Galot v Kenya Revenue Authority (Commercial Appeal E006 of 2011) [2024] KEHC 12486 (KLR) (Commercial and Tax) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12486 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E006 OF 2011

A MABEYA, J

OCTOBER 18, 2024

BETWEEN

MOHAN GALOT .... APPELLANT

AND

KENYA REVENUE AUTHORITY .... RESPONDENT

JUDGMENT

1. Sometimes in 2007, the appellant purchased motor vehicle registration number KBB 244K, Range Rover from the United Kingdom. Its tax was assessed at Kshs. 5,365,371/=. The appellant lodged a claim for refund of Kshs.1,782,386/= on 12/3/2008. The same was declined and he appealed against the respondent's assessment before the Tribunal. The tax amount was confirmed by the Customs & Excise Appeals Tribunal.

2. The Tribunal found that tax was rightly determined using the transaction value method under the 4th Schedule of the *East Africa Custom & Management Act* ("EACMA") and that the value could be deduced from the invoice and bills of lading on record. That there was no evidence that the vehicle was a used vehicle and that the appellant had bought the same as an export to be used in Kenya although he had used it in the United Kingdom for 3 months.

3. Aggrieved by those findings, the appellant preferred this appeal on 10 grounds that can be summarized as follows: -

   a. That the Tribunal erred in finding that the motor vehicle was a new vehicle purchased for export;

   b. That the Tribunal erred in finding that the tax was charged as per the transaction process when there was no evidence of sale;

c. That the Tribunal ailed to find that there was no transaction value since the buyer and the seller was the same person;

d. That the Tribunal relied on the transaction price yet the motor vehicle had been used prior to its importation;

e. That the selective method and the current retail price of the vehicle ought to have applied; and

f. That the Tribunal relied on unreliable evidence.

4. This Court is enjoined tore-evaluate and reconsider the evidence afresh and arrive at its own independent conclusions and deductions. See *Selle & Anor v . Associated Motor Boat Company Ltd* [1968] EA 424.

5. The appellant's case is that the motor vehicle was purchased in the United Kingdom under the Purchase Export Schedule Scheme where a non-resident was allowed to purchase and use a vehicle without VAT charges. That the vehicle was purchased on 30/10/2007 and he took possession thereof on 12/11/2007 and used it for 3 months. That he later travelled back to Kenya on 1/1/2008 and the vehicle arrived on 6/3/2008 and was charged custom and excise duty of Kshs. 5,365,371/=.

6. He contended that the Tribunal erred in using the transaction value method in assessing the tax. That there was no evidence of sale between the appellant and the registered owner in the United Kingdom and further evidence of consideration was not available. That in the absence of proof of the transaction price, other sequential methods of valuation applied as per the 4th Schedule of the EACCMA interpretation Notes part 11.

7. It was further contended that the respondent admitted that the vehicle had been used. That the vehicle was bought under the Personal Export Scheme in UK. The Scheme provides for use of vehicles in the United Kingdom for a period of 12months before export and are also VAT Exempt. It was urged that the subject vehicle could not be equated to a new vehicle and that depreciation and the custom value was to be used.

8. That in a case where the custom value of a used vehicle is not known, the deductive method under paragraph *6* is applied using the current retail price. That in this case, 5% depreciation ought to apply as per the customs routine order. That the retail price was Kshs. 8,3000,000/= and that therefore, the appellant had overpaid Kshs 2,601,084/=.

9. That the actual value of goods should be at the point they leave the country of origin. In this case, when the vehicle left the United Kingdom on 31/12/2007, the said time of export value would also capture the 3 months' period he had used it.

10. That had the appellant sold the vehicle to another seller in the UK or in Kenya, he would not have sold it at the purchase price since mileage and used value would be considered. The respondent had to appreciate the distinct circumstances and apply different methods in calculating customs. That the vehicle was not exported immediately after purchase and that there was no evidence at the point of export.

11. The respondent filed statement of facts and submissions in this appeal. It reiterated that customs clearing agents used the factory invoice to declare the transaction value. That the computation based on the documents was Kshs. 1,759,138/-. This comprised of the import duty, excise duty, VAT and IDF fees.

12. That the value of imported vehicle is as per the Article VII of the *World Trade Organization Agreement* and the *General Agreement on Trade and Tariff on Customs Valuation* which had been ratified by Kenya. That these provided that the customs value of imported goods both used or new shall be the transaction value price paid or payable for goods when sold for export and adjusted according to paragraph 9 of the schedule and condition 1 of Article 1.

13. The agreement also provides for use of sequential methods where it is not possible to determine the customs value. Other methods apply where the transaction value cannot be determined since there is absence of sale or existence of restrictions and considerations listed in paragraph 2(1) of Article 1. The respondent contended that the sale was evidenced by the suppliers' invoice No. 2239967 dated 30/10/2007. That there was no restriction that would preclude the use of the transaction method.

14. It was submitted that paragraph *8* applies where it is not possible to value used imported vehicles often imported through 3rd parties. In such case, depreciation is provided for. That the appellant had provided evidence of sale. That the only issue for determination was whether the duty paid was properly assessed.

15. The respondent relied on the 4th Schedule of EACCMA which emphasized on the transaction value and submitted that its witness had proved through documents that there was a sale transaction. That the appellant had applied for and purchased the vehicle for export as shown in exhibits MG6 and MG7 and using it before export to Kenya did not change the transaction value. That the evidence comprised of the bill of lading and the invoice produced as MG8 and MG4 and this was credible for the Tribunal to arrive at its decision. That the current retail price is used where the sale is suspicious as per the provisions of section 122 (4) EACCMA.

16. The Court has considered the record and the submissions. Section 56(2) of the *Tax Procedures Act* provides that appeals from the Tax Tribunal shall be limited to points of law. In this regard, the Court is minded from the onset that findings of fact remain beyond the Court's purview, unless it can be demonstrated that such findings are not backed by any evidence or that the findings were so perverse that a reasonable Tribunal could not arrive at such conclusions.

17. What constitutes a point of law has been considered in various authorities. In *John Munuve Mati v . Returning Officer Mwingi North Constituency & 2 Others* [2018] eKLR, the Court of Appeal held that: -

> " Appeals to this Court in election petitions are confined to matters of law only, meaning 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." (See *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR)."

18. The grounds set out above can be summarized into 3 issues, viz, whether it was proper to apply the transaction method at the first instance to the exclusion of other methods, whether there was evidence of sale and the transaction price and, whether an invoice can be used to determine the purchase price.

19. The undisputed facts are that, the appellant did purchase the vehicle in the UK and used it for some time. That the purchase was from Land Rover Exports Ltd and the appellant took possession thereof as per the terms of agreement between the parties.

20. Section 122 of the EACCMA provides: -

> "Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value".

21. The 4th schedule of EACCMA, 2004 provides six methods of valuation customs values of imported goods as follows: -

 i. The Transaction Value method,

 ii. The Transaction Value of Identical goods method,

 iii. The Transaction Value of Similar goods method,

 iv. The Deductive Value method,

 v. The Computed Value method, and

 vi. The Fall-back Value method.

22. These methods are applied in a hierarchical and/or sequential order such that the first method must be attempted before moving on to the next. See the case of *Wananchi Group (K) Limited v Commissioner of Customs & Border Contro*l: [2024] KEHC 2037 (KLR). In that case, the court held that: -

> "The 4th schedule of EACCMA, 2004 provides six methods of valuation in determining customs values of imported goods. These methods are applied in a hierarchical order, where the first method must be attempted before moving on to the next, if applicable.'

23. Further, that Schedule is complete with its own interpretative notes listed in Part II of the Fourth Schedule (Interpretive Notes). These are as follows: -

 i. Method 1 must be attempted first,

 ii. Method 2 can only be considered if the customs value cannot be determined under the first method,

 iii. Method 3 to 6 follow the same procedure as Method 2,

 iv. Method 6 can only be applied where all the previous methods are not applicable, and

 v. The only exception is that the sequence of methods 4 and 5 may be reversed.

 See the case of *Testimony Motors Limited v the Commissioner of Customs (Uganda Revenue Authority)* 2012 HC Civil Suit No. 212.

24. Further, Paragraph 2(1) of the Fourth Schedule to the EACCMA provides that the customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State.

25. A reading of section 122 (1) of EACCMA shows that it is couched in mandatory terms. The Fourth Schedule gives several methods of valuation under Part I thereof. On the other hand, Part II provides for

the sequential application of the valuation methods. In Paragraph 2 of Part II of the Fourth Schedule, it is provided that where the customs value cannot be determined under the provisions of paragraph *2*; it is to be determined by proceeding sequentially to the succeeding paragraphs to the first subparagraph under which the customs value can be determined except as provided for in paragraph *5*.

26. In this regard, I find that the primary method of valuation of imported goods under Part I of the Fourth Schedule is found in paragraph *2* which prescribes the transaction value method of valuation. The transaction value method is based on the price actually paid or payable for the goods when sold for export to a Partner State and as adjusted under the provisions of paragraph *9*. In other words, it is the price paid for the goods by the buyer or importer which forms the basis for assessing the customs duty payable on the goods.

27. The appellant bears the legal burden of proof and must demonstrate that the assessment was wrong. In *Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya*, [2021] eKLR, it was held that shifting of the burden of proof in tax disputes flows from the presumption of correctness, which attaches to the Commissioner's assessments and that the commissioner's determinations of tax deficiencies are presumptively correct. This is what section 56 (1) of the *TAX procedures Act* provides.

28. The invoice and the bill of lading were part of the documents presented to the customs officers at the point of entry. The appellant had a duty to provide all relevant documentation to assist in the valuation of the vehicle. This included the sale agreement and any evidence of depreciation that he sought to rely on in his favour.

29. Paragraph 2(1) of the Fourth Schedule to the EACCMA provides that: -

> " The customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State…".

30. An invoice sets out the cost of goods and also acts as a claim for payment following a successful sale of goods. This is sufficient evidence of the 'price payable'. In this regard, I find that the Tribunal's findings were in accordance with Paragraph 2(1) of the Fourth Schedule and was therefore not erroneous.

31. In the upshot, I find that the respondent's decision was legal and in accordance with the 4th Schedule of EACCMA, 2004 as read with section 122 of the *Act*.

32. Accordingly, I find that the appeal is without merit and dismiss the same with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE