



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 309 OF 2012

BETWEEN

PZ CUSSONS EAST AFRICA LIMITED.....PETITIONER

AND

THE KENYA REVENUE AUTHORITY..... RESPONDENT

JUDGMENT

Introduction

1. The petitioner PZ Cussons East Africa Limited (“the Company”) is a Multinational company involved in the manufacture and marketing of soaps, toiletries, cosmetics and pharmaceutical products. In the course of business, the company sells these products locally and exports some of it to the East African Region in particular to Uganda and Tanzania. It has for this purpose, engaged the services of two agents duly licensed by the Kenya Revenue Authority (“KRA”) who process their exports.
2. The crux of this matter is tax dispute relating to additional tax assessment triggered by a letter from KRA dated 27th July 2012 demanding tax in form of corporation and excise tax amounting to Kshs 319,775,171 and Kshs 61,609,442 respectively. The Company has filed the present suit to challenge the basis of KRA’s additional tax demand.

The Facts

3. The facts giving rise to the petition can be filtered from the supporting affidavit of Stanley Ibeere, PZ Cussons Financial Controller, sworn on 23rd July 2012 and the replying affidavit of Kennedy Odumbe, the Principal Revenue Officer in the Domestic Taxes Department (Large Taxpayer Office) at the KRA and a supplementary affidavit of 8th March 2013.
4. By a letter dated 25th August 2011, KRA gave notice to the petitioner that it intended to carry out a detailed tax audit on the company. The audit was carried out between October and December 2011 targeting the following tax heads; Corporation tax for the years 2008-2009, Withholding income tax, VAT, PAYE and Excise duty all for the period between the year 2008 and 2011.
5. According to KRA, the audit revealed that there were some missing entries from the Company’s export sales records and which were appearing in KRA’s automated system known as the *Simba*

System. Exit reports allegedly confirmed these goods as having left the customs territory. The audit also revealed excesses which could not be accounted for in their sales ledgers hence KRA concluded that the Company had under-declared the sales.

6. A series of meetings were held and correspondence exchanged between the Company's representatives and KRA to discuss the audit findings. The parties failed to reach any consensus on the audit findings whereupon KRA issued notices of additional assessments for Corporation Tax, VAT, Withholding tax and PAYE by a letter dated 19th January 2012.
7. The letter indicated that a comparison of the Company's export sales as reported in its records and an independent comparison from the Customs Department allegedly confirmed that the Company had not declared all the exports. In addition, KRA contended that there were other additional taxes payable on various grounds it set out in a letter to the petitioner. KRA assessed Corporation Tax at Kshs 463,451,552 for the three years which sum included interest and penalties totalling Kshs 212,172,887. It issued additional assessments setting out the taxes allegedly due from the Company
8. The company through its tax advisors *Deloitte and Touche* ("Deloitte") objected to the assessment by a letter dated 16th February 2012 in which it also gave a detailed response to the issues raised by KRA. In regard to the assessment for the Corporation tax arising out of the missing export entries, the Company's position was that the entries in KRA's Simba System were processed by agents not known to it and that at all material times the Company engaged only one agent, Supersonic Freighters (K) Ltd.
9. KRA issued the acknowledgement of objections on 29th February 2012. Following submission of the objection, the representatives for the Company, Deloitte's and KRA met on various occasions to discuss the issues raised from the audit. KRA was however dissatisfied with the explanation provided by the Company and by a letter dated 29th June 2012 confirmed the additional assessments. KRA however withdrew its demand with respect to some of the items set out in their letter of 19th January 2012 with regard to Corporation tax which was reduced from Kshs 461,451,552.00 to Kshs 319,775,171.00. According to KRA, this reduction was informed by the fact that KRA accepted the Company's explanation that some of the missing entries appearing in the reconciliation were cancelled or replaced orders. In the confirmation letter, KRA also levied excise duty on the missing entries in the amount of Kshs 61,609,442.0
10. The Company by the letters dated 17th March 2012 wrote to the agents who they alleged were not known to them but who appeared to have processed entries using their personal identification number. Two agents responded confirming that they had entered the entries on behalf of the Company's customers and on the basis of invoices issued by the Company.

Petitioner's Case

11. The Company contends that KRA's demand is unconstitutional, in blatant abuse of power, unlawful, unreasonable and unfair in as far as KRA failed to provide the petitioner with the relevant information and documents which formed the basis of its demand so as to afford the petitioner an opportunity to demonstrate that it had not under-declared its sales.
12. According to the Company, copies of the documentation required by the company in order to demonstrate that the tax demanded is not due included copies of all export entries duly stamped by customs at the respective port of exit, each attached to respective proforma invoices and loading sheets for each shipment. The company accused KRA of relying solely on its own information in raising the demand amount including information from the Customs Services Department KRA's electronic *Simba System* whose accuracy could not be verified.
13. Mr Kimani, counsel for the Company, termed KRA's action of demanding taxes without sharing

information that is in the sole control of KRA as irrational, unreasonable conduct, in bad faith and an affront to the company's legitimate expectation. It was claimed this withholding of information jeopardised the Company's right to move the local committee.

14. Counsel further contended that the power of KRA under **section 5(1)** of the **Kenya Revenue Authority Act** is power to access, collect and account for all revenues. It was submitted that the demand for Excise Duty was made without any assessment hence not accounted for having been first raised in the confirmation letter of the 29th June 2012. It was the Company's case that it was unclear to it the basis upon which the demand was made and it decried the fact that it was being subjected to payment of taxes not due when it was evident that there was a real possibility that the KRA's *Simba system* had been manipulated to perpetrate a fraud on KRA.
15. By a letter dated 30th December 2011 addressed to the Commissioner Customs Services Department, the Company requested the Commissioner to investigate the suspected fraud that had been committed by some agents, who were said to have fraudulently used the Company PIN to process exports on its behalf and who are neither appointed by nor known to the Company. The Company complained that in spite of its letter, no response has been received from KRA and that it has no knowledge what action, if any, was taken by KRA. The Company pointed out that during the meetings, KRA's representatives had indicated that the issue of the use of Company PIN was being investigated by the Customs Services Department and a decision would be made once a report of the investigation is available. The Company therefore reasonably expected that KRA would make known the report and indeed if necessary, call upon the petitioner to respond to it.
16. The Company through correspondence copied to KRA dated 17th March 2012 wrote to the agents putting them on notice of the fact that appropriate legal action will be taken against them for the fraudulent use of its PIN.
17. It is the petitioner's case that KRA was in breach of **Article 47** for fair administrative action as the petitioner had not demonstrated, its basis for demanding Corporation Tax and Excise Duty as its assessment was purely based on information claimed to have been obtained from independent sources, but which it had refused to make known to the Company, and records it claims to have been posted in its Simba System. That it was neither reasonable nor procedural for KRA to make what can only be termed as an arbitral demand for taxes without demonstrating the basis thereof in light of the compelling reasons given by the Company as to why the demand is without basis.
18. In short, the Company is adamant that it has paid all the taxes properly and lawfully due from it and states that it would be unfair to compel it to make payment of the disputed tax when it was clear that KRA did not want to consider all the facts of the case which should show that no tax is due from the Company.
19. The Company complained that the sums claimed by KRA are alleged to have accrued from 2008 and is now being asked to make a single payment of a colossal sum of money in disregard of its cash flow and financial obligations and that its business will grind to a halt if it is compelled to pay. It stated that KRA's decision to demand the taxes was in the circumstances, irrational, disproportionate and totally failed to consider relevant facts.
20. In its petition dated 23rd July, 2012, the Company seeks the following orders:
 1. A declaration that the failure by KRA to provide the documents and or information it claims to have in support of the demand for Corporation Tax is an infringement of the Petitioner's Constitutional right of access to information that the petitioner requires to exercise its right to challenge the assessment made.
 2. An order for judicial review by way of Mandamus to compel the Kenya Revenue Authority to furnish the petitioner with the information it claims to have and which it states to be the basis of its demand for Kshs.319,775,171.
 3. A declaration that the failure by KRA to investigate the petitioner's claim that unauthorised agents fraudulently used the petitioner's PIN to post entries on its system is an infringement of its

constitutional right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

4. *A declaration that the demand for Kshs 319,775,171 and 61,609,442 dated 29th June 2012 and issued to the Petitioner together with the assessments from which the demands arise are unconstitutional and in contravention of Article 40 of the Constitution to the extent that the same was issued arbitrarily and without regard to the due process of law and without consideration of the evidence produced by the petitioner.*
5. *An order for judicial review by way of an order of certiorari to remove to this court and quash the assessments by KRA and the decision by KRA to make demand and the demand contained in the letter dated 29th June 2012 requiring PZ Cussons East Africa Limited (the petitioner) to pay taxes in the sum of Kshs.319,775,171 being Corporation Tax and Kshs.61,609,442 being Excise Duty allegedly due from it.*
6. *An order for judicial review by way of prohibition to prohibit Kenya Revenue Authority from commencing, instituting or proceeding with any other enforcement actions against the petitioner or its directors and or officers in relation to and/or on account of the disputed Corporation Tax in the sum of Kshs. 319,775,171 and Excise Duty in the sum of Kshs.61,609,442.*
7. *An order for judicial review by way of prohibition to prohibit Kenya Revenue Authority from commencing, instituting prosecution actions against the petitioner or its directors and or officers in relation to disputed sums of Kshs. 319,775,171 and Excise Duty in the sum of Kshs.61,609,442.*
8. *A declaration that the refusal and or failure by KRA to make available to the petitioner all the information it has relied upon is an infringement of Articles 25(c) and 35(1)(b) of the Constitution as it impedes the petitioner's right to access justice and to a fair trial pursuant to Section 84(2) of the Income Tax Act.*
9. *An order for judicial review by way of Mandamus to compel Kenya Revenue Authority to carry out a thorough and proper investigation as to how unauthorised agents used the petitioner's PIN to post fraudulent entries into its Simba System and submit a report of its findings to the Criminal Investigations Department and the Kenya Ethics and Anti-corruption Commission for further action.*
10. *Any further order or relief that this court deems fit to make to meet the interests of justice.*
11. *Costs.*

Respondent's Case

12. *KRA denied withholding information from the Company stating that the information on the missing entries was always in the Company's custody, having been communicated immediately on conclusion of the audit. Further that the report from the respondent's Customs Services Department only confirmed that the exports left the customs territory and again this information and the exit reports were transmitted to the company.*
13. *KRA avers that the Company had adequate time since the audit findings were communicated to it in December 2011 to verify the exports from its Customers but that the Company had to date not provided any new information to support its position.*
14. *Regarding the alleged fraudulent use of the company's PIN by some agents, KRA stated that it was not duty bound to investigate the circumstances under which the Company's PIN and password were allegedly abused and the duty to do so lay with the Company.*
15. *Regarding the veracity of the Simba system, KRA reiterated that the system could only be assessed by an exporter/importer or the duly appointed agent of such exporter/importer who makes an export/import declaration and provides supporting documents. Such persons must have PIN which is unique to that person and a password that is only known to them. That therefore, the Company could not now deny knowledge of the large quantity of exports made using its personal identification number and password. Further that the Company cannot be heard to claim that the information in the Simba System is unreliable when it uses the system for its imports, exports and all customs transactions.*

16. Ms Mwaniki, counsel for KRA submitted that under **section 56 of *Income Tax Act***, KRA is entitled to rely on any information hence reliance on Simba System and other authorities. That the evidence revealed excesses not accounted for in its ledger. That despite several meetings and correspondence between the parties regarding the audit findings, the Company failed to provide a satisfactory explanation that KRA computed tax based on these entries. KRA contended that the Company was given an opportunity to be heard through the meetings and correspondence.
17. Regarding the levy of excise duty contested by the company, KRA explained that it levied the duty because products manufactured are liable to excise. KRA conceded that the excise component was coming up for the first time as a decision though it had been subject of discussions and the decision was communicated to them. Further that the issues the Company raised regarding excise duty liability would have been dealt with by a review application to the Commissioner. KRA maintained that it complied with the law and having issued assessments, the onus is on the Company to prove that the tax was excessive.
18. KRA denied claims of breach of any fundamental rights and maintains that in conducting the audit and raising the additional assessments for tax, it was only exercising a statutory mandate and this cannot be said to have been a violation of the petitioner's fundamental rights and freedoms especially when the Company has failed to provide any satisfactory explanation and or any new information to support its position. KRA relied on the case of ***Pierson v Belcher (H.M. Inspector of Taxes) Tax Cases volume 38*** to support the proposition that the onus was on the Company to show that the assessment made upon it was excessive or incorrect. KRA termed the company's claims as unsupported and unsubstantiated.

Determination

19. A number of issues have been canvassed by the parties surrounding the raising of the tax demand by KRA. The subject of dispute centres on the basis of assessment of corporate tax and the excise duty.
20. KRA is empowered by **section 5(1) of the *Kenya Revenue Authority Act, (Chapter 469 of the Law of Kenya)*** to *inter alia* administer and enforce all provisions of written laws including the provisions of the written laws set out in **Part 11 of the First Schedule** relating to revenue and "*for that purpose assess, collect and account for all revenues in accordance with those laws.*" Just like any other state organs, KRA is bound by the provisions of the Constitution to respect and uphold the bill of rights. Its mandate is not only confined to statutory framework, but to the higher values of the Constitution such as the national values and principles of good governance enunciated under **Article 10**.
21. The duty to assess and collect tax is imposed on KRA and the court should exercise restraint in interfering with decision of the Authority on matters within its competence. The issue for consideration is whether or not KRA breached the petitioner's fundamental rights in the manner in which it discharged its mandate, in particular whether it violated the petitioner's right to fair administrative action protected under **Article 47**.

Right to fair administrative action

22. The Company contends that KRA's actions were unfair, and unreasonable. **Article 47(1)** guarantees the right to fair administrative action. It provides that, "*Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*"
23. It is incumbent upon an organ such as the respondent which has a monopoly over the discharge of administrative action that affects the rights of others that it carries out its duties in a fair and procedural manner. In the case of ***Dry Associates Ltd v Capital Markets Authority and Another, Petition No. 328 of 2011***, it was noted as follows with regard to **Article 47** provisions; "*Article 47 is intended to subject administrative processes to constitutional discipline hence relief for*

administrative grievances is no longer left to the realm of common law ... but is to be measured against the standards established by the Constitution.”

24. On this, the Company has made various claims which may be summarised as follows;

1. That it was denied information regarding the basis on which the KRA based its tax assessments.
2. That KRA failed to investigate or furnish it with the report regarding the likely fraud perpetrated by agents who are not the company's agents with regard to the export entries variance
3. That the decision by KRA was unlawful in as far as no assessment/audit was carried out before raising tax with regard to the excise duty.

Withholding of information

4. KRA is accused of withholding information in particular the report by the Customs Services Department and the various agents who had fraudulently used its PIN. Further that during the meeting of 15th May 2012, KRA's representatives informed the Company that the Customs Services Department had submitted its report to KRA and had also met the agents who had allegedly processed transactions on KRA's system using the Company's PIN. The Company maintained that it has no control over what gets onto the Simba system and as it only uses two agents, it had no knowledge of the other agents who were alleged to have processed export entries on its behalf.
5. By a letter dated 30th December 2011, addressed to the Commissioner Customs Services Department, the Company requested the Commissioner to investigate the suspected fraud that had been committed by unauthorised agents, who were said to have fraudulently used the Company PIN to process exports on its behalf. The Company complains that in spite of its letter, no response has been received from KRA. The information before court is that the said agents were afterwards suspended.
6. The question as to whether the company is liable to pay the additional assessment of taxes with regard to the discrepant entries ostensibly fraudulently made by the agents ultimately turns on the answer to the question as to whether the purported agents were the company's agents. This is key because once the principal/agent relationship is established, then the company would be vicariously liable for the acts of such agents, by dint of **section 148** of the ***East African Community Customs and Management Act (EACCMA)*** which states as follows:

148. An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:

Provided that—

1. *an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorized agent unless the owner actually consented to the commission of the offence;*
2. *(ii) nothing herein contained shall relieve the duly authorised agent from any liability to prosecution in respect of any such offence.*
3. KRA has disclaimed responsibility stating that its role was limited to licensing such agents and that the duty to investigate the unauthorised use of its PIN lay on the Company. The Company on the other hand contends that it is KRA's mandate to investigate the allegations of fraud relating to entries in the system and maintains that it has only two duly appointed agents; *Supersonic Freighters Kenya Ltd* and *Aquarero Cargo* (now *Akamai* for bulk imports). It vouches as to the accuracy of its agents' entries and denies any knowledge of the other agents whom it accuses of fraudulently using its entry PIN.

4. It is common ground that the *Simba system* can be accessed by a duly appointed agent of an importer/exporter. The bone of contention regards to the mode of dealing with the alleged fraudulent entries by the undisclosed agents.
5. **Part XI** of the *EACCMA* deals with '**Customs Agents**'. **Section 145** states as follows with regard to licensing of agents;

145. (1) The Commissioner may license persons to act as agents for transacting business relating to the declaration or clearance of any goods or baggage other than accompanied non-manifested personal baggage of a person travelling by air, land or sea.

(2) The Commissioner shall not license any person to act as agent under this Act unless the Commissioner is satisfied that, that person has the capability, office equipment, a registered office and documents to effectively transact business in accordance with the provisions of this Act and any other conditions as may be prescribed by regulations.

(3) The Commissioner may refuse to issue a licence or may by order, suspend, revoke or refuse to renew, any such licence on the ground that the applicant or holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reason that the Commissioner may deem fit.

6. **Section 146** then goes on to deal with the authority of duly authorised agents as follows:

146. (1) Where under the provisions of the Customs laws the owner of any goods is required or authorised to perform any act then such act, unless the contrary appears, may be performed on his or her behalf by authorised agent.

(2) A person shall not be the duly authorised agent or any

owner unless—

1. *such person is exclusively in the employment of the owner; or*
2. *such person is a Customs agent duly licensed as such in accordance with this Act, and, in either case, such person is authorised in writing by the owner, either generally or in relation to any particular act, to perform the act on behalf of the owner.*

(3) The proper officer may require from any person purporting to be the duly authorised agent of any owner the production of his or her written authority and in default of the production of such authority the proper officer may refuse to recognise such person as a duly authorised agent.

3. **Section 146(2)** of *EACCMA* is clear as to who cannot be deemed an authorised agent. The agents alleged to have perpetrated the fraudulent entries were not exclusively in the employment of the Company. Furthermore, it has not been established that the agents possessed written authority to act for the Company in terms of the **section 146(2)(b)** of *EACCMA*.
4. As the agents were not the company's duly authorised agents, any acts perpetrated by them, including the purported fraudulent entries cannot be visited on the Company. KRA has attempted to indicate that some of those agents had indicated that they had carried out the transactions with instructions from the company's customers. Such a claim fails in the face of my finding above. I therefore find and hold that KRA's insistence on visiting liability upon the company is not only unreasonable and unfair but also unlawful and in breach of **Article 47** in view of the clear provisions of *EACCMA* I have cited.

5. I find it strange that the KRA disclaims responsibility in the face of possibility of grave tax offences committed by persons who are not agents by maintaining that its role is limited to licensing of the agents. As the institution charged with enforcement of tax laws and ensuring sanctity of its electronic system, it is surprising for it to suggest that it is the Company's business whilst if such an offence is proved, it would actually amount to an offence and occasion loss of revenue.

Accuracy of the Simba system/Excessive tax assessments

6. The Company has impugned the system claiming that its entries cannot be solely relied upon. *Simba system* is an automated system introduced in 2005 for purposes of simplifying and streamlining the customs clearance process for the benefit of the respondent, importers and exporters.
7. Having addressed the vital issue regarding tampering with the company's entries through alleged fraudulent use of its PIN, it is unnecessary to delve into the calculations and entries in the electronic system, as these are substantive issues which will be subject of contention in another forum. In ***First National Bank of SA Ltd t/a Westbank v Commissioner, South African Revenue Services & Another CCT 19/01[2002]*** adopted in ***Crywan Enterprises Limited v Kenya Revenue Authority, Petition No 322 of 2011***, the Customs Act was '*premised on a system of self-accounting*' and that '*The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected invasion.*'

Charge on Excise Duty

8. The Company challenged the raising of the excise duty on the ground that the issue came up only later in the letter of 29th June 2012 and that there was no accountability and there was lack of information on how the assessment was carried out. KRA conceded that the excise component was coming up for the first time as a decision though it had been subject of discussions and the decision was communicated to them. KRA also contended that it was incumbent upon the company to demonstrate that the amount was excessive.
9. In the case of ***Pearson v Belcher (supra)*** it was stated as follows; "*...there is an assessment made by the Additional Commissioners upon the Appellant; it is perfectly clearly settled by cases such as Norman v Golder, 26 T.C. 293, that the onus is upon the Appellant to show that the assessment made upon him is excessive and incorrect; and of course he has completely failed to do so. That is sufficient to dispose of the appeal, which I accordingly dismiss with costs.*"
10. I agree with the KRA that the burden would be upon the Company to show that the amounts taxed was excessive. But to that extent only. It was necessary and indeed in regard to reasonable administrative action to detail how it came to its decision contained in the letter of 29th June 2012 so as to enable the company, if it so wished, to mount challenge if it so wished. The duty to give reasons is now embedded in **Article 47(2)**. I therefore find and hold that the failure by KRA to give information as to how it arrived on the amount was unreasonable.

Conclusion and Disposition

11. I therefore find and conclude that KRA's action of insisting on payment of additional tax assessment in the circumstances in light of claims of fraudulent agents who were not the company's agent in terms of **section 146** of **EACMMA** was unreasonable and unfair and in breach of the right to fair administrative action under **Article 47**. In the circumstances, I quash the additional excise duty and corporate tax assessments in relation to the excise tax as well carried in the letter dated 29th June 2012.
12. These then are my final orders;
 1. An order of certiorari is hereby granted to remove to this court and quash the assessments by KRA

and the decision by KRA to make demand and the demand contained in the letter dated 29th June 2012 requiring PZ Cussons East Africa Limited the petitioner to pay taxes in the sum of Kshs 319,775,171 being Corporation Tax and Kshs 61,609,442 being Excise Duty allegedly due from it.

2. The petitioner shall have half the costs of the petition.

DATED and **DELIVERED** at **NAIROBI** this 1st day of November 2013.

D.S MAJANJA

JUDGE

Mr Kimani instructed by Hamilton Harrison and Mathews Advocates for the petitioner.

Ms Mwaniki, Advocate, instructed by the Kenya Revenue Authority.