REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLENEOUS CIVIL APPLICATION NO. 393 OF 2014

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS PURSUANT TO ORDER LIII OF THE CIVIL PROCEDURE RULES AND ARTICLE 23 OF THE CONSTITUTION

AND

IN THE MATTER OF THE INCOME TAX ACT, CHAPTER 476 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC… APPLICANT

V E R S U S

KENYA REVENUE AUTHORITY……………….……..….. RESPONDENT

EX-PARTE ALTHAUS MANAGEMENT & CONSULTANCY LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 22nd October, 2014, the *ex parte* applicant herein, **Althaus Management & Consultancy Limited,** seeks the following orders:

> **a. An order of certiorari to bring into the High Court for purposes of being quashed all the assessment notices numbers 242010000240 and 2420120000830 directing the Applicant to pay the Respondent tax in the sum of Kshs. 10,908,965.00 and Kshs. 89,223,881.00 respectively.**
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> **b. An order of certiorari to bring into the High Court for purposes of being quashed all the agency notices dated 4th October 2011 issued to Diamond Trust Bank Kenya Limited and Bank of Africa Limited.**
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> **c. An order of certiorari to bring into the High Court for purposes of being quashed the demand notice seeking payment of Kshs. 98,053,666.00.**

d. An order of prohibition restraining the Respondent from carrying out further or other compliance audits for the period January 2009 to March 2012.

e. An order of prohibition restraining the Respondent from demanding payment of interest and penalties in the sum of Kshs. 24,684,886.70 as at 31st October 2012 or any other amount in respect of the period from October 2012.

f. An order of mandamus directing the Respondent to offset the withholding tax due to the Applicant in the sum of Kshs. 24,684,886.70 as at 31st October 2012 against the balance of VAT demanded as at 31st October 2012.

g. In the alternative to (e) above, an order of mandamus directing the Respondent to consider the Applicant's objection and carry out an audit of the Applicants' Withholding Tax claim and offset the same against the tax due as at 31st October 2012 within a period of thirty (30) days from the date of delivery of the Judgment herein.

h. Such further and other reliefs as this Honourable Court may deem just and expedient to grant.

i. Costs of and incidental to these proceedings.

Ex Parte Applicant's Case

2. According to the applicant, the facts giving rise to the dispute between the parties are as follows:-

a. In or about the month of May 2010. The respondent demanded payment of the sum of Kshs 18,152,990.00 from the applicant being the principal Pay as you Earn (PAYE), penalties and interest allegedly due from the petitioner for the period October 2009 to April 2010.

b. In June 2010, barely two months later, the respondent demanded payment of the sum of Kshs 21,232,408.00 and Kshs.10.908,960 being the PAYE and the principal, penalty and interest allegedly due from the applicant on account of unpaid Value Added Tax (VAT) for the period March 2008 to April 2010 respectively.

c. On 4th October 2011, the Respondent issued agency notices and appointed Diamond Trust Bank Kenya Limited and Bank of Africa as its agents for recovery of the sum of Kshs. 29,264,691.00. Of the said amount, Kshs. 16,272,431.00 was said to be the outstanding PAYE whereas Kshs. 12,992,260.00 was the purported unpaid VAT.

d. The Respondent did not give an explanation for the constant change in the amounts demanded and despite the Applicant disputing the said demands and the tax claimed, the Respondent kept issuing further demands instead of addressing the issues raised by the Applicant.

e. In raising the agency notices dated 4th October 2011, the Respondent failed to take into account the sum of Kshs. 6,493,066.00 being the PAYE paid by the Applicant for the period February 2010 to May 2010. By letter dated 5th October 2011, the Applicant objected to the amount demanded and sought a breakdown of the VAT claimed.

f. This culminated in a meeting between the parties' representatives held on 26th October 2011in which meeting the Applicant demanded a re-computation of the tax to ascertain the correct amount due in view of the several demands issued seeking for payment of different amounts and also requested that its Withholding Tax refund of Kshs. 17,801,825.00 be offset against the PAYE and VAT found due.

g. By letter dated 3rd November 2011, the Respondent forwarded to the Applicant the recomputed

tax having deducted the said sum of Kshs. 6,959,162.00 and amended its demand to now claim payment of Kshs. 17,105,477.00 and Kshs. 14,267,340.00 as the PAYE and VAT allegedly due from the Applicant respectively but did not however offset the tax due to it from the Applicant's Withholding Tax refund as requested.

h. By letter dated 2nd December 2011, the Respondent called for the Applicant's books of accounts to facilitate a compliance check on the VAT, PAYE and Corporation Tax.

i. In its responses both dated 8th December 2011, the Applicant agreed to the compliance check but disputed the Respondent's decision to charge it interest and penalties in disregard of clear instructions to offset the tax found due from the Withholding tax refunds claimed by the Applicant.

j. On 9th February 2012, the Applicant sent two reminders to the Respondent to act on its request for a set off but instead of responding to the issues raised by the Applicant, by letter dated 14th February 2012, the Respondent notified the Applicant that it would, again, conduct a compliance check on the VAT, PAYE and Corporation Tax on 28th February 2012 which was subsequently moved to 12th April 2012. The Applicant agreed to the second compliance check in good faith hoping that this would speed up its Withholding Tax refund set off.

k. As the compliance check was being carried out, the Respondent's officers requested the Applicant to supply them with Withholding Tax certificates for purposes of verifying the Withholding tax claim to facilitate the requested setoff and it was agreed that the relevant certificates be forwarded to the Respondent's offices. The Applicant duly forward to the Respondent the requested certificates by letter dated 21st May 2012.

l. Instead of communicating its findings on the compliance check and/or the Applicant's Withholding tax refund claim and request for a setoff, on 1st November 2012, the Respondent issued yet another assessment notice and this time demanded payment of the sum of Kshs. 89,223,881.00 from the Applicant being the VAT purportedly due for the period May 2010 to April 2012 alleging that the said assessment was necessitated by the Applicant's failure to declare and asses the correct VAT.

m. By letter dated 28th November 2012, the Applicant objected to the said assessment on the grounds that:-

> i. Previous attempts by the Applicant to file returns for the period in issue had been rejected by the Respondent's online software due to the fact that tax arrears were allegedly due. The Applicant had nonetheless since filed manual returns for the period October 2009 to October 2012. As such, no liability arose in this regard. It was therefore not true that the Applicant had not declared or assessed the correct VAT.
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> ii. Of the Kshs. 62,440,143.45 tax demanded, the Applicant had already forwarded to the Respondent the RTGS receipts confirming payment of the sum of Kshs. 37,775,256.75 and notified the Respondent that the balance of Kshs. 24,684,886.70 was to be offset from the Withholding tax refunds held by the Respondent.
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> iii. The Respondent ought not to have charged the Applicant interest and penalties since it was the Respondent that had failed to act on the Applicant's request to offset any tax found due from the Withholding tax owed by the Respondent to the Petitioner from the year 2010.

n. When by March 2013 the Respondent had not responded to the Applicant's request, by letter dated 26th March 2013, the Applicant requested the Respondent to acknowledge the payment of the sum of Kshs. 37,775,256.75 and confirm that the offset had been effected.

o. In its letter of 28th March 2013, the Respondent notified the Applicant that a refund could only be effected once the refund claim had been audited and confirmed. By letter dated 5th April 2013, the Applicant informed the Respondent that as agreed by both parties, the Withholding tax audit had been conducted as the Compliance audit was being carried out in April 2012. In this regard, the relevant information had been supplied to the Respondent's representatives.

p. Instead of addressing the issue of the Withholding tax recoverable or acting on the Applicant's objection, by letter dated 28th June 2013, the Respondent again demanded payment of the sum of Kshs. 98,053,777.00 being the alleged VAT arrears without giving any explanation as to how the said figure was computed.

q. Despite the Applicant's further objections dated 4th July 2013, 17th July 2013 and 1st August 2013 and the meeting held between the parties on 15th July 2013 when the Applicant requested for a re-verification of the Applicant's withholding tax records, the Respondent failed to act on the objections or to confirm the set off.

r. Consequently, by letters dated 2nd May 2014 and 6th June 2014, the Applicant's Advocates demanded a resolution of the long outstanding issues. By its letters dated 26th May 2014, 27th May 2014 and 1st July 2014 the Respondent called for a further compliance audit covering the period previously audited and other unaudited periods but the Applicant while objecting to an audit being conducted on the previously audited periods agreed to an audit of the subsequent period.

s. In the said letter of 1st July 2014, the Respondent notified the Applicant that it could not comply with its request for a setoff ostensibly because an application for a setoff must be in writing and the refund confirmed as due and payable. By this statement, it was clear that the Respondent had totally ignored the Applicant's previous requests in writing for a set off going back to three (3) years.

3. According to the applicant it is clear from the aforesaid chronology of events that the Respondent has without any or any valid basis declined to act on the Applicant's application for a set off despite the same being made in writing from the year 2010 and an audit on the Withholding tax refund being conducted in the year 2012. In addition, the Respondent failed to resolve the issue of the taxes due from the Applicant and the Withholding tax recoverable for approximately four (4) years.

4. It was the applicant's believe that the Respondent's deliberate refusal to act on the Applicant's request to offset the Withholding tax recoverable from it against any taxes found due from the Applicant for the past four (4) years was unreasonable and contrary to the national values and principles set out in **Article 10** of the Constitution hence the decision by the Respondent to issue agency notices with the knowledge that the tax claimed was disputed is illegal, null and void *ab initio.*

5. The applicant averred that as a result of the Respondent's refusal to offset the tax found due against the Withholding tax refund owed, the Applicant has suffered injustice as the Respondent is now taking advantage of its own failure to act on the Applicant's request in good time or at all to charge interest and penalties on the principal amount allegedly due from the Applicant. As such, the said interest and penalties are illegal and have been irregularly charged. It was the applicant's case that by deliberately refusing to apply the Withholding tax refunds against any tax found due and instead continuing to charge interest and penalties on an amount that is in any event not due, the Respondent infringed on the Applicant's right to property under Article 40 of the Constitution which conduct also had the effect of conferring an undue benefit upon the Respondent to the detriment of the Applicant hence.

6. To the applicant, the Respondent's refusal to offset the tax allegedly due, against the Withholding tax and further refusal to deal with the Applicants objections was high handed, unreasonable and in breach of its duty to act in a manner that is procedurally fair and violated Article 47 of the Constitution. In addition, by refusing to resolve the dispute within a reasonable period of time, the Respondent shirked and/or abdicated its responsibility as a public body and breached the Applicant's right to a determination of its objection/dispute as provided under Article 50 of the Constitution and the rules of natural justice.

7. The applicant contended that by constantly demanding to carry out compliance checks without dealing with the Applicant's objection and the request for a set off, the Respondent is clearly on a fishing expedition and is determined to intimidate and vex the Applicant with a barrage of compliance audits and demands which have no basis hence amounted to contravention of the principles of taxation as it has the effect of imposing an uncertain tax upon the Applicant. In addition to the aforesaid complaints and without prejudice thereto, the tax demanded by the Respondent is based on the assumption that the Applicant did not file VAT returns. The applicant however confirmed that despite the Applicant explaining to the Respondent that the Respondent's system rejected attempts by the Applicant to file returns online and that the Applicant was for that reason forced to file manual returns, the Respondent completely ignored the said explanation and continued to demand for payment of VAT arrears which were not due hence its conduct was unreasonable within the Wednesbury's principle of unreasonableness.

8. It was the applicant's case that having lodged its objection to the assessment within the period stipulated by law, it expected that the Respondent would determine the matter within a reasonable period of time but contrary to the said expectation, the Applicant never informed of the Respondent's decision to either reject the objection or amend the assessment notices as required by law. Consequently the Applicant was condemned to live with the anxiety of the unresolved assessment looming over its head in breach of the provisions of Article 47 of the Constitution and was as such unable to make long term plans in respect of its business.

9. The applicant further accused the Respondent of having ignored relevant factors and only took into account factors suitable to its predetermined conclusion hence acted in bad faith and irrationally as a result of which the Applicant had to incur unnecessary expenses to protect its rights before this Court. The applicant therefore contended that the Respondent's conduct was clearly irrational, unreasonable and in breach of the Applicant's legitimate expectation by the reason therefor, the Applicant was deprived and continues to be deprived of its right to protection of the law guaranteed under Articles 22(1) 25(c), 48 and 50(1) of the Constitution.

10. It was the applicant's case that by reason of the Respondent unreasonably and improperly issuing agency notices, the Applicant suffered and continues to suffer loss and damage as follows:

> i. The Respondent published malicious falsehoods of and concerning the Applicant by portraying it as unable to meet its financial obligations to its bankers and business associates.
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> ii. The aforesaid depiction of the Applicant by the Respondent is defamatory and resulted in the Applicant's loss of business as its bankers were unable to vouch for its financial viability.
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> iiii. The publication of the agency notices lowered the Applicant's credit worth and occasioned it economic losses.
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> iv. By virtue of the agency notices, the Applicant was denied access to its bank accounts and in the circumstances its operations were negatively affected.
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> v. The Respondent's conduct eroded the Applicant's goodwill.

11. According to the applicant, in demanding tax that is in any event not due, the Respondent has acted *ultra vires* hence the impugned conduct by the Respondent amounts to abuse of office. In its view, any tribunal properly seized of all the facts set out above would have effected the offset without delay and no interest and penalties would have arisen. The Applicant averred that like any other tax payer, it expected the Respondent to treat it fairly and to consider all relevant matters and evidence in determining the Applicant's tax liability. However, in using predatory tactics to extort money from the Applicant, the Respondent breached the Applicant's legitimate expectation hence the Applicant is apprehensive that if the orders sought are not granted, the Respondent would continue to charge interest and penalties on the unilateral amount demanded leading to an accumulation of the amount which was disputed by the Applicant. The applicant was further apprehensive that the Respondent may also take steps to enforce the payment of the disputed taxes by issuing additional agency notices, an act which would occasion the

Applicant irreparable harm which cannot be compensated by an award of damages.

12. In a further affidavit, the applicant reiterated the foregoing and clarified that prior to the September 2009, it had been paying both PAYE and VAT as and when the same became due and indeed after November 2012 to date, the Applicant has been paying PAYE and VAT as and when the same became due. According to the applicant, the VAT due from the Applicant for the period September 2009 to October 2012 was the sum of Kshs.62,440,144.96. On 8th December 2011, the Applicant requested the Respondent to offset the principal VAT and PAYE due from the Applicant in terms of the Withholding Tax credits which set off was however not effected. Instead, the Respondent wrongly continued loading interest on the principal amount.

13. It was averred that almost a year later, on 1st November 2012, the Respondent raised an assessment of the Applicant for the period May 2010 to April 2012 demanding payment of Kshs.89,223,881.00 being the VAT allegedly outstanding out of which the Respondent purported that Kshs.51,740,930.00 constituted the principal VAT whereas Kshs.37,242,951.00 was the interest accruing with Kshs.240,000.00 alleged to be penalty.

