REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 599 OF 2017

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

EX PARTE: M-KOPA KENYA LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd October, 2017, the *ex parte* applicant herein, **M-Kopa Kenya Limited,** seeks the following orders:

> **1. A Declaration that the Respondent's Demand for the Applicant to pay Value Added Tax on imported solar powered television sets violated the Applications Right to Fair Administrative Action under Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015.**
>
> **2. A Declaration that the solar powered television sets imported by the Applicant are exempt from the payment of VAT pursuant to item 45 of part 1 of the First Schedule to the VAT Act, 2013.**
>
> **3. An order of *Certiorari* to bring before this Honourable Court and quash the Respondent's decisions in respect of the non-applicability of exemptions on Value Added Tax to solar powered television sets imported by the Applicant as contained in its letters dated 5th July, 2017, 9th July, 2017, 15th August, 2017, 19th August, 2017, 22nd August, 2017 and 8th September, 2017.**
>
> **4. An order of *prohibition* prohibiting the Respondent and its authorized officers and/or agents from demanding the payment of VAT on solar-powered television sets imported by the Applicant.**
>
> **5. An order for *mandamus* directed at the Respondent to refund the Applicant Kshs 35,773,353/= being Value Added Tax paid to Respondent by the Applicant in respect of solar powered television sets for shipments numbers AEM-INV-195, AEM-INV-199, AEM-INV-200, AEM-INV-203, AEM-INV-207, AEM-INV-217, AEM-INV-223, AEM-INV-231, AEM-**

INV-235, AEM-INV-237, AEM-INV-241, AEM-INV-242, AEM-INV-244, AEM-INV-252, AEM-INV-256, AEM-INV-257, AEM-INV-262, AEM-INV-265 and AEM-INV-268.

6. The costs of and occasioned by this Judicial Review Application be provided for.

Ex Parte Applicant's Case

2. According to the applicant, it was established with the objective of providing affordable, user friendly and effective solar power to homes in Kenya essentially on a micro-loan basis i.e. the customer obtains the equipment upon the payment of a small deposit and the balance is paid by modest instalments thereafter whilst he enjoys its use. Since its commercial launch in October 2012, the Applicant and its sister companies have provided over 500,000 homes in Kenya, Tanzania & Uganda with solar power and continues to add to that figure with solar power connections to 500 new homes each day. According to the applicant, its target market is a neglected and sometimes marginalized sector of the population who lack access to basic facilities and services that the rest enjoy such as electric power.

3. The applicant disclosed that its core activity is the manufacture, marketing, sale and distribution of solar home systems and that it initially offered solar systems with three lights, phone charging, torch and a solar powered radio which was later expanded to the provision of solar powered television sets for homes as a composite exclusively solar powered home system.

4. According to the applicant, since the expansion of its solar home systems to include solar powered television sets which was initiated on or about the month of February 2016, it had imported and cleared over 70,000 television sets which are exempted from VAT as specialized solar equipment which exclusively use or store solar power under PART 1 section A of the ***Value Added Tax Act, 2013*** ("the VAT Act") as amended by section 2 (a) (v) of the ***VAT (Amendment Act) 2014***. The Applicant has also relied on this provision to seek exemption of its radios, torches and bulbs all of which are also exclusively solar powered. Prior to May, 2017, all such applications to the Respondent by the Applicant were allowed and no VAT was paid on such exclusively solar power equipment.

5. It was averred that things however changed in May, 2018 due to an unexplained and inexplicable volte-face on the part of the Respondent as the law had not changed neither had the nature of the goods the Applicant was importing. Accordingly, on or about 17th May, 2017 as part of the established pre-arrival procedure, the Applicant sent, as it had done in the past, a letter to the Respondent's Deputy Commissioner, Customs Service Department, Exemption & Waivers seeking exemption from duty and Value Added Tax ("VAT") on a shipment of solar powered televisions sets due to arrive in Kenya on 24th May, 2017. On 23rd May, 2017 the Respondent responded to the Applicant through its Commissioner of Customs and for the very first time without any detailed explanation as to its sudden change of position, declined the said application, peremptorily stating that there was no legal provisions for exemption on solar TV and demanding payment.

6. The applicant contended that in view of huge and growing demand for the said solar powered television sets as well as to save on demurrage charges, the Applicant complied with the directions of the Respondent in order to ensure a constant supply of solar televisions sets as part of its initiative for provision of solar home systems and paid VAT (under protest) to the Respondent. Since the said arbitrary U-turn on exemptions to solar-powered television sets, the Applicant was compelled to pay, under protest, to the Respondent a total sum of Kshs 35,773,353/=as at September, 2017.

7. It was averred that on or about the 30th May, 2017, the Applicant wrote to the Respondent inquiring about the sudden and capricious change in the way that the Respondent was treating the applications for exemption with specific reference to imports of solar television sets. The Applicant further had an opportunity to demonstrate to the Respondent that the solar television sets exclusively use solar and hence came within the exemption for specialized solar equipment under the First Schedule to the VAT Act, 2013. Further, by its detailed letter of 30th May, 2017, the Applicant requested the Respondent to reconsider its position with respect to a shipment of its solar-powered television and grant it the

exemption it was entitled to at law. To this on 6th June, 2017, the Respondent responded to the Applicant reiterating that the exemption was not applicable to solar television sets.

8. The applicant averred that by a letter dated 8th June, 2017 the Respondent through the Commissioner for Customs and Border Control responded to the Applicant's letter dated 6th June 2017. In its said letter, the Respondent, without making any reference to actual terms of the legal provisions relied upon, rejected the Applicant's request for exemption on the basis that only specialized solar items used in the generation of solar power were exempt from VAT.

9. The applicant contended that on 8th June, 2017 it wrote to the Respondent to protest its decision dated 23rd May, 2017 in respect of the shipment that arrived in Kenya on 24th May, 2017 and to reiterate to the Respondent that the VAT that the Applicant paid in respect of the shipment was paid under protest.

10. It was deposed that subsequently, the Applicant engaged the services of Messrs PKF Taxation Services limited ("PKF") to act on their behalf and on 16th June, 2017 PKF, on the Applicant's behalf, lodged a request for private ruling with the Respondent's Deputy Commissioner for Compliance, Policy Programmes as per the provisions of section 65 (1) of the ***Tax Procedures Act, 2015*** and on the basis that the television sets were exempt from VAT under the provisions of PART 1 section A of the VAT Act. On 22nd June, 2017 the Applicant's team of experts attended the Respondent's offices on invitation by the Respondent during which they were given a demonstration on how the solar TV operates which showed that it exclusively relies on solar power. The demonstration was attended by a **Mr. Hadi Abdullahi** for the Respondent and two (2) members of the Trade facilitation team of the Customs Department.

11. According to the applicant, on 29th June, 2017 the Respondent's Commissioner for Customs and Border Control delivered a private ruling ("the Private Ruling") as per the provisions of section 67 of the ***Tax Procedures Act, 2015*** ("the TPA").

12. It was the applicant's case that while awaiting the delivery of the Private Ruling, the Applicant had continued to make payments of VAT (under protest) for its shipments which arrived on the 5th, 12th and 26th of June, 2017. However, the Applicant subsequently made an application for exemption from VAT for a shipment arriving in Kenya on 2nd July, 2017 but to its utter shock and dismay, the Respondent denied exemption of the same from VAT vide its letter dated 5th July, 2017 authored by the Commissioner of Customs and Border Patrol. Out of abundant caution, the applicant averred that on the 12th July 2017, it, through the 1st Interested Party escalated to the Commissioner of Customs Service on the basis of the outright defiance of the Private Ruling between the Respondent's departments by filing a notice objection to the Respondent's decision dated 5th July, 2017 pursuant to section 51 (1) of the ***Tax Procedures Act, 2015***. However, the Respondent has not made any decision in respect of the objection decision within the period allowed of 60 days thereby resulting in the objection decision being allowed by operation of section 51 (11) of the said Act.

13. Despite that on 12th July, 2017 the Respondent declined exemption on a second shipment of solar televisions which arrived in Kenya by air cargo on 9th July, 2017 and on 14th July, 2017 it informed the Applicant that the Commissioner of Custom Services had set up a Technical Committee to review the case and provide guidance. Although the Applicant made a presentation before the said Technical Committee on 25th August, 2017, to date, the said Technical Committee has not rendered its report yet the Respondent still continues to demand payment of VAT on imports of Solar Powered television sets oblivious of the fact that matter still remains unresolved.

14. Based on legal advice, the applicant believed that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair and that its right to fair administrative action as embodied in Article 47 of the Constitution has been and is still being violated by the Respondent.

15. It was the applicant's case that having affirmed the Applicant's entitlement to an exemption from VAT by virtue of the private ruling delivered on 29th June, 2017 by the Respondent's Commissioner for Customs and Border Control, which ruling is binding on the Respondent pursuant to section 65 (4) of the ***Tax Procedures Act 2015***, has illegally and unlawfully purported to derogate from its own administrative process by denying the Applicant exemptions from VAT for solar equipment. It was therefore the applicant's case that the Respondent's letter dated 5th July, 2017 and subsequent letters dated 9th July, 2017, 15th August, 2017, 19th August, 2017 and 8th September, 2017 are in violation of the Applicant's right to administrative action that is procedurally fair in light of the fact that the Respondent's Commissioner for Customs & Border Control in which the Respondent exempted the solar equipment from VAT and the subsequent letters dated 9th July, 2017, 15th August, 2017, 19th August, 2017, 22nd August and 8th September, 2017 are at odds with the said decision.

16. Its position was therefore that the Respondent has acted in excess of jurisdiction by purporting to deny the Applicant exemptions on VAT despite being divested of such jurisdiction by virtue of the notice of objection which was allowed in favor of the Applicant by virtue of Section 52 (11) of the ***Tax Procedures Act, 2015.***

17. According to the applicant, while the ***Tax Procedures Act*** ("the TPA") sets up an elaborate dispute resolution procedure for challenging some of the decisions and/actions of the Respondent pursuant to the various tax statutes including appeals to the Tax Appeals Tribunal ("the TAT") under the ***Tax Appeals Act*** ("the TAA"), the said procedure is not a viable option in these circumstances as:

(a) These proceedings seek the implementation and/or enforcement of a private ruling which is binding on the Respondents. It does not challenge any tax decision as defined in the TPA. The TAT's jurisdiction is limited to appeals tax decisions.

(b) These proceedings seek relief under the Constitution, the ***Fair Administrative Action Act*** and common public law, reliefs which only this Honourable Court can grant as provided in Articles 165(d)(ii) of the Constitution, sections 7 to 11 of the ***Fair Administrative Act*** (the "FAA") and sections 8 and 9 of the ***Law Reform Act***. The TAT has no jurisdiction in respect to such matters.

(c) These are purely public law proceedings seeking relief in respect to past and future unlawful actions of the Respondent. They do not in respect or manner impinge upon the jurisdiction of the TAT.

18. In a further affidavit, the applicant deposed that whereas Respondent's claim in the Replying Affidavit, that under Part 1 of the First Schedule to the ***Kenya Revenue Authority Act***, Cap 469 Laws of Kenya *("KRA Act"*) the Respondent enforces the ***East Africa Community Customs Management Act, 2004*** (*"EACCMA")* , the same is irrelevant to the proceedings herein as the issues raised in these proceedings are confined to VAT-exemption under item 45 of the First schedule of the ***Value Added Tax Act, 2013*** (*"the VAT Act,")* and the ***Tax Procedures Act, 2015*** ("the TPA").

19. It was its case that prior to May, 2017, there was never any question as to whether solar-powered televisions, radios and torches imported were VAT-exempt under the said item 45 of the 1st Schedule of the VAT Act- a fact not denied by the Respondent. Operationally, for any one particular shipment of said goods to get through customs, it was necessary to be provided with a code to be used to clear the shipment as VAT-exempt. The Applicant's letter dated 17th May, 2017 was not an application for exemption from VAT but a routine request for a VAT exemption code for the particular consignment of solar powered televisions, which exemption codes the Applicant had been applying for and had been granted by the Respondent as a matter of course over the past (2) years without demur.

20. The applicant averred that its application was denied with a terse response that there was no legal basis for the exemption. The Respondent did not then and to date has not explained why it changed from its previous position that the goods were exempt under item 45 of the First Schedule. It was the applicant's case that the letter dated 8th June, 2017 was not a restatement or confirmation in respect of any

purported position in respect of Item 45 of the VAT Act as alleged but rather it was the first time that the Respondent had attempted to proffer an explanation for its sudden change in treatment of the Applicant's goods by reading the words "generation of solar power" and "specific accessories" into Item 45 of the First Schedule of the VAT Act, yet the terms of that provision had not changed. According to it, the terms 'generation' and 'specialized accessories' which are not to be found in item 45 of the First Schedule of the VAT Act were introduced as amendments to ***EACCMA*** by EAC Gazette Notice No. 5 of 2016, which provided, in relevant part as follows:

> *"Amended paragraph 26 of PART B-GENERAL EXEMPTIONS, by deleting the words 'spare parts', and 'accessories' to read as follows:*
>
> *'Specialised equipment for development and generation of Solar and Wind Energy, including accessories and deep cycle batteries which use and/or store solar power.'"*

21. It was averred that as there have been no similar amendments to the ***VAT Act, 2013***, the same improper conflation of provisions of two different statutory regimes and that the position that the Respondent has adopted is not based on the actual terms of item 45 of the VAT Act, 2013. Based on legal advice, the applicant's position was that the contention that the exemption under item 45 is limited to equipment used for the generation and storage of solar power, is to the Respondent's knowledge, legally untenable.

22. The applicant reiterated that the Respondent had confirmed and admitted that upon the Applicant's application, and following investigation it issued a private ruling which confirmed that the solar-powered goods imported by the latter were VAT-exempt, which private ruling despite its binding effect was subsequently ignored despite never having been withdrawn.

23. The Applicant thereafter, through its tax consultants, filed a notice of objection as envisioned under section 51 of the ***Tax procedures Act, 2015*** (*"the TPA")* and which the Respondent was required to make a decision in respect of within sixty (60) days under section 51(11) of the said Act. Since there is no statutory prescribed format, it was not open to the Respondent to self-servingly determine what is and is not an objection whether as in this case it seeks to escape the effect of its default in making a decision within the statutorily prescribed period or at all.

24. According to the applicant, the contents of paragraphs 25 to 27 of the replying affidavit are either wholly inaccurate or deliberately misleading. While they relate to matters which transpired after the decisions and actions challenged in these proceedings. The applicant explained that after the Applicant, had instituted these proceedings and despite having obtained condition orders barring the Respondent from demanding the payment of VAT on the imported solar powered televisions imported by the Applicant, the Respondent declined to provide a code to enable clearance of a consignment that were due to arrive. On 6th October, 2017, the Applicant's through its Advocates wrote to the Respondent demanding full compliance with the orders issued by this Honourable Court or face contempt proceedings.

25. It is at this stage that officers of the Respondent approached that Respondent with a suggestion that all these matters i.e. whether or not the Applicant's goods were VAT exempt, effect of failure to timeously respond to the Applicant's objection and refund of sums paid by the Applicant under protest be discussed. While the Applicant was not averse to such discussion, it insisted that in light of the orders issued by this Court which must be complied with it was not prepared to make any further payments in respect of VAT. To forestall any potential contempt proceedings without affecting the proposed negotiations, the Respondent came up with the stop-arrangements contained in its letter dated 10th October, 2017. While the Applicant was not happy with the wording, it was not worth quibbling when a settlement was expected.

26. It was admitted that meetings were indeed held with officers of the Respondent during which the issues i.e. whether or not the Applicant's goods were VAT exempt, effect of failure to timeously respond to the Applicant's objection and refund of sums paid by the Applicant under protest were discussed. The

Respondent then requested time for internal discussions with a promise to get back to the Applicant. Owing to the nature and tenor of those discussions, the Applicant expected a favourable proposal. To its utter shock and dismay, by its letter of 24th November, 2017, it purported to reverse course without addressing any of the three issues that were the subject of discussions.

27. The applicant averred that as there was a shipment due, and the letter claimed to have withdrawn the stop-gap measures another meeting was held to address the question of whether or not VAT would be paid. At that meeting the Respondent was adamant that the sum of the guarantee was too little while the Applicant took the view that the letter of 24th November, 2017 was in contempt of Court. Eventually, the Respondent's officers while unhappy with the amount of the guarantee accepted the Applicant's proposal that efforts should made to expedite the hearing of these proceedings. As Court orders must be obeyed, a one to two line letter would be issued to the Respondent's officers directing them not to demand payment of VAT. Instead, the Respondent issued yet another inaccurate letter, which this time provoked a protest letter from the Applicant's advocates dated 1st December, 2017 setting the record straight.

28. It was the applicant's position that the Respondent's arguments that these proceedings are either pre-mature and/or improper because of unexhausted alternative remedies is misconceived because:

> (a) The matters in issue in these proceedings are under provisions of the ***Tax Procedures Act, 2015*** ("the TPA"). By section 52 (1) appeals to Tax Appeals Tribunal are limited to appealable decisions. The matters challenged in these proceedings are not appealable decisions as defined under the TPA.
>
> (b) The deposition in paragraph (25) of the replying affidavit that the Applicant filed the suit prematurely without exhausting Appellate procedures under ***EACCMA***, 2004 is ill founded and misplaced as the dispute between the Applicant and the Respondent is in respect of Item 45 of the VAT Act, 2013.

29. It was submitted on behalf of the applicant that PKF lodged an objection by a letter dated 12th July, 2017 specifically identifying the Applicant's grievance as the Respondent's *"decision to assess import VAT on specialized solar equipment to be precise Solar TVs that it imports for sale to customers together with its other products which includes torches and radios which all exclusively use solar power."* The grounds for objection were stated- *"incorrect and misleading interpretation of the Value Tax (Amendment) Act (No.7 of 2014)"* and requested the Respondent to revise its erroneous contention to the contrary. However, there has been no response to this notice of objection.

30. As to whether the applicant ought to have invoked the appellate procedure it was submitted that the general principle has no application to this particular case thus the Respondent's attempt to invoke it is doomed to fail. According to the Applicant the jurisdiction of the TAT to entertain appeals under the TPA is a limited right of appeal restricting TAT's jurisdiction only to appealable decisions in terms of section 52 (1) of the TPA which provides that:

A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013.

31. An 'appealable decision' is defined under section 3 of the TPA as follows:

> ***'appealable decision' means an objection decision and any other decision made under a tax law other than—***
>
> ***(a) a tax decision;***
>
> ***(b) a decision made in the course of making a tax decision.***

32. It was therefore submitted that not everything done or not done by the Respondent is a tax decision

which is a term of statutory art applying to eight classes of determinations:

> ***"tax decision" means—***
>
> > ***(a) an assessment;***
> >
> > ***(b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;***
> >
> > ***(c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under sections 15, 17, and 18;***
> >
> > ***(d) a decision on an application by a self-assessment taxpayer under section 31(2);***
> >
> > ***(e) a refund decision;***
> >
> > ***(f) a decision under section 49 requiring repayment of a refund; or***
> >
> > ***(g) a demand for a penalty;***

33. According to the applicant, the three matters raised for determination in these proceedings, which it will be recalled are the effect of private ruling given by the Respondent under section 67 of the TPA pursuant to an application made under section 65 of the same Act; effect of the Respondent's failure to timeously respond to the Applicant's objections; whether or not the Applicant's exclusively solar-powered goods are exempt from the payment of VAT under item 45 of the First Schedule the VAT Act are not tax decisions or decisions made in the course of a tax decision. It was submitted that the Respondent did not identify exactly under which one of the eight determinations, the defalcations laid at the feet of the Respondent qualify to be labelled tax decision or a decision made in the course of a tax decision that would thus entitle the Applicant as an appealable decision.

34. The applicant's position was that private rulings are expressly excluded from the jurisdiction of the TAT by section 67(5) of the TPA, so that even if the applicant were mistaken as to the other two issues, it would be illogical and impractical to carve out the complaint in relation to the private ruling to be addressed by this Honourable Court and simultaneously pursue the other two before the TAT. In this respect the applicant relied on the decision in **Republic vs. Commissioner of Domestic Taxes Ex-Parte I & M Bank Limited [2017] eKLR** at paragraph 91 where it was held that:

> **"in my view, it would not be fair, convenient or conducive to the proper administration of justice to require a Petitioner to split its case into two or more causes and file them before different Tribunals when the matter can be dealt with by one Tribunal. In my view the Petitioner in such circumstances ought to commence the case before the Tribunal with the jurisdiction to hear and determine all the questions in controversy and grant all the reliefs sought. That Tribunal, in the circumstances of these Petitions is the High Court."**

35. While conceding that section 12 of the ***TAT Act*** seems to confer much broader jurisdiction on TAT, the applicant contended that that is subject to an important qualification referring back to Act under which the disputed matters arose that should not be overlooked:

> ***A person who disputes the decision of the Commissioner on any matter arising under any provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to Tribunal.***

36. It was reiterated that since the relevant tax law in this case is the TPA which as already demonstrated limits the right to appeal to the TAT, *t*he option of an appeal to the TAT was not available to the Applicant.

37. According to the applicant, the reliefs which the TAT can grant in appeal before it are not extensive and are with regard to an actual impugned decision. So as far as material, section 29(2) of the TAT Act provides:

> ***The Tribunal shall make a decision in writing—***
>
> ***(a) affirming the decision under review;***
>
> ***(b) varying the decision under review; or***
>
> ***(c) setting aside the decision under review and either—***
>
> **(i)** ***making a decision in substitution for the decision so set aside; or***
>
> **(ii)** ***referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal.***

38. To the applicant these are fairly limited range on options and only in respect to an actual decision. In this case where the complaints relate to failure to honour a binding ruling; effect of timely response to an objection; deliberate erroneous interpretation and application of a VAT-exemption, all in violation of, *inter alia*, the constitutional guarantee of fair administrative action, these reliefs are no just ineffective. They are wholly inadequate. Only this Honourable Court has the powers under Articles 23, 165(2) and 258 of the Constitution, section 11 of the FAA as well as old-fashioned but still enduring common law, to fashion and grant effective relief should the Applicant make good its case.

39. However way one looks at it, the Respondent's reflexive reliance on the alternative remedy argument in this case ought not be succeed.

40. As regards the legal effect of a private ruling the Applicant relied on part X of the TPA, in particular section 67 which is directly relevant to this issue.

41. It was the applicant's submissions that a private ruling is a serious binding decision and without a suggestion that it had been withdrawn, it was not open to the Respondent to ignore and still demand payment of VAT. It was only in its letter of 24th November, 2017 that the Respondent asserted its right to withdraw it. However, apart from the incredible contention that the private ruling did not represent the correct view of the law, there is no actual withdrawal. Given that a private ruling can only be withdrawn for good reason, at a minimum for such withdrawal to be effective, it must identity the affected ruling as a private ruling, engage its contents as set out in section 67(3) of the TPA explaining exactly where it fell short and then formally withdraw it.

42. In any case it was submitted that the circumstances leading to the issue of the letter of 28th November, show that it was not written in good faith. Firstly, it was written while these proceedings, in which the private ruling forms a fulcrum of the Applicant's case, was before this Honourable Court pending argument and decision. In other words it was *sub judice.* The Respondent led the Applicant down the garden path as the Respondent fooled it believing that genuine discussions were being held for purposes settlement discussions when actually the Respondent was setting the Applicant up for an argument that it compromised its grounds for relief in these proceedings. It was not a *bona fide* fresh consideration of the issue (which were simply not addressed) but an excuse to revive and reiterate an arbitrary prior position that had been rejected by a reasoned decision as not based on the actual terms of item 45 of the First Schedule of the ***VAT Act***. In short, the letter was and is an abuse of statutory power and thus a nullity for "*it is axiomatic that statutory power can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such a power arbitrarily, capriciously or in bad faith*"- ***R v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd*** [1999] 1 EA 245, 249.

43. With respect to lack of timely response to the objection, it was submitted that section 51 of the TPA

does not prescribe any particular form for a notice of objection but specifies at sub-section (3) what it has to contain so as to be regarded as validly lodged:

> ***A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—***
>
> > ***(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and*** ?
> >
> > ***(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.*** ?

44. According to the applicant, PKF's letter of 12th July, 2017 on behalf of the Applicant plainly fulfilled the requirement of this sub-section for the ground of the objection was precisely stated- decision not grounded on the terms of item 45; amendments sought spelt out- the exclusively solar-powered goods be treated as VAT-exempt; and grounds given- on a correct reading the item 45 applied to all exclusively solar powered goods such as TVs, torches and radios imported by the applicant[3(b) is not material as it was not an objection to an assessment and anyway, the Applicant did not concede it was liable to pay anything and it had paid under protest the disputed VAT].

45. In its view, to insist on more than this statutory minimum merely so as to provide Respondent with an escape valve from the consequences of default in its statutory obligations is the vainest pedantry that is contra statute. It would also be a clear a violation as any to the undue technicality prohibition in Article 159 prohibition on undue technicality as any.

46. According to the Applicant the Respondent has not made any decision in respect of the objection within the stipulated period of sixty (60) days as a consequence of which it has been allowed by operation of Section 51 (11) of the TPA- which provides as follows:

> ***Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.***

47. While it was in a different context, the Applicant relied on the decision of this Court in **Republic vs. Cabinet Secretary, Ministry of Information & Communication & 10 others Ex Parte Adrian Kamotho Njenga [2015] eKLR.**

48. As regards item 45 of First Schedule to the ***VAT Act***, it was submitted that at heart of the current dispute between the Applicant is Respondent is item 45 of the First Schedule to the ***VAT Act***, which provisions prior to May, 2017 did not invite any controversy. Its terms are quite straightforward that:

> ***The supply or importation of the following goods shall be exempt supplies:***
>
> ***45. Specialised solar equipment and accessories, including solar water heaters and deep cycle-sealed batteries which exclusively use or store solar power.***

49. According to the applicant, this is an expansive provision that applies to either solar equipment or accessories which either exclusively use or store power. Some of such equipment or accessories which come within its scope include solar water heaters and deep-cycle-sealed batteries but that is not exhaustive for the test it whether the solar goods exclusively use or store solar power- a disjunctive test. Little wonder then since the provision was introduced in 2014 and for three years thereafter there was no demur from the Respondent that exclusively solar powered radios, torches and television sets were not liable to VAT.

50. It was submitted that it is a hornbrook cannon of statutory interpretation that the Court give effect to intention of Parliament as expressed in the words of the statutes in terms of their plain meaning as a matter of ordinary language. This cannon has particular salience in tax statutes in at least two pertinent ways in these proceedings:

(a) Tax statutes are interpreted strictly with no room for intendment and benefit of doubt accrues in favour of the tax payer as pithily put by Lord Simmonds *"subject ought to be taxed unless the words of the taxing statute unambiguously impose the tax on him."* Or alternatively put equally pithily, *" in a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at what is enacted."* This well-established principle of tax law has been followed and applied in Kenya– see for example, **Republic vs. Commissioner of Domestic Taxes Large Tax Payers Office Ex-Parte Barclays Bank of Kenya Limited [2012] eKLR** per and the cases cited therein.

(b) Exemptions conferred are liberally interpreted in favour of the tax payer so as to promote the activities incentivized by those exemptions- see for example the decision of the Indian Supreme Court in ***Commissioner of Income-tax v Shaan Finance (P) Ltd*** JT 1998 (2) SC 464

51. In the applicant's submissions it has been authoritatively held an exemption provision cannot be denied its full effect by a circuitous process of interpretation- see the judgment of the Indian Supreme Court in ***Swadeshi Polytex Ltd v Collector of Central Excise,*** AIR 1990 SC, 301. Yet the Respondent in this case does something worse than circuitous interpretation. It had engaged in amending the applicable provisions. Since its current position lacks textual foundation, the Respondent essentially sets itself up as some kind of super-legislature, disclaims actual statutory language and in effect amends item 45 to remove some words and introduce others. Thus, to sustain its current position that solar televisions, radios and torches are not VAT-exempt, the words/phrases 'including' 'exclusively use' are deleted, and word/phrases 'generation of solar power' and 'specific accessories' introduced. The notion that taxing authorities can revise amend/delete tax statutes as they deem fit is a violent affront to constitutional system of government with separation of powers at is heart with only Parliament authorized to enact law.

52. The applicant submitted that though in the replying affidavit, it was explained that the source of these revisions which the Respondent is introducing to the ***VAT Act***, i.e. 2016 amendments to the ***EACCMA***, under the ***Kenya Revenue Authority Act, 1995***- section 5(2)(a) the role and duty of the Respondent is administer the tax laws of Kenya as set out in the 1st and 2nd Schedule to the Act which includes the ***VAT Act*** as well as ***EACMA*** . It can only lawfully administer those laws as written not as it wishes it were written. While acknowledging that the Respondent is authorized to administer ***EACMA***, it was submitted that it is subject to Kenyan law since section 65 of the ***VAT Act*** provides that:

> ***Subject to this Act, the East African Community Customs Management Act, 2004 and any rules made thereunder relating to customs generally, whether made before or after the commencement of this Act, shall have effect, with such exceptions and adaptations as may be prescribed, in relation to imported taxable goods, whether 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.***

53. It was therefore submitted that the actions of the Respondent are illegal. Illegality is, of course, one of the three classic principal planks- the three "Is"- upon which actions and/or decisions are subjected to judicial review for it is a cardinal principle, essential to the rule of law that statutory bodies must act strictly within the confines of the empowering legislation. Any act supposedly done pursuant to a donated statutory power fails to do so, is unlawful, null and void- section 7(2)(i) & (ii) of the FAA and for example **Real Deals Limited & 3 Others vs. Kenya National Highways Authority & Another & another [2015] eKLR**. According to the applicant, It is now swell-settled that an action made in excess of jurisdiction and/or contra statute such as the Respondent's impugned action is a nullity, incurably bad- see generally - **Republic vs. Cabinet Secretary, Ministry of Information & Communication & 10 Others Ex Parte Adrian Kamotho Njenga [2015] eKLR**.

54. The applicant therefore prayed the grant of the orders as sought.

Respondent's Case

55. It was the Respondent's case that the dispute herein emanates from the interpretation of paragraph 45

of section A of Part 1 of the First Schedule to the ***VAT Act, 2013*** which paragraph provides for exemption of "*specialised solar equipment and accessories, including solar water heaters and deep cycle-sealed batteries which exclusively use or store solar power*" from VAT.

56. According to the Respondent, the applicant vide a letter dated 17th May, 2017 sought an exemption code from the Respondent's exemption office to allow clearance of the goods, an application which the Respondent rejected in its letter dated 23rd May, 2017 on the grounds that the goods do not meet the criteria set out under item 45 of part 1 of the first schedule to the ***VAT Act, 2013***.

57. However on 30th May, 2017, the applicant wrote to the Respondent's Customs and Border Control Department disagreeing with the Respondent's decision of 23rd May, 2017. Further the Applicant wrote to the Respondent Policy Customs *inter alia* explaining their position on item 45 of the first schedule to the ***VAT Act, 2013*** and requesting for the Respondent's reconsideration of its treatment on the ex parte applicant's consignment through their letter of 7th June, 2017. It was disclosed that the Respondent then advised the Applicant that after due consideration of the relevant item 45 of the first schedule of the ***VAT Act***, only specialised solar items used in the generation of solar power and the specific accessories mentioned quality for VAT exemption and therefore all taxes are due and payable for the consignment through its letter of 8th June, 2018.

58. It was averred that in view of the Respondent's position on the dispute, the ex parte applicant undertook to pay Import VAT under protest for its various imports in accordance with section 229(6) of ***EACCMA*** pending Appeal of the Respondent's decision in relation to interpretation of item 45 of the first schedule to the ***VAT Act, 2013***. To this end, the ex parte applicant wrote letters to the Respondent indicating payment under protest for each and every import made while the dispute was outstanding.

59. It was deposed that the Applicant, vide its letter of 13th June, 2017 then requested the Respondent's Customs and Boer Control Department for a private ruling on the Applicability of import VAT Exemption on their specialised solar equipment. The said request was based on the contention that the Respondent erred in the interpretation of item 45 of the first schedule to the ***VAT Act, 2013*** and was aggrieved by and objected the Respondent's decision to assess import VAT on specialised solar equipment including solar TVs which exclusively use solar that the *ex parte* applicant imports for sale.

60. It was averred that the Respondent, through its Customs and Border control department issued a ruling to the aforesaid request on 29th June, 2017 to the effect that the ex parte applicant's solar powered appliances fell within the description of item 45 f the first schedule to the VAT Act, 2013 which are VAT exempt. However sections of the Respondent's department did not agree with the said ruling and were of the view that such items imported by the ex parte applicant do not qualify for VAT exemption hence demanding that VAT is payable. Accordingly, the Respondent's various departments held consultative meetings through the Customs Technical Committee on the section of the law in dispute and made submission to the customs and Border Control department to issue another ruling to counter its earlier ruling.

61. It was therefore the Respondent's case that it was for the aforesaid reasons that the Respondent continued assessing Import VAT on the Applicant's imported solar appliances not covered by the exemption under item 45 of the first schedule to the VAT Act, 2013. It was disclosed that on 12th July, 2017, the applicant requested for duty and VAT exemption on its consignment consisting of solar LED TV displays to be used for its solar systems and on 12th July, 201 the applicant wrote to the Respondent citing inter alia inconsistent application of ruling by the Respondent's customs policy unit and assessing import VAT on solar TVs in spite the ruling dated 29th June, 2017. Further, the applicant sought indulgence on the matter and stated that I was available for a meeting to discuss the issue and for clarifications. However the Respondent reverted maintain that solar TVs did not qualify for exemption and that all taxes were due and payable.

62. It was averred that it was then that the Applicant wrote to the Respondent's Commissioner for

Customs Services vide a letter dated 15th August, 2015 alleging inconsistent application of the aforesaid private ruling within the Customs Department and requested for a ruling from the Commissioner of Customs Services "*on applicability of VAT exemption on MKOPA's specialised solar equipment that exclusively used and store solar power*". Thereafter the Respondent held various meetings with the Applicant' officials with a view of resolving the issue. It was averred that following the said meetings, the Respondent allowed the clearance of future importations using the ruling dated 29th June, 2017 without payment of VAT under protest pursuant to section 247(b) of ***EACCMA*** and would use the said ruling unless nullified by the Court in these proceedings. It was contended that by the applicant accepting and utilising the authority by the Respondent for future imports pending determination of the matter, the ex parte applicant bound itself in an undertaking under the provisions of section 107(1)(d) of ***EACCMA*** to pay import VAT upon determination by the Court. Accordingly, the applicant has been importing and clearing its goods in accordance with the *status quo* established in the aforesaid letter of 10th October, 2017.

63. The Respondent averred that on 24th November, 2017, upon conclusion of its internal evaluation of the VAT status of the applicant's importations of solar equipment and appliances resolved that solar panels and solar batteries including specialised cables and a set of LED lights imported by the ex parte applicant are all integral to the power generation and storage process and are therefore exempt from payment of VAT under the provisions of paragraph 45 of section A of part 1 of the first schedule to the ***VAT Act, 2013***. It however resolved that solar television sets, radios and torches are end use appliances that are not integral to the generation and storage of solar energy and that such appliances are therefore not catered for under the provisions of paragraph 45 of section A of part 1 of the first schedule to the ***VAT Act, 2013.*** Accordingly, VAT is payable on end use appliances in particular TV sets, Torches and Radios as had earlier been confirmed. It was therefore contended that the letter dated 29th June, 2017 did not reflect the correct position.

64. It was submitted on behalf of the Respondent that the issues arising out of the dispute herein are best ventilated by the parties at the Tax Appeals Tribunal since the dispute hinged on the interpretation of paragraph 45 of Part A of the First Schedule to the VAT Act.

65. According to the Respondent, the prayers sought by the Applicant and the whole dispute cannot be resolved by this Court without delving into the merits of the case since r this Court to make a finding that the solar powerd television sets imported by the Applicant are exempt from payment of VAT, the Court must first make a finding as to whether or not the solar powered television sets imported by the applicant are exempt in accordance with the aforesaid exemption provision.

66. It was submitted that whereas, prior to May, 2017, the applicant had applied for and obtained from the Respondent, the VAT exemption codes for its shipment, it is necessary for this Court to evaluate the contents of the Respondent's letter prior to May, 2017. The Court was invited to note that from the Respondent's letters, there was a qualifying paragraph to the effect that the exemption applied only to the qualifying items.

67. In support of its submissions the Respondent relied on **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] KLR**, **Republic vs. Kenya Revenue Authority exp Althaus Management & Consultancy Limited [2017] eKLR**, **Municipal Council of Mombasa vs. Republic& Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and submitted that since it is mandated under section 3 of the VAT Act and is responsible for the control and collection of, and accounting for the tax under the aforesaid Act, in so far as the determination of whether or not the Applicant's solar powered television sets were exempt or not, the Respondent was simply carrying out its mandate under the Act. Having followed the laid procedures in all its correspondence to the applicant, it was submitted that for this Court to make a declaration that the sola powered television sets imported are exempt from payment of VAT pursuant to the exemption provision, the Court must first consider the said exemption provisions, interpret the same and then make a finding that the items imported by the applicant fell within the items contemplated by the exemption provisions. It was however submitted that this would be delving into the merits of the decision which is outside the scope of the Court.

68. The Respondent also referred to section 9 of the ***Far Administrative Action Act*** and submitted that the alternative remedy to the applicant in challenging the exemption provision would ultimately lie before the Tax Appeals Tribunal pursuant to section 52(1) thereof which provides that a person dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the ***Tax Appeals Tribunal Ac***t, 2013. Under section 2 of the ***Tax Procedures Act*** an appealable decision is defined to mean an objection decision and any other decision made under a tax law other than a tax decision or a decision made in the course of making a tax decision. The Respondent also relied on section 2 of the TPA with respect to the definition of a "tax decision" as well as section 12 thereof which provides for an appeal to the Tribunal of a decision of the Commissioner.

69. While the Respondent agreed with the applicant that the issues in determination in the dispute herein are not tax decisions or decisions made in the course of a tax decision, the Respondent submitted that the issues in determination herein fall squarely under the interpretation of an "appealable decision" under section 2 of the TPA and as such, qualify to be determined by the Tax Appeals Tribunal. It was submitted that the Applicant in its various letters undertaking to pay under protest alluded to the intention to appeal hence as clearly aware of the rightful appellate procedure of the subject dispute.

70. According to the Respondent the issue of the legality of the private ruling and in particular the provisions of section 67(5) of the TPA and whether or not the Respondent was mandated to change its position of the said private ruling is better determined in a judicial forum that shall look at the merits of the same . However this Court in so far as it is called to determine the legal effect of the private ruling, the applicant has overstepped the Court's scope of judicial review.

71. In support of its submissions, the Respondent relied on **Republic vs. National Environmental Management Authority [2011] eKLR**, Grain Bulk Handlers Ltd vs. Kenya Revenue Authority & 2 Others [2018] KLR, **Republic vs. Kenya Revenue Authority exp Althaus Management & Consultancy Limited [2017] eKLR,** and **Republic vs. Commissoner of Domestic Taxes & Kenya Revenue Authority exp Fleur Investments Limited [2017] eKLR.**

72. While not disputing the presence of the private ruling, the Respondent averred that the same was issued contra statute, hence the reason the Respondent did not adhere thereto. Again while appreciating the legal effect of such a private ruling under section 67 of the TPA, the Respondent averred that pursuant to section 67(4) of the TPA, such a ruling remains in force until it is withdrawn which according to the Respondent was discernible from the Respondent's conduct in relation to the letters it issued post the private ruling in which the Respondent advised the Applicant that its items did not qualify for exemption. By seeking that the Commissioner of Customs Services makes a ruling on the applicability of VAT exemption on Mkopa specialised solar equipment that exclusively use and store solar power, it was submitted that the applicant acquiesced to the Respondent's conduct.

73. It was therefore the Respondent's case that its conduct did not create a legitimate expectation on the applicant in relation to the exemption provisions and the treatment of the applicant's solar home equipment. It was the Respondent's position that it is within the law for it to correct an erroneous interpretation of any law that it administers and advise a tax payer of the correct position as it did beginning May 2017. In this respect the Respondent relied on **Tarmal Industries Ltd vs. Commissioner of Customs and Excise and Cmmissioner of Customs and Others vs. Amit Ashok Doshi & 2 Others Mombasa Civil Appeal No. 157 of 2007,** where it was held that it is not in the interest of consistent application of the law that errors should be sanctioned as principle.

74. With respect to the objection, it was submitted that the applicant's letter dated 12th July, 2017 does not amount to a proper objection contemplated by section 51 of the TPA. To the Respondent, the said letter in so far as it invited the Respondent for a meeting to discuss the issue further failed the test of being a proper objection. Further having escalated the dispute to the Commissioner of Custom Services without making reference to it position in the alleged objection but that it was in the process of appealing, it is clear that the applicant had no intention of regarding the said letter as an objection contemplated under section 51(3) of the TPA. In this respect the Respondent relied on **Nairobi HC Misc. Application No. – Arrow Hi-fi (EA) Limited vs. Kenya Revenue Authority & 2 Others** that:

"An inquiry for information, meeting or discussion cannot in my view constitute the "application" contemplated by the section. The making of please and inquires leaves the assessment unaffected and effectual."

75. In this regard the Respondent further relied on **Africa K-Link International Limited vs. The Commissioner of Customs HC Misc. Appl. No. 157 of 2012**, **Republic vs. Kenya Revenue Authority exp Funan Construction Ltd [2016] eKLR**, **Metro Pharmaceuticals Limited vs. Kenya Revenue Authority NRB. Hc. Misc. Appl. No. 108 of 2011**.

76. According to the Respondent, the specialised solar powered TV sets and torches imported by the Applicant do not fall within the aforesaid section of the law and are therefore not exempt from VAT. To the Respondent, it is only the water heaters and deep cycle-sealed batteries which exclusively use or store solar power.

77. The Respondent therefore prayed that the application be dismissed with costs.

Determinations

78. I have considered the issues raised in this application by way of affidavits, Statement of Facts, grounds and submissions by the respective parties.

79. According to the applicant, since the expansion of its solar home systems to include solar powered television sets which was initiated on or about the month of February 2016, it had imported and cleared over 70,000 television sets which are exempted from VAT as specialized solar equipment which exclusively use or store solar power under PART 1 section A of the ***Value Added Tax Act, 2013*** ("the VAT Act") as amended by section 2 (a) (v) of the ***VAT (Amendment Act) 2014***. The Applicant has also relied on this provision to seek exemption of its radios, torches and bulbs all of which are also exclusively solar powered. Prior to May, 2017, all such applications to the Respondent by the Applicant were allowed and no VAT was paid on such exclusively solar power equipment.

80. That the application for exemption was made by the applicant is not denied save that the Respondent stated that in its letters, there was a qualifying paragraph to the effect that the exemption applied only to the qualifying items. However, the Applicant averred that since the expansion of its solar home systems to include solar powered television sets which was initiated on or about the month of February 2016, it had imported and cleared over 70,000 television sets which are exempted from VAT as specialized solar equipment which exclusively use or store solar power under PART 1 section A of the ***Value Added Tax Act, 2013*** ("the VAT Act") as amended by section 2 (a) (v) of the ***VAT (Amendment Act) 2014***. This was the same provision that the applicant relied on to seek exemption of its radios, torches and bulbs all of which are also exclusively solar powered. Prior to May, 2017, all such applications to the Respondent by the Applicant were allowed and no VAT was paid on such exclusively solar power equipment.

81. However when on or about 17th May, 2017 as part of the established pre-arrival procedure, the Applicant sent, as it had done in the past, a letter to the Respondent's Deputy Commissioner, Customs Service Department, Exemption & Waivers seeking exemption from duty and Value Added Tax ("VAT") on a shipment of solar powered televisions sets due to arrive in Kenya on 24th May, 2017, the Respondent on 23rd May, 2017 responded for the very first time without any detailed explanation as to its sudden change of position, declined the said application, peremptorily stating that there was no legal provisions for exemption on solar TV and demanding payment.

82. This Court's judicial review jurisdiction was restated in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** where it 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."

83. 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.***

84. 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."

85. 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."

86. 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."

87. 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. It therefore follows that this Court is not concerned with the merits of the Respondent's decision to subject the applicant's imported solar powered televisions to VAT. Rather, it is the process of arriving at the said decision that concerns me.

88. The question that arises is whether the Respondent having in the past permitted the Applicant to import the said items without imposition VAT, it could suddenly make an about-turn as it were, and impose the said tax on the said items. In **Attorney General of Hong Kong vs. Ng Yuen Shiu [1983] 2 All ER 346** the court stated that:

"when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty".

89. The Respondent has however insisted that its position was always clear that those items that did not deserve exemption would remain taxable. It is however clear that the Respondent's conduct did not reflect this position. That a legitimate expectation may arise either from express stipulations or by conduct was appreciated in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** where it was held that:

"…….legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way…..Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. …..In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the *quantum* of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power."

90. In this case the Respondent accepted the applicant's past applications for exemptions and proceeded to exempt the applicant's importation of the items in question. According to **Ecobank Kenya Limited vs. Commissioner of Domestic Taxes ITA No.8 of 2010** where the Judge relied on the English Case of **Council of Civil Services Unions vs. Minister for Civil Service 1985 AC 374**:

"In the English decision of COUNCIL OF CIVILSERVICES UNIONS V MINISTER FOR CIVIL SERVICE 1985 AC 374 Lord Fraser stated as follows:-

'a 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.'

I would add that the expectation herein is not just a legitimate expectation. It is an expectation backed by a written express waiver and a passive conduct in relation thereto for a period of twenty five years. All this time the Respondent was aware of section 15(7) of the Income Tax Act. In my finding, that expectation became so legitimate, and so strongly grounded, that it established an economic right that only an express, concise, and specific waiver clearly communicated and delivered, could uproot."

91. According to **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935** where **Lord Diplock** states, at page 949:-

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (Emphasis supplied)

92. I appreciate the position in **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** that a purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims and that a legitimate expectation may be withdrawn. I am also cognisant of the position in **Tarmal Industries Ltd vs. Commissioner of Customs and Excise and Cmmissioner of Customs and Others vs. Amit Ashok Doshi & 2 Others Mombasa Civil Appeal No. 157 of 2007,** where it was held that it is not in the interest of consistent application of the law that errors should be sanctioned as principle. However, it is not contended that he Respondent had no power to exempt the subject items from being subjected to VAT. The law as I understand it is that a legitimate expectation can only be lawfully withdrawn where rational grounds of the intention to withdraw the same have been communicated to the beneficiary of the expectation and he has been given an opportunity to comment thereon. In other words the decision to withdraw the expectation must be rational and the beneficiary thereof must be heard thereon. Hence in **R (Bibi) vs. Newham London Borough Council 2001 EWCA CIV 607**, it was held:

"Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires."

93. The reason why legitimate expectation is protected by the law was explained by **De Smith, Woolf & Jowell,** in ***"Judicial Review of Administrative Action"*** 6th Edn. Sweet & Maxwell page 609 to the effect that:

"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."

94. Apart from that there is, as was held by **Lord Griffiths** in the House of Lords decision in **Bennett vs. Horse Ferry Road Magistrate's Court and Anor [1993] 3 All ER at page 150**:

> **"…a clear pubic interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain."**

95. Whereas it is true as stated in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** that 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, in this case it is not contended that the persons who exempted the subject items from taxation had no actual or ostensible authority to do so.

96. I therefore have no hesitation in finding that the sudden arbitrary and unexplained about-turn made by the Respondent with respect to the importation of the solar powered televisions amounted to the thwarting of the applicant's legitimate expectations that the said items were exempt from VAT.

97. In this case, it is not in doubt that According to the applicant, on 29th June, 2017 the Respondent's Commissioner for Customs and Border Control delivered a private ruling ("the Private Ruling") as per the provisions of section 67 of the ***Tax Procedures Act, 2015*** ("the TPA") in which the Commissioner definitively concluded:

> *"In view of the provisions and having considered the matters at hand, your client's goods fall within the description "Specialized solar equipment and accessories...which exclusively use or store solar power" provided as exempt the First Schedule to the current VAT 2013.*

98. The legal effect of a private ruling appears in Part X of the TPA, in particular section 67 which provides that:

> ***(1) If the Commissioner makes a private ruling, the Commissioner shall notify the applicant of the ruling in writing.***
>
> ***(2) The Commissioner may make a private ruling based on assumptions about a future event or any other appropriate ground.***
>
> ***(3) A private ruling shall state that it is a private ruling, set out the question ruled on, and identify—***
>
> ***(a) the taxpayer;*** ?
>
> ***(b) the tax law relevant to the private ruling;*** ?
>
> ***(c) the reporting period to which the ruling applies;*** ?
>
> ***(d) the transaction to which the ruling relates; and*** ?
>
> ***(e) any assumptions on which the ruling is based.*** ?
>
> ***(4) A private ruling shall take effect when the applicant is served with written notice of the ruling and the ruling shall remain in force until it is withdrawn.***

99. It is therefore clear that a private ruling has a binding effect on the parties thereto and remains in force until it is withdrawn. From the record it is clear that the said ruling was not expressly withdrawn. In fact while not disputing the presence of the private ruling, the Respondent averred that the same was issued

contra statute, hence the reason the Respondent did not adhere thereto. Again while appreciating the legal effect of such a private ruling under section 67 of the TPA, the Respondent averred that pursuant to section 67(4) of the TPA, such a ruling remains in force until it is withdrawn which according to the Respondent was discernible from the Respondent's conduct in relation to the letters it issued post the private ruling in which the Respondent advised the Applicant that its items did not qualify for exemption.

100. While this Court cannot in these proceedings make a determination as to whether the ruling was contra statute, it is clear that the law required that the Respondent to lawfully withdraw the same such withdrawal had to be expressed in clear terms and in my view the reasons for taking such an actions which was clearly adverse to the applicant ought to have been furnished to the applicant who should have been heard thereon pursuant to Article 47 of the Constitution as read with section 4 of the ***Fair Administrative Action Act***. Considering the express particulars required to be set out in the ruling it is my view and I hold that the withdrawal of a private ruling cannot be by mere implication. It is therefore my view that the private ruling of 29th June, 2017 by the Respondent's Commissioner for Customs and Border Control delivered as per the provisions of section 67 of the ***Tax Procedures Act, 2015*** ("the TPA") was never lawfully withdrawn.

101. It is therefore neither here nor there that the applicant objected to the purported decision to withdraw the said ruling since as held by the East African Court of Appeal in **Jetha Ismail Ltd vs. Somani Brothers [1960] EA 26 while relying on Algar vs. Middlesex County Council [1945] 2 All ER 243 at 251**:

> **"The elements essential to bring a case within the scope of "estoppels" are…the representation must have been of the existence of a fact and not of promises *de future* or intention which might or might not be enforceable in contract…One realises that when one is dealing with the doctrine of estoppels, one must always be careful to see that the court is not saying that a man is stopped from stating what is the law. No man can ever be stopped from that. If all that happened was that a certain view of the law was taken and a mistake was made in what, after all, on the part of anybody, even a judge, can only be an expression of an opinion as to what is the law, no law of estoppels can prevent him from asserting that that is the law. It is questions of fact which are dealt with."**

102. Therefore the so called representation, if indeed it was one, was not a representation of fact but of law and therefore cannot amount to estoppel since as was held in **Niazons (K) Ltd. vs. China Road & Bridge Corporation (K) Civil Appeal No. 187 of 1999**, there is no waiver, estoppel or acquiescence of or against a statute or the law.

103. With respect to the objection, it was submitted that the applicant's letter dated 12th July, 2017 does not amount to a proper objection contemplated by section 51 of the TPA. To the Respondent, the said letter in so far as it invited the Respondent for a meeting to discuss the issue further failed the test of being a proper objection. Further having escalated the dispute to the Commissioner of Custom Services without making reference to it position in the alleged objection but that it was in the process of appealing, it is clear that the applicant had no intention of regarding the said letter as an objection contemplated under section 51(3) of the TPA. In this respect the Respondent relied on Nairobi HC Misc. Application No. – Arrow Hi-fi (EA) Limited vs. Kenya Revenue Authority & 2 Others that:

> **"An inquiry for information, meeting or discussion cannot in my view constitute the "application" contemplated by the section. The making of please and inquires leaves the assessment unaffected and effectual."**

104. In this regard the Respondent further relied on **Africa K-Link International Limited vs. The Commissioner of Customs HC Misc. Appl. No. 157 of 2012**, **Republic vs. Kenya Revenue Authority exp Funan Construction Ltd [2016] eKLR**, **Metro Pharmaceuticals Limited vs. Kenya Revenue Authority NRB. Hc. Misc. Appl. No. 108 of 2011**.

105. In this case the applicant through its agent, PKF lodged an objection by a letter dated 12th July,

2017. The said letter identified the Applicant's grievance as the Respondent's "*decision to assess import VAT on specialized solar equipment to be precise Solar TVs that it imports for sale to customers together with its other products which includes torches and radios which all exclusively use solar power.*" The grounds for objection were stated as the "*incorrect and misleading interpretation of the Value Tax (Amendment) Act (No.7 of 2014)*" and the letter requested the Respondent to revise its erroneous contention to the contrary. In fact the letter clearly stated that:

> ***"It is on this basis that we object the decision by KRA to assess import VAT on Solar TVs which exclusively use solar since they fall within the scope of VAT provided under Item 45 of the First Schedule to the VAT Act."***

106. In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the tax payer is seeking further particulars or indulgence to enable it pay the taxes demanded. In this case the applicant had clearly made what was in substance an objection as envisioned under section 51 of the ***Tax procedures Act, 2015.*** Accordingly, the Respondent was required to make a decision in respect thereof within sixty (60) days under section 51(11) of the said Act. As the Respondent defaulted in making a termination thereon within the prescribed time, the said objection was deemed to have been allowed.

107. As the law deems the objection to have been allowed, there is no reason why the applicant should have appealed. In the premises the question of existence of an alternative remedy does not arise in the circumstances.

108. As to whether an order of mandamus ought to issue, the House of Lords in **Commissioners of Inland Revenue vs. National Federation of Self-Employed and Small Businesses Limited [1982]A.C. 617** stated that:

> **"It must follow from these cases and from principle that a taxpayer would not be excluded from seeking judicial review if he could show that the Revenue [Department] had either failed in its statutory duty toward him or had been guilty of some action which was an abuse of their powers or outside their powers altogether."**

109. See also **Republic vs. Kenya Revenue Authority Ex-parte L.A.B. International Kenya Limited [2011] eKLR**.

110. Accordingly, based on the said grounds, the Notice of Motion dated 3rd October, 2017 is merited.

Order

111. Consequently, I issue the following reliefs:

> **1. A Declaration that the Respondent's Demand for the Applicant to pay Value Added Tax on imported solar powered television sets violated the Applications Right to Fair Administrative Action under Article 47 of the Constitution and Section 4 of the *Fair Administrative Action Act, 2015*.**
>
> **2. An Order of Certiorari removing into this Court the Respondent's decisions in respect of the non-applicability of exemptions on Value Added Tax to solar powered television sets imported by the Applicant as contained in its letters dated 5th July, 2017, 9th July, 2017, 15th August, 2017, 19th August, 2017, 22nd August, 2017 and 8th September, 2017 which decisions are hereby quashed.**
>
> **3. An order of *prohibition* prohibiting the Respondent and its authorized officers and/or agents from demanding the payment of VAT on solar-powered television sets imported by the Applicant based on the said decisions.**

4. An order for *mandamus* directed at the Respondent to refund the Applicant Kshs 35,773,353/= being Value Added Tax paid to Respondent by the Applicant in respect of solar powered television sets for shipments numbers AEM-INV-195, AEM-INV-199, AEM-INV-200, AEM-INV-203, AEM-INV-207, AEM-INV-217, AEM-INV-223, AEM-INV-231, AEM-INV-235, AEM-INV-237, AEM-INV-241, AEM-INV-242, AEM-INV-244, AEM-INV-252, AEM-INV-256, AEM-INV-257, AEM-INV-262, AEM-INV-265 and AEM-INV-268.

5. The costs of these proceedings are awarded to the applicant.

112. Orders accordingly.

G V ODUNGA

JUDGE

Delivered at Nairobi this 18th day of April, 2018

P NYAMWEYA

JUDGE

In the presence of: