Mart v Commissioner of Domestic Taxes (Income Tax Appeal E017 of 2020)
[2022] KEHC 108 (KLR) (Commercial and Tax) (18 February 2022) (Judgment)

Neutral citation: [2022] KEHC 108 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E017 OF 2020

A MABEYA, J

FEBRUARY 18, 2022

BETWEEN

ROSHINA TIMBER MART ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(An appeal against the judgment dated 26th February 2020 delivered by the Tax Appeals Tribunal in appeal Number 108 of 2017)

JUDGMENT

1. The respondent carried out an audit on the appellant's financial records for the period January, 2013 to February, 2016. The appellant was notified of the outcome vide a letter dated 28/8/2017. From the audit, the respondent assessed the appellant's tax liability at Kshs. 23,216,692/- for VAT and Kshs. 28,219,258/- for Income Tax.

2. The appellant objected to the tax assessment which the respondent declined. The appellant appealed to the Tax Appeals Tribunal ("the Tribunal") against that objection decision. By its judgment of 26/2/2020, the Tribunal dismissed the appeal and upheld the respondent's tax assessment.

3. Being dissatisfied with that judgment, the appellant appealed to this Court setting out 6 grounds of appeal which can be summarized as follows: -

    1. That the Tribunal erred in not finding that the appellant's right to a fair hearing had been breached by the respondent.

    2. The Tribunal erred in finding that the appellant had failed to keep records.

3. The Tribunal erred in its assessment of the income tax.

4. On those grounds, the appellant prayed that the judgment of 28/2/2017 be set aside, or in the alternative, the assessment be set aside and the matter be referred to alternative dispute resolution.

5. The respondent filed its statement of claim dated 20/5/2020. Its case was that the appellant was selected for audit pursuant to section 56 of the *Income Tax Act*, Section 48 of the VAT and section 58 of the *Tax Procedures Act*.

6. That the result of the audit was communicated to the appellant and a demand for Kshs. 28,219,258/- for Income Tax and Kshs. 23,612,692/- VAT made. That the appellant had proper documentation for its foreign suppliers, but there was no enough evidence for its local purchases as only ETR receipts were availed. That other crucial documents such as delivery notes and goods received notes were missing.

7. That payments to the suppliers were scrutinized on a simple basis aided by information obtained from the appellant's bankers. It was established that the beneficiaries of those payments were different from the suppliers and that all the purported payments by the appellant were actually partners' drawings and inter-bank transfers.

8. In the premises, the respondent disallowed all purchases claimed with respect to those particular suppliers and issued as assessment of Kshs. 23,612,692/- and Kshs. 28,219,258/- as VAT and Income Tax, respectively.

9. I have considered the parties' pleadings and the submissions on record. I propose to deal with all the grounds together.

10. The dispute herein relate to assessment of VAT and Income Tax owing to the failure by the appellant to prove the existence of the transactions made with 31 listed suspected suppliers. Section 17(1) and (2) of the VAT Act provides: -

> " 17. Credit for input tax against output tax
>
> 1) ...
>
> 2) If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in subsection (3), the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation ...
>
> 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. ...
>
> c. ...
>
> d. a credit note in the case of input tax deducted under section 16(2); or
>
> e. a credit note in the case of input tax deducted under section 16(5)".

11. From the said provision, it is upon a tax payer to have in his/its possession the proper documentation and produce the same to the tax authorities when called upon. In this case, it was upon the respondent to produce the documentation to support its claim for VAT.

12. What the appellant produced were ETR receipts to prove the transactions with the listed suppliers. However, the respondent was not satisfied with these. He requested for more information vide his letter of 30/1/2017 which was clear and specific. With the said request, it became incumbent upon the appellant to demonstrate to the respondent the legitimacy of its transactions with the suppliers by providing the additional information in its possession.

13. Section 59 of the *Tax Procedures Act* and section 43 of the VAT Act entitle respondent to request for additional information in order to satisfy himself on the taxable income declared or matters tax. In *Commissioner of Domestic Services v Galaxy Tools Limited* [2021] Eklr, the court detailed some of the additional documents required thus: -

> " Some of the documents to be kept by a tax payer and which should be availed to the appellant are, copies of invoices, copies of stock records, details of each supply of goods and services among others..."

14. In this case, the appellant only provided ETR receipts. ETR receipts must of necessity be accompanied by other supporting documents to support commercial transactions if one wishes to benefit under section 17 of the VAT Act aforesaid. In this case, upon requesting for information from the appellant's banks, it was revealed that the payments claimed by the appellants did not indeed correspond with the bank records, as those payments were made out to other beneficiaries and not the suppliers claimed by the appellant.

15. The appellant contended that it was given only 48 hours to produce the documentation and that that in the premises denied the right to a hearing. It is evident from the record that the audit commenced on 5/4/2016, yet the letter requesting for information was made 30/1/2017, nearly one year later. Even at the time of filing the appeal at the tax tribunal, the appellant had an opportunity to produce the documents sought and enable the respondent to scrutinize the documents and information. The appellant failed to do so. There was no evidence to show that the appellant sought for more time to produce the information but denied. No such request was ever made to the respondent.

16. Section 43 of the VAT Act 2013 requires a taxpayer to keep transactional records for a period of five years. The section provides: -

> " Every registered person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein."

17. In Malindi *Judicial Review No 2 of 2016 Silver Chain Limited vs Commissioner of Income Tax and 3 others [2016] eKLR* , the court stated: -

> " The above section elaborates the specific records to be kept under section 43 (2). Such records include tax invoices, credit and debit notes, purchase invoices, custom entries, receipts for customs duty tax among other documents."

18. Further, section 54A (1) of the *Income Tax Act*, Cap 470, provides: -

> "A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax."

19. In the end, it is evident that the appellant failed to meet the evidentiary burden of proof to satisfy the respondent as to the veracity of the transactions with the listed suppliers. In this regard, the Tribunal cannot be faulted in upholding the respondent's assessments for both VAT and Income Tax. The appeal is therefore unmeritorious.

20. As for the prayer to set aside the tribunal's assessment and refer the matter to alternative dispute resolution, the same has come too late in the day. The appellant had an opportunity to refer the matter to ADR when the appeal was pending both before the Tax Appeals Tribunal and this Court.

21. The upshot is that the appeal is unmerited and is hereby dismissed with costs to the respondent.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCIArb

JUDGE