

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 45 OF 2020**

**ARROW HI-FI (E.A.) LIMITED.....APPELLANT**

**-VERSUS-**

**COMMISSIONER OF CUSTOMS AND BORDER CONTROL.....RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. The Appellant is a limited liability company duly incorporated in Kenya under the Companies Act (Cap 486) Laws of Kenya. Its principal business is that of import and sale of motor vehicles. It is a registered taxpayer.
2. The Respondent is a principal officer of Kenya Revenue Authority, hereinafter referred to KRA. KRA is established under The Kenya Revenue Authority Act, Chapter 469 Laws of Kenya. KRA is responsible for the assessment, collection and accounting of all Government revenue.
3. The Respondent, pursuant to the provisions of Section 235 of the East African Community Customs Management Act 2004, hereinafter referred to as EACCMA, conducted an in depth audit of the Appellant's business affairs regarding compliance with customs laws and regulations, which audit commenced on 13<sup>th</sup> November 2006. The same was for the period 1<sup>st</sup> January 2002 to 31<sup>st</sup> December 2006. The Appellant was notified of the audit vide a letter dated 23<sup>rd</sup> October 2006.
4. The Respondent, having not been availed with all the documents it required, wrote to the Appellant on 29<sup>th</sup> November 2006 advising the latter to avail the same by 5<sup>th</sup> December, 2006, failing which an estimated assessment would be done based on the documents provided earlier on.

5. On 5<sup>th</sup> December 2006, the Appellant provided a comprehensive listing of all vehicles imported between 1<sup>st</sup> January 2002 and December 2006, together with all the direct import duty paid vehicles, all warehouse and subsequently ex-warehouse vehicles together with the stock list of warehoused vehicles. However, the Appellant failed to avail records related to goods warehoused and warehouse removals, which failure resulted to the Respondent relying on the Bonds Register kept by the Respondent as a basis for conducting the audit.
6. Consequently, vide a letter dated 23<sup>rd</sup> February 2007, the Respondent issued a tax demand against the Appellant for a sum of Ksh: 909,656,082.00 being additional taxes due to it broken down as follows:-

a) Import duty	-	Ksh: 176,362,704.00
b) Excise duty	-	Ksh: 176,362,704.00
c) VAT	-	Ksh: 169,308,195.00
d) IDF	-	Ksh: 13,837,273.00
e) Penalty	-	Ksh: <u>370,785,206.00</u>
		Ksh: <u>909,656,082.00</u>
7. The Appellant issued its objection vide a letter dated 12<sup>th</sup> March 2007.
8. On 7<sup>th</sup> March 2007, the Respondent's officers raided the Appellant's premises, took away all records of ledgers, VAT returns, and records of importation and locked down the premises.
9. On 9<sup>th</sup> May 2007, the Appellant wrote to the Respondent stating that its various letters had not elicited any response to the tax dispute and accordingly it deemed that the explanations given were adequate and acceptable. The Appellant further stated that it deemed its objection as having been accepted pursuant to the provisions under EACCMA.
10. On 24<sup>th</sup> May 2007, the Respondent in response to the Appellant's letter of 9<sup>th</sup> May 2007, wrote to the Appellant clarifying that the letters referred to by the Appellant were dealt with as follows;

- a) Letter dated 12<sup>th</sup> March 2007 requesting for a meeting, which meeting took place on 15<sup>th</sup> March 2007 wherein the Appellant was asked to avail original invoices from the manufactures of the motor vehicles in issue, since 2002.
  - b) Letter dated 11<sup>th</sup> April 2007 requesting for a meeting, which meeting took place on 16<sup>th</sup> April 2007, whereby the Appellant offered to pay on account a sum of Kshs.5M by 16<sup>th</sup> April 2007 and a similar amount in May 2007. However, the Respondent asked the Appellant to deposit a sum of Kshs. 100M by 30<sup>th</sup> April 2007 pending resolution of the dispute. The Appellant had only paid a sum of Kshs. 3M as at 10<sup>th</sup> May 2007.
  - c) Letter dated 16<sup>th</sup> April 2007 whereby the Appellant sent two cheques of Kshs. 5M, but one was post-dated and the Appellant was asked to replace them with bankers' cheques.
  - d) Letter dated 25<sup>th</sup> April 2007 whereby the Appellant sent three bankers' cheques of Kshs. 5M and four post-dated cheques of Kshs.10M.
  - e) In the same letter of 25<sup>th</sup> May 2007, the Respondent asked the Appellant to pay Kshs. 401, 989,236 being principal taxes and penalties in respect to taxes due with respect to the Audi cars as according to it, there was no dispute with the assessed amounts on the said motor vehicles.
11. The Respondent vide the said letter of 24<sup>th</sup> May 2007 advised the Appellant that it had not accepted the Appellant's Objection.
12. On 22<sup>nd</sup> August 2007, the Respondent issued a Notice of Assessment against the Appellant in respect to VAT for the years 2001 to 2006 for Kshs. 12, 597,363.15 and Corporation tax for the years 2000 to 2004 for Kshs. 248,930,863.14, both totalling Kshs. 361,528,226.00.
13. On receipt of the said notice of the assessment the Appellant denied owing the taxes therein vide its letter undated, but addressed to the Respondent and referring to the letter of 22<sup>nd</sup> august 2007. The Appellant further stated that all its documents had been carried away by the Respondent and the company was closed since 7<sup>th</sup> March 2007 and its bank accounts put under agency notices.
14. On 10<sup>th</sup> April 2018, the Respondent issued a letter titled Notice of Assessment and vide the same letter stated that it had confirmed the assessment against the Appellant for a sum of Kshs.577,954,080.00 being VAT and Corporation tax.

15. On 3<sup>rd</sup> June 2008, the Respondent issued an auction notice against the Appellant's motor vehicles. In response thereto and in a bid to stop the auction, the Appellant offered to issue a cheque for Kshs. 20M as a sign of goodwill pending negotiations on the tax liability.
16. On 10<sup>th</sup> July 2008, the Appellant's principal director, one Mr. Nizarali died of a heart attack. According to the Appellant, the death was as result of the business frustrations.
17. On 3<sup>rd</sup> July 2018, the Respondent advised the Appellant that it would proceed to enforce the High Court Order vide a Ruling of 27<sup>th</sup> July 2007 to recover the outstanding taxes. The said Order emanated from a Judicial Review Application that the Appellant filed in the High Court, vide Miscellaneous Civil Application Number 534 of 2007, to quash the Respondent's tax assessment demand of 23<sup>rd</sup> February 2007, which application was declined on 27<sup>th</sup> July 2007.
18. On 6<sup>th</sup> April 2018, Eleven years after the first demand, the Respondent issued an agency notice against the Appellant's bankers and a notice of distress for all goods and chattels on its premises.
19. On 28<sup>th</sup> June 2018, the Appellant applied for abandonment of the tax demand under Section 37(1) of the Tax Procedures Act (TPA) since the business had not been operational for over eleven years after closure by the Respondent. The same was declined by the Respondent vide its letter of 26<sup>th</sup> September 2018.
20. On the application of the Appellant, and by consent of the parties, the Appeal herein was admitted out time. As a result, the Appellant filed its Memorandum of Appeal together with the Statement of Facts on 19<sup>th</sup> February 2020.
21. Upon service, the Respondent filed its Statement of Facts on 18<sup>th</sup> March 2020.

## THE APPEAL

22. The Appeal is premised on the grounds that the Objection Decision, (sic.) by the Respondent dated 23<sup>rd</sup> February 2007 is erroneous in law and fact for the following reasons, namely;

- a) It confirms taxation of motor vehicle records that had been duplicated in the Respondent's computations.
- b) It confirms tax on motor vehicles that were imported duty free contrary to Section 114 (1) of EACCMA.
- c) It is tainted with illegality as it confirms tax on vehicle models that were wrongly categorized by the Respondent.
- d) Wrongly confirming tax on two Porsche vehicles that had been seized by the Respondent.
- e) Wrongly confirming tax on a vehicle that was imported on transit to Uganda.
- f) Wrongly confirming tax on a Porsche vehicle that had been assessed at its selling price instead of cost, contrary to Section 15(1) of the Income Tax Act CAP 470, (ITA) that allows all wholly and exclusive expenses used in generation of the business income be deducted from revenue/sales before taxation.
- g) Erroneously confirming taxes on the Appellant for goods/services imported by a different tax liability entity contrary to Section 18 (1) (2) (3) and (4) of the TPA.
- h) Erroneously confirming tax on goods that had been sold, as such income had not been realized on these goods.
- i) Wrongly confirming tax items that were never imported by the Appellant.
- j) It violated the Appellant's rights as guaranteed by Section 122(2) of EACCMA by not providing an explanation in writing as to how the customs value of the importer's goods were arrived even after the Appellant requested for it in writing.
- k) Erroneously assessing taxes with intent to collect tax where it is not due and violated Sections 235 and 236 of EACCMA by not giving the Appellant a notice of intention to carry out a post clearance audit.
- l) The Respondent violated the provisions of Section 122(1) of EACCMA as read with the Fourth Schedule Part 1 (2) by not disclosing the basis of the valuation relied on in making the assessment decision.

- m) The Appellant is aggrieved by the Respondent's decision not to allow the objection to the default assessment despite the Appellant stating clearly the grounds of objection as provided under Section 51(3) (a) of the TPA.
  - n) The Respondent failed to consider adequately or at all the grounds of Objection filed by the Appellant in the objection, consequently disallowed the Appellant's Objection.
23. In conclusion, the Appellant prays that the Appeal be allowed and the Objection Decision dated 23<sup>rd</sup> February 2017 by the Respondent be vacated.

## **THE RESPONSE**

24. The Respondent filed its response on 18<sup>th</sup> March 2020 and averred THAT:-
- a) During the audit conducted by the Respondent, the Appellant was requested to avail documents to support its tax position as filed. This was not done and the Respondent used the only available documents to issue the assessment. The Respondent is therefore bound by the available evidence.
  - b) For all goods imported for home use, duty paid but was undervalued and the values were adjusted in line with Section 122 of EACCMA and the Fourth Schedule and the extra import taxes were levied accordingly.
  - c) For goods warehoused and ex-warehoused but with insufficient or unsatisfactory evidence of valid removal, all applicable import taxes, as adjusted by value uplifts were deemed payable.
  - d) For undervalued goods still in the warehouse, extra guarantee was required of the Appellant and the amounts of bond in force were found to be inadequate.
  - e) The imposition of penalties was done in accordance with Section 225A of the Customs and Excise Act CAP 472 laws of Kenya for the customs transactions for the years 2002, 2003 and 2004 before the EACCMA was in force.
  - f) The Appellant failed to account for ex-warehouse removals. No evidence has been tendered to show that the motor vehicles were re-exported outside the territory, which is a violation of the terms of the bonds.
  - g) The Respondent computed taxes due and payable by the Appellant based on the above findings and issued a demand for Kshs 906,656,082.00.



25. In conclusion, the Respondent prays for the following;
- a) This Appeal be dismissed.
  - b) The Respondent's confirmation of assessment be upheld.
  - c) The taxes due and unpaid of Ksh: 906,656,082 together with interest thereon be paid to the Respondent.
  - d) Costs be awarded to the Respondent.
26. The Tribunal notes that during the hearing, the Respondent raised a preliminary point of law on the basis that the suit herein is res judicata on the basis that the tax dispute herein has been conclusively determined by the High Court.

### **ISSUES FOR DETERMINATION**

27. The Tribunal has considered the parties' pleadings, submissions, all the documentation herein together with the preliminary objection and is of the respectful view that the issues that call for its determination are as hereunder:-
- a) **Whether the Appeal is res judicata.**
  - b) **Whether the Appellant made a valid application for review as provided under Section 229 of the East African Community Customs Management Act, 2004 (EACCMA) and if so, whether the Respondent issued its response thereto within the statutory period.**
  - c) **Whether the Respondent erred in law and fact in its tax assessment against the Appellant.**
28. It is to these issues that the Tribunal will now turn into. From the onset, we note that the two issues (a) and (b) above are intertwined as the High Court delved into the Appellant's objection, giving rise to the Respondent's preliminary objection on a point of law that as a result of the High Court finding thereof, the suit herein is res judicata. In the premises, the Tribunal will merge them and analyze the issues simultaneously as hereunder.
- a) **Whether the Appeal is res judicata; and**
  - b) **Whether the Appellant made a valid application for review as provided under Section 229 of the East African Community Customs Management Act, 2004 (EACCMA).**

29. The Tribunal finds it imperative to briefly revisit the background of this matter to effectively make a determination on the issues. The Respondent issued its tax demand against the Appellant, vide its letter dated 23<sup>rd</sup> February 2007. We note that the Appellant through its pleadings and submissions has referred to this letter of 23<sup>rd</sup> February, 2007 as the “**Objection Decision**”. It is this Objection Decision that the Appellant has sought to appeal against. We must therefore at this early juncture set the record straight. The letter of 23<sup>rd</sup> February, 2007 is not an Objection Decision. It is a tax demand issued by the Respondent for taxes it deemed owing from the Appellant after carrying out an audit exercise against the Appellant’s tax affairs. It therefore follows that the Appellant’s Appeal is premised upon the Respondent’s tax demand of 23<sup>rd</sup> February, 2007.
30. The doctrine of res judicata is founded on Public Policy and is aimed at achieving two broad objectives, namely:-
- a) That there must be finality to litigation.
  - b) That an individual or entity should not be harassed twice with the same account of litigation.
31. Expounding further on the issue of the doctrine, the court in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others {2015} eKLR** pronounced itself as follows:-
- “The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”



32. In the Appeal before us, the Respondent's argument was that the matter has raised similar issues which had been considered and determined in the High Court Ruling in the Judicial Review matter, being High Court Civil Application No. 734 of 2007.
33. The Appellant on the other hand argued that it is now well settled law that the principle of res judicata does not apply to Judicial Review proceedings. In the case of **Wycliffe Indalu & 2 Others v Directorate of Criminal Investigations & Another (2019) eKLR**, the High held, in relation to whether res judicata applies to Judicial Review held as follows;

“...whether or not the doctrine of res judicata applies to judicial review is moot. Res Judicata, strictly speaking is provided under section 7 of the Civil Procedure Act which in the preamble to the Act is “Act of Parliament to make provision for procedure in civil courts”. However, it is now well settled that judicial review applications are neither criminal nor civil in nature. See *Commissioner of Lands v Kunste Hotels Ltd (1995-1998) 1 EA 1*. In the *Commissioner of Lands v Hotel Kunste Ltd Civil Appeal No. 234 of 1995* and *Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation prison (2007) 1 EA 354* it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply since it is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. ...”

34. The Appellant, to buttress its argument referred to the case of **Republic v Kenya Revenue Authority Ex-parte Neolief International Limited (2018) eKLR**, where the High Court reiterated that the question of whether or not an assessment of taxes is merited in the jurisdiction of this Honourable Tribunal held as follows:-

“The argument made by the Applicant that the Respondent selected the wrong method from among the various methods of valuation provided by law, is one that goes to the merits of the decision made by the Respondent. In particular, a determination of this ground will require a merit examination of the materials and evidence that was before the Respondent to find out whether in applying the Transaction Value Method it acted rightly or wrongly in law, which is not the purpose of judicial review.”

35. Moreover, the Appellant averred that this Honorable Tribunal has been specifically delegated the function of determining, through Appeals, the merits of decisions made by the Respondent herein. As such, it has the jurisdiction to do so and such jurisdiction cannot be taken away on the basis of previous Judicial Review Proceedings. It referred to the case of **Thuku Kirori & 4 Others –vs- County Government of Murang’a (2014) eKLR**, where the High Court held as follows:-
- “Moreover, where a statute or constitution, for that matter, has expressly delegated specific functions, duties or responsibilities to a particular organ, state or otherwise, this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates.”**
36. It is worth noting that according to the Appellant, it averred that it issued its objection to the Respondent’s “Objection Decision” vide its letter of 13<sup>th</sup> March, 2007. If this was the case, then the Objection Decision of the Respondent, if any, could only therefore be issued after the Appellant’s Objection, that is, after 13<sup>th</sup> March, 2007. We place emphasize on this because the Respondent’s demand is dated 23<sup>rd</sup> February 2007.
37. The Tribunal notes that the Appellant filed a Judicial Review application in the High Court, to wit, **High Court Miscellaneous Civil Application Number 534 of 2007, Republic –vs- KRA & 2 Others Ex-parte Arrow HI-Fi E.A Ltd.** It sought the following prayers:-
- a) **“An order of Certiorari to issue to bring to the Honourable Court and quash the decision of the Commissioner as contained in the Commissioner’s letter dated 23<sup>rd</sup> February, 2007 making assessment of extra revenue due to the Commissioner of Kshs 906,656,082.00.**
  - b) **An order of Mandamus do issue compelling the Commissioner to lift and or withdraw the appointment and or agency notices issued by the Commissioner against the accounts of the Appellant held at Habib Bank A.G Zurich, EABS Bank, African Banking Corporation Limited, Commercial Bank of Africa Limited and Imperial Bank Limited.**
  - c) **An order of Mandamus do issue compelling the Commissioner to lift and or withdraw the appointment and or agency notices issued by the Commissioner against the accounts of Nizarali Rajubali Virani or Praphulbala Nizarali Virani held at Imperial Bank Limited, Nizali Rajabali S. Virani held at Habib Bank A. G. Zurich and Virani Akif held at Habib Bank A.G. Zurich.**

- d) An order of Mandamus do issue compelling the Commissioner to release to the Appellant the wrongly and unlawfully seized motor vehicles belonging to the Appellant or the Appellant's customers.
- e) An order of Mandamus do issue compelling the Commissioner to release to the Appellant the motor vehicles belonging to the Appellant's customers which were wrongly and unlawfully deposited into the customs bonded warehouse".

38. We have carefully and thoroughly studied the High Court Ruling, delivered on 27<sup>th</sup> July 2007, emanating from the aforesaid application made by the Appellant. The court exhaustively dealt with the issue of the objection by the Appellant and held as follows:-

**"An objection that does not unconditionally state a clear and unambiguous position of the taxpayer and which suggests a discussion or a meeting is not an application under S 229 (2) and is incapable of taking effect under S 229 (5). For it to be effective it must unequivocally deal with all aspects of the assessment and specify the Taxpayer's position on each with clear answers and figures admitted or not admitted. Both letters sought meetings and discussions and the meetings took place and the discussions were held and some tentative arrangements concerning payments were never honoured, namely the submission of original invoices and the partial payments. I find and hold that the "application" did not take effect and was not capable of taking effect under S 229(5). For an application to take effect it must satisfy the description of a counter offer as understood in the law of contract or constitute a clear and complete answer to the assessment in a manner that can bind the KRA. An enquiry for information, meeting or discussion cannot in my view constitute the "application" contemplated by the section. The making of pleas and enquiries leaves the assessment unaffected and effectual."**

39. In arriving at its Ruling, the High Court sought guidance from the relevant legislation, being Section 229 of EACCMA, which states as follows:-

**"229. Appeals**

- (1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.**
- (2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.**

- (3) Where the Commissioner is satisfied that, owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).
- (4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.
- (5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.
- (6) During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner”.
40. According to the Respondent, the High Court made a determination that there was no valid application for review. It stated further that the Appellant has again come before the Tribunal challenging the decision of the Respondent as contained in its demand letter of 23<sup>rd</sup> February, 2007. It argued further that the Appellant has not appealed against the decision of the High Court and having failed to seek for leave to apply for review as provided for under Section 229 of EACCMA, the Tribunal lacks jurisdiction to determine this Appeal.
41. In its submissions dated 19<sup>th</sup> April, 2021, the Appellant argued that the Respondent failed to respond to its application for review within thirty (30) days and is therefore deemed to have accepted the application hence its tax assessment of 23<sup>rd</sup> February, 2007 ought to be set aside. The Tribunal seeks guidance from Section 51(8) of the TPA, which provides as follows;  
**“Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner’s decision**

shall be referred to as an “objection decision”. The Tribunal finds that as the High court had found in favour of the Respondent that the Appellant’s objection did not meet the statutory threshold and was declared not valid, there was no obligation on the Respondent to consider it any further and issue an Objection Decision.

42. Further, the Tribunal notes that Section 2 of the TATA defines an appeal as **“an appeal to the Tribunal against a decision of the Commissioner under any of the tax laws.”** This Section read together with Section 12 of the same Act clearly show that the decision for the Respondent which is appealed to the Tribunal is a decision made pursuant to Sections 229 and 230 of EACCMA. Indeed, the tax laws are expounded in Section 2 of the TATA wherein EACCMA is included.
43. We refer to the doctrine of precedent and note that as a Tribunal, under Article 169(1) of the Constitution of Kenya 2010, we are bound by the decisions of the superior courts. In considering the place of precedent, the Supreme Court of Kenya in **Jabir Singh and 3 others v Tarlochan Singh Rai and 4 others [2013]EKLR** held as follows;

**“39. It is perhaps too late in the day to pose this question which has been repeatedly addressed by scholars and jurists in the past and the answer to which is clear enough...In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent must be the rule and not the exception... I already have had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him...As a matter of persistent practice, the decisions of the higher courts are to be maintained as precedent, and the foundation laid by such courts is in principle, to be sustained.”**



44. Furthermore, the Tribunal refers to the holding in **National Bank of Kenya Ltd v Wilson Ndolo Ayah, Civil Appeal No. 119 of 2002; [2009] KLR 762**, where it was stated thus;

**“It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court, The High Court has no discretion in the matter.”**

45. In view of the foregoing analysis, we find that the Tribunal is bound by the precedent set by the High Court in **High Court Miscellaneous Civil Application Number 534 of 2007, Republic –vs- KRA & 2 Others Ex-parte Arrow Hi-Fi E.A Ltd.**

46. In view of the foregoing, the Tribunal finds that the Appeal is res judicata and the Appellant did not make a valid application for review as provided under Section 229 of the East African Community Customs Management Act, 2004 (EACCMA).

**c) Whether the Respondent erred in law and fact in its tax assessment against the Appellant.**

47. The Tribunal having made its findings hereinabove in respect to issues (a) and (b) would not ordinarily delve further into this issue. However, we find it pertinent to make the following observations.

48. The Tribunal observes with concern on the length of time that the parties have dragged each other in and out of court in this matter. Both parties are guilty of laches as they went to sleep on their laurels, for reasons best known to them. For clarity on this, we find it imperative to state the sequence of events as they unfolded as hereunder;

- a) The Respondent first demanded taxes on 23<sup>rd</sup> February 2007, now about fourteen years ago. Of further concern is that the said first demand was for Kshs. 909,656,082.00.



- b) Again, on 22<sup>nd</sup> August 2007, the Respondent issued what it termed as a Notice of Assessment against the Appellant of Kshs. 361,528,226.00 for VAT and corporation tax stating that there was no dispute to taxes in respect of Kshs 401, 989,236.00 for the Audi motor vehicles. A simple arithmetic of this is that the total taxes demanded in the second assessment would then be Kshs. 763,577,462.00.
  - c) As if that is not enough, yet again on 10<sup>th</sup> August 2018, eleven years since the first demand, the Respondent issued a notice of assessment against the Appellant for Kshs. 572,954,080.00 for VAT and corporation tax,
  - d) The Appellant, despite the said several tax demands commencing 23<sup>rd</sup> February 2007 and on various dates shown elsewhere in the Judgement, only approached the Tribunal by way of an appeal on 19<sup>th</sup> February 2020, approximately thirteen years thereof.
  - e) The Respondent, despite the High Court holding that the Appellant's Objection was invalid in 2007, consented to the filing of this Appeal out of time, thirteen years thereafter.
49. The Tribunal would then pose and ask, what was the Respondent up to when purportedly issuing the other two subsequent demands against the Appellant in August 2007 and August 2018, when in actual fact the Appellant had failed to issue a valid objection and the High Court as early as July 2007 had declared the Appellant's objection invalid in law? Further, why would the Respondent consent to the late filing of the Appeal when it was armed with the High Court Ruling in its favour?
50. Furthermore and most importantly, we note that from the documents filed that in the course of the engagements between the parties, the Appellant made some payments on account towards the outstanding taxes on diverse dates. Unfortunately, neither the Appellant nor the Respondent disclosed the specific amounts paid as such. We are therefore unable to determine the same with certainty.
51. In view of the foregoing and so as to do substantive justice to both parties and being cognizant of the tenets envisaged in Article 159 of the Constitution of Kenya, 2010 we find it fair that the Respondent computes and excludes all the amounts that the Appellant has paid on account of the tax demand herein.

## FINAL DECISION

52. The Tribunal finds that in the absolute interests of justice the Appeal is partially merited, **only on account of the unspecified total payments made by the Appellant towards the tax demand.** Consequently, the Tribunal makes the following orders;

- a) The Respondent's tax demand vide its letter dated 23<sup>rd</sup> February 2007 is hereby varied to exclude the various payments made by the Appellant on diverse dates and offset the same from the tax demand.
- b) Each party to bear its own cost.

53. It is so ordered.

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> day of June, 2021.**

  
.....  
**JOSEPHINE K. MAANGI**  
**CHAIRPERSON**

  
.....  
**PATRICIA M. ANAMPIU**  
**MEMBER**

  
.....  
**TANVIR ALI**  
**MEMBER**

  
.....  
**GEOFFREY KARUU**  
**MEMBER**

  
.....  
**DELILAH K. NGALA**  
**MEMBER**