in calving cows. In the letter to the Commissioner Customs Department dated 27th October 2017 the Secretary to the National Drug Authority stated that the product has mineral supplements. The package shows that it is "For animal treatment only". It is also indicated that it is a "UK Authorised veterinary medicinal product". The applicant has established a prima facie case that the product is a medicine which has not been disputed by the respondent.

The sixth and final product is Multivitamin Injection. The applicant attached a certificate of drug registration from the Tanzania Foods and Drugs Authority for a multivitamin injectable solution. The ingredients on the said certificate registration is not the same as the ingredients as on the package of the applicant. Therefore the applicant cannot rely on it. The package of the above product shows that it contains 7 vitamins; A, D3, E, B1, B2, B6 and B12. Though the respondent submitted that its contents are just vitamins it also has other contents. Oxyteracycline, Hdyrochoride, Niccotinamide, Riboflavin Sodium Phosphate. Therefore its products are not only vitamins. In the letter to the Commissioner Customs Department dated 27th October 2017 the Secretary to the National Drug Authority states that Multivitamin Injection treats or prevent vitamin deficiencies. The oxymoron of 'deficiency' is 'supplement'. In other words multivitamins

are given to the animals to supplement their deficient vitamins. The said product may be considered as a food supplement.

However the packages and the letter of 29th September 2011 by the applicant to the respondent show that Multivitamin Injection is used to treat unthriftiness, debility and convalescence. In animals, unthriftiness denotes a failure to grow or develop normally as a result of disease. Debility means physical weakness as a result of illness. Convalescence, in case of animals, refers to one which though no longer has clinical signs of disease has not yet returned to full function and production. Though these conditions are not diseases they are disorders or abnormal physical conditions. The Practice Note states that medicines may be used to treat disorders or abnormal physical states or the symptoms thereof in human beings and animals. The said product can be considered to be a medicament.

In its letter of 29th September 2011 the applicant indicate to the respondent this product is not to be mistaken for dietary supplement. It is the opinion of the Tribunal that the said product is both a supplement and a medicament. In its letter of 4th October 2011, the respondent considered the Multivitamin Injection as a medicament though it stated that it is used to prevent vitamin deficiency. So be it. The tribunal will not discuss the doctrine of legitimate expectation in respect of the USE Multivitamin Injection as the Tribunal has observed that it serves both as medicament and a food supplement. The respondent was therefore justified to classify it under HSC 3004.50.

The respondent contended the multivitamin should be classified under HSC 2309.90. The heading 2309.90.10 states that premixes used in the manufacture of animal and poultry feed attract taxes at 0% rate. HSC 2309.90.90 states other attract taxes at rate of 10% There is no evidence that the Multivitamin Injection, Colvasone, Multiject IMM, Calciject 4CM fall under HSC 2309.90.90. However Alamycin Egg and Alamycin Chick are added to the drinking water of poultry and have to do with animal or poultry feed. It is properly classified under HSC 2309.90.90.

The Tribunal therefore finds that the evidence of the applicant was consistent in respect of four of the six products these are; Colvasone, Multiject IMM, Calciject 4CM and Multivitamins. The respondent failed to prove that the four products do not have therapeutic and prophylactic uses. There were inconsistencies in respect of Alamycin Egg and Chick Formulas, Therefore the assessments in respect of the four products will not stand. Since the Tribunal has held that Alamycin Egg and Alamycin Chick are not medicaments or drugs it follows that the applicant has to pay the taxes assessed.

Taking all the above into consideration the Tribunal therefore orders:

1) The import duty, VAT and WHT assessments in respect of Colvasone, Multiject IMM, Calciject 4CM and Multivitamins be vacated.
2) The applicant pays the following taxes in respect of Alamycin Egg and Alamycin Chick:
   (a) Import duty of Shs. 176,427,344.15
   (b) VAT of Shs. 349,326,141.41.15
   (c) WHT of Shs. 25,980,920.49
3) The respondent pays the applicant 2/3 of the costs of this application.

It is so ordered.

Dated at Kampala this 15th day of May 2020.

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DR. ASA MUGENYI	**MRS. CHRISTINE KATWE**	**MR. SIRAJ ALI**
CHAIRMAN	**MEMBER**	**MEMBER**