REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR MISC. CIVIL APPLICATION NO. 350 OF 2012

IN THE MATTER OF AN APPLICATION SEEKING ORDERS OF JUDICIAL REVIEW BY TRADEWISE AGENCIES LIMITED

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT CAP 469, INCOME TAX ACT CAP 470, VALUE ADDED TAX ACT CHAPTER 476, ALL OF THE LAWS OF KENYA

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

CONSOLIDATED BANK OF KENYA LIMITED… 2ND RESPONDENT

EX-PARTE.....

TRADEWISE AGENCIES

JUDGEMENT

1. By a Notice of Motion dated 26th September, 2012, the *ex parte* applicant herein, **Tradewise Agencies Ltd,** seeks the following orders:

a. **AN ORDER OF CERTIORARI to bring to the High Court and quash the Agency Notice dated 09/07/2012 issued to the 2nd Respondent on behalf of the 1st Respondent by the Senior Assistant Commissioner.**
b. **AN ORDER OF PROHIBITION to restrain the 1st Respondent or any other person acting on behalf of and/or under the authority of 1st Respondent from collecting tax arrears allegedly owing from the Applicant on account of the assessment allegedly done on 18/09/2003 and/or from issuing any other or further Notices to any person of the following category on account of tax arrears allegedly owing from the Applicant on account of the assessment allegedly done on 18/09/2003, that is to say:**

i) Any person from whom any money is due or accruing or may become due to the Applicant; or

ii) Any person who holds or may subsequently hold money for or on account of the Applicant; or

iii) Any person who holds or may subsequently hold money on account of some other person for payment to the Applicant; or

iv) Any Person having authority from some other person to pay money to the Applicant.

c. **AN ORDER OF PROHIBITION to restrain the 2nd Respondent from acting on the Agency Notice dated 09/07/2012 issued on behalf of the 1st Respondent by the Senior Assistant Commissioner.**
d. **AN ORDER OF MANDAMUS do issue to compel the 1st Respondent to disclose to the Applicant the basis upon which the alleged the sum of Kshs.10,104,030/00 was assessed and/or to compel the 1st Respondent to grant the Applicant an opportunity to be heard on its objections to the assessment of the alleged tax of Kshs.10,104,030/00 and pay the applicant Kshs.119,305.90 unilaterally paid out of its account by the 2nd Respondent.**
e. **Costs of and incidental to these proceedings.**

EX PARTE APPLICANT'S CASE

2. The same application is based on a Statement filed on 19th September, 2012 and the verifying affidavit sworn by **John Nyoro Wairumbi**, the applicant's director on 18th September 2012.
3. According to the deponent, on or about 2nd January 1999, he applied with the 1st Respondent to have the Applicant, then known as **Tradewise Distributors Limited**, registered for payment of Taxes. They later changed the name and notified the 1st respondent vide a letter dated 25th July 2001. Consequently, the applicant was registered for Value Added Tax (VAT) and allocated VAT 2 Registration Number 0110542Y and PIN Certificate Number PO51123891A. Since then, the Applicant has promptly, faithfully and consistently filed VAT Returns with the 1st Respondent and remitted VAT amounts payable on account of all sums received and upon which VAT is payable at the applicable rates.
4. Around September 2006, the applicant was denied Tax compliance certificate and wrote a letter dated 21st September 2006 to the 1st Respondent. The applicant was stunned to receive a running statement on its VAT account indicating a balance of Kshs.11, 818,487/00. Upon scrutiny of the statement, it was noted that there was a debit entry of Kshs.10, 104,030/00 undertaken on the account on 18th September 2003. Since the applicants were strangers to this debit, they instructed our Auditors, **Messrs. Mungai & Associates** to make an inquiry with the 1st Respondent on the origins of the debit and seek clarification thereof and pursuant thereto the said Auditors wrote to the 1st Respondent on 22nd September 2006 during which they also notified the 1st Respondent that the debit was done with no notice to the Applicant and without granting the Applicant an opportunity to be heard and therefore objected to the same on their behalf. The deponent has however been informed by the said Auditors that they never received any response to that letter and have not to date. The 1st respondent has also never communicated with them regarding the Auditors letter. In view of the silence on the part of the 1st Respondent, the applicants assumed that the matter had been sorted out internally and that it no longer required their attention which assumption was reinforced by the fact that they continued to receive Tax Compliance Certificates from the 1st Respondent confirming that the Applicant is current with tax returns, is up to date on tax payments and is in fulfilment of all tax obligations as required by law with the latest such certified being issued 25th July 2012 and is valid up to 25th January 2013.
5. The applicant also made several claims for VAT refund which the 1st Respondent processed and

paid the applicant as follows;

23rd April, 2010 Co-operative Bank Account No. 01136198136700 Kshs.2, 071,025.00

29th April, 2010 Co-operative Bank Account No.01136198136701Kshs.1, 457,471.00

29th April, 2010 Consolidated Bank Account No. 0120250924600 Kshs.2, 690,946.00

6th June, 2011 Consolidated Bank Account No. 0120250924600Kshs.1, 393,238.00

1st December, 2011Consolidated Bank Account No. 0120250924600 Kshs.1, 642,674.00

6. However, in early July 2012, upon checking its Bank balance with the 2nd Respondent online, the applicant noticed a strange debit on the said account in the sum of Kshs.119, 305/90 and enquired of the same via Email. They were however, advised by the 2nd Respondent that they had on 11th July 2012 received an Agency Notice from the Senior Assistance Commissioner acting on behalf of and/or under the authority of the 1st Respondent declaring the 2nd Respondent to be an Agent of the Applicant under section 19 of the Act, and thereby requiring and/or directing the 2nd Respondent to deduct from, and remit to the 1st Respondent the sum of Kshs.10,104,030/00 as alleged tax due from the Applicant, any money which may at any time within 12 months from the date of the Notice be held by the 2nd Respondent or due from the 2nd Respondent to the Applicant and they paid the sum of Kshs.119,305.90 vide Bankers Cheque Number 137458 dated 12th July 2012. It is however contended that the applicant is yet to receive its copy of the notice by the 1st respondent and the address thereon is strange and not the applicant's.
7. According to the applicant, this sudden turn of events took them by surprise since they had not received any intimation or notice from the 1st Respondent notifying them of the alleged assessment which had apparently been done way back on 18th September 2003. To them it is clear that the Notice served on the 2nd Respondent on 11th July 2012 pre-empted the Applicant's right to be heard and was therefore premature since the same was done before the Applicant was served with Notice of assessment and the payment to the 1st respondent was irregular and unjustified. In any event, the applicant believes that both notices are unreasonable and actuated by malice since they had already unsuccessfully enquired from the 1st Respondent way back in 2006 of the basis upon which the alleged assessment of tax arrears of Kshs.10,104,030/00 was done, have received refunds and compliance certificates.
8. Subsequent to the issuance of the Notice, the Applicant's auditors, **Messrs. Mungai & Associates**, have once again held several meetings with representatives of the 1st Respondent with a view to resolving the disputed alleged tax arrears but the 1st Respondent's representatives have been unresponsive with details of the assessment leading to the claim for tax arrears necessitating this court action. It is contended that the notice served upon the 2nd Respondent has completely paralyzed the Applicant's businesses since the same requires that any money coming into the Applicant's account be attached and remitted to the 1st Respondent.
9. Based on the legal advice received the deponent believes that so long as the procedure leading to assessment of the alleged tax arrears and the subsequent issuance of the notice did not afford the Applicant an opportunity to be heard, the same is irregular and this Court has powers to offer reliefs through Judicial Review.

1ST RESPONDENTS' CASE

10. In opposition to the application, the respondents on 24th October 2012 filed a replying affidavit sworn by **John Kabeu**, an officer appointed under and in accordance with section 13 of the ***Kenya***

Revenue Authority Act, Cap 469 of the Laws of Kenya, an Act of Parliament under which the ***Value Added Tax Act*** (Chapter 476 of the Laws of Kenya) is administered.

11. According to him, the applicant is a registered Tax payer under PIN Number P051123891A and is also registered for payment of Value Added Tax under VAT Registration Number 0110542Y since the year 1999. Sometimes in the year 2003 the 1st Respondent carried out a routine audit on the Applicant to establish if the records kept by the Applicant were accurate. Pursuant to the audit several issues were raised and the Applicant was notified in order to address them and on the 18th of July 2003 the Applicant sent several documents to explain the variances that had arisen between the 1st Respondent's tabulations and the Applicant's tabulations. The 1st Respondent after going through the documents did not agree with the Applicant's tabulations and sent the Applicant an Assessment of ten million, one hundred thousand, four thousand and thirty shillings (Kshs.10,104,030.00/-) on the 18th of September 2003. It is deposed that according to the provisions of the Seventh Schedule Paragraph 9(1)(a) of the ***Value Added Tax Act*** Cap 476 Laws of Kenya, the Commissioner was entitled to issue such an Assessment and the amount became due and payable immediately. The Applicant, on the other hand was entitled to raise an objection by the 18th of October 2003 as provided under Section 32 A (1) of the ***Value Added Tax Act*** Cap 476 Laws of Kenya within thirty (30) days of receiving the said assessment stating precisely the grounds of objection the Assessment which the Applicant chose not to do. On the 28th of January 2004 the Applicant sent the Respondent further explanations to the queries that had been raised prior to the Assessment being sent to the Applicant and the same did not amount to an objection. On the 21st of September 2006 the Applicant's agents on a visit to the 1st Respondent's offices were furnished with a statement of their VAT account liability while on the 22nd of September 2006 the Applicant through their duly appointed auditors, **Mungai & Associates Certified Public Accountants**, raised an objection to the Assessment which was three years late and the amount stood as due and payable to the 1st Respondent as from 18th October 2003 when they ought to have objected to the Assessment. The Applicant after lodging a Refund Claim in the year 2009 of two million, seventy one thousand and twenty five shillings (Kshs.2, 071,025.00/=), the First Respondent sent the Applicant a letter dated 15th December 2009 notifying them that the debt of ten million, one hundred thousand, four thousand and thirty shillings (Kshs.10, 104,030.00/-) was still owing to the First Respondent and they should consider offsetting the debt against the VAT Refund claims. It is deposed that the First Respondent by the operation of Law, ***VAT Act*** Cap 476 Laws of Kenya section 11(2), could not without the written authority of the Applicant offset the debt against the VAT Refund Claims that the Applicant has been lodging over the years and the Respondent has grudgingly paid all the VAT Refund Claims to Appliance on time. It is deposed that the taxation system in Kenya is by "Self -Assessment" where a person is duty bound to calculate his taxes, make declarations and pay the amount so assessed. The ***VAT Act*** Cap 476 Laws of Kenya under the Seventh Schedule paragraph (7) elaborates the process. 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 but a Tax Compliance Certificate does not mean that a person's accounts are perfect or beyond reproach and only an audit conducted the 1st Respondent can certify accounts to be beyond reproach for tax purposes. To the deponent, at all material time the Assessments were marked VAT and bore the VAT Registration Number 0110542Y which the Applicant was well aware of and the provision of paragraph 9 of the Seventh Schedule of ***VAT Act*** Cap 476 were followed. It is contended that the 1st Respondent has been patient with the Applicant since the year 2003, 2006 and 2009 when the applicant was notified and reminded of the Assessment amount due and payable to the Respondent and has been given adequate time and opportunities since the year 2003 to address the issue but has not done anything about it whereas the First Respondent has diligently paid to the Applicant all the Refund Claims owing to the Applicant.

12. In the deponent's view, the 1st Respondent afforded the Applicant an opportunity to offset the debt against the VAT Refund Claims but the Applicant has been unwilling to pay the sums owing to the Respondent and therefore the Applicant cannot be allowed to assert that rules of natural justice were breached and at the same time claim there was an inordinate delay in collecting. To

him, the orders of Judicial Review sought by the Applicant are unwarranted because there has been no violation of the law or the rules of natural justice by the 1st Respondent hence it is in the best interests of justice that this Application be dismissed with costs to the Respondents and that this Honourable Court orders the Applicant to pay the amounts due and payable to the 1st Respondent.

2ND RESPONDENTS' CASE

13. The 2nd respondent, on the other hand opposed the application by way of a replying affidavit sworn by **Janet Mwaluma**, its Legal Manager on 16th November 2012.
14. According to her, the 2nd Respondent is not a proper party to these Judicial Review proceedings and is enjoined irregularly and save for paragraphs 13, 14, of the said Verifying Affidavit of **John Nyoro Wairumbi**, the 2nd Respondent finds difficulty in responding to the ex-parte Applicant's Application. To her the 2nd Respondent is not privy to information regarding the dispute between the ex-parte Applicant and Kenya Revenue Authority (the 1st Respondent hereafter). As regards to the said paragraph 13 and 14 of **John Nyoro Wairumbi's** Verifying Affidavit, the 2nd Respondent confirms having been issued with an Agency Notice by the 1st Respondent on the 9th July 2012 pursuant to provisions of the ***Income Tax Act*** whose import is to demand that that the 2nd Respondent remits to the 1st Respondent monies held in the ex-parte applicant's account within twelve months of the notice up to a maximum of Kshs.10, 104,030.00. The 2nd Respondent is legally bound to follow instructions of the 1st Respondent and in doing so remitted to the 1st Respondent Kshs.119, 305.90 being the amount in the ex-parte Applicant's account at the time hence it did not unilaterally decide to pay out funds from the ex-parte Application's account. To her the 2nd Respondent is not a participant in causing the ex-parte Applicant any difficulties as deposed in paragraph 20 of the Verifying Affidavit of **John Nyoro Wairumbi** hence the orders sought against the 2nd respondent ought to be dismissed with costs.

APPLICANT'S SUBMISSIONS

15. It is submitted on behalf of the applicant that the applicant has never been issued with any assessment as the address on the notice complained of is not the applicant's. It is further submitted that the 1st respondent has never notified the applicant of any issue or intention to audit it. To the contrary the 1st respondent paid the applicant refund claims the latest being on 1st December 2011 which ought not to have been done if the applicant owed it the colossal sum of Kshs 10,104,030.10 and issued the applicant with several Tax Compliance certificates the last one on 25th July 2012 valid up to 25th January 2013 indicating that the applicant had fulfilled the obligation to file relevant tax returns and to pay taxes due as provided by the law.
16. It is submitted that the rules of natural justice were not complied with at all as the applicant was not notified and or given a hearing and there was even no attempt to comply. The notice it is further submitted does not state the Act under which it was issued hence the prayers sought in the instant Motion ought to be allowed.

RESPONDENT'S SUBMISSIONS

17. On behalf of the 1st respondent, it is submitted that the decision of the Authority to demand taxes from the ex parte applicant on account of an assessment raised on 18th September 2003 was within its mandate and in accordance with the rules of natural justice. It is submitted based on the record that the applicant was notified on several occasions that he owed the 1st respondent Kshs 10,104,030.00 and was afforded numerous opportunities to present his case but the parties could not agree. It is submitted that the Tax Compliance Certificates neither endorses the accuracy of the records kept by a taxpayer nor does it mean that a taxpayer does not owe any taxes to the Authority since only an audit by the agents of the 1st respondent can determine the actual tax

liability or certify accounts to be accurate for tax purposes. On the refund, it is submitted that the 1st respondent was duty bound to pay the Refund Claims lodged by the applicant under section 11(2), 24 and 24A of the ***VAT Act*** unless specifically requested by the applicant in writing to set off the debt against the Refund Claims.

18. It is submitted that under section 19(1)(a) to (d) of the ***VAT Act***, the 1st respondent acted lawfully in collecting the tax due.
19. It is submitted that certiorari cannot issue to quash the agency notice in question in the absence of averments of bad faith, ulterior motive or possibly perverseness on the part of the 1st respondent in issuing the agency notice and the subject assessment of which there is no cogent evidence of acting without statutory authority or jurisdiction. It is further submitted that in an application for judicial review, the court is concerned with reviewing not the merits of the decision in respect of which the decision is made, but the decision making process itself and that in the instant case the 1st respondent did not act without or in excess of jurisdiction in enforcing the assessment and as such the orders of certiorari cannot issue.
20. On prohibition, it is submitted that the remedy is not available to the applicant because the 1st respondent has not acted unreasonably, without or in excess of her jurisdiction since the remedy can only issue to prevent a contemplated decision and not one that has already been made. It is submitted that the remedy cannot issue because the respondents have not acted unreasonably, without or in excess of their jurisdiction and did not breach the rules of natural justice but are legally undertaking a statutory duty

DETERMINATION

21. In the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** it was held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety are 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.....When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be

adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory."

22. Paragraph 9(1)(a) of the Seventh Schedule to the ***Value Added Tax Act*** Cap 476 Laws of Kenya, provides:

9. (1) Where, in the opinion of the Commissioner, any person has failed to pay any of the tax which has become payable by him under this Act by reason of—

(a) his failure to keep proper books of account, records or documents, required under this Act, or the incorrectness or inadequacy of those books of account, record, or documents; or

(b) his failure to make any return required under this Act, or delay in making any such return or the incorrectness or inadequacy of any such return; or

(c) his failure to apply for registration as a taxable person under this Act,

the Commissioner may, on such evidence as may be available to him, assess the amount of tax due and that amount of tax shall be due and payable forthwith by the person liable to pay the tax.

Provided that the Commissioner may, in special cases referred to him by an authorized officer, adjust or review the amount of tax assessed under this paragraph in such manner as may be just and reasonable in the circumstances.

(2) Any registered person who fails to submit a return as required under subparagraph (1) within the period allowed shall he liable to a penalty of ten thousand shillings or five percent of the tax due, whichever is higher:

Provided that a registered person who submits a return within the period allowed under paragraph 7 but fails to pay the tax as required under section 13 shall be liable to a default penalty of ten thousand under section 13 shall be liable to a default penalty of ten thousand shillings.

(2A) A registered person who fails to submit a return under paragraph 7(c) shall be liable to a penalty of ten thousand shillings.

(3) The Commissioner may grant remission of a default penalty imposed under paragraphs 5(2), 6(2) and 9(2) in individual cases where he is satisfied that it is justifiable to do so and shall make quarterly reports to the Minister on each remission so granted:

Provided that where the amount of the penalty exceeds five hundred thousand shillings, the grant of remission shall be subject to the written approval of the Minister.

23. It is therefore clear that before a Commissioner may exercise the powers conferred upon him

under the foregoing paragraph he has to form an opinion that a person has failed to pay any of the tax which has become payable by him under the Act and thereafter he is then empowered to assess the amount of tax due which amount of tax shall be due and payable forthwith by the person liable to pay the tax. However, the assessment must be based on such evidence as may be available to him.

24. How then does the Commissioner form an opinion that a person has failed to pay the tax due? According to ***Black's Law Dictionary***, Ninth Edition at page 1202 "opinion" is defined as "A person's thought, belief, or inference, esp. a witness's view about a fact in dispute, as opposed to personal knowledge of the facts themselves". "Belief" on the other hand is defined at page 175 thereof as "A state of mind that regards the existence of something as likely or relatively certain" while "believe" is defined as "to feel certain about the truth of; to accept as true". In **Onyango Oloo vs. Attorney General [1986-1989] EA 456,** it was held that "to consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion and that "Consider" implies looking at the whole matter before reaching a conclusion. The Court in that case held that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at and that it is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided. The Court was of the view that the word "consider" conveys the idea of taking into account the different aspects of a problem and that it would be absurd to hold that to take into account one side of the problem would be "consideration" of it since that would only be half consideration.

25. It is therefore my view that to "form an opinion' similarly coveys an idea of taking into account the different aspects of a problem hence it would be absurd to hold that to take into account one side of the problem would be "forming an opinion" of it. If it is true that the applicant's version was never sought before the opini0on was formed by the Commissioner, this in my view is what the Court in **Onyango Oloo vs. Attorney General** (supra) meant when it held that it is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.

26. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In my view, an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. Further an administrative action cannot be said to be procedurally fair where a decision is arrived at based on an opinion formed as a result of the consideration of the version of only one side since by a consideration of one side one cannot be said to have felt certain about the truth of the matter in dispute.

27. In this case, it is contended by the applicant that after its auditors complained to the respondent vide their letter dated 22nd September 2006 about unilateral debit of Kshs Kshs.10,104,030/00 undertaken on the account on 18th September 2003, a letter to which there was no response, the applicant continued to receive Tax Compliance Certificates from the 1st Respondent confirming that the Applicant is current with tax returns, is up to date on tax payments and is in fulfilment of all tax obligations as required by law. 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.

28. Apart from the foregoing section 105 of the Income Tax Act, Cap 470 Laws of Kenya provides:

105. (1) If it is proved to the satisfaction of the Commissioner that, in respect of a year of income, tax has been paid by or on behalf of a person, whether directly or by deduction or otherwise, which is in excess of the amount payable by that person as finally determined in respect of that year of income, the Commissioner shall refund the amount of the excess, together with any interest which may be payable thereon under this Act, to the person entitled to the refund.

(2) When tax is due and payable by a person in respect of an assessment, any amount refundable to that person under this section shall be applied towards the satisfaction of the tax so due and payable to the extent of that tax and the amount so applied shall not be refunded

(3) A claim for repayment under this section shall be made within seven years after the expiry of the year of income to which the claim relates; but in a case to which section 79(1)(c) applies, a claim for repayment may be made within the period in which an assessment may be made.

15. In this case it is claimed and admitted by the 1st respondent that the 1st respondent made some tax refund. Yet under section 105(2) the 1st respondent was entitled to apply the said refund towards the satisfaction of the tax due and payable if any to the extent of that tax and the amount so applied shall not be refunded. It therefore defeats reason to make a refund and at the same time allege that there is some tax due. To do so would in my view go against the legitimate expectation of a tax payer that by making a refund to him the authority has no claim against him. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**.

"…….legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality. In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the *quantum* of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power…….. Statutory power must be exercised fairly. Perhaps it is important to recall the observations made in the English case of *Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531* as follows: "The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural." The unilateral change of

tariff indicate that this change was done nearly nine (9) years after its use by the applicant company with its predecessors who shared the same licence that was based on tariff 22.04. The applicant has over this period arranged its business affairs in reliance with the principle of certainty of law – and that should there be a change it will only apply to the future. I hold that the applicant is entitled to hold the taxman to its bargain and its business expectations based on the principle of legality ought not to be thwarted. The respondents should have exercised their power to change the tariff …..in a spirit of legality and fairness. The retrospective application of the tariff was done: (a) without notice or adequate notice; (b) without allowing the applicant to explain its position. There is correspondence to the effect that the respondents decision on tariff would remain – and the applicant was shut out; (c) The change of tariff according to the respondents own report was intended to block the payment of a refund of a Kshs 36 million (appx) valid refund due to the applicant; (d) The exercise of the power to change the tariff was not admittedly based on the respondents addressing the law on tariff. …As reflected above the change of tariff was unilateral and abrupt and no evidence has been given concerning whether legal advice was sought and given before the change over….One other reason why the respondents conduct in changing the tariff and making its effect retroactive is illegal, is that it became penal and penal laws should not be retroactive. The applicant has in the circumstances of this case the right to protect its reliance on legitimate expectations as elaborated elsewhere in this judgment. The applicant in conducting its affairs is entitled to rely on certainty and regularity of law. The capriciousness, oppression and arbitrary application of the tariff retroactively is the antithesis of certainty and regularity of law. … This is the reason why our Constitution prohibits *ex-post facto* laws. Although the tariffs were in existence and not new laws, their arbitrary imposition in a retroactive manner has the same effect as the *ex post facto* laws. Moreover isolating the applicant is discriminatory and I would reject the tariff on this ground as well. Despite its antiquity nothing expresses the principles involved in the above holdings than the American case of *Hurtado vs. Califonia 110 US 51-0535-36 (1884)*: "Law is something more than mere will exerted as an act of power. It must not be special rule for a particular person on a particular case but ..., the general law ..." so that every citizen shall hold his life, liberty property and immunities under the protection of the general rules which govern society, and this excluding as not due process of law acts of attainder bills of pains and penalties acts of confiscation ...' and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects is not law, whether manifested as the decree of a personal monarch or an impersonal multitude."……..The fact that the respondents have arbitrarily and without notice imposed, the tariff, goes against governmental regularity and the rule of law as well. One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law. No one including a zealous taxman should be allowed to violate these principles. In short burdening otherwise the lawful activities of the applicant in relying on tariff 22.04 automatically converts the switch over to a higher tariff 22.06, into a law, that is discriminatory in its effect. 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. It stems from illegality, improper exercise of law, disregard of legitimate expectation, in violation of Government regularity, in breach of the rule of law, abuse of power and in total disregard of constitutionalism. All these are proper grounds of intervention by this court….Imposing another tariff retrospectively is punitive and our courts ought to frown upon any such practice because the effect of such imposition is the same as retroactive laws. A change of tariff just like most laws must be prospective to be fair. In *Philips vs. Eyre (1870) LR QB 1 Excheque Chamber*, the legislature of Jamaica had passed an Indemnity Act following the suppression of a rebellion in the colony. If the Act was valid it would prevent the claimant suing for assault and false imprisonment, Willes J held:

> **"Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law: Accordingly, the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature."**

Although the law under which the tariffs are imposed is not a new law which is being applied retrospectively as in the illustrations above there is nothing in the Customs & Excise Act or the other relevant Acts which supports expressly the retroactive operation of the tariff and such application is patently illegal. There are no express words or necessary implication by the legislation to support that a new tariff could be applied retrospectively. This also goes against the principle of certainty of law….On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: 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 fulfillment 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 the 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.….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. The respondents' argument that the applicant came to court prematurely without exhausting the internal tax objection process as regards each category of tax, is a serious misdirection because as it has been stated elsewhere in this judgment the issues raised were greater than any of the internal tribunals could handle. The task before the court is not, and has not been that of counting the shillings, it has been one of adjudicating on illegality, the doctrine of *ultra vires*, irrationality, procedural impropriety, Wednesbury unreasonabless, oppression, malice, bias, discrimination and abuse of power. Based on the turning points, outlined above the Court finds that the applicant has demonstrated that the respondents have acted *ultra vires* their powers to assess and levy tax in relation to the applicant. ….when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance. In the case cited by the leading counsel for both parties in this matter, namely, *Regina vs. Inland Revenue*

Commissioners, ex-parte National Federation of Self Employed and Small Businesses Ltd (1982) AC 617 at 652 **Lord Scarman emphasised the same point in these apt words:- "The duty of fairness as between one taxpayer and another is clearly recognized in these (and other passages) in the modern caselaw. Is it a mere moral duty, a matter of policy but a rule of law? If it be so, I do not understand why distinguished judges allow themselves discuss the topic: they are concerned with laws not policy. And is it acceptable for the courts to leave matters of right and wrong, which give rise to genuine grievance and are justiciable in the sense that they may be decided and are effective remedy provided by the courts to the mercy of policy? Are we in the twilight world of "maladministration" where only Parliament and the Ombundsman may enter, or upon the commanding heights of the law? The courts have a role long established, in the public law. They are available to the citizen who has a genuine grievance if he can show that it is one in respect of which prerogative relief is appropriate. I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed upon the revenue are complex and call for management decisions in which discretion must play a significant role."… Independent decision making power of the Judiciary also comprises jurisdiction over all issues of a judicial nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. No organ other than the courts themselves should decide on its own competence as defined by law. The jurisdiction as set out above is recognized even under international law – see Article 36(6) of the Statute of the International Court of Justice and Article 32(2) of the European Convention on Human Rights…While this court has due deference to the Tribunals, the applicant in this matter had a genuine apprehension that the respondents were bent to take drastic actions against it, in a manner contrary to the applicable law and they were just about to abuse their powers. These are certainly not issues the Tribunals would have had the competence or jurisdiction to deal with, determine or give relief. I reject the argument that the applicant came to the court prematurely. It was under a threat which only this court could prevent or avert. It is for the courts of law to define the limits of their competence. Even in the field of tax law judicial issues cannot be left to the tax bureaucrats. If the courts were to do this, it would be serious abdication of their core role or duty… From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors. Imposition of a different tariff, to that an investor contemplated when setting up an industry is reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law. Such a style of decision making cannot offer a conducive business or investment climate. The courts have a role in keeping public authorities within certainty of law. To enable them to do this the frontiers of judicial review have to expand. For now let it suffice to state and hold that the actions and decision of public authorities must be questioned directed and shaped by the law and, if not the courts must intervene. This is the essence of this decision…The court has in each case analysed the relevance of each ground to the outcome herein. Of great significance is the principle of certainty of law especially on taxation in a democratic state such as ours. Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. While the applicants are evidently successful on all the judicial review grounds as indicated above, I think it is significant to stress on the ground of certainty of law as an ingredient of the rule of law because it is easy for public authorities and bodies to overlook it in their decision making processes, as has happened in this case. The respondent's argument that the applicant should not have come to court before exhausting the internal objection arrangements in respect of each tax regime should also be considered from the standpoint of the rule of law. While judicial review could be a collateral attack, the right of access to court is a**

fundamental principle and cannot be taken away except in exceptional cases. It is the basis of an orderly society and the rule of law. The rule of law is the cog upon which all the provisions of the Constitution turn. For example, the intended tariff change has clearly been shown to have been discriminatory in its effect contrary to s 82 of the Constitution. I hold that the pubic bodies decisions and activities should always turn on this cog as well, failing which the courts are entitled to intervene where this is overlooked, as I have done in this case….. My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – *see Benett* case (*supra*). Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law. The courts conclusion that the change of tariff and its retrospective application are a threat to the rule of law and the principle of legitimate expectation and constitutes abuse of power, is supported by the House of Lords' decision in the case of *Bennett v Horse Ferry Road Magistrate's Court and anor [1993] 3 All ER at page 150* where the following significant observations were made by Lord Griffiths: 1. ...”there is a clear pubic interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain” 2. ...if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court, that, there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.”…..I hold that where there is proof of abuse of power and a violation or threat to the rule of law, the court must wholly stop what the perpetrator of those ills intended to do. I apply the principle in the *Benett case* above. The reason for this is that only the might and majesty of law can prevent or act as a deterrence against the temptation to abuse power and also, send the right signals, that public administration must adhere to the rule of law. In the result, I find that the applicant company is entitled to the reliefs claimed. The judicial review orders sought to forthwith issue as prayed with costs to the applicant. ”

29. 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."

30. 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.
31. By not affording the applicant an opportunity to explain its position after issuing the tax compliance certificates, it is my view and I so find that the 1st respondent was guilty of abuse of power. The applicant has however sought for orders of certiorari, prohibition and mandamus. In **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** it was held *inter alia* as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural

justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."

32. Therefore an order of prohibition cannot be granted where what is sought to be prohibited has already taken placed.
33. As the agency notice had already been issued and as the same has been quashed there is nolonger any reason to grant the prohibition sought as the Respondent if it still intends to proceed with its claim will have to start the process afresh in accordance with the law. As was held in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA. No. 1747 of 2004 [2006] 1 EA 47,** once a quashing order is given the decision making body has to act in accordance with the law and the Court cannot make the decision for the challenged body. Since the purpose of certiorari is to bring up and quash the impugned orders, that having been done there is no necessity for an order of prohibition since there is nolonger any threat present of an illegal action. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**
34. Similarly, with respect to mandamus, it is not for the Court to direct the 1st respondent on the manner in which it is supposed to exercise its discretion as long as the same is exercised fairly.

ORDER

35. It follows that the applicant is entitled to and I hereby issue an order of certiorari bringing to this Court and quashing the Agency Notice dated 09/07/2012 issued to the 2nd Respondent on behalf of the 1st Respondent by the Senior Assistant Commissioner.
36. The 1st respondent will bear the costs of these proceedings.

Dated at Nairobi this 2nd day of August 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Nyagah for the 1st respondent and Mr Munene for Mr Mbaabu for the applicant.