Commissioner of Domestic Taxes v City Gas East Africa Limited (Income Tax Appeal E059 of 2023) [2024] KEHC 10189 (KLR) (Commercial and Tax) (16 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E059 OF 2023

A MABEYA, J

AUGUST 16, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

CITY GAS EAST AFRICA LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal against the decision of the Tax Appeals Tribunal ("the Tribunal") delivered on 17/3/2023. The appellant received information that the respondent was a dealer in wholesale and resale of LPG gas and started carrying out investigations for the period 2010 to 2019.

2. *Vide* a letter dated 16/6/2020, the appellant shared its findings with the respondent stating that there had been a variance of Kshs. 2,884,665,110/- between the income and bank sales which brought about Corporation Tax of Kshs 895,651,814/-.

3. Vide a letter dated 30/7/2020, the respondent made a response to the appellant's findings where it raised several issues. The parties had several engagements and on 9/3/2021, the appellant issued an assessment of Kshs. 398,448,341/- as Corporation Tax due. The respondent objected to the assessment on 26/3/2021 and the appellant issued an objection decision on 25/5/2021.

4. Aggrieved by that decision, the respondent lodged an appeal at the Tribunal and the Tribunal delivered its judgment on 17/3/2023 allowing the appeal. That has given rise to the present appeal vide a memorandum of appeal dated 12/5/2023. The appeal is premised on four grounds of appeal which can be summarized as follows: -

    a. That the Tribunal erred in shifting the burden of proof to the appellant on proof of fraud despite there being no rebuttal on non-compliance.

b. That the Tribunal erred in finding that the appellant had erred in failing to prove that the data for determining the selling price had been obtained by EPRA.

c. That the Tribunal erred in dismissing all the assessments on taking issue with the selling price and its holding that the appellant should have prosecuted the respondent.

5. The appellant prayed for the appeal be allowed and the objection decision dated 25/5/2021 for tax liability, interest and penalties amounting to Kshs. 398,448,341/- be upheld.

6. The respondent opposed the appeal vide a Statement of Facts dated 21/8/2023. Its case was that the appellant had raided its business premises and confiscated documents, records and equipment's in a bid to ascertain the taxable income of the company. That thereafter, the appellant gave his investigation finding to which the respondent responded.

7. The respondent contended that there was significant variance between the sales which had been established by the appellant and the actual sales contained in the primary documents. That the findings showed substantial amounts in bank transactions which was erroneously treated as income and credit sales which were inexistent of Kshs. 88,947,680/- treated as unreported sales.

8. That on receipt of the assessment, it issued a notice of objection stating that the Commissioner had made assessments on the tax period outside the statutory timelines, the assessment was based on exaggerated average selling process obtained from Energy Regulatory Authority, the primary data transactions it obtained were not considered by the appellant, no consideration on the expenses incurred and the returns already filed and taxes paid.

9. Further, the respondent contended that the appellant failed to prove that the fraud was beyond the 5year period and it relied on annual indicative sales amount that had been claimed to have been obtained from EPRA.

10. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that the Tribunal extended the duty of the appellant beyond what was provided under section 51 of the Tax Procedure Act. That the Tribunal erred in finding that the burden of proof was on the appellant.

11. On whether the Tribunal erred by ignoring data provided by EPRA, it was submitted that the appellant obtained the annual indicative sales amounts from EPRA to determine the quantities and purchase cost of LPG transacted and computed the estimate revenue earned in the years 2016 and 1018.

12. In response, the respondent submitted that in computing the assessment, the appellant ignored the primary data provided by the respondent, in that the appellant used purchase data and treated them as sales, ignored the actual sales and came up with a figure obtained by EPRA and ignored the wear and tear.

13. That the entire process was wrong since the officers who were involved in the investigations were also involved with the objection review process which processes should be separate. That the assessment had been done without regard to the principles of fairness and equity thus abdicating its role under section 29 of the *Tax Procedures Act* ("the *TPA*").

14. It was further submitted that, pursuant to section 29(6) of the *TPA*, the respondent was only entitled to keep records for a period of five years and therefore, the appellant ought to have proved fraud in order to go beyond the five years. That for fraud to be alleged, it had to be sufficiently proved and the appellant did not prefer any charges of fraud. That EPRA did not regulate LPG prices but petroleum

prices. That the appellant failed to elaborate on why it ignored the sales provided by the tax payer and information given by the respondent's customers.

15. The Court has carefully considered the record and the submissions of the parties. On the first ground, the appellant has faulted the Tribunal that it shifted the burden of proof to the appellant in proving that the respondent's actions and dealings were fraudulent.

16. In tax matters, the onus of proof lies with the tax payer. Section 30 of the *Tax Appeals Tribunal Act* and section 56 of the *Tax Procedures Act* are clear that the tax payer bears the burden of proof.

17. In *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* [2022] KEHC 5 (KLR), the court stated as follows: -

> " The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold.
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> A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.

18. Having established that the burden rests with the tax payer, the tax payer is required by section 23 and 59 of the *TPA* to keep records for a period of five years and produce the same when called upon by the Commissioner. However, section 29(6) of the *TPA* allows the Commissioner to make an assessment outside the 5year period where the tax payer is guilty of gross or willful neglect, evasion or fraud.

19. In its judgment, the Tribunal held that the appellant had failed to give proof on the allegations of fraud. The appellant had made an assessment from the documents that he had obtained from the respondent's premises. According to the appellant, it is on review of the said documents that he made the opinion that the respondent had been involved in fraudulent activities.

20. Section 97 of the *TPA* provides: -

> " Any person who, in relation to a tax period, knowingly—
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> a. omits from his or her return any amount which should have been included; or
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> b. claims any relief or refund to which he or she is not entitled; or
>
> c. makes any incorrect statement which affects his or her liability to tax; or
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> d. prepares false books of account or other records relating to that other person or falsifies any such books of account or other records; or
>
> e. deliberately defaults on any obligation imposed under a tax law, commits an offence.

21. In view of the foregoing, a taxpayer would have acted fraudulently if any of the foregoing acts are proved. In the present case, the burden of proof was on the appellant to prove the existence of any of the foregoing on the part of the respondent. The burden was therefore on the appellant to prove that the documents obtained from the respondent demonstrated the existence of fraud.

22. *Halsbury's Laws of England*, 4th Edition, Volume 17, Paragraphs *13* and *14*, posit that: -

> "(13) The legal burden is the burden of proof which, remains constant throughout a trial, it is a burden on establishing the facts and contentions which will support a party's case. If at the conclusion of the trial, he has failed to establish that to the appropriate standard he will lose.
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> (14) The legal burden of proof normally rests with the party desiring the court to take action: thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential element of this case."

23. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000), the court stated that: -

> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

24. In this regard, the appellant was under an obligation to plead and prove that the any or all of the acts set out in section 97 of the *TPA* existed. Having failed to do so, the Tribunal cannot be faulted in holding that the burden was not discharged and therefore the appellant was not entitled to make assessments outside the 5year period provided for by the law.

25. On the second ground, the appellant took issue with the Tribunal's finding that he had erred in failing to show that the data he had used to ascertain the selling price was from EPRA.

26. The appellant's case was that the sales were established by multiplying the purchases with the prices provided by EPRA. That he had exercised his best judgment in arriving at the tax assessment. On this issue, the appellant had provided net sales for the period under review. On its part, the respondent contended that the appellant ought to have obtained the price from the sales records provided instead of coming up with a figure that could not be ascertained.

27. Under section 31 of the *TPA*, the Commissioner is allowed to make additional assessments. In this case, the appellant made an estimate of the sales by using the purchases made by the respondent. There was no reason given as to why the same was preferred since the sales record had been availed. If anything, this information could not have been tampered with since the respondent was ambushed and the records taken before there was time to manipulate them.

28. In this regard, I agree with the Tribunal that where the Commissioner elects to make an estimate on the sales, the variance in the figures should not be too vast to the extent that would prejudice the tax payer. Further, the same ought to be used as a last resort where the taxpayer is unable to avail the documents required. That was not the case here.

29. The respondent complained that the appellant's officers who were in charge of the objection process should have been different from the officers who conducted the investigation. According to the respondent, the objection process was a quasi-judicial review process which requires impartiality.

30. The Court was unable to find any statutory provision to underpin this submission. As to who is to do investigations and conduct the review or objection process, that is an internal obligation that is left the Commissioner. While I appreciate the concerns of the respondent, I find nothing in the law to bar or direct the Commissioner on who to appoint the to carry out investigations and review the objection.

31. In view of the foregoing, this Court finds no merit in the appeal and the same is hereby dismissed. The judgment of the Tribunal delivered on 17/3/2023 is hereby upheld. I make no order as to costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE