REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Misc Appli 1482 of 2001

REPUBLIC …….....……..APPLICANT

Versus

COMMISSIONER OF VALUE ADDED TAX…….....……
RESPONDENT

AND

EX-PARTE…….....…….……HIGHWAY FURNITURE MART LIMITED

JUDGMENT

Before me is the Notice of Motion dated 20th December 2001 filed by the Ex-parte Applicant, Highway Furniture Mart Ltd. pursuant to Order 53 Civil Procedure Rules. The Applicant seeks the following orders:-

(a) That an order of certiorari to bring to this court the demand and/or assessment dated 5th November 2001 made by the Respondent against the Applicant for Kshs.19,372,167/= for the purposes of being quashed;

(b) That an order of Prohibition be issued to prohibit the Respondent from attaching the Applicant's assets or in any manner enforcing the above and/or assessment dated 5th November 2001;

(c) Costs of and incidental to the suit.

The application is supported by an amended statutory statement amended on 16th January 2006 and filed in court on 18th January 2006, a Verifying Affidavit dated 7th December 2001 and a supplementary affidavit dated 21st July 2005, both sworn by Joseph Waitiki Ndegwa. The Applicant also filed skeleton arguments on 30th March 2006.

The application was opposed and Dick Gari filed an affidavit dated 5th April 2002 on behalf of the Respondent and Counsel filed skeleton arguments on 28th March 2006.

The Applicant was represented by Mr. F. Ngatia Advocate while Miss Odundo appeared for the Respondent.

The Applicants case is that he used to carry on business of a retail hardware shop along Kimathi Street in Nyeri but ceased that trade in 1984. He also worked as a contractor but ceased that trade in 1984 for lack of construction contracts. He started the sale of Coffee berries from his farm to the Co-operative Society; he received rents from rental residential premises, cattle sales and sale of old vehicles which were no longer in use. He used to file his annual returns with Income Tax Department and the activities which he carried on are not VAT designated and so he never applied to be registered under the VAT ACT. In early September 2001 the Respondent secretly went to the Applicant's premises and left an application for registration and by a letter dated 18th September 2001, the Respondent informed the Applicant that he was not eligible for registration but the Applicant went ahead to register the Respondent, backdated the registration to 1st September 1993. Using the Applicants annual returns, the Respondent calculated VAT as a percentage of the annual income which method is erroneous. As a result a sum of Kshs.19,372,167/= was said to be due from the Applicant for the years 1993-1999. It is the Applicants contention that the action taken by the Respondent is an abuse of its powers because VAT is payable on designated services and it fluctuates from 0% upto 18% and cannot be calculated on income. It is also submitted that the Applicant was not eligible for registration and none of the activities of the Applicant are VAT designated. It is also Submitted that the backdating effective date of 1993 was done in excess of the Respondents power so that the Applicant's liability exceeded his resources.

The 2nd ground alleged by the Applicant is that the assessment is based on abstract suppositions and is thus oppressive, vindictive and without basis. That the Applicants business is not VAT designated, the Applicant had not collected VAT from his customers and the demanded sum can only be generated from the sale of Applicants Capital assets. Mr. Ngatia submitted for the Applicant that whatever the Commissioner does in assessment has to be in accordance with the VAT ACT and the rules unless to be adopted in assessment are those laid down in the case of **ATUL SHAH & OTHER VS COMMISSIONER OF VAT HC MISC 887/88** Counsel also relied on the case of **R V THE COMMISSIONER OF CO-OPERATIVE EX PARTE KIRINYAGA TEA GROWERS CA 39/1997** where the court observed that no decision should be made arbitrarily, capriciously or in bad faith. He said the assessment is just a supposition but not an assessment. Council further submitted that if one fails to register with VAT, the Commissioner can register such person in terms of the 6th schedule Section 22 (a) but that discretion cannot be invoked because as of 2001, the Applicant was not eligible to pay VAT. Mr. Ngatia urged that backdating of an assessment has to be justified by good reasons.

In rebuttal Ms Odundo, Counsel for the Respondent said investigations on the Applicant were triggered by Mr. Gari's visit to the Applicant. The Applicant had entered into a contract of construction with the Government in 1986 which was completed in 1990. Total money paid to the Applicant was Kshs.20,500,000/= and that he continued to carry out that trade and the Applicant should therefore have registered with Commissioner of Income Tax. When requested to register, the Applicant claimed to have ceased operation in 1984 but the Applicant submitted returns in 1993, 1995, 1996, 1997 and 1998 which proved that he was still doing construction business. The Respondent exhibited the Applicant's Balance Sheet for 1993 which showed that the Applicant's principle activities to be construction work, retail shop and workshop and was therefore eligible to pay VAT. Counsel said that since the Applicant did not register itself, the Respondent invoked Section 22 (a) of VAT Act to register the Applicant and Commissioner went further to invoke paragraph 9 of the 6th Schedule to backdate the registration. Ms Odundo also submitted that the VAT charged is due from the Applicant and if there is any objection to it, the VAT Act has provision under which it can be challenged and the Applicant is abusing the process of court by coming to this court . Ms Odundo also urged that the court is being called upon to consider the merits of the Commissioner's decision which is not the mandate of this court. This court should only consider whether the decision making process was fair. The Respondent therefore claims to have relied on the documents filed by the Applicant and did not exceed its powers nor is there evidence of malice.

In reply Mr. Ngatia said that in the 1994-99 returns there is no evidence that the Applicant carried on construction work. Besides there was no evidence that they had applied the different scales of VAT to each item.

As regards there being an alternative remedy Mr. Ngatia said that issue was rejected in the case of

ATUL SHAH (Supra).

I have now considered the amended statement, the supplementary affidavit, Replying Affidavit by the Respondent, the annextures to the affidavits and arguments made by both Counsel.

The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself. In the case of **CHIEF CONSTABLE OF NORTH WALES POLICE VS EVAN (1982) 1 W.L.R. 155** Lord Halsham L.C. said:-

"It is important to remember in every case that the purpose of (the remedy of Judicial Review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matter in question."

Therefore, a decision of a tribunal or public authority may be quashed where the court or authority acted without jurisdiction, or exceeded its jurisdiction or failed to comply with the rules of Natural Justice where the rules apply or there is a error on the face of the record or the decision is unreasonable:

In the present case the Applicant alleges that the Respondent has acted in excess of their jurisdiction, maliciously and hence unfairly and therefore in breach of the rules of natural justice. That is what this court will consider based on the evidence on record.

It is the Respondent's contention that the Applicant has not filed an objection to the taxation as provided under the VAT Act nor has the Applicant exhausted the redress provided for under the said Act. However the existence of an alternative remedy is not a bar to the seeking of Judicial remedies. In the case of **DAVID MUGO T/A MANYATTA ACTIONEERS V REP CA 265/97** the Court of Appeal, when considering the existence of an alternative remedy said as follows: (page 4)

"…….the existence of an alternative remedy is not a bar to the granting of an order of certiorari"

The same view was made even clearer in the case of **R V CRIMINAL INJURIES COMPENSATION BOARD EX PARTE LAIN (1967) 2 QB 804** where the court said;

"The exact limits of the ancient limits of the ancient remedy by way of certiorari have now been, and ought not to be, specifically defined. They have varied from time to time, being expanded to meet the changing conditions. We have not reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private character, has to determine matters affecting subjects provided always that it has to act judicially."

In this case the Respondent's contention that the Applicants should have exhausted the remedies provided for in the Act before opting for Judicial Review is untenable. The Applicants are properly before this court.

The VAT ACT Cap 476 LOK is described as an Act of Parliament to impose a tax to be known as Value Added Tax on goods delivered in, or imported into Kenya; and on certain services supplied in or imported into Kenya and for connected purposes. In this case we are concerned with supply of services by the Applicant. In Section I of the Act, on interpretation, services means;

"(a) Any supply by way of business that is not a supply of goods or money; or

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right), but does not include a service provided by an employee to his employer for a wage or salary."

It is common ground that certain services and goods are designated for different percentages of taxes,

whereas others are totally exempted from VAT. The rates vary from 0%-18% (See schedules 1-5). The issue here is whether the Applicant carried on construction work/services that were VAT ratable and whether the applicant should have paid VAT.

It is evident that the Applicant had a construction contract with the Government in 1986 which is said to have been completed in 1990. Then construction services were not VAT rated. Payment was made to the Applicant in 2001 and the issue of whether or not the Applicant was registered as vatable was raised as construction services had become vatable in 1993.

The reasons given by the Applicant for failing to register with the Commissioner of VAT are that he was no longer carrying on construction business and the business he carried on was not VAT designated. In the letter dated 18th September 2001 from the Applicant to the VAT, Commissioner Nyeri Office annexed to Mr. Gari's affidavit as 'DG 3', the Applicant indicated that his company ceased operations in 1984 due to non-allocation of building contracts either from Government or individuals. It also indicated that the Applicant ceased to operate a handware shop due to lack of funds. However, this letter flies in the face of the contract entered into between the Applicant and the Government in 1986 which ended in 1990 (DG 1). The Applicants entered into the contract after the alleged cessation of business in 1984 as the contract was signed in 1986. The contents of the letter of 18th September 2004 also contradict the Applicant's audited accounts exhibited by the Respondent as DG 3 and signed on 20th September 1994. The Applicant does not deny the said accounts. The accounts do show that the principal activities that the Applicant was engaged in were construction work, retail shop and workshop. The contents of the Applicants letter dated 18th September 2001 are untrue and the court finds that the applicant was doing construction business as of the time of assessment. Though the Respondent contends that other returns were filed by the Applicant showing that the applicant did construction work even upto 1999 those audited returns were not exhibited. Those Returns exhibited by the Applicant do not show what activities the Applicant was engaged in, which ideally, should have been indicated. The Applicant was concealing the nature of business he was engaged in. The tax assessment was based on returns made up to 1999 and I believe the returns are those exhibited by the Applicant. Para 22 of the 6th schedule provides as follows:

Where in the opinion of the Commissioner

(a) any person is a taxable person under para 1 or para 2 and that person has failed to apply for registration in the prescribed manner, the Commissioner may register that person forthwith.

(b) Any taxable person has failed to notify cessation of trading under para 15, the Commissioner may deregister that person forthwith and require that person to pay the tax due and payable on supplies made and stocks of materials and other goods on which tax has not been paid or on which tax has been credited as deductible input tax"

It has not been denied that construction services were VAT rated as from 1993 September and in light of the evidence adduced by the Respondents, this court is satisfied that the Registration of the Applicant under para 22 (a) of the 6th Schedule was proper as he was eligible for registration for purposes of VAT. His returns do show that he was engaged in construction work as of 1993 as evidenced by returns filed in 1994.

Para 9 of the 6th Schedule empowers the Commissioner to vary the effective date of registration where he is satisfied that there are reasonable grounds to justify the variation. Though the issue of registration arose in 2001, the Commissioner in assessing the tax has backdated the assessment to 1993, based on the fact that the Applicant had denied being in business from 1984 when he was actually still in business in 1993 as per the returns filed. In my considered view the Commissioner was justified in backdating the date for registration. The Audited Accounts filed by the Applicants do not give a breakdown of exactly what each service was worth, and the question is, what would the Commissioner do to ascertain the VAT chargeable in the circumstances? In the case of **ATUL SHAH (supra)** Justice

Githinji at page 8 of his judgment set out some of the considerations to be included in the assessment of VAT as per the VAT Act.

"(a) Total value of taxable sales derived from relevant documents

(b) A verification whether or not the goods sold are designated.

(c) Determination of whether or not the goods sold or what percentage of the goods are exempt or zero rated and exclusion of such sales;

(d) Application of the designated tax rate to each item or class of goods sold"

The judge held that the assessment would have been arbitrary if the above were not taken into account during assessment of VAT.

In the present case, I have found above that the Applicant was as of 1993 still carrying on construction business which is vatable though the Applicant had claimed to have stopped the business 9 years earlier in 1984. Having told that falsehold, the court would not believe that the Applicant did not continue with that business after 1993. As earlier noted even the returns filed by the Applicant after 1993 do not specify the business connection. The Applicant did, conceal material facts that the Commissioner would have relied upon to assess VAT. The Applicant was obviously trying to avoid payment of VAT on construction services. Construction services are VAT designated since September 1993 (see JNH 4 Notice of Assessment).

The Notice of Assessment indicates that the tax arrears is based on the turnover indicated in the audited balance sheets for the years 1993-1999. As earlier pointed out, the Applicant did not avail the proper breakdown in the accounts to enable the Respondents determine what percentage attached to particular services in order to apply the designated tax to each item or class of goods sold or service offered as required.

Under para 9 of the 7th Schedule, the Commissioner has the discretion, in such a case to use the evidence available to him to assess the amount of tax due. The para reads:

"**9 (1) where in the opinion of the Commissioner, any person has failed to pay any of the tax which has become payable by him under this Act by reason of:-**

(a) his failure to keep proper Books of Account ; records or documents, required under this Act, or the incorrectness or inadequacy of these books of account, record, or documents; or

(b) his failure to make any return required under this Act, or delay in view of such return or the incorrectness or inadequacy of any such return; or

(c) his failure to apply for registration as a taxable person under this Act;

The Commissioner may, on such evidence as may be available to him assess the amount of the tax due and that amount of tax shall be due and payable forthwith by the person liable to pay the tax provided that the Commissioner may, in special cases referred to him by an authorized officer, adjust or review the amount of tax assessed under this paragraph in such manner as may be just and reasonable in the circumstances."

The only evidence available to the Commissioner for purposes of assessment of VAT was the filed returns on the turnover and in my view, the Commissioner properly exercised his discretion as empowered by the Act under the above quoted provision to assess VAT based on the filed returns.

So far, the Applicant has not demonstrated that the Respondent exceeded his powers under the Act or acted arbitrarily or capriciously or with malice as alleged. If anything, it is the applicant who was trying

to avoid to pay VAT. What is apparent is that the Commissioner exercised his discretion under the provisions of the Act in the said Assessment. In the earlier referred decision of CHIEF CONSTABLE OF NORTH WALES POLICE VS. EVAN [1982] 3 ALL ER Lord Brighton had this to say (at page 154); that the court will not act as a

"Court of Appeal from the body concerned nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction or the decision is unreasonable. The functions of the court is to see that lawful authority is not abused by unfair treatment. If the court is to attempt itself the task entrusted to that authority by the law, the court, would under the guise of preventing the abuse of power be guilty itself of usurping power"

The above quotation says it all. The Commissioner was exercising his discretion under the VAT Act and if the court were to interfere with his decision it is tantamount to interfering with his discretion and acting like an appellate court. This court was dealing with the process of decision making rather than the merits of the decison.

In my view the applicants want the court to reconsider the merits of the Commissioner's decision which is not this court's mandate. The Commissioner should be left to perform his statutory mandate under the VAT Act. An order of certiorari cannot therefore issue.

Similarly an order of prohibition will not issue because prohibition does not quash the decision already made but looks to the future – that is to stop what has not yet been done. See KENYA NATIONAL EXAMINATION COUNCIL V REP CAA 266/96. Since an order of certiorari cannot issue, an order of prohibition cannot issue to stop execution of the Commissioner's order.

Section 32 A (1) of the Act provides for a mechanism of raising objections in the event of a disputed assessment. Though I did note that the applicant had the right to approach this court in Judicial Review, yet after considering the evidence before this court, the Applicants should clearly have pursued their rights of objection under the Act.

In sum, I find no merits in the applicant's Notice of Motion dated 20th December 2001. It is hereby dismissed with costs to the respondents.

Dated and delivered this 19th day of October, 2006.

R.P.V. WENDOH

JUDGE

Delivered in the presence of –

Mr. Amuga holding brief for Ngaha for the applicant

Respondent absent

Ojijo: Court Clerk

R.P.V. Wendoh

Judge