



Commissioner of Domestic Taxes v Block International Limited (Income Tax Appeal E103 of 2023) [2024] KEHC 8889 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
INCOME TAX APPEAL E103 OF 2023**

MN MWANGI, J

JULY 11, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

BLOCK INTERNATIONAL LIMITED RESPONDENT

JUDGMENT

1. The appellant's case is that based on a data set of imports which established that the respondent had made imports in the years 2017 and 2018 but the sales declared by the respondent did not match up to the imports, it raised additional assessments for the respondent after it failed to respond to its inquiry on the nature of the imports, and whether it had any records to support the said imports. The appellant then issued the respondent with a demand letter dated 13th August, 2020 notifying it of the taxes due, and later with an additional VAT assessment for Kshs.18,273,428.00, for imports covering the period of July 2016. The respondent was also issued with an additional corporate tax assessment for Kshs. 2,999,426.00 for the period of June 2015 to December 2015, both dated 8th September, 2020.
2. Thereafter, the respondent was issued with a demand letter dated 21st April, 2021 by the appellant, with reference to the tax assessments issued. The respondent objected to the said assessments on iTax and was issued with objection acknowledgment receipts on 22nd April, 2021. The appellant issued its objection decision on 22nd June, 2021 where it found that the respondent did not validly object to the additional assessments raised as imports, as no sales on the same were declared. The appellant rejected the respondent's objections and confirmed its additional assessments for VAT at Kshs.11,279,893.92 and Income Tax at Kshs.1,922,709.30 for the period ending December 2015.
3. Dissatisfied by the appellant's objection decision, the respondent lodged an appeal with the Tax Appeals Tribunal (hereinafter referred to as "the Tribunal") against the said decision vide a Notice of Appeal dated 22nd July, 2021, and a statement of facts filed on 3rd August, 2021. After consideration of the parties' pleadings, the documents attached to the appeal and the submissions by the parties, the



- Tribunal found that the imports by the respondent were purchased using Directors' funds, and that the appellant did not discharge its burden of proof to the required standard. Ultimately, the appeal before the Tribunal was allowed and the appellant's objection decision dated 22nd June, 2021 was set aside.
4. Aggrieved by the Tribunal's decision, the appellant lodged the instant appeal vide a Memorandum of Appeal dated 14th July, 2023 raising the following grounds of appeal –
 - i. That the Tribunal erred in fact and law by reversing the burden of proof in tax matters contrary to Section 56 of the [Tax Procedures Act](#) and Section 30 of the [Tax Appeals Tribunal Act](#);
 - ii. That the Tribunal erred in fact and law by finding that the appellant had met its burden of proof;
 - iii. That the Tribunal erred in law and fact by not taking a holistic view of the matter from point of importation of the goods (sic) and what happened thereafter;
 - iv. That the Tribunal erred in law and fact by failing to take note of the fact that the respondent made reference to information provided to it by the appellant;
 - v. That the Tribunal erred in law and fact by failing to take note of Section 59 of the [Tax Procedures Act](#) that states that the onus is on the appellant to produce records for the purposes of obtaining full information in respect of the appellant's tax liability;
 - vi. That the Tribunal erred in fact and law by finding that the respondent was the party required to prove the particulars in the appellant's income tax returns;
 - vii. That the Tribunal erred in law and fact by finding that the respondent was required to provide documentation that is not in possession of the respondent;
 - viii. That the Tribunal erred in law and fact by finding that the respondent should have produced documentation and information that is only in the possession of the appellant; and
 - ix. That the Tribunal erred in law and fact in ignoring all material facts placed before it and based its judgment on a biased approach without due regard to the balance of the scales of justice.
 5. The appellant's prayer is for this Court to allow the appeal with costs, and set aside the judgment of the Tribunal made on 19th April, 2023 and the consequential orders thereto.
 6. The appeal herein was canvassed by way of written submissions. The appellant's submissions were filed on 25th October, 2023 by Andambi Chabala, an Advocate of the High Court of Kenya and learned Counsel for the appellant, whereas the respondent's submissions were filed by the law firm of Lewis & Co Advocates on 27th October, 2023.
 7. Mr. Chabala, learned Counsel for the appellant referred to the provisions of Sections 56 & 59(1) of the [Tax Procedures Act](#) and Section 30 of the [Tax Appeals Tribunal Act](#), and the case of [Commissioner of Domestic Taxes v Structural International Kenya Limited \(Income Tax Appeal E089 of 2020\)](#) [2021] eKLR and submitted that the burden of proof in tax disputes more often than not lies with the Taxpayer to prove that an assessment is excessive or a tax decision is incorrect. He further submitted that in arriving at its decision, the appellant relied on documentation supplied by the respondent which included purchase invoices, delivery notes, bank transfer remittance advise, supplier written confirmation, and bank statements. He asserted that it is only after perusal of the said documents that the appellant noted some inconsistencies which informed its decision to raise additional assessments.
 8. It was stated by Counsel that the appellant in its objection found that as per the imports data received, the respondent had imported machinery worth Kshs. 47,335,465.00 and Kshs.19,685,983.00 for the



