**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 221 of 2010**

**IN THE MATTER OF: AN APPLICATION BY TETRA PAK LIMITED FOR ORDERS OF CERTIORI AND PROHIBITION**

**AND**

**IN THE MATTER OF: A DECISION DATED 13TH APRIL 2010 AND CONSEQUENTLY THE DEMAND DATED 13TH APRIL 2010 AND CONSEQUENTLY THE DEMAND DATED 7TH JUNE 2010 BY THE COMMISSIONER OF CUSTOMS SERVICES**

**BETWEEN**

**REPUBLIC ……..APPLICANT**

**VERSUS**

**THE COMMMISSIONER OF CUSTOM SERVICES…..... RESPONDENT**

**EXPARTE**

**TETRA PAK LIMITED**

**JUDGMENT**

The Exparte Applicant Tetra Pak Ltd ***(herein after referred to as the Applicant)*** is a limited liability company which carries on the business of manufacturing packaging material.

The Respondent is the Commissioner of Custom Services who is an employee of the Kenya Revenue Authority (KRA), an agency of the Government of Kenya established under Section 5(1) of the Kenya Revenue Authority Act Cap 469 Laws of Kenya (K.R.A Act) with the mandate of collecting and receiving all Government revenue in the form of taxes.

Under Section 5(2) of the Kenya Revenue Authority Act, KRA is mandated to administer and enforce all provisions of the written laws set out in Part I and II of the first schedule to the KRA Act for the purposes of assessing, collecting and accounting for all revenues in accordance with the laws specified in the schedule. Under Part 1 of the first schedule, one of the laws KRA enforces is the East African Community Customs Management Act of 2004 ***(herein after referred to as the Act).*** The Respondent is under the K.R.A Act and the Act responsible for the management and control of customs, including the collection of, and accounting for customs revenue in the partner states to the Act.

Pursuant to leave granted on 17th June 2011, the Applicant filed a Notice of Motion dated 7th July 2010 in which he sought the following orders:

**a) An order of certiorari to remove into the High court for purposes of being quashed the decision and order of the Commissioner of Customs Services 13th April 2010 (sic) and consequently the demand dated 7th June 2010;**

**b) An order of prohibition to prohibit the Commissioner of customs services from demanding the tax claimed in her decision dated 13th April 2010 and consequently the tax penalty and interest claimed in her decision dated 13th April 2010 and consequently the tax penalty and interest claimed in the demand dated 7th June 2010.**

**c) An order that the Respondent do pay the cost of the proceedings.**

The application is supported by the Statutory Statement dated 16th June 2010, the Verifying Affidavit sworn on 16th June 2010 and a further Affidavit sworn on 25th October 2010 by Ann Wachira, the Applicant's Finance Director.

It is based on grounds that:

**a) Pursuant to a self-assessment submitted by the Applicant, the Respondent issued a decision to the Applicant on 15th December 2009 wherein she sought to recover tax for the sum of Kshs. 60,468,327;**

**b) The Applicant lodged an application with the Respondent to review her decision dated 15th December 2009 in accordance with Sections 229(1) and 229(2) of the East African Community Customs Management Act (*hereinafter referred to as 'the Act').***

**c) It is a mandatory requirement under section 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.**

**d) 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 applicant for review.**

**e) 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 section 229(5) is deemed to have allowed the application for review.**

**f) The Respondent has no jurisdiction to claim the tax claimed in her decision dated 13th April 2010 and consequently the tax, interest and penalties claimed in her demand dated 7th June 2010 as she is deemed to have allowed the applicant's application for review and the only tax payable is the amount stated in Applicant's application for review.**

**g) Alternatively and without prejudice to (f) above the Respondent is acting unreasonably and in excess of her jurisdiction in threatening to institute recovery measures.**

**h) The Applicant has always been ready and willing to pay the amount of Kshs 5,869,606 stated in its application for review which is deemed to have been allowed by virtue of the provisions of section 229 (5) of the Act**

The application is opposed through a replying affidavit sworn on 7th October 2010 by Kennedy Ruibi, a Revenue Officer in the Customs Services Department of the Kenya Revenue Authority.

The genesis of the matter before the court is a self-assessment in respect of import duty carried out by the Applicant and submitted to the Respondent by way of a letter dated 8th December 2009. This followed a custom's audit on the records and import procedures of the Applicant at the end of which the Respondent made an assessment of duties payable by the Applicant in respect of royalty payments made to AB Tetra Pak of Sweden.

On 15th December 2009, the Respondent vide a letter of even date informed the Applicant that the Commissioner of Customs (Commissioner) did not agree with the Applicant's self-assessment and demanded a total payment of tax in the sum of Kshs.60,468,327.00. On 14th January 2010, the Applicant pursuant to the provisions of Section 229 of the East African Community Customs Management Act (the Act) lodged an application for review of the Respondent's decision. The Applicant in its application for review appealed to the Respondent to reconsider the tax demanded in line with the relevant provisions of the Operation Agreement executed between the parties on royalty payments and the General Agreement on Tariffs and Trade (GATT) Valuation Rules. The Applicant submitted that the total amount of tax due and payable from it was Ksh.5,869,606 and not what was being demanded by the Respondent.

On 1st May 2010, the Applicant wrote to the Respondent expressing its view that as no communication had been received 30 days after lodging its application for review, the Respondent was deemed to have made a decision allowing the application under Section 229(5) of the Act. The Applicant also intimated that it was ready to pay the amount admitted in its application for review. Subsequently, when the Applicant's Notice of Motion was pending hearing as can be seen from the court record, the undisputed amount of Kshs.5,869,606.00 was paid by the Applicant by consent of the parties.

On 28th May 2010, a Mr Mwaniki from Price Waterhousecoopers, the Applicant's tax consultant, visited the offices of the Respondent for purposes of obtaining documentation to facilitate payment of the undisputed tax. Mr Mwaniki was advised to return at a later date to pick the document needed for payment of duty. He returned on 2nd June 2010 and was given a letter dated 13th April 2010 addressed to the Managing Director of the Applicant. The letter informed the Applicant that the Commissioner of Customs Services had found no merit in its appeal and asked the Applicant to pay full taxes demanded without any further delay. This letter also referred to another letter addressed to the Applicant dated 10th February 2010.

Upon receipt of the letter dated 13th April 2010, the Applicant wrote to the Respondent asking for a copy of the letter dated 10th February 2010. Instead of complying with the Applicant's request, the Respondent issued the Applicant with another letter dated 7th June 2010 in which the Commissioner demanded payment of Kshs.69,528,579.00, which amount included penalties and interest, in default of which she threatened to institute recovery measures against the Applicant.

The Applicant's case is that the Respondent has no basis in law to demand payment of the sum of Kshs.69,528,579.00 because the Commissioner failed to communicate her decision to disallow the application for review within the statutory period prescribed under Section 229(4) of the Act.

The Respondent's case is that the self-assessment done by the Applicant was erroneous in that it attributed 10% of royalties paid to trademarks, as opposed to 100% which was actually paid in relation to trademarks and patents; that when computed correctly at 100%, the principal taxes payable amounted to Kshs.59,974,363.00 as opposed to the figure assessed by the Applicant.

The Respondent did not deny having received the application for review dated 14th January 2010 but took issue with the Applicant's interpretation of Section 229(5) of the Act. The Respondent advanced the position that if the Commissioner failed to communicate her decision on the application for review within the 30 days allowed by the law, she was deemed to have accepted to reconsider or review the challenged decision but not to accept the application for review

In the Replying affidavit filed on behalf of the Respondent, the deponent averred that since the

Commissioner had written to the Applicant on 18th January 2010 reiterating the demand of Ksh.59,974,363.00 and this letter was delivered to the Applicant on 19th January 2010, the issue of non-communication of the Commissioner's decision within 30 days did not arise. In this letter, the Respondent acknowledged receipt of Kshs.493,964.00 on account of taxes assessed earlier, but maintained that the amount of Ksh.59,974,363.00 was still due and owing, and that the amount had since attracted a 5% penalty and 2% interest for one month, and now stood at Kshs.64,232,543.00. The deponent also stated that in any event, the Commissioner did eventually communicate the outcome of the application for review through the letter dated 13th April 2010.

The Respondent maintains that it acted within the law in demanding payment of the taxes, which at 7th June 2010 stood at Kshs.69,528,579.00. It is the Respondent's contention that if the Applicant was aggrieved by the decision of the Respondent, it ought to have filed an appeal to the Tax Appeals Tribunal which is properly established. The Respondent was of the view that the Applicant's notice of motion amounted to an abuse of the court process and that it ought to be dismissed with costs.

To further advance their respective positions, the parties filed written submissions which were highlighted by their advocates on record on 10th July 2012.

After considering the pleadings herein, the written and oral submissions made by M/s Malik for the Applicant and Mr Ontweka for the Respondent, I find that the main issues which emerge for the court's determination are threefold namely;

1) Whether the Respondent rendered a valid decision to the Applicant's application for review under the provisions of Section 229 of the Act.

2) Whether the Respondent's decision to demand payment of taxes from the Applicant in letters dated 13th April 2010 and 7th June 2010 was made without jurisdiction or in breach of the provisions of Section 229 of the Act.

3) Whether the Applicant is entitled to the relief's sought?

The first issue is the main bone of contention in this case. On this issue, Ms. Malik for the Applicant submitted that upon receipt of the demand for payment of taxes in letter dated 15th December 2009, the Applicant lodged an application for review in accordance with the provisions of Section 229(1) of the Act. Ms. Malik submitted further that this section requires the Commissioner to give a decision in writing on the outcome of the application for review within 30 days, and when this is not done, the application is deemed to have been allowed.

Ms. Malik pointed out that in this case, the Respondent only communicated her decision in June 2010, a full 6 months after the application for review was lodged.

Mr. Ontweka, learned counsel for the Respondent submitted that the letter dated 18th January 2010, which was received by the Applicant on 19th January 2010, contained the Respondent's decision on the application for review lodged by the Applicant, and that the letter dated 13th April 2010, was only written after the Applicant insisted that it had not received any communication from the Respondent regarding the application for review. Counsel further submitted that if the Applicant was aggrieved by the decision contained in the letter dated 18th January 2010, then it ought to have preferred an appeal to the Tax Appeals Tribunal, which is properly constituted. Mr. Ontweka argued that it is only the Tax Appeals Tribunal which would have had jurisdiction to deal with the issue of interpretation of adjustment of royalties.

Counsel further submitted that the Respondent had a statutory mandate to assess and demand taxes due from tax payers which is what the Respondent did in this case. He submitted that if the court allowed the instant application, it would amount to allowing parties to decide what tax they should pay which would

go against Article 210 of the Constitution of Kenya 2010.

In response to the Respondent's submissions, Ms. Malik asserted that the letter dated 18th January 2010 did not amount to a decision within the meaning of Section 229 of the Act noting that it did not make any reference to the application for review.

Having considered the rival submissions made by counsel on record for the parties, I find that it is not disputed that the Respondent made a decision to demand payment of taxes from the Applicant in letter dated 15th December 2009 and that the Applicant lodged an application for review of that decision under Section 229(1) vide letter dated 14th January 2010. What is in dispute is whether the Respondent's decision in respect of the application for review was communicated to the Applicant through letter dated 18th January 2010 as alleged by the Respondent or through letter dated 13th April 2010 as alleged by the Applicant. The Applicant contends that since the Respondent's decision was communicated through letter dated 13th April 2010 which was over two months after the application for review was lodged, the Commissioner was deemed to have allowed its application by operation of the law and no tax was due from it.

The Respondent on the other hand claimed that the tax demanded in letters dated 13th April 2010 and 7th June 2010 was due and payable by the Applicant as the Commissioner had not breached the provisions of Section 229(4) of the Act having communicated her decision on the application for review on 18th January 2010.

I think it is important at this juncture to reproduce verbatim the provisions of Section 229(1) to 229(5) of the Act in their entirety in order to understand their true meaning and import.

Section 229 states as follows;

**1) "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.**

**2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.**

**3) Where the Commissioner is satisfied that, owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).**

**4) The Commissioner 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.**

**5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application".**

In my view, Section 229 of the Act when considered as a whole is so clear and self-explanatory that no two meanings can be attributed to. It can only be interpreted in one way using the ordinary meaning of the words used since they are plain and clear. In my opinion, it simply means that a party who is aggrieved by the decision or omission of the Respondent is allowed under Section 229(1) to make an application for review within 30 days to the Commissioner asking for a review of the decision or omission. The Commissioner can however extend the time given for the lodging of the application for review if good cause is shown for failure to comply with the 30 days' time limit but once the application

is received, Section 229(4) requires that the Commissioner must make and communicate a decision to the affected taxpayer within 30 days. If no decision is made and communicated within 30 days, the Respondent under Section 229(5) is deemed to have made a decision allowing the application for review. It is important to note that the section is couched in mandatory terms.

The Respondent's submission that the effect of failure to comply with Section 229(4) was that the Respondent was under Section 229(5) deemed to have accepted to reconsider or review her decision and not to allow the application for review cannot be sustained.

This is because the provisions of Section 229(5) of the Act do not provide that the Commissioner's failure to communicate her decision within 30 days will accord her an option to consider whether or not to entertain the tax payer's application for review afresh.

This section is emphatic in its pronouncement that the Commissioner will in such circumstances be deemed to have allowed the application for review.

The only provision under Section 229 which gives the Respondent discretion to decide whether or not to reconsider or review her decision is Section 229(3) in the event that an application for review is lodged later than the 30 days allowed under Section 229(1) of the Act.

Turning now to the issue of which correspondence by the Respondent amounted to a decision in respect of the Applicant's application for review, the Respondent maintained that it was the letter dated 18th January 2012 which is in the following terms:

**"18TH January 2010**

**The Managing Director**

**Tetra Pak Limited**

**P.O. Box 783340-00507**

**Nairobi**

**Dear Sir**

**Re: Tetra Pak Ltd. Demand Notice-Adjustment to Transaction Value, Royalties – Ksh.59,974,363**

**We refer to our letter dated 15th December 2009 on the above subject and our subsequent reminder dated 11th January 2010.**

**We acknowledge receipt of Kshs.493,964 via F.147 No.2010 NBI 172951 in respect of audit issues: inland freight, customs value under computation, missing entries, variance in assessments and bunker adjustment.**

**Kindly note that the amount demanded in respect of adjustment to transaction value-royalties has since attracted interest and penalties in accordance with the provisions of Section 135(2) of the East African Community Customs Management Act (EACCMA), 2004.**

**By means of this letter, you are required to pay immediately the following amounts:-**

**Principal taxes Ksh.59,974,363**

**5% penalty (section 135(2),**

**EACCMA, 2004)** **Ksh. 2,998,718**

**2% interest for 1 month**

**(section 135(2)EACCMA, 2004)** **Kshs. 1,259,462**

**Total taxes due** **Kshs.64,232,543**

**Further, note that interest continues to accrue in accordance with the provisions of section 135(2) of the EACCMA, 2004.**

**Yours faithfully,**

**S.L. Mugogo**

**For: Commissioner of Customs Services**

A reading of this letter shows clearly that it has an acknowledgement of the taxes already paid, and a reminder that the disputed amount was still due and that it continued to attract interest. It makes no mention whatsoever of the application for review lodged by the Applicant.

On the other hand, the letter dated 13th April 2010, which was received by PriceWaterhouseCoopers on behalf of the Applicant on 2nd June 2010 refers to the letter of the Applicant dated 14th January 2010. The subject of the letter is the appeal lodged by the Applicant under Section 229 of the Act. It gives an overview of the Commissioner's findings on the application for review and informs the Applicant that its appeal had failed for lack of merit and that the Applicant was required to pay the taxes demanded in full and without further delay.

Having looked at the two letters, I have no doubt in my mind that the letter dated 18th January 2010 did not amount to a decision of the Commissioner under Section 229(4) of the Act. To start with, it did not make any reference to the application for review meaning that it had no connection with it and secondly, it did not contain reasons for the demand of payment of taxes if this demand was to be taken to represent the Commissioner's decision to disallow the application for review. Under Section 229(4) of the Act, the decision of the Commissioner must be in writing and must contain reasons justifying the Commissioner's decision. Thirdly and most importantly, if the letter dated 18th January was meant to be a decision on the application for review, it would not have been necessary for the Respondent to write the subsequent letter dated 10th February 2010. The letter of 10th February 2010 which was attached to the Applicant's further affidavit acknowledged receipt of the application for review and confirmed to the Applicant that the Commissioner was still reviewing its submissions and would communicate later the outcome of the review. The correspondence that followed from the Respondent after letter dated 10th February 2010 was the letter dated 13th of April 2010. It is therefore my finding that this is the letter that contained the decision of the Commissioner under Section 229(4) of the Act and not the letter dated 18th January 2010.

As correctly pointed out by Ms. Malik for the Applicant, this letter was written by the Respondent well after the expiry of the period of 30 days prescribed under Section 229(4) of the Act. The decision was made about two and a half months after the application for review was lodged It is not disputed that the decision was communicated to the Applicant through its tax consultant about six months later. I fully associate myself with the holding by my brother Korir J in ***Republic Versus The Commissioner of Customs Services Exparte Unilever Limited [2012] eKLR (Misc Civil Application No 181 of 2011)***where whiledealing with a similar matter, Korir J held that non-communication of the Respondent's decision within the statutory period of 30 days meant that the Applicant's application for review had been allowed by operation of the law (S229(5)) and that the tax payer did not thereafter owe the taxes that had been demanded by the Respondent.

By making her decision on the Applicant's application slightly over two months after receiving it and in communicating her decision six months later, the Respondent grossly violated the provisions of Section 229(4) of the Act and under Section 229(5), the respondent was in law presumed to have accepted the Applicant's application for review.

It is noted that in this case, the Applicant had requested the Respondent in the application for review to confirm that its total tax liability amounted Ksh.5,869,606. In failing to communicate her decision within the statutory period of 30 days, the Respondent is taken to have confirmed to the Applicant that its total tax liability stood at Kshs. 5,869,606. The Respondent was therefore estopped from demanding any other tax other than the undisputed amount stated in the application for review. It then follows that the Commissioner did not have jurisdiction to demand tax in the sum of Ksh.59,974,363 and the Commissioner's decision in letters dated 13th April and 7th June 2010 was ultra vires the provisions of Section 229 of the Act. That decision was consequently null and void ***ab initio***.

Though I concur with Mr Ontweka that the Respondent is statutorily mandated and has jurisdiction to assess and demand payment of taxes from tax payers, the Respondent has a legal obligation to follow the law in the process of assessing and demanding payment of taxes found due from citizens.

Non-compliance with the statutory procedures set out in the Act taints what would have been an otherwise lawful decision with illegality and procedural impropriety which automatically invites this courts intervention by way of Judicial Review.

Finally, it was also submitted by Mr Ontweka that the Applicant should have utilised the statutory appeal mechanism under Section 230 to Section 231 of the Act by appealing to the Tax Appeals Tribunal instead of commencing these proceedings. It is my view that this submission cannot be sustained since in this case, there was no decision which the Applicant could have appealed against in the Tax Appeals Tribunal. The decision in letter dated 13th April 2010 was ultra vires Section 229(5) of the Act and it was therefore a nullity in law. It amounted to no decision at all. In the circumstances, the alternative remedy of an appeal to the Tax Appeals Tribunal was not available to the Applicant. Since the Respondent had violated statutory provisions in the performance of her duties, the only avenue left for redress for the Applicant was to approach this court for orders of judicial review to correct the errors made by the Respondent and to prevent the Commissioner from implementing an illegal decision.

Before I conclude, I wish to put it on record that I have read and considered the persuasive authority relied upon by Mr Ontweka of SDV **TRANSAMI LTD VS THE COMMISSIONER OF CUSTOM SERVICES AND ANOTHER MISC APPN NO 81 of 2011.** With due respect, I am of the view that the said authority is not applicable to this case since the facts and issues for determination in that case were entirely different from the facts and issues raised in this case. In the SDV TRANSAMI case, the demand for short levied taxes was based on the misclassification of HS Codes on imported goods. One of the main issues for determination in that case was whether some identified communication between the Commissioner for Customs and the Applicant in that case amounted to a decision of the Commissioner and an application for review by the Applicant under Section 229(1) of the Act. This was not among the issues for determination in this case since the parties herein were in agreement about which correspondence constituted theRespondent's decision and which correspondence amounted to an application for review by the Applicant under Section 229(1) of the Act. All the other issues raised in that case bore no relevance to the present case.

In view of the foregoing, and since the court record shows that the Applicant paid the undisputed amount of tax stated in the application for review, I am satisfied that the Applicant has demonstrated that it is deserving of the orders of **Certiorari** and **Prohibition** as sought in Prayers 1 and 2 of the Notice of Motion dated 7th July 2010. The application is consequently allowed in terms of Prayer 1 and 2.

As costs follow the event, the Applicant is awarded costs of the application.

**DATED, DELIVERED** and S**IGNED** this 23rd day of October, 2012

**C.W. GITHUA**

**JUDGE**

***In the presence of***:

Florence – Court Clerk
M/s Malik for Applicant
Mr. Gatumuta holding brief for Mr Ontweka for Respondent