



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
INCOME TAX APPEAL NO. 7 OF 2013

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

- VERSUS -

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Ruling is in relation to the application dated 20th June 2013. It is an application for “*stay of the effects?*” of the decision made by the Local Committee on 6th June 2013.
2. The applicant also seeks an injunction to bar the Commissioner of Domestic Taxes from recovering the sum of Kshs. 80,630,445/- which was assessed as the tax payable by the Applicant, in respect to the years of income 2005/2006, 2006/2007 and 2007/2008.
3. The Local Committee had held that the appeals preferred by the Applicant were invalid because the Applicant had failed to provide evidence to demonstrate that it had paid the taxes in issue, prior to lodging the appeal.
4. In effect, the appeal was not determined on merit.
5. Following the rejection of the appeal, the Applicant moved to the High Court, where it lodged an appeal to challenge the decision of the Local Committee.
6. However, the applicant has expressed fears that the respondent would take steps to recover the assessed taxes, amounting to Kshs. 80,630,445/-.
7. In an endeavour to stop the respondent from recovering the taxes whilst the appeal was still pending, the applicant brought this application.
8. According to the applicant it would suffer serious financial and cash flow implications, if it were compelled to pay the sums demanded. The applicant said that if it had to pay the sums in issue, that would disrupt its current financial activities and obligations, including the payment of current taxes.
9. The applicant proceeded to submit on aspects of the appeal which it considered to be strong.
10. In answer to the application, the respondent made submissions calculated to show how weak the appeal was.

- 11.** Ultimately, if the court did not grant stay, the applicant believes that its appeal would be rendered nugatory.
- 12.** But the respondent was of the view that the grant of an injunction to restrain it from recovering the taxes which had been assessed, would be tantamount to stopping the respondent from carrying out the very statutory function which it was required to undertake.
- 13.** The Local Committee had rejected the appeal because it was filed before the applicant had paid the taxes.
- 14.** Whether or not the Local Committee was right, is an issue to be determined when the substantive appeal has been given due consideration.
- 15.** Although both parties have made serious submissions on the merits of the appeal, I do remind myself that currently I am not yet required to determine the said appeal. For the moment, all I am asked to determine is whether or not the respondent ought to be restrained from taking steps to collect the taxes from the applicant, whilst the appeal was still pending.
- 16.** In determining the application, I note that the applicant has a statutory obligation to pay taxes.
- 17.** The applicant has not said that it was exempt from paying taxes. What it seems to be saying is that whereas ordinarily taxes were payable, the loans payable to the Government of Kenya and to the Kenya Sugar Board had been written off, together with interest thereon.
- 18.** The applicant says that the parliament had intervened by passing Sessional Paper No. 12 of 2012, through which Withholding Tax due on interest expense on Government of Kenya and Overseas Development Agency and Kenya Sugar Board Loans were written off, in respect to all public-owned sugar companies.
- 19.** It is thus my understanding, that the applicant appears to be saying that their situation is covered by an exception to the general rule.
- 20.** The onus would therefore be upon the applicant to demonstrate that the Sessional Paper No. 12 of 2012 had the force of law, through which the applicant was excused from paying the taxes which were otherwise due and payable.
- 21.** In those circumstances, I hold the considered view that until and unless the applicant was able to satisfy the court that it was a lawful beneficiary of an exemption, the applicant would be obliged to pay the taxes.
- 22.** If the applicant's main fear is that the sudden payment of Kshs. 80 million would disrupt its services, it is not impossible for the applicant to negotiate with the respondent on a schedule for payments.
- 23.** It must be borne in mind that there was no guarantee that the appeal would succeed.
- 24.** And even if the appeal did succeed, the result would be an order compelling the Local Committee to accord a hearing to the applicant before determining whether or not the taxes were payable.
- 25.** In other words, a successful appeal before this court, coupled with a new hearing of the appeal before the Local Committee, is no guarantee that the taxes would be written-off. There is still a possibility that the Local Committee and the High Court could hold that the taxes were still payable.
- 26.** What I am getting at is the fact that the applicant may still end up having to pay the taxes. Therefore, in my considered view, the applicant ought to organize its finances in such a manner as to take into account the fact that these pending proceedings may finally result in the payment of taxes. That possibility is not, and cannot be, a surprise to the applicant.

27. In order to grant an injunction, I would have had to be convinced that the applicant had established a *prima facie* case with a probability of success. As the case is at the stage of an appeal, that implies that the court would have had to consider the merits of the appeal.

28. I hold the considered view that it was improper for the court, at this stage, to pre-judge the pending appeal.

29. I also hold the view that if the appeal was to finally succeed before me, and before the Local Committee, any money which the applicant may have paid, in the meantime, would not have been wasted. The applicant could always be given credit.

30. Finally, there is no basis upon which the court could find that the applicant would suffer irreparable loss, if an injunction were not issued. Surely, the Commissioner of Domestic Taxes cannot be said to be incapable of either repaying Kshs. 80,000,000/- or of giving an appropriate credit of that sum, in the applicant's tax records.

31. In the final analysis therefore, there is no merit in the application dated 20th June 2013. It is therefore dismissed, with costs to the respondent.

32. However, I do direct that the substantive appeal be listed for hearing on a date which is to be fixed by the court immediately after this ruling is delivered.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of August 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Chepkurui for Okongo for the Appellant

Miss Almadi for Nyaga for the Respondent

Collins Odhiambo – Court clerk.