REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION 741 OF 2007

DOSHI IRONMONGERS……APPLICANT

Versus

THE COMMISSIONER FOR DOMESTIC TAXES & ANOTHER…..…RESPONDENTS

JUDGMENT

The ex parte Applicant herein is Doshi Ironmongers Ltd. The Applicant brought this Notice of Motion against the Commissioner for Domestic Taxes and the Kenya Revenue Authority (KRA) seeking the following Judicial Review Orders:

1) That an order of prohibition do issue prohibiting the Respondents, their agents servants or other authority appointed by them from executing, pursuing, considering or effecting the recovery or enforcement of the VAT notices dated 19th June 2007 and 4th July 2007 and VAT Assessment No. 0320060000010 for the years of income 2001-2004 – inclusive of the recovery of the VAT Tax outstanding of Kshs.46,641,391.00;

2) An order of prohibition to prohibit the Respondent, their officers, agents or servants from proceeding with any threatened enforcement action for the recovery of the sums sought as allegedly due and owing to them;

3) Costs of the application.

The Application is predicated on the statutory statement dated 11th July 2007 and the verifying affidavit of Ashok Labshankar Doshi of the same date. The Applicant also filed arguments on 12th June 2008. Mr. Omulela argued the application on behalf of the applicants.

The Notice of Motion was opposed and a replying affidavit was sworn by Evans Bogita, Principal Revenue Officer in the Policy and Project Section of the Domestic Department, a Department of KRA. Mr. Matuku urged the application on behalf of the Respondents.

Briefly stated, the facts of this case are that the Applicant is a company that carries on business of hardware sundries import and export services. Ashok deponed that and that, on 28th July 2006 he wrote to the Minister of Finance requesting for grant of remission of interest of Kshs.26,641,390/= resulting from VAT Assessment ALDI. On 2nd august 2006 the Applicant addressed to 1st Respondent indicating

that he had appealed for remission of interest to the Minister for Finance and also requested 1st Respondent to grant a credit in respect of VAT 3 Return which the Applicant had submitted – letter is ALD 2 and VAT 3 ALD 3.

On 1st September 2006, the deponent again wrote to 1st the Respondent setting out a summary of the credits on VAT being refunds due to the Applicant, ALD 4 and on 5th September 2006, the 1st Respondent replied agreeing to a verifying audit being done by the 1st Respondent – ALD 5. But to date, no audit has been carried out. On 19th June 2007, the 1st Respondent sent a demand notice to the Applicant; which was received on 29th June 2007 demanding Kshs.46,641,391/= in arrears of VAT, (ALD 6). The Applicant responded but on 4th July 2007 the 1st Respondent issued another demand notice giving the Applicant 7 days to pay. It was received on 10th July 2007 – ALD 8. That on 5th July 2007, the Permanent Secretary Ministry of Finance addressed the 1st Respondent instructing the 1st Respondent to process the remission of interest of Kshs.26,641,390/= in accordance with the laid down provisions. (ALD 9) but the Respondent has failed to do so and the Respondent's actions amount to abuse of office. That is why the Applicant contends that the demand for the arrears is arbitrary, unlawful, oppressive and unfair.

In opposing the Notice of Motion, one Evans Bogita, Principal Revenue Officer in the policy and projects section of the Domestic Taxes Department, a Department of the KRA, swore an affidavit dated 20th May 2008 in which he admits that a tax audit was done of the Applicant for the years 2001 to 2004 and the Applicant found to have violated VAT Regulations 1994 and the Applicant was duly informed of it vide the letter dated 16th June 2005 'EBI'. On 28th July 2006, the Applicant wrote to the Minister for Finance through the 1st Respondent appealing for remission (waiver) of the full interest of 26,641,390/= which had accrued on the principal tax of 35,063,669/= (EB 2). On 2nd August 2006, the Applicant had written to the 1st Respondent informing them that he had sought waiver on interest (EB 3). The Applicant wrote to 1st Respondent again on 1st September 2006 indicating that it had accumulated a credit of Kshs.4,599,955 and total credit amounted to Kshs.26,596,422 and asked for an offset against the principal sum of Kshs.35,063,969 (EB 4). That by letter dated 14th June 2007, the Minister for Finance forwarded to the 1st Respondent the Applicants letter of 28th July 2006 (EB 2) and asked the 1st Respondent to process the remission in accordance with the laid down procedures (CB 5). According to Bogite, the Applicants tax records show that as of 31st May 2007, he owed a principal tax of Kshs.35,063,696 Kshs. 15,063,968/- was settled and a balance of 20,000,001 was left plus an interest of Kshs.26,641,310/= as evidenced by the letter addressed to the Applicant on 19th June 2007, by the 1st Respondent (EB 6). That the balance of 46,641,390/= is still outstanding and continuous to accrue interest. That the tax credit of Kshs.26,596,420/= cannot be processed until investigations that had been started by Investigations and Enforcement Department which is a Department of the 2nd Respondent are concluded and that a claim for VAT refund is supposed to be filed with the 1st Respondent in accordance with Section 11 (2), 11 (2 A) and Regulation 11 of the VAT Regulations 1994 and lastly that the waiver of interest of Kshs.26,641,290/= is at the discretion of the Minister for Finance and so far the Minister has not exercised that discretion in favour of the Applicant.

It seems not to be disputed that the Applicant does owe some tax. The Respondent put the sum at Kshs.46,641,391/= it is not disputed anywhere. The reasons for failure to pay is that there is an application for waiver of interest which the Minister of Finance has not yet dealt with and there is a pending application for refund of the VAT from the Respondent.

It is the Respondents, contention that no refund of the VAT can be done because the Applicant has not followed the procedure for doing so under the Act. Reference has been made to the procedure under Section 11 provides that input tax may be deducted by the registered person if it was not previously deducted and that is only done subject to the regulations and provisions of that Section. Section 10 defies input tax as tax paid on the supply to a registered person of any goods or services to be used by him for the purpose of his business and tax paid by a registered person on importation of goods or services to be used by him for the purposes of his business. Output tax on the hand means tax which is due on taxable

supplies.

S. 11 (1) has a proviso that input tax may not be deducted after 12 months have lapsed when the tax became due and payable. Section 11 reads

"**11 (1) subject to the regulations and to the other provisions of the Section, input tax may at the end of either the tax period in which the supply or importation occurred or the next following tax period, be deducted by the registered person, so far as not previously deducted and to the extent and subject to the exceptions provided under this section, from the tax payable by him on supplies by him (referred to as 'output tax'). In that tax period; provided that no input tax may be deducted –**

(a) More than twelve months after that input tax becomes due and payable pursuant to section 13;

(b)

S 11 (2) where the amount of input tax that may be so deducted under subsection (1) exceeds the amount of output tax due, the amount of excess shall be carried forward to the next tax period."

It was the Respondent's submission that the said tax became due and payable in 2005. That it is not disputed and the said refund should have been sought within 12 months of 16th June 2005. Apart from the requirement that the decision be made within three months S 11 (1A) sets out the various documents that are required before such deduction can be made.

This include;

(a) a tax invoice issued either paragraph (1) of the 7th schedule;

(b) a customs entry duty certified by the officer and a receipt for payment of tax;

(c) or A custom receipt and a certificate signed by the Commissioner of Customs stating the amount of tax paid, in the case of goods purchased from Customs auction;

(d) An import declaration form duly certified by an authorized officer and proof of payment made for the tax in the case of imported taxable services.

S. 11 (2 A) requires that where excess input tax is payable under subsection (2), a registered person shall lodge a claim for the sum payable within 12 months from the date the tax became payable or such longer period not exceeding 24 months as the Commissioner may allow. At paragraph 7(b) of the Replying Affidavit, the Respondent had pleaded that the claim for VAT refund could not be processed until the Applicant complied with Sections 11 (2) or 11 (2(A)) of the VAT Act. The Applicant did not file any affidavit to rebut this allegation. It means that if the Applicant has not complied with the requirements and lodged the necessary documents a refund cannot be made. The Applicant cannot therefore blame the Respondents for not processing the refund when they have not set the process in motion as required.

It is also not disputed that the Applicant sought to have the interest accrued on the sums due waived by the Minister. S 15 (3) of the VAT ACT provides that the Commissioner may grant remission of interest in individual cases where he is satisfied that such remission is justified and shall make quarterly reports of all remissions granted. However, where the amount of interest exceeds five hundred thousand shillings, the remission shall be subject to the prior written approval of the Minister. The Applicant applied to the Minister for remission of that tax on 28th July 2006 vide the letter of that date and sent it through the Commissioner of Domestic Tax. On 5th July 2007, the Permanent Secretary, Ministry of Finance wrote back to the Commissioner in respect of the Appeal for remission and directed the Commissioner of Domestic Taxes as follows:

"**Attached please find a copy of a letter Reg No. DM/426/2006 dated July 28, 2006, on the above mentioned subject.**

Please process in accordance with the laid down procedures."

Though the said letter is from the Ministry of Finance, it is written by one Wanyambura Mwambia on behalf of the Permanent Secretary. Unfortunately, the Respondents totally avoided to comment on the purport of the said letter. The letter is vague. It does not tell us whether these instructions meant that the Respondent was supposed to process the remission. What is clear is that it is not from the Minister nor is it written on behalf of the Minister. It does not explicitly state that remission was granted. It is nearly 3 years since remission was sought and so far, none has not been granted. The fact that remission has been sought is not guaranteed that it will be granted as it depends on the discretion of the Minister. It cannot be awaited indefinitely.

There is no doubt as to the outstanding tax that is due and payable. It is the duty of the Applicant to pay tax because it is not disputed. Besides, from an evaluation of what has transpired I find that there is no evidence of the Respondent acting unlawfully or oppressively or unfairly or abused office as alleged. The Respondent cannot be blamed for the failure of the Minister to exercise his discretion under S 15 (3) of the Act. The Respondent has also clarified that it is the Applicant who has failed to comply with the procedure under S 11 to provide the necessary documents for the refund to be processed. I find that none of the grounds contained in the statement have been proved.

The Applicant seeks orders of prohibition to prohibit the Respondent from effecting recovery of VAT Tax arrears Notice dated 19th June 2007 and 4th July 2007 and VAT assessment for the year 2001-2004. An order of prohibition will issue where a party is in breach of statutory provision or acts in excess or without jurisdiction or breaches the rules of natural justice in making a decision. None of these grounds have been proved by the Applicant. The Applicant should go ahead, pay the tax that is due and if any remission is granted by the Minister, that credit will go on their account or a refund made. The Applicant has come to a court of equity and cannot be entitled to orders of this court if they do not clean their hands. Accordingly the application is dismissed with the Applicant bearing the costs. It is so ordered.

Dated and delivered this 31st day of July 2009.

R.P.V. WENDOH

JUDGE

Present

Mr. Omogeni holding brief for Mr. Omulela for Applicant

Mr. Mutuku for Respondent

Muturi: Court Clerk