IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KARANJA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 150 OF 2018

BETWEEN

KENYA REVENUE AUTHORITY.....APPELLANT

AND

UNIVERSAL CORPORATION LTD.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi

Judicial Review Division (Odunga, J.) dated 10th June, 2016

in

J.R. MISC. APPLICATION NO. 460 OF 2013)

JUDGMENT OF THE COURT

On **10th June, 2016**, the High Court of Kenya at Nairobi (**G.V. Odunga, J)** separately, delivered judgments in three inter-related Judicial Review Misc.

Application Numbers 458/2013, **Republic versus Kenya Revenue Authority,Exparte, Cooper K. Brands Limited,** Judicial Review Misc. Application number 460 of 2013**, Republic versus Kenya Revenue Authority, Exparte Universal Corporation Limited** and lastly, Judicial Review (JR) Misc. Application Number 478 of 2014, **Republic versus Kenya Revenue Authority, Exparte Cosmos Limited**. The separate judgments gave rise to Civil Appeal Numbers 382 of 2017, **Kenya Revenue Authority versus Cosmos Limited,** lodged on **15th November, 2017**, 383 of 201, **Kenya Revenue Authority versus Cooper (K) Brand Limited** also lodged on the same date of **15th November, 2017** and lastly, Civil Appeal Number 150 of 2018, **Kenya Revenue Authority versus Universal Corporation Limited,** lodged on **8th June, 2018.**

On **4th March, 2019**, an order endorsed in Civil Appeal number 382 of 2017 directed that since the three appeals are inter-related, they should be listed for hearing on the same date and by the same Bench. Following the above directions, the three appeals were listed before this Bench for hearing. When called out, learned counsel **Mr. Pius Nyagah**, appearing with learned counsel **Miss Mburugu** appeared for the appellant in all the three appeals. Learned counsel **Mr. Kiragu Kimani** appeared for the respective respondents in appeal Numbers 382 of 2017 and 383 of 2017 respectively, while learned counsel **Mr. J. O Arwa,** appeared for the respondent in Civil Appeal No. 150 of 2018. Learned counsel for the respective parties brought to our attention the pendency of interlocutory applications in appeal numbers 382 of 2017 and 383 of 2017, filed separately, but simultaneously on the same date of **21st December, 2017.** Also the pendency of a similar application filed by the respondent in Civil Appeal No. 150 of 2018 dated **31st August, 2018** and a reference to the full court against the ruling of a single Judge (**P.O. Kiage, JA**) dated **27th March, 2019** validating appeal number 150 of 2018.

Upon hearing oral representations from learned counsel for the respective parties on the way forward on the determination of the three appeals, in light of what we have set out above, the Notice of Motion dated **31st August, 2018** and filed on **12th July, 2018**, as well as the reference to the full court against theruling of **Kiage, JA** of **27th March, 2019**, were marked as withdrawn by consent of the respective parties in Civil Appeal Number 150 of 2018

The above consent was followed by another consent by all learned counsel for the respective parties participating in all the three appeals as follows:

(1) The three appeal numbers 150 of 2018, 382 of 2017 and 383 of 2017 be and are hereby consolidated and heard together,

(2) The court will first of all endeavor to determine the applications of 21st December, 2017. If the applications succeed, then the judgment of the court will only be in respect of Appeal Number 150 of 2018,

(3) If the applications fail, then the judgment will be in respect of the three consolidated appeals,

(4) The pilot file to be Appeal Number 150 of 2018.

The applications dated **21st December, 2017** and filed separately but simultaneously in Civil Appeal numbers 382 of 2017 and 383 of 2017, were consolidated and heard together resulting in a ruling delivered on **20th December**, **2019**, sustaining the consolidated applications with the result that Appeal numbers 382 of 2017 and 383 of 2017 were accordingly struck out for reasons set out in the same ruling delivered on 20th December, 2019. This judgment is therefore in respect of Civil Appeal Number 150 of 2018 only.

The background to the appeal is that, the respondent pursuant to leave granted on **23rd December, 2013** vide a Chamber Summons dated the same date filed a Notice of Motion dated **13th January, 2014** seeking against the appellant Judicial Review (JR) orders namely:

(i) An order of certiorari to remove into the High Court and quash the decision made by the appellant requiring the respondent Company to pay the appellant Kshs 427,918,033 as VAT for the period of January, 2008 to October, 2013,

(ii) An order of prohibition against the appellant prohibiting it whether by itself, its agents, and or its servants or otherwise howsoever from purporting to take any action against the respondent's company in an attempt to recover the sum of Kshs 427,918,033,

(iii) An order of prohibition directed against the appellant prohibiting whether by itself, its agents and or is servants or otherwise howsoever from purporting to take any action that may violate the rights of the respondent's company."

Together with an attendant order for provision for costs.

The Notice of Motion was supported by a supporting affidavit of **Parviz Dhanani** together with annextures thereto, and subsequently by a lengthy further affidavit filed as a re-joinder to the appellant's replying affidavit, deposed by the same **Parviz Dhanani** on **1st September, 2014**. It was opposed by a replying affidavit deposed on behalf of the appellant by **Martin Kariuki** on 11th June 2014.

Our appraisal of the record reveals that what provoked the proceedings resulting in this appeal was the letter dated **28th November, 2013,** from the appellant to the respondent demanding unpaid VAT amounting to Kshs. 427,918,035.00, for the period covering **January, 2008 to November, 2013**, within thirty (30) days of the date of that letter. The respondent raised objection against the said demand on the grounds that from 1995, all taxes normally levied on raw materials for packaging and manufacture of medicaments (the subject materials) were exempted from VAT pursuant to an understanding between the Ministry of Health, Treasury and the Federation of Kenya Pharmaceutical Manufacturers. Following that understanding, both the VAT Act and the Customs and Excise Act (the CEA) under item 26 of Part B of the 8th Schedule, exempted the subject raw materials from all taxes as both legislations had the same exemption regime. In 2001, the Finance Act No. 6 of 31st December, 2001 repealed both part B item 22 of the Eighth Schedule of the VAT Act deleting the exemption clause. The above repeal notwithstanding, the appellant with the knowledge and authority from the treasury continued to exempt the subject raw materials from VAT. This administrative practice remained in force until 2004 when the East African Community Customs Management Act (EACCMA) was passed repealing the Customs and Excise Act and specifically introducing part B of the 5th Schedule, pursuant to which the subject raw materials were explicitly exempted from payment of VAT. According to the respondent, the appellant by its conduct had led the respondent to believe that VAT was not payable on the subject raw materials due to the long period that had lapsed since the exemption was removed by the Finance Act of 2001 and subsequently by the EACCMA, Act 2004, as well as the conduct of the parties who continued to relate to each other based on initial agreements and understanding. Second, the appellant on its own volition introduced the Simba Automated Clearing system which automatically exempted the subject raw materials from VAT. Thirdly, on account of the length of time that had lapsed, the respondent was greatly prejudiced as they would not get a refund of the VAT paid on the subject raw materials, a benefit which was legally due to them under the law had the appellant's demand been raised earlier and satisfied within the period stipulated for in the law for claiming such refund.

In its lengthy replying affidavit, the appellant gave an in-depth history of the tax regulatory system on the basis of which their action was predicated as follows; that it was in the exercise of its lawful and legitimate mandate under the relevant law that the appellant conducted a tax audit on several Companies (the affected companies) inclusive of the respondent that were importing the subject raw materials which established that the said Companies were declaring the subject raw materials as exempt from VAT, when the said subject raw materials attracted VAT at the rate of sixteen percent (16%). This precipitated the appellant to variously raise short levied tax assessment demands against the affected companies. The demand directed at the respondent was in respect of an amount of Kshs 427,918,033 for the period between 1st January, 2008 and 31st October, 2013 (five (5) years), in compliance with **section 235 (1)** of the EACCMA and Regulation **7 (6)** of the VAT Tax Regulation 1994.

The appellant took no issue with the respondent's summary of how parties related with each other with regard to the import and payment of VAT on the subject raw materials between 1995 and 2004 when the EACCMA was enacted. The appellant also conceded that in 2005, the EACCMA, came into force and replaced the Customs and Excise Act, Cap 476; and that **section 114** and paragraph 16 of the Fifth Schedule exempted the subject raw materials from duty; that the subject raw materials remained Zero Rated for VAT purposes between the years 1995 and 2012 which years were not covered under the short levied taxes audit exercise in issue; that from **1st January, 2008** to **31st October, 2013**, the respondent was neither exempted from paying VAT under the second and third Schedule nor were the goods imported listed in the zero rated VAT tax under the fifth schedule of the repealed VAT Act Cap 476. It was therefore not correct as contended by the respondent that VAT was not payable on the subject raw materials and that the appellant was entitled to demand from the respondent payment of the

short levied taxes resulting from the audit.

The JR was canvased by way of opposing pleadings and written submissions orally highlighted by learned counsel for the respective parties, at the conclusion of which the trial court analyzed the record, identified issues for determination, gave reasons for the determination of those issues resulting in the impugned decision whose reasons we shall revert to at a later stage of this Judgment.

The appellant was aggrieved and filed this appeal citing thirteen (13) grounds of appeal subsequently condensed into three thematic issues in the appellant's written submissions dated 20th June, 2019, namely whether:

> **(i) The High Court was properly seized of the case before it, in view of section 230 of the East African Community Customs Management Act 2004 (EACCMA), which established the Customs and Excise Tribunal and Section 9 (2) and (3) of the Fair Administrative Act 2015.**
>
> **(ii) The doctrine of legitimate expectations was properly appreciated, invoked and applied by the superior Court in favour of the respondent.**
>
> **(iii) The doctrine of proportionality was also properly appreciated, invoked and applied by the superior court also in favour of the respondent.**

The appeal was canvased by way of written submissions and orally highlighted by learned counsel for the respective parties. Learned counsel **Mr. Pius Nyagah** with learned counsel **Miss Mburugu**, appeared for the appellant. Learned counsel **Mr. J. O. Arwa** appeared for the respondent, while learned counsel **Mr. Kiragu Kimani** appeared for respondents in Civil Appeals Numbers 382 – 383 of 2017, respectively both of which were accordingly struck out as already indicated above and are not therefore subject of this judgment.

Supporting the Appeal on issue number 1, **Mr. Nyagah** submitted that in the exercise of its Judicial Review jurisdiction the Court enforces the rule of law by ensuring that, administrative bodies conduct themselves within the four corners of the law and to ensure that they are accountable to law; that in light of the above threshold, all that the trial court was expected to review was the process that gave rise to the appellant's decision to carry out the short levied tax audit and issue demand for the same and not the merits of the decision. In counsel's view, the trial court's considerations should have therefore been limited to the determination as to whether the appellant acted in excess of its powers, without jurisdiction, in bad faith, unfairly, unreasonably and or in manifest breach of the rules of natural justice and the applicable law.

To buttress the above submissions, counsel cited the case of **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others [2012], Municipal Council of Mombasa vs. Republic & Umoja Consultants Civil Appeal Number 185 of 2001,** and **Commissioner of Lands vs. Kunste Hotel Ltd [1993] eKLR,** all on the parameters for the exercise of judicial review mandate which we find prudent to revert to at a later stage of this judgment.

Mr. Nyagah also relied on the case of **Coffee Board of Kenya versus Thika Coffee Mills Limited & 2 Others [2014]eKLR** and submitted that the impugned decision is amenable to interference by the court because: (i) the trial court failed to properly consider and appreciate that the appellant has a statutory mandate to carry out tax audits in the manner done; (ii) indisputable basis was laid for the appellant's demand for the payment of the short levied VAT from the respondent. The respondent's obligation to meet the same was therefore well founded in law. The period covered by the short levied tax audit was also within the statutory period of five (5) years.

Relying on Civil appeal number 84 of 2010, **Republic vs. National Environment Management Authority; Kenya Revenue Authority vs. Keroche Industries (K) Limited Civil Appeal number 2 of 2008, Grain Bulk Handlers Limited vs. Kenya Revenue Authority [2018] eKLR** and **Cortec Mining Kenya Limited vs. Cabinet Secretary, Ministry of Mining [2017] eKLR**, **section 9** of the Fair Administrative Action Act 2015, which operationalizes Article 47 of the Kenya Constitution 2010; **Adero & Another versus Ulinzi Sacco Society Limited [2002], KLR 577; Kenya Revenue Authority & 2 others versus Darasa Investment Limited [2018] eKLR; Secretary County Public Service Board and another versus Hulbhai Gedi Abdalla [2013] eKLR**, **Mr. Nyaga,** faulted the trial Judge for holding that **section**s 229 and 230 of the EACCMA were not a bar to the trial court's judicial review jurisdiction over the matter, contrary to the now crystallized principle that where Parliament has provided a statutory mechanism for resolving disputes or an alternative remedy exists, parties must exhaust those available mechanisms for resolving disputes and avail themselves of the alternative remedy before invoking Judicial Review both as a last resort and only in very exceptional circumstances.

On legitimate expectation, **Mr. Nyagah** relied on the case of **Inviolate Waceke Siboe versus Kenya Railways Corporation & Another [2017]eKLR;** and **Kalpana H. Rawal vs. the JSC [2016] eKLR** and submitted that no legitimate expectation arose in favour of the respondent following the action of the appellant's carrying out a short levied tax audit on the respondent's tax records resulting in a lawful demand from the appellant to the respondent that the short levied taxes were owed, due and payable to the appellant by the respondent which demand should have been sanctioned by the trial Judge by declining to grant the judicial review reliefs sought from court by the respondent.

Mr. Nyaga also faulted the trial court's holding that the number of years taken by the appellant to unearth the short levied tax loss created a legitimate expectation in favour of the respondent entitling them to resist the appellant's legitimate demand for the payment of the short levied taxes. Further that the above holding not only rendered superflous the provisions of VAT Act pursuant to which the short levied taxes were demanded by the appellant from the respondent, but also went contrary to the mandatory requirements in Article 201(b)(i) of the Kenya Constitution 2010, and the now crystalized principles of law on the invocation and application of the doctrine of legitimate expectation which we shall also revert to at a later stage of the judgment.

Mr. Nyagah cited the case of **R. vs. Secretary of State for Home Department, Exparte Daly** ***[2001] 2 AC 532*** and **Suchan Investment Limited versus Ministry of National Heritage and Culture & 3 Others [2016]eKLR** and submitted that the doctrine of proportionality was wrongly invoked and applied for the trial court's failure to apply the requisite mandatory tests for the application of the said doctrine. Second, that the appellant's administrative action against the respondent was well founded in law and on facts as the appellant demonstrated

clearly both on the law and facts that: there was no law exempting the respondent from remitting VAT on the subject raw materials; the Audit carried out by the appellant on thirty-one (31) Pharmaceutical Companies inclusive of the respondent was triggered by the appellant's discovery that out of the thirty-one (31) Pharmaceutical Companies, only eight (8) Companies were remitting to the appellant import VAT on the subject raw materials; upon the above discovery, only twelve (12) of the thirty-one (31) Companies opted to enter into a payment plan with the appellant to defray the short levied tax liability that the appellant had demanded from each of them necessitating the appellant to initiate enforcement measures against the remaining eleven (11) Companies among them the respondent herein to recover the short levied VAT tax; and lastly that the short levied taxes demanded by the appellant from the respondent were restricted to a period of five (5) years permitted for by **sections 235** and **236** of the EACCMA.

On the totality of the above submissions, **Mr. Nyagah** urged the Court to find and hold that the appellant's lawful and legitimate actions directed at the respondent were wrongly impugned by the trial court, interfere with and set aside the impugned decision and substitute it with an order sanctioning the appellant's demand of Kshs 427,918,033.00 as short-levied taxes due and owing from the respondent to the appellant.

Opposing the appeal, **Mr. Arwa** relied on the case of **Stanbic Bank Kenya Ltd vs. Kenya Revenue Authority [2009] eKLR; Kanjee Maranjee vs. Income Tax Commissioner [1964] E.A. 257**; **Scott vs. Russel [1948] 2 ALL ER 1; Jafferali Alibhai vs. C.I.T [1961] EA 61** and the **Commissioner of Income Tax vs. Investment Power Kenya Limited [2016] eKLR;** all on the principles that guide the court on the interpretation of tax law to which we shall also revert to at a later stage of the judgment.

Mr. Arwa concedes that the appellant is statutorily mandated in law to enforce tax laws. Its decisions are therefore not only administrative in nature but also quasi-judicial and are therefore amenable to JR proceedings especially when it is not disputed that the appellant is mandated in law to receive and scrutinize applications for exemption from tax and to allow them only if it is convinced that the party applying for exemption is entitled to the exemption applied for. The trial Judge cannot therefore be faulted for finding that the appellant's decision to recover the short levied tax from the respondent long after the respondent had sold the subject raw materials without subjecting them to VAT and had therefore in the circumstances of this appeal lost the right to claim back input VAT.

Relying on the Supreme Court of Kenya decision in the case of **Communications Commission of Kenya & 5 others vs. Royal Media Services Ltd & 5 others [2015] eKLR**; **Five Forty Aviation Ltd vs. Kenya revenue Authority & others [2017] eKLR**; **Invollate Wacike Siboe vs. Kenya Railways Corporation & another [2017] eKLR** and **Justice Kalpana H. Rawal vs. JSC [2016] eKLR**, all crystalizing the parameters for the invocation and application of the doctrine of legitimate expectation, **Mr. Arwa** submitted that the trial Judge cannot be faulted for invoking the said doctrine and applying it to sustain the respondent's claim against the appellant because: (i) the Treasury was aware that for a period of thirteen (13) years, VAT was not being collected on the subject raw materials; (ii) the appellant never complained about the non-payment of the VAT on the subject raw materials over that length of time; (iii) all the post clearance audits conducted by the appellant on the respondent and other manufacturers of medicaments resulted in the issuance of certificates certifying that the affected Companies had paid taxes that were due and payable pursuant to all tax laws; (iv) all the more than thirty one (31) manufacturers of medicaments were routinely allowed to import the subject raw materials over the thirteen year period; (v) all the more than one hundred (100) clearing agents routinely involved in the clearance of the subject raw materials for the subject period of the thirteen (13) years in issue, acted on the basis of the advice and or guidelines issued by the appellant with regard to the discharge of the saidfunction; (vi) the appellant's own officers who were involved in the verification of entries relating to the subject raw materials for the thirteen (13) years routinely approved the exemption from VAT; (vii) the appellants themselves created a computer system (Simba System Computer) with a unique code (Code No. B 260) operated automatically to exempt the subject raw materials for the manufacture of medicaments from VAT; (viii) and lastly that all the revenue authorities in all the other East African Member States had long exempted the subject raw materials from VAT since the coming into operation of the EACCMA in 2004.

On account of the totality of the above submission, **Mr. Arwa** urged that the respondent's legitimate expectation that the exemption would continue was reasonable in the circumstances.

Relying on the case of **Associated Provincial Picture House vs. Wednesbury Corporation [1947] All ER 68, Mr. Arwa** submitted that the respondent clearly demonstrated before the trial court and now before this Court on appeal that the appellant acted unreasonably when it issued demand for Kshs 427,918,033 as short levied VAT for the subject raw materials well knowing that the said demand was to the detriment of the respondent who could not claim a refund of the same from the Government as at that point in time.

Mr. Arwa also relied on the cases of **Kenya Revenue Authority & 2 others vs. Darasa Investment Ltd [2018] eKLR,** and **Secretary, County Public Service Board & Another vs. Hulbhai Gedi Abdille [2017] eKLR** and submitted that the Fair Administrative Action Act 2015 does not apply to the circumstance that triggered the litigation resulting in this appeal as the respondent's claim was filed in 2013, while the Fair Administrative Action Act came into effect in 2015 with no retrospective application and prayed for the dismissal of the appeal with costs to them.

Mr. Kimani Kiragu associated himself fully with the submissions of **Mr. Arwa** and submitted that: the learned Judge properly appreciated both the facts and the law on the matter before him and came to the correct conclusion that there were breaches of administrative law for which the respondent was entitled to an appropriate remedy in law by way of judicial review; it was not disputed that the appellant had a statutory duty to collect revenue, but in **Mr. Kiragu's** opinion, the appellant was obligated to adhere to the rule of law in the execution of that mandate which required them to demand payment of the impugned taxes on condition that their demand did not offend the rule of fairness and justice which is part of our national values and principles enshrined in Article 10 of the Kenya Constitution, 2010; and which according to **Mr. Kiragu,** required the appellant not to go back on the arrangement that had been in place for thirteen years, namely the exemption of the subject raw materials from VAT. They were also required not to act in bad faith nor to trample upon the legitimate expectation of the respondent that the above mentioned arrangements which had been in place for thirteen years would not be overturned to its detriment, especially when the respondent had lost the right to claim a refund that they were lawfully and legitimately entitled to had the appellant lodged its demand against them before the statutory period for seeking the refund expired. **Mr. Kiragu** therefore urged the Court to find that the trial court in the circumstances of this appeal rightly sustained the respondent's claim against the appellant and which position this Court should affirm as in **Mr. Kiragu's** view, it was the duty of that court in the exercise of its mandate to protect the rights of the citizens in instances where the outcome of the exercise of public duty infringes on those rights; and lastly that the respondent's complaint

against the appellant fell within the realm of Judicial Review adjudication and not the Customs Tribunal; notwithstanding that the said mechanism as provided for within the EACCMA was available to the respondent as an additional avenue for the resolution of the dispute triggering the litigation resulting in this appeal.

On account of the above submissions, **Mr. Kiragu** also urged the Court to find firstly that the trial court was properly seized of the matter; and secondly that it discharged its mandate judicially thereby arriving at the correct conclusion on the matter and on that account also prayed for the dismissal of the appeal with costs to the respondent.

In reply to the respondent's submissions, **Miss Mburugu** submitted that the respondent's claim against the appellant should not have been sustained by the trial court especially when the trial court found and correctly so in **Miss Mburugu's** opinion that the short levied tax resulting from the appellant's auditing of the respondent's tax records was due and payable; that there was no ambiguity in the law as the appellant was merely exercising its statutory mandate when it carried out the short levied tax audit as it was duly mandated in law to do so. The period over which the tax was demanded was the five (5) years period provided for in law and not the thirteen years as erroneously contended by the respondent. The appellant's actions were therefore justified in the circumstances.

That the appellant does not dispute that there were changes in the law between 2001 - 2004 which change according to the appellant did not vitiate the appellant's audit for the short levied taxes which was limited to the period between 2008 - 2013, in compliance with the mandatory statutory requirement. The said audit did not therefore offend **sections 235 –236** of the EACCMA, especially when the said audit confirmed that the short levied taxes were payable. Neither does the appellant dispute that the respondent had been paying tax. All that the appellant set out to verify by the audit on the short levied taxes carried out on the respondent's records was to confirm compliance with the law and upon finding sufficient evidence of non-compliance with the law, a position which has not been controverted by the respondent, the appellant was entitled to seek recovery of the short levied taxes from the respondent as it was mandatorily required of it in law. A judicial review remedy was therefore unwarranted in the circumstances of this appeal, especially when the appellant contravened no law by acting as it did, argued **Miss Mburugu**; that the learned Judge fell into error when he improperly invoked and applied the principle of proportionality in favour of the respondent as it was not one of the grounds relied upon by the respondent when seeking Judicial Review under order 53 Rule 4 of the Civil Procedure Rules; and lastly that an alternative remedy was available in law to the respondent as provided for in **section 229(1) and (4)** of the EACCMA in law, which the respondent accordingly invoked in the first instance and which should have been exhausted first before seeking Judicial Review.

On the totality of the above reply, **Miss Mburugu** also prayed for the appeal to be allowed with costs to them. It is against the above assessments that we now proceed to determine the appeal. The dispute in this appeal arises from the trial court's impugned decision sustaining the respondent's application for JR remedies against the appellant. The principles that guide the High Court in the exercise of JR jurisdiction have now been crystalized by numerous case law. We find it prudent to highlight a few namely: **Commissioner of Lands vs. HotelKunste [1997]eKLR, David Mugo t/a Manyatta Auctioneer vs. Republic, Civil Appeal No. 265 of 1997 (UR), Zakayo Michubu Kibwanga vs. Lydia Kasera Japheth and 2 others [2014]eKLR**, **Prabhalal Gulabuland Shah vs. Attorney General & Erastus Gatheri Mlano, Civil Appeal No. 24 of 1985 (UR)** and **Welfare Society of Kenya vs. Republic and 2 others, Exparte Children Family Five Kenya [2017] eKLR**, all for principles *inter alia* that: judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process; the purposes of JR is to ensure that the individual is given fair treatment by the public authority to which he has been subjected; JR as a remedy is available in appropriate cases even where there are alternative legal and equitable remedies; being a discretionary remedy, it demands that whosoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance; judicial review as a remedy may also be invoked where the issues in controversy as between the parties are contested; and lastly that the remedy of judicial review is only available where an issue of public law in nature is involved.

In **National Hospital Insurance Fund Act vs. Central Organization of Trade Union Kenya [2006] IEA 47**, Nyamu, J. (as he then was) held the view *inter alia* that while it was true that so far jurisdiction of a judicial review court was principally based on the 3 'I's, namely, illegality, irrationality, procedural impropriety, categories of intervention by the Court were bound to change with time. In **Ransa Company Ltd vs. Mamia Frances Co. & others [2015] eKLR**,the court expressed itself *inter alia* that:

> **"……. A court sitting on judicial review exercises a sui generisjurisdiction which is restrictive indeed in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties".**

See also the case of **Republic vs Attorney General & 4 Others: Ex parte Diamond Hasham Lalji & Ahmed Hasham Lalji [2014] eKLR.**

As **Nyamu, J**. (as he then was) prophetically stated in the **National Hospital Insurance Fund Act versus Central Organization of Trade Union Kenya** (supra), that the traditional judicial review mandate was bound to change with time, it is our view that the promulgation of the Constitution of Kenya, 2010, ushered in this change. See the case of **Child Welfare Society of Kenya vs. Republic and 2 others, Exparte Child in the Family Fives Kenya [2017] eKLR** for the holding *inter alia* that following the promulgation of the Constitution of Kenya, 2010, judicial review is available as a relief to a claim of violation of rights and fundamental freedoms guaranteed in the Constitution of Kenya, 2010.

From the above exposition on the crystalized principles on the exercise of JR mandate both under the traditional and the current jurisprudential trend, judicial review is principally a discretionary remedy. Our mandate therefore when determining whether the trial court exercised its discretionary mandate judicially when it sustained the respondent's claim is as was set out in the case of **United Indian Insurance Company Limited versus East African Underwriters Kenya Ltd [1985] KLR 898**, which we fully adopt. These are that we can only interfere with the exercise of discretion if we are satisfied that the learned Judge misdirected himself in law, misapprehended the facts, took into account considerations which he should not have taken into account, failed to take into account considerations of which he should have taken into account, or that his decision, albeit a discretionary one, is plainly wrong.

We have considered the above threshold in light of the record. The issues that fall for our determination are the same as those condensed by

the appellant in its written submissions namely:

> **(i) Whether the High Court was properly seized of the matter before it in view of section 230 of the East African Community Customs Management Act 2004 (EACCMA), which established the Customs and Excise Tribunal and section 9(2) and (3) of the Fair Administrative Act 2015, both of which were operational as at the time the impugned decision was made.**
>
> **(ii) Whether the doctrine of legitimate expectation was properly invoked and applied by the superior court in favour of the respondent.**
>
> **(iii) Whether the doctrine of proportionality was also properly invoked and applied by the superior court in favour of the respondent.**

Judicial review orders sought from the trial court were two, namely, Certiorari and Prohibition, both of whose parameters were aptly restated by the court in the case of **Kenya National Examination Counsel vs. Republic, Exparte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** as follows:

> **"An order of Certiorari will issue; if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons;** while an order of Prohibition is **"an order from the High Court directed to an inferior Tribunal or Body which forbids that Tribunal or Body to continue with proceedings, there in excess of its jurisdiction or in contravention of the law of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…"**

On the first issue raised by the applicant of want of jurisdiction, we take it from the often cited case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1,** wherein it was expressed *inter alia* as follows;

> **"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."**

The Supreme Court in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others Application No. 2 of 2011 [2012]eKLR** stated,

> **"A court's jurisdiction flows from the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law."**

In **Adero & Another versus Ulinzi Sacco Society Limited [2002] 1KLR 577,** the court expressed itself that: (i) jurisdiction either exists or does not *abinitio*; (ii) jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction; and (iii) jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

The appellant's and respondent's reason of raising and opposing the issue of want of jurisdiction in the trial court to entertain the respondent's judicial review claim before it, are founded on **sections 230** of the EACCMA and **9(1) and (3)** of the Fair Administrative Action Act of 2015. The appellant's major contention is that both provisions provide for alternative remedy which respondent should have exhausted before seeking the court's intervention. We find it prudent to include the **sub-sections** in **Section 229** of the EACCMA as well because it was also taken into consideration by the learned Judge in arriving at the impugned conclusion that the trial court was properly seized of the judicial review proceedings before it. **Section 230** of the EACCMA provides as follows:-

> **"(1) A person dissatisfied with the decision of the commissioner under section 229 may appeal to a tax appeals tribunal established in accordance with section 233.**
>
> **(2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision and shall serve a copy of the appeal on the commissioner."**

While **section 9** of the Fair Administrative Action Act provides as follows:-

> **"9(1) subject to subsection (2) a person who is aggrieved by an administrative action, may, without unreasonable delay apply for judicial review of any administrative action to the high court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.**

1) The high court or a subordinate court under subsection (1) shall not render an administrative action or decision under this Act unless the mechanism including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

2) The high court or subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

3) 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.

4) A person aggrieved by an order made in the exercise of judicial review jurisdiction of the high court may appeal to the court of appeal.

Our take on the **sub-sections** of **section 229** of the EACCMA which we have indicated above was also taken into consideration by the learned Judge when arriving at the conclusion that the court was properly seized of the matter may be summarized as follows:

(1) by reason of the use of the word "shall" obligates a party aggrieved by the decision of the commission to lodge an application for review of such decision within thirty (30) days of the date of the decision;

(2) require the application to be in writing;

(3) donates power to the commissioner to extend time for lodging of the application as deemed fit and for good course to be shown;

(4) requires the commissioner to respond in writing;

(5) provides that in the absence of a response from the commissioner within a period not exceeding thirty (30) days the commissioner is deemed to have allowed the application.

In the case of **Peter Muturi Njuguna vs. Kenya Wildlife Service [2017] eKLR** the court restated the principles on exhaustion of existing procedures and which we fully adopt as follows:

The issue of exhausting specific procedure has been considered at length by this Court as well as the High Court in many decisions. In *The Speaker of the National Assembly -vs-Karume* *[2008] 1 KLR 426 (EP)*, this Court stated that, where there is a specific procedure provided for redress of grievances, that procedure ought to be strictly followed. *Similarly in Kimani Wanyoike -vs- Electoral Commission* *Civil Appeal No. 213 of 1995 (UR)* which was decided before the cause of action in this matter arose, the Court held:-

"where there is a law prescribed by either a constitution or an act of Parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed".

The rationale was explored in the latter case of *Diana Kethi Kilonzo -vs- IEBC and 2 Others* *[2013] eKLR* as follows:

"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

The approach the learned trial Judge took in determining whether the court was properly seized of the matter was first of all to reappraise, appreciate and consider the principles that guide the court in the discharge of its judicial review mandate, as expounded in the hand book on judicial review by Michael Fordham and the case of **Republic vs the Retirement Benefits Appeals Tribunal Ex parte Augustine Juma & Others [2013]eKLR**; **Republic vs Kenya Revenue Authority Ex parte Yaya Towers Limited [2008]eKLR**; and **Republic vs Commissioner of Customs Services Ex parte Africa K-Link International Limited [2012]eKLR.** Those principles which were distilled and highlighted by the learned Judge are *inter alia* that: (i) in the exercise of the JR mandate a court has to be cautious so as not to usurp the role of a public body in the discharge of its statutory mandate and unnecessarily interfere with the exercise of the pubic body's mandate whenever the court might disagree as regards those matters; (ii) the exercise of this jurisdiction does not entail the determination as to whether the learned Judge disagrees with what the public body had done but whether there is some wrong recognizable by public law that has been committed; (iii) it is purely a supervisory jurisdiction. It does not therefore allow a court of law to review or examine the evidence with a view to forming its own view about the substantive merits of the case but the challenged procedural validity of the decision; (iv) it is invoked in instances where the public body had no lawful authority to act in the manner complained of (and gave instances of the same which we find no need to rehash); (v) the jurisdiction is distinct from an appeal as the court has no business forming its own view of the evidence relied upon by the competing interests notwithstanding that it has a duty to review such evidence; (vi) its purpose is to ensure that the individual is given fair treatment by the authority he/she/it has been subjected to; (vii) the jurisdiction is supervisory in nature limited to the supervision of exercise of public power by those who hold it to ensure that such power is lawfully exercised, meaning that the purpose of JR's policing power is to ensure that the process followed by the decision making public authority is proper and the decision arrived at is within the confines of the law.

It was also the learned Judge's view, that the court is also obligated to determine whether: (i) the decision maker had the mandate to make the decision; (ii) the person affected by the decision was heard before it was made; (iii) the decision maker took into consideration irrelevant matters that ought not to have been taken into consideration; (iv) the decision was in compliance with the law; (v) and lastly to prevent statutory bodies from either abusing or infringing on the rights of persons subjected to the exercise of their administrative powers in the execution of their public statutory duty and function or acting out of their jurisdiction.

The learned Judge also reviewed the Court of Appeal decision in the case of **PILI Management Consultants Limited vs. Commissioner of Income Tax Kenya Revenue Authority Civil Appeal No. 154 of 2007[2010]eKLR**; and High Court decision in the case of **Republic versus Kenya Revenue Authority,Ex parte; Bata Shoe Company Limited HC Misc Application No. 36 of 2011[2014]eKLR** for the holding *inter alia* that KRA is mandated in law to assess tax; Section 229 of the EACCMA (summarized above); Order 53 Rule 4(1) of the Civil Procedure Rules (CPR) which provides that only grounds and reliefs relied upon at the time leave to apply for judicial review is sought, are the same ones to be relied upon at the hearing and determination of the substantive notice of motion for judicial review and that any other ground sought to be relied upon or other relief intended to be sought has to be sanctioned by the court. Also referred to by the learned Judge was the Court of Appeal case in **Republic vs. National Environment Management Authority[2011]eKLR**; and **HC Petition No. 203 of 2012 Kapa Oil Refineries Limited vs. the Kenya Revenue Authority & 2 Others [2014]eKLR**; for the holding *inter alia* that where there is a clear procedure for redress, of any particular grievance prescribed for either by the Constitution or an Act of Parliament, that procedure should be strictly followed and exhausted before applying for judicial review.

Applying the above threshold to the rival position before the Court, the learned Judge made a finding that the final decision in the judicial review proceedings that the court was seized of did not rest on the determination of the issue as to whether or not the appellant was legally entitled to collect the short levied taxes and or whether or not the short levied taxes were actually due and payable by the respondent to the appellant, but on whether the process adopted by the appellant in the exercise of its statutory mandate to collect short levied taxes from the respondent was procedural and on that reasoning ruled that the facts on the record as appraised and appreciated by the learned Judge; and the court application of the relevant law to those facts, the substance of the JR proceedings before the courts fell squarely within the JR jurisdiction; and that the court was therefore not barred by **sections 229** and **230** of the EACCMA from dealing with the matter and on that account proceeded to determine the merits of the JR claim before the court.

The approach we take in determining as to whether the above conclusion is sustainable is first of all to appraise and appreciate the principles that guide the Court in the interpretation of tax law on the one hand and those that guide the Court on the interpretation of legislative provisions generally. For those touching on the interpretation of tax law provisions, we take it from the case of **Stanbic Bank Kenya Ltd vs. Kenya Revenue Authority [supra]eKLR; Kanje Maranjee vs. Income Tax Commissioner [supra]; Scott vs. Russel [supra] Jasfara II Aubhai vs. C.I.T [supra]** and **The Commissioner of Income Tax vs. Investment Power Kenya Limited [supra]** for the principles *inter alia* that: tax legislation must be strictly construed. Nothing should be read or implied in it and in the event of any ambiguity arising in the interpretation of tax law, then the ambiguity must be resolved in favour of a tax payer. Second, that the subject should not be taxed unless the words of the taxing statute unambiguously imposes the tax upon him. Third, that the taxing laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting in penal consequences must be construed with caution.

As for those that guide the court in the exercise of its mandate to interpret legislative provisions generally, we take it from the case of **Sony Holdings Ltd vs. Registrar of Trade Marks & Another [2015]eKLR,** in which the court approved the test on the rule of statutory interpretation as enunciated by **Tindal CJ** in the case of **Sussex Peerage** case **(1844) 11CI** as follows:-

> **"……the only rule for the construction of Acts of Parliament is,**
>
> **that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statue are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case best declare the intention of the lawgiver."**
>
> **.....**

Applying the above threshold to the rival positions herein on this issue, it is our finding that the operative words in **section 9(1)** of the Fair Administrative Action Act is **"may"**, in **section 229(1) "shall"**, **section 230(1)** is **"may"** while in **section 230(2)** is **"shall"**.

