



**Commissioner of Domestic Taxes v Fortune Container Depot Limited (Tax Appeal E060 of 2020) [2021] KEHC 262 (KLR) (Commercial and Tax) (19 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 262 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
TAX APPEAL E060 OF 2020  
DAS MAJANJA, J  
NOVEMBER 19, 2021**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**FORTUNE CONTAINER DEPOT LIMITED ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 31st March 2020 in Tax Appeal No. 24 of 2018)*

**JUDGMENT**

1. The Respondent is a Kenyan limited liability company whose principal activity is the handling, storage, repairs and cleaning of empty containers at the port of Mombasa and provides services to clients such as the Mediterranean Shipping Company (MSC) and WEC Lines BV (“non-resident shipping lines”) through the entities Oceanfreight (E.A.) Limited and WEC Lines (Kenya) Limited (“General Agents”) respectively.
2. The Appellant (“the Commissioner”), as part of its mandate to administer and collect taxes on behalf of the Government of Kenya, carried out a Value Added Tax (“VAT”) refund audit of the Respondent’s refund status for the months of August 2014 to June 2015 and raised an additional assessment of KES 21,213,802.21 which amount included interest, through its letter dated 26<sup>th</sup> September 2017.
3. The Respondent was dissatisfied with this finding by the Commissioner and formally objected to the same through its letter dated 24<sup>th</sup> October 2017. The Commissioner, in its objection decision dated 17<sup>th</sup> January 2018 confirmed its earlier assessment and disallowed the records and explanations provided by the Respondent. Aggrieved, the Respondent lodged an appeal at the Tax Appeals Tribunal (“the Tribunal”) which after hearing the parties’ arguments, allowed the Respondent’s appeal and set aside the Commissioner’s objection decision and tax assessment of KES 21,213,802.00



4. It is this decision by the Tribunal that is the subject of the instant appeal by the Commissioner, which is grounded in its Memorandum of Appeal dated 28<sup>th</sup> May 2020. The Respondent opposes the appeal through the Statement of Facts dated 26<sup>th</sup> June 2020. The appeal was canvassed by way of written submissions with the parties advancing their respective positions.
5. The main and substantial issue in this appeal is whether the services rendered by the Respondent, that is cleaning, storage, handling, repair and transport of containers, to non-resident shipping lines are exported services and therefore zero rated under the VAT Act, 2013. On this issue, the Tribunal held in favour of the Respondent. I wish to point out that the same issue raised by the Commissioner in this appeal in respect of the same relationship between the same parties has been determined in HC COMM ITA NO. 063 OF 2020, Commissioner of Domestic Taxes v Fortune Container Depot Limited which arose from an audit for the period June 2015 to July 2018, a later period.
6. The court considered all the arguments raised by the Commissioner and came to the conclusion that the Tribunal's decision was well founded. I do not see any reason to regurgitate the parties' arguments and I propose to hold that the same decision applies to this case.
7. The other issue that was considered by the Tribunal in the matter giving rise to this appeal is whether the Commissioner's Objection Decision dated 17<sup>th</sup> January 2019 was issued outside the statutory time limits of 60 days in accordance with section 51(1) of the *Tax Procedures Act*, 2015 ("the TPA") which provides that where the Commissioner has not made an objection decision within sixty days from the date the taxpayer lodged a notice of objection, the objection shall be allowed. Although the Tribunal found that the Commissioner had failed to adhere to the time limits by rendering its decision 84 days after receipt of the Respondent's Notice of Objection, it condoned the delay and allowed the matter to proceed.
8. Since its appeal was allowed on merits, the Respondent did not appeal against the finding that the Objection Decision was valid even though it was rendered outside the prescribed statutory period. It however, raised the issue in its submissions although it did not appeal against the part of the decision that it was aggrieved hence it would be improper to consider this ground save to point out that the Tribunal clearly failed to follow binding judicial precedent on the issue; *Republic v Commissioner of Domestic Taxes ex. Parte Fleur Investments* [2020] eKLR, *Energy Limited v Kenya Revenue Authority and 2 Others* HC PET No. 471 of 2019, *Republic v Kenya Revenue Authority ex-parte M-Kopa Kenya Limited* [2018] eKLR and *Republic v Commissioner of Customs Services ex-parte Unilever Kenya Limited* [2012] eKLR.
9. As I stated, I have already determined the issues raised in this appeal in HC COMM ITA No. E063 of 2020, Commissioner of Domestic Taxes v Fortune Container Depot Limited by the judgment dated 19<sup>th</sup> November 2021. The judgment in that case shall apply to this case.
10. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Marigi, Advocate instructed by the Kenya Revenue Authority for the Appellant.

Mr Kimani, SC with him Mr Ruto instructed by the Hamilton Harrison and Mathews Advocates for the Respondent.

