REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 36 OF 2011

REPUBLIC ....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY ....RESPONDENT

EXPARTE

BATA SHOE COMPANY (KENYA) LIMITED

JUDGEMENT

The ex-parte Applicant, Bata Shoe Company (Kenya) Limited, is a footwear manufacturer and retailer based in Kenya. It also imports footwear. The Respondent, Kenya Revenue Authority (KRA) is a creature of Section 3 of the Kenya Revenue Authority Act (Cap 469) and its core mandate is to asses, collect and account for all revenues in accordance with identified tax laws. Among those laws is the East African Community Customs Management Act, 2004 (EACCMA).

In pursuance of its mandate the Respondent in 2010 conducted a post-clearance audit on the tax affairs of the Applicant for the period 1st January, 2005 to 31st December, 2009. At the conclusion of the said exercise the Respondent issued a partial demand notice dated 24th November, 2010 for Kshs.90,489,947/=. The said notice explained the basis of the demand as follows:

"RE: PARTIAL DEMAND NOTICE – KSH: 90,489,947.00

Following our audit of Bata Shoe Company Limited for the period 1st January 2005 to 31st December 2009, the following issues were established.

1. Tariff Classification for Imported Products

We sought to establish the correctness of tariff declared to Customs. Our analysis revealed instances of wrong tariff declarations of which tariff finds were disputed by yourselves. Arising from our meeting with you held at your premises on 11th November, 2010, it was agreed that samples of products whose tariff was disputed should be drawn for Customs Laboratory Analysis. Any assessment in tariff mis-declaration should await the outcome of the analysis and subsequent tariff ruling.

2. Pre-shipment Costs (other costs)

These comprised of Bunker Adjustment Factor (BAF), Currency Adjustment Factor (CAF), Peak Season Surcharges and other surcharges charged by the shipping lines. BAF and CAF are basically surcharges imposed by shipping lines on importers to counter the effect of fuel and exchange rate price fluctuations. These costs are incidental to the importation of the goods and should be added to the freight component of customs value. Our analysis resulted in extra taxes amounting to Kshs.1,871,743.00 which was agreed upon and is payable immediately. The breakdown is shown below.

Import Duty	**Ksh. 979,970.00**
Value Added Tax	**Ksh. 783,976.00**
Import Declaration Form Fee	**Ksh. 107,797.00**

For detailed analysis, Please see attached Schedule II

3. Service Charges

We sought to charge duty on these services of which you disputed. Explanations given to us during the audit were that the service charges were of a pre-shipment nature incurred in the export country and consisted of haulage, loading and inland freight to post of exit. During the meeting held at your premises on 11th November, 2010, you informed us that these were actually buying commissions and later provided a contract to this effect. We reviewed the contract and our further investigations revealed that these services are of a pre-shipment nature incidental to the importation of the finished goods hence chargeable in line with paragraph 9 of the 4th Schedule to the EACCMA. Our analysis resulted in extra taxes amounting to Kshs.35,425,823.00 payable as below:

IDF	**Kshs. 2,550,288.00**
Import duty	**Kshs. 23,184,439.00**
Value Added Tax	**Kshs. 18,547,551.00**

For detailed analysis, please see attached Schedule III.

4. Royalties

An adjustment to value on finished imported goods has been done in line with the 4th Schedule to the EACCMA. We did an adjustment on imported finished goods. Our analysis on taxes payable due to adjustment to transaction value resulted in extra taxes amounting to Kshs.53,192,381.00 payable as:

IDF	**Kshs. 3,063,436.00**
Import duty	**Kshs. 27,849,414.00**
Value Added Tax	**Kshs. 22,279,531.00**

For detailed analysis, Please see attached Schedule IV

Consequently, in accordance with the provisions of Section 135(1) of the East African Community Customs Management Act, (2004), you are required to make a total payment of Kshs.90,489,947.00 to The Commissioner of Customs Services within 30(thirty) days

Note that the above assessment is a partial assessment. We shall notify you on the disputed tariff issues once samples are picked, analysed and subsequently classification clarified.

Thank you for your cooperation."

The letter is signed by one D. Mwongela for the Commissioner-Customs Services Department.

The Applicant responded to the said notice vide a letter dated 14th December, 2010 and conceded and paid the amount of Kshs.1,871,743 being Import Duty of Kshs.783,976, Import Declaration Form fee of Kshs.107,797 and Value Added Tax of kshs.783,976/=. The Applicant, however, disputed the balance of kshs.88,618,204/= and gave reasons for doing so. Through a letter dated 11th January, 2011 the Respondent insisted that the Applicant should pay the taxes.

The Applicant subsequently moved to this Court. It sought and obtained leave to commence these judicial review proceedings. By way of notice of motion application dated 2nd March, 2011 the Applicant therefore prays for orders that:

1. **An order of certiorari do issue to remove to this court and quash the decision of the respondent contained in the letter dated 24th November 2010 requiring the applicant to pay taxes in the sum of Kshs. 88,618,204/- allegedly due from the applicant.**
2. **An order of prohibition do issue to prohibit the respondent whether by itself or through its officers and/or agents from commencing or instituting any enforcement actions against the applicant in relation to and/or on account of the disputed taxes in the sum of kshs. 88,618,204/=**
3. **Costs be awarded to the applicant**

The application is supported by the chambers summons application for leave, a statutory statement and the affidavit of the Applicant's Chief Finance Officer Mark Romeril, all dated 23rd February, 2011. It is also supported by a further affidavit sworn by Mark Romeril on 16th August, 2011. The Respondent opposed the application through the replying affidavit of Kennedy Ruibi, a Revenue Officer I in the Post Clearance Audit Unit of the Customs Services Department.

From the documents filed in Court, the Applicant seeks judicial review on three grounds. The first ground is that the Respondent's decision to demand payment of taxes on royalties the Applicant paid to an entity known as Bata Brands is ultra vires the Respondent's powers because:

a. The Respondent has no jurisdiction under the tax laws of Kenya to demand payment of taxes on distribution royalties from the Applicant;
b. The distribution royalties are not subject to customs duty as they are not royalties related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of the sale of the goods being valued within the meaning of Rule 9(i)(c) of the Fourth Schedule to the EACCMA;
c. The Applicant is not obliged to pay customs duty on the royalties under subparagraph 1(c) to the Note on Interpretation Rule 9(i)(c) of the Fourth Schedule to the EACCMA which provides that

'payments made by the buyer, for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of sale for export to Partner state of the imported goods.'

The Applicant asserts that it pays royalties to Bata Brands, which is a percentage of the sales made, as the proprietor of all the Bata brands and not directly or indirectly to the suppliers of the products. It is the Applicant's case that Bata Brands is not directly or indirectly related to the other manufacturers of the products which the Applicant purchases and it does not pay royalties in connection with the purchase of the products from the suppliers. The Applicant exhibited a Trade Mark Licence Agreement (TLA) dated 1st January, 2006 made between it and Bata Brands S.a.r.l in support of its argument.

As concerns the commission/service charge, the Applicant asserted that the same is governed by an agreement made between itself, China Footwear Services Limited (CFS) and Bata Shoe (Singapore) Pte Ltd (BSS). It is the Applicant's case that as per the said agreement, it pays a service charge of 6% of the goods it purchases to BSS which collects the same on behalf of CFS, a procurement agent. The payment of the buying commission is made by all Bata entities to CFS, for sourcing the products from various suppliers in China on behalf of Bata affiliates. The Applicant contends that the buying commission has no relationship with the price paid or payable for the imported merchandise and is a standard charge to all Bata Brands affiliates. The Applicant avers that CFS is not a supplier of the shoes and does not hold title to the shoes throughout the transaction process. It is the Applicant's case that in demanding taxes on the buying commission the Respondent exceeded its powers since the buying commission does not fall within the provision of Paragraph 2 of the Fourth Schedule to the EACCMA which provides that **"the customs value of imported goods shall be the price actually paid or payable for the goods when sold for export.....adjusted in accordance with paragraph 9".** The Applicant further contends that for purposes of commuting the customs value, buying commissions are expressly excluded under paragraph 9(1) (a)(i) which provides that **"in determining the customs value...., there shall be added to the price actually paid or payable for the imported goods as follows (a) ... to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods........(1)........the commissions and brokerage, except buying commissions."**

The Applicant asserts that it is not obliged to pay the customs and VAT on the buying commission by virtue of the provisions of Paragraph 1 of the Note of Interpretation of Paragraph 2(1) of the Fourth Schedule to EACCMA which provides that **"the price actually paid or payable is the total payment made by the buyer to or for the benefit of the seller for the imported goods."** The Applicant avers that the buying commission is not paid to Bata Brands nor is it payable for its benefit.

The second ground upon which the Applicant seeks the orders herein is that of irrational and unreasonable exercise of power. The Applicant contends that the demand contained in the letter dated 24th November, 2010 and repeated in the letter of 11th January, 2011 is irrational as it lacks any ostensible logic or comprehensive and adequate justifications. The Applicant submits that the said demand is unreasonable in that the same is not backed by any enabling powers under the law. The Applicant assets that it was unreasonable for the Respondent to conduct the audit on the taxes payable by the Applicant in November, 2010 for the period between 1st January, 2005 and 31st December, 2009, this being more than four years after the royalties had been paid by the Applicant.

The third ground upon which the relief is sought is that of legitimate expectation. The Applicant states that it had a reasonable legitimate expectation that the Respondent would not demand further taxes from it for the period 1st January, 2005 to 31st December, 2009 as the Applicant had paid all the taxes due from it for that period. The Applicant asserts that it had a legitimate expectation that it would not be compelled to meet tax obligations which are not imposed upon it by the law. The Applicant argues that by demanding taxes on buying commission and royalties when the law does not provide for the same, the Respondent has defeated its legitimate expectation that it would not be made to bear unlawful tax obligations. It is the Applicant's case that it has been led to believe that it can continue running its business as it has done for many years without having to change the arrangements in place with its suppliers and parent company.

The Applicant's counsel cited various decisions in support of the Applicant's case. I will refer to some of those authorities in due course.

The Respondent's case is that it undertook in-depth review of the import affairs of the Applicant pursuant to sections 235 and 236 of EACCMA. Arising from the findings of the audit and pursuant to Section 135 of EACCMA, the Respondent raised a partial assessment of Kshs.90,489,947/=. According to the Respondent, the assessment was partial in the sense that the audit team had concerns on the tariff classification of some products. It was therefore agreed between the Applicant and the Respondent's officers that the products whose tariff classification was in dispute be referred to the Customs Laboratory for purposes of assisting in the determination of the proper tariff classification. The Respondent asserts that the audit was conducted in accordance with the laid down procedure and the resultant tax liability was arrived at after due regard to the provisions of EACCMA. The Respondent contends that the assessment on service charge of kshs.35,425,823 was informed by written and oral representations that the service charge was with respect to cost of logistical services incurred in the export country i.e. haulage, loading and transport costs from factory to port of export. The Respondent submits that these costs, as explained by the Applicant, are in the nature of chargeable pre-shipment expenses brought to charge in accordance with Section 122 and Paragraph 9(2) of the Fourth Schedule of EACCMA.

As for the assessment on royalties, the Respondent states that its decision was informed by its review of the Trade Mark License Agreement (TLA) granting trade mark rights under Clause 1 to the Applicant. The said Clause grants the Applicant the right to use the trademarks on goods and/or services falling within their respective class of application of registration (collectively referred to as "the products"). The Respondent contends that the assessment's legal basis is provided under Section 122 and the Fourth Schedule, Paragraph 9(1)(c). The Respondent argues that the Interpretive Notes to paragraph 9(1)(c) clarify that royalties and licence fees may include among other things payment in respect of patents, trademarks and copyrights. The Respondent's view is that the royalties are chargeable in the Applicant's circumstances.

The Respondent admits that it received a signed service agreement dated 4th January, 2010 between China Footwear Services (CFS), on the one hand and Bata Shoe Singapore (BSS) on the other hand and its review of the agreement indicates that a component of the service charge paid could indeed relate to the buying commission.

