REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. 40 OF 2020

BETWEEN

COMMISSIONER FOR INVESTIGATIONS

AND ENFORCEMENT.....APPELLANT

AND

MENENGAI OILS LIMITED.....RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 31st March 2020 in Tax Appeal No. 166 of 2017)

JUDGMENT

1. The Appellant ("the Commissioner") is challenging the decision of the Tax Appeals Tribunal ("the Tribunal") dated 31st March 2020 dismissing its assessment dated 19th September 2017 demanding KES. 1,455,572.00 on account of some export goods whose entries had been processed on the Kenyan side and could not be traced on the Ugandan and Tanzanian sides of the common border points as required by **section 2(2)** of the ***East Africa Community Customs Management Act, 2004*** ("the ***EACCMA***").

2. The basic facts giving rise to this appeal are that sometime in the year 2016, the Commissioner conducted a compliance audit of the Respondent's business and financial affairs for the year of income period 2012-2015. At the conclusion of the exercise, the Commissioner communicated its findings to the Respondent by its letter dated 3rd May 2017. Germane to these proceedings, the Commissioner informed the Respondent that it was still looking into the Respondent's export entry records. By the letter dated 23rd January 2017, the Commissioner informed the Respondent that its investigations covering the period 2013-2016 revealed that the consignments covered by those entries reach the respective destinations. The Commissioner therefore demanded taxes amounting to KES. 58,849,409.00. In order to confirm that whether and where export proceeds were banked, the Commissioner demanded statements of account from the Respondent's bankers.

3. On 9th February 2017, the Commissioner made a further demand of KES. 240,914,107.00 in respect taxes due from exports made through the Busia-Malaba Customs frontier office. It amended this demand by a letter dated 3rd May 2017 demanding KES. 462,538,238.00 for the reason that the consignments covered in the entries attached were never declared for home use or transit in the neighbouring country common border point in contravention of **section 203** of ***EACCMA***. Based on this demand, the Respondent lodged an objection notice by the letter dated 23rd February 2017. This objection was resolved by the Objection Decision dated 1st March 2017.

4. Thereafter, the parties engaged in discussions seemingly to resolve the matter. In due course, the Commissioner issued a demand dated 16th August 2017 claiming KES. 1,455,572,320.00 on account of export of goods whose export entries had been processed on the Kenyan side but could not be traced on the Tanzanian side of the common border points as required by **section 2(2)(d)** of ***EACCMA***. The Commissioner explained that some of the entries declared by the Respondent were not fully processed as they did not have rotation numbers and export certificates. Another set of entries had export certificates and rotation numbers but did not have corresponding entries in the country of destination of the goods. The Commissioner concluded that the goods covered by the subject entries were consumed locally thus liable to tax in Kenya.

5. The Respondent responded by filing a Notice of Objection on 15th September 2017 which the Commissioner disallowed by the letter dated 19th September 2017 on the ground that the Respondent did not comply with **section 51(3)** of the ***Tax Procedures Act, 2015 ("TPA")***. This

is what precipitated the filing of an appeal at the Tribunal. In its memorandum of appeal before the Tribunal, the Respondent stated, *"The question for determination is whether the law, as currently stated, requires an exporter to provide import entry documents and or confirmations from a foreign jurisdiction (being the Country of export) as proof of exportation."*

6. Before dealing with the substance of the appeal before it, the Tribunal took the view that both parties had misinterpreted the meaning of "export". It held that the matter was governed by **section 2(1)** of the ***EACCMA*** which defines export as, *"means to take or cause to be taken out of the Partner States"* thus considering that the Partner States as defined by **Article 1(1)** of the ***EAC Customs Union Protocol*** as Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan form a Single Customs Territory, there was no export but rather *"transfer"* of goods within the Customs Territory. The Tribunal concluded that, *"You can only export to countries outside the Territory which for purposes of the Protocol are treated as "foreign""*. The Tribunal concluded that the issue of export asserted by both parties could not arise.

7. Notwithstanding the aforesaid findings, the Tribunal then proceeded to determine the matter on the basis of the parties' argument and framed the issue for determination to be whether export of goods had taken place. In its view, it is the Customs official who captures the Certificates of Export on the computer systems; the *Simba* System to denote that the goods in question have crossed the border from Kenyan tax jurisdiction to another jurisdiction and to the extent this was done, the Respondent had fulfilled its obligation. It also held that the responsibility to take all the details was on the Customs officers and the information captured would be available from any terminal in Kenya and not necessarily the point of exit.

8. The Tribunal further held that there was no nexus between deposits made by the Respondents nor was any evidence tendered to show any illegality or export products in the local market. It then concluded that requiring the Commissioner to avail information from the country receiving the goods to show that the goods were exported was beyond what the law required in order to prove exportation and was tantamount to administrative overreach and was unjustified. It is this decision by the Tribunal that gives rise to this appeal.

9. Although the Commissioner's Memorandum of Appeal dated 8th May 2020, raises several issues for determination, the Commissioner has framed two issues for determination in this appeal;

(a) Whether the goods covered by the queried entries left the Kenyan territory?

(b) Who has the burden of proving transfer/export of goods to a foreign territory?

10. Before I consider the issues raised in this appeal, it is important to point out that the jurisdiction of this court is circumscribed by statute. Under **section 56(2)** of the ***Tax Procedures Act, 2015*** ("***TPA***"), *"An appeal to the High Court or to the Court of Appeal shall be on a question of law only"*. An appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. The Court of Appeal in ***John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others*** **[2018] eKLR** summarised what amounts to "*matters of law*" as follows:

> *[38] [T]he 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.*

11. The first issue the Tribunal considered in its decision is the meaning of *"export"* as opposed to *"transfer"* under **section 2(1)** of the ***EACCMA*** as read with **Article 1(1)** of the ***EAC Customs Union Protocol*** and held that the parties misapplied the term. This finding, in my view, was not necessary for resolving the matter. Neither party disputed the fact that the goods subject of this appeal were intended for export. Otherwise, why would the Respondent take steps to comply with the provisions of the ***EACCMA*** which sets out the steps required to export goods. Further, in its memorandum of appeal before the Tribunal, the Respondent framed the issue for determination based on the fact that the goods were destined for export.

12. In order to ascertain that the goods have been exported, **section 2(2)(d)** of the ***EACCMA*** provides as follows:

> *(2) For purposes of this Act –*
>
> *(d) the time for exportation of goods shall be deemed to be (i) the time at which the carrying aircraft or vessel departs from its final position, anchorage or berth at the port or place within boundaries of the Partner State at which the goods are shipped for exportation; (ii) in the case of goods exported overland, the time at which the goods pass across the boundaries of Partner States;*
> (Emphasis mine)

13. It is thus clear that in order for goods to be exported, they must pass the across the boundaries of the Partner States. That is why the procedures and documentation imposed by the ***EACCMA*** and the ***East Africa Community Customs Management Regulations, 2010*** are intended to ensure that goods leave the respective Partner States by crossing the border. Further, **section 10(2)** of the ***EACCMA*** requires the Commissioners of Partner States to, *"establish common border posts, carry out joint customs controls and take joint steps as may be deemed appropriate to ensure that goods exported or imported through common frontiers pass through the competent and recognised Customs offices and along approved routes."*

14. To ensure compliance with the law, investigate, prevent and suppress offences, **sections 235** and **236** of the ***EACCMA*** empower the Commissioner to conduct inspection or audit as a measure to satisfy himself as to the accuracy and authenticity of declarations through examination of the relevant records held by persons concerned. These provisions state, in part, as follows:

> 235(1) *The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods,*

require the owner of the goods or any person who is in possession of any documents relating to the goods —

(a) to produce all books, records and documents relating in any way to the goods; and

(b) to answer any question in relation to the goods; and

(c) to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transhipment of the goods, as the proper officer may deem fit.

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236. *The Commissioner shall have powers to—*

(a) verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods;

(b) question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;

(c) inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and

(d) examine the goods where possible for the goods to be produced.

15. In addition to the power to conduct a post-export audit, the Commissioner is empowered to co-operate with Partner States by requesting and obtaining information under **section 10** of the ***EACCMA*** which provides as follows:

10(1) The Commissioners shall furnish each other with such information, certificate, official report or document on matters relating to—

(a) prevention, investigation and suppression of offences under this Act; and

(b) any other relevant information relating to customs.

(2) The Commissioners shall establish common border posts, carry out joint customs controls and take joint steps as may be deemed appropriate to ensure that goods exported or imported through common frontiers pass through the competent and recognised Customs offices and along approved routes.

(3) Subject to reciprocal arrangements agreed upon by the Commissioner, the Commissioner may request from, or furnish to, the competent authorities of a foreign state any information, certificate, official report or other document in order to prevent, investigate or suppress offences against the laws applicable to the importation or exportation of goods into or from the territory of such foreign state.

16. The powers set out under the ***EACMMA***, which I have outlined above, are further supplemented by the powers conferred on the Commissioner under **Part IX** of the ***Tax Procedures Act, 2015*** to inspect goods and records of any person, require any person to produce goods and records, conduct searches and seizures in order to enforce payment of taxes.

17. Turning to the substance of the appeal, the Commissioner's position was that some export goods whose export entries had been processed on the Kenyan side could not be traced on the Tanzanian side of the common border. Once the Commissioner has conducted investigations and has put its findings to the taxpayer, the tax payer bears the burden of showing that the goods crossed the border and left the country. This position is supported by **section 223** of the ***EACCMA*** which states as follows:

223. In any proceedings under this Act—

(a) the onus of proving the place of origin of any goods or the payment of the proper duties, or the lawful importation, landing, removal, conveyance, exportation, carriage coast- wise, or transfer, of any goods shall be on the person prosecuted or claiming anything seized under this Act;

(b) the averment by the Commissioner-

(i) that any person is or was an officer or is or was employed in the prevention of smuggling;

(ii) that any goods were staved, broken, destroyed, or thrown overboard, or were so staved, broken, destroyed or thrown overboard for the purpose of preventing the seizure or the securing of the goods after seizure;

(iii) that any act was done within the limits of any port or at, in, or over, any part of a Partner State;

(iv) that the Commissioner, or proper officer is or is not satisfied as to any matter as to which it is required to be satisfied under this Act;

(v) that the Commissioner has directed or requested any proceedings under this Act to be instituted, shall be prima facie evidence of such fact; [Emphasis mine]

18. In addition, under **section 30** of the ***Tax Appeal Tribunal Act, 2013*** ("the ***TATA***") provides that

30. In a proceeding before the Tribunal, the Appellant has the burden of proving –

(a) where an Appeal related to an assessment, that the assessment is excessive; or

(b) in any other case, that the tax decision should not have been made or should have been made differently.

While **section 56** of the ***TPA*** provides as follows:

56. General provisions relating to objections and appeals

(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect

19. The Respondent argued that the burden of proof is governed by **section 107(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove the facts exist. I agree with this position but I also find it does not necessarily conflict with the position taken by the Commissioner. Indeed, **section 4** of the ***Evidence Act*** recognises presumptions of fact and it states that:

4. Presumptions of fact

(1) Whenever it is provided by law that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

(2) Whenever it is directed by law that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

(3) When one fact is declared by law to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

20. In light of **sections 223** of the ***EACCMA*** as read with **section 30** of the ***TATA*** and **section 56** of the ***TPA***, the finding of the Commissioner set out in the assessment constitute prima facie findings of fact which the taxpayer is required to rebut by providing contrary evidence. I therefore agree with the decision of the court in ***Republic v Kenya Revenue Authority Ex Parte United Millers Limited*** **NRB HC JR No. 323 of 2013 [2015] eKLR**, that the burden is on the exporter, in this case the Respondent, to prove that the goods indeed exited the border and left the country. In that case the issue concerned the claim for duty drawback which can only be claimed upon prove of export, the court held the it was the duty of the exporter to establish that the goods exited the court since its claim for refund is premised on that fact. This finding is consistent with the provisions I have cited above.

21. The Commissioner's case is that during its investigation of the Respondent, it identified those entries that did not have rotation numbers and certificates of export. That for these set of entries, the Respondent caused to be issued certificates of export several years after the said entries had been declared and that the export certificates were issued in Nakuru where the Respondent's premises are situated and not at the border point. The Commissioner contends that the certificates of export and the rotation numbers are prima facie evidence that goods have exited the border. While these concerns by the Commissioner are not entirely unfounded, they beg a couple of factual questions which the Tribunal did not resolve. Why would the certificates of export be issued in Nakuru and not at the border point? Why would these certificates be issued years after the export had purportedly been made? Why would these certificates obtained in Nakuru not bear any rotation numbers? How could a proper officer in Nakuru issue a certificate of export and yet Nakuru is not a border exit point? In my view, the reason why it is desirable that a certificate of export be issued at the exit point is for a Proper Officer to physically verify that goods are being exported and will exit the border to the export country and that chances of re-routing back to the country after verification are minimal.

22. In its submissions, the Respondent conceded that one of the documents required to prove exportation is the export entry certified by a proper officer at the port of exit. Surely, issuing a certificate of export in Nakuru, which is not an exit point, defeats the purpose of verifying that the goods have actually left the country as the Commissioner cannot easily verify and physically confirm that the goods have left the country.

23. I have raised the aforesaid issue not to make any conclusive determination but to show that the Tribunal did not address itself to the facts raised by the Commissioner in light of the burden of proof. As the court's power on appeal is limited to issues of law, I cannot review the entirety of the evidence in the absence of specific findings of fact made Tribunal in order to come to the conclusion that the findings of the Tribunal are perverse.

24. **Sections 235** and **236** of the ***EACCMA*** allows the Commissioner to conduct audits of an exporter within five years of the date of

importation, exportation or transfer or manufacture of any goods and verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods. **Section 10** of the ***EACCMA*** allows the Commissioner to obtain such information, certificate, official report or document on matters relating prevention, investigation and suppression of offences under the ***EACCMA*** and; any other relevant information relating to customs from its counterparts in the partner states. It was therefore not outside the Commissioner's powers to request for this information from its counterparts in Partner States in order to confirm that the goods, which were intended for export, crossed the border. It is this information that the Commissioner put to the Respondent to answer.

25. In coming to the conclusion whether or not the taxpayer has complied with the law, the Commissioner is also entitled to consider any other information in gathered in exercise of its powers under the **Part XI** of the ***TPA***. In this respect therefore, the Commissioner was entitled to consider the Respondent's bank accounts. This evidence would assist the Commissioner determine whether the goods were actually exported by relating the same to the locus and nature of payments.

26. The Respondent on its part also raised important issues which the Tribunal failed to consider and which would form a defence to the Commissioner's demand. For example, whether previous assessments forming the basis of the demand were withdrawn and vacated, whether the audit and subsequent demand was beyond five years as provided under **section 23** of the ***TPA***. This court would no doubt have benefitted from the Tribunal's findings on the same.

27. In conclusion, I find that the question whether goods were exported is a question of fact and that the Respondent bears the burden of establishing the goods have been exported or at any rate, have crossed the border frontier of a Partner State. In answering these factual questions, this court would be obliged to consider not only the evidence presented by Commissioner but also by the Respondent on each claim made by the Commissioner.

28. As I stated earlier, the Tribunal, in its judgment, did not engage with the evidence presented by the Commissioner thus leaving open the question whether I should affirm the Commissioner's demand of KES. 1,455,572,320.00 which the Respondent contested.

29. The Tribunal is the first appellate court from the decision of the Commissioner. It is under a duty to exhaustively evaluate the facts and law in issue within the confines of **section 30** of the ***TATA*** and **section 56** of the ***TPA*** bearing in mind that the jurisdiction of the Superior Courts dealing with appeal from the Tribunal is limited to matters of law. In ***Guaca Stationers v Commissioner of Domestic Taxes*** **ML ITA No. 24 of 2017 [2020] eKLR**, the court ordered a retrial or rehearing of an appeal where the issue concerned VAT. The court noted that the Tribunal failed to consider the evidence on record and observed as follows:

> *[32] …… Further, this court did not have the benefit of consideration of the facts and substance of the VAT dispute set out in the assessment and canvassed in the appeal before the Tribunal. It is for this reason that an evaluation of the evidence afresh, as required by the first appellate court, to determine whether the appellant has established its case is not feasible.*

30. I also find that the analysis of the evidence and findings of the Tribunal on whether the goods were exported is not practicable in this case and in ordering a retrial or re-hearing of the appeal, the court is entitled draw on its general powers under **section 78** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** which provide as follows:

> *78 (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—*
>
> *(a) to determine a case finally;*
>
> *(b) to remand a case;*
>
> *(c) to frame issues and refer them for trial;*
>
> *(d) to take additional evidence or to require the evidence to be taken;*
>
> *(e) to order a new trial.*
>
> *(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.*

31. In taking this course, I do not think either party will suffer any prejudice as all the material is on record. Justice will be served if the matter is ventilated fully and all issues are considered and a party dissatisfied will have an opportunity to appeal based on a judgment that has weighed all the factual and legal issues.

32. Before I conclude, I propose to deal with the issue of competence of this appeal raised by the Respondent in its submissions. It contended that the appeal was filed out of time as it was filed 30 days after the delivery of the decision by the Tribunal. This issue is governed by **section 32(1)** of the ***TATA*** which provides:

> *32(1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.*

Further **Rule 3** of the ***Tax Appeal Tribunal (Appeals to the High Court) Rules, 2015*** provides:

3. Time for filing of memorandum of appeal

The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent.

33. It is clear from the aforesaid provisions that the time for filing the memorandum of appeal, is reckoned from the date of service of the Notice of Appeal and not from the time the decision is rendered. In the circumstances and without a proper application setting out the facts upon which this court may make a finding that the appeal is incompetent, I cannot conclude that the appeal is incompetent.

34. For the reasons I have set out above, I allow the appeal to the extent I have set out above and order a rehearing of the appeal at the Tribunal in line with the observations I have made.

35. The shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms F. Mwongera, Advocate instructed by Kenya Revenue Authority for Commissioner of Investigations and Enforcement.

Mr Mbaye instructed by Humphrey and Company LLP Advocates for the Respondent.