JUDGMENT

A. INTRODUCTION

1. The Appellant is a limited liability company registered in Kenya. It was incorporated in Kenya on 11th January 2002. The company’s principal activity is the processing of unmanufactured tobacco (imported from Uganda) for export outside Kenya.

2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5 (1), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenues. Further, under Section 5 (2) with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part I & II of the First Schedule of the Act for the purpose of assessing, collecting and accounting for all revenues in accordance with those laws.
B. BACKGROUND

3. The Appellant herein lodged a VAT refund claim for the period of February 2016 to November 2016 amounting to Kshs. 86,608,095.00 on 27th February 2017. The same was processed by the Respondent and the Respondent disallowed an amount of Kshs. 44,697,690.00 relating to February 2016 on the basis that the amount was time barred.

4. The Appellant lodged a notice of objection with the Respondent vide a letter dated 19th July 2018. The objection was premised on the ground that the VAT refund claim was filed within the prescribed period of twelve (12) months and using the prescribed form VAT 4.

5. Vide a letter dated 10th August 2018, the Respondent rendered its objection decision informing the Appellant that a refund claim of Kshs. 44,697,690.00 lodged on 22nd March 2017 via itax was time barred because it was lodged late as per Section 17 (5) of the VAT Act 2013. Dissatisfied, the Appellant lodged the Appeal herein on 7th September 2018.

C. APPEAL

6. The Appellant’s Appeals to the Tribunal against the decision issued by the Respondent vide a letter dated 10th August 2018 to disallow a VAT refund claim of Kshs 44,697,690.00 relating to February 2016 on the basis that the amount was time barred. This is as elaborated in its Memorandum of Appeal dated 19th September 2018 with the following grounds:
a. That the Respondent disallowed the VAT refund claim without due regard to the provisions of the VAT Act, 2013 and VAT Regulations.

b. The Respondent decision to disallow the amount of Kshs 44, 697,690.00 from the Appellant’s VAT refund claim was excessive and erroneous.

c. The Respondent did not take into account all information and explanations provided in order to appreciate all the issues placed before him before arriving at their decision.

d. The Respondent did not grant the Appellant adequate opportunity to explain their case thereby breaching the rules of fairness and natural justice.

e. At the hearing of the Appeal, further oral or documentary evidence shall be adduced in support of the Appeal.

7. The Appellant prayed for the following orders:-

a. THAT the decision to disallow the VAT refund claim be annulled and set aside.

b. THAT the appellant be awarded the cost of Appeal.
D. RESPONSE TO THE APPEAL

8. The Respondent responded to the grounds of Appeal in a Statement of Facts dated 16th October 2018 as follows:

   a. In response to Ground a, the Respondent reiterates that the VAT refund claim was time barred as it was lodged on 22nd March 2017 which is more than twelve months allowed under the VAT Act Section 17(5)(b).

   b. The Alliance Tobacco Kenya Limited lodged a VAT refund claim of Kshs 126,052,206.00 for the period February 2016 to May 2016, July 2016 and September 2016 to November 2016, on 22nd March through iTax Part of the claim, Kshs 44,697,690.00 for February 2016, is time barred since it was lodged more than twelve month from the date the tax became due and payable as per Section 17(5) (b) of VAT Act 2013. The Respondent is therefore within the mandate of the Act by disallowing the input VAT refund as the same was time barred.

   c. With effect from 1st August 2015, Kenya Revenue Authority stopped receiving manual claims for VAT refunds and all transactions were to be processed through the iTax portal. Therefore, the manual VAT refund claim form is deemed as an invalid claim form.

   d. The Respondent reiterates that the appellant wrongly applied paragraph 11 of the VAT Regulations, 1994 to the repealed VAT Act Cap 476.

   These regulations is therefore referring to claims lodged using the repealed VAT Act. The application procedures for the February 2016 VAT refund claim are administered under VAT Act 2013.
e. In response to ground (c) and (d), the Respondent states that the appellant was afforded an opportunity to respond and state its case as evidenced by various correspondence with its tax agents Ernst & Young. All information was provided to the Appellant as required.

f. The respondent denies that it acted *ultra vires* of its mandate and unequivocally stands by its decision to disallow the VAT refund claim.

9. The Respondent prays that:-
   a. The Appellant’s Appeal be dismissed for lack of merit
   b. The Respondent’s decision to disallow the VAT refund claim be upheld.
   c. The Respondent be awarded the costs of the Appeal.

E. ISSUES FOR DETERMINATION

10. The Appeal herein raises the following issues for determination by the Honorable Tribunal, namely;
    a. *Whether the Respondent erred in disallowing the Appellant VAT refund claim for the period of February to November 2016.*

F. ANALYSIS

11. The Appellant contends that Section 17(5) of the VAT Act provides that a registered person should lodge a claim for the refund of excess tax within twelve months from the date the tax becomes due and payable. In relying on the provisions of Section 19 (1) & (2) and 12(1) of the VAT Act, The
Appellant submitted that the February 2016 VAT refund claim was lodged on 27th February 2017 is within the stipulated timeline under Section 17 (5) of the Act.

12. It was the Appellant's further submission that by the time the February 2016 claim was lodged, there was no subsidiary legislation enacted under the VAT Act 2013 that provided for guidelines on how to and nature of documents for lodging VAT refund claims. As result, the Appellant used the VAT 4 form under the VAT Regulations 1994 for lodging its claim for February 2016 excess taxes. The 1994 Regulation under the former VAT Act (Cap 476) was still in force by dint of Section 68 (3) of the VAT Act, 2013.

13. Further, the Appellant averred that the 1994 Regulations were revoked by the Value Added Tax Regulations, 2017, which came into force on 1st July 2017. Accordingly, based on this Regulation and Section 68 (3) of the VAT Act, 2013 the manual February 2016 refund claim of Kshs. 44,697,690.00 that was lodged on 27th February 2017 was valid.

14. On his part the Respondent contends that the Appellant lodged VAT refund in question on 22nd March 2017 through the iTax platform. The claim for the month of February 2016 was rejected as it was claimed outside the period allowed under Section 17 (5) (b) of the VAT Act, 2013. This Section requires a taxpayer wishing to claim refunds to do so within a period of 12 months from the date the Tax become due. In this case 12 months' period for a February 2016 claim lapsed on February 2017 and
therefore the Appellant's claim fell outside the statutory timeline for refund.

15. It was submitted for the Respondent that at the time the Appellant made its refund claim there was a Public Notice in force stating that pursuant to the provisions of the Tax Procedures Act, 2015, directing all taxpayer to use the itax platform for PIN registration, filing returns, payment and access of other tax related services. As such, with effect from 1st August 2015 the stopped receiving manual claims hence the reason the manual VAT 4 form was deemed invalid for refund purposes.

16. We have thoroughly reviewed the parties' evidence in support of their respective claims as well as the laws and regulations relied upon in their submissions. The Appeal herein is concerned with a taxpayer's entitlement to input tax refund under Section 17 (5) of the Value Added Tax Act (VAT), 2013. More particularly, the Appeal raises concerns on the use of VAT 4 form for refund claims with respect to the period between the coming into force of the VAT Act, 2013 and the 2017 VAT Regulations.

17. As such before we begin any substantive analysis in the Appeal herein, we would like to reaffirm our position on a taxpayers' entitle to input tax refund. It is our position that in event a taxpayer has paid excess tax, so long as the taxpayer possesses the requisite documents backing the transactions and the refund claim is made within the statutory prescribed timelines, then the taxpayer's right to such refund is non-derogable. In this respected we rely on judgment in Tax Appeal No. 148 (CONSOLIDATED
WITH APPEAL NO. 344 OF 2018) Computech Limited vs Commissioner of Domestic Taxes, where in we held as follows:

"The evidence placed before us and before the Respondent during the audit fully supports the Appellant’s purchases and sales. It also sufficiently supports this Appeal on the Appellant’s entitlement to a credit refund as per Section 17 (1) of the VAT Act, 2013. As such, this Tribunal finds that the right to deduct input tax is an integral part of the VAT scheme and in principle may not be limited. It must be exercised immediately in respect of all the taxes charged on transactions relating to inputs."

18. Our restatement above aside, in this Appeal we must first determine whether the Appellant made it refund claim within statutory timeline under Section 17 (5) and secondly whether the Appellant used the correct form. On this first issue, the Appellant contends it made its refund claim on 27th February 2017 well within statutory timelines per Section 17 (5) of the VAT Act, 2013. On the other hand, the Respondent contended that one of the reasons why the Appellant’s refund claim was rejected was because the claim for February 2016 was lodged on 22nd March 2017; outside the statutory timeline under Section 17 (5) of the VAT Act, 2013.

19. We have looked into the evidence in support of the refund claim, especially the documents used for lodging the claim. The Appellant used VAT 4 form to claim for an amount of Kshs. 86,608,095.00 for the period of February 2016 to November 2016. The form was received by the Respondent on 27th February 2017, thus effectively putting Appellant’s claim within the
statutory timeline of twelve months under Section 17 (5) of the VAT Act, 2013. It is the Respondent’s own argument that in order to be successful, the February input tax 2016 claim must have been made by February of 2017. It is therefore clear in our minds that the Appellant’s claim was not time barred.

20. The second argument advanced by the Respondent was that the Appellant used manual refund process as opposed to using the Itax system. These calls on use to make pronouncements on two issues; one, on the status of the manual forms under the VAT Regulations 1994 from the effective date of the VAT Act 2013. Secondly, the effect of the Commissioner’s public notice.

21. On the first issue, we begin by noting that the VAT Act, 2015 was assented to 13th August 2013 and came into force on 2nd September 2013. This had the effect of repealing the former VAT Act, Cap 176 of the Laws of Kenya. However, the 2013 Act did not come with its Regulations. Instead it had savings clause under Section 68 (3) to the effect that any subsidiary legislation made under the repealed Act in force at the commencement of the 2013 Act shall remain in force, so far as it was not inconsistent with the 2013 Act, until subsidiary legislation with respect to the same matter is made under the 2013 Act. Subsidiary legislation under the 2013 Act made in 2017 through Legal Notice Number 54 of 2017. The implication of this is that there was a period of time between 2013 and 2017 where the Regulations under the former VAT regime were still legally applicable by dint of the savings clause contrary to the Respondent’s assertion.
22. The Respondent also contended that at the time of the Appellant’s refund claim there was a public notice directing taxpayers to use the itax system for registration of PINs and filing of return among other tax related services.

G. CONCLUSION

23. In light of the foregoing analysis, the Appeal is merited and the Tribunal makes the following Orders:-
   
a. The Respondent erred in disallowing the refund claim for the amount of Kshs. 44,697,690.00.

b. The Respondent’s objection decision of 10th August 2018 disallowing a sum of Kshs. 44,697,690.00 is hereby set aside.

c. Each party to bear its own costs.

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 21st day of May, 2021.

[Signatures]

MAHAT SOMANE
CHAIRPERSON

WILFRED GICHUKI
MEMBER

ROSE WAMBUI NAMU
MEMBER

JOHN KINYUA WANGARI
MEMBER

TIMOTHY CHESIRE
MEMBER