Jumbo Steel Mills Limited v Commissioner Customs and Border Control (Customs Tax Appeal E001 of 2022) [2023] KEHC 24615 (KLR) (Commercial and Tax) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 24615 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E001 OF 2022

MN MWANGI, J

SEPTEMBER 22, 2023

BETWEEN

JUMBO STEEL MILLS LIMITED ..... APPELLANT

AND

COMMISSIONER CUSTOMS AND BORDER CONTROL ..... RESPONDENT

JUDGMENT

1. The appellant imported a consignment of 4x40" container STC Film Faced Plywood of 1220MMx2440MMx18MM MDF, 1220MMx2440MMx18MM PVC Edge Bindin, and 22Mx0.4MM items under Bill of Lading No 140900851988. The said goods arrived in Kenya on 18th August, 2019 and an entry was entered pursuant to the provisions of Section 34(1) & (2) of the *EACCMA* 2004 vide the Simba system operated by the respondent. Entry No 2019MSA 7318849 dated 21st August, 2019 was generated. An assessment of duty amounting to Kshs 2,847,802.00 was subsequently computed and generated by the Simba system. The said amount was paid by the appellant.

2. The appellant then presented the entry and supporting documents to the Proper Officer during the examination/verification of the consignment where the accuracy of the entry in terms of valuation and tariff, description, quantity and weight was determined and found to be correct and accurate. Thereafter, approval from sections such as valuation and tariff was made, confirmation of assessed duty was done and entry No 2019MSA 7318849 was passed by the Proper Officer No 05343. On 28th August, 2019, the consignment was released and the goods were evacuated from the customs area.

3. The respondent contended that through its Business Intelligent Unit, it carried out a post clearance audit of the imported consignment to establish whether they were correctly declared in accordance

with the existing laws and regulations. It stated that the audit was to specifically determine the extent of compliance with adjustments to the tariff line made by the EAC Gazette Notice Vol. AT 1-No 10 under Legal Notice EAC/76/2019 dated 30th June, 2019, which came into effect on 1st July, 2019 for a period of one-year elapsing on 30th June, 2020. The respondent also stated that the said notice allowed Kenya to stay the application of the EAC CET rate of 25% and instead apply a duty rate of 25% or USD 175 per M^3 whichever is higher under harmonized system (HS) Code 4412.39.00 among other commodities effective from 1st July, 2019.

4. The respondent stated that after carrying out the audit, it established that at the point of the appellant declaring its imported goods, the applicable higher rate being the specific rate as per the provisions of the Gazette Notice was not used leading to short levied taxes/duties. Approximately one year, two and a half months later, the appellant was issued with a demand letter Ref No CUS/BIA/BIU/DEM/009/2020 dated 22nd September, 2020, by the respondent demanding Kshs 17,193.39, but before they could respond to the said demand, the respondent issued another demand Ref No CUS/BIA/BIU/DEM/009A/2020 dated 16th October, 2020 cancelling the earlier demand and changing the amount from Kshs 17,193.39 to Kshs 757,583.96.

5. The appellant responded to the said letters through a letter dated 2nd November, 2020 objecting to the demand. The respondent through a letter dated 12th November, 2020 Ref No CUS/BIA/BIU/DEM/009A/2020 objected to the reasons given in the appellant's letter. It explained its reasons for the issued demand and stated that the appellant's consignment was short levied, thus the appellant should pay the demanded amount. On 26th November, 2020 the appellant objected to the said decision vide a letter dated 26th November, 2020. It received an objection decision dated 30th November, 2020 from the respondent giving its reasons for its decision. The respondent rejected the objection and confirmed that the taxes were still due and owing.

6. Dissatisfied with the respondent's decision, the appellant appealed against the said decision to the Tax Appeals Tribunal vide a Memorandum of Appeal and statement of facts filed on 12th January, 2021. The appellant stated that the approved rate given by EAC Council of Ministers in Arusha allowed Kenya to stay the application of the EAC CET rate of 25% and apply a duty rate of 25% or USD 175 per M^3 whichever is higher under HS Code 4412.39.00, and that the said rate became effective on 1st July, 2019. The appellant however contended that the respondent failed to implement what it had applied for, and secured from the Council of Ministers in Arusha, by not entering the new tariffs on the Simba or the customs ICMS electronic system owned and operated by themselves.

7. The appellant contended that the information from Legal Notice No EAC/76/2019 registered in Arusha was not passed on to the respondent's own line officers who process, confirm tariffs and valuation, at their operational sections. It stated that there was no dispute on the same, all through verification, valuation up to the passing of the entry at the Document Processing Centre until evacuation of the goods on 28th August, 2019. The appellant argued that the onus of entering the correct tariff changes in the Simba system is squarely and solely the responsibility of the respondent since the system is owned and controlled by the respondent. The appellant stated that if the requisite changes were never made by the respondent on their own Simba system, the appellant should not be made to pay for the errors, mistakes and negligence outside its control.

8. At the Tax Appeals Tribunal (hereinafter referred to as the Tribunal) the appellant sought orders that it should not be burdened with the demanded tax of Kshs 757,883.96 since it was as a result of the serious omission, mistake and negligence by the respondent and that the appellant should not be punished for failure by the respondent to input the relevant information in the electronic tax system (Simba system)

as well as providing the same information to importers and the appellant, through the same electronic tax system.

9. After consideration of the pleadings filed and rival submissions by Counsel for the parties, the Tribunal framed one issue for determination, on whether the respondent erred in fact and law in demanding short-levied taxes vide its objection decision dated 30th November, 2020.

10. In its judgment, the Tribunal cited the provisions of Section 120(1) of the *EACCMA* 2004 and held that from the records adduced, the goods in question were entered for home consumption within the time period that the Gazette Notice in issue was in force, thus it was incorrect for the appellant to state otherwise. The Tribunal also held that it failed to see the nexus between the appellant's argument that the short levy demand should not apply in this case since the Gazette Notice had a life period of one year and the demand by the respondent was issued after the notice had elapsed, and the short-levying of taxes based on the fact that the law remains relevant at the time of the transaction. The Tribunal also held that the law permits the respondent to demand for taxes due for a period of up to five years from the date of importation.

11. The Tribunal held that notwithstanding the respondent's failure to update the system, the appellant was neither precluded from paying the correct amount of tax nor was the respondent estopped by law from demanding the same. The Tribunal noted that the appellant while aggrieved at the assessment had failed to demonstrate how the audit may have been punitive or the tax demand erroneous thus failing to discharge its burden of proof. As a result, the Tribunal concluded that it could not over emphasize the legal requirement to collect short-levied taxes arising from a post clearance customs audit process hence the respondent did not err in fact and law in demanding short-levied taxes vide its objection decision dated 30th November, 2020.

12. The Tribunal found the appeal by the appellant not to be merited and dismissed it. The Tribunal further upheld the respondent's objection decision dated 30th November, 2020 and ordered the appellant to apply for waiver of accrued interest and penalties if any, since the respondent admitted to the inadvertent administrative failure to capture the correct applicable rate.

13. Dissatisfied with the Tribunal's decision, the appellant lodged an appeal against the said decision vide a Memorandum of Appeal dated 12th January, 2022 raising the following grounds of appeal –

    i. That the Tax Appeals Tribunal made its ruling based on two issues at paragraph 19 of its judgment namely-

        a. Whether the respondent erred in fact and law in demanding short-levied taxes vide its objection decision dated 30th November, 2020.

    ii. That the respondent Tax Appeals Tribunal erred in law and fact by basing its ruling at paragraph 19 by failing to realize that the central focus of the appellant's appeal was on procedural unfairness in the implementation of Legal Notice No EAC76/2019 dated 30th June, 2019 contrary to Article 47 Section 4, 5, & 6 (sic) of the *Constitution* of Kenya;

    iii. That the respondent Tax Appeals Tribunal erred in both law and fact based on issues in paragraphs 22, 23, 24 & 25 in its ruling that formed the basis as per its analysis and findings in paragraph 20 but failed to recognize the extent to which the omissions and commissions (sic) caused by the respondent infringed/violated the rights of the appellant as in Article 47 of the *Constitution* of Kenya;

    iv. That the respondent Tax Appeals Tribunal erred in law and fact based on issues highlighted in paragraphs 25, 26, 27, 28, 29, 30, 31 & 32 but failed to recognize how the appellant raised no

issue with the set down laws in the *EACCMA* 2004 but with issues purely based on the costly procedural unfairness in the implementation of the said laws;

v. That the respondent Tax Appeals Tribunal erred in both law and fact when it fettered its discretion by failing to take into account the relevant considerations and accountability placed upon the respondent as a State Agency while exercising administrative authority, offended Article 47 Section 3(c), Section 4(1), Section 5(1) & (2), Section 7(1), Section 2(b), (c), (f), (k), (i), (m) (sic);

vi. That the respondent Tax Appeals Tribunal erred in both law and fact by failing to recognize that the Harmonized Commodity Description and Coding System (HS Codes) of each product is managed and purely imputed into the automated electronic document lodging Simba system and integrated customs management system managed, controlled, and operated by the Commissioner of Customs & Border Control and not the appellant;

vii. That the respondent Tax Appeals Tribunal erred in both law and fact by failing to recognize that the respondent's automated electronic Simba system and the Integrated Customs Management System (ICMS) are solidly under the control and operation of the respondent and cannot be manipulated by the appellant in any way to capture any information outside what the respondent has already inputted;

viii. That the respondent Tax Appeals Tribunal erred in both law and fact by failing to recognize that Sections 41 & 12(4) of the *EACCMA* 2004 give the respondent the mandate to determine the accuracy of the declarations made by the appellant before approval of the values as declared which the respondent either ignored, forgot or omitted the approved values (sic) in disregard to their own approved application for stay granted them by the EAC Customs Union of Council of Ministers in Arusha, Tanzania;

ix. That the respondent Tax Appeals Tribunal erred in both law and fact by failing to recognize that the respondent failed miserably, and costly (sic) to bring to the attention of its own staff who act as stop-gap machinery that checks the accuracy of the declared values, documents supporting the declaration, before release of the said goods;

x. That the respondent Tax Appeals Tribunal erred in both law and fact by failing to put the respondent to task to prove that the inadvertent administrative system lapse which the respondent alleges failed to capture the correct applicable rate of the consignment had indeed happened and the alternative measures the respondent put in place to avoid revenue leakage;

xi. That the respondent Tax Appeals Tribunal erred in both law and fact by failing to recognize that the respondent failed to carry out public participation of stakeholders based on Article 47 before, during and after it secured approval to stay from the EAC Customs Union Council of Ministers which according to Article 47 Section (o) (sic) the administrative action or decision was taken or made in abuse of power;

xii. That the respondent Tax Appeals Tribunal erred in both law and fact at paragraph 36 of its ruling by failing to recognize the nexus between the appellant's argument and the respondent's claim or short levied taxes based on Article 47 which all along the appellant's appeal was based on;

xiii. That the respondent Tax Appeals Tribunal erred in both law and fact based on its own paragraph 39 by failing to capture what the appellant raised as punitive in his statement of fact paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23 & 24 which narrated how the punitive tax would affect the appellant following his commission and omission;

xiv. That the respondent Tax Appeals Tribunal erred in law and fact at paragraph 41 of its judgment by associating itself with the cited case at paragraph 41 of its decision, a cited case whose dynamics differ widely from the one raised by the appellant in his application the cited opinion that formed the Tax Appeals Tribunal decision (sic);

xv. That the respondent Tax Appeals Tribunal erred in law and fact at paragraph 44 for finding that the respondent did not err in fact and law in demanding short-levied taxes vide its objection decision dated 30th November, 2020;

xvi. That the respondent Tax Appeals Tribunal erred in law and fact by not finding that the decision of the East Africa Community Council of Ministers was not localized through publishing it in the Kenya Gazette and thus it did not affect the goods imported then by the appellant, and that if it had been gazetted it would have appeared in the Kenya Revenue Authority Systems; and

xvii. That the respondent Tax Appeals Tribunal erred in law and fact by not finding that the respondent denied the appellant access to information under Article 35 of the *Constitution* of Kenya.

14. The appellant's prayer is for this Court to allow the appeal with costs, set aside the judgment and orders delivered by the Tax Appeals Tribunal and make appropriate orders.

15. This Appeal was canvassed by way of written submissions. On 2nd March, 2023, the law firm of Mkan & Co. Advocates filed written submissions on behalf of the appellant. The respondent's submissions were filed on 12th April, 2023 by Elisha Nyapara Advocate.

16. Mr. Mkan, learned Counsel for the appellant submitted that the respondent's action of issuing a further demand for what it purported to be short levied duty was wrong and unfair based on the fact that the appellant was guided by the rates on the system; which is controlled solely by the respondent and the appellant had no role in setting the rates to be applied. Further, that since the clearing of consignments passes through six check points within the respondent's channel before the goods are released to the importers, the respondent had a duty to verify the accuracy of the entries and the duty payable before releasing the consignment, which was done in this case. He contended that it was unfair for the respondent to claim otherwise as against the appellant.

17. It was stated by Counsel that the respondent applied to the East African Community (EAC) for the change of tariff without the knowledge of stakeholders and without carrying out public participation. That despite the fact that the respondent had knowledge of the fact that the EAC accepted and gazetted the implementation, it did not input the same in their Simba system out of negligence and/or indolence thus that kind of failure cannot be blamed on the appellant. Mr. Mkan contended that for the said reason, the respondent is estopped by law from demanding the short-levied amount. Counsel further stated that by the time the respondent was demanding for the short-levied amount, the appellant had long cleared and sold the goods hence it is unfair and unreasonable for the respondent to expect the appellant to pay for the respondent's inefficiency and ineffectiveness.

18. Mr. Mkan contended that although Section 135(1) of *EACCMA* 2004 empowered the respondent to conduct post clearance audit and demand short-levied duty, the respondent acted unfairly in demanding for the alleged short-levied duty almost 1 year, 2 and a half months later, after the initial assessment and payment of the duty was assessed. He asserted that the aforesaid action by the respondent did not accord the appellant its right to fair administrative action. He relied on the holding by the Court in the case of *Krish Commodities Limited v Kenya Revenue Authority* [2018] eKLR, which in his view has striking similarities to the instant appeal. He submitted 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, it can only be perceived as irrational.

19. He further cited the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* SC Petitions No 14, 14A, 14B and 14C of 2014 [2014] eKLR, where the Supreme Court of Kenya reiterated positions taken by the High Court and the Court of Appeal and held that the appellant acted unfairly in demanding for the alleged short levied duty almost four years after the initial assessment and payment of the duty so assessed, was irrational and did not accord the respondent its right to fair administrative action, in a matter with similar circumstances as this appeal herein.

20. He referred to Sections 235 and 236 of *EACCMA* 2004 and stated that it enables the Commissioner to collect taxes levied or not levied when it is the customer's fault but in this case, the error of omission was on the part of the respondent. Counsel prayed for an order to the effect that the money collected from the appellant's account being Kshs 757,000/= be refunded to the appellant. He submitted that in any event, the changes in taxes have never been gazetted to date in Kenya, despite the fact that the additional tax was made in the year 2019. Mr. Mkan submitted that having demonstrated that the respondent's action was unprocedural, unreasonable and unfair, and contrary to the provisions of *EACCMA* 2004, the appellant's right to fair administrative action under the *Constitution* of Kenya, 2010 and the *Fair Administrative Action Act*, No 4 of 2015 were violated. He prayed for the appeal herein to be allowed as prayed.

21. Mr. Nyapara, learned Counsel for the respondent submitted that at the time the appellant lodged the entries for the imported consignment, there was already an adjustment of the tariff/duty rate payable on the imported consignment, brought about by EAC Gazette Notice Vol. AT 1-No 10 vide Legal Notice No EAC/76/2019 dated 30th June, 2019 which came into effect on 1st July, 2019. He further submitted that the said Gazette Notice introduced the use of a higher specific import duty rate of 25% or ad valorem import duty rate of USD 175 per M^3, whichever was higher, on the appellant's imported consignment, but at the point of the appellant declaring its imported goods, the applicable higher rate being the ad valorem rate was not used. He stated as a result, it was established that there was under declaration of the said consignment leading to short levied taxes/duties.

22. Counsel agreed that at the time of importation of the consignment in issue, tariff/customs rates brought about by the law had not been adjusted and reflected in the respondent's Simba system. He argued that the dispute before this Court is whether the statutory rate or system rate should have been used for the appellant's imported goods. He further stated that the respondent acted within the law as mandated under Sections 135, 235 & 236 of the *EACCMA* 2004 as read with the East African Community Common External Tariff (EAC CET) hence the appellant bears the burden of proving the error in the decision so made as Section 135 of the *EACCMA* 2004 authorizes the respondent to recover short-levied taxes. He submitted that in execution of that mandate, Sections 235 & 236 of the said Act empowers the respondent to carry out a post-clearance audit on import declarations made by taxpayers by verifying the accuracy of the entry of goods or documents and investigating whether the taxpayer has made the correct customs declarations and paid all the taxes due.

23. Mr. Nyapara also submitted that the respondent is mandated to carry out a post- clearance audit within five years from the date of import in order to verify the level of compliance with customs law and ascertain whether correct taxes were declared and paid. He referred to Section 120 of *EACCMA* 2004 and asserted that at the time of importation of the appellant's consignment, the correct tariff classification of the said consignment was the higher amount of import duty being the ad valorem rate, chargeable at the rate of USD 175 per M^3 because the material consideration is the applicable rate at the time the consignment was imported and entries made by the appellant. To this end, Counsel relied on the case of *Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers*

Ltd & another [2016] eKLR and the case of *Tarmal Industries Ltd v Commissioner of Customs and Excise* [1968] EA 471 cited by the Court in the case of *Commissioner Customs & others v Amit Ashok Doshi & 2 others*, Mombasa Civil Appeal No 157 of 2007.

24. It was submitted by Counsel that since the taxes paid by the appellant were not as stipulated in the Gazette Notice, there was a short levying of taxes to warrant the respondent to invoke the powers granted to it under Sections 135, 136 and 235 of the *EACCMA*. Mr. Nyapara stated that the demand notices in question were issued immediately after the short-levied duties were detected and within the five years' period. He submitted that the appellant was aware and/or ought to have been aware of the correct rate of duty payable being the applicable rate imposed by the EAC Gazette Notice.

25. He contended that the respondent is allowed to change its position where subsequent audits/ investigations reveal that there was an error in the declarations made by the appellant, and as such, no legitimate expectation can arise in such circumstances. He referred to the case of *Aryuv Agencies Limited v Kenya Revenue Authority* [2019] eKLR and *Republic v Kenya Revenue Authority & another Ex Parte Krones LCS Centre East Africa Limited* [2012] eKLR.

26. Mr. Nyapara contended that the inadvertent administrative omission/delayed Simba system adjustments that failed to capture the correct applicable rate of the consignment cannot oust the express provisions of the law or be used to estop the respondent from demanding the correct amount of duty payable. He submitted that the law envisages such inadvertent administrative system lapse thus it empowers the respondent to issue demands for any short-levied taxes upon conducting a post clearance audit within five years in line with the provisions of Sections 135, 136 and 235 of *EACCMA* 2004. He relied on the case of *Partington v Attorney General* cited by the Court in *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR and submitted that the appellant had failed to demonstrate how the respondent acted outside the law. He submitted that the respondent has a statutory mandate to enforce the collection of the tax now claimed, if the taxes are found to be lawfully dues and once taxes are found to be lawfully due, the Court ought not to prohibit the respondent from lawfully exercising its statutory mandate.

27. It was stated by Counsel that every case must be decided on its own merits, bearing in mind the special circumstances and facts surrounding the case. He stated that the decisions made in *Kenya Revenue Authority v Export Trading Company Limited* [2020] eKLR and *Krish Commodities Ltd v Kenya Revenue Authority* (*supra*) cited by the appellant are circumstantially different and distinguishable from the dispute between the parties herein.

Analysis and Determination

28. It is trite that pursuant to the provisions of Section 56(2) of the *Tax Procedures Act*, an Appeal to the High Court from the decision of the Tax Appeals Tribunal or to the Court of Appeal shall be on a question of law only. For this reason, this Court is not permitted to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.

29. I have considered the Memorandum of Appeal, Record of Appeal and the statement of facts filed by the appellant. I have also considered the statement of facts and supplementary Record of Appeal filed by the respondent, as well as the submissions filed by Counsel for the parties. The issue that arises for determination is whether the decision of the Tax Appeals Tribunal should be upheld.

30. It is not disputed that at the time the appellant lodged entries for the imported consignment, there was already an adjustment of the tariff/duty rate payable on the imported consignment, brought about by EAC Gazette Notice Vol. AT 1-No 10 vide a Legal Notice No EAC/76/2019 dated 30th June, 2019 that was in force. The said Gazette Notice introduced the use of a higher specific import duty rate of 25%

or ad valorem import duty rate of USD 175 per M^3, whichever was higher. As at the time the appellant lodged entries for its imported consignment, the respondent had not adjusted the said changes on its Simba system where the appellant lodged its entries. It is also not disputed that the Simba system is solely controlled and managed by the respondent and its employees and/or officials. It therefore follows that they are the only ones who can make changes to the system and not the appellant.

31. The respondent contended that after it lodged its entries on the Simba system, an assessment of duty amounting to Kshs 2,847,802.00 was computed and generated by the Simba system and it paid the said duty. Thereafter, it presented the entry and supporting documents to the Proper Officer during the verification of the consignment, where the accuracy of the entry in terms of valuation and tariff, description, quantity and weight was determined and found to be correct and accurate. As a result, approval from sections such as valuation and tariff was made, confirmation of assessed duty was done and entry No 2019MSA 7318849 was passed by the Proper Officer No 05343 and the consignment was released on 28th August, 2019. The goods were then evacuated from the customs area.

32. From the above, it is evident that the appellant followed the law and what it was required to do and duly paid duty as assessed by the Simba system. That is not disputed by the respondent, whose position is that after carrying out an audit, it established that at the point of the appellant declaring its imported goods, the applicable higher rate being the specific rate as per the provisions of the EAC Gazette Notice Vol. AT 1-No 10 vide a Legal Notice No EAC/76/2019 dated 30th June, 2019, was not used, resulting in short levied taxes/duties. It therefore issued the appellant with a demand for Kshs 757,583.96 being the short-levied amount vide a letter dated 16th October, 2020. That was approximately one year, two months and a half, after the appellant's goods were released from the customs area. In issuing the said demand, the respondent relied on the provisions of Section 135 of the *EACCMA* 2004, which provides as follows-

> "(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) .....
>
> (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."

33. The appellant submitted that the information from Legal Notice No EAC/76/2019 registered in Arusha was not passed on to the respondent's own line officers who process, confirm tariffs and valuation at their operational sections. Furthermore, the said changes in tariff rates were not published in the Kenya Gazette and/or local dailies so as to notify and/or inform stakeholders of the said changes. It contended that since the requisite changes were never made by the respondent on their own Simba system, the appellant should not be made to pay for the errors, mistakes and negligence, which was outside the appellant's control. It was stated by the appellant that by the time the respondent was

demanding for the short-levied amount, it had long cleared and sold the goods hence it is unfair and unreasonable for the respondent to expect the appellant to pay for such inefficiency and ineffectiveness.

34. It is not in dispute that at the time of importation of the appellant's goods, the rate in force was the one provided for under EAC Gazette Notice Vol. AT 1-No 10 vide a Legal Notice No EAC/76/2019 dated 30th June, 2019 as provided for under Section 120(1) *EACCMA* 2004 which states as hereunder –

> " Subject to subsection (3) and section 94, import duty shall be paid at the rate in force at the time when the goods liable to such duty are entered for home consumption..."

35. *EACCMA* 2004 empowers the respondent to carry out a post-clearance audit on import declarations made by taxpayers within five years from the date of import by verifying the accuracy of the entry of goods or documents and the respondent is authorized to investigate whether the taxpayer has made the correct customs declaration and paid all the taxes due.

36. The contentious issue is however not if the respondent is mandated to carry out a post clearance audit, what the applicable rate at the time of importation of the appellant's goods was or whether there were short levied taxes/duties, but whether the appellant should be punished by being made to pay the short-levied amount on account of a mistake on the part of the respondent, its agents, officials and/or employees, and whether the respondent's decision dated 30th November, 2020 conforms to the provisions of Article 47 of the *Constitution* of Kenya, 2010.

37. A mistake on taxation, and more specifically, on payment of taxes due on the part of the taxman, cannot be construed against the tax payer. In this case, the respondent not only failed to implement the changes in tariff rates on the Simba system but also failed to inform its employees of the said changes. Had the employees/officers of the respondent charged with confirming tariffs and valuation at their operational sections been apprised of the change in tariffs, the said employees/officers would have flagged the inadvertent omission and charged the appellant the appropriate taxes even before the appellant's goods were released from the customs area. It is the appellant's contention that the demand for short levied taxes/dues was issued long after it had sold the imported consignment of goods. It is this Court's finding that such a demand goes against the four canons of taxation which are -

    i. Equity;

    ii. Certainty;

    iii. Convenience; and

    iv. Economy.

38. The circumstances of this case show that it is not equitable, convenient and/or economical for the appellant to pay the short-levied amount which was only brought to its attention long after it sold the imported consignment of goods. It can be argued that the appellant ought to have known that there were changes in the tariff rate and inquired from the respondent when it received the assessed duty, the said change had however not been gazetted in the Kenya Gazette and/or any Kenyan Daily Newspapers. In addition, the respondent's officers were also not aware of the said changes and that was the reason why they did not flag the said omission during the verification process.

39. In the circumstances, I agree with Counsel for the appellant that the respondent's objection decision dated 30th November, 2020 and the holding by the Tribunal do not conform to the provisions of Article 47 of the *Constitution* of Kenya, 2010, which provides for expeditious, efficient, lawful, reasonable and procedurally fair administrative action. The respondent has not offered any explanation as to why the post clearance audit was done one year, two months and a half, after the appellant had

paid its assessed dues and after Legal Notice No EAC/76/2019 has elapsed. The omission on the part of the respondent and its officers should not lead to the appellant being punished for a situation that was completely out of its control.

40. This Court finds that the respondent's actions in issuing the appellant with a demand for shot-levied taxes/dues one year, two months and a half, after the appellant had paid its assessed dues is irrational, arbitrary and capricious. In the case of *Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) the Supreme Court held that –

> " The High Court, in determining whether the appellant acted in a fairly, reasonably and expeditious manner held:
>
> > "The main question in this petition is whether in the circumstances of this case, the respondent can be said to have acted fairly, reasonably and in an expeditious manner. I am afraid that the answer to the above question is to the negative. I say so because the respondent did not furnish this court with any satisfactory explanation as to why the post clearance audit and the subsequent demand for the alleged short levied duty was made almost 4 years after the initial assessment and payment of the duty so assessed. I further find that it was not in dispute that section 135(3) of the *EACCMA* allows the respondent to make such a demand within 5 years. However, that is not to say that the respondent should wait until the tail end of the said period before making such a demand. My humble view is that there ought to be sufficient reason(s) as to why such audit and demand is made too late and at the tail end of the given period."
>
> The learned judge thus found that the actions of the appellant were irrational and not in tandem with the efficiency and expediency envisaged under article 47(1) of the *Constitution*.....
>
> 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..."

41. Due to the failure on the part of the respondent to upload the applicable tariffs on the Simba system and to publish the same in the Kenya Gazette, I find that the appeal herein is merited. It is allowed with costs to the appellant. I order the respondent to refund to the appellant the sum of Kshs 757,000/= deducted from the appellant's bank account within 30 days of this judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mkan for the appellant

Mr. Nyapara for the respondent

Ms B. Wokabi – Court Assistant.