



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D.S. MAJANJA J.**

**TAX APPEAL NO. E033 OF 2020**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES.....APPELLANT**

**AND**

**UNGA LIMITED .....RESPONDENT**

**(Being an appeal from the Judgment of the Tax Appeals Tribunal at Nairobi delivered on 4<sup>th</sup> March 2020 in Nairobi Tax Appeal Tribunal Appeal No. 156 of 2017)**

**JUDGMENT**

**Introduction**

1. This is an appeal by Commissioner of Domestic Taxes (“the Commissioner”) from the judgment of the Tax Appeals Tribunal (“the Tribunal”) delivered on 4<sup>th</sup> March 2020 arising from the Respondent’s objection dated 26<sup>th</sup> July 2017. The Commissioner filed the Memorandum of Appeal dated 30<sup>th</sup> April 2020. The Respondent (“Unga”) opposed the appeal. It filed a Statement of Facts dated 15<sup>th</sup> June 2020. Both parties filed written submissions which their counsel canvassed at the hearing.

**Background**

2. At the centre of this appeal is a dispute is over a Value Added Tax (VAT) refund claim for Kshs. 189,958,332.00 which Unga lodged with the Commissioner for the period between June 2012 and April 2013.

3. By a letter dated 7<sup>th</sup> October 2014, the Commissioner informed Unga that its VAT refund claims totalling Kshs. 189,958,332.00, “*are all processed and in the Finance Department.*” It further stated that the National Treasury had put a freeze on payment of all refund claims prior to 31<sup>st</sup> December 2013. Subsequently, the Commissioner requested Unga to provide various documents to enable it update its corporate tax records pending processing of the VAT refund claim.

4. By its letter dated 27<sup>th</sup> April 2015, Unga informed the Commissioner that all the requested information had been provided save for the tax return for the year 1998 which it could not trace. It however informed the Commissioner that it had filed the tax return on the basis of its audited financial statements and the 1998 tax computations as well as the receipt of the instalment tax paid in 1998 for a sum of Kshs. 9,000,800.00. It further requested to know if it could resubmit the tax return for the year 1998 in a bid to ensure that all the necessary information was provided.

5. In its letter dated 5<sup>th</sup> May 2015, Unga wrote to the Commissioner requesting to transfer its overpayment accumulated for the year 1997 being Kshs. 12,597,014.00 and the year 1999 being Kshs. 1,294,000.00 to offset its principal tax liability for the year 2010.

6. The Commissioner responded by its letter dated 9<sup>th</sup> October 2015 informing Unga that the tax return for the year 1998 had not been filed and that the transfer of the payment was not possible. It instead demanded payment of the principal tax liability for the year 2010.

7. Through its tax agents, Unga responded by a letter dated 15<sup>th</sup> October 2015 stating that the tax return for the year 1998 had been filed but could not be traced. It once again requested that the overpayments for the years 1998 and 1999 be utilized to offset the tax liability for the year 2010.

8. By the letter dated 1<sup>st</sup> December 2015, Unga resubmitted the tax return for the year 1998 together with the 1998 tax computation, supporting schedules and a copy of the 1998 audited financial statements.

9. The Commissioner in a letter dated 27<sup>th</sup> June 2017 withdrew the letter dated 7<sup>th</sup> October 2014 wherein it had confirmed processing the VAT refund claim. It based its actions on adjustments which Unga should have made in its financial records and which were not made. The overall effect of the adjustments was to wipe out the entire VAT refund claim for the period June 2012 and April 2013 which had been approved.

10. The Commissioner contended that the adjustments were necessitated by the 1998 balance sheet of Unga Millers Limited, a subsidiary Company that had merged with Unga, which showed an outstanding receivable from the group companies yet the same was no longer in existence following a merger. A further discrepancy it noted was the plummeting of Unga 's income from operational profits from Kshs. 292 million to a loss of Kshs. 311 million and lastly huge payments made towards staff retrenchments in the year 1998. The Commissioner further informed Unga that the VAT tax refund was subject to verification of its tax compliance status in light of the missing tax return for the year 1998.

11. Unga objected to the decision by the Commissioner withdrawing its letter dated 7<sup>th</sup> October 2014 confirming that it was processing the VAT refund claims by its letter dated 26<sup>th</sup> July 2017 on several grounds. First, that the VAT tax refund claim had already been approved, processed and confirmed for payment after the Commissioner had subjected the claim to due process of verification and approval in light of the fact that Unga had provided all the necessary information for processing it under the VAT legislation in force at the time. Second, that the original tax return for the year 1998 was submitted and resubmitted. In that regard, it contended that the **Income Tax Act** and **Tax Procedures Act** ("the **TPA**") do not provide for a time limit for filing an original self-assessment return or for re-submission. It argued that in any event that the self-assessment return did not have any relevance to the VAT refund. Third, that the Commissioner was time-barred from making a default assessment under **section 29(5)** of the **TPA** which limited the period 5 years. Fourth, it contended that it did not have any outstanding tax liability. It pointed out that the reason for the tax liability in 2010 was as a result of the Commissioner's failure to transfer the tax credits as requested. Fifth, Unga contended that the alleged discrepancies the Commissioner highlighted were not a true reflection of its financial affairs as its financial statements were reviewed and verified by an independent person in a professional capacity. It observed that any discrepancies would have been raised as it is a publicly listed company regulated by the Capital Markets Authority. Lastly, it stated that the Commissioner was estopped from deviating from the position communicated in its letter on 7<sup>th</sup> October 2014 that it was processing the VAT refund claims. In doing so, the Commissioner breached its legitimate expectation which negatively impacted its affairs, financial projections and strained its cash flows and this was in breach of the Commissioner constitutional responsibilities.

12. The Commissioner communicated its objection decision vide letter dated 15<sup>th</sup> September 2017 wherein it reiterated its position in rejecting the VAT tax refund.

13. Unga challenged the Commissioner's decision at the Tribunal. In its judgment, the Tribunal framed three issues for determination. First, whether the Unga's VAT refund claim of Kshs. 189,958,332.00 was due and payable. Second, whether Unga filed the 1998 return of income with self-assessment. Third, whether the Commissioner's failure to process the VAT refund claim after confirming that it was due and payable to Unga, goes against the doctrine of estoppel and legitimate expectation.

14. The Tribunal held that the VAT tax refund to be due and payable and further ordered that the overpayments of 1997, 1998 and 1999 be utilized to settle Unga Limited's tax liability for the year 2010.

#### **Appellant's submissions**

15. The thrust of the appellant's case is that the Tribunal misinterpreted provisions of the law and therefore reached an erroneous decision. It considered the main question to be whether the tax refund was due to Unga. In this respect Counsel for the Commissioner complained that the Tribunal erred when it misinterpreted provisions of the **TPA** stated that, "*The Commissioner cannot assess beyond five years, but the taxpayer is not prevented from self-assessing beyond five years.*"

16. The Commissioner based its case on the provisions of **Article 201(b)** of the Constitution which provides that the burden of tax is to be shared fairly. It also relied on **Article 210** of the Constitution which directs that no tax shall be waived or varied except in accordance with legislation and as such it is required to ensure that the tenets of the Constitution are adhere to.

17. The Commissioner contended that the Tribunal misinterpreted **section 47** of the **TPA** which required that before approving a refund, the Commissioner must ascertain the validity of the claim and subject it to audit. It submitted that under **section 47** of the **TPA**, a refund is what remains after the Commissioner has applied the overpayments to clear other taxes. Further, that the only way the Commissioner would know if there are other taxes pending is through an audit of the tax payer. It contended that since Unga insisted that it had filed but misplaced its tax return for the year 1998 and that even its auditors could not trace it, its tax affairs were no longer verifiable hence it could no longer pay out a refund as a matter of prudence. The Commissioner further contended that it could not accept the resubmitted tax return as properly filed and as such it was entitled to reject he refund claim.

18. The Commissioner submitted that the Tribunal accepted that the 1998 self-assessment was not filed as claimed but went on to find that though the time limit for making assessments was reduced to 5 years, there was no time limit for filing a tax return with the respective self-assessment. It attacked this finding as setting a dangerous precedent as it prohibits the Commissioner from making an assessment after the passage of 5 years but allows a tax payer to make a self-assessment at any time. The Commissioner questioned how it was expected to audit the return of 1998 under the limiting provisions of the **TPA**. In emphasising the duty of the Commissioner to conduct an audit, Counsel for

the Commissioner cited *Ericsson Kenya Limited v Attorney General & 3 Others* NRB Pet. No. 506 of 2013 [2014] eKLR where the court held that, “the Commissioner, when processing the claim, is not merely a conveyor belt performing a perfunctory exercise.”

19. While the Commissioner accepted that under **section 29(5)** of the *TPA*, it is prevented from making default assessment 5 years from the reporting period, it submitted that Tribunal ignored the contention that though the law is silent on the limitation on the tax payer, it did not mean that the period for filing was open. It submits that a strict interpretation meant that where the tax payer is allowed to self- assess in the first instance, the Commissioner must be accorded an opportunity to amend the assessment by issuing an additional assessment. It further submits that **section 23** of the *TPA*, the tax payer is required to maintain records so that their tax liability can be readily ascertained and such documents must be kept for a maximum period of 5 years.

20. The Commissioner submits that a loss carried forward from 1998 will continue to be carried forward beyond the years that the Commissioner can legally audit such that when Unga Limited filed a 1998 tax return in 2015, the Commissioner was precluded from requesting for documents from subsequent years. The Commissioner accuses the Tribunal of failing to consider the legal constraints with its finding that the tax payer could file a self-assessment at any time. It submits that it is important for this court to reverse the decision of the Tribunal in order to prevent tax payers from gaming the tax laws. In this case, the Commissioner points out that the Tribunal allowed Unga to game the system by ensuring its tax refund claim is immune to any deduction or that their return is not subjected to additional assessment. It concludes that watering down **section 47(2)** of the *TPA* in the manner in which the Tribunal did undermines **Article 201** of the Constitution in sharing of the tax burden.

22. The Commissioner further submits that the penalty for late filing under **section 83** of the *TPA* is not a carte blanche remedy and that when a return is filed late and the Commissioner cannot audit it, the penalty is irrelevant. It argues that the Commissioner’s duties cannot be reduced to an absurdity by an interpretation of the tax law that promotes avoidance and accountability. Late filing, the Commissioner argues, can only be within the confines of **section 23** of the *TPA* which limits the period to the five-year window for maintaining records.

22. The Commissioner submits that should the court uphold the Tribunal’s decision, it should set down the parameters within which the Commissioner will process the refund and provide guidelines on what happens to the Commissioner’s power to request documents outside the statutory timelines, bearing in the mind the impossibility on auditing in light of **section 23** of the *TPA*.

23. The Commissioner rejects the finding that there could be legitimate in favour of the Unga yet **section 48** of the *TPA* empowers the Commissioner to demand from a taxpayer an amount paid to them in error as a refund. It contends that in light of this provision, a claim based on legitimate expectation or estoppel cannot be made.

24. The Commissioner concludes by stating that this court should not countenance a position where a taxpayer who has failed to file a return and only does so when it caught claim a refund of tax. Counsel suggested that allowing Tribunal decision to stand would amount to permitting an irregular amnesty for non-filers which would undermine the properly regulated Voluntary Disclosure Programme (VDP) introduced in **section 37D** of the *TPA* by the *Finance Act, 2020*.

#### **Respondent’s submissions**

25. Unga’s case is that the Tribunal correctly interpreted **section 52B** of the *Income Tax Act* which is now **section 28** of *TPA* when it found that there is no time limitation on when the tax payer can file a self-assessment tax return. It contends that the law envisions late submission which can only accrue penalty under **section 72 (1)(a)** of the *Income Tax Act*, now **section 83 (1)(d)** of the *TPA*.

26. Unga urges the court to reject the Commissioners submission that the court should adopt a purposive approach in interpreting statutory provision and in instead adopt a strict interpretation in line with existing precedent that tax laws must be interpreted strictly. It relied on *Mount Kenya Bottlers Ltd & 3 Others v Attorney General & 3 Others* NRB Civil Appeal No. 164 of 2013 [2019] eKLR where the Court of Appeal cited with approval *Cape Brandy Syndicate v I.R. Commissioners* [1921] 1KB where it was held that **that in interpreting a tax statute there is no room for any intendment or implication.**

27. As regards the 1998 tax return, Unga states that it requested the Commissioner whether it could re-submit it via the letter dated 27<sup>th</sup> April 2015 in order to comply with the Commissioner’s request for information. Although the Commissioner failed to respond, it did re-submit the 1998 tax return for the 1998. Unga states that it is only two years later that the Commissioner withdrew its letter dated 7<sup>th</sup> October 2014 in the basis of the missing 1998 return. Unga supports that Tribunal finding that the re-submission of the return constituted the filing of the 1998 return and that the Commissioner could not interrogate the 1998 return unless it admitted that the same had been legally filed and by so admitting it was bound by the provisions of the *TPA* which limited it right to make an assessment.

28. Unga submits that the Commissioner could not request the court to make a presumption that the law should limit a tax payer from filing a self-assessment in the same manner it limits the Commissioner from making assessments after 7 years under **section 79** of the *Income Tax Act (Repealed)* and 5 years under the *TPA* departing from the rule of strict construction of taxing statutes even though the law is silent. It relied on the Court of Appeal decision in *Taib A. Taib Vs. Minister for Local Government* MSA Civil Appeal No. 107 of 2006 [2007] eKLR where it was held that in construction of statutes the court cannot legislate under the guise of interpretation by importing into a statute words which are not there or by filling gaps. The court further held that the duty of the court is limited to interpreting the words used by the legislature and has no power to fill in any gaps disclosed.

29. Unga contends that the Commissioner’s withdrawal of its letter dated 7<sup>th</sup> October 2014 under the guise of **section 47** of the *TPA* was misguided for two reasons. First, that while the Commissioner cited discrepancies in the 1998 tax return, it did not provide actual figures as to what the alleged discrepancies were and to what extent they affected the refund claim. Second, that the Commissioner has never disputed the validity of the VAT refund claim which was processed under the *VAT Act* and determined to be payable.

30. Unga further submits that no tax liability had crystallized on several grounds. First, under **section 79** of the *TPA*, the Commissioner is

empowered to make a default assessment within 5 years of following the last date of reporting unless there is gross or wilful neglect, evasion or fraud on the part of the tax payer under **section 29(6)** of the *TPA*. That the Commissioner failed to make use of this provision in respect of the 1998 tax return. Second, the Commissioner had in its disposal the power under **section 31** of the *TPA* to amend the self-assessment return that had been re-submitted in 2015 and issue and amended assessment. Unga supports the Tribunal's finding that there was no tax liability that had crystallized for the Commissioner to apply the tax refund and that holding on to a refund payment by the Commissioner in anticipation of a tax liability which has not crystallised in this case is not supported by law.

31. Unga maintains that it followed the procedure set out in **section 11 (2)** of the *VAT Act (Repealed)* in seeking the VAT refund and that under the procedure the Commissioner was required to carry out a review or audit of the application to satisfy itself that the VAT refund is due and payable before issuing its approval by the letter dated 7<sup>th</sup> October 2014. It condemned the Commissioner for indolence in invoking the provision of the law in disposal and for waiting until Unga engaged it for payment of its approved VAT refund claim.

32. Unga submits that the Commissioner has not disputed the validity of the VAT tax refund. It also noted that the Commissioner claims that Unga has not paid certain taxes for the year 1998, despite it providing audited financial statements for the year 1998, tax computations as well as receipt for the instalment tax paid in 1998 for a sum of Kshs. 9,000,800.00.

33. Unga supports the decision of the Tribunal on legitimate expectation. It states that it relied on the letter dated 7<sup>th</sup> October 2014 and proceeded to request that overpayments be utilized to offset its principal tax liability for the year 2010. That the withdrawal violated its legitimate expectation that its VAT refund was being processed and that funds were going to be released as soon as they were available from the National Treasury. It submits that the Commissioner was precluded from introducing new issues on appeal being the VAT missing-trader tax evasion scheme and the VDP. It submits that parties are not permitted to depart from their pleadings in order to afford the other party opportunity to prepare and defend themselves. It relied on the Court of Appeal decision in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR**.

#### **Determination**

34. Resolution of this appeal turns on whether the tax payer is limited in time as to when it can file a self-assessment and the consequences thereof particularly in reference to the power of the Commissioner to refund the taxpayer excess tax. This determination implicates **sections 23(1), 28, 29 and 47** of the *TPA* which I set out below.

35. **Section 23 (1)** of the *TPA* provides as follows;

##### 23. Record-keeping

(1) A person shall—

(a) maintain any document required under a tax law, in either of the official languages;

(b) maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and

(c) subject to subsection (3), retain the document for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.

36. **Section 28** of the *TPA* provides as follows

##### 28. Self-assessment

(1) A taxpayer who has submitted a self-assessment return in the prescribed form for a reporting period shall be treated as having made an assessment of the amount of tax payable (including a nil amount) for the reporting period to which the return relates being the amount set out in the return.

(2) If a taxpayer liable for income tax has submitted a self-assessment return in the prescribed form for a year of income and the taxpayer has a deficit for the year, the taxpayer shall be treated as having made an assessment of the amount of the deficit for the year being the amount set out in the return.

(3) If a registered person has submitted a self-assessment return in the approved form for a tax period and the taxpayer's total input tax for the period exceeds the taxpayer's output tax for the period, the registered person shall be treated as having made an assessment of the amount of the excess input tax for the period being that amount set out in the return.

(4) A tax return in the approved form completed and submitted electronically by a taxpayer shall be a self-assessment return despite—

(a) the form containing pre-entered information provided by the Commissioner; or

(b) the tax payable being computed electronically as information is being entered into the form.

37. **Section 29** of the *TPA* provides as follows:

## 29. Default assessment

(1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment (referred to as a "default assessment") of—

- (a) the amount of the deficit in the case of a deficit carried forward under the Income Tax Act (Cap. 470) for the period;
- (b) the amount of the excess in the case of an excess of input tax carried forward under the Value Added Tax Act, 2013 (No. 35 of 2013), for the period; or
- (c) the tax (including a nil amount) payable by the taxpayer for the period in any other case.

(2) The Commissioner shall notify in writing a taxpayer assessed under subsection (1) of the assessment and the Commissioner shall specify—

- (a) the amount assessed as tax or the amount of a deficit or excess of input tax carried forward, as the case may be;
- (b) the amount assessed as late submission penalty and any late payment penalty payable in respect of the tax, deficit or excess input tax assessed;
- (c) the amount of any late payment interest payable in respect of the tax assessed;
- (d) the reporting period to which the assessment relates;
- (e) the due date for payment of the tax, penalty, and interest being a date that is not less than 30 days from the date of service of the notice; and
- (f) the manner of objecting to the assessment.

(3) A written notification by the Commissioner of an assessment under this section shall not alter the due date (referred to as the "original due date") for payment of the tax payable under the assessment as determined under the tax law imposing the tax, and any late payment penalty or late payment interest shall remain payable based on the original due date.

(4) This section shall not apply for the purposes of a tax that is not collected by assessment.

(5) Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.

(6) Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer.

## 38. Section 47 of the TPA which provides as follows;

### 47. Refund of overpaid tax

(1) When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within five years of the date on which the tax was paid.

Provided that for value added tax the period of refund shall be as provided for under the Value Added Tax Act, 2013 (No. 35 of 2013).

(2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.

(3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within ninety days of receiving the application for a refund.

(4) Where, in relation to an application for a refund made under this section or made under any other tax law, the Commissioner is satisfied that a taxpayer has overpaid a tax, the Commissioner shall apply the overpayment in the following order—

- (a) in payment of any other tax owing by the taxpayer under the tax law;
- (b) in payment of a tax owing by the taxpayer under any other tax law; and
- (c) any remainder shall be refunded to the taxpayer.

(5) The Commissioner shall repay the overpaid tax within a period of two years from the date of application, failure to which the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years.

39. Resolution of this appeal involves interpretation and application of the statutory provisions I have set out above. The parties have correctly submitted that court is bound to give tax laws a strict interpretation. The accepted principle in construing a tax statute is that the court is guided by the statutory words themselves and that there is no room for intendment or adopting a purposive approach when the words of the statute are clear and unambiguous (see *Mount Kenya Bottlers Limited & 3 Others v The Honourable Attorney General & 3 Others (Supra)*, *Stanbic Bank Kenya Limited v Kenya Revenue Authority [2009] eKLR* and *Commissioner of Income Tax v Pan African Paper Mills (E.A) Limited [2018] eKLR*).

40. As correctly submitted by both parties the law places a time limitation on the Commissioner but not on the tax payer. The correctness or otherwise of the time limitation is not an issue for the court to determine, but rather to interpret. To hold otherwise would be to place an implication that goes against clear statutory provision.

41. Under **section 29** of the *TPA*, the Commissioner is empowered to make a default assessment when a tax payer fails to file a tax return. This power is however limited in time to five years under **section 29(5)** thereof. There is thus an expectation that the Commissioner would move with haste in doing so before the statutory time line expires. Where the taxpayer submits a late return, the Commissioner is empowered under **section 83** of the *TPA* to impose a fine. It provides as follows:

83. Late submission penalty

(1) A person who submits a tax return after the due date shall be liable to a penalty—

(a) of twenty five percent of the tax due or ten thousand shillings whichever is higher, if it is in relation to a return required to be submitted on account of employment income;

(b) one thousand shillings if it is in relation to a return required to be submitted under Turnover Tax; or

(c) five per cent of the amount of tax payable under the return or ten thousand shillings, whichever is the higher, if it is in relation to value added tax or excise duty;

(d) in any other case—

(i) five per cent of the amount of tax payable under the return or twenty thousand shillings, whichever is the higher, in respect of a person other than an individual; or

(ii) five per cent of the amount of tax payable under the return or two thousand shillings, whichever is the higher, for an individual:

Provided that in the calculation of the late submission penalty for purposes of this section, the amount of tax payable or due under the return shall be reduced by the amounts already paid and withholding tax credits.

(2) A person who fails to submit a document, other than a tax return, as required under a tax law by the due date shall be liable to a penalty of one thousand shillings for each day or part day of default but the total penalty shall not exceed fifty thousand shillings.

(3) For the purposes of subsection (2), a person ceases to be in default at the time the document is received by the Commissioner.

42. In the present case, both parties agreed that the 1998 tax return could not be traced. The Tribunal arrived at the conclusion that it was not filed but that the re-submission was valid. The Tribunal, noting the time limitation placed on the Commissioner under **section 29(5)** of the *TPA*, found that the Commissioner could not interrogate the 1998 return unless it admitted that the same had been legally filed. It held;

The Respondent maintains that the Appellant did not file the 1998 return of income with self-assessment. The Tribunal holds that the Respondent has therefore no legal basis for interrogating the 1998 return with the self-assessment filed by the Appellant before admitting that the same to have been legally filed.

43. When Unga filed its re-submitted 1998 tax return by the letter dated 1<sup>st</sup> December 2015, it also filed its 1998 tax computation, supporting schedules and a copy of the 1998 audited financial statements. The Commissioner was thus in possession of all the relevant facts within its possession to either reject or admit the same entirely. The Commissioner simply raised issues of ‘discrepancies’ without stating clearly what these were. If the Commissioner did not dispute the self-assessment, it was empowered to fine Unga Limited for late submission under **section 83** of the *TPA*. Instead, the Commissioner withdrew its letter of 7<sup>th</sup> October 2014, without disputing the validity of the VAT tax refund claim. On this ground, the appeal is not meritorious.

