

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.204 OF 2015

ALBA HOTELS LIMITEDAPPELLANT

VS

THE COMMISSIONER OF CUSTOMS SERVICES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant Alba Hotels Limited (Formerly Signature Hotels and Resorts Limited), is a Company incorporated under the Companies Act Cap. 486 of the Laws of Kenya, and engaged in the business of operating tourist class Hotels.
2. The Respondent is established under the Kenya Revenue Authority Act, (Cap 469) of the Laws of Kenya, charged with the mandate and administers the Tax regime on behalf of the Government of Kenya.
3. During the period 2012 and 2014, Alba Hotels Limited constructed/renovated/refurbished its hotel in Meru and in the process applied for Government's Industrial (Hotel) establishment inducement benefits in form of remissions for Customs Duty and VAT on various construction and refurbishment materials and equipment as per the provisions of the Tourism Act, The East Africa Community Customs Management Act 2004 (EACCMA), The Value Added Tax Act Cap. 476 (now repealed) etc. which were approved by the Minister in charge of

National Treasury on 20th March, 2012, upon recommendation by the Minister for Tourism.

4. After importation and completion of the refurbishment of the Hotel the Respondent herein carried out Post Clearance Audit (PCA) under the provisions of Section 235 and 236 of (EACCMA) and issued an additional tax demand of Kshs.4,618,686, which was communicated to the Appellant through a letter dated 20th July, 2015.
5. The Appellant filed an Objection and application for review of the assessment under Section 229, (1) of (EACCMA) in their letter to The Commissioner (KRA) dated 18th August 2015, and after reviewing the contents therein, the Tax Assessment was reduced and confirmed on 16th September 2015 at Kshs.2,299,555.00, being Import Duty Kshs.387,474. and VAT Kshs.1,912,081.
7. The Appellant still dissatisfied with the reduced assessment appealed to the Tax Appeals Tribunal (TAT) by filing Memorandum and Statement of facts received by the TAT on 28th October 2015. Upon being served the Respondent responded and filed their Statement of Facts dated 29th February 2016.

APPELLANT'S CASE

8. The Appellant's Case is that :

- a) The Respondent misdirected itself in fact on finding that the Appellant never paid import duty despite being provided with evidence that the same had been paid.
- b) The Respondent erred in law in its decision to impose customs duty on solar equipment while the same was specifically exempted.

c) The Respondent misdirected itself in Law by imposing VAT on materials and equipment for construction of a Hotel while such materials were specifically exempted.

d) That the Respondent misdirected itself by applying standard rate of VAT on imports and purchases specifically and explicitly identified and or classified as subject to VAT at zero rate.

9. The Appellant's prayers are that:

- a) The Respondent's Demand for Additional Taxes and Confirmation of Assessment be struck out in entirety.
- b) The Respondent's actions be declared arbitrary, capricious, unreasonable, unfair and contrary to the administration of justice and to legitimate expectations of the tax payer.
- c) The Respondent or its Agents be estopped from demanding or taking further steps to enforce recovery of the principal tax, penalties and interest as stipulated.
- d) Cost of the Appeal and
- e) Any other remedies determined by the Tribunal.

10. At the Hearing, the Appellant relied on letters of application seeking approval for remission of import Customs duty and/ or VAT under the various legal provisions from the Ministry for Tourism dated 20th February 2012 to the Ministry for Finance, giving the Tourism Ministry's recommendation for remission of taxes and attaching a list of 286 items to be imported or purchased locally.

11. The National Treasury gave approval on 20th March 2012 and communicated to the Permanent Secretary Ministry of Tourism, with copy to the Appellant on 22nd March 2012 by Permanent Secretary Finance in accordance with item 21 Part B of the Fifth Schedule to EACCMA and the

Eighth Schedule Part B item 10 of the VAT Act, headed "*Duty and or VAT remission on Materials for refurbishment and renovation*" for the Appellant. The letter listed specific goods and equipment with respective quantities and values in United States Dollars (USD) (\$), approved for duty and or VAT remission. Additionally it listed items approved by The EAC Council of Ministers under CMA as qualifying for both Duty and VAT subject to being marked or printed or engraved with the logo of the Hotel.

12. The letter also stated that the items not listed, qualify for VAT remission only and do not require being marked stamped or engraved with logo. It further stated that in order to effect the remission, the related shipping documents for specific goods will need to be submitted to the Ministry of Finance indicating specific items, quantities being imported or purchased and respective dollar (\$) values.
13. Subsequently several letters for the respective importation or purchase batches were written by the National Treasury, addressed to the Commissioner of Customs Services (the Respondent) and copied to the Respondent's Commissioner General, to the Deputy Commissioner Southern Region and to the Deputy Commissioner Central Region. Each of the letters stated the list of items to be imported or purchased and enclosed copies of respective Pro-forma Invoices, Bill of lading and IDF. Under this arrangement several batches of specific items each of them clearly listing the goods being acquired, and stating the list number from the master list, were imported or purchased by the Appellant between February 2012 and February 2013. All the letters stated that the tax remissions will be for qualifying items only.

14. The Respondent performed PCA under the Provisions of Sections 235 and 236 of The EACCMA which commenced in April 2014 and communicated its findings to the Appellant via their letter dated 20th July 2015 with initial demand of additional taxes amounting to Kshs.4, 618,686.00.
15. The Appellant objected on 18th August 2015 and filed document F147 as evidence of Duty Payments whereby the Respondent reviewed the assessment and reduced the tax demanded to Kshs.2, 299,555.00 and subsequently confirmed this revised assessment on 16th September 2015. This led to the Appellant filing an Appeal with The Tribunal on 20th October 2015.
16. On Import duty the Appellant states in its Statement of Facts in form of Affidavit sworn by its Executive Director that despite having provided all the necessary documentary evidence including Forms F147, the Respondent ignored, failed or refused to acknowledge some of the duty payments and went ahead to demand additional taxes ignoring the fact that the Appellant had actually overpaid tax by Kshs.48, 999.92.00. The Appellant states that it is entitled to written reasons under the provisions of the Constitution and the right to Fair Administrative Action as to why some payments should be ignored by the Respondent but the Respondent never gave any reasons.
17. The Appellant states that importation of materials and equipment for Hotel construction is zero rated as per Part B of the Eighth Schedule of VAT Act Cap 476 (now repealed) and therefore the Respondent is not entitled to ignore that and demand additional taxes especially when the Appellant has applied for remission and has complied with all preset conditions and requirements in order to be granted such remission by the Treasury.

18. The Appellant states that all the materials and equipment were declared at the port of entry and the Respondent was satisfied on the assessment of VAT at zero rate and cannot now be allowed to demand VAT at standard rate contrary to the provision in Part B of the Eighth Schedule of the VAT Act.
19. The Appellant avers that duty was paid on all items where it was due and was exempted where imports qualified. The Appellant further alleges in its Statement of Facts in form of Affidavit sworn by M/s Juliet Njogu, The Executive Director of the Appellant that despite having been provided with all evidence on duty payment, the Respondent Ignored or refused to acknowledge some of the payments and proceeded to assess additional taxes on the Appellant's goods, while the Appellant had indeed overpaid duty by Kshs.48,999.92. The Appellant has furnished a Schedule of Items where duty was overpaid totaling to this figure. The Respondent has not challenged this schedule but only states that there was no overpayment of duty.
20. The Appellant in its Written Submissions attaches some pictures of Dish washers, kitchen sink basins, Kitchen Hoods and front Bar Counter and states that these are some of the items that the Respondent is saying that they do not qualify for duty exemption. According to the Appellant they do qualify as kitchenware which is one of the items listed by CMA under EACCMA.
21. The Appellant objects to the Respondent's narrow interpretation of the law to mean that equipment refers to capital items like excavators and lorries and states that this is not only absurd but contrary to the intention of the legislation since a person constructing a hotel would not normally be expected to import capital equipment, and insists that the right

interpretation is that equipment refers to various goods installed or used in the Hotel to enable provision of tourist class standard of services. The Appellant has relied on the case of *Astall v HMRC* wherein it was held that interpretation of the Statutes must be determined by the intentions of the legislator (Parliament).

22. The Appellant asserts that by demanding additional taxes on the imported materials and equipment the Respondent is in actual fact reneging from what Government through Treasury has already granted to the tax payer under the written law and that such action will cause the tax payer undue prejudice and will be contrary to the legitimate expectation of the tax payer. To buttress its argument, the Appellant has relied on the case of *Sera Njeri Mwobi v John Kimani Njoroge*, Civil Appeal number 314 of 2009 wherein the Court held that, *"Prior promise by a party to the other under the law cannot afterwards be allowed to revert to previous legal relationship"*.

RESPONDENT'S CASE:

23. The Respondent states that the Appellant claimed all its imports under Regime C490, which exempts all items in the entry but some items included in some entries did not qualify for duty exemption and were therefore contrary to the provisions of EACCMA.
24. The Respondent explains that in arriving at the confirmed assessment, all duty paid was taken into account leaving a list of non-qualifying items for which duty has been assessed confirmed and demanded amounting to Kshs.387,474.00.
25. The Respondent argues that there was no duty assessed for the solar equipment and that assessment was made for industrial wires of various

- sizes, electrical wires, galvanized pipes, pvc pipes and non-pressurized stainless steel water tanks.
26. The Respondent asserts that the assessments were based on item 21 of the Fifth Schedule of EACCMA and item 10 of the Eighth Schedule of VAT Cap 476, the Laws of Kenya.
27. The Respondent denies that any of the assessed items were zero rated under VAT Act and puts the Appellant to strict proof of its claim.
28. The Respondent urges the Tribunal to find the Appellant culpable and liable under Section 203 of EACCMA for abusing the self-assessment regime and miss declaring its imports as solar equipment leading to duty exemption which was not due to the Appellant since the importer is expected to know its imports and the various regimes for declaration in order to qualify for exemption.
29. The Respondent states that the issue for determine are the actual imports, description, and identification and whether Treasury approval covered the items assessed and subject to this Appeal and whether VAT exemption was due. The Respondent stands firm by the Audit findings and urges the Tribunal to dismiss the Appeal and order the taxes to be collected without further delay. The Respondent has relied on its audit findings, EACCMA Part B item 21 of the 5th Schedule, Section 135 of EACCMA empowering demand for short levied taxes and Sections 122, 235, and 236 of EACCMA.
30. The Respondent relies on the decided case of **Golden Jubilee Limited v Commissioner of Customs Services Appeal No.5 of 2014** which it says is similar to this Appeal. In the decided case the Respondent had furnished a table of items which did not qualify so that the Tribunal can deal with each item on case by case basis to analyze and find out whether the specific item qualified or not.

31. On VAT exemption the Respondent states that items would only qualify if they are permanently fixed to the building and if they are removed they cannot be used elsewhere. Thus according to the Respondent only materials for construction would qualify and equipment will not qualify. The Respondent relies on the **Kenya Revenue Authority v Bata Shoes Limited** on strict interpretation of a Taxing statute.

32. The Respondent avers in its final Written Submissions that the Appellant imported goods which were declared under Code C490, and that the consignment contained some items which were non-qualifying for duty exemption under Part B paragraph 21 of the Fifth Schedule to the EACCMA which states, “ Section 114 (2) Duty shall not be charged on goods listed in Part B of the Fifth Schedule to this Act when imported or purchased before clearance through Customs, in accordance with any conditions attached here as set out in that Part”. The Act goes further in Paragraph 21 of the Fifth Schedule and lists “Hotel equipment” which should be engraved with a Hotel Logo in order to qualify for exemption. These are;

- i) Washing machines,
- ii) kitchen ware,
- iii) cookers,
- iv) fridges and freezers,
- v) air conditioning systems,
- vi) Cutlery
- vii) Televisions,
- viii) Carpets,
- ix) furniture,
- x) Linen and curtains

- xi) gymnasium equipment.

ISSUES FOR DETERMINATION

33. The Tribunal having heard the parties has narrowed down the issues for determination as follows:

- i. Whether or not the Appellant used exemption Regime C490, for non-exempt items contrary to part B of the Fifth schedule of EACCMA.
- ii. Whether Solar Equipment is exempt from Customs duty, as per exemption granted.
- iii. Whether or not the Appellant claimed VAT exemption on non-qualifying Items.
- iv. Whether VAT was charged at the standard rate for items that are zero rated as provided in the VAT Act Cap 476, (2012 Edition) Part B of eighth Schedule, Item number 10.

ANALYSIS AND FINDING

34. The Tribunal notes that the Respondent has given the specific items on which duty was not paid, in the revised list of the confirmed assessment. The task of the Tribunal is therefore to establish whether the items given in the list are qualifying for customs duty exemption or not by interpreting the stated sections of the EACCMA.
35. The Tribunal observes that the items confirmed for additional taxes were either declared under the wrong HC Code while belonging to an entirely different code, or items purported by the Appellant to be locally purchased but without local documentation as proof of purchase but where also the Respondent was able to show proof by citing inward

importation clearance entries for the same items and thus enabling the Tribunal to conclude that these were non qualifying imports and therefore duty was payable.

36. The Tribunal finds that in the Appellant's Appeal, the arguments relate to specific imported items qualifying for duty remission under approval given by The Minister – National Treasury. The Parties have placed divergent views before the Tribunal for the same items imported under the same conditions.
37. The test that the Tribunal has applied in determination of the qualification or otherwise is whether the items for which duty had been assessed and confirmed by the Respondent, can safely fit into the description of the items appearing in the list of the EAC Council of Ministers under CMA, which items qualify for both Duty and VAT remission subject to being stamped or engraved with the Hotel Logo. These are washing machines, kitchen ware, cookers, fridges and freezers, air conditioning systems, Cutlery, Televisions, Carpets, furniture, linen, curtains and gymnasium equipment.
38. The Tribunal also further notes that the Respondent has not raised any issue regarding the condition of marking of the items with Hotel Logo and concludes that this is not in dispute. The Tribunal has also considered the impact of declaration under regime C490 and noted that the Act does not mention this regime. The Tribunal therefore determines that this is the Respondent's internal administrative regime on definitions and classifications for revenue collection purposes. What is of relevance to the Tribunal in this Appeal is the actual items and their classification with respect to the Treasury's approval conditions and the relevant provisions in the Legislation, that is, EACCMA under CMA.

39. The Tribunal has compiled the list of disputed Imports under exemption as below and has posted against each item the classification as per the Tribunal's findings and interpretation of the EACCMA and the list of qualifying "Hotel equipment" given by the EAC Council of ministers under CMA.
40. The table defines the items assessed by entry number, HS Code, description, Duty Assessed, the Tribunal's classification and findings whether qualifying or not qualifying.

Entry.	HS Code	DESCRIPTION	ASSD ID	CLSF D	Q/ not q
3674090	85444900	3 ROLES INSULATED ELECTRICAL Wires BVR 2.5 mm 200mtrs	1,114	MAT	Not qualifying
3674090	85444900	5 ROLLS INSULATED ELECTRICAL Wires BVR 6.0 mm 500 mtrs	7,597	MAT	Not qualifying
3674090	73102990	5pcs, 2T NON PRESURIZED WATER TANKS STAINLESS STEEL	60,148	KIT ware	Qualifying
3674090	73069000	58pcs GALVANIZED PIPES	12,809	MAT	Not Qualifying
3674090	85444900	6 ROLLS	1,773	MAT	Not Qualifying

		INSULATED ELECTRICAL Wires BVR 1.5mm 500 mtrs			
3674090	39173900	200 pcs PVC PIPES FOR WIRING	30,389	MAT	Not Qualifying
3716062	73241000	FITTING WALL FOR HAND WASH BASIN WITH ACCESSIRIES DIMS 445x13x 650 mm MAKE ELECTROLUX	5,165	KIT ware	Qualifying
3716062	73242900	DRAINS SYPHON MAKE PACO	880	KIT ware	Qualifying
3716062	73241000	FITTING WALL FOR HAND WASH BASIN MAKE ELECTROLUX 445x13x650 mm	5,165	KIT ware	Qualifying
3716062	73241000	1x40 CONTAINER STC KITCHEN EQUIPMENTS PRE-WASH INFILL TOP AND BOWL	18,431	KIT ware	Qualifying

		HOOD TYPE- MAKE ELECTROLUX			
3716062	73241000	PREWASH SPRAYING – SINGLE HOLE DIMS300x200x11 50mm	4,256	KIT ware	Qualifying
3716062	73242900	2pcs WALL MOUNTED HANDS WASH BASIN MAKE ELECTROLUX STAINLESS STEEL	24,653	KIT ware	Qualifying
3716062	84213990	AIR REDUCTION KIT MODEL XC	352	KIT ware	Qualifying
3716062	84211900	PP WAFER WITH TIMER	5694	KIT ware	Qualifying
3716062	84148090	STAINLESS STEEL ISLAND HOOD WITH FILTERS AND FAN MAKE- ELECTROLUX MODEL BCV 2240DT-304	82,969	KIT ware	Qualifying
3716062	84185000	STAINLESS STEEL FRONT BAR COUNTER- MAKE- IFI	97,438	KIT ware	Qualifying

3964602	70099100	3pc mirrors	5025		Not Qualifying
3964602	85098000	SHOES POLISHING MACHINES	6,180		Not Qualifying
3964602	83081000	1 pc COAT HOOK	832		Not Qualifying
3964602	97011000	FRAMED PAINTINGS	16,605		Not Qualifying
		TOTAL ASSESSMENT	387,474		
		-ITEMS NOT QUALIFYING	82,624		
		-ITEMS QUALIFYING (kitchen)	305,150		

41. The Tribunal finds that it is not in doubt that the Respondent has unfettered powers to perform PCA after importation of any goods. It is also clear from the written law and procedure that the exemptions granted by the Treasury have to be confirmed by the Respondent so as to verify whether the listed item qualify for the remission or not under the respective preset conditions. The Tribunal however notes that from the Statute the power donated to the Respondent by the Act is to verify the quantities, the quality and the type of the items so as to either qualify or disqualify for exemption under the Treasury's approval. The Tribunal also notes that the Respondent has not raised any issues to do with these

statutory aspects, that is, quantities, quality and type of goods to prove that they are not for Hotel purposes.

42. The Tribunal finds that the Appellant has submitted that it invited the Respondent to the site to inspect the installed equipment *in situ* in order to verify where and how the equipment was used so as to make a better informed decision on the assessment but the Respondent declined such invitation.
43. The Appellant asserts that had the Respondent visited and verified the equipment as installed it would have satisfied itself that the equipment installed does indeed qualify for Duty remission under kitchenware items included in CMA list.
44. The Tribunal therefore finds that by the Respondent's action of abstaining from such verification, the Tribunal is left to conclude and make a finding on the basis of descriptions, pictures and other information and approval documents supplied by the Appellant against evidence provided by the Respondent and to apply its own independent judgment as to what qualifies or does not qualify under the written provisions of the law. In such circumstances the Tribunal has to examine the description of the equipment, the use of the equipment, where it is installed and the related services to the category of the listed items by the EAC Council of Ministers under CMA.
45. The Appellant relies on two authorities to support its arguments; the "**Astall v HMRC (2010)**" wherein the court considered the argument on purposeful interpretation of the statute, that is, purpose of Parliament in legislating on the subject. The discernible purpose here is to promote investment in tourism sector through Tourist Hotel construction and refurbishment (read equipping). To do this the Appellant needs both

materials and equipment relevant to the hospitality industry. The other authority cited by the Appellant is **Keroche Industries Limited v Kenya Revenue Authority**, where Nyamu J. ruled in favor of the predictability and certainty in governments dealing with the public under the principle of legitimate expectation which ought not to be thwarted.

46. From the evidence availed by the documents and the pictures of the installed equipment filed before the Tribunal, the Tribunal concludes that they are installed in the kitchen and related areas of the hotel in order to give service to the customers in tourism sector. In the absence of any other assertion by the Respondent, the Appellant is seen to be entitled to the exemptions as per the items marked in the above schedule as qualifying since they can be classified as kitchen ware and are marked (KIT ware) in the schedule or can be said to be materials for hotel construction or equipment to enable tidying up the Hotel and giving service to its customers. The unmarked items do not qualify and the Tribunal concludes that on these ones duty amounting to Kshs.82, 624.00 is payable, while duty amounting to Kshs.305, 150.00 is remitted.
47. The Tribunal is finds that the Commissioner has to demonstrate the solar equipment must be charged duty despite the very specific exemption provision with respect to solar powered equipment. In its written submissions the Respondent has not demonstrated why Paragraph 26 of the EACCMA does not suffice, apply or is irrelevant, but has gone ahead to submit in paragraph 15 and 16 of its response to the Appellants statement of Facts that the Appellant abused the self-assessment regime and mis-declared their imports as solar equipment leading to remission of duty which was not due to the Appellant. This statement appears to state that there was no solar equipment yet other different equipment was

declared as solar and exemption was given. The Respondent further urges the Tribunal to find the Appellant culpable and liable under Section 203 of the EACCMA. The Respondent has while responding to the Appeal at paragraph 2, asserts that no assessment was made on solar equipment. These two statements appear to be contradictory as far as import duty assessment on Solar Equipment is concerned. The Tribunal notes this glaring contradiction and faults the Respondent.

48. The Appellant in its Written Submissions quotes the Authorities in the case of *Republic v Commissioner for Income Tax ex- parte (Transami Kenya, Limited)* Whereby Justice Ojwang J. stated that: *“it may well be that there is a heading under which the Commissioner of income tax may demand tax falling broadly in that category, but it must be expressly stated to be under a different name, consistent with the Act. In the commissioner’s present demand he has not achieved the clarity required.....”*
49. The Appellant further submits that this Ruling was cited by Justice Majanja, in the case of *Republic v Commissioner of Domestic Services (Large Tax Payers Office).Ex-Parte Barclays Bank of Kenya Ltd. of 2012.* The Appellant also submits that Statutes should be interpreted in reference to their purpose.
50. The Appellant strongly points out that Section 114(2) of EACCMA, states that Duty shall not be charged on goods listed in part B of the Fifth schedule to this Act when imported in accordance with any conditions attached here as set out in that part. Paragraph 26 of Part B of the Fifth schedule specifically exempts solar powered equipment and accessories including deep cycle batteries which use or store solar power. The Tribunal agrees with the Appellant and finds that the Solar Heater equipment is specifically exempted from Duty under the EACCMA.

51. In the circumstances, the Tribunal finds the Appellants assertions on the solar equipment valid and arrives at the conclusion that Duty on solar equipment is not payable, and that the exemption was validly claimed and given as per paragraph 26 of the Fifth Schedule of EACCMA.
52. Further to the above the Tribunal finds no grounds to determine that the Appellant is culpable for mis-declaration as sought by the Respondent since the documents and procedure adopted and followed by the Appellant in seeking government's exemptions, demonstrates that the Appellant acted in good faith and in compliance with the law and procedures, seeking Governments assistance and incentive to do business in the hospitality industry, save for human mistakes or errors which can occur and be corrected as necessary.
53. The Tribunal has analyzed the goods imported by the Appellant which the Respondent avers that they do not qualify for VAT exemption are listed below showing the respective amounts of VAT assessed item by item to determine whether by definition they fall within the exemption approved by the Treasury with Copies to the Respondent on "materials and equipment," for refurbishment or renovation or whether they were indeed zero rated as per Paragraph 10 of Part B of the Eighth schedule of the VAT Act Cap. 476 of the Laws of Kenya, (now repealed), as claimed by the Appellant.
54. The Tribunal finds that under VAT Act, Eighth Schedule Part B: special goods subject to zero rating: The following goods imported or purchased before clearance through the customs or purchased before the payment of tax, generally shall be zero rated. Further at Paragraph 10: Heading: Materials and equipment for use in the construction of Tourist Hotels financed from external sources. States as follows: " *All "materials and*

equipment” excluding vehicles, The importation of which is approved by the Permanent Secretary Treasury, for use in the construction of a tourist Hotel, financed from external sources, subject to such evidence as the Commissioner may require as to the quantity, quality and type of goods required for the project”.

55. The Tribunal notes and emphasizes that the law categorically empowers the Commissioner to verify the quantity, the quality and the type of the imported items and pass them as qualifying if and only if they have been approved by the Permanent Secretary – Treasury, and if they fall under the description materials and equipment, and whether they can be used for the proposed project, that is, construction or refurbishment of the Hotel, as long as the financing is from external sources.
56. The Tribunal finds that the Respondent has not contested either the quality or the quantities or even the type of the goods imported by the Appellant or the imports for the Tourist Hotel construction was financed from external sources but only pointed out that the goods were declared under wrong Code (C490) which exempts everything, and has waited until two years later to detect that some of the goods included in the declared list do not qualify for VAT exemption. The Respondent has not specifically assigned reasons why the assessed goods do not qualify but has only selected a number of items from the long list of all the Appellants materials and equipment.
57. The Tribunal finds that the Respondent in its written submissions has tried to take refuge in the word (Construction) to argue that some of the imports were not for construction that is, not fixed to the fabric of the Hotel Building hence not qualifying for exemption. The Tribunal however interprets the provision in the law on the basis of what is written in the

subject of Paragraph 10 of Eighth schedule. It addresses *“materials and Equipment”*. It is obvious from this wording that the objective is to encourage construction and equipping of tourist class Hotel. Both *“Material and Equipment”* are necessary in order to accomplish a sound investment such as a Hotel project which will attract guests of tourist class. The upshot of the foregoing is that without equipment there is no Hotel but only an empty house.

58. For the foregoing reason, the Tribunal’s interpretation is that the purpose behind the exemption provision in Part B of the Eighth schedule at paragraph 10 of the VAT Act Cap 476 (now repealed) is to encourage investment in the hospitality industry so as to promote Tourism and consequently boost the Country’s trade in this sector together with the attendant growth benefits to the Kenya’s economy.
59. The Tribunal has considered the Principle of legitimate expectation in Governments dealings with its citizens, (The Public) that there should be certainty and predictability such that what the Government has awarded to its citizens shall not be withdrawn or be taken away without good reason. In its findings, the Tribunal relies on the ruling in the matter *of Keroche Industries* wherein the principle of *“legitimate expectation”* was espoused and the court determined that this legitimate expectation ought not to be thwarted.
60. From the foregoing reasoning and interpretation hereinabove, the Tribunal has arrived at its independent ruling based on its findings on each of the items listed below, and has marked the respective columns with its findings on items that should be subjected to VAT , those that do not qualify and that are zero rated.

61. The Columns show Entry number, HS Code, Description, VAT amount assessed, Classification of the goods with respect to the qualifying provisions of the law, and the Tribunal's findings as to whether qualifying for exemption or not, depending on whether they fall under the CMA listing or Zero rating provided by Paragraph 10 of the Eighth Schedule Part B of the VAT Act Cap 476 now repealed.

ENTRY	HS CODE	DESCRIPTION OF ITEM	ASSD VAT	CLASS FD	Qualifying/ Zero Rated
1787286	85285990	SAMSUNG HOSPITALITY SAMSUNG BRAND HOTEL INTERACTIVE TV SETS MODEL HG32AA475RWXZN HG40AA570LWXZN-	400,357	CMA	Qualifying
3468243	83089000	55-pcs STAFF RACK Model AGJ12B	6,017	EQUIP	Zero rated
3468243	94016900	40-pcs dining chairs model no.L3107	6,877	EQUIP	Zero rated
3469448	66011000	6-pcs OUT DOOR UMBRELLAS Model YG-U179 3.5 M	6,885	EQUIP	Zero rated
3469959	94016900	2-SETS SOFA MODEL NO; B162 (1 2 3)	11,101	EQUIP	Zero rated
3469959	94016900	8-SETS OUTDOOR FURNITURE (1 PC Table 4-PCS Chair	14,708	EQUIP	Zero rated
3469959	94016900	10-pcs DINING	1,926	EQUIP	Zero rated

		CHAIR Model No: L3107 SIZE: 450x580x470x900H			
3494489	94016900	70-pcs DINING CHAIR MODEL NO:L3107 SIZE 450x580x470x900- PART IDF No.E1203041312 REF:PRE-VERIFI	10,682	EQUIP	Zero rated
3494489	57050000	850SQM CARPET MODEL NO.ZM9- 011 SIZE 2MX26LX56M PART IDF NO. E1203041312, REF PREVERIFIED CANCEL	137,556	CMA	Qualifying
3615548	94034000	1 SET KITCHEN CABINETS MATERIAL MDF/MABLE	45,018	CMA	Qualifying
3615548	94036000	30PCS ROUND TABLE MATERIAL MDF/METAL	5,749	EQUIP	Zero rated
3616011	94032000	2PCS DANCE FLOOR TROLLEY	418	EQUIP	Zero rated
3616011	94036000	40 PCS LONG WOODEN TABLE	13,319	EQUIP	Zero rated
3616011	84185000	55-PCS MINI BAR MODEL NO. MB-30B	17,036	EQUIP	Zero rated
3616011	83030000	55-PCS SAFE BOXES MODEL OTB-2045 MB	15,333	EQUIP	Zero rated

3674065	94035000	1X20 CONTAINER STC 204 PACKAGES MDF WARDROBES SIZE1900*600*2175m m (PART IDF) MDF	205,624	MAT	Zero rated
3716062	84388000	AIR COOLED ICE CUBE MACHINE MODEL FG90A, MAKE-ELECTROLUX	34,805	EQUIP	Zero rated
3716062	73269090	STAINLESS STEEL BINS FOR BAIN MARIE ½,1/3/AND 1/1GN WITH LIDS	20,436	EQUIP	Zero rated
3716062	84385000	MEAT MINCER MODEL: TC12E STAINLESS STEELHEAD	11,195	CMA	Qualifying
3716062	84385000	MEAT SLICING MACHINE MODEL MIRRAA300 YOA CE PROFESSIONAL	12,961	CMA	Qualifying
3716062	84386000	VEGETABLE CUTTER – MANUAL MODEL ORTOLINA	1,409	CMA	Qualifying
3716062	84386000	VEGETABLE BOWL PROCESSOR MODEL C6	10,519	CMA	Qualifying
3716062	84386000	VEGETABLE CUTTER WITH ACCESSORIES MAKE-SIRMAN TM- INOX	15,759	CMA	Qualifying

3716062	83024900	2PCS SHOWER KIT- MODEL 202	4,226	MAT	Zero rated
3716062	84388000	HAND DOUGH SHEETER MODEL: LMP400, MAKE ELECTROLUX	22,521	CMA	Qualifying
3716062	84798200	PLANETARY MIXER TABLE MODEL PLUTON 7 MAKE SIRMAN,CAPACITY 7 LTRS	12,209	CMA	Qualifying
3716962	84388000	PIZZA MAKER- MODEL SIRIO 2 CHROMED 120W	5,560	CMA	Qualifying
3716062	76152000	ALUMINIUM AND POLYETILINE SHELVES RACK	31,180	EQUIP	Zero rated
3716062	84798200	SPYRAL MIXER- MAKE SIRMAN MODEL HERCULES 20	21,939	CMA	Qualifying
3716062	84185000	SPLIT REFRIGILATING UNITS MODEL ;STM016Z001S, 220V/400V	72,504	CMA	Qualifying
3716062	73239900	ONE UNIT STAINLESS STEEL HOT PASS THROUGH CUPBOARD, MODEL MTC1800, MAKE- ELECROLUX	29,302	CMA	Qualifying

3716062	73218900	DROP IN REFRIGILATED PLATE- MAKE TECFRIGO, MODEL: SINFONIA- 4BRINA	32,683	CMA	Qualifying
3716062	73218900	1 UNIT DROP IN WARM/BUFFET BAIN MARIE PLATE- MAKE TECFRIGO MODEL SINFONIA- 6BM	43,768	CMA	Qualifying
3716062	82083000	SHAFT WITH EMULSIFYING KNIVES FOR C6.	770	EQUIP	Zero rated
3716062	82083000	SHAFT WITH KNIVES TO MIX DOUGH FOR C6	770	EQUIP	Zero rated
3716062	73239300	STAINLESS STEEL OPEN STAND WITH SUPPORT TRAY SLIDES- MODEL XR714	9,392	EQUIP	Zero rated
3716062	73239300	DW TABLE UNLOADING AND ONLOADING STAINLESS STEEL MAKE ELECTROLUX	5,842	EQUIP	Zero rated
3716062	85094000	HAND HELD MIXER MODEL: VORTEX 750 WITH SHAFT 45MM.	7,044	CMA	Qualifying

3716062	73239900	1PC STAINLESS STEEL DOUBLE OVERSHELF AND HEATING - MODEL PA218/E2/S- MAKE: ELECTROLUX DIMS 1800X350X65	18,295	CMA	Qualifying
3716062	85423900	TEMPERATURE CONTROLLER DOUBLE PRR WITH TIMER, MAKE SIRMAN	8,453	CMA	Qualifying
3716062	85167900	HOT MILK DISPENSER	10,481	CMA	Qualifying
3716062	85167200	BREAD TOASTER BREAKFAST ROLLER	11,552	CMA	Qualifying
3716062	85167100	EXPRESSO CAPPUCINO COFFEE MACHINE MAKE - LACIMBALI, MODEL- CASADIO	33,096	CMA	Qualifying
3716062	85167100	COFFEE MAKER, FULLY AUTOMATIC, MODEL-SAEKO ROYAL CAPPUCINO	31,932	CMA	Qualifying
3716062	85167100	COFFEE FILTER MACHINE MAKE- BRAVILORBONAMAT, MODEL-MONDO 2	11,946	CMA	Qualifying
3716062	85166000	INDUCTION 2 ZONES, SIDE BYSIDE	24,418	EQUIP	Zero rated

		MAKE- ELECTROLUX			
3716062	85166000	CHAFFING DISHES, MAKE-TIGER SMART	15,402	EQUIP	Zero rated
3716062	85166000	RICE COOKER MODEL PANASONIC42-GHXN	3,005	CMA	Qualifying
3716062	85166000	HOTPLATES WITH 2 GLASS/STAINLESS STEEL DECANTERS- MAKE -BRAVILLOR BONAMAT, MODEL HP2	2,648	CMA	Qualifying
3716062	85165000	MICROWAVE OVEN, MODEL PANASONIC NN-GH668M	8,171	CMA	Qualifying
3716062	85165000	CONVECTION OVENS 10GN,1/1 MAKE UNOX,MODEL CHEFTOP	71,903	CMA	Qualifying
3716062	85098000	BLENDER, MODEL: SATURINO INOX 450W, CAPACITY1.5 LTR.	1,597	CMA	Qualifying
3716062	84172000	ELECTRIC BAKERY CONVECTION OVEN MODEL: BAKERLUX	46,958	CMA	Qualifying
3716062	85094000	COFFEE PEPPER GRINDER,MODEL: MCF0.8 HP	6,912	CMA	Qualifying
3716062	85094000	CITRUS JUICER MODEL: APPOLLO CHROMED	3,381	CMA	Qualifying

3716062	85094000	WHISKY MIXER	2,874	EQUIP	Zero rated
3716062	84221900	NHT-HOOD DISH- WASHER,1200D/H MAKE: ELECTROLUX, DIMS, 748X833X1515MM	52,218	CMA	Qualifying
3716062	84213990	AIR REDUCTION KIT MODEL XC	620	EQUIP	Zero rated
3716062	84211900	PP WATER WITH TIMER	10,021	EQUIP	Zero rated
3716062	84198900	ELECTRIC KNIFE STERILIZER	5,071	CMA	Qualifying
3716062	84185000	MULTI SYSTEM COMPLEX FOR COLD ROOMS DIVIDED INTO NO.1 CHILLER AND NO 1 FREEZER	140,499	CMA/ EQUIP	Qualifying
3716062	84185000	STAINLESS STEEL TIGER COLD DISPLAY TABLE TOP	8,359	EQUIP	Qualifying
3964602	85098000	SHOE POLISHING MACHINES	4,944	EQUIP	Zero rated
3964602	83081000	1PC COAT HOOK	1,464	EQUIP	Zero rated
3964602	97011000	FRAMED PAINTINGS	13,284	EQUIP	Zero rated
3964602	94016100	SAFA SET	2,292	EQUIP	Zero rated
3964602	94018000	OFFICE CHAIRS FABRIC FINISH	7,023	EQUIP	Zero rated

3964602	94018000	OFFICE CHAIRS FABRIC FINISH	5,766	EQUIP	Zero rated
3964602	94018000	CHAIRS - WOODEN	6,099	EQUIP	Zero rated
3964602	94033000	FILE CABINET - MDF	628	EQUIP	Zero rated
3964602	94033000	OFFICE DESK	1,201	EQUIP	Zero rated
3964602	94033000	MEETING TABLE	3,013	EQUIP	Zero rated
3964602	94033000	FILE CABINET - MDF	3,493	EQUIP	Zero rated
3964602	94033000	FURNITURE; OFFICE WORK STATION	19,406	EQUIP	Zero rated
3964602	94036000	DINNING TABLE SET	5,822	EQUIP	Zero rated
3964602	94036000	SHOES BOARDS	2,440	EQUIP	Zero rated
		TOTAL VAT ASSESSED	1,912,081		

62. On the 26th of May, 2017 when the matter came up for further hearing pursuant to the orders of the Tribunal, the parties were directed to address the issue of *“materials and equipment”* for tourist hotels financed from *“external sources”* by way of submissions and duly complied. The said issue had come to the notice of the Tribunal prior to the delivery of the judgement where it was noted that none of the parties had addressed it.
63. It is the Tribunal’s finding that the items listed do qualify for VAT exemption since they are eligible and fall under items listed under CMA by the Council of Ministers under EACCMA whereby they qualify for both

Duty and VAT exemptions as per approval by the Minister in Charge of National Treasury, or they fall under either "*materials or equipment*" for construction and refurbishment (equipping) of a Tourist Hotel under the general umbrella of zero rating given as provided for under Paragraph 10 of the Eighth Schedule of the Value Added Tax, Cap 476 of the Laws of Kenya, now repealed.

64. The Tribunal's further finds that the Respondent applied standard rate of VAT on materials and equipment imported by the Appellant for use in the Hotel while under the written law as provided for under the Eighth Schedule of the VAT Act Cap 476 of the laws of Kenya, they are actually zero rated.

TRIBUNAL DECISION

65. The Tribunal having entered the above findings holds that the Appeal partially succeeds as follows;
- i. The unmarked items do not qualify for exemption of import duty and the duty of Kshs. 82,624.00 is due and payable to the Respondent and the items that qualify for import duty exemption and the demanded duty of Kshs. 205,150.00 is not due and payable and therefore remitted.
 - ii. The Solar heater equipment is exempt from Duty as provided for under EACCMA.
 - iii. The Assessment on VAT on goods imported by the Appellant as listed in paragraph 61 above are allowed as they qualify for exemption on Duty and VAT as listed under CMA by the Council of Ministers under EACMMA and zero rated items are allowed.
 - iv. Each party to bear its own costs.

DATED and DELIVERED at NAIROBI this...21st...day of ...February...2018

In the presence of:-

.....VINCENT MUTAI.....for the Appellant

.....KEMUNTO OCHAKO.....for the Respondent

.....
MOSES B. OBONYO
CHAIRPERSON

.....
BONIFACE AWUOR DIMMO
MEMBER

.....
DANIEL TANUI
MEMBER

.....
FRANCIS K. KIVULLI
MEMBER

.....
GABRIEL KITENGA
MEMBER