



Kenya Revenue Authority v Pricewaterhouse Coopers Limited (Income Tax Appeal E044 of 2023) [2024] KEHC 9493 (KLR) (Commercial and Tax) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E044 OF 2023**

WA OKWANY, J

JULY 30, 2024

BETWEEN

KENYA REVENUE AUTHORITY APPELLANT

AND

PRICEWATERHOUSE COOPERS LIMITED RESPONDENT

(Being an Appeal against the Judgment of the Tax Appeals Tribunal delivered on 10th February 2023)

JUDGMENT

1. The Appellant herein is the Commissioner of Domestic Taxes appointed under and in accordance with Section 13 of the [Kenya Revenue Authority Act](#), and is charged with the responsibility of assessing, collecting, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
2. The Respondent is a limited liability company incorporated under the [Companies Act](#).
3. The Respondent claimed tax credits under Section 4 of the [Income Tax Act](#) in respect to the 2015 Income Tax Return. The Appellant thereafter wrote to the Respondent ^{requesting for} the following records in support of the tax credits: -
 - a. Copies of Withholding Certificates and evidence of remittance by the withholders.
 - b. Schedule and copies of remittance/payment advises for payments made outside of iTax in support of credits claimed for each year of income.
 - c. Evidence of special arrangement issued by the CS treasury.



4. It was alleged that the Respondent did not provide the said records nor explain why they claimed tax over payments under section 4 of the [Income Tax Act](#). The Appellant therefore rejected the claim for tax credits and issued additional assessment for Corporation tax for the year of income 2015 in the sum of Kshs 62,993,693/=
5. The Respondent objected to the Appellant's decision and maintained that the Appellant erred in disallowing the tax credits. The Appellant advised the Respondent to take up the matter with the Appellant's Credit Validation team for an amicable resolution of the issue in dispute.
6. Aggrieved by the Appellant's decision to disallow claim for tax credits, the Respondent filed an appeal before the Tax Appeals Tribunal (TAT).
7. The TAT delivered its decision on 10th February, 2023. The Appellant was dissatisfied with the said decision and filed this appeal vide the Memorandum of Appeal dated 11th April, 2023 where it enumerated 5 Grounds of Appeal as follows: -
 - i. The Honourable Tribunal acted in excess of jurisdiction and erred in law and in fact in holding that the Respondents tax credits automatically became available for offset against other taxes or future tax liabilities. A taxpayer is required to apply for refund of overpaid taxes under section 47 of the [Tax Procedures Act](#) in the iTax System.
 - ii. The honourable Tribunal erred in law and in fact by finding that the iTax System was not well configured.
 - iii. The Honourable Tribunal erred in law and fact in disregarding the mandatory provisions of section 42 (1) of the [Tax Procedures Act](#), which is very specific and exclusively deals with offering relief against Double Taxation in the event of any foreign liabilities.
 - iv. The Honourable Tribunal thus erred in law and in fact in disregarding the fundamental rule that tax laws must be interpreted subject to strict construction and when interpreting tax laws Courts and Tribunals should not imply into the provisions of the statutes.
 - v. Thus the Honourable Tribunal erred in law and fact in failing to find that lodging of the Respondent's claim for overpaid taxes under Section 42 of the [Tax Procedures Act](#) was incorrect.
8. The Appellant seeks the following orders in this Appeal: -
 - a. That this Court set aside the entire Judgment of the Honourable Tribunal as it offends the grounds set out herein.
 - b. The Respondent to bear the costs of the Appeal.
 - c. Make such further orders as it may deem fit and just.
9. The Respondent filed its Statement of Facts in response to the Memorandum of Appeal where it outlined the genesis of the dispute when the Appellant issued a notice to all taxpayers, including the Respondent, informing them of the new tax reporting process that required that all income tax reports be filed through the appellant's online system, iTax.
10. The Respondent states that the iTax module that existed at the time they filed their returns, did not provide for the manner in which the excess manual credits could be filed. It states that the appellant issued them with an assessment order dated 29th June, 2021 demanding corporate income tax (CIT) of Kshs 62,993,693/= for the year 2015.



11. The Respondent objected to the CIT which objection the Appellant rejected thus resulting in the appeal to the TAT.
12. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

13. The Appellant submitted that the Respondent did not provide the records or explain why they claimed tax overpayments under Section 4 of the [Income Tax Act](#) thus resulting in the rejection of the objection. The Appellant referred to Section 47 of the [Income Tax Act](#) and argued that overpaid tax should be claimed, through an application in the requisite form, within five years of the overpayment. It was submitted that the Respondent did not make the requisite application and could not therefore fault the Appellant for carrying out its mandate. Reference was made to the decision in [Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others](#) [2014] eKLR & [Republic v Kenya Revenue Authority ex-patre L.A.B International Kenya Limited](#) [2011] eKLR for the argument that the Respondent cannot compel the Appellant to perform a duty that the law does not empower it perform.
14. The Appellant maintained that the Respondent did not provide information or documents to rebut the Appellant's position. The Appellant urged this court to affirm its objection decision and allow the appeal with costs.

Respondent's Submissions

15. The Respondent submitted that in order to comply with the requirement of filing the return on iTax and to avoid losing its accrued withholding tax (WHT) credits on account of manual WHT certificates, the Respondent accounted for the WHT credits under the section provided for credits arising from Section 42 of the [Income Tax Act](#). The Respondent noted that this was the only section that could allow the Respondent on board.
16. The Respondent confirmed did not apply the provisions of Section 42 and only relied on the section provided on iTax which dealt with credits.
17. The Respondent submitted that the tribunal arrived at the correct finding that it was entitled to automatically offset its Withholding Tax (WHT) credits against its 2015 liabilities as eight (8) years had already lapsed yet the Appellant has not concluded its validation of the manual withholding tax certificates after being furnished with the relevant documentation way back during the audit process.

Analysis & Determination

18. I have considered the Record of Appeal and the parties' respective submissions. I find that the main issue for determination is whether the appeal is merited.
19. The crux the instant appeal is the TAT's finding that the Respondent's tax credits automatically became available for offset against other taxes or future tax liabilities. According to the Appellant, a taxpayer is required to apply for refund of overpaid taxes under Section 47 of the [Tax Procedures Act](#) (TPA). The Appellant argued that the TAT disregarded the mandatory provisions of Section 42 (1) of the [Tax Procedures Act](#), which exclusively deals with Double Taxation.



20. Section 56 of the *Tax Procedures Act* provides that: -

In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is wrong.

21. Section 30 of the *Tax Appeal Tribunal Act*, on the other hand, provides that: -

In a proceeding before the Tribunal, the appellant has the burden of proving where an appeal relates to an assessment, that the assessment is excessive.

22. Section 59 (1) of the *TPA* provides as follows: -

(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to:

(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;

(b) Furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice;

(c) Attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.

23. Section 47 of the *Tax Procedures Act*, on the other hand, stipulates as follows: -

“(1) When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within one year of the date on which the tax was paid.

(2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.

(3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application.

(4) Where, in relation to an application for a refund made under this section or made under any other tax law, the Commissioner is satisfied that a taxpayer has overpaid a tax, the Commissioner shall apply the overpayment in the following order—

a. in payment of any other tax owing by the taxpayer under the tax law; and

b. in payment of a tax owing by the taxpayer under any other tax law; and

c. any remainder shall be refunded to the taxpayer.”

24. The TAT extensively reviewed the correspondences between the parties and confirmed that the Appellant issued guidelines relating to tax credits wherein it stated, inter alia, that credits relating to



manual certificates would be subjected to payment validation before being approved for recognition in the iTax system and that invalid credits would be disallowed.

25. The Tribunal also confirmed that the Respondent submitted relevant documentation for validation of its 2015 tax credits to the Appellant's audit team that was, at the time, undertaking an audit on the Respondent's tax transactions which included the tax credits in question. The Tribunal also perused the extract of the return filed by the Respondent in the iTax portal and noted that indeed there was no provision for 'carried forward' credits from the previously manual system of accounting for withholding tax as withheld on payments made to the Respondent by its clients.
26. I note that the Tribunal considered the provisions of Section 47 of the TPA and noted that the TPA's date of assent was 15th December 2015 while the commencement date was 19th January 2016 which meant that as at the time the said Act was coming into force, the Appellant had already accumulated manual withholding tax certificates from the "legacy system". It was further noted that by the time of filing the 2015 return in December 2015, the TPA had not come into force yet the Respondent already had manual withholding tax certificates amounting to Kshs 41,570,953.00 that were available for utilization as credits in relation to corporation tax.
27. After reviewing a copy of the Respondent's return of iTax, the Tribunal found that the iTax system was, at the time of filing, not configured to accommodate the manual certificates that had been accrued by the Respondent since a field was not provided on iTax to enable the Respondent claim its manual certificates.
28. When finding that the Respondent's was entitled to the tax credits, the Tribunal found that certain provisions were not immediately made on iTax system to allow the filing of manual credits. The Tribunal found that it was therefore unfair for the Appellant to disallow the Respondent's credits on the basis of a process that was not in place at the time the returns were filed and that the Respondent was informed about over 3 years after the return.
29. The Tribunal rendered itself as follows: -

" 126. The Tribunal further notes that the Respondent in its pleadings acknowledges that it had advised the Appellant to consult with its Credit Validation Project Team for ledger reconciliation. Further, the Respondent expressly states that the Appellant ought to have followed the correct procedure in law to claim overpayment refunds legally owed to them by the Respondent in place of seeking to invoke the powers of this Honourable Tribunal to get orders based on an illegality and relying on the wrong provision of the law.

127. The above notwithstanding, it is clear to the Tribunal that even as the Respondent claims that a reconciliation process should have been undertaken, the Respondent went ahead to issue a demand letter and eventually an objection decision in a bid to disallow the said credits and assess taxes related to the same period when the credits should have been effected.

128. It is also not lost to the Tribunal that the Respondent categorically states, in its objection decision that, "The process is not meant to deny you the taxpayer-credit, but it is meant to confirm the existence and to update the ledger as required." In this regard, it is clear to the Tribunal that the Respondent stated the above in its objection decision but effectively ended up denying the Appellant its tax credits.



129. Further, it is apparent to the Tribunal that with the change in law to subsume certain processes from the ITA into the TPA, as well as the introduction of the iTax system, certain provisions were not immediately made on iTax, case in point the provision for filing of the manual credits in the instant case.
130. Therefore, the Respondent cannot shift the burden of the lack of provision by its own system to the Appellant. Further, in lieu of this stated provision for credits on iTax, it was incumbent on the Respondent to provide workable alternatives to bridge the gap created by the omission in the system. This would have enabled the Appellant discharge its statutory obligations without having to seek an alternative that was workable within the (new) iTax system.
131. Lastly, the Appellant filed its 2015 return on 31st December 2015 while the Respondent issued the guidelines regarding credits on 23rd August 2019. It is therefore unfounded for the Respondent to issue these guidelines to the Appellant over 3 years after the said return and expect the Appellant to comply with the directive in retrospect. Additionally, it is unfair for the Respondent to then go ahead and disallow the Appellant's credits on the basis of a process that was informed to the Appellant over 3 years after the return had been filed effectively rendering their manual credits "out of time" even for the proposed refunds under Section 47 of the *ITA*."
30. In the impugned judgment, the Tribunal observed that the Appellant acknowledged that the Respondent's was entitled to the tax credits but disallowed the same on the basis of a law that was not in place at the time the tax returns were filed.
31. My finding is that the Tribunal arrived at the correct verdict when it found that the Respondent could not have been expected to comply with a process that was not in existence at the time it filed its returns and that it was informed about 3 years after the said returns were filed. It was not disputed that that during the entire 3 years period, the Appellant did comply with the law by making provision in its tax administration system to be in tandem with the change in law. During the said period, the Appellant did not also raise any issue or reject the tax overpayments claimed as tax credits thereby creating a legitimate expectation to the Respondent that the overpayment claimed as tax credits were valid.
32. My finding is that, in the circumstances of this case, the Respondent was justified in its claim that a legitimate expectation arose in its favour over the tax credits claimed. (See *Krish Commodities Limited v Kenya Revenue Authority* [2018] eKLR).
33. For the reasons that I have stated in this judgment, I find that the instant Appeal is not merited and I therefore dismiss it with cost to the Respondent.
34. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 30TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

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