REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 170 OF 2020

AIRKENYA EXPRESS LIMITED .....APPELLANT

-VERSUS-

COMMISSIONER OF CUSTOMS & BORDER CONTROL..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company engaged in the aviation industry within the Republic of Kenya.

2. The Respondent is a principal officer appointed in accordance with Section 13 of the Kenya Revenue Authority Act.

3. On 24 January 2020 the Respondent issued a demand to the Appellant for Kshs. 14,330,770.00under Section 135 of the East African Community Custom Management Act 2004 ("EACCMA") following a post clearance desk audit of the Appellant's declarations covering the period January 2015 to December 2019.

4. The Appellant responded to the demand of 24th January 2020 by a letter dated 21st February 2020 from its tax agent, RSM Eastern Africa Consulting Limited, in which the Appellant applied for an extension of time to respond to the audit demand. The extension of time was approved to the 11th March, 2020. The Appellant responded to the audit demand substantively by a letter dated 10th March 2020 from RSM East African Consulting Limited.

5. The Respondent replied vide a letter dated 24th March, 2020 reaffirming its previous assessment and stating that the computation of taxes was correct and requested the Appellant to immediately settle the amount assessed. The Respondent also asked the Appellant to furnish proof of the payments made for any particular entries that had been included in the audit demand.

6. The Appellant being dissatisfied with the Respondent's decision filed a notice of appeal dated 17th April, 2020 against the whole decision.

THE APPEAL

7. The Appellant cited the following as its grounds of Appeal in its Memorandum of Appeal dated 29th April, 2020 filed on the 21st July, 2020.

   a) That the impugned tax decision was illegal irrational contradictory insofar as it purports to demand payment of import declaration fees under Regulation 38(A) (5) of the Customs and Excise Regulations from the Appellant who was exempted from the import declaration process for that period pursuant to the provisions of Regulation 38(A)(3) of the Customs and Excise Regulations read with the Sixth Schedule of the Customs and Excise Act.

   b) That the impugned tax decision is illegal, unreasonable and plainly irrational for suggesting that import declaration fee should be paid by importers who are by law exempted from the import declaration process.

   c) That the impugned tax decision is illegal for purporting to administer and enforce tax collection contrary to and in contradiction to provisions in written laws relating to revenue, amounting to arbitrary taxation /taxation by intendment.

d) That the impugned tax decision is illegal for purporting to compute principal IDF against the Appellant at the enhanced rate of 2.5% instead of the 2% rate stipulated in the Miscellaneous Fees and Levies Act, 2016 for the period starting 21st September 2016 resulting in an illegal overcharge of KES 4,891,401/-

e) That the impugned tax decision is illegal and unlawful for purporting to ignore proven payment of KES 139, 007/- by the Appellant as IDF fees resulting in an illegal overcharge.

f) That the impugned tax decision is illegal for charging excessive sums as late payment interest computed on principal IDF that was in itself not payable in law for the period before 20th September 2016; and that in any event at higher rates and based on wrong computation for the period after 21st September 2016.

g) That the impugned tax decision is illegal and unprocedural for failing to consider and give any reasoned decision or response to the Appellant's merited application for waiver of late payment interest made in the letter of 10th March 2020.

h) That the impugned tax decision is illegal for purporting to demand payment of the arbitrary and excessive some of KES 14, 330,770/- as IDF without legal basis and based on erroneous computation.

i) That the impugned tax decision violates the Appellant's rights under Articles10, 27, 47 and 48 of the Constitution and is therefore illegal and void.

j) That the impugned tax decision violates the Appellant's legitimate expectation to proper administration of tax law by the Respondent strictly in accordance with the provisions of the Tax Procedures Act, to its detriment.

The Appellant's Case

8. The Appellant's case is premised on the hereunder material documents:-

   a) Appellant's Statement of Facts dated 29th April, 2020 together with the documents filed therewith on the 21st July, 2020;

   b) The Appellant's Written Submissions dated 25th March, 2021 filed on the 25th March, 2021 together with the legal authorities attached thereto.

9. The Appellant asserts that the mandate of the Kenya Revenue Authority under Section 5(1)(a) of the Kenya Revenue Authority Act is to administer and enforce provisions of written laws relating to revenue as specified in Part 1 of the First Schedule to the Kenya Revenue Authority Act.

10. The Appellant contends that the Respondent has no power to make or promulgate new tax laws or supplement the provisions of existing tax laws. The Appellant relies on Article 210 of the Constitution which states that: ***"No tax or licensing fee may be imposed waived of varied except as provided by legislation."***

11. The Appellant argues that unlike the Constitution of Kenya, 2010, the repealed Constitution ("the Old Constitution") allowed imposition of taxes by the executive arm of government through regulations; and that accordingly, the Customs and Excise Regulations were promulgated by the Minister for Finance in 1996.

12. The Appellant submits that by dint of Regulation 38A(3) which was introduced by Legal Notice number 120 of 1996 as an amendment to the Customs and Excise Regulations, importers of goods specified in the Sixth Schedule of the Customs and Excise Regulations, which included aircrafts and aircraft parts, were exempted from the requirement to undertake import declaration prior to shipment.

13. Regulation 38 A(3) provides that:

> *"an importer of goods other than the goods specified in the sixth schedule shall prior to the shipment of such goods complete an import declaration form inform C61 and present it to the office in Kenya of a pre-shipment inspection agent operating at the place where such goods are purchased."*

14. The Appellant submits that Regulation 38A(5) of the Customs and Excise Regulations is a procedural provision for the routine presentation of IDF forms. The Appellant argues that Regulation 38 A (5) is to be read together with Regulation 38A(3) since it is expressly made subject to Regulation 38A(3). Regulation 38A(5) provides that:

> *"An importer shall present a copy of the import declaration form completed under paragraph (3) to Customs at the time of entering the goods, together with an import declaration fee which shall be 2% of the dutiable value of the goods reduced by an amount equal to the application fee paid under paragraph(3)."*

15. The Appellant contends that import declaration fees could therefore only be paid by persons presenting import declaration forms to customs because Regulation 38A(5)provided that the import declaration form had to be accompanied by import declaration fees and that therefore IDF fees could only be paid by persons presenting IDF Forms to customs.

16. The Appellant submits that upon the promulgation of the Constitution of Kenya, 2010 the Customs and Excise Regulations were rendered unconstitutional and therefore null and void from August 2010. The Appellant argues that this is why the Miscellaneous Fees and Levies Act Number 29 of 2016 was passed by Parliament to provide a legislative framework for the levying of import declaration fees and other levies.

17. The Appellant submits that therefore prior to 20th September 2016 importers of aircrafts and aircraft parts were exempt from the import declaration process, and accordingly had no obligation to pay import declaration fees. After the commencement of the Miscellaneous Fees and Levies Act on 21st September 2016, IDF was levied on aircraft parts at a rate of 2% of their customs value.

18. The Appellant submits that it is illegal, irrational, and a plain negation of the clear legislative intent to require a party who had been expressly exempted from the import declaration process to pay IDF under the same regime. According to the Appellant, import declaration fee was a fee payable by importers who are required by law to undertake import declaration and it is therefore preposterous to argue that persons who are exempted from undertaking import declaration should nevertheless pay import declaration fees

19. The Appellant argues that having been expressly exempted under the Sixth Schedule of the Customs and Excise Act, importers of aircrafts and aircraft parts were not required to present an import declaration form or pay IDF for the exempted goods as per the provisions of Regulation 38A(3) of the Customs and Excise Regulations whether read alone or read together with Regulation 38A(5).

20. Based on this, the Appellant submits that there was no legal obligation to pay any import declaration fees between August 2010 and September 2016 and that therefore the Respondent cannot demand for the payment of any import declaration fees from the Appellant during that period.

21. The Appellant therefore submits that IDF was not payable for importation of aircraft and aircraft parts for the period between January 2015 to September 2016 and that the Respondent erred by purporting to illegally demand principal IDF for the period between 14th January 2015 to 20th September 2016 . The Appellant submits that in addition, there was no

legal basis for imposition of any late payment interest for any period before 21st September 2016.

IDF Demand from 21st September, 2016

22. The Appellant submits that upon commencement of the Miscellaneous Fees and Levies Act, 2016 on 21st September 2016 only aircrafts remained exempt from IDF under Part II of the Second Schedule to the Miscellaneous Fees and Levies Act, 2016. Aircraft parts were not listed as exempt goods in Part II of the second schedule.

23. IDF therefore became payable on aircraft parts at the rate of 2% of the customs value as set out in Section 7 of the Miscellaneous Fees and Levies Act, 2016 which provides that:

> *"1. There shall be paid a fee to be known as the import declaration fee on all goods imported into the country for home use.*
>
> *2. The fee shall be at the rate of 2% of the customs value of the goods and shall be paid by the importer of such goods at the time of entering goods for home use"*

24. The Appellant submits that instead of the Respondent applying the rate of 2%, it has used a higher rate of 2.5% in the impugned tax decision in breach of Section 7 of the Miscellaneous Fees and Levies Act, 2016 and as a result has overcharged the Appellant with IDF off Kshs. 4,891, 401/=. The computation of this amount was set out as appendix 1 to the letter dated 11th March 2020 submitted by RSM Eastern Africa Consulting limited on behalf of the Appellant.

25. The Appellant further submitted that the Respondent failed to take into account 11 instances in which the Appellant had settled IDF to the tune of Kshs. 139,007/-.

26. The Appellant therefore contends that the IDF due from it is Kshs.749 546.00 as tabulated below:

Details	Amount (KES)
IDF Demanded by KRA	5,779,954
Over-charged IDF – computed in the letter dated 10th March 2020	(4,891,401)
IDF Paid	(139,007)
IDF Due	**749,546**

Illegal Charge of Late Payment Interest

27. The Appellant argues that the impugned tax decision violates Section 38(2) of the Tax Procedures Act because it imposes late payment interest based on principal IDF which was not payable for the period before 21stSeptember 2016.

28. The Appellant also submits that the Respondent's decision to charge late payment interest at 2% per month contravenes Section 38(1) of the Tax Procedures Act which prescribes a rate of 1% per month.

29. The Appellant further submits that the Respondent's failure to respond or to reply to the Appellant's application for the waiver of late payment interest made in the letter of 10th March 2020 was illegal and in breach of Section 89(6) and (7) of the Tax Procedures Act.

Breaches of Constitutional Provisions and Statutes

30. The Appellant argues that the Respondent breached Constitutional and statutory provisions and also violated the Appellant's Constitutional rights as follows:-

    i. The Appellant contends that the Respondent violated Article 10 of the Constitution by failing to demonstrate dignity, equity,

social justice, inclusiveness, equality, **non-discrimination good governance integrity transparency and accountability** (emphasis supplied) in its decision making process. The Appellant argues that the Respondent's decision to demand payment of the IDF of Kshs. 14, 330,770/= was in breach of the Customs and Exercise Act and the Regulations made there under, which exempted importers of aircraft and aircraft parts from the import declaration process for the period up to September 2016.

ii. The Appellant further submits that the Respondent has breached Article 27 of the Constitution, 2010. The Appellant argues that equality under the law includes enjoyment of all right and fundamental freedoms. The Appellant avers that the Respondent has persisted in issuing demands for payment without any regard to the Appellant's right to procedural fairness and a breach of natural justice. The Appellant further argues that the Respondent has discriminated against the Appellant by not giving any written reply to the Appellant's application for waiver of penalty and a late payment interest made in the letter of 10th March 2020.

iii. The Appellant argues that the Respondent also breached Article 47 of the Constitution on fair administrative action by ignoring mandatory statutory requirements. The contention is that the Respondent failed to accord the Appellant a hearing on the Appellant's application for waiver of interest which was presented under Section 89 of the Tax Procedures Act; the Respondent acted arbitrarily and without jurisdiction in demanding IDF for the period before 21stSeptember 2016; and that the Respondent acted illegally by assessing the Appellant for IDF dating back to the period before 21st September 2016 which was contrary to Regulation 38 of the Customs and Excise Regulations read with the Sixth Schedule to the Customs and Excise Act.

31. The Appellant also submits that the Respondent acted *ultra vires* its mandate by demanding for taxes where liability does not lie in law. The Appellant argues that the Respondent acted arbitrarily and exceeded its mandate of collecting taxes and was instead imposing new procedures for tax collection that are not provided for in tax legislation.

