



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

INCOME TAX APPEAL NO. 4 OF 2016

CORAM: D.S. MAJANJA J.

BETWEEN

SUPER EXPO LIMITED..... APPELLANT

AND

COMMISSIONER OF INCOME TAX.....RESPONDENT

(Being an appeal from the decision of the Local Committee at Eldoret dated 4th July 2011)

JUDGMENT

1. This is an appeal from the ruling of the Local Area Committee (“the Committee”) at Eldoret delivered on 4th July 2011 in favour of the Commissioner of Domestic Taxes (“the Commissioner”). The Committee held that the onus of proving that the tax assessment was arbitrary fell on the appellant who failed to provide documentary evidence. It therefore confirmed the assessed taxes for the year 2000 and 2004 to be Kshs. 19,657,266 and Kshs. 12,825,480 respectively.
2. By way of background, the appellant is a limited liability company in the business of selling general merchandise through wholesale and retail. On 5th July 2006, the Commissioner issued the appellant with a notice of intention to audit covering the period between 1st September 2002 and 31st August 2004. After some contention about an audit having been done by the respondent’s Large Tax Payer’s Office, another notice of intention to audit.
3. At a meeting held on 6th September 2006, the parties agreed to extend the audit period to start on 1st September 1999 as the respondent alleged the appellant was involved in fraud during that period and demanded the appellant provide records for the extended period. However, when the respondent’s officers went to the appellant’s premises for the audit exercise, the appellant failed to provide the required records whereupon the respondent proceeded to carry out the audit. Thereafter it served the appellant with a demand notice of Kshs. 81,173,408/-.
4. The appellant lodged an objection following which the figure was reviewed to Kshs. 32,482,746/-. The appellant appealed to the Committee complaining that the audit was done without actual financial records and there was no demonstration of the alleged fraud. In the meantime, the parties engaged in negotiations but they could not reach a settlement. The appellant thus sought time to file a list of issues to be determined by the Committee but the Committee denied it that opportunity and proceeded to deliver the ruling in favour of the respondent.
5. The thrust of the appellant’s case is that the Committee decision was not fair as the Committee not only failed to consider all the issues raised by the appellant but it also failed to give reasons for its decisions. It avers that the Committee never gave it an opportunity to present its case as such the resulting decision was unfair and arbitrary and that the Committee was biased against it.
6. On the other hand, the respondent argued that the assessment was done in accordance with the law and the burden of proving that it was incorrect was on the appellant. The respondent argued that the Committee gave the parties a chance to prove their cases and determined the matter according to the documentary evidence placed before it and it is the appellant who failed to prove that the assessment was arbitrary.
7. After considering the facts, filed documents and written submission, I find that the only issues that fall for consideration are whether the appellant was given an opportunity to be heard and whether the Committee gave reasons for its decision.

8. Prior to rendering its final decision, the Committee, at its meeting of 29th June 2010 resolved that, “*The case is adjourned to a date to be notified, after both parties frame their issues both agrees and non-agreed, and serve the same upon the committee within 30 days before the case is listed for hearing.*” There is no dispute that after the Committee proceedings were adjourned, the parties proceeded to seek resolution of outstanding matters. No resolution was reached. There is no evidence that any step or proceedings was taken before the Committee before it rendered its final decision rendered on 4th June 2011.

9. There is no evidence that the appellant or any the parties were heard on any of the issues that were to be framed before the final decision. Since the Committee had already anticipated that there were to be issues framed when it adjourned the hearing on 29th June 2010, the final decision did not reflect any consideration of the documents or finding on any of the issues before it. The Committee’s finding that, “*The onus of proving that the assessment is arbitrary is on the appellant who has failed to provide documentary evidence to the contrary,*” was therefore unfounded in light of what had transpired prior to that date.

10. I also find that when the Committee adjourned the matter, the only outstanding matter was the framing of contested issues. The lack of documentation on the appellant’s part or otherwise had never come up before the Committee and it is therefore strange that the Committee reached a conclusion that the appellant failed to provide documentary evidence when it its decision it did not set out it reasons support the conclusion it had reached.

11. It is unnecessary to belabour the point that the Committee’s decision cannot be supported by the record. The right to be heard on the matters in issue is constitutionally mandated as is the duty to give reasons for the decision.

12. I allow the appeal and set aside the decision of the Local Committee. I direct the Local Committee to rehear the appellant’s objection.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 26th day of November 2018.

F. TUIYOTT

JUDGE

Ms Odundo instructed by the Commissioner of Income Tax.