REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 62 OF 2019

LOUIS DREYFUS COMPANY (K) LIMITED.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

(AS CONSOLIDATED WITH PETITION NO. 64 OF 2019)

LOUIS DREYFUS COMPANY (K) LIMITED.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGEMENT

1. This judgement is in respect of two matters being Petition Nos. 62 of 2019 and 64 of 2019 filed by the same Petitioner, Louis Dreyfus Company (K) Limited, against the same Respondent, Kenya Revenue Authority.

2. Petition No. 62 of 2019 (hereinafter simply referred to as the first petition) relates to an alleged overpayment of Value Added Tax ('VAT') of Kshs. 122,016,195 for the period between November 2016 and July 2017. The petition is founded on Section 47(1) of the Tax Procedures Act, 2015 (TP Act). Pursuant to the stated provision the Petitioner made an application for a refund of Withholding VAT ('WHVAT') by a letter dated 18th December, 2017 and filed with the Respondent on 19th December, 2017. It is the Petitioner's case that it did not receive any response to the application from the Respondent.

3. Petition No. 64 of 2019 (hereinafter simply referred to as the second petition) also relates to alleged overpayment of WHVAT of Kshs. 164, 586,437 during the 2016 year of income. The Petitioner avers that it made an application for a refund through a letter dated 29th March, 2018. According to the Petitioner, its claim was rejected by the Respondent through a letter dated 20th June, 2018 received on 26th July, 2018. The Respondent, nevertheless, acknowledged the tax overpayment by the Petitioner.

4. In rejecting the Petitioner's claim, the Respondent asserted that the overpaid WHVAT was not payable as there was no express provision in the Value Added Tax Act, 2013 ('VAT Act') and Value Added Tax Regulations, 2017 ('VAT Regulations') authorizing refund of overpaid WHVAT.

5. In the first petition which is dated 19th February, 2019 the Petitioner seeks the following reliefs:

> **a) A declaration that the failure of the respondent to process the petitioner's application for refund of overpaid taxes under Section 47 of the TPA, 2015 is a violation of the petitioner's right to fair administrative action as enshrined in Article 47 of the Constitution.**
>
> **b) A declaration that failure of the respondent to refund the sum of Ksh. 122,016,195/- is a violation of the petitioner's right of property as enshrined in Article 40 of the Constitution.**
>
> **c) An order of judicial review by way of an order of mandamus directed at the respondent to compel the respondent to refund the petitioner its overpaid taxes amounting to Ksh. 122,016,195/-.**
>
> **d) A declaration that section 47(5) of the Tax Procedure Act, 2015 is unconstitutional in so far as it allows the respondent to**

hold on to overpaid tax for a period of two years and in so far as it only imposes interest on overpaid tax not refunded after a period of two years.

e) Interest do accrue at commercial rates on the said sum of Ksh. 122,016,195/- with effect from 20th March 2018 being the date the 90–day period pursuant to Section 47(3) of the Tax Procedure Act lapsed.

f) An order for costs of this petition.

g) Any other order that this court may deem fit and just to grant.

6. And in the second petition dated 20th February, 2019, the Petitioner prays for:

a) A declaration that the failure of the respondent to refund the sum of KShs 164,586,473 is a violation of the petitioner's right of property as enshrined in Article 40 of the Constitution.

b) An order of judicial review by way of an order of mandamus to compel the respondent to refund the petitioner its overpaid taxes amounting to KShs 164,586,473.

c) Interest do accrue at commercial rates on the sum of KShs 164,586,473 with effect from 24th September 2018 being the date when the objection decision was deemed allowed pursuant to Section 5(11) of the Tax Procedures Act, 2015.

d) A declaration that Section 47(5) of the Tax Procedures Act, 2015 is unconstitutional in so far as it allows the respondent to hold on to overpaid taxes for a period of two years and in so far as it only imposes interest on overpaid tax not refunded after a period of two years.

e) A declaration that the actions of the respondent that forced the petitioner to restructure its business operations at the cost of KShs 7,085,050 is a violation of the petitioner's right to property as enshrined in Article 40 of the Constitution.

f) An order for judicial review by way of an order of mandamus to compel the respondent to refund the petitioner the expenses incurred as a result of the respondent's actions amounting to KShs 7,085,050.

g) Interest do accrue at commercial rates on the sum of KShs 7,085,050 with effect from 2nd November 2016 being the date the client incurred expenses for restructuring its business.

h) A declaration that the actions of the respondent that forced the petitioner to incur tax and legal costs of KShs 7,954,200 is a violation of the petitioner's right to property as enshrined in Article 40 of the Constitution.

i) An order for judicial review by way of an order of mandamus to compel the respondent to refund the petitioner the expenses incurred as a result of the respondent's actions amounting to KShs 7,954,200.

j) Interest do accrue at commercial rates on the sum of KShs 7,954,200 with effect from 21st November 2016 being the date the client incurred tax and legal expenses whilst restructuring.

k) An order for costs of this petition; and

l) Any other order that this court may deem fit and just to grant.

7. The Petitioner's case as stated in the petitions and the affidavits of Matthew Simian sworn on 19th February, 2019 and 20th February, 2019 is that the Petitioner, in its ordinary course of business, supplies palm oil and its exports which are either subject to VAT at the standard rate of 16% or zero-rated. It also supplies wheat and other grains which are VAT exempt.

8. According to the Petitioner, over 95% of its Kenyan-resident clients have been appointed as WHVAT agents by the Respondent. The Petitioner avers that these agents are required to withhold 6% of the taxable value of supplies made by the Petitioner and remit the amount directly to the Respondent. The Petitioner's case is that during the period between November 2016 and July 2017 it overpaid taxes amounting to Kshs. 122,016,195. It also overpaid taxes amounting Kshs. 164, 586,437 in the 2016 year of income.

9. The Petitioner asserts that Section 47(1) of the TP Act entitles a taxpayer who has overpaid tax under a tax law to apply to the Respondent for a refund of the overpaid tax. In respect of the first petition it made an application on 18th December, 2018 for the refund of the overpaid Kshs. 122,016,195. It is the Petitioner's case that the Respondent was required by Section 47(3) of the TP Act to notify it of the decision on its application within 90 days of receiving the application for the refund. The Petitioner avers that it had not received a response by the time of filing of the first petition.

10. In regard to the second petition, the Petitioner avers that its application dated 29th March, 2018 for a refund of Kshs. 164,586,437 was rejected by the Respondent through a letter dated 20th June, 2018. It is the Petitioner's case that it filed a notice of objection dated 26th July, 2018 to the Respondent's refund decision but the Respondent did not respond. It is the Petitioner's assertion that its objection was deemed to have been allowed by virtue of Section 51(11) of the TP Act since the Commissioner did not make a decision on the objection within the 60 days provided therein.

11. The Petitioner premises its petitions on Articles 10, 19(3), 20(1), 22(1) and 23 of the Constitution, arguing further that the Respondent was in breach of the right to fair administrative action as provided for in Article 47 of the Constitution, as read together with Section 4(1) of the Fair Administrative Action Act, 2015, which guarantees every person the right to administrative action that is expeditious, efficient and lawful. It is additionally the Petitioner's case that its right to property under Article 40, as read together with Article 260 which provides that property includes to money, was infringed.

12. The Petitioner further deposes that Section 47(5) of the TP Act is discriminatory for allowing the Respondent a grace period of two years before paying interest on overpaid taxes while under sections 38 and 83A of the TP Act taxpayers are subjected to interest and penalties for failure to pay taxes as they become due. It is the Petitioner's case that the stated provisions are discriminatory in that both the taxpayer and tax collector should enjoy equal benefit of the law as required by Article 27 and any differentiation in treatment ought to be in line with Article 24 of the Constitution.

13. The Respondent filed grounds of opposition dated 23rd July, 2019 contending that the petitions did not meet the threshold of a constitutional petition; that the question of the constitutionality of Section 47(5) of the TP Act is *res judicata* as the issue was determined in the case of **Ericsson Kenya Limited v Attorney General [2014] eKLR;** that the petition offends the provisions of Section 52 of the TP Act which provides for appeal against a tax decision to the Tax Appeals Tribunal; that under Section 17(5) of the VAT Act excess credit of tax withheld at 6% is not subject to refund; and, that there is no provision for the claimed refund under the VAT Act and the VAT Regulations.

14. The Respondent deposed that the Petitioner could apply for exemption from WHVAT under Section 42A of the TP Act as amended by Paragraph 28 of the Finance Act, 2017.

15. The Respondent also challenged the jurisdiction of this Court asserting that the Petitioner had brought the matter to the wrong forum as the Tax Appeals Tribunal Act, 2013 ('TAT Act') provides that the Tax Appeals Tribunal ('Tribunal') is the body mandated to deal with tax disputes.

16. In the replying affidavit sworn on 5th September, 2019 by Violet Sabwa, a manager in the Respondent's Large Taxpayer Office-Refunds Unit, it is averred that the Petitioner's application for a refund of WHVAT dated 29th March, 2018 in respect of the second petition was responded to by a letter dated 20th June, 2018 as follows:

a) That refunds arising from WHVAT are provided for under Section 17 of the VAT Act;

b) That Section 17(5) of the VAT Act provides that excess credits of tax withheld at 6% are not subject to refund; and

c) That the VAT withheld by the Petitioner is not refundable since it is not provided for under the VAT Act and the VAT Regulations.

17. The Respondent avers that the Petitioner has misrepresented the TP Act; and that Section 47(1), (3) & (5) of the TP Act does not apply to the Petitioner as the relevant revenue Act referred to is the VAT Act which, at the material time, did not have provision for refund of WHVAT.

18. It is the Respondent's case that the petition is fatally defective, for non-joinder of the Attorney General and the National Assembly, in so far as it seeks the declaration of a provision of the TP Act unconstitutional.

19. The Respondent asserts that the Petitioner's prayer for costs incurred as a result of the failure to refund the claimed amount is not appropriate as the Petitioner retained legal and tax representation of its own choice. It is the Respondent's conclusion that the petition is a fishing expedition, frivolous and vexatious as the provisions of the law are clear.

20. I have considered the pleadings and submissions of the parties in this matter. The issues that arise for determination and require answers in this judgment are as follows:

a) Whether this Court has jurisdiction to hear and decide this petition in light of the jurisdiction bestowed upon the Tribunal by the TAT Act;

b) Whether the Respondent violated the Petitioner's right to property and fair administrative action;

d) Whether Section 47(5) of the TP Act is unconstitutional for being discriminatory in nature;

e) Whether the Petitioner is entitled to the reliefs sought;

f) Who should meet the costs of the proceedings?

a) Whether this Court has jurisdiction to hear and decide this petition

21. It is the Respondent's assertion through the written submissions dated 2nd July, 2020 that this petition is an appeal disguised as a constitutional petition. The Respondent contends that in respect of the claim in the second petition its response to the Petitioner through the letter dated 20th June, 2018 communicated the law as is. It is the Respondent's case therefore that if the Petitioner was dissatisfied it ought to have lobbied Parliament to change the law.

22. The Respondent submits that the Petitioner had an opportunity to challenge the Respondent's decision in the proper forum being the Tribunal established under the TAT Act but failed to do so. To this end the Respondent urges the Court to be guided by the decision in **Grain Bulk Handlers Ltd v KRA [2018] eKLR** and **Republic v KRA ex parte Althaus Management & Consultancy Limited [2017] eKLR** and find that it has no jurisdiction to handle the petitions.

23. It is the Respondent's conclusion that there is no violation of any constitutional rights as alleged by the Petitioner.

24. The Petitioner took the contrary view that this Court has jurisdiction to hear this matter and is the only proper forum that can deliberate on the issues raised in the petitions with finality. It is urged that the petitions raise weighty matters affecting constitutional rights which can only be decided by this Court. The decisions in the cases of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1; In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR;** and **Samuel Kamau Macharia v Kenya Commercial Bank Limited [2012] eKLR** are cited as supporting the Petitioner's submission.

25. The Petitioner stresses that this Court, as the custodian of the Bill of Rights, is entitled to intervene where the facts disclose a need to prevent a violation of rights and fundamental freedoms guaranteed under the Constitution as was held in the case of **Bill Kipsang Rotich v Inspector General National Police Service [2013] eKLR.**

26. Dismissing the Respondent's suggestion that the petitions do not meet the test set out in **Anarita Karimi Njeru v Attorney General [1979] eKLR,** the Petitioner asserts the rights violated by the Respondent being the rights to property, equal protection and benefit of the law, and fair administrative action are clearly highlighted in the petitions. Further, that the petitions meet the threshold of Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

27. It is further the Petitioner's case that in the circumstances there is no forum, apart from this Court, where it may seek relief. It is the Petitioner's case that in regard to the claim in the first petition the Respondent made no decision whereas in respect of the claim in the second petition the Respondent made no objection decision as required by Section 51(8) of the TP Act and its objection is therefore deemed to have been allowed in accordance with Section 51(11) of the TP Act.

28. According to the Petitioner the Respondent did not make appealable decisions in both instances and there is no way it could have sought to have the issues addressed by the Tribunal. These arguments are supported by reference to the decisions in **Republic v Kenya Revenue Authority Ex parte M-Kopa Kenya Limited [2018] eKLR; Republic v Commissioner of Domestic Taxes Ex parte Fleur Investments Limited [2020] eKLR;** and **Nairobi HC Petition No. 471 of 2019 Gulf Energy Limited v Kenya Revenue Authority & 2 others.**

29. It is now settled law that where a statute has provided an alternative dispute resolution mechanism, a court must exercise restraint and allow the statutory process to take its course before exercising its jurisdiction. In the case of **Catherine Muthoni Mwamra v Hamida Yaroi Shek Nuri & 5 others [2018] eKLR,** it was held that:

> **"It is therefore not in dispute that this court has jurisdiction in judicial review matters in exercise of its supervisory jurisdiction over subordinate courts and tribunals and in granting judicial review remedies for violation of rights including the right to be heard and to a fair administrative action as stipulated in Articles 23 and 47 of the Constitution and the Fair Administrative Action Act.**
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> **However, it is not in doubt that the jurisdiction of this court is not unlimited and that even where the court has jurisdiction, where there is an alternative effective remedy, then this court's jurisdiction would be limited to the extent that a party must first exhaust that other remedy before resorting to judicial review. This is the spirit and letter of Article 159(2) (c) of the Constitution and section 9 of the Fair Administrative Action Act, 2015."**

30. The TAT Act provides that the Tribunal is mandated to hear appeals filed against any tax decision made by the Commissioner. In regard to the application for refund that gave rise to the second petition, the Respondent acknowledged the existence of an overpayment of withholding tax by the Petitioner. However, it proceeded to state that there was no provision for refund of the WHVAT in the VAT Act and VAT Regulations.

31. The Petitioner avers that it objected to the decision on 26th July, 2018. The Petitioner's case is that the Respondent's failure to make a decision on its objection within the 60 days provided under Section 51(11) of the TP Act meant that its objection had been allowed and it had no reason to appeal to the Tribunal.

32. It is not disputed that the application dated 18th December, 2017 for refund made in respect of the first petition received no response by the Respondent.

33. The Respondent's argument is that the application for refund of overpaid tax was not responded because the Petitioner submitted a manual refund application instead of using the online iTax system as per the guidelines. The Respondent elaborates this argument in the written submissions by stating that pursuant to Section 73 of the TP Act, the Respondent issued a notice informing the public that the correct avenue for lodging claims for VAT refunds with effect from the 31st October, 2015 was the iTax system. It is the Respondent's argument that Section 47(1) of the TP Act requires that an application for a refund of overpaid tax be made in the *"approved form"* and the approved form in the circumstances is the iTax system. It is thus the Respondent's position that there was no proper claim for refund in respect of the first petition.

34. The Respondent's argument may indeed be valid but it does not explain why it treated the two claims from the same taxpayer differently. It is noted that although both applications for refund were lodged manually, the Respondent replied to one application and ignored the other. The Respondent's action can only mean that it accepted applications for refund of overpaid tax lodged both manually and through the iTax

system.

35. The failure to respond to the claim in the first petition placed the Petitioner in a quandary. It could not take any action as the decision-maker had not made a move. In the circumstances the only recourse the Petitioner had was to seek this Court's intervention as the Respondent had not made a decision that could be escalated to the Tribunal as per the provisions of Section 52 of the TP Act.

36. As for the second petition, the Petitioner's assertion that it lodged an objection to the Respondent's decision remains uncontroverted. The Petitioner's claim that the Respondent did not address that objection also remains unchallenged. There was therefore no appealable decision which could give rise to an appeal to the Tribunal.

37. Article 165(3)(d) (i) & (ii) of the Constitution empowers the High Court to hear any question respecting the interpretation of the Constitution, including the determination of the question whether or not any law is inconsistent with or in contravention of the Constitution. The Court is also mandated to determine any question as to whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

38. This Court cannot run away from its adjudicative responsibility where the statutory body authorized to hear a dispute has been rendered incapable of hearing such a dispute due to action or inaction by one of the parties. In this case, the Respondent's failure to respond to the Petitioner's application for refund giving rise to the first petition and the objection which is the subject of the second petition denied the Petitioner a tax decision to take to the Tribunal.

39. In the case of **Leonard Otieno v Airtel Kenya Limited [2018] eKLR,** it was held that:

> **"35. […] There must be a clear demonstration that the alternative remedy is not available, not effective, and not sufficient to address the grievances in question. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. The "deepest norms" of the Constitution should determine whether the dispute involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions."**

40. In the circumstances of this case the Petitioner had no viable remedy. It follows therefore that this Court has jurisdiction to hear and determine the petitions.

b) Whether the Respondent violated the Petitioner's right to property under Article 40 of the Constitution;

41. The Petitioner submits that the Respondent's action of refusing to refund the overpaid taxes amounts to violation of its constitutional right to property as provided for in Article 40, as read with Article 260 which defines property to include money. The Petitioner cites Article 19(3)(a) of the Constitution as providing that rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. The Petitioner cites the case of **Embakasi Management Limited & 8 others v Imperial Bank Limited (in receivership) & another [2019] eKLR** and submits that the holding of the Petitioner's monies by the Respondent amounts to violation of its right to property as stipulated in the Constitution.

42. There is no argument that the right to acquire and own property is protected under Article 40 of the Constitution. It is clear and undisputed there was an overpayment of WHVAT by the Petitioner, which the Respondent has not refunded to date. The Respondent, however, avers in the replying affidavit of Violet Sabwa that refunds arising from WHVAT are provided for in Section 17 of the VAT Act and not the TP Act as claimed by the Petitioner. Moreover, it is averred that post 2nd September, 2013 refund of excess WHVAT ceased and were deleted from the refund provisions of the law.

43. The said arguments go into the substance of the dispute between the parties herein. In view of the decision to be arrived at in this judgement, I do not find it necessary to address the issue as to whether the law allowed a refund of WHVAT.

44. For the reason that the Petitioner's applications for refund of overpaid tax are yet to be determined by the Respondent, this Court cannot make a finding in this judgement on the alleged violation of the Petitioner's right to property. It is, nevertheless, noted that by failing to respond to the Petitioner's objection to the second claim, the Respondent is deemed to have accepted that the overpaid tax was refundable. What only remain is for the Respondent to subject this particular claim to the procedures in Section 47 of the TP Act.

c) Whether the Respondent violated the Petitioner's right under Article 47 of the Constitution;

45. The Petitioner submits that the Respondent is mandated to exercise its administrative powers in processing applications for the refund of overpaid taxes in compliance with Article 47 of the Constitution and the Fair Administrative Action Act, 2015. It is the Petitioner's case that it has a right to have its overpaid taxes refunded expeditiously, efficiently and in a reasonably fair and lawful manner.

46. It is the Petitioner's contention that by failing to make a refund of the overpaid taxes, failing to make a decision on the application letter dated 18th December, 2017, failing to offer a recourse to the Petitioner in regard to the application dated 29th March, 2018, and failing to make a decision to its objection dated 26th July, 2018 within the timelines prescribed in the TP Act, the Respondent had undermined the rule of law and Article 19(1) of the Constitution which provides that the Bill of Rights is an integral part of Kenya's democratic state. Reliance is placed on the Court of Appeal decision in **Judicial Service Commission v Mbalu Mutava & another [2014] eKLR.**

47. In its submissions the Respondent highlighted the history of the VAT Act and stated that the prayers sought by the Petitioner cannot be granted owing to the absence of a legal provision allowing refund of WHVAT as at the time of filing the applications. Relying on **Republic v Commissioner of Domestic Taxes Large Tax Payer's Office Ex-parte Barclays Bank of Kenya Ltd [2012] eKLR,** the Respondent urged

that its duty as a statutory body is to strictly apply the law and not amend it.

48. The Respondent went on to state that in July 2019 long after the Petitioner had filed these petitions, the VAT Act was amended through Statute Law (Miscellaneous Amendments) Act, 2019 to provide for refund of withheld VAT commencing 23rd July, 2019 to 22nd July, 2020. The Petitioner was urged to take advantage of the amendment to the law to re-lodge the refund claims.

49. I have already stated that I will not determine the question as to whether overpaid WHVAT was refundable at the time the Petitioner made the refund applications.

50. However, the question as to whether the Respondent acted in compliance with Article 47 of the Constitution needs to be determined. In doing so, this Court is required to review the evidence presented by the parties in order to determine if the decision-making process complied with the dictates of Article 47 of the Constitution.

51. It was noted in the case of **Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers) [2014] eKLR** that:

> **"The purpose of Article 47 is to uplift the standards of administrative action by providing constitutional standards (see Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 [2012] eKLR). The national values and principles of governance articulated in Article 10 among them good governance, integrity, transparency and accountability must be infused in administrative action. In regard to processing of VAT refund claims, Ojwang' J., (as he then was) in the case of Republic v Kenya Revenue Authority ex-parte L.A.B International Kenya Limited (Supra) observed that, "In practical terms, Government has a public duty to effect change to any unprogressive arrangements, such as those that may characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in this regard, ordinary statutory arrangements cannot qualify the constitutional provisions.""**

52. A perusal of the pleadings and submissions indicate that the Petitioner did file refund applications with the Respondent in accordance with Section 47 of the TP Act. In the application letter in respect of which the first petition has been filed, no response was received whereas in the letter giving rise to the second petition a response was given but the Petitioner's objection to that decision was never addressed. The Respondent has a statutory responsibility to comply with the timelines set in the revenue laws. A failure on the part of the Respondent to comply with the statutory requirements violate the rights of the taxpayers to fair administrative action under Article 47 of the Constitution.

53. It was observed in **Kenya Data Networks Limited v Kenya Revenue Authority [2013] eKLR** that:

> **"The respondent had a duty to act on the petitioner's VAT refunds timeously. While recognizing that it is mandated by statute to collect taxes, and while appreciating the pivotal role that collection of taxes plays in a country's economic development and provision of services for citizens, KRA must also be always cognizant of the possible ramifications of its actions or omissions in dealing with taxpayers, and the impact on investment, revenue collection and the general welfare of the country.**

54. Further, I recently observed in **Gulf Energy Limited v Kenya Revenue Authority & another; Cabinet Secretary for Petroleum & Mining (Interested Party) [2020] eKLR** that:

> **"On his part, the 2nd Respondent not only failed to exercise the discretion granted to him by the law, but also failed to comply with a mandatory and material procedure prescribed by the empowering provision. The respondents' actions or decisions therefore attract the review of their actions or decisions by this Court under Section 7(2) (b), (c), (i), (m), (j) and (k) of the FAAA…**
>
> **The 2nd Respondent had therefore acted contrary to the FAAA and Article 47 of the Constitution by failing to render a decision expeditiously and failing to comply with a mandatory and material procedure prescribed by the TPA."**

55. I therefore find that the Respondent violated the Petitioner's right to fair administrative action by failing to make a decision on the Petitioner's application for refund of overpaid tax in one case and failing to make an objection decision in the other case. The statutory timelines were never complied with.

56. It is not disputed that the Respondent was entitled to interpret the tax laws as it deemed fit. However, it had a duty to ensure that it complied with what the law required of it under sections 47 and 51 of the TP Act. The Petitioner's claims for refund of overpaid taxes were left in suspense by the Respondent resulting in the violation of the Petitioner's constitutional and statutory right to fair administrative action. The Petitioner was entitled to know the decisions made by the Respondent on its applications so that it could move to the Tribunal if it was aggrieved by the decisions.

57. The Respondent's assertion that the Petitioner's applications for refund of overpaid taxes were premised on the wrong statute and non-existent provisions of the VAT Act (as at time of filing the petition) does not shield it from the requirement to provide administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as required by Article 47 of the Constitution. I therefore agree with the Petitioner that there was a violation of its right to fair administrative action in regard to both claims.

d) Whether Section 47(5) of the TP Act is unconstitutional for being discriminatory in nature;

58. The Petitioner contends that Section 47(5) of the TP Act 2015 is unconstitutional for being discriminatory and thus in contravention of Article 27(1) of the Constitution which provides that:

> **"Every person is equal before the law and has the right to equal protection and equal benefit of the law."**

59. It is the Petitioner's case that Section 47(5) of the TP Act endorses inequality between the taxpayer and tax collector contrary to the constitutional imperative of equality. The Petitioner contends that there is an unjustifiable bias in favour of the Respondent.

60. It is the Petitioner's contention that Section 47(5) of the TP Act is unconstitutional in so far as it allows the Respondent to refund overpaid tax within a period of two years from the date of the application for refund and only imposes interest on any unpaid amount after the period of two years. According to the Petitioner, the said provision is discriminatory in that interest and penalties are imposed on the taxpayers the moment taxes become due.

61. The Petitioner, in reliance on the decision of the Supreme Court of Canada in **R v Big M Drug Mart TD, (1985) 1 S.C.R 295,** submits that Section 47(5) of the TP Act is unconstitutional as it has no justification.

62. In reply, the Respondent submits that the Petitioner cannot require it to respond to the constitutionality of the contested provision as it is not charged with enactment of revenue laws but their implementation. It is submitted that the prayer for the declaration of Section 47(5) of the TP Act unconstitutional cannot be granted as the parties responsible for enactment of laws being the National Assembly and the Attorney General were not enjoined in the suit. Reliance is placed on the decision in **John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & Another [2016] eKLR** for the submission that the two are necessary parties in matters that seek to declare statutory provisions unconstitutional.

63. The Respondent further contends that the matter of the alleged inequality between the taxpayer and the tax collector was subjected to litigation before the High court and determined in the case of **Ericsson Kenya Limited v Attorney General & 3 others [2014] eKLR.**

64. In rejecting the Respondent's assertion that the issue of the unconstitutionality of Section 47(5) of the TP Act is *res judicata*, the Petitioner highlighted Section 7 of the Civil Procedure Act, Cap. 21 and the decision of the Court of Appeal in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No.105 of 2017** as setting out the elements that must be satisfied before a matter is said to be *res judicata.*

65. As was stated in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No.105 of 2017,** a party can only successfully raise the doctrine of *res judicata* as a defence by demonstrating that:

> **"(a) The suit or issue was directly and substantially in issue in the former suit.**
>
> **(b) That former suit was between the same parties or parties under whom they or any of them claim.**
>
> **(c) Those parties were litigating under the same title.**
>
> **(d) The issue was heard and finally determined in the former suit.**
>
> **(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."**

66. Applying the said requirements to the decision of Majanja, J in **Ericsson Kenya Limited v Attorney General [2014] eKLR** will lead to the inevitable conclusion that these petitions are not *res judicata.* Although the **Ericsson Kenya Limited** case did indeed address one of the issues raised in these petitions and was determined by a Court of competent jurisdiction, the issues raised in these petitions were not directly and substantially in issue in the former suit and neither were they between the same parties. Indeed, the provisions that were the subject of litigation in the former case were only similar but not the same with the provision that is being challenged in these cases. The Respondent's assertion that the Petitioner's case is *res judicata* is therefore without merit and is rejected by this Court.

67. In determining whether a given statutory provision is constitutional, it is important to start with the general presumption that every Act of Parliament is constitutional. This principle was captured by the Court of Appeal of Tanzania in the case of **Ndyanabo v Attorney General [2001] EA 495** thus:

> **"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative."**

68. The Court in deciding whether a provision of a statute is constitutional or not is required to determine the object and purpose of the challenged statute. For the Court to arrive at the correct decision it is important that it discerns the intention expressed in the Act itself regarding not only its purpose but also its effect.

69. Discussing the doctrine of the presumption of constitutionality of a statute, the Supreme Court of India in **Hamdard Dawakhana (Wakf) Lal v Union of India & others 1960 AIR 554** stated that:

> **"Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in**

Part 111 of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e., its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; …

Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment."

70. It is therefore proper for this Court to commence answering this question of alleged unconstitutionality of the impugned provision by assuming that the TP Act is constitutional.

71. The Court is nevertheless under a duty to determine if the impugned provision is indeed unconstitutional as claimed by the Petitioner. Section 47(5) of the TP Act states:

"(5) The Commissioner shall repay the overpaid tax within a period of two years from the date of application, failure to which the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years."

72. The Petitioner's complaint is that the above provision treats the Respondent with kid gloves compared to sections 38 and 83A of the TP Act which subject taxpayers to interest and penalties for failure to pay taxes as they become due.

73. In **Ericsson Kenya Limited (supra)** Majanja, J was confronted with the issue as to whether it was unconstitutional to impose different interest conditions upon the taxpayer and the tax collector. He found the provisions constitutional stating that:

"61. The petitioner's entitlement to interest is founded on a breach of Article 27(1) of the Constitution. The petitioner is aggrieved by the fact that a taxpayer who delays in making tax payments is bound to pay interest as a result of default; the Commissioner is not bound by a similar obligation to pay the taxpayer interest on delayed refunds. Section 21 of the *VAT Act, 2013* only applies to payments of tax due and payable to the respondents by a taxpayer.

62. <u>The Commissioner and the ordinary taxpayer cannot stand on the same footing. The Commissioner receives tax on behalf of the State while the taxpayer pays tax. The two cannot be treated equally as they are unlike and as such there can be no discrimination.</u>

63. I also hold that Section 23 of *VAT Act, 2013* serves a legitimate purpose. Under section 19(1) of the *Act,* VAT is due and payable at the time of supply of the taxable goods or services. Section 19(2) affords the taxpayer an opportunity to defer payment of tax due to any date before the 20th day of the month following that in which the tax became due. It is only when the taxpayer fails to remit VAT collected to the Commissioner by the due date that the penalties as imposed by section 21 kick in. I also agree with the respondents that the VAT collected is not due from the taxpayer but is collected from the consumer hence there is no reason why the tax must not be remitted timeously."

[Emphasis supplied]

74. I am persuaded by the decision of the learned Judge. The Petitioner being a taxpayer cannot compare itself with a state agency mandated to collect tax. The roles of the taxpayer and the tax collector in the tax regime are diametrically opposed and it cannot be said that there is discrimination when different standards are applied to them. There is therefore nothing unconstitutional in Section 47(5) of the TP Act. The fact that interest only accrue on pending refunds after two years does not render Section 47(5) of the TP Act unconstitutional. Indeed, declaring Section 47(5) unconstitutional will give the Respondent free rein as it will not be bound to make refunds of overpaid tax within two years and neither will it be obligated to pay interest on any tax refund made after two years from the date of the application for refund.

e) Whether the Petitioner is entitled to reliefs sought;

75. In considering the appropriate reliefs in these matters, the Court must bear in mind the statutory mandate of the Respondent. The Court should also take into account the circumstances of each of the two petitions. In the first petition there was no response to the Petitioner's claim for refund.

76. Section 47 of the TP Act which governs claims for overpaid tax provides that:

"47. Refund of overpaid tax

(1) When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within five years of the date on which the tax was paid.

Provided that for value added tax the period of refund shall be as provided for under the Value Added Tax Act, 2013 (No. 35 of 2013).

(2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.

(3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within ninety days of receiving the application for a refund.

(4) Where, in relation to an application for a refund made under this section or made under any other tax law, the Commissioner is satisfied that a taxpayer has overpaid a tax, the Commissioner shall apply the overpayment in the following order—

(a) in payment of any other tax owing by the taxpayer under the tax law;

(b) in payment of a tax owing by the taxpayer under any other tax law; and

(c) any remainder shall be refunded to the taxpayer.

(5) The Commissioner shall repay the overpaid tax within a period of two years from the date of application, failure to which the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years."

77. The cited provision confirms that there is a procedure to be followed when an application for refund of overpaid tax is made. In respect of the first petition, the application for refund stalled at Section 47(1) since the Petitioner's application was not responded to by the Respondent within 90 days as required by Section 47(3). The provision does not state what happens where the Respondent fails to reply to an application for refund of overpaid tax. In the instant case, the Petitioner has sought the intervention of this Court. The appropriate remedy is therefore to declare the Respondent in violation of the Petitioner's right to fair administrative action under Article 47 of the Constitution and provide remedies that will ensure the Petitioner's application is addressed by the Respondent.

78. As for the second petition, the Petitioner made an objection under Section 51(1) of the TP Act to the decision made by the Respondent under Section 47(3) of the Act. It is important to reproduce Section 51 in its entirety. It states:

"51. Objection to tax decision

(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and

(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.

(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.

(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment. (6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and (b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed."

79. It has been held that the meaning of Section 51(11) is that where the Commissioner does not make a decision on an objection that is properly filed within sixty days from the date it was lodged by the taxpayer then the objection is deemed to have been allowed-see **Republic v Kenya Revenue Authority Ex parte M-Kopa Kenya Limited [2018] eKLR.**

80. The Petitioner's view is that the fact that its objection was allowed by law means that its application for refund of overpaid tax in the second petition has been allowed and the Respondent should be compelled to refund the said amount. In order to determine whether this is correct, the meaning of the decision made by the Respondent under Section 47(3) and the objection lodged by the Petitioner under Section 51(1) must be understood.

81. In the reply dated 20th June, 2018, the Respondent dismissed the Petitioner's application dated 29th March, 2018 for a refund of overpaid tax of Kshs.164, 586,437. The crux of the Respondent's decision is that:

"Refunds arising from VAT are provided for under section 17, 30 and 31 to the VAT Act, 2013. However, excess credits of Tax Withheld at 6% are not subject to refund under Section 17(5) to the VAT Act, 2013. The role of TPA 2015 is therefore to harmonize administrative procedures in the various Revenue Acts.

Your claim for refund of VAT withheld is not refundable since it is not provided for under the VAT Act, 2013 and the VAT Regulations 2017."

82. The Petitioner's objection dated 26th July, 2018 stated in part:

"Pursuant to section 51 of the Tax Procedures Act, 2015 (TPA, 2015) we hereby object to the refund decision on the following grounds:

(1) No dispute that Louis Dreyfus Company Kenya Limited ("LDC Kenya") has a tax overpayment.

It is not in dispute that LDC Kenya has a tax overpayment of Kshs. 164,586,473/- being held by KRA.

(2) KRA has failed to correctly interpret and apply the provisions of Section 47 of the TPA, 2015.

Section 47(1) of the TPA, 2015 expressly provides for the payment of overpaid tax as follows:

…

This provision is unambiguous in its import. LDC Kenya is entitled to a refund of any and all overpaid taxes.

(3) Tax refunds are not unprecedented

Refund of overpaid taxes arising from tax withheld by Withholding VAT Agents is not unique nor is it without precedence in Kenya. Section 11(2)(aa) of the repealed Value Added Tax Act, Cap 476 of the Laws of Kenya, as it then applied, provided for the refund of taxes where input VAT exceeded output VAT as a result of tax withheld by withholding agents as follows:

…

There is therefore a clear basis for the payment of these overpaid taxes.

Conclusion and proposed way forward

Based on the above grounds and explanations, we kindly request you to process the refund claim in full. We look forward to your favourable consideration of our application."

83. A perusal of the Respondent's decision under Section 47(3) and the Petitioner's objection under Section 51(1) shows that the issue was whether the Petitioner's claim for refund of the overpaid tax was payable. The Respondent's view was that it was not payable but the Petitioner took a contrary view. The Respondent did not make an objection decision on the Petitioner's insistence through the lodged objection that the overpaid tax was refundable within the law. By virtue of Section 51(11) the Petitioner's objection was deemed to have been allowed in that respect. In my view, the issue whether the claimed amount or part of it was refundable and the manner in which any refundable amount was to be applied was never addressed by the Respondent. Indeed, in the last sentence of its objection the Petitioner came across as having understood that its application for refund was yet to be considered.

84. Whenever an application for refund of overpaid tax is made, the Respondent may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit (Section 47(2)). In accordance with Section 47(4), where a claim for refund is found to be valid, the Commissioner shall apply the overpayment in the following order (a) in payment of any other tax owing by the taxpayer under the tax law; (b) in payment of a tax owing by the taxpayer under any other tax law; and (c) any remainder shall be refunded to the taxpayer.

85. The orders sought by the Petitioner, if granted, will result in this Court usurping the statutory powers granted to the Respondent to deal with applications for payment of overpaid tax. That courts should not usurp the powers of statutory bodies was once again affirmed by the Court of Appeal in **West Kenya Sugar Company Limited v Kenya Sugar Board & another [2014] eKLR** when it stated that:

> **"The High Court was ill equipped to decide whether or not the conditions for granting a licence had been met; some of the information provided in the application for a licence was of a technical nature. Condition stipulated in section 15(1) (b) of the Act refers to technical experience and capacity. Those factors could only have been properly evaluated by persons well versed in matters pertaining to sugar industry and the application of the policy of the Act. The factors that the High Court took into consideration were some of the matters that the KSB could have taken into consideration in dealing with the applicant for a licence or could have been considered in subsequent proceedings had KSB considered and rejected the application…**
>
> **The Act shows that the original licence expires after one year but is subject to renewal upon application. Parliament vested the power to grant a licence and a renewal of the licence to KSB. If the application for an order of mandamus is not based on lawful grounds upon which the court can exercise jurisdiction as in the present case or if it unlawfully usurps the jurisdiction vested on the decision making body by the Parliament, as in this case, the court in granting an order of mandamus has acted outside its jurisdiction and the order of mandamus is invalid. KSB has never exercised its statutory discretion to grant a licence nor to consider an application for renewal based on original licence issued by it. The original licence was essentially issued by the court and the subsequent renewals spring from or rest on the court order. The effect of court order being void for lack of jurisdiction is that there has never been a licence capable of renewal within the ambit of the Act."**

86. In the circumstances, the Court must give room to the Respondent to execute its mandate. In the circumstances, I issue orders as follows:

a) Petition No. 62 of 2019:

> i)A declaration is hereby issued that the Respondent in failing to respond to the Petitioner's application dated 18th December, 2017 for refund of overpaid tax of Kshs. 122,016,195 violated the Petitioner's right to fair administrative action under Article 47 of the Constitution;
>
> ii) The Petitioner's application dated 18th December, 2017 for refund of overpaid tax of Kshs. 122,016,195 is remitted back to the Respondent for consideration in line with the provisions of Section 47 of the Tax Procedures Act, 2015 or any other law as deemed appropriate by the Respondent; and
>
> iii) If at the end of 90 days from the date of this judgement the Respondent will not have responded to the Petitioner's application for refund, the application shall be deemed to have been allowed and an order of mandamus shall issue forthwith directing the Respondent to refund to the Petitioner the sum of Kshs. 122,016,195 being overpaid tax.

b) Petition No. 64 of 2019:

> i)The Petitioner's objection dated 26th July, 2018 to the Respondent's tax decision dated 20th June, 2018 that overpaid WHVAT is not refundable in law is deemed to have been allowed under Section 51(11) of the Tax Procedures Act, 2015 as a result of the Respondent's failure to make an objection decision under Section 51(8) of the Tax Procedures Act, 2015;
>
> ii) A declaration is hereby issued that the Respondent's failure to process the Petitioner's application dated 29th March, 2018 in accordance with Section 47(2) & (4) of the Tax Procedures Act, 2015 for a refund of overpayment of WHVAT of Kshs.164, 586,437, after the same was deemed allowed by the operation of the law violated the Petitioner's right to fair administrative action under Article 47 of the Constitution;
>
> iii) The Petitioner's application dated 29th March, 2018 is remitted to the Respondent to be addressed solely in the terms of Section 47(2) & (4) of the Tax Procedures Act, 2015; and
>
> iv) If the Respondent fails to make a determination within 90 days from the date of this judgement, an order of mandamus shall issue compelling the Respondent to forthwith refund the Petitioner the claimed sum of Kshs.164, 586,437.

f) Costs

87. On the issue of costs, I first note that the petitions were consolidated and heard together. Secondly, the Petitioner has succeeded in its claim and costs should follow the event. As such, the costs for the consolidated petitions are awarded to the Petitioner.

Dated, signed and delivered virtually at Nairobi this 11th day of March, 2021.

W. Korir,

Judge of the High Court