SBI International Holdings Ad (Kenya) Limited v Kenya Revenue Authority (Customs Tax Appeal E014 of 2021) [2024] KEHC 7236 (KLR) (Commercial and Tax) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7236 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E014 OF 2021

FG MUGAMBI, J

JUNE 14, 2024

BETWEEN

SBI INTERNATIONAL HOLDINGS AD (KENYA) LIMITED ..... APPELLANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

JUDGMENT

1. The appellant is a company incorporated in Switzerland with a branch in Kenya under a certificate of compliance issued under the *Companies Act* Chapter 486 of the Laws of Kenya. Its principal business activity is the rehabilitation of roads in Kenya.

2. The respondent is a government agency established under the *Kenya Revenue Authority Act* and is responsible for the administration of tax laws in Kenya.

3. The respondent carried out an audit of the tax affairs of the appellant for the years 2005-2010 with respect to a contract awarded to the appellant by the government of Kenya to undertake the rehabilitation and upgrading to bitumen standards of the JKIA Machakos Turnoff Embakasi Road in 2006 and Mau-Summit-Kericho-Kisumu Road in 2010.

4. The respondent issued a tax demand upon the appellant dated 18/11/2013 of Kshs.18,860.246/= including penalties and interest on Petroleum Development Levy (PDL), imposed on various imports of bitumen by the appellant. Consequently, the respondent issued agency notices to the appellant's bank accounts vide a letter dated 22/2/2018 and the appellant vide a letter dated 6/3/2018 sought the respondent's approval for partial payment of Kshs.5,047,830.00 being the principal tax that was not in dispute.

5. Further the appellant through a letter dated 11/6/2018 wrote to the respondent requesting a review of the tax demand to Kshs.5,047,830/= being the correct principal amount for the audit period 2005-2010.

6. The appellant being dissatisfied with the respondent's decision to enforce payment of the tax demand through the issuance of an agency notice filed an appeal to the Tax Appeals Tribunal (hereinafter the Tribunal).

7. Upon hearing the appeal before it, the Tribunal, through a judgement delivered on 15/12/2021, struck it out and ordered the respondent to charge interest on the correct amount of Kshs.5,047,830.00 for the period the amount remained unpaid.

8. The appellant appealed against the judgement of the Tribunal through its Further Amended Memorandum of Appeal dated 14/2/2022. The grounds of appeal were as follows:

    i. That the Learned Hon. Chairman and Members of the Tribunal erred in law and in fact by dismissing the Appellant's Tax Appeal in the Tax Tribunal despite the Respondent having admitted that there were glaring errors in the Tax Demand enforced against the Appellant by the Respondent leading to double taxation by duplication the import entries in both the C402 and C493 for the same consignment.

    ii. That the Learned Hon. Chairman and Members of the Tribunal erred in law and in fact by ordering the Respondent to charge interest on the correct amount of Kshs.5,047,832.00/- notwithstanding that the fact the Respondent had collected 18,860,246/ - based on an erroneous tax demand against a principal amount of Kshs.5,047,832/- to the detriment of the Appellant who had made an overpayment of more than 13,000,000/-.

    iii. That the Learned Hon. Chairman and Members of the tribunal erred in law and in fact by striking out the Appellant's Appeal after the Respondent admitted that the Tax Demand was erroneous ab initio and that no revised Tax Demand was given to the Appellant prior to collection of the Tax Demanded which emanated from an erroneous demand contrary to the Appellant's legitimate expectation and fair administrative action required of the public body.

    iv. That the Learned Hon. Chairman and Members of the Tribunal erred in law and in fact by upholding an erroneous tax demand that was enforced against the Appellant and admitted to be erroneous by the Respondent without requiring the Respondent to review the tax demand.

    v. That the Learned Hon. Chairman and Members of the Tribunal erred in law and in fact and ended up misdirecting themselves by not appreciating the fact that since the Respondent had admitted that the Tax Demand was erroneous and that no revised demand was ever issued to the Appellant there was no valid Tax Demand upon which interest could be charged.

    vi. Deleted

    vii. Deleted

    viii. Deleted

    ix. That the Learned Hon. Chairman and Members of Tribunal erred in law and in fact by upholding the tax demand and allowing the respondent to collect taxes when they are statutorily time barred to demand and collect the said taxes by the provisions of section 135(3) of the East African Customs Management Act (EACCMA);

    x. Deleted

xi. That the Learned Hon. Chairman and Members of the Tribunal erred in law and in fact by striking out the Appellants Tax Appeal and subjecting the Appellant to double jeopardy by ordering payment of interest emanating from an erroneous and illegal Tax demand despite clear evidence that the Appellant had been double charged the principal amount together with interest and penalties.

xii. Deleted

xiii. That the Hon. Chairman and Members of the Tribunal erred in law and in fact and ended up misdirecting themselves by making a finding that the Appellant did not lodge an application for review of the Tax Demand under section 229(1) of EACCMA 2004 and ignored the letter dated 16/4/2010 from the Appellant and the attached letter from the Ministry of Roads dated 11/12/2009 and admitted by the Respondent which was the Appellant's application for review of the Tax Demand.

xiv. That the Hon. Chairman and Members of the Tribunal erred in law and in fact and contradicted themselves by making a finding that the Appellant appears not to have responded to the Respondent's letter dated 13th April, 2010 and in the very next line making a finding that the Respondent had acknowledged that the Appellant had responded on 16th April, 2010 and the Tribunal thus ended up making a finding that flies in the face of the evidence before it.

xv. That the Hon. Chairman and Members of the Tribunal erred in law and in fact and ended up misdirecting themselves by making a decision that is contrary to the law in light of the evidence that the Respondent's decision on the Appellant's letter dated 16th April, 2010 was communicated to the Appellant outside the mandatory statutory timeline specified in section 229[4] of EACCMA.

xvi. That the Hon Chairman and Members of the Tribunal erred in law and in fact and ended up making a finding that flies in the face of the statutory provisions and contradicts section 229 of the East African Community Customs Management Act 2004 (as revised) on which the tribunal purports to have placed reliance in making its findings, more so subsection (5) thereof.

xvii. Deleted

xviii. Deleted.

9. The appellant prayed to have its appeal allowed and to have the Tribunal's judgement set aside and for an order to direct the respondent to refund the excess money from the amount collected of Kshs.18,860,246/- to the appellant together with interest.

10. The respondent opposed the appeal through its statement of facts dated 4/2/2022. It contended that the Tribunal correctly observed that the appellant admitted in its submissions and witness statement that it was not until 5/3/2018 after the respondent had issued agency notices to the appellant's bank that it scrutinized the tax demand dated 24/12/2010 and objected to the decision by requesting for a review of the tax decision.

11. That the Tribunal correctly applied section 229(1) of EACCMA and found that the appellant's application for review offended the statutory period of 30 days within which a taxpayer ought to apply for review of a tax demand and as such there was no valid application for review of the demand and consequently no appealable decision under the circumstances.

12. The respondent stated that the Tribunal correctly held that since there was no valid application for review of the demand or an appealable decision, the other issues raised in the appeal had been rendered moot.

13. Further the respondent contended that the grounds of appeal in the Amended Memorandum of Appeal dated 20/1/2022 grossly misrepresent the judgement of the Tribunal for various reasons one of them being that the Tribunal did not make a finding that the tax demand was erroneous ab initio.

14. The respondent prayed for an order to affirm the judgment of the Tribunal and dismiss the present application.

Analysis and determination

15. Following directions given by this court the appeal was canvassed by way of written submissions. The appellant's submissions are dated 12/2/2024 while the respondents are dated 8/2/2024. The court has scrutinised the Record of Appeal and the pleadings filed in opposition as well as the submissions filed by the parties herein. The main issue that arises for determination in my view is whether there is before this court an appealable decision and whether the Tribunal erred in its judgment.

Whether there is an appealable decision:

16. Under Kenyan Tax laws, specifically the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*, an "appealable decision" is defined as a decision made by the Commissioner of the Kenya Revenue Authority (KRA) that a taxpayer can appeal against. This includes decisions regarding tax assessments, tax refunds, and penalties, among others.

17. The issue of timelines is integral to the jurisdiction of the Tribunal in entertaining an appeal from the Commissioner. Conversely, this Court's jurisdiction to entertain an appeal is contingent upon there being an appeal emanating from the Tribunal. In the absence of such an appeal, this Court would lack jurisdiction, thereby breaching the doctrine of exhaustion.

18. Timelines are crucial in tax legislation as they ensure clarity, efficiency, and fairness in the administration of tax laws. The East African Community Customs Management Act (EACCMA) specifies clear timelines for appeals. Section 229(1) of the Act provides as follows:

> "(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission. (emphasis)
>
> (2) ...
>
> (3) Where the Commissioner is satisfied that, owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).
>
> (4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application,

communicate his or her decision in writing to the person lodging the application stating reasons for the decision."

19. Section 230(1) of EACCMA further states:

> " A person dissatisfied with the decision of the commissioner under section 229 may appeal to a tax appeals tribunal established in accordance with section 231."

20. The record indicates that the respondent carried out an audit of the appellant's affairs and consequently sent its first demand notice dated 24/2/2010 to the appellant. The demand is found at page 145 of the Record of Appeal. In the demand notice, the respondent stated that the appellant had not paid petroleum development levy (PDL) on bitumen and as a result, extra revenue due to the Commissioner of Customs Services Department was found to be Kshs.9,650,123.

21. The appellant did not respond to the said demand nor pay the demanded taxes which led the respondent to issue another demand notice on 13/4/2010. Further demand notices dated 11/10/2011 and 18/11/2013 were issued.

22. Eventually, vide a letter dated 22/2/2018, the respondent issued an agency notice to the appellant's bank, Commercial Bank of Africa, for the amount demanded as outstanding taxes being Kshs.18,860,246. The agency notice is found at page 156 of the Record of Appeal.

23. Vide letters dated 5/3/2018, 6/3/2018 and 11/6/2018, the appellant requested for a review on principal tax, for approval to pay the partial payment of Kshs.5,047,830 and the removal of the agency notices.

24. The provisions of the EACCMA cited above indicate that a taxpayer affected by the decision of the Commissioner may apply for its review within 30 days of the date on which the decision was made. Once the Commissioner considers the review application, he/she will communicate his/her final decision to the taxpayer. If the taxpayer is dissatisfied, he/she may appeal against it to the Tribunal.

25. What is clear from the evidence that was presented before the Tribunal is that the appellant did not seek to have the tax demands of 24/2/2010 and 13/4/2010 reviewed in accordance with section 229(1) of the EACCMA. In fact, it appears that the appellant was only jolted into action once agency notices were issued in 2018 after which it promptly applied for the review of the tax demand issued in 2010. A period of 8 years had lapsed and no plausible reason for the inordinate delay was given.

26. At paragraph 81 of its judgment the Tribunal notes that:

> " In this case, the Appellant appears to have applied for a review of the demand 8 years later. No reason for such an unwarranted delay has been given. Accordingly, the Tribunal is of the view that the Appellant failed to lodge a valid application for review of the tax demand. Since the Appellant did not lodge a valid application for review of the tax demand within the statutory period, it follows then that the demand crystalized. Thus, there is no valid application for review of the demand and consequently there is no appealable decision under the circumstances."

27. I align myself with these observations and concur with the finding that there was no decision appealable before the Tribunal. I further note that having established that there was no valid application for review of the tax demand and/or an appealable decision, the issue as to whether the respondent erred in charging late payment interest for the period the tax remained unpaid was rendered moot and not determined by the Tribunal.

28. This being the case, and based on my earlier observation on the provisions of the *Tax Procedures Act* particularly section 53 thereof, and the doctrine of exhaustion of remedies, it follows that the appeal before this court cannot be sustained on these issues.

Disposition

29. The appeal before this court is dismissed with no orders to costs. The judgment of the Tribunal delivered on 15th December 2021 is hereby upheld.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF JUNE 2024.

F. MUGAMBI

JUDGE

HCCOMMCTA E014 OF 2021 JUDGMENT Page 21