THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

CIVIL APPEAL No. 0039 OF 2021

(Arising from Tax Appeal No. 0025 of 2020)

GAME DISCOUNT WORLD UGANDA LIMITED …….……. APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY …….…….…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The procedural history;

Following a notification letter dated 13th August, 2018 the respondent undertook a customs post-clearance audit of the appellant's business for the period running from January, 2012 to December, 2017. Subsequent thereto, the respondent issued the appellant with a customs post-clearance audit report dated 4th July, 2019 by which it was indicated that the appellant had an outstanding customs tax liability of shs. 32,907,788,016/= The appellant by a letter dated 9th August, 2019 objected to those findings on grounds, *inter alia*, that; - the audit ought to have commenced from September, 2013 and not January, 2012; the appellant had erroneously included in its assessment a component of transport costs not forming part of the value of the imported goods; the appellant had erroneously included procurement fees in its assessment, and so on. Responding to the objection in its letter dated 9th September, 2019 the respondent justified its findings on ground that the invoices provided by the appellant could not pass the transaction value method of tax assessment. The respondent had found that in several instances, the invoices provided by the appellant indicated prices lower than those stated in invoices availed in transactions between the appellant's South African supplier M/s Masstores Pty Ltd. and M/s Home of Living, and that the price was influenced by the relationship between the appellant and its supplier. The respondent declined to apply the Transfer Pricing Guidelines as suggested by the appellant but accepted to review the period of assessment, and insisted on using the "fall-back" method of assessment. By a letter dated 18th December, 2019 the appellant's tax liability was thus revised to shs. 21,485,110,040/=

On 20th January, 2020 the appellant objected to the revised assessment on grounds, *inter alia*, that; the respondent had erroneously found that there was no sale between the appellant and supplier M/s Masstores Pty Ltd.; the respondent had erroneously excluded relevant information when applying the "remittances" and "fall-back" approach of tax assessment, and so on. By a letter dated 5th December, 2020 the respondent indicated that its earlier decision still stood and was now proceeding to enforce collection of the shs. 21,485,110,040/= This prompted the appellant to lodge an application with the Tax Appeals Tribunal on 6th March, 2020.

b) <u>The respondent's submissions before the Tax Appeals Tribunal;</u>

In its "statement of reasons for tax decision," the respondent contended that the tax claimed by the respondent is due as a debt payable by the appellant to Government. The transaction value method of tax assessment was inapplicable and the respondent correctly used the fall-back method of assessment in the circumstances of the case. The application was premature and lacked merit as the appellant had not paid the mandatory 30% of the disputed tax as assessed. The respondent thus prayed that the application be dismissed with costs.

When the application came up for hearing, the respondent raised a preliminary point of law arguing that the application was time barred. Citing section 14 (1) and (7) of *The Tax Appeals Tribunal Act*, providing that a person intending to appeal a decision of the Commissioner General had to do so within six (6) months after being served with the decision, while sections 229, 230 and 231 of *The East African Community Customs Management Act, 2004* state that a person intending to appeal a decision of the Commissioner General had to do so within forty five (45) days after being served with the decision, the respondent argued that the appellant had lodged the appeal out of time. The objection was communicated on 9th September, 2019 yet the appellant had filed its application on 6th March, 2020. Even if time was to be reckoned from 19th December, 2020 when the respondent communicated that its earlier decision still stood, still the application would be outside the forty five (45) days' limit, hence time barred.

c) The appellant's submissions before the Tax Appeals Tribunal;

The respondent filed its "statement of reasons for tax decision" on 16th April, 2020 which was out of time. Section 17 (1) of *The Tax Appeals Tribunal Act* and Rule 14 (1) of *The Tax Appeals Tribunal (Procedure) Rules* require lodgement of those reasons within thirty (30) days after service of the application. The respondent was served with the application on 6th March, 2020. The reasons were therefore filed ten days out of time. The respondent therefore had no *locus standi* to even raise the preliminary point of law.

Alternatively and without prejudice to the foregoing, the appellant argued that the preliminary objection was misconceived. The respondent was uncertain as to the date on which its objection decision was made, whether by the letter dated 9th September, 2019 or that of 18th December, 2019. A preliminary objection cannot be based on uncertain or disputed facts which require to be established first. It is the decision of 18th December, 2019 that the appellant sought to be reviewed by its latter dated 20th January, 2020. It is in response to that application that the respondent wrote the letter dated 5th December, 2020 but curiously communicated to the appellant on 6th February, 2020. The appellant contended that the respondent's letter dated 9th September, 2019 was not an objection decision, at least not the type contemplated by section 229 (4) of *The East African Community Customs Management Act, 2004.* While in the application before the Tribunal the appellant contested an assessment of shs. 21,485,110,040/= in tax, the letter of 9th September, 2019 has a tax assessment of shs. 32,907,788,016/= Furthermore, the "fall-back" and "remittances" approach of tax assessment being challenged was never communicated by the said correspondence. The tax assessment of shs. 32,907,788,016/= was based on the "adjusted transaction value" method of tax assessment.

If the letter of 18th December, 2019 is taken to be the objection decision, then it was made out of time. Section 229 (4) of *The East African Community Customs Management Act, 2004* requires the Commissioner to make a decision within thirty (30) days after receipt of the application for review. By virtue of section 229 (5) thereof, the Commissioner is deemed to have decided to allow the application, upon failure to observe the specified time limit for decisions on applications for review. Since the application for review was submitted on 9th August, 2019 a decision thereon

made on18th December, 2019 was invalid. In the further alternative, if the objection decision of 18th December, 2019 is valid, it was incomplete until the details and underlying values were communicated to the appellant on 9th January, 2020. It constituted a new tax assessment decision that created a new cause of action. A fresh assessment allows for a fresh objection. Whenever there is a change in the method of assessment, when one method is used for the initial assessment and another upon objection being raised, the tax payer is entitled to a hearing. It is by the letter dated 6th March, 2020 threatening to commence enforcement of the decision that the appellant's right to objet was revived. The application filed on 6th March, 2020 was therefore within the time allowed.

d) Ruling of the Tax Appeals Tribunal.

In its ruling delivered on 5th July, 2021 the Tax Appeals Tribunal found that the dispute between the parties concerned the appropriate tax assessment method to be applied to the appellant's imports. The assessment of an outstanding customs tax liability of shs. 32,907,788,016/= was communicated to the appellant on 9th July, 2019. The appellant objected to it on 9th September, 2019. Although section 229 (4) of *The East African Community Customs Management Act, 2004* required the Commissioner to communicate her decision within thirty (30) days of that objection, this was not done. Nevertheless the appellant did not elect to treat that omission as a decision of the Commissioner. After reviewing the objection, by a letter dated 18th December, 2019 the Commissioner issued a revised outstanding customs tax liability of shs. 21,485,110,040/= This decision was communicated to the appellant on 19th December, 2019. It is that decision that the appellant sought to challenge before the Tribunal. Section 230 (2) of *The East African Community Customs Management Act, 2004* required the appellant to lodge the appeal within forty five (45) days form the date of notification of the decision. That time elapsed on 3rd February, 2020 yet the applicant filed the appeal on 6th March, 2020.

Once the Commissioner has made a decision, he or she cannot review it. The respondent's replies to communications made by a tax payer after a tax decision neither constitute a new decision nor revive a cause of action against the decision. Therefore the respondent's letter of 5th February, 2020 did not revive any cause of action. It is the law that periods of limitation fixed by statute must be complied with. The appeal to the Tribunal was therefore filed out of time.

On the other hand, section 17 (1) of *The Tax Appeals Tribunal Act* requires the respondent to lodge with the Tribunal a statement giving the reasons for the decision within thirty (30) days after service of the application. While the respondent was served with the application on 6th March, 2020 it did not file a statement giving the reasons for the decision until 6th April, 2020. Consequently the statement of reasons was time barred and accordingly struck out. By that the respondent lost *locus standi* in the matter.

That notwithstanding, once an illegality is brought to the attention of the Tribunal, it cannot be ignored. The fact brought to the attention of the Tribunal, that the respondent had lodged its application out of time, could not be ignored. In any event, the legality of the application had to be considered before the legality of the response to it. An objection that the application was filed out of time consequently had to be considered before one to the effect that the statement of reasons was filed out of time. The application was accordingly dismissed and since the respondent did not have *locus standi*, it was denied the costs. No order was made as to costs.

e) <u>The grounds of appeal;</u>

The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The honourable members of the Tribunal erred in law in holding that the appellant / applicant's application for review to the Tax Appeals Tribunal is time barred.
2. The honourable members of the Tribunal erred in law in holding that the applicant / appellant had the obligation to elect to treat its application for review of 9th August, 2019 as successful when the respondent did not deliver a decision within the prescribed thirty (30) days, thereby arriving at a wrong decision.
3. The honourable members of the Tribunal erred in law when they held that the letter of 18th December, 2019 was the objection decision whereas it was a fresh assessment.
4. The honourable members of the Tribunal erred in law in entertaining the respondent's preliminary objection when the respondent had no *locus standi* to raise the same.

f) The submissions of counsel for the appellant;

Counsel for the appellant M/s AF Mpanga Advocates submitted that the tribunal found that the applicant lodged their objection on 9th August, 2019. They relied on section 229 (1) of the EACCMA. The Commissioner had 30 days under section 229 (4). The appellant was found not to have elected. A deemed decision can only be rebutted by an actual decision made within 30 days. *URA v. Speke Hotel Limited CA 12 2008*. Deeming was discussed in *Kenya Republic v. Commissioner of Customs, CA 450 of 2012*. Under *The Tax Procedure Code Act*, section 24 (7) applies to failure to give a decision within time. The action required is that the tax payer must notify the commissioner. Under section 2 of that Act, the EACCMA is not subject to that law. Although there was no action taken on basis of the deemed decision, when the decision came in December, 2028 it was four months after the expiry of the time. There is no room to extend the time; *Associated Battery Manufactures TA No. 1 of 2015*; *Republic v. ex parte Unilever Misc. Application 181 of 2011*. The difference is that in the case, the expiry of time is followed by a consequence. *Republic v. Commissioner of Customs Ex-patre Tetrapack Civil application 221 of 2010*. The tax laws are interpreted strictly. They should not condone the late decision while penalising the appellant for late filing. Where a decision is given late usually the procedure is to apply for judicial review. Section 230 of the EACCMA provides for applications within 45 days. Section 14 of the TAT provides for 30 days. *The Tax Procedure Code* section 25 states it is within 30 days. The letter written to the appellant on 6th February, 2020 was a demand for the tax payer to collect shs. 21,000,000,000/= the appellant moved within the 30 days on 6th March, 2020. The assessment included amounts which were not payments for goods e.g. payments made to the respondent in compliance. We also opposed the method. They used the fall back method applied when other methods altogether fail to yield the value. The applicable method was transactional method, the actual price paid. These are at page 11 of the record.

The assessment of 18th December, 2029 was new because it is a different amount based on a different method and communicated for the first time. And the errors in the decision are new; double counting, assessment of tax on tax. The tax payer would be entitled to object to the commissioner and thereafter to the tribunal. The objection was on 20th January, 2020. The decision was on 6th February disallowing the objection, but never gave reasons. This was part of the appeal

made to the tribunal on 6th March within the 30 days. The statement of reasons was filed out of time. It is like not filing a defence at all. They could not contest facts without a statement of reasons. The preliminary objection was not proper. They prayed that the case is remitted back to the Tribunal.

g) The submissions of counsel for the respondent;

Counsel for the respondent Mr. George Okello Asst. Commissioner Litigation URA together with Mr. Aliddeki Simon Alex and Mr. Kwerit, all from the respondent's Legal Department, submitted that while the assessment was communicated on 4th July, 2019 and the appellant's letter of 8th August, 2019 constituted the objection, the respondent's letter of 9th September, 2019 constituted the decision of the respondent thereon within the meaning of section 229 (4) of the EACCMA. By that communication, the respondent was notified that its application had been partially successful to the extent of limiting the audit period to five years. Once that decision was rendered the Commissioner became *functus officio* and the promise to review the objection further upon being "availed the requisite information on the transaction value," was misconceived.

When the appellant supplied more documents, the Commissioner purported to review the decision further resulting in the decision communicated on 18th December, 2019. In the letter of 5th February, 2020 (erroneously dated 5th December, 2020) the Commissioner was categorical that the original decision stood. By that the decision referenced is that of 9th September, 2019 and not the erroneous one of 18th December, 2019. Even if the latter were to be deemed the decision, the 45 days allowed for an appeal therefrom elapsed on 3rd February, 2020. The application lodged on 6th March, 2020 was thus time barred. The Tribunal was justified in considering that objection prior to the respondent's *locus standi*.

h) The decision;

The key material facts giving rise to this appeal are that following a customs post-clearance audit of the appellant's business for the period running from January, 2012 to December, 2017 the respondent by a letter dated 4th July, 2019 communicated to the appellant a tax assessment of shs.

32,907,788,016/= based on the "adjusted value method." By a letter dated 9th August, 2019 the appellant objected to this assessment and stated its grounds for doing so. By a letter dated 9th August, 2019 the respondent stated that it would limit the audit period to five years (a reduction from the original seven years) but maintained the audit position until the appellant provided further information on the transaction value of its imports. The appellant provided the additional information by email and at a subsequent meeting held on 15th October, 2019. By a letter dated 18th December, 2019 on basis of the "fall-back" method of assessment for the period running from January, 2014 to December, 2017, the respondent communicated to the appellant a revised tax assessment of shs. 21,485,110,040/= which communication the appellant received on 19th December, 2019. The appellant asked for a more detailed explanation of the reasons behind the reviewed assessment which explanations were provided on 9th January, 2020. The appellant responded with new objections by a letter dated 20th January, 2020. By a letter of 5th February, 2020 (erroneously dated 5th December, 2020) the respondent indicated it was taking steps to collect the revised tax assessment of shs. 21,485,110,040/= The appellant lodged an application to the Tribunal on 6th March, 2020 to which the respondent filed a response on 16th April, 2020.

The appeal substantially challenges the decision of the Tax Appeals Tribunal on account of its findings of fact as to which of those series of communications constituted the decision on the appellant's tax objection, as to whether the appellant's appeal therefrom was time barred and lastly as to whether either party had *locus standi* before it. The latter becomes a threshold issue that ought to be determined before the other two. It is for that reason that the grounds of appeal will be considered in reverse order.

4th ground; the honourable members of the Tribunal erred in law in entertaining the respondent's preliminary objection when the respondent had no *locus standi* to raise the same.

For a party initiating litigation, *locus standi* denotes the legal capacity to institute, initiate or commence litigation in a competent court of law or tribunal without any inhibition, obstruction or hindrance from any person or body. *Locus standi* relates to the legal interest that a party claims in the subject matter of a suit before a court or tribunal. The question whether a party initiating

litigation has *locus standi* depends on whether he or she has sufficient interest or legal right in the subject matter of the dispute to entitle him or her to institute the litigation. The party initiating litigation must therefore show that there is a nexus between his or her claim and the conduct of the one against whom the litigation is initiated. When a party initiating litigation has been found not to have the standing to sue, the question whether other issues in the case have merit and can be properly decided does not arise. Lack of *locus standi* deprives the court or tribunal of the jurisdiction to entertain the litigation.

On the other hand, for the party against whom litigation is initiated, *locus standi* denotes the right of appearance in a court of law or tribunal, to litigate or ventilate the issues before it. That right is gained when such a party is named as an adversary and performs an act which constitutes a submission to the jurisdiction of the court or tribunal or one that recognises the pending litigation as valid and proper. Submission to the jurisdiction of the court or tribunal is signified by filing a defence to the merits of the litigation. A party who upon being served with process initiating the litigation does not file a defence, puts himself or herself out of the jurisdiction of the court or tribunal (See *Bitaitana Sirasi and four others v. Kananura Emanuel [1977] HCB 34*).

Where party against whom litigation is initiated appears and pleads to the merits without contesting the jurisdiction, there is clearly a voluntary submission. A party challenging the jurisdiction of court or tribunal should therefore be careful not to do anything in the proceedings other than bring that challenge. Where a challenge to the jurisdiction has been made or the time for doing so has not yet expired, any conduct said to amount to submission, and therefore a waiver of that right to challenge, must be wholly unequivocal. When the respondent files a statement giving the reasons for the decision within thirty (30) days after service of the application as required by section 17 (1) of *The Tax Appeals Tribunal Act*, the respondent thereby unequivocally submits to the jurisdiction of the Tribunal.

In the instant case, the respondent filed its "statement of reasons for tax decision" on 16th April, 2020 yet it had been served with the application on 6th March, 2020. Section 17 (1) of *The Tax Appeals Tribunal Act* and Rule 13 (1) of *The Tax Appeals Tribunal (Procedure) Rules, SI 50 of*

2012 require lodgement of those reasons within thirty (30) days after service of the application. The statement of reasons for tax decision was therefore filed ten days out of time.

I am in agreement with the approach taken in *Hon. Abdu Katuntu and another v. MTN Uganda Ltd and six others, H. C. Civil Suit No. 248 of 2012* where the defendants objected to the Plaintiff's suit on the ground that the plaint disclosed no cause of action and that the plaintiffs had no *locus standi* to bring the action against the defendants. In reply the plaintiffs' Counsel prayed that the preliminary objection be overruled, contending that the defences on record were groundless, without any bona fide grounds as they substantially admitted the plaintiffs claim, and that the defences perpetuated an illegality and could not stand. The court held that the question of whether a plaint discloses a cause of action against a defendant should be considered by a perusal of the plaint only and any attachments forming part of it, proceeding from the assumption that whatever is averred therein is true. The determination of the issue is not dependent on the defence and therefore whatever is averred in the written statement of defence is immaterial.