32. The Appellant further submitted that the Respondent breached the Appellant's legitimate expectation. The Appellant argues that procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advancing a decision being made. The Appellant argues that the Respondent was required by law to strictly adhere to provisions of the Tax Procedures Act including Section 89(7)on the issuance of a decision on a formal and merited application for waiver of late payment interest.

33. The Appellant contends that the Respondent's decision further violates its substantive legitimate expectation. The Appellant argues that having provided clear documentation supporting the assertion that IDF had been overcharged, the Respondent still persisted to demand the IDF and the late payment interest contrary to law.

The Appellant's Prayers

34. The Appellant prays that the Tribunal:

a) Allows the Appeal.

b) Annuls and sets aside the impugned tax decision on the grounds cited in the Memorandum of Appeal as well as the information contained in the Statement of Facts.

c) Awards the costs of the Appeal to the Appellant.

d) Makes such further orders as befits the end of justice in this case.

THE RESPONDENT'S CASE

35. The Respondent's case is premised on the hereunder material documents:-

a) The Respondent's Statement of Facts dated 3rd June, 2020 together with the documents filed therewith on the 4th June, 2020; and

b) The Respondent's written submissions dated 25th March, 2021 filed on the 26th March, 2021.

36. The Respondent framed five issues for determination which formed the basis of the Respondent's submissions in opposition to the Appeal as follows:

a. Is an importer of aircraft parts exempt from filling the import declaration form and/or paying the import declaration fee?

b. Did the Respondent calculate IDF wrongly?

c. Which law governs the rate for late payment interest?

d. Whether legitimate expectation can accrue in view of clear statutory provisions?

e. Whether there was a breach of the Appellant's Constitutional rights?

a. Is an importer of aircraft parts exempt from filling the import declaration form and or paying the import declaration fee?

37. The Respondent submits that the Appellant misconstrued the provisions of the law on imposition of IDF on aircraft parts. The Respondent argues that a reading of Section 7 of the Miscellaneous Fees and Levies Act, 2016 as well as Regulation 38A of the Customs and Excise Regulations shows that the items with respect to which the exemption of payment of import declaration fee applies do not include the aircraft parts imported by the Appellant.

38. The Respondent relied on Regulation 38A of the Customs and Excise Regulations which provides that:

> ***"(1) The imported goods specified in the Fifth Schedule shall be subject to pre-shipment inspection in accordance with Section 127D of the Act.***
>
> ***2) The Commissioner shall notify in the Gazette the name of every person appointed as a pre-shipment inspection agent under the Act and shall specify in relation thereto the countries or regions at which such person shall conduct pre-shipment inspection.***
>
> ***(3) An importer of goods other than the goods specified in the Sixth Schedule shall, prior to shipment of such goods, complete an import declaration form in Form C62 and present it to together with an application fee of five thousand shillings to the office in Kenya of a pre-shipment inspection agent operating at the place where such goods were purchased.***
>
> *(4) On receipt of an import declaration form and the import declaration fee under paragraph (3), the pre-shipment inspection agent shall, where the respective goods are subject to pre-shipment inspection, proceed to inspect such goods in accordance with the provisions of the Act: Provided that no import declaration fee shall be charged in respect of goods intended for use in the manufacture of goods for export except the minimum processing fee of five thousand shillings.*
>
> *(5) An importer shall present a copy of the import declaration form completed under paragraph (3) to Customs at the time of entering the goods, together with an import declaration fee which shall be two per cent of the dutiable value of the goods reduced by an amount equal to the application fee paid under paragraph (3).*

Provided that no import declaration fee shall be charged in respect of goods-

(a) imported into Kenya from any of the East African Community partner states that satisfy the East African Community rules of origin

(b) intended for use in the manufacture of goods for export except the minimum processing fee of 5000 shillings"

39. Section 7 of the Miscellaneous Fees and Levies Act, 2016 states that:

"1) *There shall be paid a fee to be known as the import declaration fee, on all goods imported into the country for home use.*

2) The fee shall be at the rate of two per cent of the customs value of the goods and shall be paid by the importer of such goods at the time of entering the goods for home use.

3) Despite subsection (1)-

a) import declaration fee shall not be charged on the goods specified in Part A of the Second Schedule when imported or purchased before clearance through customs; or

b) goods imported under the East African Community Duty Remission Scheme shall be charged import declaration fee of ten thousand shillings at the time of entering the goods for home use.

..."

40. The Respondent submits that the Customs and Excise Regulations allow some importers not to fill the import declaration form prior to importation of the goods but requires payment of the import declaration fee by every importer; save for goods imported from the East African Community partner states and for goods intended for use in the manufacture of goods for export.

41. The Respondent argues that the list of importers who are not required to fill the import declaration fee prior to importation has no bearing on the requirement to pay IDF. The Respondent submits that such importers would still be required to fill the import declaration form after goods have been imported, during clearance with the Respondent, and pay the full import declaration fee; and that the Appellant had indeed paid such fees on several custom declarations. The Respondent contends that the demand to the Appellant was therefore raised from the declarations for IDF not paid at the time of customs clearance.

42. The Respondent contends that in both the Customs and Excise Regulations and the Miscellaneous Fees and Levies Act, 2016 IDF is charged as a percentage of the customs value of goods imported for home use. The Respondent submits that prior to 21st September 2016 the IDF was charged at the rate of 2.25% or 5000 shillings whichever is higher in line with Legal Notice Number 100 of 2007. After the Miscellaneous Fees and Levies Act of 2016 was passed the rate was revised to 2% of the customs value.

43. The Respondent argues that in accordance with Section 24 of the Interpretation and General Provisions Act the Appellant was bound by the law and that therefore the submission that the Regulations promulgated by the Minister of Finance in 1996 became void at the promulgation of the Constitution is misleading. Section 24 provides that:

"Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder"

44. The Respondent further argues that the Appellant is estopped from arguing that IDF is not payable because the Appellant was all along paying IDF and

cannot therefore allege to have been mistaken. In support of this assertion the Respondent referred to the schedule attached to its letter dated 24th March, 2020 setting out the computation of the IDF demanded of Kshs. 14,330,771.10.

b. Whether the Respondent calculated the IDF wrongly?

45. The Respondent argues that in its letter of 24thMarch 2020 it informed the Appellant that the calculations of the total taxes were correct and in accordance with the law; but that it also required the Appellant to provide proof of payment for particular entries for any of the amounts demanded before expiry of the demand period.

46. The Respondent submits that the payment authorization forms provided by the Appellant did not add up to the figures stated by the Appellant. The Respondent further averred that some of the payment authorization forms for instance 2016JKA872502 for entry number 2016JKA2881856 were for payment of taxes of undeclared items.

47. The Respondent submits that the Appellant therefore failed to provide evidence of the alleged payments and that the Appellant has also failed to demonstrate any such payment in this Appeal. The Respondent argues that it was therefore left with no choice but to confirm the amount demanded and to apply late payment interest.

c. Which law governs the late payment interest?

48. The Respondent submits that the Tax Procedures Act does not apply to matters governed by EACCMA. Reliance is placed on Section 2 of the Tax Procedures Act which provides that: "*unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures under this act shall apply.*"

49. The Respondent submits that EACCMA is both the substantive and procedural law and that by virtue of Section 2 of the Tax Procedures Act (the TPA), the TPA has been ousted from applying to matters of customs.

50. The Respondent argues that Section 2 of the TPA does not include EACCMA in its definition of tax law and that accordingly it was correct in charging interest at 2% per month for late payment as set out in Section s 225 and 249 of the EACCMA.

51. The Respondent further submits that the Appellant's application for waiver of interest did not meet the legal threshold required by Section 249(2) of EACCMA which provides for the Respondent's discretion.

d. Whether legitimate expectation can accrue in view of clear statutory provisions?

52. The Respondent argues that a legitimate expectation cannot be created where there is conduct inconsistent with a clear provision of law. The Respondent submits that the Appellant was strictly bound by the provisions of EACCMA and not the TPA. The Respondent reiterates that the definition of tax law under the TPA does not include EACCMA.

53. The Respondent relies on the Supreme Court decision in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** where the court stated as follows:-

> *"[268] An illuminating consideration of the concept of "legitimate expectation" is found in the South African case, South African Veterinary Council v. Szymanski 2003(4) S.A. 42 (SCA) at [paragraph 28]: the Court held as follows:*
>
> ***"The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation include the following:***

The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable: Administrator, Transvaal v. Traub (supra [1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).

The representation must have been induced by the decision-maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney- General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h - j.

The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch v. Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G."

This was also referred to with approval in ***Walele v. City of Cape Townand Others;*** *2008 (6) S.A 129 (C.C.) paragraph 41.*

[269] The emerging principles may be succinctly set out as follows:

1. *there must be an express, clear and unambiguous promise given by a public authority;*

2. *the expectation itself must be reasonable;*

3. *the representation must be one which it was competent and lawful for the decision-maker to make; and*

4. ***there cannot be a legitimate expectation against clear provisions of the law or the Constitution.***

...

[301] In this context, it is clear that the Court of Appeal's order, that the 1st, 2nd and 3rd Respondents be granted a BSD licence without undergoing the procurement process, lacks a foundation in law. There cannot be a legitimate expectation for a grant of a licence by the 1st Appellant without adherence to statutory or constitutional provisions. It has been held in several persuasive authorities, R. v. Devon County Council, ex parte Baker & Another[1995] 1 All. E.R. 73; R. v. Durham County Council, ex parte Curtis & Another[1992] 158 LGRev R 241 (CA) andR. v. DPP ex p. Kebilene[1993] 3 WLR 972, ***that no legitimate expectation can override clear statutory provisions. The Appellate Court's decision, thus, stood in contradiction to Article 227 of the Constitution, and Section 27(1) of the Public Procurement and Disposal Act. With due respect, there was no lawful basis for the orders that the 1st, 2nd and 3rd Respondents be granted a BSD licence as a matter of right."***

(Emphasis supplied)

54. The Respondent therefore submits that the Appellant's contention that it had a legitimate expectation that the Respondent would adhere to the TPA would amount to a contravention of an express provision of the law and cannot therefore be said to be a legitimate expectation.

e. Was there a breach of the Appellant's Constitutional rights?

55. The Respondent submits that a perusal of the Appellant's Statement of Facts does not reveal any substantive violation in the Respondent's actions. Reliance is placed on the case of **Anarita Karimi Njeru v Republic [1979]eKLR** where the court stated:-

> *"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with* ***a reasonable degree of precision*** *that of which he complains,* ***the provisions said to be infringed,*** *and the manner in which they are alleged to be infringed."*

56. The Respondent submits that administering the provisions of EACCMA cannot amount to a violation of the Appellant's rights as guaranteed by the Constitution. The Respondent relies on the functions of the Kenya Revenue Authority as set out under Section 5 of the Kenya Revenue Authority Act which provides that:

> "1. The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collection and receipt of all revenue.
>
> 2. In the performance of its functions under subsection (1), the Authority shall—
>
> **1. administer and enforce—**

1. **all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;**
2. **the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;**
3. to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and
4. to perform such other functions in relation to revenue as the Minister may direct."

57. The Respondent argues that it is mandated to collect and receive revenue and to enforce all laws set out in Part 1 and 2 of the First Schedule to the KRA Act. The Respondent augmented its position with the cases of:

a. **Suraya Property Group Ltd & another v W&K Estates Ltd & 2 others [2014] eKLR**where the court stated:

"In considering the application before it, the Court has perused the instant application, the affidavits, the submissions, both oral and written and the response thereto by the 1st Plaintiff. According to Black's Law Dictionary, 9th Edition at pg. 251, a cause of action is defined as:

"A group of operative facts giving rise to one or more bases for suing; a factual situation ***that entitles one person to obtain a remedy in court from another person".*** *(Underlining mine).*

The 1st and 3rd Defendants also referred to Edwin E. Bryant, The Law of Pleading Under the Codes of Civil Procedure, 2nd Edition, where at pg. 170 the author writes:

"What is a cause of action? Jurists have found it difficult to give a proper definition. It ***may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be- (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunctions; or (c) it may be that there are doubts as to some duty or right, or the right be clouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property."***

A cause of action, therefore, would be a set or group of facts that give rise to a claim or suit and that which clearly violates the rights of the Plaintiff."

b. Kenya Union Of Domestic, Hotels, Education Institutions And Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 others [2014] eKLR

"Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. ***Article 209*** *of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and*

export goods and excise tax. ***The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection.*** *Under Article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax. (See Bidco Oil Refineries v Attorney General and Others Nairobi Petition No. 177 of 2012, paras. 53 – 56.) It is therefore within the legislative competence of Parliament to remove exemption of service charge from the 2013 Act."*

The Respondent's Prayers

58. The Respondent submits that it applied and interpreted the law correctly and prays that the Appeal be dismissed with costs.

ISSUES FOR DETERMINATION

59. Upon due consideration of the pleadings, written submissions and supporting documents separately filed by parties the Tribunal was of the view that the issues that stood out for determination were:-

a. Whether the Respondent erred in demanding IDF fees for the period preceding 20th September 2016

b. Whether the Respondent erred in its computation of IDF payable by the Appellant.

c. Whether the Respondent erred in assessing penalties for unpaid IDF fees from the Appellant.

ANALYSIS AND DETERMINATION

a. ***Whether the Respondent erred in demanding IDF fees for the period preceding 20th September 2016***

60. The Appellant submits that the tax decision was illegal, irrational and contradictory insofar as it purports to demand payment of import declaration fees under Regulation 38(A)(5) of the Customs and Excise Regulations from the Appellant who was exempted from the import declaration process for that period pursuant to the provisions of Regulation 38(A)(3) of the Customs and Excise Regulations read with the Sixth Schedule of the Customs and Excise Act.

61. The Respondent on the other had argues that although the Appellant's goods (aircraft and aircraft spares) were exempt from having to submit Import declaration forms, they were not exempt from payment of IDF fees.

62. Prior to coming into force of the Miscellaneous Fees and Levies Act in September 2016, IDF fees were imposed under Regulation 38A of the Customs and Excise Act Cap 472of the laws of Kenya and was anchored on pre-shipment inspection.

63. Paragraph 3of Regulation 38A provided that:-

> *"(3) An importer of goods other than the goods specified in the Sixth Schedule shall, prior to shipment of such goods, complete an import declaration form in Form C61 and present it to together with an application fee of five thousand shillings to the office in Kenya of a pre-shipment inspection agent operating at the place where such goods were purchased."*

64. Form C61 was the customs code name for the import declaration form which was meant to trigger the pre-shipment inspection process. The Sixth Schedule read as follows:

> *"SIXTH SCHEDULE*
> *GOODS TO BE ENTERED ON FORM C61*
> .....
> *All goods are to be entered in the import Declaration Form except.*
> *(a)....*
> ....
> *(p) aircraft and aircraft parts."*

65. Paragraph 4 specifically mentioned the goods that were exempt from import declaration fees. It stated as follows:

> *"On receipt of an import declaration form and the import declaration fee under paragraph (3), the pre-shipment inspection agent shall, where the respective goods are subject to pre-shipment inspection, proceed to inspect such goods in accordance with the provisions of the Act:* ***Provided that no import declaration fee shall be charged in respect of goods intended for use in the manufacture of goods for export except the minimum processing fee of five thousand shillings.***
> *"*

66. A plain reading of the foregoing provisions shows a clear intention to exempt aircraft parts from entry in import declaration forms and consequently pre-shipment inspection of aircraft spares. However, there was no express exemption from payment of import declaration fees. Thus, exemption from entry of aircraft parts in the Import Declaration Form should not have been confused with exemption from payment of Import Declaration fees. The exemption was directed at the procedure for declaration and not against the payment.

67. Furthermore, if there was an intention to exempt aircraft spares from Import Declaration fees, it would have been expressly mentioned in Paragraph 4 or elsewhere as was the case with goods intended for use in the manufacture of goods for export.

68. It was the view of the Tribunal that in taxing statutes, taxation is the rule and exemptions are the exception. Thus, when an exemption is claimed, it must be shown indubitably to exist. It must be framed in clear words as to leave no doubt or vagueness. A vague or implied exemption is no exemption. As the Appellant failed to prove that the exemption from payment expressly existed, the Tribunal found that the Respondent did not err in demanding IDF fees from the Appellant. What it demonstrated was that aircraft parts were exempted from a procedure of making an import declaration form.

69. It is a settled principle that the Tribunal cannot read any words which are not mentioned in a statute nor substitute any words in place of those mentioned in the statute and at the same time cannot ignore the words mentioned.

70. The Appellant's contention that upon the promulgation of the Constitution of Kenya, 2010 the Customs and Excise Regulations were rendered unconstitutional and therefore null and void from August 2010 is not correct. The Tribunal was of the view that the provisions of Regulation 38A of the Customs and Excise Act continued to be in force until the coming into force of the Miscellaneous Fees and levies Act 2016. The Tribunal was guided by the provisions of Section 24 of the Interpretation and General Provisions Act as relates to the legal sustainability of a subsidiary legislation following the repeal of the substantive or parent statute.

b. ***Whether the Respondent erred in its computation of IDF fees.***

71. The Appellant argued that that instead of the Respondent applying the rate of 2%, it has used a higher rate of 2.5% in the impugned tax decision in breach of Section 7 of the Miscellaneous Fees and Levies Act, 2016 and as a result has overcharged the Appellant with IDF of Kshs. 4,891,401/=. It stated that according to its computation, the IDF fees owed and for which it concedes as payable amounted to Kshs.749,546/=.

72. The Respondent on its part argued that the rates of IDF fees were clearly set out in Regulation 38A and the Miscellaneous Fees and Levies Act 2016 and that it had applied the prescribed rates correctly. It argued that it requested the Appellant to provide proof of payment with no success. It further argued that after examining the information provided by the Appellant, it subtracted from the amount demanded the amounts in respect of the IDF fees for which the Appellant had paid the fees.

73. The Tribunal examined the Appellant's written submissions and supporting documents. It found that the Appellant had purported to have paid Kshs 139,007.00 in respect of 11 entries. No proof was furnished by the Appellant to show that IDF was paid against a substantial number of the entries listed in the Appellant's computations.

74. Section 30 of the Tax Appeals Tribunal Act provides that:-

> *"In a proceeding before the Tribunal, the Appellant has the burden of proving —*
>
> *(a) where an appeal relates to an assessment, that the assessment is excessive; or*
>
> *(b) in any other case, that the tax decision should not have been made or should have been made differently."*

75. The Tribunal was of the view that the Appellant did not discharge its obligations under Section 30 of the Tax Appeals Tribunal Act and therefore determined that the Respondent did not err in its computations of the IDF fees payable.

c. ***Whether the Respondent erred in demanding penalties.***

76. The Appellant argues that the impugned tax decision violates Section 38(2) of the Tax Procedures Act because it imposes late payment interest based on principal IDF which was not payable for the period before 21st September 2016. Furthermore, the Respondent's decision to charge late payment interest at 2% per month contravened Section 38(1) one of the Tax Procedures Act which prescribes a rate of 1% per month.

77. The Tribunal having found that IDF fees were payable for the period before 21stSeptember 2016 determined that interest for late payment was consequently applicable to IDF fees that remained unpaid after they fell due.

78. On the issue of contravention of Section 38(1) of the Tax procedures Act, the Tribunal faulted the contestation by the Appellant because the current dispute was not governed by the Tax Procedures Act. Indeed, the definition of Tax Law under the Tax Procedures Act excluded the EACCMA and its predecessor the Customs Management Act from the definition of tax law for the purposes of the TPA.

79. The Tribunal made the finding that the Respondent was correct in charging interest at 2% per month for late payment as set out in Sections 225 and 249 of the EACCMA which was the operating law in this dispute. Section 2 of the said Act defines "Duty" *as any cess, levy, imposition, tax or surtax imposed by any Act.*

80. The Appellant argued that it had applied for waiver of penalties, but the Respondent did not reply and therefore its rights were violated. Although the Tribunal scorns the failure by the Respondent to reply to the Appellant's letter, it is hesitant to prescribe a remedy because the action complained of is a judicial review matter which borders the limits of the jurisdiction of this Tribunal.

Disposition

81. After careful consideration of the issues for determination the Tribunal determined that the Appeal lacks merit and therefore must fail.

FINAL DECISION

82. The Orders which recommend themselves and which the Tribunal accordingly makes are as follows:-

    a. The Appeal is hereby dismissed.

    b. The Respondent's objection decision dated 24th March 2020is hereby upheld.

    c. Each party to bears its costs.

83. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** on this **16th** day of **July, 2021.**

.....
ERIC N. WAFULA
CHAIRMAN

.....
CATHERINE N. MUTAVA
MEMBER

.....
GABRIEL M. KITENGA
MEMBER

.....
ABRAHAM K. KIPROTICH
MEMBER