44. On the issue of legitimate expectation, the Tribunal found that the Commissioner, in its letter dated 7<sup>th</sup> October 2014, had confirmed that it had processed the tax return only to withdraw it by the letter 27<sup>th</sup> June 2017. The Tribunal observed, “that keeping the Appellant for two years and eight months placing it in suspense, the Respondent failed to exercise its statutory duty by acting unfairly and unreasonably by letter the Appellant believe that it was processing its VAT refund claims.”

45. The Commissioner's conduct was the basis Tribunal's finding that it violated Unga's legitimate expectation. On this issue, the Court of Appeal in *Kenya Revenue Authority & 2 others v Darasa Investments Limited* MLD Civil Appeal No. 24 of 2018 [2018] eKLR cited with approval the following passage in *Pollard, Papworth and Hughes, Constitutional and Administrative Law; Text with Materials (4<sup>th</sup> Ed)*, P. 583:

**Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance of an individual has acted on the representation to his or her detriment.**

46. The Commissioner acted contrary to the principles of legitimate expectation. It confirmed that Unga's VAT refund had been processed and approved and was awaiting payment. As I stated in the *Ericsson Case (Supra)*, the exercise is not perfunctory and indeed by the time the Commissioner it informed Unga that its refund was ready, it must have satisfied itself that Unga complied with the provisions of the *VAT Act*. Even when it withdrew the approval, the Commissioner did not dispute the validity of the claim. As a public body, the Commissioner is required to act in good faith and in line with the precepts of fair administration. The Commissioner failed to communicate the discrepancies and to what extent it contended that the claim was unverifiable. It simply cancelled the entire tax refund.

47. The Tribunal found that the Commissioner was on the wrong in withholding the VAT refund in anticipation of tax liabilities arising. It held that;

The Tax Procedures Act is on existing liabilities at the time of payment of the refund. Holding on to a refund payment by the Respondent in anticipation of a tax liability which has not crystallised in this case is not supported by law.

48. I agree with the Tribunal that the Commissioner may not withhold a refund in anticipation of a tax liability. This is borne out **section 47(4)** of the *TPA* which provides that a refund is what is paid over when the Commissioner has applied overpayment to, "*payment of any other tax owing by the taxpayer under the tax law*" and "*payment of a tax owing by the taxpayer under any other tax law.*" In this case, the Commissioner did not demonstrate before the Tribunal that Unga owed any tax under the *VAT Act*, *Income Tax Act* or any other law which could be applied before the refund. In any case, the letter of 7<sup>th</sup> October 2014 was clear that the VAT refunds were all processed which means that by that time, the Commissioner had conducted the verification required. It cannot therefore be said that it was acting as a conveyor belt.

49. Counsel for the appellant was emphatic that by allowing the Tribunal decision to stand the court would countenance a situation where a tax payer would make a self-assessment outside the statutory timelines which would not permit the Commissioner to amend or verify the assessment. It therefore submits that the court should also accord the Commissioner an opportunity to amend that assessment by issuing an additional assessment.

50. Our courts have reiterated the principle that tax laws should be interpreted strictly and leave no room for intendment. The law regarding the procedure for filing self-assessment, the consequences for late filing and of failure to file are clearly set out in the *TPA* as I have set out above. There is nothing in those provisions, that allows the Commissioner to circumvent those provisions and none can be implied on reading of the statutes. Counsel did not point any other provision of the law that allows the Commissioner circumvent the strictures of **section 29(5)** of the *TPA* by implication. Nor is the Tribunal decision an open door for gaming the system as the Commissioner suggests. The Commissioner had already conducted audit before confirming the VAT refund was due to the Unga.

## **Disposition**

51. The Commissioner has not demonstrated the Tribunal erred in its findings. Consequently, the appeal is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of JANUARY 2021.**

**D. S. MAJANJA**

## **JUDGE**

Court Assistant: Mr M. Onyango.

Mr Marigi instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.

Mr instructed by Anjarwalla and Khanna LLP Advocates for the Respondent.