Commissioner of Domestic Taxes v Kuehne + Nagel Limited (Tax Appeal E139 of 2021) [2024] KEHC 15718 (KLR) (Commercial and Tax) (13 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15718 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E139 OF 2021

BM MUSYOKI, J

DECEMBER 13, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

KUEHNE + NAGEL LIMITED ..... RESPONDENT

(Being an appeal from judgment and orders of the Tax Appeal Tribunal at Nairobi dated 21st May 2020 in its appeal number 337 of 2020)

JUDGMENT

1. By a letter dated 13th January 2013, the appellant informed the respondent of its intention to conduct tax audit for period between 2009 and 2012. The respondent obliged and the appellant carried out an audit on the respondent after which it made a decision to demand some Value Added Tax (VAT) for the period of 2010 to 2012. By a letter dated 17th March 2014, the appellant raised a demand for Kshs 20,033,422.00 against the respondent claiming that the respondent had failed to charge VAT for the said period in respect of transport services supplied or offered to its customers for transport from the customers' farms to Jomo Kenyatta International Airport.

2. The respondent raised an objection to the demand which objection the appellant overruled by its letter dated 17th March 2014 resulting to the appeal before the Tax Appeals Tribunal. The tribunal heard the parties in its appeal number 337 of 2020 and in its judgement dated 21-5-2021 set aside the decision of the appellant and upheld the objection raised by the respondent. It is against the said decision of the tribunal that this appeal was filed.

3. The appellant's case was that the transport services for cut flowers offered by the respondent within the country were VAT chargeable but the respondent had failed to charge the same. The respondent admitted that it provided the said services but took the position that the transport was for unprocessed

agricultural produce and by virtue of Paragraph 17 of Part A of the Fifth Schedule to the VAT Act Chapter 476 of the Laws of Kenya which has since been repealed, the services were zero rated. To the contrary, the appellant maintained that the cut flowers were processed agricultural products and the transport was local and hence could not fall under the zero-rated category. According to the appellant, the zero rating of transportation of unprocessed agricultural produce was applicable only where the transportation was outside the country such that even if the flowers were to be categorised as unprocessed agricultural produce, the transportation services would still be standard rated because it ended at Jomo Kenyatta International Airport (JKIA).

4. Having read the submissions of the parties, the record of appeal especially the memorandum of appeal and the judgement of the tribunal, I have formed an opinion that there are two contentious issues just as they were at the tribunal. These are whether the cut flowers were unprocessed agricultural produce and whether the transportation services offered by the respondent for the cut flowers locally were zero rated or not.

5. There is no dispute that the flowers the respondent was transporting were plucked from the farm, thorns removed and dipped in a hydrating solution to preserve them or prevent from getting spoiled when they were on transit. It is this procedure of packaging and preservations that the appellant says amounted to processing. The respondent maintains that the procedure does not amount to processing. The gist of contention here is therefore definition of processing in relation to the flowers.

6. In my view processing involves carrying out a procedure which comes out with end result of products whose character or characteristics and nature are different from the original product. This would entail value addition and use of chemicals or other reactive media that alters the characteristic features of the produce. In relation to this matter, it would mean that the flowers have underwent a process in which they would be used as raw materials to make finished products and not end as flowers in their original forms. The tribunal heard the appeal by viva voce evidence where the appellant's witness told the tribunal that the cutting, removal of thorns and dipping the same in a hydrating solution amounted to processing. I have read the evidence of the witness and although I did not take the evidence, I cannot avoid noticing that he was at pains to explain this concept.

7. In my mind, procedure of dipping the flowers in a hydrating solution in order to preserve their original form does not pass for processing. If a product undergoes processing, it must be changed from the form it is at the time of preservation so that when the preservation reagent is removed and it does not go back to the same state it was with the same risks which would have affected it in its original form. In other words, the flowers in question would if processed withstand external vagaries such that their expiry or drying is not dependent on their very nature as at the time they are cut.

8. In this case, it was stated by the respondent and not rebutted by the appellant that dipping the flowers in a hydrating solution was meant to delay their drying up and if they were to be removed from the solution, they would go bad. In my view, this is the same as putting produce, say vegetables in a refrigerator to delay their deterioration until such time as they are needed for use. In all logical interpretation, that to my mind, cannot be termed as processing. In the circumstances, I agree with the tribunal that the appellant erred when it categorized the cut flowers as processed agricultural produce.

9. On transportation, the appellant argues that the portion of the services from the respondent's customers' farms to the JKIA was not zero rated. The tribunal held that going by the sample agreement between the respondent and its customers, the service ended outside the country. I have looked at the sample agreement which appears on pages 150 to 154 of the record of appeal and I am unable to see the respondent's obligations beyond JKIA. However, I do not think that the difference in the rating is on the destination. I do not see where the issue of transportation within or outside the country comes in

in this matter. Paragraph 17 of Part A of the Fifth Schedule to the then VAT Act which is contention in this matter was very clear that transportation of unprocessed agricultural produce was to be zero rated. It provided that;

> 'Where subject to the satisfaction of the Commissioner, the following supplies take place in the course of a registered person's business, they shall be zero rated in accordance with the provisions of Section 8: 17. The supply of transportation services in respect of unprocessed agricultural and agro-forest produce.'

10. As far as I can understand this provision, as long as the transportation services were for the unprocessed food produce, they were VAT zero rated. It did not matter the destination as the paragraph does not state so. Importing words or the aspect of the destination to the provision would be wrong.

11. In view of the above, I reach the inevitable conclusion that this appeal lacks merits. The same is dismissed with costs to the respondents.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Wainaina for the appellant for Miss Malik for the respondent.