

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 380 OF 2020

HOTPOINT APPLIANCES LIMITED..... APPELLANT

-VERSUS-

**COMMISSIONER CUSTOMS &
BORDER CONTROLRESPONDENT**

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya and is in the business of distributing various electronic and home appliances in Kenya.
2. The Respondent is a principal officer of the Kenya Revenue Authority responsible for the management and control of customs.
3. By a notice dated 21st May 2020 following an audit of the Appellant, the Respondent demanded taxes assessed at Kshs. 24,675,098/-. The Appellant objected to the demand notice vide a notice of objection dated 19th June 2020. By an objection decision dated 17th July 2020, the Respondent upheld the demand for taxes in the sum of Kshs 24,675,098/-.
4. The Appellant, being dissatisfied with the objection decision, has filed the present Appeal against the whole of the objection decision vide a Memorandum of Appeal dated and filed on 26th August, 2020.

THE APPEAL

5. The Appellant cited the following as its grounds of Appeal: -

- a) The Respondent misdirected itself in law and in fact by finding that since the local purchase order (LPO) was issued by (DEFCO) and since the invoice was raised in the name of DEFCO c/o Ministry of Defence, the supplies were to DEFCO and not to KDF. Further, the Respondents finding that DEFCO was a welfare organisation for officials of the Ministry of Defence was unfounded in law. The letterhead of DEFCO was endorsed with the words: “**Consignee: Ministry of Defence**” and further stamped indicating that the transaction was for Ministry of Defence and was thus exempt from the payment of excise duty as per Paragraph II Part A of the Excise Duty Act, 2015 and Paragraph 57 of the First Schedule of the Valued Added Tax Act, 2013 (the VAT Act). This therefore confirmed that the transaction was through DEFCO for the Ministry of Defence.
- b) The Respondent erred in law in interpreting the words “*for official use by Kenya Defence Forces and National Police*” as applied to the First Schedule of the VAT Act and Paragraph 2 of Part A of the Fifth Schedule to the East African Community Customs Management Act 2000 and (EACCMA) not to apply to DEFCO, allegedly because it serves as a convenience store for the Kenya Defence Forces offices to buy consumables. In the absence of any definition therefor either under the provisions of EACCMA and the VAT Act, and contrary to the interpretation, therefor offered by the National Treasury DEFCO was an integral part of the operations of KDF upon which the Respondent had granted exemption as prescribed in the said provisions.
- c) The Respondent erred in law and in fact in its finding that the custom declaration documents filed on behalf of the consignee - Ministry of Defence- pursuant to the LPO were in violation of Section 203 (a) & (b) of EACCMA. The LPO issued by DEFCO, showed that the goods were ordered on behalf of the Ministry of Defence which was specified in the LPO as the consignee. The declaration was made at the Instance of DEFCO and KDF, and the PIN was provided by the said state entities.

- d) It was not open in law for the Respondent to demand that import duty and VAT be payable by the Appellant on account DEFCO. The Respondent by its record shows that DEFCO had the right to benefit from exemption from Duty and VAT from year to year. The Treasury, through its letter dated 15th December 2016, confirmed that DEFCO is an integral part of KDF and that supplies to it are considered to be for the official use of KDF.
- e) The Respondent erred in law in imposing duty and VAT on the Appellant in the belief that the supply was made to DEFCO and therefore subject to duty and VAT when both the LPO and the declaration made on instructions to the Customs Agent clearly showed that the consignee was the Department of Defence.
- f) The decision by the Respondent was contrary to the values and principles of governance as established under Article 10 of the Constitution - in that it lacks equity, social justice, good governance, integrity, transparency and accountability by dragging the Appellant into a dispute involving the Treasury and as between DEFCO and KDF on the one hand and the Respondent on the other, on whether DEFCO should be exempted from Duty and VAT or not – a matter involving various organs of the State to which the Appellant is not expected to be a party.
- g) The Respondent misapprehended the effect of the letter dated 17th November 2017 by the Treasury which was a confidential communication between the Treasury and the Respondent with no legal application to the relevant schedules prescribing exemption of excise Duty and VAT in favour of KDF.
- h) It was a fundamental error on the part of the Respondent to find that supplies to DEFCO are not supplies for KDF's official use when the words "For **Official Use**" as mentioned in the Schedule to the Excise Duty Act and VAT Act does in fact apply to DEFCO. The Respondent exempted DEFCO from year to year from payment of Duty and VAT thereby showing as a

matter of law, in the absence of provision to the contrary, that DEFCO was exempted from import duty and VAT under the said provisions and/or creating a legitimate expectation for the Appellants to presume that DEFCO was exempt from both excise import duty and/ or VAT.

- i) The Respondent erred in law and in fact in breaching the doctrine of estoppel by purporting in its objection decision to run away from its own representation and approval that indeed the supplies in question were VAT and import duty exempt. The Respondent was involved in the entire process of approving the importation and supply of imported goods including the issuance of the exemption code and it was therefore not open in law and in fact for the Respondent to disregard its own approval.
- j) Unlike the letter dated 15th December 2016, which was brought to the attention of all suppliers, the letter dated 17th November 2017 (which purported to alter the relationship of DEFCO with KDF) was never communicated to the suppliers including the Appellant. Accordingly, it was a misconstruction of the law and facts for the Respondent to fail to appreciate that under the doctrine of legitimate expectation and estoppel, where an expectation or representation has been altered by a public entity, the said alteration must be communicated to affected individuals. Since this communication was not done the Respondent ought not to have relied on the letter of 17th November 2017 to demand taxes from the Appellant.
- k) The Respondent was misguided in law and in fact in finding that supplies to DEFCO were not supplies to KDF for official use when clearly the letter dated 15th December 2016 from the National Treasury to the Respondent was categorical in the following terms:

“The purpose of this letter, therefore, is to advise the Kenya Revenue Authority that supplies DEFCO are part and parcel of the supplies for official use by the Kenya Defence Forces. Accordingly, the supplies to DEFCO qualify for exemption as provided for in the revenue laws.”

- l) It was not open in law for the Respondent to disregard the express provision of Section 148 of EACCMA which provides that where an agency relationship exists, the principal ought to shoulder the liability with respect to tax due and payable. The fact that the Appellant imported the goods on behalf of DEFCO gave rise to an agency relationship and as such, the Respondent was fundamentally misguided in burdening an agent- the Appellant - with a tax liability of its principal - DEFCO.

THE APPELLANT'S CASE

6. The Appellant's case is premised on the hereunder documents:-
- a) The Statement of Facts dated together with the documents attached thereto filed on the 26th August, 2020.
 - b) The Witness Statement of Crispine Dilo Otieno dated and filed on the 12th January, 2021.
 - c) The Appellant's written submissions dated 29th March, 2021 together with the legal authorities filed therewith on the 30th March, 2021.
7. The Appellant deals with supply of home appliances both locally and internationally. The Appellant is licensed by the Respondent to import and export goods and to operate a bonded warehouse with the following bond securities: CB3 for warehousing and removal of goods from a warehouse; CB4 for re-exporting the goods from the warehouse; and CB6 for keeping goods in a licensed bonded warehouse.
8. As a licensed bonded warehouse operator, the Appellant receives consignment on behalf of importers who then pay for the relevant taxes for purposes of clearing the consignment before the goods are ultimately delivered to the importers/consignees. Taxes are not payable at the time of receipt into the bonded warehouse. They are paid at the point of having the goods released whether by export or into the local market.

9. The Appellant imports appliances from various countries including China. Upon receipt the goods are stored in the Appellant's bonded warehouse for which C.17B forms with the relevant W700 entries are filled and generated by the Respondent to authorise the holding of the consignments in the bonded warehouse.
10. The Appellant received an email from the Ministry of Defence/ DOD through its agent DEFECO containing soft copies of LPOs. The practice was for the Appellant to collect the hard copies duly signed and stamped from DOD's agent DEFECO, which the Appellant proceeded to do. The LPOs sought the services of the Appellant to supply the DOD with certain consignments. The local purchase order (LPO) dated 8th May 2018 and 20th April 2018 both issued by DEFECO indicated: "**Consignee: Ministry of Defence.**" The LPOs were entitled:

"PURCHASE ORDER

DEFENCE FORCES CANTEEN ORGANISATION, MINISTRY
OF DEFENCE."

CONSIGNEE: THE MINISTRY OF DEFENCE (ORDER)"

The LPOs were also stamped with an endorsement that:

"KENYA DEFENCE FORCES IS EXEMPTED FROM PAYING
EXCISE DUTY AS PER PARA II OF THE SECOND SCHEDULE
TO THE EXCISE DUTY ACT, 2015.

KENYA DEFENCE FORCES PURCHASES ARE EXEMPT
FROM VAT AS PER PARA 57 OF THE FIRST SCHEDULE."

11. Upon receiving the order to supply the DOD, the Appellant contracted Escom Oil Limited as the clearing agent to clear the goods on behalf of the Ministry of Defence. The Appellant availed all the relevant documents that it had received from DOD through DEFECO to the clearing agent including the LPOs, the email instructions, the letters from DEFECO dated 4th October 2016 and 25th October 2016 indicating that supplies to DOD were exempt,

the KRA exemption code letter to the Ministry of Defence, and the letter dated 15th December 2016 from the National Treasury clarifying that supplies to DOD and by extension the DEFCO were exempt from taxes.

12. The Appellant's witness Crispin Dibo Otieno stated that he was responsible for coordinating with DOD on receiving and supplying the clearing agent with relevant documentation and verification at each stage to facilitate the clearing of the consignment. The clearing agent submitted the relevant information in populating the customs forms following which there were system-generated C.17B forms which clearly indicated the importer as the DOD. Because the consignments were bonded at the Appellant's warehouse, in order for the goods to be released, relevant taxes had to be remitted.
13. After submitting the C. 17B forms the Appellant and DOD filled in the Request to Transfer Ownership of Warehoused goods Forms (C.16) pursuant to Regulation 71 off the EACCMA Regulations to allow for the release of the goods from the bonded warehouse upon payment of the requisite fees to the Respondent. The Respondent generated the payment authorisation slip with respect to each category of the consignments. The C.16 forms were signed by the Senior Supplies Officers of DEFCO on behalf of DOD, the Importer.
14. At no time did the Appellant or the clearing agent apply for the exemption. The Appellant relied on letters and codes supplied to it by the DOD.
15. After submitting the relevant C. 17B forms and C.16 forms the Respondent's residence customs officer undertook an examination account and thereafter the customs file was presented for exemption approval at the Respondent's JKIA officers with the relevant supporting documentation. The Appellant further avers that after obtaining the relevant approval and exemption from the Respondent it proceeded to pay the relevant levies such as the railway development levy, transfer fees, and the import declaration fees to enable

it to obtain a release order for the goods to be released to the consignee - KDF through DEFCO. The Appellant contends that the Respondent therefore participated in the entire clearance and approval process upon which the goods were released online.

16. After the release of a goods online by the Respondent's Customs Department the Customs Resident Officer authorised for the physical release of the goods from the bonded warehouse. The consignments were then delivered to the DOD under the care of DEFCO, upon which invoices and delivery notes were issued to DOD. Consequently, DEFCO paid the Appellant's fees for their services as per the contract.
17. It was the Appellant's understanding that at all times the taxes were payable by DOD who was the importer, and that accordingly, in the absence of the exemption letter, the Ministry of Defence as the importer should have been liable for the import duty, VAT and any other tax arising there from. This was on the basis of the exemption letter supplied to the Appellant as well as the provisions of Sections 25 and 30 of the Finance Act, 2016.
18. On 21st May 2020 the Respondent raised the demand for taxes assessed at Kshs 24,675,098/- following which the Appellant appointed RSM (EA) to review its processes and to act as its tax agent. On 19th June 2020 RSM lodged the notice of objection. The Respondent issued its objection decision on 17th July 2020 maintaining that the taxes demanded were due and payable.
19. The Appellant asserts that it was always its understanding as informed by the provisions of the Schedule to the Excise Duty Act and VAT and as emphasized by circulars circulated by DEFCO to its suppliers that imports and supplies to DEFCO were exempt from Excise Duty and VAT. The Appellant contends that the National Treasury had confirmed that DEFCO was part and parcel of KDF and that supplies to DEFCO were in effect supplies to KDF.

20. The Appellant filed a notice of objection dated 19th June 2020 objecting to the notice.
21. By an objection decision dated 17th July 2020 the Respondent upheld the demand for Kshs 24,675,098/- on the basis that the exemption given to KDF, and the National Police service was for items for official use only. The Respondent also stated that DEFCO is a convenience store for KDF officers to buy consumables and thus not exempted. The Appellant asserts that although the LPOs were in the letterheads of DEFCO, reflecting the consignee as KDF and duly signed in their name, the Respondent maintained that the same was by DEFCO.
22. The Appellant cited the Respondent's decision as follows: -

“Whereas the National Treasury in the above letter dated 15th December 2016 clarified that the supplies to DEFCO were to be considered as supplies for official use by KDF, in another letter ref: CONF 1/06 dated 17th November 2017, the Treasury noted the legal challenges that KRA was facing in handling DEFCO supplies and undertook to pay the relevant taxes only in respect of alcoholic and soft drinks.

In the letter dated 17th November 2017, 2017 treasury conceded that there was no express legal provision for the exemption, a position that the commissioner upholds...., where no tax or licensing fee may be imposed, waived, or varied except as provided by legislation.”

23. The Appellant relies on Sections 146 (1), 147 and 148 of EACCMA which state that:

146. (1) “Where under the provisions of the Customs laws the owner of any goods is required or authorised to perform any act then such act, unless the contrary

appears, may be performed on his or her behalf by authorised agent...”

- 147 “A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.”

148. “An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:...”

24. The Appellant asserts that Eskom limited processed the customs entries and filled the Request to Transfer Ownership of Warehoused Goods for the transfer of the goods from the Appellant to the DOD, duly certified by DEFECO, on behalf of the DOD while the goods were on bond. As a result the goods became in law the property of the DOD.
25. The Appellant submits that the LPOs issued to the Respondent clearly showed that the consignee was Ministry of Defence; the clearing agent presented that the Kenya Defence Forces were exempted from both excise duty and VAT; the declaration for clearance was made by the clearing agent

on behalf of the DOD; and pursuant to Regulation 71 the ownership of the goods was transferred to the DOD duly certified by DEFCO headquarters.

26. The Appellant submits that the owner of the goods by virtue of the LPOs was the DOD which was designated as the consignee and to whom the goods were transferred under Regulation 71 by form C. 16. The Appellant relies on the definition of owner under Section 2 of EACCM which states that:

"owner" in respect of...(b)goods, includes any person other than an officer acting in his or her official capacity being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or the person in possession of, or beneficially interested in, or having control of, or power of disposition over, the goods"

27. The Appellant submits that under EACCMA the only party liable for duty is the owner. Section 130 of the Act states that:

"Where any goods are liable to duty, then such duty shall constitute a civil debt due to a Partner State and be charged on the goods in respect of which the duty is payable; and such duty shall be payable by the owner of the goods and may, without prejudice to any other means of recovery, be recovered summarily by legal proceedings brought by the Partner State..."

28. The Appellant argues that it is strange that the Respondent, in the event that it deems that taxes and duties are payable, is avoiding recovering the same from the DOD or from DEFCO.

29. In response to the assertion that Eskom Oil Limited contravened Section 203(a)&(b) of EACCMA, the Appellant argues that the LPOs showed the Ministry of Defence as consignee and that the Form C. 16 was duly signed and stamped by DEFCO for the transfer of ownership to the Department of Defence. Section 203 states:

“A person who, in any matter relating to the Customs —

**(a) Makes any entry which is false or incorrect in any particular,
or**

**(b) Makes or causes to be made any declaration, certificate,
application, or other document, which is false or incorrect in
any particular;...is liable for an offence.”**

30. The Appellant argues that the Form C.17 Bond and Form C.16 were filled in accordance with the LPOs and the instructions from DEFCO on behalf of DOD. The Appellant submits that the offence is committed by the person who makes or causes the entry to be made and that in this case this person was DEFCO through the LPOs and form C.16. The Appellant alleges that the Respondent is choosing to proceed against it as a soft target and yet the Appellant made no entries at all.
31. The Appellant argues that the issue for determination in this case is not whether or not DEFCO was entitled to exemption but whether the Appellant as an exporter or consignor is liable for VAT and duty for goods provided to the DOD.
32. The Appellant points out that on 18th October 2018 the Respondent demanded for Kshs 38,241,562/- from Eskom Oil Limited. Eskom Oil Limited objected to the demand on the basis that DOD was an exempt entity and that in any event it was merely a clearing agent. The Appellant asserts that it was only later that the Respondent resorted to demanding for the taxes from the Appellant.
33. The Appellants framed four issues for determination namely:
- a) Whether the Respondent has the right in law to demand duty under EACCMA from the Appellant as the exporter/consignor?
 - b) Whether the supplies to DOD through DEFCO are exempt supplies under the execution provisions in EACCMA

- c) Whether the Respondent can impose tax on the Appellant as a supplier
- d) Whether the Appellant is guilty of an offence under Section 203 (a)&(b) of EACCMA

a) **Whether the Respondent has the right in law to demand duty from the Appellant as the supplier**

34. The Appellant argues that it is licensed to operate a bonded warehouse. The Appellant relies on the definition of a bonded warehouse to argue that the operator of a bonded warehouse is not responsible for import duty. Section 2 of EACCMA states that:

"bonded warehouse" means any warehouse or other place licensed by the Commissioner for the deposit of dutiable goods on which import duty has not been paid and which have been entered to be warehoused; "bonded warehouse" means any warehouse or other place licensed by the Commissioner for the deposit of dutiable goods on which import duty has not been paid and which have been entered to be warehoused;

35. The Appellant reiterated that the consignee for the goods throughout the LPOs was the Ministry of Defence and not DEFCO and that accordingly the Ministry of Defence was the owner.
36. The Appellant rebuts the argument that Eskom Oil Limited was the Appellant's clearing agent on the basis that it cleared the consignment on behalf of the Department of Defence. The Appellant asserts that Eskom Oil Limited was using information, documentation and exemption code on behalf of the Department of Defence and that the request for transfer of ownership was duly signed by DEFCO on behalf of the Department of Defence and submitted to and approved by the Respondent.

37. The Appellant argues that the Respondent has failed to adduce any evidence to contradict the documents submitted and that therefore the Respondent cannot argue that an offence has been committed under Section 203 (a) & (b) of EACCMA.

38. The Appellant further asserts that even if an offence was committed the penalty under that Section does not include the demand of duty from the supplier. The Appellant relies on the case of **Inland Revenue Commissioner V Duke of Westminster (1936) AC 124** where the court stated that:

“...the subject is not taxable by inference or by analogy but only by the plain words of a statute applicable to the facts and circumstances of his case.”

39. The Appellants submits that there is no provision under EACCMA which places the burden on a supplier who has released their goods to a buyer. On the contrary, the Act places the obligation on the owner as defined by Section 2 of the Act as being liable to duty both as imposed by Sections 130 and 148 of EACCMA.

40. The Appellant argues that the Respondent is being unreasonable in pursuing the Appellant for mistakes allegedly committed by DEFCO or DOD. The Appellant relies on the case of **Fleur Investments Limited vs. Commissioner of Domestic Taxes and Another Civil Appeal Number 158 of 2017 (Unreported)** where the court stated.

“...in the absence of a rational explanation one must conclude that the decision challenged can only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

41. The Appellant maintains that Eskom limited was not only the agent of, but also submitted the custom declaration on behalf of the Department of Defence and that the documents submitted were valid and true. The Appellant argues that in the event any duty remained payable or any other taxes then the DOD and DEFCO were primarily responsible. The Appellant argues that there is no provision which would make the Appellant being the exporter/consignor liable for any taxes.

b) Whether the supplies to DOD through DEFCO are exempt as supplies for the official use of the Armed Forces

42. The Appellant submits that this is not the issue in this case but that nonetheless has proceeded to address the same because it forms the Crux of the Respondents case.

43. The Appellant relies on the following statutory provisions: -

- a) **The First Schedule, Section A, Paragraph 57 of the Value Added Tax Act, 2013** which provides that the following are exempted from VAT: *“All goods including material supplies, equipment, machinery and motor vehicles, for official use by the Kenya Defence Forces and the National Police Service.”*
- b) **The Second Schedule Section A Paragraph 11 of the Excise Duty Act, 2015** which states that *“all goods including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defence Forces and the National Police Service.”*
- c) **The Fifth Schedule Part A Paragraph 2 of EACCMA** read together with Part X Section 114 which states that:

“1) Duty shall not be charged on the goods listed in Part A of the Fifth Schedule to this Act, when imported, or purchased before clearance through the Customs, for use by the person named in that

Part in accordance with any condition attached thereto as set out in that Part.”

44. The Appellant submits that what forms “all goods” is not defined by the statute and that it is therefore a question of fact.
45. The Appellant argues that there has been debate on this issue between the National Treasury and the Respondent (referring to the letters dated 15th December 2016 and 17th November 2017 from the Treasury to the Respondent). The Appellant therefore submits that there is ambiguity at least in the circumstances of supplies to DEFCO. The Appellant cites the case of **Keroche Industries Limited V Kenya Revenue Authority & 5 Others [2007] eKLR** that:

“...taxation can only be done on clear words and that taxation cannot be on intendment. Linked to this is that a penalty must be imposed in clear words. Finally even where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes a burden, tax or duty on the subject...”

46. The Appellant submits that there were legal challenges arising out of the provision on exemption as far as it concerned DEFCO, and that the same had to be resolved by the government.
47. The Appellant further argues that the National Treasury represented that DEFCO was an arm of the Kenya Defence Forces and was accordingly exempted from taxes. This created a legitimate expectation that this was the procedure applicable to all DEFCO supplies.
48. The Appellant relies on **Halsbury's Laws of England, 4th Edition Vol 1(1) para 81** at page 151 which states that:-

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice.”

49. The Appellant therefore submits that even if the supplies were to DEFCO, which is denied, the Respondent did not communicate the change of status to suppliers including the Appellant and accordingly the legitimate expectation stands. The Appellant relies on the case of **Republic v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited [2018] eKLR** where the court stated:

“The law as I understand it is that a legitimate expectation can only be lawfully withdrawn where rational grounds of the intention to withdraw the same have been communicated to the beneficiary of the expectation and he has been given an opportunity to comment thereon. In other words the decision to withdraw the expectation must be rational and the beneficiary thereof must be heard thereon.”

50. The Appellant reiterates that it is instructive that the Respondent participated and approved the entire transaction. The Appellant relies on the following judicial decisions: -

- a) **Krish Commodities Limited v Kenya Revenue Authority [2018] eKLR** where the Court of Appeal held that...

“...it is common ground that the identification of the applicable rate of duty and assessment of duty payable was done by the Simba System. The Appellant had no role in declaring or setting the rate to be applied. For the Respondent to turn around and pass the buck

to the Appellant by contending that it was aware at all material times of the right rate cannot hold any weight. More so, taking into account that the Respondent's own officers verified the entries made and even inspected the consignments. The Respondent's officers were not acting as a conveyor belt performing a perfunctory exercise. The reason they were there was to verify the accuracy of the entries and the duty payable before clearance of the consignments in question. Having verified the entries in issue, rate applied and assessed duty as correct, a legitimate expectation arose in favour of the Appellant that the assessed duty was correct."

- b) Republic v. Commissioner of Cooperatives ex-parte Kirinyaga Tea Growers Cooperative Sacco Ltd (1999) 1 EA, 245 that:

"It is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith."

51. The Appellant submits that even if the supplies had been made to DEFCO, in view of the representation by the National Treasury the duties will be exempt and if at all payable, it would be by DEFCO and not the supplier.

c) Whether the Respondent can impose a tax on the Appellant when the law is ambiguous

52. The Appellant asserts that in its objection decision as well as at Paragraph 8 of the Respondent's Witness Statements, the Respondent purports that there is ambiguity as to the proper categorisation of DEFCO. The Appellant relied on the hereunder decisions: -

- a) **Kenya Bankers Association vs Kenya Revenue Authority** [2018] eKLR it was held that: -

"From a consideration of the relevant authorities it is clear that whereas under the principles of interpretation of statutes, the general rule is that the Court should lean against the construction

which reduces a statute to futility but lean in favour of an interpretation which makes it effective and operative, in tax legislation the Court ought not to strain the language with the intention of bringing taxpayers within an otherwise vague and ambiguous legislation. Where the legislation is vague or ambiguous the Courts ought to adopt an interpretation which best favours the taxpayer.

b) **Commissioner of Income Tax vs Westmont Power Kenya Ltd [2006] eKLR**

where the court stated that:-

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity. Following the Inland Revenue vs Scottish Central Electricity Company case, any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”

53. The Appellant therefore argues that even if there was a supply to DEFCO, which the Respondent denies, the tribunal ought to interpret the law in favour of the Appellant and find that the taxpayer would be DEFCO and not the Appellant as the goods were transferred on bond with the authority of the Respondent.

d. **Whether the Appellant is guilty of an offence under Section 203 (a) & (b) of EACCMA**

54. The Appellant argues that the offence created by Section 203 attaches to the person who makes an entry which is false or incorrect or makes or causes to

be made any declarations, certificate application or other document which is false or incorrect.

55. The Appellant submits that Eskom Oil Limited were contracted to effect clearance on behalf of the Ministry of Defence and DEFCO.
56. The Appellant further argues that Section 203 of EACCMA is subject to Article 52(a) of the Constitution of Kenya and that the provision does not introduce vicarious criminal liability. The Appellant accordingly submits that even if an agent had committed an offence under this Section, which is denied, the same cannot be visited upon the principal. The Appellant submits that in any event the liability for an offence under that Section of the Act is either imprisonment or a fine and does not address the issue of tax liability.
57. The Appellant further submits that in any event the entries in the clearance application were correct and legitimate and have not been disputed or rejected by the parties on whose behalf they were made or by DEFCO which provided the certification.
58. The Appellant submits that it is not guilty of an offence because of making declaration or entries that are either incorrect or false. The Appellant asserts that the entries were made using DOD's PIN and supporting documentation which referred to DOD as the consignee.

The Appellant's Prayers

59. The Appellant prays that:
 - a) The whole of the objection decision of the Respondent delivered on 17th July 2020 be set aside.
 - b) The assessment made by letter dated 21st May, 2020 in the sum of Kshs 24,675,098/- be set aside.
 - c) Costs of the Appeal be provided for.

THE RESPONDENT'S CASE

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

- a) The Respondent's Statement of Facts dated and filed on 4th September, 2020 together with the documents attached thereto.
- b) The witness statement of Okite Maureen Adhiambo dated and filed on 29th January, 2021.
- c) The Respondent's written submissions dated and filed on the 24th March, 2021 together with the legal authorities filed therewith.

61. The Respondent asserts that the dispute arose from warehoused consignments which were supplied to DEFCO by the Appellant without payment of the requisite taxes. The warehoused supplies cover the period from 18th November 2016 to 2nd March 2018. The Respondent asserts that whereas the LPOs were issued by DEFCO, the customs declaration documents (entries) were lodged using the PIN of the DOD contrary to Section 203 (a)& (b) of EACCMA.

62. The Respondent consequently demanded for the short levied taxes following which the Appellant sought for a review under Section 229 of EACCMA. The Commissioner, upon review, upheld the tax assessment which prompted the filing of this Appeal.

63. The Respondent asserts that it issued assessments on unpaid import duty and the resultant VAT and interest for the duration that the taxes remained unpaid. The imports in question covered the period from 18th November 2016 to 13th July 2018 and generally consisted of consumer/household electronics and entertainment goods.

64. The Respondent contends that in the spirit of fairness and in light of the letter from the National Treasury dated 15th December 2016 (which had clarified that as much as DEFCO was the welfare arm of the DOD, its

operations were an integral part of the operations of the KDF and accordingly such supplies ought to be considered as part of the official supplies to KDF) the supplies to DEFCO for the period between 14th December 2016 and 17th November 2017 were excluded from additional tax assessment.

65. The Respondent however contended that in the letter dated 17th November 2017 the National Treasury had noted the legal challenges that KRA was facing in handling DEFCO supplies and undertook to pay the relevant taxes only in respect of alcoholic and soft drinks.
66. The Respondents framed two issues for determination in its Statement of Facts, namely:-
 - i) Whether the supplies to DEFCO for the welfare of KDF staff actually qualify for exemption as goods for the official use by the Armed Forces
 - ii) The effect of the two letters from the National Treasury in the recovery of the demanded taxes and specifically as to whether the taxpayer can claim legitimate expectation on the basis of the same.
67. The Respondent asserts that its customs post clearing audit team conducted an in-depth field audit of the operations of the Appellant between October 2014 to October 2019 pursuant to Sections 235 and 236 of EACCMA.
68. The Audit revealed that the Appellant had supplied certain goods to DEFCO on the premise that the goods were eligible for tax exemptions. The Respondent noted that whereas the customs entries were lodged using the PIN for the DOD it was established that the LPOs were issued by DEFCO and that the invoices were consigned to the same entity by the Appellant contrary to Sections 203 (a)&(b) of EACCMA.
69. The Respondent asserts that DOD is a separate legal entity from DEFCO and that it is the official arm of the Government in matters relating to police

and the Armed Forces. DOD has its own separate PIN and is expressly exempted under the Fifth Schedule Paragraph A item 2 of EACCMA.

70. The Respondent contends that DEFCO is a separate entity with its own PIN and that it is a contracted trading organisation operating solely for the benefit of individual members of the KDF. The Respondent asserts that there is no express legal provision exempting DEFCO from payment of taxes.
71. The Respondent asserts that the entries were lodged using the PIN of DOD covering the period from 18th November 2016 to 13th July 2018 and that the items generally constituted consumer/household electronics and entertainment goods. The Respondent asserts that the applicable taxes being import duty and VAT were automatically removed once exemption codes for DOD were input in the SIMBA system.
72. The Respondent asserts that it relies on the following legal provisions: -
- a) Article 210 of the Constitution of Kenya, 2010 which provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.
 - b) The Fifth Schedule Paragraph A item 2 of EACCMA which provides for exemption from payment of taxes on all goods including materials, supplies, equipment, machinery and motor vehicles for the official use of Partner States' Armed Forces and Police.
 - c) Sections 235 & 236 of EACCMA which gives the Commissioner the power to call for documents and conduct a post clearance audit on the import and export operations of a taxpayer within a period of five years from the date of importation or exportation.
 - d) If the post clearance audit reveals that taxes were short-levied or erroneously refunded Sections 135 and 249 of EACCMA empowers the Commissioner to recover any such amount short levied or erroneously

refunded with interest at a rate of 2% per month for the period, the taxes remain unpaid.

- e) Section 229 of EACCMA which provides for application for review by any person affected by the decision or omission of the Commissioner on matters relating to customs and provides a legal timeline to be observed.
73. The Respondent submits that there is no legal provision exempting supplies to DEFCO from payment of taxes. The Fifth Schedule Para A Item 2 only provides for exemption from payment of taxes on all goods including materials, supplies, equipment, machinery and motor vehicles for the official use of Partner States' Armed Forces and Police.
74. The Respondent submits that in its letter of 17th November 2017 the National Treasury conceded that there was no express legal provision for the exemptions and undertook to pay the relevant taxes in respect of alcoholic and soft drinks. The Respondent submits that this was in line with Article 210 of the Constitution which provides that no tax or licensing fee may be imposed, waived, or varied except as provided by legislation.
75. The Respondent further submits that whereas the LPOs were issued by DEFCO, and invoices consigned to DEFCO the customs entries were lodged using the PIN of DOD contrary to Section 203 (a) and (b) of EACCMA. The Respondent submits that the entries ought to have been lodged using the PIN of DEFCO.
76. The Respondent contends that under Section 5 of the Kenya Revenue Authority Act it was within its mandate to administer and enforce all provisions of the written law as set out in Parts 1 and 2 of the First Schedule to the Act for the purposes of assessing, securing, collecting, and accounting for all revenue in accordance with the law.
77. The Respondent further argues that the payment of taxes is a Constitutional imperative under Article 209 of the Constitution of Kenya.

78. In its submissions the Respondent summarised the following issues for determination:
- a) Whether the Respondent erred in law in interpreting the words “for official use by the Kenya Defence Forces and National Police” as applied to the First Schedule of the VAT Act, 2013 and Paragraph 2 of Part A of the Fifth Schedule to the EACCMA not to apply to DEFCO because it serves as a convenience store for the KDF officers to buy consumables.
 - b) Whether the Respondent erred in law in concluding that the dispute arose from the warehouse consignment which were supplied to DEFCO by the Appellant without payment of the requisite taxes.
 - c) Whether the Respondent erred in law in demanding for the short levied taxes; and upon review of the Appellant’s application for review under Section 229 of EACCMA for upholding the tax assessment which was made on the unpaid import duty and the resultant VAT and interest charged for the duration the taxes remained unpaid.
79. The Respondent submits that the act of using a different entity’s PIN was an offence as provided at Section 203 (a)&(b) of EACCMA which makes it an offence for anyone to make or cause to be made any declaration, certificate, application or other document which is false or incorrect.
80. The Respondent submits that although the Appellant asserts that DEFCO is an agent of DOD, DOD is a separate legal entity from DEFCO with its own PIN. There is no legal provision exempting DEFCO from payment of taxes.
81. The Respondent relies on the case of **Total Kenya Limited v Kenya Revenue Authority [2018] eKLR** where the Court of Appeal upheld the decision of Majanja J. who had stated that:

“... Though a clearing agent is licenced by the Commissioner under Section 164, the agent remains the agent for the taxpayer and the taxpayer cannot evade his liability on the basis of fraudulent acts of

the clearing agent. Section 166 of the Act underpins this liability. Even though Section 165 of the Act imposes liability to the agent.”

82. The Respondents further cites Section 147 of EACCMA which provides that:

“A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.”

83. The Respondent submits that based on the false and incorrect details input by the Appellant’s agent Eskom Oil Limited in the system the Respondent was unable to note the anomaly until the post-clearance audit was conducted.

84. The Respondent explained the importation process as follows:

- a) The importer makes a purchase order and obtains from the supplier the commercial invoice, bill of lading, or Airway bill and in some cases insurance documentation.
- b) The importer uses these documents to raise the import declaration form.
- c) Upon arrival of the consignment at the port of entry, the importer or his agent completes an entry form.
- d) With the said documents the importer prepares a single administrative form C.17B which indicates as a summary the nature of the imports, hence the tax classification, the nature of the importation, hence the customs processing code (CPC), the value of the imports and any exemption code applicable.

- e) Thereafter the Kenya Revenue Authority computes the taxes payable on the entry using the automated SIMBA system following which the officers of the Kenya Revenue Authority verify the consignment at the point of entry to ascertain the value of the goods, the tariff classification, and quantity among other requirements. At the verification KRA checks the accuracy of the value of the goods and the sufficiency of the description to enable it to verify the correct tariff code having regard to the particulars of the goods as shown in the commercial invoice.
- f) All taxes including import duty, VAT and the assessed IDF fees are then paid at this point after which point a customs clearance certificate is issued and the goods released.
85. The Respondent submits that it noted the anomalies in this case when it carried out the post clearance audit.
86. The Respondents relies on the case of **Inland Revenue Commissioner V Duke of Westminster 1936 AC 124** where the court stated that:
- “The subject is not taxable by inference or by analogy but only by the plain words of a statute applicable to the facts and circumstances of his case”.*
87. The Respondent accordingly submits that any exemption from payment of tax to DEFCO was a matter squarely to be provided for by statute and not by a decision of the Respondent. Accordingly, since no such exemption was ever made or provided in statute, the tax is payable as demanded by the Respondent.
88. The Respondent therefore contends that it correctly issued a demand for the short levied taxes of Kshs 24,675,098.00 pursuant to Section 135 of EACCMA. Section 135 of EACCMA states that:
- “(1) Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount*

short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.

(2) Where a demand is made for any amount pursuant to sub-Section (1), the amount shall be deemed to be due from the person liable to pay it on the date on which the demand note is served upon him or her, and if payment is not made within thirty days of the date of such service, or such further period as the Commissioner may allow, a further duty of a sum equal to five percent of the amount demanded shall be due and payable by that person by way of a penalty and a subsequent penalty of two percent for each month in which he or she defaults...”

89. The Respondents further cited Section 235 (which provides for the right of the Respondent to require production of documents) and 236 (which provides for inspections and audit) of the EACCMA.

90. The Respondent further relies on the following judicial decisions:-

a) **Standard Resources Group Ltd v Attorney General & 3 others [2018] eKLR**, where the court stated that:

“The 2nd and 3rd Respondents certainly had statutory power under EACCMA Act to assess customs duty and where possible demand extra duty from an importer, in this case, the petitioner. However in doing so, they had to act reasonably and in a procedurally fair manner.”

The Respondent avers that it afforded the Appellant an opportunity to be heard as can be seen from the correspondence produced.

b) **Pharmaceutical Manufacturing (K) Co Ltd & 3 others v Commissioner General of the Kenya Revenue Authority & 2 others [2014] eKLR** where Lenaola J stated that:

“...the 1st Petitioner cannot therefore devise methods of avoiding tax and then claim that it had been exempted of the same.”

91. The Respondent submits that the Appellant’s application for review under Section 229 of EACCMA was unsuccessful. The Respondent relies on the case of **Republic v Kenya Revenue Authority Ex-Parte Spear Head Limited [2018] eKLR** to argue that the Appellant was treated fairly and was granted adequate time to make clarifications before the Respondent took any decisive action; and that the Respondent applied procedural fairness by abiding by the law and not contravening any of the Appellant’s Constitutional rights under Articles 10 and 47 of the Constitution of Kenya, 2010. In that case the court quoted the decision of **Cimbria East Africa Limited vs. Commissioner of Investigation and Enforcement & Another [2016] eKLR** where it was stated that:-

“This court does not buy the argument by the exparte applicant that the objection or Appeal would only lie if reasons had been given to enable the applicant apply for review under Sections 229 and 230 of the EACCMA or on Appeal before the Tax Appeals Tribunal and that it has invoked Article 47(2) of the Constitution. In my humble view, the applicant can still challenge the demanded taxes through the statutory available channels by stating that it was not given reasons for the demand, or that the applicant did not import the goods for which Customs Duty was being demanded or that some

of the clearing agents named were not contracted by the applicant and provide evidence to that effect. ”

92. The Respondent further submits that in tax disputes the taxpayer must satisfy the burden of proof in order to successfully challenge tax assessments. The onus is on the taxpayer in proving that the assessment was excessive by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied. The Respondent relies on the Australian case of **Mulherin v Commissioner of Taxation [2013] FCAF 115**.

93. The Respondent further relies on the hereunder statutory provisions:-

- a) Section 56(1) of the Tax Procedures Act, 2015 (TPA) which states that: “*in any proceedings under this part the burden shall be on the taxpayer to prove that a tax decision is incorrect*”;
- b) Section 59(1) of the TPA which states that “*for the purposes of obtaining full information in respect of the tax liability of any person, or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person by notice in writing to.... ”*
- c) **Section 30 of the Tax Appeals Tribunal Act, 2013** which provides that:

In a proceeding before the Tribunal, the Appellant has the burden of proving—

(a) where an Appeal relates to an assessment, that the assessment is excessive; or

(b) in any other case, that the tax decision should not have been made or should have been made differently

94. The Respondent contends that from the foregoing submissions the demand in this case was neither arrived at in defiance of logic or acceptable moral standards to warrant quashing under the limb of irrationality and/or unreasonableness.

95. The Respondent submits that since the matter revolves around fiscal policy the decisions should be left to the Executive and that the courts should not interfere. The Respondent cites the case of **Shivashanker Bhat, J. in J. Seetha Rama Sastry v. the State of Karnataka, 199 ITR 588 at p.596** where the court stated that:

“In this field of fiscal legislation, very rarely, Courts interfere being aware of the magnitude of the problem to be solved by the State. But does this mean that the Citizens of this country should always surrender their fundamental right to equality in favour of the state's power to tax? Should the court hesitate to strike down a fiscal law solely on the ground that the revenue of the State would suffer? Should the role of the courts as the guardian of the fundamental rights of the people be held confined to non-fiscal spheres only? Glaring inequalities resulting from any legislation cannot be allowed to impinge the equality rights.”

96. The Respondent submits that in this case the legislation is clear and does not have any aspect of inequality and that it is in line with Articles 201 and 210 of the Constitution of Kenya which state that:

“201) The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters;

(b) the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

(ii) ... ”

“210) 1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

(2) If legislation permits the waiver of any tax or licensing fee—

*(a) a public record of each waiver shall be maintained together with the reason for the waiver; and
(b) each waiver, and the reason for it, shall be reported to the Auditor-General...”*

The Respondent’s Prayers

97. The Respondent therefore prays that this matter be dismissed and that the Respondent be allowed to perform its statutory duty of assessing collecting and accounting for the revenue that the Government needs to run its affairs.
98. The Respondent further prays that its assessment and the objection decision of 17th July 2020 be upheld and that this Appeal be dismissed with costs to the Respondent.

ISSUES FOR DETERMINATION

99. After a careful consideration of the issues raised in the submissions of both parties, the Tribunal was of the view that the only issues for determination were.
- i) Whether goods imported by DEFCO are exempt from duty of customs?
 - ii) Whether the Respondent Erred in demanding short levied taxes from the Appellant.

ANALYSIS

i) Whether goods imported by DEFCO are exempt from duty of customs?

100. The Defence Forces Canteen Organisation (DEFCO) contracted the Appellant to import and supply a number of appliances. The Appellant contends that the imports were on behalf of the Kenya Defence Forces and

therefore subject to various exemptions. The Appellant relied on the following legal provisions:-

- a) **First Schedule, Section A, Paragraph 57 of the Value Added Tax Act, 2013** which provides that the following are exempted from VAT: “*All goods including material supplies, equipment, machinery and motor vehicles, for official use by the Kenya Defence Forces and the National Police Service.*”
- b) **The Second Schedule Section A Paragraph 11 of the Excise Duty Act, 2015** which states that “*all goods including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defence Forces and the National Police Service.*” And.
- c) **The Fifth Schedule Part A Paragraph 2 of EACCMA** read together with **Part X Section 114** which states that:

“1) *Duty shall not be charged on the goods listed in Part A of the Fifth Schedule to this Act, when imported, or purchased before clearance through the Customs, for use by the person named in that Part in accordance with any condition attached thereto as set out in that Part.*”

101. The Respondent contends that DEFCO is a separate entity with its own PIN and that it is a contracted trading organisation operating solely for the benefit of individual members of the KDF. It asserted that there is no express legal provision exempting DEFCO from payment of taxes. It further asserted that although the entries were lodged using the PIN of DOD covering the period from 18th November 2016 to 13th July 2018, that the items imported generally constituted consumer/household electronics and entertainment goods.

102. It was held in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1980) 147 CLR 297* that the fundamental object of statutory

construction in every case is to ascertain the legislative intention by reference to the language of the instrument.

103. The expression ***Expressio unius est exclusio alterius*** conveys a rule of interpretation to signify that the circumstances where the express mention of one person or thing results in totality the exclusion of another. In other words, in any particular provision where the statutory language is plain or straight and its meaning is apparently clear, there is no scope of applying the rule. The converse to this maxim is ***expressum facit cessare facitum*** which means that what is expressed makes what is implied silent thus when there is express mention of certain things, then anything not mentioned is excluded.
104. The Tribunal examined the wording of the impugned provisions on exemptions as against the goods imported and found that there was express intention to exempt goods imported for **official use** of the armed forces as institutions from payment of duty of customs. This is distinct from goods for **personal or household use** by members of the armed forces especially goods of the kind that is subject to this dispute. The tribunal guided by the maxim cited above was of the view that the exemption intentionally omitted the expression “*for personal or household use of members of the armed forces*”.
105. Prior to coming into force of the EACCMA, the goods imported by the Armed Forces Canteen Organization(AFCO), the predecessor of DEFCO were expressly exempt from duty of Customs in the Third Schedule Part A Item 19 which read as follows:-

“19 The Navy, Army and Air Force Institute and the Armed Forces Canteen Organisation

Goods for the Navy, Army and Air Force Institute and the Armed Forces Canteen Organisation, subject to such conditions as the Commissioner may specify, provided that-

- (i) such goods shall be marked with the inscription "NAAFI" or "AFCO" as the case may be, or where it is unsuitable to mark goods, the containers, bags or packets thereof shall be so marked.*
- (ii) goods for the Armed Forces Canteen Organisation shall be cleared through Customs by the Armed Forces Canteen Organisation only"*

This provision was completely left out in the EACCMA and the Value Added Tax Act 2013.

106. Lord Coke stated in *Heydon's Case [1584] EWHC Exch J36 (01 January 1584)* as follows as regards statutory interpretation:- for the sure and true interpretation of all statutes, four things are to be discerned and considered; First, what was the common law before the making of the Act? Second, what was the mischief and defect for which the common law did not provide Third, what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And fourth, the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono public."
107. In the view of the Tribunal there was a clear intention of the legislature to leave out from exemption from payment of duty and taxes goods imported by DEFCO. After all, if there was an intention to exempt such goods, nothing would have been easier than to insert it in the list of institutions that are exempt.
108. In matters of interpretation of the tax statutes the Tribunal has been consistent as to the fact that tax legislation must be interpreted strictly and literally leaving no room for perceived intentions other than that which is

expressly provided. The Tribunal is equally guided by the case of *Amalgamated Society of Engineers Vs Adelaide Steamship (1920) 28 CLR 129 at 161-2* where Higgins J stated as follows as relates to statutory interpretation:-

“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of parliament that made it; and that intention has to be found by examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning even if we consider the result to be inconvenient or impolitic or improbable.”

109. Furthermore, Article 210 of the 2010 Constitution provides as follows on the imposition of tax:-

“(1) No tax or licencing fee shall be imposed or waived except as provided by legislation.

(2) If legislation permits the waiver or licencing fee-

(a) A public record of each waiver shall be maintained together with the reason for the waiver; and

(b) Each waiver, and the reason for it shall be reported to the Auditor General.

(3) No law may exclude or authorise the exclusion of a state officer from payment of tax by reason of-

(c) the office held by that State officer; or

(d) the nature of the work of the State officer”

110. In the view of the Tribunal, any attempt purporting to exempt goods for personal or household use of members of the armed forces from payment of duty or any tax for that matter in the absence of an express legislation to that effect is a flagrant affront to the Constitution of Kenya, 2010. Furthermore, when an exemption is claimed it must be shown to indubitably to exist.

111. Based on the foregoing, the Tribunal determined that the goods imported by the Appellant and sold to DEFCO were not for Official use of the Armed Forces and were therefore not exempt from duties of Customs under the EACCMA.

ii. Whether the Respondent erred in demanding the short levied tax from the Appellant.

112. The Appellant argued that under EACCMA the only party liable for duty is the owner. It relied on Section 130 of the Act which states that:

“Where any goods are liable to duty, then such duty shall constitute a civil debt due to a Partner State and be charged on the goods in respect of which the duty is payable; and such duty shall be payable by the owner of the goods and may, without prejudice to any other means of recovery, be recovered summarily by legal proceedings brought by the Partner State...”

113. The Appellant argues that it is strange that the Respondent, in the event that it deems that taxes and duties are payable, is avoiding recovering the same from the DOD or from DEFCO.

114. Section 2 of the EACCMA defines owner as follows:

“Owner “in respect of

(c) goods, includes any person other than an officer acting in his or her official capacity being or holding himself or

herself out to be the owner, importer, exporter, consignee, agent, or the person in possession of, or beneficially interested in, or having control of, or power of disposition over, the goods.

115. Based on this definition, the Tribunal found it impossible to exclude the Appellant from falling within the definition of owner of the impugned goods having been the importer of the same and having held the goods in its bonded warehouse pending sale to its customers. The fact that it held LPO's issued by DEFCO, or any other party could not discharge its liability to ensure that all duties were paid prior to release of the goods from its possession and control as an importer and bonded warehouse keeper.
116. The Tribunal found nothing in the EACCMA that prevents the Respondent from recovering unpaid duties from the Appellant as an owner and importer of the goods notwithstanding the fact that by the time the short levied duties were assessed and demanded, it had already sold the goods to a third party.

FINAL DECISION

117. Based on the findings above, the Tribunal found that the Appeal lacks merit and must fail. The Tribunal accordingly makes the following Orders:-

- i) The objection decision dated 17th July, 2020 for the sum of Kshs. 24,675,098.00 is hereby upheld.
- ii) Each party to bear its costs.

118. It is so ordered.

DATED and DELIVERED at NAIROBI on this 25th day of June, 2021.



ERIC N. WAFULA
CHAIRMAN



CATHERINE N. MUTAVA
MEMBER



GABRIEL M. KITENGA
MEMBER



ABRAHAM K. KIPROTICH
MEMBER