



**OML Africa Logistics Limited v Kenya Revenue Authority (Tax Appeal E037 of 2021)
[2023] KEHC 1211 (KLR) (Commercial & Admiralty) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
TAX APPEAL E037 OF 2021
A MSHILA, J
FEBRUARY 17, 2023**

BETWEEN

OML AFRICA LOGISTICS LIMITED APPELLANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

*(Being an appeal from the Tax Appeals Tribunal of Kenya at Nairobi Registry
in Tax Appeals Tribunal No.352 of 2018 delivered on 9th April, 2021.)*

JUDGMENT

Background

1. The Respondent in this matter identified the Appellant for a documents verification exercise via a notice dated 8th March, 2018 to verify the appellant's business transaction with oil and gas exploration companies. Consequently the respondent issued its audit findings on pay as you earn (PAYE) dated 4th September, 2018 claiming kshs. 18,211,311.00 including penalties and interest for the period of July 2015 and March 2017.
2. The Appellant raised an objection to the assessment through a letter dated 28th September, 2018 stating that meals and accommodation costs do not constitute a taxable benefit because they were provided for security reasons and for better performance of employees' duties. The meals and accommodation were in any way provided by the appellant's client, Tulow Kenya BV, which would then charge the appellant at a specified rate.
3. The Respondent replied to the appellant through a letter dated 12th October, 2018 reaffirming its earlier tax demand of kshs.18,211,331.00. The respondent stated that provision of meals and accommodation for security reasons and better performance of employees' duties is not an exemption



from tax under the *Income Tax Act* and hence lacks legal basis. According to the appellant's and Tullow Kenya BV's contract, the appellant has the obligation to pay taxes payable against benefits paid to its personnel.

4. This prompted the appellant to file an appeal before the Tax Appeals Tribunal (the Tribunal) seeking the Tribunal to set aside the decision of the respondent dated 12th October, 2018 and to restrain the respondent from undertaking any enforcement measures against the appellant with a view to collecting the sum of kshs.18,211,331.00 including penalties and interest. The appellant argued that the respondent erred in fact and in law in dismissing the appellant's objection of the demand notice dated 28th September, 2018. Further the respondent erred in fact and in law in assessing the PAYE of kshs.18,211,331.00 for the period of July 2015 to March 2017 by treating accommodation and meals provided to its employees as taxable benefit.
5. The Tribunal held in favour of the respondent that meals and accommodation given to the appellant's employees amount to taxable benefit for purposes of the *Income Tax Act*. The appellant filed the instant appeal based on the following grounds in its amended memorandum of appeal dated 22nd June, 2021;-
 - a. The Tribunal erred in law by misinterpreting section 3 (2)(a) (ii) of the *Income Tax Act* on "benefits, gains and/or profit".
 - b. The Tribunal erred in law by treating the meals and accommodation as a taxable benefit pursuant to section 3(2)(a)(ii) of the *Income Tax Act*.
 - c. The Tribunal misapplied section 5(2)(a)(ii) of the *Income Tax Act* and erred in law by failing to exclude the expenditure on meals and accommodation provided to the employees out of their ordinary work station.
6. Counsel for both parties were directed to file written submissions and highlighted them in support of their respective cases as follows;

The Appellant's Submissions

7. The appellant submitted that the accommodation and meals provided to its employees did not meet the threshold of the statutory provision for taxable income under sections 3(2)(a)(ii) and 5(2)(a) of the *Income Tax Act*. The appellant relied on the Black's Law Dictionary 2nd Edition which defines "benefit" as advantage, profit or privilege while in the realm of income taxation benefit is anything that brings economic gain.
8. The appellant only dispatched its employees to provide services to Tullow Kenya BV from time to time. The employees performed their duties outside their usual work station hence it was necessary to provide them with accommodation and meals. The appellant relied on section 3 clause 4.6.10 of its contract with Tullow Kenya BV which provides that the purpose of providing meals and accommodation was to enable its employees to perform their duties.
9. The appellant also relied on *Reed v Cattermole* (H.M Inspector of Taxes) (1) (1935-1938) 21 Tc 35 where it was held;-

"I think that all the cases were really decided upon the view expressed by Tindal C.J in the case of *Dobson v Jones* (1), that the residence was for the interest of the employer and for the more effectual performance of the service required from the officer."



10. There was no gain or profit to the employees. They only occupied the premises at the camps temporarily. They would vacate them and return to their usual work station when their services were not needed at Tullow Kenya BV's site. They were not receiving any monetary compensation or allowance to stay at the premises.
11. The provision of meals and accommodation was necessary since the site was remote and the employees' security was at risk. The local area also did not have hospitality facilities hence giving an allowance to employees to find a place to live was impossible. There are four instances in which an employee can be provided with accommodation without triggering tax charges which apply to the appellant's case as follows;-
 - a. Where the provision of accommodation is necessary for the proper performance of the duties of the employment.
 - b. Where the provision of accommodation is necessary for the better performance of the employee's duties and it is customary for accommodation to be provided.
 - c. The accommodation is provided as a result of a security threat.
 - d. The job is regarded as having representative occupier status.
12. Nothing went to the pockets of the employees to amount to a taxable income. For the Tribunal to hold in favour of the respondent it was necessary that the following should have been proved;-
 - a. The meals and accommodation were for the benefit and convenience of the employees; and
 - b. The employees got an economic gain out of the provision of the meals and accommodation.
13. The provision of accommodation to employees falls under the limb of "necessary test" hence exempted from taxation because;-
 - a. The employees had to live there for the proper performance of their work;
 - b. The employees had to live there due to the security risk posed in the area;
 - c. There were no alternative accommodation facilities in close proximity to the work area;
 - d. It was contractual for the employees to live in the area provided.
14. The Tribunal used the appellant's and Tullow Kenya BV's contract to determine tax liability. This was wrong since a contract cannot be used to impose a tax obligation where there is no specific legal provision. The contractual clause was in any way general and not specific to the instant case. The appellant urged this Court to agree with its position and allow the amended memorandum of appeal dated 22nd June, 2021 with costs to the appellant.

Respondent's Submissions

15. The respondent relied on its written submission which it highlighted and the statement of facts dated 6th August, 2021. It contended that PAYE assessment against the appellant was raised in accordance with the [Income Tax Act](#) and the agreement between the appellant and Tullow Kenya



- BV. The appellant's assertion that the accommodation was provided for security reasons and better performance of employees' duties lacks any legal basis in law. There is no such express exemption under the *Income Tax Act*.
16. The respondent relied on Republic v Kenya Revenue Authority ex-parte Bata Shoe Company (Kenya) Limited [2014]eKLR and Mount Kenya Bottlers Ltd & 3 Others v Attorney General & 3 Others [2019]eKLR to support the position that tax laws are to be interpreted strictly and that there is no room for intendment.
 17. The PAYE assessed by the respondent was chargeable, due and payable according to sections 3(2)(ii) and 5(2)(a)(ii) of the *Income Tax Act*. The Tribunal therefore properly interpreted the law and the agreement between the appellant and Tullow Kenya BV.
 18. The obligation to pay tax overrides the inconvenience to be endured by the taxpayer even when it looks inequitable to demand the tax. The Respondent relied on Republic v Kenya Revenue Authority ex parte Bata Shoe Company (Kenya) Limited [2014]eKLR where it was observed that payment of tax is an obligation imposed by law. It is not voluntary. A taxpayer is not obliged to pay a single coin more than is due and the taxman is entitled to collect up to the last coin that is due. The Respondent also relied on Mount Kenya Bottlers Limited & 3 Others v Attorney General & 3 Others [2012]eKLR where it was held that whether the taxation is unfair, harsh or inequitable cannot be the reason for holding that it should not be imposed.
 19. The Tribunal was right that accommodation fell under "gains or profits" defined in section 5(2)(a) (ii) as the list of such gains and profits is non-exhaustive. The respondent did not rely on section 5(4) (f) of the *Income Tax Act* to charge PAYE as alleged by the appellant. The respondent also relied on Helpage International v Commissioner of Domestic Taxes [2017]eKLR where it was held that while the petitioner's work was commendable, the obligation to pay taxes cannot be wished away.
 20. The respondent was also guided by section 5(4)(f) of the *Income Tax Act* which recognizes meals as a taxable benefit and deducted the exemption of forty-eight thousand per year as required by the said provision. Whereas the respondent used its best judgment and correct provisions of law, the appellant did not discharge its evidentiary burden of proof in demonstrating that the assessment was incorrect or excessive.
 21. According to clause 4.6.10 of section 3 of the service agreement between the appellant and Tullow Kenya BV, Tullow Kenya BV would provide meals and accommodation to the appellant's employees but it was the appellant who would bear the costs. The effect of this back charging is that the costs of meals and accommodation incurred by Tullow Kenya BV was offset against the contract sum accruing to the appellant as a sub-contractor. These costs were expensed in the appellant's books supporting the respondent's assertion that they were benefits to the appellant's employees chargeable for PAYE.
 22. The respondent relied on section 107(1) of the *Evidence Act* which states that the burden of proof is on the person wishing the court to give judgment on existence of a set of facts. The respondent also cited section 37(1) of the *Income Tax Act* which requires the employer to deduct taxes from its employees' emoluments. The respondent prayed that the appeal be dismissed to avert the substantial loss to the Government in terms of tax revenue.

Issues for Determination

23. This appeal raises the following issues for determination;-
 - a. Whether the meals and accommodation provided to the appellant's employees were a taxable benefit;



- b. If a) is answered in the affirmative, whether there was double taxation.

Analysis

24. Section 3 (2) (a) of the *Income Tax Act* recognizes gains or profits from any employment or services rendered as taxable in the following manner;-

“(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—

(a) gains or profits from—

- (i) any business, for whatever period of time carried on;
- (ii) any employment or services rendered;
- (iii) any right granted to any other person for use or occupation of property;”

25. Section 5 (2) (a) illustrates what amounts to gains or profits as follows;-

“(2) For the purposes of section 3(2)(a)(ii) “gains or profits” includes—

- a. any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income:

Provided that—

- i. where any such amount is received in respect of a year of income which expired earlier than four years prior to the year of income in which it was received, or prior to the year of income in which the employment or services ceased, if earlier, it shall be deemed to be income of the year of income which expired five years prior to the year of income in which it was received, or prior to



the year of income in which the employment or services ceased as the case may be; and

- ii. where the Commissioner is satisfied that subsistence, travelling, entertainment or other allowance represents solely the reimbursement to the recipient of an amount expended by him wholly and exclusively in the production of his income from the employment or services rendered then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure; and
- iii. notwithstanding the provisions of subparagraph (ii), where such amount is received by an employee as payment of subsistence, travelling, entertainment or other allowance, in respect of a period spent outside his usual place of work while on official duties, the first two thousand shillings per day expended by him for the duration of that period shall be deemed to be reimbursement of the amount so expended and shall be excluded in the calculation of his gains or profits;”

26. Section 5(4)(f) excludes the following from the inclusion as gains and profits;-

“(4) Notwithstanding anything to the contrary in subsection (2) “gains or profits” do not include—

- (f) the value of meals served to employees in a canteen or cafeteria operated or established by the employer or provided by a third party who is a registered taxpayer (whether the meals are supplied in the premises of the employer or the premises of the third party) where the value of the meal does not exceed the sum of forty-



eight thousand shillings per year per employee subject to such conditions as the Commissioner may specify;”

Whether the meals and accommodation provided to the appellant’s employees were taxable;

27. The Appellant argued that since meals and accommodation were offered temporarily when its employees offered services to its client, Tullow Kenya BV, the said meals and accommodation could not be subjected to tax. The meals and accommodation were not provided for the convenience of the employees but as a necessity due to security issues in the local area and that hospitality services were not available in the area. Further the meals and accommodation were given for better performance of employees’ duties. The respondent contended that the meals and accommodation were chargeable to PAYE in accordance with sections 5(2)(a) and 3(2)(a)(ii) of the *Income Tax Act* because the meals and accommodation were expensed in the appellant’s financial documents and hence not reimbursable allowances excluded under section 5(2)(a)(ii) of the Act.
28. The resolution of this appeal lies in the proper interpretation of the above-outlined *Income Tax Act* provisions. A plethora of case law including *Republic v Commissioner of Domestic Taxes Large Taxpayer’s Office Ex-Parte Barclays Bank of Kenya Ltd* [2012] eKLR, *Kenya Bankers Association v Kenya Revenue Authority* [2018] eKLR, *Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others* [2019] eKLR and *Kenya Revenue Authority v Universal Corporation Ltd* [2020] eKLR reiterate the established principles that tax legislation must be interpreted strictly without implication or intendment and that any ambiguity in the statute must be resolved in favour of the tax payer.
29. The Court of Appeal in *Commissioner of Domestic Taxes (Large Taxpayers Officers) v Barclays Bank of Kenya Ltd NRB CA Civil Appeal No. 195 of 2017* [2020] eKLR succinctly expounded these principles as follows:-

“There is no doubt in our minds that the decisions in *Adamson v Attorney General* [1933] AC 247, *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1920] 1 KB 64, *T. M. Bell v. Commissioner of Income Tax* [1960] EA 224, *Republic v. Commissioner of Income Tax ex parte SDV Transami* [2005] eKLR and the first judgment represent a correct statement of the law, namely strict construction of tax legislation, so that the tax demand must fall within the terms of the statute without ambiguity. If there’s any ambiguity in the legislation, it is not to be rectified by considerations of intendment, but by amending the legislation. However, determination of whether there is clarity or ambiguity in the legislation or whether a tax demand is precise and within the terms of the legislation, is not an abstract or pedantic exercise. It must be based on the evidence and the circumstances of each case. We agree with the majority of this Court in *Stanbic Bank Ltd v. Kenya Revenue Authority* [2009] eKLR that meaning of words should not be strained so as to find ambiguity.”

30. The import of section 3(2)(ii) (a) of the *Income Tax Act* is that it identifies gains or profits from employment as chargeable to tax under the Act. The definition of gains or profits under section 5(2)(a) is inclusive in nature and properly fits meals and accommodation provided to employees in its ambit. The provision states:-

- “(2) For the purposes of section 3(2)(a)(ii) “gains or profits” includes—
- b. any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other



allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income.”

31. The appellant alleged that some instances of provision of meals and accommodation to employees do not trigger tax charges. These include where such meals and accommodation are provided for proper performance; they are necessary since there are no alternatives due to situations such as security or occupier representative status. These exemptions to the charging provisions of the *Income Tax Act* are however not in the Act and cannot be read into it.
32. The English decision cited by the appellant, *Reed v Cattermole* (H.M Inspector of Taxes)(1) (1935-1938) is distinguishable and such a persuasive authority cannot override clear provisions of an Act of parliament. Exemptions to the charging provisions of the *Income Tax Act* can be traced throughout the Act but the appellant has neither relied on them nor proved their applicability to its case. These exemptions include the provisions cited above as follows;-
 - a. Section 5(4)(f) of the *Income Tax Act* which explicitly excludes from tax meals provided to employees whose value does not exceed the sum of forty-eighty thousand shillings per year per employee. The respondent stated that it took this into consideration in its detailed assessment.
 - b. Under section 5(2)(a)(ii) of the *Income Tax Act* the commissioner is required to exclude from tax any gains or profits received as reimbursement allowance for amounts expended wholly and exclusively in production of the employee’s income. The respondent indicated that this was not discernable from the appellant’s books and hence the meals and accommodation could not be treated as reimbursement.
 - c. Under section 5(2)(a)(iii) of the *Income Tax Act* even where an employee receives an allowance for period spent outside the usual place of work, the first two thousand shillings per day should be excluded from gains and profits for purposes of tax.
33. For the above reasons, this court is satisfied that the meals and accommodation provided to the Appellant’s employees were a taxable benefit.

If a) is answered in the affirmative, whether there was double taxation;

34. The Respondent’s counsel superficially mentioned in highlighting of its submission that there was double taxation since the caterer already paid for the taxes. The respondent had the burden to set out the details of the tax to alleviate the possibility of double taxation. The Respondent stated that there was no evidence of double taxation before the Tribunal. According to the agreement between the appellant and Tullow Kenya BV, the Appellant was supposed to account for its own taxes and those of its employees.
35. From the record of appeal it is clear that although Tullow Kenya Bv was providing to meals and accommodation to the appellant’s employees, the cost would be back charged to the appellant. These costs would be off set against the contract sum accruing to the appellant. The respondent therefore properly sought for the appellant’s employees’ PAYE from the appellant. There was no proof of any



double taxation. Without such evidence of double taxation the court cannot imply or guess there was such an impropriety.

36. The upshot is that the court is satisfied that the meals and accommodation provided to the appellant's employees are chargeable to tax under the sections 3(2)(a)(ii) and 5(2)(a) of the *Income Tax Act*. None of the exemptions cited by the appellant are applicable. The appellant did not demonstrate that the exemptions under the *Income Tax Act* or any law on imposition of tax are applicable to its case. The claim of double taxation was not proved against the respondent and remains a mere outrageous allegation against the taxman.
37. Consequently, the court is satisfied that the Tribunal properly interpreted the law when it concluded that the meals and accommodation given to the appellant's employees amount to taxable benefit for purposes of the *Income Tax Act*.

Findings and Determinations

38. For the forgoing reasons this court makes the following findings and determinations
 - i. This court finds that the meals and accommodation provided to the Appellant's employees were taxable;
 - ii. The Appeal is found lacking in merit and is hereby dismissed; and the decision of the Tribunal be and is hereby upheld;
 - iii. The Appellant shall bear the costs of the Appeal.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

HON.A.MSHILA

JUDGE

In the presence of;

Mr. Wachira for the Appellant

Mr. Onyango for the Respondent

Sarah -----Court Assistant