year 2017 and 2018 respectively. It was claimed that the respondent had however declared liabilities under payables/creditors at Kshs. 11,380,348.10, Kshs.10,633,253.00, Kshs.9,910,127.00, and Kshs. 4,730,000.00 for the years 2016, 2017, 2018 and 2019 respectively. The appellant therefore arrived at the conclusion that the plants and machinery imported were never recognized in the balance sheet, and there were no loans to support purchase of the said equipment. The appellant treated the funds used in the purchase of the imported machinery as undeclared sales and the same was brought to charge for income tax and VAT.

9. Mr. Chabala further stated that it was also noted that the Director had declared less income as per his income tax individual returns filed on the iTax portal vis a vis his deposits as per his availed bank statements, and that was also brought to charge. Counsel contended that the respondent was requested to reconcile the aforesaid accounts but it failed to do so, thus it did not discharge its burden of proof. To this end, Counsel relied on the decisions in *Saniken (K) Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E049 of 2021)* [2023] KEHC 23536 (KLR) and *Branso Distributors Ltd v Commissioner of Investigations and Enforcement (Income Tax Appeal E041 of 2021)* [2023] KEHC 23224 (KLR).
10. Mr. Gicheha, learned Counsel for the respondent relied on the provisions of Section 30 of the *Tax Appeals Tribunal Act* and Section 56 of the *Tax Procedures Act* and submitted that they impose the burden of proof on the Taxpayer to prove that a tax decision is wrong. He further submitted that the respondent's position is that the appellant's additional tax demand was based on the assumption that the tractors and equipment imported were for resale which is not the case, as the said tractors and equipment were purchased by Director's savings and to date, they exist as company assets. Counsel referred to the provisions of Section 107 of the *Evidence Act* and paragraph 34 of the Tribunal's judgment and argued that since the assumption that the imported tractors and equipment were sold came from the appellant, the appellant bore the burden of proving that the said machinery has since been sold to third parties.
11. Counsel asserted that there were no sales in the years 2017 and 2018, and that the imported tractors formed part of the company's capital as they are registered in the name of the respondent's Director. Thus, the appellant's contention that the respondent's imports in the said years did not meet its declared sales is misguided. Mr. Gicheha relied on the case of Kenya Revenue Authority v Maluki Kitili Mwendwa [2021] eKLR to buttress his submissions. He also relied on the case of Commissioner of Domestic Services v Galaxy Tools Limited [2021] eKLR. Counsel stated that in full compliance with the provisions of Section 59 of the *Tax Procedures Act*, the respondent provided all the documents that were asked for by the appellant, some of which were disregarded and/or never reviewed by the appellant.

ANALYSIS AND DETERMINATION

12. Under the provisions of Section 56(2) of the *Tax Procedures Act*, an appeal to the High Court from the decision of the Tax Appeals Tribunal or to the Court of Appeal is on a question of law only. The Court of Appeal in the case of John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR summarized what amounts to "matters of law" as hereunder -

"The interpretation or construction of *the Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of



witnesses or which witnesses are more believable than others; by law that is the province of the trial court.”

13. This Court is therefore not permitted to substitute the Tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts, unless the Tribunal’s decision cannot be supported by any evidence, or if the Tribunal misapplied the law.
14. On consideration of the Memorandum of Appeal, the Record of Appeal and statement of facts filed by the respondent, as well as the written submissions filed by Counsel for the parties, the issue that arises for determination is whether the appellant’s additional assessments issued to the respondent were justified.

Whether the appellant’s additional assessments issued to the respondent were justified.

15. The appellant’s position is that from the data it received from its customs office, the appellant imported machinery worth Kshs.47,335,465.00 and Kshs. 19,685,983/= in the year 2017 and 2018, respectively, but only declared Kshs. 10,300,000/= for the period 2016 to 2018, and Kshs.1,020,000/= for the period 2019 in its Income Tax Returns. The appellant stated that it also noted under the liabilities’ section, the respondent declared items of Kshs.11,380,348.10, Kshs. 10,633,253.00, Kshs.9,910,127.00, and Kshs. 4,730,000/= for the years 2016, 2017, 2018 and 2019, respectively. The appellant contended that the said amounts revealed that the imported machinery was neither accounted for in the balance sheet nor were there loans supporting the purchase of the said equipment.
16. The appellant stated that it treated the funds used in the purchase of the said machinery as undeclared sales and brought them to charge for Income Tax and VAT. The respondent on the other hand contended that the appellant’s assumption that the imported machinery was for resale was wrong, as the said machinery was imported for the respondent’s use, and it now forms part of the respondent’s assets. The appellant stated that the funds used to purchase the said equipment was from the Director’s savings and disposal of assets.
17. The Tribunal considered this issue alongside the documents that had been provided to the appellant during the objection stage and to the Tribunal which included, the Import Declaration Form, Invoices, Bills of Lading, Export Certificate from Country of Origin, Duty Payment Receipts, National Transport and Safety Authority Vehicle Inspection invoices and payments, Shipping Line payments, Delivery orders, Certificates of Conformity, import entries among others, and stated at paragraph 72 of its judgment that it had established that the importer on record was the respondent, and the funds transfers were done by the respondent’s Directors. This means that the respondent’s imports were paid for by its Director’s funds. In the end, the Tribunal found that from the documents provided, the goods in question belonged to the respondent and shifted the burden of proof to the appellant.
18. In the instant appeal, the appellant stated that the Tribunal erred in shifting the burden of proof from the respondent to the appellant since in tax disputes, the Taxpayer who is the respondent in this case, bears the burden of proving that a tax decision is wrong. To his end, I agree with the appellant that pursuant to the provisions of Section 30 of the [Tax Appeals Tribunal Act](#) and Section 56(1) of the [Tax Procedures Act](#), the respondent bears the burden of proving that a tax assessment and/or decision is incorrect. From the record, it is evident that the appellant does not dispute the fact that the respondent provided it with the documents referred to by the Tribunal in its judgment. Instead, it states that it is only after perusal of the said documents that it noted some inconsistencies which informed its decision to raise additional assessments.



19. As correctly submitted by the appellant, Section 59 of the *Tax Procedures Act* provides for the requirement that a Taxpayer is required to maintain records and that the Commissioner has the power to request for the production of such records. Section 59(1) states that -

- “(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.”

20. Further, Section 43 of the VAT Act, 2013 states the following=

“43. Keeping of records

1. A person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein.
2. The records to be kept under subsection (1) shall include-
 - a. copies of all tax invoices and simplified tax invoices issued in serial number order;
 - b. copies of all credit and debit notes issued, in chronological order;
 - c. purchase invoices, copies of customs entries, receipts for the payment of customs duty or tax, and credit and debit notes received, to be filed chronologically either by date of receipt or under each supplier's name;
 - d. details of the amounts of tax charged on each supply made or received and in relation to all services to which section 10 applies, sufficient written evidence to identify the supplier and the recipient, and to show the nature and quantity of services supplied, the time of supply, the place of supply, the consideration for the supply, and the



- extent to which the supply has been used by the recipient for a particular purpose;
- e. tax account showing the totals of the output tax and the input tax in each period and a net total of the tax payable or the excess tax carried forward, as the case may be, at the end of each period;
 - f. copies of stock records kept periodically as the Commissioner may determine;
 - g. details of each supply of goods and services from the business premises, unless such details are available at the time of supply on invoices issued at, or before, that time; and
 - h. such other accounts or records as may be specified, in writing, by the Commissioner.
3. Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorised officer for inspection and shall give the officer every facility necessary to inspect the records.
4. For the purposes of this section, the Commissioner may, in accordance with the regulations, require any person to use an electronic tax register, of such type and description as may be prescribed, for the purpose of accessing information regarding any matter or transaction which may affect the tax liability of the person.
5. A person who contravenes any of the provisions of this section commits an offence.”

21. The burden of proof in tax matters is not stationary but is like a pendulum swinging between the Taxpayer and Taxman at different points. The Kenyan tax system places the evidential burden of proof on the Taxpayer. In that regard, in *Republic v Kenya Revenue Authority; Proto Energy Limited (Ex parte)* (*Judicial Review Application E023 of 2021*) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment), the Court stated thus-

“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.”

22. In this case, the respondent provided the appellant with all the documentation in its custody in relation to importation of the machinery in question, documentation which the appellant does not dispute receipt of. It is worth noting that other than allege that it noted some inconsistencies upon perusal of the documents supplied by the respondent, the appellant does not challenge and/or question the authenticity of the said documents. It is also worth noting that the appellant does not disclose the nature of inconsistencies noted on the said documents to enable this Court to consider the same.

23. In view of the foregoing, this Court finds that upon the respondent producing to the appellant the documents referred to by the Tribunal at paragraph 72 of its judgment, the respondent discharged its burden of proof on a prima facie basis, thus the burden shifted to the appellant to disqualify the said documents on grounds inter alia of not being authentic and/or that they had been tampered with. By failing to do that, the appellant did not discharge its burden of proof as was correctly observed by the Tribunal. The appellant’s insistence that the imports made did not correspond with the declared sales even after the respondent had provided supporting documentation to show that the imported machinery was not sold hence there were no sales to be declared, placed the respondent’s burden of proof so high that it became unachievable, thus contrary to the provisions of Article 47 of *the Constitution* of Kenya, 2010. In the case of *Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya* [2021] eKLR, the Court in dismissing the Kenya Revenue Authority’s appeal held that -

“As I will be stating shortly, a tax payer can only produce documents in his custody and relating to transactions undertaken by him/her.”

24. Further, in *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 held that –

“There is a concern that the Commissioner may request for documents ad nauseam. I hold that the Commissioner has a duty to act reasonably and where it shown that the request is unreasonable in the circumstance, the Tribunal may reject such a request. The duty to act reasonably is anchored in the right to fair administrative action in Article 47 of *the Constitution*. The Commissioner is not a conveyor belt for information and documents, it has a right to satisfy itself the documents presented to it by the taxpayer are capable of discharging the burden imposed on it. If the documents are questioned on bona fide and reasonable grounds, then the burden shifts back to the Respondent, as the taxpayer, to disprove the Commissioner and prove that the said documents are genuine and that actual goods were purchased from the said listed suppliers.”

25. For the reasons given here before, it is this Court’s finding that the Tribunal did not err in its interpretation and application of the provisions of Sections 56 & 59 of the *Tax Procedures Act*, and Section 30 of the *Tax Appeals Tribunal Act*.

26. Accordingly, this Court finds that the instant appeal is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI



JUDGE

In the presence of:

Mr. Wainaina h/b for Mr. Chabala for the appellant

Mr. Njeru h/b for Mr. Gicheha for the respondent

Ms. B. Wokabi – Court Assistant.

