



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D.S. MAJANJA J.
TAX APPEAL NO. 24 OF 2017

BETWEEN

GUACA STATIONERS LIMITED.....APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal on 22nd May 2017 in Nairobi Tax Appeal No. 215 of 2017)

JUDGMENT

Introduction and Background

1. This is an appeal from the decision of the Tax Tribunal dismissing the appellant's appeal.
2. The facts giving rise to this appeal are not in dispute. The respondent carried out an in-depth audit of the appellant for the years 2007 and 2008 and raised assessments on various heads being Income Tax, PAYE, VAT and Withholding Tax amounting to Kshs. 38,409,067/-, Kshs. 4,929,453/-, Kshs. 115,822,812/- and Kshs. 126,706/- respectively. The assessments were communicated to the appellant by a letter dated 30th July 2012.
3. The appellant objected to the assessment by its letter dated 24th August 2012 and lodged an objection notice with the respondent. The respondent dismissed the objections and confirmed the assessment by the letter dated 17th October 2013. The appellant, being aggrieved by the decision to confirm the assessment, lodged an appeal with the Tax Appeals Tribunal ("the Tribunal").
4. At the hearing of the appeal before the Tribunal, the parties settled several issues by consent except the following issue framed for determination, "Whether the Respondent was within the law in confirming the assessment of VAT amounting to Kshs. 10,511,139/- due to failure of the appellant to produce the necessary documents."
5. In its decision dated 22nd May 2017, the Tribunal dismissed the appeal. It is this decision that has now precipitated this appeal.

The decision and grounds of appeal

6. The appellant filed its memorandum of appeal on 21st June 2017 featuring 11 grounds of appeal. The gravamen of the appeal concerns the conduct of proceedings by the Tribunal.
7. Before the Tribunal, the appellant filed its Memorandum of Appeal while the appellant filed its response to the Memorandum of Appeal and the Statement of Facts. On 1st July 2016, the Tribunal expunged the respondent's statement of facts on the ground that the documents were filed outside the timelines prescribed by the *Tax Appeal Tribunal Act, 2013* ("the Act"). It relied on **section 15** of the *Act* which states that:

15. The Commissioner shall, within thirty days after being served with a copy of the appeal to the Tribunal, submit to the Tribunal enough copies as may be advised by the Clerk, of –

- a. a statement of facts including the reasons for the tax decision; and
- b. any other document which may be necessary for review of the decision by the Tribunal.

8. The Tribunal explained that notwithstanding that it had expunged the respondent's documents, it went further and stated as follows;

[41] The foregoing notwithstanding it must be appreciated that in line with the policy of the Tribunal the legal framework and rules of natural justice, we are guided by Section 26 of the TAT, Act 2013 which provides;

The Tribunal shall ensure that every party to the proceedings is given a reasonable opportunity to –

- a. present his case; and
- b. Inspect any documents in relation to the proceedings and make submissions.

And section 30 of TAT Act 2013 which provides

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

- a. where an Appeal related 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.

[42] In which case the Respondent was given the opportunity to orally cross-examine the evidence adduced by the Appellant pertaining to this case, refer to the document filed by the Appellant in their Statement of Facts and the right to file their written submissions within the period given by Tribunal. This is a right that cannot be taken away from the Respondent even though the Tribunal has expunged their Statement of Facts from the record as the same were filed out of time contrary to the mandatory provisions of Section 15 of TAT, Act 2013.

9. The thrust of the appellant's appeal before this court is that having expunged the respondent's statement of facts, the Tribunal did not have any factual basis to ground its decision dismissing the appeal. The appellant complained that despite striking out the respondent's statement of facts, the Tribunal allowed an advocate rather than the party present factual issues in violation of the law. The appellant contended that the Tribunal also failed to appreciate that the import of **section 30** of the **Act** having regard to the burden of proof.

10. The parties filed statement of facts and written submissions to support their respective positions.

Appellant's submissions

11. The appellant submitted that after the respondent's statement of facts was expunged in line with **section 15** of the **Act**, the respondent never filed or adduced any documentary evidence to support its assertion that the assessment and decision was proper, lawful and based on facts. The appellant therefore submits that the respondent failed to lead evidence to support its case as required by **section 15** of the **Act** and **sections 107** and **108** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**.

12. The appellant relied on several cases to support its position that the respondent failed to satisfy its evidential burden hence its case remained unproven. The appellant cited several cases; **CMC Aviation Ltd v Crusair Ltd (No. 1) [1978] KLR 103** and **Re B [2008] UKHL 35**. The appellant submitted that upon the appellant leading evidence that the assessment was erroneous, the burden shifted to the respondent to show that the assessment was valid and that this could only be established by documents and not cross-examination or submissions as was held in **Mary Njeri Murigi v Peter Macharia and Another [2016] eKLR**. The appellant contended that since its evidence was unchallenged, the appeal ought to have been allowed.

13. The appellant submitted that the Tribunal erred in allowing the respondent to adduce oral evidence at the hearing and in its written submissions when it's statement of facts had been expunged. The appellant contended that the Tribunal erred by relying on **section 26** of the **Act** to proceed in the manner it did. It referred to the case of **Petra Development Services Limited v Evergreen Marine (Singapore) Pte Ltd and Another [2018] eKLR** where the court held that where a defence had not been filed it was improper to allow a defendant to lead evidence as this would amount to allowing a party to depart from its case. The appellant urged that the respondent was only allowed to cross-examine a witness where a defence had not been filed. Counsel for the appellant further submitted in so far as the Tribunal's decision referred to evidence adduced by the respondent and the submissions, the decision could not be supported and the appeal should be allowed.

14. On the substance of the assessment, the appellant submitted that the respondent did not show how Kshs. 10,511,139/-, assessed as VAT, was charged or levied. Counsel for the appellant submitted that the Tribunal erred by confirming the VAT assessed by the respondent when it was not based on any specific taxable supply or sale in accordance with **section 5** as read with **section 2** of the **Value Added Tax Act, 2013** ("the **VAT Act**"). The appellant cited the case of **Robert Ayisi v Kenya Revenue Authority and Another NRB Petition No. 412 of 2016 [2018] eKLR** where the court held that a taxing authority must have a rational basis for arriving at the sum demanded from the taxpayer otherwise action would be arbitrary, capricious and in bad faith.

15. The appellant further submitted that in any event, it answered and or gave unchallenged evidence to show why the respondent's assessment set out in the letter dated 28th May 2013 ought not to have been made by its letter dated 4th July 2013. Moreover, the appellant stated that it furnished the Tribunal with all the documents it requested in its submissions but despite this evidence, the Tribunal went ahead and confirmed the assessment notwithstanding the unchallenged evidence adduced by the appellant.

16. The appellant further pointed out that despite it furnishing the evidence as directed, the Tribunal still went ahead and concluded that it failed to provide certain documents. The appellant therefore challenged the Tribunal's conclusion that had not furnished the documents when it had done so. It submitted that its evidence remained unchallenged and that it satisfied the burden imposed on it by **section 30** of the *Act*.

Respondent's submissions

17. The respondent's case was that while conducting an audit on a taxpayer, it is authorised to require such a person to provide any documents relating to the tax liability for examination under **section 48** of the *VAT Act* (former **section 30** of the *Value Added Tax Act (Repealed)*). It submitted that it was not in dispute that the respondent requested the appellant to supply the documents to enable it establish the correct amount in taxes payable but the appellant did not do so forcing the respondent to rely on documents in its possession.

18. The respondent submitted that appellant bore the burden of proving that the tax has been paid or not or that the particular goods or services are exempt from taxation or that the assessment was excessive or that the tax decision should not have been made or should have been made differently. Counsel for the respondent referred to **section 56(1)** of the *Tax Procedures Act, 2015*, **section 30** of the *Act*, **section 44** of the *Value Added Tax Act (Repealed)*. He added that under **section 107** of *Evidence Act*, the appellant bore the burden to be discharged even where the matter was not defended.

19. The respondent further submitted that the appellant failed to discharge the burden to the required that the additional VAT demand of Kshs. 10,511,139 was either excessive or that the tax decision should not have been made or should have been made differently. In the circumstances, counsel urged that the Tribunal's hands were tied and the case was properly dismissed. Counsel also referred to *Petra Development Services Limited v Evergreen Marine (Singapore) Pte Ltd and Another (Supra)* to support its position.

20. The respondent submitted that the despite expunging the respondent statement of facts, the Tribunal had before it the impugned assessment and correspondence leading to the decision of the respondent which led to the appeal. It contended that in the circumstances, the Tribunal came to an informed decision as it was able to see the reasoning of the respondent. The respondent added that in light of the **section 26(b)** of the *Act*, the Tribunal allowed the respondent to interrogate the appellant's facts through cross-examination and filing submissions. The respondent submitted that the burden may only shift depending on the evidence adduced and in this case, the appellant never adduced sufficient evidence to prove its case.

Determination

21. The appellant's appeal arises from an assessment issued by the respondent following an in depth audit contained in the letter dated 30th July 2012. The letter of objection was dated 24th August 2012 and the letter confirming assessment was dated 17th October 2013. Although the assessments dealt with income tax, withholding tax, corporation tax and VAT, the parties settled all matters except the issue of VAT

22. This appeal raises two issues; a procedural one regarding the manner in which the Tribunal dealt with the appeal and substantive issue regarding the assessment of VAT. I will deal with the procedural first. The appellant complains that Tribunal the expunged the respondent's statement of facts for failure to comply with the timelines under **section 15** of the *Act* but went ahead to allow it to present its case by relying on **section 26** thereof as I have set out in paragraph 8 above.

23. I have reviewed the proceedings and it is not clear that the Tribunal expunged the respondent's documents. When the matter came up for hearing, the appellant's representative raised the issue that they had not been served with the respondent's statement of facts which had been filed out of time. The respondent's representative explained that the due to changes in the office, there was an oversight in serving the Tribunal and appellant with the documents. Thereafter one of the members of the Tribunal expressed the view the documents were filed outside the time limited by **section 15** of the *Act* and directed that the respondent should not rely on its statement of facts.

24. The proceedings do not show that the Tribunal made a decision expunging the documents. I hold that in such circumstances, it is important that when a preliminary or interlocutory order is made, it must be recorded in a decision of the Tribunal by all the members or a majority of them as required by **section 29(1)** of the *Act*. What appears on record is the view of a member of the Tribunal. Since the objection was raised, the respondent was entitled to give and indeed gave a reason why the documents were filed out of time but the Tribunal appears not have considered this aspect of the case. The decision to expunge the respondent's documents was however dealt with in the judgment as I have set out elsewhere.

25. Even though the parties were allowed to put forward their respective cases, the importance of parties' pleadings cannot be underestimated. The purpose of the statement of facts is to delineate the matters in dispute and by allowing the parties to submit, refer to and present documents at the end of the hearing without reference to the statement of facts undermines the objective of a fair process. At the end of the day though, each party was given an opportunity to put forward its case and the Tribunal was left to make a decision on the merits of the case. The manner in which the Tribunal dealt with the issue affected, the substantive determination relating to the taxes to which I now turn.

26. The issue framed for determination by the Tribunal was, "whether the respondent was within the law in confirming the assessment of VAT amounting to Kshs. 10,511,139/- due to failure of the appellant to produce the necessary documents."

27. The issue of VAT was set out in the letter of assessment dated 30th July 2012 in which the respondent stated as follows:

VAT

During the audit we realized that the VAT declaration was based on the sales and purchases ledger less credit notes as produced by the computerised system. The monthly Z- reports were not taken into account. An analysis of the Z-report showed that the sales on the same were higher than the ledgers.

During the exercise were also found out that you made purchases from suppliers who had either ceased operations or non-existent. We have disallowed such invoices and treated them as fraudulent supplies.

The company purported to have made purchases from Guaca Converters Ltd amounting to sh. 9,027,388/- for hardware material for the renovation of the factory at the compound of Converters. As far as the Guaca Converters is trading it does not deal in hardware material or sand sales. Furthermore a close check on the accounts of Guaca Converters Ltd showed that the company did not declare the sale in the audited accounts neither did it have a corresponding purchases entry in VAT 3 for the month. We have disallowed the invoice.

28. It is the above assessment that the respondent affirmed in its letter of 17th October 2013. The same position in respect of VAT was reiterated in the letter dated 28th May 2013 from the respondent to the appellant. The reason I have set out the contents of the assessment as regards VAT, is that the issue framed and the basis of the Tribunal's decision is that the appellant failed to supply documents contrary to **section 48** of the **VAT Act**. The letters dated 17th October 2013 and 28th May 2013 do not make any reference to the failure to supply certain documents. Nothing would have been easier than for the respondent to clearly state that the reasons it was proceeding to make the assessment was that the appellant had failed to supply certain specific documents.

29. In its judgment the Tribunal concluded that the respondent was guided by **section 43(3)** of the **VAT Act** which provides that:

43. Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorised officer for inspection and shall give the office every facility necessary to inspect the records.

30. The Tribunal further stated that the appellant failed to supply the respondent with documents as requested forcing the respondent to rely on documents in the possession of the applicant's suppliers and in so doing the respondent was guided by **section 48** of the **VAT Act** which stipulates as follows:

48 (1) For the purposes of obtaining full information, whether on a data storage devise or otherwise, in respect of the tax liability of any person or class of persons, or for any other purposes, the Commissioner or an authorised officer may require any person, by notice in writing, to-

(a) produce for examination, at such time and place as may be specified in the notice, any records, books of account, statements of assets and liabilities or other documents that are in the person's custody or under the person's control relating to the tax liability of any person;

(b) furnish such information relating to the tax liability of any person in the manner specified in the notice;

(c) attend, at such time and place as may be specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to tax liability of any person. [Emphasis mine]

31. It is correct to state that the taxpayer has an obligation to keep all the necessary records and avail them in the event of inspection. However, **section 48 (1)** of the **VAT Act**, comes in play when the Commissioner or an authorised officer issues a notice in writing. I have read and re-read the proceedings and I have not seen any evidence of the notice in writing issued by the Commissioner or his agent. Such a notice would specify the kind of documents required by the Commissioner and the taxpayer would be required to produce them. There was therefore no basis for the Tribunal to hold that the appellant failed to supply certain documents when no notice under **section 48(1)** had been issued and when in fact such an issue was not raised in the assessment letter of 30th July 2013 and subsequent correspondence between the parties. As there was no evidence that a notice under **section 48(1)** of the **VAT Act** was issued to the appellant for compliance, I allow this appeal on that basis.

32. At the hearing of the appeal, the Tribunal invoked the provisions of **section 17** of the **Act** which empowers it to call for additional evidence. It directed that parties attach documents to their respective submissions. By taking this course, the Tribunal denied each party the opportunity to interrogate the evidence produced by the other side. Further, this court did not have the benefit of consideration of the facts and substance of the VAT dispute set out in the assessment and canvassed in the appeal before the Tribunal. It is for this reason that an evaluation of the evidence afresh, as required by the first appellate court, to determine whether the appellant has established its case is not feasible.

33. When dealing with an appeal, this Court has broad powers under **section 78** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which provides as follows:

78. (1) Subject to such conditions and limitations as may be prescribed, an *appellate court shall have power—*

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

Disposition

34. In conclusion, I allow the appeal and set aside the judgment of the Tribunal dated 22nd May 2017.

35. I direct the Tribunal to rehear the appeal subject to the following directions:

a. The respondent's statement of facts shall be deemed to be properly filed and served on the appellant.

b. The submissions and evidence duly filed by the parties shall form part of the record of the Tribunal.

36. Each party shall bear its own costs.

DATED and DELIVERED at NAIROBI this 20th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Wakwaya instructed by Rachier and Amollo Advocates LLP for the appellant.

Mr Lem/-*--+

iso, Advocate instructed by the Commissioner of Domestic Taxes.