



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 586 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION & DECLARATORY ORDERS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**EXPARTE:**

**NEOLIFE INTERNATIONAL LIMITED**

**JUDGMENT**

**Introduction**

1. The *ex parte* Applicant herein, Neolife International Limited (hereinafter “the Applicant”) is a registered company under the Company Act, carrying on business of selling supplying and distributing food supplements in Kenya. The Respondent on the other hand is a statutory body established under the Kenya Revenue Authority Act, and tasked with the mandate of collecting revenue on behalf of the Government of Kenya and the enforcement of revenue law, including the Value Added Tax Act 2013, the Excise Duty Act 2015, and the East African Community Customs Management Act of 2004.

2. The dispute between the Applicant and Respondent arises from a customs post clearance audit carried out by the Respondent on the Applicant’s import and export operations for the year 2010 to September 2015, pursuant to sections 235 and 236 of the East African Community Customs Management Act (hereinafter “EACCMA”). Resulting from the said audit, the Respondent issued the Applicant with a demand for alleged extra taxes in the amount of Kshs 98,815,351/=, on the basis that the royalties paid by the Applicant to its parent company GNLD US was a consideration for which the value could not be ascertained at the time of importation, and was thus part of the transaction value for custom purposes.

3. The Applicant and Respondent thereafter engaged in meetings and correspondence on the method that was used to compute the custom value of the goods. In particular, the Applicant alleged that the Transaction Value Method employed by the Respondent was not applicable, for various reasons it enumerated. The Respondent subsequently in a letter dated 4<sup>th</sup> August 2017 demanded that the Applicant pays the alleged extra taxes within 14 days, and notified the Applicant that it intended to recover the extra taxes through the measures provided by EACCMA.

4. The Applicant consequently moved this Court by way of a Notice of Motion Application dated 12<sup>th</sup> October 2017, after having been granted leave, in which they seek the following orders:

- a) **An order of Certiorari do issue to remove into this Court and quash the Respondents decisions in its letter dated 4<sup>th</sup> August 2017 to demand for alleged extra taxes.**
- b) **An order of Prohibition directed at the Respondent whether by itself, its servants, agents, officers, successors and /or assigns, prohibiting them from enforcing or executing the demand for the payment of the alleged extra taxes for the period of 2010-2015 contained in its letter dated 4<sup>th</sup> August 2017 against the Applicant.**
- c) **A Declaration do issue that the Respondent, in issuing the demand for the alleged extra taxes and threatening to enforce**

the such demands for the period 2010-2015 against the Applicant, has abrogated the Applicants rights to a fair administrative action, as guaranteed under Article 47 of the Constitution and as provided for under Sections 3,4,5,6 and 7 of the Fair Administrative Action Act.

**d) A Declaration do issue that in the exercise of its powers as vested in it by statute and otherwise, the Respondent has failed to comply with the requirements and tenets of fair administrative action contrary to the provisions of Sections 5, 6 and 7 of the Fair Administrative Action Act and Article 47 of the Constitution.**

**e) An order for damages do issue on account of the Respondent's violations of the Applicant's constitutional and statutory rights, and such damages to comprise general, aggravated and punitive damages**

**f) The costs of this Application be provided for.**

5. This Court shall now proceed to highlight the parties' respective cases as stated in the pleadings they filed in Court.

### **The Applicant's Case**

6. Mr. David Nyaga, the Applicant's Finance Manager, filed a verifying affidavit he swore on 22<sup>nd</sup> September 2017, and a supplementary affidavit sworn on 8<sup>th</sup> February 2018 in support of the application. The Applicant Advocates on record, Coulson Harney Advocates, also filed a statutory statement dated 22<sup>nd</sup> September 2017 detailing the grounds relied upon for the relief sought, submissions dated 3<sup>rd</sup> April 2018 in support of the application, and submissions in reply dated 25<sup>th</sup> June 2018.

7. From the said pleadings, it is contended that the Applicant is involved in the business of selling and supplying food supplements, home care products and nutriance/personal products imported from various entities outside Kenya, and is a subsidiary of GNLD International LLC. The Applicant annexed a notice issued to it by the Respondent dated 29<sup>th</sup> September 2015 pursuant to sections 235 and 236 of the EACCMA, to conduct the customs post clearance audit for the period 2010 to September 2015 on its imports.

8. The Applicant also attached letters from the Respondent dated 17<sup>th</sup> December 2015 and 15<sup>th</sup> February 2017, on the extra taxes that the Applicant was required to pay, as well as the demand dated 4<sup>th</sup> August 2017, whose contents have been summarized in the introduction to this judgment. Also annexed were the Applicant's letters in response dated 9<sup>th</sup> June 2017 and 2<sup>nd</sup> August 2017 respectively.

9. The Applicant's position is that the Transaction Value Method used by the Respondent in computing the value of the goods during the period of the post clearance audit was not the lawful method to be used, based on the following reasons:

a) That pursuant to the provisions of the Fourth Schedule of EACCMA, the Transaction Value Method may only be used in specific instances of which the nature of the Applicant's goods is not one of them.

b) That whereas the Transaction Value Method is the primary method of valuation of the customs value of imported goods, where the customs value cannot be ascertained under the Transaction Value Method it is determined by proceeding sequentially through the succeeding paragraphs of the Fourth Schedule, and that it is only when the customs value cannot be determined under the provisions of a particular paragraph will the provisions of the next apply.

c) That the Transaction Value Method is only to be used in instances where *inter alia* the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued.

d) That the Transaction Value Method is to be used where the importer of the goods and the person the goods are being sourced from are not related, as such relationship may influence the purchase price of the imported goods.

e) That the Respondent is required to justify the application of one customs valuation method as opposed to another, and may not arbitrarily shift from one method to another.

10. The Applicant in this regard relied on the fact that the Respondent had used a different valuation method in March 2016, when it had disputed the customs value declared by the Applicant on the importation of goods with regard to Entry No 2016MSA5901346 and Entry No MSA5929872, contending that the transaction value declared was low, and that the supplier which was GNLD International (Pty) Limited South Africa, and the Applicant were related, both being subsidiaries of GNLD International.

11. The Applicant contended that it then supplied the Respondent with documentation, in particular the supplier commercial invoices and the sales contract on which they had imported the goods from GNLD South Africa. That the Respondent, through a letter dated 20<sup>th</sup> July 2017, made a decision to compute the final extra taxes on the goods imported in 2016 under Entry numbers MSA20165901346 and MSA5929872 using the Deductive Value Method, after taking into account the relationship between the Applicant and its suppliers GNLD SA. A copy of the said letter and correspondence exchanged between the Applicant and the Respondent on the customs valuation of those particular imports were attached.

12. Therefore, that based on the previous decision, the Applicant expected that the Respondent would use the Deductive Value Method, with regard to their subsequent imports of its goods. In addition, that the Respondent has at all material times known that the Applicant is part of the GNLD International LLC group of companies from whom it imports the goods it sells in Kenya; and that it's because of the relationship between the Applicant and other GNLD international group of companies that the Respondent decided to apply the Deductive Value Method and not the Transaction Value Method with respect to the goods imported in 2016.

13. The Applicant was of the view that it is absurd that the Respondent having conducted a customs post clearance audit for the period 2010-2015 to demand payment of the alleged extra taxes based on the Transaction Value Method, yet the overarching commercial arrangements both in the 2010-2015 audit and in the valuation of the 2016 consignment are identical. Further, that in both instances the Applicant has always imported its goods from the various GNLD/Neolife entities based on two key documents, namely the Licence Agreement and Contract for Sale of Goods, copies of which were annexed, and which were shared with the Respondent by the Applicant in a letter dated 1<sup>st</sup> February 2017, which was also annexed.

14. It is thus the Applicant's case that the differential treatment by the Respondent goes to show the arbitrariness with which the Respondent has acted towards the Applicant, who is entitled to uniform application of the law in determining the custom value of the goods imported by them. Furthermore, that the manner the Respondent applies the valuation methods on imported goods is unlawful, unprocedural and a violation of the Applicant's rights in law, as the Respondent selects the valuation method to use in determining the customs value of the Applicant's goods depending on whether the Applicant will be liable for additional taxes.

15. Further, that in accord with the provisions of the Fourth Schedule of EACCMA, the Transaction Value Method should not be used to determine the custom value of goods in circumstances where the sale price of the goods being valued is subject to some condition or consideration for which a value cannot be determined. That in this regard, it was confirmed by the Respondent in its letter dated 15<sup>th</sup> February 2017 that the royalties or license fees paid by the Applicant were considerations for which a value could not be determined at the time of importation of the relevant products, as it was a percentage of the Applicant's turn over. It was averred that the Applicant stands to suffer grave harm, and will be unable to meet its financial obligations to its bankers and other institutions if the Respondent is allowed to recover and collect the tax assessments claimed.

16. The legal grounds for review put forward by the Applicant in its pleadings are firstly, that the Respondent's decision to issue a demand relating to the period 2010-2015 based on the Transaction Value Method in determining the customs value of the Applicant's imported good is unfair, unreasonable, arbitrary, and not based on law. This is for the reason that the Respondent has arbitrarily chosen not to give reasons for its departure from the use of the Deductive Value Method that it had previously used in assessing taxes payable on similar imports by the Applicant, as would be required by section 122 of the EACCMA as read together with the Fourth Schedule.

17. Secondly, that the Respondents actions were in abuse of discretion and of the powers and authority conferred upon it by EACCMA, and is an affront to the Applicant's constitutional rights and will irredeemably affect the Applicant's business operations.

18. Lastly, that the Respondent's decision and conduct violate the principle of legitimate expectation, and that the Applicant had legitimate expectations that there would be legal certainty in the determination of customs value of its goods; that the Respondent would make its decision in this regard with fairness and consistently; that the tax measures and structures would be uniform, equal in application and certain; and that the Respondent would not exercise its powers in an unlawful manner, or abuse its powers for an improper motive.

### **The Respondent's Case**

19. The Respondent opposed the application by way of a replying affidavit sworn on 27<sup>th</sup> November 2017 by James Buyela, its Chief Manager in the Customs and Border Control Department, and submissions dated 4<sup>th</sup> May 2018 filed by its Advocate, Ms. Sheila Sanga.

20. The Respondent confirmed that it wrote a letter to the Applicant on the 29<sup>th</sup> September 2015, giving notice of intention to carry out a post clearance audit for the period 2010-2015 pursuant to section 235 and 236 of the EACCMA. That after carrying out the Audit, the Respondent on the 17<sup>th</sup> December 2015, issued an original demand notice for the payment of taxes amounting to Kshs 75,789,069/=-, which only covered the period under audit. Further, that the taxes assessed were as a result of the adjustment of custom value to include the franchise fees paid by the Applicant to GNLD international LLC over the period under audit, as required under the World Customs Organisation (WCO) Agreement on Customs Valuation.

21. Various correspondence and meetings thereafter took place between the Respondent and Applicant, which were enumerated in the Respondent's replying affidavit, and copies of the correspondence were also attached, as regards the extension of the payment deadline and the treatment of royalty fees in determining the customs duty. Further, that on 24<sup>th</sup> February 2016, the Respondent sought documents from the Applicant, including the contract between it and its parent affiliate company regarding intellectual property rights considerations and professional or management fee payments; which the Applicant did not provide.

22. It is the Respondent's case that it again wrote to the Applicant on the 15<sup>th</sup> February 2017, seeking the documentation and demanded for the accrued taxes of Kshs 98,815,351 inclusive of penalties and interests; and that it further clarified that the royalties paid by the Applicant to the parent company GNLD LLC, were considered as part of the transaction value for customs purposes, as payment of the royalties was a condition of sale and not optional.

23. The Respondent stated that the Applicant thereafter communicated its position with regard to the taxes, and that the two parties held a meeting on the 28<sup>th</sup> March 2017 with a view to solve the issues in dispute. Another meeting was held on the 28<sup>th</sup> April 2017, and after the parties could not reach an agreement on whether the royalties were treated as a condition of sale or not, it was therefore resolved that the Applicant would give a substantive response to the demand notice dated 15<sup>th</sup> February 2017.

24. According to the Respondent, the Applicant through its letter dated 9<sup>th</sup> June 2017 wrote to them conveying its position that the licence fees required by GNLD Kenya should not constitute an adjustment to the transaction value to be subjected to taxation. The Respondent then issued a demand notice on the 4<sup>th</sup> August 2017 restating its position that the royalties or license fees paid were a condition of sale which influenced the transaction value, and that the characterisation of the royalty payment to dividends immediately after the notice of intention dated 29<sup>th</sup> September 2015 does not in any way affect the treatment of such payments in determining the customs value.

25. In addition, that according to the license agreement between the Applicant and its related parent entity, the Applicant is the sole licensee of the licensor in Kenya, with sole distribution, marketing and other rights in relation to GNLD products, a fact which was a condition affecting the transaction value. Further, that the payment of royalty is a condition for the sale which must be taken into account in determining the transaction value for purposes of levying taxes.

26. The Respondent therefore contended that in the circumstances, the valuation method it employed giving rise to the demand notice dated the 4<sup>th</sup> August 2017 was proper in law and was not arbitrary, unprocedural, unreasonable, illegal and/or against the Applicant's legitimate expectation, and that its action complied with Article 47 of the Constitution and the Fair Administrative Action Act.

27. The Respondent averred that the Applicant responded to its demand notice through a letter dated 22<sup>nd</sup> August 2017, and thereafter moved to Court disputing the basis of the said demand notice. The Respondent asserted that the taxes are payable as demanded, and the Applicant's action of moving to court before exhausting all avenues is premature, as this is a tax dispute which requires to be handled first by the Tax Appeals Tribunal under the Tax Appeal Tribunal Act 2013.

28. Further, that the Applicant in its pleadings has deliberately misled the court by mixing issues arising from the Respondent's post customs audit of the period 2010-2015, with an unrelated and subsequent transaction and/or imports arising after the said period.

29. Particularly on the allegations made by the Applicant on the valuation method used for its 2016 consignment, the Respondent stated that the Applicant, through its letter dated the 18<sup>th</sup> March 2016, sought the Respondent's guidance in respect of the valuation method to be used with regard to the entry No.2016 MSA 5901346 GNLD, 1X20Ft Container. That the Respondent thereafter replied in a letter dated 21<sup>st</sup> March 2016 that the Transaction Value Method could not be applied in the circumstances of that entry, as the documentation provided could not justify the application of that method, and advised that the correct method was the Deductive Value Method and proceeded to use it in determining the value and taxes payable.

30. It is the Respondent's case that the Applicant failed to immediately pay, and that it consequently issued a separate assessment on 20<sup>th</sup> July 2017 limited only to two entries in 2016 being entry no 2016 MSA 5901346 and Entry No 2016 MBS 592872. The Respondent contended, that in the letter dated 20<sup>th</sup> July 2017, it justified the reason why it was using the Deductive Value Method, as opposed to the Transaction Value Method, and which was only limited to the transactions in 2016.

31. The Respondent averred that the aforesaid separate assessment was outside the scope of the post clearance audit demand dated 17<sup>th</sup> December 2015 which was to cover the years 2010-2015, and was only limited to the 2016 entries, and that the Applicant duly paid the taxes therein relating only to the transactions that occurred in 2016.

32. It was explained that when it comes to the valuation of imports, the Respondent is guided by the provisions of section 122 as read together with the Fourth Schedule to the EACCMA 2004, which lay out the manner of determining the value of imported goods for the purposes of levying duties, and sets out the methods of valuation which are to be applied in a sequential order. In addition, that it is only where the value cannot be determined in one method, that the commissioner considers whether the value could be determined using the next method.

33. Further, that paragraph 2 of the Fourth Schedule states the customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export subject to the conditions stipulated thereunder. In addition, that in determining the transaction value, there shall be added to the price paid or payable to the imported goods the royalties and license fees related to the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.

34. The Respondent asserted the method of valuation used is dependent on the facts of each case, which is dependent on the information available at the material time which will inform the Respondent's decision to adopt one method as opposed to another. It was deposed, with regard to the valuation of the 2016 consignment transaction, that the information available to the Respondent indicated that the Applicant and the persons whom they were importing from affected the transactions value, and therefore then transaction value method was inapplicable.

35. Further, that there were glaring differences in the invoice prices provided by the Applicant to the retail prices at which the same goods were resold in the market, and the Respondent annexed copies of the Applicant's tax invoices and price catalogue for the period 4<sup>th</sup> September 2015 to 5<sup>th</sup> October 2016 in support of this position.

36. Therefore, that the Transaction Value Method being doubtful, the Respondent had to use other methods in the manner stipulated under the Fourth Schedule of EACCMA 2004, in determining the customs value; and that it could neither use the Transaction Value Of Identical Goods method nor the Transaction Value Of Similar Goods method, as the Applicant was the only distributor of the products in Kenya, and there were no goods to compare.

37. The Respondent thus refuted the allegation that it arbitrarily shifted from one method to another, as the first three methods failed and the next sequentially acceptable method under the Fourth Schedule was the Deductive Value Method. Furthermore, that the assessments, were based on values obtained from the Applicant's product catalogue and their distributor compensation plan, and there for they acted in a lawful manner.

### **The Determination**

38. The parties canvassed the application by way of written submissions, which were highlighted at a hearing held on 26<sup>th</sup> July 2018. A preliminary issue has been raised by the Respondent as to whether this Court is properly seized of the Applicant's application on account of non-exhaustion of alternative remedies. If the application is found to be properly before this Court, the four substantive issues that will require determination are first, whether the Respondent acted illegally in assessing the additional taxes in the post-customs clearance audit

for the period of 2010 -2015 using the Transaction Value Method.

39. Second, whether by assessing the additional taxes in the post customs clearance audit for the period of 2010 -2015 using the Transaction Value Method the Respondent acted irrationally and unreasonably. Third, whether by assessing the additional taxes in the post customs clearance audit for the period of 2010 -2015 using the Transaction Value Method the Respondent violated the Applicant's legitimate expectation. Lastly, whether the Applicant is entitled to the reliefs sought.

#### **On The Preliminary Issue**

40. The Respondent submissions on the preliminary issue of whether the Applicant's application is properly before this Court were on account of judicial review being a remedy of last resort, and it was contended that where another statutory procedure lies, then the same ought to be followed before resort to judicial review unless exceptional circumstances make the procedure inapplicable. Reliance was placed in this regard on the decisions in Enkasiti Flowers Growers Limited vs Kenya Revenue Authority, (2010) e KLR, Republic vs Commissioner for Income Tax & Another ex parte Stockman Rozen (K) Limited, (2015) e KLR and Republic vs National Environment Management Authority, (2011) e KLR, as well as on the provisions of section 12 of the Tax Appeal Tribunal Act 2013 which provides that the Respondent's decision be appealed to the Tax Appeals Tribunal. According to the Respondent, the Applicant has not demonstrated that judicial review is the more effective and convenient remedy than the statutory laid down dispute resolution mechanism.

41. On the other hand, it is the Applicant's view that the decision made by the Respondent contained in the letter of 4<sup>th</sup> August 2017 is amenable to judicial review, and relied on the case of Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex parte Barclays Bank of Kenya Limited [2015] eKLR, for the position that the grounds upon which this Court exercises its judicial review jurisdiction are incapable of exhaustive listing. Further, that in the exercise of its jurisdiction, the Court is concerned with the decision making process rather than the decision itself, as held in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001.

42. The Applicant submitted that it seeks to challenge the Respondent's decision-making process that culminated into the decision contained in the letter dated 4<sup>th</sup> August 2017, and that that there is no challenge at this stage on the quantum of taxes sought to be levied by the Respondent. Therefore, that this is a principle of law that requires determination by this Court and which falls squarely within its judicial review jurisdiction.

43. The Applicant cited the decision in Republic v Kenya Revenue Authority, Commissioner of Customs Service & Julius Musyoki Ex-parte Darasa Investments Limited [2018] eKLR in this regard, and also contended that the Respondent should have properly raised its objection to the jurisdiction of this Court as a preliminary point for determination by Court at the earliest moment, as held in Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1,

44. I have considered the arguments made on the preliminary issue of the propriety of the Applicant's application, and also perused section 12 (1) of the Tax Appeals Tribunal Act, which states as follows:

**“(1) A person who disputes the decision of the Commissioner on any matter arising under the 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 the Tribunal, Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings..”**

45. Sections 9(2) (3) and (4) of the Fair Administrative Action Act also provide as follows:

**“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

**(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**

**(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”**

46. It is trite that under section 9(2) (3) and (4) of the Fair Administrative Action Act and under Article 159(2)(c) of the Constitution, one ought to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving this Court for judicial review proceedings. However, the Court is also granted discretion to exempt an applicant from such mechanisms in exceptional circumstances.

47. I find in this regard that that the appellate process provided for in section 12 of the Tax Appeals Tribunal Act mainly deals with the merits of a decision made by the Commissioner or Respondent, and would not be an efficacious remedy if what is in challenge is the decision making process, which is properly in the remit of this Court, as was appreciated in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others, [2007] 2 KLR 240 thus:

**“The respondents' argument that the applicant came to court prematurely without exhausting the internal tax objection process as regards each category of tax, is a serious misdirection because as it has been stated elsewhere in this judgment the issues raised were greater than any of the internal tribunals could handle. The task before the court is not, and has not been that of counting the shillings, it has been one of adjudicating on illegality, the doctrine of *ultra vires*, irrationality, procedural**

impropriety, Wednesbury unreasonableness, oppression, malice, bias, discrimination and abuse of power. Based on the turning points, outlined above the Court finds that the applicant has demonstrated that the respondents have acted *ultra vires* their powers to assess and levy tax in relation to the applicant. The act of lumping together assessments whereas the statute provides for separate notices of assessment to be issued and giving a 14 days notice, initially, without the separate assessments, was an act aimed at ambushing the applicant and causing panic. In short it was a malicious act which the respondents were not legally entitled to do – what the respondents were authorized to do as stated in *Somerset* is only what is within their statutory powers. And in the face of this, the respondents still have the courage to fault the applicant in seeking judicial review. I say no, when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance.”

48. In addition, when a similar issue arose in Kenya Revenue Authority & 2 others vs Darasa Investments Limited [2018] e KLR, the Court of Appeal held as follows:

“[35] As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this Court in Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR and Kenya Revenue Authority & 5 others vs. Keroche Industries Limited -Civil Appeal No. 2 of 2008. Perhaps, that is the reason why the legislator under Section 9(4) of the Fair Administrative Action Act stipulated that:-

"Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice." [Emphasis added]

Our reading of the above provision reveals that contrary to the appellants contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.

[36] Did the respondent 's case fall within the exception? The principles which a court should consider in determining whether a case falls within the exception are settled. This Court in Republic vs. National Environmental Management Authority- Civil Appeal No. 84 of 2010, set out the said principles as follows:

"...in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..."

[37] We find that the issue in dispute was the appropriateness or otherwise of the process or mode adopted by the appellants in arriving at the administrative decision as contained in the letter dated 22<sup>nd</sup> November, 2017. In other words, the respondent sought the review of the decision which it deemed as being unreasonable, unlawful and irrational. To us, the dispute rightly fell within the scope of judicial review which is concerned with the decision making process rather than the merit consideration of the decision in issue. As respondent was alleging arbitrariness on the part of the appellants, on the face of it, it would seem the High Court could not have declined to hear the matter”.

49. The Court of Appeal however held in that particular appeal that in the course of the hearing in the High Court; issues of failure on the part of the Respondent to produce evidence arose, and it then began to look like the judicial review forum was not the most efficacious in the circumstances. In the present application, the Applicant is challenging the legality and propriety of the process leading to the demand dated 4<sup>th</sup> August 2018 by the Respondent, and the application is thus properly before this Court.

### The Substantive Issues

50. Coming to the substantive issues raised and the arguments made thereon, this court is reminded of the broad grounds in which it exercises its judicial review jurisdiction as stated in the case of Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300 at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

51. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review.”

52. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

#### ***Whether the Respondent acted Illegally***

53. On the first issue of whether the Respondent acted illegally, the Applicant submitted that the Respondent completely misdirected itself and used the wrong procedure to value the customs value of its imports, and therefore violated the right to Fair Administrative Action under Article 47 of the Constitution. The Applicant relied on the case of **Republic vs KRA & Another Ex-parte Trade Wise Agencies** (2013) eKLR, for the proposition that an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. They also relied on the Court of Appeal decision in **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others** for the holding that judicial review has shifted to include aspects of merit review.

54. The Respondent on the other hand submitted that post clearance audit is founded in law specifically sections 235 and 236 of EACCMA, that following the audit a demand notice was communicated to the Applicant pursuant to the provisions of section 135 (1) of the EACCMA , and the assessment of fees was in accordance with the provisions of section 122 as read together with the Fourth Schedule of the EACCMA.

55. Further, that the Applicant failed to disclose that license fees payment was periodically done to the parent company, and this in turn affected the customs value of the imported goods. That the Applicant therefore abused the trust reposed on them by EACCMA to make accurate declarations of license fees payment. The Respondent relied on the Court of Appeal case of **Pili Management Consultants Ltd vs Commissioner Of Income Tax And Kenya Revenue Authority**, Civil Appeal No 154 of 2007 for this supposition.

56. Therefore, that the Respondent t acted within its statutory mandate and in the larger public interest to investigate tax fraud and initiate measures to safeguard the taxes. Further, that the Respondent had a statutory obligation and reasonable basis and justification for initiating the post clearance audit and issuing the tax demand against the Applicant.

57. In determining this issue, this Court is guided by the circumstances when a public body shall be deemed to have made an error of law as expounded in **Halsbury’s Laws of England, 4<sup>th</sup> Edition** at paragraph 77 as follows:

“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The **error of law must be relevant**, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash **where the decision would have been no different had the error not been committed**. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”

58. I have perused the provisions of law relied upon by the Respondent for its actions. Section 235 of EACCMA provides as follows as regards the duty of production of documents relating to goods:

**(1) 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 relating in any way to the goods; and

(b) to answer any question in relation to the goods; and

(c) make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transshipment of the goods, as the proper officer may deem fit.

(2) Where any owner fails to comply with any requirement made by the proper officer under this section, the proper officer may refuse entry or delivery, or prevent exportation or transfer, of the goods, or may allow the entry, delivery, or exportation or transfer, upon the deposit of such sum, pending the production of the books and documents, as the proper officer may deem fit; and any deposit made shall be forfeited and paid into the Customs revenue if the documents are not produced within three months, or such further time as the proper officer may permit from the date of the deposit.

(3) Where any requirement made by the proper officer under this section relates to goods which have already been delivered, exported, or transferred and the owner fails to comply with the requirement, the proper officer may refuse to allow the owner to take delivery, export or transfer any other goods.

(4) The proper officer may retain any document produced by any owner under the provisions of this section but such owner shall be entitled to a copy of the document certified under the hand of the responsible officer; and the certified copy shall be admissible in evidence in all courts and shall have equal validity with the original.

(5) A person who fails to comply with any requirement made under this section commits an offence.

59. Upon an inspection and audit of documents so produced, section 236 gives certain powers to the Commissioner as follows:

“The Commissioner shall have the 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 customs 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 possible for the goods to be produced.

60. The power to demand for any duties or taxes due upon such an audit is provided for under section 135 of the EACCMA, which provides as follows:

“(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.

