IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 85 OF 2015

REPUBLIC.....APPELLANT

AND

COMMISSIONER FOR INVESTIGATION & ENFORCEMENT.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Odunga, J.) dated 7th February 2014

in

HC. Misc. App. No. 836 of 2013)

****

JUDGMENT OF THE COURT

This appeal arises from the judgment and decree of the High Court of Kenya at Nairobi ***(Odunga, J.)*** dated 7th February 2014, dismissing an application for orders of *certiorari* and *prohibition* by ***Wananchi Group Kenya Ltd*** as the *ex parte* applicant. For convenience, in this appeal we shall refer to Wananchi Group Kenya Ltd as ***the appellant***. In the application before the High Court the applicant challenged an Agency Notice issued by the respondent, the ***Commissioner for Investigation and Enforcement***, demanding the respondent's bankers, ***Commercial Bank of Kenya,*** to pay the sum of ***Kshs. 124,866,992.80*** as tax due from the appellant. It contended that the appellant was in breach of tax remission granted to it by the ***Minister for Finance (the Minister)***. In dismissing the application, the learned judge held that under the ***Value Added Tax Act (the Act)***, the respondent had the responsibility of ascertaining whether the appellant had fully complied with the conditions under which the Minister granted the tax remission, and having determined that the appellant had not complied, the tax demand was not wrongful. The appellant was aggrieved and lodged this appeal.

By way of background, the appellant was at all material times in the business of telecommunications services. On various dates between June 2007 and December 2011, the appellant applied to the Minister for remission of ***Value Added Tax (VAT)*** for its investment network infrastructure intended to provide digital television and fiber-optic cable services. There is no dispute that the Minister had the power to grant VAT remission. ***Section 23*** of the Act (repealed) provided as follows:

> "***(1) Subject to subsection (3), the Minister may, by order in the Gazette, remit wholly or partly tax payable in respect of any taxable goods or taxable services, if he is satisfied that it is in the public interest to do so.***
>
> ***(2) Where any remission is granted under this section on a condition that tax shall be payable in the event of the breach of any term or condition or on the occurrence of any event, the tax shall, on the breach of that term or condition or on the occurrence of that event forthwith become due and payable by such persons as may be specified in the order concerned."***

Subsection (3) specified the goods and services in respect of which the Minister may grant remission. Among those were "capital equipment and machinery imported or purchased solely for use in the manufacture of goods in a licensed customs bonded factory for export only." After considering the application, the Minister acceded to it, but subject to the following conditions:

> "***NOTE: Spares and accessories do not qualify for this remission.***
>
> ***In accordance with the provisions of Legal Notice No. 51 dated 10th June 2004, M/s Wananchi Group (K) Limited will be expected to allow and facilitate the Commissioner of Customs Services inspection of the machinery to which this remission relate.***

In the event that the machinery being imported under the authorization of this letter is not utilized for the stated purpose, all taxes shall be paid in full.

The Minister may further revoke this remission in case of any inconsistency with conditions attached to it."

By a letter dated 6th March 2012, the respondent informed the appellant that upon investigations, it had established that the appellant had irregularly imported goods that did not qualify as capital goods for investments pursuant to the remission that it had obtained from the Minister. The goods involved were specified as:

"home appliances such as pay TV decoders, domestic internet modems and variety of tools that are not capital goods (plant and machinery) for investment as contemplated under section 23 of the VAT Act."

Accordingly the respondent demanded from the appellant payment of Kshs 124,866,992.80 within 30 days from the date of the letter, at the risk of enforcement action.

After unsuccessful attempts to resolve the dispute amicably, on 7th February 2013 the respondent issued an agency notice declaring the appellant's bankers, Messrs. Commercial Bank of Africa, the appellant's agent for purposes of payment of the said sum of Kshs. 124,866,992.80 within 30 days. The appellant respondent by taking out judicial review proceedings for an order of *certiorari* to quash the agency notice and an order of *prohibition* to stop the respondent from demanding the disputed sum. It contended that it had lawfully obtained remission from the minister; that it had not breached the conditions on which the remission was granted; that the respondent was acting illegally and *ultra vires* its powers by purporting to overrule the minister; and that the respondent's action was in violation of its legitimate expectation.

The respondent resisted the application vide a replying affidavit sworn on 16th April 2013 by ***Kamau Kamau***, its revenue officer responsible for investigations, tax assessment and compliance audits. He deposed that following analysis of data in the Customs Statistics Unit from 2009 to 2012, the respondent established that the appellant had violated the conditions upon which the Minister had granted the remission, by importing non-capital goods and accessories such as decoders and modems that did not qualify for remission. As we have already stated, after considering the matter, the learned judge held that there was no basis upon which he could issue orders of *certiorari* or *prohibition* because he was satisfied that the respondent was acting within the law.

The appellant's memorandum of appeal is founded on 8 grounds of appeal. However in its written and oral submissions, the appellant coalesced its complaints into three, contending that the leaned judge erred by:

(i) failing to hold that the respondent had acted in excess of jurisdiction by demanding tax in respect of items for which the Minister had granted remission;

(ii) holding that there was no evidence that the Minister had granted remission; and

(iii) failing to award the remedies it had sought.

On the first issue, ***Mr. Gachuhi***, learned counsel for the appellant submitted that the respondent did not have jurisdiction to charge VAT for goods that the Minister had granted remission. In counsel's view, if there was a breach of the conditions upon which the Minister had granted remission, the solution was for the Minister to revoke the remission under ***regulation 8*** of the ***Value Added Tax (Remission) (Investment) Regulations, 2004***. He contended that the respondent did not apply to the Minister to invoke regulation 8 and that by proceeding otherwise, it acted *ultra vires* and violated the appellant's legitimate expectation that due process would be followed. He contended that the tax demand by the respondent amounted to a challenge to or countermand of the decision by the Minister to grant remission, which the respondent could not do under its general powers granted by section 25 of the Act to assess and collect revenue. The appellant relied on the decision of the Tanzania High Court in ***Tanzania Tea Packers Ltd v. Commissioner of Income Tax [2000] 1 EA 233*** and submitted that tax could not be levied by one statutory body after another had granted remission.

It was the appellant's further submission, founded on the decision of the High Court of Australia in ***Anthony Holden & Sons v. Amalgamated Clothing & Allied Trade Unions [1932] 47 CLR 1***, that a general provision in a statute cannot override a particular provision and therefore the respondent's powers under section 25 of the Act cannot override those of the Minister under section 23.

Moving to the second broad complaint, the appellant submitted that the learned judge erred by holding that there was no evidence of the remission that the Minister had granted. Counsel submitted that both parties had annexed to their pleadings the letters granting the remission and that it was therefore common ground that the Minister had indeed granted the remission. He further added that the learned judge was in error in holding that there was no evidence that the Minister had granted the appellant remission for set-top boxes and decoders.

Lastly, on account of the foregoing, namely the respondent's alleged *ultra vires* actions and the learned judge's misdirection on the evidence, the respondent submitted it had made out a sufficient case to justify grant of orders of *certiorari* and *prohibition*. Accordingly we were urged to allow the appeal with costs.

The respondent, represented by ***Mr. Nyagah***, learned counsel, opposed the appeal, contending that the learned judge had properly dismissed the judicial review application for lack of merit. He contended that the remission granted by the Minister was subject to the conditions set out in section 23(3) of the Act and the Value Added Tax (Remission) (Investment) Regulations, 2004, which permitted remission of VAT for capital goods only. Counsel further submitted that the conditions upon which the Minister granted remission expressly stated that spare parts and accessories did not qualify for remission, but the appellant nevertheless imported decoders/set top boxes, internet modems, coaxial cables, lashing wires and drop cables, which were accessories rather than capital goods because they were accessories to the main

infrastructure laid by the appellant and designed to be used by its commercial clients to access broadcast signals.

It was the respondent's view that it had legal a duty to audit the appellant's records on VAT remission to confirm compliance with the conditions and to levy taxes if the appellant failed to comply. In that regard counsel relied on the judgment of the High Court in ***Republic v Kenya Revenue Authority & Another ex parte Bear Afric (K) Ltd, Misc. App. No. 285 of 2013*** and ***Republic v. Commissioner of Customs & Excise & Another ex parte Mwalimu Digore, Misc. App. No. 62 of 2006*** and submitted that the respondent is the technical expert for purposes of determining whether set top boxes and decoders were capital or non-capital goods, and that it was the respondent's duty to consider the exemption and confirm that it is in compliance with the law.

Citing section 25 (1) of the Act, the respondent submitted that it had authority to collect taxes from the appellant for the goods imported in breach of the condition imposed by the Minister, and having done so, it was merely enforcing the law rather than countermanding the decision of the minister or acting *ultra vires*. Regarding the relationship between section 23 and 25 of the Act, the respondent submitted that there was no inconsistency. It cited the judgment in ***Republic v. Kenya Revenue Authority ex parte Bata Shoe Company (Kenya) Ltd [2014] eKLR*** and contended that tax legislation should not be interpreted so as to result in an absurdity.

Turning to whether the learned judge erred by refusing to grant the remedies sought by the appellant, the respondent submitted that it acted within the law and afforded the appellant a fair opportunity to be heard before the taxes were levied. In those circumstances, the respondent urged us to find that there was no basis on which to issue orders of *certiorari* or *prohibition*. It was further contended that if the intention of the appellant was to challenge the correctness of the determination that set top boxes and decoders were accessories, it was obliged to file an appeal at the Tax Appeals Tribunal.

Accordingly, the respondent urged us to find that the appeal has no merit and to dismiss it with costs.

We have carefully considered the judgment of the trial court, the grounds of appeal, the submissions by learned counsel, both oral and written, the authorities that the parties cited and the law. We propose to consider the three issues in the appeal in the order, which the appellant raised them.

At the heart of the first issue is the contention that once the Minister granted the appellant VAT remission, it was only the Minister who could cancel the remission in the event of alleged breach of the conditions of the remission and that the respondent had no business levying taxes once the minister had granted remission. To do so would amount to countermining the decision of the Minister and the respondent would be acting *ultra vires* its powers.

As we pointed out earlier in this judgment, we have no doubt in our mind that the Minister had statutory power to grant remission under section 23(1) of the Act. However, the Act expressly provided that the power of the Minister was ***subject*** to subsection (3) of the Act, which set out the goods and services for which the Minister could grant remission. Section 23(3) (d) allowed the Minister to grant VAT remission for:

> ***"capital equipment and machinery imported or purchased solely for use in the manufacture of goods in a licensed customs bonded factory for export only."***

In other words, goods that were not capital equipment and machinery for use in manufacture of goods in a licensed customs bonded factory for export only did not qualify for remission. ***Regulation 5*** of the Value Added Tax (Remission) (Investments) Regulations, 2004, which were made under the powers conferred on the Minister by ***section 58*** of the Act, further provided that:

> ***"Remission shall not be granted in respect of stocks in trade, consumables, office furniture, typewriters, copying equipment, stationery, kitchenware, crockery, linen, draperies, carpets (in single pieces), safes and refrigerators***.

Further, ***regulation 7*** of the same Regulations empowered the Minister, in granting remission, to attach such conditions, as he considered necessary. Pursuant to that power, the Minister imposed specific conditions, which we have set out above, three of which we must pay due regard to. Firstly, spares and accessories did not qualify under the remission. Secondly, the appellant had an obligation to allow and facilitate the respondent to inspect the machinery purchased or imported under the remission. Lastly, if the appellant imported or purchased machinery contrary to the terms and conditions of the remission, all taxes were to become due and payable in full.

The appellant contends that once the Minister had granted the remission, the respondent had no business poking its nose into the matter and to do so would be to purport to countermand the powers of the Minister or to act *ultra vires* the respondent's powers. In the appellant's view, if it was contended that it had violated the conditions upon which the Minister granted remission, the solution lay in regulation 8 of the Regulations, which provided as follows:

> ***"The Minister may revoke a remission if any condition set out in regulation 6 or attached under regulation 7 is breached."***

It is obvious to us that the powers of the Minister to grant remission under section 23(1) were not absolute. They were carefully circumscribed as to the goods and services that qualified for remission. The Minster was empowered to impose and did impose conditions, which in our view were intended to ensure that tax remission was not obtained or granted arbitrarily or irregularly. Once the remission was abused, the Minister could revoke it and any taxes that would otherwise have been waived, became due and payable.

The appellant was notified in advance the goods that qualified for remission and the conditions under which the Minister granted remission.

The respondent contends that in the exercise of its statutory powers, it carried out an investigation and established that after the appellant

obtained the remission, it imported accessories that did not qualify for remission and in terms of the conditions set by the Minister, the taxes became due and payable. We are persuaded by that argument. In demanding payment of the taxes, the respondent was not countermanding the decision of the Minister, but merely enforcing the conditions under which the Minister granted remission. We say so because, regulation 6 provides for inspection of goods under remission in the following terms:

> ***"6. It is a condition of a remission that the person to whom a remission has been granted shall-***
>
> ***(a) allow and facilitate the inspection of the goods in respect of which the remission relates; and***
>
> ***(b) avail to the Commissioner the records of such goods for purposes of inspection and audit."***

We have also stated that one of the conditions that the Minister imposed specifically for the appellant's remission was that the appellant must allow and facilitate the respondent to inspect the machinery purchased or imported under the remission.

We ask ourselves, what is the point in providing for inspection by the respondent of goods purchased or imported on the strength of the remission granted by the Minister and obliging the beneficiary of the remission to allow and facilitate inspection? If, as the appellant contends, once the Minister has granted remission the respondent has no role, why then expressly provide, in a grant of remission, for the respondent's powers of inspection and audit of the purchased or imported goods and the corresponding obligation on the beneficiary of the remission to allow and facilitate inspection?

The mischief that the conditions were intended to address is mis-description of unqualified goods and services so as to bring them within the remission or other abuse of the remission to enable tax-free purchase or importation of goods that were otherwise unqualified for remission. Both the regulations and the Minister's condition made that investigation and audit mandatory. The appellant accepted the grant of remission subject to those conditions. It is the statutory power of the respondent to investigate compliance with the conditions demanded by the Regulations or imposed by the Minister for the grant of remission. To that extent we agree with the learned judge that there was no evidence that the respondent was countermanding the decision of the minister or acting *ultra vires.*

In the same vein, it does not avail the appellant in the circumstances of this case to rely on regulation 8, which empowers the minister to revoke a remission where the conditions upon which it was granted are violated. Regulation 8 is intended to stop a party who has abused the conditions of remission from continuing to enjoy further or future remission. It does not address the taxation of goods that have already been imported or purchased in breach the conditions upon which the remission was granted. The regulations and the Minister's conditions made it clear that taxes were payable in full for goods imported in breach of the remission conditions. In our view, to accede to the appellant's argument would be to ignore the express terms of the statute, the regulations and the Minister's conditions. Worse, it would entail allowing a party who has abused the conditions upon which the remission was granted to enjoy tax exemption for goods already imported or purchased in violation of the remission conditions, but only deny him the opportunity to abuse the conditions in future. We believe that there is no room for an interpretation that would result in conferment of a benefit following breach of express statutory provisions and conditions.

We do not think it necessary to venture into the argument on the relationship between sections 23 and 25 of the Act for the simple reason that section 25 applies to recovery of erroneously remitted or refunded taxes of, which is not the case here. The issue in this ground of appeal is whether the appellant was in breach of the conditions of the remission and whether the respondent had power to enforce the conditions and demand payment of tax by the appellant.

Having found that the respondent had power to inspect the goods purchased or imported pursuant to the remission and to verify that they complied with the Act, the regulations made thereunder, and the conditions imposed by the Minister, the first ground of appeal premised on the actions of the respondent being *ultra vires* has no merit.

The appellant did not seriously contend that the equipment in dispute, namely, decoders/set top boxes, internet modems, coaxial cables, lashing wires and drop cables were "capital equipment and machinery imported or purchased solely for use in the manufacture of goods in a licensed customs bonded factory for export only." They appear, on the face of it, to be accessories, which the Minister expressly provided were not covered by the remission. They could also be ***"stock in trade",*** which the ***Stroud's Judicial Dictionary of Words and Phrases, 7th ed. (2006)*** defines as ***"all chattels as are acquired for the purpose of being sold or let to hire, in a person's trade***".

We must also add that under the Act, the duty of determining whether the goods in question are capital goods or not is vested in the respondent. The respondent identified the equipment that it contended was not capital goods and gave the appellant detailed reasons for its position. In the absence of evidence that the respondent's decision in that regard was tainted by unreasonableness, illegality, irrationality or procedural impropriety, we have no basis for disagreeing with the respondent's assessment. Certainly we are not at liberty in these circumstances to merely replace our views and opinions for those of the respondent. We adopt the reasoning of this Court in ***Mastermind Tobacco (K) Ltd v Commissioner of Domestic Taxes & 2 Others, CA No. 44 of 2013:***

> ***"Having concluded that the respondents had legal basis to demand payment of excise duty from the appellant; that the reference to the non-existent fourth column of the Fifth Schedule did not absolve the appellant from its duty to pay excise duty; and that the tax assessment in dispute related to a period before the 2008 amendment, there is in our view no justification for issuing judicial review remedies on the basis of illegality on the respondents' part. They did not act contrary to the law, ultra vires or without jurisdiction. In the same vein, we do not see how, in the circumstances of this appeal, the decision by the respondents to collect excise duty due from the appellant is unreasonable or irrational within the meaning of the Wednesbury principles. That decision cannot by any stretch of imagination be described as irrational, outrageous, arbitrary or lacking in reason or logic such that no reasonable person could have arrived at it."***

Further in ***Edward Ilandi Kitheka v. Independent Electoral & Boundaries Commission & Another, CA No. 212 of 2017***, the Court

quoted with approval the following passage from the **Supreme Court Practice 1997, Vol. 53/1-14/6**, which we also agree with:

> ***"The Court will not, however, on a judicial review application act as a 'court of appeal' from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law, the Court would, under the guise of preventing the abuse of power be guilty itself of usurping power."***

The second broad ground of appeal appears to be based on a misapprehension because, having carefully read the judgment of the trial court, nowhere do we see the learned judge having held that there was no evidence of the Minister having granted remission. All that he observed was that none of the parties had produced the Gazette order pursuant to which the Minister granted the remission. Section 23(1) of the Act requires the Minister to grant remission *by order in the Gazette*. Notwithstanding the non-production of the Gazette order, the learned judge noted that it was common ground between the parties that the Minister had indeed granted remission. It behooves us to quote paragraph 38 of the judgment on the issue.

> ***"It is agreed by the parties herein that in the exercise of the powers conferred upon him by the aforesaid section the Minister did grant the applicant remission of payment of VAT in respect of its investment network infrastructure for the provision of digital television and fiber-optic cable services. However, and regrettably so, none of the parties have deem it fit to exhibit a copy of the Gazette Notices by which the remission was granted. It is however clear that the remission, for it to be valid could only apply to items mentioned under section 23(3) of the Act."***

Again, in paragraph 42 of the judgment, the learned judge decried the failure by both parties to produce the necessary Gazette order but stated that he would proceed on the basis that the Minister had acted within the provisions of section 23(3). In other words, contrary to the appellant's submission, the learned judge neither stated nor held that there was no evidence that the minister had granted remission. The judgment impugned in this appeal did not turn on the basis that the Minister did not grant remission. This ground of appeal is totally bereft of merit.

As for the last ground of appeal, having found that the respondent did not act *ultra vires* its powers, there was no basis upon which the orders of *certiorari* and *prohibition* sought by the appellant could be granted. The upshot is that we are satisfied that the learned judge did not misdirect himself and there is no basis for interfering with his judgment. Accordingly this appeal is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 8th day of February, 2019

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR