



Autopress Limited v Commissioner Customs and Border Control (Customs Tax Appeal E003 of 2020) [2023] KEHC 1460 (KLR) (Commercial and Tax) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E003 OF 2020**

A MABEYA, J

FEBRUARY 28, 2023

BETWEEN

AUTOXPRESS LIMITED APPELLANT

AND

COMMISSIONER CUSTOMS AND BORDER CONTROL RESPONDENT

(Being an appeal from the judgment of the Tax Appeals Tribunal delivered at Nairobi on 28th August 2020 in Tax Appeal No 33 of 2018)

JUDGMENT

1. The appellant informed the respondent of unfair trading practices by traders who created unfair competition by smuggling and under invoicing tires brought to the country. The respondent acted on the information supplied by the appellant and in the process the duty on imported goods went high and caused excessive delays in processing the appellants import documents.
2. The appellant was subjected to demurrage charges and communicated the same to the respondent but no response was given by the respondent. The appellant made an application for refund of duty and demurrage charges and in a letter dated 28/2/2018, the respondent dismissed the application. Aggrieved by that decision, the appellant filed an appeal at the Tax Appeals Tribunal (“the Tribunal”) and by a judgment delivered on 28/8/2020, the appeal was dismissed.
3. Being dissatisfied by the judgment, the appellant appealed to this court setting out four grounds of appeal which was basically that the Tribunal erred in holding that the matter relating to refund of demurrage falls out of its jurisdiction.
4. In opposition to the appeal, the respondent filed its statement of facts dated 25/2/2022. His case was that the Tribunal did not err in holding that the matter relating to demurrage fell outside its jurisdiction



and therefore could not proceed to make a ruling on matters related to demurrage. It was contended that the issue of demurrage was a matter of contract between itself and the shipping company and not from any tax laws. That the request for payment of demurrage was akin to asking for damages and the Tribunal did not have power to grant the same.

5. The appeal was canvassed by way of written submissions which I have considered.
6. The appellant submitted that the respondent's decision to reject the application for refund of the duty paid amounted to a tax decision under which the Tribunal has jurisdiction. Counsel submitted that the jurisdiction of the Tribunal was derived from the [Tax Appeals Tribunal Act](#) to determine the refund decision of demurrage. It was submitted that the Tribunal failed to give reasons for its decision on not having jurisdiction to determine the issue of demurrage.
7. On the other hand, the respondent submitted that demurrage was a payment arising out of a contract between two independent parties and was therefore out of the purview of the respondent. That the respondent could not associate itself with the payment of demurrage as there was no tax decision with relation to demurrage. Counsel submitted that the Tribunal did not have the jurisdiction to decide on issues of demurrage as it did not consist of a tax decision. That the respondent was not a party to the private contract and thus was not liable to pay demurrage.
8. I have considered the record, the statement of facts and the submissions on record. The issue for determination is whether the Tribunal had jurisdiction on matters relating to refund of demurrage.
9. It was the appellants case that the respondent delayed in processing the appellants import documents and as a result the appellant was subjected to demurrage charges. The appellant faults the Tribunal for holding that the issue of demurrage charges was not within its jurisdiction and could therefore not address it.
10. In Black Law Dictionary (10th Edition) Demurrage is defined as; "a charge due for the late return of ocean containers or equipment".
11. The respondent's contention was that the issue of demurrage was a matter of contract and was therefore not related to tax laws. The Tax Appeals Procedure Act defines an appealable decision as: -
 - (a) a tax decision; or
 - (b) a decision made in the course of making a tax decision;
12. Further, a tax decision is defined as;
 - (a) an assessment;
 - (b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;
 - (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under sections 15, 17, and 18;
 - (d) a decision on an application by a self-assessment taxpayer under section 31(2);
 - (e) a refund decision;
 - (f) a decision under section 48 requiring repayment of a refund; or
 - (g) a demand for a penalty;



13. The appellants position is that the respondent's actions led it to incur additional charges and in this case demurrage charges. From the foregoing discussion, an appealable decision is either an objection decision or any other decision made in the course of making a tax decision. In my view, the letter dated 28/2/2018 was neither a tax decision or an assessment of tax. It cannot be said that the same qualifies as an appealable decision under the Act.
14. The *Tax Procedures Act* under section 52 sets out the jurisdiction of the Tax Appeals Tribunal. It states: -
- “(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the *Tax Appeals Tribunal Act*, 2013 (No. 40 of 2013).
- (2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”
15. Similarly, section 12 of the *Tax Appeals Tribunal Act* provides: -
- “A person who disputes the decision of the commissioner on any matter arising under the provisions of any tax law, subject to the provisions of the relevant tax law, upon giving notice to the commissioner, appeal to the tribunal
- Provided that such person shall before appealing pay a non-refundable fee of twenty thousand shillings.”
16. In view of the foregoing, the issue of demurrage charges is not a tax decision or a decision made in the course of a tax decision. The jurisdiction of the Tribunal is limited to appealable decisions and therefore the Tribunal was right in holding that it lacked jurisdiction to deal with demurrage charges.
17. In the upshot, I find no merit in the appeal and dismiss the same with costs. The Judgment of the Tribunal dated 28/8/2020 is hereby upheld.
- It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2023.

A. MABEYA, FCIArb

JUDGE

