



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL NO. E143 OF 2020

TAV AFRICA OPERATION SERVICES LIMITEDAPPELLANT

VERSUS

COMMISSIONER OF INVESTIGATIONS &

ENFORCEMENTRESPONDENT

(Being an appeal from the Judgment of the Tax Appeals Tribunal at Nairobi delivered on the 16/10/2020 in the Tax Appeals Tribunal Tax Appeal No. TAT/81 of 2018)

BETWEEN

TAV AFRICA OPERATION SERVICES LIMITEDAPPELLANT

VERSUS

COMMISSIONER OF INVESTIGATIONS &

ENFORCEMENT..... RESPONDENT

J U D G M E N T

1. By a letter dated 27/3/2018, the respondent notified the appellant that he had conducted investigations to the appellant's consignment of goods imported and cleared by its Clearing Agents for the period of 2016 through JKIA. That the appellant's goods had been undervalued and as a result Kshs. 24,206,189/= had been underpaid by the appellant of which he demanded payment.

2. The appellant applied for the review of that decision vide a letter dated 25/4/2018 which was rejected by the respondent. That provoked an appeal to the Tax Appeal Tribunal. By a judgment delivered on 16/10/2020, the tribunal dismissed the appellant's appeal.

3. It is against that appeal that the appellant lodged the present appeal on the following grounds: -

a) The Tax Appeal Tribunal (Tribunal) erred in law in failing to consider the appellant's constitutional rights to fair hearing and fair administrative action by allowing the respondent to produce documents after the parties had been heard.

b) The Tribunal erred in law in holding that the respondent gave sufficient reasons in its demand dated 27th March 2018 as to how it arrived at its decision that the imported goods were undervalued.

c) The Tribunal erred in law in holding that the appellant is liable to pay import duties for the under-declarations of the value of imported goods under the provisions of the East African Community Customs Management Act, 2004.

d) The Tribunal erred in law in finding that there was no fraud on the part of the respondent's employees.

e) The Tribunal erred in law in failing to consider that only the respondent had the mandate to licence and regulate clearing agents.

f) The Tribunal erred in law in holding that the respondent did not violate the appellant's right to legitimate expectation and that none of the parties tendered the letter of 19th April 2016 as evidence.

4. The appeal was heard by way of written submissions which the Court has considered. It was submitted for the appellant that the tribunal breached the appellant's right to a fair hearing and fair administrative action by allowing the respondent to produce documents after the parties had been heard. That after the matter was heard on 7/2/2020, the tribunal directed the parties to share additional documents which, after they had been supplied, the appellant was not given an opportunity to test or challenge them.

5. The appellant submitted that the tribunal erred in holding that the respondent gave sufficient reasons in its demand dated 27/3/2018 as to how it arrived at its decision that the imported goods were undervalued. That the appellant's constitutional right to fair administrative action was violated when the respondent adjusted the value of the goods using the correct invoices which were not provided to the appellant until the tribunal heard submissions on its appeal.

6. That the tribunal erred in finding the appellant liable to pay import duties for under-declaration of the value of the goods. That this was so because the appellant had provided authentic documents to its clearing agents and had received what appeared to be completed approved importation documents. It made full payment and received corresponding bank pay slips that had been stamped and approved by the respondent.

7. That both the tribunal and respondent acknowledged that there was fraud on the part of the clearing agents in relation to falsified invoices. That it was only fair that the respondent claimed the duty from the agent and not the appellant. That the agents should be liable for the taxes where they are engaged in fraudulent activities.

8. The appellant also submitted that the tribunal erred in finding that there was no fraud on the part of the respondent's employees. That the clearing agent could not have made false declarations without the assistance of the respondent's employees. That only the employees of the respondent could procure stamps approving the bank pay-in slips and the form C17s.

9. It was further submitted that the tribunal erred in finding that the respondent did not violate the appellant's legitimate expectation on the basis that none of the parties tendered the letter of 19/4/2016 as evidence. That in arriving at the value of the disputed taxes, the respondent failed to take into account the fact that it had sanctioned the importation of goods answering the description under the 5th Schedule Part B, Item 1 of the EACCMA on a duty free basis vide letters dated 19th April 2016 and 5th April 2016.

10. That the tribunal was wrong in holding that the letter dated 19/4/2019 had not been produced yet it was at page 85 of the appellant's statement of facts filed before the tribunal.

11. On his part, the respondent submitted that both parties were afforded an opportunity to be heard before the tribunal. That the production of the documents was permissible under **sections 17 and 20 of the Tax Appeals Tribunal Act, 2013**.

12. That all the documents produced by the respondents were entries and invoices it had received from the appellant which entries had resulted in the corresponding entries on the Simba system, hence there was no new document produced by the respondent.

13. That as part of the process of importation of goods to Kenya, the importer lodges an entry form with details of its imported goods and the role of the respondent is to compute taxes on the entry lodged by the importer using the Simba system. In the premises, the entries in the Simba system is based on what the importer lodges with the respondent. That the tribunal properly held that there were sufficient reasons in the respondent's letter dated 27/3/2018 as there was review of the appellant's documents before the tax demand was made.

14. That the appellant was liable for the actions of its Clearing Agents of under-declaring the value of the imported goods by virtue of **Section 147 & 148 of the EACCMA**. As the owner of the goods, the appellant was not absolved from liability for the payment of any duties to which the goods are liable.

15. That the appellant had failed to prove its allegation that the respondents' employees were part of the fraud. Finally, that the respondent had explained to the tribunal that it was not aware of the letter dated 19/4/2016 allowing remission of duty in respect to IDF NO. E16042966264. That that letter did not have any stamp showing receipt as was that of 5/4/2016 which is the norm for all letters sent to tax payers.

16. The Court has carefully considered the entire record and the submissions on record. The **grounds a, c, d, e and f** are related while **ground b** is to be considered separately. I propose to deal with **ground b** first.

17. **Ground b** is whether the respondent gave sufficient reasons in his demand dated 27/3/2018 as to how he arrived at his decision that the imported goods were undervalued.

18. I have seen the said letter. The respondent informed the appellant that he had undertaken investigations on the appellant's consignment of goods imported and cleared by Move and Pick Logistics, Hi Tech Impex Limited and Quicksave Agencies Limited for the period 2016 through JKIA.

19. The respondent went further to inform the appellant that the findings of the investigation established that the goods imported had been undervalued hence correct taxes due was not paid. He explained that the value of goods had been adjusted using the correct invoices. He then provided a table to demonstrate the total taxes due and payable. He referred to the relevant section of the law that had been contravened- **Section 203 of the EACCMA 2004**, and explained its import.

20. To this Court, the letter was detailed and clear as to how the respondent had reached his decision to demand for full payment of tax. To that end, the Court agrees with the tribunal's finding and it finds no fault with it.

21. **Ground a)** is whether the appellant's right to a fair trial was violated. It is not in dispute that on 7/2/2020, the tribunal directed both parties to file and exchange assorted documents with the tribunal. Those documents were supplied to the tribunal as ordered.

22. On 20/2/2020, the appellant wrote to both the tribunal and the respondent contending that 11 of the 16 import entries submitted by the respondent had not been made available to it before then. It had therefore been condemned unheard.

23. The record shows that the appellant had filed its submissions on 5/2/2020. This was before it was served with the complained of documents. The documents were supplied way after the hearing had been concluded. The appellant was therefore not afforded the opportunity to test, challenge or comment on those documents before the honorable Tribunal could make a decision thereon.

24. The 16 import entries were generated by the respondent's Simba system. This was not information that was accessible to the appellant. The appellant ought to have been given a chance to submit on the contents of those documents. The Tribunal itself was alive of the fact that production of these documents was crucial to the determination of the matter before it. That is borne by the interrogation made by the Tribunal during the hearing. The appellant's to the Tribunal was on 20/2/2020 while the judgment was made way after on 16/10/2020. There was ample time for the Tribunal to give directions to facilitate fair trial to the appellant. It could have granted leave to the appellant to file supplementary submissions on the ground of new evidence. It could have even convened another hearing to allow the parties a chance to address it on the new evidence adduced. For this reason the first ground cannot be said not to be without merit.

25. In J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School [2018] Eklr, the Court observed: -

“Though the short title to Section 6 is entitled “Request for reasons for administrative action”, the subject of the section is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review. The information, which must be supplied in writing within three months, may include reasons for the administrative action and any relevant documents relating to the matter.

26. The respondent ought to have made available to the appellant all relevant documents relating to the matter. The respondent availed the documents after the appeal had been filed, heard and after filing of the appellants submissions. It is clear that the appellant was condemned unheard as far as the 11 entries, which was new evidence, were concerned. It is imperative that the Tribunal does give the appellant a hearing on the same before it can render its decision.

27. As regards **grounds c), d), e) and f)**, all are related and intertwined with **ground a)**. They can only be answered after **ground a)** is properly investigated and determined. This Court cannot make any determination on the rest of the grounds unless the Tribunal first makes a determination after hearing the parties on the evidence that was submitted to it after the hearing.

28. In Guaca Stationers Ltd v. Commissioner of Domestic Taxes [2020] Eklr, the Court observed:

“At the hearing of the appeal, the Tribunal invoked the provisions of section 17 of the Act which empowers it to call for additional evidence. It directed that parties attach documents to their respective submissions. By taking this course, the Tribunal denied each party the opportunity to interrogate the evidence produced by the other side”.

29. In the said case, the court remitted the matter back to the Tribunal to consider the matter after giving the parties a hearing. When dealing with an appeal, this Court's powers are set out under **section 78 of the Civil Procedure Act** which provides follows: -

“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”.

30. In view of the foregoing, I allow the appeal and set aside the judgment of the Tribunal dated 16/10/2020.

31. I direct the Tribunal to rehear the appeal and give the parties a hearing on the evidence that was submitted to it after the hearing. Each party to bear own costs.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 10th day of **June, 2021**.

A. MABEYA, FCIArb

JUDGE