Golden Cara Investments Limited v Commissioner of Domestic Taxes (Tax Appeal E078 of 2023) [2024] KEHC 5570 (KLR) (Commercial and Tax) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5570 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E078 OF 2023

DAS MAJANJA, J

MAY 8, 2024

BETWEEN

GOLDEN CARA INVESTMENTS LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 10th February 2023 in Tax Appeal No.703 of 2021)

JUDGMENT

Introduction and Background

1. By a letter dated 28.04.2020, the Respondent ("the Commissioner") informed the Appellant that it had carried out investigations into its tax affairs for the period 2014-2018 2019. The Commissioner stated that it had established that the Appellant undertook construction contracts with various entities and that it was also receiving other deposits which included local cheque deposits, Inward Telex Payment and cash payments. The Commissioner stated that the Appellant received a total of Kshs. 1,069,144,510.00 through accounts held in various banks and claimed that the Appellant under-declared the income for both corporation tax (CIT) and Valued Added Tax (VAT) which the Commissioner computed liability at Kshs. 102,002,362.00 and Kshs. 82,446,411.00 respectively. The Commissioner stated these findings constituted a tax offence of knowingly omitting from the Appellant's tax returns an amount that should have been included contrary to section 97(a) of the *Tax Procedures Act* (Chapter 469B of the Laws of Kenya) ("the TPA") for which the Commissioner may initiate criminal proceeding as provided in law.

2. In response to the above investigation findings, the Appellant, through its tax agent responded through a letter dated 20.08.2020. On CIT, the Appellant stated that the Commissioner had exaggerated the

adjusted net income as the adjusted bank receipts were treated as being net of VAT in calculating the VAT although VAT was part of what was deposited. It further faulted the Commissioner for treating a project loan deposited in one of the accounts as income at the time of the disbursement and yet the same was supposed to be recognized as income at the period of recovery. Further, that several deposits were erroneously treated as income and yet some of the deposits were borrowings made to meet the cashflow needs of the construction projects done through the directors and direct bank deposits. The Appellant further stated that the tax withheld by the payers was not deducted in arriving at the tax due, that the excess expenses that should have reduced the taxable income declared were not considered and that the correct and supported business expenses were not considered in the tax computations of the period 2015 and 2016.

3. On VAT, the Appellant stated that sales declared in the year 2014 and 2015 were not considered in determining the sales variance and that the amount in the VAT returns for April 2017 and June 2018 were not considered in determining the VAT declared hence exaggerating the VAT payable. Further, that withheld VAT was not deducted, VAT credits were not considered from the VAT payable and that taxes withheld in respect to supplies made to various county governments and the Kenya Ports Authority was not supported by certificates and therefore not deducted from the taxes payable. The Appellant thus requested the Commissioner to consider the aforementioned information before concluding on the tax payable. In response, the Commissioner, through its letter dated 17.09.2020 and while acknowledging the various documents availed to it by the Appellant and review of the same, sought additional documents including contracts and certificates of works done between the Appellant and the various entities and audited financial statements and supporting schedules/ledgers thereon.

4. On 09.03.2021, the Commissioner, using the the information available, did comparisons between the bankings net income and the project Certificates/payment to the Appellant and noted that payments showed the corrects sales and was more reliable than bankings and thus issued additional assessments of Kshs. 177,525,639 in respect of CIT and VAT derived from the payments amounting to Kshs.647, 882,284 from the various entities. The Respondent, in a letter dated 30.03.2021 objected to these findings and assessments whereby it reiterated much of the grounds in its earlier letter. The Appellant lamented that it had fully cooperated and responded to all correspondences and that all the requested information and documents were fully provided and there was no reason given as to why the expected adjustments requested earlier were not done before issuing the assessment.

5. On 28.05.2021 upon considering the issues raised in the Objection, the Commissioner issued its objection decision and assessed the taxes at Kshs. 257,429,348 being the Principal Taxes, Penalties and Interest, in respect of CIT and VAT ("the Objection Decision").

6. The Appellant lodged an appeal against the Objection Decision at the Tax Appeals Tribunal ("the Tribunal") which after considering the pleadings and documentation produced before it together with the submissions of the parties rendered a decision on 10.02.2023 (Golden Cara Investments Limited v Commissioner for Domestic Taxes [2023] KETAT 101 (KLR)). The Tribunal identified three issues for determination; whether the Commissioner breached the Appellant's right to fair administrative action while reviewing and determining the objection, whether the Commissioner erred in its assessment and demand for VAT and CIT and whether the it erred in law by issuing an assessment beyond the statutory period of five years.

7. On the first issue, the Tribunal stated that as per section 51(8) of the TPA, the Commissioner is only required to 'consider the objection and decide' and that it is its prerogative to institute measures within its Departments and officers that ensure efficient and effective consideration and delivery of its decisions within the stipulated time. That for the Appellant's rights to have been breached under this section, it ought to have proven that the Commissioner did not 'consider' its objection in rendering

the Objection Decision. The Tribunal therefore found that the Commissioner did not breach the Appellant's right to a fair administrative action while reviewing and determining the objection.

8. On the second issue, the Commissioner stated that it had looked into the pleadings and arguments of the parties together with the evidence annexed thereto and observed that the Commissioner did its due diligence in seeking information from various third parties. However, that it was not clear how and when the Appellant presented the impugned documents it claimed to have filed as none had been presented to the Tribunal, therefore the Tribunal did not find occasion to interrogate the same. The Tribunal held that it expected the Appellant to vigorously support its argument before it, with documents and any other material it deemed necessary to thwart the Commissioner's position that the additional tax assessed had been properly included in the Appellant's returns and that the expenses and input tax deductions were wrongly omitted by the Commissioner in arriving at the additional assessment. The Tribunal therefore found that the Appellant had not sufficiently met its burden of proof and held that the Commissioner's assessment and demand for VAT and CIT was proper.

9. On the last issue, the Tribunal noted that the appeal emanated from the Commissioner's investigation and findings that the Appellant had committed a tax offence by knowingly omitting from its tax returns amounts which should have been included. The Tribunal stated that having concluded that the Appellant had omitted to include the turnover as alleged by the Commissioner, found that the Appellant knowingly omitted in its tax returns which should have been included. That therefore, the Commissioner was justified in assessing the Appellant for the period beyond 5 years as allowed by section 97 (d) and 29(6) of the TPA.

10. In the upshot, the Appellant's appeal was dismissed and the Objection Decision upheld. It is this decision that has precipitated the filing of the instant appeal by the Appellant which is grounded on the Memorandum of Appeal dated 07.06.2023. The Commissioner responded to the appeal through its Statement of Facts dated 10.11.2023. The parties have also filed written submissions which disposed of the appeal and which regurgitate their respective positions summarized above hence I will not rehash the same but make relevant references in my analysis and determination below.

Analysis and Determination

11. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that 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". This means that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts (see John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018]eKLR).

12. The Appellant raises 11 grounds in its Memorandum of Appeal which it has condensed to two issues for determination in its submissions. First, whether the objection review process was procedurally fair and second, whether the Tribunal erred in issuing assessments beyond the statutory period of 5 years.

13. On the objection review process, the Appellant submits that the Objection Decision was rendered by the same officers who conducted the investigations on the Appellant and that this was in contravention of the rules of equity that a person cannot be the judge in his own trial. That the Objection review process is quasi-judicial where the independence and the impartiality of the decision maker is of paramount importance but that in this case, the Commissioner was the complainant, investigator and the decision maker. It submits that a person appearing before his accuser cannot expect his accuser to be fair or just, even if he is because bias is an issue of perception.

14. The Appellant submits that it had a legitimate expectation that the dispute would be referred to the Independent Review of Objection which was informed by the Commissioner's own advertisement on their own website about the existence of such a department established vide a gazette Notice no Vol. CXX—No. 141 and that the Appellant indeed requested that the officers involved in the investigations to advice the Commissioner to appoint an independent panel. The Appellant submits that under section 29(2)(f) of the TPA, the Commissioner was under an obligation to advise the Appellant on the manner of objecting to the assessment and that the manner in this case includes informing the tax payer about the existence of the body or the division to object to. That from the Commissioner's brochure and the legal notice, it is envisaged that the objection review process is a quasi-judicial function where the tax payer and the Commissioner (investigator) stands in equal footing before an impartial and independent arbiter as opposed to the situation where the Commissioner investigator would behave "like a deity and the tax payer would assume the role of a supplicant who must approach the deity on a bended knee and with utmost humility". That there should be a discernable difference between objection review and an inquisition. Therefore, the Appellant submits and urges the court to find that the Objection Decision having been rendered by the complainant / investigator, the same was a nullity ab initio. That no legality can flow from an illegality and as such, the only orders that lends themselves to this appeal is for its dismissal and that it would save judicial time not to consider any other issue as everything flows from that illegal objection review process.

15. On its part, the Commissioner submits that despite the Appellant alleging that the Commissioner used the same officers in investigations to review their objection, they have not shown any prejudice they have suffered. That there is no proof of bias or procedural impropriety on the part of the Commissioner that warrants the setting aside of the Objection Decision and that in any event, the TPA mandates the Commissioner or his authorized officers to issue tax assessments, review objections and issue objection decisions.

16. As stated, the Tribunal agreed with the Commissioner by stating that as per section 51(8) of the TPA, the Commissioner is only required to 'consider the objection and decide' and that it is its prerogative to institute measures within its Departments and officers that ensure efficient and effective consideration and delivery of its decisions within the stipulated time. That for the Appellant's rights to have been breached under this section, it ought to have proven that the Commissioner did not 'consider' its objection in rendering the Objection Decision. The Tribunal therefore found that the Commissioner did not breach the Appellant's right to a fair administrative action while reviewing and determining the objection. The said section 51(8) of the TPA provides that 'Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision". The "Commissioner" is defined under section 2 of the *Kenya Revenue Authority Act* (Chapter 469 of the Laws of Kenya) as a commissioner appointed under section 13(1) of the Act which includes "...such Commissioners and Deputy Commissioners as may be deemed necessary". The Commissioner in this case is one such commissioner. I agree with the Tribunal that it is the prerogative of the Commissioner to consider the objection and decide whether to allow the objection in whole or in part or disallow it. How the Commissioner decides to consider the objection is within its purview and nothing stops it from constituting such departments to review and determine the objections. Whereas it is desirable that different persons within the Commissioner's office conduct the investigations and review objections, there is no requirement that this should be the case under any law. The law provides that it is the 'commissioner' who is to consider the objection which is what happened in this case. If the said objection is not considered or a taxpayer is dissatisfied with the same, the law, that is section 12 of the *Tax Appeals Tribunal Act* (Chapter 469A of the Laws of Kenya) and section 52(1) of the TPA provide for an avenue of appeal of the said objection decision. In any event, I agree with the

Commissioner that there was no allegation of impropriety or prejudice even if the investigations and review was done by the same officers within the Commissioner's office. Even if the same was raised by the Appellant, it was never substantiated. Since it was not denied that the Commissioner considered the objection as is expected by the law, it follows that the Appellant cannot claim that its right to a legitimate expectation was infringed. The objection was considered as per the law and I find no illegality in the Objection Decision as advanced by the Appellant.

17. The Respondent contends that the Commissioner contravened section 29(2)(f) of the TPA which provides as follows:

> The Commissioner shall notify in writing a taxpayer assessed under subsection (1) of the assessment and the Commissioner shall specify—
>
> .....
>
> the manner of objecting to the assessment.

18. Whereas the Appellant submits that the Commissioner was mandated to inform it about the existence of the body or the division to object to, I find that from the above provision, there is no such requirement. In its assessment letter of 09.03.2021, the Commissioner rightly informs the Appellant of its right to object within 30 days of the letter and how to validly object to the same as per section 51 of the TPA. I find that this was sufficient detail of explaining the "manner of objecting to the assessment" and there was no violation of section 29(2)(f) of the TPA as advanced by the Appellant. This ground of appeal thus fails.

19. Turning to the issue of the Commissioner raising assessments beyond the 5-year period, it is not in dispute that under section 29 of the TPA an assessment shall not be made after five years immediately following the last date of the reporting period to which the assessment relates. However, this position is disclaimed by section 29(6) of the TPA which provides that the same " ... shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer." It is not in dispute that the assessments for the period 2014 and 2015 were issued outside the statutory period. However, the Commissioner, in its preliminary findings and Objection Decision stated that the Appellant was involved in fraud and neglect for omitting from its returns amounts that should have been included therein as demanded by section 97 of the TPA and thus the said assessments for the impugned periods stood.

20. The Appellant submits that it has never been convicted of any tax offence which would allow the Commissioner to go beyond 5 years and that the Commissioner cannot merely allege, he must prove. Further, that the fact that the Commissioner never preferred any charges against the Appellant under section 97 of the TPA clearly gives rise to the adverse inference that the Commissioner had no evidence in support of fraud. That if merely alleging fraud gives the Commissioner the powers to extend timelines, it will give it draconian powers to even go back for 10 years.

21. The Appellant further submits that even assuming that the Commissioner did indeed prefer charges on fraud, the same would not have stood in light of section 23(1) of the TPA which obligates the tax payer to keep records for only 5 years. That to expect a tax payer to have supporting documentation of invoices, receipts and other documents beyond the statutory period is not only unfair but grossly unreasonable and that it would "need a whole building" to keep receipts for over 5 years. That a tax payer is allowed by section 23 of the TPA to destroy, misplace, mutilate and/fail to keep any tax record beyond 5 years.

22. As stated, the Tribunal noted that the appeal emanated from the Commissioner's investigation and findings that the Appellant had committed a tax offence by knowingly omitting from its tax returns amounts which should have been included. The Tribunal stated that having concluded that the

Appellant had omitted to include the turnover as alleged by the Commissioner, found that the Appellant knowingly omitted in its tax returns which should have been included. That therefore, the Commissioner was justified in assessing the Appellant for the period beyond 5 years as allowed by section 97(d) and 29(6) of the TPA.

23. The issue of who bears the burden of proof in instances where a taxpayer has been accused by the Commissioner of fraud is not novel and has been determined by this court in a number of decisions. For starters, in tax matters the taxpayer bears the burden of proving that a tax decision is incorrect or excessive. This position is in line with section 30 of the *Tax Appeals Tribunal Act* and section 56(1) of the TPA which provide as follows:

> 30. Burden of proof
> 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.
>
> 56. General provisions relating to objections and appeals
>
> (1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

24. In Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) [2022] KEHC 5 (KLR), the court expounded on this principle by stating as follows:

> 48. 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.
>
> 49. 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. The onus of proof may shift based on the stage of the proceedings and the actions taken by the parties. In *Commissioner of Investigations and Enforcement v Pearl Industries Limited (Tax Appeal E086 of 2020)* [2022] KEHC 51 (KLR) (Commercial and Tax) (31 January 2022) (Judgment) and Commissioner of Domestic Taxes v Trical and Hard Limited (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR) (Commercial and Tax) (8 July 2022) (Judgment) the court described it like a pendulum swinging between the taxpayer and taxman at different points but more times than not swinging towards the taxpayer. This "pendulum of proof" swings at least twice and at most thrice; the first is when the Commissioner asserts its position and the tax payer is expected to disprove this

position. Once the taxpayer states its position, the pendulum swings to the Commissioner who then reviews the position taken by the taxpayer. If it is determined that the position taken by the taxpayer is devoid of evidence or that the evidence is insufficient, incompetent and irrelevant, then the pendulum swings back to the taxpayer to prove that the Commissioner was wrong in its position and overall findings.

26. Therefore, in discharging this burden, the Appellant is required to provide such evidence as is required by law to prove that the assessments as issued by the Commissioner were incorrect or excessive. Such evidence includes the records the taxpayer is required by statute to maintain. Section 23(1) of the TPA provides that a taxpayer is mandated to keep records as follows:

> 23. Record-keeping
>
> (1) A person shall—
>
> a. maintain any document required under a tax law, in either of the official languages;
>
> b. maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and
>
> c. subject to subsection (3), retain the document for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.

27. Section 59 (1) of the TPA also provides that a tax payer shall produce records when required to do so by the Commissioner as follows:

> 59. Production of records
>
> (1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—
>
> (a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
>
> (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or
>
> (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.

28. This position is fortified and further reverberated under the ITA where section 54A requires a person carrying on a business to keep records adequate for the purpose of computing tax. As I have highlighted in the introductory part, the Commissioner in its letter of 17.09.2020 requested for more documentation for analysis together with the documentation already provided by the Appellant on the same date. In its objection, the Appellant stated that "On 23rd Sept. 2020 the taxpayer communicated to the commissioner and provided further documents required in the letter of 17th Sept. 2020". However,

the Commissioner stated that no such documents were ever furnished. The Tribunal also stated that the record did not have those documents the Appellant claimed it provided the Commissioner for the Tribunal's interrogation. As stated in the introductory part, the Commissioner in this letter had sought contracts and certificates of works done between the Appellant and the various entities and audited financial statements and supporting schedules/ledgers thereon. I have also gone through the record and I agree with the Tribunal that these aforementioned documents sought by the Commissioner are not on record. Contrary to its submissions now, the Appellant never stated that it was unable to get these documents because they were unavailable or that the request was unreasonable in the circumstances. If anything, the Appellant stated that it had furnished the same, though the Commissioner and Tribunal had concluded that the documents were not furnished. This conclusion was well founded and I cannot come to a contrary conclusion.

29. The Appellant, having been requested by the Commissioner to provide records and documents and having failed to produce them meant that it did not discharge the burden of proof placed on it and thus failed to prove that the Commissioner was wrong in its decision or that its assessments were excessive. The Appellant thus failed to demonstrate or upstage the Commissioner's conclusion that it had committed fraud within the meaning of section 97 of the TPA. I cannot therefore fault the Tribunal for finding that the Commissioner had proved fraud on the part of the Appellant for not declaring all its income in its returns. I have also gone through section 97 of the TPA which provides as follows:

> 97. Fraud in relation to tax
>
> Any person who, in relation to a tax period, knowingly—
>
> a. omits from his or her return any amount which should have been included; or
>
> b. claims any relief or refund to which he or she is not entitled; or
>
> c. makes any incorrect statement which affects his or her liability to tax; or
>
> d. prepares false books of account or other records relating to that other person or falsifies any such books of account or other records; or
>
> e. deliberately defaults on any obligation imposed under a tax law, commits an offence.

30. The above provision does not make it mandatory for one to be convicted of fraud by a criminal court for fraud to be proved under that section. Once any of the aforementioned grounds is established and there is no satisfactory explanation or rebuttal from the taxpayer as in this case, then fraud has been proved and that this is sufficient for the 5-year statutory rule for assessments not to apply under section 29(6) of the TPA. This ground of appeal by the Appellant fails.

Disposition

31. The Appellant's appeal lacks merit. It is dismissed but with no order as to costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

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

A. MABEYA

JUDGE