Letshego Kenya Limited v Commissioner of Domestic Taxes (Tax Appeal E169 of 2023) [2024] KEHC 5571 (KLR) (Commercial and Tax) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5571 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E169 OF 2023

DAS MAJANJA, J

MAY 8, 2024

BETWEEN

LETSHEGO KENYA LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 19th October 2023 in Tax Appeal No.752 of 2022)

JUDGMENT

Introduction and Background

1. The Appellant is a credit institution licensed to provide financial services by the Central Bank of Kenya as a digital lender to small and micro-entrepreneurs, individuals and salaried employees in the public and private sector. The Respondent ("the Commissioner") carried out a document examination of the Appellant's records and documents for the income period 2016-2019 to ascertain the correctness of the fees brought to charge for Value Added Tax (VAT) on imported services. The Commissioner found that management fees, guarantee fees, license and MIS costs and software costs were not declared for VAT on imported services for the period as required under section 10 of the *VAT Act* (Chapter 476 of the Laws of Kenya). Thus, the Commissioner ascertained that the VAT due for this period was Kshs 88,857,369.36 which the Appellant ought to have declared as it was registered for VAT.

2. On 25.06.2021, the Appellant made an application for amnesty under the Commissioner's Voluntary Tax Disclosure Program(VTDP) pursuant to section 37D of the *Tax Procedures Act* (Chapter 469B of the Laws of Kenya) ("the TPA") where the Appellant disclosed a tax liability of Kshs 92,621,260 inclusive of penalties and interest. In response to the application, the Commissioner, through its letter dated 15.10.2021 informed the Appellant that it was supposed to have declared and paid reverse VAT

on services imported prior to November 2019. The Commissioner then requested the Appellant to provide it with the Trial Balances for the years 2016, 2017 and 2018 to enable the determination of the reverse VAT on the imported services. The Appellant was reminded that it could still apply for the VTDP for the reverse VAT due for the period from 01.07.2015 to 31.10.2019. The Appellant, in its response of 26.10.2021 stated that 'a registered person' for VAT purposes is a person who makes or expects to make taxable supplies as per section 34 of the *VAT Act* and that prior to the Finance Act, 2019, persons dealing with exempt supplies were not liable to account for reverse VAT as they were not considered registered persons as guided by section 34. That the Finance Act, 2019 provided clarity and expanded the applicability of reverse VAT on imported services to include all taxable services received from non-resident persons whether or not the recipient is registered for VAT.

3. The Appellant stated that despite Micro Africa Limited, the company acquired by the Appellant, being registered for VAT since 07.06.2004, it was their understanding that it never made any taxable supplies. That the Appellant was under no obligation to register for VAT having been in the business of exempt supplies as per the First Schedule of the *VAT Act* and that the VAT obligation on the system was an erroneous registration by Micro Africa Limited. The Appellant asserted that it had not met the registration criteria as envisioned by section 34 and that whereas it was ready and desirous to honour its tax obligations, the imposition of the reverse VAT was an unwarranted burden to the taxpayer to the extent that it arose as a result of an erroneous registration of the VAT obligation. In its response, the Commissioner, through its letter of 10.11.2021 stated that the Appellant was not erroneously registered for VAT and was declaring taxable sales and making payment of the VAT due from the point of registration in June 2004 until December 2010. The Commissioner then reminded the Appellant to furnish the Trial Balances and financial statements for the period 2016-2019 that had been requested earlier on.

4. In its letter of 17.11.2021, the Appellant furnished the Trial Balances and financial statements requested and restated that it provides financial services and have not made any taxable supplies in the past 10 years and that it has been filing NIL returns under the VAT obligation. The Commissioner maintained its position as evidenced by its letter of 08.02.2022 where it raised additional assessments totalling Kshs 88,875,367.00 including interest and penalties. The Appellant, through its letter of 14.03.2022 objected to the said assessments and thereafter, the Commissioner issued the Objection Decision on 14.06.2022 ("the Objection Decision") maintaining the assessments.

5. Aggrieved by the Objection Decision, the Appellant lodged an appeal with the Tax Appeals Tribunal ("the Tribunal") on 06.07.2022. Having considered the parties' submissions, the Tribunal rendered a decision on 19.10.2023(Letshego Kenya Limited v Commissioner of Domestic Taxes [2023] KETAT 531 (KLR). In the judgment, the Tribunal distilled that the only issue for determination was whether the confirmed assessments were justified law and that the dispute rested on the answer to the question of whether a taxpayer who deals in exempt services and who has erroneously registered for VAT and filed VAT returns can be assessed and compelled to pay VAT. The Tribunal held that a plain reading of section 1 together with section 10(1) of the *VAT Act* makes it clear that a registered person who receives a supply of imported taxable services is deemed to have made a taxable supply. In other words, as long as a taxpayer is registered for VAT, then such a taxpayer must account for VAT regarding transactions that qualify for VAT payment. That the only way for a taxpayer to get out of the yoke of VAT liability is by cancelling its registration under section 36(3) of the *VAT Act*.

6. The Tribunal held that gleaning through the evidence on record it was clear and undisputed that the Appellant had not canceled or succeeded in canceling its VAT registration in the periods under review and that the cancellation only came through in 2022 while the review period was between January 2016 to October 2019. That the law under section 36(8) of the *VAT Act* therefore required the Appellant

to account for the VAT obligation during the period when the Appellant was registered. The Tribunal held that the Appellant was under obligation to pay and or account for VAT in the period when it was so registered and that the argument that it ought not to have been registered for VAT because it was dealing in exempt services is thus not sustainable.

7. The Tribunal also noted that registration for VAT was done voluntarily by the Appellant and it even filed VAT returns for six years between 2004 to 2019. Therefore, the Appellant was aware of this obligation and by its conduct also acquiesced to its VAT obligations and could not be allowed to resile from its admitted and statutory obligations only at the point when its VAT obligation has moved from nil to the assessed Kshs 88,875,367.77. That even if the Appellant erred when it registered for VAT, this error brought it within the ambit of the *VAT Act* and the Tribunal stated that that it was obligated to enforce the law as it is, however unfair it may seem. It stated that it could not look at the intention or the hardships of the Appellant in its effort to de-register from VAT or whether the implementation of the law would result in unfairness or inequity as was held in *Cape Brandy Syndicate v Inland Revenue Commissioner* [1921] 1 KB 64.

8. The Tribunal asserted that, for as long as the Appellant was registered for VAT, it had obligations to account for VAT as decreed in the *VAT Act* and that an alleged error made in applying and obtaining that VAT registration would not remove it from the tax obligations that are specified under the *VAT Act*. Based on this analysis, the Tribunal was satisfied that the Appellant voluntarily registered for VAT obligations in the period under review and it was thus legally required under sections 1, 5(1) 10(1), 36(3) and 36(8) of the *VAT Act* to account for VAT in the period when it was VAT registered for VAT liabilities under the *VAT Act*. Thus, the Tribunal found that the appeal lacked merit and accordingly dismissed it with the Objection Decision being upheld.

9. 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 24.10.2023. The Commissioner has responded to the appeal through its Statement of Facts dated 19.12.2023 and 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

10. 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).

11. This court is being called to determine the same issue that was determined by the Tribunal that is whether the additional assessment by the Commissioner requiring the Appellant to pay reverse VAT was justified. The Appellant's position was that in as much as it was registered for VAT, the said registration was erroneous and an internal administrative oversight since it was offering exempt services. That prior to amendments introduced by the Finance Act, 2019, reverse VAT was only applicable and payable by persons registered for VAT and that the Appellant was only brought under the scope of payment of reverse VAT after 07.11.2019 when the amendments introduced in the *VAT Act* by the Finance Act, 2019 took effect.

12. That the Appellant was registered for VAT prior to the November 2019 and before the amendments introduced by the Finance Act, 2019 is not in dispute. Section 34(1) - (5) of the *VAT Act* provides for voluntary registration of VAT which the Appellant does not dispute was its case. However, it claims that the registration was erroneous as it ceased or was not making any taxable supplies for it to be registered for VAT. Section 36 of the *VAT Act* provides that 'A registered person who ceases to make taxable supplies shall apply in writing to the Commissioner, for the cancellation of the person's registration, within thirty days of the date on which the person ceases to make taxable supplies.' The Appellant claimed that since the registration in 2004, no taxable supplies were made and thus it ought not have been registered. However, there was no application to the Commissioner for cancellation of the registration within 30 days of the cessation of the taxable supplies as required by section 36 of the *VAT Act* above. This means that the Appellant continued to be deemed as a "registered person" as provided by section 2 of the *VAT Act* which defines such a person as one who is registered under section 34. As a registered person, the Appellant was liable for the accounting and payment of the VAT as provided by section 5(3) of the *VAT Act* as follows:

> Tax on a taxable supply shall be a liability of the registered person making the supply and, subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply.

13. Therefore, the Appellant, having been a registered person before the Finance Act, 2019 and the provisions then providing that imported services received by it shall be deemed as a taxable supply, meant that the Appellant was liable to pay and account for the reverse VAT for the said imported services. The Commissioner was therefore not wrong to demand for reverse VAT for the period between 2016 and 2019 when the Appellant was registered and when the law at the time required it as a registered person to account and pay for VAT received on imported services. On the contention by the Appellant that it is the Commissioner that ought to have deregistered it, I will apply the same rationale in *Commissioner of Investigations and Enforcement v Mwangi* [2022] KEHC 3176 (KLR) where I stated that it is only the taxpayer who knows its business position as it is the one making taxable supplies hence the obligation to register or deregister is imposed on it. On the other hand, the Commissioner would only exercise the power to register or deregister a taxpayer upon investigation and audit whereupon it is obliged to inform the taxpayer of the deregistration. In any event, had the Commissioner been satisfied that the Appellant had ceased to make taxable supplies and was not otherwise required to be registered, the Appellant would still have been liable for any act done or omitted to be done while registered as provided by section 36(8) of the *VAT Act*.

14. The Tribunal did not therefore err when it found that the Appellant voluntarily registered for VAT obligations in the period under review and it was thus legally required under sections 2, 5(1) 10(1), 36(3) and 36(8) of the *VAT Act* to account for VAT in the period when it was VAT registered for VAT liabilities under the *VAT Act*.

Disposition

15. The Appellant's appeal has no merit. It is dismissed 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