Mwangi v Commissioner of Domestic Taxes (Income Tax Appeal E071 of 2021) [2023] KEHC 17366 (KLR) (Commercial and Tax) (12 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17366 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E071 OF 2021

A MABEYA, J

MAY 12, 2023

BETWEEN

ISMAEL GAITE MWANGI ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

1. The respondent reviewed returns of the appellant and discovered that there were some discrepancies with regard to the sales per VAT returns for 2016 and 2017. He sought clarification vide a letter dated December 3, 2023. He disallowed the inputs claimed by the appellant and raised an additional assessment of Kshs 75,094,232/- which was later adjusted to Kshs 58,470.032/-.

2. The appellant objected to the assessment by a letter dated January 14, 2019 to which an objection decision was made on February 28, 2019. Aggrieved by the objection decision, the appellant lodged an appeal at the Tax Appeals Tribunal ("the Tribunal") which dismissed the same vide its judgment of May 13, 2021.

3. Dissatisfied with that decision, the appellant filed this appeal setting out 14 grounds -which can be summarized into three as follows: -

    a. That the Tribunal erred in law in not appreciating the evidence and practice of the small medium enterprises.

    b. The Tribunal erred in law and fact in failing to consider the provisions of section 31 of the *Tax Procedures Act, 2015*.

    c. The Tribunal erred in law and fact in upholding the assessments without a lawful basis.

4. In response to the appeal, the respondent filed a statement of facts dated June 30, 2021. It was contended that the respondent's power to amend the tax returns filed by the appellant was derived from section 31 of the *Tax Procedures Act*. It was further stated that the appellant's returns were erroneous and therefore not payable in that state. That an attempt to settle the dispute via alternative dispute resolution was not successful. That the appellant's failure to provide the supporting documents gave the respondent the power to amend returns and exercise his best judgment based on the information that was available. It was the respondent's contention that the returns filed by the appellant were not in the prescribed form and any return filed manually did not constitute a return.

5. The appeal was canvassed by way of written submissions which I have considered.

6. The appellant submitted that he was not accorded a fair hearing at the Tribunal as the time allocated to him to present his case was limited. Counsel submitted that the limitation imposed on the appellant were a violation of his rights. It was the appellants case that, he was a small trader and was entitled to be protected by the law with relation to small traders. That section 23(5) of the *Tax Procedures Act* enabled the protection of small businesses. It was submitted that electronic tax system was not mandatory to all category of tax payers as the appellant had indeed maintained the manual records and filed the claimed input VAT.

7. The respondent did not file any submissions.

8. I have considered the record as well as the submissions. On the first ground of appeal as summarized by the court, the appellant's contention was that the Tribunal erred in failing to appreciate the evidence and practice of the small medium enterprises. According to the appellant, he was a small trader who had 12 casual employees and a capital of below 10 million. It was contended that the respondent had failed to promulgate regulations for simplified record keeping for small traders.

9. In support of his case, the appellant submitted that he had maintained manual records with respect to the taxable supplies and that section 75 of the *Tax Procedures Act* which authorized the Commissioner to advocate for the use of Information technology ought to be read together with section 23(5) of the *Tax Procedures Act* ("the TPA").

10. Section 23(5) of the *TPA* provides that: -

> " ...
>
> 5) Despite anything in any tax law, the Regulations may provide for a simplified system of record-keeping for small businesses.

11. On the other hand, section 75 of the *TPA* provides: -

> " 1) The Commissioner may, authorize the following to be carried out through the use of information technology, including computer systems, mobile electronic devices, electronic and mobile communication systems—
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> a) an application for registration under a tax law;
>
> b) the submitting or lodging of a tax return or other document under a tax law;
>
> c) the payment or repayment of a tax under a tax law; or

d) the doing of any other act or thing that is required to be done under a tax law.

2) A certificate of registration, service of a notice, issuing of any document, or other act or thing that is required to be issued, served, made, or done by the Commissioner under a tax law, may be issued, served, made, or done through a computer system, mobile electronic device or other form of electronic or mobile communication."

12. Section 23 of the *TPA* requires the Commissioner to provide a simplified system of record keeping for small businesses. On the other hand, section 75 requires the Commissioner to direct the tax procedures to be carried out through use of information technology.

13. In this case, the Commissioner had directed that the returns be filed using the ITAX platform but the appellant opted to use the manual filing of returns against the Commissioner's directions. The appellant has not provided sufficient reasons as to why the same was done other than he was a small trader and that the electronic method of filing as complex.

14. I have considered the legal provisions and find that there is no evidence before court to show that the use of information technology in filing returns is detrimental to small traders. There is no evidence to show that the appellant tried to engage the respondent on the issue whether he should be allowed to file tax returns manually. The law gives the respondent the discretion to give directions in the manner in which returns are filed. The appellant has not shown that section 23(5) of the *TPA* means that manual filing of returns is simple.

15. With respect to the second and third grounds of appeal, the appellant's contention was that the Tribunal erred in law in failing to consider the provisions of section 31 of the TPA and upholding the assessment.

16. Section 31 aforesaid provides: -

1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that—

a) in the case of a deficit carried forward under the *Income Tax Act* (Cap. 470), the taxpayer is assessed in respect of the correct amount of the deficit carried forward for the reporting period;

b) in the case of an excess amount of input tax under the *Value Added Tax Act*, 2013 (No. 35 of 2013), the taxpayer is assessed in respect of the correct amount of the excess input tax carried forward for the reporting period; or

c) in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates."

17. The Tribunal appreciated the fact that by virtue of section 31(1) of the TPA, the respondent had the power to amend any assessment by the tax payer. In his reply, the respondent averred that the returns filed by the appellant did not tally with the information that had been provided. According to the respondent, the returns as filed were erroneous and improperly claimed.

18. Section 56 of the TPA and section 30 of the *Tax Appeals Tribunal Act* places the burden of proof upon the tax payer to prove that a decision is wrong.

19. In *Commissioner of Domestic Services v Galaxy Tools Limited* [2021] eKLR, it was held that: -

> "Further, the tax Laws reverse the well-known principle of evidence of "he who alleges must proof". In this regard, the tax authorities would assess what it considers to be the tax due from a taxpayer and the tax laws would burden the tax payer to disprove that the assessment or tax demanded is wrong or incorrect. This is borne by the fact that the assessment and demand is ordinarily made way after the tax payer has assessed himself and made a declaration of what according to him is the tax payable and has already paid such tax. The burden is therefore shifted to the tax payer because, the tax authority has to rummage through the documents of the tax payer years after the tax payer assessed himself and paid what he considered to be his tax liability."

20. Section 17 of the *VAT Act 2013* provides: -

> (1) Subject to the provisions of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies.
>
> (2) If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in sub-section (3), the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation. Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred."

21. In the present case, the Commissioner disallowed the input VAT claimed by the appellant for the years 2016 and 2017 and amended the returns of the appellant and assessed tax at Kshs 58,470.032/-. From the record, the assessment was amended based on the information available in the system which did not tally with the returns filed. The Commissioner was also of the view that a single pin had been used to claim all the VAT inputs.

22. From the foregoing, it is clear that the tax was assessed based on the available information on the system. Having stated that the law allowed the Commissioner the discretion to give the direction on the manner of filing returns, the appellant could not fault the respondent for relying on the information he had in arriving at his decision. The appellant had an opportunity to make an amendment and file returns electronically but chose not to. He should also have provided the documentation in his possession at the point of objection which he did not.

23. The upshot is that the appeal lacks merit and is dismissed with costs. The decision of the Tribunal is hereby upheld.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE