REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 72 OF 2010 (JR)

IN THE MATTER OF: AN APPLICATION BY THE APPLICANT, MAT INTERNATIONAL LIMITED

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI

AND PROHIBITION DIRECTED TO THE KENYA REVENUE AUTHORITY AND

COMMISSIONER OF INCOME TAX AND COMMISSIONER OF VALUE ADDED TAX

AND

IN THE MATTER OF: THE INCOME TAX ACT

BETWEEN

MAT INTERNATIONAL LIMITED.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

The Application

1. Pursuant to leave granted by this Court, the Applicant herein filed a Notice of Motion Application dated 30/6/2020 seeking the following orders:

> *(a) An Order of Certiorari to move into this court and quash the decision of Kenya Revenue Authority contained in the Income Tax Assessment dated **14th October 2009** requiring the applicant to pay **Kshs. 598,183,012.00** allegedly due as outstanding Income Tax.*
>
> *(b) An order of Prohibition to prohibit Kenya Revenue Authority, the Commissioner of Income Tax and the Commissioner of Value Added Tax from commencing, instituting or proceeding with any other enforcement actions against the applicant in relation to and/or account of the disputed tax in the sum of **Kshs. 598,183,012.00.***
>
> *(c) Costs of and incidental to the suit.*
>
> 1.

2. The Application is supported by the statement dated 14/6/2020 and the Verifying Affidavit sworn by David Killoran on the same date.

3. The Respondents have opposed the application and have filed the Replying Affidavit of Patrick Chege sworn on 14/12/2010.

Brief Background

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4. In the year 2004, the Domestic Taxes Department of the Kenya Revenue Authority (herein after referred to as KRA) undertook an audit of the Applicant's Income Tax returns for the years 2001 and 2002. By a letter dated 14/10/2009 KRA made an assessment of Income Tax in the sum of Kshs. 598,183,012.00.

5. The Applicant through its Tax Consultants objected to the assessment and, vide its letter dated 9/11/2009, requested the Respondent to reconsider the assessment. The Applicant avers that it has on various occasions made proposals for settlement of the tax due but the same was turned down and rejected by the Respondent without any reasons being given. The Applicant states that it was always willing and committed to reach a fair settlement and pay tax and had even offered to pay Kshs. 52,625,995.00 by a letter dated 9/4/2020. Earlier, by a letter dated 18/7/2005 the Applicant had proposed to pay the sum of Kshs. 15, 447,593.00 which offer was nonetheless ignored, but the Applicant nonetheless made the payment. The Applicant states it had a series of meetings with KRA through its tax consultants with a view to resolving the issue of income tax audit and to reach a fair settlement but all such efforts were futile. The Applicant avers that it had another tax dispute with KRA where it was putting an assessment of Income Tax and Value Added Tax and offered to pay tax in installments pending an audit promised by KRA.

6. Despite the above attempts, the Respondent proceeded to issue agency notices against the Applicant causing it apprehension that enforcement measures would be taken against it if the Applicant proceeded to the local tax committee and obtained compelling orders to pay the demanded tax.

7. Further, the Applicant avers that there was a fire in the Applicant's offices on 21/11/2004 which destroyed the records and thus they could not be traced. The Applicant avers that the Respondent failed to take into consideration the mitigating factors while deriving the income tax assessment which would have significantly reduced the astronomical figure of Kshs. 598,502,074.00.

8. It is the Applicant's case that the orders sought in the Notice of Motion application herein should be granted for the following reasons:

(a) Unreasonableness and procedural impropriety

(b) Irrationality

(c) Abuse of Power

(d) Legitimate expectation and unfairness

9. The application is supported by a statutory statement and Supporting Affidavit of David Killoran sworn on 14/6/2010.

The Response

10. The application is opposed by the Respondent vide Replying Affidavit sworn by Patrick Chege on 14/12/2010.

11. The Respondent's case is that pursuant to powers donated by the Income Tax Act (Cap.470 of the Laws of Kenya) (hereinafter *"ICTA"*), conducted an examination of the Applicant Company's records, books of accounts and other documents in 2004. The examination was intended to determine full information on the Applicant's income for income tax purposes. The examination covered the accounting years 2001 and 2002 during which period the Applicant Company was engaged in the import and wholesaling of sugar.

12. One of the first issues identified during the examination by the Respondent's Officers, was that the Applicant Company was a member of a group of companies, whose holding company was Tal Holdings Limited and the bank accounts to the Applicant Company were not separated from those of its sister companies. The Examination further established that the documents in support of the Applicant Company accounts were incomplete yet the accounts had been certified by M/s Athman Erry & Company. In summary the findings were as follows:

In respect of the 2001 year of income: -

· The Applicant company had in its local currency account an amount of Kshs. 107,543,563.00. This amount was omitted in its final accounts.

· That the Applicant had expensed in its accounts an amount of Kshs.10,000,000.00 as bank charges. However, no documentation to support this was provided either by way of an agreement on a facility or otherwise. The expensing of this amount would have the effect of reducing the Company's profitability on which corporation tax is computed.

13. The Respondent avers that it was imperative upon the Applicant to adduce supporting evidence for these charges so as to enable the Respondent satisfy itself that the charges were allowable deduction in terms of section 15 of the ICTA. This provision defines the allowable deductions and states in opening,

"15(1) for the purpose of ascertaining the total income of a person for a year of income there shall, subject to section 16, be deducted all expenditure incurred in the year of income which expenditure wholly and exclusively incurred by him in the production of that income…"

14. The debtors control account reflected a credit of Kshs. 77,942,127.00 in respect of stock sold on credit but for which cash had been received and the debtors balance in the trial balance reflected a debit of Kshs. 37,117,835.00 in regard to stock sold on credit but for which cash was yet to be received making a total of Kshs. 109,059,962.00. An amount of Kshs. 13,422,496.00 was posted in the accounts relating to the freight account. The Respondent avers that no document was available to support the entry. Examination of the 2002 record revealed: -

· There were sale proceeds of Kshs. 22,300,000.00 used to settle a debt owed to Roost Freighter. However, the sale was not reflected in the Applicant's books of accounts. The Applicant's funds in the amount of Kshs. 22,300,000.00 were also used to procure supplies for a sister Company, Somken Limited, but it was not reflected in the inter-Company accounts. It should have been reflected as money owed to the Applicant by the sister Company but this was not done. Closing stock for the financial year 2002 was understated by Kshs. 174,523,372.00. Goods in transit amounting to Kshs. 1,851,979.00 were expensed under port operations yet they should have been reflected as stock. The Respondent disallowed the expense and instead added the amount back to stock. Analysis of the inter-Company account was done and the same established a difference of Kshs. 27,691,697.00 between the total debit balance and the balance as per the final books of accounts. An amount of Kshs. 2,000,939.00 was paid vide cheque No. 178 drawn on ABC Bank to unknown person. The same was posted to a clearing and forwarding account but no documentation was provided to support the payment.

15. The Respondent avers that the manner in which the Applicant Company's accounts had been prepared and the lack of supporting documentation together with the lack of any valid explanation, led the Respondent's officers to conclude that the Applicant Company had no intention of declaring the income in its final accounts. The Respondent's Officers added back the unexplained and undeclared income and expenses as follows: -

Year 2001 - Kshs. 570,141,778.00;

Year 2002 - Kshs. 260,667,932.00

16. The Respondent's Officers following the audit issued assessments for additional tax on 30/1/2006 for year 2001 and 0n 6/6/2006 for year 2002 (attached as annexure "PC2"). Following the conduct of the audit in 2004, the Respondent's Officers and the Applicant Company exchanged various correspondence aimed at resolving the issue raised from the audit. The Applicant Company however failed to provide any further documentation or explanation to the satisfaction of the Respondent compelling the Respondent's Officers vide a letter dated 14/10/2009 to reconfirm the additional tax assessments as follows: -

Year 2001 -Kshs. 410,502,074.00 (inclusive of penalty and interest)

Year 2002 -Kshs. 187,680,938.00 (Inclusive of penalty and interest)

Total Kshs. 598,183,012.00 (inclusive of penalty and interest)

17. Following the reconfirmation of assessments, further correspondence was exchanged and discussions held between the Respondent and the Applicant Company. The Respondent was however not satisfied with the explanation given by the Applicant Company in its letter dated 9/11/2009 and annexed as *"DK2"* to the Verifying Affidavit of David Killoran sworn on 14/6/2010 that:

"4. Mat International Limited is part of a Group of Companies with common ownership including Somken Petroleum Ltd where inter Company banking was common depending on cash flow and business needs of any given group Company…"

5. Due to staff turnover, changes and movements in storage facilities, sabotage by disgruntled staff etc., location of some documents to support genuine business expenses has proved elusive."

18. In the Respondent's view, it was, in the absence of any evidence, difficult to accept the explanation offered by the Applicant Company in its letter of 9/11/2009, given the magnitude of the group entities of which the Applicant company was part, and the income generation of each of the entities. The group would be expected to observe prudent accounting practices. The Applicant Company also alleged that its documents were destroyed in a fire but again this explanation was rejected by the Respondent as the documents produced in support of the fire,

- Related to a different entity, namely, Somken Petroleum Company Limited; and

- The audit herein was conducted in April 2004 yet the fire incidence occurred on 21/11/2004 by which time the audit was complete. Discussions on the audit findings had commenced way back in June 2004 and even as early as then the Company had failed to provide any supporting documentation.

19. However, still pursuing negotiations on the assessments, the Applicant Company lodged an appeal with the Local Committee under the ICTA. However, before the appeal could be heard and concluded they filed these judicial review proceedings.

Issues for Determination

20. From the grounds relied upon by the Applicant Company in its statement dated 6/11/2009, the issues that lie for determination are whether the Respondent's actions was: -

- Unreasonable
- Irrational
- An abuse of power, or
- Frustrated the Applicant Company's legitimate expectation

Submissions

21. The application was dispensed with through written submissions. The Respondent's submissions were filed on 23/6/2014 while the Applicant's submissions were filed on 9/7/2020.

Determination

22. I have carefully considered the application, opposing affidavits and the rival submissions. Although the parties have isolated the issues for determination by this court, the Respondent has raised a further issue, that is, - whether there exists an alternative remedy.

23. It has been stated by the Respondent, and the same has not been denied by the Applicant, that the Applicant had before lodging these proceedings instituted an appeal process under the ICTA which makes provision for an inbuilt dispute resolution mechanism and which allows for disputes to be determined on merit. The said appeal is still pending. The decision arising from that appeal may end up in this court for review, and therefore this court has to be cautious in exercising jurisdiction herein.

24. Having lodged the said appeal, the Applicant ought to have waited for the same to be determined before coming to this court for judicial review. The Applicant submitted that it filed this suit for judicial review on the apprehension that enforcement measures would be taken against it. However, this fear is misplaced and unfounded because under ICTA, when an appeal is lodged to the local committee the collection of tax is stopped until the appeal is determined. It would therefore amount to an abuse of the court process to allow two processes to go on over the same issues, one of whose outcome might still come back to this court for review.

25. This court therefore declines to determine all the other issues raised in the motion herein except the issue of existence of alternative forum. In any event, the issue of availability of an internal dispute resolution mechanism is now established following the case of **Republic vs. National Environmental Management Authority [2011] eKLR**, where the Court of Appeal, at page 15, had this to say:

> **"The Principle running through these case is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. See for example RV BIRMINGHAM CITY COUNCIL exparte FERRERO LTD. The learned trial judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the judge."**

26. The use of internal dispute resolution mechanism has also been given underpinning by article 159 (2) (c) of the constitution of Kenya, 2010 which requires Courts and Tribunals in exercising judicial authority to consider alternative means of dispute resolution. More recently, in the case of H.C. PETITION NO. 203 OF 2012; **Kapa Oil Refineries Limited vs. the Kenya Revenue Authority, the Commissioner of Customs Services and the Attorney General**, the learned Justice Lenaola had this to say at 13:

> **"Looking at the petition again, I am clear that the major issue for determination in this petition is whether it is lawful under Article 210 of the constitution and section 235 (1) of the EACCMA for the 1st and 2nd Respondents to demand the taxes so demanded.**
>
> **The issue in my view is none that ought to be determined by the procedure provided for under section 230 of the Act. "**

The Learned Judge in the case of Kapa (supra) went on to state at pages 14 and 15:

> **"In so holding I am alive to the fact this Court has previously held that the Constitution is not substitute for all other legal procedures. In Alphonse Mwangemi Munga & 10 others –vs- African Safari club limited (2008) eKLR, The Court stated as follows:**
>
> > **"that does not give the licence to every litigant to come to Court by way of a Constitutional application even where there is no constitutional issue arising and where there are adequate remedies in other laws to cover such situations. This Court has considered similar applications where the petitioners seek to enforce service contracts by way of**

constitutional applications and have held them to be an abuse of the Court process…

27. This rule has also recently been upheld by the Court of Appeal in **Speaker of the National Assembly vs. Njenga Karuma [2008] 1 KLR 425**, where it held that: -

"In our view there is considerable merit… that where there is clear procedure for redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure should be strictly followed."

28. Further Tax Procedures Act No. 29 of 2015 has now laid elaborate internal mechanism for resolving tax disputes before one may come to court.

"51. Objection to tax decision

(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and

(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.

(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.

(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.

52. Appeal of appealable decision to the Tribunal

(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.

Appeals to High Court

A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable

decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).”

29. Further, the appeal proceedings under the local committee have been saved under Section 44 of Tax Appeals Tribunal.

“44. Saving provisions

(1) Despite the provisions of sections 41, 42 and 43, any Tribunal or appeal committee established by any tax law or regulations made thereunder before the coming into effect of this Act shall continue to hear and conclude any appeals filed by a taxpayer for a period of ninety days after the commencement of this Act.

(2) Any appeals referred to in subsection (1) which are not concluded within the period specified, shall be taken over by the Tribunal.

(3) The Tribunal shall hear and determine appeals relating to tax decision made before its first sitting (if it was not concluded by the appeal mechanism that existed before the establishment of the Tribunal) within a period of one year from the date of first sitting.”

30. From the foregoing, I am satisfied that there is adequate alternative forum in which the tax disputes herein can be determined, and since there is already an appeal lodged by the Applicant in that respect, the Applicant should proceed and prosecute the said appeal. I am also satisfied that the Applicant shall not suffer any threat of enforcement until the said appeal is heard, and a decision therein is made.

31. The upshot is that the motion herein is dismissed. Costs to abide in the said appeal.

Dated, Signed and Delivered at Mombasa this 28th day of September, 2020.

E. K. OGOLA

JUDGE

Ruling delivered in Chambers via MS Teams in the presence of:

M/s. Lipwae holding brief M/s. Agwata for Applicant

No appearance for Respondent

Ms. Peris Court Assistant