REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL NO. 2 OF 2017

BTB INSURANCE BROKERS LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

J U D G M E N T

1. Before me is an appeal from the judgment of the Tax Appeals Tribunal delivered on 16th November 2016. The Appellant is **BTB Insurance Brokers Limited** and the Respondent is **The Commissioner of Domestic Taxes**.

2. The Appellant is a Limited Liability Company and is in the business of insurance brokerage. It is not denied that the Appellant is also licenced under the Insurance Act Cap 487.

3. The Respondent is a statutory Corporation established under the provisions of the Kenya Revenue Authority Act Cap 469. It is the sole agent of the government for the assessment and collection of all government revenue.

4. The genesis of this matter is the audit of the Appellant and subsequent assessment by the Respondent. By that audit the Respondent assessed that the Appellant earned commission income of Kshs. 81,912,203 for the period of June 2013 to December 2013 and Kshs. 211,820,570 for the period January 2014 to September 2014. The Respondent determined that the Appellant had not subjected that amount to excise duty contrary to the amendments of paragraph 7, 8 and 9 of part III of the fifth schedule to the customs and Excise Act. Following meetings between the Appellant and the Respondent, the Respondent issued the Appellant with an assessment for Kshs. 35,788,553 as unpaid excise duty on brokerage on income earned for the period July 2013 to September 2014. That assessment was confirmed by the Respondent through the letter dated 7th September 2015. By that confirmation the Respondent, the Respondent stated that Kshs. 35,788,553 was due and payable by the Appellant.

5. The Appellant filed an appeal against the assessment before the Tax Appeals Tribunal. In that appeal the Appellant sought the following prayers:

> *i. That the Respondent's demand for additional taxes and the confirmation of the assessment dated 7th September 2015 be struck out in its entirety.*
>
> *ii. The Respondent's action be declared arbitrary, capricious, unreasonable, unfair and contrary to the provisions of law.*
>
> *iii. The Respondent's action be declared ultra vires and contrary to the fair administration of justice and legitimate expectation of the taxpayer.*
>
> *iv. The Respondent, its employees, agents or other persons purporting to act on its behalf be barred from demanding or taking any further steps towards enforcement or recovery of principal tax, penalties and interest on the Respondent's demand stipulated above.*
>
> *v. The costs of the appeal.*
>
> *vi. Any other remedies deemed just and reasonable by the Honourable Tribunal.*

6. The above prayers were supported by 13 grounds of appeals. The main thrust of those grounds of appeal was that the Respondent erred in

determining that the Appellant as the broker, and not the insurance company, failed to remit to the Respondent excise duty on commission earned in accordance with paragraph 8 of the fifth schedule of the Customs and Excise Act Cap 472 (hereinafter referred to as the Act). The other grounds raised by the Appellant, before the Tax Tribunal, were in relation to the unconstitutionality of the statutory provision under paragraph 7, 8 and 9 of the fifth schedule of the Act.

7. The Tax Tribunal delivered its judgment on 16th November 2016. By that judgment the Appellant's appeal was dismissed. The Appellant was aggrieved by the judgment and filed this present appeal.

8. The Appellant has presented the following grounds of appeal.

i. That, the Tribunal erred in failing to determine the core issue raised in the appeal whether the responsibility of charging and remitting excise duty ought to be on the insurance companies as underwrites and not on the intermediary.

ii. That, the Tribunal erred in holding that the provisions of the Customs and Excise Duty Act and the amendment contained in the Finance Act, 2013 provide that commissions earned by intermediaries are the tax target of the Finance Act, 2013.

iii. That, the Tribunal erred in failing to address itself on all issues framed in the Appellant's Grounds of Appeal.

iv. That, the Tribunal erred in making a determination on the substantive appeal while the parties had only argued the preliminary issue of res judicata and admissibility of the response filed by the Respondent.

v. That, the Tribunal erred and acted without jurisdiction in admitting and considering the statement of facts filed by the Respondent out of time while there was no application for extension of time filed by the Respondent.

vi. That, the Tribunal wrongly interpreted the Finance Act 2013 and arrived at the wrong decision in dismissing the appeal before it.

9. It is on the basis of the above grounds the Appellant seeks the setting aside of the Tribunal's judgment of 16th November 2016 and the setting aside of the additional taxes and the confirmation of the Respondent's assessment dated 7th September 2015.

10. The Appellant clustered together grounds (iii) and (iv); grounds (i), (ii) and (vi) together; and left ground (v) on its own.

11. On the first cluster of grounds (iii) and (iv) the Appellant submitted that the Tribunal, in its judgment, only made determination of the grounds which related to the imposition of the custom and excise tax on the Appellant and not the insurance company but did not determine the other grounds which related to the Appellant's view that the tax imposition was unconstitutional. In this regard the Appellant relied on the case **HOUSING FINANCE COMPANY LIMITED V J. N. WAFUBWA [2014) eKLR** thus:

> ***"…..the respondent himself in his closing written submissions in this case raised the issue of limitation for the first time. The appellant in its closing written submissions picked up the issue contending that the claim was statute barred. The court did not address the matter in its judgment. In the circumstances of this case where both parties took up the issue in their submissions and placed it before the court for determination, we think the failure by the court to adjudicate on it was an error."***

12. The Respondent in its submission, in this regard, submitted that the Tribunal made determination on the substantive issues raised by the Appellant and in so doing made a clear determination the substantive issues raised in the appeal before it.

13. I take the following view in respect to the argument raised above. There was, prior to the hearing of the appeal before the Tribunal, constitutional Petition, being Petition No. 383 of 2013 filed by six individuals acting on behalf of the Association of Kenya Insurers and two other individual acting on behalf of the Association of Kenya Insurers and two other individual acting on behalf of the Association of Insurance Brokers of Kenya amongst others. The Appellant herein is a member of the Association of Insurance Brokers of Kenya. The Petitioners, in that Petition were challenging a Notice by the Respondent which was published on 23rd July 2013 in a newspaper. This is that Notice:

> ***"PUBLIC NOTICE***
>
> ***EXCISE DUTY ON MONEY TRANSFER SERVICES AND OTHER FEES CHARGED BY FINANCIAL INSTITUTIONS.***
>
> ***Kenya Revenue Authority wishes to inform the public that the Finance Bill 2013, has now made the following clarifications: -***
>
> ***Financial institutions have now been defined to include persons licenced under the Banking Act, Insurance A t, Central Bank Act, Sacco Societies Act and Kenya Post Office Bank "other fees" is defined to include any fee, charge, or commission charged by financial institutions but excludes interest.***
>
> ***Excise duty shall be charged at a rate of 10% of the excisable value and shall become due when the service is purchased by the consumer.***
>
> ***The service provider shall collect the duty and pay to the commissioner not later than the 20th day of the succeeding month. The excise duty for the month of June is payable by 20th July 2013. Prescribed excise return form for payment of excise duty on***

services is available on the KRA website 222.k4a.go.ke or from KRA office…"

14. In challenging the above Notice before the High Court the Petitioners argued that the Notice violated their rights under Article 47(1) of the Constitution; that the imposition of the excise duty under paragraphs 7, 8 and 9 of Part III of fifth schedule of the Act violated their rights under Article 47(1) of the constitution; and that there be a declaration that the imposition of that tax was an infringement of Fair Administrative Action.

15. The High Court on hearing that Petition delivered its judgment on 30th June 2014 and determined that imposition of that tax was not unconstitutional. In part the court in that case **MARK OBUYA, TOM GITOGO & THOMAS MAARA GICHUHI ACTING FOR ON BEHALF OF ASSOCIATION OF KENYA INSURERS & 5 OTHERS V COMMISSIONER OF DOMESTIC TAXES & 2 OTHERS [2014] eKLR**

*"It is therefore clear that under **Part III** of the **Fifth Schedule** excise duty is levied on services rendered by financial institutions which are persons licenced under the respective Acts applicable. The petitioners' members are all licensed under the **Insurance Act** and are categorized as financial institutions. I find and hold that there is no ambiguity in the intention of the legislature to capture services offered by all the persons who are licenced under the applicable statutes to provide certain services.*

The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court licence to declare it unconstitutional."

16. In view of that determination the Respondent raised a preliminary objection to the appeal before the Tax Appeal Tribunal. By that objection the Respondent sought a finding that the appeal before the Tax Appeal Tribunal was *res judicata*. The objection was based on the High Court's finding in the **Petition No. 383 of 2013 Mark Obuya & Others (Supra)**

17. The Tribunal made the following finding on that preliminary objection:

"The Tribunal observed that whereas the parties were the, and the Appellant was a month the Petitioners directly or indirectly in both Petitions and the issues adjudicated on merit. The Tribunal finds the issues were not the same or similar to the matters in this Appeal which challenged the assessment of excise duty and the retrospective application of the same."

18. In other words, the Tribunal found the appeal before it was distinct to the Petitioner and that accordingly the appeal before it was not *res judicata*. It is no wonder, that after that decision the Tribunal stirred away from the grounds, filed by the Appellant, which ground were seeking re-litigation of the Constitutionality of the imposition of custom and excise tax against itself. The grounds that sought to re-litigate the constitutionality of that tax are in grounds 8, 9, 10, 11, 11, 12, 13 and 14 of the Appellant's ground of appeal before the Tribunal. Those grounds were either, directly presented before the High Court in the Petition No. 383 of 2013, or they ought to have been raised in that Petition.

19. The Tribunal cannot therefore be faulted for failing to minutely consider those grounds. To have done so would have led to the Tribunal going against its finding that the Appellant's appeal before the Tribunal, in as far as it related to the assessment of custom and excise tax, did was not *res judicata*. By implication that finding, by the Tribunal, was that the issues of constitutionality of that tax had been determined in High Court Petition No. 383 of 2013 and could not be re-litigated.

20. The Appellant, in further advancing ground (iii) and (iv) submitted that the Tribunal erred in delivering its judgment when parties had been given the opportunity to, and had indeed only submitted on the preliminary objection and not the substantive appeal.

21. In the Respondent's view, the Tribunal in its judgment addressed all the issues in the appeal and that accordingly the Appellant was not accorded a fair hearing as enshrined in the constitution.

22. I have looked at the supplementary record of appeal wherein are typed proceedings of the Tribunal. Those proceedings are of 22nd March 2016. On that date the Respondent raised the preliminary objection, which would seem to have been made orally, rather than in writing. If indeed it was in writing, then it was not included in the record of appeal. That apart, on 22nd March 2016 the Tribunal requested the parties to do written submissions on the preliminary objection. Both parties did file their submissions. The Tribunal after receiving those submissions, it would seem, delivered a judgment, wherein it first considered the preliminary objection then proceeded to consider the substantive appeal. In that judgment the Tribunal made reference to having heard parties on the substantive issues of the appeal. Whether indeed parties were heard on the substantive appeal is not clear to me.

23. This is the first Appellant court. The duty of the first Appellant court is to reconsider and re-evaluate the evidence on record and draw its own conclusion. This is what was stated by the court of appeal in the case **NATIONAL UNION OF WATER AND SEWERAGE EMPLOYEES & 3 OTHERS V NAIROBI WATER AND SEWERAGE COMPANY LIMITED [2018] eKLR** viz:

*"This is a first appeal. Our mandate is as was restated by the court in **PIL Kenya Ltd Vs. Oppong [2009] KLR 442** as follows:*

"It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that."

24. Bearing that duty in mind the Appellant ought to have submitted on the substantive appeal before this court. The Appellant did submit on the substantive appeal, on the other grounds of appeal, which I will be considering hereafter. It is after that consideration that I will be in a position to make final determination of grounds (iii) and (iv) of the Appellants grounds of appeal, before me.

25. The next cluster of grounds of appeal that the Appellant submitted on are grounds (i), (ii) and (vi). Those grounds relate to Appellant's view that the charging and remitting of excise duty lay on the insurer, as the underwriter, and not the Appellant who is an intermediary the broker.

26. The Respondent submitted that the Custom & Excise Act vide the Finance Act 2013 required the Appellant to charge excise tax on commission earned and to remit the same to the Respondent, which the Appellant failed to do.

27. The Tribunal by its judgment identified the issue before it as follows:

> ***"The issue is whether an intermediary or agent registered under the Insurance Act is subject to excise tax on brokerage commissions earned, under customs and Excise Act as read together with the amendment in Finance Act number 38 of 2013."***

28. The Tribunal in determining that issues recognized that the Appellant was licensed under the Insurance Act and by virtue of the amendment to the Finance Act the Appellant was a Financial Institution. The Tribunal made the following finding:

> ***"The Tribunal finds that the provisions of the Customs and Excise Duty Act and the Amendments contained in the Finance Act of January 2013, Financial Service Providers, money transfer service providers, communication providers are all intermediaries connecting persons who need to do business with each other and further establishes that commission earned by these intermediaries are the tax target of the Finance Act 2013."***

29. As a consequence of that finding the Tribunal found that the Appellant's earning on commission was caught by the Act and by the Finance Act and therefore custom and excise tax was payable.

30. As a consequence of that finding the Tribunal found that the Appellant's earning on commission was caught by the Act and by the Finance Act and therefore custom and excise tax was payable.

31. Excise tax on certain financial services was introduced under Part III of the fifth Schedule of the Custom and Excise Act as follows:

> ***"7. Excise duty charged for money transfer services by cellular phone service providers, banks money transfer agencies and other financial service providers shall be ten percent.***
>
> ***8. Excise duty on other fees charged by financial institutions shall be ten per cent.***

32. The Finance Act 2013 amended Part III of the fifth schedule by deleting financial services providers and substituting it with financial institution thus:

> ***"6. The fifth Schedule of the Customs and Excise Act is amended in Part III-***
>
> ***a) By deleting the words 'financial services providers' appearing in item 7 and substituting thereof the words 'financial institutions'.***
>
> ***b) By inserting the following new paragraph immediately after paragraph 8.***
>
> ***9. For the purpose of item 7 and 8 financial institutions means-***
>
> ***(a) A person licenced under –***
>
> ***(i) The Banking Act,***
>
> ***(ii) The Insurance Act***
>
> ***(iii) ……..***
>
> ***(iv) ……..***
>
> ***'Other fees includes any fees, charges or commissions charges by financial institution, but does not include interest.***

33. As it will be seen above that amendment brought in the term financial institution which includes those that are licensed under the Insurance Act.

34. It became clear from the above amendment that the Appellant's argument that it being an intermediary and because the client pays directly to the underwriter and that the obligation for payment of excise duty lies with the insurance company does not hold water at all. All one needs to consider is that the Appellant is licensed under the Insurance Act. That being so it is a financial institution by the definition of the Finance Act 2013. By that Finance Act it will be seen that the Appellant since it receives other fees, that is commission, this makes the decision of the imposition of the excise duty to be fait accompli.

35. It follows that grounds of appeal (i) (ii) and (vi) fail, and similarly grounds (iii) and (iv) also fail.

36. On ground (v) of the appeal the Appellant faulted the Tribunal for having permitted the Respondent's statements of facts which were filed out of time. The Appellant argued that the Tribunal had no jurisdiction to permit those statements of facts which were filed out to time.

37. The Respondent does not deny that its statement of facts were filed out of time. Rule 8 of the Tax Appeal Tribunal Rules provides:

> ***"The respondent shall file a statement of facts with the Registrar within thirty days of service upon him of the copy of memorandum of appeal by the appellant, during office hours."***

38. The Tribunal, on an objection being raised by the Appellant on the Respondent's reliance on those statement of facts filed out of time, allowed the Respondent to so rely on those statements of facts because of what the Tribunal terms as *"in the interest of justice."*

39. It should be noted that the statements of facts were on record and had been served when the Appellant objected to reliance on them. The Respondent did not, as required under Rule 10 of the Tax Appeals Tribunal (Procedure) Rules 2015, seek extention to file the statement of facts out of time.

40. In my view the period within which statements of facts should be filed, having been provided the Tribunal erred to permit, in the absence of an application, reliance on statement of facts filed out of time.

41. I have looked at the Rules and the substantive Act and I am unable to find what would happen in the absence of Statement of Facts being filed. I will therefore make reference to the Civil Procedure Act, since it is permitted to refer to the same Under Rule 20 of the Tax Appeal Tribunal Rules. Under the Civil Procedure Rules where a party fails to file a defence the claimant can proceed to formally prove its claim. The defendant who has not filed a defence may raise points of law in its defence what such a defendant cannot do is rely on facts in absence of a defence.

42. In my humble view the Appellant, at this appeal which is a rehearing, and before the Tribunal, failed to prove that it did not fall within the ambits of the Custom and Excise Duty Act as amended by the Finance Act 2013. In my view the provisions therein are crystal clear that the Appellant is one of the parties obligated to pay the excise duty on commission earned. That liability cannot be passed on to the insurance company.

43. Accordingly, nothing turns on ground (v) of the Appellant's appeal. On points of law the Appellant was defeated. The fact that the Tribunal permitted reliance on the statement of facts by the Respondent did not prejudice the Appellant.

44. In the end, I uphold the judgment of the Tax Tribunal of 16th November 2016. Accordingly this appeal is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **28th** day of **April, 2020.**

MARY KASANGO

JUDGE