Commissioner of Domestic Taxes v Mansart Engineering Limited (Income Tax Appeal E010 of 2023) [2024] KEHC 15208 (KLR) (Commercial and Tax) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15208 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E010 OF 2023

MA OTIENO, J

NOVEMBER 28, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

MANSART ENGINEERING LIMITED ..... RESPONDENT

(An appeal from the Judgment of the Tax Appeals Tribunal delivered on 23rd December 2023 in the Tax Appeal Case No. 577 of 2021)

JUDGMENT

Introduction

1. This is an appeal from the Judgment of the Tax Appeals Tribunal (TAT) delivered on 23rd December 2023 in the TAT Case No. 235 of 2022 where the Tribunal allowed the Respondent's appeal and set aside the Appellant's objection decision dated 12th August 2021.

2. The background of the matter is that sometime in the year 2020, the Respondent ("the taxpayer) was subjected to a tax audit by the Respondent ("the Commissioner") in relation to the tax period for the years of income May 2017 to February 2021.

3. Following the tax audit, the Commissioner issued the taxpayer with a pre-assessment notice dated 11th September 2020 requiring the taxpayer to amend its tax (VAT) returns within 14 days from the date of the notice and pay to the Commissioner the correct taxes (VAT) in relation to undeclared sales to Kenya Rural Roads Authority (KERRA).

4. The Respondent did not amend the returns within the stipulated 14 days as had been directed by the Commissioner. The Commissioner consequently raised an additional VAT assessment on 24th February 2021 for the tax period May 2017 to January 2019 in the sum of Kshs. 1,311,141/-.

5. Dissatisfied with the tax assessment, the Respondent on 19th March 2021 lodged an Objection with the Commissioner, objecting to the additional VAT assessment, requesting to be allowed to amend its returns so as to be able to claim input VAT for the period assessed.

6. On 12th August, the Commissioner issued its Objection Decision on the Respondent's Objection of 19th March 2021, confirming the VAT Assessment of 24th February 2021 on the ground that all the input VAT which the Respondent had sought to claim were time-barred under Section 17(2) of the VAT Act, 2013.

7. The Commissioner therefore confirmed the additional VAT Assessment of Kshs. 1,311,141 confirmed.

8. The Respondent, dissatisfied with the Appellant's Objection Decision, filed an appeal in the Tax Appeals Tribunal, TAT No. No. 235 of 2022, challenging the Commissioner's decision.

9. On 23rd December 2022, the Tribunal rendered its judgment in the matter and allowed the Respondent's appeal on the basis that the Appellant's Objection Decision was issued outside the timelines prescribed under section 51(11) of the *Tax Procedures Act*.

The Appeal

10. Aggrieved by the Judgment of the TAT, the Appellant lodged this appeal vide its Memorandum of Appeal dated 20th February 2023 on the grounds that; -

    i. The Honourable Tribunal failed to appreciate the mandatory provisions of Section 51(3) of the *Tax Procedures Act* with regard to the threshold required for a valid objection.

    ii. Section 51(11) of the *Tax Procedures Act* is a procedural law. the Tribunal ought to have given more weight to the substantive issue as opposed to the procedural technicalities.

    iii. The Tribunal erred in both fact and law by failing to consider the relevant material evidence placed before it and thus arriving at a wrong conclusion.

    iv. The Tribunal issued a judgment without considering the arguments raised by the Appellant in its pleadings and the submissions filed before the Tribunal and thereby giving a one-sided judgment to the detriment of the Appellant contrary to the provisions of Section 29 of the *Tax Appeals Tribunal Act*.

    v. That in any event, the delay was not inordinate given the complexity of tax matters.

11. The appeal was canvased by way of written submissions. The Appellant filed its submissions dated 12th February 2024 whilst the Respondent did not file any submissions despite having been served with the Appellant's submissions and a return of service made in that regard.

12. The Appellant submitted that contrary to the finding by the Tribunal, its Objection Decision of 12th August 2021 was made only thirty-one (31) days after receipt of the requisite information from the Respondent. That this was within the sixty (60) days provided under Section 51(11) of the *Tax Procedures Act*, as it then existed.

13. The Appellant submitted that the Tribunal by concluding that the Objection Decision was issued beyond the statutorily prescribed sixty days fell in error by applying retrogressively, a 2022 amendment of Section 51(11) of the TPA.

14. The Appellant asserted that prior to the amendment in 2022, the *Tax Procedures Act* provided under Section 51(11) of the Act that the sixty days was to start running from the date of receipt of "any further information the Commissioner may require from the taxpayer."

15. Further, on the period within which input VAT is to be claimed, the Appellant submitted that Section 17(2) of the VAT Act restricts the period to six (6) from the date of supply or importation.

16. According to the Appellant, in the instant case, the supplies in question were made between 1st May 2017 and 31st May 2017 and therefore the six months within which the input VAT was to be claimed expired on 30th November 2017. However, the Respondent only claimed input VAT in respect of those supplies on 19th March 2017, which was well over sixteen (16) months from the date of the supply.

17. The Appellant, therefore, submitted that the Respondent's claim was time-barred and therefore the Tribunal ought not have made a decision which has the effect of allowing the Respondent to claim input VAT which is by law prohibited.

18. Finally, the Appellant submitted that the Tribunal erred in failing to appreciate that section 17 of the VAT Act only allows deduction of input VAT where, among others, the taxpayer provides requisite documentation under Section 17(3) in support of the claim. That in the instant case, no such documentation was provided and therefore the Respondent's objection was not valid as required under Section 51(3) of the *Tax Procedures Act*.

19. The Appellant therefore urged this court to allow the appeal with costs and set aside the Tribal Judgment and Order.

Analysis and determination

20. This is an appeal from the Tax Appeals Tribunal to this court pursuant to Section 53 of the *Tax Procedures Act*, Cap. 469A of the Laws of Kenya which provides as follows; -

> " 53. A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the *Tax Appeals Tribunal Act* (Cap. 469A)"

21. Further Section 32 of the *Tax Appeals Tribunal Act* (Cap. 469A) provides that appeals from the Tribunal lie with the High Court and that the rules applicable in the High Court are those set out by the Chief Justice.

> " 32.
>
> (1) Appeals to the High Court on decisions of the Tribunal (1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.
>
> (2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice."

22. The Appeal to this court from the decision of the Tribunal being one limited to the points of law only, this court is not therefore expected to entertain an invitation to interfere with the factual findings of the Tribunal, except where it is shown that the Tribunal considered matters it should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse (See: Stanley N. Muriithi and Another versus Bernard Munene Ithiga (2016) eKLR).

23. In Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR the Court of Appeal, distinguishing between matters of law and matters of fact stated as follows: -

> " First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it, and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

24. Again, in Charles Kipkoech Leting v Express (K) Ltd and another [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That it should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated as follows; -

> " This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi and Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

25. I have carefully reviewed and considered the Appellant's memorandum of appeal dated 20th February 2023, the record of appeal, and the Appellant's submissions in support thereof and note that the only issues for determination in this appeal are as follows; -

    i. Whether the Respondent's application for amendment under section 31 of the *Tax Procedures Act* was accepted by the Appellant.

    ii. Whether the Objection Decision was issued within statutory timelines

26. I will first examine whether the Respondent's application for amendment was accepted by the Appellant and thereafter proceed to determine whether the Appellant's Objection Decision of 12th August 2021 was made within the prescribed statutory timelines.

Whether the Respondent's application for amendment under section 31 of the *Tax Procedures Act* was accepted by the Appellant

27. Section 17 of the VAT Act provides for credit of input tax against input tax in the following terms; -

> " 17. Credit for input tax against output tax
>
> 1. Subject to the provisions of this Act 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.
>
> 2. If, at the time when a deduction for input tax would otherwise be allowable under subsection (1),
>
> (a) the person does not hold the documentation referred to in subsection (3), or
>
> (b) the registered supplier has not declared the sales invoice in a return, the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation.
>
> Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.
>
> 3. The documentation for the purposes of subsection (2) shall be—
>
> a. an original tax invoice issued for the supply or a certified copy;
>
> b. a customs entry duly certified by the proper officer and a receipt for the payment of tax;
>
> c. a customs receipt and a certificate signed by the proper officer stating the amount of tax paid, in the case of goods purchased from a customs auction;
>
> d. a credit note in the case of input tax deducted under section 16(2); or;
>
> e. a debit note in the case of input tax deducted under section 16(5). [Emphasis added]

28. From the above provisions of the law, it is apparent that a taxpayer is by law authorized to deduct input tax incurred on a taxable supply or importation. However, the limitation is that such a deduction is only legally permitted where the same is done within 6 months from the date of the supply or importation to which the input relates.

29. It is also a further requirement under Section 17(2) of the VAT Act that for a deduction of input VAT to be allowed under Section 17(1), the trader/taxpayer must first be in possession of the documents enumerated under subsection (3) thereof which includes, original tax invoice issued from its supplier, customs entry and evidence of payment (in case of importations), credit notes and debit notes.

30. In the instant case, it is evident from the record of appeal that the Appellant audited the Respondent's tax affairs for the period May 2017 to January 2019. That after noticing that there was an underpayment of the taxes, the Appellant vide its pre-assessment notice dated 11th September 2020 gave notice to the Respondent to amend its taxes and pay the correct taxes.

31. It is important to note at this point that pursuant to the six-month restriction imposed under section 17(2) for taxpayers to claim input VAT, supplies that were made by the Respondent for the period covered by the tax audit ought to have been claimed latest six months after January 2019, that is by July 2019. Input VAT for supplies that were made in May 2017 ought to have been claimed six months thereafter, that is, by November 2017.

32. However, the Respondent herein, in its submissions dated 9th May 2022 before the Tribunal argued that they had by their letters of 26th June 2017 and 26th February 2019 sought the Appellant's assistance to amend their returns under section 31 of the *Tax Procedures Act* so as to claim the input VAT for the period and supplies in question.

33. There was however no evidence that the returns were amended. In fact, the Appellant in its Objection Decision denied ever receiving the two letters by the Respondent. According to the Appellant, the two letters did not have any stamp from the Appellant acknowledging receipt.

34. I note that the Tribunal in its Judgment (Paragraphs 37-42) after examining the evidence adduced by the parties on the two letters, found in favour of the Respondent stating that they were convinced that the letters by the Respondent and the accompanying documents were received by the Appellant's officer, one Salina Kigen on the 26th June 2017 and 26th February 2019. Consequently, the Tribunal was therefore satisfied that the documents were submitted by the Appellant within the six months required in law.

35. I have painstakingly perused the record of appeal and note that copies of the two letters (of 26th June 2017 and 26th February 2019) by the Respondent appear to be the ones attached at pages 113 and 114 of the record of appeal. However, they are ineligible and this court cannot make any meaningful determination based on the two letters. For instance, it is not clear from the copies of the two letters attached to the record of appeal whether the documents enumerated under section 17(3) of the VAT Act were indeed forwarded by the Respondent to the Appellant as alleged.

36. Section 31 of the *Tax Procedures Act* permits taxpayers who have made self-assessments to apply to the Commissioner for the amendment of the self-assessment within a period of five (5) years from the date of the Assessment. The Section also gives the Commissioner the discretion to either reject or accept the amended self-assessment; and where he rejects the amendments, then he is to provide the reasons thereof to the taxpayer within thirty (30) days from the date of receipt of the application.

37. The Applicable provisions of Section 31(2) of the *Tax Procedures Act* provides as follows; -

> " 31. Amendment of assessments
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> 1. ----------
>
> 2. A taxpayer who has made a self-assessment may apply to the Commissioner, within the period specified in subsection (4)(b)(i), to make an amendment to the taxpayer's self-assessment.
>
> 3. Where an amended self-assessment return has been submitted under subsection (2), the Commissioner may accept or reject the amended self-assessment return and where he rejects, he shall furnish the taxpayer with the reasons for such rejection within thirty days of receiving the application.
>
> 4. The Commissioner may amend an assessment—
>
> a. in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or
>
> b. in any other case, within five years of—
>
> i. for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or
>
> ii. for any other assessment, the date the Commissioner notified the taxpayer of the assessment:
>
> Provided that in the case of value-added tax, the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred."

38. From a reading of section 31 of the *Tax Procedures Act*, it is evident that the law does not specify whether the application for amendment is to be done manually (as was the case herein) or electronically (on i-tax).

39. In view of the finding by the Tribunal that Respondent proved on a balance of probabilities, that they submitted the application for amendment of the returns in question to the Appellant within the timelines, which finding I agree with, the Appellant had, a period of thirty (30) days from the date receipt, to either accept or reject the amendments as proposed in the letter.

40. It is clear from the record that the amendments were not accepted by the Appellant. It is also clear that the Appellant did not communicate to the Respondent its rejection of the proposed amendments. The question then, is, what would be the consequence of such an action on the part of the Appellant? would it then mean that the amendments as proposed by the Respondent were automatically accepted upon the expiry of the 30 days stipulated under Section 31(2) of the Act?

41. Section 31(2) does not prescribe any consequence for the failure on the part of the Appellant to communicate its rejection of an amendment proposed by a taxpayer under that section of the Act.

42. It is trite law that in tax law, where there is any ambiguity, then such ambiguity is to be construed in favour of the taxpayer. See the Court of Appeal [DK Musinga, HA Omondi, KI Laibuta] in the case of Kenya Revenue Authority v Waweru and 3 others; Institute of Certified Public Accountants and 2 others (Interested Parties) (Civil Appeal E591 of 2021) [2022] KECA 1306 (KLR) (2 December 2022) (Judgment) where the Court stated that; -

> " As a general rule when a taxing provision was ambiguous, it had to be construed in favour of the assessee. Such an interpretation was also in consonance with ordinary notions of equity and fairness, and would further fortify the trial court in adopting such a course of interpretation. The concept of fair taxation or a fair tax burden had no linear definition. The threshold for fairness was ensuring that everyone bore their fair share of taxation and paid the correct amount which was seen to be fair by vigorous pursuit of tax avoidance and evasion."

43. For the above reasons, I find and hold that the Appellant was deemed to have accepted the Respondent's application for amendment and that the documents submitted vide the Respondent's letters of 26th June 2017 and 26th February 2019 were accepted by the Appellant to be in conformity with those specified under Section 17(3) of the VAT Act.

Whether the Objection Decision was issued within the statutory timelines

44. The second issue for determination by this court is whether the Appellant's Objection Decision of 12th August 2021 was made within the statutory timelines.

45. Section 51 of the *Tax Procedures Act*, as of the date of the Appellant's Objection Decision (12th August 2021), provided as follows; -

> " 51. Objection to tax decision
>
> 1. A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.
>
> 2. A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.
>
> 3. A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—
>
> (a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and
>
> (b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute, or has applied for an extension of time to pay the tax not in dispute under section 33(1).

(c) all the relevant documents relating to the objection have been submitted.

4. Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.

5. Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

6. A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

7. The Commissioner may allow an application for the extension of time to file a notice of objection if—

a. the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

b. the taxpayer did not unreasonably delay in lodging the notice of objection.

8. Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

9. The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

10. An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

11. The Commissioner shall make the objection decision within sixty days from the date of receipt of—

a. the notice of objection; or

b. any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed." [Emphasis added]

46. The Appellant in this appeal submitted that contrary to the finding by the Tribunal, the Appellant's Objection Decision of 12th August 2021 was made within thirty-one (31) from the date of receipt of the requisite information from the Respondent. That this was well within the sixty (60) days provided under Section 51(11) of the *Tax Procedures Act*, as it then stood.

47. I have carefully reviewed the record of appeal and note that the Respondent objected to the tax Assessment vide its letter of 19th March 2021 and that the Appellant issued its Objection Decision thereon on 12th August 2021. This obviously, is a period in excess of the sixty (60) days permitted under Section 51(11) of the *Tax Procedures Act*.

48. Further, I find as unmeritorious, the Appellant's argument that the Objection Decision was issued within 31 days from the date of receipt of additional documents or information from the Respondent. There is nothing in the record demonstrating this neither has the Appellant demonstrated the same in its submissions in this appeal.

49. In any event, the Appellant has not demonstrated to this court any special reason why the subject Objection Decision should be upheld despite having been issued outside the sixty days prescribed under Section 51(11) of the *Tax Procedures Act*.

50. For the above reasons, I find no reason to depart from the finding of the Tribunal. I hereby uphold the same.

51. Accordingly, the Appeal fails and is hereby dismissed.

52. The Respondent having not participated in this appeal, no costs have been awarded in its favour.

53. It is so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant

.....for the Appellant.

..... for the Respondent.