61. Lastly, section 122 of EACCMA provides for the manner in which the customs value of goods shall be determined for purposes of imposing import duties as follows:

(1) Where imported goods are liable to import duty *ad valorem*, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value.

(2) Upon written request, the importer shall be entitled to an explanation in writing from the proper officer as to how the Customs value of the importer's goods was determined.

(3) Where, in the course of determining the customs value of imported goods, it becomes necessary for the Customs to delay

the final determination of such customs value, the delivery of the goods shall, at the request of the importer be made:

**Provided that before granting such permission the proper officer may require the importer to provide sufficient guarantee in the form of a surety, a deposit or some other appropriate security as the proper officer may determine, to secure the ultimate payment of customs duties for which the goods may be liable.**

**(4) Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.**

**(5) The Council shall publish in the Gazette judicial decisions and administrative rulings of general application giving effect to the Fourth Schedule.**

62. The Fourth Schedule in turn in its interpretation section states that Paragraphs 2, 3, 4, 5, 6, 7 and 8 of the said Schedule define how the customs value of imported goods is to be determined. Further, that the methods of valuation are set out in a sequential order of application, and the primary method for customs valuation is defined in Paragraph 2, and it is only where the customs value cannot be determined under the provisions of paragraph 2, that the value will then be determined by proceeding sequentially through the succeeding paragraphs. Paragraph 2 of the Fourth Schedule in this regard provides that the customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State which is adjusted in accordance with the provisions of Paragraph 9.

63. The Respondent's actions to undertake a post clearance audit of the Applicant's documents, assess additional tax thereon, and to also apply the Transaction Value Method as the primary method of valuation of the custom value of the Applicant's goods are clearly allowed by the foregoing provisions of the law, and to this extent the Respondent did not make any error of law or substantive illegality in reaching its decision of 4<sup>th</sup> August 2017.

64. The argument made by the Applicant that the Respondent selected the wrong method from among the various methods of valuation provided by law, is one that goes to the merits of the decision made by the Respondent. In particular, a determination of this ground will require a merit examination of the materials and evidence that was before the Respondent to find out whether in applying the Transaction Value Method it acted rightly or wrongly in law, which is not the purpose of judicial review.

65. It is notable in this regard that the Court of Appeal in Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others (supra) held that merit review by this Court is limited to certain grounds for judicial review as follows:

**“Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review.**

**The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.”**

66. Lastly, both the Applicant and Respondent annexed various correspondence that demonstrated discussion between them on the issue of the valuation method employed by the Respondent before the impugned decision was made by the Respondent on 4<sup>th</sup> August 2017. The Respondent in the said correspondence in addition explained why it chose the Transaction Value Method as opposed to the Deductive Value Method as its valuation method. This Court is thus reluctant to find that the use of the Transaction Value Method was shrouded in secrecy and was procedurally unfair.

#### ***Whether the Respondent acted Irrationally***

67. On the second issue as to whether the Respondent acted in an irrational and unreasonable manner, the Applicants submitted that by applying different methods for tax assessment for similar products imported under similar circumstances and without proper justification, the Respondent's decision was tainted with irrationality and illegality, and therefore ought to be quashed. Reliance was placed on the definition of a decision that is irrational and unreasonable found in Halsbury's Laws of England, 5<sup>th</sup> Edition, Volume 61, at paragraph 617, that it is a decision which is so perverse that no reasonable body, properly directing itself as to the law to be applied, could have reached that decision.

68. Further, that the misapplication of the EACCMA coupled with a total disregard of the representations made by the Applicant especially in its letter of 9<sup>th</sup> June 2017 was unreasonable, and that the Respondent's decision contained in its letter of 4<sup>th</sup> August 2017 should be quashed as sought in the Application.

69. The Respondent submitted that it had explained to the Applicant the reasons for the tax demand, and no evidence had been adduced to demonstrate that it acted illegally, irrationally or unreasonably, or that the Applicant's right to fair administrative action had been violated.

Reliance was placed on the decision in Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223 that the Court should in considering whether it acted unreasonably, investigate its actions to see if it took into account any matters that ought not to be, or disregarded matters that ought to be taken into account. Also cited was the decision in Bernard Murage vs Fineserve Africa Limited & 3 Others (2015) e KLR on the obligation on a party to plead with precision how a right has been violated.

70. This court has power to set aside a decision on the ground that the decision is irrational in its defiance of logic or of accepted standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it. This principle was settled by the decisions in Associated Provincial Picture Houses vs Wednesbury Corporation (supra) and Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374.

71. This ground was also explained in Pastoli vs Kabale District Local Government Council & Others, (supra) as follows:

**“...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...”**

72. In the present application, the impugned decision was in the Respondent’s letter dated 4<sup>th</sup> August 2017 which read as follows:

**“The Finance Manager**

**GNLD International limited**

**P O Box 355000, 00200**

**Nairobi**

**Dear Sir**

**RE: DEMAND NOTICE OF KENYA SHILLINGS 98,815,351.00**

**The above subject matter refers.**

**We acknowledge receipt of your letter to us ref AM/GK/6170313 dated 09<sup>th</sup> June, 2017 and our reply letter dated 05<sup>th</sup> July, 2017. We would like to submit as follows:**

**The Licence Agreement between GNLD International LLC and GNLD International limited at Article 1 sub rule 1.5 describes Licensed Information to include patents, trademarks, confidential technical information etc... with respect to the production, marketing or provision of goods and services under or in association with the GNLD name... It is thus clear that the imported goods which bear the trademark/copyright information affixed on them or are produced by utilizing patents and confidential technical information are the reason proper for the payment of royalties by the importer to its parent company.**

**The importer is therefore the sole licensee of the licensor in Kenya and has sole distribution, marketing and other rights in relation to GNLD products. Article 14 of this same Agreement also entitles the licensor to terminate the Agreement if any royalty payments are in arrears for a period of 30 days from the date they fall due. The termination article read together with Article 10 at 10.2 confirms that when the license Agreement is terminated, the licensee shall refrain from operating by itself or vide a 3<sup>rd</sup> party any business or program that makes use of any of the licensed information for a period of 5 years which therefore precludes the importer from importing or in any way dealing with GNLD branded products for a period of 5 years upon termination of the License Agreement. This therefore confirms that indeed the payment of royalties is a condition of sale of the imported goods. In the instant case therefore, a termination of the License Agreement due to non-payment of royalties estops the licensee from dealing in any manner with the licensed information.**

**The importer’s claim that the royalty payment is not a condition of sale of the imported goods is thus defeated by a reading of the implication of Article 10 read together with Articles 14 and 1 of the License Agreement. The re-characterisation of the royalty payment to dividends immediately after we had sent a notice of intention (ref HQ/PCA/FA/335/2015 dated 29<sup>th</sup> September, 2015) connotes a change in the modus operandi of the importer which is aimed at defeating the efforts of Customs to collect revenue rightfully due to the Commissioner of Customs.**

**In view of the above, we confirm our position that taxes captioned above are due and we intend to recover them vide measures elucidated in the EACCMA 2004.**

**You are therefore called upon to pay all the taxes assessed and accrued penalties, to the Commissioner of Customs without any further delay within fourteen (14) days from the date of this letter.**

**Yours faithfully,**

**J. Buyela**

**For: Commissioner, Customs and Border Control Department.”**

73. This decision is alleged to be reasonable by dint of *inter alia* using a different method from used in a by the Respondent namely the use of the Deductive Value Method is shown in its letter dated 20<sup>th</sup> July 2017 which read as follows:

“The Logistics Manager

**GNLD International Limited**

**NAIROBI**

**VALUATION OF GOODS IMPORTED BY GNLD INTERNATIONAL LIMITED UNDER ENTRY NO. 2016MSA5901346 AND MSA 5929872**

Reference is made to your appeal letter ref. No. 6157950 dated 28<sup>th</sup> June, 2016 from your legal representatives on the above subject and our joint subsequent meetings.

We have reviewed the case based on the additional information you have provided to us including the product catalogues, the distributor compensation plan and deliberations made during our meetings held on 16<sup>th</sup> May, 2016, 10<sup>th</sup> August, 2016. 9<sup>th</sup> March, 2017 and 20<sup>th</sup> July, 2017.

We have reviewed the customs value of the goods based on the information provided to us during the meetings. Pursuant to the provisions of sections 122 of the East African Community Customs Management Act, 2004 (as read together with the Fourth Schedule of the Act, paragraph 6), since GNLD is the sole distributor of the goods and taking into account its relationship with the suppliers of the goods, we have applied the deductive value method to determine the customs value of the goods. We have for purpose taken into account the corresponding retail prices in Kenya of the goods as per your distributor price list. On this basis we have established that:

a) The declared values for the supplements were found to be within the acceptable range; and

b) There was some disparity in the value of the home care products (beauty products and detergents) declared by GNLD for customs purposes compared to the customs value determined using the deductive value method. We have for this determined that you are liable to pay additional taxes as follows:

Tax head	2016MSA5929872 (KES)	20165901346 (KES)	TOTAL (KES)
Import duty	74,339	148,703	223,042
VAT	61,651	118,962	180,613
IDF	6,997	13,383	20,380
KRD	4,665	8,992	13,587
Total payable taxes	147,652	289,970	437,622

Please proceed to pay additional taxes in the amount of KES 437,622 as computed above in full and final settlement of this matter as soon as possible and following which we will forthwith procure the release of the bank guarantee you have provided to us in this matter.

We have also agreed that once the customs value of your home care products (beauty products and detergents) are in accordance with our discussions as reflected above, the customs value of your products will now be in order.

S.K. Sang

**FOR: COMMISSIONER OF CUSTOMS & BORDER CONTROL”**

74. An examination of the two letters shows that the Respondent gave the reasons why it chose to apply the Transaction Value Method and Deductive Value Methods in the two respective valuations, which are both methods of valuation provided by law. In addition, there were different considerations at play in the two decisions. In the decision of 20<sup>th</sup> July 2017 the Respondent considered the relationship between the Applicant and supplier of goods and the retail prices of the imported goods, while in the decision of 4<sup>th</sup> August 2017, the Respondent examined the terms of the Licence Agreement between the Applicant and its parent company in terms of royalty payment, in reaching a conclusion that payment of royalties is a condition of sale of the imported goods.

75. The provisions of the Fourth Schedule to the EACMMA address these circumstances, and how they determine the valuation method to be used. This includes when the relationship between an importer and supplier of goods will influence the use of the Transaction Value Method. The issue of when royalties or payments made by the buyer for the right to distribute or resell the imported goods shall or shall not be added to the price actually paid or payable for the imported goods, depending on whether or not such payments are a condition of the sale for export is also covered in the Fourth Schedule. The Respondents' decisions cannot therefore be said on their face to be irrational, as they were supported by reasons and the law.

76. It will also be going beyond the permissible limits of merit review for this Court to examine the circumstances that obtained during the two different valuations and the evidence that was before the Respondent to find out if the methods of valuation were justified, as this will be tantamount to making a decision on the substantive propriety and correctness of the Respondent's decisions, which is beyond the acceptable limits of merit review on the ground of reasonableness..

#### ***Whether the Respondent violated the Applicant's legitimate expectation***

77. On the third issue of whether the Respondent violated the Applicant's legitimate expectation, it was the Applicant's argument that by employing the Transaction Value Method in the assessment of taxes and based on its various dealings with the Respondent, its right to legitimate expectation had been thwarted. In particular it placed reliance on the demand notice issued to them on the 20<sup>th</sup> July 2017 where the Deductive Value Method was used. That this meant that the Deductive Value Method would be used in future transactions

78. The Applicant further submitted that they had a legitimate expectation that the Respondent would assess the taxes in a uniform manner. It relied on **Keroche Industries Limited vs Kenya Revenue Authority & 5 Others- Nairobi (2007) KLR** for the holding that legitimate expectation arises 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.

79. It submitted that legitimate expectation arises to protect the Applicant from whimsical decisions of the Respondent. They relied on the case of **Republic vs AG & Another Exparte Waswa & 2 others 2005 1KLR 280** for the holding that the principle of legitimate expectation should not be confined only to past advantage but should be extended to a future promise or benefit yet to be enjoyed.

80. Further, that it is trite law that there must be certainty in taxation so as to aid the public in making business and investment decisions. The Applicant relied on the case of **Keroche Industries Limited vs Kenya Revenue Authority & 5 Others (supra)** for this proposition. Therefore, that the Respondent's decision of changing the method it has been using to assess the tax payable by them is an affront to the doctrine of legitimate expectation.

81. The Respondent on the other hand contends that they acted in compliance with the law and that there was no violation of legitimate expectation. It contended that the Applicant was misleading the Court with regard to the demand issued on them on 20<sup>th</sup> July 2017, which is not at all related with the demand notice of 4<sup>th</sup> August 2017.

82. The Respondent submitted that legitimate expectation cannot operate against the law and cannot be based on actions which are patently illegal. That the Applicant's non revelation of the license fees payment is a material mis-declaration which is an offence under section 203 (b) of the EACCMA 2004 which also give the Respondent the powers to conduct post audit custom clearance. The Respondent relied on the case of **Republic vs Kenya Revenue Authority & Another ex parte Kronos LCS Centre East Africa Limited, (2012) eKLR** for the holding that legitimate expectation must be within the law.

83. It was the Respondent's further position that legitimate expectation must be based on full disclosure by the Applicant, and it relied on the case of **Republic vs KRA Aberdare Freight Services Ltd, Nbi Civil Appl. No 946 of 2004** for this proposition. They further submitted that there cannot be breach of legitimate expectation or estoppel in the face of express statutory provisions.

84. A five judge bench of this Court in the case of **Kalpna H. Rawal v Judicial Service Commission & 4 others [2015] eKLR** exhaustively discussed the doctrine of legitimate expectation and various judicial decisions on the doctrine in a decision that was affirmed by the Court of appeal . The said bench observed as follows:

***“207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4<sup>th</sup> Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:***

***“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.***

***The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.”***

85. The said bench also reviewed various decisions on the doctrine, including the decision by Nyamu, J (as he then was) in the case of

**Keroche Industries Ltd v Kenya Revenue Authority and others (2007) eKLR** and that of Lord Diplock in the case of **Council of Civil Service Unions Minister for the Civil Service** (supra). It was noted by the Bench that in order to successfully rely on the doctrine of legitimate expectation there is need to demonstrate that the promise was made by an authorised public officer; was reasonable; and was within the law. Further, that any promise made outside the law cannot be legitimate and thus cannot give rise to any expectation, and that it is also necessary that an applicant places all the facts before the public authority before the assurance was given to him or her.

86. The Supreme Court in the **Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) eKLR** also explained the principle of legitimate expectation as follows:

**“[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.**

**[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”**

87. The said Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

**“[269] The emerging principles may be succinctly set out as follows:**

- a. there must be an express, clear and unambiguous promise given by a public authority;**
- b. the expectation itself must be reasonable;**
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and**
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”**

88. Applying these principles to the present case, this Court finds that no legitimate representation was created by the Respondent’s letter dated 20<sup>th</sup> July 2017 that applied the Deductive Value Method of valuation, as firstly, it was limited to the circumstances of that particular valuation and it cannot therefore be found that there was a persistent practice by the Respondent to apply the Deductive Value Method. Secondly, this Court cannot find that there was a representation in that letter that the Respondent will apply the Deductive Value Method for all valuations of the Applicant’s goods to the exclusion of the Transaction Value Method, as to do so would be contrary to the applicable provisions of the law, that allow for different methods to be applied depending on the circumstances of each case.

#### ***On the Reliefs Sought***

89. On the last issue as regards the relief sought, the Applicant has sought orders of certiorari and prohibition, declarations and damages. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge (supra) inter alia** as follows as regards the nature of the orders of prohibition and certiorari:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

90. The remedy of a declaration on the other hand is normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a public body’s powers and duties, the rights of individuals or the law on a particular issue. Lastly, for damages to be granted in judicial review, an Applicant must also in addition establish a free-standing right to compensation for example arising from a tort, contract or restitution, which is usually only possible by way of ordinary proceedings, and as such damages are a rare remedy in judicial review proceedings.

91. In the present application, this Court has found that the Respondent was acting within its powers and mandate and powers, and did not act unreasonably or violate the Applicant’s legitimate expectation. The Applicant is thus not entitled to the reliefs sought.

92. In the premises, I find the Applicants Notice of Motion dated 12<sup>th</sup> October 2017 is not merited, and it accordingly fails. The same is hereby dismissed, and each party shall bear their own costs.

93. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER 2018

P. NYAMWEYA

JUDGE