

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 81 OF 2019**

**DE LA RUE CURRENCY AND SECURITY PRINT LIMITED.....APPELLANT**

**VERSUS**

**COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. The Appellant, De La Rue Currency and Security Print Limited (“**DLRKe**”) is a limited liability company incorporated in Kenya and is part of the De La Rue Plc Group whose headquarters is in Basingstoke, the United Kingdom.
2. The Appellant is a licenced Export Processing zone (EPZ) enterprise under the Export Processing Zone Act, 1990 and engages in the business of manufacturing bank notes and security printing. The Appellant has been carrying out this business since 1994 to date.
3. The Respondent is a principal officer of the Kenya Revenue Authority, a public body, duly established under the Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya), whose primary duty is the collection and accounting for government Revenue.
4. The Respondent carried out an audit of the Appellant’s tax affairs for the period 2013 to 2017 for Corporation Tax, Withholding Tax (WHT), Pay as You Earn (PAYE) and Value Added Tax (VAT).

5. The Respondent issued its preliminary findings vide its letter dated 16<sup>th</sup> November 2017. The letter also sought clarification on various matters. The Appellant responded to these issues through its letter dated 18<sup>th</sup> December 2017.
6. Thereafter, the Appellant and the Respondent engaged in meetings including a meeting on 1<sup>st</sup> February 2018 where the audit findings including the VAT issue was discussed. At this meeting, it was agreed, among other things that the findings in relation to VAT would be marked as resolved.
7. However, the Respondent, through a letter dated 26 November 2018, re-opened the VAT matters and assessed the Appellant on VAT on the sale of bank notes to Central Bank of Kenya (CBK) of Kshs. 1,219,192,946.00, inclusive of penalties and interest.
8. The Appellant objected to the assessment in a letter dated 21<sup>st</sup> December 2018. The Respondent subsequently issued an Objection Decision dated 18<sup>th</sup> January 2019. Being dissatisfied with the Respondent's decision, the Appellant lodged this Appeal through a Memorandum of Appeal dated 28<sup>th</sup> February, 2019 filed on the 1<sup>st</sup> of March, 2019.

## **THE APPEAL**

9. The Appeal was premised on the following grounds:
  - i. That the Respondent erred in fact and law by failing to appreciate the statutory exemption from VAT granted to DLRKe by virtue of being an Export Processing Zone (EPZ) enterprise.

- ii. That the Respondent erred in law and fact in failing to appreciate that under the VAT Act, 2013 DLRKe has no obligation to account for VAT, if any, on the import of banknotes into Kenya.
- iii. That the Respondent erred in both fact and law in finding that DLRKe was responsible for charging, collecting and accounting for VAT on the sale of banknotes.
- iv. The Respondent erred in law and fact in failing to appreciate the basic tenets of the EPZ regime and specifically that an EPZ enterprise is deemed to be a territory outside of the customs territory of Kenya and therefore outside the VAT Act jurisdiction.
- v. The Respondent erred in law and fact in attempting to extra-territoriality implement the provisions of the VAT Act.
- vi. The Respondent erred in law and fact by failing to acknowledge the provisions of the Export Processing Zone Act (EPZ Act) that any removal of goods out of an EPZ is importation into the customs territory and hence the importer has the obligation to account for VAT if any.
- vii. The Respondent erred in law and fact by not considering the provisions of the VAT Act that provide that it is the importer's obligation to account for VAT, if any, on importation of goods.
- viii. The Respondent erred in law and fact by failing to apply a consistent tax treatment on importation of bank notes as is carried out on the importation of other security documents.
- ix. That the Respondent erred in law and fact by ignoring the contractual obligations of the Ex Works contract between the Appellant and CBK which

stipulates that CBK, as the customer in the contract is responsible for importing the banknotes and therefore accounting for VAT if any.

- x. That the Respondent erred in law and fact in failing to acknowledge that under the contract between the Appellant and CBK, the Appellant does not remove goods from the EPZ, rather the CBK removes the banknotes from the Appellant's premises and imports these banknotes into Kenya.
- xi. The Respondent erred in fact and law in failing to be bound by its own letter dated 5th November 2013 which expressly, clearly and unambiguously confirmed that VAT does not apply on importation of currency.
- xii. The Respondent erred in fact and law in assessing the Appellant on supply of banknotes yet these do not constitute a taxable supply under the VAT Act.
- xiii. The Respondent erred in law and fact by failing to take cognizance of the annual licence renewals by the competent authority Export Processing Zone Authority (EPZA) which renewals were issued based on the Appellant's filed returns to EPZA.
- xiv. The Respondent erred in law and fact by failing to appreciate and consider that the Appellant had been filing quarterly and annual returns with the EPZA which is mandated to licence EPZ.
- xv. That the Respondent erred in law and fact by breaching the Appellant's legitimate expectation in assessing the Appellant on an alleged breach yet the Appellant has had a valid EPZ license since 1994 to date
- xvi. The Respondent erred in law and fact by ignoring the mandate of the EPZA in issuing and renewing EPZ licenses with full knowledge of the Appellant's operations including local sales.



- xvii. The Respondent erred in law and fact in failing to recognize the powers and functions of the EPZA as the competent authority as provided by Regulation 8 of the East Africa Community Customs Union EPZ Regulations
- xviii. The Respondent ignored its express, clear and unambiguous confirmation that importation of currency is not subject to VAT through a letter dated 3<sup>rd</sup> November 2013 to CBK as the importer of currency.
- xix. The Respondent is in breach of legitimate expectation by disregarding its binding confirmation that the import currency is not subject to VAT.
- xx. The Respondent erred in fact by disregarding its discussions with DLRKe where the Respondent agreed to vacate the VAT issue in February 2018 but later backtracked and issued the impugned assessment.
- xxi. The Respondent erred in fact and law in failing to consider the approvals by its authorized resident customs officer attached to the Appellant's premises for CBK to import the banknotes into Kenya.
- xxii. The Respondent acted ultra vires its powers and therefore erred in law by abrogating unto himself/herself and exercising the powers and functions vested in the EPZA.
- xxiii. The Respondent erred in law by disregarding the provisions of the EPZA and EACCMA EPZ Regulations that both appoint the EPZA as the competent and rightful authority to regulate the affairs of the EPZ operators such as the Appellant and especially in relation to license provisions.
- xxiv. The Respondent erred in law by acting ultra vires its powers and mandate in seeking to assess an alleged breach on an EPZ operation having a valid license granted by the issuing authority EPZA.

- xxv. The Respondent erred in fact by failing to appreciate the national and strategic importance of the contract between the Appellant and CBK as the sole provider of banknotes to CBK.
- xxvi. The Respondent erred in fact by failing to recognize the practical ramifications of a situation where the CBK runs out of currency, by virtue of the Appellant not performing its contract over compliance issue of meeting the licence conditions.
- xxvii. The Respondent erred in law and fact in failing to take cognizance that the competent authority EPZA had in full disclosure of the Appellant's sales, still renewed its license due to the strategic important nature of the supply made by the Appellant.

#### **Appellant's Case**

- 10. The Appellant's case is premised on the hereunder material documents and proceedings:
  - i. The Appellant's Statement of Facts dated 28<sup>th</sup> February 2019 together with the documents filed therewith on 1<sup>st</sup> March 2019.
  - ii. The witness statement of Francis Gakuru dated 16th March 2021 filed on the same day;
  - iii. The Appellant's written submissions dated 30th March 2021 filed on the same day together with the copies of legal authorities.
- 11. The Appellant has, in its submissions, summarized the above grounds into the following key points which it considers to form the issues for determination:-

- a) The Appellant is a licensed EPZ entity thus exempted from registration under the VAT Act. Therefore, the Appellant is not VAT registered and had no obligation to charge or account for VAT;
- b) Section 5(5) of the VAT Act imposes the obligation to account for VAT on the importer and CBK is the importer of the banknotes;
- c) The contract between CBK and the Appellant for the supply of banknotes provided that it was CBK's responsibility to account for taxes, if any, arising on the imported banknotes;
- d) Importation of currency/money/banknotes is not subject to VAT under the VAT Act as confirmed by KRA in its letter dated 5 November 2013 to the importer CBK;
- e) The Respondent breached the Appellant's legitimate expectation in respect of its communicated position that the supply of currency is not subject to VAT; and
- f) The Respondent acted ultra vires its powers in respect of licensing the Appellant as an EPZ enterprise.

**a) The Appellant is a licensed EPZ entity and exempt from registration under the VAT Act.**

12. The Appellant submitted that it was not in dispute that it has operated as a licensed EPZ enterprise since its establishment in 1994. It is also not in dispute that the EPZA has duly renewed its license over the years. This renewal was with the EPZA's full knowledge of the quantum of sales made to CBK each year based on the Appellant's returns filed with the EPZA. As such, the EPZA's approval of the Appellant's EPZ license is a clear acceptance by the EPZA for the Appellant

to continue operating as an EPZ enterprise manufacturing bank notes and making sales to CBK.

13. Having established that the Appellant is a duly licensed EPZ enterprise, the Appellant asserted that by virtue of being a licensed EPZ enterprise, it was exempt from registration under the VAT Act and therefore has no legal obligation to charge, collect and account for VAT both under the VAT Act and the EPZ Act.

The Appellant relied on Section 29(2) of the EPZ Act which states as follows:-

*“Subject to subsection (1) and without prejudice to any other written law, the export processing zone enterprises, export processing zone developers and the export processing zone operators shall be granted the following: exemptions under the Value Added Tax Act...”*

14. The Appellant further relied on Section 5 of the VAT Act, 2013 states:-

*“A tax to be known as value added tax, shall be charged in accordance with the provisions of this Act on:*

*(a) a taxable supply made by a registered person in Kenya;*

*(b) the importation of taxable goods;”*

15. From the above, the Appellant submitted that the obligation to charge and account for VAT arises under the VAT Act and specifically the obligation is in respect of a registered person. As the Appellant has an EPZ License and is governed by the EPZ Act, the Appellant is not VAT registered. Accordingly, it was the Appellant's submission that it does not supply taxable supplies and is therefore not required to register, charge or account for VAT.

**b) Section 5(5) of the VAT Act imposes the obligation to account for VAT on the importer**

16. The Appellant sought to rely on Section 5(5) of the VAT Act which stipulates that:

*“Tax on the importation of taxable goods shall be charged as if it were duty of customs and shall become due and payable by the importer at the time of importation.”*

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17. It is the Appellant’s assertion that the Respondent’s witness conceded that an EPZ is for tax purposes (including VAT) deemed to be outside the territory of Kenya. Consequently, the Appellant, by virtue of being an EPZ entity operates outside the customs territory within the meaning of Section 2 of the EPZ Act which defines a customs territory as *‘the territory in which the customs laws of Kenya apply in full but does not include an export processing zone’*.

18. The Appellant highlighted Section 24(b) of the EPZ Act which states:

*“Goods which are brought out of an export processing zone and taken into any part of the customs territory for use therein or services provided from an export processing zone to any part of the customs territory shall be deemed to be imported into Kenya.”*

19. The Appellant submitted that the Respondent’s witness had acknowledged that the Appellant’s sale to CBK was an export and indeed confirmed, on cross-examination, that CBK is the importer of the banknotes into Kenya.

20. It was the Appellant’s view that the confirmation that the Appellant is an EPZ enterprise operating in a duly licensed Export Processing Zone and that CBK imports the banknotes, when considered together with the definition of a customs territory, the provisions of Section 24(b) of the EPZ Act, and Section 5(5) of the VAT Act clearly demonstrate that the Appellant has no legal

obligation to account for VAT on goods imported into Kenya. The importer of the goods in this case is CBK. It is CBK as the importer of the banknotes who is responsible to account for all import duties, including VAT if any, which arises.

21. It is the Appellant's assertion that this treatment is consistent with the treatment of the other security products that it sells whereby the importers on record are the local customers who are responsible for bringing in their goods from the EPZ into the customs territory. Accordingly, these importers account for VAT on their imports.
22. The Appellant addressed the assertion made by the Respondent's witness that the Appellant was found to be accounting for VAT on sale of other security products. However, the Appellant submitted that the letter relied upon by the Respondent to support this assertion set out the administrative understanding between the Appellant and the Respondent in respect of cheques and does not cover banknotes. Moreover, the Respondent had confirmed through its witness, during cross-examination, that the Appellant invoices Barclays Bank of Kenya and that the import declaration forms clearly show the Appellant as the exporter and Barclays Bank of Kenya as the importer. The Appellant submitted that under the MoU (being the letter relied on and referred to herein) the Appellant's role was only to facilitate tax collection and remittance and in no way did the obligation to pay the taxes shift from the importing banks to the Appellant.
23. Based on the foregoing, the Appellant submits that it is not the importer of the banknotes and is not in law or in fact liable for the VAT, if any, on importation of the banknotes by CBK. The Appellant sought to rely on the case of Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 2KB as cited in

**Republic V Commissioner Of Domestic Taxes Ex-Parte Barclays Bank Of Kenya**

**Ltd [2012]** for the proposition that:

*“...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”*

- c) **The contract between CBK and the Appellant for the supply of banknotes provided that it was CBK’s responsibility to account for taxes, if any, arising on the imported banknotes.**
24. The Appellant submitted that under both the VAT Act and the EPZ Act, the importer on record is liable to account for VAT at importation, if any is due. The question of who the importer was, is a question of fact. The contract for sale of the banknotes stated clearly that the Appellant sold the banknotes “ex-works” incoterms basis. Clause 1.5 of the agreement between the Appellant and CBK stated that *‘Delivery shall be deemed to take place Ex-works at De La Rue Ruaraka Banknote Printing Factory, Nairobi (Incoterms, 2000)’*.
25. Ex-works, the Appellant submitted, is defined by the International Chamber of Commerce (2010) to mean:

*“The seller delivers on its contractual obligation when it places the goods at the disposal of the buyer at the seller’s premises or at another named place*

*(i.e. works, factory, warehouse etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable.”*

26. The Appellant submitted that the implication of the Ex-works contracts is that the Appellant as seller:

- i)* Prepares the goods for the buyer, suitably packed, ready for collection and loading by the buyer or his carrier;
- ii)* Delivers the goods when it places them at the disposal of the buyer at the seller's premises or another named place, in this case, the Appellant's warehouse at Ruaraka;
- iii)* Is not responsible for loading or unloading goods; and
- iv)* Is not responsible for export clearance.