14. It was averred that by letter dated 28th November 2012, the Applicant informed the Respondent that the VAT payable as at October 2012 was Kshs.62,440,143.45; that the said sum had accumulated owing to the Respondent's refusal to effect the set off requested on 8th December 2011 and to accept returns from the Applicant without which the Applicant could not pay the VAT; that the Withholding tax recoverable by the Applicant as at 31st October 2012 was 24,684,886.70; that in view of the fact that the Applicant could not continue waiting for the Respondent to effect the set off, it had paid the VAT of Kshs.62,440,143.45 due as at 31st October 2012 as follows:

> a. Payment of Kshs.37,755,256.75 by RTGS in the sums of Kshs 6,336,942.55 and Kshs.31,418,314.20.
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> b. It had off set the sum of Kshs.24,684,886.70 being the Withholding Tax recoverable as at 31st October 2012 against the VAT claimed.

15. According to the applicant, from the foregoing, the VAT of Kshs.62,440,143.45 was paid in full in November 2012 and thereafter, it had diligently been paying VAT as and when the same became due and had not accumulated any arrears to date. To the applicant, in total it had paid VAT in the sum of Kshs.105,870,397.40 from November 2012 to May 2015. It therefore came as a surprise when on 28th June 2013, about six (6) months after the payment of Kshs.62,440,143.45 was made, the Respondent again demanded payment of Kshs.98,053,660.00 being allegedly VAT arrears. In the applicant's view, it is clear that the Respondent continued to load interest on the said sum of Kshs.89,223,881.00 despite the fact that the amount was in fact not due.

16. The applicant's case was therefore that there was no basis whatsoever for the demand of Kshs.98,053,666.00, the Applicant having fully paid the tax due in November 2012 hence the said demand ought to be quashed. In addition, the Applicant having paid all the PAYE and VAT demanded by the Respondent, there is no justification for the Respondent refusing to lift the agency notices issued on 4th October 2011.

17. It was the applicant's case that the Respondent's explanation that the initial demand of Kshs.18,152,990.00 was erroneous because the principal amount and interest for the month of March 2010 had been understated being made for the first time is an afterthought as the variation in the conflicting demands being so substantial it could not have been solely occasioned by an understatement of the tax due in one month. The applicant averred that although prior to the institution of these proceedings it had raised the issue of the conflicting demands and disputed the loading of interest on amounts which in actual fact were not due, the Respondent completely ignored the same. In the circumstances, the impression sought to be created by the Respondent that the differences in the demands was attributable to increasing interest is false.

18. With respect to the allegation that the cheques amounting to Kshs.32,141,374.00 forwarded to the Respondent upon receipt of the demand of 11th June 2010 for PAYE (Kshs.21,232,408) and VAT (Kshs.10,908,965) were rejected by the Bank, the applicant averred that it had since enquired from Diamond Trust Bank and had been advised that the said cheques were never presented for payment and were not returned unpaid as alleged. It is therefore clear that the Respondent wrongly returned the said cheques to the Applicant.

19. The applicant added that it was aware that the amount demanded in the agency notices issued on 4th October 2011 was in any event erroneous because the Respondent failed to take into account the sum of Kshs.6,493,066.00 being the PAYE paid by the Applicant on 23rd July 2010 (for the period February 2010 to May 2010). In view of the said omission, it follows that the principal demanded as well as the interest computed thereon was erroneous and/or overstated. Upon noting the said discrepancy, by letter dated 5th October 2011, the Applicant complained about the correctness of the amount of PAYE demanded in the agency notices. Although by its letter of 3rd November 2011 (at page 12 of the Verifying Affidavit) the Respondent notified the Applicant that it had now factored in the payment of Kshs. Kshs.6,493,066.00 and reduced the tax demanded from the sum of Kshs.21, 232,408.00 to 14,739,342.00, it did not deduct the penalties and interest wrongly loaded on the initial principal sum demanded in the agency notices. Accordingly, even after recognising the payment of Kshs.6,493,066.00, the amount of Kshs.14,739,342.00 demanded and the 2% interest calculated thereon was still erroneous.

20. The applicant explained that the payment of Kshs.6,493,066.00 was made on 23rd July 2010 and not September 2011 as alleged by the Respondent and added that it is only after the Applicant pointed out on 5th October 2011 that the Respondent had not taken into account the said payment in its demand that the same was revised. In view of the foregoing, the allegations in the Replying affidavit that interest and penalties continued to accrue in respect of the sum of the Kshs.6,493,066.00 necessitating the issuance of agency notices on 4th October 2011 are false because any interest charged on this amount between July 2010 and September 2011 was illegal. The applicant also refuted the averment that despite being issued with a breakdown of the tax due on 3rd November 2011, it did not pay the tax owing as inaccurate and meant to mislead this Honourable Court for the following reasons:-

a. In a meeting held with the Respondent's representative **Mrs. Matoke** on 26th October 2011, the Applicant had requested the Respondent to offset the principal amount demanded as PAYE and VAT from the Withholding Tax recoverable by the Applicant which at the time stood at Kshs.17,801,825.00.

b. When by December 2011 the Respondent had not effected the said set off, by letter dated 8th December 2011, the Applicant requested the Respondent in writing to offset the principal amounts of PAYE and VAT (which according to the Respondent's letter of 3rd November 2011 amounted to Kshs. 6,959,162 and Kshs. 9,878,623 respectively) against the Withholding Tax recoverable from the Respondent.

c. In its letter aforesaid, the Applicant further notified the Respondent that all the original certificates supporting the Withholding Tax recoverable were available for verification by its officers at any time convenient to the Respondent a fact that has been admitted by the Respondent in its Relying Affidavit.

d. Despite the aforesaid request, as at February 2012, the Respondent was yet to carry out the verification exercise. Consequently, by letter dated 9th February 2012 (at page 16 of the Verifying Affidavit), the Applicant reminded the Respondent to send its officers to verify the Withholding Tax recoverable for purposes of effecting the offset.

e. On 12th April 2012, the Respondent carried out an audit which included a verification of the Withholding Tax recoverable as per the reminders of 8th December 2011 and 9th February 2012. Indeed at the Respondent's request, the Applicant forwarded to the Respondent the original of the

Withholding Tax certificates under cover of the letter dated 21st May 2012 (at page 20 of the Verifying Affidavit).

f. By November 2012, about eleven (11) months after the Applicant made a request for an offset in writing, the Respondent had still not effected the offset despite the said verification in April 2012. Instead it issued a demand for payment of Kshs.89, 223,881.00, being the VAT allegedly due from the Applicant for the period May 2010 to April 2012.

21. It was the applicant's case that it is clear from the foregoing that as at December 2011 when the request for an offset was made in writing, the Respondent was holding sufficient funds due to the Applicant on account of Withholding Tax credits to repay the principal amounts demanded as PAYE and VAT. As admitted in the Replying Affidavit, pursuant to section 25 of the ***Kenya Revenue Authority Act***, the tax demanded is deemed to have been paid from the date of receipt of the written request for a set off. The applicant's case was therefore that the Respondent having received the written request for a set off on 8th December 2011, the principal tax demanded is deemed to have been paid and it was not necessary for the Applicant to again pay the same tax as this would have amounted to a double payment.

22. It was averred that in view of the Respondent's admission that the set off is deemed to have been effected from the date of receipt of the written request, it was not irregular for the Applicant to deem the sum of Kshs. 24, 684,886.70 as paid as suggested in the Replying Affidavit. Further, upon paying the sum of Kshs.62,440,143.45 in November 2012 there have been no instances of non-compliance because the Applicant has paid all taxes due from it on time. It is therefore not true that the Applicant is seeking to avoid payment of tax. The applicant therefore averred that the allegations that the Applicant has a history of non-compliance or that it neglected to pay the tax due from it are vexatious and are a mere red herring meant to divert the attention of this Court from the real issues in controversy as the correct position is that the Applicant has paid all its taxes on time.

