



Commissioner of Investigations and Enforcement v Libya Oil Kenya Ltd (Income Tax Appeal E104 of 2021) [2024] KEHC 3624 (KLR) (Commercial and Tax) (15 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E104 OF 2021
JWW MONG'ARE, J
APRIL 15, 2024**

**BETWEEN
COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT
AND
LIBYA OIL KENYA LTD RESPONDENT**

JUDGMENT

1. The Appellant herein conducted a transfer pricing review on the Respondent for the years 2012 to 2014 and issued preliminary audit findings on 5th December 2016. Subsequently, the Respondent received a Notice of Assessment of Tax for the years 2010 to 2016, amounting to Kshs 10,074,047,904/=, pursuant to Section 31 of the *Tax Procedures Act*. A partial settlement was reached by both parties on some tax issues, leading to an agreement on 30th November 2020, to submit the principal tax assessment of Kshs 943,142,856/= on product gains to the Tribunal for determination. The Tribunal rendered its judgment in favor of the Respondent.
2. The Appellant aggrieved by the said judgment, filed a Memorandum of Appeal dated 25th June 2021 and appealed against part of the judgment on the following grounds:-
 - a. The Tribunal erred in law and fact in not appreciating the difference between customs entry and customs clearance.
 - b. The Tribunal erred in law and fact in not appreciating that the product gains are entered under a new manifest called a zero manifest and a new entry made which is different from the original entry and hence it is subject to import duties.



- c. The Tribunal erred in law and fact in not appreciate that the duty was paid based on the declared volumes and the same released and the new entry was subject to duty.
 - d. The Tribunal erred in law and fact in not appreciate the entry under section 34 is a self-entry which is verifiable only at the point of customs clearance and the volumes declared had been released to the Respondent hence any extra volumes were undeclared and subject to duty.
 - e. The Tribunal erred in law and fact in not finding that duty is payable when the goods exit customs area and the volumes is what determines duty to be paid.
 - f. The Tribunal erred in law and fact in not finding that at all times the goods were under customs control and it is only when they are released and verified is when the correct volumes for customs purpose is ascertained.
3. The Appellant prayed that the Appeal filed herein be allowed and that the judgment of the Tax Appeals Tribunal be set aside.
4. The Respondent filed the Statement of facts dated 26th August 2021 and arguing that the Tribunal correctly concluded that the tax point of duties and levies payable on importation of petroleum products, which is upon importation of the petroleum products into the country and, as such, no additional duties and levies are due on product gains or any other duty paid petroleum products which arise after importation.
5. Further, the Respondent asserted that there is no provision in statute that requires product gains to be declared for customs a second time under a new manifest, called a zero manifest. Nor indeed is there any provision in statute requiring that such a new customs entry under the zero manifest must be subject to additional import duties and other levies.
6. The parties canvassed the Appeal by way of written submissions which the court has considered.
7. The two main issues for determination are:-
 - a. Whether the Tribunal erred in its Judgment by failing to appreciate that product gains are not part and parcel of the petroleum products which are already duty paid?
 - b. Whether the Tribunal erred in finding that there is no justification for levying additional taxes on petroleum products and that the same should be taxes under Income Taxation regime?
8. It is not disputed that the tax point with regard to petroleum products for the payment of the various duties and levies is when the goods are imported and entered for home use measured at 20 degrees Celsius a process that normally takes place prior to the release of the product to the Oil Marketing Companies (OMC) by KRA and after payment of applicable duties and taxes.
9. In its submissions, the Appellant contended that in the case of petroleum eco system duty paid product experiences some certain gains and losses due to molecular expansion and contraction due to temperature or seasonal measurements which have an impact on the observable volume of the product. Thus, the gains the Appellant seeks to tax have not previously been taxed and the same ought to be taxed accordingly.



10. The Respondent did acknowledge that it is common for OMCs to incur operational gains and losses during storage and batch movement of petroleum products through the KPC pipelines. However, the Respondent contended that the product gains are part and parcel of the petroleum products which are already duty paid.
11. In the proceedings before the Tribunal, the Respondent further stated that the Appellant herein selectively levied additional duties on the product gains without granting the Respondent and other OMCs a credit for the corresponding product losses arising from the process.
12. As stated by the Appellant, under Section 138 of the EACCOMA; the Respondent has a right to claim a refund for approved losses.

“Drawback of import duty may on exportation or the performance of such conditions as may be prescribed, be allowed in respect of such goods, such amount, and on such conditions, as may be prescribed.

.....

- (3) Drawback shall not be allowed in respect of any goods where—
 - (a) the value of such goods for home consumption is less than the amount of the duty drawback which may be otherwise allowed; and
 - (b) the import duty on the goods was less than one hundred dollars.
- (4) Where the proper officer is satisfied that any goods under drawback, after being duly put on board any aircraft or vessel for exportation or for use as stores —
 - (a) have been destroyed by accident on board such aircraft or vessel; or
 - (b) have been materially damaged on board such aircraft or vessel and that such goods have, with the permission of the proper officer, been discharged at any port or place within a Partner State and abandoned to the Customs, then drawback may be allowed in respect of such goods as if such goods had actually been exported or used as stores.”

13. It is the court’s view that indeed both parties acknowledge that there are product gains and losses resulting from the petroleum products after the duties and taxes have been paid when the goods are imported for home use.
14. However, the court finds that there is no law that upon which the product gains are anchored. In a nutshell, the import duty and levies on product gains is not anchored in law and this goes against the rules of statutory interpretation when interpreting a taxing statute. In the case of *T. M. Bell v The Commissioner of Income Tax* 1960 (EALR) 224, it was held at page 240 of the decision that:-

“...in a taxing Act one has to look merely at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”
15. Should the product gains be treated as a taxable gain? A taxable gain is a profit that results from sale of any asset that is subject to taxation. The Appellant in its submissions stated that product gain cannot be described as a gain or benefit or a profit in terms of Section 3 of the Income Tax Act. However, the Appellant did not proceed to state under what provision of the law the product gain lies. Taxes should



only be levied based on clear and specific provisions of the law. The court disagrees with the Tribunal and reiterates the above decision and holds that the law should be clear on what a product gain is.

16. This Court associates itself with the case of *Commissioner of Income Tax v Vestmont Power (K) Ltd* [2006] eKLR, where the court held thus: -

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity. Following the *Inland Revenue v Scottish Central Electricity Company* case, any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”

17. Further, in *Vestey v Inland Revenue Commissioners* [1979] 3 ALL ER at 984:-

“Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.”

18. In light of the above, and having carefully considered the submissions and pleadings by both parties, I find that the Appellant has not established under what section of the law that this type of tax is anchored. It is trite that Tax Statutes are to be strictly interpreted and there is no room for imputing that which has not been legislated into statute by Parliament. In the case before me, I am not persuaded that the Appeal before me has merit. Subsequently the Appeal is dismissed and the Judgment of the Tax Appeals Tribunal is upheld. Each party is directed to bear its own costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF APRIL, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Saadia holding brief for Ms. Chelangat for the Appellant.
2. Mr. Kanja for the Respondent.
3. Amos- Court Assistant