27. On the other hand, the buyer (in this case CBK):

- i)* Bears the full costs and risks of carriage to the ultimate destination.
- ii)* Is responsible for both export and import clearance.

28. The Appellant averred that based on its contract with CBK, it was CBK's responsibility to account for taxes. The Appellant's role ended on placing the goods, ready for collection, by CBK at the Appellant's premises. The Appellant therefore averred that it had never exported anything out of the EPZ customs territory and did not import the goods into the territory of Kenya. Consequently, the Appellant has no obligation to account for VAT as alleged and demanded by the Respondent. The Appellant further asserts that were any VAT payable on



importation of the banknotes into the Kenya customs territory, such VAT would be for the account of CBK as the importer and not the Appellant.

29. The Appellant further submitted that it was a gross misrepresentation for the Respondent to claim that terms of trade are irrelevant yet when collecting VAT and other taxes on the importation of goods, such taxes are levied on the Cost Insurance Freight (CIF) value of the good which is an example of incoterms that the Respondent uses on a daily basis. The incoterms cannot therefore be said to be irrelevant.

**d) Importation of currency is not subject to VAT under the VAT Act**

30. It was the Appellant's submission that it is not in contention that it sold banknotes to CBK. The importer on record, being CBK sought the Respondent's confirmation as to whether it was liable to account for the VAT on the importation of currency in order to be clear on its tax obligations in respect of the imported banknotes or currency. Indeed, a letter dated 5<sup>th</sup> November 2013 from the Respondent to CBK was issued in response to CBK's query confirming that VAT is not chargeable on importation of currency/money.
31. The Appellant submitted that having clarified the position regarding banknotes, the Respondent cannot now renege on this position as to do this would violate the taxpayer's legitimate expectation as enunciated in various High Court decisions including **Republic vs Kenya Revenue Authority Ex Parte Aberdare Freight Services Limited HC Misc. No 946 of 2004.**

32. According to the Appellant, the Respondent's witness, Mr. Munyao, attempted to draw a distinction between banknotes and currency or money. However, Mr. Munyao failed to explain what further procedure CBK performs to the printed banknotes for them to become currency or money. Indeed, on being questioned, Mr. Munyao conceded that the ordinary person would transact with banknotes if they stole them en-route from the Appellant to CBK as they are at the time legal tender. Mr. Munyao further confirmed during cross examination that when he went to conduct the audit at the Appellant's premises, he was asked to declare the currency he was carrying. This security procedure is enforced as anyone who makes off with banknotes from the Appellant's strong rooms would be able to use them as there is no difference between the said bank notes and the ones issued by CBK once CBK imports them. It was therefore the Appellant's submission that the letter of 5<sup>th</sup> November 2013 to CBK covers and should be understood to cover banknotes as this is what CBK imports from the Appellant.
33. The Appellant further submitted that pursuant to the Tribunal's order to file a copy of the CBK application to the Respondent for the letter dated 5<sup>th</sup> Nov. 2013, the Appellant wrote to the CBK requesting for the application but has not yet secured a copy of the letter despite concerted efforts to do the same. The above notwithstanding, the Appellant submitted that the Respondent's letter of 5<sup>th</sup> November 2013 is patently clear. It is trite law that a document speaks for itself and if the Respondent is claiming that the said letter was written in a different context then the onus is on the Respondent to prove that context. Section 109 of the Evidence Act states that:

*“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person.”*

34. The Appellant further relied on Section 112 of the Evidence Act which states that:-

*“In court proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”*

35. It was the Appellant’s assertion that the CBK application was sent to the Respondent who therefore has it in his possession. Thus, it argues, if it is the Respondent’s submission that the application was made in a different context then this fact is especially within the Respondent’s knowledge and the burden of proving this fact falls squarely on the Respondent. The Appellant relied on **Allied Wharface Limited v Ganja Mavambu Nyawa (2020) eKLR** where the Court after citing Section 109 of the Evidence Act held that if the Respondent was claiming to be an employee of the company then *“...it was incumbent on him (Respondent) to call evidence in support of his assertion.”*

36. It was therefore the Appellant’s prayer that the Tribunal find that the Respondent is bound by its express, clear and unambiguous position that importation of currency is not subject to VAT.

37. The Appellant submitted that the matter of legitimate expectation was canvassed in court at length in the case of **Keroche Industries Limited V Kenya Revenue Authority & 5 Others [2007] eKLR** where the court held that:

*“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.”*

38. The Appellant further relied on the case of **Council of Civil Service Unions v Minister of Civil Service (1995) AC 374**, in which Lord Diplock asserted that:

*“a legitimate expectation may arise from an express promise ‘given on behalf of a public authority’ and ‘some benefit or advantage which..[the applicant] had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment.”*

39. The Appellant also cited the case of **Republic V Kenya Revenue Authority Ex Parte Universal Corporation Ltd** [ [2016] eKLR where the Court stated that: *“it follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner.”*
40. As stated in the above precedents the Appellant submitted that it is important that the Respondent is held to its word and conduct.

**e) The Respondent has acted ultra vires its powers**

41. According to the Appellant, the Respondent's case is premised on the Appellant's alleged contravention of its EPZ license and in the Respondent's view, such contravention denied the Appellant the benefits of an EPZ enterprise. Specifically, the Respondent's witness statement states that pursuant to Regulation 12(3) of the East African Community Customs Union (EPZ) Regulations (EACCU EPZ), no EPZ enterprise shall enjoy the benefits described in regulation 16 unless such EPZ enterprise holds a valid license issued by a competent authority and has complied with customs requirements.
42. During cross-examination, Mr. Munyao, witness for the Respondent conceded that the benefits described in Regulation 16 of the EACCU EPZ Regulations are in respect of duty exemptions on import of machinery and raw materials by an EPZ enterprise. Regulation 16 clearly does not apply to the Appellant's dispute which is in respect of VAT on banknotes exported by the Appellant and imported by CBK. On this account alone, the Appellant submits that the Respondent's reliance on the alleged breach of the EPZ conditions and license fails and the Respondent's entire claim of VAT must necessarily fail. Mr. Munyao failed on cross-

examination to point out any provision of the East Africa Community Customs Management Act or Regulations which would entitle the Respondent to treat the Appellant as the importer of the banknotes and to claim VAT from the Appellant.

