



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 83 OF 2012

BHARAT GENERAL AGENCY.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. The matter before this Court for determination is the Ex-Parte Applicant's Application for Judicial Review dated the 15/10/2012 and filed herein on the 17/10/2012. The Application is supported by the Affidavit of Jay Vora sworn on 4/10/2012 and filed in Court on 4/10/2012 when leave to institute Judicial Review Proceedings was sought. In addition, the Ex-parte Applicant filed a Further Affidavit sworn by Jay Vora on the 24/4/2013 and filed herein on 27/5/2013.

2. The Ex parte Applicant prays for the following orders:

(a) That an Order of Certiorari to remove into this Honourable

Court, for the purposes of quashing, the decision made by the Respondent on 24/9/2012 stopping the release of the goods which were the subject of Entry Number 2012/MSA/3701288 to the Applicant, Bharat General Agency;

(b) That an Order of Prohibition to prohibit the Kenya

Revenue Authority from continuing to wrongfully demand from the Applicant any monies on account of the alleged underpayment of duty/taxes in respect of importation of Mercedes Benz Station Wagon E200 which was cleared by the Kenya Revenue Authority under Entry No. MSA 2005 56485;

(c) That costs of and occasioned by this Motion be taxed and

paid by the Respondent to the Applicant be provided for.

3. The facts leading to this Application have been stated fully in the Respondent's Replying Affidavit and to a certain extent in the Ex-parte Applicant's Statutory Statement and Verifying Affidavit.

4. On 26/8/2005, the Ex parte Applicant vide an Import Entry No. 2005MSA 56485 imported one unit used Mercedes Benz 200 Chassis No. WDB2100352 a876344, Engine No. 11194222 068064. The year of manufacture was declared as 1999. Further, the Ex parte Applicant declared the value of the Mercedes Benz to be KES 992,276.526. The import entry is attached to the Respondents Replying Affidavit as JN 1. Based on the Ex parte Applicant's self-declaration, it paid taxes amounting to KES. 761, 572.00 being Import Duty, Excise Duty and VAT. Upon payment of the said taxes based on self-declaration, the said Mercedes Benz was released to the Ex parte Applicant through Consolbase Limited Container Freight Station on 15/9/2005 through a CFS Release Order No. 027558. The release order is attached to the Respondent's Replying Affidavit as JN 2. The Respondent thereafter did a Post Clearance Audit where they appraised the value of the Mercedes Benz. It was established that the value of the Mercedes Benz had been understated because the Mercedes Benz's Current Retail Selling price was KES. 1,276,800 after depreciating it by six years. According to the Respondent, the Ex parte Applicant had not declared the correct value of the car because it declared the value as per annexure JN 1 to be KES 992, 276.526. Therefore, the import duty on the Mercedes Benz (the car) had been short levied within the meaning of Section 135(1) of EACCMA. A demand letter dated 31/8/2006 was sent to the Ex parte Applicant, where the Respondent demanded from the Ex parte Applicant the payment of KES. 218, 372/- being the short levied duties payable to the Commissioner because of the under declaration detected. On 24/8/2011 the Respondent prepared and sent an Agency Notice to the Ex parte Applicant's bank since the demand for taxes was not honoured. It became clear that the Agency Notice would not achieve the intention of recovering the taxes demanded. The Respondent was left with no choice but to invoke the provisions of Section 130(2) of EACCMA and targeted the Ex parte Applicant's subsequent imports for detention as lien for recovery of the debt of the short

levied Import Duty which accrued interest and penalty to KES. 436,744/-. It is as a result of the move by the Respondent to target the Ex parte Applicant's subsequent imports for detention as lien for recovery of the debt of the short levied Import that led to the suit herein.

5. On its part the Ex parte Applicant's case is that in the year 2005, the Ex Parte Applicant imported a Mercedes Benz E200 Station Wagon from Singapore which was subsequently registered as KAU 945T and it paid all the relevant taxes therefor. However, there was no further communication from the Respondent until 24/9/2012 when the Respondent withheld clearance and release of the Ex parte Applicants' cargo which was the subject of Entry No.2012/MSA/3702188 on the grounds that the Ex parte Applicant had an alleged query on account of the aforesaid importation.

6. It is the Ex parte Applicant's case that the Respondent did not make any demand for alleged underpaid duty from the Ex parte Applicant until 23/9/2010 when it, for the first time, received correspondence from the Respondent demanding alleged duty arrears. The Ex parte Applicant contends therefore that the demand was made more than 5 years after the importation of the subject motor vehicle and is hence time barred pursuant to the provision of Section 134 of the East African Community Customs Management Act 2004. Further, the Ex parte Applicant contends that the Respondent is acting *ultra vires* and abusing its powers in attempting to wrongfully and illegally recover allegedly underpaid duty from the Ex parte Applicant but has and continues to conduct itself in a manner that infringes upon the Ex parte Applicant's right to fair Administrative Action under Article 47 of the Constitution of Kenya 2010. The Ex parte Applicant further contends that the Current Retail Sale Price (CRSP) used to calculate the alleged underpayment has no basis in law and in the year 2005, there was no electronic CRSP System implemented. Besides, and in any event, the use of C400 as a model basis for calculation of the CRSP is wholly misconceived and without any basis in law.

7. the Ex parte Applicant states that the Respondent in its Replying Affidavit simply states that it is entitled to charge any underpaid duty under the law and that the CRSP for the Motor Vehicle at the time of the Post Audit Clearance Audit was Kshs. 6,942,600.00. However, no evidence has been produced of where this figure has been obtained from, and the Exhibit annexed as 'JN-5' has no evidential value as it is not evident what this document is, nor where it is extracted from nor is it signed by anyone. The Ex parte Applicant notes that the Respondent relies on a WTO Agreement on Customs Valuation and treatment of used Motor Vehicles. Applying these very principles, it is the Ex parte Applicant's case that the Respondent is acting arbitrarily, without any legal basis and/or in breach of the Ex parte Applicant's right to fair administrative action pursuant to the Provisions of Articles 47 of The Constitution of Kenya 2010.

Submissions

8. Parties filed submissions which were highlighted on 10/6/2019. I have considered the application and the submissions. I raise the following issues for determination:

- (i) Whether the Respondent acted within its mandate.
- (ii) Whether the Ex parte Applicant's right to fair administrative action was abrogated.

(i) Whether the Respondent acted within its mandate

9. The Respondent submitted, that under Section 5 (1) of the Kenya Revenue Authority Act, the Respondent 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 Respondent 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.

10. Further, under Part 1 of the First Schedule to the Kenya Revenue Authority Act, Cap 469 Laws of Kenya, among the laws the Kenya Revenue Authority enforces is the ***East African Community Customs Management Act, 2004*** (hereinafter referred to as **EACCMA**). The determination of import duty on goods, including motor vehicles, is based on the value of the goods and is governed by the 4th Schedule to EACCMA.

11. The Respondent states that the 4th Schedule to EACCMA provides for several methods for the determination of value of goods for purposes of levying import duty on the same. These include:

- a. Transaction value;
- b. Transaction value of identical goods;
- c. Transaction value of similar goods;
- d. Deductive value;
- e. Computed value and
- f. Fall back value.

12. In my view, whichever method is used by the Respondent in arriving at the tax due is not for the determination by this court, except where it was an issue to be determined, and in which cogent evidence was led to establish the criteria. Since that was not done in this case,

this court has the right to accept whichever method was used to arrive at the applicable tax, provided plausible reasons are given for that, and the process leading thereto is acceptable. What is clear, however, is that the demand for additional tax by the Respondent was not satisfied, and the Respondent resorted to its legal mandate to recover the same.

13. The Respondent then was left with no option but to invoke the provisions of Section 130 (2) of EACCMA and targeted the Ex parte Applicant's subsequent imports for detention as lien for recovery of the debt of the short levied Import Duty which accrued interest and penalty to **KES. 436,744/-**

Section 130(2) reads:

“130(2) Goods under Customs control which belong to any person from whom duty is due, and any goods afterwards imported or entered for export by that person, shall be subject to a lien for such debt and may be detained by the Partner State until such duty is paid and the claim of the relevant Partner State shall have priority over the claims of whatever nature of any other person upon the goods and the goods may be sold to meet the duty due if the duty is not paid within two months after the goods are detained.”

14. The Respondent's case is that the action of the Respondent on 24/9/2012 to stop the release of the goods of the Ex parte Applicant which were the subject of Entry No. 2012/MSA/3701288 as a lien for the short levied import duty of the Mercedes Benz was well within the law and the mandate of the Respondent to do. The decision therefore cannot be quashed as prayed. The Respondent submitted that under **Sections 235 and 236** of the EACCMA, the Respondent has a statutory duty to carry out Post Clearance Audits on the import declarations made by taxpayers by verifying the accuracy of the entry of goods or documents and determine whether a person has made the correct Customs declarations and paid all the taxes due. Section 235 (1) of the EACCMA provides that, **“The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods –**

- a. To produce all books, records and documents in relation to the goods; and**
- b. To answer any question in relation to the goods; and**
- c. To make declaration with respect to weight, number, measure of goods, as the proper officer may deem fit.”**

15. Section 236 of the EACCMA provides that the Commissioner shall have powers to: -

- a. Verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant custom documents, commercial documents and other data related to the goods;**
- b. Question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;**
- c. Inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and**
- d. Examine the goods where it is possible for the goods to be produced.**

16. The Respondent submitted that the Ex parte Applicant was subjected to a Post Clearance Audit (Desk Audit) in accordance with the powers donated to the Commissioner by Section 235 and 236 of the EACCMA. The Desk Audit revealed that the Ex parte Applicant owed the Commissioner a sum of KES. 218, 272/- being short levied taxes accrued from the under declaration of the Mercedes Benz accrued interest and penalty to **KES. 436,744/-**. Pursuant to the provision of Section 135 (1) of the EACCMA, the Commissioner by a letter dated 31st August 2006 demanded the short levied taxes from the Ex-parte Applicant. In the present case, Section 34 of EACCMA provides that the owner of goods imported into a country is under an obligation to **enter and self- declare such** goods to the proper officer. That declaration is done online through a computer system christened the *Simba System*. Section 34(2) of EACCMA provides that the importer's self declaration and subsequent payment of import duty is taken at face value and the goods usually released forthwith in the hope and trust that the importer would have made a correct declaration.

Section 34 states:

“34.(1) Save as otherwise provided in the Customs laws, the whole of the cargo of an aircraft, vehicle or vessel which is unloaded or to be unloaded shall be entered by the owner within twenty one days after the commencement of discharge or in the case of vehicles on arrival or such further period as may be allowed by the proper officer, either for—

- (a) home consumption;**
- (b) warehousing;**
- (c) transshipment;**
- (d) transit; or**

(e) export processing zones.

(2) Where any entry is delivered to the proper officer, the owner shall furnish with the entry full particulars supported by documentary evidence of the goods referred to in the entry”

17. The Respondent submitted further that it is to deal with the possibility of exploitation of the system by unscrupulous importers that Section 135(1) of EACCMA was put in place. **“135. (1) where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.**

18. From the foregoing, it is the finding hereof, and I hold that it was fully within the legal mandate of the Respondent to demand for extra tax.

(ii) Whether the Ex parte Applicant’s right to fair administrative action was abrogated

19. By a letter dated 31/8/2006, the Respondent demanded from the Ex-parte Applicant the payment of KES. 218, 372/- being the short levied duties payable to the Commissioner because of the under declaration detected. In the said letter, the Respondent elaborated to the Ex parte Applicant how the short levied taxes had been arrived at and the provision of the law relied on to demand for the taxes. The demand letter is annexed as **JN 6** where Section 135 of EACCMA was invoked. The Section reads as follows:

“135. (1) where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.

(2) Where a demand is made for any amount pursuant to sub-section (1), the amount shall be deemed to be due from the person liable to pay it on the date on which the demand note is served upon him or her, and if payment is not made within thirty days of the date of such service, or such further period as the Commissioner may allow, a further duty of a sum equal to five percent of the amount demanded shall be due and payable by that person by way of a penalty and a subsequent penalty of two percent for each month in which he or she defaults.

(3) The proper officer shall not make any demand after five years from the date of the short levy or erroneous refund, as the case may be, unless the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made, as the case may be.”

20. The Respondent states that the Demand Letter of 31/8/2006 was e-mailed to the last known postal address of the Ex parte Applicant through the email raj@carsrus.co.ke which email address was in a deposit banking slip for the IDF fees paid by the Ex parte Applicant. Annexure **JN 7** is a copy of the Deposit Banking Slip dated 24/6/2005. The Respondent states that the Demand letter for the tax arrears was done within the 5 years provided for under Section 135(3) of EACCMA. However, the Ex parte Applicant claims that he did not receive the demand letter **JN 6** either by way of post or email. The Respondent states that the Ex parte Applicant is not telling the truth because he received the Respondents letter of 23/9/2010 which was sent through the email address raj@carsrus.co.ke which is the same email address that the Demand letter was sent through; that he also received a copy of the Agency Notice dated 24/8/2011 which he forwarded to his lawyers on record.

Section 131 reads:

“131. (1) The Commissioner may, by written notice addressed to any person (in this section called the agent) appoint that person to be the agent of another person (in this section called the principal) for the purposes of collecting duty due under this Act from the principal where the Commissioner is satisfied that the agent—

(a) owes or is about to pay money to the principal;

(b) holds money for or on account of the principal;

(c) holds money on account or some other person for payment to the principal;

(d) has authority from some other person to pay money to the principal;

(e) holds goods belonging to the principal which are liable to duty and on which duty has not been paid,

and the Commissioner shall in the notice specify the amount of duty to be collected by the agent, which amount shall not exceed the amount, or value of the goods, held or owing by the agent for or to the principal.”

21. I have looked at Annexure **JN 6** attached to the Replying Affidavit of Jomo Nyakoe for the Respondent. This is the alleged letter of demand by the Respondent. It is alleged to have been e-mailed to the Ex parte Applicant. However, there is no evidence that the said letter was posted or that it was received by the Ex parte Applicant. The Respondent states that the letter was sent by e-mail. However, there is no proof even for that allegation. Email postings normally generate evidence of delivery. No such evidence has been produced to confirm

posting. **JN 6** is not a letter which can satisfy this court that it was ever posted or received by the recipient. Annexure **JN 8** is a letter of agency dated 7/9/2011 written to and received by Imperial Bank Limited. The bank acknowledges the receipt of the letter, but in short reply states thus:

“...We hereby inform you that the above client does not hold an account with ourselves and we are therefore unable to remit any funds to you.”

22. It is therefore clear beyond peradventure that the Ex parte Applicant did not receive a letter of demand, either directly from the Respondent or from the Respondent’s agent.

23. Without the satisfaction that the letter of demand was received, the Respondent began a process which clearly did not satisfy the requirements of fairness.

24. Article 47 states:

“(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.

25. Further although the Respondent had a right to carry out the post clearance audit and to demand the short levied duty, the process still had to be fair and reasonable as stated above. As I have shown above, there was no evidence that a demand notice **JN 6** was ever posted. That letter was written on 31/8/2006. If that letter was posted and received by the Ex parte Applicant, it is arguable that a demand was made within reasonable time after the duty was due. The Respondent states that on 24/8/2011 it prepared and sent Agency Notice to the Ex parte Applicant’s bank since the demand for tax was not honoured. There is no evidence of a letter dated 24/8/2011. However, **JN 8** is a possible reply to that letter in which the Imperial Bank denied having the account of the Ex parte Applicant.

26. It is the finding hereof that there was no basis upon which to purport to punish the Ex parte Applicant when no notice was given to him about the tax alleged to be due.

27. But even then between 2005 when the tax became due, and 2011 when the Respondent took action was a long time during which the Respondent took no action. In **Krish Commodities Limited vs. KRA** Civil Appeal No. 67 of 2017 (Mombasa) the court held that

“28...it is not in dispute that Section 135 (3) of EACCMA allows the respondent to make such a demand within 5 years. However, that is not to say that the respondent should wait until the tail end of the said period before making such a demand. There ought to be sufficient reason(s) as to why such audit and demand is made at the tail end. In our minds, the respondent cannot simply stand behind the time limit given to justify its conduct of demanding the short levied duty in question about 4 years later.”

28. The above reasoning applies in this situation with the result that the Ex parte Applicant’s motion succeeds with the following orders:

(a) That an Order of Certiorari to remove into this Court, for the purposes of quashing, the decision made by the Respondent on 24/9/2012 stopping the release of the goods which were the subject of Entry Number 2012/MSA/3701288 to the Applicant, Bharat General Agency;

(b) That an Order of Prohibition to prohibit the Kenya Revenue Authority from continuing to wrongfully demand from the Applicant any monies on account of the alleged underpayment of duty/taxes in respect of importation of Mercedes Benz Station Wagon E200 which was cleared by the Kenya Revenue Authority under Entry No. MSA 2005 56485;

(c) That costs of this Motion shall be for the Ex parte Applicant.

Dated, Signed and Delivered at Mombasa this 29th day of July,

2020.

HON. E. K. OGOLA

JUDGE

Ruling Delivered via MS Teams in the presence of:

Mr. Khagram for Applicant

Mr. Naeku for Respondent

Mr. Kaunda Court Assistant