



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 413 OF 2009

REPUBLIC

VERSUS

THE KENYA REVENUE AUTHORITY RESPONDENT

EX PARTE

BEIRSDORF EAST AFRICA LTD APPLICANT

RULING

Beirsdorf East Africa limited, the ex parte applicant, hereinafter referred to as “**the applicant**”, filed an application dated 15th July, 2009 and sought the following orders:

- “1. An order of judicial review by way of certiorari to remove to this court and quash the decision of the Kenya Revenue Authority contained in the letter dated 7th may 2009 requiring the applicant to pay taxes in the sum of Kshs.22,898,505/= allegedly due from the applicant.**
- 2. An order of judicial review by way of prohibition to prohibit the Kenya Revenue Authority, whether acting directly or through any of its agents and/or officers from commencing or instituting any enforcement actions against the applicant in relation to and/or on account of the disputed taxes in the sum of Kshs.22,898,505/=.**
- 3. An order for costs.**

The said orders were sought on the grounds that:

- “1. There is no jurisdiction for the Kenya Revenue Authority to demand payment of the taxes:**
 - a. The Kenya revenue authority has no jurisdiction under the Customs and Excise Act, Chapter 472 of the Laws of Kenya, the Value Added Tax Act Chapter 476 of the Laws of Kenya and the East African Community Customs Management Act, 2004, to demand the payment of taxes on distribution royalties from the applicant.**
 - b. The distribution royalties are not subject to Customs Duty as they are not royalties ‘related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of the sale of the goods being valued’ within the meaning of Rule 9 (i) (c) of the Fourth Schedule to the East African Community Customs Management Act, 2004.**
 - c. The applicant is not obliged to pay customs duty on the distribution royalties under subparagraph (1) (c) to the Note on Interpretation of Rule 9 (1) (c) of the Fourth Schedule to the East African Community Customs Management Act which provides that ‘payments made by the**

buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the Parent state of the imported goods’.

2. The demand contained in the letter dated 7th May 2009 from the Kenya Revenue Authority to the applicant is irrational as it lacks any ostensible logic or comprehensible and adequate justifications.
3. The action by the Kenya Revenue Authority amounts to an unreasonable exercise of power.
 - a. The issuance of the demand contained in the letter dated 7th May 2009 by the Kenya Revenue Authority to the applicant is unreasonable in absence of any enabling powers under the law.
 - b. It was unreasonable for the Kenya Revenue Authority to conduct the audit on the taxes payable by the applicant in October 2008 for the period between 1st January 2004 to 30th September 2008, this being more than 4 years after the royalties has been paid by the applicant.
 - c. No reasonable authority properly directing itself as to the circumstances of the case and the applicable law would have issued the letter of 7th May 2009 to the applicant as the Kenya Revenue Authority did.
4. The applicant had a reasonable legitimate expectation that the Kenya Revenue Authority would not assess taxes payable by the applicant for the period 1st January 2004 to 30th September 2008. The applicant was under the understanding that he had paid all the taxes due for this period.”

The application was supported by a statutory statement which discloses the facts and the grounds for review as well as the reliefs sought. The application was further supported by an affidavit sworn by **Philip Kabiaru**, the Finance and IT Manager of the applicant. Mr. Kabiaru stated that the applicant is a 99.9% owned subsidiary of Beirsdorf AG, hereinafter referred to as **“Beirsdorf”**, a company incorporated in Germany. Beirsdorf is one of the largest manufacturers of consumer products in the world. Some of the products are manufactured by its subsidiary companies incorporated in other countries. The company has registered trade marks and patents on the products it manufactures.

The applicant has licences from its affiliated companies to manufacture the companies’ patented goods in Kenya and distribute the same wherein the companies’ trade marks in East Africa and other countries within the Preferential Trade Area. The applicant is granted licences from over 120 companies affiliate to it, hereinafter referred to as **“the applicant’s affiliated companies”**. The applicant is obliged to pay to the applicant’s affiliated companies licence fees for manufacturing and distributing the products, hereinafter referred to as **“the manufacturing and distribution royalties respectively”**.

By a manufacturing and licensing agreeing dated 20th February, 2006 (the manufacturing agreement) made between the applicant and Biersdorf, the applicant is obliged to pay manufacturing royalties to Biersdorf for manufacturing Biersdorf’s patented consumer products in Kenya. By a Product Licensing Agreement dated 20th February, 2006 (distribution agreement) made between the applicant and Biersdorf the applicant is obliged to pay distribution royalties to Biersdorf for distributing consumer products bearing Biersdorf’s trademarks in Kenya, Uganda, Tanzania and other African territories within the Preferential Trade Area (PTA). The manufacturing and distribution agreements are the main agreements governing the licences the applicant is granted by its affiliated companies.

The manufacturing royalty is paid by the applicant as the percentage of the cost of the locally manufactured products. The basis for calculation of the royalties is the cost of manufacturing the products and the royalties become due and payable to the applicant’s affiliated companies when the products are sold. The distribution royalties are paid by the applicant to Biersdorf based on a percentage of value of

goods sold whether the goods are manufactured in Kenya or imported as finished goods from the applicant's affiliated companies. The distribution royalties are paid to Biersdorf upon the sale of the products.

Mr. Kabiaru further explained that upon paying the manufacturing and distribution royalties to the applicant's affiliated companies, the applicant makes payment for Value Added Tax (VAT) on imported services and withholding tax to the Government of Kenya as required under the various tax laws.

In October 2008, the Post Clearance Audit Division of the Kenya Revenue Authority, a division charged with the duty of making specific enquiries into specific cases notwithstanding the fact that a tax payer has been previously cleared by the Kenya Revenue Authority on payment of taxes, conducted a Customs Post Clearance Audit to assess taxes payable by the applicant. Upon conclusion of the assessment, Kenya Revenue Authority demanded that the applicant pays tax amounting to **Kshs.66,230,577/=** based on, *inter alia*, the adjusted price of products after considering the value of the manufacturing and distribution royalties paid by the applicant. The Post Clearance Audit Division stated that the audit was conducted in accordance with the requirements of **Sections 235 and 236 of the East African Community Customs Management Act, 2004** and the International Auditing Standards. The audit process covered the period between 1st January, 2004 to 30th September, 2008.

The deponent stated that over the said period Kenya Revenue Authority had not raised any questions relating to taxes payable by the applicant. Out of the total demanded sum of Kshs.66,230,577/=, Kshs.11,938,231/= is penalty. The applicant states that it is unfair to claim the tax and unjust to charge penalty in the circumstances. The applicant further contends that the assessment and demand for tax by the respondent is contrary to the law in that:

“(a) The Post Clearance Audit Division did not have power under Sections 235 and 236 of the East African Community Customs Management Act, 2004 to conduct the audit.

(b) The Customs Duty is not payable on goods manufactured in Kenya.

(c) Royalties paid by the applicant to Biersdorf are assessed as taxes required under the Income Tax Act and Value Added Tax Act.

(d) The distribution royalties which the applicant is obliged to pay to its affiliated companies is not payable by the applicant if the goods are not sold this being in accordance with the distribution agreements made with the applicants affiliated companies.

(e) The distribution royalties are based on selling prices which prices are different from those at which the products are imported.

(f) As such, the distribution royalties are not subject to custom duty as they are not royalties “related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of the sale of the goods being valued” within the meaning of rule 9 (i) (c) of the Fourth Schedule to the East African Community Customs Management Act.

(g) This is because the applicant's affiliated companies do not charge the distribution royalties as a condition of the sale of goods to the applicant.”

On 19th January, 2009 the applicant and the respondent held discussions on the matter and the applicant's position was that the aforesaid assessment of tax and penalty was wrong on the grounds cited above.

Subsequent to the said meeting the respondent reviewed the earlier assessment and by a letter dated 7th May, 2009 issued a revised demand of taxes in the sum of **Kshs.29,694,719/=**. The applicant paid Kshs.6,786,213/= which amount it was obliged to pay on account of use of wrong tariffs resulting from inadvertent, incorrect classifications, under valuations and incorrect declarations. Following the said meeting, the respondent abandoned the demand for tax on all manufacturing royalties and distribution royalties on goods exported from Kenya, the applicant averred.

The applicant now contends that it is not obliged to pay the balance of Kshs.22,898,505/= being the assessment made on taxes payable after taking into account the distribution royalties paid to Biersdorf. It states that:

- (a) It is not obliged to pay customs duty on the distribution royalties under **subparagraph 1 (c)** to the Note on Interpretation of **Rule 9 (i) (c)** of the Fourth Schedule to the **East African Community Customs Management Act, 2004** which provides that **‘payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the partner state of the imported goods’**.
- (b) The applicant’s affiliated companies do not receive the distribution royalties from the applicant as a condition of exporting the goods to the applicant.

The respondent filed a replying affidavit sworn by **William Otieno Odhiambo**, a Senior Post Clearance Tax Auditor. He stated that the respondent established the Post Clearance Audit Division to facilitate trade, curb the increase in commercial fraud and cross border offences, in accordance with **World Customs Organizational (WCO)** standards. The division is charged with the responsibility of verifying declarations made by importers through examination of their records, books, business systems and other data at the importer’s premises within five years after importation or declaration. The Post Clearance Audit process is conducted in accordance with **Sections 5, 122, 235 and 236** of the **East African Community Customs Management Act, 2004 (EACCMA)** as well as International Auditing Standards and the WCO standards.

Section 235(1) of the **EACCMA** states that:

“The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods –

- (a) **to produce all books, records and documents relating in any way to the goods; and**
- (b) **to answer any question in relation to the goods; and**
- (c) **to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transshipment of the goods, as the proper officer may deem fit.”**

Section 236 gives the Commissioner power to verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods. The Commissioner also has power to question any person involved directly or indirectly in the business or any person in the possession of documents and data relevant to the goods or entry.

Mr. Odhiambo further stated that following a field audit conducted upon the applicant in the months of September and October 2008, the respondent established that there were instances of misclassification, undervaluation and misdeclaration which resulted in initial assessed tax liability of Kshs.66,230,577/=. When the applicant queried that assessment a meeting was held between the parties on 1st April, 2009 and not on 19th January, 2009 as stated by the applicant. As a result of the negotiations the respondent excluded various taxes and the amount demanded came down to Kshs.29,694,719/= which the applicant agreed to pay and a fresh demand notice was issued. However, the applicant paid only Kshs.6,786,213/= and reneged on the agreement and commenced these proceedings. The respondent denied that out of the initial demanded sum, Kshs.11,938,231/= was on account of penalties. The actual penalty sum was Kshs.2,549,589/=.

Mr. Odhiambo reiterated that the claimed sum was properly assessed in accordance with the relevant

law. The amount in dispute is on royalties paid by the applicant to Beirsdorf on imported finished products according to the terms of the distribution agreement. The respondent referred to paragraph 9 of the Fourth Schedule of EACCMA which provides as hereunder:

“Adjustments To Value

Para 9(1) In determining the customs value under the provisions of paragraph 2, there shall be added to the price actually paid or payable for the imported goods as follows:

Para 9 (1) (c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

9 (1) (d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.

Note to Paragraph 9

Subparagraph 1(c)

1. The royalties and licence fees referred to in paragraph 9 (1) (c) may include, among other things, payments in respect of patents, trademarks and copyrights. However, the charges for the right to reproduce the imported goods in the partner state shall not be added to the price actually paid or payable for the imported goods in determining the customs value.

2. Payments made by the buyer for the right to distribute or resale the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the partner state of the imported goods.

Sub Paragraph 3

... if the amount of this royalty is based only on the imported goods and can be readily quantified, an addition to the price actually paid or payable can be made.”

Regarding the legality of the demanded taxes, the respondent stated that the law provides that in assessing customs duty, royalty should be added to the customs value on imported finished goods so as to make an adjustment to the value and then compute duty on the new value.

In response to the applicant’s contention that the royalties accruing to Biersdorf is not a condition of sale of the imported goods, the respondent stated that if royalties were not a condition of sale then anyone would be free to import, manufacture or even distribute patented products without permission of the patent holder. The applicant had agreed with Biersdorf that it would manufacture, sell and distribute Biersdorf’s products then pay royalties for them as a mandatory condition of sale of the imported goods. The applicant’s affiliated companies charge distribution royalties as a commission of the sale of goods to the applicant, Mr. Odhiambo stated.

The parties filed their respective submissions and **Mr. Kimani** for the applicant and **Ms. Lavuna** for the respondent highlighted the same.

The applicant’s application challenging the respondent’s decision to demand taxes amounting to Kshs.22,898,505/= is based on four grounds:

- (a) Want of jurisdiction,
- (b) Unreasonable exercise of power,
- (c) Violation of its legitimate expectation and
- (d) Irrationality

I will proceed to determine this application on the basis of findings in respect of the aforesaid issues.

JURISDICTION

Did the respondent have jurisdiction to make the demand sought to be quashed? The applicant's contention is that the respondent had no jurisdiction under the Customs and Excise Act, the Value Added Tax Act and the EACCMA to demand the payment of taxes on distribution royalties. It contended that the distribution royalties are not subject to custom duty as they are not royalties **'related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of the sale of the goods being valued'** within the meaning of **rule 9 (1) (c)** to the EACCMA as the value of resale and importation may not necessarily be the same.

On the other hand, the respondent's position is that it is mandated by the law under **Sections 235 and 236** of the EACCMA to demand payment of the said taxes. I have already cited the provisions of the aforesaid sections.

The bone of contention between the parties herein relates to the correct interpretation of **Paragraph 9** of the **Fourth Schedule** of the EACCMA. The respondent submitted that in determining the amount of duty to be charged on goods, the customs value must be assessed. The customs value, for purposes of taxation, is based on the price of the goods plus the royalties and licence fees which are subsequently added. Also added is the value of any part of the proceeds of any subsequent resale. **Section 122** of the EACCMA states that:

"Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value."

I have already referred to the provisions of **Paragraph 9**. **Paragraphs 9 (1) and 9 (1) (c)** state that in determining the customs value royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, should be added to the price actually paid or payable, to the extent that such royalties and fees are not included in the price actually paid or payable. The Note to that paragraph is explicit that the royalties and licence fees may include among other things payments in respect of patents, trademarks and copyrights but the charges for the right to reproduce the imported goods in a partner state are not added to the price actually paid or payable for the imported goods in determining the customs value.

It appears to me that the tax in dispute is on royalties paid by the applicant to Biersdorf on imported products according to the terms of their distribution agreement. **Articles 4 and 6** of the applicant's **Product Licensing Agreement** show that the payment of royalty to Biersdorf is a condition of sale. The goods in issue are sold under a trademark licence from Biersdorf. Royalties must be paid for the use of that trademark at 4.5% on the net sales proceeds for the products sold.

Section 2 of the Income Tax Act Cap 470 defines **"Royalty"** as:

A payment made as a consideration for the use of or the right to use –

- (a) the copyright of a literary, artistic or scientific work; or**
- (b) a cinematography film, including film or tape for radio or television broadcasting; or**
- (c) a patent, trade mark, design or model, plan, formula or process; or**
- (d) any industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific equipment or experience, and gains derived from the sale or exchange of any right or property giving rise to the royalty."**

The respondent went through all the applicant's sales records and other relevant documents and its

assessment of the tax payable was based on the royalties paid after sales in accordance with **Article 6** of the applicant's **Product Licensing Agreement**.

In his submissions, Mr. Kimani for the applicant stated that Biersdorf does not charge the royalties as a condition of sale of goods to the applicant. He referred to the definition of the phrase "**Condition**" as per World Customs Organization which is stated as "**a term or requirement stated in contract of sale context, which must be met for the other party to have the duty to fulfill his/her obligations**". Counsel also cited the Canadian case of CANADA (DEPUTY MINISTER OF NATIONAL REVENUE) vs MATTEL CANADA INC. 2001 SCC 36. The facts in that case were that under the **Customs Act**, value must be attributed to goods that are imported to Canada to determine duty. The valuation method set out in **Section 48(4)** of the **Act** required determining the price paid or payable for goods when the goods are sold for export to Canada. Once determined, the price paid or payable has to be adjusted by added royalties and licence fees and the value of any part of the proceeds of any subsequent resale to the extent that such amounts are not already included in the price paid or payable for the goods. In the said case, goods were invoiced in three stages. The foreign manufacturers invoiced the intermediary, the intermediary invoiced Mattel US and Mattel US invoiced Mattel Canada. The goods were sold at progressively higher prices. The intermediary and Mattel US took title to the goods before title was transferred to Mattel Canada. The goods were shipped directly from the foreign manufacturers to Mattel Canada. Mattel Canada had title to the goods when the goods were transported into Canada.

The Deputy Minister of National Revenue argued that under **Section 48(4)** of the **Customs Act**, the price paid or payable was the price at which Mattel US invoiced Mattel Canada and not the price at which the foreign manufacturers invoiced the intermediary. Under **Section 48(5) (a) (iv)**, the Deputy Minister sought to include royalties said to be paid by Mattel Canada pursuant to a licence agreement between Mattel Canada and a trademark licensor (Licensor X) in the value for duty of the imported goods. Mattel Canada also made periodic payments to Mattel US in respect of agreements Mattel US had with various licensors (Master Licensors). The Deputy Minister also sought to include in these payments in the value for duty of the imported goods.

The Canadian International Trade Tribunal held that duty should be calculated on the sale between Mattel US and Mattel Canada and that neither the royalties nor the periodic payments were dutiable because they were not paid 'as a condition of the sale of the goods for export to Canada' in accordance with **Section 48(5) (a) (iv)** of the Act. The Federal Court of Appeal reversed the tribunal's decision in part, finding that the periodic payments fell within the ambit of **Section 48(5) (a) (v)**.

The court held that the royalties Mattel Canada paid to licensor X are not royalties within the meaning of **Section 48(5) (a) (iv)** which requires that royalties and licence fees be paid 'as a condition of the sale of the goods for export to Canada'. In that context, the court further stated, 'the words condition of sale' are clear and unambiguous and incorporate traditional concepts in sale of goods legislation and the common law of contract. Unless a vendor is entitled to refuse to sell licenced goods to the purchaser or repudiate the contract of sale where the purchaser fails to pay royalties or licence fees, **Section 48(5) (a) (iv)** is inapplicable, the court stated. It further held that the royalties were not paid as a condition of sale. If Mattel Canada refused to pay royalties to licensor X, Mattel US would not refuse to sell the goods to Mattel Canada or repudiate the contract of sale. The sale contract and the royalties contract were separate agreements between different parties, the court found.

In the context of the facts in that case, I would agree with the decision of the Federal Court of Appeal. However, the facts in the present case are somewhat different. There is no intermediary between the applicant and Biersdorf. The applicant manufactures and/or distributes Biersdorf's patented goods under a manufacturing and licensing/distribution agreements and as a condition for so doing, the applicant is obliged to pay to Biersdorf manufacturing and distribution royalties. If the applicant were to refuse to pay such royalties it would not be able to manufacture and/or distribute Biersdorf's patented goods.

P.S. Atiyah's Textbook, "**THE SALE OF GOODS**" 8th Edition [1990] states that:

"In its usual meaning, a condition is a term which, without being the fundamental obligation

imposed by the contract, is still of such vital importance that it goes to the root of the transaction.”

Article 6 of the **Manufacturing Licensing Agreement** between the applicant and Biersdorf states as follows:

“In return for the services to be provided and the rights to be granted by BDF under this Agreement, BEA shall pay to BDF, in addition to the payments specified separately in this agreement, a regular manufacturing licence fee amounting to 3%. The basis for the calculation of the licence fees shall be the costs of manufacturing of the products being ready for sale. The claims for licence fees shall accrue when the relevant products have been manufactured and become due and payable when the products have been sold.”

In respect of the **Product Licensing Agreement**, Article 6 states as follows:

“In return for the service to be provided and the rights to be granted by BDF under this Agreement, BEA shall pay to BDF a regular product licence fee amounting to 4.5% on the net sales proceeds earned by BEA for products sold under the trademarks. Licence fees under this agreement shall not payable on turnover with BDF group companies.”

The respondent’s counsel made reference to World Customs Organizations Regulations;

Under Article 8.1 (c), royalties and licence fees are to be added to the price actually paid or payable for the imported goods where they are related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such licence fees are not included in the price actually paid or payable.

In the general commentary, the Technical Committee on Customs Valuation, in its 30th session held at Brussels on 13th January, 2010 held:

“10. The Technical Committee is of the view that whether the buyer is able to purchase the imported goods without paying the royalty or licence fee depends on a review of all the facts surrounding the sale and importation of the goods, including linkages between the sales of licence agreements and other pertinent information. These factors may include, inter alia, the following:

- **There is a reference to the royalty or licence fee in the sales agreement or related document.**
- **There is a reference to the sale of the goods in the licence agreement.**
- **According to the facts, the sales agreement can be terminated as a consequence of breaching the licence agreement because the buyer does not pay the licence fee to the licensor”.**

The committee was of the view that where a royalty or licence fee is paid to a third party, it is unlikely that the fee would be included in the price actually paid or payable. In CANADA (DEPUTY MINISTER OF NATIONAL REVENUE) vs MATTEL CANADA INC. (supra), the royalty was paid to a third party and I believe that is why the federal Court of Appeal held that the royalties paid were not royalties within the meaning of section 48 (5) (a) (iv) of the Customs Act. In this case, there is no third party involved in the transaction.

In my view therefore, payment of royalties by the applicant to Biersdorf is a condition of sale of their imported patented goods. I agree with the respondent that if royalties were not a condition of sale anyone would be at liberty to import, manufacture or even distribute Biersdorf’s products without permission of the patent holder. That would be an unacceptable trade practice. The relevant law must be interpreted in a manner that makes economic sense. The only instance in which payments made by a buyer for the right to distribute or resale imported goods may not be added to the price actually paid or payable for purposes of

determining custom value is where the payments (including royalties) are not a condition of the sale.

The respondent cannot be said to have acted without jurisdiction in imposing the tax complained of by the applicant. The respondent's decision was mandated by the provisions of **Sections 5, 122, 235 and 236** of the **EACCMA**, among others. The respondent acted within its jurisdiction.

Was the decision made by the respondent unreasonable? I do not think so. Following the initial demand of Kshs.66,230,577/= meetings were held between the applicant's and the respondent's officers. The applicant stated its objection to the imposed tax sum and the respondent considered the applicant's views and re-calculated the tax due which came to Kshs.29,694,719/=. The applicant made partial payment of the said sum amounting to Kshs.6,786,213/= and disputed the balance of Kshs.22,898,505/=.

Having come to the conclusion that the respondent was acting within its legal mandate in demanding the said sum from the applicant, it is not within the province of this court to determine whether indeed the entire amount as claimed by the respondent is payable. In judicial review proceedings the court is not concerned with the merits of a decision but the decision making process itself. See **REPUBLIC vs JUDICIAL SERVICE COMMISSION ex parte PARENO [2004] 1 KLR 203**. The court cannot also act as an appellate court from the decision of the respondent. As long as it is established that the respondent had jurisdiction to demand payment of tax from the applicant based on the royalties paid for the imported goods, the court has no jurisdiction to determine whether the amount charged is correct or not.

With regard to the applicant's submission that the respondent's decision was contrary to its legitimate expectation that the respondent would not assess taxes payable by the applicant for the period 1st January 2004 to 30th September 200, the respondent's Post Clearance Audit Division was operating within the five years period stipulated under **Section 235 (1)** of the **EACCMA**. It is trite law that there can be no legitimate expectation in the face of clear statutory provisions. See **R vs KENYA REVENUE AUTHORITY ex parte ABERDARE FREIGHT SERVICES LIMITED [2004] 2 KLR 530**.

From what I have stated hereinabove, it is clear that the respondent did not act irrationally as alleged by the applicant. According to "**JUDICIAL REVIEW OF ADMINISTRATIVE ACTION**" (5TH Edition) by De Smith, Woolf & Jowell (1955) paragraph 13 – 019 on page 559, a decision is irrational if it lacks ostensible logic or comprehensible justification.

I am satisfied that the applicant is not entitled to the orders sought. I dismiss the application with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE, 2011

D. MUSINGA
JUDGE

In the Presence of:

Nazi – Court clerk

Mr. K. Kimani for the Applicant

Mr. Ng'ang'a for Miss Lavuna for the Respondent