REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 442 OF 2013

IN THE MATTER OF AN APPLICATION BY FONTANA LIMITED FOR ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE VAT ACT, CAP 476 LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF THE VAT ACT, 2013

AND

IN THE MATTER OF THE RULING AND ORDERS ISSUED BY VAT TRIBUNAL ON THE 26TH NOVEMBER 2013 IN VAT APPEAL NO.1 OF 2013

REPUBLIC …………………………………………………APPLICANT

VERSUS

KENYA REVENUE AUTHORITY…………….……1ST RESPONDENT

THE HON. THE ATTORNEY GENERAL…..………2ND RESPONDENT

***EX PARTE*: FONTANA LIMITED**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th December, 2013, the *ex parte* applicant herein, **Fontana Limited,** seeks the following orders:

1. An Order of Certiorari to remove into this honorable Court and quash the decision of the VAT Tribunal (hereinafter referred to as the said Tribunal) made on the 26th November 2013 in the VAT Appeal No. 1 of 2013 (hereinafter referred to as the said decision) declaring that the *Ex-parte* Applicant herein is liable to pay VAT on the services offered to it by Tele Flower Auction B.V. East Africa Flowers and Airflow FZE on the premises that the services were imported to Kenya.

2. Costs of this application be provided for.

Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by **Yogesh Shah**, one of the Directors of the applicant herein on 9th December, 2013.

3. According to the deponent, the Applicant herein engages in the horticultural business where it grows, processes, exports and markets flowers to the Netherlands and it entered an agreement with Tele Flower Auction B.V and East African Flowers who were to unpack the consignment of flowers upon its arrival in the Netherlands. It was however contended that the Applicant did not engage the services of Airflow FZE a company based in Dubai nor those of East African Flowers, to wit; to arrange and source pre-inspection of the flowers at the Jomo Kenyatta International Airport, phytosanitary inspection and export documentation as the Applicant herein had already done the said services themselves and/or engaged the services of the relevant government agency (KEPHIS).

4. It was emphasized that the services offered by the aforesaid companies were only the marketing of the flowers, binning, transfer of the flowers from the airport in the Netherlands to the auction site and the consignment security and handling in consideration of which the Applicant herein would pay the abovementioned companies certain sums of money effected by Tele Flowers Auction B.V sending to the Appellant a document detailing the gross flower sales and the various costs arranged and handled by the aforementioned companies, costs of which are deducted from the gross auction proceeds of the flower sales. Thereafter, only the net proceeds are wired to the Appellant by Tele Flowers Auction B.V after the deduction of the marketing costs, freight charges, market handling and security costs, binning charges and PSV commission costs of which are incurred on exportation and auction of the flowers abroad.

5. It was deposed that whereas the phytosanitary inspection in Kenya was done by the Kenya Plant Health Inspectorate Service (KEPHIS), the inspection in the Netherlands was done by the relevant authorities in the said country and not subject to VAT in spite of the fact that Respondents had subjected the same to VAT. There were also phytosanitary services rendered abroad by the Government of Netherlands these services were not rendered by the agents of the ex-parte applicant in spite of the fact that the Respondents proceeded to subject such services to VAT on the fallacious assumption that they were rendered by the overseas agents of the ex-parte applicant.

6. It was averred that the Commissioner of Domestic Taxes carried out an audit on the Appellants account for the years 2006, 2007, 2008, 2009 and noted the various costs abovementioned incurred by the Applicant herein on the exportation of the flowers and their eventual auction had not been subjected to VAT and that the said costs are subjected to reverse VAT as under the provision of section6 (6) of the ***VAT Act*** Cap 476 Laws of Kenya. As a result of the said audit the Commissioner of Domestic Taxes raised a Notice of Assessment in the sum of Kshs. 122,809,385 made up of Kshs. 78,696,277 in the principal tax and Kshs. 44,113,108 in interest to which the Applicant objected but was confirmed on the 9th February 2012 upon which the Applicant herein filed an appeal with the VAT Appeals Tribunal.

7. However, the said tribunal passed a ruling in favour of the Commissioner of Domestic Taxes and as such required that the Applicant herein to pay the disputed VAT as had been assessed by the Commissioner of Domestic Taxes and objected to by the Applicant herein, in spite of the fact that the figure assessed that were rendered by the Applicant's agents and which were actually rendered by government authorities.

8. It was contended that the said tribunal acted in bad faith by deliberately, willfully and maliciously distorting clear provisions of the said Act namely section 2 and sec 6 (6). Under the later, VAT is payable by the person receiving the taxable service and under no circumstance are expenses and services incurred by an individual outside of the country liable to VAT while under

section 2 of the repealed Cap 476 service imported into Kenya is defined to mean a service provided by a person normally resident outside Kenya who is not required to register for tax in Kenya, or for consumption by a person in Kenya.

9. According to the deponent, notwithstanding the clear provisions and definition of service imported into Kenya both the law and judicial precedent the tribunal went ahead to wrongly find that the services provided to the applicant herein should be taxed in Kenya as they were not taxed in the Netherlands. To the deponent, under the South African case VAT 144 Case it was observed that, "imported services within the meaning of VAT law everywhere in the world should be confined solely to services consumed within the relevant country and cannot extend services consumed abroad." It was therefore the applicant's position that the said tribunal wrongly interpreted the term horticultural services by excluding services such as the processing, marketing, packing, handling, palletizing, airlifting, sale by exportation or any other means of transportation (hereinafter referred to as the said services). Further, horticultural activities were exempt from VAT under the 7th schedule of the ***VAT Act*** Cap 476 Laws of Kenya which was repealed and as such the tribunal acted inconsistent and *ultra vires* the law while under section 14 (2) of the new Act it is provided that the services that are ancillary and/or incidental to the importation of goods shall be treated as part of the importation.

10. It was contended that it is tenable that the said services being services done to get the horticultural products to the final consumer can be said to be part of the horticultural services and as such exempt from VAT as under paragraph 6 of the 3rd schedule Cap 476 of the repealed Act and therefore the tribunal's ruling is null and void to that extent. It was therefore averred that the tribunal acted unreasonably by relying partly on a section of a document which defined horticultural services; the said document was relied on by both the appellant and the respondent in the appeal, the tribunal however chose to rely on only a part of the document as was presented by the Respondent and disregarded the section relied on and in favour of the appellant as under the said document. Further, the tribunal disregarded international best practices and the Organization for Economic Co-operation and Development (OECD) guidelines and as much as the tribunal was conscious of the destination principle i.e. the jurisdiction where the final consumption of services takes place should be where the tax should be paid, the tribunal went ahead and disregarded the said principle and ruled that the applicant herein pays VAT as was alleged by the Commission of Domestic Taxes in disregard of judicial precedents and even though the tribunal was minded of the ruling in the F.H Services case which partly noted that "what plays a role in determining whether a service is exported or not, and what should be the test in determining whether a service there has been an exportation of a service or not should solely lay with the test as to the place of use or consumption of the service" the tribunal went ahead to pass a ruling that was not in tandem with and that also disregarded the said ruling.

1st Respondent's Case

11. On behalf of the 1st Respondent a replying affidavit was on 10th March, 2014 filed sworn by **David Malla**, a Chief Manager in the 1st Respondent's Domestic Tax Department on 7th March, 2014.

12. According to him, the 1st Respondent herein, is established under the *Kenya Revenue Authority Act* Cap 469 Laws of Kenya. Under section 5(1), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under section 5(2) with respect to the performance of its functions under subsection (1), the Authority is required to administer and enforce all provisions of the written laws set out in part 1 & 2 of the First Schedule of the ***KRA Act*** for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

13. It was deposed that prior to the events leading up to this judicial Review application and prior to the Appeal at the Value Added Tax Appeals Tribunal, the 1st Respondent carried out a Tax

Audit on Value Added Tax operations of the applicant herein for the years 2006, 2007, 2008 and 2009 and following the audit, the 1st Respondent's raised an additional assessment on VAT totalling Kshs. 122,809,385 (Principal Tax 78,696,277 + Interest 44,113,108) which was demanded from the Ex-parte Applicant herein. The Ex-parte Applicant objected to the assessment and filed an appeal at the VAT Appeals Tribunal, which appeal was heard and the tribunal was pleased to dismiss the same, in a detailed and well-reasoned ruling. To the deponent, the tribunal in its ruling adequately addressed itself on the definition of "import" in paragraphs 154 to 156 of the said ruling and pointed out that it is not correct to read section 6(6) together with the word "import" since the word "import" qualifies the word "importer" which as defined in the VAT Act is concerned with importation of taxable goods and not services. In his view, section 2 defines import as to bring or cause to be brought from a foreign country or an export processing zone, while importer means any person who imports taxable goods and on the issue as to whether the tribunal erred in finding that VAT is payable on services that have not been used and consumed in Kenya, it is important to look at the definition of services imported in to Kenya, which means "a service provided by a person normally resident outside Kenya who is not required to register for tax in Kenya, or a service provided by an export processing zone enterprise for use or consumption by a person in Kenya." It was therefore deposed that from the definition, it is clear that, the tribunal correctly found that the said services were provided by non-resident persons, namely; Tele Flowers Auction B.V (TFA), East African Flowers (EAF) and Airflow FZE (Airflow), who are not required to register for tax in Kenya, and as such had not registered for tax in Kenya, for use or consumption by a person in Kenya, i.e. the ex-parte applicant herein, hence the place of performance of the service is not relevant in determining whether the service is imported into Kenya so long as the service is provided by a person not resident in Kenya hence not registered for tax in Kenya and the user or consumer of the service is resident in Kenya.

14. On the issue whether VAT is payable by a person who has not consumed or used the service the 1st Respondent's position was that imposition of tax on services imported into Kenya is provided in section 6(6) of the VAT Act which provides that, tax on service imported into Kenya shall be payable by the person receiving the services and that the services being sought for taxation were imported into Kenya and received by the ex-parte applicant on whom the 1st respondent is seeking to levy taxes. On the issue whether the disputed tax also comprised of VAT levied on services that were rendered by the ex-parte applicant themselves of which VAT had already been paid, it was deposed that the tribunal was alive to the fact, provision of the said services commenced in Kenya and continued in Holland where the performance of the same ended, as outlined in its ruling hence it is clear that the tax in dispute does not comprise of VAT levied on services that were rendered by the ex-parte applicant themselves of which VAT had already been paid. The services the 1st respondent sought to tax were provided by either TFA or EAF or Airflo whether performed in Kenya or outside Kenya. To him, the ex-Applicant engaged Airflo FZE to arrange for the transportation, through air freight, of its flowers from JKIA to Netherlands, which exercises includes inspection of the cargo before shipment out of the country and the 1st Respondent seeks to tax only the services provided by Airflo for consideration and for which they were paid by the Ex-Applicant.

15. It was contended that the ex-parte applicants entered into agreement with TFA to market and sell its flowers at the flower auction in Holland. It engaged EAF to transfer flowers from the airport in Holland to the auction site, unpack and bin the flowers and oversee consignment security and handling including phytosanitary inspection in Holland. Airflow was engaged to arrange and oversee freight of flowers from JKIA to Holland. To the deponent, the Ex-Applicant authorized TFA to effect payment for consideration for services provided by the said companies by deducting amounts due from the gross auction proceeds and remitting the same to the said companies, the authority of which was duly effected. TFA also recovered its consideration for the marketing services from the auction proceeds and sent to the Applicant detailed summary of auction flower sales proceeds and various payments recovered from the same. Only the net proceeds from flower auction were wired by TFA to the ex-parte applicant's account in Kenya after deducting incidental costs.

16. The 1st Respondent's case was that it does not seek to tax inspection services provided by KEPHIS in Kenya. The Ex-parte Applicant did not however state clearly how phytosanitary inspection charges were incurred in Netherlands. On the issue as to whether the various costs incurred by the applicant had not been subjected to VAT and/or that the said costs are subject to reverse VAT under the provisions of section 6(6) of ***VAT Act*** Cap 476, the 1st Respondent case was that the various costs arise from services which are neither listed as exempt services nor listed as zero rated services in the repealed VAT Act hence the Ex-parte Applicant is liable to pay VAT on the same pursuant to the provisions of section 6(6) since it received the services from non-resident persons who are not required to register for tax in Kenya. It received services imported into Kenya which is subject to tax in Kenya. It was reiterated that the tax assessed was on taxable services and was in no way in respect of exempt services but was assessed on marketing services, flight arrangement, consignment handling and security, phytosanitary charges, PVS commission and binning services all of which are taxable services.

17. It was therefore contended that the tribunal neither acted in bad faith nor did it wilfully and maliciously distort clear provisions of the said Act in section 2 and 6(6). To the contrary, the tribunal laboured in its ruling to explain the reasoning that informed its decision that the word 'import' qualifies the word 'importer' which means a person who imports taxable goods and is therefore not relevant when considering the meaning of 'services imported into Kenya'. It further laboured to explain the reasoning behind its finding that section 6(6) is applicable in this case and that the decision was purely based in law.

18. It was deposed that for cross border traded services, the person receiving the service is the customer in the transaction. The identity of the customer in the transaction is guided by the contract/agreement/invoice. The contracting party is the customer and the contracted party is the supplier offering the service. The person invoiced is the one that pays the person invoicing consideration for services rendered. The Ex-parte Applicant contracted the said overseas agents who offered the said services and were paid by the Applicant for services rendered. Under section 6(6), tax on services imported into Kenya is payable by the person receiving the taxable services. The Ex-parte Applicant received taxable services imported into Kenya notwithstanding the fact that the services were performed outside Kenya. The place of performance of the service is not relevant when determining whether a person has received services imported into Kenya.

19. It was averred the definition does not make any reference to the jurisdiction where the service is performed. The service could be performed anywhere in the world, including in Kenya so long as the service is provided by a person not resident in Kenya and consumed by a person in Kenya. TFA, EAF & Airflo are non-resident persons who required to register for tax in Kenya. Since they provided taxable services to the Ex-parte Applicant for use or consumption in Kenya, the said taxable services were therefore imported into Kenya, in line with the finding by the tribunal in its ruling analysed in paragraphs 133 to 143.

20. It was reiterated that the tribunal was indeed guided by OECD International VAT/GST Guidelines on neutrality. The guidelines provide the tax is achieved using the destination principle, which provides that internationally traded services and intangible should be taxed according to the rules of jurisdiction of consumption. The guidelines specify that, for internationally traded business-to-business supplies of service or intangibles, the application of this principle is, in most cases, best achieved by allocating the taxing rights to the jurisdiction where the customer is located (the "Main Rule"). The customer in this case the Applicant is located in Kenya and therefore Kenya, and not Netherlands, has taxing rights over the services provided.

21. According to the deponent, the term 'horticultural service' was not defined in the repealed ***VAT Act***. The Applicant sought to stretch the meaning of the term by quoting a reference obtained from ***Wikipedia*** to include processing, marketing, handling, palletizing, airlifting, sale by exportation or any other means of exportation. The tribunal in its ruling disregarded this definition on grounds that ***Wikipedia*** has never been known to be reliable, accurate and credible source of information and went further to provide the plain ordinary meaning as provided in the dictionary

citing ***Oxford Concise Dictionary, The Dictionary, The Free American Dictionary*** and ***The US Legal Dictionary***. The citations limit the definition of horticultural services to services that pertain to cultivating fruits, vegetables or ornamental plants; and the management or cultivation of a garden.

22. On the issue as to whether horticultural activities are exempt from VAT under the 7th schedule of the repealed ***VAT Act*** Cap 476 Laws of Kenya, the 1st Respondent stated that the seventh schedule of the said Act deals with 'invoice, records and returns' and not exempt services. List of exempt services is found in the Third Schedule. Horticultural services are listed alongside agricultural and animal husbandry services in paragraph 6 of the Third Schedule. Horticultural services are therefore exempt services. The services in this case however do not fall within the meaning of horticultural service and cannot be considered as such.

23. It was asserted that the tribunal did not act unreasonable by relying partly on a section of a document to define horticultural services. The tribunal did independent research and cited four dictionaries for the meaning of the word horticulture. The outcome of their research supported the Respondents contention that horticultural services are limited to cultivation of fruits, vegetables or ornamental plants; and management or cultivation of a garden.

24. To the 1st Respondent, the citations by the Ex-parte Applicant contained different definitions by different authors stretched the meaning beyond the plain ordinary dictionary definition. The 1st Respondent on the other hand cited the definition that is in tandem with the plain ordinary dictionary meaning of the word horticulture. The tribunal was right in finding that the definition being adopted for by the Applicant was out of the scope of horticultural services as provided in the repealed Act. Therefore the tribunal did not disregard international best practice and OECD Guidelines but instead cited them to explain the reasoning behind the decisions it made. The 1st Respondent further affirmed that the tribunal did not disregard the principle that the jurisdiction where final consumption of services takes place should be where the tax should be paid. The suggestion by the Ex-parte Applicant that only the person making the supply to the ultimate consumer should charge VAT and that all other persons in the supply chain should not charge VAT was therefore erroneous since the said principle is achieved by registered suppliers in the supply chain charging VAT and claiming on their input until the final product reaches the ultimate consumer who pays the VAT but does not claim it back.

25. Its position was that the tribunal laboured at length in its ruling to explain how the ruling in the F. H. Services cases is relevant to this case and pointed out differences and similarities and that the reasoning in the F.H Service case supports Respondent's contention that if destination jurisdiction is Kenya, then Kenya has taxing rights over the said services imported into Kenya. Therefore the assessment and demand for outstanding VAT Tax totalling Kshs. 122,809,385 is within the law as provided under section 6(6) of the repealed VAT Act and the respondents' actions in this matter were within the law and its mandate as outlined in the ***KRA Act*** Cap 469 and that the 1st Respondent has not acted without or in excess of its jurisdiction.

26. Therefore, the Applicant being dissatisfied with the decision of the tribunal, ought to have appealed to the High Court within fourteen days of being notified of the decision as the decision by the tribunal did not maliciously distort clear and unequivocal provisions of the Act, exhibit bias and unreasonableness or bad faith towards the ex-parte applicant, made glaring jurisdictional errors both of law and of fact, disregard judicial precedents, international best practice and OECD Guidelines as to warrant the invocation of the jurisdiction of this Honourable Court for fair administrative action under Article 47 of the constitution of Kenya. In order to succeed in an application for judicial review, the applicant had to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety and the Applicant has not demonstrated that the tribunal's was tainted with any of the above for the orders sought to issue.

27. To the 1st Respondent, the ex-parte applicant is not entitled to the orders sought as this

Application is founded on a fundamental misapprehension of the jurisdiction of this Honourable Court in proceedings brought under Article 47 of the Constitution, in that:-

i. The Ex-parte Applicant has not demonstrated with precisions how the decision of the tribunal is tainted with illegality, irrationality and procedural impropriety.

ii. This application is misdirected as against the Respondent herein fails to meet the minimum threshold and it is an abuse of the process of the court.

iii. The 1st Respondents have demonstrated that they have executed their mandate under Article 210(1) by imposing taxes provided for by legislation and that they have not violated the ex-parte applicant's right to fair administrative action and the taxes subject matter herein demanded lawfully and procedurally in accordance with the various laws administered by the 1st Respondent.

28. According to the 1st Respondent, the Notice of Motion dated 17th December, 2013 ought to be dismissed with costs and the orders of Certiorari cannot issue because the Respondents have not acted without or in excess of their jurisdiction. Similarly, orders of Prohibition cannot issue because the Respondents have not acted without or in excess of their jurisdiction. On the contrary, there will be substantial loss to the government in terms of revenue, if the orders prayed for by the Applicant are granted hence it is only fair and just in the circumstances to allow the Respondents undertake its statutory duties unhindered and to safeguard much needed government revenue.

29. The Respondents urged the Court to dismiss the Application with costs.

Applicant's Rejoinder

30. In a rejoinder the applicant filed a supplementary affidavit sworn by the same deponent on 7th April, 2014 in which he reiterated no VAT was payable contrary to the position taken by both 1st respondent and the VAT Appeals Tribunal (hereinafter called the tribunal) for the following reasons:

(a) Reverse VAT on cross-border services was introduced for the first time in 2010 vide the finance Bill 2010. Previously all services rendered to exporters by persons who were not registered for tax in Kenya were zero rated pursuant of Regulation 6 of the 5th Schedule to the VAT Act;

(b) The audit exercise carried by the 1st respondent on the applicant covered the period between 2006 and 2009. Accordingly the provisions of the VAT Act 2010 were completely inapplicable to the said period assessments carried out by the 1st respondent on the basis of the provisions of the VAT Act 2010 were wholly illegal;

(c) fell within the meaning of horticultural services and were accordingly exempt from the provisions of the VAT Act.

(d) were not consumed in Kenya and were accordingly not chargeable to VAT under Section 6 (6) of the ***VAT Act*** as read together with Section 2 thereof;

(e) were not imported into Kenya and were accordingly not subject to VAT under Section 6 (6) of the ***VAT Act*** as read together with Section 2 thereof;

31. It was deposed that the tribunal, if it was objective and impartial, could not have failed to notice the foregoing and being an appendage of the 1st respondent in the sense that it is constituted by the 1st respondent who pays all its expenses and who pays all its sitting allowance and all expenses of its chairperson and members could not be impartial and exhibited open bias as against

the applicant herein.

32. It was maintained that the 1st respondent had no mandate or jurisdiction to levy the alleged VAT or cause the same to be levied with respect to services that were rendered out of the country by foreigners and which were consumed out of the country also by foreigners and thus the tribunal's decision to find that the services were chargeable to VAT was tainted with irrationality, illegality and procedural impropriety in that it was founded on substantial errors of fact; it was based on fundamental errors of law; it was vitiated by open bias and bad faith; it was *ultra vires; it was* made in excess of jurisdiction; and it was made in defiance of logic and therefore unreasonable.

33. To the deponent, the decision of the tribunal was based on the following fundamental errors of fact:

(a) The first error of fact that the tribunal made is that it wrongly operated on the fallacious notion that ALL the following services were rendered by Airflo FZE (hereinafter Airflo): Pre-inspection at JKIA, marketing, flight arrangement, binning, transfer of flowers from the Airport in Netherlands to the auction site, phytosanitary inspection services, export documentation and consignment security and handling. The truth is that not all services aforesaid were rendered by Airflo and this fact was brought to the attention of the tribunal. The following services were actually rendered by the applicant itself: pre-inspection at JKIA, flight arrangement and export documentation. It was therefore wrong and erroneous for the 1st respondent to purport to reason that all the above services were rendered by Airflo and thereafter proceed to estimate the value of all the services and consequently subject the same to VAT. Furthermore it was wholly wrong and erroneous for the tribunal to find, contrary to the weight of evidence of adduced, that the VAT was wrongly and improperly assessed by the 1st respondent, ought to be paid by the applicant.

(b) The second error of the fact is that the tribunal assumed erroneously that phytosanitary inspection services at JKIA were rendered by Airflo. The truth is that the said services at JKIA were rendered by the KEPHIS. It was therefore wrong and erroneous for the 1st respondent to estimate the value of the said services on the false assumption that they were rendered by Airflo and proceed to subject them to VAT. The tribunal therefore wrongly found that the assessments made by 1st respondent with respect to such services ought to be paid by the applicant.

(c) The tribunal further committed an error of the fact by holding that phytosanitary inspection services at the Netherlands was done by Airflo and thus chargeable to VAT. The truth is that the said services were rendered by a government agency in the Netherlands called Plant protection service of the Netherlands (an equivalent of Kenya agency called KEPHIS) which is a requirement of the regulations of the Netherlands. The regulations are to the effect that no plant product or other similar organism can be imported into the Netherlands without a phytosanitary certificate issued by the said government agency upon inspection of the said plant product or other organism. The applicant contends that it is in the public domain that phytosanitary services everywhere in the world are rendered by governmental agencies.

(d) The four error of fact which the Tribunal made vide its decision aforesaid was to the effect that the services of the overseas agents were consumed by the applicant .The truth is that the said services were consumed in the Netherlands. It is common knowledge that VAT is a consumption tax in this sense refers to the consumption by the ultimate users of the products. The products in this case were flowers which were used in the Netherlands. It is therefore clear that the persons who were in receipt of, or benefited from, the services were the persons who used the flowers .These are the persons who consumed the services. All such persons were in the Netherlands and the consumption of the said services took place in the Netherlands.

(e) The tribunal also made a fundamental error of fact in holding that the applicant ought to pay Kshs, 122,809,385 as reverse VAT for services rendered abroad by various overseas agents without

ascertaining, as a fact, the value of each of the services allegedly rendered before subjecting the same to VAT. The Tribunal instead based its decision on figures furnished by the 1st respondent but which were not proved, in spite of the protestations by the applicant.

(f) The tribunal further made a grave error of fact when it held that services rendered herein by the alleged overseas agents were not horticultural services contrary to logic sense.

34. It was further deposed that the tribunal's decision was also grounded on fundamental errors of law as summarized hereunder:

(a) The tribunal erred in law in falling to notice that ***VAT Act*** 2010 had absolutely no application to the transactions that occurred in 2006, 2007, 2008 and 2009.

(b) The tribunal erred in law in falling to appreciate that reserves VAT on cross-border services as a principle of law did not exist in 2010.

(c) The tribunal made a mistake of law in falling to notice that before 2010 amendments to the ***VAT Act*** all services rendered to an exporter were zero rated and accordingly, if the 1st respondent's argument that the services were rendered to and consumed by the applicant was correct (which is denied) then the said services would still be zero rated and hence no VAT would be payable.

(d) The tribunal erred in law by holding in paragraph 154 of its ruling that the word "import" in section 2 of the VAT Act was "only concerned with the importation of goods and not services". No such restriction is found in the ***VAT Act*** itself. The tribunal was therefore engaging in an act of the law making (which is outside its mandate) rather than adjudication.

(e) The tribunal erred in law by holding that the word "for consumption in Kenya" used in the definition of "services imported into Kenya" in section 2 of the VAT Act had no meaning and were accordingly legally insignificant.

(f) The tribunal erred in law by holding that the words "horticultural services" used in the third schedule of the VAT Act did not include "any service that involved the cultivation, processing, marketing and sale of fruits, vegetables and flowers", in spite of the fact that they were given sufficient proof in this regard.

(g) The tribunal erred in law by holding that the words "horticultural services" used in the third schedule of the VAT Act was for all practical purposes equivalent in meaning to the word "horticulture". The two words are different for all intents and purposes and this is quite obvious to any objective mind.

(h) The tribunal erred in law in falling to appreciate that tax legislations, are usually strictly constructed and that any doubt or ambiguity thereon usually operate in favour of the tax payer, and that courts or tribunals have no power to amend, add, amplify or subtract anything from the clear meaning of a tax legislation.

35. To the applicant the tribunal's decision was further vitiated by open bias in favour of the 1st respondent as well as bad faith as illustrated hereunder:

(a) The applicant filed their written submissions dated 29th July 2013 in which they stated at page 14 thereof that the word "horticultural services" refers to "any service that involved cultivation, processing, marketing and sale of fruits, vegetables and flowers". It did not indicate the source of that definition.

(b) The 1st respondent then filed their written submissions in which they challenged the said

definition and went ahead, without any basis whatsoever, to allege that the said definition was obtained from Wikipedia. They then proceeded to give their own definition which was apparently drawn from the internet.

(c) The applicant's advocate during the hearing of the case protested at the statement made by the 1st respondent that the applicant's definition was obtained from Wikipedia. The applicant advocate then produced and showed the tribunal the document from which the applicant derived their definition aforesaid and clarified to the tribunal that their definition aforesaid did not emanate from Wikipedia as alleged by the 1st respondent.

(d) The applicant's advocate also produced and gave to the tribunal a document obtained from the internet from which the 1st respondent obtained the definitions contained in their written submissions. That document also contained the same definition which was being advanced by the applicant but the 1st respondent unethically, unprofessionally and with a view to fraudulently misleading the tribunal concealed the portions of the document which supported the applicant's contentions.

36. Further, the tribunal exhibited open bias when it:

(a) Stated in its ruling that the applicant's definition was obtained from Wikipedia. The applicant's document clearly confirms that the definitions were not obtained from Wikipedia. Further, the applicant's advocate protested that the said definitions were not obtained from Wikipedia when the parties appeared before the tribunal. The applicant went ahead and produced to the tribunal the source of the 1st respondent's definition which also contained the evidence that the applicant relied on. In spite of all this, the tribunal went ahead to hold that the applicant's definition came from Wikipedia.

(b) Confirmed the meaning of horticulture which was advanced by the 1st respondent. This is in spite of the fact that the said meaning was contrary to the meaning contained in the documents produced by both the applicant and the 1st respondent.

(c) Chose not to comment on the unethical, unprofessional and mischievous conduct of the 1st respondent of attempting to openly and deliberately mislead the tribunal. The advocate for the applicant demonstrate to the tribunal the attempt by the 1st respondent to fraudulently mislead the tribunal by concealing or mischievously hiding or concealing a definition similar to the definition sought to be relied on by the applicant. The tribunal did not at any time and in whatever manner comment, reprimand or otherwise touch on this unethical, unprofessional and mischievous conduct of the 1st respondent.

(d) Stated that Wikipedia has never been known to be reliable and accurate (in spite of the fact that no such submissions were made by the 1st respondent on that issue) while ironically holding that free American dictionary (which shares the same status with Wikipedia as internet sources) is reliable and credible.

37. To the deponent, the tribunal acted *ultra vires* and assumed responsibility with regards to matters fell outside its mandate as mandate as illustrated hereunder:

(a) The tribunal stepped out of its mandate and jurisdiction by purporting to exercise jurisdiction where it had none. The tribunal mandate is confined to situations where VAT is chargeable. By virtue of the provisions of the 3rd schedule to the ***VAT Act***, the services herein being horticultural services were exempt from VAT and accordingly fell outside the jurisdiction and mandate of the tribunal.

(b) The tribunal stepped out of its mandate when it purported to exercise a legislative function.

The tribunal purported to fill the assumed inadequacy of the VAT Act by purporting to formulate its own definitions and relying on the same in its ruling aforesaid, thereby failing to appreciate that tax statutes like criminal statutes have to be interpreted strictly and applied as is and any perceived inadequacies ought to be referred to the relevant arm of Government to make the necessary amendments. The tribunal thus assumed the powers of amending a statute which is not within its province.

(c) The tribunal also purported to exercise power to hear and determine cases after it had been disbanded by the passing of the ***VAT Act*** (VAT Act, 2010) established the tribunal and as such the tribunal derived its existence, powers and authority from the ***VAT Act 2010***. The VAT Act, 2013 by repealing the ***VAT Act, 2010*** therefore disbanded the tribunal as it did not provide for the re-establishment of the tribunal. Although the ***VAT Act, 2013*** preserved proceedings instituted under the repealed ***VAT Act*** and even though the proceedings were preserved for purposes of being determined by the yet to be constituted successor to the tribunal, the ***VAT Act, 2013*** did not re-establish the tribunal and being a creature of statute, the tribunal therefore ceased existence upon the repealing of the ***VAT Act, 2010*** by the ***VAT Act 2013***. Any purported powers it exercised after the repealing of its mother statute was thus an illegality and *ultra vires.*

38. According to the applicant, the tribunal's decision was so unreasonable and irrational that any person acquainted with the facts of the case would not have arrived at such a decision. The decision was so unreasonable and irrational as illustrated hereunder:

(a) While seeking to discern the meaning of "horticultural services" under the ***VAT Act*** the tribunal chose to base its decision on the meaning of the word "horticulture" without realizing that there is a difference between the word "horticulture" and the word "horticultural services". Accordingly the word "horticultural services" was not defined. The tribunal in essence made its impugned decision without defining horticultural services in spite of the fact that there is the term used in the act. This is quite an unreasonable attempt or exercise at definition.

(b) The tribunal settled on a preposterous definition of horticulture as that which "pertains to cultivating fruits, vegetables, ornamental plants and the management or cultivation of a garden". This definition of horticulture is grossly unreasonable as well as completely absurd as the definition appears to suggest that anything done in connection with the management and/or cultivation of a garden is to be termed as horticulture. In this erroneous sense, virtually anything that has to do with cultivation or management of soil is horticulture.

39. The deponent therefore asserted the said decision by the tribunal ought to be reviewed by this Honourable Court and the orders sought herein granted.

Applicant's Submissions

40. The applicant filed submissions which were highlighted by its counsel, **Mr Arwa**.

41. According to the applicant, the dispute revolves around the failure by the tribunal to understand the provisions of the ***VAT Act*** and interpret the same as provided by the law.

42. It was submitted that there were simple errors of fact and this encompassed the fact that the tribunal operated on an erroneous fact that the services on the face of the ruling were rendered by certain agents appointed by the applicant which was not factually correct as some of the services were rendered by the applicant themselves while others were rendered by Government agencies and could not have been rendered by overseas agents of the applicant.

43. The second issue was whether the services were consumed by the applicant and it was submitted that a number of them were not such as sanitary inspection which could not have been received by the applicant.

44. There were also numerous errors of law, it was submitted. The primary issue was whether it was lawful and proper for the tribunal to apply ***VAT 2010*** with respect to transactions which took place before that date. It was submitted that between 1990 and 2010, there was a provision which zero-rated all taxes for services rendered to exporters in Regulation 6 of Part A of the 5th Schedule. According to the applicant, the argument that the phrase "subject to satisfaction of the Commissioner" meant that Parliament had delegated the authority to impose taxes on the Commissioner was incorrect. This was due to the fact, firstly, that the conditions in Regulation 6 which are to be prescribed by the Commissioner are not conditions of zero-rating but are conditions of supply i.e. the manner in which zero-rated services are to be supplied, the manner of supply as opposed to what is zero-rated. According to **Mr Arwa** that is the meaning that naturally emerges from the interpretation of the said Regulation and the Commissioner's duty is only to ensure that the services took place and were provided in the course of the business and once satisfied, the law takes its course. According to him the issue of zero-rating was set by the law. The Act therefore zero-rated supplies to importers and therefore the tribunal applied the 2010 legislation to a transaction which took place earlier.

45. The other fundamental error was the misinterpretation of "imported service". The tribunal argued it referred to service rendered by a person not normally resident in Kenya and consumed by a person physically present in Kenya contrary to section 2 as read with section 6(6) of the ***VAT Act***. It was submitted that the tribunal concluded that the word "import" is superfluous since services are not goods and cannot cross the border and concluded that only gods could be imported. To **Mr Arwa** this was serious misapprehension of the law, was arbitrary, irregular and illogical. In order to determine this issue, the Court was urged to determine that there was import of services rendered by someone outside the country and consumed in Kenya and not as was contended that the Court should only determine whether the service was rendered by a person resident in Kenya. The importance should not be placed on a person in Kenya but on consumption in Kenya. It was submitted that in tax interpretation the law should be construed and interpreted strictly and where the language is difficult, the inclination is against interpretation which imposes a burden and in the event of an ambiguity the matter ought to be referred to the Legislature and that this is what the tribunal failed to appreciate.

46. It was further submitted that with respect to horticultural services the Tribunal committed the same mistake since Schedule 3 of the ***VAT Act*** exempted VAT on such services though the tribunal disagreed with the applicant's position that these were horticultural service. The tribunal therefore only defined horticulture which is different from horticultural services which the applicant gave as including not only the growing of flowers but marketing as well. The tribunal therefore took a narrower definition rather than the broader one which was unreasonable.

47. The other issue is that the tribunal was disbanded in August 2013 when the ***VAT Act, 2013*** was passed and there was no provision for the tribunal so that it nolonger exists. The ruling however was delivered in 2013 hence it was submitted that the ruling was delivered by a non-existent body. It was submitted that section 68 of the Act only preserved the proceedings for the purposes of being determined by an existing body which could be a Court but did not breathe life into a non-existing body since the terms of the Chairperson and the Members had lapsed and therefore it had no jurisdiction to make the orders it made. On the same note service could not be effected on a non-existent body.

<u>Respondents' Submissions</u>

48. The Respondents similarly filed submissions which were highlighted by their learned counsel **Mr Chaballa**.

49. According to the applicant, the tribunal was alive to the fact that provision of services commenced in Kenya and continued in Holland where performance of the same ended and hence the tax claimed related to services provided either by TFA or Airflo whether performed in Kenya or outside.

50. With respect to phytosanitary inspection charges incurred in England, it was submitted that the tribunal found that there was no satisfactory evidence provided by the applicant to enable the Tribunal decide whether or not it was an exempt service and the duty to do so rested on the applicant.

51. It was submitted that since TFA, EAF and Airflo FZE were not required to register for tax in Kenya and were as such not registered, the services were provided by non-resident persons hence were services imported into Kenya. It was therefore submitted that the place of performance was irrelevant in determining whether the service is imported into Kenya so long as it was provided by a person not resident in Kenya. Since services were imported into Kenya and received by the appellant on whom the respondent is seeking to levy taxes, it was submitted that section 6(6) of the Act applied.

52. According to the Respondents the tribunal did not apply section 6(6) of the ***VAT Act, 2010*** in the assessment of VAT for the years of income 2006, 2007, 2008 and 2009 and in any event the provisions of this section are the same.

53. It was contended that Regulation 6 of the 5th Schedule to the Act clearly provides for exemption under conditions prescribed by the Commissioner and the applicant has not exhibited any document by the Commissioner granting the exemption and the conditions thereof hence there was no exemption.

54. Whereas horticultural services were exempted in paragraph 6 of the Third Schedule, the services in this case, processing, marketing, packing, handling, palletizing, airlifting, sale by exportation or any other means of transportation, it was submitted do not fall within the meaning of horticultural services.

55. It was further submitted that the tribunal did not err in interpreting “import” as being restricted to goods only and this is clear from the definition of “import” as read with “importer” in section 2 hence it was not correct to read section 6(6) together with the word “import” since the word “import” qualifies the word “importer” which deals only with goods and not services. Since services are intangible, it was submitted that the qualification “to bring or cause to be brought from a foreign country” does not apply to service imported into Kenya.

56. It was submitted that under section 2 of the ***VAT Act***, service imported into Kenya only requires satisfaction of two conditions namely, that the provider of the service should be a person normally resident outside Kenya and is not required to register for tax in Kenya and that the service provided should be for use or consumption in Kenya hence the jurisdiction where the service is performed is irrelevant. It was submitted that the tribunal did not hold that “for consumption in Kenya” had no meaning.

57. It was submitted that the definition of “horticultural service” as adopted by the tribunal was in tandem with the plain meaning and the tribunal was right in finding that the definition adopted by the applicant was overstretched.

58. The fact that the tribunal’s expenses are paid by the 1st Respondent, it was submitted is no reason for imputing bias on the tribunal. To the Respondent, the Respondents did not act *ultra vires* and that the transitional provisions of section 68 of the ***VAT Act*** saved legal proceedings in existence. It was further submitted that the decision of the Tribunal was neither unreasonable nor irrational.

59. Without joining the Tribunal or its members, it was submitted that the instant application violates the rules of natural justice.

Determinations

60. The principles guiding tax legislation were restated in **<u>Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR</u>** 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 *Jafferali 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."

61. In **<u>Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629</u>**, 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 **<u>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.</u>**

62. Similarly, it was held in **<u>Vestey vs. Inland Revenue Commissioners [1979] 3 All ER at 984</u>** 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."

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

"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."

64. 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 **Kanjee Nazanjee 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."

65. In these kinds of cases therefore the Court is not entitled to attempt a discovery at the intention of the Legislature but is restricted to the clear words of the statute. In a taxing Act one has to merely look at what is clearly said since there is no room for any intendment. There is no equity about tax and there is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only fairly look at the language used. Therefore 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" See also **H vs. The Commissioner of Income Tax [1958] EA 303.**

66. 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 or 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."

67. 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."

68. 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."

69. Section 2 of the ***VAT Act*** defines the word "import" as meaning "to bring or cause to be brought from a foreign country or from an export processing zone" while the word "importer" as meaning "any person who imports taxable goods". Whereas the Applicant contends that from the definition of the word "import", "service imported into Kenya" would include services, the Respondents contend that since the word "importer" is limited to goods the phrase ought to be construed with respect to goods only. In 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.**

70. In light of the foregoing decisions, the interpretation which favours the taxpayer is that the phrase "services imported into Kenya" is not to be restricted to goods but also includes services.

71. Section 2 of the ***VAT Act*** defines "service imported into Kenya" to mean "a service provided by a person normally resident outside Kenya who is not required to register for tax in Kenya, or a service provided by an export processing zone enterprise for use or for consumption by a person in Kenya whether or not the service is provided from outside or in Kenya or both inside and outside Kenya". In its determination the Tribunal held that if service is not taxed in the jurisdiction of destination, it has to be taxed in one or the other jurisdiction to avoid a situation of double non-taxation. There was no authority for this very robust statement and this Court is aware of none. Tax legislation must be construed strictly and therefore the Tribunal's decision was not in compliance with the well-known principles when it purported to stretch the meaning of the words defined in section 2 in order to avoid what in its view was "double non-taxation."

72. The next issue for determination is whether the services in question being processing, marketing, packaging, handling, palleting, airlifting, sale by exportation or any other means, transportation and so forth are horticultural services. If the same are horticultural services then it was agreed that they would be exempt from taxation. It was also agreed that the words "horticultural services" are not defined in the ***VAT Act***. However as already appreciated above in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 240** (supra) taxation can only be done on clear words and cannot be on intendment and that 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. In arriving at the decision that the services in dispute did not fall under the classification of "horticultural services" the Tribunal considered the definition of the word "horticulture" as well as the fact that services relating to exportation of flowers are zero-rated. In other words but without expressly saying so the Tribunal considered the fact that since Parliament specifically selected services relating to exportation of flowers for the purposes of zero-rating impliedly meant that other services relating to processing, marketing, packaging, handling, palleting, airlifting, sale by exportation or any other means, or transportation could not possibly fall under "horticultural services". One does not need to go far to see that the Tribunal was in effect interpreting the intention of the legislature and that in my view was an error. Without expressly defining what was meant by the words "horticultural services" the legislature left the issue open to interpretation and since there could possibly be two interpretations,

the law is that the one that favours the taxpayer is to be adopted and in this case it is that services relating to processing, marketing, packaging, handling, palleting, airlifting, sale by exportation or any other means, transportation of horticultural products were 'horticultural services" and hence exempted. Unless the legislature amends the law and clarifies the position, this Court ought not to dwell on the intendment of the legislation since the law is clear that 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.

73. The next issue for determination is the scope of section 6(6) of the ***VAT Act***. The said provision provides that Tax on services imported into Kenya shall be payable by the person receiving the taxable service. In this case it is contended by the applicant that the services for which tax is being levied were consumed in Netherlands. A question as to the place where services are consumed is necessarily a question of fact and whereas this Court is entitled to interfere with a finding of fact where there is no evidence in support of such a finding, where there is evidence the issue is not one for judicial review but is one for appeal since it is a matter which goes to the merit of the decision itself since its determination depends on the nature of the evidence adduced. In this case the Tribunal found that it was the applicant who was consuming the services that were rendered by TFA/EAF/Airflo when they undertook the service in question. Whereas this Court may not necessarily agree with that conclusion, this Court is not entitled to interfere with the said conclusion.

74. It was the applicant's case that section 6 of the 5th Schedule did not empower the Commissioner to determine which goods and services were zero-rated. It is clear that the said provision as worded was capable of two interpretations. Either it could mean that the Commissioner's role was limited to determining whether the supplies in question took place in the course of the registered person's business in which case, once so satisfied the itemized supplies would be automatically zero-rated. The other interpretation would be that it was the sole discretion of the Commissioner to determine what supplies were to be zero rated. Again the law is clear that in cases of an ambiguity in a tax legislation, the same must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation. In this instance the interpretation which favours the tax payer and which ought to have been adopted is that the Commissioner's role as limited to determining whether the supplies took place in the course of a registered person's business and once that was the position, the zero-rating would apply automatically under section 6 of the 5th Schedule.

75. It was contended that the Tribunal also purported to exercise power and determine cases after it had been disbanded by the passing of the ***VAT Act, 2013*** hence its actions subsequent to the repeal of the ***VAT Act, 2010*** were *ultra vires*. Suffice it to say that this was not one of the grounds specified in the Statement of Facts filed herein. Order 53 rule 4(1) of the ***Civil Procedure Rules*** provides:

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.

76. It follows that the said ground is not open for consideration by this Court in these proceedings.

77. Having considered the issues raised in this application, it is clear to me that the failure by the Tribunal to consider the well-established principles in tax legislation as well as the applicable legislation rendered the impugned decision liable to be quashed since the omission to do so amounts to procedural impropriety. As held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** that procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

“Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

78. That the Tribunal was enjoined to observe the statutory or legislative provisions and principles either expressly laid down or developed jurisprudentially in the course of time cannot be in doubt. To fail to do so clearly renders the decision in question liable to be quashed.

79. I have said enough to show that the Tribunal’s impugned decision cannot be allowed to stand.

Order

80. In the premises the order which commend itself to me and which I hereby grant is an order of Certiorari removing into this Court for the purposes of being quashed the decision of the VAT Tribunal made on the 26th November 2013 in the VAT Appeal No. 1 of 2013 which decision is hereby quashed.

81. As the Tribunal is not a party to these proceedings there will be no order as to costs.

Dated at Nairobi this 29th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kirui for M Arwa for the ex parte applicant

Miss Nganga for Mr Chaballa for the Respondent

Cc Patricia