



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 471 OF 2019

GULF ENERGY LIMITED.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

CABINET SECRETARY FOR NATIONAL TREASURY.....2ND RESPONDENT

AND

CABINET SECRETARY

FOR PETROLEUM & MINING.....INTERESTED PARTY

JUDGEMENT

The Petitioner's Case

1. The Petitioner, Gulf Energy Limited, by way of the petition dated 22nd November, 2019 brought against Kenya Revenue Authority as the 1st Respondent and the Cabinet Secretary for the National Treasury as the 2nd Respondent seeks the following reliefs:

a) An order for judicial review by way of certiorari to remove into the High Court and quash the decision of Kenya Revenue Authority contained in the demand dated 3rd October 2019 issued to Gulf Energy Limited for Kshs 163,514,488 with respect to excise duty as accrued on Kerosene type jet fuel for the period 1st December 2015 to 31st August 2016.

b) An order for judicial review by way of certiorari to remove into the High Court and quash the agency notices dated 21st November 2019 issued by Kenya Revenue Authority to Gulf African Bank, Citi Bank or any other bank in respect of the sum of Kshs 163, 514, 488 or such excise duty as Kenya Revenue Authority has claimed as accruing on Kerosene type jet fuel for the period 1st December 2015 to 31st August 2016.

c) An order of judicial review by way of an order of prohibition to prohibit the Kenya Revenue Authority, whether by itself or through its officers and/or agents from commencing or instituting any enforcement actions against Gulf Energy Limited in relation to and/or on account of excise duty claimed as accruing on Kerosene type jet fuel for the period 1st December 2015 to 31st August 2016.

d) A declaration that the decision to make demand and issue the agency notices as set out in (a) and (b) above is unfair, unreasonable and irrational, constituting an abuse of power.

e) A declaration that the 1st respondent and the 2nd respondent have violated the Petitioner's right to fair administrative action.

f) An order of judicial review by way of an order of mandamus to compel the 2nd respondent to discharge its mandate by considering the recommendation of the 1st respondent and the petitioner's application for the abandonment of the taxes demanded by the 1st respondent on Kerosene type jet fuel for the period 1st December 2015 to 31st August 2016.

g) An order of injunction to restrain Kenya Revenue Authority from taking any enforcement action relating to the taxes demanded with respect to Kerosene type jet fuel for the period 1st December 2015 to 31st August 2016. For the avoidance of doubt the Kenya Revenue Authority be stopped from taking any steps to collect any money on account of the disputed taxes.

h) Any further order or relief that this court deems fit to make to meet the interests of justice.

i) The costs of this petition be provided.

2. The Petitioner's case as stated in the petition and the affidavits of Charles Nyakundi and Joseph Kirii Kanyugi dated 22nd November, 2019 is that during the period of 1st December, 2015 and 30th September, 2016 the 1st Respondent had not put in place a system for the assessment and collection of excise duty on kerosene jet fuel and it was therefore impossible for the Petitioner to collect the tax from its customers. Further, that the 1st Respondent accepted it had failed to configure its system to facilitate the assessment and consequently the collection of excise duty for the period of 1st December, 2015 to 31st August, 2016.

3. The Petitioner's case is that guidelines on how to collect excise duty were only issued on 7th September, 2016, and the system was finally configured in 2017. The Petitioner therefore complains against the 1st Respondent's demand dated 10th October, 2016 for the sum of Kshs. 79, 763,888 as excise duty payable for the period 1st December, 2015 to 31st August, 2016.

4. The Petitioner avers that it objected to the demand through a letter of objection dated 2nd November, 2016 and the 1st Respondent failed to respond within the stipulated sixty days and instead responded on 3rd February, 2017 outside the prescribed period. The Petitioner asserts that the failure by the 1st Respondent to comply with the law resulted in the objection to the tax assessment being allowed. However, the 1st Respondent continued to issue demands letters which the Petitioner contends have no effect in law.

5. The Petitioner further asserts together with other Oil Marketing Companies (OMCs), and the Interested Party (Cabinet Secretary for Petroleum and Mining) they asked the 2nd Respondent to act on the recommendation of the 1st Respondent to abandon and refrain from the recovery of the impugned taxes. Nevertheless, the 1st Respondent continued to make demands for the excise duty which the Petitioner has protested against. Subsequently, the 1st Respondent proceeded to issue agency notices against the Petitioner's bankers in effect threatening its existence as a viable business undertaking.

6. The Petitioner deposes that despite several letters to the 2nd Respondent by the Interested Party seeking a decision on the 1st Respondent's recommendation for abandonment of the excise duty for the period in question, the 2nd Respondent had failed to act.

7. The Petitioner asserts that the decision by the 1st Respondent to issue agency notices in respect of a liability that it knows does not exist is irrational and in excess of its powers and should be quashed. Furthermore, it is alleged that the 1st Respondent has acted unreasonably and violated Article 47 of the Constitution and sections 3 and 4 of the Fair Administrative Action Act, 2015 ('FAAA') by demanding tax even after recommending abandonment of the same taxes to the 2nd Respondent and notwithstanding the fact that the objection by the Petitioner has been allowed by operation of the law. The 1st Respondent is also said to have acted unreasonably by making various demands while it was aware that the failure to remit the taxes was due to a defect in its system that made it impossible for the Petitioner to comply.

8. It is further argued that the 2nd Respondent has acted in violation of Article 47 of the Constitution by failing to exercise an administrative function. The Petitioner also complains that its right to property under Article 40 of the Constitution has been violated by the 1st Respondent through its demands as the imposition of penalties and interest on the principal tax which the Petitioner was prevented from collecting by KRA constitutes an attempt to arbitrarily deprive it of its property.

9. The Petitioner additionally asserts that it had a reasonable legitimate expectation that the 1st Respondent would not make any further demands and would await the decision of the 2nd Respondent; and that the 2nd Respondent would act on the 1st Respondent's recommendation and render a decision.

10. The Petitioner filed a further affidavit sworn by Charles Nyakundi on 30th January, 2020 in response to the 1st Respondent's replying affidavit. Through the affidavit it is averred that it is not true that the Petitioner was represented in the budget deliberations that led to the introduction of the excise duty on local supplies of Jet A1 fuel. That, in any event, any such deliberations does not change the fact that the 1st Respondent did not have a system for collection of the excise duty.

11. It is further the Petitioner's deposition that the 1st Respondent is attempting to shift the administration of the tax collection system and the determination of the tariff codes to be used on the system to the Petitioner. It is asserted that there has been no objection to the 1st Respondent's recommendation to the 2nd Respondent for authorisation to abandon and refrain from recovering the impugned excise duty.

The Respondents' Responses

12. The 1st Respondent filed a replying affidavit on 9th January, 2020 contending that the Petitioner was represented in the budget deliberations that led to the introduction of the excise duty on local supplies of jet fuel and did not remit excise duty as was required.

13. The 1st Respondent avers that its demand notice dated 3rd October, 2019 to the Petitioner was received on 4th October, 2019 and therefore any objection should have been served by the Petitioner before 4th November, 2019, which was not done.

14. The 1st Respondent contends that the lack of a response by the 2nd Respondent to its recommendation that the tax be abandoned can be construed to mean a rejection of the request. Further, it is asserted that neither the Petitioner nor any of the affected OMCs made any specific request for tax abandonment and thus there was no decision to be made on that issue.

15. According to the 1st Respondent, the Petitioner failed to respond to the demand notice dated 3rd October, 2019 within thirty days, and after a reminder letter was sent the Petitioner responded requesting for a waiver of the taxes due. The 1st Respondent points out that the Petitioner did not make a request for tax abandonment and there is no objection to the demand notice issued on 3rd October, 2019. Further, that the Petitioner's notice of objection dated 14th November, 2019 in response to the 1st Respondent's letter dated 7th November, 2019 was submitted outside the thirty days allowed for an objection to a tax decision.

16. The 1st Respondent asserts that this petition amounts to an abuse of the court process and the Petitioner is using the Court to circumvent express statutory provisions of the Tax Procedures Act, 2015 ('TPA') to delay and frustrate the collection of taxes. It is further averred that where Parliament has provided a statutory mechanism for resolving disputes, the procedure should be exhausted before invocation of the judicial review mechanism.

17. On the prayer for an order of mandamus, the 1st Respondent contends that the mere refusal to grant a tax waiver which does not meet the criteria for granting a waiver is not a good ground for the issuance of an order of mandamus. It is also argued that there cannot be a legitimate expectation arising from a case of waiver of additional taxes.

18. The 1st Respondent asserts that since the matter of waiver of tax revolves around fiscal policy, such decisions should be left to the Executive and the Court should not interfere. Additionally, it is averred that if an order of prohibition is issued, it would prohibit tax collection and administration.

19. The 2nd Respondent did not file any pleadings or submissions in response to the petition. The Interested Party clearly indicated to the Court on 25th February, 2020 that he did not wish to participate in the proceedings.

The Analysis

20. Upon considering the pleadings and submissions, I determine that the issues to be answered in this judgement are:

- a) Whether the Petitioner has violated the exhaustion principle;
- b) Whether the respondents have abused their powers and infringed Article 47 of the Constitution; and
- c) Whether the Petitioner had a legitimate expectation which was infringed by the respondents.

The Exhaustion Principle/Jurisdiction of the Court

30. The 1st Respondent in its written submissions dated 5th June, 2020 submits that this matter is purely a tax dispute and the proper forum is the Tax Appeals Tribunal ('Tribunal') established under the Tax Appeals Tribunal Act, 2013 ('TATA'). The Court is urged to refer the matter to the proper forum. The 1st Respondent relies on the decision in **Grain Bulk Handlers Ltd v Kenya Revenue Authority & 2 others [2018] eKLR** in support of the submission. It is asserted that there is nothing constitutional in the case and that the same should be referred to the Tribunal.

31. The Petitioner filed written submissions dated 26th May, 2020 and argues that the 1st Respondent fails to recognise that the Tribunal does not have jurisdiction over the decisions of the 2nd Respondent as sections 3 and 12 of the TATA states that the Tribunal only has jurisdiction to hear matters concerning the Commissioner. It is therefore urged that the circumstances of the present case are exceptional because the unreasonableness, irrationality and unfairness of the 1st Respondent can only be fully appreciated when considered together with the 2nd Respondent's failure to make a decision. Reliance is placed on the decision in the case of **Speaker of National Assembly v Karume**, as cited in **Republic v Kenya Revenue Authority ex-parte Style Industries Limited [2019] eKLR**.

32. The Petitioner further contends that there is no clear procedure provided in law to challenge the failure by the 2nd Respondent to make a decision based on a recommendation by the Commissioner under Section 37 of the TPA. According to the Petitioner, the only recourse open to it was to institute these proceedings.

33. Article 165(6) of the Constitution grants the High Court supervisory jurisdiction over persons, bodies, authorities or subordinate courts. Furthermore, Article 23 of the Constitution gives the High Court jurisdiction to hear and determine applications for redress of the infringement of a right or fundamental freedom, including the right to fair administrative action under Article 47 of the Constitution. Therefore where a petitioner or applicant has raised the issue of constitutional violation and there is no other satisfactory procedure for addressing the grievance, then the Court must step in and make a determination on the issues raised.

34. In the case of **Catherine Muthoni Mwamra v Hamida Yaroi Shek Nuri & 5 others [2018] eKLR**, it was held that:

“56. 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.

57. 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."

35. There does indeed exist an alternative mechanism under the TPA to deal with the decisions of the 1st Respondent through the Tribunal. The Tribunal is established under the TATA with the exclusive mandate of hearing appeals filed against any tax decision made by the Commissioner. This mandate is further reiterated under Section 12 of the TATA. However, as has been established by the Petitioner, the failure of the Commissioner to make an objection decision under Section 51 of the TPA means that there is no appealable decision to be taken to the Tribunal. An appealable decision is defined under Section 3 of the TPA as an objection decision and any other decision made under a tax law other than a tax decision or a decision made in the course of making a tax decision.

36. The jurisdiction of the Tribunal cannot also be invoked due to Section 51(11) of the TPA which states that the failure of the Commissioner to make an objection decision within sixty days operates to allow the objection of the taxpayer. Therefore, any action taken or decision made by the 1st Respondent following the allowance of the objection by the operation of the law is a matter of unfair administrative action and not an objection decision.

37. Moreover, the Petitioner, in my view, correctly argues that the Tribunal does not have jurisdiction to hear matters to do with any other body besides the Commissioner; and further that under the TPA there is no procedure to challenge the 2nd Respondent's failure to make a decision and therefore the only recourse available is to seek this Court's intervention. 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. In this regard, I am persuaded beyond doubt that the adjudication of the issues complained herein can safely be left to the statutory provisions."

38. Having reviewed the provisions of the TPA, in particular Section 37 of the Act, there is no available alternative remedy against the 2nd Respondent for failure to take action he deems fit or direct the Petitioner and the 1st Respondent to obtain the directions of the court in relation to the tax in dispute. In line with the decision in the case cited above, I find that the only recourse available to the Petitioner is to seek the Court's intervention under Articles 23 and 165 of the Constitution, as well as the FAAA. The exemption to the doctrine of exhaustion of remedies is therefore applicable to this case and the 1st Respondent's objection to the petition on the ground that the Petitioner did not exhaust the available statutory remedies therefore fails.

Abuse of Power and Infringement of Article 47 of the Constitution

39. The Petitioner submits that the 1st Respondent's actions amount to abuse of power as it failed to acknowledge and make a decision on the Petitioner's objection dated 2nd November, 2016 within the mandatory timeline of sixty days. Additionally, that the 1st Respondent has ignored the fact that it wrote to the 2nd Respondent admitting difficulty in recovering the unpaid taxes and recommending that the 2nd Respondent authorise the abandonment of the unpaid excise duty. The Petitioner cites the decision in **Republic v Kenya Revenue Authority ex-parte Aberdare Freight Services Ltd & 2 others [2004] eKLR** as quoted in **Keroche Industries Limited v Kenya Revenue Authority [2007] eKLR**, and submits that the demands for recovery of taxes should not be allowed as its objection of 2nd November, 2016 was deemed allowed by the operation of the law.

40. The Petitioner submits that the 1st Respondent has also acted in breach of Article 47 of the Constitution by insisting on making demands and taking enforcement action against it despite the admission by the Commissioner of Customs and Border Control that there is difficulty in recovering the unpaid excise duty owed by OMCs. Further, that the 2nd Respondent was yet to make a decision on the 1st Respondent's recommendation for the abandonment of the tax. Reliance is placed on the decisions in **Pz Cussons East Africa Limited v Kenya Revenue Authority [2013] eKLR**; and **Five Forty Aviation Limited v Kenya Revenue Authority & 3 others [2017] eKLR**.

41. The Petitioner argues that the 1st Respondent failed in its duty to configure the system to enable the collection of excise duty on Jet A1 fuel and to explain to the OMCs the problems encountered in the collection of excise duty on Jet A1 fuel. It is further asserted that the 1st Respondent's insistence to demand excise duty on Jet A1 fuel for the period December 2015 to August 2016 without giving any regard to the recommendation by the Interested Party as the parent Ministry in charge of petroleum is further proof of the 1st Respondent's unreasonableness, unfairness and irrationality.

42. The Petitioner additionally submits that the 2nd Respondent's delay of more than three years in deciding on the recommendation to authorise the abandonment of the unpaid excise duty owed by OMCs is unreasonable delay and is contrary to Article 47 of the Constitution thereby warranting the intervention of the Court. The Petitioner relies on Section 7(2)(j) of the FAAA in support of the assertion that the Court has discretion to review an administrative action or decision. Section 11(2)(a) of the FAAA is cited for the proposition that the Court has discretion to grant any order that is just and equitable, including an order directing the making of a decision. The Petitioner anchors its arguments on the case of **Katiba Institute v Attorney General & 3 others; Kenya National Commission on Human Rights (Interested Party) [2019] eKLR** and the provisions of Section 37 of the TPA.

43. In opposing the petition, the 1st Respondent argues that the Petitioner was aware of its tax responsibility but chose not to pay the taxes in the hope that it will succeed in the application for waiver made to the National Treasury. It is further submitted that the Petitioner was given enough time to engage the National Treasury and waiting any longer will amount to a failure by the 1st Respondent on its tax collection and administration mandate.

44. The 1st Respondent submits that it acted within the law in demanding the duty as provided under Section 135 of the East African Community Customs Management Act, 2004, and the First Schedule of the Excise Duty Act, 2015. The 1st Respondent asserts that the only recourse where a waiver has not been granted is for the taxpayer to pay the tax due. Reliance is placed on the cases of **Partington v Attorney General 1869-4 HL 100**; and **Inland Revenue Commissioner v Duke of Westminster 1936 AC 124**.

45. I will begin by considering the provisions of Section 51 of the TPA. The Petitioner herein submitted an objection dated 2nd November, 2016 in response to the 1st Respondent's demand letter dated 10th October, 2016. The 1st Respondent did not respond to the objection within the statutory sixty days. The objection to the demand made in 2019 was equally met by the statement that the objection was not valid under law and was therefore rejected.

46. It is necessary to first determine whether the objection was validly lodged by the Petitioner. Under Section 51(3) of the TPA it is provided that:

(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.

47. I have perused the objection by the Petitioner and find that it was lodged well within the stipulated thirty days and therefore the objection was validly lodged within the statutory period. Furthermore, the notice of objection stipulated the grounds for the objection, the amendments required and reasons for the amendments, and a statement confirming that the Petitioner followed all tax procedures in place. Therefore, as per Section 51(8) of the TPA, where an objection is validly lodged in time, the Commissioner may allow the objection in whole or in part or disallow it.

48. As per sub-sections (9) and (10):

“(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.”

49. The 1st Respondent has not only failed to explain why the Petitioner's objection is not valid under the law and which specific law it is in breach of, but it has also failed to meet the requirements under Section 51(10). The 1st Respondent has omitted to include a statement of findings on the material facts of the objection and the reason for the decision. It is therefore evident that the 1st Respondent's letter dated 18th November, 2019 does not amount to an objection decision and therefore the 1st Respondent has not fulfilled its duty in providing the Petitioner with a decision on its objection. The response to the objection of 2nd November, 2016 was made way out of the statutory period. By virtue of the failure by the 1st Respondent, Section 51(11) comes into effect. The provision states that:

“(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.”

50. Since the Commissioner did not make a proper objection decision, the objection by the Petitioner stood allowed by operation of the law. It is also observed that the excise duty for the period in question was put in abeyance by the 1st Respondent awaiting the decision of the 2nd Respondent. In the circumstances of this case, it is clear that the actions of the respondents are in breach of the Petitioner's right to fair administrative action as espoused in Article 47 of the Constitution and the provisions of the FAAA. The 1st Respondent acted in contravention of the law by continuing to demand the excise duty even after the Petitioner's objection was deemed to have been allowed by the law.

51. 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.

52. The 2nd Respondent was called upon by the 1st Respondent, the OMCs and the Interested Party to consider the recommendation for waiver of the excise duty. The Interested Party wrote severally to the 2nd Respondent to respond to the recommendation that the excise duty for the period in question be waived but the 2nd Respondent failed to make a decision on the issue. According to Section 37(3) of the TPA:

“In any case referred to the Cabinet Secretary under subsection (1) and where appropriate, the Cabinet Secretary may direct the Commissioner in writing—

(a) to take such action as the Cabinet Secretary may deem fit; or

(b) to obtain the directions of the court in relation to the case.”

53. The 2nd Respondent has not taken any of the actions provided to him by the law and therefore has failed to fulfil his statutory duty. The 2nd Respondent has 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.

54. I therefore concur with the Petitioner that both respondents have abused their powers and contravened its right to fair administrative action as protected by Article 47 of the Constitution.

Breach of the Petitioner’s Legitimate Expectation

55. The Petitioner in its petition asserts that it had a reasonable legitimate expectation that the 1st Respondent would not make any further demands and would await the decision of the 2nd Respondent; and that the 2nd Respondent would act and render a decision.

56. The 1st Respondent submits that it has never given the Petitioner any indication that the taxes were not payable and therefore there is no basis for any claim founded on legitimate expectation. Reliance is placed on the decisions in **High Court Misc. Civil Appl. No. 449 of 2001, Republic v Kenya Revenue Authority ex-parte Total Kenya Limited; Dry Associates Limited v Capital Markets Authority & another [2012] eKLR; Republic v Kenya Revenue Authority ex-parte Aberdare Freight Services Ltd [2004] 2 KLR 530; Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; and Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge & 9 others C.A. 266 of 1996.**

57. The test for legitimate expectation was expressed in the case of **Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex-parte Soweto Residents Forum CBO [2019] eKLR** as follows:

“18. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*. These include:- (i) that there must be a representation which is “clear, unambiguous and devoid of relevant qualification”, (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator’s actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.”

58. The Petitioner claims that its legitimate expectation arose from the 1st Respondent’s letter dated 10th February, 2017 to the Principal Secretary of the National Treasury, where the 1st Respondent expressly stated that “*meanwhile the demand to the airlines by our Investigations and Enforcement Department has been put on hold to await the waiver approval.*” This meets the first criteria of the test for a legitimate expectation as the 1st Respondent made a representation which is clear and unambiguous that it would function in a particular manner until the 2nd Respondent decided on its recommendation.

59. Secondly, the expectation herein is reasonable to the extent that any ordinary person reading the letter dated 10th February, 2017 would have concluded, as the Petitioner did, that the demand notices by the 1st Respondent would cease until the 2nd Respondent made a decision.

60. Thirdly, the expectation was induced by the decision-maker, in this case, the Commissioner of Customs and Border Control.

61. The last criteria that the decision must be lawful is also met as this scenario is accounted for under Section 37 of the TPA.

62. I therefore find that the Petitioner did have a legitimate expectation created by the 1st Respondent that it would cease demanding for the taxes until the 2nd Respondent decided on its recommendation that the collection of the excise duty for the period in question be abandoned.

63. On the part of the 2nd Respondent, I also find that the Petitioner had a legitimate expectation that the Cabinet Secretary would act in accordance with the law and make a determination on the recommendation by the 1st Respondent. Any person who subjects himself to a statutory process has a legitimate expectation that the law will be complied with. Failure to exercise statutory powers can, like in the circumstances of this case, amount to breach of a legitimate expectation.

64. In the circumstances of this case, I find and hold that the respondents violated the Petitioner’s legitimate expectation that it would be taken through a fair process and taxes that are deemed unrecoverable by law would not be demanded again.

The Determination

65. Considering what has been stated in this judgement, the outcome is that the petition dated 22nd November, 2019 succeeds and orders shall issue as follows:

a) An order of certiorari is issued removing into this Court and quashing the decision of Kenya Revenue Authority contained in the demand dated 3rd October, 2019 for Kshs 163,514,488/= issued to Gulf Energy Limited in respect to excise duty accrued on

Kerosene type jet fuel for the period 1st December, 2015 to 31st August, 2016.

b) An order of certiorari is issued removing into this Court and quashing the agency notices dated 21st November, 2019 issued by Kenya Revenue Authority to Gulf African Bank, Citi Bank or any other bank in respect of the sum of Kshs 163, 514, 488/= or such excise duty as Kenya Revenue Authority has claimed as accruing on Kerosene type jet fuel for the period 1st December, 2015 to 31st August, 2016.

c) An order of prohibition is issued prohibiting Kenya Revenue Authority, whether by itself or through its officers and/or agents from commencing or instituting any enforcement actions against Gulf Energy Limited in relation to and/or on account of excise duty claimed as accruing on Kerosene type jet fuel for the period 1st December, 2015 to 31st August, 2016.

d) A declaration is issued that the 1st Respondent's decision to make demand and issue the agency notices as set out in (a) and (b) above is unfair, unreasonable and irrational, and constitute an abuse of power.

e) A declaration is issued that the respondents have violated the Petitioner's right to fair administrative action.

f) The Petitioner shall have the costs of this petition from the respondents.

Dated, signed and delivered virtually at Nairobi this 15th day of October, 2020.

W.Korir,

Judge of the High Court