REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INCOME TAX APPEAL NO. E005 OF 2020

COMISSIONER OF

INVESTIGATIONS AND ENFORCEMENT.....APPELLANT

VERSUS

GRAIN BULK HANDLERS LIMITED ..... RESPONDENT

(*An Appeal from part of the Judgment of the Tax Appeals Tribunal delivered on 18th December 2019*)

IN

TAX APPEALS TRIBUNAL AT NAIROBI

TAX APPEAL NO. 22 OF 2018 (As consolidated with TAT No. 23 of 2018)

BETWEEN

GRAIN BULK HANDLERS LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF

INVESTIGATIONS AND ENFORCEMENT.....RESPONDENT

J U D G M E N T

1. The respondent is a limited liability company registered in Kenya. It operates a specialized dry bulk discharge and handling terminal for grain imports, located in Shimanzi and linked by an overhead conveyor directly to Berth No.3, Kilindini Port, in Mombasa.

2. The appellant is in charge of tax collection in Kenya. He has power conferred by statute, from time to time to seek to verify and/or audit information provided by a taxpayer on matters tax. In so doing, he may require the taxpayer to furnish records and/or documents which may lead him to raise additional assessment and thereby demand payment of extra taxes in cases where the taxpayer has under declared and or under-paid taxes.

3. In 2011, the appellant conducted investigations on the affairs of the respondent. Vide a notice dated 2/06/2011, the appellant requested from the respondent, documents covering the period of 1/01/2007 to 2/06/2011 in accordance with ***section 56 of the Income Tax Act and Section 30(1) of the VAT Act***. The investigation led to an assessment for additional taxes by way of corporation tax, import duties and VAT as well as PAYE.

4. The respondent disputed the whole of the appellant's additional assessment whereby after consideration, the appellant issued an amended assessment confirming the initial assessment except for the underpaid Import Duty VAT and IDF assessments.

5. The respondent contested the amended assessment and filed an Appeal before the then Local Committee. It then filed a Constitutional Petition in the High Court which was dismissed on 29/01/2018. The dismissal led to the filing of a Notice of Appeal at the Tribunal on 7/02/2018.

6. On 18/12/2019, the Tribunal allowed the Appeal and held as follows: -

i. "The appellant do pay underpaid import duty, VAT, IDF in respect of entry number 2009MSA1620790 in the sum of Kshs. 23,778,029/-.

ii. Demand in respect of undeclared income from sale of grains during the period in dispute be and is hereby quashed.

iii. The appellant's costs incurred in respect of maintenance overtime, casual labour and routine repairs of the paving and conveyor are allowable.

iv. The Appellant was entitled to wear and tear allowances on truck crane.

v. The Appellant was entitled to claim on WFP contract.

vi. The Appellant was entitled to other claims.

vii. The Appellant's Fire Insurance claim is out of the scope of Section 4 (c) of the Income Tax Act.

viii. The Appellant is not liable to pay Customs Duty under Section 200 (d)(iii) of the EACCMA, 2004.

ix. Each party do bear own costs."

7. Being dissatisfied with part of that decision, the appellant lodged this Appeal to set aside that part of the decision on the following grounds: -

> ***"1. THAT the Honourable Tribunal erred in law in allowing the Appellant to file a late Appeal without leave;***
>
> ***2. THAT the Honourable Tribunal erred in law and in fact in finding that the Respondent's documents were inadmissible contrary to provisions of Section 57, 78 and 79 of the Tax Procedures Act No. 29 of 2015;***
>
> ***3. THAT the Honourable Tribunal erred in law and fact in finding that the assessment against the Appellant was similar to that against a Director of the Appellant;***
>
> ***4. THAT the Honourable Tribunal erred in fact in finding that the Respondent failed to prove that the Appellant was an importer;***
>
> ***5. THAT the Honourable Tribunal erred in fact in finding that Terminal Tolerance was duty paid and was of no concern to the Respondent;***
>
> ***6. THAT the Honourable Tribunal erred in law and fact in finding that the Appellant did not require a destruction certificate upon destruction of Terminal Tolerance;***
>
> ***7. THAT the Honourable Tribunal erred in law and fact in finding that the Appellant was not liable for dealing in un-customed goods"***.

8. On the foregoing grounds, the appellant sought that the appeal be allowed to the extent that the impugned judgment offended the aforesaid grounds and that his demand for additional taxes be upheld.

9. The respondent opposed the appeal vide its Statement of Facts dated 9/03/2020.

10. For the appellant, it was submitted that the Tribunal erred in law in allowing the respondent to file a late Appeal without leave. That once the Petition was dismissed by the High Court, the respondent ought to have sought leave from the Tribunal to file its Memorandum of Appeal out of time and therefore the Appeal was improperly before the Tribunal.

11. That the respondent was liable to pay Duty for the grain which remained un-customed as provided for under ***section 26 of the EACCMA.*** The respondent, being the operator of the licensed transit shed, was under a statutory obligation to account for all goods delivered into and out of the shed as provided for under ***section 26(2) and (3) of EACCMA***. That therefore, the Tribunal erred in finding that the respondent did not derive any income from sale of un-customed grain.

12. On its part, the respondent submitted that this Court can only make a determination on matters of law and not of facts as provided for under ***section 56 of the Tax Procedure Act No. 29 of 2015 (TPA)***.

13. As regards the filing of the Appeal in the Tribunal out of time, the respondent submitted that it had been granted a 30 days' stay in **Petition No. 239 of 2012** before the High Court which was later extended by mutual consent through a letter dated 31/01/2013 by the parties. That the stay only terminated on 29/01/2018 when the judgment in **Petition No. 239 of 2012** was delivered and the Appeal filed 9 days later.

14. It was further submitted that, the appellant was wrong in issuing additional assessment on the Managing Director of the respondent and another on the respondent on the same tax or set of facts. It was urged that the appeal be dismissed.

15. The Court has considered the record in its entirety and the submissions of the parties. The grounds of appeal can be collapsed into four as follows: -

i. Whether the respondent's appeal before the Tribunal was filed out of time;

ii. Whether the Tribunal erred in finding that the respondent was not an importer and that no tax was payable on terminal tolerance or that the respondent required a destruction certificate or that the respondent was liable for un-customed goods;

iii. Whether the Tribunal erred in finding the appellant's documents were inadmissible;

iv. Whether the Tribunal erred in holding that the assessment against the respondent was similar to that of its Managing Director.

16. On the first ground, there was uncontroverted evidence that, after the objection decision the respondent filed an appeal to the Local Committee. It then filed a Petition in the High Court in **Petition No. 239 of 2012** wherein an order of stay was granted and the 30 day's period for lodging an appeal suspended. Thereafter, a consent letter dated 31/10/2013 was filed extending the said order of stay subject to the payment of security of Kshs.40 million. The deposit of Kshs.40 million was made thereby extending the stay until the determination of the petition.

17. ***Section 52 of the Tax Procedures Act No. 29 of 2015*** provides: -

"(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice."

18. ***Section 13 of the Tax Appeals Tribunal Act No. 40 of 2013*** on the other hand, provides that a notice of appeal to an objection shall be lodged with the Tribunal within 30days of receipt of the decision of the Commissioner. The tax payer is required to lodge the substantive appeal within fourteen days of filing the notice of appeal. The timelines can be extended by the Tribunal on application.

19. In the present case, the respondent did obtain the suspension of the 30-day timeline in **Petition No. 239 of 2012.** Thereafter, the parties entered into a consent dated 4/2/2013 which extended the orders until judgment. Both the consent order and the initial order suspending the timeline were produced before the Tribunal and this Court.

20. In this regard, time did not start to run until the said petition was determined on 29/01/2018. The respondent did then file the Notice of Appeal on 7/02/2018. That was within 30 days. That in my view, was within time.

21. The contention that the judgment in **Petition No. 239 of 2012** did not grant leave is without basis. This is so because, the stay granted by consent was to run until the determination of the petition which was on 29/01/2018. That is when the 30-day period started to run. Accordingly, the appeal before the Tribunal was filed within time. The first ground therefore fails.

22. The second ground was that the Tribunal erred in finding that the respondent was not an importer and that no tax was payable on terminal tolerance. That the respondent did not require a destruction certificate or that it was not liable for un-customed goods;

23. This Court's jurisdiction on matters appeal is set out in ***section 56 of the Tax Procedures Act*** which provides: -

"(1) …

(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

(3) …"

24. In ***Oceanfreight (E.A) Limited –vs- Commissioner Of Domestic Taxes [2018] Eklr,*** **Tuiyott J.** as he then was held: -

"Whilst the jurisdiction of this Court in this Appeal is to hear and determine questions of law only, issues of facts may turn out to give rise to a question of law. In Mercy Kirito Mutegi –vs- Beatrice Nkatha Nyaga & 2 Others [2013] eKLR, the Court of Appeal said as follows: -

"What are the points of law raised in this appeal? An appellant Court will not ordinarily differ with the findings on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion

although based on primary factual evidence that is erroneous becomes a point of law."

This is a demonstration that there will be occasion when facts or evidence matter in determining a question of law."

25. In **Tile and Carpet Centre Limited v Commissioner of Domestic Taxes [2020] Eklr,** Majanja J held: -

> ***"These decisions do not suggest that the appellate court should not consider the evidence on record at all. Where the issue is misapprehension of evidence, leading to a perverse decision or ignoring material evidence or basing a decision of extraneous evidence amount to points of law that may be taken up on appeal."***

26. In the present case, the appellant challenges the Tribunal's finding of fact. The appellant failed to show that the finding was so perverse that it amounted to a point of law. The appellant contended that the respondent was an importer. This was denied by the respondent who contended that it only carried the business of bulk handling grain on behalf of its clients whereby it enters into Service Provisions Agreements.

27. The Tribunal made a finding that there was no evidence to suggest that the respondent imported any grains. Further, there was no evidence to show that the respondent sold any grains to 3rd parties for which it would have been liable to pay tax.

28. The Court has considered the documents relied on by the appellant. Those documents do not suggest that the grain dealt by the respondent had been imported by the respondent or on its behalf. The Tribunal made a finding that duty is usually paid in full by the importers of all grain handled by the respondent. That finding cannot be faulted for lack of evidence to the contrary.

29. The Terminal Tolerance cannot be held to have been imported merchandise by the respondent. There was no evidence that it was being sold to 3rd parties by the respondent. The grain released to Millet Company Ltd was shown to have been on the instructions of Louis Dreyfus Commodities on behalf of the owners thereof. Further, the respondent produced destruction certificates as Exhibit GBH 25 pages 370-503 of its Statement of Facts. There was no suggestion that the same did not cover all the Terminal Tolerance and that the remaining had been sold, and if so, to who.

30. In this regard, the Court finds that there was no evidence to show that the Tribunal erred in its finding that the respondent did not deal with un-customed goods. That ground is accordingly dismissed.

31. The other ground was that the Tribunal erred in finding as inadmissible, the documents produced as evidence to prove that there were deliveries of grain made by the respondent to clients who were not importers. The respondent submitted that the Tribunal did not in fact declare the said documents as inadmissible but that the documents fell short of proving the appellant's case.

32. It was further submitted that the appellant relied on a summary of banking made by Millets Company which summary was not dated, signed, stamped and did not set out the details of the bank, account name or number in respect of which it was allegedly issued. That the appellant contended that the banking summary was in respect of the respondent's Managing Director's bank account who is not a party to these proceedings.

33. ***Section 57 of the Tax Procedures Act*** provides: -

> ***"Notwithstanding anything to the contrary in any other written law—***
>
> ***(a) a document, or copy of or extract from a document, relating to the affairs of any person which has been seized or obtained by an authorised officer under section 59 or section 60 as the case may be; or***
>
> ***(b) a statement made by a person relating to his affairs is made to an authorised officer in accordance with the provisions of this Act; shall, if relevant, be admissible in civil or criminal proceedings under this Act to which that person is a party."***

34. On the documents relied on by the appellant, the Tribunal observed at paragraph 63 as follows: -

> ***"…With due respect, the Respondent furnished the Tribunal with records showing movement of grain without showing which consignments were duty paid, in transit, uncustomed or otherwise. Furthermore, it is not an unusual business practice for an importer of grain to direct the Appellant to release grain to a third party.***
>
> ***Fifthly, no record was produced by the Respondent to show a contract or invoice indicating a buyer seller relationship or that any transaction existed between the Appellant and any other party. The list of bankings produced by the Respondent is not admissible on the ground that it has no details showing that moneys were received in the Appellant's account. As pointed out by the Appellant even the name of the bank is missing."*** (Emphasis added)

35. From the foregoing, it is clear that the Tribunal only found the documents relied on to be insufficient to prove that the respondent had earned income from the sale of grain. On inadmissibility, the Tribunal only made a finding that the summary of banking produced did not prove that moneys were received by the respondent from sale of grain.

36. As regards ***sections 78 and 79 of the Tax Procedures Act,*** referred to by the appellant, the Court finds that the same are inapplicable in

the circumstances of this case. This is because, the said sections relate to validity of assessments and notices by the appellant. The documents in issue here are documents allegedly touching on the respondent and were merely a summary of bankings.

37. In view of the foregoing, the Tribunal cannot be faulted for arriving at the decision it did that, the documents fell short of proving what they were intended to, that income had been derived from sale of grain by the respondent.

38. The last ground was that the Tribunal erred in holding that the assessment against the respondent was similar to that against the latter's director. With respect, the Tribunal did not make any such determination in its judgment. It only referred to the submissions and statement of facts of the respondent at page 4 of the judgment where that issue had been raised. That ground also fails.

39. In view of the foregoing, the appeal fails on all grounds and it is hereby dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2021.

A. MABEYA, FCI Arb

JUDGE