REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAX APPEAL NO. 150 OF 2015

BIDCO OIL REFINERIES LIMITED……………………………………… APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS SERVICES ……………………… RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya carrying out the business of import, manufacture and refining of edible oils and related products.

2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act Cap 469 Laws of Kenya to collect, manage and account for Government revenue under the East African Community Customs Management Act, 2004, hereinafter referred to as EACCMA.

3. In 2008 the Respondent selected the Appellant for routine post clearance audit. The audit revealed that values declared on credit and debit notes were 110% of the customs value declared by the Appellant and therefore the Respondent concluded that there was an undeclaration of values by the Appellant. Consequently, the Respondent adjusted the customs values declared by the Appellant upwards by 10%. The Respondent further increased the adjusted value by 1.5% to cater for insurance premium.

4. By a letter dated 11th September 2009 referenced HQ/PCA/F/060/2007, the Respondent demanded additional revenue amounting to Kshs. 702,334,527.00 in respect of crude palm oil, palm stearin, crude palm olein, Crude degummed soya bean oil and crude palm kernel oil imported by the

Appellant. Subsequently, the Respondent issued agency notices dated 23rd September, 2009 to the Appellant's bankers and distributors.

5. Following subsequent meetings and correspondences exchanged between the Appellant and the Respondent, the agency notices were lifted subject to posting of a guarantee to secure the taxes that had been demanded.

6. The Appellant then moved to the High Court vide Miscellaneous Civil Application Number 568 of 2009 and sought prayers to set aside the Respondent's demand for taxes and the lifting of the agency notices issued. On 8th October 2009, the High Court granted the prayers sought subject to the Appellant furnishing the Respondent with a bank guarantee for the payment of the demanded sum of Kshs. 702,344,527.00.

7. On 22nd January 2010, following recommendations of an internal team of experts formed by the Commissioner General to review the matter, the Respondent issued a demand calling upon the Appellant to pay within 30 days a sum of Kshs. 780,871, 291.00 being additional taxes arising from an audit carried out for the period January 2004 to July 2008 broken down as follows:

Particulars	Amount
Revenue due to under valuation	702, 344,527.00
Revenue due to Undeclared insurance	78,526,765.00
Total	**780,871,291.00**

8. On 8th February 2010, the Appellant wrote to the Respondent seeking for a review of the assessment made on 22nd January 2010. On 11th February 2010, the Appellant again moved to the High Court and filed Miscellaneous Civil Application No 38 of 2010 seeking leave for orders of Court to quash the report of the internal team of experts, the demand letter dated 22nd January 2010 and an order prohibiting the Respondent from demanding, enforcing, collecting, issuing agency notices to the Appellant's trading partners, distributors and bankers or in any way acting on the letter dated 22nd January 2010.

9. The High Court granted the stay orders sought for a period of 30 days. The order was later extended until the matter was heard and finally determined. Upon hearing the matter, the High Court, on 8th March 2012 dismissed the said application.

10. Following the decision of the High Court, the Respondent vide a letter dated 19th April 2012 again demanded payments as per the earlier letter dated January 2010. The amount now included accrued interest and penalties totaling to a sum of Kshs. 1,377,505,229.00 made up as follows.

Particulars	Amount Kshs
Demand of 22nd January 2010	708,871,292.00
Penalty at 5%	39,043,565.00
Interest at 2%	557,590,372.00
Total	**1,377,505,229.00**

11. Being dissatisfied with the Respondent's demand the Appellant filed this Appeal by way of a Memorandum of Appeal and Statement of Facts both dated the 27th day of April, 2012 filed before the defunct Customs and Excise Appeal's Tribunal.

The Appeal

12. The Appeal was premised on the grounds hereunder: -

    a) That the Respondent erred in failing to appreciate that the Appellant had right of Appeal against any decision of the Commissioner of Customs to the Tax Appeals Tribunal under Section 229 of the East African Community Customs Management Act, 2004. (EACCMA).

    b) That the Respondent erred in its appreciation and determination of the statutory regime and parameters of determination of value and assessment of duty as provided for under Section 122 and Rules 9(2) in the Fourth Schedule of the EACCMA.

c) That the Respondent erred in failing to appreciate that Section 122(1) of the EACCMA provides that value of imported goods shall be determined in accordance with the Fourth Schedule to the EACCMA and duty is paid on that value.

d) That the Respondent erred in rewriting and setting up a new parameter of determination of value and assessment of duty contrary to the mandatory statutory regime that Kenya together with other members of the EAC established under the East African Community Customs Union to be the customs law of the EAC.

e) That the Respondent's determination of value and assessment of duty in relation to the Appellant is arbitrary and contrary to the written law to wit Section 122 of the EACCMA.

f) That the Respondent has erred in failing to appreciate that taxes become payable when the provisions quoted above are complied with and the correctness of those taxes are arrived at in accordance with Section 122 and Rule 2 with adjustments under Rule 9 in the Fourth Schedule of the EACCMA.

g) That the demand for extra revenue of Kshs. 1,337,505,229.00 is not in accordance with Section 122 and Rule 3 with adjustments under Rule 9 in the Fourth Schedule of the EACCMA.

13. The Appellant sought the following prayers, that:

   a. The Appeal be allowed.
   b. The Tribunal do interpret the statutory regime and parameters of determination of value and assessment of duty as provided under Section 122 and Rule 2 with adjustments under Rule 9 in the Fourth Schedule of the EACCMA.
   c. The demand for Tax by the Commissioner dated 19th of April 2012 in the sum of Kshs. 1,377,505,229.00 be set aside and in place thereof the Tribunal finds that no tax is payable.
   d. Costs.
   e. The Tribunal be pleased to grant any such other orders and further orders as it deems fit to grant.

THE APPELLANT'S CASE

14. In its Statement of Facts signed by Vimal Shah who is the Managing Director of the Appellant and in the Written Submissions filed before the Tribunal on 14TH March 2016 the Appellant made elaborate and substantive arguments in support of the Appeal.

15. The alleged dispute between the Appellant and the Customs Services Department of the Kenya Revenue Authority arose out of a contract for import of edible oils and related products from Josovina Commodities PTE Singapore wherein customs alleged an undervaluation of duty payable on imports under the said contract.

16. The Appellant disputed the alleged undervaluation of duty payable on the imports under the said contract and furnished the Respondent with full details of the contract of sale between it and the said Josovina Commodities PTE Singapore.

17. That as it was entitled to do, the Appellant objected to the Customs Services Department methodology and parameters of assessment of import duty as provided for under Section 122 and Rule 2, with adjustments under Rule 9 in the Fourth Schedule of the East African Community Customs Management Act, 2004 (EACCM).

18. That by a letter dated 11th September 2009 from the Respondent to the Appellant under Ref: HQ/PCA/FA/060/2007 the Respondent demanded payment within seven (7) days, as under valuation of duty, of the sum of Kshs 702,334.527.00 in respect of crude palm oil, crude palm olein, crude degummed soya beans oil, crude palm stearin and crude palm kenel oil that was imported by the Appellant for use in its manufacturing business.

19. That by a letter dated 14th September, 2009 the Appellant in response to the said Respondent's letter of 11th of September, 2009 objected to the said demand of Kshs 702,334.527.00 which was claimed as undervaluation and asserted that the Respondent had erred on the assessment of import duty as provided for under Section 122 and Rule 9(2) in the Fourth Schedule of **the EACCMA.**

20. That by a letter dated 16th September, 2009 the Respondent accepted and confirmed the quantity of the crude palm olein, crude degummed soya beans oil, crude palm stearin and crude palm kenel oil that was imported by the Appellant from Josovina Commodities PTE Singapore, but rejected the Appellant's contention on the erroneous assessment of Import duty as provided for under Section 122 and Rule 9(2) in the Fourth Schedule of the **EACCMA** and demanded payment of the sum of Kshs 702,334.527.00 under Section 229 of the **EACCMA**.

21. That in the letter dated 16th September, 2009 the Respondent accepted the quantity of the crude palm oil, crude palm olein, crude degummed soya beans oil, crude palm stearin and crude palm kenel oil that was imported by the Appellant, in the following terms;

> ***"Kindly note that we have no doubt that the quantities declared were correct, any documentation requested in relation to the quantity was purely for our record keeping. However, we have raised issues on the value declared for both cost and insurance".***

22. That the Respondent then unlawfully and illegally purported and proceeded to set a new criteria for the determination of duty in the following terms:-

> ***"I therefore restate the Departmental position that the demand (Undervaluation based on cost) still stands as earlier presented and that a further demand based on undervaluation of undeclared insurance is to follow"***

23. That the Respondent sought to uplift the values on all of the Appellant's cargoes from 2004 to 2008 by 10% since the Appellant insured all its cargo at 110% of the transaction value that is Cost and Freight, CFR Value.

24. That the relevant clause of the contract between the Appellant and Josovina Commodities reads as follows:

> ***" <u>Comprehensive cover (CC)</u>***
> ***Seller shall arrange, through SGS or ITS or any other reputable underwriter or agency (CC provider), a cc package which will guarantee an outturn of the total loaded quantity, without any excess clause being applicable. This CC package will include survey by SGS/ITS or any other recognized agency at discharge port, full***

cover for all marine perils during voyage and settlement of all short/excess quantity at discharge port.
The cost for such cc package shall be determined from time to time by the seller on a best effort basis.
Seller shall cover the cargo under the CC package for value which shall be 110% of the invoice value (covered value) settlement of all short/excess quantity at discharge port and all other claims, if any shall be made on the basis of such covered value.

The seller shall settle with the cc provider for all short/excess quantity immediately after discharge and issue respective CN/DN to the buyer. Other claims if any, shall be handled by the buyer with the cc provider directly. The Seller shall assist the buyer in filling and finalizing of such claims".

25. That by its letter dated 16th September 2009, the Respondent rejected the Appellant's contentions on the erroneous assessment of import duty as provided for under Section 122 and Rule 9(2) in the Fourth Schedule of the **EACCMA** and demanded payment of the sum of Kshs. 702,334,527.00 under Section 229 of the **EACCMA**.

26. That the Appellant has the right of appeal against any decision of the Commissioner of Customs to the Tax Appeals Tribunal under Section 229 of the **EACCMA.**

27. That the Republic of Kenya together with other members of the East African Community established the East African Community Customs Union to be managed by the customs law of the community under the East African Community Customs Management Act, 2004 of the Laws of Kenya. (hereinafter "EACCM Act".

28. That the statutory regime and parameters of determination of value and assessment of duty is provided for under Section 122 and Rule 2, with adjustments under Rule 9 in the Fourth Schedule of the East African Community Customs Management Act, 2004.

Rule 2 in the Fourth Schedule of the EACCMA provides as follows:-
"(2) In determining the value for duty purposes of any imported goods, there shall be added to the price actually paid or payable for the goods: -

(a) the cost of transport of the imported goods to the port or place of importation into the Partner State; provided that in case of imports by air no freight costs shall be added to the price paid or payable.
(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation into the Partner State; and
(c) the cost of insurance. (i.e. The premium paid).

(3) Additions to the price actually paid or payable shall be made under this paragraph only on the basis of objective and quantifiable data.

(4) Additions shall not be made to the price actually paid or payable in determining the customs value except as provided in this paragraph".

29. That Section 122 (1) of EACCMA provides that value of imported goods shall be determined in accordance with the Fourth Schedule to the Act and that import duty shall be paid ***on that value***.

30. That Paragraph 2 (1) provides that Customs Value of imported goods shall be the Transactions Value, which is **the price actually paid or payable, adjusted** in accordance with the provisions of Paragraph 9; Sub-paragraph (4) which reads "additions *shall NOT be made to the price actually paid or payable in determining the customs value* ***EXCEPT*** *as provided in this paragraph*"..

31. That Paragraph 2 (1) provides that 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 and ***adjusted*** in accordance with the provisions of Paragraph 9.

32. That since the field audit was done when the goods had been imported and paid for, the *Transaction Value* is the price ***ACTUALLY*** paid for the subject goods.

33. That Paragraph 9 (1) provides that in determining the Customs Value under the provisions of Paragraph 2 above, there ***shall*** be added to the price actually paid or payable for the imported goods costs listed in subparagraph

(1).Paragraph 9 (2) provides that in determining the value for duty purposes of any imported goods there ***shall*** be added to the price actually paid or payable for the goods: -

(*a*) *Cost of the transport to the port or place of importation* ***EXCEPT*** *for airfreight.* ***(F= Freight).***

(*b*) *Loading etc. associated with the transport of the imported goods to the port or place of importation into the Partner States (part of the freight,* ***F****).*

(*c*) *The* ***COST*** *of insurance* ***(I=Insurance).***

33. Paragraph 9 (4) provides that additions shall not be made to the price actually paid or payable in determining the customs value except as provided in Paragraph 9 (2) above.
34. That the above provision thus provides that value for Customs purposes on imported goods shall be Cost Insurance and Freight ***(CIF).***

34. That the demand by the Respondent that value (cost) be adjusted to the amount insured by the supplier does not meet the provisions of Transaction Value because the insured amount was ***NOT*** paid ***NOR*** was payable by the Appellant.

35. The provisions of Paragraph 9 provide that value for customs purposes on imported goods shall be the Cost Insurance and freight (CIF). Thus, the demand for value (cost) adjusted to the amount insured by the supplier does not meet the provisions of Transaction value because that insured amount was not paid nor was it payable by the Appellant. The amount which was paid was the amount in the respective entries and therefore met the provisions of the Transaction Value as laid down in the Fourth Schedule to the Act.

36. That the insurance cost paid by the Appellant on the imported quantity was the amount, it paid its insurers, Kenindia Assurance Company Ltd through M/s Universal Insurance Broker Ltd. This amount was fully added in all the import entries being the insurance on the goods imported and paid for by the Appellant.

37. That the Respondent acted and was in breach of the mandatory statutory regime and parameters of determination of value and assessment of import duty as provided under Section 122 and Rule 9(2) in the Fourth Schedule of the EACCMA Act.

38. The Statutory regime and parameters of determination of value and assessment of duty is provided for in Section 122 and Rule 2 with adjustments under Rule 9 in the Fourth Schedule of the EACCMA.

39. That Section 122 (1) of EACCMA provides that value of imported goods shall be determined in accordance with the Fourth Schedule to the Act and that import duty shall be paid on that value.

40. That Rule 2 provides as follows: -

> *"(2) in determining the value for duty purposes of any imported goods, there shall be added to the price actually paid or payable for the goods:*
>
> *(a) the cost of transport of the goods to the port or place of importation into the Partner State; provided that in the case of imports by air no freight costs shall be added to the price paid or payable.*
>
> *(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation into the Partner State; and*
>
> *(c) the cost of insurance (i.e. the premium paid)*
>
> *(3) additions to the price actually paid or payable shall be made under this paragraph only on the basis of objective and quantifiable data.*
>
> *(4) additions shall not be made to the price actually paid or payable in determining the customs value except as provided in this paragraph".*

41. That the Respondent purported to set a stage for a new criteria for the determination of duty by stating in its letter dated the 16th of September 2009 as follows; -

> *"I therefore restate the Departmental position that the demand (Undervaluation based on cost) still stands as earlier presented and that a further demand based on undervaluation of undeclared insurance is to follow"*

42. That the Respondent accordingly purported to set a new criteria for the determination of duty by seeking to uplift the values on all the Appellants cargoes from 2004 to 2008 by 10% since the Appellant insured its cargo at 110% of the transaction value i.e. CFR Value.

43. That the Commissioner's contention was succinctly set out in its letter dated 23rd October 2008 which stated that:

> ***"We established that your value declarations to customs were in certain instances inconsistent with the provisions of Section 122 of the EACCMA and Fourth Schedule to the aforesaid Act.***
> ***The Debit/credit motes issued by Josovina Commodities PTE Ltd to adjust the quantities as per the commercial invoice to agree to the outturn report were found to have a price difference of 10% higher than the invoiced amount. This implied that there was undervaluation of all supplies from Josovina Commodities PTE Ltd. Which was inconsistent with the provisions of Section 122 of the EACCMA and the Fourth Schedule to the aforesaid Act".***

44. That the Respondent failed to appreciate that Section 122 (1) of the EACCMA provides that value of imported goods ought to be determined in accordance with the Fourth Schedule to the EACCMA and duty is paid on that value.

45. That in the context of tax law, this stipulation must be further read in the light of the principle of legality which in accordance with Judicial authority (*per Lord Simonds in* **Scott *versus* Russel (Inspector of Taxes) (3)**, 30 T.C. 394 at p. 424, (***Unanimously***) approved by the Court of Appeal at Nairobi in *Civil Appeal No. 4 of 1961*; **Jafferali M. Alibhai *versus* The Commissioner of Income Tax**, [1961] EA, 610 at page 614) has been rendered thus:

> ***"... the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."***

46. That this important principle of taxation has been expressly recognised by the Constitution under Article 210(1) which states that:

"No tax or licensing fee may be imposed, waived or varied except as provided by legislation".

47. That the Respondent cannot re-write and set up a new parameter of determination of value and assessment of duty contrary to the mandatory statutory regime that Kenya together with other members of the East African Community have established under the East African Community Customs Union to be the customs law of the East African Community, *to wit* , the EACCMA.

48. That the Respondent erred in relation to the Appellant in its interpretation and determination of the statutory regime and parameters of determination of value and assessment of duty as provided for under Section 122 and the Rules 9(2) in the Fourth Schedule of the EACCMA.

49. The Respondent's demand for extra revenue from the Appellant is void and without any legal basis under Section 122 and the Rules 2, with adjustments under Rule 9 in the Fourth Schedule of the East African Community Customs Management Act, 2004 (EACCMA).

50. That the Respondent is not entitled to demand the extra revenue of **Kshs. 1,377,505,229.00** as demanded on its part.

THE RESPONSE

51. In opposing the Appeal, the Respondent filed a Statement of Facts dated 18th May, 2012 before the Customs and Excise Appeals Tribunal and its Written Submissions dated the 13th day of November, 2017 in which the Respondent made substantive submissions.

52. That whereas several issues have been raised by the parties in dispute, this dispute actually revolves around whether KRA had powers to conduct the assessment as it did, the interpretation of the applicable statutory mechanisms available in the disputed tax assessment and whether the taxes in dispute are due.

53. That the origin of this tax dispute can be traced back to a contract for the import of edible oils and related products from Josovina Limited Singapore by the Appellant. After KRA carried out an audit into the Appellant's imports for the period January 2004 to 31st July 2008, it alleged *inter alia*, undervaluation of Value Added Tax and duty payable on the contract due to tariff misclassification.

54. That the legality of the audit is backed by the law as set out under Sections 235 and 236 of the EACCMA 2004. Under the said provisions the Commissioner is empowered to carry out in depth audits after the release of the goods at the port of entry without the pressure of time which would otherwise prevail at the port of entry before release of the goods. A literal reading of the two Sections reveal that the Commissioner has powers to call for relevant documents from the taxpayer and to conduct an inspection or audit as seen below:-

> *"235(1) The proper officer may, within five years of the date of importation or transfer or manufacture of any goods require the owner of the goods or any person who is in possession of any goods relating to the goods-*
> *(a) To produce all books……*
> *(b) To answer any question in relation to the goods, and*
> *(c) To make declaration with respect to weight, number, measure, value cost, selling price………. As the proper officer may deem fit.*
>
> *236 The Commissioner shall have power to-*
> *(d) Verify the accuracy of the entry of goods or documents through examination of books, records……*
> *(e) Question any person involved directly or indirectly in the business ……*
> *(f) Inspect the premises of the owner of the goods……*
> *(g) Examine the goods where it is possible for the goods to be produced…"*

55. That in order to facilitate cross border trade, Sections 235 and 236 of the EACCMA have endowed the Respondent with the powers to carry out Post Clearance Audits in order to ensure that goods are efficiently cleared from the port of entry and the time taken while in customs custody is significantly reduced and to enable traders to dispose of their goods promptly upon their arrival in the country. Therefore, the purpose of such audits is to verify the accuracy and authenticity of declarations and covers a trader's commercial data, business systems records and books. Post clearance Audits can be conducted on a case by case basis, focusing on targeted sectors/industries, selected on the grounds of analysis of the commodity and/or trader, or in a panned, regular way, set out in the annual audit programme.

56. That Post Clearance Audit is articulated in the **Guidelines for post Clearance Audit (PCA) Volume 1 by the World Customs Organization known as Customs Cooperation Council, of June 2012**.

57. That the WCO guidelines are relied upon by virtue of Section 223(g) of the EACCMA which provides that: -

> ***"In any proceedings under this Act a certificate or a copy of a document or publication purporting to be signed or issued by or under the authority of the Customs Cooperation Council (WCO) and produced by the commissioner shall be admissible in evidence and shall be prima facie evidence of the matters contained therein".***

58. That Post Clearance Audits, **PCAs,** are done within the statutory powers of the Commissioner. The PCAs are not only an integral and necessary part of customs control of imported goods in Kenya but also a common practice the world over. In the circumstances of this case the Post Clearance Audit was lawfully carried out within a period of 5 years and the taxpayer afforded an adequate opportunity to present documents and raise objections if need be.

59. That in the case of **Republic Vs Kenya Revenue Authority Exparte Bata shoe company (Kenya) limited (2014) eKLR** the High Court (W. K. Korir J.) held that Sections 235 and 236 of the Act clearly give the powers to conduct a post clearance audit on the affairs of a taxpayer for the previous five years from the date of the audit.

60. That 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. The position was stated by the High Court in the **Republic vs Kenya revenue Authority Ex-parte Bata Shoe Company (Kenya) limited**

61. That being the case, a strict interpretation of tax statutes is the way to go. In this case the statutory regime is to be found in Section 122 as read with the Fourth Schedule to the EACCMA 2004.

62. That this Tribunal has previously affirmed the statutory position on how customs value is arrived at through various valuation methods in the case of **Diamond industries limited Vs Commissioner of Customs Services – Appeal No. 12 of 2013.**

63. That a distinction however needs to be drawn in the **Diamond** case. Page 8 of the Ruling explains that the Commissioner adjusted CIF value upwards by using the credit and debit notes which showed value higher by 10% of the Appellant's self-declaration. Unfortunately, in doing so the commissioner failed to explain which customs valuation method was used. In the instant case, the Commissioner has computed customs value using the debit and credit notes of the identical excess-landed goods, which showed value applied by the Appellant's self-declaration to customs in customs entry declarations during importation. **Section 122 as read with paragraph 3(1-3) of the Fourth Schedule** on identical goods was categorically stated to have been the method relied on.

64. That like in the Diamond case, in the case of **Kapa oil industries limited Vs Commissioner of Customs Services (Appeals No. 17 of 2013)** the Commissioner also failed to disclose the valuation method used having disputed the transaction value and not because the assessment was illegal. Another distinguishing feature is that in the Kapa case, the transaction value was based on the adjustments under Paragraph 9 of the 4th Schedule.

65. That on the strength of the literal interpretation of Section 122 of the Act and the fore going precedent from the Tribunal, Section 122 of the EACCMA and the 4th Schedule stipulate how customs value is to be arrived at through various valuation methods. Price paid or payable is the basis of customs value subject to adjustment consistent with the 4th Schedule. Customs value is cost plus insurance plus freight subject to adjustment as provided in Paragraph 9of the Fourth Schedule. But where value cannot be determined on the basis of transaction value and or if the customs reasonably doubts the accuracy /truthfulness of information provided to support the transaction value, alternative methods are used sequentially and consistently with the Fourth Schedule.

66. That the Commissioner has the right under Section 122(4) b of EACCMA to satisfy himself on the accuracy/truthfulness of the information provided by the taxpayer, indeed the subsection provides.

"(4) Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself as to the accuracy of any statement, document or declaration for customs valuation purposes"

67. That having established that the Commissioner had statutory powers to conduct a post clearance audit on the Appellant for a period of five years as it did, it is now logical to ascertain whether in the circumstance of this case, the Commissioner proceeded to assess the duty demanded within those statutory parameters.

68. That the Respondent's letter stated in part:

We have adjusted the declared value resulting in the assessment of Kshs.702, 344,527.00 broken down as follows:

Import duty	*Kshs 6,646,685.00*
VAT	*Kshs 426,148,684.00*
IDF	*Kshs 66,608,054.00*
Penalty	*Kshs 302,941,148.00*

69. That the Respondent was unable to determine the correct transaction value as per the documentation presented since there were two invoices to every consignment both of which had different cost per unit.

70. That the Respondent's expectation was that the invoices presented and any subsequent supplementary invoices for the same consignment in the form of debit or credit note should reflect the cost per unit. Coincidentally, the supplementary invoices (credit and debit notes) always showed a 10% value above the cost per unit declared by the Appellant. After doing the initial adjustments, it was discovered that sizeable VAT, import duty as well as import declaration fees (IDF) had not been paid.

71. That following the demand for payment, objections, negotiations a judicial Review application in the High Court, a team of technical experts, TTE, also reviewed the legal basis of the Respondent's assessment. The TTE held meetings with the Appellant in an effort to resolve the issues at hand.

72. That the TTE report on the face of it established that the Respondent doubted the accuracy and truthfulness of the information provided by the Appellant which put into question the reliability of the transaction value as declared by the Appellant through self-assessment. It is on this premise that the Respondent sequentially proceeded to assess the extra taxes based on **Section 122 read together with paragraph 3 of the Fourth Schedule to the EACCMA 2004 and not** as provided under Rule 2 with adjustments under paragraph 9 of the Fourth Schedule to the EACCMA 2004. That Assessment was upheld by the findings and a report of a Technical Team of Experts formed by both parties pursuant to a consent order of the High Court and subsequently upheld by the High Court in Judicial Review proceedings.

73. That logically therefore, the Tribunal should uphold that position and affirm that the Respondent properly interpreted and applied the statutory provisions and did not set a new parameter or regime applicable in determining the taxes owed by the Appellant.

74. That on the question of the insurance element, the Respondent initially did not demand the insurance element as part of the duty after the post clearance audit. It is only after the TTE did its work that it was established that a combined assessment on insurance not declared for the post clearance audit period 2004-2005 was done resulting in extra taxes of Kshs. 78,340,338.00. The Assessment arose after KRA's finding that:-

    (a) The Respondent maintained two sets of marine insurance for the same consignment from the port of loading to the port of discharge.
    (b) One marine insurance taken with *Societa Italiana Assicurazione Riassicurrazio,* the insured was indicated as Josovina Commodities PTE Limited and the notifying party as Bidco Oil Refineries Limited.

(c) Another Marine Insurance was taken locally with Universal Insurance Brokers for the same consignments. The insured was indicated as Bidco.

(d) The insurances covered the consignments from the port of Exportation to the port of discharge.

(e) According to the Appellants letter dated 27thApril 2009, no local insurance company has been in a position to provide FOG comprehensive cover and this can be confirmed from any local insurance company. The information in the said letter clearly contradicts the information contained in the insurance debit note.

(f) The importer had Foreign insurance certificates availed to them by *M/s Josovina Commodities*, that is to say, the supplier. This explained that the supplier was insuring the goods from the country of export, Indonesia, to the port of discharge, Mombasa.

(g) These Foreign certificates of Insurance lacked details of insurance premiums paid, that is to say, cost but quoted the sum insured, bill of lading quantities and the nature of product insured relating to a particular consignment.

(h) These certificates of insurance were in the account of Josovina, the supplier with the notifying party being BIDCO, the importer.

(i) Each import consignment by BIDCO, the importer had its own foreign insurance certificate showing sum assured but not saying the premium.

(j) Commercial invoices from M/s Josovina Commodities indicated the incoterms as CFR, cost and freight, and as such the Full Outturn Guarantee (FOG) cum marine insurance element in the invoices.

(k) The FOG marine insurance cover is taken before the outturn report and guarantees the weight and quantity discrepancies at the time of loading and the time of discharge.

75. That it is important to point out that the TTE established that the Appellant made its declaration based on insurance cover which materially differed with the actual premium paid to the insurance company.

76. That furthermore, according to the invoices presented to support transaction value for clearance of the 203 importation entries that were scrutinized and found to be based on cost and freight INCOTERMS (the insurance component was not included. From the analysis, it was established that contrary to statutory requirement, the three components that constitutes customs duty (cost, Insurance and freight) for tax assessment purposes were not fully factored by the auditee during the assessment for tax computation.

77. That consequently, the TTE established that there was an insurance component of Kshs 78,526,765.00 that was not factored in the figure thus the extra amounts demanded. The finding of the TTE not only concurred with the Respondent on assessment done by the post clearance audit team on demand for extra taxes but also recommended that there is need to issue a fresh assessment that takes into account the uncollected taxes and incorporated the insurance element.

78. That according to WTO Customs Valuation Agreement on Implementation Article VII of the General Agreement on Tariffs and Trade 1994 & Decision 6.1 of May 1995 made by the WTO Technical Committee on 12th May 1995 is applicable in this case by virtue of Section 122 (5) & (6) of EACCMA 2004. The computed custom value shall consist of the cost or the value of all other expenses necessary to reflect the valuation option chosen by members under Paragraph 2 of Article 8. A reading of article 8(1) confirms that insurance costs if not included by the buyer should be included in the computation of duty.

79. That under paragraph 3(2) of the Fourth Schedule, costs and charges referred to in Paragraph 9(2) are included in the transactional value, an adjustment shall be made to take into account of significant differences in such costs and charges between imported goods and identical goods in question arising from the difference in distances and modes of transport.

80. That a reading of Paragraph 9(2)(c) made by the WTO Technical committee dealing with adjustment provides that in determining the value for duty purposes of any imported goods, there shall be added to the price actually paid or payable for the goods, the cost of insurance.

81. That the Respondent averred that Part II of the 4th Schedule (the interpretative Notes) Paragraphs 4 & 5 to the note to Paragraph 3 clearly and relevantly allows for adjustment either to increase or decrease on the basis of available evidence. Paragraph 4 provides that in the following terms:-

    "for purposes of paragraph 3, the transaction value of identical goods means a customs value, adjusted as provided for in subparagraphs (1)(b) and (2), which has already been accepted under paragraph (2)"

82. That the TTE established that the Appellant undervalued their declarations to the Customs Services Department. It is important to point out that the TTE established that the Appellant made its declaration based on an insurance cover which materially differed with the actual premium paid to the insurance company. It therefore recommended the issuance of a fresh assessment that takes into account the under collected insurance element. On account of the foregoing and the WCO decision, the Tribunal is urged to find that the assessment to incorporate insurance element was proper and founded in law.

83. That the findings and report of a TTE formed by both parties pursuant to a consent order of the High Court was subsequently upheld in the High Court in a Judicial Review proceedings. Logically, the Tribunal bound by the High Court decision should uphold that position and affirm that the Respondent properly interpreted and applied the statutory regime and did not set a new parameter or regime applicable in determining the taxes owed by the Appellant.

84. That pursuant to the recommendations and findings of the Report by the TTE (which was in line with the consent order of 28th October 2009) the Respondent issued fresh demand being the additional taxes arising from the audit carried out on the import transactions for the period January 2004 to July 2008 totaling 780,871,292.

85. That on the 11th February 2010 following the fresh demand and agency notices the Appellant filed another application in **High Court Msc. Civil Application No. 38 of 2010 Republic Vs Kenya Revenue Authority ex-parte BICO Oil Refineries Limited,** seeking to quash the report of the TTE

(the basis of the demand) and the Authority's demand letter dated January 2010. It also sought for an order of Court prohibiting the KRA from demanding, enforcing, collecting, issuing agency notices to BDCO's trading partners, distributors and bankers or in any other way acting on the letter dated 22nd January 2010. Upon hearing the parties, the High Court(W K KorirJ.) dismissed that application.

86. That following the decision of the High Court, the Respondent through a letter to the Appellant dated 19th April 2012 again demanded the payments of outstanding taxes as per the earlier demand of 22nd January 2010. The amount demanded which now included accrued interest and penalty in the sum of Kshs 1,377, 505,229.00 particularized thus:-

(a) Amount as per the demand of 22nd January 2010	Kshs 780,871,292.00
(b) Penalty accrued to date at the rate of 5%	Kshs 39,043,565.00
(c) Interest at the rate of 2%	Kshs 557,570,372.00
Total	**Kshs 1,377,505,372.00**

87. That under Section 135(1) & (2) of EACCMA 2004, the Respondent is entitled to demand for payment of short levied taxes/duty within 30 days to be levied together with a further 5% of the amount and a subsequent interest to be levied at the rate of 2% for each month which the taxpayer defaults.

88. That on account of the foregoing the Respondent acted within the law to demand the extra taxes of Kshs 1,377,505,229.00.

89. The Respondent prays that this tax Appeal be dismissed because:-

    (a) post clearance was lawfully carried out by the Respondent as per provisions of Sections 235 and 236 of the EACCMA 2004 for a period of 5years and the taxpayer afforded an adequate opportunity to present documents and raise objections.

(b) on the strength of the literal interpretation of Section 12 of the Act and the precedents from this Tribunal, Section 122 of the EACCMA and the Fourth Schedule stipulate how custom value is to be arrived at through various valuation methods. Price paid or to be payable is the basis of Customs value subject to adjustment consistent with the Fourth Schedule. Customs value is Cost plus insurance plus freight subject to adjustment as provided in Paragraph 9 of the Fourth Schedule. But where the value cannot be determined on the basis of transaction value and or if customs reasonably doubts the accuracy /truthfulness of information provided to support the transaction value, alternative methods are used sequentially and consistently with the Fourth schedule.

ISSUES FOR DETERMINATION

90. On the 6th of November 2017 the parties recorded a consent order on the issues for determination by the Honorable Tribunal as follows;-

a) ***What is the statutory regime and parameters of determination of value and assessment of duty as provided for under Section 122 and paragraph 2, with adjustments under paragraph 9 in the Fourth Schedule of the East African Community Customs Management Act, 2004.***
b) ***Has the Respondent erred in appreciation and determination of the statutory regime and parameters of determination of value and assessment of duty as provided for under Section 122 and paragraph 3 and 9 of the Fourth Schedule of the EACCMA, 2004.***
c) ***Has the Respondent erred in purporting to rewrite and set up a new parameter of determination of value and assessment of duty in this case and whether the Respondent has the power to uplift transaction value based on the sum assured.***
d) ***Is any such determination as made in this case arbitrary and contrary to the EACCMA, 2004.***
e) ***Is the Respondent entitled to demand the extra revenue of Kshs. 1,377,505,229 as demanded in this case.***
f) ***Orders as to cost.***

91. Upon reading the pleadings and submissions of both parties, and having considered the issues for determination in the consent order as agreed upon by both parties, the Tribunal has determined that the said issues can be collapsed into two, namely;

a) **Whether the statutory provisions governing customs valuation of imported goods was properly applied by the Respondent?**
b) **Whether the Respondent is entitled to demand the extra revenue of Kshs.1, 377,505,229.00?**

ANALYSIS AND FINDINGS

92. The Tribunal notes that the above issues are intertwined and will therefore proceed to analyze them simultaneously as hereunder.

93. In the instant case, the Appellant used the CFR (Cost and Freight) and adjusted it to include marine insurance premium to determine the customs value upon which import duty was applied on the imported oils. Under the terms of contract between the seller and the Appellant, the seller took out a comprehensive insurance cover against all risks including losses related to excess and under deliveries of the contract quantities. The Full Outturn Guarantee (FOG) had a sum assured which was equivalent to 10% of the invoice price. Thus, excesses and losses were compensated according to the sum assured which was 10% of the invoice price. The Appellant used the sum assured to account for losses and excess deliveries using credit and debit notes against which import duty for the excess and short landed quantities was calculated. The Appellant also took a marine policy covering the transport of goods from Indonesia /Singapore port to its premises at Thika. The cost of this insurance was used to adjust the invoice value to calculate the customs value of its imported goods.

94. Noting that the values declared in the debit and credit notes was 10% more than the value declared by the Appellant, the Respondent rejected the transaction values declared by the Appellant and adopted the values declared on the debit/ credit notes. This adjustment was made on the CFR. Further, the Respondent rejected the value of insurance declared by the Appellant and loaded 1.5% as set out in the Customs Service's Operational Guidelines. The import of this was an adjustment to tax payable of Kshs. 780,871,292.00

plus subsequent penalties and interest. In essence, the Respondent adopted the sum assured as the Cost and Freight (CFR), loaded a factor of 1.5% and assumed that as the customs value for purposes of assessing import duty.

95. There was no dispute, and rightly so, that the legal regime for valuation of goods for purposes of customs is embedded in Section 122 and the Fourth Schedule of the EACCMA and the WTO Agreement on Customs Valuation.

96. The Tribunal will turn to the relevant Subsection 122(1) of the EACCMA, which provides that:-

> **" Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value".**

97. Moreover, the Fourth Schedule and the Agreement lists six valuation methods used in the valuation of goods for customs purposes, being ;

Method 1 — Transaction value
Method 2 — Transaction value of identical goods
Method 3 — Transaction value of similar goods
Method 4 — Deductive method
Method 5 — Computed method
Method 6 — Fall-back method

98. These methods are applied sequentially until a value that is as closely as possible estimates the price actually paid or payable for the goods in an arm's length transaction is arrived at.

99. The Tribunal notes that the Respondent has attempted to distinguish this case from the two cases relied upon by both parties herein, among others, namely; Diamond **Industries Limited vs Commissioner of Custom Services and Kapa Oil Industries Limited vs Commissioner of Custom Services, being Tax Appeal Nos. 12 of 2013** and **17 of 2013,** respectively. Having perused the said cases we note that the Commissioner therein failed to apply the valuation methods sequentially as envisaged in law resulting into the holding that the customs values were not procedurally uplifted. In the instant case, we will agree with the Appellant's contention that the

Respondent has failed to demonstrate to the Tribunal to its satisfaction as to which valuation method it applied in adjustment of the customs values in issue.

100. Transaction value is defined in Paragraph 2 of the Fourth schedule as:-

> ***"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".***

101. Furthermore, in the World of International Trade, the CIF value captures the transaction value normally used as customs value for purposes of charging import duty.

102. The Respondent in its submissions argued that it proceeded to assess the extra taxes based on Section 122 as read together with Paragraph 3 of the Fourth Schedule to the EACCMA 2004 **and NOT** as provided under Rule 2. Paragraph 3 provides that:-

> ***"Additions to the price actually paid or payable shall be made under this paragraph only on the basis of objective and quantifiable data".***

103. The Tribunal notes that Rule 2 provides as hereunder;

> ***" In determining the value for duty purposes of any imported goods, there shall be added to the price actually paid or payable for the goods: -***
>
> ***(a) the cost of transport of the imported goods to the port or place of importation into the Partner State; provided that in case of imports by air no freight costs shall be added to the price paid or payable.***
>
> ***(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation into the Partner State; and***
>
> ***(c) the cost of insurance"***

104. The facts as presented in this case show that the Appellant presented objective and quantifiable evidence of price actually paid. However, the Respondent being dissatisfied with this evidence, adopted the sum assured value which was more than the price actually paid for cost and freight

adjusted for insurance. The Tribunal is of the view that the sum assured is not equivalent to the CIF and should not be deemed to be the customs value. It belongs to a contract of insurance and not the contract for sale of goods. It is the monetary value of an insurable interest payable on occurrence of a misadventure. The price actually paid is the consideration for transfer of ownership. It is provided in the East African Community Customs Valuation Manual at page 19 that:

> ***"It often happens that value for insurance purposes is higher than the selling price. However, if the insured value is considerably higher, this may be an indication of undervaluation".***

105. The Tribunal makes a finding that the customs value of the Appellant's goods should have been made using the price actually paid for the goods and not the sum assured. The goods had been over insured by 10% as agreed between the seller and the Appellant as per industry practice. Furthermore, even if the sum assured values were to be used, they should ideally have been depreciated to take into account local charges incidental to delivery of the goods from the ship to the storage tank where the goods are collectible.

106. The Tribunal therefore determines that the adjustment done by the Respondent on the price actually paid was not done on the basis of objective and quantifiable data as prescribed in Rule 3 of the Fourth Schedule to the ECCMA which in the view of the Tribunal refers to the adjustments in Rule 2, that is freight charges, costs incidental to the goods at the port of loading and insurance premiums and not sum assured. Furthermore, the Respondent was bound to apply Rule 2 of the Fourth Schedule to the ECCMA in accordance with Rule 3 instead of ignoring the Rule 2 and purport to applying Rule 3 as it did in complete disregard of the material provision of Rule 2.

107. As relates to the cost of insurance, it is not disputed that there were two policies related to the goods. One was the FOG comprehensive cover taken by the supplier as per the contract of sale. The other one was the marine insurance cover taken by the Appellant. The Respondent submitted that the cost of insurance incurred by the supplier could not be determined because the supplier did not indicate the premiums paid to its insurer *Societa Italiana Assicurazione Riassicurrazio.* The marine insurance cover taken by the

Appellant from its insurer *Kenindia Assurance Company Ltd* through the *Universal Insurance Broker Ltd was* supported by an insurance debit note. The Appellant used the cost of this local marine insurance cover in its computation of Customs Value. The Respondent rejected this cost of insurance. It stated in its Statement of Facts that *"one cannot insure property that does not belong to them and expect to gain from its loss or otherwise. A contract of insurance based on such premise is defective and of no legal consequence".* The Respondent therefore assessed the cost of insurance at 1.5% of the CFR.

108. The Tribunal is of the View that the marine insurance cover taken by the Appellant had legal consequences and should have been considered in the adjustment of the price actually paid because it had an insurable interest in the goods. Sections 5 and 7 of the Marine Insurance Act Cap 300, Laws of Kenya provide that:-

> ***"5(1) Subject to this Act, every person has an insurable interest who is interested in a marine adventure.***
> ***(2) In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.***
>
> ***6....***
> ***7(1) A defeasible interest is insurable, and a contingent interest is insurable.***
> ***(2) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise."***

109. It is a known position in export business that the ownership of the goods is supposed to change at the port of importation- the seller should deliver the goods on the basis of cost, freight and insurance (CIF). It therefore means that the seller will have taken insurance cover and that the buyer ought to

declare the total costs of the goods to the Respondent for purposes of customs valuation on CIF basis. However, in this case, the Appellant imported goods, declared them to Customs and attached supporting documents which included Customs Clean Report of findings, import declaration Forms, Bill of lading, Commercial invoice Outturn report, cargo Debit notes, and certificate of insurance by **Josovina Commodities PTE limited** and insurance debit note by **Universal Insurance Brokers Limited.**

110. In **Lucena v Craufurd (1806) 2 Bos & PNR 269** it was held that: *"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; interest does not necessarily imply a right to the whole or a part of a thing, not necessarily and exclusively that which may be the subject of privation, but then having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring*

111. In view of the above, the Tribunal concludes that the validity of the cost of insurance incurred by the Appellant in respect of the imported goods was not in question and should have been accepted by the Respondent in adjusting the price actually paid in accordance with Rule 2 of the Fourth Schedule of ECCMA.

112. The upshot of the foregoing is that the decision of the Respondent to adjust the price actually paid on the basis of sum assured and adjusting the insurance actually paid was not in accordance with the provisions of Section 122 and Fourth Schedule to the East African Customs Management Act, 2004.

113. Having made the above finding that the Respondent's adjustment of the customs value as declared by the Appellant on the basis of the sum assured was not in conformity to the provisions of Section 122 and the Fourth Schedule to the ECCMA we hereby find that the statutory provisions governing customs valuation of imported goods was not properly applied by the Respondent and consequently the Respondent is not entitled to demand the extra revenue of Kshs.1, 377,505,229.00 from the Appellant.

114. The upshot of the foregoing is that the Appeal has merits and succeeds.

115. Consequently, the Tribunal makes the following Orders:

a) The Respondent's Tax Assessment vide its letter dated 19th April 2012 for the sum of Kshs.1, 377,505,229.00 is hereby annulled and set aside.

b) There will be no Order as to costs.

116. Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **18th** day of **December, 2020.**

ERIC N. WAFULA
CHAIRMAN

JOSEPHINE K. MAANGI
MEMBER

GABRIEL M. KITENGA
MEMBER