James Finlay (Kenya) Limited v Commissioner of Domestic Taxes (Tax Appeal E025 of 2021) [2024] KEHC 16809 (KLR) (Commercial and Tax) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16809 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E025 OF 2021

BM MUSYOKI, J

NOVEMBER 29, 2024

BETWEEN

JAMES FINLAY (KENYA) LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(Appeal arises from judgement of the Tax Appeals Tribunal dated 19-02-2021)

JUDGMENT

1. This appeal arises from judgement of the Tax Appeals Tribunal dated 19-02-2021 in which it upheld the decision of the respondent. The background of the matter is that the appellant applied for a refund claim on Value Added Tax for the tax period of December 2016 amounting to Kshs 831,437.57 which it claimed to be related to tax input related to repair and maintenance of houses for its staff quarters, bathroom, shades and other amenities and consumables such as tea, sugar and drinking water.

2. The appellant based its claim on its believe that the tax input in question fell and fitted in the provisions of Section 17 (4)(b) i and ii of the *Value Added Tax Act*. The respondent disallowed the appellant's application for refund as according to the respondent, the claim was not directly used to make taxable supplies. The appellant objected to the decision of the respondent and by a letter dated 26-06-2018, it confirmed its decision which prompted the appeal to the Tax Appeals Tribunal. The tribunal heard the matter and found that the respondent had not erred in its decision.

3. This appeal was disposed of by way of both oral and written submissions. Although the parties submitted at length and cited many authorities, I form the opinion that the only issue for determination is whether the supplies for which the appellant claimed VAT refund entitled it to deduct the tax input under Section 17(4)(2)(b)(i) and (ii) of the VAT Act 2013. The tribunal in its judgment

found that the said section ousted the appellant from the bracket of the said section. Section 17(1) of the said Act provides that;

> 'Subject to the provision of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies.'

4. There is no much dispute on the above Section which gives the taxpayer the right to deduct input tax from the tax payable while making returns for the relevant period. But it is clear that the said Section makes a qualification that the deductions must be related to supplies that are acquired for purposes of making taxable supplies. In the context of this matter, the deductions the appellant was entitled to must have been accrued from supplies related to its core business of supplying tea and flowers. The qualifications do not end there as Section 17(4)(b) of the same Act provides that;

> 'A registered person shall not deduct input tax under this Act if the tax relates to acquisition of entertainment, restaurant and accommodation services unless;
>
> i. The services are provided in the ordinary course of the business carried on by the person to provide services and the services are not supplied to an associate or employee; or
>
> ii. The services are provided while the recipient is away from home for the purposes of the business of the recipient or the recipient's employer.'

5. The main point of contention in this matter is whether the appellant's case fits in the above qualifying provisions. Whereas the respondent argues that the appellant cannot benefit from the said provisions, the appellant claims that it should qualify to deduct the claims as the input it sought to deduct was perfectly within Section 17(4)(b).

6. On whether the tax input in dispute could was incurred in the course of the business of the appellant, the tribunal did not expressly address itself to that and this court sees no difficulty in finding that it was incurred during the ordinary course of the appellant's business of providing the services since the houses were for exclusive use of its employees. The contentious part is the provision that the law does not allow deductions where such services are provided to employees. The appellant also takes issues with the definition of the word accommodation.

7. The appellant has argued that the provision of housing to its employees could not fall under supplies provided to employees and faults the respondent for having added the word 'direct' into the statute which led to the changing of the meaning of the law. The appellant claims that the word 'direct' is not anywhere in the Section 17(1) and the argument by the respondent that the provision of the housing services was not directly related to the core business of the appellant was wrong. In my view, whether the word 'direct' is used or not, it would not matter much. The clear position as I see it, is that the provision of housing to employees was a service provided in the course of the core business of the appellant whether directly or indirectly but one cannot avoid the clear fact that the same was provided to the appellant's employees.

8. According to the appellant, the housing it was providing to the employees was in compliance with the *Employment Act* where Section 31 obligates the employer to provide housing or adequate housing accommodation to its employees. The respondent on its part argues that the law did not require the

appellant to provide housing to its employees. It is my opinion that the two parties are missing the point on the issue in dispute. The taxation issue we are dealing with does not depend on the whose responsibility it is to provide housing for the employee. Tax laws make provisions for taxation of income and other benefits whether they are mandatory in law or not. Employer/employee relationship may constitute terms, conditions and benefits which may not necessarily be subjected to taxation. The fact that the *Employment Act* requires employers to provide housing does not mean that the law on taxation cannot subject the benefits or supplies related to the same to tax. It will all depend on the wording of the taxation law as passed by the legislating body. On this, I do agree with the citation by the tribunal of decision of Lord Cains in Partington v AG (1869) LR 4 HL thus;

> 'If a person sought to be taxed comes within the letter of the law, he must be taxed however great hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparent within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statue what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you simply adhere to the words of the statute.'

9. This holding in my considered opinion places the appellant squarely on Section 17(4)(b)(i) to the extent that the services in question were proved to the appellant's employees thus the deductions in dispute were prohibited. I cannot see any other interpretation. I take persuasion from the submissions of the respondent where it cites the case of Cape Brandy Syndicate v I.R. Commissioner (1921) 1KB 64 which was adopted in Republic v The Commissioner General; Ex-Parte Equator Bottlers Limited (2020) eKLR which was cited by the appellant herein thus;

> 'In a taxing statute one has to look at what is clearly said. There is no room for any intendment. There is no equity to tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'

10. The appellant has invited the court to find that in the *Income Tax Act*, costs incurred on farm workers are considered to have been wholly and exclusively incurred in production of income and necessary for the proper operation of the farm and that the same should be applied when we come to VAT Act pursuant to pari materia rule of interpretation which posits that laws of the same nature and on the same subject must be construed with reference to each other. To that extent, I agree with the appellant and as I have held above, the cost of providing housing and other welfare needs for the staff by the appellant was perfectly within the costs incurred in generating taxable services. But this does not mean that the VAT Act cannot exclude the input tax related to the services from allowable deductions. It is not for this court to classify or categorise what form of taxes should be applied on particular services or goods.

11. The other point the appellant has taken in the appeal is the definition of the word accommodation. In its opinion, the staff housing is not an accommodation going by the definition of the word in the Oxford Dictionary which defines accommodation as 'room for receiving people especially a place to live or lodgings'. The appellant has also cited Black's Law Dictionary definition of accommodation as 'a convenience supplied by someone especially lodging' and proceeds to urge that the accommodation services provided for in Section 17(4)(b)(i) of the VAT Act relates to acquisition of lodging services and that it did not receive lodgings services from a third party. The appellant is being selective in these definitions by picking out those parts which seem to favour its case and leaving out other parts. For instance, it has left out the part that also describes accommodation as a place to live in.

12. It is common knowledge that one word can have several meanings and interpretation of a provision of the law must be done in context of the subject matter of the Act. The same word 'accommodation' is used in Section 31 of the *Employment Act* the appellant has relied on in its argument that the law requires it to provide housing to its employees. The appellant claims that since the Act does not expressly list staff housing as prohibited from deductions, then the same is allowable. In my view, the Act did not need to expressly use the word housing for such related input deductions to be prohibited. Any other descriptions or use of similar words that would fit the prohibition would be allowable. I hold that the word accommodation in the context of the matter in question is synonymous to housing.

13. The other argument put forward by the appellant is that the employees it houses should be deemed to be working away from home and therefore fit in the bracket of Section 17(4)(b)(ii) of the Act. It is not disputed that the appellant has provided housing for its employees in its vast villages across two counties in order to make it easy for them to get to work. The appellant urges the court to believe that the fact that the employees live in these villages means that they are away from home. Taking that position would mean that description of home is where employees hail from. I don't think that this should be the position. A home of the employee is where he chooses at his convenience, to live in order to attend their ordinary duties and chores. In other words, where they reside in order to attend their duties on daily basis or as when required by their nature of work. Away from home in the context of that Section is a situation where the employees will not be expected to spend their days or nights in their ordinary residence. If the appellant has provided residential houses or villages for its employees, then that is their homes for the purposes of this Section.

14. In the same breath, I find the appellant speaking from the two sides of its mouth in respect of this issue of accommodation. In one instance, it submits that it has provided housing for its employees and therefore entitled to deduct the contentious tax input under Section 17(4)(b)(i) while in another instance, it claims that the accommodation of the employees in the same houses means that they are being accommodated away from home and therefore categorised under Section 17(4)(b)(ii) of the Act. I find the position taken by the appellant wrong.

15. The obvious conclusion from the above analysis is that, I find the appeal lacking in merits and it is hereby dismissed. I make no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in presence of Miss Malik for the appellant and Miss Naeku for the respondent.