IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 1756 OF 2005

COASTAL BOTTLERS LIMITED………………………APPLICANT

Versus

THE COMMISSIONER OF DOMESTIC TAXES……RESPONDENT

JUDGMENT

The application dated 3rd January 2006 was brought pursuant to Section 8 and 9 of the Law Reform Act, Order 53 Rule 1, 3 and 4 of the Civil Procedure Rules in which Coastal Bottlers Ltd. seeks the following orders against the Commissioner of Domestic Taxes;

1) An order of prohibition directed at the Respondent, whether acting by himself or through any of his officers, prohibiting him from acting upon his decision made on 13th December 2005 and communicated through a demand letter of the same date for the payment of taxes, penalties and interest in the sum of Kshs.137,128,368.00 based upon the findings of an excise duty audit carried out by the Respondent and upon the ex parte Applicant which findings do not conform with the provisions of the Customs and Excise Act by allowing deductions provided thereunder;

2) An order of certiorari to remove into the High Court and quash the said decision of the Respondent made on 13th December 2005 to make a demand for the payment of taxes, penalties and interest in the sum of Kshs.137,128,368.00 based upon the findings of an excise duty audit carried out by the Respondent upon the ex parte Applicant, which findings do not conform with the provisions of the Customs and Excise Act by allowing deductions provided for thereunder;

3) An order of mandamus directed at the Respondent compelling him to comply with the provisions of the Customs and Excise Act in relation to the determination of the nature of goods for excise duty purposes by allowing for the deductions provided for thereunder and to refund any and all sums collected by him in contravention of the said provisions;

4) An order of prohibition directed at the Respondent prohibiting him from issuing any further demands for payment or instituting recovery mechanism for the sum of Kshs.137,128,368.00 or at all prior to complying with the provisions of the Customs and Excise Act in relation to the subject matter of the dispute;

5) Costs of this Application be borne by the Respondent.

The Application is supported by a statutory statement and a supporting Affidavit sworn by Ndegwa Mucheru, a manager in Tax and Corporate Services Department of KPMG, agents of the Applicant, who are conversant with this matter. The Applicant also filed skeleton arguments on 28th April 2006. The

applicant was represented by Mr. Mugambi.

The Application was opposed and Ms. Sheila Kamau a Senior Assistant Commissioner, Collections & Debt, swore an Affidavit dated 3rd November 2006, and Mr. Kashindi, Counsel for the Respondent also filed a Notice of Preliminary Objection dated 3rd November 2006 and skeleton arguments on the same date.

The grounds upon which the motion is brought are as they appear in the statutory statement and are inter alia;

(xii) the aforesaid decision of the Respondent made on 13th December 2005 to make a demand for the disputed tax is tainted with illegality to the extent that the tax claimed is not chargeable, due or payable under the provisions of the Customs and Excise Act, governing the calculation of the value of the locally manufactured goods for excise duty purposes under Section 127 C of the Customs and Excise Act;

(xiii) the decision of the Respondent made on 13th December 2005 to make a demand for the disputed tax is unreasonable and manifestly unjust as it seeks to enforce the payment of tax which is not chargeable, due or payable under the provisions of the Customs and Excise Act, and it is based upon, inter alia, certain costs which the Respondent has already ruled in respect of similar Soft Drinks Bottling Company, are not to be included in the calculation of the value of locally manufactured goods for excise duty purposes;

(xiv) The decision of the Respondent made on 13th December 2005 to make a demand for the disputed tax is tainted with demonstrable bad faith and malice to the extent that;

(a) There appears on record an acknowledgement in the Respondent's letter dated 28th November 2005 that certain costs incurred in the manufacture of excisable goods and being costs that were now being included by the Respondent in the calculation of outstanding tax allegedly payable by the ex parte applicant, were already ruled in respect of a similar soft drinks bottling company, by the Respondents as not to be included in the determination of the value of goods for calculation of excise duty purposes;

(b) The Respondent has nonetheless callously threatened to apply and will in all certainty apply, domestic enforcement mechanisms to the grave detriment of the ex parte Applicant which shall include the forceful recovery of upto Kshs.137,128,368.00;

(xv) The decision of the Respondent made on 13th December 2005 to make a demand for the disputed tax was made for the improper purposes as it is not based on the fact that the tax is properly chargeable and due, but rather, is motivated by the need for the Respondent and Kenya Revenue Authority to meet revenue collection targets, and the aggressive collection of taxes by the Respondent and the Kenya Revenue Authority is a matter of Public record;

(xvi) The Respondent has previously advised the Applicant's tax consultants KPMG Kenya, in the case of another soft drinks bottling company, that certain costs are not to be included in the calculation of the value of locally manufactured goods for excise duty purposes, yet the Respondent is including those exact costs in the calculation of the value of locally manufactured goods for excise duty purposes in the case of the ex parte Applicant. The ex parte Applicant therefore has a legitimate expectation against the calculation of the value of its goods for excise duty purposes other than in accordance with the previous ruling of the Respondent on that specific issue."

A brief factual background of this case as we understand it is that the Applicant is engaged in the business of bottling soft drinks in the Coca Cola range of products which are subject to excise duty by virtue of the Customs and Excise Act. The Applicant uses returnable containers and incurs costs of returning the containers to a reusable state, transport costs of the said containers and costs of washing the containers. In

2005, the Respondent conducted an audit on the ex parte Applicant for excisable goods for the years 2000 to July 2005 and the Respondent assessed the duty at Kshs.195,893,388.00 in its letter of 31st August 2005. The sum included tax, interest and penalties. The Applicant commenced its own investigations but on 15th September 2005 the Respondent demanded payment within 2 months. To avoid any collection measures being put in place by the Respondent, the Applicant paid Kshs.1,138,075.00 on account. On 29th October 2005 KPMG complained to the Respondent that material deductions under S. 127 C of the Act had not been taken into account and sought amicable settlement of the matter. The parties entered into negotiations and the Applicant offered to make an additional payment of Kshs.16,401,268/= by installments. The Respondent conceded that there were some errors in the assessment and asked for more documents from the Applicant but later they still demanded payment. Despite further negotiations, the Respondent demanded Kshs.142,366,761.00 by letter dated 13th December 2005 and demanded that 137,128,368/= be paid by 20th December 2005. That is what prompted this Judicial Review proceedings since the Applicant contends that the computation of the excise duty is erroneous following misinterpretation of Section 127 C of the Customs and Excise Act. Mr. Mugambi submitted at length on the applicability of S. 127 of the Customs and Excise Act which provides for what goods are excisable and which are not. It was Counsel's submission that if a tax law is ambiguous the same has to be resolved in favour of the tax payer. He submitted that S.127 C has been amended severally and that only the excisable goods are the Liquid, cost of the bottle, label, or any other cost incidental to the sale like adverts, but the cost of returnable containers and excise stamps are not excisable. He urged this court to interpret S. 127 C of the Customs and Excise Act which was been amended in 1999, 2002 and 2004. He said that excise duty is charged on manufactured goods and it is determined by the Finance Minister. S.2 of the Customs & Excise Act defines what excisable goods are, and the value is determined under S. 127 C of the Act . That in the 1999 Act, the selling price included cost of the wrapper, package, box, bottle or other container in which excisable goods are packed; (3)(b) the cost of any other goods contained or attached to the wrapper, etc, and (3)(c) the cost incidental to the sale of goods including advertising, financing warranty, transportation, mark up and any other cost related to transport. However S., 127 C (4) provided that the cost of returnable containers and excise stamps would be excluded from excisable value. Counsel said that in the 2002 Act, the cost of returnable containers was excluded from excisable duty. Counsel urged that the cost of returning the bottle to usable state should be part of the exemption not to charge duty on the returnable containers. It is the Applicants case that after the Respondent reassessed the duty to come to 52 million as the duty owed, it is because the Respondent did not know what to include in the computation and what to leave out and computation is therefore uncertain. Counsel used as an example, the letter of 28th October 2005 from Kenya Revenue Authority to KPMG which indicates that the cost of returning the returnable containers to the factory are allowable costs for excise duty purposes. Counsel argued that in the 2002 Amendment, returnable containers were excluded from duty which means that the costs of washing and bringing the bottles to a usable state are also excluded from duty and that S. 127 C (3) lists items that are liable to duty which are attached to the bottle and S. 127 C (4) becomes a proviso, to S.127 C (3) (b) which should not have been the case. It was Counsel's view that, the law is unclear and should be resolved in favour of the Applicant. That in the 2004 Amendment, S.27 C (2) specifically provides that the selling price shall not include VAT, cost of returnable containers or cost of excise stamps. Counsel urged that the effect of that Section was to reduce excise duty payable on goods such as the costs of transport, advertising etc was left out. He submitted that transport costs are not part of the excisable costs and are deductible from the selling price. In sum, he urged that the only excisable goods is the liquid in the bottle and for anything else to attract duty, it must be specifically provided for under S.127 C (3) of the Act.

The Counsel further submitted that the Applicant's legitimate expectation has been breached in that the Respondent has treated the Applicant differently from other Bottlers who do the same business and that all costs associated with returnable containers should be excise free that is washing, cleaning and transport. He referred to the letter dated 28th October 2005 where the Respondent clarified to another Bottler that to arrive at the cost of returnable containers, the cost of bringing containers back to the factory are allowable costs for excise duty. In addition Counsel urged that it is expected that since the cost of transport was exempt from duty, it was the Applicant's legitimate expectation that the other costs like sterilizing the bottles would be excluded from tax. That some costs which reduced the figure claimed from 195,000,000/= to 52,000,000/= were allowed but they were later reinstated and that shifting from

one figure to another was evidence of uncertainty in the law.

It was also the Applicant's case that the different assessments of Kshs.195,000,000/= then 52 million and 137 million is unreasonable and denied the Applicant the chance to know what they were expected to pay. That the requirement that they pay Kshs.195,000,000/= in 24 hours was made in bad faith. Lastly, that the Kenya Revenue Authority has been keen on collecting revenue to meet certain targets without levying the correct duty.

In opposing the application Mr. Kashindi, counsel for the Respondent relied on the affidavit of Sheila Kimani and conceded that an audit for the years 2000 to July 2005 was carried out on the Applicant and it was found that the Applicant was not adopting the right procedure in computing excisable value and there is no contention that duty was due. According to Counsel, the only issue is the computation and the amount of duty due. That after the Respondent sent a demand in respect of the duty due, the parties met severally to resolve the contentious issues which included DFC (Deferred Container Cost), Transport cost, overheads on diet coke, Price Differentiation and ice Blocks. After further negotiation the items that remained outstanding are DFC, Transport and Mark up.

On DFC, it is the Respondent's contention that the Applicants admitted in their letter dated 29th September 2005 by KPMG to the Respondent that they had adopted a standard amount of Kshs. 32/= which was excluded from every returnable container and was not subject to excisable duty. That the Applicant's reason for challenge was that the price had been agreed upon amongst other Bottlers. The Respondent contends that the use of a standard Kshs.32/= was wrong because that was not the actual cost and further that the Kshs.32/= included washing costs but washing costs were not excluded from excisable duty under S. 127 C of the Customs and Excise Act. The Respondent therefore disallowed 32/= in calculating how much duty was due and asked the Applicant to apply the actual cost in the computation of duty and that is why the duty came to Kshs.65,000,000/= before penalties and interest were applied. After the penalties and interest were applied, the sum rose to Kshs.137,000,000/= which is now demanded.

On the question of transport, it is the Respondents case that the Applicant excluded transport cost of the bottles back to the point of sale and the reason for so doing was that a Commissioner of Income Tax, now deceased, had met with the bottlers and allowed them to pay half the transport costs. The Respondents said that such a directive by a commissioner does not comply with S.127 C of the Act as the Commissioner could not contract outside the law and that in any case there was no evidence of the said meeting between the bottlers with the Commissioner in terms of minutes. The Applicants admitted to having adopted a figure of Kshs.11.87 per crate (unit) without taking the actual distance into account as distance varies. The Applicant was asked to provide the actual cost which was the correct way to compute the transport cost and arrive at the correct assessment of the duty that was due.

The third contentious issue is Mark up which was introduced in the Act on 1st September 2001. It is the Applicants contention that the same should not be included in the computation of duty prior to 1st September 2001. To the contrary, the Respondent contends that Mark up is the sum added to an item's cost to determine the selling price and it is the selling price that has excisable value. That Mark up has always been included in the selling price and has therefore always been excisable. That Mark up is the difference between sale price and cost price expressed as a percentage of the cost.

Mr. Kashindi urgued that the inclusion of Mark up in the Act was for purposes of clarity and that in any event, even if it had not been included in the Act, the Applicants cannot claim a refund because they are time barred by dint of S. 146 of the Customs and Excise Act which provides for refunds in case of payments made in error. A refund should have been made vide a formal Application within 12 months (S.146 (2)).

In response to the ground of alleged breach of the Applicants legitimate expectation, Counsel urged that the letter dated 28th October 2005 which was relied upon by the Applicant in seeking to pay ½ the transport cost, was not addressed to the Applicant but to KPMG, in respect of another client; That the letter refers to other letters and a ruling whose particulars were not disclosed or shown to the Respondent;

the letter was written on 28th October 2005 after the 1st assessment had been done and cheques issued and lastly that tax matters are confidential and the letter relied upon by the Applicant was confidential to the particular client addressed and should not have been exhibited in this matter. Counsel relied on the case of **ABERDARE FREIGHT SERVICES LTD. V KRA MISC APPLICATION 946/04** where the court held that for one to allege breach of legitimate expectation, he must have enjoyed such a benefit before which he can legitimately receive or must have received assurance from the decision maker that the benefit will not be withheld without giving a chance to give reasons as to why it should not be withdrawn. Counsel urged that in this case, there was no promise or same practice relied upon by the Applicant and a letter cannot vitiate all other arrangements that exist.

The Respondent denies that their decision was unreasonable, made in bad faith or for an improper purpose and that since the Applicant disputes the amount payable they should have moved under S. 159 of the Act which deals with disputes relating to computation of excise duty. That on the other hand the Applicant would have paid the sums claimed and contested the assessment later.

Mr. Kashindi also raised a Preliminary Objection to the effect that the Applicant did not serve notice on the Registrar as per requirement of order 53 Rule 1(3) Civil Procedure Rules and that failure to comply renders the application incompetent. That it was a mandatory requirement that the notice be filed a day prior to the filing of the Chamber Summons or that the Applicant seeks extension of time to file the said notice or apply to the court to be excused from filing the same. Counsel relied on the case of **LAWRENCE NGINYO KARIUKI V COUNTY COUNCIL OF KIAMBU NRB MISC 1446/02** in which Justice Ole Keiwa adopted the decision in **MSA HIGH COURT 93/1990 NDUNGU V MUTHONI** and declared the Application to be fatally defective for failing to comply with Order 53 Rule 1 (3) Civil Procedure Rule. Counsel also cited several other cases of **REP V COMMISSIONER OF LANDS ex parte JAMES KIMOTHO (2006) KLR, REP V CHAIRMAN LDT ex parte SHIUMA JACOB MUKALAMA (2006) KLR** where the courts have held likewise. In reply, Mr. Mugambi maintained that when he appeared before Justice Nyamu on 19th December 2005, he indicated to the court that the notice was served on 10th December 2005. That no prejudice will be suffered by the Respondent even if the service of the notice is improper.

We have now considered all the Affidavits both in support and in opposition to the motion, the annextures thereto, skeleton arguments filed by both counsel and all the rival arguments and the authorities that were cited. Before we delve into the merits of the motion we think it proper to consider the Preliminary Objection raised by the Respondent because if it can dispose of the whole motion, then it would be unnecessary to consider the merits of the motion. The Preliminary Objection relates to alleged none compliance with Order 53 Rule 1 (3) of the Civil Procedure Rules by the Applicant. That Provision stipulates as follows:

"(3) the Applicant shall give notice of the Application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the statements and affidavits;

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown."

The Chamber Summons seeking leave was filed on 16th December 2005 meaning that the notice should have been served on the registrar at the latest on the 15th December 2005. Having failed to do so the Applicant should have sought the court's leave either to extend time for filing of the notice or to be excused from the filing of the notice all together. The Chamber Summons application was not heard until 19th December 2005. Prayer 2 of the Chamber Summons was requesting the court to exercise its discretion and dispense with the requirement for the lapse of one day with respect to the notice of the Chamber Summons application to the Registrar of the High Court. When the application was not heard on 16th December 2007, the Applicant served the notice on the Registrar on that same day and informed the court of that fact on 19th December 2005 and sought to abandon the prayer for dispensing with the requirement that notice be served on the preceding day. In the court's ruling of 19th December 2005, the

judge noted that the notice had been served and that prayer (2) was abandoned. What is the purpose of the notice to the Registrar? We are in agreement with the observation made in **NDUNGU V MUTHONI (supra) and LAWRENCE NGINYO KARIUKI (supra)** that the notice to the Registrar is meant to notify the Republic in whose name the Judicial Review proceedings are brought in which the Republic has an interest, so that the Attorney General can come and support or oppose the Application.

The courts have held that failure to comply with Order 53 R 1(3) Civil Procedure Rules renders the Application fatally defective. Our view is however different. Firstly a Preliminary Objection of this nature should be raised at the earliest time possible but not await the hearing of the Notice of Motion like in this instance. The Judicial Review proceedings were commenced on 19th December 2005 and it is not until 3rd November 2006 that the Respondent filed the Preliminary Objection. Had this Preliminary Objection been raised earlier and the court found that the Notice of Motion was fatally defective because of failure to serve the notice on the Registrar, may be the Notice of Motion would have been struck off and the Applicant allowed another opportunity to file another Application and serve the necessary notice. The Respondent having delayed in raising the Preliminary Objection, the Applicant would not have their chance to ventilate their case due to lapse of time.

Secondly, we notice that the proviso to Order 53 Rule 1 (3) Civil Procedure Rules gives the court a discretion to extend the time for serving the notice or excuse the serving of the notice all together. It means that the provision is not mandatory as the court is left with some discretion. We do agree that the manner in which the notice was served was irregular in that the Chamber summons had already been filed though the court had not heard it. However, when Counsel was heard, the court in exercise of its discretion noted that the notice had been served and the court had no problem with the notice as served and allowed the Applicant to abandon the prayer seeking to dispense with the notice. We are of the view that the court having exercised its discretion and having conceded that the notice had been served and not questioned the irregularity, the issue of none service of the notice on the day preceding the filing of the Chamber Summons or seeking to be excused from filing cannot arise at this stage. We would and do find that the notice is properly on record.

Our third observation is that the notice was meant to notify the Respondent of the filing of the Judicial Review proceedings. The proviso to the Rule allows the court to do away with the notice all together for good reason. In this case the Respondent is a Government parastatal and having been served with the Notice of Motion, they have filed papers in opposition thereof. The Respondent has not shown that any prejudice has been occasioned to the State or the Respondent for failure to comply with the said provision. We find that the Applicant did their best and endeavoured to serve the notice on the Registrar which demonstrates good faith, diligence and keenness to comply with the law. The omission by the Applicant is a mere irregularity that only goes to the form but not the substance of the Application and we would beg to differ with the decisions in the other cases that failure to serve notice in this case would render the Notice of Motion fatally defective. The Preliminary Objection cannot be sustained.

Of Interpretation of S. 127 C of the Customs and Excise Act; The Applicant has asked this court to interpret S. 127 C of the Customs and Excise Act which has been amended severally between 1999 and 2004. Their contention is that the same is ambiguous because it is not clear what excisable goods are under that Section. That is why the Applicant urges the court to find in favour of the Applicant on account of the ambiguity

Section 2 of the Customs & Excise Act which is the interpretative Section defines excisable goods to mean goods manufactured in Kenya or imported into Kenya on which excise duty is imposed under that Act and excisable value means ex factory selling price or the value determined in accordance with S. 127 C.

The audit carried out on the Applicant relates to the period 2001 to 2005. In the 1999 Act which was amended on 8th June 2002, S. 127 C partially reads as follows:-

"(2) the value of locally manufactured goods for purposes of levying and valuing excise duty shall be the ex factory selling price;

(3) For the purposes of sub section (2), the ex factory selling price shall include;
(a) the cost of any wrapper, package, box, bottle, or other container in which the excisable goods are packed;
(b) The cost of any other goods contained in or attached to the wrapper, package, box, bottle or other container, and
(c) any other cost incidental to the sale of the goods, including advertising, financing warranty, commission, transportation, Mark up (w.e.f. 1.9.2001) or any other cost incurred related to delivery to the point of sale (w.e.f. 1.9.2001)
(4) Notwithstanding sub section (3) (b), the cost of returnable containers and excise stamps (w.e.f. 1.9.01) shall be excluded from excisable value."

Under the above provision, only a returnable container and excise stamps were exempted from duty. Mr. Kashindi explained that the glass

bottle which is a returnable container is not excisable because it belongs to Coca cola and is returned to Coca cola once the soda is consumed and that the bottle is purchased only once. On the contrary, a plastic bottle is excisable because it is used only once. It was Mr. Mugambi's argument that though not specifically provided for under Section 127 C, the cost of washing the bottle and sterilizing it for reuse should be excluded from duty. We have no idea where Mr. Mugambi got that interpretation of S. 127 C. S. 127 C, is specific as to what is excluded from excise duty. S. 127 C (3) provides that any other costs incidental to the sale of the goods, including, advertising, commission, warranty, package etc or any other cost incurred related to delivery to the point of sale is excisable. In our understanding, washing of the bottle or sterilizing would be included in "**any other cost that is incidental to the cost of delivery."** We find nothing ambiguous about their Section.

Section 127 C was amended and took effect on 8th June 2002, it retained the same provisions save that only returnable containers were excluded from excisable value. Duty was supposed to be calculated to exclude the washing and sterilizing of the returnable container. We find nothing ambiguous with that provision as to what goods were supposed to be excisable.

Another amendment to the Section was in June 2003 where the VAT cost of returnable containers and cost of excise stamps, was again excluded from excise duty. It means that the only item that was excluded from duty was the returnable bottle for reasons given by the Respondent, that the returnable container belongs to Coca Cola and has been paid for once and for all. We found nothing ambiguous with the said provision. The exclusion of other items from duty by the Applicant is part of what was bringing down the assessed duty due from the Applicant. We do agree with the Applicants submission that generally, a taxing statute must be strictly construed and if there be any ambiguity in such statute, a dispute arising therefrom has to be resolved in favour of the tax payer. The courts have so held as did Justice Nyamu in the **KEROCHE CASE**. However, in this case, there is nothing ambiguous about S. 127 C that would call for resolving of this matter in favour of the Applicant. The section is clear that only returnable containers which are Coca Cola glass bottles were the items excluded from excise duty for good reason, that is, they are the property of Coca Cola Company and duty is paid for the bottle once.

It is not in dispute that the Applicant did not agree with the excise duty assessment in respect of DFC – (Deferred Container Cost which are the returnable bottles); Mark Up and Transport. Having conceded to the liability, that some duty was owed and they went ahead to pay part of it, we do agree with the Respondents that what is really in issue is the computation of excisable duty in respect of the disputed items.

The question is whether this court in a Judicial Review application has the capacity to carry out the computation? The Applicant attributes the variations in the assessment carried out by the Respondent as being a result of uncertainty in the law. In the 1st assessment the Applicant reduced the duty to Kshs. 52,884,336/= by letter dated 9th November 2005 after the parties met and negotiated but by letter of 13th December 2005, a new figure of Kshs.142,366,617/= was demanded. The Respondent has explained that in arriving at the latter figures now claimed, in their letter of 9th November 2005 to the Applicant, the Respondent requested for further particulars, for example on DFC costs the Respondent asked for actual

costs of replacing the containers and not the cost loaded on every unit; On transport, the Respondent asked the Applicant to apply the actual cost but not a standard one and hence the difference in the final figures. Mr. Kashindi demonstrated that the Applicants had applied the wrong principles in arriving at the contested figures. For DFC, the Applicant applied a replacement cost of 32/=, a cost agreed upon with other bottlers but yet the law (S.127C) required that the actual cost of the returnable containers be adopted. As earlier noted in this judgment, there was no statutory basis for the Applicant excluding washing costs of the dirty containers. In their letter of 29th September 2005 the Applicants admitted having applied those wrong principles in calculating the excise duty.

In respect of transport costs, the Applicants also admitted (letter of 29/9/05) to applying a standard figure of Kshs.11.87 as transport cost for returnable containers irrespective of the distance covered. The Applicant erred by allowing deduction of the transport costs from returnable containers back to the factory yet this is not allowed under S.127 C (4) of the Act. Only returnable containers were excluded from excisable duty under S.127 C (4). The Applicant claimed to have been authorized to do so by a Commissioner of Income Tax who was by then deceased. Again that agreement with the Commissioner was not based on S.127 C of the Act and was the wrong principle to apply in computing the excisable duty.

The other item of contention is Mark Up, which was specifically provided for in the 1999 Amendment. Mr. Kashindi described Mark Up as the sum added to an item's cost to determine the selling price. The Applicants wanted the same excluded from the computation of duty for the period before 1st September 2001 when the amendment took effect but it is the Respondent's contention that Mark Up was always excisable and was always included in the duty as it is the difference between the selling price and cost price. The Applicants have not availed any evidence to the contrary. Mark Up was never separated from the sale price prior to the 1999 Amendment and it must have been in existence and subject to duty.

Computation of duty or assessment involves the court going into the details of every claim and the principles of assessment which in our view is not the purview of Judicial Review. In our view the scope of Judicial Review is as espoused in the **SUPREME COURT PRACTICE 1997 VOL 53/1-14/6** as follows;

"The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

Bearing the above principles in mind, if we descend into the arena of considering the merits of the assessment carried out by the Respondents, we shall be usurping the statutory mandate of the Respondent under the Customs and Excise Act. The Applicant has alleged that the Respondent in arriving at the decision, acted unreasonably, in bad faith, had an improper motive and breached the Applicant's legitimate expectation. In regard to the allegation of unreasonableness, it was the Applicants contention that the decision was unreasonable because the Respondent was inconsistent in its decision and arrived at different figures and the Applicant could not know what to pay. The 1st assessment was Kshs.195,000,000/=, the 2nd 52,000,000/= and lastly 137,000,000/=. We find nothing unreasonable about the difference in the assessment. The 1st figure was arrived at before negotiations and some clarifications were made by the Applicant. When the figure of 52,000,000/= was arrived at, the Respondent asked for the actual transport and DFC costs in the letter dated 9th November 2005 addressed to the Applicants. The figures changed after the Applicants provided the proper information. In addition to the computation the Respondents also applied interest and penalties. That explains the variation in the figures. We find the ground of unreasonableness to be baseless.

The Applicants also allege that the Respondents acted in bad faith by demanding payment of the full sum within 24 hours. The Respondent had written to the Applicants about the assessment vide the letter dated

31st August 2005 and requested that the Applicant do settle the claim to avoid accumulation of additional taxes but the letter elicited no response and it is then another demand was made vide the letter of 15th September 2005. The Applicants cannot blame the Respondent for what they called upon themselves. They should have acted diligently by seeking time to negotiate or settle. We find no evidence of bad faith on the part of the Respondents.

The Applicants also allege that the collection of the taxes was done for the improper purpose that is to meet certain targets. The Kenya Revenue Authority is charged with the collection of revenue and taxes on behalf of the Government. The Respondent did agree that they have targets to meet but there is no evidence that they employed the wrong method or computation to arrive at the figures claimed in order to meet their targets. Clarification has been made as to how the figures were arrived at and we are satisfied that there is a satisfactory explanation for the variations.

Lastly, the Applicants complain that their legitimate expectation to be treated like other Bottlers has been breached. The Applicants based their claim on a letter from Kenya Revenue Authority addressed to KPMG and dated 28th October 2005 which the Applicant alleges that other Bottlers were treated differently from them. In that letter the Respondent advised that in arriving at the cost of returnable containers, the cost of bringing the returnable containers back to the factory are allowable costs for excise duty purposes and further advised that they could apply for waiver of penalties.

We are in agreement with the Respondent that this letter is not addressed to the Applicant and tax matters between the Respondent and a different entity are confidential and cannot be used as a basis of assessment in respect of another person. Further to that, the facts underlying the letter are unknown and this court has not seen the minutes of the meetings referred to in the letter, what was discussed and what led to the decision that was arrived at. Further, the letter mentions a ruling of Kenya Revenue Authority which this court has not had occasion to see. Since it is the Applicant alleging, they should have produced the said documents in support of their case. Even if the letter were properly on record, would the Applicants raise the principle of legitimate expectation based on the letter? What is legitimate expectation?

That principle was considered in the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR CIVIL SERVICE (1985) AC 375** where Lord Diplock defined the principle as follows, (page 406)

"If the decision made unreasonably departs from the publicly stated policy or customary practice or reneges on an earlier decision or undertaking thus confounding the Applicant's legitimate expectation from the decision maker, then it can also be argued that there has been a breach of the duty to act fairly. A person or a group may have a legitimate expectation that they will be consulted by the decision maker or if the decision maker has made promises or given undertakings which the decision in question will alter…."

A legitimate expectation is said to arise **"from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."**

CSU CASE (supra).

The letter relied upon does not contain any promise that the Respondent would act in a certain way nor is the letter evidence of a practice that the Applicant would expect to continue and which the Respondent has failed to follow.

We also find that any ruling that violates any specific statutory provisions could not satisfy the requirement of the principle of legitimate expectation.

As to whether Judicial Review remedies sought can issue, we are of the view that none can. We find that there is no public duty or statutory power which the Respondent has failed to exercise in respect of the prayers for prohibition and mandamus. In respect of certiorari there is no evidence of unreasonableness, bad faith, malice or illegality established as against the Respondent. The Notice of Motion failed to satisfy the requirements of Order 53 Civil Procedure Rules.

Having considered all the Affidavits, the submissions and authorities, we are satisfied that the Applicant has failed to establish any of the grounds available in Judicial Review. We are of the view that this is a purely commercial matter as the Applicant is disputing the assessment of excise duty. S. 159 of the Customs and Excise Act gives the Applicant a remedy, where a dispute arises as to whether any or what duty is payable on the goods, the importer shall pay the amount demanded and after payment, file suit within 6 months after the date of payment. This is a matter where there would be need to adduce evidence on how assessment was arrived at and it would be impossible to dispose of this dispute by way of Judicial Review in any event. We have also found that there is no breach of S. 127 C of the Customs & Excise Act. In the result, and for all the above reasons, the application must fail and the same is hereby dismissed with costs to the Respondent.

Dated and delivered this 30th day of April 2008.

J.G. NYAMU
JUDGE

R.P.V. WENDOH
JUDGE

Read in the presence of:

Mr. Mugambi for Applicant
Mr. Matuku for Respondent
Daniel: Court Clerk
Njoroge: Court Clerk