Commissioner of Domestic Taxes v Total Kenya Limited (Income Tax Appeal E023 of 2020) [2021] KEHC 255 (KLR) (Commercial and Tax) (12 November 2021) (Judgment)

Neutral citation: [2021] KEHC 255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E023 OF 2020

A MABEYA, J

NOVEMBER 12, 2021

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

TOTAL KENYA LIMITED ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal delivered on 26/2/2020 in Tax Appeal No.151 of 2016 and 161 of 2017)

JUDGMENT

1. A brief background of this dispute is that the respondent entered into an agreement dated 18/5/2010 with a company known as Total Outre Mer (hereinafter "TOM"), a company tax resident in France. The agreement stipulated that TOM would provide technical assistance to the respondent.

2. A Double Taxation Agreement (hereinafter "DTA") exists between Kenya and France and was entered into on 1/11/2010 and became effective form 1/1/2011.

3. On 14/8/2013, the respondent received a withholding tax assessment for the years 2011 to 2012 from the appellant claiming that the fees paid by it to TOM are classified as management or professional fees under the provisions of section 35(1) of the *Income Tax Act* and Article 21(4) of the DTA. The appellant claimed that withholding tax ought to have been deducted in respect of the same and raised an assessment.

4. The respondent objected to the assessment and argued that the fees paid by it falls within the business profits of TOM and that under Article 7(1) of the DTA, a business profit is taxable in France and not Kenya.

5. The respondent invoked Article 24 of the *Kenya France DTA* which provides for a dispute resolution mechanism referred to as the mutual agreement process (hereinafter MAP).

6. Subsequent to the MAP process beginning, the appellant issued an Objection Decision dated 29/9/2016 whereby it confirmed an assessment notice for Kshs.310,068,589/= being withholding tax, interest and penalties on payments made to TOM for the years 2011 and 2012.

7. Further, the appellant issued an additional assessment on 29/9/2016 for the years 2013, 2014 and 2015 amounting to Ksh.256, 849,272/-.

8. The respondent filed an objection to the assessments. However the respondent proceeded to issue its Objection Decision dated 15/12/2016 whereby it confirmed its assessment.

9. The respondent lodged an appeal at the Tax Appeals Tribunal ("the Tribunal) which upheld the appeal vide its judgment of 26/2/2020 and found that the MAP process had not been exhausted.

10. The appellant being dissatisfied with the said decision appealed to this Court on the following grounds:-

> " (i) The Honourable Tribunal erred in law and in fact, in finding that the parties had not resorted to the provisions of Article 24 of the *Double Taxation Agreement*, Legal Notice No. 140 of 2009.
>
> (ii) The Honourable Tribunal erred in law and in fact in not considering the evidence and the submissions of the parties and reaching a determination that technical fees paid by the Appellant were subject to withholding tax.
>
> (iii) The Honourable Tribunal erred in finding that the decision by the parties to resolve the dispute at the Tribunal was premature and finding that the doctrine of exhaustion had not been exercised."

11. Based on the above grounds, the appellant prayed that the appeal be allowed and his assessments be upheld.

12. The respondent opposed the appeal vide its Statement of Facts dated 6/5/2020.

13. It was contended that the Tribunal was correct in upholding the dispute resolution provisions in the DTA and that the appeal is completely without merit as it is required to exhaust the dispute resolution process provided for therein before subjecting the dispute to the Tribunal in Kenya.

14. The Court has considered the entire record and the parties' submissions.

15. In the court's opinion, the grounds of appeal can be summarised as: whether the DTA made it mandatory for the dispute between the parties to be resolved under the mechanisms therein.

16. On lodging this appeal, the appellant applied to be allowed to produce additional evidence. The document in question was a letter dated 22/1/2019. That document had not been produced before the Tribunal. For reasons contained in the ruling of this Court dated 8/4/2021, the Court allowed that additional evidence to be adduced.

17. I have considered that additional evidence and the entire record. My view is that if I make a determination on the appeal I have to take into consideration the said additional evidence. In doing so, this Court will not have had the benefit of the Tribunal's decision on the same.

18. The Tribunal's decision was based on the grounds that it had no jurisdiction as the Mutual Agreement Process had not yet been exhausted. In admitting the additional evidence, this Court held: -

> "... it was not produced at the trial because the parties knew or conducted themselves in a manner suggesting that it was not necessary. This is so because, the parties with the knowledge that the mutual agreement process had collapsed, resorted to the appeal before the Tribunal before and without considering the Alternative Dispute Resolution required under Article 24 of the Double Taxation Agreement. This is the Article the Tribunal relied on to determine the matter against the appellant.
>
> ...
>
> The Court is persuaded that, if it be true that the Tribunal's decision was based on the unavailability of the intended evidence and reliance thereon was suo motto, that piece of evidence would have been crucial to the applicant's case. ...".

19. In this regard, under section 78(1) of the *Civil Procedure Act*, this Court's jurisdiction on appeal includes: -

> "a) to determine a case finally;
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> b) to remand a case;
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> c) to frame issues and refer them for trial;
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> d) to take additional evidence or to require the evidence to be taken;
>
> e) to order a new trial".

21. The Tribunal made its decision without considering the additional evidence which this Court admitted as stated above. It is fair and just that the Tribunal re-considers the matter afresh taking into account the new evidence.

22. Accordingly, I make the following orders: -

a) The appeal is hereby allowed.

b) The Judgment and decree of the Tribunal made on 26/2/2020 is hereby set aside.

c) The matter is referred back to the Tribunal to re-try the matter taking into consideration the new evidence admitted by this Court.

d) Each party to bear own costs.

It is so decreed.

DATED AND DELIVEREDAT NAIROBI THIS 12TH DAY OF NOVEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE