27 March 2019

Global Tax Alert

# Kenya's High Court reiterates importance of proper processes and procedures in taxation

**NEW!** EY Tax News Update: Global Edition

EY's new Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration here.

Also available is our EY Global Tax Alert Library on ey.com.

## Executive summary

The High Court of Kenya has quashed a tax demand that was raised by the Kenya Revenue Authority (KRA) on a taxpayer (Petitioner) on the basis that it did not meet the basic standards of taxation.[1] It was therefore deemed as unreasonable, irrational and unconstitutional.

The Judge reiterated the importance of the KRA adhering to the universally accepted standards of taxation. This was the foundation of the judgment which is likely to establish a precedent in future dealings with the KRA. The KRA was deemed to have violated several principles including: timeliness of tax demands, certainty as well as legitimate expectations.

The Constitution of Kenya also provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

## Detailed discussion

The Petitioner imported rice consignments between 2008 and 2009 from countries other than Pakistan and paid taxes as assessed by the KRA's customs management system – the Simba system. The Simba system erroneously applied a lower import duty rate of 35% on the customs value as opposed to the rate which had been published in the *East African Community Gazette* of 75%.

Building a better working world

The customs officers verified the custom entries made by the Petitioner and even inspected the consignments but did not raise any concerns relating to the lower rate applied by the Simba system. The Petitioner also noticed the anomaly and sought prior clarification in 2007 but the letter was not responded to by the KRA.

The KRA in 2013 raised a tax demand in relation to the additional customs taxes payable by virtue of the lower rate applied at the point of importation of the rice. The Petitioner filed an objection in the High Court of Kenya to contest the tax demand seeking among other orders that the tax demand be quashed and KRA officers estopped from any enforcement of the said tax demand.

The KRA argued that the lower customs duty imposed on the consignments was as a result of a human and system error and the Petitioner ought to have relied on the legal notice which was in place at that point in time.

Normally, the system error would have been corrected by the KRA on inspection of the custom entries requesting the Petitioner to make an additional payment of the underpaid duty through an F147 – Miscellaneous payments document which acts as a communication to the authority regarding underpaid taxes. In this case, the consignments were released unconditionally.

The Court declared the tax demand unconstitutional, quashed it and barred the KRA from enforcing the tax demand. The judgment was based on the following:

- Unfair, irrational and unreasonable delay by the KRA (by almost – four to six years) to conduct the post clearance audit
- Non-responsiveness of the KRA to a clarification sought by the Petitioner
- Failure by the KRA to verify the accuracy of the custom entries and the duty payable prior to clearance of the consignments

## Next steps

Taxpayers should consider if the KRA has followed proper processes and procedures in issuing tax demands to them. The grounds of an appeal should be expanded beyond technical tax issues to the process and procedures of arriving at a tax demand, if applicable.

### Endnote

1. *Export Trading Company vs KRA* (2018) eKLR.

For additional information with respect to this Alert, please contact the following:


**Ernst & Young (Kenya), Nairobi**

- Hadijah Nannyomo hadijah.nannyomo@ke.ey.com
- Robert Maina robert.maina@ke.ey.com
- Emmanuel Makheti emmanuel.makheti@ke.ey.com

**Ernst & Young Advisory Services (Pty) Ltd., Africa ITS Leader, Johannesburg**

- Marius Leivestad marius.leivestad@za.ey.com

**Ernst & Young LLP (United Kingdom), Pan African Tax Desk, London**

- Rendani Neluvhalani rendani.mabel.neluvhalani@uk.ey.com
- Byron Thomas bthomas4@uk.ey.com

**Ernst & Young LLP (United States), Pan African Tax Desk, New York**

- Dele A. Olaogun dele.olaogun@ey.com

EY | Assurance | Tax | Transactions | Advisory

**About EY**
EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.



EYG no. 001027-19Gbl

1508-1600216 NY
ED None



**ey.com**