



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR. MISC. CIVIL APPLICATION NO. 460 OF 2013

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

Ex parte: UNIVERSAL CORPORATION LTD

JUDGEMENT

Introduction

1. By a Notice of Motion dated 13th January, 2014, the *ex parte* applicant herein, **Universal Corporation Ltd**, seeks the following orders:
 1. **An Order of Certiorari to remove into this honourable Court and quash the decision made by the respondent requiring the Applicant Company to pay the Respondent Kshs 427,918,033/- as VAT for the period of January 2008 to October, 2013.**
 2. **An order of prohibition directed to the respondent prohibiting it, whether by itself, its agents, and/or its servants or otherwise howsoever from purporting to take any action against the Applicant Company in an attempt to recover the total sum of Kshs 427,918,033/-**
 3. **An order of prohibition directed to the respondent prohibiting it, whether by itself, its agents, and/or its servants or otherwise howsoever from purporting to take any action that may violate the rights of the Applicant Company.**
 4. **That the costs of this application be in cause.**

Ex Parte Applicant's Case

2. According to the applicant, it is involved in the production, manufacturing and packaging of pharmaceutical products. As early as 1995, it averred that there was a general consensus between the then Ministry of Health (the Ministry), Treasury and Federation of Kenya Pharmaceutical Manufacturers (the Federation) that all taxes including Value Added Tax (VAT) and Customs Duty (the Duty) normally levied on raw materials for packaging and manufacture of medicaments were to be exempted.
3. Following that understanding, both the *VAT Act* and the *Customs and Excise Act* (the CEA), under item 26 of Part B of the 8th Schedule exempted from all taxes, raw materials and packaging for manufacture of medicament since both legislation had the same exemptions regime. In 2001, both legislation were amended vide *Finance Act* of that year which inadvertently removed the

- exemptions regime therefrom.
4. It was averred that without noticing the error and being aware that the spirit of both the **VAT Act** and the **CEA** was that both VAT and Customs Duty for raw materials and packaging for manufacture of medicament ought to be exempted, the Respondent ensured that the administrative systems of exemptions remained in force and the Respondent and the Treasury continued to exempt from payment of all taxes, raw materials and packaging for manufacture of medicament so that all clearance systems remained as before.
 5. When the Federation noticed that there was an error in the **Finance Act 2001** which operated to delete the provisions of both the **VAT Act** and the **CEA** that gave the said exemptions, they wrote to the Minister of Finance to correct the anomaly and the said anomaly was corrected in 2002 by the introduction of the exemptions regime in the **CEA** and the amendment of the **CEA** to include a definition that broadened the meaning of duty to include VAT.
 6. It was averred that in 2004, the **East African Community Customs and Management Act (EACCMA)** was passed which operated to repeal the provisions of the **CEA** and under the 5th Schedule Part B thereof, packaging materials and raw materials for manufacture of medicament is exempted upon recommendation of the authority responsible for the manufacture of medicaments. Accordingly, the Minister for the time being of Health periodically made recommendations to the Treasury and the Respondent to have raw materials and packaging for manufacture of medicament exempted from payments of VAT and Customs Duty in accordance with section 23 of the now repealed **VAT Act** which permitted him to do so and the 5th Schedule, Part B, item 16 of **EACCMA**. Additionally the Respondent established a system known as *Simba System* for the collection of revenue where they introduced an exemption code number B0260 (the Code), which automatically operated to exempt all raw materials and packaging for manufacture of medicament from payment of VAT and Customs Duty. To the applicant, this has been the position to date and all the players in the pharmaceutical industry involved in either the importation of raw materials and production and packaging materials for the manufacture of medicaments have benefited from these exemptions.
 7. To the applicant the main reason for the exemption was to make the costs of basic health care and medicines affordable to the ordinary Kenyans.
 8. It was the applicant's case that since it was involved in the production, manufacture and packaging of pharmaceutical products it was entitled to the said exemptions and has been so since 2006 to date.
 9. However by a letter dated 28th November, 2013, the Respondent wrote to the applicant alleging that there was unpaid VAT and required the applicant to pay VAT amounting to Kshs 427,918, 033/- for the period covering January, 2008 to November, 2013 within 30 days of the date thereof. This demand was based on the allegation that only the Duty is exempted and not VAT. To the Applicant the Respondent's decision is unreasonable, oppressive and excessive and unfair for the reason that under the **EACCMA**, duty 'includes any cess, levy, imposition, tax or surtax imposed on any tax' hence duty in this context include VAT. It was the applicant's case that it was settled that both VAT and the Duty were exempted on raw materials and packaging for manufacture of medicament and the fact that there were some errors by the Respondent and the Treasury which inadvertently led to omission of the exemptions regime by the Respondent and the Treasury should not be visited upon the Applicant.
 10. To the Applicant the said decision is unreasonable, oppressive and excessive and unfair for the reason that the Respondent's mandate under the **Kenya Revenue Act** includes, assessing and collecting taxes and the Respondent in pursuit of this mandate created the *Simba System* and further introduced the said Code, whereby once an entry is made it indicates whether it falls under raw materials and packaging for manufacture of medicaments, and as such VAT is automatically removed which is so for the Applicant. It was therefore averred that it was the Respondent's own infrastructure that operated to automatically exempt the Applicant from the payment of VAT and therefore the Respondent cannot seek to benefit from its own wrongdoing. In any case, it was contended there was no loss occasioned to the government since even if duty had been paid the Respondent would pass the tax burden to the ultimate consumers of its products by claiming back refunds hence the loss would be nil for the Respondent. However the demand has been made at a time when the Applicant cannot claim refunds and will have to bear the loss itself. It was therefore contended that the Respondent's action is enhancing injustice, inequity and unfairness upon the

- applicant.
11. While the applicant would have been ready and willing to pay the taxes had they been due, it was contended that though the then legislation did not provide for exemptions the Respondent continued with the administrative system of exemptions hence the mistake was on the part of the Government by failing to correct the legislative error. In any event, it was averred this is one of the circumstances contemplated by section 20 of the **VAT Act**, 2013 on which the Respondent ought to rely.
 12. It was contended by the Applicant that the tax legislation gives the Minister power to exempt certain goods from the application of the **VAT Act** and therefore the Respondent cannot purport to claim tax on goods that are subject to that exemption hence the Respondent's decision amounts to an abuse of power and violates the rules of natural justice. Further the said decision was irrational and in bad faith and was in excess of its jurisdiction.

Respondent's Case

13. The Respondent's case was that in the year 1995, there was a general consensus between the Ministry of Health, the Treasury and the Federation of Kenya Pharmaceutical manufacturers, that all taxes, (VAT and Customs Duty), normally levied on raw materials for packaging and manufacture of medicaments were to be exempted. For that reason, an exemption code was created in the *Simba System*, BO260, where goods could be logged in and cleared without those taxes. However, following a desk audit of the Petitioner's company for the period 1st January 2008 to 31st October 2013, it was noted that the Petitioner was not paying import VAT on raw materials and packaging materials for manufacture of medicaments which should have attracted VAT at the rate of 16%. It was averred that an analysis of import statistical data revealed that the Petitioner was importing raw materials for manufacture of medicaments and wrongly lodging them into the *Simba System* under the exemption Code BO260. To the Respondent, the exemption code was earlier derived from item 26 of the third schedule to the **Customs & Excise Act Cap 472** which was overtaken by the enactment of the **East African Community Customs Management Act (EACCMA) 2004**. A Legal Notice No. 343 issued on 31st October, 1995 published a list of approved manufacturers of medicaments with regards to Item 26 of Part B of the Eighth Schedule to the **VAT Act Cap 476** which item refers to Jet Fuel and Aviation Spirit. It was contended the **EACCMA 2004** became the law applicable with effect from the year 2005 when it came into force and its purpose was to harmonise and administer Customs laws and procedures within the partner states and it replaced the exemption clauses under the **Customs & Excise Act Cap 476**.
14. According to the Respondent, as a result of the Applicant's omission, the Respondents issued a demand notice to the Applicant for an amount of **Kshs. 427, 918, 033.00** for the audit period January 2008 to October 2013, by way of a demand letter dated 3rd December 2013 in which the Applicant was explained to that they had misapplied or misinterpreted the law on this issue for the following reasons:
 - a. Whereas the Applicants were relying on Item 26 of Part B of the Eighth Schedule to the **VAT Act Cap 476**, that provision related to Jet Fuel and Aviation Spirit. Further scrutiny of the entire Eighth Schedule to the **VAT Act** made no reference to exemption of raw materials for manufacture of medicaments. Instead, most of these raw materials were zero rated under the Fifth Schedule, Part B of the **VAT Act**.
 - b. Whereas the Applicants were relying on Item 16 Part B of the Fifth Schedule to the **EACCMA 2004**, which provides for exemption from import duty on packaging materials and raw materials upon recommendation of the authority, the Respondent clarified that;
 - i. The Fifth Schedule is a provision anchored in the substantive **Section 114** of the **EACCMA 2004** which falls under Part X on **Duties**.
 - ii. Section 114(1) is an exemption regime for liability **on duty** and provides;

Duty shall not be charged on the goods listed in Part A of the Fifth Schedule to this Act, when imported, or purchased before clearance through the Customs, for use by the person named in that part in accordance with any condition attached thereto as

set out in that part;

15. To the Respondent, raw materials and packaging for manufacture of medicaments such as dealt with by the Applicant have been exempted from Import **Duty** but have never been exempt from Import **VAT**. Accordingly, pursuant to Paragraph 26 of the Third Schedule of the **Customs and Excise Act, Cap 472**, raw materials for use in Manufacture of Medicaments were exempt from Import Duty, Suspended Duty and Dumping Duty whereas under the **VAT Act, Cap 476**, they were subject to VAT but at Zero per cent (Zero-rating). It is only in 1995 vide **Finance Act No. 13 of 29th December 1995** when Part B of the Eighth Schedule to the repealed **VAT Act Cap 476**, (Special Goods Subject to Zero-Rating), was amended by introducing a new item 26 making “Raw Materials for Manufacture of Medicaments” Special Goods subject to Zero Rating. It was further averred that the “Zero-Rating” of “Raw Materials for manufacture of Medicaments” was retained in the following year 1996 but shifted from Item 26 of Part B of the Eighth Schedule to Item 22 vide the Ninth Schedule of the **Finance Act 1996 Act No. 8 of 1997** and that they remained Zero-Rated for VAT purposes between the years 1995 and 2000 which years were not covered under the Audit in issue. However, in the year 2001, vide **Finance Act No. 6 of 31st December 2001** the Eighth Schedule to the repealed **VAT Act Cap 476** was further amended by deleting Part B, item 22 on “Raw Materials for Manufacture of Medicament” subjecting it to import VAT before clearance through customs effective 15th June 2001.
16. To the Respondent, when goods or services are not listed on the First, Second, Third, Fifth or the Eighth Schedule of the repealed **VAT Act Cap 476**, they are subject to VAT at the rate of 16% and that the rates of VAT are provided for under Part I of the First Schedule of the repealed **VAT Act Cap 476** which states that:

“Subject to Part II of this Schedule and Parts A, B, and C of the Fifth Schedule, the rate of tax referred to in Section 6 shall be 16 per cent of the taxable value.”

17. It was the Respondent’s case that the Applicant was at no time exempt from paying VAT on its imports and that the only exemption the Applicant enjoys on importation of raw and packaging materials for the manufacture of medicaments is on import duty, previously under the **Customs and Excise Act Chapter 472** of the Laws of Kenya and now under the **East African Community Customs Management Act, 2004**. However, for the period under review, 1st January 2008 to 31st October 2013, the Applicant was neither exempt from paying VAT under the Second and Third Schedule nor were the goods it imported listed as Zero-rated under the Fifth or Eighth Schedule of the repealed **VAT Act Cap 476**. It was its position that the applicant has always been aware that raw and packaging materials for the manufacturer of medicaments has neither been “exempt” nor “zero rated” for Import VAT and that this is confirmed by letters dated 18th June 2004 and 15th July 2004 by the Chairman of the said Federation addressed to the then Minister for Finance **Hon. Daudi Mwiraria M.P** in which the Applicant’s Federation was petitioning the Honourable Minister to exempt Pharmaceutical Manufacturers from Duty and VAT. However, despite the pleas by the Federation, the Minister for Finance did not move an amendment of the provisions of the Eighth Schedule of the repealed **VAT Act Cap 476** to reflect the requests of the Federation to have raw and packaging materials exempted from VAT.
18. It was asserted that Import VAT accrues under the **Value Added Tax Act** and is due and payable to the Commissioner of VAT when the goods are cleared for home use directly at the port of importation but is collected by the Commissioner of Customs for ease of collection and accountability. In its view, Import VAT is distinguishable from Import Duty in that VAT is a Domestic Tax on the consumption of a person whereas Import Duty is a tax on goods entering or leaving a customs territory in order to raise Government Revenue and to protect domestic industries. In addition, the two taxes, Import VAT and Import Duty are charged under different statutes, that is, the **Value Added Tax Act Cap 476** (repealed by the Valued Added Tax Act No. 35 of 2013) and the **East African Community Customs Management Act, 2004** respectively. It was added that the importation and exportation of goods the world over is governed by the Harmonized System for Products (commonly referred to as the ‘**HS Code**’) which is an international nomenclature for the classification of products which is a six-digit code system that

allows participating countries to classify goods on a common basis for customs purposes. The East African Community has established a Customs Union which has transposed the Harmonized System to the Common External Tariff (CET) whereby goods are assigned rates of import duties based on whether they were primary raw materials, industrial inputs, capitals goods or finished goods with a Heading, H.S. Code/Tariff No., Description, Unit of Quantity and the rate of duty to be applied.

19. According to the Respondent, the Applicant's imports of raw materials used in the manufacture of medicaments are classified under Chapters 28, 29 and 30 of the Common External Tariff and that the Common External Tariff rate of raw materials used in the manufacture of medicaments is charged at 0% in line with the General Exemption provided for under Paragraph 16 of the Fifth Schedule of the ***East African Community Customs Management Act, 2004*** and it is this Common External Tariffs that are used to make import declarations by the Importer or his Clearing Agent because they dictate the duties and rates payable per product. Both the Importer and the Clearing Agent are expected to know the duties payable per product since all Clearing Agents are trained and knowledgeable on the Common External Tariff applicable per product. Further, taxes on imports are self-assessed by the importer who furnishes an import entry Form C17B for Kenya and C17A for the other East African partner states and that the self-declared import entry is passed on the face value as declared by the importer.
20. It was further averred that the duties payable by an individual are greatly influenced by the Customs Procedure Codes (C.P.C) and Preference Codes used in the import entry Form C17B, item 40 (d) and (n) respectively which Codes are available to the importer and the clearing agent and are very precise on the duty and taxes payable on the imported goods and inform the Customs Authorities the purpose of the shipment. Its position was that in order to facilitate a swift and efficient mode of clearing cargo at the Port of Mombasa, the Respondent has adopted a computerized system, *Simba System*, for the clearance of cargo at the port and in order to input the exemption code B0260 the importer or his clearing agent has to use a Customs Procedure Code (C.P.C) that supports the Preference Code (exemption code B0260) stated in the import entry Form C17B.
21. It was contended that the General Exemption on Packaging materials and raw materials for the manufacture of medicaments was introduced by Legal Notice No. 2 of 15th September 2005 by the Council of Ministers hence the packaging materials and raw materials were supposed to be entered under the Customs Procedure Code '**C420**' which clearly indicated that Customs Taxes were not payable but import VAT was payable. Although the *Simba System* did not levy import VAT on the packaging materials and raw materials, the Customs Procedure Codes were clear that the import VAT was due and payable and the Applicant ought to have made a further declaration on the short levied import VAT as was the position with several companies in the Pharmaceutical Industry. The Applicant also had the option of entering the goods for home use under Customs Procedure Code '**C400**' which did not permit the use of Preference Code (exemption code) but could claim the import duty under section 144(3) of the ***EACCMA*** which provides:

“The Commissioner shall refund any import duty paid on goods in respect of which an order remitting such duty has been made under this Act.”

22. It was therefore contended that the Applicant cannot blame the *Simba System* for his omissions and failures when the Tax Statutes and the Customs Procedure Codes are very explicit on the taxes payable and the exempt taxes and that a computerized system is as good as the information it is fed. In the Respondent's view, there was no uncertainty in the law since it is clear that raw and packaging materials for manufacture of medicaments were not exempt from import VAT or zero rated for VAT from 2001 but the same was exempt from Import Duty first under the ***Customs & Excise Act*** and currently under the ***East African Community Customs Management Act, 2004***.
23. It was averred that the Customs Authorities the world over have competing functions which they perform simultaneously and these include; revenue collection, trade compliance and facilitation, interdiction of prohibited substances, protection of cultural heritage and enforcement of intellectual property laws. In its view, there can never be estoppels against statute; legitimate expectation cannot be contrary to statutory provisions; and the demand made by the Respondent on the import VAT is anchored in law and the same cannot be said to be unilateral, unreasonable

- or unfair. It was further asserted that under section 236 of the **EACCMA** the Respondent is authorized to inspect or audit the accounts of the Applicant and under section 135 the Respondent is authorized to recover short levied taxes hence it has not acted unreasonably in exercising its statutory power to collect taxes.
24. The Respondent's position was therefore that orders of certiorari and prohibition cannot issue because the Respondents have not acted unreasonably without or in excess of their jurisdiction.
25. It was added that by way of a **VAT Amendment Act** whose commencement date is 29th May 2014, parliament amended the First Schedule to the **VAT Act** to allow for exemption of VAT on raw materials imported for use in manufacture of medicaments "*as approved from time to time by the Cabinet Secretary for National Treasury in consultation with the Cabinet Secretary responsible for health*".
26. On the issue of Tax Compliance Certificates, the Respondent's position was that a person who complies with the provisions of the 7th Schedule para 7 of the **VAT Act** is eligible for a tax compliance certificate because the said person has filed tax returns and paid only what he has assessed for himself as due and payable to the commissioner. This is according to the self-assessment system of taxation, where the Commissioner by law must later audit and confirm the self-assessment and demand for any short-levied taxes. Further, a tax compliance certificate does not mean that a person's taxes are fully paid, and only an audit conducted by the commissioner can confirm compliance even after the issuance of the certificate.

Applicant's Rejoinder

27. In a rejoinder, the applicant contended that the policy of the Government from 1995 has always been that raw and packaging materials used for the manufacture of medicaments are to be exempted from tax and that the reason for this policy has always been to facilitate the production of cheap medicines which can compete with imported medicine and thus promote the development and expansion of the local industry. A further reason for the policy has always been to avoid closure of local medicine manufacturing companies which closure would inevitably lead to loss of jobs and to further promote the status of Kenya as the biggest pharmaceutical manufacturing in the region. This policy, it was contended was and has always been implemented in tax legislations from 1995 to date, in line with the Government's international and regional obligations which arise from *inter alia* the various regional policies it has committed itself to including but not limited to:
- a. Pharmaceutical Manufacturing Plan for Africa (PMPA) which is premised upon the inalienable principle that access to quality healthcare, including access to all essential medicines that are affordable, safe, efficacious and of good quality is a fundamental human right.
 - b. The East African Community Regional Pharmaceutical Manufacturing Plan of Action 2012-2016 with the objectives of promotion of competitive and efficient pharmaceutical production; facilitation of increased investment in pharmaceutical production; strengthening of pharmaceutical regulatory capacity; development of skills and knowledge for pharmaceutical production; utilization of TRIPS flexibilities towards improved local production of pharmaceuticals and mainstreaming of innovation, research and development.
28. It was disclosed that prior to 2004 the **Value Added Tax Act** regulated VAT on imports while the **Customs and Excise Act** regulated customs and excise duties. While **Customs and Excise Act** exempted raw and packaging materials used in the manufacture of medicaments from customs duty, **VAT Act** zero rated the supply of raw and packaging materials for the manufacture of medicaments. Paragraph 26 of the 3rd schedule of the **Customs and Excise Act** exempted raw materials and packaging materials used in the manufacture of medicaments while the **VAT Act** zero rated the same under item 26 of Part B of the 8th Schedule. In 1996 zero rating of raw materials and packaging materials used in the manufacture of medicaments was moved from item 26 of Part B of the 8th Schedule to item 22 of the 9th Schedule and in 2001 item 22 of the 9th Schedule to the **VAT Act** was deleted and abolished but the **Customs and Excise Act** continued to exempt the raw materials and packaging materials from customs duties.

29. As from 2001 all the importers of medicaments were then exposed to VAT on imports of raw materials and packaging materials for the manufacture of medicaments by dint of the deletion and abolition of item 22 of the 9th Schedule to the VAT contrary to the Government policy and its regional and international obligations. However, the government policy of not subjecting the raw materials and packaging materials for the manufacture of medicaments to taxation however remained and continued to be in force and no VAT was demanded by KRA at any time whatsoever.
30. In 2002, with the repeal of the provisions relating to the Essential Goods Support Programme (EGSP), Export Promotion Programmes Office (EPPO) schemes, packaging and raw materials for use in the manufacture of medicaments were included in the newly established Tax Remission for Export Office (TREO) scheme in order to protect local industries. As with all goods imported under TREO, raw and packaging materials used for the manufacture of medicaments continued to enjoy VAT exemption. Through this mechanism the government was able to facilitate VAT exemption on raw and packaging materials for manufacture of medicaments during the period when there was no zero-rating of VAT on such products. Due to the fact that such persons continued to enjoy duty exemption under item 26 of Part B of the Third Schedule to the **Customs and Excise Act**, cap 472 and hence clear goods using the exemption code B0260 the Respondent also continued allowing such persons to use the same code while VAT exemption was achieved as explained in paragraph 16 above. However, manufacturers of pharmaceutical products did not feel sufficiently protected especially in relation to import VAT on raw and packaging materials for manufacture of medicaments and in order to address this anomaly the Federation, seeking legislative redress, petitioned the Minister for Finance to re-introduce the zero-rating of VAT on imports hence the letters dated 18th June 2004 and 15th July 2005. To the applicant, although the Minister did not amend the **VAT Act** to reintroduce the zero-rating, he instead addressed the concern of the Federation through the repeal of **Customs and Excise Act** and its replacement with the **East Africa Community Customs and Management Act (EACCMA)** which when it came into effect in 2005, exempted both customs and excise taxes and VAT on imports of raw materials and packaging materials for the manufacture of medicaments as follows:
- a. Section 114 (2) of the EACCMA provides that **duty** shall not be charged on goods listed in Part B of the 5th Schedule when imported or purchased before clearance for use by the person named in that Part in accordance with any conditions attached thereto as set out in that part.
 - b. Paragraph 16 of Part B of the said 5th Schedule expressly mentioned **raw materials and packaging materials for the manufacture of medicaments shall be exempted upon recommendation of the authority responsible for manufacture of medicaments.**
 - c. **Duty** in the EACCMA is **defined at section 2 thereof to include any other tax imposed by any other law** and this therefore logically included tax imposed by the VAT Act for the reason that tax is defined under the VAT Act cap 476 (Repealed) as value added tax.
 - d. Accordingly it was no longer necessary to amend **VAT Act** by introducing the zero-rating of raw and packaging materials for the manufacture of medicaments as long as the conditions prescribed in Paragraph 16 of Part B of the said 5th Schedule to the **EACCMA** were fulfilled.
 - e. It is trite that a subsequent Act repeals a former Act unless a contrary intention is provided for and that the **EACCMA** repealed the **VAT Act** in so far as the **VAT Act** was inconsistent with the **EACCMA**.
31. It was averred that subsequent to the coming into force of the EACCMA the Ministers responsible for Finance of Kenya, Uganda and Tanzania met on the 14th day of May 2005 to review progress made in the implementation of the Protocol to the Establishment of the East African Community Customs Union, during which meeting they agreed on various amendments to the **EACCMA** and the Common External Tariff (CET). Among the amendments proposed and agreed upon was the removal of the conditions set by Paragraph 16 Part B of the 5th Schedule to the **EACCMA** which required recommendation of the authority responsible for manufacture of medicaments. The effect was that the said Paragraph 16 of Part B of the 5th Schedule to the **EACCMA** was amended to unconditionally exempt from duties packaging and raw materials for manufacture of medicaments and that is the law and has been the law as from 2005 when **EACCMA** came into force.

32. To the applicant, the above stated legal position informed the practice and policy of the Respondent of not collecting VAT on import of raw and packaging materials for the manufacture of medicaments which argument is further evidenced by the fact that the Government has amended the **VAT Act, 2013** upon realizing its error and/or omission and has included raw and packaging materials as being exempted from VAT in line with its regional and international obligations although this is absolutely unnecessary since the matter has already been substantially dealt with under the **EACCMA**.
33. To the applicant, this is the reason why the Respondent itself fed information into the *Simba System* that automatically exempted VAT from imports of raw materials and packaging materials used in the manufacture of medicaments. To it, the allegation by the Respondent of a supposed error in using the code B0260 instead of code C420 is therefore illogical and unreasonable and founded on a fundamental error of law and facts and that the following confirms this position:
- a. The Treasury was aware that VAT on imports of raw and packaging materials used in the manufacture of medicaments were not being paid in the period between 2001 and 2013 as part of government policy of not subjecting raw and packaging materials used in the manufacture of medicaments to tax which policy was entrenched in the law between 1995 and 2000 vide the **VAT Act** as well as between 2005 to present since the enactment of the **EACCMA**.
 - b. It is less than candid for the Respondent to purport to say that they were not aware that the law was not being followed for a period of 13 years. Indeed the Respondent has a specific department that normally audits compliance with all laws and it is impossible for that department to have failed to notice an anomaly for a period of over 13 years.
 - c. The Respondent has been conducting post clearance audit on the import of raw and packaging materials for the manufacture of medicaments for the period 2001 to 2008 and it is impossible to believe that it is only the audit for the period between 2008 and 2013 that could detect the anomaly.
 - d. It is impossible to believe that all the thirty (30) plus importers of raw and packaging materials for the manufacture of medicaments would coincidentally have conspired not to pay VAT in the absence of some common understanding as between them and the position in law.
 - e. It is impossible to believe that all the numerous clearing agents who were involved in the clearance of such imports (many as they were) would have conspired not to pay VAT on import of such materials without there being some conclusion on their part that the same was not payable.
 - f. It is impossible for the Respondent to have fed into the *Simba System* a code that automatically operated to exempt VAT without an understanding on their part that VAT was not payable.
 - g. Although taxes are self-assessed by the importer who through his agent prepares the entries the said entries must be verified by the Respondent's officers who confirms that the taxes stated in the entry complies with the law and this must happen before goods can be cleared.
 - h. It was therefore impossible for all the Respondent's officials who verified each of the thousands of entries prior to clearance to have all cleared the goods without an understanding that VAT was not payable.
 - i. KRA's arguments that the exemption was founded on an alleged mistake and/or fraud is also wholly untenable in view of the fact that KRA itself prepared a manual containing all the exemption codes which were given to clearing agents to input into the *Simba System* and the entry of these codes into the *Simba System* automatically operated to exempt VAT of the raw and packaging materials for the manufacture of medicaments. In giving clearing agents the said manual, it is clear that KRA was operating on the understanding that raw and packaging materials for the manufacture of medicaments were exempted and further KRA had all intention and purpose to exempt the raw and packaging materials used for the manufacture of medicaments from VAT.
 - j. **EACCMA** being a regional treaty is to be interpreted in the same manner in each of the East African countries. All the other East African countries have exempted raw and packaging materials for the manufacture of medicaments from custom duty, VAT or any other tax as per the definition of duty under section 2 of the **EACCMA** and as put forth in paragraph 21 hereinabove. It is only the Respondent that has sought to give the provisions of the **EACCMA** a different interpretation and this is unreasonable and illogical.

34. According to the applicant the process involved with regard to declaration to Kenya Revenue Authority and clearance of imported goods for purposes of, *inter alia*, levying taxes and approval of tax exemptions up to and including the point of release, is an elaborate procedure in which the Respondent is involved significantly hence cannot now allege that the self-declared import entry is passed on the face value as declared by an importer. To the applicant, it would be a fallacy to allege that the Respondent was not at all involved in the process of validation and that the Respondent only relied on the information fed to the *Simba System* as it is clear that the Respondent is involved in the validation, verification and the entire process of the Simba system. It is therefore not true to allege that the Simba system operated on the basis that “a computerized system is as good as the information it is fed” as the Respondent has attempted to purport.
35. It was asserted that it is impossible to permit the payment of VAT on imports of raw and packaging materials for the manufacture of medicaments in view of the provisions of section 114 as read together with section 2 and Paragraph 16 of the 5th Schedule of the *EACCMA* for the following reasons:
- a. *EACCMA* expressly prohibits the levying of VAT on imports of raw materials and packaging materials for the manufacture of medicaments.
 - b. If there is a conflict between *VAT Act* and *EACCMA* then *EACCMA* prevails for the following reasons:
 - i. *EACCMA* is both a treaty and a statute;
 - ii. Under the principle of subsidiary, international treaties override local statutes; and
 - iii. Because *EACCMA* has been domesticated and is a local statute it operates to abrogate previous legislations conflicting therewith in so far as the same are in conflict with it.
36. The applicant’s position was that Customs Procedure Codes do not have a force of law and cannot prevail over clear provisions of statute. Further, Import VAT on raw and packaging materials for manufacture of medicaments were only paid by companies as products that failed to meet the conditions prescribed under Paragraph 16 of the 5th Schedule to *EACCMA* or were paid in ignorance of the clear provisions of the law.
37. It was its position that the Respondent having issued the manufacturers of medicaments with tax clearance certificates cannot now come back and claim that some taxes were not collected. Even assuming *arguendo* that VAT was payable the Respondent cannot now claim the same for the following reasons:
- a. **Even if VAT was payable the manufacturers would be entitled to claim it back meaning that the government lost no tax;**
 - b. **VAT Act itself under section 23 imposes a duty on the Commissioner to issue assessments on any unpaid taxes within a reasonable time. It is unreasonable for the Commissioner to issue fresh assessments for tax which is supposed to be claimed back within a certain period outside the stipulated period when it knows that the same cannot be claimed back;**
 - c. **It is unreasonable for the Commissioner to issue assessments on the alleged unpaid tax thirteen (13) years after the same was due *arguendo* hence the reason the Respondent is claiming for the period between 2008 and 2013;**
 - d. **If VAT is consumption tax as claimed by the Respondent then it is supposed to be paid by the consumers. In these circumstances the Respondent wants a consumption tax to be paid otherwise than by a consumer which would violate the provisions of the law that it seeks to enforce; and**
 - e. **Where revenue legislation authorizes a revenue body to receive money but for the limited purpose of paying it back that does not give the authority the power to receive the money for purposes of keeping the same.**
38. It was its view that the reliance on section 235 of the *EACCMA* by the Respondent to demand for tax which were allegedly not exempted is illogical and unreasonable for the following reasons:
- a. The said section provides for post clearance inspection of documents in possession of the

- Applicants, answer any question in relation to the goods and making declarations with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transshipment of the goods.
- b. The scope of the said section as clearly laid out in the section does not in any way whatsoever provide for issues regarding questions or determinations of issues regarding tax or exemption of tax or otherwise.
 - c. Any matter regarding exemption of tax is the sole responsibility of the Respondent and it is the Respondent who in exercising this responsibility prepared a manual with exemption codes and gave the same to clearing agents and thus cannot now come under the said section to demand for tax which in any event is not provided for under the said section.
 - d. If in any event, which the Applicant denies, post clearance inspection is allowed with respect to tax exemption as sought to be put forth by the Respondent, and which the Applicant restates is not the correct position, then several complexities will arise for instance where one is required to pay tax and claim it within a year it would be utter absurdity for the Respondent to demand the same after five years for the sole reason of the Respondent keeping the monies in order for the Applicant to claim it back.
39. The applicant's case was that there is therefore no law or provision that the Respondent relied or could have logically relied on to demand the said taxes. In its view, the assertions by the Respondent are baseless and unfounded and the assessment of the tax was based on a fundamental error of law and fact and in issuing the said assessments the Respondent acted unreasonably and illogically and illegality.
40. It was further disclosed that in any event the Applicant filed a review with the Commissioner in accordance with section 229 of the **EACCMA** which review has never been responded to and should thus be taken as having been allowed.

Applicant's Submissions

41. The applicant filed submissions which were highlighted by its counsel, **Mr Arwa**. According to the applicant, payment of tax is an obligation imposed by the law. It is not a voluntary activity. 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. No more, no less. This obligation is imposed, varied or exempted by law and legislation. Where the law outrightly exempts the payment of any form of tax, none ought to be paid. Any decision that purports to impose the payment of tax where the same is explicitly exempted is a decision tainted with illegality, procedural impropriety and irrationality. Further, where the decision purports to rescind and derogate from such legitimate expectation as is created by the conduct of the public body, such a decision ought to be quashed for breach of legitimate expectation.
42. It was the Applicant's case that no import tax with reference to the import of raw and packaging materials for the manufacture of medicaments was due as alleged by the Respondent or at all. The Applicant submitted that even if VAT was payable as alleged by the Respondent, the Applicant would have been entitled to a 100% refund of the input tax. There would therefore be no revenue lost by the Respondent. It was a further case of the Applicant that even when the VAT Act cap 476 was repealed and there appeared to be a lacuna in the law, the policy in force made the Government go to great lengths to exempt the raw and packaging materials for the manufacture of medicaments from tax. It was equally the Applicant's case that the **EACCMA**, a regional treaty, expressly exempted the payment of any form of tax on the import of raw and packaging materials for the manufacture of medicaments. The Applicant therefore submitted that no tax is due and owing to the Respondent.
43. It was submitted that prior to the coming into effect of the **East Africa Customs Community and Management Act** (EACCMA) on or about the year 2005, VAT on raw and packaging materials was zero rated vide the **Value Added Tax Act** while custom duty was exempted vide the **Customs and Excise Duty Act**. Thus no tax was demanded on the import of raw and packaging materials used for the manufacture of medicaments. This is a fact which is not in contention at all. This was the period between 1996 and 2001.
44. However, in or around the year 2001, item 22 of the 9th schedule to the **VAT Act** which zero rated

VAT on import of raw and packaging materials for the manufacture of medicaments was deleted from the *VAT Act, cap 476*. This exposed importers of raw and packaging materials for the manufacture of medicaments to VAT. However, none was demanded. This was on the understanding that the Government policy exempting the raw and packaging materials used for the manufacture of medicaments was still in force and that the deletion was erroneous. Further the regional and international obligations of the Government required the Government to exempt the said materials from tax.

45. The *EACCMA* came into effect in 2005. It exempted imports of raw and packaging materials for the manufacture of medicaments from both customs and excise duties and VAT and in particular section 114 (2) of the *EACCMA* was relied upon which states that duty shall not be charged on goods listed in Part B of the 5th Schedule when imported or purchased before clearance for use by the person named in that Part in accordance with any conditions attached thereto as set out in that part. Similarly the applicant cited paragraph 16 of Part B of the said 5th Schedule which states that raw materials and packaging materials for the manufacture of medicaments shall be exempted upon recommendation of the authority responsible for manufacture of medicaments. Since the Ministers of the East African Countries met and decided to unconditionally exempt the raw and packaging materials used for the manufacture of medicaments from tax, there was therefore no need of recommendation by a relevant authority.
46. It was submitted that *EACCMA* defines duty at section 2 to include any other tax imposed by any other law and VAT is defined under the *VAT Act* as value added tax hence VAT is any other tax. It was submitted that the definition of tax as per the *EACCMA* therefore logically and reasonably included tax imposed by the *VAT Act*. It was therefore submitted that VAT, as per the *EACCMA*, is therefore any other tax imposed by any other law. The *EACCMA* thus explicitly exempted raw and packaging materials used for the manufacture of medicaments from VAT and customs and excise duties, or any other form of tax. This exemption was as of the year 2005 when the *EACCMA* came into force to the present date. This includes the said period in which the Respondent has purported to demand the said sum from the Applicant. In the applicant's view, this decision is grounded upon a thorough misconception of the clear provision of law. It was contended that the position adopted by the Respondent that it conducted a post clearance audit and proceeded to demand the said sum as VAT from the Applicant for the said period, that is between the year 2008 to 2013, was tainted with illegality as the Respondent is proposing to demand tax for a period during which tax was explicitly exempted on the raw and packaging materials used for the manufacture of medicaments. This is contrary to the express provision of section 210 of the Constitution which provides that tax can only be imposed by legislation. In the instant case, the provision of the *EACCMA* outrightly exempted duty, defined as tax, from raw and packaging materials used for the manufacture of medicaments. It was contended that the Respondent relied on a gross misunderstanding of the provisions of the *EACCMA* in demanding the said sum as VAT on the imports of raw and packaging materials used in the manufacture of medicaments.
47. To the applicant, there is no ambiguity in the provisions of the *EACCMA* and even if there was ambiguity, such ambiguity ought to be interpreted in favour of the tax payer, as it has been held that payment of tax is a limitation on the right to own property and therefore such limitation ought to be given the strictest meaning. In this respect the applicant relied on the American Supreme Court case of Billings vs. United States 232 U.S. 261 S.C.T. 421 (1914), in which the Court stated:

“Tax statutes should be construed strictly and if any ambiguity be found to exist it must be resolved in favour of the citizen.”

48. It also relied on United States vs. Merriam U.S. 179 44 S.C.T. 69 (1923) in which it was held that:

“...in statutes levying taxes, the literal meaning of the words are used.”

49. It was submitted that the literal meaning of the provisions of the *EACCMA* is that no duty is to be demanded from imports on raw and packaging materials used for the manufacture of medicaments. The applicant relied on the holding in Keroche Industries Limited vs. Kenya

Revenue Authority & 5 Others [2007] eKLR.

50. This Court was however urged to find that if there was any ambiguity then the provisions of the *EACCMA* must be given the strictest meaning in accordance with the well settled principles of interpreting tax law as held in the Malaysian case of **Colgate Palmolive Marketing SDN BHD vs. Ketua Pengarah Kastam Case No. R2-25-259-2008 (Malaysia, Unreported)** as cited in **Republic vs. Kenya Revenue Authority Exparte Bata Shoe Company (Kenya) Limited [2014] eKLR, Mohd Zawani Salleh, J** quoted with approval the decision of **Gopal Sri Ram, JCA** (as he then was) in **Palm Oil Research and Development Board Malaysia & Another vs. Premium Vegetable Oils SDN BHD [2004] 2 CLJ 265.**
51. It was submitted that applying these principles to the instant case, applying the first principle of giving the words of the *EACCMA* their ordinary and literal meaning, neither is an absurdity occasioned nor is injustice caused. It is clear that the enactors of the *EACCMA* intended the raw and packaging materials used for the manufacture of medicaments to be exempted from taxes. This was obviously to ensure that medicine and medical products were cheap and readily available to the citizens of East Africa, the signatories to the *EACCMA*.
52. It was further submitted that the decision by the Respondent to demand the said sum as VAT on imports on raw and packaging materials used for the manufacture of medicaments is grounded on fundamental error of fact. To the applicant, there was a Government policy from 1995 which policy has always been that raw and packaging materials used for the manufacture of medicaments are to be exempted from tax. This has been the practice and has been translated into the various tax legislations enacted by the Government. No tax was therefore demanded with regard to the import on raw and packaging materials used for the manufacture of medicaments even when there was no express provision exempting the same, that is, between the year 2001 and 2004. The Respondent, a department of the Government, knew this and operated on the same premise of no taxation on the raw and packaging materials for the manufacture of medicaments.
53. To the applicant, even the Treasury was aware VAT on imports of raw and packaging materials used in the manufacture of medicaments was not being paid in the period between 2001 and 2013 as part of government policy of not subjecting raw and packaging materials used in the manufacture of medicaments to tax which policy was entrenched in the law between 1995 and 2000 vide the *VAT Act* as well as between 2005 to present since the enactment of the *EACCMA*. Due to this fact Respondent never at any time during the said period or at all, demanded VAT from the Applicants on the import of raw and packaging materials for the manufacture of medicaments. Indeed the Respondent has a specific department that is concerned with audits and ensuring compliance with all laws. It is a fact that such a department would not have failed to notice any anomaly for the period of over 13 years. To purport to state that the Respondent has been negligent of this is utterly illogical.
54. While reiterating the role of the Respondent in the clearance of the imports of raw and packaging materials used for the manufacture of medicaments, it was submitted that the procedure for the clearance of goods, specifically the raw and packaging materials for the manufacture of medicaments, is well known to the Respondent. It is also a fact that the Respondent is actively involved in the said clearance process. The Respondent cannot now claim that it was unaware and only relied on the information fed into the *Simba System*.
55. It was submitted that the decision by the Respondent to demand the said sum as VAT on the imports of raw and packaging materials used for the manufacture of medicaments was made *ultra vires* and in jurisdictional error. To the applicant, the Respondent is established by section 3 of the *Kenya Revenue Authority Act*, cap 469 and its functions are clearly outlined under section 5 thereof as below:
1. *The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collection and receipt of all revenue.*
 2. *In the performance of its functions under subsection (1), the Authority shall —*
 - a. *administer and enforce—*
 - i. *all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;*

- ii. *the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;*
- b. *to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and*
- c. *to perform such other functions in relation to revenue as the Minister may direct.*

56. To the applicant, nowhere in the **KRA Act** or anywhere at all is the Respondent empowered to interpret statute as opposed to specifically enforcing the provisions of the tax legislations as enacted and thus be an agency of the Government in collecting revenue. In support of this submission the applicant relied on **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** where Chesoni, J (as he was then) stated:

“The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied.”

57. Since the powers conferred upon the Respondent are synonymous to its jurisdiction, it was submitted based on **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** that it can only exercise such powers and jurisdiction as are conferred on it under the statute establishing the Respondent and could only enforce those provisions of the tax legislations as are enacted. Therefore any purported clothing of itself with any other function, such as interpretation of the tax statute, is *ultra vires* and of no consequence. To the applicant, the Respondent gave itself wide latitude in interpreting tax statute and ended up making irrelevant considerations in reaching the impugned decision. In purporting to assume powers to interpret the tax statutes, the Respondent assumed powers and jurisdiction that it did not have and as a consequence, its decision is tainted with illegality and procedural impropriety. In assuming powers of interpreting tax statute, the Respondent in effect imposed and proceeded to demand tax where none was due, contrary to the law and contrary to and outside the ambit of its powers which was an outright abuse of power by the Respondent in the pretext of enacting provisions of the statute which enactment is contrary to the express meaning of the statutes and a complete departure from the intent of the enactors. In support of the submission that as a creature of statute the Respondent can only exercise such powers as are conferred on it by statute, the Applicant relied on the House of Lords decision in **Anisminic Limited vs. Foreign Compensation Commission (1969) 2AC 147**. The decision by the Respondent to demand VAT on the raw and packaging materials used for the manufacture of medicaments should be quashed for the reason that it is irrational, unreasonable and illogical.

58. Based on **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) 1 Kb 223** and **R vs Minister Of State for Immigration and Registration of Persons J.R. 361 of 2012** it was submitted that the Respondent’s decision was unreasonable.

59. According to the applicant, since a subsequent law repeals a former law in so far as the former law is inconsistent with the subsequent law, unless a contrary intention is provided, the EACCMA therefore repealed or amended the **VAT Act** in so far as the **VAT Act** was inconsistent with the **EACCMA**.

60. According to the applicant, **EACCMA** being a regional treaty is to be interpreted in the same manner in each of the East African countries. All the other East African countries have exempted raw and packaging materials for the manufacture of medicaments from custom duty, VAT or any other tax as per the definition of duty under section 2 of the **EACCMA**. It is only the Respondent that has sought to give the provisions of the **EACCMA** a different interpretation. This is truly unreasonable and illogical and relied on **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.**

61. The decision by the Respondent to demand the said sum as VAT, it was submitted, is a breach of the Applicant’s legitimate expectation and should be quashed. This legitimate expectation was

created by the Respondent as shown in the policy of the Government from 1995, which policy the Government has always been implementing this policy in line with its international and regional obligations which arise from *inter alia* the various regional policies it has committed itself to including but not limited to the Pharmaceutical Manufacturing Plan for Africa (PMPA). This policy is premised upon the inalienable principle that access to quality healthcare, including access to all essential medicines that are affordable, safe, efficacious and of good quality is a fundamental human right. The East African Community Regional Pharmaceutical Manufacturing Plan of Action 2012-2016 is the second policy statement whose provisions Kenya is obligated to fulfil. Its objectives include promotion of competitive and efficient pharmaceutical production; facilitation of increased investment in pharmaceutical production; strengthening of pharmaceutical regulatory capacity; development of skills and knowledge for pharmaceutical production; utilization of TRIPS flexibilities towards improved local production of pharmaceuticals and mainstreaming of innovation, research and development.

62. Based on the averments by the applicant, it was submitted that it has thus always been a legitimate expectation of the Applicant that taxes would not be demanded on the raw and packaging materials used in the manufacture of medicaments, in line with the government's regional and international obligation and further in reliance on the Respondent's actions of not demanding VAT during the said period. In support of this submission the Applicant relied on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** and **Diana Kethi Kilonzo & Another vs. The Independent Electoral & Boundaries Commission (IEBC) & 2 Others, [2013] eKLR.**
63. **Further to the foregoing the Applicant submitted that there will be untenable disadvantage meted out to and visited upon the Applicant if this breach of legitimate expectation is condoned by this Honourable Court as the Applicant has already lost opportunity to adjust the prices of its products in order to factor in the cost of production which would have included the import VAT.**
64. **It was contended that based on Republic vs Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478:**

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong...or which infringes a man's liberty...must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard.”

65. To the Applicant the Respondent's decision ought to be quashed and a prohibition issued as it is not authorised by any law whatsoever on the authority of **Republic vs. Kenya National Examinations Council Ex Parte Gathenji & Others Civil Appeal No. 266 of 1996.**
66. To the applicant, the Respondent's decision was tainted with illegality, irrationality and procedural impropriety. It was submitted that the Respondent in demanding the said sum as VAT for the said period departed from its regional and international obligation and principle of *pacta sunt servanda* in adopting a distinct and separate interpretation of the *EACCMA*, an interpretation distinct from the meaning ascribed to the treaty by the other member states. It was also the Applicant's submission that the Respondent in demanding the said sum as VAT for the said period is attempting to derogate from the policy of the government and depart from its conduct and promise which the Applicant has relied on. Finally, it was the Applicant's submission that there was no tax payable to the Respondent for the said period or at all with regard to the import of raw and packaging materials used for the manufacture of medicaments.
67. It was therefore the Applicant's submission that the decision by the Respondent to demand the said amount as VAT for the said period was utterly illogical and irrational, a decision founded on gross error of law and fact, an illegality and a decision tainted with procedural impropriety and

should be quashed for this reason and a prohibition issued against the Respondent prohibiting the Respondent from demanding the said amount or any part thereof from the Applicant. It was submitted that the decision by the Respondent to demand the said amount from the Applicant is irrational, illegal and tainted with procedural impropriety. The Applicant submitted that the Respondent took into account irrelevant considerations and failed to take into account relevant considerations in demanding the said amount from the Applicant, rendering the Respondent's decision liable for the judicial review order of certiorari, to quash the decision for its illegality, irrationality and procedural impropriety. In support of this position the applicant relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 OF 2001, Pastoli vs. Kabale District Local Government Council And Others [2008] 2 EA 300.**

68. To the applicant, the decision by the Respondent demanding the said amount from the Applicant when the same was not due at any time whatsoever is utterly misconceived, irrational and unreasonable; is grounded on a thorough misconception of law and based on an erroneous understanding of the facts. The decision is also utterly illogical and irrational, capricious, arbitrary and an abuse of power and should be quashed in its entirety and a prohibition issued against the Respondent prohibiting the Respondent from demanding the said taxes at all.
69. It was further submitted that the Respondent's decision to demand the said taxes from the Applicant is grounded on a thorough misapprehension and application of law as relates to the import of raw and packaging materials used for the manufacture of medicaments. It relied on Article 210 (1) of the Constitution which states that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. In its view, the only way that VAT, defined by the **VAT Act** as a form of tax, can be imposed, waived or varied, as per the Constitution, is where the same is provided for in tax legislation. Where tax has therefore been exempted by express provision of the statute, the same ought not to be demanded. It was submitted that tax cannot be imposed by intendment or otherwise than by explicit provision of the law. There has to be explicit provision in legislation providing for the tax.

Respondent's Submissions

70. The Respondents similarly filed submissions which were highlighted by their learned counsel **Mr Nyagah**.
71. According to the Respondent, there is only one (1) main issue in contention, for the court to make a determination, and the rest of the minor issues raised will collapse following the determination of the one main issue and this main issue is whether the Applicants were indeed exempted from paying VAT on raw and packaging materials during the period in which the taxes in issue were audited and demanded for.
72. According to the Respondent, the genesis of this Application, in so far as the assessment of the import VAT amounting to KShs.43,579,768.00 is concerned, was precipitated by a Post Clearance Audit carried out on the import operations of the Applicant which Audit covered the period 1st January 2008 to 31st October 2013, a period of five years, and was carried out under the **VAT Act**. Cap 476 which was repealed on 2nd September 2013. The said Audit, it was contended was restricted to five (5) year in compliance with the provisions of Regulation 7(6) of the VAT Regulations 1994 and section 135(3). Such Post Clearance Audit process is underpinned in law under the **EACCMA** under sections 5, 122, 235, and 236. It is also conducted guided by International Auditing Standards and the World Customs Organizational standards.
73. Section 135(3) of **EACCMA, 2004** it was submitted provides that no demand of short levied duty can be made after 5 years. Since the Respondent has confined itself to making a demand for the audit period 5 years, it was contended that it was within the law.
74. Under Part 1 of the First Schedule to the Kenya Revenue Authority Act, Cap 469 Laws of Kenya, one of the laws the Kenya Revenue Authority enforces is the **East African Community Customs Management Act, 2004** (hereinafter referred to as **EACCMA**).
75. In execution of that mandate under sections 235 and 236 of the **EACCMA**, the Respondent is duty bound by law to carry out Post Clearance Audit on the import declarations made by taxpayers through verifying the accuracy of the entry of goods or documents and investigate whether any party has made the correct Customs declarations and paid all the taxes due.

76. It was submitted that the Post Clearance Audits period is an integral part of customs control of imported goods. The law recognizes that the time frame within which the officers have to clear the good initially does not allow for a thorough check, hence the allowance for a period for verifications afterwards. To the Respondent, the Audit was precipitated by a discovery that there was a problem with the payment of Import VAT on raw materials and packaging materials for the manufacture of medicaments that cut across the Pharmaceutical Sector in the country. The Desk Audit carried out by the Respondent on a number of Pharmaceutical Companies revealed that out of thirty one (31) Pharmaceutical Companies, only eight (8) companies were remitting to the Respondent import VAT on raw materials and packaging materials for the manufacture of medicaments contrary to the provisions of the repealed **VAT Act**, Cap 476, Laws of Kenya.
77. In response to the allegation that the Applicant was exempted from the taxes it was submitted that the Respondent was guided by the law where the taxable value on imported supplies under the **VAT Act**, Cap 476 is imposed by Section 9(1)(c) & (d). Thus while Value Added Tax on imports is charged under the VAT Act the same is collected by the Commissioner of Customs at the Port of Importation together with duty of Customs, if any.
78. On the allegation that even if VAT was payable, the Applicants would have been entitled to a 100% refund of the input tax, it was submitted that the law did not exempt or zero rate the Applicants from the payment of VAT during the period under review, and therefore, the issue of refund would never have arisen as it only applies to when indeed there is an exemption.
79. To the Respondent, Import duty of customs is a levy on select imported goods and it is levied under the **EACCMA**, before the goods are allowed to enter the territory of Kenya, while VAT is a domestic tax charged on select goods and services at every point of value addition, up to the final consumer. These two regimes are separate tax regimes. The taxes that are in contention in this matter are the Value Added Tax which tax is governed by the **VAT Act**, and if any exemptions from VAT were to be granted for the relevant period, it would be so granted under the **VAT Act**, Cap 476.
80. It was submitted that under Section 2 of the **VAT Act** CAP 476, the word “**tax**”, is defined as “**Value Added Tax chargeable under this Act**”. The words Duty of Customs is defined as “*excise duty, import duty, export duty, suspended duty, dumping duty, levy, cess, imposition, tax or surtax charged under any law for the time being in force relating to customs or excise*”. It was therefore submitted that **VAT Act** emphasizes in its definition of the word Duty, that it only relates customs or excise. This emphasis counter’s the Applicant’s contention that duty includes each and every tax, including VAT. To the Respondent, under section 57 of the **VAT Act, Cap 476** (repealed), imported goods are liable to Value Added Tax, whether those goods were liable to any duty of Customs or not, as if all such goods were liable to duties of Customs and as if those duties included tax. It was submitted that the tax being demanded became payable between 2008 and October 2013 when the repealed Act was still in force.
81. To the Respondent, since VAT on imported goods is collected under the Customs law as a percentage of the duty of Customs; when it comes to accounting for the same it is the Customs officer who is conversant with Customs procedures and processes who is called upon to do such accounting through a Post Clearance Audit. From the Post Clearance Audit it was established that, the Applicant, for the period 2001 to 2013, when importing its Raw materials and Packaging materials for the manufacture of medicaments, it had been declaring the same as exempt from VAT while the same should have attracted VAT at the rate of 16%. However, a tax can only be expressly exempted within the Parent Act. Indeed the Applicants are right in stating that under Article 210(1) of the Constitution, no tax or licensing fee may be imposed, waived or varied except as provided by legislation. The Applicants have failed to demonstrate which express provision of the law has allowed for the exemption of taxation VAT on the packaging material in question.
82. To the Respondent, the law is not ambiguous, and relied on the *ejusdem generis* canon of construction that when particular words pertaining to a class, category or genus are followed by general words, the general words or phrase will be interpreted to include only items of the same type as those listed. In its view, the clear and natural construction of the statute in context is that Customs Duty is a tax levied on imports (and, sometimes, on exports) by the customs authorities of a country to raise state revenue, and/or to protect domestic industries from more efficient or predatory competitors from abroad. Customs duty is based generally on the value of goods. The

law that governs the administration of Customs and hence duty is the *EACCMA, 2004*. However, Value Added Tax (VAT) is a type of [consumption tax](#), that is placed on a product whenever value is added at a stage of production and at final sale and the law that governs the administration and levying of VAT is the *VAT Act* Cap 476 of the Laws of Kenya. In the Respondent's view, the Applicant has failed to understand that the two subject matters of VAT and Duty, relate to different taxation regimes and statutes. It was further submitted that Raw and Packaging Materials for the manufacture of medicaments such as dealt with by the Applicant have been exempted from Import **Duty** under the *EACCMA 2004* but have never been exempt from **VAT**. The *VAT Act* is clear and unequivocal that unless it expressly exempts VAT, it is to be taxed and the Applicants have failed to show where in the principal Act, they were ever exempted from VAT.

83. It was submitted based on *Black's Law Dictionary* p. 807 that:

“It is a Canon of construction that statutes that are in *pari material* may be construed together so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”

84. The Applicant, it was contended, has deliberately ignored the relevant Act, which is the *VAT Act*, in order to fix itself under provisions of another statute that is not relevant to the VAT regime. The Court was therefore urged to uphold the VAT law and allow taxes to be collected accordingly.

85. On the issue of *ultra vires*, it was submitted that taking into account the expertise of the Revenue officers that administer the Revenue laws it was within the mandate of the Respondents to interpret the law because no person can apply the law unless the first understand it by interpreting it. Further the Respondent being an administrative authority, it performs quasi-judicial functions in making decisions within the powers donated to it by law. Interpretation is merely the process of determining what the law or a legal document means. The ascertainment of meaning to be given to words or other manifestation. If the court and the Applicants were to expect that the Respondents ought not to apply their minds to the meaning of the words in the law, then the court would in fact be welcoming a situation where, an absurd application of the law would be allowed, and the Applicants themselves should also dare not apply their minds to interpret the same law so that they ought to not to have any objections which support their own version of interpretation.

86. It was submitted that adequate notice was given to the Applicant; that various meetings were held between the Applicant's officers and the Respondent's officers to iron out contentious issues; and that the Respondent gave details of findings, discussed, engaged and heard the Applicants response to the issues now before the Court. Accordingly, the taxes demanded from the Applicant are well within the law, and the audit conducted by the Respondent was in full compliance with the relevant tax laws.

87. On legitimate expectation, it was submitted that some of the industry players have been complying with the law and paying their VAT according to the law. In this case, this principle does not arise for the following reasons;

- a. Contrary to the Applicant's allegations that there was a Government policy that packaging material should be exempt, it is evident from the foregoing that the Minister, upon application, would issue a letter allowing for exemptions for the raw and packaging materials for manufacture of medicaments for a certain periods. This exemption has never been mandatory or as of right or law and the Applicant was aware of this.
- b. From the letters exhibited it is apparent that the Applicant through its Federation, the Federation of Kenya Pharmaceutical Manufacturers, has always been aware that Raw and Packaging materials for the manufacture of medicaments has neither been exempt or zero rated for import VAT and the Federation that the raw materials and packaging materials which are employed in the manufacture of pharmaceutical products locally be notified on Kenya Gazette for duty and VAT exemption.
- c. This is a clear indication that the Applicant was at all material time, from as far back as the year 2004, alive to the fact that raw and packaging materials for the manufacture of medicaments were neither exempt from VAT nor were they zero rated. The tax demand in this matter covers the period running from January 2008 to October 2013.
- d. It is noticeable that the Minister did not take any action and even if he did, the said pharmaceutical manufacturing inputs were not gazetted for exemption or zero rating in the Kenya Gazette. Indeed,

- the Applicant has not produced a Gazette Notice to that effect.
- e. In any event, it is a presumption of law that once a law has been assented to, every citizen is deemed to be aware of the law and the said law is enforceable against all citizens. The **Finance Act 2001** was assented to on 31st December 2001 and the Applicant was deemed to be aware of the applicability of the law. The said **Finance Act 2001** deleted **Item 22 of Part B**, of the Eighth Schedule of the repealed VAT Act on “**Raw Materials for Manufacture of Medicament**” thus subjecting the items to **Import VAT** before clearance through Customs effective 15th June 2001.
 - f. Therefore, it is the Respondent’s humble submission that the Applicant was aware that Import VAT was due and payable to the Commissioner but wilfully chose to disregard the law by not remitting the import VAT.
88. With respect to the *Simba System*, it was submitted that the Respondent is charged with the responsibility of facilitating both international and local trade by providing expedited clearance of goods through simplified and harmonized Customs procedures as envisaged under the Revised Kyoto Convention. To this end, the Respondent in the year 2000 procured a Customs Automated System commonly known as the *Simba System* to replace the inefficient and unreliable manual system that was liable for delays in clearance of goods and loss of government revenue. *Simba System*, it was explained is an open and interactive system built on a client/server platform which enables the clearing agents to prepare and lodge customs entries online for customs officials to process and facilitate the release of imported goods. It was the Applicant’s responsibility to input data into the *Simba System* through a clearing agent who enters the Regime Code and the Customs Procedure Code applicable to a commodity. This is the hallmark of a self-assessment system of taxation. The Customs Officer is then supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the accrual of demurrage and customs warehouse rent. It is for this reason that the Respondent is conferred powers under section 235 and 236 of the **EACCMA** to conduct Post Clearance Audits to verify the accuracy of the entries after the goods have been released from Customs control. It is worth noting that the tax statutes are self sustaining and provide remedies where taxes are short levied in the process of facilitating trade.
89. In the present case, the Applicant and its clearing agent deliberately chose to apply the wrong *Customs Procedure Code (CPC) C490* for ‘direct importation for home use’ in order to enjoy an exemption instead of using *Customs Procedure Code C400* for ‘goods liable to duty and taxes’ which would have subjected the goods to duty and import VAT. It was reiterated that a computerized system is as good as the information it is fed and if manipulated to give a certain desired outcome, it is more often than not susceptible to such manipulation since the person feeding it the information is the person in command. The Applicant chose the **Customs Procedure Code C490** because it was the only code that would have allowed for the use of the Preference Code B0260 which the Applicant used in order to avoid paying Import VAT. The Applicant, like the other companies that complied, ought to have used the **Customs Procedure Code C400** which did not permit the use of the Preference Code B0260.
90. It was therefore submitted that the non-payment of VAT by use of the above method was a deliberate ploy by the Applicants to evade payment of tax. Accordingly legitimate expectation does not arise since there cannot be legitimate expectation which is in contradiction to the law. In support of this position, the Respondent relied on **Republic vs. Kenya Revenue Authority Exparte Shake Distributors Limited [2012] eKLR.**
91. It was the Respondent’s submission that every year, revenue laws are amended to suit the government’s budgetary needs. There is no promise that the laws will never be repealed or amended as far as exemptions go. There was no representation made to the Applicant to the effect that Import VAT will not be charged on their imports or to the effect that they would be exempted from the provisions of Section 235 and 236 of the **EACCMA**. Therefore the claim for legitimate expectation by the Applicant must fail.
92. Based on **Mombasa Civil Appeal No. 157 of 2007 between Commissioner Customs and Others versus Amit Ashok Doshi & Two Others**, it was submitted that there was no estoppel against statute and that although Commissioner initially erred in deciding the substance was not dutiable and possibly was negligent not to have analyzed the sample the Commissioner was bound under the law to correct the matter and levy duty on the basis that the substance had always been

- dutiable.
93. Accordingly, the Respondent submitted that the doctrine of legitimate expectation as advanced by the Applicant must fail. In addition, the Applicant cannot be heard to say that the short levied taxes are hefty while the said short levied taxes were accrued as a result of the Applicant's own devious and negligent acts of inputting the wrong Customs Procedure Code with a view of minimizing their tax liability contrary to the express provisions of the **VAT Act**.
94. It was contended that if the applicants stretched interpretation of the definition duty were to be applied, then if duty indeed includes all taxes, then duty would include Income Taxes, [Property Taxes](#), Consumptive Taxes, Corporate Taxes, Capital Gains taxes, Inheritance or Estate Taxes, Inheritance or Estate Taxes, etc. By definition, some of these taxes are unrelated and their governing statutes provided that these taxes must be paid unless on goods or services expressly stated within the parent statutes. The Applicant's interpretation of duty creates an absurdity.
95. It was submitted that subsidiary legislation at all material times granted the minister the powers to grant exemptions, upon application, and only to approved pharmaceutical companies. KRA, it was submitted has treated all the pharmaceutical players in the industry in the matter equally, and if they had not, the Petitioners would have pleaded unfair treatment.
96. With respect to the new **VAT (Amendment) Act No. 7 of 2014**, it was submitted that, the law applicable is the law that was subsisting at the time of the cause of action and not the new law. The prevailing law of the audit period demanded taxes be paid and those taxes are not waived by any latter amendments. The deletion of a law is purposefully done and can never be an error. Government policy, it was submitted, follows the law, and not the other way round. By way of a **VAT Amendment Act** whose commencement date is 29th May 2014, parliament amended the First Schedule to the VAT Act by adding paragraph 46 to allow for exemption of VAT on raw materials imported for use in manufacture of medicaments **ONLY** "*as approved from time to time by the Cabinet Secretary for National Treasury in consultation with the Cabinet Secretary responsible for Health*". To the Respondent, the amendment still does not give the Applicants any exemptions as of right, but only re-affirms the former position that exemptions are on condition that the Minister approves, upon application from the Applicants from the pharmaceutical industry, and the Minister may grant such exemption from time to time if he deems it appropriate.
97. Therefore on the issue whether the applicant is entitled to the reliefs sought, the Respondent relied on the decision in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kurmarstheth [1985]** as cited in **R vs The Council of Legal Education Ex-parte James Njuguna & 14 Others [2007] eKLR** , **Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL** and ***Judicial Review Handbook*** by **Michael Fordham** (Third Edition) p.249- 256.
98. It was submitted that the Applicants have failed to demonstrate how the Respondents acted outside the law. To grant the order prohibiting the Respondent from enforcing the collection of the tax now claimed, it was submitted would act as an injunction against the Government from performing its statutory duties i.e. tax collection if the taxes are found to be lawfully due. Once taxes are found to be lawfully due, the court should not prohibit the Respondents from lawfully collecting the taxes.
99. Relying on Article 210 of the Constitution which provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation, the Respondent asserted that it has a mandate under the law to ensure that taxes are paid according to legislation.
100. To the Respondent this case is on all fours with the decision of **Lenaola, J** Petition No. 589 of 2013, **Pharmaceutical Manufacturing and 3 Others vs KRA and 2 Others [2014] eKLR**, where the learned Judge held that even though the exemption was enjoyed at one time, there was no exemption at the period in issue under audit. The Court relied on **Majanja, J's** decision in **Kudhehua vs. KRA & Others, Petition No. 544 of 2013**.
101. To the Respondent, a grievance with a government policy does not constitute breach of the law.
102. In the Respondent's view, due to the illegal zero rating and self exemption of VAT by the Applicants, the sum demanded by the Respondent remains due by law hence this Court was urged to dismiss this application with costs to be borne by the Applicant.