The Tax Appeal Tribunal correctly extended the reasoning in that decision to apply to a situation where a defence is filed out of time. While it is trite that a defendant who fails to file a defence puts himself out of court and no longer has any *locus standi* and cannot be heard (see *Kanji Devji v. Damodar Jinabhai & Co. (1934) 1 E.A.C.A. 87*), a statement of defence filed out of time cannot be ignored (see *Patel v. Othwele [1955] 28 K.L.R 27* and *Rajinder Nath Dhiri v. Preetam Singh (1950) 24 (1) K.L.R. 26*). Court ought not to exclude a defence filed out of time as this would prevent it from deciding the suit on the merits (see *Kampala Industrial Works v. Katwe Limited, MB No. 72 (1958*); The defence, if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered (see *Jamnadas Sodha v. Gordhandas Hemraj (1952)7 U.L.R. 7*).

Whereas the party initiating a litigation has a choice in determining when and how to initiate it, and thereby is expected to carefully consider issues of his or her *locus standi*, the one against whom it is initiated has no choice but to respond. Therefore, in those cases where substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to

be preferred more in favour of the case of the party against whom litigation is initiated. For all the foregoing reasons the Tax Appeals Tribunal came to the correct decision and accordingly this ground fails.

3rd ground; The honourable members of the Tribunal erred in law when they held that the letter of 18th December, 2019 was the objection decision whereas it was a fresh assessment;

It is contended by counsel for the appellant that not only was the preliminary objection not pleaded, but also it was founded on disputed facts and therefore ought not to have been considered as a preliminary point of law. It is trite that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion. A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit (see *Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd [1969] 1 EA 696* and *Katabazi and 21 Others v. Secretary General of the East African Community and Another (Ref No. 1 of 2007) [2007] EACJ 3*). In any preliminary objection therefore, there is no room for ascertainment of facts through affidavit or oral evidence.

Whereas according to Order 6 rule 28 of *The Civil Procedure Rules,* a defendant wishing to rely on points of law as a preliminary issue is required to set out such points of law in the written statement of defence before the preliminary issue is regarded as properly raised, whether raised by way of formal application or informally at the commencement of the hearing, the Court has discretion to dispose of the preliminary objection immediately or defer its ruling until after hearing the whole case (see *The Attorney General v. Major General David Tinyefunza, S. C. Constitutional Appeal No. 1 of 1997*).

In the instant case, facts establishing communications by the respondent to the appellant on 9th August, 2019 as well as on 18th December, 2019 were pleaded by both parties. The two sets of fact did not require to be ascertained by some form of oral or affidavit evidence. These were not

disputed facts but rather agreed facts over which the parties had differing opinion. A difference of opinion as to the implication of facts established does not mean that the facts are in dispute. Although not pleaded, the preliminary objection arose by clear implication out of the pleadings. In a situation in which the two sides hold clearly opposite views concerning facts common to both and pleaded by both, points of law arising from such pleaded facts may be argued as preliminary points of law. The nature of preliminary points of law is that of a dispute over the legal implications rather than the facts engendering them. The Tribunal therefore did not err in considering this as a preliminary point of law since it was over the legal implications rather than the facts.

Section 229 (1) of *The East African Community Customs Management Act, 2004* confers the right upon any person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs, within thirty (30) days of the date of the decision or omission, to lodge an application to the Commissioner for review of that decision or omission. Since the section requires an applicant to demonstrate that an interest of theirs was genuinely affected, the decision or omission appealed ought to relate to a substantive or significant technical or procedural issue arising in the implementation of tax legislation. This then triggers the process by which a taxpayer submits his or her disagreement with the decision or omission made by customs officers with regard to the applicant's tax position or liability.

An objection can be made on basis of technical or procedural issue including: the inclusion in an assessment of an amount as part of the taxable value, the disallowance in an assessment of an amount claimed as a deduction in ascertaining the taxable value, the determination by the tax officer of the amount of an assessed loss, the amount set off under the relevant provisions, the imposition of any amount of penalty for failure to lodge a tax return within the prescribed time or any extended time allowed, the imposition of any amount of penalty for failure to lodge a correct tax return, any decision relating to the status of a tax payer, and so on. Once the period for objecting (including any extension of time to lodge an objection) has ended, the assessment is binding on the taxpayer, unless there is any error or omission made in the tax decision or in any related proceedings. In the instant case, by a letter dated 4th July, 2019 communicated to the appellant a tax assessment of shs. 32,907,788,016/= based on the "adjusted value method." By a letter dated 9th August, 2019 the appellant objected to this assessment and stated its grounds for doing so.

It is trite that where decisions are made under a non-statutory scheme, there can be no right to merits review. The right to merits review and the corresponding jurisdiction can exist only where a legislative enactment creates a decision making power and also provides that a person may apply to an administrative tribunal for review of that decision. Quite properly the right and the corresponding jurisdiction are a creature of statute. An objection is a formal request by a taxpayer asserting his or her legal right to have a tax decision reviewed by the same authority that made the decision. An appeal is a formal request by a taxpayer asserting his or her legal right to have a tax decision reviewed by an institution that did not make the decision, whether in the executive or judicial branch.

Where a person who is dissatisfied with a tax decision lodges an objection against that decision, the Commissioner, after reviewing that objection, provides an objection decision. It is the Commissioner's decision to either allow the objection in whole or in part or disallow the objection. A tax objection decision therefore is a final ruling or any other written resolution of a tax dispute or appeal published by the Commissioner, which involves a substantive or significant technical or procedural issue arising in the implementation of tax legislation.

A review under section 229 of *The East African Community Customs Management Act, 2004* is an internal merits review. This involves the Commissioner standing in the shoes of the customs officer as the original decision-maker, and making a decision on the merits of the assessment. The Commissioner, not being the primary decision-maker, reconsiders the facts, law and policy aspects of the original decision, and determines what the correct and preferable decision should be. If based on the facts there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts (see *Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158 at 161-162*). Such a review therefore may result in the amendment of an assessment, either by increasing or reducing a taxpayer's liability.

While an administrative review of tax decisions is not a substitute for judicial review, providing taxpayers with an opportunity to obtain an internal review within the executive branch before appealing to the High Courts can strengthen the integrity of the tax administration, speed up the process of redressing taxpayer grievances, and ease the caseload faced by the High Court I tax

disputes. The task of the Commissioner is akin to what an administrative tribunal must undertake when reviewing a decision on the merits, which task was explained in *Drake v. Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409*, thus:

> The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.

Merits review enables a reconsideration of all aspects of the challenged decision, including the finding of facts and the exercise of any discretions conferred upon the decision-maker. By its very nature as a merits review, a broad approach has to be taken in the identification of the relevant facts, law and policy aspects of the dispute. To that end the Commissioner may require further information from the person lodging the application. Section 229 (1) of the *EACCMA* confers inquisitorial powers which enable the Commissioner to take the initiative in eliciting evidence and formulating legal arguments, and to control the way in which the application is presented.

The Commissioner may use the broad inquisitorial powers to make inquiries in order to ascertain facts central to the decision and thus assemble his or her own evidence, conduct a comprehensive *de novo* inquiry into errors of fact when applying the law, reassess the weight given to a particular piece of evidence by the original decision-maker, and reach his or her own conclusions. Thus, the Commissioner will "stand in the shoes" of the primary decision-maker, and will make a fresh decision based upon all the evidence available to the Commissioner, including that which might not have been available to the primary decision-maker. The Commissioner becomes the new decision-maker, having the same powers and functions as the original decision-maker. The Commissioner may either confirm, reduce or increase the tax. Merits review is usually informal in nature, and the rules of evidence do not apply. The whole idea of this process is to avoid court-like procedures and, more importantly, a court-like way of thinking. The Commissioner has a wide discretion to amend an existing assessment which may be incorrect and substitute another more appropriate assessment. Where the assessment is an additional assessment or a reduced assessment which partly imposes a fresh liability, the person assessed has no further right of objection.

Section 229 (4) of *The East African Community Customs Management Act, 2004* requires the Commissioner to communicate his or her decision, stating reasons for the decision in writing, to the person lodging the application, within a period not exceeding thirty (30) days of the receipt of the application. However, since this section mandates the Commissioner within "thirty days of the receipt of the application.....and any further information the Commissioner may require from the person lodging the application," therefore when the Commissioner by written notice served on the person within the original thirty (30) days' period, requires the person to give information relating to the taxation objection, then the end of the period will be reckoned thirty (30) days after the Commissioner receives that information.

By the letter dated 9th September, 2019 the Commissioner explained the reasons behind the tax assessment of shs. 32,907,788,016/= as follows;

> We would like to inform you that the tax obligation arising from the said audit arose majorly from the fact the supporting documents you submitted at the time of clearance of your imports at first importation, in particular the invoices secured from you, cannot pass the Transaction Value Method…. We therefore came to the conclusion that the Transaction Value Method could not be applied….and an alternative method was used to derive the Customs Value……In view of the aforementioned, we would like to inform you that the decision as earlier communicated …..still stands, however the scope of the audit finding will be limited to five years from the commencement of the audit and the period beyond [the] statute of limitation will be reviewed by the Tax Investigations Department to establish whether there was fraud…..<u>The audit position communicated to you therefore stands until you avail us with the requisite information on the transaction value of your products to enable an objective review of your objection</u> (emphasis added).

The objection decision envisaged under section 229 (4) of *The East African Community Customs Management Act, 2004* is a final, not a tentative decision. A tentative decision is a preliminary one indicating the decision the Commissioner is prepared to make, which may be modified or reversed in the final decision on account of additional information having been provided. A tentative decision may also note any issues on which the Commissioner wishes the parties to provide further argument. It is essential to tax administration to have a clear stopping place, a point of no turning back; otherwise, there would no end to the objections procedure, nor any beginning of

enforcement. The doctrine of *functus officio* (Latin for "a thing adjudged"), defines what constitutes a valid and final decision, from which point the parties and the decision-maker are bound and enforcement may be had, lest the decision be struck on appeal or judicial review. But for the doctrine of *functus officio* that dictates finality and forbids decisions from being easily undone, decision-makers could change their decisions as they like, as many times as they like. Preclusion from changing a decision is necessary to ensure a stable basis for appeal and judicial review.

Considering that section 229 (4) of *The East African Community Customs Management Act, 2004* authorised the Commissioner to seek "further information the Commissioner may require from the person lodging the application" before making the final decision, and that by the letter of 9th August, 2019 the Commissioner postponed the final decision to a point in time when the appellant availed the Commissioner with "the requisite information on the transaction value of your products to enable and objective review of your objection," a final decision was not made on 9th September, 2019. Therefore since the objection was made on 9th August, 2019 and the tentative decision was made on 9th September, 2019 then the end of thirty (30) days' period within which the Commissioner was required to give a decision, would be reckoned from the date the appellant would avail the "requisite information on the transaction value" on basis of which the respondent was to make a final decision.

At a meeting held on 15th October, 2019 between the appellant and the Commissioner, what constituted the "requisite information on the transaction value" was agreed upon. This information is catalogued in the respondent's letter dated 21st October, 2019. It is not clear from the record as to when that information was finally provided by the appellant. What is clear though is that following receipt of whatever additional information was provided by the appellant, by a letter dated 18th December, 2019 the Commissioner communicated as his final decision a revised tax assessment of shs. 21,485,110,040/= on basis of the "fall-back" method of assessment for the period running from January, 2014 to December, 2017. The appellant received this communication on 19th December, 2019.

No society, nor the average litigant, could afford an adjudication process with a revolving door policy. At some fixed, discernable point, the process must draw to a close. The doctrine of *functus officio* kicks in when a final and valid decision is made. Upon the rendering of a final and valid decision, the Commissioner is enjoined from reconsidering the decided matter and rescinding or varying the decision in any manner. Put another way, the doctrine circumscribes the jurisdiction of the Commissioner by delineating when his jurisdiction is exhausted. Once the jurisdiction is spent, the decision is fixed. With no going back, finality is achieved. With finality comes legal certainty, which is essential to efficient tax administration and a democratic society founded on the rule of law.

Consequently, subsequent communication between the appellant and the respondent relating to that decision was superfluous. In that communication, the appellant asked for a more detailed explanation of the reasons behind the reviewed assessment which explanations were provided on 9th January, 2020. The appellant responded with new objections by a letter dated 20th January, 2020. By a letter of 5th February, 2020 (erroneously dated 5th December, 2020) the respondent indicated it was taking steps to collect the revised tax assessment of shs. 21,485,110,040/= That the Tax Appeal Tribunal was ambivalent in its finding as to which between the tentative decision of 9th September, 2019 and the final one of 18th December, 2019 was "the decision" was indeed an error but one that is inconsequential in light of my findings on the last two grounds.

2nd ground; The honourable members of the Tribunal erred in law in holding that the applicant / appellant had the obligation to elect to treat its application for review of 9th August, 2019 as successful when the respondent did not deliver a decision within the prescribed thirty (30) days, thereby arriving at a wrong decision;

Section 229 (4) of *The East African Community Customs Management Act, 2004* requires the Commissioner to communicate his or her decision, stating reasons for the decision in writing, to the person lodging the application, within a period not exceeding thirty (30) days of the receipt of the application. According to sub section (5) thereof, Where the Commissioner does not communicate his or her decision to the person lodging the application for review within the

prescribed thirty (30) days, the Commissioner is deemed to have made a decision to allow the application.

The word "deem" means to treat something as if; - (i) it is really something else, or (ii) it has qualities that it does not have. "Deem" is used when it is necessary to establish a legal fiction either positively by "deeming" something to be something it is not or negatively by "deeming" something not to be something which it is. Deeming provisions in statutes therefore consider a particular set of facts and then proceed to assume that it is something else.

Every deeming provision under a statute is created with specific intent, purpose or objective sought to be achieved and that can be gathered from applying the *Hayden's Rule* or "Mischief Rule" of Interpretation i.e. what was the problem sought to be remedied was. Though the words "deemed" or "as if" etc. are used to denote deeming, it serves variety of purposes and thus it becomes essential to understand the real intent behind introducing deeming provision. In *Consolidated Coffee Ltd. & Another v. Coffee Board, Bangalore, (1980) 3 SCC 358*, the Supreme Court of Canada held that;

> The word "deemed" is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail**,** but in each case it would be a question as to with what object the legislature has made such a deeming provision. In *St. Aubyn v. Attorney-General, 1952 AC 15, 53: (1951) 2 All ER 473, 498,* Lord Radcliffe observed thus: "The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.

When applied interpretatively, it establishes an irrefutable presumption regarding the meaning of a particular word or expression. A deeming provision artificially imports into a word or expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used. Its purpose in this context then is to do away with subjectivity and

conclusively clarify the meaning of a term that may be particularly ambiguous or may imply a value judgment, and to eliminate any controversy over the application of a particular provision.

When applied to factual scenarios, deeming creates a legal fiction by the consideration of something as true notwithstanding the impossibility of proving it to be so. This fiction establishes something which is not in existence in fact. Used in this sense, it creates a presumption that accepts something as fact without the benefit of evidence. While presumptions of law are conclusive, factual presumptions may either be rebuttable or irrebuttable. The purpose of irrebuttable deeming provisions is that since legal consequences attach to a set of facts, if the facts are conclusively presumed, the legal consequences should follow automatically in all circumstances.

There is difference between deeming provision creating legal fiction as against deeming provision creating a presumption. While legal fiction assumes existence of a fact which may not really exist, a presumption of a fact depends on satisfaction of certain circumstances. Normally any presumption is rebuttable unless the legislature creates an irrefutable presumption. The distinction was clarified in *M/s. Bhuwalka Steel Industries Ltd. & Another v. Union of India, Civil Appeal No. 7823 of 2014*, thus;

> 32. There is a clear distinction in law between a "legal fiction" and "presumption". A distinction commonly taken between the fiction and the legal presumption runs something as follows: A fiction assumes something which is known to be false; a presumption (whether conclusive or rebuttable) assumes something which may possibly be true. This distinction is regarded as being reinforced, as it were, in the case of the rebuttable presumption because such a presumption assumes a fact which probably is true. "Presumptions" are closely related to legal fictions … but they operate differently. "Fictions" always conflict with reality, whereas presumptions may prove to be true". Legal fictions create an artificial state of affairs by a mandate of the legislature. "… an assumption of fact deliberately, lawfully and irrebuttably made contrary to the facts proven or probable ……. with the object of bringing a particular legal rule into operation … the assumption being permitted by law …" They compel everybody concerned including the courts to believe the existence of an artificial state of facts contrary to the real state of facts. When a fiction is created by law, it is not open to anybody to plead or argue that the artificial state of facts created by law is not true, barring the only possible course if at all available is to question the

constitutionality of the fiction. It is settled law that only sovereign legislative bodies can create legal fictions but not a subordinate law making body.

33. Whereas presumptions are rules of evidence for determining the existence or otherwise of certain facts in issue in a litigation. "Presumptions" were inferences which the judges were directed to draw from certain states of facts in certain cases, and these presumptions were allowed a certain amount of weight in the scale of proof; such a presumption and such evidence amounted to full proof, such another to half full, and so on."

34. Rules of evidence are the principles of law which command the courts or other bodies whose duty is to determine the existence or otherwise of certain facts. The Anglo saxon legal system recognises that facts could be established either by direct or circumstantial evidence. Presuming certain facts, if they are so commanded by law has always been recognised by our legal system to be one of the accepted processes for those bodies charged with the duty of collecting evidence. Therefore, law making bodies make provisions incorporating presumptions wherever they believe it appropriate. But such practices have well recognised qualifications and limitation. Section 114 of the Evidence Act embodies some of the basic principles of the law of presumptions and the limitations thereon. Technically, the Evidence Act may or may not be applicable to everybody charged with the responsibility of collecting evidence. But the principles underlying the provisions do constitute valuable guides. They are based on sound principles of jurisprudence deduced from the observation of human conduct, natural course of events and logic etc……we have already noticed that by definition a "fiction always conflicts with the reality whereas presumption may be proved to be true". It therefore follows that there is no possibility of a fiction being rebutted by evidence.

It is clear then that a deeming provisions creating legal fiction under law cannot be refuted or countered by producing evidence to demolish the fact(s) deemed as such by way of such fiction. Where facts are conclusively presumed, their legal consequences follow automatically and effectively result in a legal fiction. In other words, the rules of evidence do not apply to deeming created under a legal fiction.

That appears to have been the view taken in a judgment delivered on 23rd August 2021, by the High Court of Kenya in *Equity Group Holdings Limited v. Commissioner of Domestic Taxes, Civil Appeal ITA E069 & E025 of 2020 (Consolidated); [2021] eKLR* when it ruled against the

Commissioner of Domestic Taxes for failure to issue an objection decision within the statutory 60 days. The brief facts of the case were that pursuant to an amendment to *The Banking Act*, Cap 488 recognising non-operating holding companies and banking groups, Equity Bank Limited sought the requisite approvals from the Capital Markets Authority, and the Competition Authority of Kenya to undertake internal restructuring to create a non-operating holding company. They received the necessary approvals on 15th October 2014 from the Capital Markets Authority, and on 28th November 2014 from the Competition Authority of Kenya. The restructuring then took effect on 31st December 2014, with a new entity, a non-operating holding company created, namely Equity Bank Kenya Limited.

The Commissioner of Domestic Taxes conducted a review of the restructuring exercise and determined that Capital Gains Tax (CGT) arose from the transaction, issuing a tax demand to Equity Bank Kenya Limited on 10th October 2016 for payment of CGT relating to the transfer of net banking assets from Equity Bank Limited to Equity Bank Kenya Limited, amounting to K. Shs. 330,858,696, inclusive of penalties and interest. The parties met on 2nd November 2016 but failed to resolve the matter.

Equity Bank Kenya Limited filed a Notice of objection on 9th October 2016 objecting to the entire amount, to which the Commissioner of Domestic Taxes reviewed the objection and adjusted the tax demand to K. Shs. 820,406,196. This was confirmed by an objection decision dated 9th January 2017. Equity Bank Kenya Limited appealed this decision on the basis that, among other grounds, it was time barred, having been made contrary to Section 51 of *The Tax Procedures Act* and ought to be set aside. The Commissioner of Domestic Taxes responded that the Objection Decision was not time barred, and made submissions praying that the TAT find the Decision to be within the provisions of Section 51 dismiss the appeal with costs.

The court noted that the 60th day was 8th January, which fell on a Sunday, and therefore the objection decision ought to have been issued and delivered latest Friday 6th January, 2017. However, the TAT held that "though the wording in Section 51 of the TPA is framed in mandatory terms, the Tribunal would invoke the Provisions of Article 159 of the Constitution in order not to shut out the Respondent (The Commissioner) on this technical ground" and thus admitted the

objection decision, allowing the appeal. Equity Bank Kenya Limited, dissatisfied with the decision, then lodged the second appeal, seeking to overturn the decision.

On appeal, the High Court, noted that the heart of the appeal lay in the interpretation of section 51(11) of *The Tax Procedures Act*, and the consequences of the Commissioner's failure to render an objection decision within the statutory time frame. In its holding, the Court also stated that the general rule of interpretation is that an absolute enactment must be obeyed, or fulfilled, substantially, and that some rules are vital and go to the root of the matter – they cannot be broken, while others are only directory and a breach of them can be overlooked, provided there is substantial compliance. Concluding its decision, the Court stated that "there is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, and that one can only look fairly at the language used." The Court ordered, on the basis of the submissions placed before it that the Objection Decision dated 9th January be set aside in its entirety and costs awarded to Equity Bank Kenya Limited, the appellant in this matter.

This decision though seems to have taken too narrow a view of deeming provisions in tax legislation. Authorities on the construction of deeming provisions were summarised in *East End Dwellings Co Ltd v. Finsbury Borough Council [1952] AC 109* at pp. 132–13 as follows;-

> For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

In *Inland Revenue Commissioners v. Metrolands (Property Finance) Ltd [1981] 1 WLR 637*, it was held that;

> When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes

> are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied

Therefore the words "deemed" or "deeming" do not always import a conclusive legal fiction into a statutory scheme. The word must be construed in the entire context of the statute concerned. The court must ascertain the purpose of the statutory provision and should not apply the deeming provision so far as to produce unjust, absurd or anomalous results unless the court is required to by clear language. It is well established that a statute is best interpreted when one can retrieve with ease why it was enacted. For this reason, it must be interpreted in a way that gives effect to its purpose or object. Use of the expression does not invariably and necessarily imply an irrebuttable legal fiction, but it must be read and understood in the context of the whole statute.

A deeming provision that declares certain facts as established creates a presumption that accepts something as fact without the benefit of evidence. The presumption created by such a deeming provision may be either conclusive or rebuttable. The latter type may be useful to deal with an evidentiary difficulty. The purpose of the former is rather to create a legal rule: since legal consequences attach to a set of facts, if the facts are conclusively presumed, the legal consequences follow automatically in all circumstances. The difference between deeming provisions that create a legal fiction and those that conclusively declare the law should be distinguishable: whereas one declares the law to be different from reality, the other merely clarifies the reality of the law.

When a statute requires the court to treat an imaginary state of affairs as real, it must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it (see *East End Dwellings Co Ltd v. Finsbury Borough Council [1952] AC 109* and *East End Dwellings v Finsbury Borough Council [1952] AC 109*). As a statutory hypothesis, this deemed decision must not be carried further than the legislative purpose requires, but the extent to which it must be carried depends upon ascertaining what that purpose is. I construe that purpose as being the maximisation

of the social and economic benefits of tax collection. In that regard, decisions in tax administration are intended to be rendered with clarity, certainty and speed.

In that context, the deeming in section 229 (5) of *The East African Community Customs Management Act, 2004* is in the nature of a proactive step taken to reduce bureaucratic delays with a view to affixing responsibility on the Commissioner to fulfil his or her role within the expected time frames. It is designed to avoid unacceptable delays where applicants have to make business decisions dependant on the outcome of the objection. From the point a deemed decision, the Commissioner's only remaining role is to give a decision notice which either approves the application or approves the application subject to conditions. The power to refuse the application is lost where section 229 (5) is enlivened and the powers in the Act to impose conditions cannot be used to effect a refusal, even one which would be consistent with the Act. Therefore once the Commissioner has made a decision on a taxation objection under section 229 (4), or deemed to have made one under section 229 (5), he or she has made an objection decision. The general provisions about appealing the decision apply to a deemed decision.

A deemed decision is activated by the applicant acting upon it. It constitutes a final decision if acted upon. Therefore, until it is acted upon, a deemed decision to a tax objection is replaceable by an actual decision that allows the objection only in part, or imposes conditions which do not have the effect of rejecting the application. It is not necessary to assume that a decision has been made allowing the application where the objector had not acted to its detriment in reliance on the deemed decision. Where an actual decision is made before the objector had not acted to its detriment in reliance on the deemed decision, the deemed decision would no longer be of effect; the actual decision is substituted for the deemed decision.

In the instant case, although evidence was furnished to show that at a meeting held on 15th October, 2019 between the appellant and the Commissioner, what constituted the "requisite information on the transaction value" was agreed upon and subsequently catalogued in the respondent's letter dated 21st October, 2019 there is no evidence to show when it was eventually submitted. Consequently, there is no evidence to show that the final decision of 18th December, 2019 was made after thirty (30) days had elapsed following that submission. In any event, there was no

evidence to show that the respondent ever made a business decision dependant on a deemed outcome of the objection. This ground accordingly fails,

1st ground; the honourable members of the Tribunal erred in law in holding that the appellant / applicant's application for review to the Tax Appeals Tribunal was time barred;

Section 229 (1) of *The East African Community Customs Management Act, 2004* confers the right upon any person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs, within thirty (30) days of the date of the decision or omission, to lodge an application to the Commissioner for review of that decision or omission. The objection period starts from, in the case where the assessment notice has been posted, the date of posting, not the date the assessment notice was produced. Once the period for objecting (including any extension of time to lodge an objection) has ended, the assessment is binding on the taxpayer, unless there is any error or omission made in the tax decision or in any related proceedings. Failure to lodge an appeal within the time specified (or extended time) means that the application becomes invalid.

When an application is made to the Tax Appeals Tribunal, the Tribunal will verify whether the application is valid before it. To determine the validity of an application, there are three things that Tribunal will consider:

a) Whether the application has been lodged within the time frame prescribed by law, or within an extension of time granted to lodge the application;
b) Whether the application is in the acceptable form; and
c) If the application is against an amended assessment, whether the grounds of the application relate only to the liability arising from that amendment.

In the instant case, a preliminary point of law was raised questioning the validity of an application lodged on 6th March, 2020 challenging a decision communicated on 19th December, 2019. Cleary by virtue of section 230 (2) of *The East African Community Customs Management Act, 2004* the forty five (45) days available for exercising the right of appeal out-rightly elapsed on 3trd February, 2020. The application lodged on 6th March, 2020 was over thirty days out of time. Although

according to section 16 (2) of *The Tax Appeals Tribunals Act* the tribunal may, upon application in writing, extend the time for the making of an application to the tribunal for a review of a taxation decision the appellant did not make such application before filing the appeal.

Counsel for the appellant's argument that the assessment of 18th December, 2029 was new because it is a different amount based on a different method and communicated for the first time; that the errors in the decision were new involving double counting, assessment of tax on tax, etc. and that therefore the tax payer would be entitled to file a new objection to the commissioner and thereafter to the tribunal, is misconceived. The purported objection of 20th January, 2020 was equally misconceived. The respondent's letter of 6th February, 2020 was not a new decision disallowing the objection. With the decision of 18th December, 2029 the objections procedure before the Commissioner drew to a close. Once that point was reached and the narrow window for appeal had elapsed, the parties would be able to heave a sigh of relief and move on, rest assured that the matter would not come back to haunt them in re-litigation. The Commissioner would likewise move on, knowing that the objection was off his docket for good.

Two major purposes underlie limitation periods in statutes; protecting defendants and respondents from having to defend stale claims by providing notice in time to prepare a fair defence on the merits, and requiring plaintiffs and appellants to diligently pursue their claims. Periods of limitation are designed to protect defendants and respondents from plaintiffs and appellants who fail to diligently pursue their claims. Once the time period limited by statute expires, the plaintiff's right of action and the appellant's right of appeal will be extinguished and becomes unenforceable against a defendant or respondent. The Appeals tribunal therefore came to the correct conclusion, and consequently the appeal fails and is dismissed with costs to the respondent.

Delivered electronically this 1st day of December, 2021 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
1st December, 2021.

https://taxguru.in/income-tax/interpretation-deeming-provisions-income-tax-act-deep-dive.html

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