

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**TAX APPEAL NO. 21 OF 2021**

**AUTO INDUSTRIES LIMITED ..... APPELLANT**

**-VERSUS-**

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

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**JUDGMENT**

**BACKGROUND**

1. The Appellant is a private limited company incorporated in Kenya under the Companies Act 2015 and is a registered taxpayer. Its principal activity is the assembly of and distribution of two (2) wheelers and three (3) wheelers imported Semi Knocked Down (SKD) form.
2. The Respondent is a principal officer of the Kenya Revenue Authority (“KRA”), a public body duly established under the Kenya Revenue Authority Act, CAP 469 of the Laws of Kenya, whose primary mandate is the assessment and collection of revenue on behalf of the Government of Kenya.
3. The Respondent conducted a Post Clearance Audit on the Appellant’s products for the period February 2015 to January 2020 pursuant to the provisions of Section 235 and 236 of the East African Community Customs Management Act, 2004 (EACCMA).

4. The Respondent's audit covered various issues including Customs Valuation, imports under Duty Remission and Tariff Classification, and resulted in a demand notice of Kshs. 1,092,089,174.00 made on 15<sup>th</sup> July 2020 and a subsequent reviewed demand notice of Kshs.512,815,342.00 issued on 10<sup>th</sup> December 2020.
5. In its final demand notice dated 10<sup>th</sup> December 2020, the Respondent demanded taxes amounting to Kshs.333,183,052.00 in relation to Tariff Classification based on the alleged tariff misdeclaration of the Appellant's product- Three-wheeled Motorcycle Kits on Semi Knocked Down (SKD) form. The Respondent's tariff classification demand was mainly on Excise Duty on the three-wheelers and the resultant VAT on the same.
6. The Respondent in its demand notice submitted that the proper classification for the Appellant's three wheeled vehicles is under Heading 8703 and 8704, and more specifically in subheading 8703.21.90-petrol and 8703.31.90-diesel and not Heading 87.11. The proposed tariff codes attract rate of 25%, Excise Duty rate of 20% and a VAT rate of 16%
7. The Appellant objected through its tax advisors, AAM Resources Management Consultants on 25<sup>th</sup> November 2020 stating grounds of objection. In its letter dated 10<sup>th</sup> December 2020 the Respondent proceeded to confirm the assessments.
8. The Appellant being dissatisfied with the Respondent's decision to confirming the tax assessment filed a Notice of Intention to Appeal on 6<sup>th</sup> January 2021, through its consultants, Westminster Consulting Limited. The Appeal was filed on 20<sup>th</sup> January 2021

## THE APPEAL

9. Based on the Memorandum of Appeal dated 20<sup>th</sup> January 2021 and filed on the same date, the Appeal is premised on the following grounds:

(i) That the Appellant imports Three-Wheeler Motorcycle kits in Semi Knocked Down (SKD) form under tariff code 87.11 of the East African Community Common External Tariff (EAC/CET) as they do not possess the conventional characteristics of a motor vehicle stipulated under tariff code 87.03.

a) Heading 87.11 caters for, *Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without sidecars, sidecars.* Additionally, the third Paragraph to the chapter Explanatory notes specifies that “*three-wheeled vehicles (e.g., the “delivery tricycle” type) are also classified here provided they do not have the character of motor vehicles of Heading 87.03.*”

(ii) That Legal Notice 112 of 2020 defines the word “**motorcycle**” as “*a vehicle having a seat or a saddle for the use of the rider and designed to travel on two wheels or three wheels in contact with the ground that is powered by a motor.*” This definition thereby takes into account the Three-Wheeler Motorcycle kits imported by the Appellant.

(iii) That the Three-Wheeler Motorcycle kits that are imported by the Appellant do not meet the threshold envisaged by tariff code 87.03 of the EAC/CET.

(1) Heading 87.03 caters for, *Motor cars and other motor vehicles principally designed for the transport of persons (other than those of Heading 87.02), including station wagons and racing cars.* Additionally, the Explanatory Note to Heading 87.03 states that “...*the Heading also covers light weight three wheeled vehicles of simpler construction. Such as: those fitted with motorcycle engines and wheels etc. which, by virtue of their mechanical structure, possess the characteristics of conventional motor cars, that is motor car steering system or both reverse gear and differential;*”.

(iv) That the Three-Wheeler Motorcycle kits are locally assembled by the Appellant as they are imported in Semi Knocked Down (SKD) form.

(v) That the Respondent erred in fact and law by classifying the Three-Wheeler Motorcycle kits imported by the Appellant as Fully Built Units (FBUs) which are provided for under tariff code 8703.21.90 of the EAC/CET, which attracts an import duty rate of 25%, Excise Duty rate of 20% and a VAT rate of 16%.

(vi) That if the Three-Wheeler Motorcycle kits are to be classified under Heading 87.03 of the EAC/CET, they should be classifiable under tariff code 8703.21.10 which caters for **unassembled** units and attracts **0% import duty**.

(vii) That since the Three-Wheeler Motorcycle kits are imported in **unassembled** SKD form and ultimately locally assembled by the Appellant, they further qualify for exemption from Excise Duty under the First Schedule of the Excise Duty Act of 2015.

(viii) That the First Schedule of the Excise Duty Act 2015 which provides for rates of Excise Duty stipulated that “*Motorcycles of tariff 87.11 other than motorcycle ambulances and locally assembled motorcycles shall be at the rate of Kshs. 10,000.00 per unit.*” It is clear from this provision that the Three-Wheeler kits imported and locally assembled by the Appellant were envisaged under this definition thereby exempting them from the payment of Excise Duty.

(ix) That, furthermore, the Appellants are **approved assemblers of Completely Knocked Down kits** for motorcycles to be imported at the rate of 10% in twelve months in accordance with the East African Community Gazette published on 19<sup>th</sup> March 2013 and therefore qualify for the exemption of Excise Duty under the aforementioned provision on “*Motorcycles of tariff 87.11 other than motorcycle ambulances and locally assembled motorcycles,*” under the First Schedule of the Excise Duty 2015.

(x) That the Respondent’s intention to move the Three-Wheeler Motorcycle kits to Heading 87.03 would result in the items being classified under Tariff Code 8703.21.10 which caters for unassembled items under the said Heading. The effect would then be the items

would be exempt from Excise Duty and attract 0% import duty. It is therefore not clear what the Respondent's intention are in moving the items to a tariff code under which it will not collect any revenue in the form of taxes.

(xi) That the Respondent conducted an audit on the Appellant's business operations for the period December 2012 to February 2014 in accordance with the Customs Procedures and Laws. Following the said audit, the Respondent in its findings (signed by the Respondent's officer Mrs. Rosemary Mureithi) confirmed that it did not come across any misclassified items as per the Harmonized System of classification and thus no taxes were due in relation to classification.

(xii) That the Respondent created a legitimate expectation when the Respondent's customs officers at the point of clearance verified the containers, examined the imports, sighted the Three-Wheeler Motorcycle kits imported by the Appellant and established that the declared tariff classification by the Appellant under tariff code 87.11 was correct, and at no point in time did the officers raise concerns on the classification. As a result, the Appellant relied on this legitimate expectation. The Respondent can avail all the online Inspection and Verification Reports in relation to the Appellant's consignment at the time to verify the same.

(xiii) That according to the classification advice given by the East African Community Secretariat on 6<sup>th</sup> September 2006, the Secretariat was of

the view that, *“the Explanatory notes to Heading 87.11. motorcycles, mopeds, motorized cycles, etc. of Heading 87.11 are essentially construed for carrying persons. Three wheeled versions of those vehicles, including the “delivery tricycle” types, are classified in this Heading, if they do not possess the character of motor cars falling in Heading 87.03.”*

(xiv) That other agencies such as Kenya Bureau of Standards (KEBS) concerned with standards and in accordance with the Standard Act Cap 496 Laws of Kenya, have classified the Three-Wheeler Motorcycle kits under tariff code 87.11.

(xv) That the tax demand is unlawful and is based on questionable facts rather the facts of the law and should therefore be annulled.

## **THE APPELLANT’S CASE**

10. The Appellant relied on its Statement of Facts dated 20<sup>th</sup> January 2020 and filed on the same date and its written submissions dated and filed on 9<sup>th</sup> September 2020 together with the legal authorities annexed thereto.
11. The Appellant submitted that the Respondent conducted a Post Clearance Audit on the Appellant’s products for the period February 2015 to January 2020 pursuant to the provisions of Section 235 and 236 of the East African Community Customs Management Act, 2004 (EACCMA). It submitted that the Respondent’s audit was in regard to various issues including Customs Valuation, Imports under Duty Remission and Tariff Classification, and thereafter issued a demand notice

of Kshs. 1,092,089,174.00 on 15<sup>th</sup> July 2020 and a subsequent reviewed demand notice of Kshs. 512,815,342.00 on 10<sup>th</sup> December 2020.

12. The Appellant stated that in its final demand notice dated 10<sup>th</sup> December 2020, the Respondent demanded taxes amounting to Kshs. 333,183,052.00 in relation to Tariff Classification based on the alleged tariff misdeclaration of the Appellant's product- Three-wheeled Motorcycle Kits on Semi Knocked Down (SKD) form. It further stated that the Respondent's tariff classification demand was mainly on Excise Duty on the three-wheelers and the resultant VAT on the same.
13. According to the Appellant, the Respondent's demand notice stated that the proper classification for the Appellant's three wheeled vehicles is under Heading 8703 and 8704, and more specifically in subheading 8703.21.90-petrol and 8703.31.90-diesel and not Heading 87.11. The proposed tariff codes attract rate of 25%, Excise Duty rate of 20% and a VAT rate of 16%
14. The Appellant submitted that the correct tariff classification for its products falls under Tariff HS Code 87.11 of the East African Community Common External Tariff (EAC/CET) as they do not possess the conventional characteristics of a motor vehicle stipulated under tariff code 87.03. It submitted that Heading 87.11 provides for:
  - i. Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without sidecars, sidecars.
  - ii. For Heading 87.11, the Explanatory notes provide as follows with regard to the product classification:

- a. This Heading covers a group of two-wheeled motorized vehicles which are essentially designed for carrying persons.
- b. In addition to motorcycles of conventional type, the Heading includes motor-scooters characterized by their small wheels and by a horizontal platform which joins the front and rear portions of the vehicles; mopeds, equipped with both a built-in engine and a pedal system; and cycles fitted with an auxiliary motor.
- c. This Heading also covers two wheeled, electrically powered transportation devices, designed for carrying a single person, for use within low-speed areas such as pavements (sidewalks), paths, and bicycle lanes. Their technology allows the rider to stand upright while a system composed of gyroscope sensors and multiple onboard microprocessors maintains both the devices and rider's balance on two independent, non-tandem wheels.
- d. Motorcycles may be equipped to protect the driver against the weather or be fitted with a side car.
- e. **Three-wheeled vehicles (e.g., the "delivery tricycle" type) are also classified here provided they do not have the character of motor vehicles of Heading 87.03** (see Explanatory Note to Heading 87.03). (Emphasis added)
- f. The Heading further covers sidecars of all kinds, a type of vehicle which is designed for the transport of passengers or goods, and which cannot be used independently. They are equipped with a

wheel on one side, the other side bearing fittings enabling the sidecar to be attached to, and to travel alongside, a cycle or motorcycle.

15. The Appellant submitted that Heading 87.03 provides for motor cars and other motor vehicles principally designed for the transport of persons including station wagons and racing cars. According to the Explanatory Notes to Heading 87.03 the following are features indicative of the design characteristics generally applicable to the vehicles which fall under this Heading:

- i. Presence of permanent seats with safety equipment (e.g., safety seat belts or anchor points and fittings for installing safety seat belts) for each person or the presence of permanent anchor points and fittings for installing seats and safety equipment in the rear area behind the area for the driver and front passengers; such seats may be fixed, fold-away, removable from anchor points or collapsible.
- ii. Presence of rear windows along the two side panels.
- iii. Presence of sliding, swing-out or lift-up door or doors, with windows, one side panels or in the rear.
- iv. Absence of a permanent panel or barrier between the area for the driver and front passengers and the rear that may be used for the transport of both persons and goods.
- v. Presence of comfort features and interior finish and fittings throughout the vehicle interior that are associated with passenger areas of vehicles (e.g., floor carpeting, ventilation, interior lighting, ashtrays).

16. The Appellant further submitted that, the Explanatory Notes to Heading 8703 also state that, the Heading also covers lightweight three-wheeled vehicles of simpler construction, such as:
- i. Those fitted with motorcycle engine and wheels, etc. which by virtue of their mechanical structure, possess the characteristics of conventional motor cars, that is motor car type steering system or both reverse gear and differential (*Emphasis added*).
  - ii. Those mounted on a T-shaped chassis, whose rear wheels are independently driven by separate battery-powered electric motors. These vehicles are normally operated by means of a single central stick with which the driver can start, accelerate, brake, stop and reverse the vehicle, as well as steer it to the right or to the left by applying a differential torque to the drive wheels or by turning the front wheel.
17. The Appellant submits that the three-wheeled vehicles it imports lack the appropriate essential characteristics of motor vehicles described above, to enable its classification under Heading 8703. It averred that the three-wheeled vehicles at the point of importation do not match the description of Heading 87.03 above. It stated that the essential features also vary as follows:
- i. It has a handlebar steering as compared to the motor car type steering system.
  - ii. The differential is different from that of a car.
  - iii. It does not have doors like motor cars when imported and needs to be fabricated and installed locally.

- iv. It does not have a front passenger seat like motor cars.
  - v. It does not have comfort features.
  - vi. It has a monocoque chassis and not a T-Type chassis. This is also known as a frameless or unit chassis.
  - vii. It has no single central control stick like motor cars. Gears are operated from the handlebar type steering
18. The Appellant reiterates that in appreciation of the provisions of the Headings, Sections, and Explanatory Notes thereof, the most accurate, appropriate, and fair classification of the three-wheelers at the point of importation is HS Code 87.11.
19. The Appellant further submits that there are six General Rules used in interpreting and applying the Tariff heads. These are known as the General Rules of Interpretation (GIR) 1 through 6 (**Appendix IV**). Rules one to four are related and must be applied in sequence. Rules five and six stand on their own to be applied as needed.
20. The Appellant cited Rule 1 of the General Rules of interpretation of the HS which provides as follows:
- “The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes and, provided such Headings or Notes do not otherwise require, according to GIRs 2 through 6.”*
21. This is the first Rule to be considered in classifying any product. Most products are classified according to this rule. Classification is determined by the words

(terms) in the Headings (the first four numbers) and the Section and Chapter Notes that apply to them unless the terms of the Heading and the notes say otherwise. In other words, if the goods to be classified are covered by the words in a Heading and the Section and Chapter Notes do not exclude classification in that Heading, the Heading applies.

22. The Respondent has relied on the said General Rules of Interpretation of the Harmonized System, in particular Rule 2(a) in its classification of the Appellant's three-wheelers. In doing so the Respondent has disregarded Rule 1, which requires the most appropriate Heading to be applied to the product.

23. Rule 2 (a) provides as follows:

*“Any reference in a Heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.”*

24. The Appellant avers that even though Rule 2 applies in the classification of incomplete articles, the Respondent ought to have considered the provisions of both Rule 1 and 2 and the fact that the product that was presented at the point of importation and what the officers at the ground inspected and verified and not what its Post Clearance Audit (PCA) Department contemplates was imported.

25. It submitted that the Respondent's PCA team failed to appreciate the findings of the inspection team at the point of importation which verified that the items were unassembled and classifiable under 87.11. The Appellant attached several copies of the inspection and verification reports issued by the various officers at the point of importation ascertaining that HS Code 87.11 applies.
26. The Appellant averred that the Respondent therefore erred in moving the three-wheelers to Heading 87.03 and more specifically in subheading 8703.21.90-petrol and 8703.31.90-diesel which caters for assembled items while the items imported by the Appellant were in unassembled form as inspected and verified by the customs inspection team.
27. The Appellant submitted that the Respondent's intention to move the Three-Wheeler Motorcycle kits to Heading 87.03 would result in the items being classified under Tariff Code 8703.21.10 which caters for unassembled items under the said heading.
28. It was the Appellant's assertion that the Respondent failed to appreciate that the issues at hand were within the realm of the Tax Procedures Act, 2015 (TPA). The Appellant states that in line with the provision of Section 112 of the TPA, the Cabinet Secretary for the National Treasury and Planning gazetted the Tax Procedures (Unassembled Motorcycles) Regulations 2020. In the stated Regulations the term "motorcycles" has been defined as:

*"motorcycle" as "a vehicle having a seat or a saddle for the use of the rider and designed to travel on two wheels or three wheels in contact with the ground that is powered by a motor."*

This definition thereby considers the Three-Wheeler Motorcycle kits imported by the Appellant.

29. The Appellant further submits that moving the unassembled three-wheelers to HS Code 87.03 will not attract Excise Duty and Import Duty in line with the EAC tariff nomenclature and the provisions of the First Schedule of the Excise Duty Act, 2015.
30. The Appellant submits that the First Schedule of the Excise Duty Act 2015 which provides for rates of Excise Duty stipulated that “*Motorcycles of tariff 87.11 other than motorcycle ambulances and locally assembled motorcycles shall be at the rate of Kshs. 10,000.00 per unit.*” It is clear from this provision that the Three-Wheeler kits imported and locally assembled by the Appellant were envisaged under this definition thereby exempting them from the payment of Excise Duty.
31. The Appellant submitted that the Cabinet Secretary for National Treasury and Planning on 25<sup>th</sup> February 2019 approved it as importer and **assemblers of Completely Knocked Down kits** for motorcycles affirming that the company is in the business of motor vehicle assembling. This is in addition to the gazettelement by the EAC Secretariat under the East African Community Duty Remission Scheme.
32. The Appellant relied on the case of **Unilever Kenya Limited vs. The Commissioner of Income Tax** where the court on the interpretation and application of tax law, held that:

*“any tax imposed on a subject is strictly to be dictated by the laws of the legislature; the taxing authority must satisfy itself that the transaction fits within the definition of the statute before moving to demand the tax; it is incumbent upon the taxing agency to establish that its claim was within the ambit of the prescriptions in the statute before demanding payment; taxation provision with penal consequences must be interpreted with great caution and any ambiguity in a tax law must be resolved in a tax payer’s favor.”*

33. The Appellant also relied on the case of **Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex-Parte Unilever Tea Kenya Limited [2017] eKLR**. The principles guiding tax practice, legislation and enforcement were restated *in Republic vs. Commissioner of Domestic Taxes Large Taxpayer’s Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR* where Majanja, J held:

*“The approach to this case is that stated in the oft cited case of Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64 as applied in T.M. Bell v Commissioner of Income Tax [1960] EALR 224 where Roland J. stated, “...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject*

*is free, however apparently within the spirit of the law the case might otherwise appear to be.” As this case concerns the interpretation of the Income Tax Act, I am also guided by the dictum of Lord Simonds in Russell v Scott [1948] 2 ALL ER 5 where he stated, “My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him” adopted in Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR per Nyamu JA (See also Jafferli Alibhai v Commissioner of Income Tax [1961] EA 610, Kanjee Naranjee v Income Tax Commissioner [1964] EA 257). Any tax imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute. In Adamson v Attorney General (1933) AC 257 at p 275 it was held that, “The Section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect-if it be in view of the Crown a defect can only be remedied by legislation.”*

34. The Appellant further cited the case of **Commissioner of Income Tax vs. Westmont Power (K) Ltd Nairobi High Court Income Tax Appeal No. 626 of 2002**, where the Court while citing **Inland Revenue vs. Scottish Central Electricity Company [1931] 15 TC 761** expressed itself as follows:

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

35. The Appellant stated that the aforementioned cases seek to emphasize that taxation should be justified in law, free from ambiguity and uncertainty. It argued that the Respondent erred in using the EACCMA in auditing and assessing the Appellant as Excise Duty and VAT are appropriately covered under the Tax Procedures Act, 2015(TPA). The TPA, has clear provisions as pertains to audit, tax assessment, collection, and recovery of tax. The EACCMA is not a tax law under the TPA. The Appellant was of the view that the use of the wrong application of the law nullified the audit and assessment.
36. On the issue of whether the Appellant filed its Appeal to the Commissioner’s decision out of time, the Appellant submits that the Respondent’s team continued to engage the Appellant as shown in various correspondences following the Commissioner’s review decision vide a letter dated 15<sup>th</sup> July 2020. Moreover, the Chief Manager Post Clearance Audit issued a final decision on 10<sup>th</sup> December 2020 directing the Appellant to appeal to the Tax Appeals Tribunal. The last Paragraph of the said letter clearly stated, “... *Kindly consider this a final decision*

*on your appeal to the Commissioner but if dissatisfied, you are at liberty to appeal the decision at the Tax Appeals Tribunal pursuant to Section 230 of the East African Community Customs Management Act.”*

37. Following the said letter, the Appellant filed its Notice of Appeal on 6<sup>th</sup> January 2021, which is within the 45 days stipulated under Section 230 of the East African Community Customs Management Act. It would therefore be erroneous for the Respondent to claim that the Appellant filed the appeal to the Commissioner’s review decision out of time.
38. In regard to whether the Respondent violated the principle of legitimate expectation, the Appellant submitted that the Respondent’s customs officers at the point of clearance verified the containers, examined the imports, sighted the Three-Wheeler Motorcycle kits imported by the Appellant and established that the declared tariff classification by the Appellant under tariff code 87.11 was correct. At no point in time did the officers raise concerns on the classification.
39. Furthermore, the Respondent conducted an audit on the Appellant’s business operations for the period December 2012 to February 2014 in accordance with the Customs Procedures and Laws. Following the said audit, the Respondent in its findings dated 26<sup>th</sup> February 2014 (signed by the Respondent’s officer Mrs. Rosemary Mureithi) confirmed that it did not come across any misclassified items as per the Harmonized System of classification and thus no taxes were due in relation to classification.

40. The Appellant submitted that it expected that there would be legal certainty in the determination of the tariff codes and verification process of the goods at the point of importation. Legitimate expectation places limitations on a public authority's ability to act inconsistently with a person's expectation as to how the authority would exercise its powers in a particular situation or case, where the expectation is reasonably based on a representation by, or consistent past practice of the relevant tax legislation.
41. The Appellant relied on **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** where it was held that:

*“The principle of a legitimate expectation...is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability, and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century, but it is clear that it has its cousins in private law of honoring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honored in public law and therefore the situations where the expectations shall be recognized, and protected must of necessity defy restrictions in the years ahead. The*

*strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”*

42. The Appellant submitted that the Respondent from its actions described under Paragraphs 37 and 38 conducted itself so as to give rise to a reasonable expectation on the part of the Appellant that it would be treated in a particular way and that the Three-Wheeler Motorcycle kits imported by the Appellants are classifiable under Tariff Code 87.11. Given this legitimate expectation, it would in all circumstances, be unfair and an abuse of power for the Respondent to act inconsistently with that legitimate expectation.
43. Furthermore, according to Article 47 of the Constitution of Kenya, 2010 “every person has a right to administrative action that is expeditious, efficient, lawful and procedurally fair.” The fact that the Appellant has relied on HS Code 87.11 for years without queries from the Respondent, it would be a breach of fair administrative action for the Respondent to act otherwise.
44. The Appellant cited **Krish Commodities Limited v Kenya Revenue Authority [2018] e KLR** where it was stated under Paragraph 30 that:

*“Moreover, it is common ground that the identification of the applicable rate of duty and assessment of duty payable was done by the Simba system. The appellant had no role in declaring or setting the rate to be applied. For the respondent to turn around and pass the buck to the appellant by contending that it was aware at all material times of the right rate cannot hold any weight. More so, taking into account that the respondents own officers verified the entries made and even inspected*

*the consignments. The respondent's officers were not acting as a conveyor belt performing a perfunctory exercise. The reason they were there as to verify the accuracy of the entries and the duty payable before clearance of the consignments in question. Having verified the entries in issue, rate applied and assessed as correct, a legitimate expectation arose in favor of the appellant that the assessed duty was correct."*

### **Appellant's Prayers**

45. The Appellant prays that this Honourable Tribunal grants the following prayers:
- a. That this Appeal be allowed.
  - b. That the Respondent's assessments be set aside.

### **RESPONDENT'S CASE**

46. The Respondent's opposition to the Appeal was premised on the Statement of Facts dated 19<sup>th</sup> February 2021 and the Witness Statement of Mr. Koome Mwirigi, dated 16<sup>th</sup> June 2021 and adopted in evidence on 11<sup>th</sup> August 2021, and the Respondent's written submissions dated and filed on 9<sup>th</sup> September 2021 together with the list of authorities annexed thereto.
47. The Respondent argued that this dispute raised an urgent point of law. At Paragraph 13 of the Respondent's Statement of Facts, the Respondent stated that it would raise a preliminary objection on **the question of jurisdiction** to the extent that the jurisdiction of this Honourable Tribunal had not been properly invoked.

48. It proposed to dispense with this issue first as guided by the case of **Owners of The Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (1989) eKLR**, in the famous words of Nyarangi, JA.

*“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”*

49. The Respondent also cited the case of **Kenya Hotel Properties Limited V Attorney General & 5 Others [2018] eKLR**, where the High Court cited the Supreme Court in the case of **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & Another [2012] eKLR** where the superior court held as follows:

*“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”*

50. The Respondent also cited **The Matter of The Interim Independent Electoral Commission, Constitutional Application Number 2 of 2011** where the Supreme Court stated thus:

*“Where the Constitution exhaustively provides for jurisdiction of a Court of law, the Court must operate within the constitutional limits. **It cannot expand its jurisdiction through judicial craft or innovation.** Nor can*

*parliament confer jurisdiction upon a Court of law beyond the scope defined in the Constitution...” (emphasis added)*

51. According to the Respondent, the Court then went on to surmise that:

*“The legal flowing of the above decision is that a court of law must only exercise jurisdiction conferred on it either by the constitution, the law or both but it cannot exercise jurisdiction it does not have, exceed jurisdiction conferred on it or even confer jurisdiction on itself through some form of innovation. Any action taken by the court without jurisdiction or exceeding jurisdiction would be unconstitutional and illegal.”*

52. The Respondent averred that in the present case,

1. The Respondent issued a Demand Notice on **5<sup>th</sup> June 2020**.
2. The Appellant applied for review on **12<sup>th</sup> June 2020**.
3. The Respondent issued a decision on **15<sup>th</sup> July 2020**.

53. Curiously, the Appeal before this Honourable Tribunal is not based on the decision issued on **15<sup>th</sup> July 2020**. The Notice of Appeal points to a “decision” dated **10<sup>th</sup> December 2020** as the basis of the appeal.

54. The Respondent stated that its letter dated **10<sup>th</sup> December 2020**, that the Appellant refers to as the decision, was prompted by the Appellant’s letter dated **25<sup>th</sup> November 2020**. The Respondent however made a point of reminding the Appellant that this letter of **10<sup>th</sup> December 2020** was only made in furtherance

of the review decision and the letter of **25<sup>th</sup> November 2020**. The letter is titled **Demand Notice**.

*“Reference is made to the Commissioner’s review decision dated 15<sup>th</sup> July 2020 and our subsequent meetings upon your request for engagement. We further refer to your letter dated 25<sup>th</sup> November 2020. The Commissioner has noted the contents of your latter letter and would like to comment as follows: ...”*

55. The Respondent argued that the letter of **15<sup>th</sup> July 2020**, on the other hand was clearly titled **“Commissioner’s Decision on Application for Review -Demand Notice: Kshs. 1,092,089,174.00”** The process of challenging the decision of the Commissioner is well spelt out in the **East African Customs Management Act 2004**. This is to be found in **Section 229**.
56. It averred that Section 229(1) of EACCM 2004 provides that a person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review for that decision or omission. *(For the avoidance of doubt, the Appellant did this vide their letter dated 12<sup>th</sup> June 2020)*
57. It further averred that **Section 229 (4)** provides that the Commissioner shall, within a period **not exceeding thirty days** communicate his or her decision in writing to the person lodging the application stating reasons for the decision. *(In the present case, there is the Commissioner’s review decision dated 15<sup>th</sup> July 2020)*

58. The Respondent argued that **Section 230** provides that a person dissatisfied with the decision of the Commissioner under Section 229 may appeal to a Tax Appeals Tribunal... within 45 days after being served with the decision. (*For the avoidance of doubt, the Appellant did not lodge their appeal against the decision dated 15<sup>th</sup> July 2020 within 45 days. As matter of fact, the Appeal before the Tribunal is not based on the review decision of 15<sup>th</sup> July 2020*)
59. The Respondent further argued that it has been stated that taxing statutes are statutes of strict interpretation. In the oft cited case of **Cape Brandy Syndicate Vs Inland Revenue Commissioner [1921] 1 KB 64**, it was held that:
- “In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used”*
60. The Respondent averred that the clear wording of **Section 229** of EACCMA bestows no further obligation to the Commissioner other than making a decision in terms of **Sub-rule 4** (*Decision to be in writing and give reasons for the decision*). The Respondent argued that it mentioned this because during the hearing of the case, the Honourable panel members asked the Respondent’s witness questions (or clarifications, as they called them) as to whether the Respondent was not under an obligation to indicate to the Appellant in the said decision that he had a right of appeal to the Tribunal; this was in contrast to the letter of 10<sup>th</sup> December 2020 that informed the taxpayer of the right of appeal.

61. The Respondent averred that the right of appeal to the Tribunal directly stems out from the express provisions of **Section 230**.
62. It argued that the Tax Appeals Tribunal's judgment itself is appealable to the High Court, but the Tribunal is under no obligation by some fanciful stretch of the right to fair administration to inform the parties at the tail end of their judgment that they can indeed appeal to the High Court if they so wish.
63. It further argued that when a procedure is clearly spelt out in law, the assumption is that everyone is aware of the procedure, because ignorance of the law is no defence.
64. It stated that further, the law does not contemplate a situation where the Respondent can make two review decisions under **Section 229**. And neither does the law contemplate a situation where the Respondent can review his own decision. Once the Respondent issues a decision under **Section 229(4)**, it becomes *functus officio*.
65. The Respondent relied on the case of **John Gilbert Ouma V Kenya Ferry Services Limited [2021] eKLR**, where the Court held as follows at Paragraph 20 of its judgement

*“The Supreme Court of Kenya in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special*

***Reference to its Application in Administrative Law” (2005) 122 SALJ 832***

which reads: -

*“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker”. [emphasis added]*

66. The Respondent argues that the point here is that once the Respondent rendered its decision on **15<sup>th</sup> July 2020**, it became *functus officio*. This means that there is only one review decision and that is the one of **15<sup>th</sup> July 2020**. This is the decision that should inform the appeal before this Honourable Tribunal.
67. The Respondent stated that the letter of **10<sup>th</sup> December 2020** is not a review decision, and neither did the Respondent pretend that it was. In the said letter of **10<sup>th</sup> December 2020**, the Respondent clearly referenced the review decision of **15<sup>th</sup> July 2020**.
68. It was the Respondent’s contention that the language deployed in that letter of **10<sup>th</sup> December 2020** should be understood in the context that it was written. This context was explained by the Respondent’s witness who informed the

Honourable Tribunal that after the review decision of **15<sup>th</sup> July 2020**, the Appellant went quiet. The Appellant was only jolted out of its slumber when the Respondent moved in to restrict the clearance of its consignment from the port.

69. It was the Respondent's submission that in the Appellant's letter of **25<sup>th</sup> November 2020**, the Appellant clearly recognizes the decision of **15<sup>th</sup> July 2020**. Therefore, the argument cannot be made that the Appellant did not receive the said review decision.
70. During cross-examination, the Respondent's witness stated that there were several meetings held between the Appellant and the Respondent. The witness submitted that the Respondent advised the Appellant that it had an option to appeal to the Tribunal, and even if its appeal was late this could be rectified by seeking leave to file an appeal out of time. This evidence is uncontroverted since the Appellant opted not to call any witness.
71. The Respondent stated that the Tribunal has been invited by the Appellant to consider the letter of 10<sup>th</sup> December 2020 as being the review decision while the Respondent maintains that the review decision is that dated 15<sup>th</sup> July 2020. The Respondent urged the Tribunal to be guided by the law on the doctrine of *functus officio*. According to the Respondent, the doctrine of *functus officio* is, The Respondent cited the case of **ICEA Lion General Insurance Co. Ltd Vs Julius Nyaga Chomba [2020] eKLR** where the court observed at Paragraph 15 of its Ruling:

*“...functus officio, defined in Black’s Law Dictionary, Ninth Edition as “[having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished...”*  
*[emphasis added]*

72. The Respondent insisted that this was an incompetent appeal within the meaning of the text of **Section 230** of the EACCMA. According to the Respondent, an appeal before this Honourable Tribunal can only lie on the basis of a review decision arising out of **Section 229(4)**. On that ground alone, this Appeal ought to be dismissed. Otherwise, the Appeal currently before this Tribunal is not anchored on an appealable decision.
73. It was the Respondent’s averment that the Appellant understood the problem of relying on the letter of **10<sup>th</sup> December 2020** as an anchor of this Appeal. This is clearly demonstrated from the pleadings that deliberately misrepresent the review decision of **15<sup>th</sup> July 2020** as having been an assessment.
74. The Respondent contented that the Appellant was admitting that it made a review application, but instead of the Respondent issuing a decision, the Respondent decided to issue an assessment. This is simply absurd. It argued that it behoves to reiterate that the decision of 15<sup>th</sup> July 2020 was clearly titled as *“Commissioner’s Decision on Application for Review”*.
75. The Respondent argued that in the event this Honourable Tribunal finds that the Appeal is properly filed and therefore competently anchored in law, the

Respondent maintains that the Appellant has not discharged the burden of proof that the tax decision is incorrect.

76. The Respondent relied on **Section 30** of the **Tax Appeals Tribunal Act** which places the burden of proof upon the Taxpayer in the following words:

*“In a proceeding before the Tribunal, the appellant has the burden of proving—*

*(a) Where an appeal relates to an assessment, that the assessment is excessive; or*

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

77. The Respondent cited the case of **Commissioner of Domestic Taxes Vs Galaxy Tools Limited [2021] eKLR**, where the High Court, at Paragraph 28 of its judgment, faulted the Tax Appeals Tribunal for shifting the burden of proof contrary to statute:

*“...The Tribunal further failed to appreciate the burden of proof set out in Section 30 of the Tax Appeals Tribunal Act. In effect the Tribunal shifted the burden of proof to the appellant which was contrary to law.”*

78. That is not the only time that the High Court has faulted the Tribunal for irregularly shifting the burden of proof contrary to statute. In **Commissioner of Domestic Taxes Vs Golden Acre Limited [2021] eKLR**, the Learned Judge observed as follows:

*“The SACCO did not meet that burden of proof*

*In the Australian case of Mulheim v Commissioner of Taxation [2013]*

*FCAFC115 the Full Federal Court of Australia (PFC) held:*

*“A taxpayer must satisfy the burden of proof to successfully challenge income tax assessments. The PFC held that it is not enough for a taxpayer to simply demonstrate that the assessment issued by the Commissioner is incorrect. Rather, the onus is on the taxpayer in proving that an assessment issued by the Commissioner is excessive can only be discharged by the taxpayer adducing positive evidence which demonstrates the taxable income on which tax ought to be levied. That onus requires the taxpayer to positively prove his or her ‘actual taxable income’ and in doing so, must show that the amount of money for which tax is levied by the assessment exceeds the actual substantive liability of the taxpayer.”*

*On the foregoing, it was upon the respondent to prove that the assessment was wrong...*

**In this regard, the Tribunal erred in shifting the burden of proof to the Appellant...” [Emphasis added]**

79. It was the Respondent’s assertion that there is no burden placed upon the Revenue Authority to prove that the assessment is correct. In fact, under the Tax Procedures Act **Section 50(1)(a)** the law goes to the extent of creating a presumption of correctness of the assessment (though we must be quick to admit that the TPA is not applicable in the present case).

80. The Respondent argued that while the Courts have held that the taxing authority cannot pluck a figure out of thin air **and impose it upon the taxpayer**, this has never amounted to shifting the burden of proof. In fact, this statement of *plucking a figure* was only employed with a caveat, and the caveat has always been **“rational basis”**, which is simply a measure for **best judgment principle in arriving at an assessment** that is protected within the taxing statutes.
81. The Respondent relied on **Republic V Kenya Revenue Authority Ex Parte Jaffar Mujtab Mohammed [2015]** eKLR, where Odunga J held as follows:
- “a taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure...”*
82. The Respondent argued that that is the only obligation placed upon the Authority, setting up some rational basis for the assessment. This cannot be translated to the more stringent burden that the law places upon the taxpayer; the burden to prove that the assessment is excessive: the taxpayer remains with the burden of proof.
83. It averred that in the present case, the Appellant has **done absolutely nothing to demonstrate how the assessment is either incorrect or excessive**. The Appellant has not presented any **positive evidence** as the case of **Commissioner of Domestic Taxes vs Golden Acre Limited (supra)** asked of a taxpayer.
84. It was the Respondent’s submission that the Appellant saw no need to call a witness during the hearing of the case either. Which simply means the Appellant

pegged its case on cross-examining the Commissioner's witness, a trap that the Tribunal almost fell into when the members of the Panel also started seeking clarifications from the Commissioner's witness. There is a thin line between cross-examining and seeking clarification especially because the Appellant had not presented himself before the Tribunal for the Panel members to seek clarifications from him as well.

85. The Respondent invited the Tribunal to an article in the **Campbell Law Review** titled: *When Should a Trial Judge Intervene to Question a Witness?* In this article, written by **Hon. Hamilton H. Hobgood**, he opined that as a general rule “A judge is entitled to ask clarifying questions, but must not cross-examine, impeach, badger, harass, humiliate or belittle the witness.” The article then goes ahead to list instances that were found by the appellate court to have gone beyond clarification.
86. The Respondent stated that **Hon. Hobgood** himself says “*In my opinion, the judge should not question the witness under any circumstances unless it is apparent that the witness is terrified, apprehensive or misunderstands. Even then, the judge should only ask preliminary questions to put the witness at ease or to clear up a lack of communication.*” The judge seems to favour the questioning of an advocate on a point of law rather than the questioning of a witness.
87. The Respondent argued that when the Tax Appeals Tribunal asks the Commissioner's witness whether an Objection Decision ought not to inform the taxpayer of his right of appeal, certainly that is cross-examination. The Tribunal

is in no way seeking from the witness to get a clarification from a process that it unaware of, but it is seeking to make a point itself. Such point can only be countered if the Tribunal also cross-examined the Appellant (were he present) on what he did with the decision dated 15<sup>th</sup> July 2020 once it was communicated to him; what followed the days after; is it true that the Commissioner told him during a meeting of his right to appeal to the Tribunal, or even to seek leave to file a late appeal...and so on.

88. It was the Respondent's assertion that it found that the Appellant had been classifying the three-wheeled vehicles under **Heading 87.11** instead of **Headings 8703** and **8704**. The Respondent further states that, from the Explanatory Notes, **Heading 8703** covers motor vehicles of various types designed for the transport of persons. The Heading also covers lightweight three-wheeled vehicles of simpler construction such as:

- i. Those fitted with motorcycle engines and wheels, etc. which by virtue of their mechanical structure possess the characteristic of conventional motor cars, that is motor car type steering system or both reverse gear and differential.
- ii. Those mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate battery powered electric motors. They are normally operated by means of a single central control stick with which the driver can start, accelerate, brake, stop and reverse the vehicle as well as steer it to the right or to the left

by applying a differential torque to the drive wheels or by turning the front wheel.

89. The Respondent also stated that **Heading 8704** covers the three-wheeled vehicles described in **Heading 8703** if they are designed for the transport of goods and specifically in **sub-Heading 8404.21.90-diesel** and **8704.31.90-petrol**. The Appellant had been classifying the three-wheelers under **87.11**, which covers delivery tricycles that do not bear the essential characteristics of motor vehicles. The Appellant alluded to an advisory from the Secretariat of the East African Community as having formed the basis of why it classified under **Heading 87.11**.
90. The Respondent argued that that communication does not in any way controvert what the **Respondent** is saying. In fact, this is what the communication states:

*“...On the basis of the aforementioned provisions of the Explanatory Notes, the Secretariat is of the view that motorcycles, mopeds, motorised cycles, etc. of Heading 87.11 are essentially constructed for carrying persons. Three-wheeled versions of these vehicles, including the “delivery tricycle” types, are classified in this Heading, **if they do not possess the character of motor cars falling in Heading 87.03...**” [Emphasis added]*

91. The Respondent submitted that it was therefore up to the Appellant to demonstrate by way of placing material before this Honourable Tribunal how the three-wheelers they were dealing with **did not possess the character of motor cars falling in Heading 87.03**, because the Respondent’s case was that they did indeed possess the character of motor cars.

92. The Respondent cited **TAT No. 115 of 2017 Digital Box Limited Vs Commissioner of Domestic Taxes**, where this Honourable Tribunal observed as follows at Paragraph 91 in its judgment:

*“The Appellant on its part failed to adduce evidence to refute the Respondent’s position. It failed to show that the notebooks did not belong to it and were not in any way related to its business. It merely made averments. It did not furnish the Tribunal with any proof of its averments. Madan J in his judgment in **CMC Aviation Ltd v Cruisair Ltd (1) [1978] KLR 103** observed that:*

*“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence, and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.*

*Thus, these averments are not sufficient at proving its case.”*

93. The Respondent urged this Honourable Tribunal to be guided not only by the test of what “evidence” means, but also the binding High Court decisions quoted earlier on the burden of proof. It insisted that the Appellant had a responsibility of presenting evidence before this Honourable Tribunal to demonstrate that their three-wheelers are those of Heading 8711 and not those of 8703 and 8704. Nothing would have been easier than even simply presenting photographic evidence.

94. The Respondent submitted that its supplementary list of documents dated 16<sup>th</sup> June 2021 provided an excerpt of World Custom Organization decisions by the Harmonized System Committee from the 47<sup>th</sup> to 60<sup>th</sup> Sessions, and a schedule of rulings from other jurisdictions on the tariff classification of three-wheeled motor vehicles. The tariff rulings especially show that the jurisprudence on this matter is well settled.

### **Respondent’s Prayers**

95. The Respondent prays that the Tribunal dismisses the appeal with costs.

### **ISSUES FOR DETERMINATION**

96. Following a careful consideration of the submissions of both parties, the Tribunal was of the view that the issues that commended themselves for determination were:

- I. Whether there was a valid appeal before the Tribunal; and,
- II. Whether the Respondent erred in classifying the three-wheeler vehicles assembled by the Appellant under Hs Code 8703 & 8704?

## ANALYSIS AND DETERMINATION

### Whether there was a valid Appeal before the Tribunal?

97. This dispute was triggered by an audit conducted by the Respondent on the Appellant's import records for the period February 2015 to January 2020. It was recommended in the Audit Report, inter alia, that the company should be visited for further follow up to ensure continued compliance. The report also assessed Kshs 1,092,089,174.00 as extra duties and taxes as being due from the Appellant. The audit report was signed off by the auditors on 5<sup>th</sup> June 2020.
98. On 5<sup>th</sup> June 2020 the Respondent issued a management letter based on the audit highlighting to the Appellant the issues that had been raised in the Audit report. The management letter called on the Respondent to rectify various issues raised in the audit report and called on the Appellant to pay extra duties and penalties.
99. Even before the Appellant could respond to the management letter, on the same day, 5<sup>th</sup> June 2020 the Respondent wrote a demand letter to the Appellant requiring it to pay Kshs. 1,092,089,174.00 being extra duties and taxes and interest. The demand letter cautioned the Appellant that the areas not audited were open for further enquiry to ensure compliance.
100. The Appellant in response wrote to the Respondent on 12<sup>th</sup> June 2020 mainly protesting the rejection of HS code 8711.20.90 under which it had been importing the three-wheeler motorcycle kits. It also stated various grounds for review.

101. On 15<sup>th</sup> July 2020 the Respondent, after considering the application for review revised the amount demanded from the Appellant to Kshs. 512,815,342.00.
102. What followed were documented meetings between the parties culminating in the Appellant's letter dated 25<sup>th</sup> November 2020 where it offered to pay part of the amount demanded and asked for review of the demand in respect of tariff classification.
103. The Respondent vide a letter dated 10<sup>th</sup> December 2020 acknowledged receipt of payment of Kshs 36,019,523.00 towards offsetting the principal amount on the exceeded quota under remission scheme. The letter advised the Appellant that the principal amount outstanding was Kshs.37,731,033.00 plus interest amounting to Kshs.73,742,410.00. With respect to tariff classification, the Commissioner stated in the letter that total taxes and interest amounting to Kshs.480,676,018.00 remained payable to the Commissioner. It is instructive that the letter advised the Appellant to:
- “Kindly consider this as a final decision on your appeal to the commissioner but you are at liberty to appeal the decision at the Tax Appeals Tribunal pursuant to Section 230 of the East African Community Customs Management Act”*
104. The Respondent insisted that its letter dated 15<sup>th</sup> July 2020 was the Objection Decision. On the other hand, the Appellant by his conduct assumed that the Objection Decision was contained in the letter of 10<sup>th</sup> December 2020. The import of the Respondent's submission is that if the Objection Decision was given on 15<sup>th</sup> July 2020, then the current Appeal on 6<sup>th</sup> January 2021 was filed out of

time. If on the other hand the Tribunal finds that the Objection Decision was issued on 10<sup>th</sup> December 2020, the Appeal is to be determined on merit.

105. The Tribunal examined the correspondence between the parties and in particular the Respondent's demand letter dated 5<sup>th</sup> June 2020 and the management report of the same date. It appeared to the Tribunal that the Respondent by issuing these two documents was digging a trap for the Appellant.
106. For good order, the audit report attached to the pleadings was not approved an indication that it was waiting for comments from the Appellant before it was amended and finalised. To issue a demand letter based on such a report was at best premature. The Tribunal was reluctant to regard the letter as anything more than a statement of the findings of the audit.
107. The Tribunal was of the view that the Respondent's letter of 5<sup>th</sup> June 2020 could not pass the test of procedural fairness contemplated by Justice Majanja in **Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR** where he stated that

*"I find that the Tax Demand letter of 20<sup>th</sup> June 2011 sent to the Company fell short of the requirements of a proper notice in as far as it did fail to disclose its nature and the implication and consequences of non-compliance as well as notifying the taxpayer of the avenues of appeal or review available to it. A notice of the nature issued to enforce collection of taxes must clearly state to be such a notice, state the amount claimed, state the legal provision under which it is made and draw the taxpayer's attention to the consequences of failure to comply with the law and the*

*opportunity provided by the law to contest the finding. Such a notice would give the opportunity to any Kenyan to know the case against it and utilize the legal provisions to contest the decision. The right to fair administrative action and the right of access of justice now enshrined in our Constitution demand nothing less.”*

108. In view of the foregoing and in consideration of events that ensued including review of the amount demanded, the Tribunal is of the view that the actual assessment was made on 15<sup>th</sup> July 2020 when the debt appears to have crystallised. It is against this conclusion that the Tribunal considered the Objection Decision as having been made on 10<sup>th</sup> December 2020.

109. The letter dated 10<sup>th</sup> December 2020 was an unequivocal as to what constituted an appealable decision as between the parties. This is discernible from the following Paragraph of the letter”-

*“Kindly consider this a final decision on your appeal to the Commissioner but if dissatisfied, you are at liberty to appeal the decision at the Tax Appeals Tribunal pursuant to Section 230 of the East African Community Customs Management Act.”*

110. The witness called by the Respondent and who was over zealously protected by his counsel, appeared to have been coached on the response to give as regards the material issue of the purport of the letter dated 10<sup>th</sup> December 2020 was unfortunately unhelpful. The Tribunal without intrusion sought clarification from the witness on the processes involved in the manner in which review applications are determined by the Respondent and communicated to aggrieved taxpayers.

111. Moreover, the Tribunal was of the view that the doctrine of *functus officio* could not apply to the Respondent's letter dated 15<sup>th</sup> July 2020 as the letter was effectively an assessment. The letter as it was manifest from the proceedings open to intervention by the Appellant and indeed parties continued to engage in the review process precipitating in the final decision in the letter dated 10<sup>th</sup> December 2020. The doctrine could only apply to the Respondent's decision contained in its letter dated 10<sup>th</sup> December 2020. In the eyes of the Tribunal, it was this latter letter which contained the appealable decision.
112. Based on the foregoing, the Tribunal determined that the Appeal before it was valid in law.

**Whether the Respondent erred in classifying the Appellant's three wheeled vehicles under HS 8703 & 8704.**

113. At the heart of this dispute are three-wheel vehicles imported unassembled by the Appellant which the Respondent seeks to reclassify at HS 8703 and 8704. The Appellant argues that it has at all times been declaring the same at HS 8711 and the Respondent has not raised the issue of classification in the past.
114. At this point the Tribunal found it necessary to reiterate that the fact that the Commissioner had accepted a declaration from a taxpayer in the past does not stop him from reviewing that decision and issuing a fresh assessment as and when new facts on the imported goods emerge. Similar position was held in the case of **Tarmal Industries Ltd v. Commissioner of Customs and Excise [1968] EA 471**

where it was held that “*The fact that he failed to do so cannot stop him from carrying out his duty when he discovers the original error*”

115. The Tribunal noted that from its submissions, the Respondent had placed reliance on the tariff classification adopted by other members of World Customs Organization. The Tribunal agrees with the Respondent that contracting parties to the HS Convention are bound to contracting parties to follow the sequence of the Harmonized System and apply the General Rules for Interpretation of all Sections, Chapters, and subheading Notes in its Customs Tariff nomenclature. The Tribunal was however of the view that interpretation of the HS by a single contracting party, though persuasive did not form an official binding decision of the WCO.
116. To that extent, the Tribunal determined that the Respondent was not bound to apply a decision on the HS merely because it was made by another contracting party to the HS Convention. Furthermore, the rulings attached by the Respondent from various customs administrations do not settle on one HS Code.
117. From the written and oral submissions of both parties, the Tribunal determined that the vehicles were potentially classifiable in HS 8703, 8704 and 8711. Therefore, in determining the correct classification of the vehicles imported by the Appellant, the Tribunal relied on the General Rules of Interpretation (GIR) of the EAC CET and the World Customs Organization (WCO) Explanatory Notes to the Harmonized System (HS).

118. GIR 3 on classification of goods that are potentially classifiable in two or more Headings provides as follows:

*“When by application of Rule 2 (b) or for any other reason, goods are prima facie, classifiable under two or more Headings, classification shall be effected as follows: (a) The Heading which provides the most specific description shall be preferred to Headings providing a more general description. However, when two or more Headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those Headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.*

*(b) .....*

*(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the Heading which occurs last in numerical order among those which equally merit consideration*

119. GIR 4 on goods which cannot be classified under Rules 1 to 3 states as follows:

*“Goods which cannot be classified in accordance with the above Rules shall be classified under the Heading appropriate to the goods to which they are most akin.”*

120. Bearing Rule 4 in mind, the call before the Tribunal was therefore to determine whether the three-wheel vehicles imported by the Appellant were more akin to vehicles of HS 8703 and 8704 or more akin to motorcycles of HS 8711.

121. According to the EACCET and the HS, **Heading 87.03** covers - *Motor cars and other motor vehicles principally designed for the transport of persons (other than those of Heading 87.02), including station wagons and racing cars.*

The Explanatory Notes to this Heading state that the Heading also covers lightweight three-wheeled vehicles such as:

- those fitted with motorcycle engine and wheels, etc. which, by virtue of their mechanical structure, possess the characteristics of conventional motor cars, that is motor car type steering system or both reverse gear and differential.

- those mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate electric accumulator-powered electric motors. These vehicles are normally operated by means of a single central control stick with which the driver can start, accelerate, brake, stop and reverse the vehicle, as well as steer it to the right or to the left by applying a differential torque to the drive wheels or by turning the front wheel.

122. **Heading 87.04** covers **Motor vehicles for the transport of goods**. According to the Explanatory notes to this Heading, the Heading also covers lightweight three-wheeled vehicles, such as:

- those fitted with motorcycle engine and wheels, etc. which, by virtue of their mechanical structure, possess the characteristics of conventional motor cars, that is motor car type steering system or both reverse gear and differential.
- those mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate battery-powered electric motors. These vehicles are normally operated by means of a single central control stick with which the driver can start, accelerate, brake, stop and reverse the vehicle, as well as steer it to the right or to the left by applying a differential torque to the drive wheels or by turning the front wheel. Three-wheeled vehicles of the above-described character are classified in Heading 87.03 if they are designed for the transport of persons.

123. Heading 87.11 which was declared by the Appellant covers **Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without sidecars**. The Explanatory Notes to this heading state that three-wheeled vehicles (e.g., the “delivery tricycle” type) are also classified here provided **they do not have the characteristics of motor vehicles of Heading 87.03 or Heading 87.04** (*emphasis added*).

124. The Tribunal took note of the Classification Decision of the WCO Harmonized System Committee in November 2011 where having considered HS Codes 87.04 and 87.11 classified goods carrying three wheelers under 8704 and more specifically under 8704.21 as follows:

*“Three wheeled vehicle, enclosed for the delivery of beverages and incorporating a divers cab, propelled by a four stroke, single cylinder, compression ignition engine with a cylinder capacity of 395 cm<sup>3</sup>. The load capacity is 500kg, the front wheel is steered using handlebars, the vehicle has a differential, a four-speed gear box with reverse gear, a transmission shaft, and drum brakes. The front wheel suspension consists of shock absorbers and spiral springs, and the rear wheel suspension consists of leaf springs assisted by two telescopic shock absorbers.”*

125. According to the Explanatory Notes, the following features are indicative of the design characteristics generally applicable to the vehicles which fall in Heading 8703:

- (a) Presence of permanent seats with safety equipment (e.g., safety seat belts or anchor points and fittings for installing safety seat belts) for each person or the presence of permanent anchor points and fittings for installing seats and safety equipment in the rear area behind the area for the driver and front passengers; such seats may be fixed, fold-away, removable from anchor points or collapsible.
- (b) Presence of rear windows along the two side panels.
- (c) Presence of sliding, swing-out or lift-up door or doors, with windows, on the side panels or in the rear.

(d) Absence of a permanent panel or barrier between the area for the driver and front passengers and the rear area that may be used for the transport of both persons and goods.

(e) Presence of comfort features and interior finish and fittings throughout the vehicle interior that are associated with the passenger areas of vehicles (e.g., floor carpeting, ventilation, interior lighting, ashtrays).

126. As per the Explanatory Notes the following features are indicative of the design characteristics generally applicable to the vehicles which fall in Heading 8704:

(a) Presence of bench-type seats without safety equipment (e.g., safety seat belts or anchor points and fittings for installing safety seat belts) or passenger amenities in the rear area behind the area for the driver and front passengers. Such seats are normally fold-away or collapsible to allow full use of the rear floor (van-type vehicles) or a separate platform (pick-up vehicles) for the transport of goods.

(b) Presence of a separate cabin for the driver and passengers and a separate open platform with side panels and a drop-down tailgate (pick-up vehicles).

(c) Absence of rear windows along the two side panels; presence of sliding, swing-out or lift up door or doors, without windows, on the

side panels or in the rear for loading and unloading goods (van-type vehicles).

(d) Presence of a permanent panel or barrier between the area for the driver and front passengers and the rear area.

(e) Absence of comfort features and interior finish and fittings in the cargo bed area which are associated with the passenger areas of vehicles (e.g., floor carpeting, ventilation, interior lighting, ashtrays).

127. The Appellant submitted that the three-wheeled vehicles imported by it lacked the design characteristics of the vehicles of HS 8703 and 8704 that is:

a) It does not have a motor car type steering system or both reverse gear and differential.

b) It is not mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate battery powered electric motors.

c) It does not have permanent seats with safety equipment when imported and need to be fabricated and installed locally.

d) It does not have rear windows.

e) It does not have doors in the three wheels when imported and need to be fabricated and installed locally.

f) It has a permanent barrier; and

g) It does not have comfort features.

128. The Tribunal analysed the features described by the Respondent and found nothing in the submission excluded the three-wheeler from being classified under HS 8711. In fact, it was the Appellant's submission that clearly distinguished the vehicles from being classified under either 8703 or 8704. For instance, the steering system consists of a handlebar more characteristic of vehicles of HS 8711 than vehicles of 8703 and 8704 which consist of a steering wheel.
129. Based on the facts before it, the Tribunal pursuant to GIR 3(c) and GIR 4 found that the three-wheeler vehicles imported by the Appellant did not meet the design characteristics of vehicles of Heading 8703 and 8704 and were most appropriately classifiable under HS 8711.
130. It was submitted by the Respondent that the Appellant failed to prove to the Tribunal that what it imported were three-wheeler vehicles that did not fall under the description of HS 8703 and 8704. Its argument was that the Appellant did not discharge its burden of proving that it had imported vehicles of HS 8711. It argued that the Appellant did not furnish documents to proof its case.
131. In **Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Limited [2014] JOL 31933 (SCA)** the court was of the view that this approach was untenable, for, it left the taxpayer none the wiser as to what was truly in issue and what needed to be produced for it to discharge the burden of proof that rested upon it. In the view of the Tribunal, the type of vehicles imported by the Appellant were not in doubt. They were a three-wheeler vehicle popularly referred to as tuktuks, which were properly documented in the import documents and correspondences between the parties.

132. The foregoing notwithstanding, a significant factor in proceedings before the Tribunal is that the Commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position. The taxpayer bears the ultimate burden of persuasion, which requires the party bearing the burden of proof to convince the Court by providing sufficient evidence to satisfy the required standard of proof. This is implied in *Section 30 of the Tax Appeals Tribunal Act 2013* which provides that:

*“In a proceeding before the Tribunal, the appellant has the burden of proving — (a) where an appeal relates to an assessment, that the assessment is excessive; or  
(b) in any other case, that the tax decision should not have been made or should have been made differently.”*

133. In light of the fact that the Tax Appeal Tribunal Act does not set the standard of proof to be met in proceedings the Tribunal approached the present Appeal on the basis that the onus was on the Appellant to show on a preponderance of probability that the decisions of the Respondent against which it appealed were wrong. Similar approach was taken in *Bar L Ranch, Inc. v. Phinney, (426 F.2d 995, 998-99 (5th Cir. 1970))*. the court held that the taxpayer need only show that an assessment is arbitrary and that the burden of proof would then be on the government to show the existence and the amount of any deficiency.

According to **Sharwell v. Commissioner**, (419 F.2<sup>nd</sup> 1057, 1060 (6th Cir. 1969)) (burden of proof shifts to Commissioner once taxpayer has successfully rebutted presumption of correctness).

134. The Tribunal recalls that in **Car and General Vs Commissioner of Customs and Border Control (Tax Appeal No 83 of 2021)**, where it substantively dealt with the HS classification of three-wheel vehicles which are the subject of this Appeal and arrived at the conclusion that the same are classifiable under HS 8711. Nothing has been presented in the current appeal to persuade the Tribunal to depart from that decision and accordingly the Tribunal reiterates that decision in this Appeal.

135. In light of the foregoing, the Tribunal determined that the Appellant had discharged its burden of proving that the vehicles imported by it were of the type that is classifiable under HS 8711. Consequently, the Tribunal found that the Respondent erred in classifying the three-wheel vehicles imported by the Appellant under HS 8703 and 8704.

## **FINAL DECISION**

136. After analysing the facts before it, the Tribunal found that the Appeal had merit and the Orders that commend themselves are as follows:

- i. The Appeal be and is hereby allowed.
- ii. The objection decision dated 10<sup>th</sup> December 2020 be and is hereby amended to strike out the assessments relating to tariff classification.

iii. Each party to bear its own costs.

137. It is so ordered.

**DATED and DELIVERED at NAIROBI this 12<sup>th</sup> day of November, 2021.**



.....  
**ERIC N. WAFULA**  
**CHAIRMAN**



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



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



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



.....  
**ELISHAH NJERU**  
**MEMBER**