



Rift Valley Railways Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E121 of 2020) [2025] KEHC 2344 (KLR) (Commercial and Tax) (12 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E121 OF 2020
A MABEYA, J
FEBRUARY 12, 2025**

BETWEEN

RIFT VALLEY RAILWAYS KENYA LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

1. This is an appeal arising out of the decision of the Tax Appeals Tribunal (Tribunal) delivered on 25/9/2020. The respondent conducted investigations on the appellant for the years 2011 to 2016 and issued an assessment on 13/9/2017 for Kshs 1,696,233,674.00.
2. The appellant objected to the assessment on 12/10/2017 and the respondent issued his objection decision on 11/12/2017 wherein he confirmed the assessment. Aggrieved by the respondent's decision, the appellant lodged an appeal before the Tribunal and on 25/9/2020 the Tribunal delivered its judgment allowing the appeal partly by reducing the withholding tax liability on local and imported services.
3. Being dissatisfied by that decision, the appellant filed the present appeal vide a Memorandum of Appeal dated 10/11/2020. It was premised on 20 grounds of appeal which can be summarized as follows: -
 - a. That the Tribunal erred in law by misapprehending the evidence and holding that the National Treasury did not give the appellant an exemption on all the capital goods it had intended to import.
 - b. That the Tribunal erred in law in finding that the appellant was not given remission with respect to locomotives and was not given an exemption by relying on internal memos of the National Treasury.



- c. That the Tribunal erred in law in finding that the appellants VAT Remission of Kshs 403,322,260.00 was obtained fraudulently.
 - d. That the Tribunal erred in law and fact in holding that the unperfected entries related to locomotives whereas they related to new loops permanent way.
 - e. That the Tribunal erred in law and fact in finding that the withholding tax amounting to Kshs 36,606,243 was due and payable.
4. The appeal was challenged by the respondent vide statement of facts dated 19/1/2021. The respondent stated that pursuant to section 38(2) of the EACCMA the appellant ought to have perfected the provisional entry of goods by either payment of duty or exemption of duty but the appellant failed to provide evidence of exemption of duty.
 5. That the appellant undervalued the cost of Insurance freight (CIF) in the year 2013 thus prompting the respondent to levy tax of Kshs 391,393. The respondent contended that the appellant ought to have provided proof of extension to his officers and perfected the entries in question.
 6. It was contended that the appellant's failure to receive validation by Treasury resulted in the respondent's assessment of duty payable on the unperfected entries beyond the three months as envisaged by law. That the appellant had to bear the consequences of its inaction which is payment of duty.
 7. That the appellant had under declared the freight cost of six locomotives imported in December 2014. That the letter sent by National Treasury dated 15/8/2011 did not include locomotives as part of capital goods approved by the Minister for VAT remission. It was stated that the VAT remission in respect of some capital goods was approved by the Minister on 29/6/2011 and further communicated to the appellant on 15/8/2011. That the response from the National Treasury had exempted some items which the appellant had sought exemption in its letter dated 31/3/2011.
 8. It was further contended that the respondent had required the appellant to provide further explanations as well as supporting documents of the reconciling items it used in the computation for review but failed to avail the same leading the respondent to treat the variance as unreported.
 9. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that it made a request to the Deputy Prime Minister and Minister for Finance seeking to have an exemption on the capital goods for the renewal of the rail track for the benefit of the Republic of Kenya.
 10. That vide a letter dated 15/8/2011, the Deputy Prime Minister and Minister for Finance approved wholly without alteration and amendment of the application. He however made a condition that the appellant was required to submit relevant documents. That the said documents were submitted and on numerous times, the appellant wrote to the respondent requesting for waiver of VAT and IDG fees which request was ignored by the respondent.
 11. Counsel submitted that the Tribunal erred in disregarding the evidence placed before it and holding that the National Treasury did not grant an exemption to the appellant on capital goods and that the letter relied on by the appellant had left out some items which did not qualify for exemption. The appellant submitted that once remission was granted by the National Treasury, the goods became exempted and there were no taxes due on the capital goods.
 12. That had the National Treasury intended to allow exemption on some goods and deny others, it would have specifically stated so. That the National Treasury's internal memo of 29/5/2011 relied on by the



Tribunal, was extraneous and the appellant was not privy to it. That if there was fraud, the appellant had no knowledge of the same as it was not privy to the internal procedures and processes of the National Treasury.

13. It was submitted by the appellant that the total goods to be imported was clearly stated as capital goods for USD 203,432,000 and the applicable VAT of USD 2,766,675,200. That the remission granted by the National Treasury was not revoked and the Minister was at liberty to revoke the same if it was obtained irregularly.
14. It was the appellant's submission that, issuing the tax exemption by one government agency and demanding the same by another government agency was against its legitimate expectation. That the diesel engines were the same wagon engines therefore the Tribunal erred in holding that the diesel engines were not in the master list of 15/8/2011.
15. It was submitted that errors of the National Treasury excluding major capital items cannot be used to invalidate the exemption founded on law. That the appellant made effort for the correction of the errors where it noted that the remission letter had omitted up to over 65% of the total capital expenditure.
16. On the part of the respondent, it was submitted that the appellant had raised issues of fact as opposed to issues of law as stipulated in section 56(2) of the [Tax Procedures Act](#) 2015. With respect to the letter from the National Treasury dated 15/8/2011, Counsel submitted that some of the appellant's imports did not fit or conform to the exempted capital goods in the remission. That there had been discrepancies between the remission granted by the National Treasury to the appellant and the purported letters from the National Treasury produced by the appellant.
17. It was submitted that the repealed VAT Act section 23 was repealed on 1/9/2013 and therefore any letter by the National Treasury post that date could not grant any remission and therefore, the appellant could not place reliance on the said letters. Counsel submitted that the remission of 15/8/2011 did not cover all the appellant's imports and specifically the late/unperfected entries, six locomotives, spare parts, diesel engines, train simulator system, the tamping and ballast stimulating machines.
18. Counsel submitted that the appellant had raised new issues with respect to provisional entries exempted by the National Treasury. That there were discrepancies between the remission granted by the National Treasury to the appellant and the purported letters from the National Treasury to the appellant. That the respondent was justified to raise an additional tax for the disputed imports which fell outside the scope of remission.
19. I have considered the record, the response by the respondent and the submissions by both parties. The first issue for determination is whether the National Treasury had granted the appellant full VAT remission as prayed.
20. Section 23 of the [Value Added Tax Act](#) CAP 476 provides: -
 - (1) Subject to subsection (3), the Minister may, by order in the Gazette, remit wholly or partly tax payable in respect of any taxable goods or taxable services, if he is satisfied that it is in the public interest to do so.
 - (2) Where any remission is granted under this section on a condition that tax shall be payable in the event of the breach of any term or condition or on the occurrence of any event, the tax shall, on the breach of that term or condition or on the occurrence of that event forthwith become due and payable by such persons as may be specified in the order concerned.
 - (3) Remission under subsection (1) shall only apply in respect of



- (a) capital goods, excluding motor vehicles of a total value of not less than one million shillings per investment, imported or purchased locally for new investment in the expansion of investments.”

21. It is uncontested that vide a letter dated 31/3/2011, the appellant applied for a remission of VAT to the Deputy Prime Minister and Minister for finance in respect of capital goods. The appellant received a response from the Deputy Prime Minister and the Minister for Finance pursuant to section 23(1) and 23(30) (a) of the VAT Act (repealed) wherein VAT remission was approved. Section 23 of the repealed VAT Act made a provision for remission of goods specified under subsection (3) which enumerates where remission is applicable.
22. The appellant contended that the VAT exemption letter dated 15/8/2011 granted remission for capital goods, including locomotives and train simulators, as confirmed by a later letter from the National Treasury on 28/5/2014. It argued that the exclusion of these items from the remission was a typographical error and did not invalidate the exemption.
23. The respondent countered that the VAT Act (Cap 476) was repealed in September 2013, removing the Minister's power to grant VAT remission under section 23. Therefore, letters issued after that date, including the alleged confirmation of 2014, could not legally grant remission. The respondent further argued that the Minister intentionally excluded certain items, including locomotives and simulators, from the exemption.
24. As to whether the letter dated 15/8/2011 gave the appellant remission for all the capital goods provided for, the Tribunal found that the exemption left out some items which the National Treasury found that they did not qualify for exemption.
25. I have perused the remission granted to the appellant on 15/8/2011 with respect to the remission of VAT on capital goods. The said letter approved VAT Remission with respect to capital goods that were being imported/purchased for the expansion of the appellant's existing plant. The letter outlined that the spare parts and accessories did not qualify for the remission and the appellant was requested to avail relevant documents that is; the bills of lading, airway bills, invoices and IDF together with a forwarding letter.
26. I have compared the letter dated 31/3/2011 requesting for remission with the letter dated 15/8/2011 granting the remission. It is evident from the contents of the latter that certain items were explicitly excluded. While the appellant argues that the National Treasury made an error in omitting locomotives, this claim is not supported by any factual evidence. Furthermore, the appellant's letter dated 5/11/2011, which sought to address the alleged omissions, was not approved or acknowledged by the National Treasury. At that time, the appellant was well aware that some goods had been left out.
27. The Court notes that remission of VAT has significant legal and financial implications. A tax exemption carries significant implications and must be precise, as it is relied upon for compliance and enforcement. If it was Treasury's intention to include the omitted items, it should have explicitly done so. But it deliberately left them out. It cannot be inferred that it intended to include the same.
28. In this regard, the Court concurs with the Tribunal's finding and finds no error in its determination that the letter dated 15/8/2011 excluded certain items that were not covered by the remission. I therefore do not find that the appellant's legitimate expectation was violated in this case. The appellant did not demonstrate any specific commitment by the National Treasury to include the omitted items in the VAT remission. The letter dated 15/8/2011 explicitly outlined the scope of the remission and identified the items included in the remission.



29. The second issue is with respect to perfection of the provisional entries as per the provisions of section 38(2) of the EACCMA 2004 which provides: -
- “38(2) Where any such goods are provisionally entered for home consumption, then the proper officer may require the owner to deposit, in addition to the amount estimated as the duty for the purpose of making such provisional entry, such further sum as the proper officer may deem fit; and such estimated duty and further sum shall be held on deposit and shall be forfeited unless the owner within three months, or such further period as may be allowed by the proper officer, of the provisional entry produces to the proper officer satisfactory evidence of the value of such goods and makes perfect entry thereof.”
30. The appellant contended that, the unperfected entries had been granted remission by the National Treasury through the exemption letter dated 15/8/2011. That therefore, the tax remission was zero meaning that, the lack of administrative documents to effect clearance would not defeat the clearance granted.
31. In its decision, the Tribunal held that the 4 unperfected entries related to locomotives which were not exempted and the appellant had failed to comply with section 38(2) of the EACCMA 2004.
32. I have considered the provision of section 38(2) of the EACCMA 2004. It allows goods to be provisionally entered for home consumption, but the owner must deposit the estimated duty and any additional sum required by the customs officer as security. The owner has three months (or more, if permitted) to provide satisfactory evidence of the goods' value and finalize the entry process. If they fail to do so, the deposited amounts are forfeited, ensuring compliance and safeguarding customs revenue.
33. In this regard, the law placed a burden on the appellant to take the steps outlined above to be able to enjoy the safeguards or benefits set out therein. However, the appellant did not adhere to the said processes. Accordingly, the respondent was therefore justified in making the assessment.
34. Whether the Tribunal erred in holding that the appellant was required to remit Kshs. 36,606,243/- as withholding tax. The Tribunal held that the assessment of the respondent with respect to withholding tax was Kshs. 93,323,534/=. However, however the appellant adduced evidence of bank statements totaling to Kshs. 56,717,291/- leaving a balance of Kshs. 36,606,243/=. which was not accounted for.
35. Section 35 of the *Income Tax Act* governs withholding tax which is tax deducted from the source by a payer. The appellant submitted that it had already complied with its obligation under section 59 of the *Tax Procedures Act* 2015 which allows the Commissioner to obtain full information of a tax liability. The appellant further submitted that it had not paid for the service owing to the non-performance by the supplier.
36. On whether the books of account demonstrated whether the payment was made, the court of appeal interpreted the meaning of the term “upon payment” in the case of *Cimbria (EA) Limited v Kenya Revenue Authority* [2017] eKLR in relation to the timing for imposition of withholding tax on interest which had accrued in the books of a tax payer. It was held that ‘upon payment’ basically meant when payment was made. In this case, the Tribunal noted that not all the amount was paid with respect to the acquisition of the SAP System. That however, since the appellant had entered the corresponding book entry, payment or deduction need not be done physically or practically but as a book entry.



37. In *Kenya Revenue Authority v Republic (Ex parte Fintel Ltd)* [2019] eKLR, the court relied on the provisions of section 2 of the *Income Tax Act* to define ‘paid’ as follows: -

“Paid’ includes distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person and “pay”, “payment” and “payable” have corresponding meanings.”

38. The court stated thus;

“While the words “upon payment” in their colloquial and ordinary parlance suggest “payment” or “paid”, that is, to be given money for something in exchange, it is our considered view that the relevant statute, the *Income Tax Act* must be the source of the meaning to be attached to it. The interpretation must be contextual...

the *Income Tax Act* has given the word “paid” a technical as opposed to an ordinary definition. Tax law is ever changing, complicated and highly technical. That is why we, with respect disagree with the learned Judge for insisting that “upon payment” must only convey the meaning that money or some valuable thing was delivered. He gave the phrase a very narrow construction. In the context of the *Income Tax Act*, payment is deemed to have been made even when no money has passed over. We therefore reject the contention that it was not practical to deduct and remit the tax without first actually paying the interest to the contractor. Although section 35(5) requires that where withholding tax is payable, the tax payer must “deduct” and remit the amount so deducted to the Commissioner, the sense in which the word “deduct” is used, as an accounting term refers to the act or process of subtraction of an item or expenditure from gross income to reduce the amount of income subject to income tax. This need not be done physically or practically but as a book entry.”

39. From the foregoing, I agree with the Tribunals finding as it aligns itself with the above noted decision of the Court of Appeal. That decision is clear that book entries, in certain circumstances, can constitute payment for tax purposes according to section 2 of the *Income Tax Act*.

40. The appellant raised the issue of VAT where it was stated that the Tribunal erred in disallowing input VAT on account of the fact that the appellant provided services for transportation of passengers.

41. Section 17(1) of the *Value Added Tax Act* (the Act) provides that input tax on a taxable supply to or importation made by a registered person could be deducted by the registered person from the tax payable on supplies but only to the extent that the supply or importation was acquired to make taxable supplies. For an input tax to be deducted, there need be proof of supply via the invoices required under the Act.

42. In this case, the Tribunal held that the appellant had failed to provide the required documentation in support of its case. The burden of proof lay with the appellant to demonstrate the existence of a taxable supply to substantiate and prove its claim for input tax deduction. In his objection decision, the respondent highlighted the lack of adequate documentation to support the claim.

43. In view of the foregoing, I do not find any error in the Tribunal’s decision as the appellant did not fulfill its obligation to provide the required proof.

44. Accordingly, I find that the appeal before court is not meritorious. The same is dismissed with costs and the decision of the Tribunal dated 25/9/2020 is hereby upheld.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.



A. MABEYA, FCI ARB

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

