



Commissioner of Domestic Taxes v Gulf Badr Group (Kenya) Limited (Tax Appeal E141 of 2023) [2024] KEHC 4819 (KLR) (Commercial and Tax) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E141 OF 2023**

DAS MAJANJA, J

MAY 8, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

GULF BADR GROUP (KENYA) LIMITED RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 14th July 2023 in Tax Appeal No. 896 of 2022)

JUDGMENT

Introduction and Background

1. Before the court is an appeal by the Appellant (“the Commissioner”) challenging the decision of the Tax Appeals Tribunal (“the Tribunal”) dated 14.07.2023 based on the following grounds contained in its Memorandum of Appeal dated 08.09.2023:
 1. The Tribunal erred in law in holding that there is no tax liability issuing on the Respondent on the basis of Sections 3,10 and 35 of *Income Tax Act*.
 2. The Tribunal erred in law in finding that the Appellant’s actions and decisions in levying Withholding Tax were founded on illegalities and cannot be supported by the law.
 3. The Tribunal misinterpreted the provisions erred in law in holding that according to Income Tax (Withholding) Rule 4 (1), 2001, hence arriving at the wrong decision.
 4. The Tribunal erred in law in failing to determine that the Appellant’s Notice of Objection issued on 21st April, 2021 was res judicata



5. The Tribunal erred in law in failing to find that the demurrage charges were akin to rental income and that Respondent was therefore bound to pay the same.
 6. The Tribunal erred in law in finding that the private ruling has a binding effect on the Commissioner, despite the same running contrary to the law.
 7. The Tribunal erred in law in failing to find that there was and still is a legal obligation for the Respondent to withhold and remit taxes from payments collected on behalf of the principal prior to the enactment of the Finance Act, 2018.
 8. The Tribunal erred in law in finding that the Respondent was not liable to pay WHT for the period after the promulgation of the Finance Act, 2018
2. Apart from its memorandum of appeal and the record of appeal, the Commissioner relies on its written submissions. The Respondent opposes the appeal through its Statement of Facts dated 03.01.2024 together with its written submissions.
 3. The background and facts giving rise to this appeal are largely common ground and can be gleaned from the record. The Respondent is a disclosed shipping agent of Evergreen Line ('Evergreen'), a non-resident shipping line. Evergreen provides services in respect of international carriage of goods to customers, including Kenyan customers. These freight services are carried out pursuant to a Bill of Lading that acts as the contract of carriage entered into between Evergreen and the importers of cargo. The Respondent acts as the general agent of Evergreen in Kenya and in some instances, Evergreen charges its Kenyan customers' demurrage charges. When this happens, the Kenyan customers make payment of the demurrage charges to Evergreen through its disclosed agent in Kenya, that is, the Respondent.
 4. By a letter dated 30.11.2021, the Commissioner, evinced its intention to verify the Respondent's tax declarations including tax declarations on the demurrage and detention charges it received. In the letter, the Commissioner stated that the demurrage and detention charges collected by the Respondent on behalf of Evergreen was deemed to be income derived in Kenya and was therefore subject to Withholding Tax (WHT) pursuant to section 35(1)(c) of the *Income Tax Act* (Chapter 470 of the Laws of Kenya) ('the ITA') prevailing as at January 2015 to July 2018. In its response, the Respondent, through a letter dated 09.12.2021 stated that WHT on demurrage was introduced by the Finance Act, 2018 and that it had been complying with the same since its introduction. That for the WHT on demurrage prior to the enactment of Finance Act, 2018, the issue was currently in Court and the Respondent was party to the joint case filed with other shipping agents, in the Court of Appeal and that the appeals were still pending hearing. The Respondent acknowledged that while the Commissioner is mandated by law to verify particulars of institutions, it stated that the power to assess or verify documents provided with respect to WHT on demurrage was limited to the extent that the Commissioner was barred from taking any enforcement action in relation to WHT on demurrage pending the hearing and determination at the Court of Appeal. The Respondent stated that it had enclosed copies of the Court order entered by consent of all parties including the Commissioner.
 5. The Commissioner proceeded to conduct the review exercise and issued the Respondent with preliminary audit findings by the letter dated 25.03.2022. The Commissioner reiterated its previous position that the Respondent was obligated to withhold and pay taxes on the demurrage and detention charges collected by it on behalf of its principal, Evergreen and as such the Commissioner computed that the Respondent ought to pay WHT amounting to Kshs. 77,757,616.00. On 19.04.2022, the Commissioner raised additional assessments through system generated assessment orders related to the said WHT totalling Kshs. 125,931,831.15 which was in addition to penalties and interest.



6. The Respondent filed its Objection to the assessments through its letter of 21.04.2022 where it reiterated its previous position on the pending appeals before the Court of Appeal and urged the Commissioner to vacate the additional assessments while taking cognizance of the pending appeals. In a further letter in support of the Objection dated 11.05.2022, the Respondent stated that the assessment orders did not contain a statement of reasons explaining the basis upon which the principal WHT assessment and interest computed thereon had been issued and that the Respondent was left to speculate. The Respondent lamented that the assessments were issued contrary to its right to fair administrative action under Article 47 of *the Constitution*, and the procedure set out under the *Tax Procedures Act*, 2015(Chapter 469B of the Laws of Kenya) (“the TPA”). That under Article 47(2) of *the Constitution*, the Respondent had a right to be given written reasons for the assessment as it was adversely affected by the decision to carry out the assessments which did not clearly state the reasons for the assessment, and this limited the Respondent’s ability to know the reasons for which the assessments had been issued.
7. The Respondent further averred that section 4 of the *Fair Administrative Action Act* requires an administrator, such as the Commissioner, to accord a person against whom an administrative action is taken a reasonable opportunity to be heard. Furthermore, that under section 51(2) of the TPA, the Appellant had the right to lodge a notice of objection within 30 days of being issued with the assessment but that the Commissioner did not allow this and instead required it to object within 5 days of receiving the assessment orders in contravention of the Respondent’s right to fair administrative action as enshrined under both *the Constitution*, the *Fair Administrative Action Act* and the TPA. The Respondent stated that this materially impacted its ability to lodge a notice of objection which indeed necessitated the Commissioner’s request for additional information.
8. On the substance of the assessments, the Respondent asserted that WHT on demurrage was only introduced through the Finance Act, 2018 and there was no obligation prior to this. That the Finance Act, 2018 was passed into law on 21.09.2018 and this introduced the following amendments to the ITA with effect from 04.07.2018 July 2018:
 - a. Section 2 of the ITA was amended to provide for a definition of demurrage.
 - b. Section 10 of the ITA was amended to provide that demurrage paid by a resident of Kenya shall be deemed to be income which was accrued in or was derived from Kenya.
 - c. Section 35 of the ITA was amended to expressly provide for WHT on demurrage.
 - d. Paragraph 3 of the Third Schedule to the ITA was amended to provide for WHT at the rate of 20% on demurrage paid to ship operators.
9. The Respondent contended that Parliament does not legislate in vain and every word or phrase that appears in legislation was put there for a purpose and must not be disregarded. That if there had been a legal, unambiguous basis to charge WHT on demurrage prior to the enactment of the Finance Act 2018, Parliament would not have found it necessary to introduce the amendment. Thus, the Respondent stated that there was no legal basis for the Commissioner to seek to charge WHT on these amounts prior to this date.
10. The Respondent further contended that its role was limited to collection of demurrage and detention charges from importers of cargo and that even if such payments were subject to WHT, the Respondent was not the “payer” for WHT purposes and as such, had no obligation to deduct and account for WHT. It stated that the obligation to deduct WHT if any, lies with the person who makes payment. The Respondent stated that applying the Income Tax (Withholding Tax) Rules, 2001 (“WHT Rules”), an importer of cargo who actually incurs the demurrage and detention charges is the “payer” for



WHT purposes whilst Evergreen is the “payee” and the Respondent is its agent. The Respondent proffered that payment to an agent is payment to the principal and it relied on the Tribunal’s decision in TAT Appeal No. 269 of 2018; Maersk Kenya Limited v The Commissioner of investigations and Enforcement to insist that the law unequivocally places the burden to deduct and account for WHT on the payer, that is, the importers of cargo.

11. The Respondent took the position that the assessment was contrary to the position communicated in the Commissioner’s Private Ruling dated 20.07.2018 (“the Private Ruling”) addressed to the Kenya Ships Agents Association, the umbrella body for ships agents in Kenya to which the Respondent is a member. That in the Private Ruling, the Commissioner considered the law as it then applied prior to the enactment of Finance Act, 2018 and stated that the person who is responsible for accounting for WHT on import demurrage charges is the one who incurs the charges and shall pay/remit to the Commissioner and that the tax point for application of this tax is when a person is invoiced by the shipping line. The Respondent proffered that in effect, the Commissioner communicated who it considered to be the taxable person and what it considered to be the tax point and that this was in response to a direct request for a private ruling sent by the Kenya Ships Agents Association dated 06.07.2018. Thus, the Respondent stated that whilst it maintains its position that demurrage was not subject to WHT prior to enactment of the Finance Act, 2018, private rulings are binding on the Commissioner pursuant to section 65 of the TPA. Therefore, the Respondent averred that the Commissioner could not depart from the position communicated in the Private Ruling and that the assessment therefore ought to have been vacated.
12. The Respondent contended that the Private Ruling created a legitimate expectation and therefore an entitlement that courts will protect in the same way that they protect property, contractual and tortious interests. In light of the foregoing, the Respondent objected to the entire assessment of Kshs. 125,931,831.15 and contended that no principal tax, penalties or interest was payable and it requested the Commissioner to vacate the entire assessment.
13. On 14.07.2022, the Commissioner made its objection decision (“the Objection Decision”). The Commissioner stated that the basis of the assessment was raised in line with section 35(1)(c) of the ITA that requires tax to be withheld from any monies payable to a non-resident in respect of rent for the use of and occupation of property. From the Objection, the Commissioner distilled that there were two issues for determination. Whether Commissioner erred by bringing to charge the demurrage and retention charges and whether the Respondent had an onus to withhold taxes from remittances to Evergreen. It was the Commissioner’s position that prior to the enactment of the Finance Act, 2018 there was and still is in existence a legal obligation for the Respondent to withhold and remit taxes from payments collected on behalf of the agent. That section 35(2)(c) imposed on the Respondent the onus of withholding of taxes at the respective rate from rent payments made to a non-resident person not having a permanent establishment in Kenya. It held that the demurrage charges levied on the importer for the prolonged, uncontracted usage of the shipping containers are in the character of rental income and hence subject to WHT.
14. The Commissioner faulted the Respondent’s interpretation of the WHT Rules by stating that Rule (4) thereof envisions payment of income involving the direct remission of the payments from the procurer of goods and services to the payee while payment “on account” of income earned caters for the situations where payments to the ultimate beneficiary income are channelled through an intermediate such as an agent. It stated that a similar interpretation was adopted by the High Court in Ocean Freight (E.A) Limited v Commissioner of Domestic Taxes [2020] eKLR. That this authority not only overruled the Tribunal’s Maersk Kenya Limited case (Supra) by virtue of it being a judgment from a



Court of higher status but also, in the absence of any appeal judgment providing otherwise, becomes the default binding precedent.

15. On the Private Ruling, the Commissioner held that the legal position as espoused therein was subject of an ongoing appeal at the Court of Appeal hence the Commissioner could only align its decision with the most current available judicial pronouncement; *Oceanfreight E.A Limited (Supra)*. It further held the position that the Objection was *res judicata* as the substantive issues raised in all the three judicial forums (Tax Appeal Tribunal, High Court and Court of Appeal) were again canvassed in the Objection and that as a result, the Commissioner took judicial notice that the Objection offends section 51(1) of the TPA that expressly prohibits the Respondent from pursuing any other action under any other written law whilst still objecting under the TPA. In view of the foregoing, the Commissioner confirmed the assessments as earlier raised.
16. The Respondent, being dissatisfied with the Objection Decision, filed an appeal to the Tribunal hence the judgment of 14.07.2023. In its decision, the Tribunal identified two issues for determination:
 - a. Whether the Commissioner had any legal basis to demand WHT for the period prior to the enactment of the Finance Act, 2018.
 - b. Whether the Commissioner assessment was justified after the enactment of the Finance Act 2018
17. The Tribunal held that the details of sections 3, 10 and 35 of ITA do not impose demurrage as a taxable income and consequently no WHT can be imposed on the same. That there is obviously no tax liability issuing on the Respondent on the basis of the cited law. The Tribunal dismissed the Commissioner's position that demurrage charges were akin to rental income by stating that the meaning of the two terms (demurrage and rental income) in ordinary English are obviously not the same. It noted that the Finance Act 2018 defined demurrage charges as "the penalty paid for exceeding the period allowed for taking delivery of goods, or returning of any equipment used for the transportation of goods" and it also defined rental income as "income derived from renting om residential for use or occupation." That there was no mention of the term demurrage in the ITA before the promulgation of the Finance Act, 2018 and the Respondent could not therefore be assessed for the same at the time. The Tribunal stated that a party can only be liable for taxes where the law is specifically binding on him and in light of the case of *Cape Brandy Syndicate v Inland Revenue Commissioner [1920] KB 64*. Thus, the Tribunal held that the Commissioner's actions and decisions in levying the WHT on the Respondent were founded on illegalities and cannot be supported in law. It faulted the Commissioner's interpretation of Rule 4(1) of the WHT Rules by stating that this law indicates that if there is any tax payable the same ought to be withheld and be paid by the person paying for the services in issue and in this case the person paying the demurrage.
18. The Tribunal noted that demurrage was specifically provided for in the Finance Act 2018 and that this was done through section 9 thereof which amended section 34 of the ITA. That had that income been part of the law prior to the enactment of the Finance Act 2018 there would have been no need to include it in the amendment. On the issue of the Objection being *res judicata*, the Tribunal stated that it would have considered the issue in a logical manner without considering all the ingredients of the doctrine of *res Judicata* by determining whether it would still deal with the matter had the care been dealt with prior to the present matter. That the parties did not annex to their pleadings the cases on whose basis they were alleging the existence or non- existence of the *res judicata* doctrine. In the circumstances the Tribunal did not dwell on the issue. In the foregoing, the Tribunal found that there was no WHT applicable to the Respondent in the period before the promulgation of the Finance Act 2018.



19. On the demand for WHT after the enactment of the Finance Act, 2018, the Tribunal noted the Private Ruling was issued by the Commissioner on application of the Respondent through its umbrella body. The Tribunal stated that the provisions of section 65(4) of the TPA state very clearly that the Private Ruling is binding on the Commissioner and that the fact that the Private Ruling had not been withdrawn, it was still binding on the Commissioner and the Respondent was entitled to benefit from the Private Ruling. The Tribunal noted that the core issue covered on the Private Ruling is that the person liable to pay the WHT is the person liable to pay the demurrage charges. In the circumstances, the Tribunal concluded that the Respondent was not liable to pay WHT for the period after the promulgation of the Finance Act 2018.
20. The Respondent's appeal was thus allowed and the Objection Decision set aside. As stated, it is this decision by the Tribunal that forms the subject of the instant appeal which has been canvassed by way of written submissions. Since the submissions restate the parties' positions I have already summarized above, I will not rehash the same but make relevant references if need be in my analysis and determination below.

Analysis and Determination

21. The jurisdiction of this court in determining this appeal is circumscribed by section 56(2) of the TPA which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". The Court of Appeal's dealt with "question of law", as employed to prescribe the limits of appellate jurisdiction and as was stated in *M'Iriungu v. R* [1983] KLR 455 at page 466 as follows:

In conclusion, we would agree with the views expressed in the English case of *Martin v. Glyneed Distributors Ltd* that where a right of appeal is confined to questions of law only, an appellate Court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law... unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law....

22. Therefore, the duty of this court is to determine whether the conclusions of the Tribunal were reflective of the material on record and the law and whether another tribunal similarly constituted would have arrived at the same dispositive conclusions. The Tribunal was called upon to determine the basis of the Commissioner demanding WHT on demurrage charges received before and after the enactment of the Finance Act 2018. It is not in dispute that prior to the enactment, the term 'demurrage' did not exist in the ITA and that the same was introduced by amendment through the Finance Act, 2018. However, the Commissioner in its Objection Decision maintained that even prior to the Finance Act, 2018, the demurrage and detention costs charged could be interpreted to be monies payable in respect of rent for the use and occupation of property and thus subject to WHT in line with section 35(1)(c) of the ITA. The Commissioner further relied on the court's decision in *Ocean Freight (E.A) Limited (Supra)* where it was held as follows:

QUOTE

SUBPARA 21.

Whether that charge for the late return of the container is called a penalty or rent, it is an income to the owner of the container, which is the shipping line.....As the charge on demurrage would have been derived from or accrued in Kenya, it is subject to income tax legislation in Kenya. That is the effect of Section 3(1) and 3(2) of the *Income Tax Act*....

.....



SUBPARA 31.

On my own assessment and for reasons I have given, I have come to the conclusion that demurrage charges on containers was chargeable to income tax even under the statutory regime that existed at the material time. Any amendments that come later may have served to reinforce legislation that was already clear and without ambiguity.

23. The Tribunal was of the view that the two terms, 'demurrage' and 'rental income' in ordinary English were not the same and that a party can only be charged for taxes where the law is specifically binding on them. However, I note that the Tribunal did not interrogate the aforementioned decision of the court which determined this very issue. I also note that the Tribunal did not refer or rely on this decision in as much as the same was brought to its attention by the Commissioner. This was an error of law by the Tribunal because as a subordinate court, it is bound by the decisions of this court (see *Dodhia v National and Grindlays Bank* [1970] EA 195). As such, the Tribunal ought to have been guided by the aforementioned findings that demurrage charges were subject to income tax even before the enactment of the Finance Act, 2018. I therefore find that the Tribunal erred in finding that demurrage charges were not subject to WHT when there was a binding decision before it that stated otherwise. This ground of appeal by the Commissioner therefore succeeds.
24. On whether WHT on the demurrage costs was payable after the Finance Act, 2018, the Respondent stated that the Commissioner issued the Private Ruling to the effect that the WHT ought to have been withheld by the payers of the costs, that is Evergreen's customers and that the Private Ruling bound the Commissioner as stipulated by section 65(4) of the TPA which provides as follows:

if the tax payer has made a complete and accurate disclosure of the transaction in relation to an application for a Private ruling and the transaction has proceeded in all material respects as described in the application, the Private ruling shall be binding on the Commissioner
25. The Commissioner countered this position by stating that the Private Ruling had since been superseded by the court's decision in *Oceanfreight E.A Limited* (supra). Once again, I note that in its decision, the Tribunal did not interrogate this position by the Commissioner and the court's decision above. In any event, I am in agreement with the Commissioner that in as much as the Private Ruling was binding upon the Commissioner, the same was not binding upon the Tribunal or this court. The Tribunal or this court cannot be bound by a ruling of the Commissioner more so if it is contra statute and against a superior court's decision. In any case, I find that the Respondent could not obtain any benefit from the Private Ruling as the same was made on 20.07.2018 and yet the Commissioner sought WHT from income received by the Respondent between February 2017 and June 2018. Before the Private Ruling and as was held by the court in *Oceanfreight E.A Limited* (Supra), the Respondent, as the shipping agent was liable to withhold tax for payments it received on behalf of its principal, Evergreen in respect of demurrage charges.
26. My findings above make it moot and unnecessary for me to discuss whether the Objection was res judicata.

Conclusion and Disposition

27. It follows that the Commissioner's appeal has merit. It was justified to demand WHT from the Respondent for demurrage charges that were paid to it and for onward remittance to its principal, Evergreen. The Commissioner was correct to demand this tax for the demurrage costs income received before the enactment of the Finance Act, 2018 and before the Private Ruling of the Commissioner



dated 20.07.2018. This was in line with the court's decision in Oceanfreight E.A Limited (Supra) which the Tribunal ignored and ought to have bound and guided its decision which I now find erroneous in law.

28. I therefore set it aside with the consequence that the Commissioner's Objection Decision dated 14.07.2022 be and is hereby upheld. In light of the circumstances leading to the success of the appeal, each party should bear its own costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2024.

A. MABEYA

JUDGE

