



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E052 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

SONY HOLDINGS LIMITED.....RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 30th March 2020 in

Tax Appeal No. 62 of 2017)

JUDGMENT

Introduction and Background

1. In this appeal, the Appellant (“the Commissioner”) is challenging the decision of the Tax Appeals Tribunal (“the Tribunal”) dated 30th March 2020 holding that the Respondent is entitled to claim Commercial Building Allowance (also referred to as “the Allowance”) in accordance with **section 15(1)** and **2(b)** as read with the **Second Schedule** to the **Income Tax Act (Chapter 470 of the Laws of Kenya)** (“the **ITA**”)in respect of its building, an upmarket shopping mall located in Westlands, Nairobi known as Westgate Shopping Mall (“the Mall”). It also allowed the Respondent to amend its self-assessment returns from the year 2010.
2. The Commissioner filed a Memorandum of Appeal dated 22nd May 2020. The Respondent opposes the appeal and filed its Statement of Facts dated 23rd June 2020. Both parties filed written submissions supported by a plethora of authorities with their respective counsel making oral submissions.
3. The facts giving rise to this appeal are largely common ground. The Respondent completed construction of the Mall in 2007 whereupon it opened for business with retail chains and other shops as tenants. In 2015, the Commissioner conducted an audit of the Respondent’s books. By its letter dated 25th May 2016, the Respondent made an application to amend its self-assessment returns for the years of income 2010 to 2015 in order to claim the Allowance on the basis that it was entitled to this deduction at the rate of 25% from with effect from the year 2010 since it specializes in the construction and rent of buildings which qualify as Industrial Buildings under the **Paragraph 5(1)(ee)** of the **Second Schedule** to the **ITA** introduced by the **Finance Act, 2009**. After a back and forth, the Commissioner, by its letter dated 12th January 2017, declined the Respondent’s application on the ground that the Mall for which the Respondent sought to claim the allowance was completed and put into use in 2007 way before the law allowing taxpayers to claim the allowance came into force on 1st January 2010.
4. Aggrieved by the Commissioner’s decision, the Respondent formally objected by filing its Notice of Objection dated 7th February 2017. The Commissioner rejected the objection and affirmed position by the letter dated 8th March 2017 precipitating the appeal to the Tribunal.
5. In allowing the appeal, the Tribunal held that the Commissioner erred in holding that the Allowance only applied to, “*building that were completed and put to use on or after 1st January 2010*” yet the statutory provision applied to any claim made, “*for any year of income commencing on or after 1st January, 2010.*” The Commissioner now appeals against this decision.

The Commissioner’s Case

6. The Commissioner submitted that the only one issue for determination is whether the allowance can be claimed by owners of buildings whose construction was completed and the buildings put into use before the law allowing the allowance came into force.

7. Mr Lemiso, counsel for the Commissioner, submits that the Commissioner's position remains that it could not grant the Respondent's application as the law that allowed taxpayers to claim the allowance as an expense in computing taxable income came into effect on 1st January 2010 following enactment of the **Finance Act, 2009** which came into effect on 1st January 2010. Counsel submits that when a law comes into operation, it is prospective, affects things that happen from the time it came into effect going forward and is not retrospective. In his view, when the law that allowed the Commercial Building Allowance came into effect, it only affected taxpayers who were constructing buildings and who have incurred that expenditure to claim it from the date the law came into effect going forward.

8. Counsel further submitted that the Tribunal's interpretation would lead to an absurdity as it would mean that all taxpayers who constructed commercial buildings prior to 1st January 2020, are entitled to the allowance from time immemorial may now claim the allowance. Counsel cited the Supreme Court decision of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others SCK Application No. 2 of 2011 [2012] eKLR** to support the position that such laws are not retrospective in application.

9. Counsel further contended that the **ITA** is neither a statute that is merely declaratory nor one which relates to matters procedure or evidence and therefore it cannot be presumed to have retrospective application unless it is expressly stated. That **Paragraph 1(1) of Second Schedule** of the **ITA** is express and clear as there are words indicating that the benefit given shall apply retrospectively nor is there any necessary implication be made. In his view, the provision is clear and leaves no room for ambiguity.

10. Counsel urged the court to be guided by the principles governing the interpretation of a taxing statute including the following cases **Republic v Kenya Revenue Authority Exparte Bata Shoe Company (Kenya) Limited JR Case No. 36 Of 2011 [2014] eKLR**, **Palm Oil Research and Development Board Malaysia & Another v Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265** and **Law Society of Kenya v Kenya Revenue Authority & Another Petition No. 39 of 2017 [2017] eKLR**.

11. The Commissioner urged the court to allow the appeal and set aside the Tribunal's decision and affirm its objection decision.

The Respondent's Case

12. Mr Oraro, SC for the Respondent submits that the issue before the court is whether the amendment of the **Second Schedule** by the **Finance Act, 2009** which introduced the commercial building allowance applied only to those buildings which were constructed after 2010 or it applied to any person claiming from the year of income 2010 for the allowance and have complied with the requirements of the provisions of the amendment to the **ITA**.

13. Counsel submits that the amendment was not concerned with the date when the infrastructure was built but rather whether it is being claimed for a year of income commencing 1st January 2010. Counsel adds that if it was intended that the provision should apply either from the year of occupation or from the year of creation of infrastructure, it would have clearly stated. Counsel pointed out that the Commissioner's position is negated by the amendment to the **Second Schedule** introduced by the **Finance Act, 2012** which deleted **Para. 1(1) (ee)** and replaced it with **Para. 6A** which introduced the year of occupation as a basis for claiming the allowance.

14. Counsel submitted that the statute has to be given their ordinary meaning and that Tribunal was right in holding that the Commissioner indeed introduced words which were not prescribed on the statute and urges the court find that the following three conditions are to be met for the provision to apply;

- (a) First, a person must have incurred a capital expenditure on the construction of an industrial building to be used in a business carried on by him or his lessee;
- (b) Secondly, that Commercial Building Allowance is claimable for any year of income commencing on or after 1st January 2010; and
- (c) Third, that a claimant for Commercial Building Allowance, incurring expenditure, must have provided roads, power, water, sewers and other social infrastructure.

15. The Respondent contends that the Commissioner admitted that it met all the requirements entitled to the allowance and that it should be allowed to amend its assessment as earlier advised by the Commissioner's officers during the compliance audit. Counsel further stated that the Commissioner's position that the allowance is deductible on the date when the capital expenditure is incurred is a misconception of the law, as the deduction of the costs is given in subsequent years, at a specified rate, for example the Commercial Building Allowance allowed at 25% per year is to be deducted over a period of four years. That the Commissioner's position clearly does not appreciate this, as if the deduction is done on the year of the capital expenditure, then it would change the amount of deduction of 25% as prescribed in the law to 100%.

16. The Respondent rejects the Commissioner's contention that in order to qualify for the allowance, the building must have been constructed by 1st January 2010. Counsel submits that the allowance is claimable provided the taxpayer incurred capital expenditures by providing social amenities on the date the building was put to use the date on which the capital expenditure was incurred or when the building was put to use. Once these conditions have been met, the allowance is claimable for "any year of income after 1st January, 2010."

17. In answer to the Commissioner's submission that upholding the Tribunal's decisions would lead to an absurdity as all commercial buildings owners from time immemorial would be allowed to claim the allowance, counsel submits that this is a misconception of the law as it only applies to those who meet the strict requirements of the provision supported by evidence.

18. Counsel adds that the Commissioner is aware that the provisions under which the claim was to be made were repealed in the year 2013 by enactment of **Para. 6A** of the **Second Schedule** of *ITA* creating a standalone claim for commercial building deductions, which is now distinct from Industrial building deductions.

19. Turning to **section 31** of the *Tax Procedures Act* (“the *TPA*”), the Respondent submits that it allows for amendment of assessments for a period going back to 5 years, meaning that any claim would only be made for the year 2015, when the provision in issue herein was amended and repealed by 31st December, 2012. It therefore denies that the Commissioner would be overwhelmed by an avalanche of claims of the allowance as allowed from the year of income 2010 as the claim is unfounded and without any basis in law. Counsel also added that a taxpayer cannot claim the allowance in perpetuity and once a taxpayer has recovered its capital cost, which it does so within 4 years as the rate is 25%, the same is extinguished.

20. The Respondent urges the court to dismiss the appeal as it constitutes an attempt by the Commissioner to administer tax laws by intendment and through departure from the clear, express and non-ambiguous provisions of the law, and is an attempt to invite this Court to depart from a long, firm and globally accepted jurisprudence that where the tax laws are clear, the same is to be interpreted and implemented as is, without any intendment, craft or innovation.

Analysis and Determination

21. The issue for determination in this appeal is fairly straightforward and concerns interpretation and application of **Paragraph 1(1) (ee)** of the **Second Schedule** of *ITA* which states as follows:

1(1) Subject to this schedule, where a person incurs capital expenditure on the construction of an industrial building to be used in a business carried on by him or his lessee, a deduction equal-

.....

(ee) in a case referred to in paragraph 5(1)(f) for any year of income commencing on or after 1st January 2010, where roads, power, water, sewers and other social infrastructure have been provided by the person incurring the capital expenditure, twenty-five per cent.

22. The parties differ in their interpretation of the above provision. The Commissioner’s position is that costs associated with the construction of the Mall did not qualify for the allowance as the Mall was commissioned in the year 2007 prior to the enactment and coming into force of the applicable law in January 2010. On the other hand, the Respondent contends that the said provision did not disallow the allowance for buildings constructed before the effective date but rather the allowance was payable to any person claiming the allowance from the 2010 year of income provided it has complied with the conditions therein.

23. Both parties cited copious authorities on the interpretation of tax statutes. I would only cite *Kenya Revenue Authority v Republic (Exparte Fintel Limited) NRB CA Civil Appeal No 311 of 2013 [2019] eKLR* cited with approval the case of *Inland Revenue Commissioners v Duke of Westminster [1936] A.C. 1; [1] 19 TC 490* where Lord Atkinson elucidated the rule of construing tax laws as follows;

It is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of a statute must be adhered to, and that so-called equitable constructions of them are not permissible.

The court also cited the observations of Lord Simonds in *Russel v Scott [1948] 2 ALL ER 5* that;

[T]here is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him.

24. The strict approach to the interpretation of tax legislation is found in the oft cited case of *Cape Brandy Syndicate v Inland Revenue Commissioner (1) [1930] 12 TC 358*, it was held:

In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

25. The language of **Paragraph 1(1) (ee)** of the **Second Schedule** of *ITA* is clear and does not need any technical interpretation. It provides that in order for the tax payer to qualify for the Commercial Building allowance, it must satisfy three conditions. First, the taxpayer must incur capital expenditure on construction of the industrial building. Second, the expenditure must be for the year commencing on or after 1st January 2010 and third, the person incurring expenditure, must have provided roads, power, water, sewers and other social infrastructure.

26. Consequently, I reject the Commissioner’s submission that the words, “for any year of income commencing” Includes “buildings that were completed and put to use on or after 1st January, 2010 ...” Not only would this interpretation do violence to the statute, it is inconsistent with the wording of the statute and would imply a meaning not supported by the words, a proposition not supported by well-established authority. I am unable to find any interpretation that would lead to the conclusion that a taxpayer ought to have constructed and be in occupation and/or use of the building after 1st January 2010 for them to qualify for the allowance.

27. The issue of retrospective application of the provision does not arise and the Commissioner's fear that building owners from time immemorial coming to claim the building allowance for buildings that were completed years before is unfounded. The provision is clear that the expenditure in question must be incurred on construction, "for any year of income commencing on or after 1st January 2010". This means the expenditure is prospective and not retrospective. Nor is the argument by the Commissioner that for the taxpayer to qualify, it must construct a building from scratch. On the contrary, **Para. 1(3)** of the **Second Schedule** of **ITA** defines the construction to include "the expansion or substantial renovation or rehabilitation of an industrial building, but does not include routine maintenance or repair" meaning that such capital expense can be incurred even after the building is in use.

28. Ultimately, the Commissioner's position is negated by the **Para. 6A** which replaced **Paragraph 1(1) (ee)** of the **Second Schedule** which introduces the element of use of the building and which provides as follows:

6A. (1) Where a person incurs capital expenditure on the construction of a commercial building to be used in a business carried on by him or his lessee on or after the 1st January, 2013, and the person has provided roads, power, water, sewers and other social infrastructure, there shall be deducted, in computing the gains or profits of that person for any year of income in which the building is so used, a deduction equal to twenty five percent per annum.

29. The Commissioner does not controvert that the Respondent incurred a capital expenditure and that there was provision for roads, power, water, sewers and other social infrastructure and that this expenditure was incurred as from 1st January 2010. I therefore find and hold that the Respondent was entitled to the Commercial Building Allowance and that there was no valid reason why the Commissioner rejected the Respondent's application for amendment of the self-assessments for the subject period.

Conclusion and Disposition

30. For the reasons I have set out above, I affirm the judgment of the Tribunal dated 30th March 2020. The appeal is therefore dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

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

Mr Oraro, SC with him Ms Omondi instructed by Oraro and Company Advocates for the Respondent.