Determinations

103. I have considered the issues raised in this application by way of affidavits, Statement of Facts, grounds and submissions by the respective parties. Before plunging into the Application proper, it is important once again to regurgitate the principles guiding tax legislation. These principles were restated in **Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR** where Majanja, J held:

“The approach to this case is that stated in the oft cited case of Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64 as applied in T.M. Bell v Commissioner of Income Tax [1960] EALR 224 where Roland J. stated, “...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.” As this case concerns the interpretation of the Income Tax Act, I am also guided by the dictum of Lord Simonds in Russell v Scott [1948] 2 ALL ER 5 where he stated, “My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him” adopted in Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR per Nyamu JA (See also Jafferli Alibhai v Commissioner of Income Tax [1961] EA 610, Kanjee Naranjee v Income Tax Commissioner [1964] EA 257). Any tax imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute. In Adamson v Attorney General (1933) AC 257 at p 275 it was held that, “The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect-if it be in view of the Crown a defect can only be remedied by legislation.”

104. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See **London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

105. Similarly, it was held in **Vestey vs. Inland Revenue Commissioners [1979] 3 All ER at 984** that:

“Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.”

106. In the same vein, it was held in **Russell (Inspector of Taxes) vs. Scott [1943] AC 422 at 433:**

“I must add that the language of the rule is so obscure and so difficult to expound with confidence that – without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind I feel that the tax payer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected...my Lords, there is a maxim of income tax law, which though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose tax upon him. It is necessary that this maxim should on

occasion be reasserted and this is such an occasion.”

107. In Unilever Kenya Limited vs. The Commissioner of Income Tax Nairobi High Court Income Tax Appeal No. 753 of 2003, in which the holdings in Scott vs. Russell [1948] 2 All ER 1 and Kanjeo Nazanjeo vs. Income Tax Commissioner [1964] EA 257 were cited with approval, it was held that where the language used in the legislation is somehow obscure, the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clarity before he is adversely affected. In Commissioner of Income Tax vs. Westmont Power (K) Ltd Nairobi High Court Income Tax Appeal No. 626 of 2002, the Court while citing Inland Revenue vs. Scottish Central Electricity Company [1931] 15 TC 761 expressed itself as follows:

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity...any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”

108. In tax cases therefore the Court is not entitled to attempt a discovery at the intention of the Legislature but must restrict itself to the clear words of the statute.

109. The same reasoning was adopted by Nyamu, J (as he then was), in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 240 where he expressed himself as follows:

“taxation can only be done on clear words and cannot be on intendment. Linked to this is that a penalty must be imposed in clear words. Finally even where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes a burden, tax or duty on the subject...Nothing summarises the above position better than *Brooms Legal Maxims*: ‘a remedial statute therefore shall be construed so as to include cases which are within the mischief which the statute was intended to remedy; whilst, on the other hand, where the intention of the Legislature is doubtful, the inclination of the court will always be against that construction which imposes a burden, tax or duty on the subject. It has been designated as “a great rule” in the construction of fiscal law, “that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation; and if a person who is subjected to a duty in a particular character or answers that description, the duty no longer attaches upon him and cannot be levied. A penalty moreover must be imposed by clear words. The words of a statute shall be restrained for the benefit of him against whom the penalty is inflicted, and the language of the statute must be strictly looked at in order to see whether the person against whom the penalty is sought to be enforced has committed an offence to do with it.’...The principle remarked Lord Abinger “adopted by Lord Tenterden, that a penal law ought to be construed strictly is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject and I hope will always remain so. This Court of course does appreciate the point made by the respondents’ Counsel that if the meaning of the provisions of the relevant empowering taxation laws is clear the court has no business intervening. This principle is based on the high authority of *Bennun on Statutory Interpretation* at page 726, 727 as follows:- ...If the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. It is of course regarded as penal for a person to be taxed twice over in respect of the same matter.” The significance of this quotation is that although the applicant did file monthly returns and keep daily production records, and the stockbook as required the

tax imposed by the subsequent formula based on input and output purports to tax the company twice. This is also reflected in the inconsistent figures reflected by the three major audits. The taxman had come up with inconsistent figures for the same period due to its lapse in adhering to the law especially s 137 of the Act. I find that they cannot tax the applicant twice over *Bennion* adds:- ‘Nevertheless taxation is clearly “penal” within this section of the Code, and must not be enforced by the courts unless clearly imposed. As Evans LJ said in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision so that the taxpayer shall not become liable to tax unless this is clearly and unequivocally the object of the statutory provisions...The Courts are reluctant to adopt a construction permitting a person’s tax liability to be fixed by administrative discretion.’...This is how this court has regarded the assessment of tax on an arbitrary input-output formulae because it is not supported by any law nor is its retroactivity permitted by law...The same principles as above, were accepted and applied in the case of *Cape Brandy Syndicate vs. Inland Revenue Commissioners [1921] KB 64* where Ronlat J, restated the principle in these words: ‘in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no reason for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly on the language used.’... Again, in the case of *Ramsay Ltd vs. Inland Revenue Commissioner [1992] AC 300* the same principles were expressed as follows:- ‘A subject is only to be taxed on clear words not upon intendment, or upon the “equity” of an Act’. Any taxing Act of Parliament as to be construed in accordance with this principle. What are “clear words” is to be ascertained upon normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole and its purpose may, indeed should be regarded ...” A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect.”

110. However, whereas the Court appreciates the need to collect taxes, in carrying out their statutory obligations the tax authorities must adhere to the law. As was held in *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* (supra):

“It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due... Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law.”

111. This position is reflected in *Inland Revenue Commissioners vs. Wolfson [1949] 1 All ER 864 at 868* where it was held that:

“It was argued that the construction that I favour leaves an easy loophole through which the evasive tax payer may find escape. That may be so, but I will repeat what has been said before. It is not the function of a court of law to give words a

strained and unnatural meaning because only thus will a taxing section apply to a transaction which had the legislature thought of it, would have been covered by appropriate words. It is the duty of the Court to give to the words of this subsection their reasonable meaning, and I must decline on any ground of policy to give them a meaning which with all respect to the dissentient Lord Justice I regard as little short of extravagance.”

112. It is clear that what provoked these proceedings was the letter dated 28th November, 2013, from the Respondent to the applicant by which the Respondent was claiming unpaid VAT amounting to Kshs 427,918, 033/- for the period covering January, 2008 to November, 2013 within 30 days of the date thereof. It is not contended that the Respondent is not legally entitled to demand for VAT which was due before the repeal of the **VAT Act**, as long as the period in question does not go beyond 5 years, hence the limited period of between January, 2008 and October/November, 2013.
113. From the Applicant's own case, it is clear that from 1995, all taxes normally levied on raw materials for packaging and manufacture of medicaments was to be exempted. This according to the applicant was as a result of an understanding between the then Ministry of Health, Treasury and Federation of Kenya Pharmaceutical Manufacturers. Following that understanding, both the **VAT Act** and the **Customs and Excise Act** (the CEA), under item 26 of Part B of the 8th Schedule exempted from all taxes, raw materials and packaging for manufacture of medicament since both legislation had the same exemptions regime.
114. However, come the year 2001, whether by design or by inadvertence this legal position changed when both legislation were amended vide **Finance Act** of that year which removed the exemptions regime therefrom. This position seems to be on all fours with the Respondent's contention that vide **Finance Act No. 6 of 31st December 2001** the Eighth Schedule to the repealed **VAT Act** Cap 476 was amended by deleting Part B, item 22 on "Raw Materials for Manufacture of Medicament" subjecting it to import VAT before clearance through customs effective 15th June 2001. However, it was the Applicant's contention that the Respondent and the Treasury continued to exempt from payment of all taxes, raw materials and packaging for manufacture of medicament so that all clearance systems remained as before. Again this factual position is not denied by the Respondent.
115. This position seems to have remained till 2004, when the **East African Community Customs and Management Act (EACCMA)** was passed which operated to repeal the provisions of the **Customs & Excise Act** and under the 5th Schedule Part B, thereof, packaging materials and raw materials for manufacture of medicament is exempted upon recommendation of the authority responsible for the manufacture of medicaments.
116. From the Applicant's own position it therefore comes out clearly that from the time the **Finance Act No. 6** of 31st December 2001 was passed till 2005 when **EACCMA, 2004** became effective there was no express legal regime exempting the Applicant from payment of all taxes on raw materials and packaging for manufacture of medicaments. The applicants relied on the amendments to the **Customs and Excise Act in 2002 (CEA)** which according to it, broadened the definition of "duty" to include VAT. The question is therefore whether in broadening the definition of duty in the **Customs and Excise Act in 2002**, necessarily amended the **VAT Act** as well. To make this finding would amount to derogation of the known principle in tax matters that one has to look merely at what is clearly stated as there is no room for any intendment and nothing is to be read in or implied. This rule, in my view applies to both the taxpayers and the taxing authority. Accordingly, I am unable to import the definition of duty under the **CEA** to apply to the **VAT Act** by implication.
117. It is therefore clear that for that period apart from other issues raised in this application the applicant had no specific legal regime exempting it from payment of the subject taxes.
118. Again, it is the applicant's case that following the passage of the said **EACCMA**, the Minister for the time being of Health periodically made recommendations to the Treasury and the Respondent to have raw materials and packaging for manufacture of medicament exempted from payments of VAT and Customs Duty in accordance with section 23 of the now repealed **VAT Act** which permitted him to do so and the 5th Schedule, Part B, item 16 of **EACCMA**. It is therefore similarly clear that from the Minister's point of view, even the passage of the **EACCMA** did not automatically exempt the applicant from the payment of the subject taxes his powers were to

periodically recommend to the Treasury and the Respondent to have raw materials and packaging for manufacture of medicament exempted from payments of VAT and Customs Duty in accordance with section 23 of the now repealed **VAT Act** which permitted him to do so and the 5th Schedule, Part B, item 16 of **EACCMA**. That this is the position comes clearly from the applicant's own contention that subsequent to the coming into force of the **EACCMA**, the Ministers responsible for Finance of Kenya, Uganda and Tanzania on 14th day of May 2005 agreed to amend **EACCMA** and the Common External Tariff (CET) in order to remove the requirement for recommendation of the authority responsible for manufacture of medicaments in order to unconditionally exempt from duties packaging and raw materials for manufacture of medicaments. Therefore even the said Ministers appreciated that the exemption was not absolute but was subject to recommendations. This was the position adopted by **Lenaola, J** in **Pharmaceutical Manufacturing and 3 Others vs. KRA and Two Others** (supra) in which he stated that:

“The obvious effect therefore is that there may well be exemption subject to proper approvals being obtained...”

119. This position seems to have prevailed till 29th May, 2014 when by the **VAT Amendment Act** the First Schedule to the **VAT Act** was amended to allow for exemption of VAT on raw materials imported for use in manufacture of medicaments “*as approved from time to time by the Cabinet Secretary for National Treasury in consultation with the Cabinet Secretary responsible for health*”. Even with this amendment, it is still clear that the exemption of VAT depends on periodical approvals by the Minister.

120. The applicants contend that the exemption was informed by the Government policy of facilitating the production of cheap medicines which can compete with imported medicine and thus promote the development and expansion of the local industry and to avoid closure of local medicine manufacturing companies which closure would inevitably lead to loss of jobs and to further promote the status of Kenya as the biggest pharmaceutical manufacturing in the region. Why the Government did not think it proper to translate this policy into law even after the Federation brought this to attention of the then Minister of Finance remains a mystery. That the Federation itself appreciated that there was something amiss in the Minister not expressly gazetting the exemption is clear from its letters dated 18th June 2004 and 15th July 2004 addressed to the Minister for Finance petitioning that Pharmaceutical Manufacturers be exempted from Duty and VAT. The Minister however maintained a loud silence.

121. The first issue for determination is whether the policy alluded to could supersede the express provisions of the law. In **Cape Brandy Syndicate vs. Inland Revenue Commissioner [1921] 1 KB 64**, it was held:

“In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used”

122. In my view this Court does not have the liberty to read into the tax legislation the effect of what was not expressed therein. Similarly, this Court is not permitted to draw on the past episodes to determine whether or not the tax is payable. In this case as long as the 2001 amendments to the **Finance Act** which removed the exemptions regime from the **VAT Act** and the **Customs and Excise Act** remained intact, the law is that prima facie the Applicant was liable to pay the said taxes. This position is reinforced by no less than the Constitution itself where in Article 210(1) it is expressly provided that:

(1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

(2) If legislation permits the waiver of any tax or licensing fee—

(a) a public record of each waiver shall be maintained together with the reason for the waiver; and

(b) each waiver, and the reason for it, shall be reported to the Auditor-General.

123. It is therefore clear that public or Government policy cannot without more override the express provisions of the law. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policies or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See Richardson vs. Mellish (1824) 2 Bing 229 and Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251.

124. In R vs The Council of Legal Education Ex-parte James Njuguna & 14 Others [2007] eKLR the Court cited the holding in Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kurmarsteth [1985] where it was held that:

“so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or the efficaciousness of such rules or regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not the court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation – making power conferred on the delegate by the statute. The responsible representative entrusted with the power to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair...It is not for the court to concern itself with the policy behind the Act and the regulations as long as the latter are within the purview of the parent Act. This court prefers to keep away from usurpation of power or any manifestation of usurpation of power clearly vested in a competent authority by Parliament.”

125. A similar position was taken in Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL to the effect that:

“It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show”

126. The Court’s role in such matters was explained in *Judicial Review Handbook* by Michael Fordham (Third Edition) p.249- 256 as hereunder:

“Every public body has its own role and has matters which it is to be trusted to decide for itself. The courts are careful to avoid usurping that role and interfering whenever it might disagree as regards those matters. ”

127. The parties ought to appreciate the parameters of judicial review as opposed to an appeal. Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.

128. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

129. The common law view was that judicial is concerned not with private rights or the merits of the decision being challenged but with the decision making process and that its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It aims at ensuring that the individual receives fair treatment, and not see that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285** and **Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.**

130. The rationale for this position was that to do that would amount to the Court sitting on appeal on the decision made by the Respondent. This position was appreciated in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** where it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

131. It was similarly held in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR**, that:

“...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or ‘wrongness’ or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a ‘wrong’ decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company

Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...”

132. Similarly, in Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.*

133. This position was adopted in Republic vs. Kenya Revenue Authority & Another Ex-Parte Bear Africa (K) Limited where Majanja J. quoting with approval the decision of Githua J in Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR as follows;

“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”

134. The question whether a judicial review Court is the proper forum to deal with the issue whether or not taxes are due and if so how much has been the subject of judicial decisions in this jurisdiction. As was held by the Court of Appeal in Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007:

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

135. Korir, J in H.C. Misc. Civil Application No.36 of 2011; Republic vs. Kenya Revenue Authority; Ex-Parte: Bata Shoe Company Limited, similarly held that where the Court confronted with the issue whether certain payments made by the ex-parte Applicant to a Procurement Centre (CFS) were costs associated with design of production and hence should be

brought to charge under the fourth Schedule of *EACCMA* that deals with valuation, held that:

“The Applicant appears to be urging this Court to determine that the payments made to CFS were buying commissions...What the Applicant is asking this Court to do may be done by an appellate court. Acting as urged by the Applicant would be a usurpation of the Respondent’s powers. The Respondent is mandated in law to assess tax and it should be allowed to do its work. Even if the Court decides to be the taxman, it does not have in its possession the documents presented to the Respondent by the Applicant in support of its claim that whatever it paid CFS were buying commissions. I therefore reject the Applicant’s application in relation to the service charges/buying commissions.”

136. In other words the issue whether or not tax is due and payable ought to be left to an appellate Tribunal as opposed to a judicial review Court since such issues go to the merit of the decision rather than the process.

137. With respect to the issue of Tax Compliance Certificate, it was contended that a person who complies with the provisions of the 7th Schedule paragraph 7 of the *VAT Act* is eligible for a Tax Compliance Certificate because the said person has filed tax returns and paid only what he has assessed for himself as due and payable to the commissioner. However, as this Court held in **Republic vs. Kenya Revenue Authority & Another ex parte Tradewise Agencies [2013] eKLR:**

“Although the respondent contends that a person who complies with the provisions of the Seventh Schedule paragraph 7 is eligible for a Tax Compliance Certificate because the said person has filed tax returns and paid what he has assessed himself as due to the Commissioner and that a Tax Compliance Certificate does not mean that a person’s accounts are perfect or beyond reproach and only an audit conducted by the First Respondent can certify accounts to be beyond reproach for tax purposes the same certificates indicate that the authority reserves the right to withdraw the certificate if new evidence materially alters the tax compliance status of the recipient. Why would the certificate be withdrawn if it is not evidence of compliance? If it is only evidence of submission of remission of taxes in which event it is not binding on the authority there would be reason for it to be withdrawn by the authority. The only conclusion one would draw is that the certificate is prima facie evidence of compliance and until withdrawn the same is proof of fulfilment of the obligation to pay taxes... Whereas this Court cannot hold that the applicant was not obliged to pay any taxes, the 1st respondent was expected to notify the applicant of any discovery of new evidence which was likely to materially alter the applicant’s tax compliance status and hear the applicant’s side of the story before taking an action which was contrary to its earlier conduct.”

138. In other words Tax Compliance Certificate is a rebuttable evidence that a person is tax compliant. Whereas, in *Tradewise Case* there was no evidence that the applicant was afforded an opportunity to deal with the rebuttal of this presumption, in this case it was contended adequate notice was given to the Applicant; that various meetings were held between the Applicant’s officers and the Respondent’s officers to iron out contentious issues; and that the Respondent gave details of findings, discussed, engaged and heard the Applicants response to the issues now before the Court. That being the position, the circumstances herein are clearly distinguishable from those in the *Tradewise Case*. It must be emphasized that the Tax Compliance Certificate is not a final proof of payment of taxes. However, where there is evidence that the taxpayer did not actually pay the taxes, the tax authority ought to furnish the taxpayer with the grounds on the basis of which the tax authority believes that the information giving rise to the Certificate was incorrect before seeking to recover what in its view is the correct amount of tax due.

139. I am aware of the decision by **Mumbi Ngugi, J** in **Navcom Ltd vs. Kenya Revenue Authority and 3 Others Petition No 86 of 2012** where the learned Judge expressed herself as follows:

“I am unable to accept the contention by the petitioner that the issuance of the Tax

Compliance Certificate was ‘unqualified’ and that therefore the demand for arrears was unreasonable. The explanation by the respondent that the issue of the certificate was an acknowledgement that the petitioner had complied with the requirement to file its tax returns as part of the country’s self- assessment system and that the self- assessment is subject to further audit is, in my view, more credible.”

140.If I understand the learned Judge well, the Judge was not rubbishing the importance of the Tax Compliance Certificate. The Judge was simply disabusing the notion that the said certificate is unqualified and cannot be challenged. It is in the same light that I understand the decision of **Korir, J in Republic vs. Kenya Revenue Authority ex parte Tononoka Steels Ltd HC Misc. Appl. No. 165 of 2014**. In my view the two Courts’ understanding of the *Tradewise Case* was correct.

141.It is however contended that the Respondent by its action or inaction in demanding for payment of VAT created a legitimate expectation in the applicant that VAT was not payable. This fact according to the applicants was reinforced by the introduction of the Simba System through which the said VAT was automatically exempted. This issue brings us to what constitutes legitimate expectation.

142.In **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hmisc. Civil Application No. 359 of 2012** it was held that:

““According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of DE SMITH’S JUDICIAL REVIEW, ‘Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)’. It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law. In the case before me there is no evidence of a written or verbal promise made to the Applicant that its goods would be allowed in Kenya once he obtained the necessary licenses. One may argue that the legitimate expectation was based on the understanding that goods from Uganda would be admitted into Kenya at a duty rate of 0%. However, that argument cannot hold when one considers the fact that the Respondent has a statutory duty to ensure that all the necessary taxes for goods entering Kenya have been paid. The Applicant’s argument that its legitimate expectation was breached therefore fails.”

143.The three basic questions were identified in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]** as follows:

“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself to; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”

144.It was further held in **R vs. Jockey Club ex p RAM Racecourses [1993] 2 All ER 225, 236h-237b** that the basic hallmarks of an unqualified representation are:

“(1) A clear and unambiguous representation. (2) That since the [claimant] was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the [claimant] to rely upon it without more...(3) That it did so rely upon it.(4) That it did so to its detriment...(5) That there is no overriding interest arising from [the defendant’s] duties and responsibilities.”

145.According to De Smith, Woolf & Jowell,“*Judicial Review of Administrative Action*” 6thEdn.

Sweet & Maxwell page 609:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

146. However it was held in South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18] that:

“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.”

See also Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67].

147. Similarly, in Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280 it was held:

“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

148. The first ground upon which the applicant based its case of legitimate expectation is the long period that lapsed between the time the transactions took place and the demand for the payment of tax. To the applicant this period spans 13 years. That 13 years is such a long time for a prudent and efficient authority to discover its mistake is not in doubt. However, on its part the Respondent relied on section 135(3) of *EACCMA, 2004*, which seems to give remedies to the Respondent in the event of short levies resulting from an action taken in the facilitation of trade, as long as the recovery of the short levy does not go beyond 5 years. In this respect sections 235 and 236 of the *EACCMA, 2014* are couched in the following terms:

235 (1) *The “proper officer” may, within five years of the date of importation, exportation or transfer or manufacture of any goods, demand for documents relating to the goods, to answer any question in relation to the goods; and to make declaration for audit purposes.*

236 The Commissioner shall have the powers to- (a) verify the accuracy of the entry of goods or documents (b) question any person; (c) inspect the premises of the owner of the goods or; and (e) examine the goods.

149. I agree with the position taken by the Respondent that the Customs Officer is supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the accrual of demurrage and customs warehouse rent hence the reason for conferment of the powers under section 235 and 236 of the *EACCMA* to conduct Post Clearance Audits to verify the accuracy of the entries after the goods have been released from Customs control.
150. However the exercise of statutory power must be so exercised in a manner that is fair and just to the people against whom the same is being exercised. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC:**

“A power which is abused should be treated as a power which has not been lawfully exercised...Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must pass a much higher test than that of rationality from the standpoint of the public body...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, renegeing without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

151. As was held in **Republic vs. Commissioner of Co-operatives ex-parte Kirinyaga Tea**

Growers Co-operative Savings and Credit Society Ltd [1999] 1 EA 245 (CAK) at page 249, statutory powers can only be exercised validly if they are exercised reasonably, rationally and properly and no statute ever allows any public officer to statutory power arbitrary or capriciously. It similarly held in **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] eKLR** at page 20 that it is now an accepted principle in this field of law that statutory powers and duty must be exercised and performed reasonably.

152. Therefore it is my view that public authorities must exercise their power diligently, fairly and prudently. This was the position in **Doody vs. the Home Secretary of State [1993] 1 All ER 151** where it was held that:

“Where an Act of Parliament confers administrative power there is a presumption that it will be exercised in a manner which is fair.”

153. A public exercise of power whether permitted or otherwise in a manner that frustrates the purpose for which the power is granted amounts to abuse of the same. This was the position adopted in **Republic vs. Commissioner of Customs Ex parte Mulchand Ramji & Sons Limited [2010] eKLR** in which it was held that:

“A power may be abused in various ways for example when one acts beyond the limits of power, or acts irrationally or acts for an improper purpose or seeks to frustrate the legitimate expectation of another. A public body or officer is expected to act fairly in decision making, so that if he does not, then he is deemed to abuse his powers....In the instant case, I have found above that there seems to be no legal or factual basis upon which the Respondent decided and classified the goods...and therefore abused its powers and unfairly exercised its discretion”

154. That abuse of power is one of the grounds upon which a taxing authority's powers can be challenged was appreciated in **Re Preston [1985] 1 A.C. 835**, page 836 paragraphs B and C where it was held that:

“a taxpayer could challenge a decision taken by the commissioners in exercising their statutory powers and duties if he could show that they had failed to discharge their statutory duty towards him or that they had abused their powers...”

155. The duty to act fairly, on the other hand was emphasised in by **Scarman L.J.** in **H.T.V. Ltd vs. Price Commission [1976] I.C.R. 170** at page 189, which was cited by **Lord Templeman** in **Re Preston** (supra) at page 866 paragraph A and B where the Judge expressed himself as follows:

“Agencies such as the Price Commission must act fairly. If they do not, the High Court may intervene either by prerogative order to prohibit, quash or direct a determination as may be appropriate, or, as sought in this case, by declaring the meaning of the statute and the duty of the agency...It is a commonplace of modern law that such bodies must act fairly...It is not really surprising that a code must be implemented fairly, and that the courts have power to redress unfairness.”

156. In this case, the Respondents seek to recover the taxes for the period between January 2008 to October, 2013. The letter demanding for the said payment was dated 28th November, 2013. Whereas the period for which the taxes were being demanded was within the statutory grace period of 6 years, when it comes to the consideration of legitimate expectation, it is the effect of the delay as opposed to its length coupled with the conduct of the parties that comes into focus. Where the inability by the taxing authority to discover the actual taxes payable was as a result of concealment by the tax payer, the tax payer cannot hide behind legitimate expectation to escape the payment of taxes. I accordingly associate myself with the position adopted by **Lenaola, J** in **Pharmaceutical Manufacturing and 3 Others vs. KRA and Two Others** (supra) that:

“...the 1st Petitioner cannot therefore devise methods of avoiding tax and then claim

that it had been exempted of the same.”

157. However, where the taxing authority goes to sleep and as a result lulls the taxpayer into a false sense of security that the taxes in question would not be demanded, as a result of which the taxpayer loses recourse which would have been legally available to it had the tax been demanded promptly, it may well be unfair and unjust for the demand to be sustained.
158. In this case, it is clear that prior to the year 2001, the applicant enjoyed tax exemptions on VAT in respect of raw materials and packaging for manufacture of medicaments. Whereas in 2001, the said exemption was removed, no VAT was claimed from the applicant whether deliberately or inadvertently. By the time the Respondent sent its demand on 28th November, 2013, the applicant contends, which contention is not seriously contested that the Applicant was no longer in a position to claim refunds which it would have otherwise been in a position to claim had the demand been prudently made. **The Applicant contended that it had already lost opportunity to adjust the prices of its products in order to factor in the cost of production which would have included the import VAT.** The effect of this is that the applicant would have to bear the loss which but for the inaction on the part of the Respondent, it would have otherwise not absorbed.
159. That the applicant is in control of the instruments through which the actual taxes are payable is not in doubt. By not regularly monitoring its said instruments with a view to determining the actual taxes payable, the Respondent placed the applicant in the unenviable position where the applicant is being exposed to shouldering the burden which legally ought not to have been shouldered by it. In my view the circumstances of this case cry loud against the imposition of the burden on the applicant. The Respondent, in my view by its failure to act prudently, cultivated in the applicant legitimate expectation that the position prevailing before 2001 would continue to prevail notwithstanding the 2001 amendments to the *Finance Act*.
160. I appreciate the holding in **Tarmal Industries Ltd vs. Commissioner of Customs and Excise [1968] EA 471** approved in **Commissioner of Customs & Others vs. Amit Shok Doshi** (supra) that:

“The fact that he failed to do so, on the authorities above cited cannot him from carrying out his duty when he discovers the original error. Indeed, his earlier classification under item 108 (k) was in breach of S. 195 of the East African Customs Management Act. It was a breach of statutory duty and in that sense it was not lawful and estoppel cannot be raised against him to prevent him from correcting that act. Naturally one reaches such conclusion with a certain measure of reluctance as it is undoubtedly hard on the defendant company to be called upon long after the event to find such a substantial sum, which would not have been payable but for the plaintiff’s negligence in the first instance in not having pellets which were sent to him for examination properly tested. One can well understand, however, that on balance it is preferable that the law should be as it is. It is not in the interest of consistent application of the law that errors should be sanctified as principle...”

161. However each case must be determined on its own merits and there is no hard and fast rule in these kinds of cases. The general rule is however the one propounded in Mombasa Civil Appeal No. 157 of 2007 between **Commissioner Customs and Others vs. Amit Ashok Doshi & Two Others** that:

“The High Court of Tanzania (Georges, C.J) held that there was no estoppel against statute and that although Commissioner initially erred in deciding the substance was not dutiable and possibly was negligent not to have analyzed the sample the Commissioner was bound under the law to correct the matter and levy duty on the basis that the substance had always been dutiable. His lordship after a consideration of the authorities said in part at page 482 para E:-

‘The fact that he failed to do so, on the authorities above cited cannot him from carrying out his duty when he discovers the original error. Indeed, his earlier classification under

item 108 (k) was in breach of S. 195 of the East African Customs Management Act. It was a breach of statutory duty and in that sense it was not lawful and estoppel cannot be raised against him to prevent him from correcting that act. Naturally one reaches such conclusion with a certain measure of reluctance as it is undoubtedly hard on the defendant company to be called upon long after the event to find such a substantial sum, which would not have been payable but for the plaintiff's negligence in the first instance in not having pellets which were sent to him for examination properly tested. One can well understand, however, that on balance it is preferable that the law should be as it is. It is not in the interest of consistent application of the law that errors should be sanctified as principle..."

162. Nevertheless, where the delay in exercising statutory power has led to injustice which would otherwise have been avoided and no explanation is forthcoming for such inaction the law must step in to ameliorate the injury. In my view this was the genesis of the principle of legitimate expectation. In the circumstances of this case, the respondent's actions and inactions legitimately created an expectation on the applicant that the taxes were not payable as was held by **Nyamu, J** in **Akaba Investments Limited vs. Kenya Revenue Authority [2007] eKLR**, that legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.
163. Apart from legitimate expectation, it was the applicant's case that in any case, there was no loss occasioned to the government since even if duty had been paid the Respondent would have passed the tax burden to the ultimate consumers of its products by claiming back refunds hence the loss would be nil for the Respondent. This contention brings into focus whether the decision to demand the taxes was therefore *Wednesbury* unreasonable. This principle was projected in **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** where it was held:

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in **Short vs. Poole Corporation [1926] Ch. 66, 90, 91** gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

164. Therefore if authority empowered to exercise statutory power does not in bad faith, its decision would amount to irrationality. This must be so due to the rationale propounded by **Prof Sir William Wade** in his work *Administrative Law* that:

"The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether.

It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them..."

165. Therefore if a public authority delays in the exercise of its statutory power without justifiable grounds and as a result, the person against whom the power is exercised is exposed to unwarranted injury, the authority may be deemed to have intended to exercise its powers in order to achieve collateral purposes. To set out to impose a liability upon the applicant which liability the applicant would have been entitled to reimbursement after the period for seeking the same, is in my view irrational.

166. This Court is aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in **R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815**, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

167. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47**, Nyamu, J (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the “3 I’s” namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

168. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law.”

169. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that:

“... like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and 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. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century...”

170. Article 259 of the Constitution of Kenya, 2010, places a constitutional obligation on courts of law to develop the law so as to give effect to its objects, principles, values and purposes. This position was appreciated in the South African case of Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99, with respect to the provisions of the Constitution of that Country which bears similarities to our own Constitution. In that case, the Constitutional Court of South Africa (**Chaskalson, P**) expressed itself as follows:

“Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution...Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was “the main crucible” for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers

in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control.”

171. According to *Judicial Review Handbook*, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.
172. However, as stated hereinabove, like all legal remedies, judicial review continues to enlarge the categories of its sphere of influence. Proportionality for example is considered to be one of the grounds upon which judicial review relief may be granted. The *Fair Administrative Act* (Sections 7(i) and 7(ii)) specifies proportionality as a ground to challenge administrative decisions if the decision is not proportionate to the interests or rights affected. Proportionality was recognized by **Lord Diplock**, in **Council of Civil Service Unions vs. Minister for the Civil Service 1AC, 374** where he recognized the development of this ground in the Laws of the European Economic Community. Apart from that the courts have over the years developed a framework within which to conduct a proportionality analysis which is usefully summarised by **De Smith, Woolf and Jowel**, *Judicial Review of Administrative Action*, Fifth Edition (pp.594-596) that it is:

“a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues”

173. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.
174. This is the position now adopted by the Court of Appeal which expressed itself in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 Others [2016] eKLR**, at paras 55-58 as follows:

“55. An issue that was strenuously urged by the respondents is that the appellant’s appeal is bad in law to the extent that it seeks to review the merits of the Minister’s decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role.

Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in *Section 11* of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In *Mbogo & another -v- Shah* (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in *Mbogo -v- Shah* (*supra*) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the *Fair Administrative Action Act* permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.”

175. My understanding of the Court of Appeal's position is that for the purposes of making a determination as to whether the decision being challenged was irrational, was not proportional or failed to consider relevant matters, the Court is bound to deal with the merits of the questioned decision. Where however the Court finds that these principles were not adhered to, the Court still has no power to substitute its decision for that of the decision maker and can only remit the matter back to the said authority. The Court however appreciated that future judicial decisions shall delineate the extent of merit review under the provisions of the ***Fair Administrative Action Act***.
176. Whereas it is true that judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution and the conventional grounds for judicial review take a secondary role after the constitutional benchmarks, the South African Constitutional Court, itself recognised in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health** (supra) that:

“The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the “spirit, purport and objects of the Bill of Rights.” This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is “lawful administrative action,” “procedurally fair administrative action” and administrative action “justifiable in relation to the reasons given for it,” cannot mean one thing under the Constitution, and another thing under the common law...Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court “makes the final decision whether a matter is a constitutional matter”. This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.”

177. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the ***Law Reform Act*** and Order 53 of the ***Civil Procedure Rules*** have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the ***Civil Procedure Rules*** should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent.
178. It was contended that the Applicant filed a review with the Commissioner in accordance with section 229 of the ***EACCMA*** which review has never been responded to and should thus be taken as having been allowed. However, this submission is contrary to the provisions of Order 52 rule

4(1) which provides that:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

179. Accordingly, that issue cannot be the basis upon which this Court would be entitled to grant the orders sought herein as the same was not one of the grounds expressed in the statement.

180. I have considered the provisions of section 229 as read with section 230 of ***EACCMA*** with respect to the available internal dispute resolution mechanism provided thereunder. I agree with the decision in Civil Appeal No. 84 of 2010; **Republic vs. National Environmental Management Authority**, where the Court of Appeal held that:

“...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 statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. 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.”

181. I also agree with the holding in H.C. Petition No. 203 of 2012; **Kapa Oil Refineries Limited vs. The Kenya Revenue Authority, The Commissioner of Customs Services and The Attorney General**, where Lenaola, J at page 13 and 15 stated:

“Looking at the Petition again, I am clear that the major issue for determination in this Petition is whether it is lawful under Article 210 of the Constitution and Section 235 (1) of the EACCMA for the 1st and 2nd Respondents to demand the taxes so demanded. The issue in my view is one that ought to be determined by the procedure provided for under Section 230 of the Act...I am also aware that even if this Court has jurisdiction to determine a violation of fundamental rights and freedoms. It must also first give an opportunity to other relevant bodies established by law deal with the dispute as provided in the relevant statute. This rule was well articulated by the Court of Appeal in Narok County Council –v- Transmara County Council (2000) 1 EA 164 where it stated that;

“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister....refuses to give direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision at page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”

This rule has also recently been upheld by the Court of Appeal in Speaker of the National Assembly –vs- Njenga Karume (2008) 1 KLR 425, where it held that:-

“In our view there is considerable meritthat where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

182. In my view however, the final decision does not rest upon the issue whether or not the Respondent was legally entitled to collect the taxes due or whether or not taxes were actually due. The decision rests on the process that was being adopted by the Respondent in the exercise of its statutory obligation. That in my view is not an issue for an appeal but one that falls squarely within the judicial review jurisdiction. According to it is my view that the provisions of section 229 and 230 of *EMCCA* do not bar this Court from dealing with the issues raised herein.

183. Whereas this Court appreciates the role of the Respondent in the collection of taxes which is the mainstay of development in this Country, and that all those who are liable to pay taxes ought to do so no matter the amount as long as the same is lawful, in the exercise of its mandate the Respondent is expected to be guided by the national values and principles of governance in Article 10 of the Constitution one of which is integrity. In my view, efficiency in public finance is a component of integrity. A body entrusted with the collection of revenue ought not to be seen to be lethargic in the conduct of its affairs and whereas the law allows the Respondent a period within which to confirm its record, that period ought not to be taken as a derogation of Article 47 of the Constitution that requires that administrative action be carried out expeditiously.

184. Apart from that since in making its decision the Respondent was purportedly applying the law, it was constitutionally obliged pursuant to Article 10(1)(c) of the Constitution to comply with the national values and principles of governance and in my view this includes fair administrative action as enshrined in Article 47 of the Constitution which provides as hereunder:

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.*

185. This was the position adopted in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

186. In other words the Respondent is under a constitutional obligation to be efficient and when its failure to adhere to this constitutional decree renders its decision unfair, the same is liable to be struck out as amounting to abuse of power. As was held in **Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR**:

“If statutory power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations.”

187. Having considered the issues raised in this application, it is my view and I so hold that on the ground of legitimate expectation, abuse of or wrongful exercise of power and irrationality the Respondent's decision cannot be allowed to stand. My view is reinforced by the decision in *Keroche case* (supra) at page 23 that *“a decision tainted with abuse of power is not severable...*

and once tainted always tainted in the eyes of the law”.

188. In the premises, it is my view and I hereby find that it would be contrary to justice to compel the applicant to pay the sum demanded by the Respondent. To do so would be contrary to substantive fairness which dictates that a body must not act conspicuously unfairly, nor unfairly as to abuse its power, nor in unjustified breach of legitimate expectations.

189. Accordingly, based on the said grounds, the Notice of Motion dated 13th January, 2014 is merited.

Order

190. Consequently, I issue the following reliefs:

1. **An Order of Certiorari removing into this Court and the decision made by the respondent requiring the Applicant Company to pay the Respondent Kshs 427,918,033/- as VAT for the period of January 2008 to October, 2013 which decision is hereby quashed.**
2. **An order of prohibition directed to the respondent prohibiting it, whether by itself, its agents, and/or its servants or otherwise howsoever from purporting to take any action against the Applicant Company in an attempt to recover the said sum of Kshs 427,918,033/-**
3. **Since this determination has not been arrived at based on the merits and a determination has not been made on the issue whether or not there were taxes actually due and owing but merely on the process of recovery thereof, there will be no order as to costs.**

191. Orders accordingly.

Dated at Nairobi this 10th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munyua for Mr Arwa for the Applicant

Miss Mburugu for the Respondent

Cc Mutisya