



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

INCOME TAX APPEAL NO.26 OF 2017

AWAL LIMITED.....1ST APPELLANT

VERSUS

COMMISSIONER OF INVESTIGATIONS

AND ENFORCEMENT.....RESPONDENT

(Being an Appeal from part of the decision of the Tax

Appeals Tribunal dated 9th December 2016)

AWAL LTD.....APPELLANT

VERSUS

COMMISSIONER OF INVESTIGATIONS

AND ENFORCEMENT.....RESPONDENT

(An appeal from the decision of the commissioner of investigations and enforcement

contained in the Income Tax confirming notices dated 19th September 2007)

J U D G M E N T

INTRODUCTION

The Appellant being aggrieved by decision of Tax Appeals Tribunal filed this appeal seeking to quash the Tribunal’s decision, which held that it is not entitled to amnesty as it failed to meet the terms provided by Section 123A of Income Tax Act. Section 123A of the Incomes Act disentitles a person under audit or investigation amnesty. The Appellant’s contention is that the tax audit contemplated by Section 123 of Income Tax Act is not VAT audit but income audit.

The Appellant prays that the holding that, tax assessment for the periods January 2002 to October 2007 is payable be set aside.

Grounds of Appeal

- That the Tribunal erred by mixing up provisions of Section 123 of Income Tax Act and Section 14A of the Value Added Tax.
- That the Respondent erred in fact and law by interpreting the word “**any tax**” appearing in Section 123A of the Income Tax Act to include Value Added Tax when Value Added Tax is chargeable under Values Added Tax Act and not Income Tax Act.
- That the Tribunal erred by failing to appreciate that the word “**tax**” for Income Tax purposes is defined under **Section 2** of the Income Tax Act as **tax charged under the Income Tax Act** and “**any tax**” to mean **any tax charged under the Income Tax Act** & that the **any tax** appearing at **Section 123A of the Income Tax Act can only be construed and interpreted only within the context of Income Tax Act**; that it is tax charged on a person under Section 3 (2) of the Income Tax and is different from value added tax charged on taxable supplies.
- That the Tribunal erred by mixing the words *any person under investigation or audit in respect of undisclosed income* with *any*

matter relating to undisclosed income

- That the Tribunal failed to appreciate that even if the Appellant was under investigation when it applied for amnesty on 13th October 2004 in accordance with public notice, investigations were not Income Tax investigations for purposes of Section 123 of Income Tax Act.
- That the Tribunal erred by failing to appreciate that the Appellant complied with condition of amnesty requiring it to submit returns or amended returns by 31st December 2004; that it erred by focusing on the dictum in **Republic Vs Kenya Revenue Authority Exparte Sanjay & 3 others, 2012 eKLR**; that the Tribunal failed to appreciate that the Applicants in the above case failed to submit amended returns and that facts in the above case differed from the case herein.
- That the Tribunal erred by failing to appreciate that it was incumbent on the Respondent to issue a letter of confirmation on extent of voluntary disclosure to the Appellant; that failure by the Respondent to issue the said letter does not amount to failure by the Appellant to comply with terms of amnesty.
- That the Tribunal erred by failing to appreciate that Section 123A of Income Tax is coached in mandatory terms and does not give discretion to the commissioner to reject application for amnesty.

The Respondent averred that the Tribunal rightfully interpreted and applied Section 123A of the Income Tax to the facts presented; that the Tribunal observed that there are conditions for commissioner's exercise of discretion to grant of amnesty.

The Respondent contends that the Appellant did not voluntarily disclose but undisclosed income had been established by the Respondent before the application for amnesty.

That the right interpretation of the Section is that amnesty does not apply to a taxpayer who is under audit or undisclosed income or any other matter relating to undisclosed income.

That it is not in dispute that the Appellant was under VAT investigation at the time application for amnesty was done, and that the investigations ended on 9th December 2004.

The Respondent aver that the Tribunal was right in observing that the Appellant was not granted letter of confirmation by commissioner of Income Tax showing extent of disclosure for purposes of grant of amnesty as the Appellant had not fulfilled by Finance Minister.

Further, the obvious interpretation of Section 123A of Income Tax Act was for the Appellant had to comply with conditions set out in order to take advantage of the amnesty declared.

The Respondent prays for the appeal to be dismissed.

Analysis and determination

From the record and arguments herein, there is no dispute that the Appellant was under VAT investigation at the time of application for amnesty.

I wish to consider the following issues:

- 1. Whether investigation or audit referred to in Section 123A of the Income Tax Act relate to both Income Tax and VAT or Income Tax only.*
- 2. Whether the Appellant met requirements/conditions for grant of amnesty provided in Section 123A of the Income Tax Act.*

On perusal of public notice issued for Amnesty, I note the following:-

The Respondent put up public notice on 10th June 2004 for Amnesty.

The Amnesty covered the following:-

- Penalties or fines under Custom & Excise Act;
- Additional tax, penalties under Value Added Tax(Cap 476);
- Penalties & interest under Income Tax Act;

Section 123A (B) provided as follows:-

“...Provided that this Section shall not apply in respect of any tax if the person who should have paid the tax

(i) Has been assessed in respect of the tax or any matter relating to the tax

(ii) Is under audit or investigation in respect of undisclosed income or any matter relating to the undisclosed tax”

It is not disputed that the Appellant herein was under investigation on VAT under VAT Act.

Does the investigation that was going on relate to the undisclosed income?

The Applicant applied for amnesty in respect of Income Tax on 13th October 2004. It is not disputed that investigations on VAT were going on at the time of the application and that they were concluded on 9th December 2004.

The Tribunal found that investigations on VAT for the period under investigations revealed additional invoices for corporate tax, which had not been declared in the amnesty application.

Whereas the Appellant argues that consideration of amnesty should have been dealt with separately and not lamped together with VAT, it is evident the investigations that were going on had a bearing on the income of the Appellant.. The condition above provide for investigation on any other matter relating to the tax.

Additional Invoices in respect of VAT voluntarily disclosed by the Appellant led to additional assessment for corporate tax. The additional on Income Tax head was not disclosed in the application for amnesty.

There is no doubt profits from sale of goods subjected to VAT forms part of income which ought to be disclosed.

From the foregoing, there is no doubt that findings on investigation on VAT had effect on income declared; the same ought to have been disclosed in the amnesty application.

From the foregoing, I find that the Tribunal rightfully found that the Appellant did meet the conditions for grant of amnesty.

The Tribunal's decision dated 9th October 2015 is hereby upheld. Appeal is dismissed with costs to the Respondent.

Judgment dated, signed and delivered at Nairobi this 18th day of October 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

CATHERINE: **COURT ASSISTANT**

OBAI: **COUNSEL FOR APPELLANT**

SEGA H/B FOR KIRUGU: **COUNSEL FOR RESPONDENT**