Bharat General Agency v Kenya Revenue Authority (Tax Appeal E004 of 2023) [2024] KEHC 9756 (KLR) (22 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

TAX APPEAL E004 OF 2023

DKN MAGARE, J

JULY 22, 2024

BETWEEN

BHARAT GENERAL AGENCY ..... APPELLANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

(An appeal from the Judgment of the Tax Appeals Tribunal given on Tribunal Case No. 516 of 2022 in Nairobi on 3/11/2023.)

JUDGMENT

1. This is an appeal from the Judgment of the Tax Appeals Tribunal given in Tribunal Case No. 516 of 2022 in Nairobi on 3/11/2023. The appellant set out 8 grounds of Appeal. Given the nature of the matter in dispute, I shall deal with each of the grounds seriatim. The appeal was argued before me on 21/2/2024.

Submissions

2. The Appellant argued that I adopt the written submission and have a look at page 172 of the record. They contended that the Respondent's decision was to the effect that the tax payer knew the law and should have followed the same. However, they disputed the appellant's contention that 1,100 pieces were bought. It was their case that 925 pieces were brought. There were for shuttering plywood black film. His case was that the Simba system picked the higher rate which they paid.

3. The Appellant was not disputing the power to re-audit but the same should be exercised in a reasonable manner. They stated that waiting for 2 years for goods which were for sale was unreasonable.

4. The respondent stated that they filed a statement of facts on 29/02/2023. There was no contention on the description of goods. The EAC evaluated the rate from 29% to 35% or USD 230 per cubic metres. The Advocate admitted an error in indicating 1,100 pieces instead of 925 pieces.

5. She stated that the demand was based on the correct tonnage. The extra 125 pieces will reduce taxes but not significantly. This was not part of the Appeal from the tribunal.

6. In rejoinder the Appellant stated that KRA does not know the amount due. They stated that the decision is irrational, unreasonable and unjust.

7. In the statement of facts, the respondent stated that an audit demand for Kshs. 2,161,283 was for gross under declaration of cubic metres on a consignment of film faced plywood imported. There was an objection on the grounds set out in a letter dated 5/4/2022. In the letter the tax payer denied gross under declaration. The tax payer maintained that all documents relate to the same declaration.

8. On 6/4/2022 the Respondent responded to the objection and a tax assessment concluding that a demand of Kshs. 1,384,520.000 was upheld for principal and interest. In that demand the total No. of pieces were Kshs 1,100/= resulting in a difference of 641,695/=. The CIF value was 61,498,040/=. This resulted in a total of Kshs. 741,366. The tax payer was informed that the tax was either at a specific rate of 230 USD per cubic meter or an ad valorem rate of 35% as per Gazette Notice No. KOL ATI – No 8 of 30/6/2018

9. The Respondent regretted the demand of Kshs. 2,160,882 and stated that it was an error and a sum of Kshs. 1,384,520.00 was due and owing. The appellant was dissatisfied and filed a Notice of Appeal on 5/5/2022.

10. The Appellant contended that the assessment of tax in the manner the Respondent did was contrary to Article 40 of *the Constitution* and its legitimate expectation to be treated fairly. They stated at entry, it was the Simba system that generated tax payable and which was duly paid.

11. The appellant further postulated that they made a correct declaration and after verification of the goods, the system generated duty charges and other charges. The tax payer was required to declare a correct tax code which is used to generate import entry on which the Simba system generated the duty.

12. The review decision related to the goods for sale and the appellant contended that the goods were already sold. Adding tax after sale was robbing the appellant as cash flow will be affected. The appellant stated that they have no control of the Simba system.

13. The respondent contended that the 1,100 pieces was said to be 55.66616 cubic metres at a price of USD 230 which is equal to Kshs. 10,766,346. The tonnage produced more tax than use of USD. The Appellants are said to have used the lesser of the two.

14. On ground 3, they stated that notice was served on 15/12/2023, in line with Section 56 (3) of the *Tax Procedures Act*. It is a new introduction. This was not a ground in the objection. They stated that Section 235 and 236 of East Africa Community Customs Management Act allowed them to carry out the audit. The result was the demand. The basis of custom was the actual price payable.