The first to be addressed is the use of the word **"shall"**. The approach we take in determining the intent of the legislature in using the word **"shall"** on the above provisions and which we fully adopt is that taken by the court in the same case of **Sony Holdings Ltd vs. Registrar of Trade Marks & Another** [supra], wherein the court expressed itself as follows:

Whether the words *"shall"* or *"may"* convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters. The Supreme Court in its advisory opinion In the Matter of the Principle of Gender Representation in The National Assembly and the Senate, Application No. 2 of 2012 found that, the use of *"shall"* in Article 81 (b) of the Constitution on the gender-equity rule as used in the context, incorporates the element of management discretion on the part of the responsible agency or agencies. In contrast in Velji Shahmad V. Shamji Bros & Propatlal Karman & Co. [1957] EA 432 construing the meaning of the word *"may"* as used in the former Order XLVI Rule 9 of the Civil Procedure Rules providing that:-

> **"An appeal from a decree or order of subordinate court… to the Supreme Court may be filed in the District Registry within the area of which such subordinate court is situate,"**

the Court held that in the context, the word *"may"* is mandatory that any appeal from a subordinate court outside Nairobi must be filed in the appropriate district registry:

> **"…….as to hold otherwise would simply subvert the whole rule for it would mean that an advocate or**

appellant, to suit their own convenience, could file an appeal in Mombasa from a subordinate court in Kisii or Nairobi."

See also the case of **Kericho Nursing Home Limited vs. Rael Langat [2016]eKLR** in which the decision of **Sony Holding vs. Registrar of Trade Marks & Another** [supra] was approved and adopted.

Turning to the use of the word **"may"**, we take it from the positon taken by the court in the case of **Peter Muturi Njuguna vs. Kenya Wildlife Service** [supra] in which the court expressed itself as follows:

> **"Black's Law Dictionary, 9th Edition, gives several definitions of the word "may" including:**
>
> **"to be permitted to"**
>
> **"to be a possibility"**
>
> **or loosely put:**
>
> **"is required to".**
>
> **On the interpretation words "may" and "shall" have of been statutes used, this where Court has the held**
>
> **before that:-**
>
> **"It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision..... Whether the words "shall" or "may" convey**
>
> **a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters."**
>
> **See the case of Sony Holdings Ltd –vs- Registrar of Trade Marks & Another [2015] eKLR.**
>
> **In the Australian case of Johnson's Tyne Foundry Pty Ltd v Maffra Shire Council (1948) 77 CLR 544 at 568, Williams, J stated:**
>
> **"'May', unlike 'shall', is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as 'shall' which is a mandatory word, may be deprived of the obligatory force and become permissive in the context in which it appears."**

Applying the above threshold to the rival positions herein, it is our finding that the use of the word **"may"** in **section 9(1)** of the Fair Administrative Action Act is merely elective and not mandatory. Second, as was submitted by **Mr. Arwa**, and correctly so in our view, since the citation of the said Act indicates explicitly that it was assented to on 27th May, 2015, and commenced on 17th June 2015 it has no application to events that triggered the litigation resulting to this appeal. It is therefore accordingly discounted.

As for the use of the said word in **sections 229** and **230** of EACCMA, it is our finding that the mandatory requirement in **section 229(1)** of the EACCMA is limited to the time line within which to lodge the application for review, while the use of the word **"may"** in **section 230(1)** of the EACCMA though we agree it relates to the forum for adjudication, there is nothing in it to oust the jurisdiction of the court. The learned trial Judge cannot therefore in the circumstances be faulted for declining to accede to the appellant's request for him to down tools and reroute the respondent to pursue its remedy before the said forum. Second, the above finding notwithstanding, we cannot lose sight of the fact that in terms of the principles that guide the exercise of JR mandate already highlighted above, JR is not only a unique but is also a special jurisdiction. Whereas the right to apply for a JR relief is entrenched in section 8(2) of the Law Reform Act Cap 26, of the Laws of Kenya, the jurisdiction to entertain the JR applications is donated by order 53 of the Civil Procedure Rules and the requisite rules made thereunder.

We find nothing in the above provisions to suggest that the Appeals Tribunal provided for in **section 230** of the EACCMA had mandate to entertain JR proceedings and pronounce itself on claims anchored in JR jurisdiction. Lastly, as **Nyamu, J**. (as he then was) observed in the case of **National Hospital Insurance Fund Act vs. Central Organization of Trade Union** [supra]; that the parameters for the exercise of this jurisdiction are bound to change with time, as we have already alluded to above, this change which we cannot ignore was ushered in by the promulgation of the Kenya Constitution 2010. That is why in the case of **David Mugo t/a Manyata Auctioneers versus Republic Civil Appeal No. 265 of 1997(UR),** the court stated that JR, as a remedy is available in appropriate cases even where there are alternative legal or equitable remedies.

The threshold of what does or does not amount to exceptional circumstances to warrant subjection of a claim to a JR process where alternative remedies are provided for in law was set by this Court in the case of **Republic vs the National Environment Management Authority** (supra) in which the court expressed itself *inter alia* as follows:-

> **"In determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask if what in the context of the**

statutory powers, was the real issue to be determined and whether the statutory appeal process was suitable."

In this appeal as correctly appreciated by the learned Judge, what was in issue before the trial court was the process the appellant had followed in determining the short levied tax owed by the respondent to the appellant resulting from the appellant's own inaction in demanding the same timeously resulting in the respondent's loss of the right to demand refunds which the respondent was legally entitled to had those demands for the short levied assessed taxes been timeously made by the appellant. In the learned Judge's view and correctly so in our view, it was only through judicial review that the appellant's administrative actions could be reviewed and on that account found the tribunal appellate process though available as an alternative remedy for redressing the respondent's grievances against the appellant less convenient, effective, beneficial and inappropriate in the circumstances to redress the respondent's grievances against the appellant and which circumstances according to the learned Judge vested the court with judicial review jurisdiction which we find was well founded both on the facts and in law. We therefore reject the appellant's complaint of want of jurisdiction in the trial court to determine the respondent's claim against the appellant.

On the principles that guide the court on the invocation and application of the principle of legitimate expectation, the approach the learned Judge took to determine the applicability of this principle to the respondent's claim against the appellant was first of all to review and appreciate numerous case law on the principles that guide the court on the interpretation and application of tax law, among those reviewed was the case of **Republic vs. Commissioner of Domestic**

Taxes Large Tax Payers Officer, Ex parte, Barclays Bank of Kenya Limited [2012]eKLR, Unilever Kenya Limited vs. The Commissioner of Income Tax, Nairobi High Court Income Tax Appeal No. 753 of 2003; Commissioner of Income Tax vs Westmont Power (K) Limited, Nairobi High Court Tax Appeal No. 626 of 2002; and lastly **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 24** all for the holding *inter alia* that: any tax imposed on a subject is strictly to be dictated by the laws of the legislature; the taxing authority must satisfy itself that the transaction fits within the definition of the statute before moving to demand the tax; it is incumbent upon the taxing agency to establish that its claim was within the ambit of the prescriptions in the statute before demanding payment; taxation provision with penal consequences must be interpreted with great caution and any ambiguity in a tax law must be resolved in a tax payer's favour.

Also reviewed towards the same purpose was numerous case law on the principles that guide the court on the application of the principle of legitimate expectation, among these was the case of **Republic vs. Kenya Revenue Authority, Ex parte Shake Distributors Limited, High Court Misc. Civil App. No. 359 of 2012 [2012]eKLR**; and **Republic vs. Attorney General and Another, Ex parte Waswa & 2 Others [2005] 1KLR 280**, all for the principles *inter alia* that: a legitimate expectation arises where there is demonstration that: a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/she/it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the pubic authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker's action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate.

The trial court also construed **section 135(1)** and **(3)** of the EACCMA which provides *inter alia* that where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall on demand by the proper officer pay the amount. The proper officer shall not make any demand after five (5) years from the date of the short levy or erroneous refund, unless the short levy or refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made; **section 235** of the EACCMA which provides for production of all relevant documents in relation to importation of goods to the proper officer to carry out a verification tax audit.

Applying the above threshold to the rival position before the trial court, the learned trial Judge made findings that: a period of thirteen (13) years was such a long time for a prudent and efficient authority to discover its mistakes; a customs officer is supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the occurrence of damage and customs warehouse charges hence the mandate donated by **section 235** and **236** of the EACCMA to conduct post clearance audits to verify the accuracy of the entries after the goods had been released from the customs control.

On the manner that the appellant exercised its statutory duty in demanding the short levied taxes from the respondent after a period of thirteen

(13) years, the learned Judge among others reviewed the case of **Republic vs. Commissioner of Cooperatives, Ex parte Kirinyaga Tea Growers Co-operative Savings and Credit Society [1999] 1 EA 245 (CAK)**; **Republic vs. Kenya Revenue Authority, Ex parte Aberdare Freight Services Limited [2014]eKLR;** and **Republic vs. Commissioner of Customs, Ex parte Mulchand Ramji & Sons Limited [2010]eKLR**, all for the principles that a review which is abused should be faulted by a court of law as a power which has not been lawfully exercised should not be sanctioned by a court of law; that a public authority must not be allowed by a court of law to get away with illogical, immoral or acts which result in unfairness and in so doing abuse its statutory powers; lack of fairness in the exercise of administrative statutory power by a public authority is a ground for interference by a court of law; administrative statutory power is deemed to have been exercised validly if the same was exercised reasonably, rationally and not arbitrarily or, capriciously; and lastly that administrative power may also be abused if the same is exercised beyond the limits permitted for in law or alternatively where the same is exercised for an improper purpose.

On the duty to act fairly, the learned Judge reviewed the case of **Pharmaceutical manufacturing and 3 others vs. KRA and 2 Others [2014] eKLR**, for the holding *inter alia* that Public agencies have a duty to act fairly failing which they risk the court's intervention to have those actions quashed by way of prerogative orders.

Applying the above threshold to the rival positions before the court, the learned Judge reasoned as follows:

> **"156 ... Whereas the period for which the taxes were being demanded was within the statutory grace period of 6 years, when it comes to the consideration of legitimate expectation, it is the effect of the delay as opposed to its length coupled with the conduct of the parties that comes into focus. Where the inability by the taxing authority to discover the actual taxes payable was as a result of concealment by the tax payer, the tax payer cannot hide behind legitimate expectation to escape the payment of taxes.**
>
> **159. However, where the taxing authority goes to sleep and as a result lulls the taxpayer into a false sense of security that the taxes in question would not be demanded, as a result of which the tax payer loses recourse which would have been legally available to it had the tax been demanded promptly, it may well be unfair and unjust for the demand to be sustained."**

On the basis of the above reasoning the learned Judge made findings that: prior to the year 2001, the respondent enjoyed tax exemption on VAT in respect of the subject raw materials; whereas in 2001 the said exemption was removed, no VAT was claimed from the respondent whether deliberately or inadvertently; by the time the appellant sent its demand on 28th November 2013 for the short levied taxes, the respondent was no longer in a position to claim refunds which they would have otherwise claimed and which contention in the trial Judge's view had not been contested by the appellant; the effect of that default on the part of the appellant meant that the respondent would have to bear the loss which but for the inaction on the part of the appellant it would have otherwise not suffered; the appellant was in control of the instruments through which the actual taxes were payable; by not maintaining its said instruments with a view to determine the actual taxes payable at the appropriate time, the appellant placed the respondent in the inevitable position where the respondent was exposed to shoulder the burden which legally ought not to have been shouldered by the respondent; the circumstances of the case before the court cried loudly against the imposition of the burden on the respondent. Lastly, that in the trialcourt's view, the appellant's failure to act prudently cultivated on the respondent a legitimate expectation that the positon prevailing before 2001 would continue to prevail notwithstanding the amendment of the Finance Act, 2001.

We have considered the above findings in light of the preceding learned trial Judge's reasoning and the principles that guide the court on the application of the principle of legitimate expectation highlighted above, and which we fully adopt as the threshold for resolving the rival positions before us on this issue and find no basis to fault the trial Judge on the conclusions reached above. Our reasons for holding the above view are as follows: first, although there is no dispute that the respondent was obligated to meet its tax commitments to the appellant either as self-assessed or upon assessment by the appellant and demand to that effect issued by the appellant to the respondent for meeting the same, the appellant was duty bound to exercise that power with due diligence and as prescribed for by the law namely within the time frame permitted for by law to allow the respondent claim a refund they were entitled to in law within the time frame stipulated for within the law. Nowhere in its contestations either before the trial court nor before this Court on appeal do we find any suggestion that it's policing role over the respondent had primacy over the respondent's right to recover taxes lawfully due to it subject to lodging for such refunds within the time stipulated for within the law upon meeting the respondent's demands for those short levied taxes.

In **Care Phone (Pty) Ltd vs. Marcus [1977] (3) SA 304**, the Court of Appeal of South Africa expressed itself as follows:

> **"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgements will have to be made which will, almost inevitably, involve the consideration of the merits in some way or another. As long as the judge determining (the) issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof but to determine whether the outcome is rationally justifiable, the process will be in order."**

In light of the above persuasive threshold, we find no basis for faulting the learned trial Judge for arriving at the above conclusion that the process employed by the appellant as a tax authority statutorily mandated to exercise its policing powers over the respondent as the tax payer obligated to pay either self-assessed or demanded tax was not only unfair but also irrational and therefore infringed on the respondent's legitimate expectation that demand for any short levied taxes would be made timeously to enable them claim refunds to which they were legally entitled. Second, the learned Judge's finding was in tandem with the principle that guide interpretation of tax law with penal consequences, namely, that tax law with penal consequences must be interpreted with great caution and that any ambiguity in such a law must be resolved in favour of a tax payer. The penal consequence in the tax legislation invoked by the appellant is that which mandated the appellant to demand short levied taxes as and when assessed and demanded for; while the ambiguity in the said law arose from the failure to provide a window for the affected tax payer to apply for late refund for such short levied tax demanded for after the period for claiming a refund has long lapsed. Third, the default resulting in the belated audit and demand for the short levied taxes against the respondent was not occasioned by fraud perpetrated by the respondent but the appellant's own conduct of failure to subject the said raw materials to VAT after the repeal of the Finance Act 2001, and the institution of the Simba Automated Clearing System which automatically exempted the subject raw material from payment of VAT processes, over both of which the respondent had no policing power or control. We therefore find that the doctrine of legitimate expectation was properly invoked and applied by the learned trial Judge in the circumstances of this appeal.

On the application of the doctrine of proportionality, the learned trial Judge reviewed the case of **Suchan Investments Limited vs Ministry of National Heritage and Culture & 3 Others [2016]eKLR** in which the decision in **Republic vs. Home Secretary, Ex parte Dally [2001] 2AC532** was approved for the holding, *inter alia*, that the principle of proportionality requires the administrative authority, while exercising its discretionary power to maintain a proper balance between any adverse effects which its decision may have on the right, liberty or interests of persons likely to be affected by the said decision and the purpose for which the decision was made; the reviewing authority is also obligated to assess the rationality and reasonableness of the balance the decision maker has struck and determine whether relevant considerations were or were not taken into account in making the impugned administrative decision, or whether irrelevant considerations were taken into consideration; or whether there was evidence of abuse of discretion.

Further, on further factors failing the invocation and application of the doctrine of proportionality, the learned trial Judge also reviewed the case of **Republic vs. the Commissioner of Lands; Ex parte Lake Flowers Limited Nairobi HC Misc. Application No. 1235 of 1998; Bahass Holding Limited vs. Mohammed Bahass & Company Limited and Another Civil Application No. Nai 97 of 1998; National**

Hospital Insurance Fund Act and Central Organization of Trade Union Kenya [2006] 1 E A 47; Kera & 3 Others vs. Attorney General [2002] 2 KLR 69; and **Re Birac International SA (Bureau Vantas) [2005] 2 EA 43**, for the reiteration of propositions, *inter alia*, that: judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds; availability of other remedies is no bar to the granting of judicial review reliefs although this may be an important factor in exercising the discretion whether or not to grant the relief sought for from the Court; the court must resist any temptation to try and contain judicial review in a strait jacket; judicial review intervention has been extended using the principle of proportionality pursuant to which the court is called upon to intervene in situations where public authorities and officials act in bad faith, abuse power, fail to take into account relevant considerations in the decision making process or take into account irrelevant considerations or act contrary to legitimate expectations of persons affected by the decision making process; Judicial review is a tool of justice meant to serve the needs of a growing society on a case to case basis; the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions; it is a central control mechanism of administrative law (public law) by which the court discharges its constitutional responsibility of protecting citizens against abuse of power by public authorities; it is a safeguard which is essential to the rule of law; that exercise of judicial review mandate is to ensure that public authorities are accountable to law with a view to protecting the rights and interests of those affected by the exercise of such public authority.

Also considered as basis for the application of the doctrine of proportionality were Articles 10 and 47 of the Kenya Constitution 2010, the case of **Judicial Service Commission vs. Mbalu Mutava & Another [2015]eKLR**; and the case of **Noor Maalim Hussein & 4 Others vs. Ministry of State for Planning, National Development and Vision 2013 & 2 Others [2012]eKLR**, on the basis of which the learned Judge appreciated the role of the appellant in the collection of taxes and that of the respondent to pay tax they were liable to pay no matter the amount forming the tax demand as long as the same is lawful. In the learned Judge's opinion, in the exercise of its statutory mandate under the tax law, the appellant was expected to be guided by the constitutional provisions cited above and the principles/propositions in the case law also highlighted above and on the basis of which the learned Judge ruled that statutory power is deemed to have been exercised carelessly, irrationally and unreasonably when it is shown to have been exercised contrary to law which in the learned Judge's view obligated the appellant to demand the short levied taxes within such a time frame that would have accorded the respondent an opportunity to claim a refund. Second, that the appellant had a constitutional obligation to act efficiently in the discharge of its mandate. Third, that its failure to adhere to this constitutional demand rendered its decision not only unfair and amenable to judicial review, but also liable to be struck out as in the learned Judge's opinion, it amounted to abuse of power.

On the totality of the above assessment and reasoning, the learned Judge rendered himself as follows:

> **187. Having considered the issues raised in this application, it is my view and I so hold that on the ground of legitimate expectation, abuse of or wrongful exercise of power and irrationality the Respondent's decision cannot be allowed to stand. My view is reinforced by the decision in the Keroche case (supra) at page 23 that "a decision tainted with abuse of power is not severable... and once tainted always tainted in the eyes of the law".**
>
> **188. In the premises, it is my view and I hereby find that it would be contrary to justice to compel the applicant to pay the sum demanded by the Respondent. To do so would be contrary to substantive fairness which dictates that a body must not act conspicuously unfairly, nor unfairly as to abuse its power, nor in unjustified breach of legitimate expectations.**
>
> **189. Accordingly, based on the said grounds, the Notice of Motion dated 13th January, 2014 is merited.**

We have considered the above conclusion in light of the rival submissions on the issue as to whether the doctrine of proportionality was properly invoked and applied in the circumstances of this appeal. We take it from the definition of this doctrine by **Desmith Woolf** and **Jowel** in their writings on Judicial Review of Administrative Action, Fifth edition (pg 594-596) as:

> **"A principle requiring the administrative authority when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberty or interests of a person affected by the decision and the purpose which it pursues."**

The threshold we are obligated to apply in determining as to whether the above doctrine was properly invoked and applied by the trial court in favour of the respondent is that set in the case of **Secretary of State for Home Department Ex parte Dally** [supra] as approved in the case of **Suchan Investments Limited vs. Ministry of National Heritage and Culture & 3 Others** [supra], **Bato Star Fishing (Pty) Limited vs. Minister of Environmental Affairs & Others [2004] ZACC15**, in which the decision in **Republic vs. Chief Constable of Sussex Ex parte International Traders Ferry Ltd [1995] 1All ER 129** was approved for the reiteration of the principle that the simple test to be applied for the application of the doctrine of proportionality is determination as to whether the impugned decision was one which a reasonable public authority could reach on the one hand; and as to whether the decision was one which no sensible authority acting with a proper appreciation of its official public responsibility would have decided to adopt. Third whether the decision maker struck a balance open to him fairly and reasonably; and lastly the case of **Care Phone (Pty) Limited vs. Marcus** [supra] also already highlighted above.

We have applied the above threshold to the rival position herein on the application of the above doctrine, in light of the above learned trial Judge's reasoning and conclusion for the invocation and application of the above doctrine in favour of the respondent and find no error in the said reasoning. Our reasons are as follows: (i) the appellant as the indisputable public authority charged with the mandate of carrying out tax audits for purpose of detecting and enforcing recovery of short levied taxes in the first instance and as the chief administrator of the tax law in the second instance, was aware of the respondent's right to be requested to meet its obligation with regard to any short levied taxes that may be found due and payable from it in a time frame that would allow the respondent an opportunity to claim a refund to which the appellant has not disputed that the respondent was indisputably entitled to in law; (ii) in an instance where the appellant failed to explain itself for inaction, the trial Judge cannot be faulted for finding its action of moving to recover the short levied taxes at a time when the respondent was not in a position to recover the same unfair, irrational and unreasonable; (iii) the appellant's gain in recovering the short levied taxes from the respondent at that point in time was not proportional to the total loss the respondent stood to suffer on account of inability to recover refunds lawfully due to it and which it would have rightfully claimed had it not been for the appellant's inaction and default in failing to demand for the same timeously, and which move the learned Judge properly found unfair; (iv) the appellant's decision was irrational because no reasonable public authority properly directing its mind to the issue would have failed to realize that its decision to

demand for the said short levied taxes at that point in time was not only unfair but also unjust; (v) it was unreasonable because no justification was given for the appellant's action of moving at that point in time to penalize the respondent for the appellant's mistakes arising from it having in place a system of operations established and managed by itself which led to the late discovery that there were short levied taxes owed to it by the respondent; (vi) issue of eight (8) other companies that never complained and those others that entered into an arrangement with the appellant to meet their payment were irrelevant considerations in the circumstances of this appeal as they were neither contested at the trial nor ruled upon by the trial Judge and do not now therefore fall for consideration on appeal, especially when the circumstances under which those other companies came to the above arrangements with the appellant were not part of the rival pleadings and facts that fell for interrogation by the trial Judge. We find as did the learned trial Judge that these were inconsequential to the ultimate determination of the JR proceedings that the trial court was seized of and therefore rightly found that argument illogical.

In the result we find no merit in the appeal. It is accordingly dismissed with costs to the respondent, both on appeal and at the trial.

Dated and Delivered at Nairobi this 7th day of August, 2020.

R. N. NAMBUYE

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR