



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

TAX APPEAL NO E091 OF 2020

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

-VERSUS-

GOLDEN ACRE LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of the Tax Appeals Tribunal at Nairobi)

delivered by the Honourable Tribunal on 24th July 2020

in Tax Appeals Tribunal Appeal Number 112 of 2017)

J U D G M E N T

1. On 27/2/2014, the appellant assessed the respondent and demanded payment of taxes amounting to 7,875,461/-. The respondent objected to the additional tax assessment on 27/3/2014. No action took place but 3 years later, on 28/3/2017, the appellant issued a notice of amended assessment based on documents it had retrieved from the respondent's bankers.

2. The respondent was aggrieved by that decision and it appealed to the Tax Tribunal Appeal. By a judgment delivered on 25/7/2020, the Tribunal partially allowed the said appeal. It upheld the tax assessment of 27/4/2014 for Kshs. 7,875,461/- subject however, to the appellant allowing interest on loans borrowed by the directors to finance the properties of the respondent.

3. Being dissatisfied with that judgment, the appellant lodged this appeal to set aside part of that decision on the following grounds: -

(i) THAT the Honourable Tribunal erred in law and in fact in failing to appreciate that the burden of proof in tax matters lies on the taxpayer.

(ii) THAT the Honourable Tribunal exercised its discretion wrongly by issuing a Judgment that contravenes an express Provision of the Law.

(iii) THAT the Honourable Tribunal erred in law and in fact in finding that the Respondent failed to state evidence of ownership of the Kariobangi property.

(iv) THAT the Honourable Tribunal erred in law and in fact in finding that the Kariobangi property should not be subjected to tax.

4. On the foregoing grounds, the appellant prayed that the appeal be allowed with costs.

5. The respondent neither appeared nor filed any pleadings in response to the appeal. The Court granted the respondent several opportunities to defend the appeal but it never acted on the same. The appeal was therefore determined by way of written submissions ex-parte.

6. The appellant submitted that the burden is on the taxpayer to prove that a tax decision is incorrect. That the respondent had failed to adequately prove that the tax assessment carried out by the appellant was incorrect.

7. The appellant further submitted that the respondent did not discharge its burden of proof in showing that the appellant used extraneous considerations and documents other than those prescribed by the law and that the averments made by the respondent at the hearing did not amount to evidence.

8. The **Section 30 of the Tax Appeals Tribunal Act** states:

“In a proceeding before the Tribunal, the appellant has the burden of proving -

a) where an appeal relates to an assessment, that the assessment is excessive; or

b) in any other case, that the tax decision should not have been made or should have been made differently.”

10. The general rule of evidence is that, he who alleges must prove. In this regard, **Section 107 of the Evidence Act, Cap 80, Laws of Kenya** provides: -

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

9. In its Judgment, the tribunal it was held that the appellant’s tax assessment of 27/4/2014 for Ksh.7,875,461.00 was upheld subject to the appellant allowing interest on loans borrowed by the directors to finance the properties of the company. That was based on the finding that, that the appellant had failed to persuade the tribunal that the Kariobangi property, was not owned by the directors but by the respondents.

10. The evidence before the tribunal regarding the ownership of the subject property was the respondents own documents which had indicated that the property belonged to it and the testimony of one **Wanjau Muriithi**. He told the tribunal that he was a director of the respondent and that the subject property was owned by himself and another director **Mercy Wanjau**.

11. Although the rental income was sent to the respondent’s bank account, the property belonged to the two directors and not the respondent.

12. It is on the foregoing that the Tribunal held that the appellant had failed to persuade it that the said property belonged to the respondent. That the appellant ought to exclude the rental income from that in its tax assessment as the income in relation to the said property was wrongly assessed on a party who did not own it.

13. In the case of **Sheria Sacco Society Limited V Commissioner of Domestic Taxes [2019] eKLR Mary Kasango J** held:

“The SACCO however needs to appreciate that what the Tribunal was dealing with was an appeal against the Commissioners’ confirming notice that the SACCO had taxes to pay. When one appreciates that then the submissions of the Commissioner, under this head, are correct that the burden of proof lay on the SACCO. This is what is provided under Section 30(b) of the Tax Appeal Tribunal Act cap 40. That section provides:

‘In a proceeding before the Tribunal, the Appellant has the burden of proving-

a. Where an appeal relates to an assessment, that the assessment is excessive; or b. In any other case, that the tax decision should not have been made or should have been made differently.”

14. *The SACCO did not meet that burden of proof.”*

In the Australian case of **Mulheim v Commissioner of Taxation [2013] FCAFC 115** the Full Federal Court of Australia (PFC) held:

“A taxpayer must satisfy the burden of proof to successfully challenge income tax assessments. The PFC held that it is not enough for a taxpayer to simply demonstrate that the assessment issued by the Commissioner is incorrect. Rather, the onus is on the taxpayer in proving that an assessment issued by the Commissioner is excessive can only be discharged by the taxpayer by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied. That onus requires the taxpayer to positively prove his or her 'actual taxable income' and in doing so, must show that the amount of money for which tax is levied by the assessment exceeds the actual substantive liability of the taxpayer”.

15. On the foregoing, it was upon the respondent to prove that the assessment was wrong. That the Kariobangi property belonged to the alleged directors and not the company. It is the respondent who had included that property in the Schedule of those rental premises from which the tax was assessed. At the hearing no title was produced to prove that the property did not belong to the respondent. The issue of ownership of the subject property was in the special knowledge of the respondent. The respondent failed to prove it.

16. In this regard, the Tribunal erred in shifting the burden of proof to the Appellant.

17. Accordingly, the appeal succeeds and is allowed as prayed.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2021.

A. MABEYA, FCI Arb

JUDGE