KCB Bank Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E138 of 2021) [2022] KEHC 576 (KLR) (Commercial and Tax) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 576 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E138 OF 2021

DAS MAJANJA, J

MAY 31, 2022

BETWEEN

KCB BANK KENYA LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(This was an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 4th June 2021 in Tax Appeal No. 251 of 2019)

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal filed by the Appellant dated 28th July 2021 against the judgment of the Tax Appeals Tribunal ("the Tribunal") dated 4th June 2021.

2. The facts that give rise to this appeal are common ground and are as follows. The Appellant is a limited liability company incorporated in Kenya and licensed under the *Banking Act* (Chapter 488 of the Laws of Kenya) to provide an extensive range of banking, financial and related services. The Respondent ("the Commissioner") as part of its mandate under the *Customs and Excise Act* (Repealed) as amended under Part III of the Fifth Schedule by the *Finance Act, 2012* and the *Finance Act, 2013*, the *Excise Duty Act, 2015* and the *Finance Act, 2018,* carried out a review of the Appellant's records in order to determine whether the correct amount of Excise Duty payable had been remitted as required by law.

3. The review specifically focused on the Appellant's transactions turnover growth following the increased loans due to automation, non-branch services, mobile lending platforms and increased efficiency among others, excisable revenue streams, fees and charges, growth of non-interest revenue streams, the excisable value of services as provided for under section 9(4) of the *Excise Duty Act,*

2015 and the billings and charges for transactions and services as per the Appellant's tariffs schedules and charges. By a letter dated 24th January 2019, the Commissioner communicated its analysis and findings to the Appellant where the Commissioner stated that there was Excise Duty tax shortfall of KES 655,102,343.00 which amount included penalties and interest and which the Commissioner demanded from the Appellant by issuing additional assessments.

4. The Appellant objected to the assessments through its letter of 25th February 2019 ("the Objection") on the grounds that; the Commissioner was under a wrong assumption that all revenues reported under Fees and Commission or Other Fees are liable to Excise Duty contrary to the provisions of the *Excise Duty Act, 2015*, double counting of certain revenues in the basis used for Excise Duty computation which is leading to an overstatement of the tax payable, arithmetic errors in the summation of revenues from Fees and Commissions used as a basis for computation of the Excise Duty, amounts reported as 'Other Income' in the published financial statements are not liable to Excise Duty in line with the *Excise Duty Act, 2015* and that the Appellant is in an Excise Duty overpayment position going by the analytical review model used by the Commissioner in raising the assessments. Thus, the Appellant urged the Commissioner to drop all the assessments as they lacked proper merit and basis in law.

5. The Commissioner responded to the Appellant's Objection through its letter dated March 26, 2019, requesting for various documents. It also invited the Appellant to a review meeting at a later date. In response, the Appellant wrote to the Commissioner on 4th April 2019 explaining its position on the various streams of income.

6. After reviewing the Objection together with the Appellant's letter of 4th April 2019 aforementioned, the Commissioner rendered its objection decision on 24th April 2019 ("the Objection Decision"). The Commissioner disallowed the Objection in whole and maintained that the assessed amount of KES 655,102,343.00 as earlier communicated remained due and payable.

7. The Appellant preferred an appeal to the Tribunal challenging the Objection Decision. In the course of the appeal, the parties engaged in an Alternative Dispute Resolution process which culminated in the signing of a partial consent dated 8th December 2020 that was filed before the Tribunal on 27th January 2021. As per the consent, the Commissioner revised the taxable base for the Excise Duty and apart from Risk Margin Insurance Premiums for loans, all 'Other Fees' and commissions were properly subjected to Excise Duty. The parties thus agreed to refer back to the Tribunal the determination of whether 'Risk Margin Insurance Premium for loans' is subject to Excise Duty.

8. According to the Appellant, the Risk Margin Fund Premiums ("the Premiums") were used to secure risk attendant on unsecured loans and the same fall outside the ambit of 'Other Fees' chargeable to Excise Duty and that seeking to subject the Premiums to Excise Duty for the sole reason that the same had not been ceded to a third party underwriter would be discriminatory and contrary to the provisions of Article 27 of *the Constitution*. On its part, the Commissioner held that since the Premiums are not transferred to an insurance company but are retained by the Appellant, the same forms normal business charges with any losses thereon being treated as allowable reductions and the balance forms normal margins in the business of loan advances. Thus, the Commissioner contended that this income is excisable as being 'Other Fees' earned by the Appellant.

9. In its judgment, the Tribunal determined that an insurance premium must be one paid to a company that is registered under the *Insurance Act* (Chapter 487 of the Laws of Kenya) to carry on the businesses listed under the said Act and as it stands, the Appellant is not registered under the *Insurance Act* to carry out the business it is carrying out. Thus, the Premiums it receives from its customers cannot be deemed to be insurance premiums and consequently, the Premiums that the Appellant receives do not fall under the exemption as provided under the *Excise Duty Act, 2015*. The Tribunal proceeded to hold that

since the Premiums received by the Appellant do not meet the qualification of insurance premiums, they agreed with the Commissioner that the Premiums constitute 'Other fees' earned by the Appellant and the Tribunal accordingly found that the amounts received by the Appellant as premiums are 'Other Fees' which are subject to Excise Duty.

10. The Tribunal dismissed the Appellant's appeal, set aside the Objection Decision to the extent of the terms of the Partial Consent of 8th December 2020 and adopted as a Partial Judgment by the Tribunal on the 2nd February 2021 and held that the Objection Decision as relates to tax assessment for Excise Duty in respect of the Premiums in the sum of KES 305,412,714.00 comprising of principal tax, penalties and interest be upheld.

11. It is this decision that forms the substance of this appeal. The respective advocates adopted their written submissions which regurgitate the parties' positions before the Tribunal and which I have considered.

Analysis and Determination

12. As I determine this appeal, I am cognizant of the fact that this court's jurisdiction is circumscribed under section 56(2) of the *Tax Procedures Act*, 2015 which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". The 11th Ed. of *Black's Law Dictionary* defines a 'matter of law' to be "A matter involving a judicial inquiry into the applicable law." The Court of Appeal in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* NRB CA Civil Appeal No. 300 of 2013 [2014] eKLR accepted the passage of Denning J., in the English case of *Bracegirdle v Oxley (2)* [1947] 1 ALL E.R. 126, 130 where he stated as follows:

> The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act, 1930*, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts...

13. In this appeal, the court will determine whether the Tribunal arrived at the correct conclusion in determining that the Premiums received by the Appellant are excisable. It is not in dispute that this court is ultimately being called to interpret and give proper legal effect to the definition of 'Other Fees' under the *Excise Duty Act, 2015*. I agree with the Appellant's submission that tax statutes must be interpreted strictly and that this position has been upheld by our courts in various cases including *Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others* NRB CA Civil Appeal No. 164 of 2013 [2019] eKLR. Further, that tax statues must be looked at using slightly different lenses as the language imposing the tax must receive a strict construction leaving no room for intendment or implication (see *Cape Brandy Syndicate v I.R. Commissioners* [1921] 1KB and *Stanbic Bank Kenya Limited v Kenya Revenue Authority* CA Civil Appeal No. 77 of 2008 [2009] eKLR).

14. It is also established that if there is any ambiguity in the statute, then it must be resolved in the tax payer's favour. This principle was summarized and restated by the Court of Appeal in *Commissioner*

of Domestic Taxes (Large Taxpayers Office) v Barclays Bank of Kenya Ltd NRB CA Civil Appeal No. 195 of 2017 [2020] eKLR it observed 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.

15. It is not in contention that Excise Duty is payable by financial institutions such as the Appellant in respect of what is termed as "Other Fees" received by these institutions from their customers. The First Schedule, PART III of the *Excise Duty Act, 2015* defines "Other Fees" as "any fees, charges or commissions charged by financial institutions relating to their licensed activities, but does not include interest on loan or return on loan or any share of profit or an insurance premium or premium based or related commissions specified in the *Insurance Act* or regulations made thereunder" [Emphasis mine].

16. A strict reading and interpretation of the above definition is that insurance premiums charged by financial institutions as specified in the *Insurance Act* and the Regulations made thereunder are exempt from Excise Duty as they are not included in the definition of "Other Fees". The words of the statute are clear and specific and any other interpretation of the plain and clear words of the statute would amount to amending the statute by stealth.

17. Section 56 of the *Tax Procedures Act* and section 30 of the *Tax Appeals Tribunal Act* impose the burden of proof on the Appellant as the tax payer to prove that an assessment is excessive or a tax decision is incorrect. It is therefore incumbent upon the Appellant to demonstrate that it ought to benefit from the exemption by proving that it is a financial institution and that it has been collecting insurance premiums specified in the *Insurance Act* or Regulations made thereunder. The parties are agreed that the Appellant is a financial institution and that it has been receiving the Premiums, the parties differ on whether recourse ought to be made to the *Insurance Act*. I find that the reference to the *Insurance Act* as provided for by the First Schedule, PART III of the *Excise Duty Act, 2015* is inevitable and a financial institution receiving insurance premiums specified under the *Insurance Act* and Regulations made thereunder benefits from the exemption of paying Excise Duty.

18. I do not find any fault in the Tribunal making reference to the *Insurance Act* in determining whether the Premiums received by the Appellant were excisable as this is imperative. Under the *Insurance Act*, insurance premiums can only be received by persons carrying on an insurance business and such persons can only be those registered under the *Insurance Act*. It is common ground that the Appellant is not registered under the *Insurance Act* and thus, cannot benefit from the exemption under the *Excise Duty Act, 2015* as the Premiums it receives are not specified under the *Insurance Act*.

19. Before I conclude let me comment briefly on the issue of discrimination raised by the Appellant. It claims that it has been subjected to discrimination contrary to Article 47 of *the Constitution* which safeguards equality and outlaws discrimination. The Appellant claims that it has been discriminated

against on account of the fact that while it charges premiums to insure against high risk loans, it is not granted the same tax benefit as licenced insurance companies under the *Excise Duty Act, 2015*. I would point out that not all distinctions resulting in differential treatment violate equality rights. The State may treat persons differently based on policy considerations that result in achieving legitimate purposes (see *Federation of Women Lawyer FIDA Kenya and 5 Others v Attorney General and Another* [2011] eKLR). In this case, there is a difference between a licenced insurance company which is subject to regulatory regime under the *Insurance Act* and a bank, which is not licenced thereunder. In this case there is sufficient justification for differentiation based the regulatory requirements that the person must meet. At the end of the day, banks and insurance companies are regulated under different statutory regimes that require different considerations given the nature of their business.

20. The Appellant failed to demonstrate that it carries on insurance business and is licenced under the *Insurance Act*. I do not find anything irrational in the Tribunal's conclusion that the Premiums the Appellant receives do not fall under the exemption provided under the *Excise Duty Act, 2015* and do not meet the qualification of insurance premiums. I am therefore in the agreement with the Tribunal and the Commissioner that the Premiums earned by the Appellant constitute 'Other Fees' and are thus subject to Excise Duty.

Conclusion and Disposition

21. I am satisfied that the Tribunal appreciated and applied the provisions of the First Schedule, PART III of the *Excise Duty Act*, 2015 and the *Insurance Act* in finding that the Risk Margin Fund Premiums earned by the Appellant constituted "Other Fees" and thus subject to Excise Duty.

22. The appeal is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022.

D. S. MAJANJA

JUDGE

Mr Kimani, SC within him Mr Ruto instructed by Hamilton, Harrison and Mathews Advocates for the Appellant.

Mr Twahir, Advocate instructed by the Kenya Revenue Authority for the Commissioner of Domestic Taxes.