23. Responding to the averment that the Respondent did not carry out a verification of the withholding income tax, the applicant reiterated that on 8th December 2011, it invited the Respondent to carry out a verification of the Withholding Tax recoverable and sent a reminder therefor on 9th February 2012. The verification was done on 12th April 2012. In a meeting held on 15th July 2013 with the Respondent's **Mr. Nalianya**, **Mr. Mwangi** and **Mr. Arua**, the Applicant in good faith agreed to a third audit in respect of the same period within fourteen (14) days hence it was incumbent upon the Respondent to carry out the verification exercise immediately upon receiving the set off request and not a few months or years after. The Applicant contended that it had no control over how the said exercise was to be conducted other than to provide the Withholding Tax certificates, which it did. The Respondent, on the other hand, had sufficient time to effect the off set December 2011 and in the circumstances cannot blame the Applicant for the delay in carrying out its statutory obligation.

24. The applicant therefore believed that the delay by the Applicant in effecting the set off was malicious and intended to provide it with an opportunity to continue loading interest and penalties on the principal amount contrary to the provisions of section 25 of the ***Kenya Revenue Authority Act***. In addition, by refusing to effect the offset, the Respondent also denied the Applicant the opportunity to file its returns online and manually and as such, the Applicant was unable to pay taxes as and when the same became due. It is for this reason that in October 2012, the Applicant deemed the set off as effected so that it could continue paying taxes in time.

25. It was disclosed that on 12th April 2012, while carrying out a compliance check, the Respondent's officers including **Mr. Lawrence Njogu** requested the Applicant to furnish them with the originals and copies of the Withholding Tax certificates for verification of the Applicant's Withholding Tax refund claim to facilitate the proposed set off and the Applicant duly complied. Following the said audit, on the advice of **Mr. Njogu**, by letter dated 21st May 2012, the Applicant forwarded to the Respondent twenty-three (23) original Withholding Tax certificates amounting to Kshs.14,718,000.00 as evidence of the Withholding Tax deducted at source which letter which was duly received by the Respondent. It is therefore not true that the Applicant has refused to facilitate a verification of Withholding Tax

recoverable as alleged in the Replying Affidavit.

26. The applicant lamented that despite the foregoing, on 1st November 2012 the Respondent raised an assessment the sum of Kshs. 89,223,881.00 being VAT allegedly outstanding inclusive of penalties and interest for the period May 2010 to April 2012 which assessment was erroneous as it completely ignored the request to offset the Withholding Tax credit against the outstanding principal VAT. In the circumstances, the allegation in the Replying Affidavit that that the Applicant had accumulated VAT areas for Kshs.89,223,881.00 for the period May 2010 to April 2012 is a blatant falsehood. Six (6) months later, on 28th June 2013, the Respondent demanded for payment of Kshs.98,053,666.00, which amount was arrived at by loading interest and penalties on the sum of Kshs. 89,223,881.99 previously demanded and which in any event was not due. In addition, the Respondent did not take into account the payment of Kshs.37,755,256.00 and the set off of Kshs.24,684,886.70 effected in November 2012. It is therefore clear that the assessment raised on 28th June 2013 was illegal as no tax was in fact due at this time.

27. The applicant invited the Court to note that upon challenging the said amount, contrary to the position previously asserted, the Respondent for the first in a meeting held on 15th July 2013, notified the Applicant that the compliance check of April 2012 did not include a verification of the withholding tax recoverable, which is not true. Despite the Applicant, in good faith, agreeing that the third verification exercise being carried out within fourteen (14) days there from, this did not happen as the Respondent did not send its auditors. It was therefore averred that it was clear from the foregoing that the Respondent was to blame for the current state of affairs owing to its failure to effect the set of from December 2011 for the sole purpose of charging interest since once the request for a set off was received, penalties and interest could not accrue further. Accordingly it was improper for the Respondent to continue charging the Applicant penalties and interest after 8th December 2011 as suggested in the Replying Affidavit. In the applicant’s view, even if interest was to continue accruing, and it demonstrably could not or should not, it could not go beyond the alleged outstanding amount due to the offset of Ksh.24,684,886.70 as it would be capped by the *in duplum* rule envisaged under section 21 of the Value Added Tax Act.

28. Responding to the allegation that the Applicant did not file manual returns and that it did not communicate the difficulties it was facing to the Respondent, the applicant contended that this was a most unfair accusation for the following reasons:-

> a. During the period in issue, no company could file returns online while in a tax arrears position. This position was brought about by the Respondent’s refusal to accept returns. This fact was communicated to the Respondent during face to face meetings before, during and after the audit and also in writing under cover of the Applicant’s letter of 28th November 2012 (at page 63 of the Verifying Affidavit) wherein the Applicant enclosed manual returns for the entire period they had been rejected. This enabled the Applicant to subsequently file online returns on time, the first being that for October 2012.
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> b. It is imperative to note that the deponent of the Replying Affidavit is the one who received all the returns and stamped the same. Indeed the filing of the manual returns was pursuant to **Mr. Njogu’s** advice in the letter of 28th November 2012.
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> c. The failure to declare the VAT payable was occasioned by the Respondent’s system. In terms of assessing the correct VAT, the Respondent adopted the figures in the Applicant’s ledger which is clear evidence that the Applicant had already assessed itself and what was remaining as at that time was payment. As explained above, the Applicant had already applied for offset at the time and expected that the set off would be used to settle the outstanding amount.
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> d. All the amounts owing to the Respondent as at November 2012 were fully paid by RTGS and by the set off envisaged by the application for set off made in writing on 8th December 2011. Consequently, the Respondent’s contention that the amount represented by the set off applied for by the Applicant is still accruing interest and penalties is in utter contravention of section 25 of the

Kenya Revenue Authority Act and is unreasonable.

29. It was the applicant's case that it was malicious for the Respondent to deny that a compliance check to ascertain the Withholding Tax recoverable was carried out in April 2012. As the Respondent did not communicate the results of any of the audits to the Applicant, the Applicant assumed that the set off request had been accepted. Accordingly, the Respondent should not be allowed to rely on the fact of non-communication to deprive the Applicant of the right that accrued to it by statute immediately it lodged the application for a set off since in denying the said audit, the Respondent is intent on wrongfully charging the Applicant further interest.

30. With respect to the allegations purporting that the Applicant declined to be fully audited, the applicant averred that the correct position is as follows:-

a. After the Applicant issued its demand letter dated 2 May 2014 (at page 74 of the Verifying Affidavit), instead of responding to the issues raised in the demand letter the Respondent reacted by issuing a notice dated 26th may 2014 of intention to carry out an in-depth audit of the Applicant from January 2009 to March 2014 to "ascertain the exact tax position" and "grant any offset owing" (at page 82 of the Verifying Affidavit).

b. As demonstrated above although the Respondent carried out compliance audits on 9th June 2010 and 12th April 2012, it has to date not communicated the findings to the Applicant. As such, the representation that there were disputes arising from previous tax audits is erroneous. The whole purpose of the intended audit to justify loading interest from January 2009 to date.

c. The Applicant could not have raised any disputes regarding the previous audits since it was not aware of the outcome of those audits. In addition to the above, no explanation was provided on the need to carry out yet another audit for the period January 2009 to April 2012 considering that the Respondent had already carried out audits covering the same period twice without confirmation of the set off.

d. In the circumstances, the Applicant agreed to an audit limited to the period May 2012 to March 2014, which period the Respondent had not previously audited. Despite the foregoing, the Respondent still failed to carry out the audit.

e. In addition, there is no requirement in law that a verification of the Withholding Tax recoverable must be conducted pursuant to a full audit. Indeed although as shown above a full audit was carried out twice, no explanation has been given as to why the set off was not effected and the amount paid recognised.

31. It was therefore averred that in seeking to tie the issue of the Withholding Tax recoverable and the in-depth audit, the Respondent was harassing and intimidating the Applicant to abandon its claim for off set of tax against Withholding Tax credit and that the whole purpose for the fourth audit was to justify charging interest from 2009 to date which amounts to abuse of authority. The applicant refuted the Respondent's assertion that the audit of April 2012 could and did not include a verification of the withholding income tax and noted that the Respondent's letter of 26th May 2014 (at page 82 of my Verifying Affidavit) calling for an in-depth audit also called for withholding tax certificates, which is an addition to the standard audit documents. It was therefore not available for the Respondent to deny that the verification exercise of the withholding income tax recoverable was conducted as part of the April 2012 compliance audit. This is particularly so considering the fact that the original withholding tax certificates were supplied to the Respondent soon after the audit under cover of the letter dated 21st May 2012. The assertion to the contrary by the Respondent amounts to approbating and reprobating at the same time.

32. The applicant asserted that in any event, as no tax audit of financial statements can be done without verifying the withholding tax certificates and this was the case in April 2012, the allegations at paragraphs

17 to 24 of the Replying Affidavit are in view of the matters set out above, baseless and are unsubstantiated. As demonstrated above, even after the Applicant, in good faith, conceded to a third verification exercise as set out in its letter dated 17th July 2013, the Respondent failed to carry out the same.

33. The applicant further noted that the Respondent drew conclusions based on worksheet prepared by itself and not the Applicant an issue which had it been resolved in good time, the Applicant's business would be doing much better.

34. In the applicant's view, the totality of the above is that the Respondent has not provided any or any sufficient explanation as to why it did not offset the tax as demanded and taken into account all the payments. Neither has the Respondent justified the demand of Kshs.98,053,600.00. On the other hand, the Applicant has shown that there is no tax owing in view of the payment made in October 2012 together with the set off.

35. In the circumstances, the applicant prayed that the orders sought be granted.

36. In its submissions, the applicant, through its learned counsel, **Mr Kamau Karori**, relied on **Lab International (K) Ltd vs. Kenya Revenue Authority Misc. Appl. No. 82 of 2010** and in **Samura Engineering Limited and & Others vs. Kenya Revenue Authority HC Petition No. 54 of 2011 [2012] eKLR** where **Majanja, J** in paragraph 58 emphasised that:

> **"…Kenya Revenue Authority as the State agency charged with the collection of taxes is bound by the provisions of the Bill of Rights to the fullest extent in the manner in which it administers the laws concerning the collection of taxes. The values contained in Article 10 must all times permeate its functions and activities which it is mandated to carry out of by statute."**

37. Reliance was similarly placed on **Kenyatta National Hospital Board vs. Minister for Labour and Human Resource Development & 3 Others [2006] eKLR** where **Ibrahim, J** (as he then was) found that:

> **"The Application for exemption by the Applicant was not a simple matter and the Minister was under a duty to consider it with all the seriousness and expedition that the matter deserved. Instead, the Minister has done nothing for a period of twelve years since the first application for exemption. Despite the duty imposed on him by section 7(3) of the Act, the Minister did nothing. I do hereby hold that the Minister has to date not considered the Applicant's application for exemption and he cannot purport to make a decision through these proceedings. The Minister was also under a duty to communicate his decision to the Applicant once he made a decision. Understandably, this could not be possible because the Minister has yet to make a decision in the first place. The Applicant has a right to know of the outcome of its application within a reasonable time and if a rejection, the reasons for the refusal. I do hereby hold that the Minister of the First Respondent is in breach of his statutory duties under section 7(3) of the Act and the second schedule, Regulation 1. The Minister by his inaction has caused the Applicant untold anxiety and suspense thereby violating the rights of the members of the Kenyatta National Hospital staff superannuation scheme who are the true beneficiaries of the scheme. Under the Law, this court has the jurisdiction to compel him to discharge his duties in accordance with the Law. Where a public officer is required by statute to take a positive act or step, he cannot fold his hands and sit back. He must carry out his duty one way or the other, applying all the rules of natural justice and fair play."**

38. On the issue of delay to in confirming the refund due to the tax payer the applicant relied on **LAB International (K) Ltd vs. Kenya Revenue Authority Misc. No. 82 of 2010.**

Respondent's Case

39. In response to the application, the respondent contended that it is duly authorized to act on behalf of the Kenya Revenue Authority which is established under the **Kenya Revenue Authority Act,** Chapter 469 of the Laws of Kenya ("***KRA Act***") to act as an agent of the Government for the assessment, collection, receipt and accounting of all Government revenue.

40. According to the Respondent, some time in the year 2010, it, through its authorized officers commenced an audit of the Applicant for the period 2009 to 2010 which revealed that the Applicant had instances of non compliance with tax laws. Pursuant thereto, the Respondent demanded outstanding Pay-As-You-Earn (PAYE) for October 2009 to April 2010 from the Applicant amounting to Kshs. 18,152,990.00 broken down as follows: Kshs. 11,219,235 being the principal amount and Kshs. 6,933,755 being penalties and interest as per the Respondent's letter dated 24th October, 2010. It was however contended that in the aforesaid letter, the Respondent had erroneously indicated that the principal amount of PAYE owing in March 2010 was Kshs. 1,084,893 instead of Kshs. 1,684,893 and that the penalties amounted to Kshs. 7,203,756 instead of Kshs. 6,997,974 which error was corrected in the further demand issued by the Respondent on 11th June, 2010 which correction the applicant acknowledged in paragraph 3 of its letter dated 28th November, 2012.

41. It was averred that the further demand also captured VAT arrears outstanding at Kshs. 10,908,963 for the period of March 2008 to April 2010 broken down as follows: Kshs. 9,878,623 being the Principal amount and Kshs. 1,030,340 being penalties and interest. It was explained that by the time the further demand was issued, the Applicant had incurred PAYE arrears in the month of May, 2010. As such, the demand now covered PAYE for October 2009 to May, 2010 which amounted to Kshs. 21,232,408 broken down as follows: Kshs. 13,452,228 being the principal amount and Kshs. 6,933,755 being penalties and interest.

42. It was averred that the Applicant conceded to the tax liability and issued post dated cheques for the principal amounts for both VAT and PAYE amounting to Kshs. 32,141,374 which cheques were however returned to the Applicant after they were rejected by the bank. Meanwhile, the Applicant remitted Kshs. 6,493,066 in part payment of the principal PAYE but did not however pay the penalties and interests that had already accrued in respect thereof. Accordingly, the Respondent readjusted the tax computations to reflect the principal amount of Kshs. 6,493,066 that had been paid resulting in an outstanding PAYE of Kshs. 16,272,231 which amount included interest that had accrued until the partial payment which was made in September, 2011. The VAT arrears also remained unpaid and continued to accrue interest.

43. According to the Respondent, as the Applicant failed, refused and/or neglected to pay the outstanding tax, the Respondent issued agency notices dated 4th October, 2011 and copied the same to the Applicant's directors. To the Respondent, at the date of issuing the said agency notices, PAYE had accrued to Kshs. 16,272,231 and VAT to Kshs. 12,992,260 excluding the principal PAYE of Kshs. 6,493,066 which the Applicant had paid.

44. According to the Respondent, in its response dated 5th October, 2011, the Applicant made it clear that it was willing to pay the outstanding VAT and PAYE upon being provided with a breakdown and this was despite the fact that it had been issued with a breakdown containing the principal VAT and PAYE amounts on 11th June, 2010. Nevertheless, the Respondent gave a detailed breakdown in its letter dated 3rd November 2011 by which time the PAYE had accumulated to Kshs. 17,105,477 and VAT to Kshs. 14,267,340 due to accrual of interest and penalties.

45. To the Respondent, an analysis of the breakdown confirms that the Respondent has been fair and consistent in its approach because (1) The principal tax at all times remained the same for both VAT and PAYE, i.e. principal tax for the period March 2008 to April 2010. (2) The payment that the Applicant had made to partially settle the outstanding principal amount of PAYE was duly recognized. However, despite being issued with a breakdown the Applicant did not pay the tax owing and concerned by the Applicant's trend of non compliance, the Respondent issued a notice dated 2nd December, 2011 to carry out an audit on the Applicant to confirm its current compliance status which notice of audit above was specific that the Respondent intended to carry out an audit to confirm VAT, PAYE and Corporation Tax

for the period March 2008 to date. The notice was also specific as to the documents it required and its scope did not include a verification of withholding income tax. However, the Applicant is misleading by alleging that a withholding tax audit had been conducted in April 2012 as there was none.

46. In response thereto, the Applicant made a written request for set off in its letter dated 8th December, 2011. It was however contended that there was no evidence of prior request for set off in writing as required by law contrary to section 25 of the ***KRA Act ("Section 25")***, whereby set off must be requested for in writing and the credit verified by the Respondent to be accurate before it can be considered for set off. In this respect the Respondent reproduced the said provision which provides that:

> ***"(1) Where—***
>
> > ***(a) under the provisions of any of the written laws specified in Part III of the First Schedule, any amount of tax or duty is due and payable by any person; and***
> >
> > ***(b) a refund of tax or duty under any of the said written laws is confirmed to be due and payable to that person, the person may, in writing, request the Authority to set-off the amount of the outstanding tax or duty against the amount of such refund:…..***
>
> ***(2) The Authority shall, upon receipt of a request under subsection (1), setoff the amount of the outstanding tax or duty against the amount of the refund confirmed to be due and payable to the person and such set-off shall, with effect from the date of receipt of the request, be deemed to be a payment by the person of the outstanding tax or duty."***

47. Respondent averred that ***Income Tax Act*** and ***Value Added Tax Act*** are listed in the First Schedule. To it, the tax set off is then deemed under section 25 to have been paid with effect from the date of receipt of the written request for set off.

48. It was averred that the second audit revealed that VAT arrears in the months of May 2010 to April 2012 had accumulated to Kshs. 89,223,881 broken down is as follows: Kshs. 51,740,930 being the principal amount and Kshs. 37,482,951 being penalties and interest for which the Respondent issued a demand dated 1st November, 2012 attaching the findings which the Applicant objected to but paid the said Kshs. 37,775,256 in VAT arrears. It also informed the Respondent that it would set off the outstanding principal amounts from withholding tax credits that had not been verified yet this was expressly contrary to section 25 of the ***KRA Act***. According to the Respondent, despite being duly notified by the Respondent that setting off tax from credits that had not been verified was irregular, the Applicant proceeded to set off arbitrarily and without regard for the law and declared the set off in its income tax returns for year 2012. In its view, this set off was not only done unprocedurally; it was also declared in the return erroneously.

49. According to the Respondent:

> a. Contrary to the Applicant's assertions, the Respondent duly addressed the Applicant's objection lodged on 28th November, 2012: in particular, (i) it recognized payment of Kshs. 37,775,256.00 (ii) It duly notified the Applicant of its non compliance in setting off tax unprocedurally. (iii) It also proceeded to issue a demand dated 28th June, 2013 on outstanding VAT which by then had accrued to Kshs. 98,053,666 as at date (June 2013).
>
> b. Although the Applicant has pleaded that it filed manual VAT returns for the period October 2009 to October 2012, there is no evidence of such filing.
>
> c. On the contrary, the Applicant attached the returns in its objection letter on 28th November, 2012 and sought to wrongfully blame its non compliance on the Respondent. Further, this was the first time during the engagement between the parties that the Applicant sought to excuse itself for its non compliance in failing to file returns.

d. More importantly, the principal VAT arose from failure to declare and assess the correct VAT which was chargeable, the fact of filing notwithstanding.

50. In The Respondent's view, the Applicant is wrongly digressing to avoid tax liability which it conceded to and from which interest and penalties have continued to accrue by law pursuant to sections 37(2), 72 D and 94 (1) of the ***Income Tax Act, Cap. 470*** and section 15 of the ***Value Added Tax Act, Cap. 476***. The Respondent Therefore asserted that it was misleading for the Applicant to allege that the Respondent was inconsistent. On the contrary, the Applicant has been consistently non compliant. Further, the Applicant has been inconsistent in that it initially conceded to the tax liability but failed to pay as required and as a result, the principal amounts have continued to accrue interest and penalties. In the Respondent's view, had the Applicant paid when the demand was made in June 2010, penalties and interest would not have accrued hence the Applicant is misleading and being mischievous by attempting to blame the Respondent for its own non compliance.

51. The Respondent asserted that it would also have been negligent of the Respondent to allow set off without verifying the Applicant's claims, given its past conduct of non compliance. It disclosed that on 26th May, 2014, it issued a notice of audit to verify the withholding tax claim for the period from January 2009 to March 2014 which notice was also served on the Applicant's Advocates on 26th May, 2014 and the audit was to commence on 9th June, 2014. However in a turn of events, the Applicant's Advocates issued a letter on 6th June 2014, 3 days before the audit, declining the Applicant to be audited fully and in the said letter sought to compel the Respondent to confirm the withholding tax which the Applicant had set off at its own instance as a precondition to agreeing to be audited fully. To this the Respondent responded by a letter dated 1st July, 2014 reiterating the provisions of section 25 of the ***KRA Act*** and advising that the Applicant comply with the audit to enable verification of its withholding tax claim. According to the Respondent, the preferences of the Applicant relayed in its Advocates letter aforesaid are unlawful and unprocedural because there is no basis whether by law, fact, procedure or practice that permits or entitles a taxpayer owing tax to offset the tax irregularly and none can be implied. To the Respondent, there is no basis in law, fact, procedure or practice that permits the Respondent to set off the Applicant's tax without verification and none can be implied. Further there is no basis upon which the Applicant can circumvent the statutes to off set withholding tax from VAT and/or PAYE tax debts without an audit.

52. It was therefore contended that it is irregular, arbitrary and excessive for the Applicant to seek to compel the Respondent to vacate tax owing without payment and to compel the Respondent to offset withholding tax credits in express contravention of the law.

53. The Respondent averred that sections 96 and 19 of the ***Income Tax Act*** and ***VAT Act*** respectively empower it to collect tax owing by way of agency notices which agency notices were issued lawfully and procedurally. Further, the law provides that interests and penalties accrue because tax is not paid and that the liability to pay tax does not vitiate upon a request for set off as such an interpretation would be offensive to the law, procedure and practice.

54. It was the applicant's case that the Applicant is erroneous in categorizing its request for set off as a dispute under the Constitution or rules of natural justice. To it a dispute in the circumstances would only arise if the Respondent gave reasons for declining to set off which the Applicant disagreed with. It was averred that there was no objection to the initial demand of June 2010 and that the Respondent duly addressed the Applicant's subsequent objection which it made in November 2012.

55. According to the Respondent, the Applicant has continued firmly in business that is thriving evidenced by its self assessments, in which the Applicant has declared growth by a consistent increase in its turnover.

56. On without prejudice, the Respondent stated that it remains willing to set off procedurally hence the issue of the notice of audit and since section 25 is specific that tax set off upon verification of credits is deemed to have been paid with effect from the date of written request for set off, the Applicant does not

suffer interest and penalties thereon. However it was averred that the Applicant's actions are tainted with ill faith to the extent that on 6th June, 2014, the Applicant's Advocates refused a full audit for withholding tax and instead proceeded to institute court proceedings. Therefore the prayer by the Advocates to compel an offset without audit was also excessive and irregular.

