REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

JUDICIAL REVIEW APPLICATION NO. 346 OF 2019

VIVO ENERGY KENYA LIMITED.....APPLICANT

VERSUS

THE COMMISSIONER OF CUSTOMS & BORDER CONTROL,

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE CABINET SECRETARY, THE NATIONAL TREASURY.....2ND RESPONDENT

JUDGEMENT

The Applicant's Case

1. The Applicant, Vivo Energy Kenya Limited, instituted these proceedings through an originating notice of motion dated 2nd December, 2019 pursuant to sections 4, 7, 8 and 11 of the Fair Administrative Action Act, 2015 ('FAAA') and all other enabling provisions of the law. The Commissioner of Customs & Border Control, Kenya Revenue Authority is the 1st Respondent and the Cabinet Secretary, the National Treasury is the 2nd Respondent. Through the said application, the Applicant is seeking the following orders:

> **a) A Declaration that as a consequence of the Commissioner's failure to make a decision of the Applicant's Notice of Objection dated 8th November, 2016 (and received on 9th November, 2016) within the statutory period of 60 days, the said Notice of Objection was allowed in terms of Section 51(11) of the Tax Procedures Act, 2015.**
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> **b) An Order of Certiorari to bring before the Honourable Court and quash the Commissioner of Customs and Border Control's decisions in respect of Excise Duty on Jet A1 fuel for local use as contained in its letters dated 24th August, 2016, 23rd November, 2016, 3rd February, 2017, 3rd October, 2019 and 24th October, 2019.**
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> **c) An Order of Prohibition prohibiting the Commissioner of Customs and Border Control whether by itself, its authorised officers and/or agents from demanding the payment of and/or taking any enforcement action of whichever nature in respect of Excise Duty on Jet A1 fuel for local use for the period December, 2015 to August, 2016.**
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> **d) In the alternative, an Order of Mandamus be issued against the Cabinet Secretary, the National Treasury, compelling him to approve the Kenya Revenue Authority's recommendation made on 10th February, 2017 for authorization to abandon and refrain from the recovery of the Excise Duty Tax on Jet A1 Fuel to the local aviation industry from 1st December 2015 to 31st August 2016.**
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> **e) An Order of Mandamus be issued against the Commissioner of Customs and Border Control compelling him to refund forthwith the sum of Kshs 109,759,854.00 paid by the Applicant on 18th November, 2019 in respect of Excise Duty on Jet A1 fuel for local use for the period December, 2015 to August, 2016.**
>
> **f) The costs of and occasioned by these proceedings be provided.**

2. The Applicant's case as disclosed in its originating notice of motion, statutory statement, and the verifying and supplementary affidavits of Naomi Assumani is that the 1st Respondent by way of a letter dated 10th October, 2016, without citing any provision of the law, issued a

demand against the Applicant for Kshs. 109,759,855/= being excise duty on locally consumed Jet A1 fuel for the period of 1st December, 2015 to 31st August, 2016. Thereafter, the 1st Respondent sent another demand letter dated 25th October, 2016 for the same tax but now demanding Kshs. 127,183,364/=.

3. It is the Applicant's case that upon being served with the demands it lodged a notice of objection dated 8th November, 2016 pursuant to the provisions of Section 51(1) and (2) of the Tax Procedures Act, 2015 ('TPA') which the 1st Respondent received but failed and/or declined to decide on either within the sixty days stipulated in Section 51(11) of the TPA or at all. It is asserted that under Section 51(11) of the TPA the Applicant's objection was allowed and therefore it should not be liable to pay the demanded tax.

4. The Applicant avers that the 1st Respondent subsequently issued demands dated 3rd October, 2019 and 24th October, 2019 requiring payment of the same excise duty within thirty days. It is the Applicant's case that the demand for the payment of Kshs. 109, 759, 855/= as excise duty issued after its objection was allowed is illegal and violates its right to equal protection of the law as well as the right to fair administrative action guaranteed under Article 47 of the Constitution and Section 7(2)(a)(ii), (c), (d), (e), (h), (j), (m) & (o) of the FAAA.

5. It is further averred that the impugned demands are in breach of the Applicant's legitimate expectation that no excise duty was payable on jet fuel for domestic consumption as until September 2018, the Kenya Revenue Authority's system explicitly recognised that no excise duty was payable. Further, that the 1st Respondent did not provide nor allow for payment of excise duty.

6. Additionally, it is alleged that the demand for payment of excise duty is in breach of the 1st Respondent's explicit undertaking not to pursue the impugned tax until the 2nd Respondent decided on the request for authorization of abandonment of the same. According to the Applicant, the 2nd Respondent had failed to approve the 1st Respondent's request dated 10th February, 2017 for authorization of the abandonment of the impugned excise duty under Section 37 of the TPA.

7. The Applicant deposes that upon pressure from the 1st Respondent and threat of adverse enforcement measures, it paid the claimed excise duty on 18th November, 2019.

8. It is the Applicant's testimony that the 1st Respondent did not contest the fact that it had timeously lodged a valid notice of objection against the tax demands. Further, that the 1st Respondent did not dispute the Applicant's averment that no objection decision had been issued by the 1st Respondent within the stipulated sixty days.

9. In opposition to the respondents' contention that this Court has no jurisdiction to entertain these proceedings, the Applicant asserts that it has not asked this Court to determine the merits of the 1st Respondent's actions. According to the Petitioner, the issue of the merits of the decision does not arise as its objection to the tax demand was allowed by operation of the law and therefore the demand letters of 3rd October, 2019 and 24th October, 2019 were *void ab initio*. Further, that under Section 3 of the Tax Appeals Tribunal Act, 2013 ('TATA') the Tax Appeals Tribunal ('Tribunal') has no jurisdiction to hear the matter as there is no objection decision by the 1st Respondent that can be appealed to the Tribunal. It is therefore deposed that the application is rightly before this Court.

The Respondents' Response

10. The 1st Respondent filed a replying affidavit sworn by Nicholas Mugambi on 10th December, 2019 and avers that the demand notices complained of and sought to be quashed have been overtaken by events by virtue of the payments made in compliance with Article 210 of the Constitution. Additionally, the 1st Respondent asserts that orders of certiorari and prohibition are not concerned with the correctness or otherwise of the decision made but with the decision-making process.

11. It is the 1st Respondent's case that the issues raised by the Applicant cannot be raised in this Court, as the TPA and other tax statutes provide for objection procedures. The 1st Respondent suggests that the Tribunal is the forum for the Applicant to ventilate the issues raised herein.

12. The 1st Respondent contends that the Court process is being abused by the Applicant in order to circumvent the express statutory provisions of the TPA. Further, it is asserted that since the matter deals with the waiver of tax on Jet A1 fuel, the issues revolve around fiscal policy and such issues should be left to the Executive branch of government and not the courts.

13. It is also contended that an order of prohibition cannot stand as an order of prohibition is directed to the future and what is under attack has already taken place. Further, that if the prayer is granted it would amount to prohibiting tax collection and administration.

14. The 1st Respondent also filed a notice of preliminary objection on 13th December, 2019 asserting that the application is an attempt to circumvent the law as the Applicant has failed to comply with sections 51 and 52 of the TPA. Additionally, it is asserted that this Court lacks the statutory jurisdiction to deal with the issues raised in the application on the ground that the suit offends the doctrine of exhaustion of alternative remedies.

15. The 2nd Respondent filed grounds of oppositioin on 25th February, 2020. The application is opposed on the grounds that this Court has no jurisdiction to handle this matter as the substratum of the application falls within the ambit of the TPA and the Tribunal; that the application offends Section 9(2) and (3) of the FAAA; and that the application offends the principle of exhaustion which requires that any alternative dispute resolution mechanism provided by statute should be exhausted before the court is resorted to.

The Analysis

16. I have carefully reviewed the parties' pleadings and submissions and I identify the the issues for determination as follows:

a) Whether the Court has jurisdiction to hear and determine this matter;

b) The effect of the 1st Respondent's failure to timeously consider the Applicant's objection to the tax demand;

c) Whether the respondents acted irrationally, unreasonably and contrary to the Applicant's rights under Article 47 of the Constitution;

d) Whether the respondents acted contrary to the Applicant's legitimate expectation; and

e) Whether the Applicant is entitled to the reliefs sought.

The Court's Jurisdiction

17. The 1st Respondent in its written submissions dated 24th February, 2020 asserts that judicial review is a remedy of last resort and where there exists another statutory remedy, then the same should be pursued before seeking judicial review. The 1st Respondent submits that the Applicant has not demonstrated that judicial review is a more effective and convenient remedy than the dispute resolution mechanism provided by statute. The 1st Respondent contends that the Applicant did not resort to the provisions of Section 51(1) and (2) of the TPA and relies on the decisions in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo v IEBC & 2 others;** and **Konton Trading Limited v Kenya Revenue Authority & 3 others [2018] eKLR** in urging the Court to dismiss the application.

18. It is the 1st Respondent's assertion that where there is an alternative remedy provided such as a statutory appeal procedure then it is only in exceptional circumstances that an order for judicial review would be granted. The 1st Respondent contends that the judicial review proceedings herein are an abuse of the court process. The argument is supported by reference to the decisions in **Speaker of the National Assembly v Njenga Karume Nairobi C.A. No. 92 of 1992; Kipkalya Kones v Republic & another ex-parte Kimani Wanyoike & 4 others [2008] 3 KLR (EP) 291; Francis Gitau Parsimei & 2 others v National Alliance Party & others Petition No. 356 & 359 of 2012;** and **Damian Belfonte v Attorney General of Trinidad and Tobago C. A. 84 of 2004.**

19. The 1st Respondent asserts that judicial review is a discretionary procedure that considers the decision-making process rather than the decision itself. It is urged that the power of the court to review an administrative decision is extraordinary and exercised sparingly. This is buttressed by the holdings in **Council of Civil Service Unions v Minister for Civil Service [1985] AC 374**; and **Nairobi H.C.J.R. Misc. Appl. No. 374 of 2006 Republic v Kenya Revenue Authority Ex-parte Yaya Towers Limited** that the grounds for judicial review are abuse of discretion; irrationality; excess of jurisdiction; improper motive; failure to exercise discretion; abuse of the rules of natural justice; fettering of discretion; and error of law.

20. The 1st Respondent submits that the application herein is not within the scope of judicial review and that the decision of the 1st Respondent was reasonable. This is supported by the cases of **Republic v Kenya Power & Lighting Company Ltd & another [2013] eKLR; Republic v Public Procurement Administrative Review Board & another Ex Parte Gibb Africa Ltd & another [2012] eKLR;** and **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others, Civil Appeal No. 145 of 2011.**

21. The 2nd Respondent filed written submissions dated 16th June, 2020 and urged that the subject of the application is a tax dispute and therefore this Court has no jurisdiction to determine the matter as it should have been filed before the Tribunal. The 2nd Respondent also asserts that the application offends the provisions of Section 9(2), (3), (4) and (5) of the FAAA.

22. Furthermore, it is contended that the application offends the legal principle of exhaustion of alternative and statutory dispute resolution mechanisms. The 2nd Respondent relies on the cases of **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR; Megalith Mining Company Limited v Hon AG & Cabinet Secretary Ministry of Mining, Nairobi ELC Misc (JR) Civil Application No 948 of 2015; Speaker of the National Assembly v Hon James Njenga Karume, Civil Application No 92 of 1992; Peter Oduor Ngoge v Hon Francis Ole Kaparo, SC Petition No.2 of 2012; Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others [2014] eKLR;** and **Raila Odinga v The Independent Electoral & Boundaries Commission & 3 others, Supreme Court Petition No. 5 of 2013.**

23. The Applicant holds a different view from that of the respondents as disclosed in the written submissions dated 24th February, 2020. It is the Applicant's assertion that the alternative remedy under Section 52 of the TPA would only be available if there was an objection decision, which could be appealed, issued by the 1st Respondent. According to the Applicant, because the 1st Respondent failed and/or declined to issue an objection decision within the statutory sixty days, the ojection was allowed by the operation of Section 51(11) of the TPA. It is thus urged that there is no decision capable of being challenged before the Tribunal. The argument is supported by the decisions in **Republic v Kenya Revenue Authority Ex-Parte M-Kopa Kenya Limited [2018] eKLR** and **Fluer Investments Limited v Commissioner of Domestic Taxes & another, Civil Appeal 158 of 2017.**

24. The Applicant submits that the 1st Respondent's argument in the replying affidavit that the application lacks merit and is an abuse of the court process lacks justification both in fact and in law. This assertion is supported by the case of **Nancy Musili v Joyce Mbete Katisi [2018] eKLR.**

25. This Court is well versed with the doctrine of exhaustion and the importance of ensuring that parties have pursued all available remedies before seeking judicial review. This doctrine is enshrined in Article 159(2)(c) of the Constitution and Section 9(2) & (3) of the FAAA. Nevertheless, I appreciate the exemption to the rule provided by Section 9(4) of the FAAA as follows:

> **"(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."**

26. 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—**
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> **(a) a tax decision; or**
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> **(b) a decision made in the course of making a tax decision."**

27. The Applicant herein argues that it has been precluded from placing this case before the Tribunal as the 1st Respondent failed to make any decision on its notice of objection dated 8th November, 2016 in response to the 1st Respondent's tax demand dated 10th October, 2016, and the Kenya Revenue Authority's Investigation and Enforcement Department's letter dated 25th October, 2016. The 1st Respondent does not dispute that an objection decision was not made within the scope and stipulated timeline provided under Section 51(8) of the TPA. On that score alone, the Applicant is correct that there was no decision it could have appealed to the Tribunal. The Applicant was therefore faced by exceptional circumstances not envisioned under the TPA. I therefore find that the jurisdiction of the Tribunal could not be invoked in the circumstances of this case.

Effect of the Commissioner's failure to timeously consider the Applicant's Notice of Objection

28. The Applicant's case is that the 1st Respondent upon being served with the notice of objection to the tax demand failed to make a decision on the objection within the statutory stipulated period of sixty days. The Applicant argues that by operation of Section 51(11) of the TPA, its objection was allowed. This argument is buttressed by the decision in **Ex-Parte M-Kopa Kenya Limited (supra).** On this ground, the Applicant claims that it is entitled to the reliefs in prayers (a), (b), (c) and (e).

29. According to Section 51(11) of the TPA:

> **"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."**

30. In **Ex-Parte M-Kopa Kenya Limited (supra),** it was held that:

> **"106. In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the tax payer is seeking further particulars or indulgence to enable it pay the taxes demanded. In this case the applicant had clearly made what was in substance an objection as envisioned under section 51 of the *Tax procedures Act, 2015.* Accordingly, the Respondent was required to make a decision in respect thereof within sixty (60) days under section 51(11) of the said Act. As the Respondent defaulted in making a termination thereon within the prescribed time, the said objection was deemed to have been allowed.**
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> **107. As the law deems the objection to have been allowed, there is no reason why the applicant should have appealed. In the premises the question of existence of an alternative remedy does not arise in the circumstances."**

[Emphasis supplied]

31. The provisions of the TPA are clear that where the Commissioner fails to make a decision on an objection within sixty days, the objection shall be allowed. This means that the objection dated 8th November, 2016 in which the Applicant sought for the revision of the Commissioner's decision to demand the excise duty amounting to Kshs 127,183,364/= was allowed by operation of the law by dint of Section 51(11) of the TPA. Therefore the 1st Respondent should not have continued to demand the payment of the excise duty through the letters dated 23rd, November, 2016, 3rd, February, 2017, 3rd, October 2019, 24th,October 2019, and 7th, November 2019. All those demands amounted to nothing in law.

Whether the respondents acted irrationally, unreasonably and contrary to the Applicant's rights under Article 47 of the Constitution

32. The Applicant argues that the Commissioner's acts and/or omissions are unreasonable or otherwise an abuse of power thus violating Article 47 of the Constitution and the decision in **Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR.** The Applicant contends that the raising of the demands by the 1st Respondent was irrational warranting appropriate intervention by this Court for the reasons that the provisions of the law are not cited in the letter dated 10th October, 2016 which demanded Kshs. 109,759,855/=; that another demand letter for an aggregate sum of Kshs.127,183,364/= was issued; that until 2018 Kenya Revenue Authority's excise duty entry system explicitly recognised that no excise duty was payable; that the Applicant filed excise duty returns for the relevant period; that it is impossible for the Applicant to recover the contested duty from the customers; that the Commissioner has

explicitly accepted that the collection of the excise duty would put the operations of the domestic airline industry in peril; and that the figures of the sums demanded vary from each letter without explanation.

33. The Applicant submits that the case for abandonment or extinguishment of the excise duty is warranted under Section 37(1)(b) & (c) of the TPA, and therefore by adopting an inflexible policy not to exercise the discretion granted by the provision, the 2nd Respondent has acted unlawfully. Reliance is placed on the cases of **British Oxygen Co. Ltd v Minister of Technology [1970] UKHL 4;** and **Rama Sugar Industries Ltd v State of Andhra Pradesh & others 1974 SCC (1) 534.**

34. The Applicant additionally urge that the actions of the 2nd Respondent also constitute an abuse of his statutory powers as he unreasonably, irrationally and without explanation declined and/or refused to give his approval to the Commissioner's request for abandonment of the impugned excise duty. Reliance is placed on **R v Commissioner of Co-operatives, Kirinyaga Tea Growers Co-operative & Savings & Credit Society Ltd [1999] 1 E.A. 245.**

35. The 1st Respondent submits that he acted within the law in issuing the demand notices and did not exercise his discretion unreasonably, in bad faith or in disregard to the law.

36. The Applicant claims that the 1st Respondent acted contrary to the provisions of Article 47 of the Constitution which states that every person has a right to administrative action which is expeditious, lawful, reasonable and procedurally fair. Section 7(2)(k) of the FAAA further states that a court may intervene and review an administrative action if the action or decision is unreasonable. In the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR** the test for unreasonableness was stated as follows:

> **"84. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *'objectively so devoid of any plausible justification that no reasonable body of persons could have reached it* and that the *impugned decision had to be 'verging on absurdity' in order for it to be vitiated*. In *Prasad v Minister for Immigration*, the Federal Court of Australia held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required 'something overwhelming.' It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when 'looked at objectively… so devoid of any plausible justification that no reasonable body of persons could have reached them.' "**

37. The Court went on to hold that:

> **"88. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others."**

38. From the cited decision, it is clear that for one to establish that an action or decision is unreasonable it must be shown that the reasoning is illogical or irrational. Herein the Applicant argues that the 1st Respondent's actions were irrational as he continued to send out demand notices even though he was fully aware that the excise duty could not be redeemed from the Applicant's customers. Further, that there was a suspension of the demand for the excise duty by the 1st Respondent pending the decision of the 2nd Respondent.

39. By way of a letter dated 10th February, 2017 addressed to the 2nd Respondent, the 1st Respondent admitted that the "*additional tax burden will cripple local airlines*" and recommended that the 2nd Respondent exercises the powers conferred upon him by Section 37(2) of the TPA to authorise the 1st Respondent to abandon and refrain the recovery of the tax in line with the provisions of Section 37(1)(a), (b) and (c) of the TPA. The 1st Respondent went on to confirm that the demands made had been put on hold to await the approval of the proposed waiver.

40. It therefore goes against all logic that the 1st Respondent, having made the recommendation for the abandonment of the tax and assured that the demand for the same would be put on hold until the 2nd Respondent approved the recommendation, went ahead to demand payment of the same tax from the Applicant.

41. In respect of the 2nd Respondent, the Applicant claims that he acted contrary to the provisions of Section 37 of the TPA which states as follows:

> **"37. (1) This section applies where the Commissioner determines that—**
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> **(a) it may be impossible to recover an unpaid tax;**
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> **(b) there is undue difficulty or expense in the recovery of an unpaid tax; or**
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> **(c) there is hardship or inequity in relation to the recovery of an unpaid tax.**
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> **(2) Despite the provision of any tax law, the Commissioner may, with the prior written approval of the Cabinet Secretary, refrain from assessing or recovering an unpaid tax and the liability in relation to the tax shall be deemed to be extinguished**

or the tax shall be deemed to be abandoned or remitted, as the case may be.

(3) 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."

42. The minutes of the Ministry of Petroleum and Mining marked 'NA-17' annexed to the Applicant's application indicate that the representatives of the 2nd Respondent who were present at the meeting, apparently claimed that as a matter of principle the Cabinet Secretary is not allowed to waive the principal amount but only the penalties. However, this is by no means a proper decision in conformity with the provisions of Section 37 of the TPA as the 'decision' was not made in writing to the 1st Respondent, and the Act does not envision a scenario where the Cabinet Secretary refuses to propose any action to be taken by the Commissioner.

43. The TPA prescribes that the 2nd Respondent may direct the Commissioner to take any action he recommends or direct the Commissioner to obtain the directions of the court. The Cabinet Secretary has failed to take any of the steps provided by the law and has therefore declined to exercise his statutory responsibilities. According to Section 7(2)(b) of the FAAA, the court may review an administrative action or decision where a mandatory and material procedure or condition prescribed by an empowering provision was not complied with. The Cabinet Secretary has refused to exercise his statutory powers. The TPA required the 2nd Respondent to make and communicate a decision on the recommendation placed on his desk by the 1st Respondent.

44. From the evidence adduced, I therefore concur with the Applicant that the 1st Respondent acted unreasonably in demanding for the excise duty, and both the 1st and 2nd respondents acted contrary to the Applicant's right to fair administrative action under Article 47 of the Constitution by failing to properly dispense with their statutory mandates under the TPA.

Whether the respondents acted contrary to the Applicant's legitimate expectation

45. The Applicant submits that it had a legitimate expectation that it would not be liable to pay the excise duty for the relevant period on grounds that until September 2018 Kenya Revenue Authority's excise duty entry system explicitly recognised that no excise duty was payable; that during the period the Applicant filed its excise duty returns which were accepted by the Commissioner and the jet fuel was cleared without the payment of any excise duty; that the Applicant did not include the excise duty in its final price to its consumers and it is either impossible or well near impossible to recover the contested duty from the said customers; and that the Commissioner undertook not to take any action while awaiting the 2nd Respondent's decision on its recommendation for abandonment but persisted in issuing the demands and threatening dire consequences for non-compliance. The case of **Republic v Commissioner of Domestic Taxes & another, ex-parte Kenton College Trust [2013] eKLR** is cited in support of the arguments.

46. The Court of Appeal in **Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR** at paragraph 52 explained what is meant by legitimate expectation as follows:

"Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment."

47. I have carefully reflected upon the parties' arguments on this issue and in particular the actions of the 1st Respondent, which it does not deny, and I find that there indeed existed a legitimate expectation on the part of the Applicant that the 1st Respondent would not collect taxes that had been successfully objected to by the Applicant. The expectation was firmed up by the fact that the 1st Respondent undertook not to collect the taxes prior to the decision of the 2nd Respondent on the request by the 1st Respondent that it be allowed to write off the taxes.

48. It is observed that the 1st Respondent failed to put in place a proper system for the Applicant and other oil marketers to collect the excise tax from their customers during the relevant period and also cleared the excise duty returns without the remittance of the excise duty for the period in question. This would create in the mind of any ordinary person the impression that the duty which was to be collected during the relevant period would not be collected at all. Furthermore, the 1st Respondent made representations to the 2nd Respondent to the effect that it did not believe that it was reasonable to collect the said excise duty and that it was fully aware that the duty pending from the relevant period was irrecoverable. Once again the 1st Respondent had created in the mind of any reasonable person that it would not continue to demand the excise duty awaiting the waiver of the same by the 2nd Respondent.

49. I therefore concur with the Applicant that the 1st Respondent through its past actions and statements had created a legitimate expectation that it would not seek excise duty for a particular period as it was impossible to recover the tax. I consequently find and hold that the 1st Respondent's demand for excise duty in respect of the period in question violated the Applicant's legitimate expectation.

Whether the Applicant is entitled to the reliefs sought

50. The Applicant submits that the respondents acted unreasonably, irrationally, capriciously, illegally and contrary to the Applicant's

legitimate expectation and therefore the only recourse that the Applicant had was to seek court orders. The Applicant supports this argument with the decision in **Republic v Kenya Forest Service Ex-parte Clement Kariuki & 2 others [2013] eKLR**.

51. Under Article 23(3) of Constitution, the Court is empowered to grant the following reliefs where the rights and fundamental freedoms of a person are violated or threatened with violation:

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

52. Furthermore, under Section 11 of the FAAA, the court is empowered to grant orders as follows:

(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of a duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in a particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate

cases.

(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order—

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs and other monetary compensation.

53. In the case of **Ericsson Kenya Limited v Attorney General & 3 others [2014] eKLR** it was affirmed that:

"66. Upon finding a violation of fundamental rights and freedom, the duty of the Court under Article 23 is to frame "*appropriate relief*" to vindicate the Applicant's rights. The court is not limited to the reliefs prayed for by the Applicant nor is the court limited to the specific relief outlined in Article 23(3) (a) to (e). The nature of relief will depend on the facts of the case."

54. From the foregoing, it is clear that the Applicant has not asked for any remedies or orders contrary to the law. It has been established that the 1st Respondent not only carried out an administrative action contrary to the rights of the Applicant but also failed to take administrative action in the form of an objection decision. Additionally, the 2nd Respondent acted contrary to his statutory mandate by failing to respond to the 1st Respondent's recommendation in the proper manner. Therefore the Applicant is indeed entitled to appropriate reliefs.

55. As was held by the Court of Appeal in **Fleur Investments Limited v Commissioner of Domestic Taxes & another, Nairobi Civil Appeal No. 158 of 2017; [2018] eKLR**, a demand for taxes not owing attracts judicial review remedies. In that regard the Court stated:

> **"27. It is clear from the foregoing that the respondents were guilty of Wednesbury unreasonableness and this made their decision amenable to Court intervention by way of judicial review. The circumstances surrounding this matter were exceptional and called for the intervention of the court. This case is distinguishable from the case of Pili Management Consultants Ltd vs Commissioner of Income Tax, Kenya Revenue Authority (2010) eKLR cited by the respondents because that case dealt with merit hearing as to whether the money in the bank was liable to taxation or not, while in this case it is a clear case of arbitrariness and bad faith. This was not a case for merit hearing. It was about the respondents arbitrarily and maliciously out of the blues imposing a tax that was not owed based on the incorrect premise that the appellant had declined to present itself for tax audit when it had already done so. As we have stated before (See Cimbria E.A limited vs Kenya Revenue Authority Civil Appeal No, 61of 2011) whereas the respondent is mandated by law to collect taxes where the same is lawfully owed, imposing taxes where none is owed and arbitrarily imposing sanctions to enforce payment is acting in excess of its jurisdiction and is *ultra vires* and thus amenable to judicial review."**

The Determination

56. Having found in favour of the Applicant herein, I allow the application and grant orders as follows:

(i) A declaration is hereby issued that as a consequence of the Commissioner's failure to make a decision on the Applicant's notice of objection dated 8th November, 2016 (and received on 9th November, 2016) within the statutory period of sixty days, the said notice of objection was allowed in terms of Section 51(11) of the Tax Procedures Act, 2015.

(ii) An order of certiorari is issued bringing into this Court for quashing and quashing the Commissioner of Customs and Border Control's demand for excise duty for the period December 2015 to August 2016 as contained in the letters dated 24th August, 2016, 23rd November, 2016, 3rd February, 2017, 3rd October, 2019 and 24th October, 2019 on Jet A1 fuel for local use.

(iii) An order of prohibition is issued prohibiting the Commissioner of Customs and Border Control whether by himself, his authorised officers and/or agents from demanding the payment of and/or taking any enforcement action of whichever nature in respect of excise duty on Jet A1 fuel for local use for the period December 2015 to August 2016.

(iv) An order of mandamus is issued compelling the Commissioner of Customs and Border Control to refund forthwith the sum of Kshs 109,759,854/= paid by the Applicant on 18th November, 2019 in respect of excise duty on Jet A1 fuel for local use for the period December 2015 to August 2016.

(v) The Applicant is awarded the costs of this petition against the respondents.

57. I believe the above remedies are sufficient to right the wrongs visited upon the Applicant by the respondents. In the circumstances, I find that issuance of the alternative prayer sought against the 2nd Respondent will not serve any useful purpose. Consequently, the prayer for the alternative order is declined.

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

W. Korir,

Judge of the High Court