Republic v Kenya Revenue Authority; Cooper K-Brands Ltd (Ex parte) (Miscellaneous Application 458 of 2013) [2016] KEHC 7748 (KLR) (Judicial Review) (10 June 2016) (Judgment)

Republic v Kenya Revenue Authority Ex Parte Cooper K-Brands Limited [2016] eKLR

Neutral citation: [2016] KEHC 7748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION 458 OF 2013

GV ODUNGA, J

JUNE 10, 2016

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

AND

COOPER K-BRANDS LIMITED ..... EX PARTE

JUDGMENT

Introduction

1. By a Notice of Motion dated 2nd January, 2014, the ex parte applicant herein, Cooper K-Brands Limited, seeks the following orders:

    1. An order for judicial review by way of certiorari to remove to this court and quash the decision by the Kenya Revenue Authority to make demand and the demand contained in the letter dated 26th November 2013 requiring the Applicant to pay Kshs.161, 833,529.00 on account of Import Value Added Tax allegedly due from the applicant.

    2. An order of judicial review by way of prohibition to prohibit the Kenya Revenue Authority, whether by itself, its officers, employees and/or agents, from commencing, instituting or proceeding with any enforcement or prosecution actions against the Applicant or its directors and/or officers on account of demand contained in the letter dated 26th November 2013 issued to the Applicant.

3. An order for the costs of this application to be awarded to the applicant.

Ex Parte Applicant's Case

2. According to the applicant, it is a limited liability company duly incorporated under the *Companies Act* Cap 486 and carrying on the business of manufacture of farming products for both crops and animals which fall in the general category of medicaments or pharmaceuticals and has been the leading animal health company in East and Central Africa since its inception in 1906 and is a principal supplier of animal and crop health products with a strong presence in Tanzania, Uganda Burundi and Rwanda. To the Applicant, it is a growing dynamic company with over 130 employees and with an asset base of over Kshs. 300,000,000/- which assets include immovable property and machinery of very high value.

3. It was averred by the Applicant that it has been tax compliant from its inception and has been issued with Tax Compliance Certificates by KRA over the years, including Tax Compliance Certificates for the period between 3rd September 2008 and 9th May 2013 and currently holds a Tax Compliance Certificate which is valid up to 10th May 2014. It averred that as an entity running its business in Kenya and as a responsible corporate citizen, the Applicant has complied with the law and has over the years made payment of the taxes required of it and that for the past five years, it has paid taxes in excess of Kshs. 320 million including, Value Added Tax (VAT), Corporation Tax, Excise Duty, Import Duty, PAYE and Withholding tax. It added that it has at all material times been recognized as a manufacturer of medicaments or pharmaceuticals for purposes of taxation as is evidenced by its listing in Legal Notice No. 343 of 1995 and Gazette Notice No. 3604 of 15th June 2000.

4. The Applicant averred that it imports some of the raw materials used in the manufacture of its products and these have to undergo clearance by KRA before they are released to it as the importer which clearance is done on behalf of the Applicant by its clearing agents and the imports are released after all taxes due on them have been paid. In order to facilitate the process of clearance, KRA has assigned various codes/tariff numbers (hereinafter code) to different classes of goods for tax purposes. These codes are entered into KRA's Simba System when the imports are being declared so that the taxes payable are ascertained. The exemption code for 'raw materials for the manufacture of medicaments' has at all material times been assigned the code B0260. To the Applicant, the process of clearing imports involves the clearing agent entering the details of the imports and the relevant code in the Simba System which information is relayed electronically to KRA's offices at Times Towers in Nairobi where KRA officers then check the entry. Thereafter, the tax payable on the imports is calculated and generated by the Simba System when the unique code for the class of goods is entered. However, KRA issues the codes and has exclusive control of the results generated by the Simba System in terms of tax payable which system is an automated tax collection and import clearance system used by the KRA.

5. To the Applicant, the system does not allow or permit the importer and/or its clearing agent to state the rate of duty applicable to the goods being imported and cleared since the system is designed in such a way that it only requires the importer or its clearing agent to state the code of the goods being imported and cleared and other required fields after which the Simba System automatically ascertains the amount of import taxes payable based on the code assigned by KRA. It was disclosed that the KRA officers in Nairobi upon receiving the entries as made by the agent in the Simba System ask the port of entry officers to physically verify the goods and give feedback on the accuracy of the entries made. After this verification is done, KRA clears the goods after which they are released upon payment of the taxes assessed.

6. It was therefore contended that the process of verification of goods, the assessment and the collection of duty payable as laid down by KRA is very elaborate and that the Applicant's imports have been subjected to it. The process of importation of goods into Kenya was explained in general as follows:

   (1) The importer makes a purchase order and obtains from the supplier, the commercial invoice, bill of lading or airway bill and in some cases, insurance documentation.

   (2) With the documents outlined above the importer is then able to raise the Import Declaration Form (IDF).

   (3) Upon arrival of the consignment at the port of entry, the importer or his agent completes an entry form.

   (4) With the documents referred to above, the importer prepares a Single Administrative Form (Form C17B), which indicates as a summary the nature of the imports hence the tax classification, the nature of the importation hence the customs processing code (CPC), the value of the imports and any exemption code applicable.

   (5) KRA then computes the taxes payable on the entry using the automated Simba System.

   (6) KRA's Customs Officers then verify the consignment at the point of entry to ascertain the value of the goods, tariff classification and quantity among other requirements. During this verification KRA checks the accuracy of the value of the goods and the sufficiency of the description thereof to enable it verify the correct tariff code having regard to the particulars of the goods as shown in the commercial invoice. For purposes of imports of raw materials for the manufacture of medicaments by the Applicant and other importers in the industry, the exemption code assigned by KRA and verified by its custom officials was and still is B0260.

   (7) All taxes including import duty, Value Added Tax (VAT) and the assessed IDF fees are then paid at this point after which a customs clearance certificate is issued and the goods released.

7. According to the Applicant, the Simba System computed all taxes payable which the Applicant duly paid. However, it averred that no import VAT was payable on raw materials for the manufacture of medicaments at all material times, particularly between 1st January 2008 and 1st September 2013.

8. However, by a letter dated 21st May 2009, KRA gave the Applicant notice of intention to audit under section 235 and 236 of the East African Community Customs Management Act, 2004 (hereinafter referred to as "the EACCMA") and stated that they would conduct an audit of the Applicant's operations for the years of income 2004 to 2009. To this the Applicant complied to facilitate the audit which was conducted. There was however no information communicated to the Applicants on the findings of the audit. The Applicant was therefore very surprised to receive a letter dated 26th November 2013 from KRA demanding payment within 30 days thereof of Kshs. 161,833,529.00/- allegedly due from the Applicant on account of import VAT on raw materials and packaging materials for the manufacture of medicament for the period between 1st January 2008 and 31st October 2013.

9. The Applicant reiterated that it had paid the taxes due from it and as assessed by KRA for the period in question hence the tax demanded by KRA is neither due from nor payable by the Applicant. Based on legal advice the Applicant contended that:

   (1) Packaging and raw materials imported for use in the manufacture of medicament are tax exempt pursuant to section 114 as read with item 16 of part B of the 5th schedule to EACCMA.

(2) This exemption extends to import VAT considering the definition of duty under section 2 of EACCMA and also considering the provisions of section 6 (5) of the VAT Act, chapter 476 of the Laws of Kenya (now repealed but applicable at all material times).

(3) Code B0260 being the exemption code assigned by KRA for the import of raw materials for use in the manufacture of medicament does not impose any liability for import VAT. In addition the provisions of EACCMA as more particularly set out above specifically exempt the application of duty on the said goods.

(4) The taxes demanded are therefore not payable under the law.

10. According to the Applicant, in order to obtain the exemption referred to above, the raw materials for the manufacture of medicaments were and still are subjected to an elaborate process by KRA and based on information from a Mr. Stephen Musembi of Intra Speed Arcpro Ltd its clearing agent this process can be summarised as follows:

(1) Entry registration: This involves capturing of data necessary for declaration of the shipment to Customs as per the importation documents. While capturing the data, the appropriate customs processing Code (CPC) for duty exemption under the 5th schedule of EACCMA 2004 is selected (C490). The exemption code B0260 is also declared on column (n-preference code) of the single Administrative Document commonly referred as C17B. When satisfied that all the details have correctly been captured, the entry is registered. On the registered entry, when the exemption code B0260 is declared, the VAT amount payable is remitted.

(2) Payment of entry dues - At this stage the clearing agent settles all other payments due (the Government of Kenya Processing Fee, Railway Development Levy and Merchant Shipping Services levy). When the payments reflect on the entry in Simba System, the KRA Document Processing Officer (DPO) to whom the entry is allocated prompts the clearing agent through a system message to seek exemption approval of the VAT amount which was remitted at the time of declaration. At this point a Customs folder is prepared with a full set of all original importation documents and presented at the Customs exemption office in the region the clearance is taking place such as Mombasa Port.

(3) Exemption approval: On presentation of the Customs folder, the file is referred to a KRA Verification Officer at the physical location where the shipment is, for pre-verification to ascertain if what is being imported is actually the product in the Entry. Upon satisfying him/herself that the declaration is as per the physical cargo, the KRA Verification Officer inputs an online message confirming the description of the commodity and quantities shipped. The customs folder is returned to the clearing agent who takes it back to the exemption office.

(4) A KRA Exemption Officer then goes through the file against the exemption documents within their offices to establish whether the item for which exemption is sought qualifies. After the officer is satisfied that the item qualifies for exemption, he sends a message online in the system approving the exemption and inscribes the exemption message number on the folder. The customs folder is then returned to the clearing agent to enable them communicate with the Document Processing Officer so that the entry can be processed.

(5) Processing of the entry - On relaying the exemption message number to the Document Processing Officer, the officer confirms whether the exemption approval has indeed been granted and on being satisfied processes the entry by way of giving it a long-room pass.

(6) Clearance of the shipment - when the entry is passed, the clearing agent prints a passed copy, attaches it to the set of documents in the Customs folder and moves with it to the CFS for the actual clearance of the containers.

11. It was therefore the applicant's belief that in view of the subjection of the Applicant's imports to the elaborate exemption process and subsequent clearance by KRA officers the taxes demanded were not due. To it, the exemption of VAT on raw materials for the manufacture of medicaments has been applied by KRA to other companies manufacturing similar products as the Applicant and based on interactions with other companies in the region the exemption also applies to companies manufacturing similar goods as the Applicant in the East African region.

12. It was the Applicant's view that if the tax now demanded was actually due and the Simba System had indicated that it was payable upon the entries being made by the clearing agents, the Applicant would have paid the tax and adjusted its prices to reflect the cost of production which would have included the tax, an opportunity which the Applicant has now lost hence would suffer huge losses if it has to pay the tax demanded. It was disclosed that the medicaments manufactured with the subject raw materials were zero- rated for VAT under the VAT Act prevailing at the time in question and the Applicant would also have had an opportunity to apply for VAT refunds of 100% of the import VAT now demanded which the Applicant would have paid if it was shown to be payable by the Simba System upon entry of the details of the imports and the code specified by KRA. This opportunity, likewise, Applicant has now lost as the application must be made within one year and the new VAT Act 2013 under which the medicaments are no longer zero rated.

13. It was further contended that even if the import VAT demanded was payable, the Applicant would have recovered the entire amount through VAT refunds. KRA will therefore in effect not suffer any loss of revenue if the demand for the tax is quashed. To the Applicant, even if the import VAT demanded by KRA was actually payable, the following peculiar facts of this case should be considered:

(i) KRA made a representation to the Applicant and other manufacturers of medicaments in the industry that import VAT was not payable on importation of packaging and raw materials for the manufacture of medicaments.

(ii) KRA cleared and released to the Applicant the imports after all the taxes which the Simba System, controlled by KRA indicated were payable had been paid and after physical verification by its officers.

(iii) The Simba System is exclusively controlled by KRA. KRA also assigned the code applicable to the imports the subject of these proceedings. KRA cannot purport to unilaterally change the tax liability or lack thereof several years later.

(iv) The Applicant relied on KRA's representation that import VAT was not payable and took steps and made business decisions including fixing of prices on the basis of that representation.

(v) If the demand for tax is enforced, the Applicant will not have an opportunity to recover that money which it would have been able to do, had the demand been made timeously by, among others, factoring this cost in its pricing of the final products or applying for VAT refunds.

14. To the Applicant:

(i) The decision to demand the alleged unpaid import VAT is unilateral, unreasonable and unfair.

(ii) The decision of KRA is in breach of the Applicant's legitimate expectation.

(iii) By making the demand, KRA is abusing and unreasonably exercising its statutory power to collect taxes.

(iv) The demand for import VAT is made in bad faith particularly considering that KRA conducted its audit in 2009 and did not disclose any findings or assessment to the Applicant. If the tax was indeed payable, and had it been demanded in 2009, the potential exposure to the Applicant would have been greatly minimised.

15. It was therefore its view that In light of all the facts and circumstances set out above, the demand by KRA for import VAT should be quashed and this is done, it would suffer extreme hardship, substantial and irreparable losses and cash flow problems that would adversely affect its operations.

16. The Applicant denied that through the Federation of Kenya Pharmaceutical Manufacturers (herein after "the Federation") it sought an amendment of the provisions of the Eighth Schedule of the repealed Valued Added Tax (VAT) Act Cap 476 to have raw and packaging materials exempted from VAT as stated in the replying affidavit. According to it, it was at all material times not a member of the Federation having only become a member in the year 2013 after applying for membership thereof by way of an application dated 9th December 2013 and paying the sum of Kshs.180,000/- being the membership fee required by the Federation, membership which the Federation confirmed by way of a letter dated 18th December 2013. The Applicant therefore asserted that it has not at any time endorsed any decision by the Federation of Kenya Pharmaceutical Manufacturers (herein after "the Federation") to write to the Minister seeking an amendment to the provisions of the Eighth Schedule of the repealed VAT Act.

17. Based on legal advice, the Applicant believed that:

a. The letters dated 18th June 2004 and 15th July 2004 should not be construed to amount to "a petition seeking an exemption from payment of VAT" but rather a mere request to the Minister to issue a gazette notice confirming an already existing legal position to the effect that the raw and packaging materials were already exempted from import VAT under the applicable law.

b. The letters dated 18th June 2004 and 15th July 2004 should not be a basis for deviation, by the Respondent, from an already existing provision in law that specifically exempts the raw materials for the manufacture of medicaments from import VAT.

c. Any demand for tax has to be made on the basis of an express statutory provision and therefore the purported reliance by the Respondent, on the letters dated 18th June 2004 and 15th July 2004 is of no value at all.

d. The assertion by the Respondent that the Applicant endorsed the letters dated 18th June 2004 and 15th July 2004written by the Federation to the Minister of Finance is in bad faith as it is not only unsubstantiated but lacking in truth.

18. The Applicant denied that together with members of the Pharmaceutical manufacturing industry they conspired to defraud the Respondent by using an invalid code to clear its goods since the code B0260 was at all material times the code assigned by the Respondent for the clearance of packaging materials and raw materials used for the manufacture of medicaments. Based on information from its said Clearing Agent, it averred that the Respondent and its officers are part and parcel of the clearing process and that the use of the exemption code in the Respondent's Simba System has always been subject to the Respondent's approval. The applicant added that the exemption codeB0260 has been used for clearance by most manufacturers of pharmaceutical products for purposes of clearance of packaging and raw materials used for the manufacture of medicaments for several years and that between the years

of 2008 and 2013 being the period covered in the demand from the Respondent, a total of 230 entries were processed and cleared by the Respondent under the code B0260. It was its case that it has always considered and understood the correct position to be that no import VAT was payable on imports of raw materials for the manufacture of medicaments at all material times.

19. The Applicant disclosed that pursuant to section 229 of the EACCMA, it made an application by way of a letter dated 20th December 2013, for a review of the decision contained in the Respondent's demand letter dated 26th November 2013 which application was responded to by the Respondent in a letter dated 16th January 2014 received on 17th January 2014.

20. However, after receipt of the demand dated 26th November 2013, the Applicant made payment of VAT in respect of packaging and raw materials used for the manufacture of medicaments in spite of the position taken by the Applicant in the proceedings herein that this tax was not payable though the same was made on a without prejudice basis as its imports would not be cleared without payment of the tax. The said payment was therefore made only as a commercial decision in order to avoid putting its business at risk. It was disclosed that the total amounts, VAT as well as Railway Development Levy as well as IDF fees, paid for the period starting September 2013 to August 2014 was Kshs.17,373,025/- an amount for which pursuant to Regulation 148 of the East African Community *Customs and Excise Act* Regulations 2010, the Applicant by way of a letter dated 2nd September 2014 submitted an application for refund of tax paid in error.

21. The Applicant maintained its position that I the import VAT demanded by the Respondent is not due as per the applicable law as well as for the reason that the Respondent has at all material times, through its own conduct and/or representations confirmed with certainty that import VAT was not payable on the imported packaging and raw materials for the manufacture of medicaments. In particular, the Respondent made a decision to clear and release the Applicant's goods upon physical verification by its officers and satisfying itself that all taxes due were paid by the Applicant.

22. To the Applicant, it stands to suffer grave prejudice if the Respondent were allowed to go back on its representations by taking enforcement action against the Applicant particularly in view of the fact that the Applicant has relied on such representations extensively.

Respondent's Case

23. According to the Respondent, the Kenya Revenue Authority is established under the Kenya Authority Act Cap 469 Laws of Kenya and that the Respondent is an agent for the Government of Kenya for the collection and receipt of all revenue under section 5(1) of the said Act. Under Part 1 of the first Schedule, the Respondent enforces the East African Community Customs Management Act 2004 and the *Value Added Tax Act* (Cap 476 as repealed by the *Value Added Tax Act* No. 35 of 2013)

24. According to the Respondent, KRA carried out a post clearance desktop audit on the import operations of the Applicant, covering the period between 1st January 2008 and 31st October 2013, to establish if the records kept by the Applicant were accurate pursuant to section 235 of the EACCMA and section 30 (1) of the repealed *Value Added Tax Act*.

25. The Post Clearance Audit established that the Applicant when importing its Raw and Packaging materials for the manufacture of medicaments between 2001 and 2013 had been declaring the same as exempt from VAT while the same should have attracted VAT at the rate of 16% and as a result of that omission in the Applicant's declaration of import VAT, the Respondent raised tax arrears of Kshs 161,833,529 covering the period 1st January 2008 to 31st October 2013 (5 years) in compliance with section 235 (1) of the EACCMA and Regulation 7(6) of the Value Added Tax Regulations 1994.

26. Raw and Packaging materials for the manufacturing of medicaments such as dealt with by the Applicant, it was contended, have been exempted from Import duty but have never been exempted from Import VAT pursuant to Paragraph 26 of the Third Schedule of the *Customs and Excise Act*, Cap 472. However, EACCMA exempted Raw and Packaging Materials for the manufacturing of Medicaments from duty when it came into force in 2005. The Respondent added that zero-Rating of Raw materials for manufacture of medicaments was retained in the following year 1996 but shifted from item 26 of Part B of the Eighth Schedule to item 22 vide the Ninth Schedule of the Finance Act 1996 Act no. 8 of 1997 and that raw materials for manufacture of medicament remained zero-rated for VAT purposes between the year 1995 and 2000 that were not covered under the Audit in issue.

27. To the Respondent, when goods or services are not listed in the first, second, third, fifth or the eighth schedules they are subject to VAT at the rate of 16% which are provided for under the repealed Cap 476. In this case, at no time was the applicant exempted from paying VAT on its imports and the only exemption the applicant enjoys on importation of raw and packaging materials for the manufacture of medicaments is on import duty now under the EACCMA 2004. It was disclosed that the applicant through, its Federation of Kenya Pharmaceutical Manufacturers was also aware that raw and packaging materials for manufacturer of medicaments had not been exempted for the import VAT and petitioned vide a letter dated 15th July 2004 for exemption of duty and VAT. Despite that no amendment was done on the provision of the 8th schedule

28. In the Respondent's view, VAT is distinguishable from Import Duty, in that it's a domestic tax on the consumption of a person whereas Import Duty is a duty on goods entering or leaving a customs territory this is to raise Government Revenue and to protect domestic industries. The applicant's imports of raw materials used in the manufacture of medicaments are classified under chapters 28, 29 and 30 of the Common External Tariff, in which goods are assigned rates of import duties based on whether those were primary raw materials, industrial inputs, capitals goods or finished goods. Importers or clearing agents are expected to be aware of the duties payable per product. Taxes on imports are self-assessed by the importer who furnishes import entry. Duties payable by an individual are influenced by the Customs Procedure Codes and the Preference Codes used in the import entry.

29. In this case, it was averred that the respondent adopted a computerized system to facilitate a swift and efficient mode of clearing cargo at the port of Mombasa and that the General Exemption on Packaging materials and raw material for the manufacture of medicaments was introduced by Legal Notice No.2 of 15th September 2005 by the Council of Minister. Since packaging materials and raw materials are supposed to be entered under the Customs Procedure Code C420 which clearly indicates that Customs Taxes are not payable but import VAT is payable, the applicant ought to have made further declaration on the short levied import VAT.