57. It was contended that at no time has the Respondent indicated to the Applicant that it could offset the tax without audit. Such intimation would not in any case sustain because legitimate expectation cannot premise on illegality. It is therefore erroneous and misleading for the Applicant to refer to the Respondent's statutory mandate of collecting and enforcing tax as a predatory tactic to extort money from the Applicant. On the contrary, it is the Applicant who has acted unconstitutionally, unlawfully, arbitrarily and contrary to its mandate as a taxpayer and a citizen of the country by avoiding, refusing, neglecting and/or failing to pay tax as and when due. The Applicant, it was contended, also took the law in its hands by unanimously and erroneously setting off tax without following the procedure laid down by law.

58. It was therefore the Respondent's view that the prayers as sought by the Applicant are excessive, irregular and in contravention of the law.

59. In support of its case the Respondent relied on section 92(6) of the ***Income Tax Act***, which provides that:

> ***Where a notice of objection has been given, notwithstanding that the assessment has not been finally determined, if the tax is due and payable under subsection (2), so much of the tax as is not in dispute shall be due and payable in accordance with that subsection and the balance in accordance with section 93; but the Commissioner may permit a lesser or no amount to be paid in accordance with this subsection, in which case the balance of the amount, as the case may be, otherwise so due and payable shall be due and payable at the same time as the amount referred to in section 93 is to be paid***.

60. In this respect the Respondent relied on In the case of **Doshi Ironmongers vs. Commissioner for Domestic Taxes & Another [2009] eKLR**, where it was held that:

> "**There is no doubt as to the outstanding tax that is due and payable. It is the duty of the Applicant to pay tax because it is not disputed. Besides, from an evaluation of what transpired I find that there is no evidence of the Respondent acting lawfully or oppressively or unfairly or abused office as alleged…The Applicant should go ahead, pay the tax that is due and if any remission is granted by the Minister, that credit will go on their account or a refund made. The Applicant has come to a court of equity and cannot be entitled to orders of this court if they do not clean their hands**."

61. The Respondent further relied on **Republic vs. Kenya Revenue Authority Ex-parte Bata Shoe Company (Kenya) Limited [2014] eKLR**, where the Court expressed itself as hereunder:

> "**This brings me to the role and interpretation of tax laws. Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman. The taxman on the other hand is entitled to collect up to the last coin that is due from a taxpayer**."

62. In the Respondent's view, it would be in vain to quash the assessments by the Respondent but make an order compelling the Respondent to audit the Applicant's withholding tax claim (under section 25(2) of the ***KRA Act*** and 105(1) of the ***Income Tax Act*** which would have the effect of re-opening the compliance checks afresh. It was therefore submitted that the most efficacious order this Honourable Court can make is to order the Respondent to consider the Applicant's objection and audit the withholding tax claim as prayed at Paragraph (g) of the Notice of Motion and if dissatisfied with the outcome, to file an appeal with the Tax Appeals Tribunal as provided by law. In this respect the Respondent relied on **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal**

Investigation Officer Makadara & 2 Others [2014] eKLR.

63. The Respondent further based its case on Article 201(b)(i) of the Constitution which provides that:

> ***The public finance system shall promote an equitable society and in particular the burden of taxation shall be shared fairly.***

64. The Court was therefore urged to order the Respondent to consider the Applicant's objection to the tax demand and amend the demand accordingly as this will not only be in public interest but also in the best interest of the Applicant. In so submitting the Respondent relied on **Republic vs. Kenya Revenue Authority Ex-parte Boaz Makomere & 2 Others [2012] eKLR**, where the Court pointed out that:

> "**Importantly and at all stages of any Judicial Review proceedings involving a matter of Public Interest, the Court must weigh Public Interest vis-à-vis the rights of the Applicants. Judicial Review is a remedy in the realm of public law. Often the right of the Applicants will be competing with public interest. Although deciding a Constitutional matter, the decision of the Privy Council in Attorney General vs. Sumair Bansraj (1985) 38 WLR 286 quoted by Ibrahim, J (as he then was) in Petition No. 7 of 2011 Muslims for Human Rights (MUHURI) & 2 Others vs. The Hon. Attorney General & 2 Others explained the need to strike the balance. In my view the following passage from that decision is as true to Judicial Review proceedings as it is to Constitutional matters…The Constitutional Court must hold the scales of justice evenly between the Claimants and the State. There are competing and powerful interests at stake in this case. The rights of the Claimants to their liberty and the freedom of movement on the one hand and on the other the public interest in the prosecution of the crime, the comity of the nations, attendant obligations under International treaties with foreign nations…This must therefore be astute to balance these competing interests in the interim while it deals with substantial complaint of the Claimants.**"

Determination

65. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

66. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"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...The order of** *mandamus* **is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party**

against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...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."

67. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

> **"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."**

68. 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.***

69. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

70. However, it must always be remembered that persons charged with statutory powers and duties ought to exercise the same reasonably and fairly. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC MISC. APPL. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**. If the discretion is used arbitrarily and unreasonably, the court may step in to remedy the situation. As was held by the Court of Appeal in **Republic vs. Commissioner of Co- Operatives, Kirinyaga Tea Growers Co- Operative & Savings & Credit Society Ltd. Civil Appeal No. 39 of 1997 [1999] 1 EA 245,** it is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith. It has been appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International Sa (Bureau Veritas) [2005] 2 EA 43**.

71. Therefore whereas this Court is not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court in intervening. In **Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, it was held that in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the *Wednesbury* unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.

72. In this case the applicant contended on 28th November, 2012, it objected to the Respondent's notice dated 1st November, 2012 but the Respondent did not respond to this objection. Instead the Respondent issued further assessment notices which the applicant objected to culminating in the objection dated 1st August, 2013. To the applicant none of these objections were dealt with by the Respondent. Instead of dealing with the objections, the Respondent called for a compliance audit covering the period previously audited and other unaudited periods.

73. It was the applicant's case that the failure by the Respondent to apply the Withholding tax refunds against any tax found due infringed on the Applicant's right to property under Article 40 of the Constitution. The applicant further contended that the said action and the Respondent's refusal to deal with the applicant's objections is high handed, unreasonable and in breach of its duty to act in a manner that is procedurally fair and violated Article 47 of the Constitution.

74. It was contended that by refusing to resolve the dispute within reasonable period of time, the Respondent has shirked and/or abdicated its responsibility as a public body and breached the Applicant's right to a determination of its objection/dispute as provided under Article 50 of the Constitution and the rules of natural justice.

75. On behalf of the Respondent, it was contended that it duly addressed the Applicant's subsequent objection which it made in November 2012. The Respondent has however not dealt with the applicant's objections subsequent thereto which culminated in the one dated 1st August, 2013.

76. Sections 84(1) of the ***Income Tax Act*** provide as follows:

> ***A person who disputes an assessment made upon him under this Act may, by notice in writing to the Commissioner, object to the assessment.***

77. Apart from that section 50(1) of the ***VAT Act*** stipulates that:

> ***A person who disputes an assessment made by the Commissioner under section 45 or 46 may, by notice in writing to the Commissioner, object to the assessment.***

78. In my view the applicant's case is based on two grounds. The first ground is that it objected to the assessment by the Respondent and the Respondent failed to deal with its objections. The second ground which is intertwined with the first is that as a result, the Respondent imposed unjustified interests and penalties upon the Applicant. As I have noted hereinabove there is no evidence that the Respondent acted on the applicants objections subsequent to November 2012.

79. The applicant has in its submissions contended that the issues raised by it are constitutional matters that require this court to pronounce itself thereon. In **Muiruri vs.Credit Bank Ltd & Another [2006] 1 KLR 385**, **Nyamu, J** (as he then was) held that a constitutional issue is that which directly arises from the court's interpretation of the Constitution. As was held in **Ngoge vs.Kaparo & 4 Others Nairobi HCMA No. 22 of 2004 [2007] 2 KLR 193,** any inclination to demand an inquiry every time there is a bare

allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process and that where the facts as pleaded do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry. The Court proceeded to hold that the notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious since the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court in the exercise of its constitutional interpretation or application. It would amount to an abuse of the process of the court if that jurisdiction is invoked solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.

80. Therefore it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

81. This was the position adopted in **John Harun Mwau vs. Peter Gastrow & 3 Others [2014] e KLR** where the Court held that the Constitution ought only to be invoked when there is no other recourse for disposing of the matter and expressed itself as hereunder:

> **"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights…It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all."**

82. This is clearly the position in other jurisdictions as well. In **NM & Others vs. Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC)** the Constitutional Court of South Africa stated that:

"**It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.**"

83. Similarly in **Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755, Georges, CJ** held as follows;

> **"It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22)…Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."**

84. Therefore the thread running through the decisions whether local or foreign can be summarised in the words of the Court in **Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR,** in which **Lenaola, J** (as he then was) held that:

> **"Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well**

aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions."

85. In my view the matter before this Court falls squarely within the purview of Article 47 of the same Constitution which provides that:

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

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

86. In order to implement the said Article, Parliament enacted the ***Fair Administrative Action Act, 2015***.

87. In my considered view, the issues raised herein could have been properly dealt with if the applicant's objection was determined in a process in which the merits of the said objections would be addressed by a body properly clothed with the powers to address the same as opposed to this Court in the exercise of its judicial review jurisdiction.

88. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

89. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. See **Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike& 4 Others (2008) 3 KLR (EP) 291**, and **Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012**.

90. This position has now acquired statutory underpinning vide section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, 2015 which provides:

(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.

91. Having considered the issues raised before me in these proceedings, I am not satisfied that this is a matter in which an exemption ought to be considered. As was held in **Republic vs. National Environment Management Authority Civil Appeal No. 84 of 2010** in which the Court of Appeal expressed itself as follows:

> **"...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that 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 real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge."**

92. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 - Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

93. In the premises the order that commends itself to me is that the issues raised by the applicant vide its objection ought to be addressed in a process provided by the relevant statutes being the ***Income Tax Act*** and the ***VAT Act***.

94. It is therefore my view that the reliefs sought by the applicant herein cannot be granted in the manner sought. I am aware that in his submissions, **Mr Kamau Karori**, informed the Court from the bar that the applicant was abandoning prayer (g) which was framed in the alternative. In learned counsel's view, to grant the same would amount to sanctioning an illegality. However section 11(1)(f) and 11(2) of the ***Fair Administrative Action Act*** empowers this Court in proceedings for judicial review relating to failure to take an administrative action, to grant an order compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right any order that is just and equitable, including an order directing the taking of the decision. Therefore the Court, in the exercise of its judicial review jurisdiction under the ***Fair Administrative Action Act***, ought not to place itself in a straight jacket and restrict itself to the traditional remedies of certiorari, prohibition and mandamus, but is entitled to fashion appropriate remedies in order to do justice to the parties before it. On must therefore recall the words of **Lord Denning** in **O'Reilly vs. Mackman [1982] 3 WLR 604, 623** that:

> **"Just as the pick and shovel is nolonger suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom**

in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 30 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 30 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty."

95. It is clear that what provoked these proceedings was the Respondent's failure to properly or at all address the issues raised by the applicant in its objection to assessment including the request to offset the withholding tax refunds against the tax, if any due. However it is my view that the appropriate relief that the applicant ought to have sought before this Court was an order compelling the Respondent to address the issues raised in its objections. With the state of the pleadings as they are before me to issue the orders sought herein would amount to this Court determining whether the applicant owes the Respondent payment in form of taxes or not. As was held in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007**:

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

96. I am however in agreement with the position adopted in **LAB International (K) Ltd vs. Kenya Revenue Authority Misc. No. 82 of 2010** where the Court cited with approval the decision in **Intersplav vs. Ukraine** and held at pages 10-12 that:

"… By Article 47 of the Constitution of Kenya 2010, persons such as the applicant have a right to fair administrative action, which must not be denied whether by the respondent, or by other Government agencies and mechanisms to which the Respondent may happen to be operationally attached, the whole set of those agencies which are statutory and public bodies are subject to Article 10 of the Constitution which, under the head of national values and principles of governance," requires "good governance, integrity, transparency and accountability (Article 10(2) (c)…In practical terms, Government has a public duty to effect change to any unprogressive bureaucratic arrangements such as those that may characterize the operational linkage of the Respondent to slothful structures, so as to render the Respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in this regard, ordinary statutory arrangements cannot qualify the Constitutional provisions. On this account, the Respondent has no justification for failing to make VAT refunds timeously…From the facts of the instance case, it is clear to this Court that the Respondent failed to deal with the Applicant's claim for VAT refund in the context of fairness transparency, accountability or good governance. Given the safeguards in the Constitution which clearly apply to the Applicant herein, the Court does not accept the Respondent's plea that it is subject to certain structural inefficiencies which are traceable to other organs of Government or the provisions of the ordinary statute".

97. It is therefore my view the request for set off of the withholding tax refunds from the tax due ought to be treated with seriousness and I associate myself with the view adopted by **Ibrahim, J** (as he then was) in **Kenyatta National Hospital Board vs. Minister for Labour and Human Resource Development & 3 Others [2006] eKLR** that:

"The Application for exemption by the Applicant was not a simple matter and the Minister was under a duty to consider it with all the seriousness and expedition that the matter deserved. Instead, the Minister has done nothing for a period of twelve years since the first application for exemption. Despite the duty imposed on him by section 7(3) of the Act, the Minister did nothing. I do hereby hold that the Minister has to date not considered the Applicant's application for exemption and he cannot purport to make a decision through these proceedings. The Minister was also under a duty to communicate his decision to the Applicant once he made a decision. Understandably, this could not be possible because the Minister has yet to make a decision in the first place. The Applicant has a right to know of the outcome of its application within a reasonable time and if a rejection, the reasons for the refusal. I do hereby hold that the Minister of the First Respondent is in breach of his statutory duties under section 7(3) of the Act and the second schedule, Regulation 1. The Minister by his inaction has caused the Applicant untold anxiety and suspense thereby violating the rights of the members of the Kenyatta National Hospital staff superannuation scheme who are the true beneficiaries of the scheme. *Under the Law, this court has the jurisdiction to compel him to discharge his duties in accordance with the Law. Where a public officer is required by statute to take a positive act or step, he cannot fold his hands and sit back. He must carry out his duty one way or the other, applying all the rules of natural justice and fair play*." [Emphasis mine].

98. This is the position adopted even in other jurisdictions as was held in **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Limited [1981] UKHL 2** at page 22 here the Court was:

> **"…persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within complex comprised in the management of tax, every part of which it is their duty, if they can, to collect."**

99. In the foregoing premises this Court ought to issue orders which would ensure that justice is done to the parties in this matter.

Order

100. In the premises, I hereby issue an order of *mandamus* directing the Respondent to within 30 days of service of this order on it consider the said applicant's objections and furnish the applicant with its decision and its reasons therefor.

101. I hereby issue an order of certiorari bringing into this Court for purposes of being quashed all the agency notices dated 4th October 2011 issued to Diamond Trust Bank Kenya Limited and Bank of Africa Limited which decision is hereby quashed.

102. Save for the said orders, the rest of the prayers are disallowed.

103. Each party will bear own costs of these proceedings.

104. Orders accordingly.

Dated at Nairobi this 27th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Akhabi for Mr Kamau Karori for the applicant.

Miss Sang for Mr Nyagah for the Respondent

CA Mwangi