Cool Collections Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E133 of 2021) [2024] KEHC 5472 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5472 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E133 OF 2021

FG MUGAMBI, J

MAY 13, 2024

BETWEEN

COOL COLLECTIONS LIMITED .... APPELLANT

AND

THE COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT .... RESPONDENT

JUDGMENT

1. The respondent investigated the appellants tax affairs in 2018 leading to issuance of an assessment dated 9th May 2018 for Kshs. 95,307,848/= comprised of corporation tax and VAT. The premise of the tax assessment was that the appellant had participated in a missing trader scheme.

2. The appellant filed a Notice of Objection dated 7th June 2018 to which the respondent issued objection decisions dated 3rd August, 2018, and 6th August, 2018. Aggrieved by the decisions, the appellant lodged an appeal before the Tax Appeals Tribunal (the Tribunal) dated 24th August 2018. The Tribunal dismissed the appeal and confirmed the VAT assessments dated 4th and 9th May 2018 for Kshs.95,307,848/=.

3. Still aggrieved, the appellant filed the present appeal vide a Memorandum of Appeal dated 19th July 2021, which was subsequently amended. The respondent opposed the appeal through a Statement of Facts dated 8th December 2023. The appeal was canvassed by way of written submissions dated 12th February 2024 by the appellant as well as submissions and supplementary submissions dated 9th February and 16th February 2024 filed by the respondent.

4. Two issues arise for determination in this appeal:

    i. Whether the assessment and the objection decisions were valid.

ii. Whether the Tribunal erred by holding that the appellant had failed to discharge its burden of proof.

Analysis

Whether the Assessment and the Objection Decisions were Valid.

5. The appellant took issue with the Tribunal for finding that the objection decisions issued by the respondent were valid despite the respondent's failure to provide sufficient reasons and disclosing the substantive provisions relied upon. This, the appellant submits was contrary to Section 49 of the *Tax Procedures Act* (TPA) 2015.

6. The appellant further submits that the Tribunal erred in its interpretation of section 51(10) of the *TPA* in which the Tribunal found that there is no obligation placed on the respondent to respond to each of the grounds raised by the appellant, so long as the respondent had provided a statement of the facts and the reason for the decision.

7. The respondent vehemently opposes this ground of appeal and states that the objection decisions did in fact provide the statement of findings on the material facts and the reason for the decisions as required by law. The respondent reiterated that no further obligation is placed on it beyond this, to respond to the grounds raised by the appellant under section 51(10).

8. For the avoidance of doubt section 51(10) of the *TPA* provides that:

> " An objection decision shall include a statement of findings on the material facts and the reasons for the decision."

9. The threshold for an objection decision has been extensively discussed in judicial circles. For instance, in Supreme Court of Appeal in *Minister of Environmental Affairs & Tourism & Others V Phambili Fisheries (Pty) Ltd & Another*, [2003] 2 All SA 616 (SCA) the Court stated that in order to ensure that adequate reasons are given for the purpose of a tax assessment, the Commissioner ought to:

> " Set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."

10. Likewise, the South African decision of *CSARS v Sprigg Investment 117 CC t/a Global Investment*, [2010] JOL 26547 (SCA) quoted with approval from the dictum of the Supreme Court of Appeal in *Minister of Environmental Affairs & Tourism & Others V Phambili Fisheries (Pty) Ltd & Another*, [*supra*] regarding what constitutes adequate reasons for purposes of a tax assessment or decision.

11. The court found as follows:

> " [T]he decisionmaker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."

12. The Court went on to state that the decision by the [Commissioner] ought to communicate several things which it set out as follows:

> " ...Set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."

13. I invoke these decisions because they are consistent with the criteria specified in sections 51(9) and (10) of the *TPA*. As with any administrative procedure, the respondent must furnish comprehensive written explanations for its decisions. The precedents I've cited shed light on the expected standard for an objection decision. Although the provisions in these jurisdictions closely mirror those of the *TPA*, none explicitly requires that every argument put forth by a taxpayer should be responded to in the objection decision.

14. Against this background, I have reviewed the record presented before this Court. It is observed that in the objection decisions dated 3rd and 6th August 2018, the respondent acknowledged that the conclusions reached were the result of a careful consideration of the objections raised by the appellant. The respondent has affirmed that these decisions were informed by the provisions of Section 51 of the *TPA*, 2015.

15. Ultimately, the respondent justified its decision on the grounds that it had determined the absence of any supply of taxable goods by the suppliers as claimed by the appellant. The respondent communicated the decision that due to lack of evidence, the Corporation tax and VAT Assessments had been confirmed.

16. On this issue I come to the conclusion that the objection decision contained sufficient reasons for the decision by the respondent. Accordingly, I find that the Tribunal did not err in its finding that the decision was valid.

Whether the Tribunal erred by holding that the appellant had failed to discharge its burden of proof.

17. the appellant contended that given the fraudulent nature of missing trader cases, the the obligation hence the burden to substantiate the denial of input VAT claims fell upon the respondent. The appellant claims that the respondent had to prove that the appellant was not only in such fraudulent missing trader scheme but that it was personally implicated. Furthermore, the appellant argued that as a purchaser, it was not incumbent upon them to verify that its suppliers had remitted input VAT.

18. The appellant took issue with the Tribunal for failing to recognize that the appellant had availed the copies of invoices, corresponding ETR, proof of payments, delivery notes and store records for all its purchases from its suppliers.

19. On its part the respondent argued that it ascertained that the expenses detailed in the tax invoices were not actually incurred, suggesting that these claims were part of a strategy by the appellant to decrease its tax liability.

20. The respondent further submitted that in order for the appellant to claim input VAT, it was not enough to produce the documents listed under section 17 of the *VAT Act* and Regulation 7. These

documents must be supported by an underlying transaction. The respondent notes that even though the appellant alleged to have provided documents as requested to the respondent, the said documents were not presented to the Tribunal to enable the Tribunal determine whether the appellant had indeed discharged its burden of proof.

21. This Court has been very consistent in its decisions that the burden of proof in tax matters is a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer.

22. This was the basis of the reasoning in *Commissioner of Domestic Taxes v Trical and Hard Limited*, (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR) as well as *Rahisi Cash and Carry Traders Ltd v Commissioner of Investigations and Enforcement*, (Income Tax Appeal E053 of 2021) [2023] KEHC 24261 (KLR) (Commercial and Tax) (27 October 2023) (Judgment) amongst other decisions of the Court.

23. This argument finds support in the tax legislation and in particular section 56 of the *TPA* and section 30 of the *Tax Appeals Tribunal Act* (TATA). Both impose the burden of proof on the tax payer to prove that an assessment is excessive or that a tax decision is incorrect. The rationale for this is that the law recognizes that 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.

24. In *Republic v Kenya Revenue Authority; ex-parte Proto Energy Limited*, (JR Appn E023 of 2021) [2022] KEHC 5 (KLR), it was propounded that:

> "The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records.
>
> The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold. A presumption of correctness arises from the Commissioner's determination/ assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented."

25. This Court therefore distances itself from the submission by the appellant that it was up to the respondent to substantiate its reasons for the denial of input VAT claims. The other question is whether the documents provided for under section 17 of the *VAT Act* were provided to the respondent and therefore whether the appellant discharged its burden.

26. Even though the appellant asserted that it provided the respondent with the documents requested, the basis of the respondent's objection decisions was that there were no documents availed by the appellant to prove that there were goods supplied.

27. I have also looked at the impugned judgment. The fact that there were no documents produced before the Tribunal to enable it to scrutinize them is confirmed at paragraph 46 of the Tribunal's judgment. It reads as follows:

> "In the absence of providing evidentiary records to buttress its case, the Tribunal has no option other than to conclude that the appellant did not discharge its burden."

28. For these reasons this ground of appeal equally fails.

Disposition

29. On the whole, therefore, the Court finds no merit in the appeal and the same is dismissed with costs. The decision of the Tribunal dated 9th July, 2021 upholding the objection decisions of 3rd and 6th August, 2018 issued by the respondent are upheld. There shall be no orders to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE