Gracan Construction Limited v Commissioner of Domestic Taxes (Tax Appeal E162 of 2020) [2022] KEHC 14614 (KLR) (Commercial and Tax) (31 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14614 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E162 OF 2020

DAS MAJANJA, J

OCTOBER 31, 2022

BETWEEN

GRACAN CONSTRUCTION LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

((Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 3rd September 2021 in Tax Appeal No. 575 of 2020)

JUDGMENT

Introduction and Background

1. The appellant is in the business of construction and/or property development. Sometime in 2020, the commissioner conducted a verification exercise on the appellant's tax status for the period of January 2015 to December 2019 pursuant to a demand notice issued to the appellant on July 3, 2020 and discussions held during the verification process of the appellant's records.

2. As regards corporation tax, the income from the grossed up withholding tax certificates was compared to income declared in the appellant's annual income tax returns and the commissioner found that the corporation tax payable together with penalties and interest was Kshs 2,095,117.00. From the variance established from corporation tax, the commissioner then computed the Value Added Tax (VAT) payable as Kshs 5,474,298.00. The Commissioner raised an additional assessment for VAT by grossing up withholding income tax amounts for the periods 2014 - 2019 and comparing the amount to cumulative sales declared by the taxpayer for both VAT and income tax for the respective years. The commissioner found a variance of Kshs 26,208,360 for the year 2017 in regard to VAT which was then charged at 16% to bring about the VAT due at Kes 4,193,338.00.

3. The commissioner raised the assessments on iTax on September 7, 2020. The appellant was in agreement with the corporation tax assessment but filed an objection to the VAT assessment on September 9, 2020. In its objection, the appellant sought to be allowed an input tax deduction of Kshs 3,114,930.00 against the assessed output tax of Kshs 4,193,338.00 for the month of December 2017 to revise the assessment to Kshs 1,078,408.00. The Appellant averred that these were purchases that were not claimed inadvertently and should be allowable since they were incurred and also form part of the purchases that were considered in their income tax assessment. The appellant further argued that the purchases fell within six months from the December 2017 return period/date.

4. After reviewing the objection, the commissioner issued an objection decision on November 6, 2020 ("the objection decision"). The commissioner held that under section 17(2) of the *Value Added Tax Act*, 2013 (''the VAT Act''), the appellant's input claims were time-barred since they were past the six-month period allowable for deduction from the time of supply. As such, the commissioner disallowed the objection and required the appellant to make immediate payment of the outstanding VAT amounting to Kshs 4,193,338.00 together with the interest and penalties which as per its demand notice of November 10, 2020 amounted to Kshs 5,655,141.00.

5. The appellant appealed against the objection decision to the Tax Appeals Tribunal ("the tribunal") on November 19, 2020. In the judgment rendered on September 3, 2021, the tribunal framed the following issue for determination; whether the commissioner erred in law by failing to admit the appellant's input VAT claim in the sum of Kshs 3,114,930.00 in respect of 2017. The tribunal noted that the appellant did not contest the commissioner's right to raise an additional VAT assessment under section 31(1) of the *Tax Procedures Act*, 2015 ("the TPA") and that a taxpayer may also amend its self-assessment under section 31(2) of the TPA. The tribunal pointed out that at the time a taxpayer amends its self-assessment, inclusion of any omitted input VAT may be claimed at that point. However, in this case the tribunal found that the appellant did not make an amendment to its self-assessment during which time it had a right to claim omitted input VAT and that it is only after the commissioner raised the additional assessment on the appellant for 2017 that the issue of the omitted input VAT was raised and then only during the objection stage.

6. The tribunal found as irrelevant the appellant's assertions that the commissioner erred by acknowledging revenue without taking into consideration the attached expenses and that the commissioner's actions of denying those inputs amounted to infringement of the appellant's right to claim input VAT and further offended the principles of accounting where all income is expected to have expenses attached to it. The tribunal stated that these assertions are matching concepts which relate to income tax while the case before it concerned VAT. The tribunal agreed with the commissioner's submissions that section 17(2) of the VAT Act is mandatory and specific on the conditions on which a taxpayer can claim input tax, when it can be considered and allowed. It stated that the appellant ought to have followed the procedure laid down in the VAT Act as underpinned in the provisions of section 2(2) of the TPA.

7. The tribunal relied on its decision in *Paleah Stores Limited v Commissioner of Investigations and Enforcement*, TAT Appeal No 81 of 2017, to hold that the circumstances in both cases are similar in that the appellant made the input VAT claim after the statutory period and that the tribunal's hands were tied in respect to extension of time and that it was unable to vary the same. On the contention that the commissioner had infringed on its constitutional rights to a fair administrative action in its tax assessment, the tribunal opined that the necessary legal redress ought to be sought elsewhere as provided for in legislation. The tribunal concluded that the commissioner did not err in law by failing to admit the appellant's input VAT claim in the sum of Kshs 3,114,930,00 in respect of 2017. The tribunal made dispositive orders dismissing the appeal and upholding the objection decision.

8. The appellant is dissatisfied with this decision and has filed an appeal before the court that is grounded in the memorandum of appeal dated October 14, 2021. The commissioner has responded to the appeal through its statement of facts dated November 25, 2021. The parties have also filed and rely on written submissions which together with their respective pleadings, regurgitate the positions taken by them along the lines I have outlined above.

Analysis and Determination

9. The appellate jurisdiction of this court is limited by 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". 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 ER 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...'

10. Essentially, this means that an appeal limited to matters of law does not permit the appellate court to substitute the tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. What the court is to determine is whether the tribunal arrived at a conclusion that was supported by the law and the evidence before it.

11. The tribunal was called to determine whether the commissioner erred in law by failing to admit the appellant's input VAT claim in the sum of Kshs 3,114,930.00 in respect of the year 2017. In its judgment, the tribunal rightly summarised how our VAT system operates. In *Highlands Mineral Water Limited v Commissioner of Domestic Taxes* ML HC ITA No E026 of 2020 [2021] eKLR, the court explained that VAT is a tax chargeable on supply of taxable goods or services made or provided in Kenya and on importation of taxable goods or services into Kenya. It works under the input and output tax system. Output tax refers to the VAT charged on the sales of taxable goods or services, while input tax refers to VAT charged on taxable purchases of goods and services for business purposes. The tax payable is the difference between the output tax and input tax (see also *Rabai Operation and Maintenance Limited v Commissioner of Domestic Taxes* Comm TA No 7 of 2017[2019] eKLR).

12. The aforementioned position on the VAT system above is anchored under section 17 (1) and (2) the VAT Act, 2013 which provide as follows:

> 17. Credit for input tax against output tax

(1) Subject to the provisions of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies.

(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.

Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.

13. The appellant's case before the tribunal and its submissions before the court are that the aforementioned provisions are not applicable to amended assessments made by the commissioner and that the tribunal's decision upholding the applicability of those provisions to additional assessments by the commissioner was a fundamental misinterpretation of the law thus null and void.

14. As submitted by the commissioner, the interpretation and effect of section 17(2) of the VAT Act was discussed by the court in *Highlands Mineral Water Limited v Commissioner of Domestic Taxes* (supra) where the only conditions provided for a taxpayer to qualify for input VAT were set out as follows:

a. That the input tax was incurred on a taxable supply made to or on importation made by a taxpayer at the end of the tax period,

b. That the input tax is deducted by a registered person on taxable supplies made by him; and

c. That the input tax is to be allowable for deduction within six months after the end of the tax period in which the supply or importation occurred.

The court went ahead to state that, "The straightforward interpretation of section 17(2) is that the 6-month period of claiming input VAT begins to run when the supply or importation occurred and not necessarily when the return is filed. Meaning, if a taxpayer files a VAT return say, 7 months after when the supply or importation occurred, then the input tax claimed on that return cannot be allowed". The court did not find any fault in the commissioner disallowing input VAT claims relating to purchases made outside the 6-month window period from the date of supply provided in section 17(2) of the VAT Act notwithstanding that a return was filed late.

15. While interpreting the provisions of section 17(2) above, the court was well aware of the principles and cannons of interpretation of tax statutes that such statutes must be interpreted strictly, leaving no room for intendment or implication. This view was summarised by Nyamu JA, in *Stanbic Bank Kenya Limited v Kenya Revenue Authority* CA civil appeal No 77 of 2008 [2009] eKLR as follows:

> In my interpretation of the law, it is quite evident that I have not sought any assistance from outside a dictionary in ordinary use. Moreover, I have not strained the meaning of the words in order to achieve any particular result. I have simply adopted the ordinary meaning of the words used in the relevant tax statute. This is because as regards tax law the issue of intention or intendment does not arise. If there is any ambiguity, and I did not detect any in my analysis, the same must be construed in favour of the tax payer. In tax law, the converse is also true that if the meaning is clear, that tax is chargeable, the issue of what was intended

is not the function of the court and where tax liability is expressed and located by law the courts must uphold the taxman's position.

16. Therefore, hold that under section 17(2), a claim for input tax is not dependent on whether there is an amended or additional assessment made by either the taxpayer or commissioner. As long as the purchase is within the six-month window period then the same ought to be allowed. Asking the court to examine whether section 17(2) is applicable to additional assessments made by the commissioner is inviting the court to make a determination on the intention of the legislature, something that is frowned upon in interpretation of tax statutes as explained in *Stanbic Bank Kenya Limited v Kenya Revenue Authority* (supra) above.

17. In this case, the appellant sought to be allowed to claim input VAT for purchases made after six months from the date of supply. I find that the commissioner rightly rejected these claims as they fell outside the six months' statutory period from the date of supply. Further, there is nowhere in statute where these late claims are to be excused or allowed merely because there was an additional or amended assessment raised by the commissioner. Any claim outside the 6-month period provided is time barred and cannot be allowed under the express terms of section 17 of the VAT Act. Thus, I am unable to fault the tribunal's conclusion.

Disposition

18. This appeal is now dismissed but with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this **31ST day of OCTOBER 2022.**

D. S. MAJANJA

JUDGE

Mr Thiong'o instructed by Thiong'o and Partners Advocates for the Appellant.

Ms Onyango, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.