REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL NO. E138 OF 2020

COMMISSIONER OF DOMESTIC TAXES .....APPELLANT

-VERSUS-

ALTECH STREAM (EA) LIMITED ..... RESPONDENT

(**Being an appeal against the judgment of the Tax Appeals Tribunal delivered on 25/9/2020 in**

Tax Appeal No.159 of 2016)

J U D G M E N T

1. In 2015, the appellant initiated an audit on the respondent's operations for the years of income 2011 - 2015. The appellant notified the respondent of its audit findings and raised an assessment of Kshs.190,833,899/- as tax liability for Corporation Tax, Vat and Withholding Tax. The respondent objected to the assessment which was rejected by the appellant.

2. Aggrieved by the objection decision, the respondent filed an appeal in the Tax Appeals Tribunal. By its judgment made on 25/9/2020, the Tribunal allowed the appeal and held that the respondent was entitled to a refund of the excess tax paid to the appellant less Kshs. 2,124,858.35 being VAT liability for 2013.

3. Being dissatisfied with part of the decision of the Tribunal, the appellant has appealed to this court raising 6 grounds which can be summarized as follows:-

i) That the Tribunal misapplied the provisions of Section 56(1) of the Tax Procedure Act 2015 and Section 30 of the Tax Appeals Tribunal's Act, 2013

ii) That the Tribunal failed to appreciate Section 23 of the Tax Procedures Act that mandate a tax payer to keep documents for 5 years from the end of the reporting period.

iii) That the Tribunal erred in finding that the respondent had proved its case despite an acknowledgement that it had failed to provide the requested documentation.

iv) That the decision was contrary to section 31 of the Tax Procedures Act that mandate the appellant to rely on available information and best judgment in ascertaining the taxable income and further erred in failing to hold that grossing up of withholding tax certificates claimed was the reliable way of establishing the taxable income.

v) That the Tribunal erred in holding that Kshs. 119,536,768/= had been correctly accounted for.

4. On the foregoing grounds, the appellant prayed that the said judgment be set aside and the appellant's decision contained in his letter dated 13/10/2016, demanding additional taxes of Kshs.190,833,899/-, be upheld.

5. The respondent opposed the appeal on the basis of its statement of facts filed in response thereto. It contended that under ***section 56(2) of the Tax Procedures Act***, an appeal to the High Court or Court of Appeal is on questions of law only. That despite this, the present appeal sought to challenge the findings of fact made by the Tribunal. That in the premises, the appeal is incompetent and should be dismissed.

6. It was further contended that there was no basis for the appellant's claim that the Tribunal had misapplied the provisions of ***section 56(1) of the Tax Procedures Act and section 30 of the Tax Appeals Tribunal Act***. That the respondent had discharged the burden of proof by providing sufficient explanations, documentation and witness testimony in support of its position. That the onus fell on the appellant to rebut

the position which he failed to.

7. It was further contended by the respondent that although it was required to maintain documents for a period of five years from the end of the reporting date, this was never an issue in the proceedings before the tribunal. That it had lost documentation through no fault of its own and the appellant refused to provide copies of the respondent's returns filed with KRA to assist in the reconstruction of its documentation to enable it to reconcile the variance. It urged that the appeal be dismissed.

8. The Court has carefully considered the respective contentions and the submissions on record.

9. Before dealing with the grounds raised in the Memorandum of Appeal, this Court needs to first determine whether the appeal is in breach of ***section 56 (2) of the Tax Procedures Act*** as contended by the respondent. The first ground was that the Tribunal had misapplied ***section 56(2) of the Tax Procedures Act*** and ***section 30 of the Tax Appeals Act, 2013***.

10. **Section 56(2) of the Tax Procedures Act** provides:-

> "**An** ***appeal to the High Court or to the Court of Appeal shall be on a question of law only.***"

11. What then is a "question of law"? In **John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR ,** the Court of Appeal held:

> ***"...appeals to this Court in election petitions are confined to matters of law only,the interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court."***

12. In **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013] eKLR,** the Court of Appeal held:

> "**What** ***are the points of law raised in this appeal? An appellate court will not ordinarily differ with the findings on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law."***

13. Further in the Indian case of ***Meenakshi Mills, Madurai v. The Commissioner of Income Tax, Madras (1957) AIR 49, (1956) SCR 691*** the Supreme Court of India came to the conclusion that a question of law would arise in the following three instances only*:*

> ***"a. the construction of a statute or document of title;***
>
> ***b. the legal effect of the facts found where the point for determination is a mixed question of law and fact;***
>
> ***c. a finding of fact unsupported by evidence, or that is unreasonable or perverse in nature."***

14. From the foregoing, it is clear that a question of law is one which concerns the interpretation and construction of laws and the application of laws to the facts established by the trial court. The facts are only used by the appellate court to understand the background and context and to satisfy the court that the conclusions arrived at by the trial court was based on the evidence on record.

15. The respondent submits that although the appellant makes reference to various sections of statutes, it sought to challenge findings of fact made by the tribunal which renders the appeal incompetent.

16. Having considered the appeal in its entirety, the Court does not agree with the respondent's submission. All the grounds of appeal point towards the way the Tribunal interpreted or applied the referred to provisions of the Law to the facts. In this regard, it is not correct that the appeal is incompetent for challenging the decision on facts. That objection is rejected.

17. The first ground of appeal was that the Tribunal misapplied the provisions of ***section 56(1) of the Tax Procedures Act, 2015*** and ***section 30 of the Tax Appeals Tribunals Act, 2013.*** It was the Appellant's contention that the Tribunal did not apply the correct burden of proof.

18. The two provisions vest upon the tax payer with the burden of proof. It is for the tax payer in any proceeding to prove that the tax decision is incorrect or assessment is excessive. The record would show that the respondent not only produced a detailed statement of facts, well supported by documentary evidence, but that it presented a witness at the trial who clarified the issues to the satisfaction of the Tribunal.

19. In this Court's view, the respondent discharged its onus thereby shifting the evidentiary burden to the appellant. The appellant failed to discharge the same whereby the respondent was held to have proved its case. Accordingly, the Tribunal did not misapply the said provisions either as alleged or at all. That ground fails.

20. The second ground was that the Tribunal failed to appreciate ***section 23 of the Tax Procedures Act*** and consequently erred in finding

that the respondent had proved its case despite acknowledging the failure to provide the requested documentation.

21. ***Section 23*** aforesaid provides, interalia:-

(i) "A person shall-

(c) subject to subsection (3), retain the documents for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law".

22. It is not in dispute that in his communication, the appellant requested the respondent to provide him with certain documents. Those documents were well within the five (5) years bracket. The respondent failed to supply those documents but explained that they had been destroyed by a fraudulent employee. The respondent then proceeded to request the appellant to supply it with some of its records in respect of the tax previously filed with KRA. According to the respondent, this was to enable it reconstruct its records.

23. It should be noted that the respondent's evidence on this area was neither denied nor challenged. The appellant accepted the said explanation without challenging the same. One would have expected that if the appellant did not agree with the same, he would have raised questions on it. These would include, that it be supplied with the full particulars of the alleged perpetrator, the date(s) of destruction, evidence of any report(s) made to the authorities and whether this had been disclosed to the respondent's auditors and factored in its previous statement of accounts. Since the appellant was satisfied with the explanation given, as to the missing documents, the Tribunal cannot be faulted. The evidentiary burden shifted and laid with him.

24. In view of the foregoing, although the respondent had admitted not to have provided the documents requested, the Tribunal was entitled to hold that the respondent had discharged its burden the moment the appellant failed to challenge and/or controvert the same. The appellant having been contented with the explanation given, he cannot fault the Tribunal for also being contended with the explanation as to the missing documentation.

25. Further, as a sign of good faith, it was incumbent upon the appellant to supply to the respondent the documents relating to the previous returns as had been requested. By refusing to either supply the documents requested or respond to the request, the appellant is deemed to have been satisfied with the explanation given by the respondent and was bound thereby.

26. The position the Court takes is that, whilst ***section 23 of the Tax Procedures Act*** burdens the tax payer with the responsibility of keeping the required documents for the noted period, where an acceptable explanation is given, which is accepted by the tax authorities, such as in the present case, the burden will be deemed to have been discharged. Accordingly, that ground is rejected.

27. The other ground was that the decision of the Tribunal was contrary to ***section 31 of the Tax Procedures Act*** which mandate the appellant to rely on available information and use best judgment in ascertaining the taxable income. That the Tribunal erred in failing to hold that grossing up of withholding certificates claimed was the reliable way of establishing the taxable income.

28. Both ***sections 29 (1) and 31 (1) of the Tax Procedures Act*** allow the appellant, to make an assessment based on such information as may be available and to the best of his judgment. In the present case, some of the documents crucial for assessment were not available for reason of destruction. The appellant resorted to grossing up withholding tax certificates to determine the taxable income.

29. It should be noted that there was nothing wrong perse in grossing over the withholding tax certificates as a means of determining the taxable income. However, the respondent was able to demonstrate to the satisfaction of the Tribunal that in grossing up the withholding tax certificates for the years 2012 and 2013, the same would have amounted to double taxation. The respondent availed a witness who testified before the Tribunal and demonstrated the likelihood of double taxation. Her testimony was not impeached.

30. Further, the Tribunal found as a matter of fact that; the respondent had matched its Withholding Tax Certificates against the actual invoices. This matching was neither challenged nor faulted. It should be recalled that this court cannot impeach a finding of fact of the Tribunal unless it is made without evidence or is so perverse to be allowed to stand. That is not the case here.

31. As contended by the respondent, there was other information that the appellant could have used other than grossing of the Withholding Tax Certificates. Once the respondent was able to match those certificates with the actual invoices, the use of the certificates could not be the best available information and judgment. There was the previous statement of accounts which could as well have been used. That ground is rejected.

32. The final ground was that the Tribunal erred in holding that Kshs. 119,536,768/= had been correctly accounted. This amount related to impaired debtors. The respondent contended and proved that this amount had been added back in its tax computation for the year 2013. This was contained in the returns of the respondent for the year in question.

33. The Tribunal having found as a fact that at pages 80 and 92 of the record, the amount had been accounted for in the subject year, that finding cannot be said to be without basis. It was based on evidence. The appellant did not challenge those returns. The amount was there and the adding back of the same for purposes of tax computation could not be denied neither was it challenged. That ground in the view of the court was without basis.

34. In view of the foregoing, the appeal is without merit and is dismissed with costs. The Judgment of the Tribunal is hereby upheld.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2021.

A. MABEYA, FCI Arb

JUDGE