SDV TRANSAMI KENYA LIMITED.....APPLICANT

VERSUS

THE COMMISSIONER OF CUSTOMSSERVICES.....RESPONDENT

AND

ENERGY INVESTMENTS LIMITED.....INTERESTED PARTY

JUDGMENT

The application dated 27th April 2011 was brought pursuant to Order 53 rule 3 of the Civil Procedure Rules. The applicant seeks the following orders:-

1. An order of Certiorari to remove into the High Court for purposes of it being quashed the decision and order of the Commissioner of customs Services dated 1st April 2011 and consequently the demand dated 30th December 2010 in so far as it is made against and relates to the Applicant.

2. An Order of Prohibition to prohibit the Commissioner of Customs Services from demanding the tax claimed in her decision dated 1st April 2011 and consequently the demand dated 30th December 2010 in so far as it is made against and relates to the Applicant.

3. An order that the Respondent do pay the cost of the proceedings.

The grounds on which such relief is sought are:

(a) The Respondent issued a decision to the applicant on 30th December 2010 wherein she sought to recover tax for the sum of Kshs.123,968,690.94. The Applicant lodged an application on 4th January 2011 with the Respondent to review her decision dated 30th December 2010 in accordance with s.229 (1) and s.229(2) of the East African Community Customs management Act (hereinafter referred to as "the Act").

(b) It is mandatory requirement under s.229(4) for the Respondent to communicate her decision in respect of an application to review brought under sections 229(1) and (2) within a period of 30 days.

(c) Section 229(5) clearly states that where the Respondent fails to communicate her decision within the stated period, then the Respondent will be deemed to have allowed the Application for review.

(d) The Respondent failed to communicate her decision in respect of the Applicant's Application for review within the 30 day time period stipulated in the Act and therefore by virtue of the clear provisions of s.229(5) of the Act is deemed to have allowed the Application for review.

(e) The Respondent has no jurisdiction to claim the tax, penalties and interest claimed in her

decision dated 1st April 2011 as she is deemed to have allowed the Applicant's application for review in which the Applicant had stated that it was not liable for the payment of the tax.

(f) Alternatively and without prejudice to (e) above the Respondent is acting unreasonably and in excess of her jurisdiction by demanding the tax, penalties and interest in her decision dated 1st April 2011 and is also acting in excess of her jurisdiction in threatening to institute recovery measures.

(g) Alternatively and without prejudice to paragraphs (a) to (f) above, the Respondent is acting inconsistently and in breach of the legitimate expectation created by the post clearance audit report issued by her pursuant to sections 235 and 236 of the Act in which she verified that the tariff classification and the computation of duty was correctly done.

(h) Alternatively and without prejudice to paragraphs (a) to (g) above, the respondent has no jurisdiction to demand or alternatively is acting in excess of her jurisdiction in demanding tax which arises from a demand made by the Commissioner for Investigations and Enforcement who has no jurisdiction under the Act to enforce the provisions of the Act, make a demand in his own name for payment of tax or carry out a post clearance audit or any other investigation under the Act.

(i) Alternatively and without prejudice to paragraphs (a) to (k) above, the applicant also lodged an earlier application for review pursuant to the provisions of s.229(1) and s.229(2) on 2nd June 2010. The Commissioner failed to communicate her decision within the thirty day period prescribed by s.229(4() of the Act is therefore deemed to have allowed the Application. Having allowed the Application, the Respondent has no jurisdiction to raise a subsequent demand or alternatively is acting in excess of her jurisdiction in raising the same.

(j) Alternatively and without prejudice to paragraphs (a) to (k) above, the Respondent is acting unreasonably and without any consistency in first demanding the tax from the Applicant, then the owner of the goods, then both the owner of the goods as well as the Applicant then finally interpreting a contract between the Applicant and the owner of the goods to which the Respondent was not a party and absolving the owner of the goods from liability in contravention of the clear provisions of s.147 of the Act.

(k) The Respondent acted in excess of her jurisdiction in concluding that the Applicant was negligent, which is a question of fact and absolving the owner of the goods of liability in contravention of the Act which supersedes the contract.

(l) The Respondent acted unreasonably in pursuing the applicant for tax when the owner of the goods was a disclosed principal known to the Applicant. The payment of tax had been made directly by the owner of the goods in accordance with a directive issued by the Respondent and the Respondent had even conducted a post clearance audit in the absence of the Applicant and communicated the report directly to the owner of the goods.

The applicant is an authorized customs agent pursuant to the provisions of sections 147 and 148 of East African Community and Management Act 2004. The respondent is an employee of the Kenya Revenue Authority established under Cap 469 Laws of Kenya and is appointed as such in accordance with section 13(2) of Cap 469 and section 5(1) of the East African Community Customs Management Act. Under section 5(1) of the Kenya Revenue Act, the authority is an agency of Government of Kenya for the collection and receipt of all revenue. Under section 5(2) of the said Act, the Authority is required to administer and enforce all provisions of the written laws set out in part I and II of the first schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. Under Part I of the first schedule to the Kenya Revenue Authority Act Cap 469 one of the laws the Kenya Revenue Authority enforces is the East African Community Customs Management Act 2004.

The Interested Party won a tender and was contracted by the Kenya Power and Lighting Company to

supply aluminium conductors by an agreement dated 12th November 2008. It is contended that the Interested Party entered into an agreement dated 10th February 2009 with applicant to provide clearing, forwarding and handling services on its behalf. Before entering into an agreement it is alleged the Interested Party made extensive inquiries locally as well as with SDV PLC International Freight Forwarding Company and the inquiries established that the applicant was a reputable clearing agent. It is also contended by the Interested Party that after making inquiries into Kenya Revenue Authority it established that the Applicant enjoyed authorized economic operators status as KRA's duly appointed customs agent.

The Interested Party engaged the applicant to deal with the logistics and clearing of the entire consignment to be delivered to Kenya Power and Lighting Company, which it was importing. It was in line with duties that the applicant opened, import declaration forms and advised the Interested Party on the import duty payable. The applicant cleared various goods belonging to Interested Party and paid certain import duties which it declared was payable in accordance with the correct tariffs. Later the respondent carried out an investigation which disclosed that the applicant declared the wrong tariff, the result of which is that more taxes was said to be due and payable to Kenya Revenue Authority.

By a letter dated 6th May 2010 addressed to the applicant and copied to the Interested Party, the respondent stated that the aluminium conductors were classified under tariff 7614 and not 7605 as done by the applicant. The respondent called upon the applicant to pay the sum of Kshs.103,419,275/48 being the under-declared taxes. By a letter dated 21st May 2010 addressed to the applicant and copied to the Interested Party, the Commissioner of Investigations And Enforcement stated that the finding/decision agrees with item description under the correct prevailing rates of taxes were applied on import declaration contained in the audit report of 19th January 2010. The respondent indicated that the demand in the letter of 6th May 2010 still stood.

By a letter dated 16th November 2010, the Commissioner of Customs Services Department demanded tax in the sum of Kshs. 103,419,275/48 from the Interested Party. On 4th January 2011, the *exparte* applicant lodged an application with the respondent requesting that the demand dated 30th December 2010 be reviewed. It is contended the application for review was made pursuant to the provisions of section 229(1) and 229(2) of East African Custom Management Act. It is the position of the applicant that it did not receive any decision from the respondent within the time frame stipulated in section 229(4) of the said Act. On 1st April 2011, the applicant received a demand for payment of tax of Kshs.123,968,690.94. It is contended that the demand was made against applicant only and not against Interested Party.

Mrs. Malik learned counsel for the applicant submitted that it is mandatory under section 229(4) for the respondent to communicate her decision in respect of an application brought under s.229(1) and (2) within a period of 30 days. She contended that section 229(5) clearly states that where the respondent fails to communicate a decision within the stated period, then the respondent will be deemed to have allowed the application for review. The learned counsel submitted that the respondent failed to communicate her decision in respect of the applicant's application for review within the 30 days period as stipulated in the Act. And in the absence of such a decision, the respondent has no jurisdiction to claim the tax penalties and interests claimed in her decision dated 1st February 2011. **Mrs. Malik** also submitted that the respondent is acting unreasonably and in excess of her jurisdiction by demanding the tax, penalties and interests in her decision dated 1st April 2011 and also acting in excess of her jurisdiction in threatening to institute recovery measures.

The learned counsel also submitted that the respondent is acting inconsistently and in breach of the legitimate expectation created by the post clearance audit report issued by her pursuant to ss.235 and 236 of the Act in which she verified the tariff classifications and computation of the Duty was correctly done. It was also submitted by **Mrs. Malik** that the applicant also lodged an earlier application for review on 2nd June 2010. The Commissioner failed to communicate her decision within the 30 days period. Lastly it was submitted by **Mrs. Malik** that the respondent acted unreasonably in pursuing the applicant

for taxes when the owner of the goods was a disclosed principal known to the respondent. Consequently she urged me to allow the application with costs against the respondent and the Interested Party.

Ms Odundo learned counsel for the respondent submitted that the commissioner of Investigations and Enforcement carried out an investigation and found that the applicant who is an agent used the wrong tariffs to clear the goods of the Interested Party. The respondent has powers to carry out investigations into any matter in order to establish whether correct taxes and revenue were paid. After investigation it was established the correct taxes which was not paid was in excess of Kshs.103 million. It was contended that the final decision was rendered on 17th August 2010. **Ms Odundo** also submitted that under section 147 and 148, the law allows the Commissioner to demand taxes either from agent or principal. In this case there was a contract between the agent and the principal and the agent was found to have been negligent. It was submitted that through a letter dated 13th January 2011, the applicant admitted to have used the wrong tariff. Consequently he acted against the law.

Mr. Kimani Kiragu learned counsel for the Interested Party submitted that this court will have to define whether the demand of 1st April 2011 was a request for review pursuant to section 229(1). He contended that there was a previous application under the same provision made on 2nd June 2010, which was rejected by the respondent on 17th October 2010.

The other issue to be determined is whether the applicant was entitled to review its application by its letter of 4th January 2011 thus the sending of multiple demands for taxes create a fresh right of appeal. **Mr. Kimani** invited me to consider the implications of section 147 of the Act as to whether an agent is deemed to be owner for purposes of section 147 and 148. **Mr. Kimani** submitted that if the applicant is absolved from liability then the Interested Party should also be absolved from liability.

I have considered the application and all the documents and arguments filed on behalf of the parties herein. The issues for my determination are:

(1) Whether the respondent has breached section 229 of the East African Community Customs Management Act 2004 as alleged by the applicant.

(2) Whether the respondent has acted unreasonably and in excess of its jurisdiction in demanding for taxes through letters dated 16th November 2010 and 1at April 2011 and whether the same has been done in accordance with section 135(1) and (2) of EACCMA.

(3) Whether the respondent violated the legal principle of legitimate expectation and whether it has acted unreasonably and without consistency in demanding for payment from both the applicant and the Interested Party under section 147 and 148 of EACCMA.

It is clear that Kenya Revenue Authority is duty bound by law to investigate all claims and information received from any source to the effect that any party has evaded the lawful payment of taxes. It is pursuant to the said mandate that the Commissioner of Investigations and Enforcement carried out investigations to establish whether the applicant had used the correct tariff in clearing aluminum conductors/cables belonging to the Interested Party. After the investigations, it was discovered and/or established that the applicant had used a wrong tariff classification to clear goods belonging to its client, the Interested Party herein. Through a letter dated 6th May 2010, the respondent called upon the applicant to pay the short levy taxes that had accrued. The letter states as follows:

"The Managing Director,

SDV Transami (K) Ltd

P. O. Box 46586-00100

NAIROBI

ENERGY INVESTMENT LIMITED – P051215680F

We have reviewed the above company's customs entries processed by your company and we are convinced that the imported items are finished products (cables) correctly classified under HS heading 7614 and not 7605.

This tariff heading attracts import duty at a rate of 10%. You are hereby called upon to pay the Commissioner Customs Services the accruing taxes."

By a letter dated 2nd June 2010, the applicant objected to the demand by the Commissioner of Investigations and Enforcement and asked the respondent to review the same. The respondent through a letter dated 30th June 2010 informed the applicant that she would review the matter and requested for more time to resolve the matter as it required collection of the samples of the goods that were being imported by the Interested Party herein. The respondent through a letter dated 27th July 2010 requested the applicant to provide documents that would assist in determining the correct tariffs applicable to the goods. The applicant forwarded the documents in its letter dated 11th August 2010.

The respondent's Valuation Tariff section reviewed the matter further and still arrived at the same conclusion as that of the Commissioner of Investigations and Enforcement which was done that the applicant had been using a wrong tariff to clear the Interested Party's goods. The ruling was based on samples collected from various importers and invoices provided. The decision was then communicated to the applicant through a letter dated 17th August 2010. Subsequently the applicant by a letter dated 16th September 2010 addressed to the Interested Party acknowledged that a wrong tariff had been used to clear their goods and asked them to pay the short levied taxes. The letter states as hereunder:

"Managing Director,

Energy Investments Ltd,

Sharp Centre, Wambui road,

P. O.B ox 16860-Mobil Plaza

MUTHAIGA.

Dear Sir,

RE: KENYA REVENUE AUTHORITY DEMAND ON YOUR VARIOUS IMPORT ENTRIES OF STRANDED BARE ALUMINIUM CABLES/CONDUCTORS/WIRES

Kenya Revenue Authority letter HQ/VAL/TARI/1 of 17th august, 2010 confirmed that the correct tariff of stranded bare aluminum cables/conductors/wires is 7616.90.00 and correct rate of import duty is 10%. The demand which followed Kenya Revenue Authority audit is payable as follows:-

1) Demand under Section 135(1) of the Act Kshs.103,419,280.00

2) Since you did not pay within 30 days, the penalty under 135(2) at 5% is Kshs.5,170,965.

3) Penalty at 2% from June to September, 2010 under Section 135(2) of the Act is Kshs.8,947,837.00

4) Total payable on or before 30th September, 2010 is Kshs.117538,080.00

Section 236 of the East African Community Customs management Act empowers the Commissioner to verify imported documents after clearance from Customs. Any short collection

detected is payable by the importer under section 135 of the said Act. The Commission may at any time now impose Agency Notice on you under section 131 or Distress under section 130 of the said Act without any further notice.

Please make payment on or before 30th September, 2010. If the amount is not paid as per (4 above there will be additional 2% per month or part thereof."

In the said letter;

(1) The applicant acknowledged and confirmed the correct tariff is as stated by the respondent.

(2) It also acknowledged that as a result of the use of the wrong tariff a sum of Kshs.103,419,280.00 is due and payable.

(3) Under section 135(2) the sum is payable within 30 days otherwise it will attract penalties and interests.

(4) That under section 236 of the East African Community Customs Management Act, the respondent has powers to verify imported goods and documents after clearance from customs. Any short collected detected is payable to the importer.

(5) That the respondent was empowered any time to impose Agency Notice under section 131 or distress under section130 of the said act without any further notice.

(6) It requested the Interested Party to make payment on or before 30th September 2010.

Again on 16th November 2010 the respondent issued a demand letter to the Interested Party demanding payment of the short levied taxes in accordance with section 135(1) of the East African Community Custom Management Act. The Interested party responded through a letter dated 24th November 2010 asking the respondent to pursue the payment of the short levied taxes from the applicant in accordance with section 147 of the East African Community Customs Management Act.

On 16th December 2010 the respondent informed the Interested Party that they were the owners of the goods and that they were jointly liable together with their agent for the short levied taxes as provided under section 147 as read together with s.148 which allows both the principals and the agent to be liable for such taxes. In a letter dated 30th December 2010 addressed to the applicant and copied to the Interested Party, the respondent informed both parties that the short levied taxes were still due and owing and called upon them to pay taxes which continued to accrued and stood at Kshs.123,968.690.94.

The applicant through letters dated 4th and 13th January 2011 were still on the view that the taxes be demanded from the interested party who were importers of the goods. The respondent having received the applicant's letter dated 4th January 2011 held a meeting with the applicant's representative and it was agreed that the respondent be allowed more time to review the same. That position was confirmed by the respondent's letter dated 10th February 2011. The respondent having considered the matter further vide the letter dated 1st April 2011 made a final demand of short levied taxes of Kshs.123,968.690.94 from applicant.

The question therefore is whether the decision and/or demand of 1st April 2011 and the earlier one of 30th December 2010 was a request for a review pursuant to section 229 of the East African Community Customs Management Act. It is clear that on 6th May 2010 the respondent informed the applicant that it had reviewed customs entries process and that the correct tariff were not used in assessing the correct revenue payable in respect of goods it cleared on behalf of the Interested Party. The respondent made a demand calling upon the applicant to pay the commissioner of Customs Services the accruing taxes.

The applicant was aggrieved by the said decision and objected through a letter dated 2nd June 2010 and asked for a review of the said demand. The respondent accepted to review the matter and requested for more time to resolve the issues as it required collection of samples of the goods that were cleared on behalf of the Interested Party. After exchange of several letters, the respondent made a ruling on 17th August 2010which decision as communicated to the applicant. In receipt of the decision and the demand from the respondent, the applicant in a letter dated 17th September 2010, addressed to the interested party acknowledged and accepted that a wrong tariff had been used to clear the goods of the Interested party and asked the same company to pay the short levied taxes. The respondent also addressed a letter dated 16th November 2010 informing them that the department had reviewed the tariff declared for aluminum conductors and that it was found that the tariff is at variance with the declared tariff code and demanded payment to the Commissioner of Customs Services a sum of. Kshs.103,419.275.48.

In a letter dated 24th November, 2010 the Interested Party denied liability and directed the respondent's claim to the applicant who was their clearing agent. In a letter dated 30th December 2010 addressed to the applicant and Interested Party the respondent directed them to make immediate settlement of the sum of Kshs.123,968.690.94.

It is clear that from the above exchange of correspondences that the decision as to the amount and the correct tariff was made on 17th August 2010. Anything after that time, revolved around the person or entity liable or responsible for the payment. The dispute was not whether the amount was due and payable but who was responsible to Kenya Revenue Authority. The issues that arose after 17/8/2010 was a dispute and/or disagreement between the importer and the agent. Nobody was accusing or complaining that actually and indeed the amount is not payable. The applicant agreed and acknowledged a wrong tariff was used resulting in underpayment of taxes. It was a question of a dispute between the importer and the agent. It had nothing to do with the respondent. What happened after 17th August 2010 was a contest between the applicant and the Interested Party in so far as their internal disagreements as to the liability which had accrued in respect of this matter.

Ms Malik learned counsel for the applicant submitted that the provisions of sections 229(1) and (4) were complied with by the respondent. Section 229(1) states;

"A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission."

It is important to note that section 229(1) deals with decision or omission of the Commission on matters relating to customs. Customs means the customs department of Kenya Revenue Authority. The decision or omission must be prejudicial to the interests and rights of a particular individual. It means that a party is affected by a detrimental decision or omission made by the Commissioner or any of his agents.

Under section 229(3) the Commissioner may accept an application made outside the mandatory 30 days on reasonable and sufficient grounds for excusing the delay.

Section 229(4;

"The Commission shall within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision."

It is contended by the applicant that the respondent in a letter dated 30/12/2010 made a demand for payment against the applicant and interested party. The applicant allegedly lodged an application with the respondent requesting that she review her demand dated 30/12/2010. The application or review was made pursuant to the provisions of section 229(1) and (2) of East African Community Customs

Management Act.

Ms Malik submitted that the applicant did not receive any decision from the respondent within the time frame stipulated in section 229(4) of the Act. No doubt the applicant made an application for review of a demand dated 30/12/2010. The application for review made on 4/01/2011 was not seeking a review of a decision or omission. It was seeking a review of a demand for payment made by the respondent. The last paragraph the letter states;

"In accordance with the provisions of section 229(1) of the EACCMA and in the light of the above explanations especially <u>your review of the decision which had been conveyed</u> to the importer vide the Commissioner of Customs Services letter dated 19/01/2010 in which the importer had based his defence, we are applying <u>to you to review your decision of 30/12/2010 to demand the short levy from SDV Transami Kenya Ltd</u>. Following field audit – Audit queries <u>are payable by the importer, an agent is only a medium of transmission</u>."

In my understanding what the applicant was seeking from the respondent was to seek payments from the Interested party who was the importer of the goods. The applicant was asking for a review of the demand made in the letter dated 30/12/2010. The said letter demanded payment of extra taxes from both the importer and the agent.

The question is whether the respondent made a decision which was capable of being challenged under section 229(1) (2) (3) and (4) of the Act. And whether the respondent is entitled to proceed as it did in the letter dated 30/12/2010. In my understanding where any obligation has been incurred for the payment of any duty, such obligation shall be deemed to be an obligation to pay all duties which are or may become payable or recoverable under the provisions of the East African Community Customs Management Act.

Under section 146(1) where the owner of any goods is required or authorized to perform any act then such act unless the contrary appears may be performed on his or her behalf by an authorized agent. The agent recognized be an employee of a customs agent duty licensed as such in accordance with the law.

Section 147 states as follows:

"A duly authorized agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.

Section 148 states;

An owner of any goods who authorizes an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorized agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:

Provided that-

(i) An owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorized agent unless the owner actually consented to the commission of the offence;

(ii) Nothing herein contained shall relieve the duly authorized agent from any liability to prosecution in respect of any such offence.

My understanding of sections 147 and 148 is that the respondent is empowered to hold the agent liable for the payment of any Duty to which the goods are liable and for the performance of all acts in respect of the

goods which the owner is required to perform. It is also clear that an owner of any goods who authorizes an agent to act for him shall be liable for the acts and declaration of such duty by authorized agent. Consequently, the respondent was perfectly right in making a demand against the applicant and interested party as it did in the letter dated 30th December 2010.

The applicant's case is that under section 236 of the East African Community Customs management Act, the respondent is empowered to carry out field audit. It is the case of applicant that any short collection/levy discovered is payable as prescribed under section 135 of the said Act. It is also the case of the applicant that taxes due on import are payable by the importer. The agent is only responsible for declarations. Any fine arising from incorrect declaration by the agent where detailed description of the goods and correct values are given by the importer is met by the agent.

On the other hand it is the case of the Interested Party that the agent is responsible for tariff declaration and that they cannot understand how the importer can be liable for any legally due short levy when they relied entirely on the agent for the wrong tariff classification.

In my view, what the applicant was seeking in the letter dated 4th January 2011 was to apportion liability between the importer and itself. I do not think the respondent has jurisdiction to determine who should shoulder all responsibilities or the greatest liability. It is my decision that the letter dated 4th January was not a review within the meaning of section 229 as alleged by the applicant. It cannot be said that the respondent made a decision or an omission relating to custom matters by demanding short levied taxes from the agent and the importer jointly and severally. The respondent had statutory duty, authority, jurisdiction and/or powers to make such a demand under section 147 and 148 of the Act.

It is the position of the applicant that its applications for appeal through letters dated 2nd June 2010 and 4th February 2011 were deemed allowed by virtue of the clear provision of section 229 of the Act. It is clear various correspondence were exchanged between the applicant, the respondent and the Interested Party in respect of the amount payable and the persons responsible for the said payment. The respondent demonstrated that it responded to the applicant's letter dated 2nd June 2010 and the letter dated 30th June 2010 where it requested for more information regarding the tariff classification.

The applicant supplied the information requested for by the letter dated 11th August 2010. In a letter dated 17th August 2010 the respondent concluded that the tariff classification given by the applicant was incorrect. This was within the time frame provided by section 229(5) of the East African Community Customs management Act. It is therefore my view that the decision envisaged under section 229(1) was made on 17th August 2010. The demand letter dated 30th December 2010 was a follow up to the previous demand made upon the applicant and the Interested Party. Once the respondent had communicated in August 2010 that tax was due, it was incumbent upon the applicant to lodge an appeal within the stipulated or specified period under section 229. That was not done. Therefore it was not open or available to the applicant to lodge an appeal 5 months after the offensive decision was made. It was not within the jurisdiction and powers of the respondent to entertain an appeal outside the time allowed. What applicant was raising in all its letters after 17th August 2010 is that it did not owe the respondent any tax in respect of the goods imported and cleared in the names of the Interested Party. It is therefore my decision that there was no valid appeal lodged by applicant under section 229 and the respondent cannot be condemned for violating the law when there is no basis to do so. It is not within the powers of the respondent to decide who is liable to pay the taxes. The respondent is allowed to make a choice or election in terms of sections 147 and 148 of the Act. There is no evidence to show that in demanding taxes from the applicant and Interested Party, it acted capriciously and in violation of the law. The respondent treated the applicant and Interested Party in a dignified manner by asking them to sort out the payment due between themselves. It is perfectly right for the respondent to proceed against the respondent or the Interested Party in the absence of bad faith and illegality in its decision. The respondent did not make a phantom judgment against the applicant in a manner to warrant intervention of this court. a decision cannot be said to have been made in error simply because the respondent demanded taxes due and payable from the agent and importer. The applicant was not condemned unheard. They participated in the decision from the start to the end.

It is my position certiorari cannot issue to quash the letters dated 30th December 2010 and 1st April 2011 and there is no bad faith or ulterior motives or unreasonableness that was committed by the respondent in addressing the two letters to the applicant and the Interested Party. An order of prohibition cannot issue to prohibit the Commissioner of Customs from demanding taxes which is acknowledged to be outstanding and due by the applicant and the Interested party. An order of prohibition can only issue to prevent a contemplated decision and not one which has already been made. In this case the decision as to the amount payable was made on 17th August 2010. It is clear in my mind prohibition cannot issue against a decision which has already been made, it can only prevent a making of a contemplated decision.

As was rightly pointed out in the **Kenya National Examination Council Civil appeal No.226 of 1999** an order of prohibition is powerless against a decision which has already been made before such an order is granted. It means that an order of prohibition operates as to the future to prevent unlawful act on the part of public bodies or authorities. It is not the case of the applicant that the respondent committed unlawful act or exceeded its authority when it made a demand for taxes which is acknowledged to be owing and due. In any case there is no evidence of unreasonableness, bad faith, malice or illegality that was committed by the respondent in demanding short levied taxes against the respondent and the Interested Party. It is not the business of this court to apportion liability between the applicant and the Interested Party.

It is also not the business of this court to review the merits of the decision by the respondent. This court is concerned with the decision making process. There is no single evidence to show that the process followed by the respondent is contrary to the principle of legitimate expectation and natural justice. Before the decision was made, the respondent involved the applicant and the Interested Party. When the respondent discovered that the applicant had used the wrong tariff to clear the goods of Interested Party, the decision was communicated so as to reach a proper decision. In a letter dated 30th June 2010 the respondent informed the applicant that the matter involves giving a tariff ruling which in effect will help in determining whether the goods in question are correctly classifiable under the heading either 7605 or 7614. The respondent also informed the applicant that it may end up collecting samples from the Interested Party for laboratory analysis.

The Interested Party informed the respondent that no samples for laboratory analysis were available since the goods in question are out of stock. It was then that the respondent requested production of copies of import entries and relevant import invoices for the consignment under query. In a letter dated 11th August 2010 the applicant forwarded two sets of entries, invoices and packing list of importations from the two importers namely the Interested Party and M/S Rural Electrification Authority. It is therefore clear that the respondent did not make a decision without giving the applicant and the Interested Party an opportunity to present their position and views. The applicant and the Interested Party participated in the decision making process and gave valuable inputs and their side of the story before the final decision was made.

In conclusion it is my view that the respondent demanded the short levied taxes legally and in accordance with section 135(1) of the East African Community Customs Management Act. It is a statutory duty bestowed upon the respondent which must be exercised without interference in the absence of any violation, omission or acts committed by the respondent. The application has no merits and it is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 28th day of March 2012.

M. WARSAME

JUDGE