Commissioner of Domestic Taxes v Pevans Africa Ltd (Tax Appeal E048 of 2020 & Income Tax Appeal E079 of 2020 (Consolidated)) [2022] KEHC 11879 (KLR) (Commercial and Tax) (12 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11879 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E048 OF 2020 & INCOME TAX APPEAL E079 OF 2020 (CONSOLIDATED)

A MABEYA, J

AUGUST 12, 2022

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

PEVANS AFRICA LTD ..... RESPONDENT

(Being an appeal on part of the Judgment of the Tax Appeals Tribunal dated 16th April, 2021 in Tax Appeals Tribunal Appeal Number 402 of 2020)

JUDGMENT

1. The appellant collects taxes for the government and administers various tax laws in Kenya. The respondent is a limited liability company incorporated in Kenya and licensed under the Betting, Lotteries and Gaming Act ("the Betting Act").

2. Vide a letter dated 28/6/2019, the respondent made a voluntary self-disclosure of Betting Tax for the year 2018 of Kshs. 1,272,469,133/= and made a settlement proposal. The Finance Act, 2018 was thereafter re-introduced and became applicable as of 1/10/2018.

3. That piece of legislation required taxpayers to withhold 20% on the gross winnings paid by punters and remit the same to the appellant. The respondent was assessed on withholding tax on winnings for the period October 2018 to February 2019 for Khs. 21,285,342,744/= inclusive of penalties and interest. The appellant demanded payment of the amount.

4. The appellant also issued the respondent with withholding tax demands and agency notices for withholding tax arrears on winnings payable to punters for the period April 2019 and May 2019 for Kshs. 3,296,532,012/= and Kshs. 2,570,692,379/=, respectively.

5. The respondent was aggrieved by the withholding tax demands and filed Tax Appeal Nos. 304 and 305 of 2019 before the Tribunal on 28/6/2019. It sought, inter alia, the interpretation of the term winnings. While the appeals were pending determination, the appellant wrote to the BCLB stating that the respondent was not tax compliant and requested the board not to renew its license.

6. This prompted the respondent to pay Kshs. 1,900,000,000/= pending the Tribunal's determination of the said appeals and in a bid to settle the dispute amicably. It was the respondent's case that the money was paid from its own funds and not from the punter's winnings and that the funds were paid to avoid non-renewal of its license and to have the agency notes lifted.

7. On 6/11/2019, the Tribunal determined the two appeals in favour of the respondent. It held that the winnings did not include the stake of the punters thus it set aside the appellant's demands for Kshs. 3,296,532,012/= and Kshs. 2,570,692,379/=.

8. On 22/7/2020, the appellant sought clarification on the status of payment of the voluntary self-declaration for Betting Tax for the year 2018. Vide its response of 23/7/2020, the respondent requested the appellant to offset the betting tax of Kshs. 1,272,469,133/- (excluding penalties and interest) from the Kshs. 1,900,000,000/= that it had paid earlier.

9. Vide a letter dated 21/8/2020, the appellant declined to off-set the betting tax from the said sum on the ground that withholding tax related to punters and not to the respondent. The appellant therefore demanded immediate payment of the betting tax of Kshs. 1,661,350,351/= inclusive of penalties and interest and issued agency notices in respect thereof.

10. This prompted the respondent to file Tax Appeal No. 402 of 2020 before the Tribunal. In its judgment of 16/4/2021, the Tribunal partly allowed the appeal and set aside the respondent's agency notices of 25/8/2020. However, it upheld the appellant's decision disallowing the set-off of betting tax against the withholding tax.

11. The respondent was aggrieved by that decision and filed ITA No. E079 of 2021 while the appellant lodged ITA No. E048 OF 2021. These two appeals were consolidated with the latter being the lead file.

The Appellant's appeal

12. The appellant's memorandum of appeal is dated 21/5/2021. The grounds were that the Tribunal; i) failed to appreciate that the dispute was based on Article 209 of *the Constitution*; ii) failed to give due regard to section 42 of *Tax Procedures Act* (TPA), sections 13, 29A (2) 68 of the Betting Act, section 10,34 & 35 of *Income Tax Act* (ITA), and section 5 as read together with the first schedule of the KRA Act; iii) erred in failing to appreciate that the respondent had conceded to unpaid taxes but failed to clear them; iv) erred in failing to appreciate that the appeal before it was contrary to section 51(3) TPA as it related to taxes not in dispute; v) erred in holding that the appellant lacked authority to enforce collection of taxes under the Betting Act; v) erred in failing to consider relevant binding precedent on interpretation of the subject tax in dispute; and vii) had failed to appreciate and distinguish the case where it was not for it to determine the most efficient method of collection of taxes.

13. The appellant therefore prayed that the Tribunal's judgment be set aside and the agency notices dated 25/8/2020 be upheld.

14. The respondent filed its lengthy statement of facts dated 19/8/2021. It denied that the dispute was based on Article 209 of *the Constitution*. It contended that the appellant was empowered under section 42 of the TPA to enforce and collect betting tax from the respondent and that the agency notices were issued under the said section.

15. That even though the appellant was empowered by the KRA Act to collect taxes on behalf of the government, the issue in dispute before the Tribunal was whether collection of taxes under the Betting Act should be governed by provisions of the TPA.

16. It was contended that the Tribunal had considered all the sections of the law complained of by the appellant. That although betting tax is payable to the appellant, the Tribunal correctly found that the method of collecting the tax ought to have been in accordance to section 68 of the Betting Act. That the Tribunal correctly held that the agency notices were ultra vires as the wrong collection method was applied.

17. As for section 5 as read together with the First Schedule of the KRA Act, it was contended that whereas the appellant was the designated tax collector under the KRA Act, its administration and enforcement of the betting tax was to be exercised in accordance with the Betting Act and not the TPA. That the written laws referred to in part II of the First Schedule of the KRA Act included the Betting Act hence the appellant was bound to its provisions.

18. The respondent denied having conceded to unpaid taxes as it had filed Tax Appeals Nos. 336 of 2018, 304 and 305 of 2019 before the Tribunal. That to the contrary, the appellant was holding Kshs. 1,900,000,000/= due to the respondent. That what was outstanding was the procedure to be followed in applying part of the said funds to settle the Betting tax.

The respondent's appeal

19. The respondent's Memorandum of Appeal was dated 11/6/2021. It challenged the judgment of the Tribunal on basis that the Tribunal had failed to find that the Kshs. 1,900,000,000/= paid by the respondent was not payment of withholding tax but rather a payment from its personal funds on a without prejudice basis pending the determination of Tax Appeals Nos. 336 of 2018, 304 of 2019 and 305 of 2019.

20. That the Tribunal erred in finding that the respondent ought to have sought a refund under section 47 of the TPA yet the sum was not a tax payment made to the appellant. That the Tribunal ought to have found that the appellant ought to have utilized the Kshs. 1,900,000,000/= to settle the betting tax liability.

21. The respondent therefore urged that the Tribunal's decision refusing to utilize the funds paid on account to settle the betting tax and its finding that the respondent ought to have applied for a refund under section 47 of TPA be set aside.

Analysis and determination

22. The Court has considered the entire record and the parties' submissions. The grounds of appeal enumerated in both Memorandums can be collapsed into two issues, to wit: -

    1. Whether the issuance of agency notices dated 25/8/2020 was ultra vires.

    2. Whether withholding tax of Kshs. 1,661,350,351/= could be offset from the Kshs. 1,900,000,000/= paid by the respondent to the appellant.

23. On the first issue, the appellant's case was that via a letter dated 28/1/2019, the respondent made a voluntary disclosure of unpaid tax for the year 2018 of Kshs. 1,272,469,133/=. It proposed to settle the same in six equal installments of Kshs. 212,078,189/= between July 2019 and December 2019. However, it failed to honor the proposal whereby the appellant issued a demand letter of 21/8/2020 for

Kshs. 1,661,350,351/= which included penalties and interest. No payment was made and the appellant issued agency notices on 24/8/2020.

24. According to the appellant, he is empowered to collect, impose and administer tax by virtue of Article 209 of *the Constitution*. That section 5 of the KRA Act empowers him/her to enforce collection of taxes under the Betting Act. That in enforcing the collection of taxes, section 42 of the TPA allows the issuance of agency notices to force uncooperative taxpayers to meet and satisfy tax obligations. The case of George Lesaloi Selelo & Another v Commissioner General, KRA & 4 others: Pevans EA Limited (t/a Sportpesa) & 3 others (2019) Eklr was relied on in support of those submissions.

25. It was also submitted that section 13 of the Betting Act and part 3 of its regulations were inapplicable as they referred to fees whereas betting tax was an income under section 10(1) of the *Income Tax Act* wherein it was defined as winnings.

26. On the other hand, the respondent submitted that the Betting Act is not a tax law and therefore the appellant lacked power to collect unpaid betting tax by issuing agency notices. That the appellant could only administer and collect betting tax in accordance with the provisions of the Betting Act and not under the TPA. That the appellant erroneously applied section 42 of the TPA to issue the agency notices as the Betting Act was not a tax law under the provisions of section 3 of the TPA. That the mechanism for collection of betting tax was provided for under section 69B of the Betting Act and the issuing of agency notices was not provided for.

27. The respondent further submitted that though the appellant was the designated collector of betting tax pursuant to section 5(2) of the KRA Act, its powers were confined to the Betting Act. That the appellant's action of issuing the agency notices was therefore ultra vires.

28. In its judgment, the Tribunal found that the enforcement of betting tax ought to have been guided by section 68 of the Betting Act which provides for a civil suit. At paragraphs 97-98, the Tribunal found that section 3 of the TPA sets out the Laws it applies to excluding the Betting Act hence the appellant could not rely on enforcement mechanisms under the TPA to force collection of taxes owed under the Betting Act.

29. Section 5 of the KRA Act empowers the appellant to collect and receive all revenue. It provides, inter alia, that: -

> "
>
> "(1) The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collection and receipt of all revenue.
>
> (2) In the performance of its functions under subsection (1), the Authority shall;
>
> (a) administer and enforce... (ii) the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws.
>
> ..."

30. It is clear from the foregoing that, the appellant is empowered to administer and enforce the provisions of the written laws set out in Part II of the First Schedule which includes the Betting Act.

31. Section 29 (A) (2) of the Betting Act provides that Betting Tax;

> " shall be paid to the Collector by the licensed bookmaker on the 20th day of the month following the month of collection."

32. However, as correctly found by the Tribunal, the Betting Act does not provide for an enforcement mechanism. The Tribunal observed that the proper procedure ought to be found at section 68 of the Betting Act.

33. That section provides: -

> " Any fee due to the Board, and any penalty in respect thereof, due to the Permanent Secretary shall be deemed to be a civil debt due to the Government, and may be sued for and recovered with costs by and in the name of the Board or the
>
> Permanent Secretary as the case may be."

34. It is clear from the foregoing that the section provides for fees as provided for under section 3 and 13 of the Betting Act. In this regard, it is the fees that has to be collected by way of suit.

35. On the other hand, section 2 (1) of the TPA provides that the objects and purpose of the Act is to provide uniform procedures for-

> " a) consistency and efficiency in the administration of tax laws;
>
> (b) facilitation of tax compliance by taxpayers; and
>
> (c) effective and efficient collection of tax."

34. Section 2(2) provides that: -

> " (2) Unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under this Act shall apply."

36. Section 3 of the TPA defines ta law as follows: -

> " tax law means-
>
> a. This Act
>
> b. The *Income Tax Act*, Value Added Tax Act, and Excise Duty Act; and
>
> c. any Regulations or other subsidiary legislation made under this Act or the *Income Tax Act*, Value Added Tax Act, and Excise Duty Act."

37. However, the same section provides that tax means;

> a. a tax or penalty imposed under a tax law;
>
> b. an instalment tax imposed under section 12 of the *Income Tax Act*; or
>
> c. withholding tax".

38. Section 2 The *Income Tax Act* defines betting tax as winnings. Section 10(1) of the ITA provides that: -

> " For the purposes of this Act, where a resident person or a person having a permanent establishment in Kenya makes a payment to any other person in respect of—
>
> ...
>
> (g) winnings;
>
> The amount thereof shall be deemed to be income which accrued in or was derived from Kenya."

39. Section 34 (2) (i) of the ITA also provides that tax upon income of a non-resident person not having permanent establishment in Kenya consists of winnings from betting and gaming. Section 35 thereof similarly provides for winnings from betting and gaming as income hence they are subjected to taxation and the tax rates prescribed in the Act.

40. It has been held before that the administration of betting tax or winnings is through withholding tax. In *George Lesaloi Selelo & Another v Commissioner General, KRA & 4 others: Pevans EA Limited (t/a Sportpesa) & 3 others* (2019) eKLR, it was held that: -

> " Parliament in its wisdom enacted the various legislations that have been impugned in these petitions. By those legislations, Parliament decided to tax winnings from betting, lotteries, and gaming. It then provided a mechanism for how this tax was to be administered. That mechanism was by way of withholding tax under sections 34 and 35 of the *Income Tax Act*. Withholding tax, of itself, is not a tax; it is a collection mechanism. It merely places an obligation on somebody else other than the person who has accrued the income, to collect and remit that tax to the national government through the mandated agency, the Kenya Revenue Authority.
>
> This collection mechanism, at enactment, would no doubt be guided by the doctrine of efficiency, and it is the peculiar province of the legislature to determine the most efficient method of collection of the tax and legislate the same. It cannot be for the court to determine that."

41. The totality of the foregoing is that, winnings or betting tax is an income and is subjected to taxation and the tax rates prescribed in the Act. Betting tax is a subject of the *Income Tax Act* and its collection is by way of withholding tax. That is obviously subject to the TPA by virtue of section 3 thereof.

42. The foregoing being the case, betting tax qualifying as a withholding tax, its collection is subject to the provisions of the TPA. In this regard, the issuance of agency notices to force collection of betting tax/ withholding tax is well within the powers of the appellant. Accordingly, the Tribunal misdirected itself in failing to give due regard to all tax laws and only confined itself to the provisions of the Betting Act.

43. In any case, the TPA provides that unless a tax law specifically provides a procedure that is unique to the administration of a tax thereunder, the procedures provided for under the TPA shall apply. Having found that there was no specific procedure for the enforcement of betting tax, the tribunal ought to have fallen back on the provisions of the TPA which provide for issuance of agency notices.

44. The upshot is that the appellant's decision to issue agency notices to collect the betting tax was not ultra vires.

45. The second issue is whether withholding tax of Kshs. 1,661,350,351/= should be offset from the Kshs. 1,900,000,000/= made by respondent to the appellant.

46. It was the respondent's contention that the Tribunal failed to appreciate that the Kshs. 1,900,000,000/= was not payment for withholding tax. That it was made subject to the decisions in the three appeals then pending before the Tribunal on whether the taxes demanded were actually due.

47. That the Tribunal failed to consider that the money was not paid from the collections of withholding tax on winnings from punters, but from the respondent's own funds as there was a court order issued in CMCC 1662 of 2014 which restrained the respondent from collecting withholding tax on winnings from punters. That the money was paid to settle the matter amicably and to avoid non-renewal of its licence.

48. On the other hand, the appellant's submission was that the respondent had not discharged the burden under section 56 of the TPA to proof that the Kshs. 1,9000,000,000/= was paid from its own funds and not from tax withheld from punters. That it did not meet the criteria for a set off provided for under section 25 of the KRA Act and no application had been made under section 47 of the TPA for refund of overpaid tax.

49. At paragraphs 101-106 of the judgment, the Tribunal found in favour of the appellant and relied on section 47 of the TPA.

50. Section 47 of the TPA provides for refund of overpaid tax. The issue before the Tribunal was whether the Kshs. 1,900,000,000.00/= was paid as withholding tax and, in light of the outcome on the three tax appeals finding that withholding tax was not due, whether the amount was refundable. Further, there was the issue of whether the self-assessed betting tax should be off-set against the Kshs. 1,900,000,000/-.

51. From the letters dated 2/11/2018, 20/11/2018, 25/11/2019 and 22/11/2019 that were tendered in evidence, it is clear that; the said money was paid in order to avoid non-renewal of the respondent's license. It was paid to secure the lifting of the agency notices. Finally, the money was paid pending the determination of Tax Appeal Nos. 336 of 2018, 304 and 305 of 2019 and on a without prejudice basis.

52. The above shows that it is evident that the Kshs. 1,900,000,000/= was not paid as withholding tax, but for the reasons stated above.

53. Despite the appellant's contention that the judgments were appealed against in the High Court and that the appeals were still pending, there was no contention or evidence that there was a stay of those judgments. The Court finds that the said sum of Kshs. 1,900,000,000/= was not paid as withholding tax but as security for any taxes that would have been found to be due.

54. Since it is undeniable that there is betting tax of Kshs. 1,661,350,351/= due from the respondent, there is nothing to bar the off-setting of the same from the amount being held by the appellant. The Court finds that, since the said sum was paid as security for taxes, the provisions of the law regarding overpayment of taxes does apply.

55. The respondent contended that since the said money was paid from its own sources, the same should be refunded now that the decisions in the pending appeals were in its favor. That the provisions of tax refunds under section 47 of the TPA is not applicable as the money was not an overpayment of tax.

56. With due respect, the said money was not paid by the respondent for any other purpose other than as security for tax. There was no commercial dealing between the two for which the said money was paid. It was paid either as tax due or as security for tax that would be found to be due. Monies paid to the

tax man is not for purchase of any commodity or for any services rendered. It is in respect of tax and the provisions of tax laws apply fully.

57. Accordingly, the provisions of the tax refunds under section 47 of the TPA apply in full force. The Tribunal was not in error.

58. That being the case, the provisions of sections 47 of the TPA and section 25 of the KRA Act do apply.

59. Section 25 of the KRA Act provides: -

> " Where- (a) under the provisions of any of the written laws specified in Part III of the First Schedule, any amount of tax or duty is due and payable by any person and (b) a refund of tax or duty under any of the said written laws is confirmed to be due and payable to that person, the person may, in writing, request the Authority to set-off the amount of the outstanding tax or duty against the amount of such refund."

60. The tax in question was the betting tax as provided for by the Betting Act as well as withholding tax under the ITA. Upon the Tribunal's judgment in favour of the respondent, the betting tax due should have been off-set against the Kshs. 1,900,000,000/= balance be dealt with under the refund provisions of the tax laws.

61. Accordingly, the two appeals are determined as follows: -

    a. The Judgment of the Tribunal dated 16/4/2021 in Tax Appeals Tribunal Appeal Number 402 of 2020 is hereby set aside.

    b. The agency notices issued on 25/8/2020 were validly issued.

    c. The appellant is hereby ordered to set-off the Kshs. 1,661,350,351/= being betting tax inclusive of penalties and interest from Kshs. 1,900,000,000/= paid by the respondent and balance be dealt with in accordance with the tax laws applicable.

    It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE