



Commissioner of Domestic Taxes v Excel Chemicals Limited (Income Tax Appeal E058 of 2023) [2024] KEHC 2440 (KLR) (Commercial and Tax) (8 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E058 OF 2023**

FG MUGAMBI, J

MARCH 8, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

EXCEL CHEMICALS LIMITED RESPONDENT

JUDGMENT

1. The respondent is a food and beverage manufacturer incorporated under the *Companies Act* No.17 of 2015. The appellant reviewed the respondent's returns for excise duty for December 2021 to February 2022 and concluded that the respondent had underpaid excise duty for the said period, basing its calculations on Legal Notice No. 217 of 2021 (LN 217/2021). Through a letter dated 21st March 2022 the appellant demanded the variance in the sum of Kshs.4,855,997.94.
2. The respondent responded to the said demand in a letter dated 29th March 2022, protesting the application of LN 217/2021. The respondent argued that their excise duty returns had been filed using the applicable rates contained in Legal Notice No. 194 of 2020 (LN 194/2020) since there were status quo orders on enforcement of LN 217/2021. The appellant disagreed with the respondent on the applicability of LN 194/2020 and issued its objection decision vide a letter dated 28th April 2022, confirming its additional assessment of Kshs.4,855,997.94.
3. Dissatisfied with this finding the respondent lodged an appeal at the Tax Appeals Tribunal (the Tribunal) vide a Notice of Appeal dated 23rd May 2022. In a judgment delivered on 17th March 2023 the Tribunal allowed the appeal and set aside the objection decision dated 28th April 2022 confirming the additional assessment of excise duty amounting to Kshs.4,855,997.94.
4. The Tribunal held that the High Court had suspended the implementation of LN 217/2021 which introduced excise duty that is the subject matter of the objection decision. It was the Tribunal's finding



that the appellant's attempt to implement excise duty that had been stayed by a Court order was an illegality. The Tribunal confirmed that the applicable rate of excise tax pending the determination of the suit before the High Court was as contained under LN 194/2020.

5. Being dissatisfied with the Tribunal's finding, the appellant lodged the instant appeal vide a Memorandum of Appeal dated 11th May 2023 raising the following grounds of appeal:
 - i. That the Honourable Tribunal erred in law and fact by holding that the date of gazettment of LN 217/2021 is not the effective date, contrary to Section 23(1) of the *Statutory Instruments Act* that provides that a statutory instrument shall come into operation on the date specified in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable;
 - ii. That the Honourable Tribunal erred in law and fact by misapprehending the legislative process as outlined in the *Statutory Instruments Act* and holding that it was not possible for LN 217/ 2021 to come into effect on 2nd November 2021 when it was forwarded to the National Assembly on the 8th November 2021 and was acceded/approved by the same National Assembly on the 24th November, 2021;
 - iii. That the Honourable Tribunal erred in law and fact by misapprehending Section 23(1) of the *Statutory Instruments Act* that specifically anticipates that a statutory instrument can come into operation on the date of its publication in the Gazette subject to annulment where applicable;
 - iv. That the Honourable Tribunal erred in fact by failing to appreciate that by the time the High Court was issuing its status quo orders on 19th November 2021 in High Court Petition No. 024 of 2021 as consolidated with Petition E403 of 2021, LN 217/2021 had already become operational by virtue of its gazettment on 2nd November 2021, meaning that status quo meant that LN 217/2021 was the prevailing law;
 - v. That the Honourable Tribunal erred in both law and fact by arriving at the conclusion that the High Court had suspended the implementation of LN No. 217/2021 that introduced the excise duty that was the subject matter of the objection decision;
 - vi. That the Honourable Tribunal further erred in fact by selectively picking paragraphs of the advocate of the appellant herein in an application dated 10th January 2022 to the High Court seeking clarity on status quo orders issued by the High Court on 19th November 2021 and making the finding that the appellant herein was aware that it was in breach of the High Court orders by insisting on the implementation of LN 217/2021;
 - vii. That the Honourable Tribunal erred in both law and fact by holding that the assessment and the objection decision dated 28th April 2022 were illegal and unjustified as they were grounded on LN 217/2021; and



- viii. That the Honourable Tribunal misapplied the law and facts and therefore arrived at the wrong decision.
6. The appeal was canvassed by way of written submissions. Parties addressed the Court on the submissions on 8th November, 2023. I shall however not regurgitate the contents of the said submissions which I have carefully considered and will refer to them in my analysis.

Analysis

7. It is my view that this appeal presents two main issues for determination:
- i. Whether the Tribunal erred in law and fact in holding that the appellant's excise duty assessment of Kshs. 4,855,997.94 based on LN 217 of 2021 was unlawful;
 - ii. Whether the Tribunal erred in law and fact in quashing and setting aside the impugned tax decision dated 28th April 2022;
8. I note the decision of the Tribunal at paragraph 45 - 46 where the Tribunal found as follows:
- “The date of the gazettelement is not the effective date. It is clear to us that LN 217/2021 could not have been operational as at 2nd November 2021 ... it is thus not possible that LN 217/2021 could have become operational before it could be approved by the National Assembly.”
9. On this question it behoves this Court to adopt a position divergent from that articulated by the Tribunal. It is the commencement of this Court's analysis that a Legal Notice constitutes a species of a statutory instrument. This is because statutory instruments are a means of delegated legislation, which allow government ministers or other authorities to make detailed orders, rules, or regulations under powers given to them by an Act of Parliament. Legal Notices are typically used to publish these regulations, making them an essential part of implementing and enforcing legislative provisions without the need for passing a new Act of Parliament.
10. In corroboration of this assertion, section 2 of the [Statutory Instruments Act](#) defines a statutory instrument as:
- “Any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.”
11. I would concur with the position espoused by the appellant that LN 217/2021 constitutes a statutory instrument issued by the respondent in exercise of delegated powers under section 10 of the [Excise Duty Act](#). Of particular note is section 23(1) of the [Statutory Instruments Act](#) which provides for the commencement of statutory instruments. It provides that:
- “A statutory instrument shall come into operation on the date specified in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable.” (emphasis mine)



12. To dispel any ambiguity regarding the potential for a statutory instrument to be published in the gazette prior to its presentation before Parliament, section 11(1) of the [Statutory Instruments Act](#) mandates that:

“Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.”
13. This provision aligns with the enabling legislation, namely the [Excise Duty Act](#), which, under section 10(2) obligates that the statutory instrument be tabled within 7 days from the date of publication in the Kenya Gazette for consideration by Parliament within 28 days under section 10(3). Section 23(1) of the [Statutory Instruments Act](#) implies that Parliament may retrospectively annul a statutory instrument even if it has already come into effect.
14. It is therefore quite clear that a Legal Notice is indeed capable of entering into force upon publication in the gazette even prior to being tabled and approved by the National Assembly, like in the present case. The rationale for this is to take care of instances where a statutory instrument may need to come into effect immediately or before it is laid before Parliament, typically due to urgency or necessity. In such cases, the responsible Minister must provide a justification for the urgency, and the statutory instrument may come into effect before parliamentary scrutiny.
15. The long and short of this is that while the general principle is that statutory instruments should be scrutinized by Parliament before coming into effect, exceptions exist for urgent cases but even in these cases, the requirement for parliamentary scrutiny cannot be bypassed; it is merely deferred, ensuring that there remains a level of parliamentary oversight over delegated legislation. This is pursuant to section 11(2) and 11(4) of the [Statutory Instruments Act](#).
16. For the reasons set forth herein, this Court concurs with the appellant’s assertion that LN. 217/2021 was duly published in the Kenya Gazette on 2nd November 2021, thereafter presented to Parliament on the 8th day of November 2021, and subsequently received parliamentary approval on the 24th day of November, 2021. Consequently, the operative date of LN. 217/2021 is hereby affirmed to be 2nd November 2021, in contradiction to the Tribunal’s determination of 24th November 2021.
17. Be that as it may, the Tribunal further noted that various suits were filed by various stakeholders in this Court, seeking to stop the implementation of the excise rates under LN 217/2021, pending the hearing and determination of the petitions being Petition No. 024 of 2021 as consolidated with Petitions E491 of 2021 and E403 of 2021; Pubs, Entertainment & Restaurants Association of Kenya & 2 Others vs National Assembly & 4 Others (the petitions).
18. The appellant on the one hand insists that the High Court issued orders of maintenance of status quo in the petitions on 19th November 2021, which is after LN 217/2021 came into effect. According to the appellant this means that the status quo prevailing and maintained by the Orders of 19th November 2021 was that of the rates in Legal Notice No. 217 of 2021.
19. The respondent tells a different story, which is that the High Court in the said petitions issued status quo orders staying the implementation of LN. 217/2021 on 19th November 2021 and 15th December 2021, which orders are in place to date.
20. I am well aware that the said petitions are still before this Court and yet to be determined, in the absence of any evidence to the contrary. This Court does not sit on appeal in its own concurrent jurisdiction



decisions. The constitutionality and application of LN 217/2021 must be determined by the Division of this Court that is seized of the petitions.

21. As such, having looked at the applications filed in the matter, the prayers sought and the orders for directions given in totality, I am convinced that the objective of the said directions of 19th November 2021 and 15th December 2021 in the said petitions, was to suspend the implementation and coming into effect of LN. 217/2021 until the petitions have been heard and determined. This is in tandem with the Tribunal's finding at paragraphs 54 and 55.
22. I therefore find that the applicable Legal Notice during the period under review was the previous law which effectively had not been revoked and was LN. 194/2020. In light of all that I have stated, it is my view that the appellant's additional assessment of Kshs.4,855,997.94 with respect to excise duty payable by the respondent was invalid and unjustifiable. I find no error on the Tribunal's decision setting aside the impugned tax decision dated 28th April 2022.

Determination

23. In the end, the Court finds that the instant appeal is bereft of merit. Consequently, it is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 8TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

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