30. The respondent confirmed that since the computerized system is as good as the information fed, there was no uncertainty in the law since it was clear the raw and packaging materials for manufacture of medicaments were not exempt from Import Duty under the Custom & Exercise Act and currently under the EACCMA.

31. According to the respondent, since there is no estoppel against statute, legitimate expectation cannot be contrary to statutory provisions and that demand made by the respondent on the import VAT was anchored in law and cannot be said to be unilateral, unreasonable or unfair. In its view, section 135 of the EACCMA allows the respondent to inspect and audit the accounts of the applicant the respondent is authorized to recover short levied taxes.

32. The respondent therefore asserted that since it had not acted unreasonably in exercising of its statutory power to collect taxes, the order of Certiorari and the orders of Prohibition could not be issued against him.

33. According to it, the Tax Compliance Certificate is based on self-assessment and does not stop the respondent from auditing the applicant and demanding any unpaid taxes established to be due and payable. The law mandates the commissioner to audit and confirm self-assessments and demand short levied taxes.

34. The Respondent was of the view that there are nine (9) main issues raised in this application for the Court's determination and may be summarized as follows:-

    a. Whether the Respondent acted within its mandate.

    b. Whether the Post Clearance Audit was necessary.

    c. Whether import VAT ought to be administered under the VAT Act or the EACCMA.

    d. Whether the raw and packaging materials for the manufacture of medicaments were exempt from Import VAT and whether there were uncertainties in the law.

    e. Whether the Applicant was aware that the Import VAT was due and payable to the Respondent.

    f. Whether the Respondent, through the SIMBA System, created a Legitimate Expectation.

    g. Whether the Orders sought by the Applicant can issue against the Respondent.

    h. Whether the issuance of a Tax Compliance Certificate stops the Respondent from demanding taxes

    i. Whether there are any VAT refunds payable to the applicant.

35. Based on the foregoing issues, it was submitted that section 5(1) of the *Kenya Revenue Authority Act*, the Authority is an agency of the Government for the collection and receipt of all revenue. Further, under section 5(2) of the said Act, with respect to the performance of its functions under subsection (1), the Authority is required to administer and enforce all provisions of the written laws set out in Part 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. Further, under Part 1of the First Schedule to the *Kenya Revenue Authority Act*, Cap 469 Laws of Kenya, one of the laws the Kenya Revenue Authority enforces is the EACCMA.

36. In execution of that mandate under sections 235 and 236 of the EACCMA, the Respondent is duty bound by law to carry out Post Clearance Audit on the import declarations made by taxpayers through verifying the accuracy of the entry of goods or documents and investigate whether any party has made the correct Customs declarations and paid all the taxes due.

37. It was contended that the ex parte Applicant (and thirty other pharmaceutical companies) was subjected to a Post Clearance Audit (Desk Audit) covering the period between January 2008 to October 2013 in accordance with the powers donated to the Commissioner by the EACCMA section 235 and 236 of the EACCMA. This was precipitated by a discovery that there was a problem with the payment of Import VAT on raw materials and packaging materials for the manufacture of medicaments that cut across the Pharmaceutical Sector in the country. The said Desk Audit carried out by the Respondent on a number of Pharmaceutical Companies revealed that out of thirty one

(31) Pharmaceutical Companies, only eight (8) companies were remitting to the Respondent import VAT on raw materials and packaging materials for the manufacture of medicaments contrary to the provisions of the repealed VAT Act, Cap 476, Laws of Kenya.

38. According to the Respondent, this was a very specific desk audit that targeted the Import VAT on raw materials and packaging materials for the manufacture of medicaments and covered the whole Pharmaceutical sector in the country.

39. Through a letter dated 26th November 2013, the ex parte Applicant was notified of its specific findings of the Desk Audit and assessed for the short levied taxes in the sum of Kshs.161,833,529.00/- and the taxes sought to be enforced in accordance with Section 130, 131 and 135 of the EACCMA. The letter went ahead to warn the ex parte Applicant that the assessment was a result of Desk Audit and did not exonerate the ex parte Applicant from any future field or desk audits. It was therefore contended that the allegations by the ex parte Applicant that by a letter dated 21st May 2009 the Respondent conducted an audit whose results were never communicated cannot be challenged in this forum since this suit seeks redress against a specific demand contained in the letter dated 26th November 2013 and that this particular Desk Audit targeted all Pharmaceutical Companies and sought to rectify a specific common anomaly within the pharmaceutical sector in the country.

40. As to the necessity of the said post clearance audit, it was contended that the role of Customs Authorities is dynamic in order to ensure its relevance in a constantly changing world. In Kenya, Customs is generally associated with the collection of import and excise duties so much that it is lost to many that Customs plays other critical roles such as trade facilitation compliance and facilitation, interdiction of prohibited substances, protection of cultural heritage and enforcement of intellectual property laws. It is because of reasons such as trade facilitation that sections 235 and 236 of the EACCMA has endowed the Commissioner of Customs with the powers to carry out Post Clearance Audits in order to ensure that goods are efficiently cleared from the port of entry and the time taken while in Customs custody is significantly reduced and to enable traders to dispose of their goods promptly upon their arrival in the country. Therefore the purpose of such audits is to verify the accuracy and authenticity of declarations and covers a trader's commercial data, business systems, records and books. Post Clearance Audits can be conducted on a case-by-case basis, focusing on targeted sectors/industries, selected on the grounds of risk analysis of the commodity and/or trader, or in a planned, regular way, set out in an annual audit programme.

41. To the Respondent, the essence of a Post Clearance Audit is articulately captured in the Guidelines for Post Clearance Audit (PCA) Volume 1 by the World Customs Organization (officially known as Customs Cooperation Council), June 2012 at the introduction where it is provided that:

> " The traditional public image of the Customs official is often portrayed as the uniformed man or woman at a frontier airport. The physical presence of Customs at the gateway to a country means checks can be conducted in real time before a decision is made to release a consignment of goods. It can also act as a deterrent to would be fraudsters. Border controls still have a part to play in a modern Customs service; however, excessive and time-consuming checks at the point of clearance can be counter productive. Modern international commerce works to tight deadlines and national economic benefits can be derived as the result of the smooth and timely clearance of goods. Furthermore, the majority of international trade involves large corporations with global networks and complex business systems and supply chains. The limited documentation required to be produced at the time of importation does not provide the whole picture and context of a commercial transaction, which is necessary to properly determine, inter alia, the correct Customs value, classification and

entitlement to preferential origin. It becomes unfeasible, therefore, for Customs to make conclusive decisions regarding duty liability in the narrow time frame available. Neither is it appropriate to delay clearance of goods whilst resolving such enquiries, unless fraud is suspected. Many administrations, therefore, now concentrate their controls on post-importation environment, whilst retaining selective and targeted checks at the frontier.

By application of a post-clearance, risk-based approach, Customs are able to target their resources more effectively and work in partnership with the business community to improve compliance levels and facilitate trade. The Post-Clearance Audit (PCA) process can be defined as structured examination of a business' relevant commenced systems, sales contracts, financial and non-financial records, physical stock and other assets as a means to measure and improve compliance."

42. These guidelines were relied upon by virtue of section 223(g) of the EACCMA which provides that:

> "In any proceedings under this Act a certificate or a copy of a document or publication purporting to be signed or issued by or under the authority of the Customs Co-operation Council (WCO) and produced by the Commissioner shall be admissible in evidence and shall be prima facie evidence of the matters contained therein."

43. To the Respondent, Post clearance Audits are not only an integral and necessary part of customs control of imported goods in Kenya but also a common practice the world over. In the circumstances, it is absurd of the Applicant to allege that the Post Clearance Audit was carried out in bad faith and was an abuse of power.

44. On the issue whether Import VAT ought to be administered under the VAT Act or the EACCMA, the Respondent relied on the preamble to the repealed VAT Act provides that it is:

> An Act of Parliament to impose a tax to be known as Value Added Tax on goods delivered in, or imported into Kenya; and on certain services supplied in or imported into Kenya and for connected purposes.

45. In the Respondent's view, this means that all Value Added Taxes are to be collected under the VAT Act and in case of any exemption to the Value Added Tax it has to be specifically provided for in the VAT Act. Further section 9(1)(c) and (d) of the VAT Act imposes Value Added Tax on imported supplies while under section 6(5) of the VAT Act, Cap 476, Value Added Tax on imported supplies is collected under the EACCMA, 2004 and before then under the *Customs and Excise Act* Cap 472 of the laws of Kenya. Therefore, according to the Respondent, while Value Added Tax on imports is charged under the VAT Act the same is collected by the Commissioner of Customs at the Port of Importation together with duty of Customs "as if it were a duty of customs"; this doesn't make it a duty of Customs. The Respondent justified this reasoning on the basis that "Tax" under section 2 of the VAT Act Cap 476, is defined as "Value Added Tax chargeable under this Act" whereas "Duty of Customs" is defined as "excise duty, import duty, export duty, suspended duty, dumping duty, levy, cess, imposition, tax or surtax charged under any law for the time being in force relating to customs or excise." In addition, under section 57 of the VAT Act, Cap 476, imported goods are liable to Value Added Tax, whether those goods were liable to any duty of Customs or not, as if all such goods were liable to duties of Customs and as if those duties included tax. It was therefore its position that the determination of the Value Added Tax chargeable on imported goods is ascertained as provided for under section 9(1)(c) and (d) of the VAT Act and that since VAT on imported goods is collected under the Customs Law as a percentage of the duty of Customs, when it comes to accounting for the same it is the Customs

Officer who is conversant with the Customs procedures and processes to account for it and conduct Post Clearance Audit to ensure VAT is levied but this does not make it a duty under the Customs law.

46. It was contended that Raw and Packaging materials for the manufacture of medicaments such as dealt with by the Applicant have never been exempt from import VAT under the repealed VAT Act, Cap 476 or the current VAT Act, 2013 though historically, they were being charged Import VAT under the VAT Act at zero-rate (0%) between 1995 and 2000.In 1995 vide Finance Act No. 13 of 29th December 1995, Part B of the Eighth Schedule of the repealed VAT Act Cap 476, was amended by introducing a new item 26 making Raw Materials for Manufacture of Medicaments special goods subject to zero rating which was retained in the following year, 1996, but shifted from Item 26 of Part B of the Eighth Schedule to Item 22 vide the Ninth Schedule of the Finance Act 1996, Act No. 8 of 1997 hence Raw Materials for Manufacture of Medicament remained zero rated for VAT purposes between the year 1995 and 2000.

47. According to the Respondent, come the year 2001 vide Finance Act No. 6 of 31st December 2001, the Eighth Schedule of the repealed VAT Act Cap 476 was further amended by deleting Part B, Item 22 on "Raw Materials for Manufacture of Medicament" thus subjecting the items to Import VAT before clearance through Customs effective 15th June 2001.On the other hand, Paragraph 26 of the Third Schedule of the *Customs and Excise Act*, Cap 472, provided that Raw Materials for use in Manufacture of Medicaments were exempt from Import Duty, Suspended Duty and Dumping Duty. In 2005 when the EACCMA came into force and replaced the *Customs and Excise Act*, Cap 476, section 114 and Paragraph 16 of the Fifth Schedule exempted Raw and Packaging Materials for the manufacture of medicaments from Customs duty. It was therefore clear, in the Respondent's view that during the period under review, January 2008 to October 2013 the Applicant's Raw and Packaging materials for the manufacture of medicaments were neither exempt from VAT nor attracting VAT at 0%. In support of this position the Respondent relied on Pharmaceutical Manufacturing (K) Co. Ltd & & Others vs. Commissioner General of the Kenya Revenue Authority & 2 Others [2014] eKLR.

48. It was the Respondent's contention that from the replying affidavit of Mr. Martin Kariuki, the Applicant through its Federation, the Federation of Kenya Pharmaceutical Manufacturers, was not only aware that the pharmaceutical manufacturing inputs were neither exempt nor zero rated from import VAT but also aware that if the said pharmaceutical inputs were exempted or zero rated from import duty, the Minister would have to do it on the Kenya Gazette and that from the letter dated 15th July 2004 the Minister did not take any action and even if he did, the said pharmaceutical manufacturing inputs were not gazetted for exemption or zero rating in the Kenya Gazette. In any event, it is a presumption of law that once a law has been assented to, every citizen is deemed to be aware of the law and the said law is enforceable against all citizens. The Finance Act 2001 was assented to on 31st December 2001 and the Applicant was deemed to be aware of the applicability of the law. The said Finance Act 2001 deleted Item 22 of Part B, of the Eighth Schedule of the repealed VAT Act on Raw Materials for Manufacture of Medicament thus subjecting the items to Import VAT before clearance through Customs effective 15th June 2001.

49. To the Respondent, the Applicant was aware that Import VAT was due and payable to the Commissioner but wilfully chose to disregard the law by not remitting the import VAT.

50. On alleged legitimate expectation created by the Simba System, it was the Respondent's case that the doctrine of legitimate expectation as propounded by the Applicant in this matter is not only erroneous but also misleading. To the Respondent, it is charged with the responsibility of facilitating both international and local trade by providing expedited clearance of goods through simplified and harmonized Customs procedures as envisaged under the Revised Kyoto Convention. To this end, the

Respondent in the year 2000 procured a Customs Automated System commonly known as the Simba System to replace the inefficient and unreliable manual system that was liable for delays in clearance of goods and loss of government revenue. The Simba System, it averred, is an open and interactive system built on a client/server platform which enables the clearing agents to prepare and lodge customs entries online for customs officials to process and facilitate the release of imported goods as captured in the affidavit sworn by Stephen Musembi on 1st September 2014 where it is deposed that it is the Applicant's responsibility to input data into the Simba System through a clearing agent who enters the Regime Code and the Customs Procedure Code applicable to a commodity. This is the hallmark of a self-assessment system of taxation.

51. It was expounded that the Customs Officer is then supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the accrual of demurrage and customs warehouse rent. It is for this reason that the Respondent is conferred powers under section 235 and 236 of the EACCMA to conduct Post Clearance Audits to verify the accuracy of the entries after the goods have been released from Customs control. It is worth noting that the tax statutes are self sustaining and provide remedies where taxes are short levied in the process of facilitating trade.

52. According to the Respondent, in the present case, the Applicant and its clearing agent deliberately chose to apply the wrong Customs Procedure Code (CPC) C490 for 'direct importation for home use' in order to enjoy an exemption instead of using Customs Procedure Code C400 for 'goods liable to duty and taxes' which would have subjected the goods to duty and import VAT. To the Respondent, a computerized system is as good as the information it is fed and if manipulated to give a certain desired outcome, it is more often than not susceptible to such manipulation since the person feeding it the information is the person in command. The Applicant chose the Customs Procedure Code C490 because it was the only code that would have allowed for the use of the Preference Code B0260 which the Applicant used in order to avoid paying Import VAT. The Applicant, like the other companies that complied, ought to have used the Customs Procedure Code C400 which did not permit the use of the Preference Code B0260.

53. It was therefore the Respondent's contention that it was not only simplistic but also self-serving for the Applicant to claim that the failure which they knowingly occasioned and which went unnoticed for some time by the Respondent created a legitimate expectation on their part.

54. The Respondent relied on Republic vs. Kenya Revenue Authority Exparte Shake Distributors Limited [2012] eKLR, for the proposition that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner and for the promise to hold, the same must be made within the confines of law since a public body cannot make a promise which goes against the express letter of the law. In this case, however, it was contended that as there was no representation made to the Applicant to the effect that Import VAT will not be charged on their imports or to the effect that they would be exempted from the provisions of Section 235 and 236 of the EACCMA, the claim for legitimate expectation by the Applicant must fail. The Respondent was however of the view that even if one was inclined to question the existence of the Preference Code B0260 in the SIMBA System which allowed the Applicant to import the goods without paying Import VAT, a loophole that the Applicant sought to exploit, this would not preclude the Respondent from demanding the short levied Import VAT under section 135 of the EACCMA since the VAT Act was clear that Import VAT was due and payable upon import of the pharmaceutical materials. In support of its case the Respondent relied on Mombasa Civil Appeal No. 157 of 2007 between Commissioner Customs and Others versus Amit Ashok Doshi & Two Others, and submitted that the doctrine of legitimate expectation as advanced by the Applicant must fail. In addition, the Applicant cannot be

heard to say that the short levied taxes are hefty while the said short levied taxes were accrued as a result of the Applicant's own devious and negligent acts of inputting the wrong Customs Procedure Code with a view of minimizing their tax liability contrary to the express provisions of the VAT Act.

55. On the issue whether the orders sought can issue against the Respondent, it was contended that following the Post Clearance Audit, on all pharmaceutical companies to establish their compliance levels, it was established that out of the thirty one (31) pharmaceutical companies, eight companies were compliant and the other twenty three (23) companies were non-compliant and on diverse dates in November 2013, the twenty three (23) pharmaceutical companies were notified by the Respondent of the outcome of the desk audit and the short levied taxes were demanded. Out of the twenty three (23) companies found to be non-compliant, fourteen (14) companies entered into a payment plan to pay the short levied taxes while nine (9) companies filed suits against the Respondent. The Applicant, vide a letter dated 26th November 2013, was notified by the Respondent that the desk audit had revealed it owed Kshs.161,833,529.00/- for the five years covered by the audit period running from January 2008 to October 2013 in line with the provisions of section 135(3) of the EACCMA. The said letter elaborately stated how the assessment of Kshs. 161,833,529.00/- had been arrived at and the Applicant was even warned that failure to pay the taxes within thirty (30) days would result in a penalty of 5% of the amount demanded and a further penalty of 2% for each month in default.

56. Despite the provisions of section 229(1) of the EACCMA which allows the Applicant, within thirty days of the decision by the Commissioner, to file for a review of the decision, the Applicant filed this suit on 23rd December 2013 extinguishing the procedures contemplated under section 229 of the EACCMA. Therefore, the Applicant cannot be heard to say that it was not afforded an opportunity to respond to the findings of the audit conducted by the Respondent.

57. To the Respondent, although by a letter dated 20th December 2013 the Applicant sought a review of the decision of the Commissioner contained in the letter dated 26th November 2014, the Respondent by a letter dated 16th January 2014 rightfully dismissed the said application for review of the decision on the grounds that the Applicant had filed this Judicial Review proceedings before this Hon. Court. The Respondent noted that:

    a. Section 229 (4) provides that, "The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision."

    b. By the letter dated 16th January 2014 the Commissioner informed the Applicant that, "Subsequently, on 23rd December 2013 you lodged a Judicial Review under Miscellaneous Civil Application No.458 for review of the matter. In our view the matter you are seeking for review has been overtaken by events as the Commissioner is unable to act as requested in your letter dated 20th December 2013. Please note that the decision of the Commissioner has not changed and the demand still stands." This constituted a decision by the Commissioner affirming the decision contained in the letter dated 26th November 2013.

    c. The 'correctness' or 'wrongness' of the reasons contained in the Commissioner's letter dated 16th January 2014 ought to have been challenged by the Applicant under the provisions of section 230 of the EACCMA at the Tribunal and not via this Judicial Review proceedings.

    d. In addition, on 8th January 2014 the Applicant served the Commissioner with an order prohibiting the Respondent from commencing or instituting any enforcement or prosecution actions against the Applicant or its directors on account of the demand contained in the letter

dated 26th November 2013. The order also barred the Commissioner from taking any steps to collect any money pursuant to the said demand letter. In the circumstances, the Commissioner correctly adjudged the provisions of section 229 to have been overtaken by events since her hands were tied by these proceedings.

e. It is fallacious to claim that the review under section 229 of EACCMA and the Judicial Review proceedings instituted by the Applicant can run concurrently. If that were true, then the Applicant ought not to have sought for a stay of the demand dated 26th November 2013 in order to allow the procedures under section 229 of the EACCMA to run the full course. The net effect of these Judicial Review proceedings where a stay order in favour of the Applicant been granted was to expose the Commissioner to contempt proceedings if she pursued the matter under section 229 of the EACCMA.

f. The two cases cited by the Applicant do not apply to this case. First, the circumstances surrounding those cases are not similar to this one. Second, in those cases the Commissioner rendered her decision out of time whereas in this case the Commissioner rendered her decision within the statutory period. Lastly, what the Applicant is contesting in this case is the 'correctness' or 'wrongness' of the reason given by the Commissioner which is beyond the mandate of this court sitting in Judicial Review proceedings.

58. It was contended by the Respondent that from the foregoing, it is apparent that the decision of the Commissioner contained in the letter dated 26th November 2013 was informed by the provisions of the EACCMA and VAT Act and that the decision was made in good faith since it was restricted to the five years, from January 2008 to October 2008, allowed by the section 235 of the EACCMA despite the problem stemming from the year 2001. In addition, the decision was fair and reasonable since it was applied across the pharmaceutical sector in the country and the rules of natural justice were observed. The Applicant was served with a demand notice and had an option of challenging it in accordance with the provisions of section 229 but opted to file this Application which is beyond the control of the Respondent.

59. The Respondent accordingly submitted that the remedy of Judicial Review is not available to Applicant since Judicial Review is not an avenue to pursue an appeal since it is not concerned with the merits of the decision but the decision making process and relied on Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR.

60. To the Respondent, the remedy of Judicial Review is not available to the Applicant because the writ of Certiorari cannot issue to quash the decision of the Commissioner contained in the letter dated letters dated dated 26th November 2013 in the absence of averments of bad faith, ulterior motive or possible perverseness on the part of the Respondent of which there is no cogent evidence or at all of acting without statutory authority and jurisdiction. The writ of prohibition is also not available to the Applicant because the Respondent has not acted unreasonably, without or in excess of her jurisdiction and reliance was placed on Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR.

61. According to the Respondent, the fact that the Respondent did not notice the error for over 13 years cannot confer upon the Applicant the right not to pay taxes that were and are due and payable to the Commissioner subject to the limitations imposed by section 135(3) of the EACCMA. In this respect,

it relied on Niazsons (K) Limited vs. China Road & Bridge Corporation (Kenya) [2000] eKLR, where the Court of Appeal held that:

> " It is trite that there can be no estoppels against statute. Nor can jurisdiction be conferred by estoppels, consent, acquiescence or default."

62. It was the Respondent's position it demanded the short levied taxes legally and in accordance with the provisions of the VAT Act and section 135 of the EACCMA and should therefore be allowed to undertake its statutory duties unhindered in order to safeguard the much needed Government revenue.

63. The Respondent therefore urged this Court to find that the Application dated 2nd January 2014 lacks in merit and dismiss the same with costs to the Respondent.

Determinations

64. I have considered the issues raised in this application by way of affidavits, Statement of Facts, grounds and submissions by the respective parties. Before plunging into the Application proper, it is important once again to regurgitate the principles guiding tax legislation. These principles were restated in Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR where Majanja, J held:

> " The approach to this case is that stated in the oft cited case of Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64 as applied in T.M. Bell v Commissioner of Income Tax [1960] EALR 224 where Roland J. stated, " ...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." As this case concerns the interpretation of the *Income Tax Act*, I am also guided by the dictum of Lord Simonds in Russell v Scott [1948] 2 ALL ER 5 where he stated, "My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him" adopted in Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR per Nyamu JA (See also Jafferali Alibhai v Commissioner of Income Tax [1961] EA 610, Kanjee Naranjee v Income Tax Commissioner [1964] EA 257). Any tax imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute. In Adamson v Attorney General (1933) AC 257 at p 275 it was held that, "The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect- if it be in view of the Crown a defect can only be remedied by legislation."

65. In Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109;

Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

66. Similarly, it was held in Vestey vs. Inland Revenue Commissioners [1979] 3 All ER at 984 that:

> "Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined."

67. In the same vein, it was held in Russell (Inspector of Taxes) vs. Scott [1943] AC 422 at 433:

> "I must add that the language of the rule is so obscure and so difficult to expound with confidence that – without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind I feel that the tax payer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected...my Lords, there is a maxim of income tax law, which though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion."

68. In Unilever Kenya Limited vs. The Commissioner of Income Tax Nairobi High Court Income Tax Appeal No. 753 of 2003, in which the holdings in Scott vs. Russell [1948] 2 All ER 1 and Kanjee Nazanjee vs. Income Tax Commissioner [1964] EA 257 were cited with approval, it was held that where the language used in the legislation is somehow obscure, the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clarity before he is adversely affected. In Commissioner of Income Tax vs. Westmont Power (K) Ltd Nairobi High Court Income Tax Appeal No. 626 of 2002, the Court while citing Inland Revenue vs. Scottish Central Electricity Company [1931] 15 TC 761 expressed itself as follows:

> "Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity...any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation."

69. In tax cases therefore the Court is not entitled to attempt a discovery at the intention of the Legislature but must restrict itself to the clear words of the statute.

70. The same reasoning was adopted by Nyamu, J (as he then was), in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 240 where he expressed himself as follows:

> "taxation can only be done on clear words and cannot be on intendment. Linked to this is that a penalty must be imposed in clear words. Finally even where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes a burden, tax or duty on the subject...Nothing summarises the above position better than Brooms Legal Maxims: 'a remedial statute therefore shall be construed so as to include cases which are within the mischief whichthe statute was intended to remedy; whilst, on the other hand, where the intention of the Legislature is doubtful, the inclination of the court will always

be against that construction which imposes a burden, tax or duty or the subject. It has been designated as "a great rule" in the construction of fiscal law, "that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation; and if a person who is subjected to a duty in a particular character or answers that description, the duty no longer attaches upon him and cannot be levied. A penalty moreover must be imposed by clear words. The words of a statute shall be restrained for the benefit of him against whom the penalty is inflicted, and the language of the statute must be strictly looked at in order to see whether the person against whom the penalty is sought to be enforced has committed an offence to do with it.'...The principle remarked Lord Abinger "adopted by Lord Tenterden, that a penal law ought to be construed strictly is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject and I hope will always remain so. This Court of course does appreciate the point made by the respondents' Counsel that if the meaning of the provisions of the relevant empowering taxation laws is clear the court has no business intervening. This principle is based on the high authority of Bennun on Statutory Interpretation at page 726, 727 as follows:- ...If the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. It is of course regarded as penal for a person to be taxed twice over in respect of the same matter." The significance of this quotation is that although the applicant did file monthly returns and keep daily production records, and the stockbook as required the tax imposed by the subsequent formula based on input and output purports to tax the company twice. This is also reflected in the inconsistent figures reflected by the three major audits. The taxman had come up with inconsistent figures for the same period due to its lapse in adhering to the law especially s 137 of the Act. I find that they cannot tax the applicant twice over Bennion adds:- 'Nevertheless taxation is clearly "penal" within this section of the Code, and must not be enforced by the courts unless clearly imposed. As Evans LJ said in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision so that the taxpayer shall not become liable to tax unless this is clearly and unequivocally the object of the statutory provisions...The Courts are reluctant to adopt a construction permitting a person's tax liability to be fixed by administrative discretion.'...This is how this court has regarded the assessment of tax on an arbitrary input-output formulae because it is not supported by any law nor is its retroactivity permitted by law...The same principles as above, were accepted and applied in the case of Cape Brandy Syndicate vs. Inland Revenue Commissioners [1921] KB 64 where Ronlat J, restated the principle in these words: 'in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no reason for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly on the language used.'... Again, in the case of Ramsay Ltd vs. Inland Revenue Commissioner [1992] AC 300 the same principles were expressed as follows:- 'A subject is only to be taxed on clear words not upon intendment, or upon the "equity" of an Act'. Any taxing Act of Parliament as to be construed in accordance with this principle. What are "clear words" is to be ascertained upon normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole and its purpose may, indeed should be regarded ..." ..... A subject is entitled to arrange his affairs so as to reduce his liability to tax.

The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect."

71. However, whereas the Court appreciates the need to collect taxes, in carrying out their statutory obligations the tax authorities must adhere to the law. As was held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others (supra):

> " It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due...Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law."

72. This position is reflected in Inland Revenue Commissioners vs. Wolfson [1949] 1 All ER 864 at 868 where it was held that:

> " It was argued that the construction that I favour leaves an easy loophole through which the evasive tax payer may find escape. That may be so, but I will repeat what has been said before. It is not the function of a court of law to give words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which had the legislature thought of it, would have been covered by appropriate words. It is the duty of the Court to give to the words of this subsection their reasonable meaning, and I must decline on any ground of policy to give them a meaning which with all respect to the dissentient Lord Justice I regard as little short of extravagance."

73. It is clear that what provoked these proceedings was the letter dated 28th November, 2013, from the Respondent to the applicant by which the Respondent was claiming unpaid VAT amounting to Kshs 427,918, 033/- for the period covering January, 2008 to November, 2013 within 30 days of the date thereof. It is not contended that the Respondent is not legally entitled to demand for VAT which was due before the repeal of the VAT Act, as long as the period in question does not go beyond 5 years, hence the limited period of between January, 2008 and October/November, 2013.

74. From the Applicant's own case, it is clear that from 1995, all taxes normally levied on raw materials for packaging and manufacture of medicaments was to be exempted. This according to the applicant was as a result of an understanding between the then Ministry of Health, Treasury and Federation of Kenya Pharmaceutical Manufacturers. Following that understanding, both the VAT Act and the *Customs and Excise Act* (the CEA), under item 26 of Part B of the 8th Schedule exempted from all taxes, raw materials and packaging for manufacture of medicament since both legislation had the same exemptions regime.

75. However, come the year 2001, whether by design or by inadvertence this legal position changed when both legislation were amended vide Finance Act of that year which removed the exemptions regime therefrom. This position seems to be on all fours with the Respondent's contention that vide Finance Act No. 6 of 31st December 2001 the Eighth Schedule to the repealed VAT Act Cap 476 was amended by deleting Part B, item 22 on "Raw Materials for Manufacture of Medicament" subjecting it to import

VAT before clearance through customs effective 15th June 2001. However, it was the Applicant's contention that the Respondent and the Treasury continued to exempt from payment of all taxes, raw materials and packaging for manufacture of medicament so that all clearance systems remained as before. Again this factual position is not denied by the Respondent.

76. This position seems to have remained till 2004, when the East African Community Customs and Management Act (EACMA) was passed which operated to repeal the provisions of the Customs & Excise Act and under the 5th Schedule Part B, thereof, packaging materials and raw materials for manufacture of medicament is exempted upon recommendation of the authority responsible for the manufacture of medicaments.

77. From the Applicant's own position it therefore comes out clearly that from the time the Finance Act No. 6 of 31st December 2001 was passed till 2005 when EACCMA, 2004 became effective there was no express legal regime exempting the Applicant from payment of all taxes on raw materials and packaging for manufacture of medicaments. The applicants relied on the amendments to the *Customs and Excise Act* in 2002 (CEA) which according to it, broadened the definition of "duty" to include VAT. The question is therefore whether in broadening the definition of duty in the *Customs and Excise Act* in 2002, necessarily amended the VAT Act as well. To make this finding would amount to derogation of the known principle in tax matters that one has to look merely at what is clearly stated as there is no room for any intendment and nothing is to be read in or implied. This rule, it is my view applies to both the taxpayers and the taxing authority. Accordingly, I am unable to import the definition of duty under the CEA to apply to the VAT Act by implication.

78. It is therefore clear that for that period apart from other issues raised in this application the applicant had no specific legal regime exempting it from payment of the subject taxes.

79. Again, it is the applicant's case that following the passage of the said EACCMA, the Minister for the time being of Health periodically made recommendations to the Treasury and the Respondent to have raw materials and packaging for manufacture of medicament exempted from payments of VAT and Customs Duty in accordance with section 23 of the now repealed VAT Act which permitted him to do so and the 5th Schedule, Part B, item 16 of EACCMA. It is therefore similarly clear that from the Minister's point of view, even the passage of the EACCMA did not automatically exempt the applicant from the payment of the subject taxes his powers were to periodically recommend to the Treasury and the Respondent to have raw materials and packaging for manufacture of medicament exempted from payments of VAT and Customs Duty in accordance with section 23 of the now repealed VAT Act which permitted him to do so and the 5th Schedule, Part B, item 16 of EACCMA. That this is the position comes clearly from the applicant's own contention that subsequent to the coming into force of the EACCMA, the Ministers responsible for Finance of Kenya, Uganda and Tanzania on 14th day of May 2005 agreed to amend EACCMA and the Common External Tariff (CET) in order to remove the requirement for recommendation of the authority responsible for manufacture of medicaments in order to unconditionally exempt from duties packaging and raw materials for manufacture of medicaments. Therefore even the said Ministers appreciated that the exemption was not absolute but was subject to recommendations. This was the position adopted by Lenaola, J in Pharmaceutical Manufacturing and 3 Others vs KRA and two Others (supra) in which he stated that:

> " The obvious effect therefore is that there may well be exemption subject to proper approvals being obtained..."

80. This position seems to have prevailed till 29th May, 2014 when by the VAT Amendment Act the First Schedule to the VAT Act was amended to allow for exemption of VAT on raw materials imported

for use in manufacture of medicaments "as approved from time to time by the Cabinet Secretary for National Treasury in consultation with the Cabinet Secretary responsible for health". Even with this amendment, it is still clear that the exemption of VAT depends on periodical approvals by the Minister.

81. The applicants contend that the exemption was informed by the Government policy of facilitating the production of cheap medicines which can compete with imported medicine and thus promote the development and expansion of the local industry and to avoid closure of local medicine manufacturing companies which closure would inevitably lead to loss of jobs and to further promote the status of Kenya as the biggest pharmaceutical manufacturing in the region. Why the Government did not think it proper to translate this policy into law even after the Federation brought this to attention of the then Minister of Finance remains a mystery. That the Federation itself appreciated that there was something amiss in the Minister not expressly gazetting the exemption is clear from its letters dated 18th June 2004 and 15th July 2004 addressed to the Minister for Finance petitioning that Pharmaceutical Manufacturers be exempted from Duty and VAT. The Minister however maintained a loud silence.

82. The first issue for determination is whether the policy alluded to could supersede the express provisions of the law. In Cape Brandy Syndicate vs. Inland Revenue Commissioner [1921] 1 KB 64, it was held:

> "In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

83. In my view this Court does not have the liberty to read into the tax legislation the effect of what was not expressed therein. Similarly, this Court is not permitted to draw on the past episodes to determine whether or not the tax is payable. In this case as long as the 2001 amendments to the Finance Act which removed the exemptions regime from the VAT Act and the *Customs and Excise Act*, the law is that prima facie the Applicant was liable to pay the said taxes. This position is reinforced by no less than *the Constitution* itself where in Article 210(1) it is expressly provided that:

> (1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.
>
> (2) If legislation permits the waiver of any tax or licensing fee—
>
> (a) a public record of each waiver shall be maintained together with the reason for the waiver; and
>
> (b) each waiver, and the reason for it, shall be reported to the Auditor-General.

84. It is therefore clear that public or Government policy cannot without more override the express provisions of the law. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policies or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See Richardson vs. Mellish (1824) 2 Bing 229 and Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251.

85. In R vs The Council of Legal Education Ex-parte James Njuguna & 14 Others [2007] eKLR the Court cited the holding in Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kurmarstheth [1985] where it was held that:

> "so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or the efficaciousness of such rules or regulations. It is

exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not the court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation – making power conferred on the delegate by the statute. The responsible representative entrusted with the power to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair...It is not for the court to concern itself with the policy behind the Act and the regulations as long as the latter are within the purview of the parent Act. This court prefers to keep away from usurpation of power or any manifestation of usurpation of power clearly vested in a competent authority by Parliament."

86. A similar position was taken in Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL to the effect that:

> " It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show."

87. The Court's role in such matters was explained in Judicial Review Handbook by Michael Fordham (Third Edition) p.249- 256 as hereunder:

> " Every public body has its own role and has matters which it is to be trusted to decide for itself. The courts are careful to avoid usurping that role and interfering whenever it might disagree as regards those matters."

88. The parties ought to appreciate the parameters of judicial review as opposed to an appeal. Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.

89. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that

in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See Reid vs. Secretary of State for Scotland [1999] 2 AC 512.

90. The common law view was that judicial is concerned not with private rights or the merits of the decision being challenged but with the decision making process and that its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It aims at ensuring that the individual receives fair treatment, and not see that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

91. The rationale for this position was that to do that would amount to the Court sitting on appeal on the decision made by the Respondent. This position was appreciated in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 where it was held that:

> "Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

92. It was similarly held in Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR, that:

> "...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its

own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter..."

93. Similarly, in Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.

94. This position was adopted in Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited where Majanja J. quoting with approval the decision of Githua J in Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR as follows;

> " It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

95. The question whether a judicial review Court is the proper forum to deal with the issue whether or not taxes are due and if so how much has been the subject of judicial decisions in this jurisdiction. As was held by the Court of Appeal in Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007:

> " As the trial Judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili's account at the Bank was or was not liable to tax. No material was placed before the Judge on that point... it was not the role of the superior court nor of this Court to determine the correctness or otherwise of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004."

96. I similarly associate myself with the decision of Korir, J in H.C. Misc. Civil Application No.36 of 2011; Republic vs. Kenya Revenue Authority; Ex-Parte: Bata Shoe Company Limited, where the Court confronted with the issue whether certain payments made by the Ex-parte Applicant to a Procurement

Centre (CFS) were costs associated with design of production and hence should be brought to charge under the fourth Schedule of EACCMA that deals with valuation held that:

> "The Applicant appears to be urging this Court to determine that the payments made to CFS were buying commissions...What the Applicant is asking this Court to do may be done by an appellate court. Acting as urged by the Applicant would be a usurpation of the Respondent's powers. The Respondent is mandated in law to assess tax and it should be allowed to do its work. Even if the Court decides to be the taxman, it does not have in its possession the documents presented to the Respondent by the Applicant in support of its claim that whatever it paid CFS were buying commissions. I therefore reject the Applicant's application in relation to the service charges/buying commissions."

97. In other words the issue whether or not tax is due and payable ought to be left to an appellate Tribunal as opposed to a judicial review Court since such issues go to the merit of the decision rather than the process.

98. The issues of Tax Compliance Certificate, was raised by the Applicant though the same was not touched on by the Respondent in the submissions. This Court held in Republic vs. Kenya Revenue Authority & Another ex parte Tradewise Agencies [2013] eKLR:

> "Although the respondent contends that a person who complies with the provisions of the Seventh Schedule paragraph 7 is eligible for a Tax Compliance Certificate because the said person has filed tax returns and paid what he has assessed himself as due to the Commissioner and that a Tax Compliance Certificate does not mean that a person's accounts are perfect or beyond reproach and only an audit conducted by the First Respondent can certify accounts to be beyond reproach for tax purposes the same certificates indicate that the authority reserves the right to withdraw the certificate if new evidence materially alters the tax compliance status of the recipient. Why would the certificate be withdrawn if it is not evidence of compliance? If it is only evidence of submission of remission of taxes in which event it is not binding on the authority there would be reason for it to be withdrawn by the authority. The only conclusion one would draw is that the certificate is prima facie evidence of compliance and until withdrawn the same is proof of fulfilment of the obligation to pay taxes... Whereas this Court cannot hold that the applicant was not obliged to pay any taxes, the 1st respondent was expected to notify the applicant of any discovery of new evidence which was likely to materially alter the applicant's tax compliance status and hear the applicant's side of the story before taking an action which was contrary to its earlier conduct."

99. In other words Tax Compliance Certificate is a rebuttable evidence that a person is tax compliant. Whereas, in Tradewise Case there was no evidence that the applicant was afforded an opportunity to deal with the rebuttal of this presumption, in this case the Respondent has explained the circumstances giving rise to these proceedings. According to the Respondent, following the Post Clearance Audit, on all pharmaceutical companies to establish their compliance levels, it was established that out of the thirty one (31) pharmaceutical companies, eight companies were compliant and the other twenty three (23) companies were non-compliant and on diverse dates in November 2013, the twenty three (23) pharmaceutical companies were notified by the Respondent of the outcome of the desk audit and the short levied taxes were demanded. Out of the twenty three (23) companies found to be non-compliant, fourteen (14) companies entered into a payment plan to pay the short levied taxes while nine (9) companies filed suits against the Respondent. The Applicant, vide a letter dated 26th November 2013, was notified by the Respondent that the desk audit had revealed it owed Kshs.161,833,529.00/-

for the five years covered by the audit period running from January 2008 to October 2013. This was in line with the provisions of section 135(3) of the EACCMA.

100. The letter elaborately stated how the assessment of Kshs. 161,833,529.00/- had been arrived at. The Applicant was even warned that failure to pay the taxes within thirty (30) days would result in a penalty of 5% of the amount demanded and a further penalty of 2% for each month in default.

101. By a letter dated 20th December 2013 the Applicant sought a review of the decision of the Commissioner contained in the letter dated 26th November 2014, which the Respondent by a letter dated 16th January 2014 dismissed on the grounds that the Applicant had filed this Judicial Review proceedings before this Hon. Court. However the Commissioner respondent by affirming the said decision.

102. That being the position, the circumstances herein ought to be distinguished from those in the Tradewise Case. It bears repeating that Tax Compliance Certificates are not a final proof of payment of taxes. However, where there is evidence that the taxpayer did not actually pay the taxes, the tax authority ought to furnish the taxpayer with the grounds on the basis of which the tax authority believes that the information giving rise to the Certificate was incorrect before seeking to recover what in its view is the correct amount of tax due.

103. The circumstances of this case clearly show that the Respondent put forwards its case to the Applicant which case the applicant challenged through the available legal mechanisms. Accordingly, the finality of the said Tax Compliance Certificates does not arise in these circumstances.

104. I am aware of the decision by Mumbi Ngugi, J in Navcom Ltd vs. Kenya Revenue Authority and 3 Others Petition No 86 of 2012 where the learned Judge expressed herself as follows:

> "I am unable to accept the contention by the petitioner that the issuance of the Tax Compliance Certificate was 'unqualified' and that therefore the demand for arrears was unreasonable. The explanation by the respondent that the issue of the certificate was an acknowledgement that the petitioner had complied with the requirement to file its tax returns as part of the country's self- assessment system and that the self-assessment is subject to further audit is, in my view, more credible."

105. If I understand the learned Judge well, the Judge was not rubbishing the importance of the Tax Compliance Certificate. The Judge was simply disabusing the notion that the said certificate is unqualified and cannot be challenged. It is in the same light that I understand the decision of Korir, J in Republic vs. Kenya Revenue Authority ex parte Tononoka Steels Ltd HC Misc. Appl. No. 165 of 2014. In my view the two Courts' understanding of the Tradewise Case was correct.

106. It is however contended that the Respondent by its action or inaction in demanding for payment of VAT created a legitimate expectation in the applicant that VAT was not payable. This fact according to the applicants was reinforced by the introduction of the Simba System through which the said VAT was automatically exempted. This issue brings us to what constitutes legitimate expectation.

107. In Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012 it was held that:

> "According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of De Smith's Judicial Review, 'Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)'. It follows

therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law. In the case before me there is no evidence of a written or verbal promise made to the Applicant that its goods would be allowed in Kenya once he obtained the necessary licenses. One may argue that the legitimate expectation was based on the understanding that goods from Uganda would be admitted into Kenya at a duty rate of 0%. However, that argument cannot hold when one considers the fact that the Respondent has a statutory duty to ensure that all the necessary taxes for goods entering Kenya have been paid. The Applicant's argument that its legitimate expectation was breached therefore fails."

108. The three basic questions were identified in R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19] as follows:

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself t0; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

109. It was further held in R vs. Jockey Club ex p RAM Racecourses [1993] 2 All ER 225, 236h-237b that the basic hallmarks of an unqualified representation are:

> "(1) A clear and unambiguous representation. (2) That since the [claimant] was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the [claimant] to rely upon it without more...(3) That it did so rely upon it.(4) That it did so to its detriment...(5) That there is no overriding interest arising from [the defendant's] duties and responsibilities."

110. According to De Smith, Woolf & Jowell,"Judicial Review of Administrative Action" 6th Edn. Sweet & Maxwell page 609:

> "A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

111. However it was held in South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18] that:

> "Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

See also Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] Ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67].

112. Similarly, in Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280 it was held:

> " The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

113. The first ground upon which the applicant based its case of legitimate expectation is the long period that lapsed between the time the transactions took place and the demand for the payment of tax. To the applicant this period spans 13 years. That 13 years is such a long time for a prudent and efficient authority to discover its mistake is not in doubt. However, on its part the Respondent relied on section 135(3) of EACCMA, 2004, which seems to give remedies to the Respondent in the event of short levies resulting from an action taken in the facilitation of trade, as long as the recovery of the short levy does not go beyond 5 years. In this respect sections 235 and 236 of the EACCMA, 2014 are couched in the following terms:

235 (1) The "proper officer" may, within five years of the date of importation, exportation or transfer or manufacture of any goods, demand for documents relating to the goods, to answer any question in relation to the goods; and to make declaration for audit purposes.

236 The Commissioner shall have the powers to- (a) verify the accuracy of the entry of goods or documents (b) question any person; (c) inspect the premises of the owner of the goods or; and (e) examine the goods.

114. I agree with the position taken by the Respondent that the Customs Officer is supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the accrual of demurrage and customs warehouse rent hence the reason for conferment of the powers under section 235 and 236 of the EACCMA to conduct Post Clearance Audits to verify the accuracy of the entries after the goods have been released from Customs control.

115. However the exercise of statutory power must be so exercised in a manner that is fair and just to the people against whom the same is being exercised. As was held in Keroche Industries Limited vs. Kenya

Revenue Authority & 5 Others (supra) while citing Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC:

> "A power which is abused should be treated as a power which has not been lawfully exercised...Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in ex parte Unilever Plc (supra) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must pass a much higher test than that of rationality from the standpoint of the public body...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the ex-parte Preston where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617 that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral purpose, as set out in ex-parte Preston, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."

116. As was held in Republic vs. Commissioner of Co-operatives ex-parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd [1999] 1 EA 245 (CAK) at page 249, statutory powers can only be exercised validly if they are exercised reasonably, rationally and properly and no statute ever allows any public officer to statutory power arbitrary or capriciously. It similarly held in Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] eKLR at page 20 that it is now an accepted principle in this field of law that statutory powers and duty must be exercised and performed reasonably.

117. Public authorities must therefore exercise their power diligently, fairly and prudently. This was the position in Doody vs. The Home Secretary of State[1993] 1 All ER 151 where it was held that:

> " Where an Act of Parliament confers administrative power there is a presumption that it will be exercised in a manner which is fair."

118. The exercise of public power whether permitted or otherwise in a manner that frustrates the purpose for which the power is granted amounts to abuse of the same. This was the position adopted in Republic vs. Commissioner of Customs Exparte Mulchand Ramji & Sons Limited [2010] eKLR in which it was held that:

> " A power may be abused in various ways for example when one acts beyond the limits of power, or acts irrationally or acts for an improper purpose or seeks to frustrate the legitimate expectation of another. A public body or officer is expected to act fairly in decision making, so that if he dies not, then he is deemed to abuse his powers....In the instant case, I have found above that there seems to be no legal or factual basis upon which the Respondent decided and classified the goods...and therefore abused its powers and unfairly exercised its discretion."

119. Abuse of power is one of the grounds upon which a taxing authority's powers can be challenged and this was appreciated in Re Preston [1985] 1 A.C. 835, page 836 paragraphs B and C where it was held that:

> " a taxpayer could challenge a decision taken by the commissioners in exercising their statutory powers and duties if he could show that they had failed to discharge their statutory duty towards him or that they had abused their powers..."

120. The duty to act fairly, on the other hand was emphasised in by Scarman L.J. in H.T.V. Ltd vs. Price Commission [1976] I.C.R. 170 at page 189, which was cited by Lord Templemann in Re Preston (supra) at page 866 paragraph A and B where the Judge expressed himself as follows:

> " Agencies such as the Price Commission must act fairly. If they do not, the High Court may intervene either by prerogative order to prohibit, quash or direct a determination as may be appropriate, or, as sought in this case, by declaring the meaning of the statute and the duty of the agency...It is a commonplace of modern law that such bodies must act fairly...It is not really surprising that a code must be implemented fairly, and that the courts have power to redress unfairness."

121. In this case, the Respondents seek to recover the taxes for the period between January 2008 to October, 2013. The letters demanding for the said payment were dated 9th October, 2014 and 3rd December, 2014. Whereas the period for which the taxes were being demanded was within the statutory grace period of 6 years, when it comes to the consideration of legitimate expectation, it is the effect of the delay as opposed to its length coupled with the conduct of the parties that comes into focus. Where the inability by the taxing authority to discover the actual taxes payable was as a result of concealment by the tax payer, the tax payer cannot hide behind legitimate expectation to escape the payment of taxes. I

accordingly associate myself with the position adopted by Lenaola, J in Pharmaceutical Manufacturing and 3 Others vs. KRA and Two Others (supra) that:

> " ...the 1st Petitioner cannot therefore devise methods of avoiding tax and then claim that it had been exempted of the same."

122. However, where the taxing authority goes to sleep and as a result lulls the taxpayer into a false sense of security that the taxes in question would not be demanded, as a result of which the tax payer loses recourse which would have been legally available to it had the tax been demanded promptly, it may well be unfair and unjust for the demand to be sustained.

123. In this case, it is clear that prior to the year 2001, the applicant enjoyed tax exemptions on VAT in respect of raw materials and packaging for manufacture of medicaments. Whereas in 2001, the said exemption was removed, no VAT was claimed from the applicant whether deliberately or inadvertently. By the time the Respondent sent its demand on 28th November, 2013, the applicant contends, which contention is not seriously contested that the Applicant was nolonger in a position to claim refunds which it would have otherwise been in a position to claim had the demand been prudently made. The Applicant contended that it had already lost opportunity to adjust the prices of its products in order to factor in the cost of production which would have included the import VAT. The effect of this is that the applicant would have to bear the loss which but for the inaction on the part of the Respondent, it would have otherwise not absorbed.

124. That the applicant is in control of the instrument s through which the actual taxes are payable is not in doubt. By not regularly monitoring its said instruments with a view to determining the actual taxes payable, the Respondent placed the applicant in the unenviable position where the applicant is being exposed to shouldering the burden which legally ought not to have been shouldered by it. In my view the circumstances of this case cry loud against the imposition of the burden on the applicant. The Respondent, in my view by its failure to act prudently, cultivated in the applicant legitimate expectation that the position prevailing before 2001 would continue to prevail notwithstanding the 2001 amendments to the Finance Act.

125. I appreciate the holding in Tarmal Industries Ltd v. Commissioner of Customs and Excise [1968] EA 471 approved in Commissioner of Customs & Others vs. Amit Shok Doshi (supra) that:

> " The fact that he failed to do so, on the authorities above cited cannot him from carrying out his duty when he discovers the original error. Indeed, his earlier classification under item 108 (k) was in breach of S. 195 of the East African Customs Management Act. It was a breach of statutory duty and in that sense it was not lawful and estoppel cannot be raised against him to prevent him from correcting that act. Naturally one reaches such conclusion with a certain measure of reluctance as it is undoubtedly hard on the defendant company to be called upon long after the event to find such a substantial sum, which would not have been payable but for the plaintiff's negligence in the first instance in not having pellets which were sent to him for examination properly tested. One can well understand, however, that on balance it is preferable that the law should be as it is. It is not in the interest of consistent application of the law that errors should be sanctified as principle..."

126. However each case must be determined on its own merits and there is no hard and fast rule in these kinds of cases. The general rule is however the one propounded in Mombasa Civil Appeal No. 157 of 2007 between Commissioner Customs and Others vs. Amit Ashok Doshi & Two Others that:

> " The High Court of Tanzania (Georges, C.J) held that there was no estoppel against statute and that although Commissioner initially erred in deciding the substance was not dutiable and possibly was negligent not to have analyzed the sample the Commissioner was bound under the law to correct the matter and levy duty on the basis that the substance had always been dutiable. His lordship after a consideration of the authorities said in part at page 482 para E:-
>
> 'The fact that he failed to do so, on the authorities above cited cannot him from carrying out his duty when he discovers the original error. Indeed, his earlier classification under item 108 (k) was in breach of S. 195 of the East African Customs Management Act. It was a breach of statutory duty and in that sense it was not lawful and estoppel cannot be raised against him to prevent him from correcting that act. Naturally one reaches such conclusion with a certain measure of reluctance as it is undoubtedly hard on the defendant company to be called upon long after the event to find such a substantial sum, which would not have been payable but for the plaintiff's negligence in the first instance in not having pellets which were sent to him for examination properly tested. One can well understand, however, that on balance it is preferable that the law should be as it is. It is not in the interest of consistent application of the law that errors should be sanctified as principle...'"

127. Nevertheless, where the delay in exercising statutory power has led to injustice which would otherwise have been avoided and no explanation is forthcoming for such inaction the law must step is to ameliorate the injury. In my view this was the genesis of the principle of legitimate expectation. In the circumstances of this case, the respondent's actions and inactions legitimately created an expectation on the applicant that the taxes were not payable as was held by Nyamu, J in Akaba Investments Limited vs. Kenya Revenue Authority [2007] eKLR, 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.

128. Apart from legitimate expectation, it was the applicant's case that in any case, there was no loss occasioned to the government since even if duty had been paid the Respondent would have passed the tax burden to the ultimate consumers of its products by claiming back refunds hence the loss would be nil for the Respondent. This contention brings into focus whether the decision to demand the taxes was therefore Wednesbury unreasonable. This principle was projected in Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223 where it was held:

> " It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926]

Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

129. Therefore if authority empowered to exercise statutory power does not in bad faith, its decision would amount to irrationality. This must be so due to the rationale propounded by Prof Sir William Wade in his work Administrative Law that:

> " The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them..."

130. Therefore if a public authority delays in the exercise of its statutory power without justifiable grounds and as a result, the person against whom the power is exercised is exposed to unwarranted injury, the authority may be deemed to have intended to exercise its powers in order to achieve collateral purposes. To set out to impose a liability upon the applicant which liability the applicant would have been entitled to reimbursement after the period for seeking the same is in my view irrational.

131. This Court is aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:

> " Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial

review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

132. Similarly in Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998 the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in Re: *National Hospital Insurance Fund Act* and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3 I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

133. Again in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 the Court expressed itself as follows:

> " So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."

134. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that:

> " ... like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century..."

135. Article 259 of *the Constitution* of Kenya, 2010, places a constitutional obligation on courts of law to develop the law so as to give effect to its objects, principles, values and purposes. This position was appreciated in the South African case of Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99, with respect to the provisions of *the Constitution* of that Country which bears similarities to our own Constitution. In that case, the Constitutional Court of South Africa (Chaskalson, P) expressed itself as follows:

> "Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by *the Constitution*...Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under *the Constitution* which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by *the Constitution*, (and that need not be decided in this case) *the Constitution* is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

136. According to Judicial Review Handbook, 6th Edition by Michael Fordham at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

137. However, as stated hereinabove, like all legal remedies, judicial review continues to enlarge the categories of its sphere of influence. Proportionality for example is considered to be one of the grounds upon which judicial review relief may be granted. The Fair Administrative Act (Sections 7(i) and 7(ii)) specifies proportionality as a ground to challenge administrative decisions if the decision is not proportionate to the interests or rights affected. Proportionality was recognized by Lord Diplock, in Council of Civil Service Unions vs. Minister for the Civil Service 1AC, 374 where he recognized the development of this ground in the Laws of the European Economic Community. Apart from that the

courts have over the years developed a framework within which to conduct a proportionality analysis which is usefully summarised by De Smith, Woolf and Jowel, Judicial Review of Administrative Action, Fifth Edition (pp.594-596) that it is:

> " a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues."

138. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by Lord Steyn in R (Daly) vs. Secretary of State for Home Department (2001) 2 AC 532 where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

139. This is the position now adopted by the Court of Appeal which expressed itself in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 Others [2016] eKLR, at paras 55-58 as follows:

> " 55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of *the Constitution* to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.
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> 56. Analysis of Article 47 of *the Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were

not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah (supra) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (1) (e) and (h) of the *Fair Administrative Action Act* permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

140. My understanding of the Court of Appeal's position is that for the purposes of making a determination as to whether the decision being challenged was irrational, was not proportional or failed to consider relevant matters, the Court is bound to deal with the merits of the questioned decision. Where however the Court finds that these principles were not adhered to, the Court still has no power to substitute its decision for that of the decision maker and can only remit the matter back to the said authority. The Court however appreciated that future judicial decisions shall delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*.

141. Whereas it is true that judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of *the Constitution* and the conventional grounds for judicial review take a secondary role after the constitutional benchmarks, the South African Constitutional Court, itself recognised in Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health (supra) that:

> " The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of *the Constitution* and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of *the Constitution* consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system *the Constitution* is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under *the Constitution* according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under *the Constitution*, and another thing under the common law...Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under *the Constitution* and in accordance with its provisions. Section 167(3)(c) of *the Constitution* provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."

142. In my view since *the Constitution* is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under *the Constitution* and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the *Law Reform Act* and Order 53 of the Civil Procedure Rules have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in *the Constitution*. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the Civil Procedure Rules should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent.

143. In my view however, the final decision does not rest upon the issue whether or nor the Respondent was legally entitled to collect the taxes due or whether or not taxes were actually due. The decision rests on the process that was being adopted by the Respondent in the exercise of its statutory obligation. That in my view is not an issue for an appeal but one that falls squarely within the judicial review

jurisdiction. I, accordingly associate myself with the decision on Nyamu, J (as he then was) in Stephen Mutuku Muteti vs. The Director of Land Adjudication & Settlement & Others Nairobi HCMA 246 of 1998 that:

> " The court deals with limits of power because the Government is limited by law and when public officers act outside the law aggrieved parties are as of right entitled to ask for relief from the Courts so that those limits of power are defined by the Court and the necessary sanctions are given. Where the decision making process is clearly flawed in that the public officers clearly acted outside their jurisdiction and their acts were both biased, unreasonable and not supported by any provision under the relevant Act, a constitutional and judicial review court cannot deny the applicant a judicial remedy because the illegality brings the matter within the judicial review ambit."

144. Whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action simply because there is a right of appeal provided by the statute especially where such a right is less convenient, effective and beneficial or otherwise less appropriate.

145. According it is my view that the provisions of section 229 and 230 of ECCMA do not bar this Court from dealing with the issues raised herein.

146. Whereas this Court appreciates the role of the Respondent in the collection of taxes which is the mainstay of development in this Country, and that all those who are liable to pay taxes ought to do so no matter the amount as long as the same is lawful, in the exercise of its mandate the Respondent is expected to be guided by the national values and principles of governance in Article 10 of *the Constitution* one of which is integrity. In view, my efficiency in public finance is a component of integrity. A body entrusted with the collection of revenue ought not to be seen to be lethargic in the conduct of its affairs and whereas the law allows the Respondent a period within which to confirm its record, that period ought not to be taken as a derogation of Article 47 of *the Constitution* that requires that administrative action be carried out expeditiously.

147. Apart from that since in making its decision the Respondent was purportedly applying the law, it was constitutionally obliged pursuant to Article 10(1)(c) of *the Constitution* to comply with the national values and principles of governance and in my view this include fair administrative action as enshrined in Article 47 of *the Constitution* which provides as hereunder:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

148. This was the position adopted in Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, in which the Court of Appeal held that:

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of

constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

149. In other words the Respondent is under a constitutional obligation to be efficient and when its failure to adhere to this constitutional decree renders its decision unfair, the same is liable to be struck out as amounting to abuse of power. As was held in Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR:

> " If statutory power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations."

150. Having considered the issues raised in this application, it is my view and I so hold that on the ground of legitimate expectation, abuse of or wrongful exercise power and irrationality the Respondent's decision cannot be allowed to stand. My view is reinforced by the decision in Keroche Case (supra) at page 23 that "a decision tainted with abuse of power is not severable... and once tainted always tainted in the eyes of the law".

151. With respect to the tax refunds, the Respondent admitted that the sum of Kshs 11,151,476/- was due and owing to the applicant and that the only stumbling block was the Treasury. I agree with the position in Republic vs. Kenya Revenue Authority Exparte L.A.B International Kenya Limited Misc Civil Application Number 82 of 2010 (Unreported), Kenya Data Networks Limited vs. Kenya Revenue Authority [2013] eKLR and Tata Chemicals Magadi Limited vs. Commissioner of Domestic Taxes (Large Taxpayers) [2014] eKLR that the Respondent is under an obligation to act upon the Petitioner's VAT refunds timeously and the failure to do so amount to a breach of the applicant's right to a fair administrative action under Article 47 of *the Constitution*. I further agree that a taxpayer who carries own business in accordance with the law is entitled to a refund as a matter of right and that the process of verification and processing the claim must, in the word of article 47 of *the Constitution*, be efficient and expeditious.

152. With respect to the failure on the part of the Treasury to make allocation for the said refunds I wish to remind the Respondent of the position adopted by Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR that:

> " Once the certificate of order against the Government is served on the Hon. Attorney General, Section 21(3) imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. The Respondent's claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year." [Emphasis added].

153. In my view, the financial public requires decisiveness and finality in the conduct of their financial affairs and they should not be placed in limb or state of uncertainty for unnecessarily long as to when their money will eventually be refunded to them. The economy with the current volatile financial markets cannot afford to have such uncertainty. Therefore where it has been ascertained that a tax payer is entitled to a refund, such refund ought to be made timeously and without unreasonable delay to enable them invest the same.

154. In the premises, it is my view and I hereby find that it would be contrary to justice to compel the applicant to pay the sum demanded by the Respondent. To do so would be contrary to substantive fairness which dictates that a body must not act conspicuously unfairly, nor unfairly as to abuse its power, nor in unjustified breach of legitimate expectations.

155. Accordingly, based on the said grounds, the Notice of Motion dated 31st December, 2014 is merited.

Order

156. Consequently, I issue the following reliefs:

1. An Order of Certiorari removing into this Court and the decision by the Kenya Revenue Authority to make demand and the demand contained in the letter dated 26th November 2013 requiring the Applicant to pay Kshs.161, 833,529.00 on account of Import Value Added Tax allegedly due from the applicant which decision is hereby quashed.

2. An order of prohibition prohibiting the Kenya Revenue Authority, whether by itself, its officers, employees and/or agents, from commencing, instituting or proceeding with any enforcement or prosecution actions against the Applicant or its directors and/or officers on account of demand contained in the letter dated 26th November 2013 issued to the Applicant.

3. An order of mandamus compelling the KRA to process and pay the Applicant the admitted sum of Kshs 11,151,476/- being Value Added Tax refunds due to the Applicant forthwith.

4. Since this determination has not been arrived at based on the merits and a determination has not been made on the issue whether or not there were taxes actually due and owing but merely on the process of recovery thereof, there will be no order as to costs.

157. Orders accordingly.

DATED AT NAIROBI THIS 10TH DAY OF JUNE, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ochieng for the Applicant

Miss Mburugu for the Respondent

Cc Mutisya