15. They also state that Section 135 and 259 (1) of EACCMA empowers the respondent to recover the amount that is short less with 2 % interest.

16. It is their case that Simba System allows self-declaration. It is the duty of the importer to factor all details using correct classification. They relied on General Interpretation Rules as cited in EAC Common Reference Tariff for classification of goods. Goods were also determined according to the heading or any relative section or chapter notes unless they require otherwise. Therefore, GRI's 2-6 were variances in transaction value.

17. The respondent filed concise submissions, 9 pages long and orally submitted before me. One hallmark of the submissions is that the respondent has been unable to get the math right on pieces of material that were imported. They indicate they were 110 pieces of what was declared as black film face plywood instead of plywood's covered under tariff code 4412.10 -4412.39.

18. This is contrary to their notice that the taxes were paid at ad valorem instead of specific duty calculation. The declaration was said to be under heading 44.12 of EAC/CET, 2017. I got a definite feeling that the respondent did not have a specific case to place before the court.

19. They stated that the issue of urgency notice was new. I agree and shall not deal with the same further as it was apparently abandoned in the oral arguments.

20. Reliance was placed on sections 236, 135 and 249 of the East African Community Customs Management, Act 2004.

21. They relied on the case of Kenya Union Of Domestic, Hotels, Education Institutions And Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 others [2014] eKLR, where Justice D. S. Majanja, as he was then, stated as follows: -

> " Article 209 of *the Constitution* empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of *the Constitution*, the legislature retains wide authority to define the scope of the tax.

22. Further reliance was placed on the case of Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR where Mativo, J as he was then stated as doth: -

> 31. The import of the above provisions is that the party with the obligation of persuasion (what Wigmore termed the risk of non-persuasion) is said to bear the burden of proof. The flip side of the foregoing is the effect of non-persuasion on a party with the burden of proof which is that the particular issue at stake in the litigation will be decided against him/her. Generally, the taxpayer has the burden of proof in any tax controversy. The tax payer must demonstrate that the commissioner's assessment is incorrect. The taxpayer has a significantly higher burden. The taxpayer must prove the assessment is incorrect.
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> 32. The shifting of the burden of proof in tax disputes flows from the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency. The commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption created by the above provisions is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position. If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer."

23. They relied on the principle in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] KB 64 that requires tax statutes to be construed strictly. They prayed that the appeal be dismissed, the review decision be implied.

24. On the other hand, the Appellant submitted that an audit demand for Kshs. 2,1671,282 was made. Notice of Appeal was made on 5/5/2022 and memorandum of appeal and statement of facts on 19/5/2022.

25. They adopted a lengthy statement of fact. They stated that 925 pieces were imported vide entry No. 6986169 on 24/8/2018. They stated that the respondent was wrong to demand tax for 1,100 pieces. It was their position that after objection the demand was reduced to Kshs. 1,384,520. They stated that the cubic metres were erroneously said to be 55.66. A further demand for Kshs. 1,384,520 and later Kshs. 3,181,994 was made. They said that the latter smirks of mischief.

26. They stated that only 925 not 1,100 pieces were imported. The goods were sold after tax was paid. The taxman was therefore, placing a tax burden on them. They denied incorrect declaration. They stated that Kshs. 1,384,520 was attributed to specific duty and Kshs. 640,155 was said to be interest.

27. They state that it is the Simba System that generates both import entry, duty and other charges. The appellant has no control over the subsystem. They stated that even if the tax was due, the same is unfair and unjust since the Appellant cannot pass the loss to clients long after selling the goods.

28. They support grounds 1 and 2 of the appeal stating that the object was handled arbitrarily, unfairly and unjustly. They question demand for Kshs. 3,181,994; Kshs. 2,1010,282.

29. It was their case that the correct tariff classification was used. The appellant stated that import duty was assessed and paid. The assessment was automated and there was no incorrect declaration on their part. Their case was use of 35% or USD 110 per metric ton.

30. They question the bad faith, which they describe as incongruous and irrational to demand duty on an alternative basis 4 years later. It was their case that 28.00lkg or 28 T was declared in the bill of lading.

31. They blamed the respondent and Simba System that correctly charged 35% of customs value and 649,972 and VAT was 343,682. It is their case that a sum of Kshs. 310,729 and Kshs 289,404 were higher than the 35%. They pleaded legitimate expectation. It was their case that if the rate of USD 110 per MT is applied, the amounts would be Kshs 310,729.00 for the duty and Kshs 289,404.00 for VAT calculated as:

    a) Duty 28 MT x USD 110 x

       K.Shs 100.886 (Exchange Rate) – K.Shs 310,729.00

    b) VAT at 16% of Customs Value and Duty

       (K.Shs 1,498,040.8 + K.Shs 310,729 =

       K.Shs 1,808,770.00) – K.Shs 289,404.00

32. They state that the taxation is arbitrarily irrational, unreasonable and unjust. They relied on the case of Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR.

33. On ground 4 they state that the case was calculated to shift blame for the respondent's misdeeds.

Analysis

34. This Court is under the duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the Appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

35. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

36. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

37. In Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga & 2 Others [2013] e KLR, the Court of Appeal held:

> " An appellate court will not ordinarily differ with the findings on a question of fact, by a trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law. This is a demonstration that there will be occasion when facts or evidence matter in determining a question of law".

38. These principles guiding taxation were restated in Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR where Majanja, J held:

> " The approach to this case is that stated in the oft cited case of Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64 as applied in T.M. Bell v Commissioner of Income Tax [1960] EALR 224 where Roland J. stated,
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> " ...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." As this case concerns the interpretation of the *Income Tax Act*, I am also guided by the dictum of Lord Simonds in Russell v Scott [1948] 2 ALL ER 5 where he stated, "My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him" adopted in Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR per Nyamu JA (See also Jafferali Alibhai v Commissioner of Income Tax [1961] EA 610, Kanjee Naranjee v Income Tax Commissioner [1964] EA 257). Any tax imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute. In Adamson

v Attorney General (1933) AC 257 at p 275 it was held that, "The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect-if it be in view of the Crown a defect can only be remedied by legislation."

39. Tax legislation should be stated in clear and simple terms. In Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language.

40. Similarly, it was held in Vestey vs. Inland Revenue Commissioners [1979] 3 All ER at 984 that:

> "Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined."

41. In the same vein, it was held in Russell (Inspector of Taxes) vs. Scott [1943] AC 422 at 433:

> "I must add that the language of the rule is so obscure and so difficult to expound with confidence that – without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind I feel that the tax payer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected…my Lords, there is a maxim of income tax law, which though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion."

42. In *Commissioner of Income Tax vs. Westmont Power (K) Ltd Nairobi High Court Income Tax Appeal No. 626 of 2002*, the Court while citing Inland Revenue vs. Scottish Central Electricity Company [1931] 15 TC 761 the court expressed itself as follows:

> "Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity…any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation."

43. Therefore, it is settled law that the legislation that imposes tax must be unambiguous. I add that the rules of taxation should be published and only then can the citizens be liable.

44. The respondent relied on various sections of law. What I understand is that the dispute is not on interpretation of the sections. The first of these was section 135 of the East African Community Customs Management, Act 2004,which provides as follows: -

> 135. (1) Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount

erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.

(2) Where a demand is made for any amount pursuant to sub-section (1), the amount shall be deemed to be due from the person liable to pay it on the date on which the demand note is served upon him or her, and if payment is not made within thirty days of the date of such service, or such further period as the Commissioner may allow, a further duty of a sum equal to five percent of the amount demanded shall be due and payable by that person by way of a penalty and a subsequent penalty of two percent for each month in which he or she defaults.

(3) The proper officer shall not make any demand after five years from the date of the short levy or erroneous refund, as the case may be, unless the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made, as the case may be.

45. On the other hand, section 136 East African Community Customs Management, Act 2004 provides as follows: -

236. The Commissioner shall have the powers to-

(a) 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;

(b) 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;

(c) inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and

(d) examine the goods where possible for the goods to be produced."

46. These sections allow audit for under declaration. They do not contemplate audit due to mistakes by the system managed by the Respondent. Even then there must be prompt demand to avoid the tax payer shouldering the pain of incompetence of the taxman.

47. I note that correct declaration were made and after verification of the goods, the system generated duty charges and other charges which were duly paid. There were no incorrect declarations. The declarations were verified by the respondent and paid. Indeed, it is not true as the Respondent contends.

48. It was the Respondent's position that the Appellant tax payer was required to declare and correct its code which is used to generate import entry on which the Simba system generated the duty and which was done. I do not find this a serious argument as correct tariff was declared. The Respondent never raised the issue of tariff but ad valorem and specific duty. However, the duty was generated by the Respondent's system and verified.

49. The court notes that the Review decision related to the goods for sale and the appellant contended that the goods were already sold. The Respondent is clothed with jurisdiction to re-audit.

50. However, the Respondent must act reasonably, especially where there is no fraud or concealment on part of the tax payer. The Respondent was wrong in stating that there were mis-declarations. I cannot find any evidence of incorrect declaration. The only evidence I can see are the moving targets and claims by the taxman. It is not true that 1,100 pieces were imported. 925 pieces were imported. I was invited to recalculate the taxes, since there was a misstatement by the tax authority. I decline the invitation. The tax Authority had the 2 proceedings below to deal with the number of pieces.

51. Whereas the court appreciates the need to collect taxes, in carrying out their statutory obligations the tax authorities must adhere to the law. As was held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others (2007)e KLR:

> "It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due...Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law."

52. The next issue is whether, even if the Respondent had shown the correct amount to be due, they are entitled to recover the same. Customs and Excise duty is meant to foster trade. It is a tax that increases rapidly. It is almost always collected at source. Whereas the taxman has up to 5 years to audit, there must be an audit question, especially wrongful declaration.

53. If there is no fault on part of the taxpayer and there is no bid to under declare tax, the Respondent must inform the taxpayer within a reasonable time so that the same is factored into the price to sell the goods. Of what use is it to commerce, for the taxes to be added many years later, when even the input taxes cannot be claimed.

54. It is also unfair, since the taxes will have been paid and declared even as income tax and then additions are made when the fault is not the tax payers'. It is not to say that the Respondent cannot re-assess tax. It has to do so reasonably, fair and not arbitrarily and capriciously. It does not make any sense to wait for more than 2 years to charge extra amounts and imbedded penalties. In Standard Resources Group Ltd v Attorney General & 3 others [2018] eKLR, the court stated as follows:

> 59. Article 47 in some way calls on the public administrators to apply the principles of transparency and accountability in their actions. That is why they are required to act in a manner that is lawful, reasonable and procedurally fair. In that regard, for the rule of law to be entrenched in our democratic state, public officers must act within the law. Article 259 requires of the courts to interpret *the constitution* so as to promote its purposes, values and principles and advance the rule of law, and human rights and fundamental freedoms in the Bill of Rights. That done, we will give effect to the true values and principles in *the constitution* as espoused in Article 10.
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> 60. Taking the above exposition into account, the 2nd and 3rd respondents who were "applying the law", had a constitutional obligation to act transparently and be accountable on their actions, including in assessing customs duty. They could not hide under the discretion conferred

on them by the EACCMA Act and act without regard to the values and principles in our constitution. In this respect, I agree with the court's observation in Geothermal Development Company Ltd v Attorney General & 3 others (supra) that "Article 232 enunciates various values and principles of public service including"(c) responsive, prompt, effective, impartial and equitable provision of services" and "(f) transparency and provision to the public of timely, accurate information." The 2nd and 3rd respondents, as public servants, had a duty to act transparently which they did not do."

55. Further, as was held in Republic v City Council Of Nairobi Exparte Callfast Services Limited & 32 others [2013] eKLR,

> " Therefore whereas the demand of payment of fees by the Respondents may not be in excess of its jurisdiction, the fact that the said fees has never been demanded by the Respondent in the past which has given the ex parte applicants legitimate expectations that they are only liable to pay the taxes to the Authority is a ground for restraining the Respondent from demanding such payment with respect to the taxes that accrued in the past unless and until the Respondent gives a reasonable notice of the change in their past policy. To suddenly demand such payments amounts to abuse of power on the part of the Respondent."

56. I also associate myself with the following detailed reasoning of the Court in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240.

> "...This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality. In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the quantum of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power."

57. I therefore find and hold that whereas the demand of payment of tax by the Respondent may not be in excess of its jurisdiction, the fact that the said tax was not promptly demanded by the Respondent in the past gave Appellant legitimate expectation that they are only liable to pay the taxes to the Respondent with respect to the taxes that accrued in the past unless and until the Respondent gives a reasonable notice of the change in their past policy. To suddenly demand such tax amounts was in abuse of power

and unreasonable on the part of the Respondent. As was further held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others (supra):

> ...And the rule of law enforces minimum standards of fairness, both substantive and procedural." The unilateral change of tariff indicate that this change was done nearly nine (9) years after its use by the applicant company with its predecessors who shared the same licence that was based on tariff 22.04. The applicant has over this period arranged its business affairs in reliance with the principle of certainty of law – and that should there be a change it will only apply to the future. I hold that the applicant is entitled to hold the taxman to its bargain and its business expectations based on the principle of legality ought not to be thwarted. The respondents should have exercised their power to change the tariff .....in a spirit of legality and fairness. The retrospective application of the tariff was done: (a) without notice or adequate notice; (b) without allowing the applicant to explain its position. There is correspondence to the effect that the respondents decision on tariff would remain – and the applicant was shut out; (c) The change of tariff according to the respondents own report was intended to block the payment of a refund of a Kshs 36 million (appx) valid refund due to the applicant; (d) The exercise of the power to change the tariff was not admittedly based on the respondents addressing the law on tariff. ...As reflected above the change of tariff was unilateral and abrupt and no evidence has been given concerning whether legal advice was sought and given before the change over....
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> It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due. It stems from illegality, improper exercise of law, disregard of legitimate expectation, in violation of Government regularity, in breach of the rule of law, abuse of power and in total disregard of constitutions. All these are proper grounds of intervention by this court....Imposing another tariff retrospectively is punitive and our courts ought to frown upon any such practice because the effect of such imposition is the same as retroactive laws. A change of tariff just like most laws must be prospective to be fair.
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> ...I hold that where there is proof of abuse of power and a violation or threat to the rule of law, the court must wholly stop what the perpetrator of those ills intended to do. I apply the principle in the Benett case above. The reason for this is that only the might and majesty of law can prevent or act as a deterrence against the temptation to abuse power and also, send the right signals, that public administration must adhere to the rule of law. In the result, I find that the applicant company is entitled to the reliefs claimed. The judicial review orders sought to forthwith issue as prayed with costs to the applicant. "

58. Consequently, the Respondent cannot be allowed to suddenly wake up and demand taxes which they have in the past several years not demanded. Whereas the said taxes are not illegal; and in demanding the same, the Respondent cannot be said to be acting outside their jurisdiction, the said demand should take into account the principle of fairness and reasonableness in order to allow the Appellant time to alter their course of conducting business in order to take into account the changed circumstances.

59. I also find that there was no legitimate defence offered by the respondent. I hold and find that the tax payer did not do any mis-description or commit any fraud. There were no materials warranting the post-payment audit over 2 years later after the goods were long sold and tax for the sale received by the respondent.

60. The respondent was thus capricious, arbitrary and unreasonable in demanding fees for items that had long been traded. It is not good faith, to apply wait until penalties have outstripped the underpaid duty then demand. It breeds grounds for rent seeking and breach of legitimate expectation.

61. I am persuaded by two authorities referred by the Appellant. In the case of Krish Commodities Limited –V- Kenya Revenue Authority [2018] eKLR, the Court of Appeal held that:

> '...The issue was not whether the Respondent had the power to conduct the post clearance audit and demand the short levied duty. It is given that the Respondent has such powers under the EACCMA, in our view, the pertinent issue was whether the manner in which the decision was made or the process followed was reasonable, fair and in conformity with Article 47 of *the Constitution*...'
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> We tend to agree and hold that in the absence of an explanation as to why the post clearance audit and resulting demand for short levied duty was made after a long time can only be perceived as irrational.
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> Moreover, it is common ground that the identification of the applicable rate of duty and assessment of duty payable was done by the SIMBA System. The Appellant had no role in declaring or setting the rate to be applied. For the Respondent to turn around and pass the buck to the Appellant by contending that it was aware at all material times of the right rate cannot hold any weight. More so, taking into account that the Respondent's own officers verified the entry made and even inspected the consignments.... Having verified the entries in issue, rate applied and assessed duty as correct, a legitimate expectation arose in favour of the Appellant that the assessed duty was correct.'

62. Further in the case of *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)* [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment), the Supreme Court affirmed the above principles and stated:

> 'We reiterate the findings by the High Court and Court of Appeal and hold that the appellant acted unfairly in demanding for the alleged short levied duty almost 4 years after the initial assessment and payment of the duty so assessed were irrational and did not accord the respondent its right to fair administrative action and we shall explain why.Legitimate expectation: Does it arise?
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> 49. The appellant claims that it is not only simplistic but also self-serving for the respondent to claim that the deficiencies of the Tradex Simba system created a legitimate expectation as the respondent was solely responsible for the short levied taxies whilst the law was clear that the applicable rate for the rice imported was 75%. It is its submission that there cannot be a legitimate expectation that is in contradiction to the law and that the error on the Tradex Simba system cannot oust the law. It thus urges that the findings by both courts did not meet the threshold for the application of the doctrine of legitimate expectation.
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> 50. In the 4th Edition, Vol 1 (1) At page 151, paragraph 81 of the Halsbury's Laws of England, legitimate expectation is described as follows:"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise

made by authority, including an implied representation, or from consistent past practice".

51. Further according to De Smith Woolf & Jowell, "Judicial Review of Administrative Action" 6th Edn Sweet & Maxwell page 609;"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage."

52. As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.

Taking into account the above expressions of the law, we must agree with the Court of Appeal that a legitimate expectation arose since the appellant failed to collect duty at the applicable rate, having applied the rate of 35% in their Tradex Simba system. It is also incomprehensible how the appellant, four years after the assessment of duty, demanded for payment of extra duty when it sat on its laurels having itself assessed the duty payable. This act is unreasonable for the reason that, first, it is totally irrational and unreasonable to require the respondent to carry the burden of being aware of any mistakes made by the Tradex Simba system, a system run by the appellant. Second, it is also incomprehensible how the respondent should be made to suffer the consequences of the actions of the appellant of failing to input the correct rate in a system it had full control over. This line of reasoning, is with respect, misguided. It misses the point that judicial review is not concerned with the merits of the case but the decision making process.

9. It was unacceptable that the respondent adopted the view that it did not matter whether there was a mis-declaration, under-declaration or a system error and that the appellant was entitled to demand for any levies discovered following the carrying out of a post-audit at any given time. Anyone who decided anything affecting the right or interest of another person if the person, body or authority against whom it was claimed exercised a quasi-judicial function of function that was likely to infringe on their right to fair administrative action, was entitled to remedies for judicial review.

63. The delay is thus unreasonable and unjust. The mistake if any was by a system run by the Respondent who did nothing for 2 years or so. Consequently, I find merit in the Appeal and allow it.

64. I decline the invitation to re-assess tax as there is no cross appeal to that effect.

Determination

65. In the upshot, I find no merit in the Appeal and make the following orders:

a. The Appeal is allowed and the Judgment of the Tribunal in Tax Tribunal Case No. 516 of 2022 given in Nairobi on 3/11/2023 is set aside in its entirety. The tax payer's objection is

upheld. The decision contained in the letter dated 6/4/2022 is unreasonable, irrational, unjust and contrary to the Appellant's legitimate expectation.

b. The Appellant shall have the costs of the appeal assessed at Kshs. 395,000/=.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Essasee for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah