



REPUBLIC OF KENYA



**Bemarc Limited v Commissioner of Domestic Taxes (Tax Appeal E136 of 2020)
[2022] KEHC 18123 (KLR) (Commercial and Tax) (24 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 18123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E136 OF 2020
DAS MAJANJA, J
JUNE 24, 2022**

BETWEEN

BEMARC LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 4th September 2020 in Tax Appeal No. 101 of 2016)*

JUDGMENT

Introduction and Background

1. The appellant is a limited liability company that trades in tyres. The respondent (“the Commissioner”), in a letter dated September 11, 2015 and as part of its mandate under various tax laws including the [Kenya Revenue Authority Act](#), cap 469, the [Tax Procedures Act](#), 2015 (“the TPA”) and the [VAT Act](#), 2013 (“the VAT Act”) issued a notice to the appellant evincing its intention to carry out an audit of its operations for the years of income 2012-2015. The commissioner further notified the appellant that the audit would focus on a number of issues including examination of its sales records and bank statements to determine sales for ascertainment of output tax, examination of its purchases records including imports to establish input VAT, examination of its PAYE related records so as to determine the PAYE due, examination of its cash book, cheque counter foils and payment vouchers for payments to its directors and employees, establish ownership and usage of its motor vehicles and compute car benefit as appropriate and examination of its directors’ accounts and bank statements to establish if tax had been paid.
2. The commissioner thus required the appellant to provide a number of documents within 4 days of the letter, which documents included copies of financial statements, returns and tax computations for the



period 2012-2014, trial balances for the period 2012-2014, bank statements for all banks held by the appellant from 2012 to August 2015, VAT returns and analysis from 2012 to July 2015, monthly Z-Reports from January 2012 to July 2015, loan agreements, if any for the period 2012-2014, receivables and payables ledgers for the period 2012-2014, sales and purchase ledgers for the period 2012 -2014, stock sheers for the period 2012-2013, import and export documents for the period 2012 to July 2015, assets register for the period 2012-2014 and tenancy/lease agreements for the period 2012 to July 2015. The commissioner further indicated that the audit was to be conducted at the appellant 's premises and would cover corporation tax for the period 2012-2013, VAT for the period January 2012 to June 2015 and PAYE for the period January 2012 to June 2015.

3. It appears that the intended audit never took place as planned as evidenced by the commissioner's follow up letter dated October 22, 2015 where it lamented that its officers were unable to meet with the appellant 's director so as to agree on the conduct and commencement of the audit. The commissioner therefore gave the appellant 14 days from the date of that letter to provide the documents requested earlier and that upon expiry of that period the commissioner would have no choice but to proceed and issue estimated assessments and enforce collection.
4. The commissioner then followed up with another letter dated December 10, 2015 inviting the appellant for an interview on December 17, 2015 at the commissioner's offices. From the record, it would appear that this meeting never took place as what followed was the commissioner requesting the appellant 's customs records from its counterpart at the customs and border control department through its email dated February 3, 2016. It further requested the appellant 's bankers to provide statements and documents relating to the appellant through its letter dated February 8, 2016.
5. By the letter dated March 23, 2016, the commissioner informed the appellant that due to its failure to provide the requested documents and information, it had invoked the provisions of section 73(2) (b) of the *Income Tax Act* (chapter 470 of the Laws of Kenya) and section 45 of the *VAT Act* to assess the appellant . Based on information obtained from various sources, the commissioner estimated that the appellant 's income for the years 2012, 2013 and 2014 was Kes. 2,054,930.00, Kes. 5,631,293.00 And Kes. 6,523,579.00 respectively and that the additional corporation tax inclusive of interest and penalties for the three years was KES. 4, 803,025.00 which was net of the taxes already paid.
6. On VAT, the commissioner held that in reference to the availed bank details, all deposits made in to the appellant 's bank accounts had been summed up on a monthly basis net of any loan disbursements and VAT element and assumed to be the monthly sales. That a 16% VAT was charged on these and a default penalty of KES. 10,000.00 from the month of June 2012 imposed on every month that VAT returns were not filed. Thus, the commissioner determined that the total principal VAT due was Kes. 19, 054,998.00 with interest amounting to KES. 5,352,268.00 and default penalties totaling KES. 400, 000.00. Hence the total VAT payable was Kes. 24, 807,267.00.
7. On PAYE, the Commissioner stated that based on the customs data obtained, it was shown that the appellant had imported three vehicles over the subject period and that only one was assumed to be commercial. Thus, the other two noncommercial vehicles were assessed for motor vehicle benefit and PAYE charged thereon on the directors and that the monthly motor vehicle benefit charged per month was KES. 11,750.00 for the period April 2013 to June 2015 and KES. 150,239.00 for the period July 2015 to December 2015 upon acquisition of a new vehicle. Thus, the Commissioner assessed the PAYE additional tax as KES. 752,647.00 inclusive of interest and penalties.
8. The Commissioner assessed the appellant 's total tax liability as KES. 30,362,937.00 inclusive of penalties and interest and issued additional assessments on the same and demanded payment from the appellant .



9. The appellant objected to the said additional assessments through its letter that was erroneously dated 21st March 2016. It accused the Commissioner of malice and harassment in respect of the events leading upto and during the said audit claiming that the Commissioner's actions were steered at a predetermined end. In any case, it specifically opposed the assessments under the various tax heads.
10. On Corporation Tax, the appellant impugned the Commissioner's method of relying on the its bankings stating that the Commissioner had not provided sufficient details of its bank sources and that there were gross variances between the appellant 's computed tax liability and what was in the assessments and therefore there was no clarity as to the extent of the liability. On VAT, the appellant impugned the veracity of the data used and also objected to the 'bankings' method applied by the Commissioner questioning its source. The appellant further stated that in as much as the Commissioner used customs data to arrive at the VAT payable, there was no input tax adjustment and that since it used a 25% margin while computing Corporation Tax, it was expected that it would use those same figures in computing VAT. In addition, the appellant also stated that the Commissioner's entire VAT assessment was based on a repealed statute in that section 45 of the VAT Act had been deleted by the TPA and thus the VAT assessment lacked a legal basis and was not enforceable. On PAYE, the respondent stated that the Commissioner's assessment appeared to have been in relation to a different company called Bamack Limited and not the appellant . In any case, the appellant stated that said motor vehicles were used for company duties and were pool vehicles and the evidence of this was to be provided after clarification of whether the audit related to the appellant or the company aforementioned. Thus, the appellant objected to the tax liability of the three vehicles under PAYE in its entirety.
11. In conclusion, the appellant expressed its willingness to closely cooperate with the Commissioner in finding an amicable solution of the tax dispute and that it preferred that all communication on the matter be in writing, either by email or letters rather than phone calls as one of the directors was a regular traveler and could not be reached in most cases.
12. The Commissioner responded to the objection through its letter dated 26th April 2016 stating that while the appellant 's director visited the Commissioner's offices and raised the issue that the notice given to the appellant to avail the requested documents was short, the Commissioner granted the appellant an extension of time but that the appellant never availed the same. The Commissioner denied any malice on its part and stated that all it was doing was following departmental procedures. On the source of information used as a basis for computing Corporation Tax and VAT, the Commissioner reiterated that due to difficulties in accessing the appellant and the requirement for the department to conclude the case, it had no alternative but to obtain some information from the readily available sources that could enable it move the case. The Commissioner disclosed that its sources of information were Equity Bank and the Commissioner's own internal customs data and that the Bank provided a list of bank accounts operated by the appellant and its directors.
13. The Commissioner further stated that the deposits used in estimating income for Corporation tax and VAT purposes are net of loans received by the appellant from the Bank. That in regard to bank transfers, the Commissioner stated that it was only able to confirm which other deposits related to bank transfers after the appellant provides it with the relevant bank accounts and statements which only the appellant and its directors would be privy. On input VAT, the Commissioner stated that the appellant could not be allowed to claim input tax as it did not file its VAT returns and that the input tax was time barred, hence the same could not be claimed under the VAT Act which was applicable to the appellant when the audit notice was served. Thus, the Commissioner stated that section 45 of the VAT Act was applied since the notice of audit dated 11th September 2015 was served on 14th September



2015 when the VAT Act was still in force and the TPA had not come into force and that it only came in force on 19th January 2015.

14. On PAYE, the Commissioner stated that the name Bemack was made in error and that out of the six vehicles provided in the Business Intelligence Report, it had only picked the vehicles imported by the appellant during the period and used the same for determining the motor vehicle benefits to be used as a basis for charging PAYE on the directors.
15. The Commissioner further stated that in order to resolve the objection within the stipulated time period, the appellant needed to provide it with the records as requested in the letter of audit dated 11th September 2015. In the meantime, the Commissioner decided to stand over all the additional assessments and tax demands.
16. The commissioner, in an email dated 6th May 2016 and a letter dated 2nd June 2016, reminded the appellant to avail the said documents that had been requested and that the Commissioner intended to visit the appellant's premises on 9th June 2016 to carry out the audit, which visit the appellant confirmed and expected. The meeting was indeed held on the stated date where both parties were present and the discussions were recorded by the appellant. In an email dated 13th June 2016, Commissioner wrote to the appellant appraising it on the matters discussed at the meeting of 9th June 2016. The Commissioner noted that for the period under audit, the appellant did not have any financial records and was thus not able to provide the same for the purpose of dealing with the objection, that input tax paid at the point of importation of tyres was to be considered for offset against the output tax on the VAT assessment, that a Toyota Fielder imported by the appellant was subsequently transferred to one of the employees who had since left employment and hence motor vehicle benefit was not to be assessed on the directors for this particular vehicle, that consideration was to be made for input tax paid on construction of the office premises, garage and restaurant/club and the input tax was to be offset against output tax derived from bankings and that the Toyota Lexus imported by the appellant was currently being used by the directors and that PAYE was to be assessed on the resultant motor vehicle benefit and purchase documents for the Toyota Lexus would be required for the Commissioner's file copy. The Commissioner also welcomed any other representation from the appellant that would help in resolution of the objection.
17. On 20th June 2016, the Commissioner made its objection decision ("the Objection Decision). On PAYE, the Commissioner agreed with the appellant's representations made in the meeting of 9th June 2016 and thus, the Toyota Fielder motor vehicle was removed from the computation meaning that the resultant PAYE tax due was reduced to KES. 332,767.00. On Corporation Tax, the Commissioner stated that it had not been able to obtain any information towards resolving the objection on this tax head and thus confirmed its previous assessment for the period 2012-2014 and after revising the interest, the same stood at KES. 6,020,792.89. On VAT, the Commissioner also stated that there was no information to enable it amend the assessment and thus the assessment after revising interest stood at KES. 25,135,760.00. The Commissioner concluded that the total tax due from the appellant was KES. 31,489,319.89 which it now demanded.
18. The appellant was dissatisfied with the Commissioner's Objection Decision and proffered an appeal to the Tax Appeals Tribunal ("the Tribunal"). After considering the grounds of appeal and rival submissions of the parties, the Tribunal delivered its judgment on 4th September 2020. The Tribunal framed a single issue for determination; Whether the Commissioner's assessment of the appellant's tax liability was proper in law given that the appellant failed to provide the documents and books of accounts as requested for by the Commissioner.



19. The Tribunal's view of the case was that it was one where the Commissioner went out its way to accommodate a tax payer in terms of extension of time to provide the books of accounts and other business records, only for the same to be frustrated by the tax payer and that the record before the Tribunal was ridden with evidence illustrative of the Commissioner's patience with the tax payer, in this case, the appellant .
20. The Tribunal cited various tax statutes on the issue of production of records and documentation and how the same place a burden on every tax payer being assessed to maintain and produce their tax records and documentation. The Tribunal found that the appellant had failed in its mandatory obligation of providing records of its business activity upon request by the Commissioner and that its allegations of why the records were unavailable were bereft of proof. The tribunal further held that the claim in the appellant 's statement of facts that it had provided records for the Commissioner's examination was also without evidence and that for an individual facing a hefty assessment of KES. 31,489,319.89, the appellant did not substantively dispute the specific tax issues raised in the additional assessment or the Objection Decision and that this, coupled with the burden placed on a tax payer by the provisions of section 56 (1) of the [TPA](#) only served to buttress the position that the appellant failed in its responsibility to provide its records and documents for examination by the Commissioner. In light of the above findings, the Tribunal dismissed the appellant 's appeal and upheld the Commissioner's Objection Decision.
21. It is this decision by the Tribunal that has precipitated this appeal which is grounded on the Memorandum of Appeal dated 28th October 2020. From the record, only the Commissioner filed written submissions. However, I have considered the entirety of the record including the arguments that were made by the parties before the Tribunal.

Analysis and Determination

22. This court's jurisdiction, in resolving this appeal, is circumscribed under section 56(2) of the [TPA](#) which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". [Black's Law Dictionary \(11th Ed.\)](#) defines a 'matter of law' to be "A matter involving a judicial inquiry into the applicable law." The Court of Appeal in [Bashir Haji Abdullabi 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 ER 126 at pg 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...'
23. The Court of Appeal in [Bashir Haji Abdullabi v Adan Mohammed Nooru](#) (supra) further agreed with the decision in [Attorney General v David Murakaru](#) [1960] EA 484, where it adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of



law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in points of law and that where the lower court arrives at a conclusion on the primary facts that it could not reasonably come to then such a conclusion or decision becomes an error in a point of law.

24. The task of this court, exercising its appellate jurisdiction, is to determine whether the tribunal's decision to dismiss the appellant's appeal and uphold the commissioner's objection decision was so perverse in light of the facts before it so as to warrant the court's interference.
25. I have set out a detailed sequence and series of events giving rise to this appeal in the introductory part and I find nothing much to add to or subtract from the Tribunal's decision for a number of reasons. First, I am in agreement that every taxpayer has a duty to maintain records and documentation for purposes of ascertaining their tax affairs. This position is echoed in all tax statutes regardless of the tax head. In relation to this appeal, this obligation is set out in section 23(1) of the *TPA*, section 43(1) of the *VAT Act* and section 54A(1) of the *Income Tax Act*.
26. Second, the Commissioner has power to request for these records and a tax payer is required to avail the same to the Commissioner for inspection upon request or notice. This is provided for under section 43(3) of the *VAT Act* which provides that 'Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorised officer for inspection and shall give the officer every facility necessary to inspect the records.' Section 59(1) of the *TPA* also buttresses this position by providing that:
59. Production of records
- (1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—
- (a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
- (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or
- (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.
27. Third, I agree with the tribunal that the appellant never provided the records and documentation that had been requested for by the Commissioner from the onset. This position was admitted by the appellant during the meeting of June 9, 2016 when it stated that it did not have any records which could be used to deal with its objection and that the records disappeared with a team of rogue and runaway staff who had been fired after engaging in fraud. The appellant further explained that the employees "crashed" the company's quick books accounting system when they realized they would be fired. As such, the appellant requested the Commissioner to use the records in the Commissioner's possession which included the bank statements, customs data and copies of tax returns.



28. Fourth, once the appellant failed to provide any information to support its tax position, it follows that the Commissioner's position remains uncontroverted and is presumed to be correct. This position is anchored in section 56 of the TPA and section 30 of the *Tax Appeals Tribunal Act* which 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 and this court has restated the same in a number of decisions including *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* (Judicial Review Application E023 of 2021) [2022] KEHC 5(KLR) (24 January 2022) (Judgment).
29. Once the appellant failed to provide the required documents, the Commissioner was entitled to use its best judgment to come up with the appellant's tax liability on the basis of all the available documents from other sources available to the Commissioner. This is provided for under section 29 of the *TPA* which provides that the Commissioner may make a default assessment based on such information as may be available and to be in the best of his or her judgment. Counsel for the Commissioner referred the court to *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290 where Woolf J., considered the meaning and application of 'best judgment', he stated as follows:

[T]he very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them ...

Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognised, particularly bearing in mind the primary obligation of the taxpayer, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain the information without carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them. [Emphasis mine]

30. In line with the aforesaid decisions, the appellant was granted every opportunity to provide documents. When the appellant failed to furnish the documents, the Commissioner used the documents available to it to assess the appellant's tax liability. The appellant has not shown that the ultimate decision was arbitrary, unreasonable or irrational. It is for the above reasons that I find and hold that the Tribunal's decision was sound and judicious and that any reasonable or different tribunal sitting in its place would have arrived at the same conclusion in light of the facts and evidence before it.

Disposition

31. This appeal lacks merit. It is now dismissed.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2022.

D. S. MAJANJA



JUDGE

Mr Musyoki instructed by Musyoki Benson and Associates Advocates for the appellant .

Mr Marigi, Advocate, instructed by Kenya Revenue Authority for the respondent .