43. The Appellant avers that based on Regulation 8(1) of the EACCU EPZ Regulations, the EPZA is the competent authority, appropriate regulator, competent and lawful decision maker for EPZ enterprises charged with supervision of EPZ activities including the approval, suspension or cancellation of licenses. The Appellant therefore submitted that the Respondent has no regulatory jurisdiction over the Appellant's license as an EPZ enterprise and the benefits it enjoys as an EPZ enterprise. In any event, the Respondent's witness confirmed during cross examination that the Respondent is represented on the EPZ board and as such is aware of all of the Appellant's EPZ return filings and subsequent licenses all of which have been issued without cancellation each year.
44. The Respondent's mandate as outlined in the KRA Act No. 2 of 1995 imposes several obligations on KRA none of which provides that the Respondent can act on behalf of the EPZA. In any event, and without prejudice to the foregoing, nothing prevented the Respondent from bringing the alleged breaches by the Appellant to the attention of the EPZA which is the rightful person to address the Appellant's licensing as per Section 9(2) of the EPZ Act.
45. The Appellant cited Section 9 (2)(o) of the EPZ Act which provides that:-

*“For the purpose of carrying out the objectives specified in subsection (1), the Authority may exercise, perform and discharge all or any of the following powers, duties and functions to suspend or cancel the license*

*of an export processing zone operator or an export processing zone enterprise or an export processing zone developer which is in violation of the Customs & Excise Act (Cap 472), the Exchange Control Act (Cap. 113) and the Value Added Tax Act... ”*

46. The Appellant submitted that by purporting to appropriate and abrogate unto itself powers under the EPZ Act, the Respondent overstepped its mandate and its actions are therefore gravely ultra vires its powers and jurisdiction and therefore null and void *ab initio*. Accordingly, the impugned assessment cannot stand.

**f) The Respondent is in breach of an agreement on closure of the VAT Assessment.**

47. It was the Appellant's submission that the Respondent backtracked on its word regarding this VAT assessment. As indicated in the background, the Respondent carried out a tax audit on several tax heads including Corporation Tax and VAT. The Appellant and the Respondent subsequently entered into good faith discussions to resolve the various matters and indeed most of the matters such as Corporation Tax on sales support services and PAYE were resolved at these discussions.
48. The Appellant averred that the discussions culminated in an agreement that this VAT matter was marked as resolved. The discussions were captured in an email from KPMG to KRA. The Respondent through Mr. Philip Munyao then replied to the email summary on the very same day confirming that the email 'fairly captures the deliberations. The Appellant understood the Respondent's email to mean that the VAT matter on the sale of banknotes to CBK was resolved. However, in disregard of this agreement, the Respondent assessed the Appellant

on VAT on the importation of banknotes by CBK. The Appellant submits that the Respondent's actions are in bad faith and violate the Appellant's legitimate expectation which arose from the emails and discussions in which the Respondent had marked the matter was resolved. Further, the silence and subsequent turn of the Respondent together with the acceptance of the email stating that the matter has been resolved is extremely prejudicial to the Appellant, as the Appellant relied on the Respondent's presentation that the VAT matter was resolved.

49. Further, the Appellant's witness Mr. Gakuru asserted that the Respondent had through various correspondence and meetings stated that the Commissioner General has written to the National Treasury recommending that this matter be vacated in its entirety. These meetings clearly incorporated the current case as part of the overall agreement for all indirect taxes' disputes, and the Commissioner General indicated that 'he had an idea how we can resolve this' as a means to progress and resolve the issue.
50. On the premise of the above undertaking, the Appellant along with other companies that have been members of the De La Rue Group for the period of the relevant assessments including DE La Rue Kenya EPZ Limited, entered into a without prejudice settlement agreements in respect of the other open tax disputes and the parties entered a total of 5 consents at this Tribunal settling these matters including TAT Nos. 245 of 2020, 246 of 2020, 315 of 2020, 316 of 2020 and 82 of 2019 all to do with customs disputes. It is important to highlight that in respect of the customs disputes in TAT Nos. 315 of 2020, 316 of 2020 and 82 of 2019, the Appellant did not admit liability especially because CBK imported the



banknotes into Kenya. In the settled disputes both parties made concessions on a without prejudice basis.

51. It was the Appellant's assertion that it was on the basis of its honest belief that the VAT matter has been concluded and based on the confidence of 'good faith' demonstrated by the Respondent that the Appellant entered into the above-mentioned settlement agreements on the other open disputes between the parties. These followed many communications within De La Rue which also led to the support from various companies within the group including De La Rue Kenya EPZ limited which has two National Treasury representatives on its Board having had a briefing at its Board meeting on 24 February 2021 and including the following in the briefing paper that:

*"The Kenya Treasury needs to formally respond to the Commissioner General, KRA, to separately vacate the large VAT assessment of circa KES 1.2bn (Case 81 now part of TAT No 395) against De La Rue Currency & Security Print Limited."*

52. The Appellant submitted that the Commissioner General had confirmed to the Appellant and other parties that he had written to the National Treasury for an abandonment of this demand in its entirety.
53. It was the Appellant's submission that sustaining the Respondent's impugned assessment would be tantamount to de-legitimizing its legitimate expectation on a promise given by a public body, which has been relied on by the Appellant in good faith and further, that the Appellant settled the agreed penalties on this basis. The Appellant would thus suffer financial loss based on this reliance.

54. From the foregoing, the Appellant submitted that the Respondent's assessment is erroneous, based on a misapprehension of the law and facts and clearly denies the Appellant's legitimate expectation on the various undertakings given by the Respondent towards the resolution of this matter.

#### **Appellant's prayers**

55. The Appellant therefore prays that the Tribunal grant the following orders:
- a) That the assessment of Kshs 1,219,192,946 and the resulting penalties and interest be vacated.
  - b) That the Appeal be allowed with costs to the Appellant.
  - c) Any other remedies that the Tribunal deems just and reasonable.

#### **THE RESPONDENT'S CASE**

56. The Respondent's case is premised on the hereunder material documents and proceedings:-
- i. Statement of Facts dated 28th March 2019 together with the documents filed therewith on 29th March 2019.
  - ii. The witness statement of Philip Munyao dated 16<sup>th</sup> March 2021 filed on 17<sup>th</sup> March 2021.
  - iii. The Respondent's written submissions dated 30th March 2021 filed on 31<sup>st</sup> March together with the copies of legal authorities.
57. The Respondent submitted that the Appellant was registered to operate under the EPZ regime in February 2014. It operated under a tax holiday until February 2004 and a reduced corporate income tax rate of 25% up to February 2014.

Currently, the Appellant operates under a conditional EPZ license which allows it to sell up to 50% of its products in the local market.

58. The conditional license under which the Appellant was operating specifies that at all times during the validity of the license, the Appellant shall:

- i. Be located in a validly licensed Export Processing Zone.
- ii. Undertake *manufacturing activities* approved by the Authority i.e., the manufacture of banknotes and other security documents.
- iii. Not at any time to make sales of more than 50% to the local market subject to approval by the Minister of Trade.
- iv. Comply with all laws (*customs laws*), rules and regulations for the time being in force save or any exemptions that may from time to time be granted.
- v. Comply with any other special terms and conditions as may be specified hereafter by the Authority.

59. The Respondent submitted that while in the process of auditing the Appellant, it was discovered that the Appellant was operating in violation of Customs Laws and procedures. It also operated in clear violation of the EPZ licensing conditions whereby it was selling more than 50 percent (*table 1 below*) of its production in the local market despite having a ceiling of 50% local sales. The same was captured in the Preliminary Audit Findings reports tabulated below:

	2013	2014	2015	2016	2017	Total
	KShs. '000'	KShs. '000'	KShs. '000'	KShs. '000'	KShs. '000'	KShs. '000'
Local Sales - Currency (CBK)	3,706,014	1,993,248	976,262	-	2,364,957	9,040,481
- Security Print	204,437	245,684	255,336	-	499,452	1,204,909
<b>Total Local Sales (A)</b>	<b>3,910,451</b>	<b>2,238,932</b>	<b>1,231,598</b>	<b>-</b>	<b>2,864,409</b>	<b>10,245,390</b>
Export Sales	60,662	844,740	2,189,132	3,614,865	1,431,733	8,141,132
<b>Total Sales</b>	<b>3,971,113</b>	<b>3,083,672</b>	<b>3,420,730</b>	<b>3,614,865</b>	<b>4,296,142</b>	<b>18,386,522</b>
	<b>98%</b>	<b>73%</b>	<b>36%</b>	<b>0%</b>	<b>67%</b>	<b>56%</b>

60. As a as a result, additional assessments on VAT were issued vide the Respondent's letter of 26<sup>th</sup> November 2018, which amounted to **Kshs. 1,219,192,946.**

61. Having provided this background, the Respondent submitted that the following are the main issues for determination:

- a) Whether the Appellant had an obligation to account for VAT.
- b) Whether, under the Appellant's contract with CBK, it is the CBK's obligation to account for import VAT.
- c) Whether the supply of banknotes was subject to VAT during the audit period.
- d) Whether the Respondent breached Appellant's legitimate expectation in assessing VAT on the sale of banknotes to CBK.

**a) Whether the Appellant had an obligation to account for VAT**

62. The Respondent submitted that the Appellant was not exempted from registering for VAT based on the provision of Section 29(2) of the EPZ Act, hence was obligated to account for VAT.

63. The Respondent asserted that the provisions of Section 25 of the EPZ Act provide that no goods should be exported into a Customs territory without proper

approvals and due adherence to the Customs laws. Further, Section 29(2) of the EPZ Act provides that the exemption of an EPZ from any taxes is subject to the conditions specified in the Customs laws. Section 29(2)(a) of the EPZA states.

*“Subject to subsection (1) and without prejudice to any other written law, the export processing zone enterprises, export processing zone developers and the export processing zone operators shall be granted:*  
*(a) exemption from registration under the Value Added Tax Act ...”*

64. According to the Respondent, the determination of whether an entity (EPZ) conforms to the customs laws and procedures rests with the Commissioner of Customs and Border Control. Further, the Respondent insisted that the Appellant operated without due regard to customs laws. Notably, the Appellant:
- i. failed to enter goods for home consumption by lodging customs entries for the exports.
  - ii. flouted the threshold for local sale as provided for under Regulation 15(1) of the East Africa Customs Union Export Processing Zones Regulations.
65. It was the Respondent’s submission that the Appellant did not observe the conditions attached to the license and should therefore not enjoy the benefits of VAT exemption. The conditional licensing by the EPZ Authority (“the Authority”) stipulated that in all the yearly licenses issued by the Authority, the Appellant ought to have complied with ALL customs procedures for the exemption to remain valid.

66. The Respondent asserted that the import of Section 15(1) of the EPZ Act is that exemption of an EPZ enterprise from taxes (including exemption from registration from VAT) is not absolute but rather is subject to various laws. The Respondent submitted that the Appellant has selectively applied the law by indicating that the EPZ enterprises are only governed by the provisions of the EPZ Act. The Customs laws as spelled-out under Section 2(1) of EACCMA and Article 39 of the EAC Protocol also apply.

67. The Respondent referred to various provisions of the law including:-

- a. Section 2(1) of the EACCMA which spells out that the governing and applicable customs law which include:

*“Acts of the Partner States and the Community relating to Customs, relevant provisions of the Treaty, the Protocol, Regulations and directives made by the Council and relevant principles of international law.”*

- b. Article 39 of the EAC Protocol which states:

*“The customs law of the Community shall consist of:-*

- (a) relevant provisions of the Treaty;*
- (b) this Protocol and its annexes;*
- (c) regulations and directives made by the Council;*
- (d) applicable decisions made by the Court;*
- (e) Acts of the Community enacted by the Legislative Assembly; and*
- (f) Relevant principles of international law.”*

- c. Section 253 EACCMA which provides that: -

*“This Act shall take precedence over the Partner States’ laws with respect to any matter to which its provisions relate.”*

68. The Respondent averred that it therefore follows that any law, including VAT Act 2013, Income Tax Act or the EPZ Act, if inconsistent with ECCMA is void to the extent of the inconsistency, and any act or omission in contravention with EACCMA is invalid. Therefore, the provisions of ECCMA regarding the validity of an EPZ exemption from taxes take precedence over any provisions under the VAT Act 2013 or the EPZ Act.
69. The Respondent submitted that Section 168(1) of the EACCMA specifies that the Commissioner may, subject to the Customs law and to such conditions as the Commissioner may impose and on payment of the duties due, permit removal of goods from an EPZ to be **entered** for home consumption.
70. The Respondent asserted that Article 29 of the Protocol on the Establishment of the East African Custom Union (the Protocol) specifies that the Partner States agreed to support the establishment of Export Processing Zones. And that the implementation of this Article was to be per the EACCU (EPZ) Regulations and the customs law of the community.
71. Further, Article 1 of the EAC Protocol defines “Partner States” to mean the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania and any other country granted membership to the Community under Article 3 of the Treaty. In addition, the East African Community Customs Union (Export Processing Zones) Regulations were enacted as an implementation tool of the provisions of Article 29 of the Protocol (*Regulation 2*).
72. On the other hand, Regulation 12(3) specifies that *no EPZ enterprise shall be established and the benefits described in Regulation 16 shall not accrue to any EPZ enterprise unless that EPZ enterprise holds a valid license issued by a*

*competent authority and has complied with customs requirements. The Appellant should not therefore argue that the Respondent cannot demand taxes failure to observe this legal requirement.*

73. The Respondent also cited Regulation 15 which specifies that goods within an EPZ shall not be taken out of the EPZ except:-

*“a)Exports*

*b) exports into the customs territory subject to:*

- i. necessary permits being obtained from the competent authority; payment of all applicable import duties, levies and other charges;*
- ii. compliance with all customs procedures; and*
- iii. the per centum of the exporters which shall not exceed twenty per centum (in DLRKe’s case 50% with prior approval of the Cabinet Secretary of the Ministry of Trade and Co-operatives) of the total annual production of the company concerned;”*

74. The Respondent states that Regulation 3 of the EACCU (EPZ) defines “Custom Territory” to mean the geographical area of the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania and any other country granted membership of the Community under Article 3 of the Treaty. Since the EPZ enterprise registered by the Appellant is within the geographical area of the Republic of Kenya, it is thus governed by the above-mentioned customs law hence the Appellant operated in total disregard of the customs laws and procedures as pertains to tax obligations.



75. The Respondent further submitted that the EACCMA provides that an EPZ is a designated part to customs territory where any goods introduced are generally regarded; in so far import duties and taxes are concerned, as being outside Custom territory but are restricted by controlled access. The import of this is that EPZ enterprises are only exempted from import duties and taxes for the manufacture of goods destined for export. In cases where goods are entered for home use, an EPZ enterprise is obligated to adhere to all customs law and procedure including payment of customs taxes.
76. The Respondent further states that it had penalized the Appellant for flouting the Customs laws. The Appellant conceded and the offense was compounded.
77. The Respondent submitted that the Appellant (EPZ) is governed by all the above-cited laws. In complete disregard of the aforementioned clear provisions of the laws and procedures, the Appellant opted to operate outside the laws and thus should not enjoy benefits (including any tax exemption status) that should only accrue to law-abiding taxpayers.
78. Further, the Respondent asserts that the Appellant incorrectly misapplied the law by stating that the obligation to account for VAT arises from being registered for VAT and misguided itself by stating that it does not supply taxable supplies and therefore not required to register for VAT.
79. The Respondent relied on Section 2(2) of the EACCMA which specifies that goods must be entered for home consumption through a prescribed form (*custom entry form C17*) and on payment of the requisite duty. The Appellant being the party entering the banknotes (sales to CBK) for home use and as guided by the provision of Section 168(1) of the EACCMA, ought to have accounted for VAT

and paid the duty. Notwithstanding the above, payment of import duties does not warrant a party to be registered for VAT. Therefore, the argument by the Appellant that it is not obligated to account for VAT since it is exempted from VAT registration (although they have flouted the exemption condition) is not supported by any written law.

80. The Respondent stated that Section 2(1) of the EACCMA defines **duty** to include any cess, levy, imposition, tax, or surtax, imposed by any Act. Hence, according to the Respondent, the Appellant was liable to account and pay for VAT as the supply of banknotes to CBK is a Vatable supply as provided by Sections 2, Section 5 and Section 13 of the VAT Act, 2013.
81. The Respondent relied on the case of **Rex v Detody 1926 AD 198 at 202-3** where the court stated:

*“Custom, of course, cannot prevail over the plain and unambiguous meaning of a statute, but where language is open to two constructions, then the fact that it has been uniformly read in one sense by those entrusted with the administration of the measure cannot be ignored. The Civil Law attached great importance to prior custom as a factor in the interpretation of statutes ... But the tendency of modern decisions is greatly to restrict the weight to be attached to contemporaneous exposition... “No usage can control the unambiguous language of the law...”*

82. Further the Respondent cited the case **Master Currency v CSARS (155/2012)** [2013] ZASCA 17 (20 March 2013) where it was held that:

*“Although modern bank notes no longer all contain such a promise they nevertheless embody personal rights which are situated at their place of issue, that is the place where the debtor resides. It follows, so the argument went, that the incorporeal rights attaching to banknotes are situated in the country where they are issued and where the issuing bank resides. The banknotes exchanged by the appellant are therefore ‘movable property’ situated in ‘export countries’ at the time the services (that is, the exchange of currencies) are rendered.*

*It follows that banknotes, with or without a promise to pay its face value on demand, cannot be regarded as documents that embody incorporeal rights that are situated, in the case of foreign notes, elsewhere. The appellant has failed to show that the Johannesburg Tax Court reached the incorrect conclusion. The appellants’ services rendered in the duty free area are subject to VAT at the standard rate and were correctly assessed as being so by the Respondent.”*

83. The Respondent asserts that for the Appellant to escape liability from VAT it must bring itself within one of the ‘exemptions, exceptions, deductions and adjustments’ provided for in the VAT Act. In this case the Appellant did not bring itself within the confines of the Act. Further, the Respondent submits that the Appellant has failed to identify the parts of the law that exempted them from payment of VAT even after violating the terms and conditions of the EPZ licenses.

b) Whether, under the Appellant's contract with CBK, it is CBK's obligation to account for import VAT.

84. The Respondent submitted that the Appellant failed to charge VAT as required by the Customs laws. Further, the Appellant erred in interpreting the definition of "*customs territory*" as defined under Section 2 of the EPZ Act thus abrogating itself from accounting and payment of VAT.

85. The Respondent submitted that the Appellant has selectively applied the law by indicating that the EPZ enterprises (including the Appellant) are only governed by the provisions of the EPZA. However, Section 2(1) of the EACCMA spells out governing and applicable customs law which includes the EACCMA, Acts of the Partner States and of the Community relating to Customs, relevant provisions of the Treaty, the Protocol, Regulations and directives made by the Council and relevant principles of international law. Further, Section 253 of the EACCMA provides that:-

*"This Act shall take precedence over the Partner States' laws with respect to any matter to which its provisions relate."*

86. As such, the Respondent stated that if the provisions of any other law (in this case EPZ Act) are inconsistent with the provisions of the enacted Acts of the EACCMA the former law is void to the extent of the inconsistency and the EACCMA takes precedence.

87. The Respondent relies on the case of **Africa Cash & Carry Ltd V Commissioner SARS (2019) ZASCA 148** where the Supreme Court of Appeal of South Africa found that:-

*“The powers of the tax court and its functions are unique. It places itself in the shoes of the functionary and re-evaluates the facts and circumstances of the subject matter on which the assessments were based.*

*‘By its very nature an estimated assessment is subject to change based on an evaluation of the evidence and any information that becomes available. What is important is that the methodology used and the assumptions on the strength of which the estimated estimates were made should remain the same, otherwise the conclusions reached by the tax court might not be procedurally fair.’*

*‘The tax court must place itself in the shoes of the functionary to determine whether the methodology followed and the assumptions on which the estimated assessment are based, are reasonable and produce a reasonable result.’*

*‘Reasonableness requires that a balance must be struck between a range of competing considerations in the context of a particular case.’*

88. In addition, the Respondent submitted that the EACCMA provides that an EPZ is a designated part to customs territory where any goods introduced are generally regarded, in so far import duties and taxes are concerned, as being outside Custom territory but are restricted by controlled access. The import of this is that EPZ enterprises are only exempted from import duties and taxes for the manufacture of goods destined for export. In the instant case, where goods are entered for home use, an EPZ enterprise is obligated to adhere to all customs law and procedure including payment of customs taxes.

89. The Respondent further states that PART XIV (Sections 167 - 170) of the EACCMA is the provision guiding the EPZs operations. This part is buttressed by PART XIV (Regulations 169 – 178) of the East African Community Customs Management Regulations, 2010.

a. Section 167(1) of EACCMA specifies that:

*“Subject to the custom laws, goods in export processing zones or free port, whether of foreign or of domestic origin shall be entered for export after undergoing processing in an export processing zone or re-export in the same state from a Freeport.”*

b. Section 168(1) of EACCMA gives the Commissioner power to impose conditions on EPZ goods entered for home use.

Section 168(1) of EACCMA states:

*“The Commissioner may, subject to the Customs Removal of goods or laws and to such conditions as the Commissioner may impose and on payment of the duties due, permit removal of goods from an export processing zone or a free port, including waste from the manufacturing process, to be entered for home consumption.”*

These conditions are set out under Regulation 15 of the EACCU (EPZ) Regulations.

90. The Respondent stated that export in the instant case means a sale to CBK. Therefore, the Appellant, as the party entering the goods for home use, ought to have entered the banknotes sold to CBK using the prescribed custom form (C17) and account for VAT as per the provisions of Section 168(1) of EACCMA. Upon properly doing so, CBK would have an input VAT which would be available for claim.

91. Further, the Respondent submitted that the terms (incoterms) of the contracts are irrelevant in the current case since it was the obligation of the Appellant to account and pay the relevant duties since it was the party entering the goods for home use. The terms of the contract cannot override clear provisions of the customs law.
92. The Respondent asserted that it is incorrect and ignorant on the part of the Appellant to state that it has never exported anything out of the EPZ custom territory. By doing so it has adjudged itself as operating in utopia and the customs laws do not apply to it. Further, it would be self-defeating as the Appellant has agreed to commit the offence of not lodging customs entries for the banknotes, an offense that was compounded and they paid the resultant penalties as per the settlement terms reached through the Alternate Dispute Resolution Process in *TAT N. 82/2019* which was a Customs Appeal and a consent filed on 8<sup>th</sup> March 2021.
93. The Respondent insisted that the provisions of Section 24(b) of the EPZ Act and Section 5(5) of the VAT Act cannot be relied upon since in the instant case the governing procedures on accounting and payment of duties are set out under Section 168(1) of the EACCMA.
94. The Respondent therefore asserted that the Appellant was obligated to account for VAT on sale of banknotes as it was accounting for VAT on supplies made in connection with other security products sold locally.

**c) Whether the supply of banknotes was subject to VAT during the audit period**

95. The Respondent submitted that Section 2 of the VAT Act defines “*money*” as any coin or paper currency that is legal tender in Kenya. Therefore, it is important to

differentiate between money and banknotes. Firstly, for a paper currency to be termed as money it must be issued and accepted as a legal tender. This function rests with CBK and not the Appellant. CBK has the sole right to issue notes and coins in Kenya and, that only those notes and coins (so issued) shall be legal tender in Kenya. Thus, the Appellant cannot term the banknotes produced as an item of stock since it is solely contracted by the CBK to manufacture the banknotes on its behalf (provide manufacturing services to CBK).

96. The Respondent averred that “*Legal tender*” means the lawfully established national currency denominations. Legally required commercial exchange medium for money-debt payment.
97. Further, the Respondent asserted that it is uncontested that during the period September 2013 to March 2017 banknotes were taxable supply. This was after the enactment of the VAT 2013. Instructively, VAT Act Cap 476 provided that bank notes were a VAT exempt supply.
98. Further the Respondent asserts that under the Second Schedule to the repealed VAT Act, Cap 476, banknotes were exempt from VAT under Harmonized System (HS) Code 4907.00.90. Following the enactment of the VAT Act 2013, banknotes became a taxable supply. However, through the Finance Act, 2017, a new Paragraph 88 to the First Schedule of the VAT Act, 2013 was introduced to make banknotes an exempt supply. This therefore means that before 1<sup>st</sup> July 2017 and post-September 2013, sale of bank notes was Vatable supply. Effectively, the Appellant should have declared this VAT in its C17’s in line with Part XIV of EACCMA.



99. In addition, the Respondent stated that the Appellant produced and supplied banknotes to the CBK at prices specified in the various contracts it has with CBK. The price per unit of banknotes (revenue to the Appellant) was made up of the following variables:

- i. Cost of paper.
- ii. Cost of ink.
- iii. Other operating costs incurred to process the paper into money.
- iv. A mark-up/profit earned by DLRKe for printing the money.

100. The Respondent submitted that the above price of manufacturing a unit of a banknote that is subject to the VAT and not the denominations value or the intrinsic value of the banknote. The cost of making a unit of currency qualifies as a taxable value as provided for in Section 13 of the VAT Act 2013.

101. Section 2 of the VAT Act defines taxable supply to *mean*:

*“a supply, other than an exempt supply, made in Kenya by a person in the course or furtherance of a business carried on by the person, including a supply made in connection with the commencement or termination of a business.”*

102. The Respondent asserts that the insinuation that that CBK buys money from the Appellant is misplaced as it implies that the Appellant owns the money and not CBK. As it would be rightly assumed, the Appellant cannot sell that which they do not own. Kenyan currency does not belong to the Appellant. To hold so would lead to an absurdity and such an argument can only be construed to be tailored to purely evade payment of taxes. Section 2 of the VAT Act defines ‘*money*’ as:-

- (a) *Any coin or paper currency that is legal tender in Kenya;*

- (b) *A bill of exchange, promissory note, bank draft or postal or money order;*
- (c) *Any amount provided by way of payment using a debit or credit card or electronic payment system.*

103. As such, the Respondent submitted that the Appellant should have accounted for VAT vide a Customs entry when exporting the banknotes to CBK.

**d) Whether the Respondent breached Appellant's legitimate expectation in assessing VAT on the sale of banknotes to CBK**

104. The Respondent submitted that since the Appellant holds an EPZ license, it is not exempt from complying with any other laws. Regulation 12(3) of the EACCU (EPZ) Regulations specifies that *no EPZ enterprise shall be established and the benefits described in Regulation 16 shall not accrue to any EPZ enterprise unless that EPZ enterprise holds a valid license issued by a competent authority **AND** has complied with customs requirements.*

105. Further, the Respondent submitted that pursuant to Regulation 15(1) of the EACCU (EPZ) Regulations and Section 167(1) of the EACCMA, upon the exportation of banknotes to CBK, the Appellant was obligated to pay all import duties, levies and other charges and comply with all customs procedures. The Appellant blatantly circumvented the above provisions of the law. Therefore, the Respondent's action of charging VAT on the sale of banknotes was within the provision of the law.

106. The Respondent submitted that the Appellant flouted the conditional licensing requirements and thus should not enjoy the exemptions thereof. In addition, the Respondent states that Section 253 of the ECMMA provides that *this Act shall take precedence over the Partner States' laws concerning any matter to which its provisions relate*. In the matter of accounting and payment of customs taxes, provisions of EACMMA take precedence over any other Law. The Appellant cannot predicate itself to be governed only by EPZA provisions as this would be to act against clear provisions of the Customs Laws.
107. The Respondent submitted that the letter of 5<sup>th</sup> November 2013 was a private correspondence between the Respondent and CBK which requested for a ruling on whether VAT was chargeable on importation of “currency” hence the Appellant’s reliance on the letter is misguided and without a basis as they were not party to the same.
108. The Respondent was of the view that that “money” as defined under Section 2 of the VAT Act is excluded from the definition of “goods”. Hence, the Appellant cannot rely on the ruling set henceforth since it did not sell “currency” but rather offered printing services to CBK. The services are Vatable supplies as per the provision of Section 13 of the VAT Act, 2013.
109. The Respondent contended that the implication by the Appellant that it sells money to CBK, would imply that that the Appellant owns the money and not CBK as it would be rightly assumed that the Appellant cannot sell that which they do not own. Kenyan currency does not belong to the Appellant.

110. The Respondent relied on the case of **Bank Note Press Vs. Additional Assistant Commissioner of Commercial Tax** where the High court in India found as follows:

*“it is manifest that the main object of the company is to do the business of designing and printing of currency notes. When the company is engaged in the business as defined under section 2(d) of the VAT Act, 2002 then it acts as a "dealer" also as per section 2(i) of the Act because it is buying, selling and supplying of currency directly or otherwise and as the definition of the goods all kinds of movable property are goods. Though the word currency is not mentioned in the definition of 'goods' but the currency printed by the petitioner becomes a currency by virtue of section 22 of the RBI Act and becomes property of the Govt. of India, hence all the three ingredients are involved to bring the petitioner within the purview of Entry Tax. Petitioner is only engaged in printing and selling of bank notes to the Reserve Bank of India, therefore, there is a sale transaction between petitioner and the Reserve Bank of India and after sale the said goods become Bank Note or currency and before such transaction it is merely goods under the definition of VAT Act, 2002.”*

111. Further the Respondent denied the allegation that its comment on the email on the minutes meant that the matter of VAT on Banknotes was “marked as resolved.” In fact, the issues of VAT and customs were agreed to be assessed separately, and as a result the Respondent affirmed its position by notifying the

Appellant through the assessment letter dated 24<sup>th</sup> August 2018 that the VAT matter would be assessed separately.

112. In addition, the Respondent wished to clear the notion created by the Appellant that it may have agreed to a scheme with the Respondent to commit an illegality by violating the aforementioned tax laws. Article 47 of the Constitution provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Respondent asserts that at no point did KRA state that they would never pursue the tax arrears as doing so would be illegal.

113. The Respondent relied on the ruling in the case of **Communications Commission of Kenya & 5 others V Royal Media Services Limited & 5 others [2014]**. The Supreme Court held, in that case, that a person claiming legitimate expectation must satisfy the following:

- i. There must be an express, clear and unambiguous promise given by a public authority;*
- ii. The expectation itself must be reasonable;*
- iii. The representation must be one that was competent and lawful for the decision-maker to make; and*
- iv. There cannot be a legitimate expectation against clear provisions of the law or the Constitution.*

114. The Respondent asserted that the law cannot be bent to meet the Appellant's expectations. Doing so would be a violation of the principle of legality, a key

principle in the Rule of Law. This was upheld in **R. v. DPP ex p. Kailee**, that clear statutory words override any expectation howsoever founded.

### **The Respondent's Prayers**

115. The Respondent therefore prays that:

- a) The Respondent's Objection Decision be upheld;
- b) The outstanding tax arrears of Kshs. 1,219,192,946 are due and payable by the Appellant
- c) The confirmed assessments dated 26<sup>th</sup> November 2018 were proper in law;
- d) The Appeal herein be dismissed with costs to the Respondent.

### **ISSUES FOR DETERMINATION**

116. After considering the pleadings and written submissions filed by both parties along with the evidence tendered on the separate part of the parties, the Tribunal is of the view that the issues for determination are:-

- i. **Whether the Respondent had an obligation to pay import VAT for goods exported to the Customs Territory.**
- ii. **Whether the goods supplied were vatiable.**

### **ANALYSIS AND DETERMINATION**

- i. **Whether the Respondent had an obligation to pay import VAT for goods exported to the Customs Territory.**

117. In this dispute, the Appellant, a gazetted EPZ operator exported goods namely banknotes to the Central Bank of Kenya. The same were subject to import duty and VAT during the audit period. The Respondent sought to recover the import duty and VAT payable from the Appellant arguing that the Appellant had an obligation to account for duties and taxes imported into the customs territory.
118. The relevant laws in this dispute are the VAT Act, the East African Customs Management Act, the protocol on the Establishment of the East African Customs Union and the EPZ Act. These statutes prescribe, inter-alia, the guidelines governing the taxation of goods going into, within and removed from Export processing zones. In particular, Export Processing Zones are deemed to be outside the Customs territory and as such goods going into the EPZ from the customs Territory are deemed to be exported to the EPZ while those removed from the EPZ to the Customs Territory are deemed to be imported and subject to duties of customs. This is what is provided for in **Regulation 14 of the East African Community Customs Union (Export Processing Zones) regulations**
119. Under Section 168 of the East African Customs Management Act, the Commissioner may allow, on payment of duties removal of goods from an EPZ for home use. What is in dispute is whether the Appellant being an exporter had an obligation to pay the duties of customs or that was the obligation of the importer.
120. The responsibility for payment of customs duties for imported goods lies on the owner of the goods. Under **Section 2** of the Act, the definition of owner in respect of the goods includes both the Exporter and importer of the goods. However, because under normal circumstances it is the importer who has

possession of the goods when they are imported into the Customs Territory, such obligation is imposed on the importer.

121. Furthermore, under most contractual arrangements between the importer and the foreign exporter, the latter relinquishes ownership of the goods prior to their entry in the Customs Territory thus leaving the responsibility of payment of duties to the importer. In the view of the Tribunal, it is the person who brings the goods into the customs territory that has the responsibility of payment of duties.
122. The Tribunal examined the customs import entry submitted by the Respondent and found that the Appellant was named as the exporter and the Central Bank of Kenya as being the importer of the impugned goods. Under the supply contract between the latter and the former, the obligation for payment of duty and taxes was on the importer (Central Bank of Kenya). It was the responsibility of the Central bank to pay the taxes emanating from the purchase of bank notes from the Appellant.
123. The Tribunal was of the view that the Respondent ought to have sought the import Customs Duty and VAT on the person indicated on the Customs entry as the importer since that is the person who brought the goods into the customs territory. The Tribunal was also of the view that the goods could not be subjected to output tax because they were supplied from outside the jurisdiction of the VAT Act. In any case, removal of goods from the Export Processing Zone is an export and would therefore not be subject to VAT.





ii) Whether the goods supplied were vatiable.

124. Having found that the Appellant did not bear the responsibility for accounting for VAT, the question of whether the bank notes supplied are vatiable is rendered moot.

#### FINAL DECISION

125. Based on the foregoing, the Tribunal found that the Appeal has merit and must succeed.

126. Arising out of the finding above, the Tribunal makes the following Orders.

(a) Objection decision dated 18<sup>th</sup> January 2019 is hereby set aside.

(b) The Respondent is at liberty to collect any imports VAT from the disclosed importer.

(c) Each party to pay its own costs.

127. It is so ordered.

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

.....  
**ERIC NYONGESA WAFULA**  
**CHAIRMAN**

.....  
**CATHERINE N. MUTAVA**  
**MEMBER**

.....  
**ABRAHAM K. KIPROTICH**  
**MEMBER**

.....  
**GABRIEL M. KITENGA**  
**MEMBER**

.....  
**ELISHA NJERU**  
**MEMBER**