The Respondent, however, assert that payments for product development and the design and development of technologically advanced shoe production lines are properly brought to charge under the provisions of Section 122 and Paragraph 9(1)(b)(iv), Fourth Schedule of EACCMA. According to the Respondent, further research on the internet (http://www.bata.com/procurement-centre.php) indicates the establishment of Bata International Procurement Centre. This was followed by the formation of CFS which was charged with three functions namely exclusive collections, quality control and logistics. The Respondent contends that these costs pertain to exclusive design and the development of technologically advanced shoes production lines in other countries other than Kenya and they were brought to charge under the provisions of Section 122 and Paragraph 9(1)(b)(iv) of the Fourth Schedule of EACCMA. The other costs relates to development of specific products in other countries other than Kenya in satisfaction of specific Kenya customer requirements.

The Respondent avers that in view of the information in the service agreement and after its further research it invited the Applicant for further discussions on the subject with a view of establishing a mutually agreeable basis of bringing to charge service fees accruing to CFS and relating to the imported goods. The discussion was, however, never held since the Applicant gave notice of its intention to appeal to the Customs and Excise Appeals Tribunal and later obtained a court order staying enforcement of the taxes.

The Respondent asserts that the buying commission is indeed specifically excluded by the Fourth Schedule of EACCMA in the computation of customs duty but costs relating to engineering, design, development, artwork, design work and plans and sketches undertaken elsewhere other than Kenya necessary for the production of imported goods should be added back to the price actually paid or payable as per paragraph 9(1)(b)(iv), Fourth Schedule of EACCMA. The Respondent states that is the reason it invited the Applicant to determine a mutually agreeable basis, using the Applicant’s financial records, for purposes of determining service charge.

On the issue of royalties, the Respondent asserts that they are properly brought to charge under Paragraph 9(1)(c) of the Fourth Schedule since they are paid as a condition of sale. The Respondent contends that EACCMA provides for two conditions to be satisfied to establish chargeability of royalties namely the royalty payment relates to the goods being valued and the royalty is paid pursuant to a condition of sale. The Respondent submits that both these two conditions are satisfied in the case of the Applicant.

On the relationship between royalty or licence fees to the goods being valued, the Respondent asserts that a royalty may be related to the imported goods in two principal ways. Firstly, the royalty payment will be related to the imported goods if it is calculated on the basis of revenue derived from the sale of imported goods which condition is satisfied in the case of the Applicant in importation of Bata branded shoes from Bata affiliated companies. Secondly, the right for which the royalty payment is done is related to the imported goods. Thus, royalty for the right to use a particular trademark, copyright, patent, know-how, design etc. which is attached to, reflected in or inherent to the imported goods is chargeable. A royalty would be related to the imported goods if it is paid for the use of a trademark that is attached to the goods being valued. It is the Respondent’s case that all these conditions are satisfied in the case of the Applicant as per Clause 1 of the TLA.

The Respondent further submits that the Applicant sources its products from companies affiliated with Bafin (Nederland) BV, formerly Bata (BM) BV which is incorporated in Netherlands. According to the Respondent, Bafin is the ultimate company, wherein you will also find Bata Brands Ltd. A direct or indirect relationship is therefore established between the vendor of the goods (Bata affiliated suppliers) and the beneficiary of the royalty payment (Bata Brands Ltd).

As to whether the payment of the royalties by the Applicant is subject to condition of sale, the Respondent asserts that in determining whether a condition of sale exists, it is important to examine whether the seller would not sell the goods for export to the buyer without the royalty payment or in the alternative, the buyer could not buy and import the goods being valued legally and definitively, without the royalty payment. The Respondent submits that if such a situation were present, then such an obligation would constitute a condition of sale of the goods being valued. It is the Respondent’s case that the condition is similar even where the royalty is paid to a third person (related) as a result of an obligation arising out of the sale contract between the seller and the buyer. According to the

Respondent the foregoing captures the situation of the Applicant as can be seen in Clause 11 of the TLA which provides for the effect of termination.

The Respondent argues that it acted reasonably and the commencement of these proceedings is an abuse of the court process and intended to delay the collection of taxes assessed without regard to the avenue availed by Section 230 of EACCMA and Article 169(1)(d) of the Constitution.

The Respondent cited authorities in support of its arguments and I will refer to them in the course of this judgment.

In reply to the Respondent's arguments, the Applicant asserted that the service charge/buying commission related to procurement and sourcing of products done by CFS on behalf of the Applicant and no payments were made to CFS for product development and the design and development of technologically advanced shoe production lines. The Applicant therefore asserts that the buying commission it paid is not an expense within the meaning of Section 122 as read with Paragraph 9(2) of EACCMA. The Applicant further submits that the contract with CFS does not provide for service charges as it is an agency agreement and the amounts paid by the Applicant are buying commissions.

On the question of royalties, the Applicant asserted that the same were not paid as a condition of sale. According to the Applicant the royalties in respect of imported goods are payable upon resale as a percentage of the resale value. The Applicant contends that Paragraph 9(1)(c) of the Fifth Schedule to EACCMA does not apply in that:

a. The resale prices are different from the prices at which the products are imported and as such the royalties are not **"related to the goods being valued that the buyer must pay ....."** within the meaning of paragraph 9(i)(c) of the Fifth Schedule to EACCMA.
b. It would be impossible to quantify the royalties at the point of sale of the goods and as such the royalties do not fall under the provisions of paragraph 9(i)(c) of the Fifth Schedule to EACCMA.
c. The effect of the Respondent's demand on taxes payable on royalties is that all royalties would be subject to the provisions of Paragraph 9(i)(c) of the Fifth Schedule of EACCMA whereas it was clear that Parliament by this provision envisaged situations (as the case herein) where such payments may not be a condition of sale.
d. Royalties paid for the right to use a brand is not subject to customs duty.

The Applicant reiterated that no tax is payable on account of royalties and buying commissions as claimed by the Respondent.

After considering the pleadings and the submissions made herein, I find that there are preliminary issues that I need to deal with before proceeding to the substantive issues.

In its submissions dated 9th November, 2011 and filed in Court on the same date, the Respondent submits that its position is that the Applicant did not properly account for taxes especially the one relating to intellectual property rights to wit trademarks and patents for which royalties were payable. The Respondent argues that the Applicant wants to admit 10% of these to be chargeable and 90% not to be chargeable. It is the Respondent's case that in the absence of documentary evidence of the 10% apportionment of royalties as to trademarks then the demand made is justified. The reasoning of the Respondent is that 100% of royalties paid have bearing on the value of finished imported products being a trademark especially when the Respondent excluded revenue of royalties of goods imported but not consumed in Kenya and raw materials without trademarks. It is the Respondent's submission that the remedies of certiorari and prohibition are not available to the Applicant since it refused to produce documents to enable the Respondent to verify the Applicant's allegations as concerns the payment of royalties. The Respondent also submitted that the Applicant is guilty of material non-disclosures and should not benefit from judicial review remedies.

The Applicant responded to the Respondent's submissions through further submissions dated 28th November, 2011. The Applicant asserts that the Respondent did not pinpoint the disclosures the Applicant did not make in its application. On the Respondent's argument that the Applicant wants duty to be charged on 10% of the royalties only, the Applicant argues that this is an issue that has been introduced through submissions and the Court should disregard it. The Applicant cited the decision of the Court of Appeal in **REPUBLIC v COMMUNICATIONS COMMISSION OF KENYA [2001] 1 EA 199** where the Court observed:

"It is clear to us, as it was clear to the Learned Judge, that in his written submissions, Dr. Kiplagat paid very little attention to the grounds upon which he was asking the superior court to strike out the Applicant's notice of motion. We have already set out the prayers made in the chamber summons and the grounds upon which those prayers were sought. There was no allegation, either in the prayers, or in the grounds that the notice of motion was not properly before the court. Such an assertion had been outlined in the "Grounds of Opposition" filed in answer to the notice of motion but Githinji, J was not dealing with the grounds of opposition. Those grounds could only be dealt with if the chamber summons to strike out had not been filed. Having asked the Judge to strike out the motion under a specified rule and on specific grounds, it was not open to the Respondent to abandon those grounds and concentrate on other issues not specified in the application to strike out."

I have gone through the pleadings and the annexures to the affidavits and I do not see any reference to the Applicant having accepted to pay duty on 10% of the royalties paid to Bata Brands. This is an issue that is being raised by the Respondent through submissions and the Applicant could not respond to the same by availing any documents it may have had. This submission is therefore disregarded.

The Respondent also claimed that the Applicant is guilty of material non-disclosures. However, as the Applicant correctly pointed out, the Respondent did not identify the alleged material non-disclosures. This particular argument by the Respondent also fails.

The Applicant submitted that the Respondent acted unreasonably by conducting an audit in respect of years for which it had paid taxes. The Respondent replied that the tax audit was conducted in accordance with sections 235 and 236 of EACCMA. Section 235 of EACCMA provides that:

"235. (1) The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods –

(a) to produce all books, records and documents relating in any way to the goods; and

(b) to answer any question in relation to the goods; and

(c) to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transshipment of the goods, as the proper officer may deem fit.

(2) Where any owner fails to comply with any requirement made by the proper officer

under this section, the proper officer may refuse entry or delivery, or prevent delivery, or exportation or transfer, upon the deposit of such sum, pending the production of the books and documents, as the proper officer may deem fit; and any deposit made shall be forfeited and paid into the Customs revenue if the documents are not produced within three months, or such further time as the proper officer may permit from the date of the deposit.

(3) Where any requirement made by the proper officer under this section relates to goods which have already been delivered, exported, or transferred and the owner fails to comply with the requirement, the proper officer may refuse to allow the owner to take delivery, export or transfer any other goods.

(4) The proper officer may retain any document produced by any owner under the provisions of this section but such owner shall be entitled to copy of the document certified copy shall be entitled to a copy of the document certified under the hand of the responsible officer; and the certified copy shall be admissible in evidence in all courts and shall have equal validity with the original.

(5) A person who fails to comply with any requirement made under this section commits an offence."

Section 236 of EACCMA provides that:

"236. The Commissioner shall have the powers to –

(a) verify the accuracy of the entry of goods or documents through examination of books, records computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the good;

(b) question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;

(c) inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and

(d) examine the goods where possible for the goods to be produced."

The two sections clearly gave the Respondent power to conduct audit of the Applicant's tax affairs for the previous five years from the date of the audit. The Applicant has not placed any evidence before this Court to support its assertion that the Respondent exercised those powers unreasonably. The law allows the Respondent to conduct post clearance audit. The Applicant has not demonstrated that the said authority was abused by the Respondent. The Applicant's claim that the audit on its tax affairs was unreasonable therefore fails.

The main questions to be answered in this judgment are:

a. Whether the Respondent was correct in charging duty on the royalties paid to Bata Brands by the Applicant; and
b. Whether the service charge paid to BSS for onward transmission to CFS was a buying commission.

Paragraph 2(1) of the Fourth Schedule of EACCMA provides for the determination of the customs value of imported goods as follows:

"2. (1) The customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State adjusted in accordance with the provisions of Paragraph 9….."

Paragraph 9 of the same Schedule then goes ahead to provide for how the customs value of goods is to be adjusted in certain circumstances and states that:

"9. (1) In determining the customs value under the provisions of Paragraph 2, there shall be added to the price actually paid or payable for the imported goods as follows:

a. **to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:**
    i. **the commissions and brokerage, except buying commissions;**
    ii. **…….**
    iii. **…….**
b. **the value, apportioned as appropriate, of the goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable as follows:**
    i. **……..**
    ii. **……..**
    iii. **……..**
    iv. **engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Partner State and necessary for the production of the imported goods;**
c. **royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;**

2. **……………."**

The above provisions are the ones which the Applicant claims were misinterpreted by the Respondent. The provisions will be considered in due course.

Before proceeding further, I must state that there is an element of these proceedings which gives me some discomfort. Whereas, I have no doubt in my mind that judicial review is available to any person in situations where a public body has acted *ultra vires*, unreasonably or in breach of the rules of natural justice, I also know that it is important for an applicant to exhaust the alternative remedies before resorting to judicial review. It is sometimes said that judicial review is a remedy of last resort.

In **REG v I.R.C. EX-PARTE PRESTON (H.L.(E)) [1985] 846** Lord Scarman emphasized that although the taxman is not immune from the process of judicial review, a taxpayer who wishes to challenge the decision of the taxman must do so within certain established principles. This is what he said:

"The second proposition relates to the grounds upon which a taxpayer may seek judicial review of a decision taken by the Inland Revenue Commissioners. The commissioners have their statutory powers and duties, the exercise of which can be challenged by the process of judicial

review only if certain principles of general application are met. The taxpayer must show either a failure to discharge their statutory duty to him or that they have abused their powers or acted outside them..... My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that courts will allow the collateral process of judicial review to be used to attack an appealable decision......"

The Applicant herein was aware of its right of appeal, against the decision of the Respondent, to the Customs & Excise Appeals Tribunal as provided by Section 230 of EACCMA and Section 127 B(4) of the Customs and Excise Act, Cap 472. Indeed the Applicant had clearly indicated by its letter of 10th February, 2011 that it intended to appeal to the Tribunal. It is only after the Applicant was informed that it needed to deposit the assessed taxes as per Section 127 F of the Customs & Excise Act that it opted to commence these proceedings. In fact the Applicant alludes to this when Mark Romeril avers in Paragraph 27 of his affidavit that the demand for the assessed tax before an appeal can be filed with the Customs and Excise Appeals Tribunal is a fetter on the Applicant's right under Article 48 of the Constitution which guarantees unimpeded access to justice.

I do not wish to delve into the issue of the Applicant's constitutional right to access justice since no sufficient material has been placed before the Court to enable me to determine the constitutionality of the statutory provision in question. It is noted that what the Respondent did was to simply point out to the Applicant the legal requirement for depositing the assessed tax before an appeal can be filed.

Was the Applicant therefore right in bypassing the Tribunal" It must be remembered that the Tribunal has expertise in tax matters and it should be given room to discharge its mandate. However, the fact that there is an alternative remedy cannot of itself prevent an applicant from seeking judicial review remedies. Where the Court finds that judicial review orders are appropriate, it will grant them. In my view, where a matter falls into the province of judicial review, a party is entitled to approach the Court notwithstanding the availability of an alternative remedy. In the case before me, the Applicant contends that the Respondent assessed taxes yet the law did not provide for such taxes. In short, the Applicant is contending that the Respondent acted *ultra vires* the tax laws. I find that this is a matter for judicial review and I will proceed to consider the application on merit.

This brings me to the role and interpretation of tax laws. Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman. The taxman on the other hand is entitled to collect up to the last coin that is due from a taxpayer. In the Malaysian case of **COLGATE PALMOLIVE MARKETING SDN BHD v KETUA PENGARAH KASTAM CASE NO. R2–25-259–2008 (Malaysia, Unreported)** Mohd Zawani Salleh, J quoted with approval the decision of Gopal Sri Ram, JCA (as he then was) in **PALM OIL RESEARCH AND DEVELOPMENT BOARD MALAYSIA & ANOTHER v PREMIUM VEGETABLE OILS SDN BHD [2004] 2 CLJ 265** in which he stated the principles governing the interpretation of taxing statutes as follows:

"The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in Mangin v Inland Revenue Commissioner [1971] AC 739:

First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner, J said in his (albeit dissenting) judgment in Marx v Inland Revenue Commissioners [1970] NZLR

182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.

Secondly, '.....one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' (Per Rowlatt, J in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64 at 71 approved by Viscount Simons LC in Canadian Eagle Oil Co. Ltd v Regeim [1945] 2 All ER 499, [1946] AC 119

Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid in its construction.

................Hence, the governing principle is this. When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein."

In interpreting the tax laws, the plain language of Parliament should be adhered to lest the goods and services which Parliament did not want to tax are taxed as a consequence of the taxman's misinterpretation of the laws. In order to achieve this purpose, tax statutes must be strictly interpreted.

The first issue to be considered is whether the royalties paid to Bata Brands by the Applicant should be added to the price paid for the imported goods so as to form the transaction value for custom purposes. The Applicant's case is that it pays royalty fees to Bata Brands being a percentage of the sales made. The sales made by the Applicant relate to its locally manufactured shoes and imports from Bata related suppliers and third party suppliers. The royalty payments are made in accordance with Clause 1 of the TLA for use of the Bata trademark. The Applicant argues that the royalty fee is not made as a condition of sale of the imported goods. The Applicant pays royalties to Bata Brands, which is the proprietor of all Bata trademarks. It does not pay the royalty fee directly or indirectly to the suppliers of the imported goods and it cannot be said that it makes the royalty payments in connection to the products purchased from suppliers. The Applicant submits that Bata Brands has no direct or indirect relationship with the factories which manufacture the products it purchases. The Applicant asserts that the royalty is therefore not made as a condition of sale.

On its part, the Respondent submits that the EACCMA is clear on the subject of chargeability of royalties and provides for two fundamental conditions that must be satisfied namely:

i. The royalty payment relate to the goods being valued.
ii. The royalty is paid pursuant to a condition of sale.

The Respondent contends that these two conditions are met in the case of the Applicant. The Respondent's case is that the royalty fee paid to Bata Brands by the Applicant relates to the goods being valued in two principal ways. Firstly, the royalty fee is calculated on the revenue derived from the sale of imported goods. The Respondent submits that the Applicant imports Bata branded shoes from Bata affiliated companies. Secondly, the right for which the royalty payment is made is related to the imported goods. Thus royalty for the right to use a particular trademark, copyright, patent, know-how and design which is attached to, reflected in or inherent to the imported goods is chargeable. The Respondent contends that Clause 1 of the TLA between the Applicant and Bata Brands meets this condition. The Respondent asserts that the payment of the royalty fee to Bata Brands is a condition of sale as can be seen in Clause 11 of the TLA which provides for the termination of the agreement.

The Respondent referred this Court to the decision of D Musinga, J (as he then was) in **REPUBLIC v KENYA REVENUE AUTHORITY EX-PARTE BEIRSDORF EAST AFRICA LTD, NAIROBI HIGH COURT MISC. APPLICATION NO. 413 OF 2009.** In that case, the applicant was a subsidiary of Beirsdorf AG a company incorporated in Germany. Beirsdorf AG is a producer of various consumer products. Some of the products are manufactured by its subsidiary companies in other countries. Biersdorf AG has registered trademarks and patents for the products it manufactures. The applicant was licensed to manufacture in Kenya and distribute Biersdorf AG's products in East Africa and other countries within the Preferential Trade Area.

The applicant had entered manufacturing and distribution agreements with Biersdorf AG under which the applicant was to pay Biersdorf AG manufacturing and distribution royalties for manufacturing and distributing its patented products. The manufacturing royalty was paid as a percentage of the cost of the locally manufactured products. The distribution royalties were paid based on a percentage of value of goods sold whether the goods are manufactured in Kenya or imported from affiliated companies. The distribution royalties were paid upon the sale of the products.

In October, 2008 the respondent conducted a post clearance audit and upon conclusion of the exercise it demanded payment of tax amounting to Kshs.66,230,577/= based on, *inter alia*, the adjusted price of products after considering the value of the manufacturing and distribution royalties paid by the applicant. The applicant was aggrieved by the said decision and moved to Court to challenge the assessment on the ground that the royalties paid to Biersdorf AG should not be added to the customs value of the imported products since the royalties were not being paid as a condition of sale. The Learned Judge dismissed the application and concluded that:

"In my view therefore, payment of royalties by the applicant to Biersdorf is a condition of sale of their imported patented goods. I agree with the respondent that if royalties were not a condition of sale anyone would be at liberty to import, manufacture or even distribute Biersdorf's products without permission of the patent holder. That would be an unacceptable trade practice. The relevant law must be interpreted in a manner that makes economic sense. The only instance in which payments made by a buyer for the right to distribute or resale imported goods may not be added to the price actually paid or payable for purposes of determining custom value is where the payments (including royalties) are not a condition of sale."

Mr. Ontweka for the Respondent strongly urged this Court to adopt the decision in the **Biersdorf** case.

Mr. Kiragu Kimani for the Applicant, however, urged this Court to be persuaded by decisions of courts in Commonwealth countries. For the record, I note that Mr. Kiragu Kimani represented the applicant in the **Biersdorf** case. He has urged this Court to follow the decision of the Canadian Supreme Court in **CANADA (DEPUTY MINISTER OF NATIONAL REVENUE) v MATTEL CANADA INC. [2001] 2 SCR.** In that case the Court was called upon to interpret a section of Canadian law which is similar to Paragraph 2 (1) as read with Paragraph 9(1)(c) of the Fourth Schedule of EACCMA. The Court after interpreting the said provision concluded that:

"In summary Section 48(5) (a)(v) requires that royalties and licence fees be paid "as a condition

of the sale of the goods for export to Canada." The words incorporate traditional concepts found in sale of goods legislation and the common law of contract. Unless the vendor is entitled to refuse to sell the goods to the purchaser or repudiate the contract of sale where the purchaser fails to pay royalties or licence fees, s. 48 (5) (a)(iv) is inapplicable. The royalties that Mattel Canada paid to Licensor X are not royalties within the meaning of Section 48 (5) (a)(iv) of the Customs Act."

D. Musinga, J (as he then was) gave his reasons for departing from the decision in the **Mattel** case as follows:

"In the context of the facts in that case, I would agree with the decision of the Federal Court of Appeal (sic). However, the facts in the present case are somewhat different. There is no intermediary between the applicant and Biersdorf. The applicant manufactures and/or distributes Biersdorf's patented goods under a manufacturing and licensing/distribution agreement and as a condition for so doing, the applicant is obliged to pay to Biersdorf manufacturing and distributing royalties. If the applicant were to refuse to pay such royalties it would not be able to manufacture and/or distribute Biersdorf's patented goods."

Counsel for the Applicant also referred me to the decision in the case of **NIKE SALES MALAYSIA V JABABATAN KASTAM AND 2 OTHERS, CASE NO. R (3)(1) – 25-03-2004 (Malayisa, Unreported).** Interpreting a similar provision, the Court observed that:

"In my view, it is necessary to consider the economic reality as well as the legal relationship underlying the business transaction flow on the facts of this case. On the facts of this case, all the relevant parties do not form one integrated economic unit. The manufacturers and suppliers are third parties, unrelated to Nike International, Nike USA or Nike Malaysia. There is also the intermediation of Nishho as buying agent and trade financing agent. While it is true that royalty will be payable by Nike Malaysia to Nike International when the goods are sold and based on net invoiced sales revenues (in accordance with the Intellectual Property Licence and Exclusive Distribution Agreement between Nike Malaysia and Nike International), it is not a condition to be fulfilled for the purpose of the sale of the goods by the manufacturers/suppliers to Nike Malaysia. Indeed, the intellectual property and licensing agreement itself makes it clear that non-payment of royalty shall not prevent or impede the sale.

The question was posed by counsel for the respondents, in the course of submission, that Nike Malaysia must be taken to purchase the tangible with the intangible, for without the intangible (meaning the trademark and other proprietary rights) the goods do not have value. To obtain the tangible, royalty has to be paid. Therefore, royalty has to be regarded as a condition of sale and accepted as an adjustment item for the purposes of calculating the customs value. With due respect, if this argument is accepted, the words "royalties .....in respect of the goods that the buyer must pay, directly or indirectly, as a condition of the sale of the goods for export to Malaysia" will be rendered devoid of any meaning, since it will be regarded as a condition of sale in all cases, whereas the regulation envisages situations where such payment might not be a condition of sale."

In the case of **COMMISSIONER FOR THE SOUTH AFRICA REVENUE SERVICE V DELTA MOTOR CORPORATION (PROPRIETY) LIMITED, CASE NUMBER 279 OF 2001 (Supreme Court of South Africa, unreported)** the question arose as to whether a charge for engineering, styling and tooling (EST) included in the purchase price paid to Adam Opel Aktiengesellschaft, Germany for purchase of vehicle parts (CKD – completely knocked down kits) constituted royalties or licence fees within the meaning of

Section 67 (1)(c) of the South African Customs and Excise Act 91 of 1964 which provides that:

"royalties and licences fees in respect of imported goods, including payments for patents, trademarks and copyright and for the right to distribute or resell the goods, due by the buyer, directly or indirectly, as a condition of sale of the goods for export to the Republic, to the extent that such royalties and fees are not included in the price actually paid or payable....."

The Court held:

"For paragraph (c) of Section 67 (1) to render a royalty or licence fee dutiable all the constituent elements of the paragraph must be present. Absent any one, the provision is inapplicable. ....

In the present matter the sale of kits to the respondents is regulated by the supply agreement. Nothing in that agreement makes the charges now in dispute payable as a condition of sale. The engineering and styling charges constitute the royalty payable, not in terms of the supply agreement but the A and D agreement. As for the tooling charges (assuming they amount to royalties or licence fees) they, too, are not payable pursuant to anything contained in the supply agreement. The EST charges are consequently not payable 'as a condition of sale.' On the contrary, in so far as the supply agreement does apply to these charges it makes them payable even if no kits are sold (so long, of course, as assembled vehicles are sold)."

I have my reservations about the decision of the South African Court in the **Delta Motor Corporation** case. Can a product be complete without the aesthetics that goes with it" Is engineering, styling and tooling not part of a product"

There is, however, no unanimity in the Commonwealth countries as to whether royalties should be added to the price actually paid or payable for customs valuation purposes. New Zealand has taken the economic sense approach in interpreting the meaning of "condition of sale". In the case of the **CHIEF EXECUTIVE OF THE NEW ZEALAND CUSTOMS SERVICE v NIKE NEW ZEALAND LIMITED, Civil Application Number 124 of 2002 (New Zealand, unreported)** the Court of Appeal of New Zealand interpreted a provision similar to the one found in EACCMA. The Court considered the decision of the Canadian Supreme Court in the **MATTEL** case and stated that:

"[66] In its judgment in the Mattel case, subsequently reversed by the Supreme Court, the Canadian Federal Court of Appeal was of the opinion that the payment of royalties was a condition of the sale of goods for export first if it appeared as such in the contract of sale between the vendor and the importer and second, "if either the licensor because it owns or controls the vendor, or the vendor when it holds the trademarks rights or copyrights, can prevent the importation of the goods by the purchaser or seriously compromise the ability of the purchaser to buy the goods for export in cases where he has failed to pay the royalties." The Court pointed out that the wording of para (iv) does not refer to a "condition of the contract for sale" and therefore, it was, in the opinion of the Federal Court, not a requirement that the payment of royalties be expressly stipulated in the sale contract. The word "condition" was not considered to have been used in the Act as a term of art carrying the meaning generally ascribed to it in the law of sales. Rather, the word was used in its ordinary and common sense way to mean that the payment of royalties had to be made as a pre-requisite or requirement for the export of the goods: para [26].

[67] That view was not accepted by the Supreme Court, as we have seen, but, with respect, we find it convincing. It seems to us that for a royalty to come within para (iv) there must be a

combination of two features. First, the royalty must be payable to the manufacturer or to another person as a consequence of the export of the goods to New Zealand and secondly, the party to whom the royalty is payable must have a control of the situation going beyond the ordinary rights of a licensor of intellectual property and giving it the ability to determine whether the export to New Zealand can or cannot occur. An ordinary licensor, unrelated to the licensee, may be able to take steps to prevent further importations if royalties are not paid in respect of a particular importation of licensed product, but it has no control over an importation prior to any default. In contrast, where royalties are payable to a licensor which is a member of the same corporate group as the licensee and particularly where buying is in practice conducted through another member of the corporate group the situation is throughout under the parent company's control exercisable on behalf of the licensor."

All the cited decisions seem to agree that whether the payment of royalty or licensing fees is to be added to the price payable or actually paid will depend on the relationship between the licensee and the licensor and third parties. There is disagreement as to whether the word "condition of sale" should be construed in the legal sense or in the ordinary sense.

An overview of the TLA entered on 1st January, 2006 between Bata Brands s.a.r.l. as the licensor and Bata Shoe Company (Kenya) Ltd as the licensee reveals that the agreement allowed the Applicant to use the 'BATA' trademark for all its business activities in Kenya (known as the Territory). For this, the Applicant would pay 2% of the total annual sales **"after all withholding and other taxes, levies or dues of all kinds imposed by any authority in the Territory ....."**

In clause 10 of the agreement the conditions for early termination of the agreement are enumerated. One of them is nonpayment of royalty. As per clause 11 the effect of termination would mean that the Applicant would cease trading in products with the trademark 'BATA'.

A perusal of this particular agreement therefore shows that Bata Brands does not sell any products to the Applicant. The Applicant is simply getting rights to use the licensor's trademarks in Kenya.

The other agreement is the service agreement between CFS (referred to as Party A in the agreement) and BSS (referred to as Party B in the agreement). The purpose of the agreement is captured in clause 2 as follows:

"Party A shall provide following services to Party B: product development, price negotiation, orders follow-up, assistance to visitors from party B to Party A in applying visa and arrangements of interpreters, accommodation, transportation and catering for the visitors. Party B shall deliver advance written notice to Party A within a reasonable period of time if Party B requires aforementioned services from Party A."

The Applicant stated that it normally imports its products from manufacturers in China and it pays a buying commission/service charge to BSS onward transmission to CFS.

The question would then be whether the royalty fee paid to Bata Brands is a condition of sale. In my view, it is not. The TLA between the Applicant and Bata Brands has no nexus between the purchases the Applicant makes from China through BSS. Bata Brands cannot stop the Applicant from purchasing Bata products from third parties. If the Applicant fails to pay the royalty fee the only thing Bata Brands can do is to pursue the options found in the TLA. Of course, the Applicant cannot legally use the Bata trademarks if the TLA is terminated but this does not stop it from purchasing Bata products for whatever fanciful reason it may have. There is no evidence the Bata brands has any control over BSS or CFS. I am therefore persuaded by the decisions in the **Mattel** and **Nike Sales Malaysia** cases. I am of the humble opinion that the facts in the **Biersdorf** case are different from the facts of this case and the decision of the Court in the **Biersdorf** case is therefore not applicable in this case. Where the nexus between the sale and the royalty payment is remote, it cannot be said that the royalty payment is made as a condition of sale. As to whether the term "condition of sale" should be given a legal construction or an ordinary common sense meaning, I would say that the EACCMA is an Act of Parliament and the words found therein can either take a legal connotation or the ordinary meanings ascribed to them. In my view, the words should be given the meaning attributed to them in contracts relating to sale of goods. If the lawmaker had intended otherwise, nothing would have been easier than to state that royalties and licence fees should be added to the value of the goods for customs purposes.

It is also observed that the royalty fees paid to Bata Brands by the Applicant are payable in respect of imported goods as well as goods manufactured locally. The royalty fees, in my view, are paid for the use of the trademarks in Kenya and they have nothing to do with the prices of imported products. It would be a herculean exercise to try and separate royalties for locally manufactured goods and imported goods so as to find out what the price payable for the imported goods is. I therefore agree with the Applicant that the Respondent is asking it to pay taxes which it is not obligated by the law to pay. As per the TLA, the royalty payments are made on the sales proceeds after tax. The royalties paid are therefore too remote from the value of the imported goods. The Respondent has therefore stepped out of its boundaries and the remedies of judicial review are available to the Applicant.

The second substantive issue is whether the money paid to BSS are commissions and brokerages. It is agreed by the parties that buying commissions are not added to the transaction value for purposes of custom valuation. In the Interpretative Notes found in Part II of EACCMA, the Note to Paragraph 9 Subparagraph (1)(a)(i) states that:

"The term "buying commissions" means fees paid by the importer to the importer's agent for the service of representing the importer abroad in the purchase of the goods being valued."

The Respondent in its letter dated 11th January, 2011 appears to concede that whatever was paid by the Applicant in respect of the Service Agreement could have been in the nature of buying commissions. This admission is also found in the Respondent's replying affidavit, specifically Paragraph 15. On the issue of the service charge, the Respondent in its letter dated 11th January, 2011 communicated to the Applicant as follows:-

"2. Service Charge-Kshs.35,425,823.00

We have reviewed your grounds objecting to our assessment on this subject and wish to state as follows in response thereto.

You premise your objection really on one ground that the service charge referred to in the Service Agreement is exclusively in the nature of a buying commission. While we agree that part of the service charge could represent a buying commission due to a clear procurement function availed by Chinese Footwear Services (CFS) this is not a absolute for the following reasons:

Bata organization has established the Bata International Procurement Centre. Consequently, a company CFS was constituted. This company is charged with three broad functions:-

1. **Exclusive collections**
2. **Quality control**

3. **Logistics**

Specifically, CFS is in charge of among others exclusive design and the development of technologically advanced shoe production lines. Clearly, costs associated with the design of production lines undertaken in another country other than in a partner state are properly brought to charge under the provisions of paragraph 9(1)(b)(iv), fourth schedule to the East African Community Customs Management Act (EACCMA), 2004.

Paragraph 9(1)(iv): "Engineering, design engineering, development, artwork , design work, and plans and sketches undertaken elsewhere than in the Partner State and necessary for the production of the imported goods" should be added back to the price actually paid or payable.

In summary, such other costs like costs of developing specific products in satisfaction of specific customer requirements undertaken elsewhere other than in a partner state are integral to the product being valued and should be brought to charge accordingly.

Other costs may be brought to charge under the provisions of paragraph 9(1)(d)

We shall be inviting you in due course for a further discussion to establish a mutually agreeable basis of bringing to charge service fees accruing to CFS and relating to the imported goods."

The Applicant's response to the Respondent's statement is found in paragraphs 4 and 5 of the Further Affidavit of Mark Romeril as follows:

"4. It is not disputed that CFS provides other Services in addition to procurement of goods as set out at paragraph 16 of the Replying Affidavit.

5. The Applicant however only engaged CFS with respect to the procurement of goods and no other services. There were no payments made by the Applicant for product development and the design and development of technologically advanced shoe production lines."

Looking at the Respondent's replying affidavit and its letter dated 11th January, 2011, it is apparent that the Respondent was retracting its claim of Kshs.35,425,823.00 in relation to service charges. The Applicant on the other hand is insisting that what it paid to CFS were buying commissions. This particular issue has not been brought to conclusion either way. The Applicant appears to be urging this Court to determine that the payments made to CFS were buying commissions. That is not the role of a judicial review court. What the Applicant is asking this Court to do may be done by an appellate Court. Acting as urged by the Applicant would be a usurpation of the Respondent's powers. The Respondent is mandated by the law to assess taxes and it should be allowed to do its work. Even if this Court decides to be the taxman, it does not have in its possession the documents presented to the Respondent by the Applicant in support of its claim that whatever it paid CFS were buying commissions. I therefore reject the Applicant's application in relation to the service charges/buying commissions.

In conclusion, I find that the Respondent exceeded its powers in finding that the royalties paid to Bata Brands by the Applicant ought to be added to the transaction value for purposes of customs valuation. The Applicant's application therefore partially succeeds and an order of certiorari is issued to remove to this Court the portion of the Respondent's letter dated 24th November, 2010 in respect of royalties and specifically claiming payment, from the Applicant, of extra taxes amounting to Kshs.53,192,381.00 payable as:

ID F	Kshs. 3,063,436.00
Import Duty	Kshs. 27,849,444.00
Value Added Tax	Kshs. 22,279,531.00.

An order of prohibition will also issue prohibiting the Respondent and its officers or agents from commencing or instituting any enforcement actions against the Applicant in relation to the said sum of Kshs.53,192,381.00.

As for the sum of Kshs.35,425,823.00 arising from service charges, I find the Applicant's application unmerited. In respect of this particular item the Applicant should submit itself to the Respondent and if dissatisfied it can exploit the appellate mechanism provided by the tax laws. I therefore dismiss the Applicant's prayers in respect of this particular amount.

Owing to the partial success by the Applicant in this matter, I order each party to meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 21st of day February, 2014

W. K. KORIR,

JUDGE OF THE HIGH COURT