Wananchi Group (K) Limited v Commissioner of Customs & Border Control (Customs Tax Appeal E060 of 2023) [2024] KEHC 2037 (KLR) (Commercial and Tax) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2037 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E060 OF 2023

FG MUGAMBI, J

MARCH 1, 2024

BETWEEN

WANANCHI GROUP (K) LIMITED ..... APPELLANT

AND

THE COMMISSIONER OF CUSTOMS & BORDER CONTROL . RESPONDENT

JUDGMENT

1. The appellant, a limited liability company incorporated in Kenya, engages primarily in providing cable television, internet services, and triple play services. This includes supplying customers with set-top boxes (STBs) and modems. Prior to 2018, the appellant had imported new STBs and technicolor modems, declaring their customs value at USD 28 per STB kit and USD 40.5 per modem kit. However, between 2018 and 2019, in an effort to reduce costs associated with high customer acquisition, the company shifted to importing factory refurbished STBs and modems. This move enabled the appellant to subsidize the cost of the equipment to their customers. The purchase price for these refurbished items was set at USD 17 per STB kit and USD 17 per technicolor modem.

2. Following this decision, the respondent carried out a post clearance audit under sections 235 & 236 of the East African Community Customs Management Act (EACCMA) covering the years 2017 to 2019. This audit resulted in a demand notice issued on 29th November 2019, seeking additional taxes of Kshs. 60,945,649 due to alleged under declaration of imported goods' value.

3. In response, the appellant submitted a review request on 16th December 2019. The respondent sought further clarification, and requested additional information on 17th January 2020, which the appellant provided on 14th February 2020. Consequently, on 15th October 2020, the respondent revised the additional tax demand down to Kshs. 43,145,600/=, but stated that the information provided was insufficient to explain the significant price discrepancy of the imported items over the audit period.

4. The parties attempted to settle the dispute through Alternative Dispute Resolution (ADR), but were unable to reach a consensus. Consequently, the respondent upheld its assessment of 15th October 2020, including interest, through a correspondence dated 22nd January 2021. Dissatisfied with this outcome, the appellant lodged an appeal with the Tax Appeals Tribunal (the Tribunal), through a Notice of Appeal on 14th February 2022.

5. However, the Tribunal, in its judgment dated 17th March 2023, dismissed the appeal. The Tribunal concluded that the appellant, despite asserting that the imported items were refurbished, failed to provide evidence supporting this claim. Therefore, the appellant did not meet the burden of proof required to demonstrate that the items imported were indeed refurbished. This led to the Tribunal affirming the respondent's decision to adjust the declared values of the imported modems and STBs, finding no error in their assessment.

6. Being dissatisfied with the Tribunal's finding, the appellant lodged the instant appeal vide a Memorandum of Appeal dated 12th May 2023 raising the following grounds of appeal:

    i. The Tribunal erred in law and in fact in upholding the price uplift on the imported STBs and modems by the respondent, in contravention with Section 122 of the East Africa Community Customs Management Act (EACCMA) as read together with the Fourth Schedule;

    ii. The Tribunal erred in law and in fact in failing to uphold the "strict interpretation rule" in tax statutes that applies to the above provision and using the uplifted price of imported STBs and modems instead of their transaction value;

    iii. The Tribunal erred in fact in holding that there was no sufficient proof that the imported items were refurbished, even after the appellant submitted documentation that indicated a considerably lower price paid for the items;

    iv. The Tribunal erred in fact in failing to hold that, the fact that the imported items were refurbished warranted the huge price variance between the imported items and previous identical importations; and

    v. The Tribunal erred in law and in fact in requiring the appellant to produce written renegotiated contracts between the appellant and their suppliers in order to prove that the imported STBs and modems were refurbished.

7. The appellant seeks to have the decision of the Tribunal dated 17th March 2023 overturned, and for this Court to allow the appeal herein with costs and have the respondent directed to vacate its tax demand for Kshs. 46,428,080/=. The appeal was canvassed by way of written submissions. I shall however not regurgitate the contents of the said submissions but I have considered them and will refer to them in my determination.

Analysis

8. I have carefully considered all the pleadings, submissions and authorities cited by the adversaries. I am of the view that the grounds in the Memorandum of Appeal can be condensed into the following two pivotal issues that arise for determination:

    i. Whether the appellant discharged its burden of proving that the imported goods were refurbished; and

ii. Whether the respondent erred in law and in fact by uplifting the prices of imported modems and STBs contrary to the provisions of Section 122 as read together with the Fourth Schedule to the EACCMA.

9. In considering this appeal, the court acknowledges the constraints imposed by section 56(2) of the *Tax Procedures Act* (TPA) which confines appeals to the High Court from decisions of the Tribunal strictly to questions of law. This effectively means the Tribunal's findings of fact remain beyond the court's purview, unless it can be demonstrably shown that such findings are not backed by any evidence.

10. The demarcation of what precisely constitutes a matter of law was elucidated in the widely referenced Court of Appeal case of John Munuve Mati v Returning Officer Mwingi North Constituency & 2 Others, [2018] eKLR. With this understanding I shall now proceed to determine the identified issues.

Whether the appellant discharged its burden of proving that the imported goods were refurbished

11. As correctly submitted by Counsel for the respondent, in proceedings such as the one before me, the taxpayer has the onus of proving that a tax decision is wrong pursuant to the provisions of section 30 of the *Tax Appeals Tribunal Act* (TATA) which provides that:

> " In a proceeding before the Tribunal, the appellant has the burden of proving:
>
> a. where an appeal relates to an assessment, that the assessment is excessive; or
>
> b. in any other case, that the tax decision should not have been made or should have been made differently."

12. Section 56 (1) of the TPA is also relevant. It states as follows:

> " In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect."

13. These provisions are in tandem with sections 107, 108, & 109 of the *Evidence Act* underscoring the established principle that he who makes allegations must prove them, albeit with a dynamic shift in tax-related disputes. In tax matters it is now settled that the burden of proof swings between the tax payer and the tax man, but is mostly on the tax payer.

14. This is due to the self-assessment tax regime applied in Kenya. The law recognizes that the evidence required in support of transactions for tax purposes is ordinarily in the possession of the taxpayer and that the Commissioner cannot sustain the burden. (For decisions confirming this view see for instance: Commissioner of Taxes v Galaxy Tools Ltd, [2021] eKLR; Commissioner of Domestic Taxes v Trical and Hard Limited, (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR) amongst others).

15. Back to the matter at hand. The appellant reiterates that the relevant invoices and purchase orders demonstrating the price difference between the previous and the refurbished items were provided to the respondents. The appellant also confirms having provided written confirmation from its suppliers, Optiwella and Shenzen that it was importing refurbished goods and not new goods. As far as the appellant is concerned, they complied with all the requirements set by the respondent to prove that the items were refurbished. This is vehemently denied by the respondent.

16. I have carefully perused the record of appeal and it is observed that the appellant submitted invoices purporting to reflect the purchase prices for the modems. However, these documents conspicuously lack any indication that the modems were refurbished. The HS Codes and description of the goods

provided on the invoices do not facilitate discernment of the goods' condition. Consequently, solely based on these invoices, it is not feasible to ascertain the rationale behind the pricing disparity.

17. Regarding the supplier statements provided by the appellant, the record indicates that the respondent contests having received these documents. However, these statements are indeed part of the Record of Appeal, and I have reviewed them. Specifically, the statement from Shenzen was attached to the appellant's letter dated 16th December 2019, addressed to the respondent.

18. The respondent confirmed receiving this letter through their correspondence dated 17th January 2020. Similarly, the statement from Optiwella was included with the appellant's letter dated 14th February 2020, receipt of which the respondent acknowledged in their letter dated 13th March 2020.

19. Upon reviewing the statements, it is my view that the documentation presents varying degrees of specificity and reliability. The statement from Optiwella, explicitly addressed to the respondent and dated 10th July 2018, bears the signature of its Managing Director. This document asserts that the modems sold to the appellant were indeed refurbished, also specifying the unit price. However, it lacks detailed information regarding the sale dates or the invoice numbers correlating to these transactions.

20. Conversely, the statement from Shenzen lacks a date and recipient address, raising questions about its authenticity, which issue was raised by the respondents who confirmed that they could not rely on the document. The absence of a clear signatory and their role within Shenzen further compounds these concerns. While this statement details specific invoice sales and associated pricing, it fails to directly affirm that the supplied goods were refurbished. Both letters in my view left a significant gap in the evidentiary trail intended to substantiate the appellant's claims.

21. The appellant contests the requirement to present written renegotiated contracts with its suppliers as proof that the imported STBs and modems were refurbished. The appellant cited the Court of Appeal case of National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Limited, [2002] 2 E.A. 503 to support its averment. The appellant argues that this requirement effectively seeks to alter the contractual dynamics between it and its suppliers by imposing a specific mode of contractual documentation tailored to the respondent's preferences. Such a move they say seeks to rewrite the contractual obligations of the parties and undermines the principle of contractual freedom.

22. The appellant maintains that the arrangement to receive and import refurbished goods at a lower cost was an oral mutual agreement with its suppliers, and one that was never formalized in writing.

23. The record however presents a different narrative and confirms that the practice of a structured business relationship and use of written contracts was familiar in the appellant's dealings with the suppliers. I say so on the strength of the letter of 16th December 2019 which alludes to contracts that, although not submitted to the court, were evidently shared with the respondent. The said letter provides in part:

> "...We also attach the signed Shenzen contract that confirms that the price agreed per unit was USD 17 per unit as appendix V to this letter...We also attach the Optiwella contract that confirms that the value is not USD 40.5 as alleged by KRA as appendix X1."

24. It is evident that upon receipt of the contracts aforementioned, the respondent raised the issue that the contracts had no specific mention of the fact that goods were refurbished, a fact that is not denied by the appellant. As such the contracts as they were did not meet the requisite standards for substantiating the claims made by the appellant.

25. Given this established precedent of formalizing trade terms via written contracts, it was extremely reasonable to expect the appellant to furnish a written agreement that explicitly indicates any modifications to the quality and pricing of goods, specifically to confirm their status as refurbished. This expectation aligns with the Tribunal's observation, as noted in paragraph 124, that the appellant had done business with the suppliers over a long time. This business was based on contracts between the parties.

26. Moreover, it is my finding that the respondent's request, as outlined in their correspondence dated 17th January 2020, for a demonstration highlighting the distinctions in form and appearance between the new and refurbished set-top boxes, was a logical and reasonable demand, given the significant pricing disparity. According to the Oxford Learners Dictionary, a "demonstration" is defined as the act of showing or explaining the workings or functionality of something.

27. Considering this, it stands to reason that showcasing the physical differences between new and refurbished items would have provided clear, tangible evidence to justify the reduced pricing for refurbished goods. Given the presumption that the appellant had access to both new and refurbished versions of the goods, conducting such a demonstration through a physical session rather than a written explanation was both a practical and effective approach to meet the respondent's request for clarification.

28. The absence of a rationale for not conducting this demonstration, particularly at the meeting on 27th November 2020, opting to give a written explanation leaves unanswered questions regarding the appellant's commitment to substantiating their claims with concrete evidence.

29. I would reiterate in agreement with the decision in National Social Security Fund Board of Trustees v Commissioner of Domestic Taxes, Kenya Revenue Authority, [2016]eKLR that:

> " There is a world of difference between assertion and proof. That which a party puts to be his case is an assertion. The party needs to adduce evidence to support his said assertion with a view to supporting his case."

30. All in all, given the lack of a physical demonstration to illustrate the distinctions between new and refurbished goods, the absence of invoices explicitly labeling the items as refurbished, and the unavailability of a contract specifying the goods' refurbished status, alongside uncorroborated statements, it is my view that the appellant failed to furnish adequate evidence to justify the significant reduction in price. This Court finds that the appellant failed to prove that the demand issued by the respondent was incorrect or excessive as required under section 30 of the TAT and section 56(1) of the TPA.

> Whether the respondent erred in law and in fact by uplifting the prices of imported modems and STBs contrary to the provisions of Section 122 as read together with the Fourth Schedule to the EACCMA.

31. The appellant argued that the invoices and purchase orders furnished were adequate to show that the respondent's increase in the customs value of the imported goods was unjustified and excessive, contrary to the stipulations of the EACCMA. It was the appellant's submission that the respondent ought to have relied on the invoices and purchase orders provided to ascertain the price that was actually paid for the items, and hence their transaction value, was USD 17 per STB kit and USD 17 per technicolor modem.

32. Conversely, the respondent cited Section 122(4) of the EACCMA, emphasizing that when the nature or character of the imported goods is under scrutiny, as is the case here, a thorough investigation is warranted. This should be facilitated by the presentation of pertinent evidence before resorting to any of the valuation methods outlined in the 4th schedule of the EACCMA.

33. The 4th schedule of EACCMA, 2004 provides six methods of valuation in determining customs values of imported goods. These methods are applied in a hierarchical order, where the first method must be attempted before moving on to the next, if applicable. The six methods are as hereunder:

    i. The Transaction Value method.

    ii. The Transaction Value of Identical goods method.

    iii. The Transaction Value of Similar goods method.

    iv. The Deductive Value method.

    v. The Computed Value method.

    vi. The Fall-back Value method.

34. The respondent justified its decision to apply the second transaction value of identical goods method, contending that the appellant failed to furnish convincing evidence to substantiate its assertion that the imported items were refurbished. This Court has deliberated on this matter and determined that the appellant indeed did not successfully demonstrate the refurbished status of the goods.

35. Consequently, the primary valuation method, based on the transaction value of the goods, would not have provided an accurate foundation for determining the tax obligation. Failing, this, I agree with the respondents that the proper method to be applied in determining customs values of imported goods in this case was the transaction value of identical goods method as provided for under paragraph 3(1)(a) of the Fourth Schedule of EACCMA, 2004 which states as hereunder:

> " Where the customs value of the imported goods cannot be determined under the provisions of paragraph 2, the customs value shall be the transaction value of identical goods sold for export to the Partner State and exported at or about the same time as the goods being valued."

36. Although the appellant has cited precedents such as Commissioner of Customs, Calcutta v South India Television (P) Limited, Case Number Appeal (Civil) 1137 of 2002, and Commissioner v V.K Metcast Pvt. Ltd, (CESTAT Delhi) Customs Appeal No. 51287 of 2023-SM to bolster its arguments, it is essential to recognize the distinct circumstances surrounding the current matter.

37. While the principles derived from these cases offer valuable insights into customs valuation and the evidentiary standards required for tax disputes, the specifics of the case at hand necessitates a nuanced approach. The differences in the factual backdrop, the nature of the goods involved, and the evidence provided (or lack thereof) regarding their refurbished status distinguish this situation from those cited cases. Consequently, this Court finds that while the legal precedents are instructive, the unique facts of this case warrant a tailored analysis, leading to a conclusion that may diverge from the outcomes in the referenced appeals.

38. In the end, I concur fully with the Tribunal's assertion, as noted in paragraph 141, that the responsibility to demonstrate the refurbished condition of the imported items squarely rested on the

appellant. The appellant's failure to satisfactorily establish that the goods were refurbished necessitated the respondent's recourse to the second method of valuation for determining the goods' value.

39. Given this context, there is no alternative but to uphold the Tribunal's conclusion. The Tribunal determined that the appellant did not meet the evidentiary burden required to show that the imported items were refurbished. Therefore, the respondent's decision to adjust the valuation of the imported modems and STBs was neither erroneous in law nor in fact and I endorse this conclusion. Top of Form

Determination

40. For the reasons stated herein it is my finding that this appeal is without merit and the same is dismissed. Consequently, the decision of the Tax Appeals Tribunal dated 17th March 2023 confirming the respondent's objection decision of 14th January, 2022 is hereby upheld. Each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 1ST DAY OF MARCH 2024.

F. MUGAMBI

JUDGE