Commissioner of Customs and Boarder Control v Bic East Africa Limited (Income Tax Appeal E091 of 2021) [2022] KEHC 15981 (KLR) (Commercial and Tax) (25 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E091 OF 2021

A MABEYA, J

NOVEMBER 25, 2022

BETWEEN

COMMISSIONER OF CUSTOMS AND BOARDER CONTROL ..... APPELLANT

AND

BIC EAST AFRICA LIMITED ..... RESPONDENT

(Being an Appeal against the judgment of the Tax Appeals Tribunal delivered on 23/4/2021)

JUDGMENT

1. The appellant is a principal officer appointed under section 11 of the Kenya Revenue Act and is responsible for the collection of customs duties and levies and facilitating international trade through regulation of imports and exports.

2. The respondent is a company incorporated in Kenya and carries on the business of manufacturing and distribution of BIC products. The respondent is a subsidiary of Societe Bic situated in France. It commenced operations in Kenya in January 2019 following the acquisition of the manufacture and distribution of BIC branded products from Haco Industries Kenya Limited. The transaction herein involved acquisition of a stationery manufacturing line, shaving razor assembly line and stock in Kenya for distribution across East Africa.

3. The respondent imported its first consignment on 15/3/2019 and the appellant disputed the customs import values declared by the respondent. The appellant also withheld the impugned consignment imported under entry number 2019CD87772 on 15/3/2019.

4. The dispute thus related to the declared ex-works values of goods sourced from the BIC related suppliers whose value fell significantly compared to the value declared by HACO prior to the

respondent's acquisition. This the appellant took issue with on grounds that the pricing of the imports remained relatively similar to the pre-acquisition price.

5. The drop in value prompted the upward value adjustment done by the appellant and an extra assessment raised. The appellant adjusted the value of ink, BIC shavers and ball pen nibs to the Transaction Value of identical items as per Paragraph 3 of the Fourth Schedule of The Act and the finished Bic Pens value was adjusted in accordance with Deductive Value per Paragraph 6 of the Fourth Schedule of the East African Community Customs Management Act, EACCMA ("the Act).

6. The respondent disputed the value adjustment and, though it paid the uplifted value under protest, it applied for review under section 229 of the Act on 9/5/2019. The appellant failed to respond to the application or render a decision thereon. However, he proceeded to demand taxes of Kshs. 52,483,955/- vide his letter dated 19/12/2019. The respondent was again dissatisfied and applied for review on 17/1/2021. The appellant rendered his decision on 20/2/2021 and upheld the value adjustment and proceeded to demand the taxes due.

7. The respondent was dissatisfied with that decision and appealed to the Tax Tribunal on 3/4/2020. The Tribunal delivered its judgment on 23/4/2021 in its favour.

8. Aggrieved by that judgment, the appellant has preferred the instant appeal raising seven grounds that revolve around the Tribunal's interpretation and application of section 229(4) of the Act.

9. The grounds of appeal were that; the Tribunal disregarded section 229(4) of the Act in its decision, and failed to correctly interpret the phrase "not exceeding thirty days of the receipt of the application"; that the Tribunal erred in failing to establish when the time started to run and further erred in failing to appreciate that there were two assessments one for 9/5/2019 and another for 17/1/2020; that the Tribunal failed to appreciate that the assessment for 17/1/2020 was reviewed by the appellant.

10. That the Tribunal erred in declaring that the demand for additional taxes of Kshs. 49,363,424.00/= was erroneous; that it further erred in failing to consider the appellant's response to the 2nd application for review. The appellant therefore sought that the judgment delivered on 23/4/2021 be aside and the matter be referred back to the Tribunal for determination on merit.

11. In response to the appeal, the respondent filed a Statement of Facts dated 19/7/2021. It was contended that on 9/5/2019, the respondent lodged an application for review pursuant to section 229 (1) of the Act against the appellant's decision to uplift its customs value. That under section 229(4) of the Act, the appellant was to respond to the application within 30 days failure to which the application was deemed to have been allowed under section 229(5) of the Act. That the appellant failed to respond within the statutory timeline.

12. That the appellant then carried out a post clearance audit and issued a demand notice for additional taxes of Kshs. 52,483,955/= vide letter dated 19/12/2019, an amount that was based on the uplifted customs. That the respondent was dissatisfied with that decision and filed an application for review before the Tribunal on 17/1/2021 under section 229(1) of the Act. That the appellant was required by section 229(4) of the Act to issue his decision within 30 days failure to which the application was deemed to be allowed under section 229(5), but that once again the appellant failed to issue his decision within the prescribed time. That he issued his decision on 20/2/2020 revising the demand to Kshs. 49,364,424/=.

13. It was further contended that the respondent appealed against the review decision before the Tax Tribunal and argued that the earlier application for review had already been allowed due to the appellant's failure to respond. That the decision of 20/2/2020 was issued outside the statutory timelines. That the Tribunal's decision of 23/4/2021 correctly found that the appellant had violated

the provisions of section 229(5) of the Act in issuing his decision of 20/2/2021 despite the fact that the respondent's applications for review were deemed to be allowed.

14. That the Tribunal correctly found that section 229 (4) and (5) was couched in mandatory terms and the timelines therein could not be extended. That once the application for review was deemed to be allowed, there was no tax liability in the eyes of the law. The respondent therefore urged that the Tribunal's decision be upheld.

15. The appeal was canvassed by way of written submissions which were highlighted orally on 14/2/2022. The appellants submissions were dated 24/11/2021 whilst those of the respondent were dated 9/2/2022. The Court has considered those submissions as well as the entire record.

16. In paragraphs 17 – 24 of the judgment, the Tribunal found that the respondent lodged its review application on 9/5/2019. That according to section 229 (4) of the Act, the appellant ought to have rendered his decision within 30 days of that date, that is on or before 7/6/2019. That however, the appellant only wrote to the respondent on 27/6/2019 proposing a joint meeting. That the appellant only addressed that application in his decision of 20/2/2020. That the explanation given was that he needed an informed response thus the delay. The Tribunal found explanation to be baseless and unsupported by evidence.

17. In this regard, the Tribunal found that the late response violated section 229(5) of the Act and that as of 7/6/2019, the respondent's application was deemed to be allowed and had no tax liability in the eyes of the law. That the respondent was within its rights to apply for refund of the taxes paid earlier under protest.

18. As regards the second review lodged by the respondent on 17/1/2020 in respect of which the appellant rendered his decision on 20/2/2020, the Tribunal found that though the appellant submitted that he had received the same on 21/1/2020, he did not supply a copy of his to verify the date of receipt. That the copy supplied by the respondent indicated that the application was received by the appellant on 17/1/2020 and not 21/1/2020 as contended.

19. In the premises, the Tribunal found that the appellant had dealt with the applications casually and disregarded the procedures laid down in the law. It set aside appellant's decision of 20/2/2020 and nullified the appellants demand for additional taxes of Kshs. 49,363,424/=.

20. As a first appellate court, the Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own independent conclusions. See *Peter M. Kariuki v Attorney General* [2014] eKLR.

21. Section 229 of The Act provides: -

    1. "A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

        2) ...

        3) ...

        4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application".

22. In *Republic v Commmissioner of Custom Services Exparte Tetra Pak Limited* [2012] eKLR, it was held: -

> " In my view, Section 229 of the Act when considered as a whole is so clear and self-explanatory that no two meanings can be attributed to it. It can only be interpreted in one way using the ordinary meaning of the words used since they are plain and clear. In my opinion, it simply means that a party who is aggrieved by the decision or omission of the Respondent is allowed under Section 229(1) to make an application for review within 30 days to the Commissioner asking for a review of the decision or omission. The Commissioner can however extend the time given for the lodging of the application for review if good cause is shown for failure to comply with the 30 days' time limit but once the application is received, Section 229(4) requires that the Commissioner must make and communicate a decision to the affected taxpayer within 30 days. If no decision is made and communicated within 30 days, the Respondent under Section 229(5) is deemed to have made a decision allowing the application for review. It is important to note that the section is couched in mandatory terms."

23. From the foregoing, it is clear that the appellant must respond to an application for review within 30 days of the receipt of such application. The law leaves no room for the appellant to extend the time by which to respond to a review application. Only the taxpayer enjoys extension of the time by which to bring the application for review, and even then, the taxpayer must show good cause to the appellant for such extension of time.

24. It is not in dispute that the appellant did not respond to the application for review made on 9/5/2019. The appellant however submitted that the issue had been addressed and the parties held meetings to sort out the dispute. The Court takes note that the appellant failed to respond in any manner whatsoever up until 27/6/2019 when he requested for a joint meeting.

25. Undoubtedly, the appellant was already in breach as at that time and could not extricate himself out of a statutory obligation. In any case, there is no evidence that any agreement was ever reached by which the respondent could be bound to.

26. The Court thus finds that the appellant was in breach of section 229 (4) of the Act. It then follows that in terms of section 229 (5) of the Act, the respondent's application for review dated 9/5/2019 was deemed to have been allowed by the appellant.

27. Tax laws must be strictly interpreted as was found in Mount Kenya Bottlers Ltd & 3 Others v Attorney General & 3 Others NRB Civil Appeal No. 164 of 2013 [2019] eKLR. In that case, the Court of Appeal cited with approval Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB where it was held that in interpreting a tax statute there is no room for any intendment or implication. The consequence of non-compliance is clear. As at the date when the 30 day period expired, the appellant was deemed to have made a decision to allow the application.

28. In this regard, any other action that the appellant took after the expiry of the thirty-day period, was taken without jurisdiction and thus erroneous and invalid.

29. This then brings The Court to the second application for review dated 17/1/2020. After the appellant had failed to respond or render his decision to the respondent's 1st application for review, he proceeded to conduct a post clearance audit and issued a tax demand of Kshs. 52,483,955/= vide a letter dated 19/12/2019.

30. However, the respondent disputed the demand and lodged another application for review dated 17/1/2020. The appellant rendered his decision on 20/2/2020, purporting to cover both the 1st and 2nd application. In that decision, he revised his demand to Kshs. 49,364,424/=.

31. The Tribunal found that the appellant was again in contravention of section 229(4) of the Act, having rendered his decision post the thirty-day period. Though the appellant submitted that he received the application on 21/1/2020 and that time begun running on 22/1/2020, the Tribunal found that the appellant did not provide proof that he received the application on 21/1/2020. He who alleges must prove. The appellant failed to prove that allegation. The tribunal cannot be faulted in its finding.

32. In this regard, that decision having been made outside the statutory period of 30 days, it was of no effect.

33. Accordingly, the Court finds that the appeal lacks merit and upholds the decision of the Tribunal. The appeal is dismissed with costs to the respondent.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

A. MABEYA, FCIArb

JUDGE