Commissioner of Investigations and Enforcement v Roser Roofing East Africa Limited (Tax Appeal E133 of 2020) [2021] KEHC 12540 (KLR) (Commercial and Tax) (4 November 2021) (Judgment)

Neutral citation: [2021] KEHC 12540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E133 OF 2020

DAS MAJANJA, J

NOVEMBER 4, 2021

BETWEEN

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT

AND

ROSER ROOFING EAST AFRICA LIMITED .... RESPONDENT

(Being an appeal against the Judgment of the Tax Appeals Tribunal at Nairobi dated 2nd October 2020 in Tax Appeal No. 112 of 2019)

JUDGMENT

Introduction and Background

1. The court is asked to determine this appeal filed by the Appellant ("the Commissioner") through the Memorandum of Appeal dated 7th November 2020. The Respondent has also filed a cross-appeal through its Memorandum of Appeal dated 26th February 2021. These appeals have been filed against parts of the judgment of the Tax Appeals Tribunal ("the Tribunal") dated 2nd October 2020.

2. The Respondent is in the business of the supplying building, roofing and other construction material. The facts giving rise to this appeal can be traced back to investigations conducted by the Commissioner on the Respondent's financial and tax affairs where the Respondent's director was summoned to appear before the Commissioner. The parties held a meeting on 17th September 2018 where the Commissioner required the Respondent's director to provide further information and documents regarding the Respondent. The Respondent's tax representative wrote to the Commissioner seeking more time to provide the information sought but by the letter dated 24th September 2018, the Commissioner responded by requesting the Respondent to furnish the information within 7 days of

the letter. By the letter dated 25th September 2018, the Respondent sought further indulgence and proposed a schedule to provide the information sought.

3. On 15th October 2018, the Commissioner communicated its preliminary investigation findings for the income period 2013 – 2017. The Commissioner stated that an analysis of the Respondent's bank deposits from Family Bank and Spire Bank revealed unreported income which attracted Corporation Tax of Kshs. 65,352,982.00. The Commissioner further held that there were variances in the Respondent's self-assessment VAT and Income Tax returns and that its returned sales as per the Corporation Tax self-assessment returns was lower than the Expected Sales and that principal VAT of Kshs. 21,741,879.00 was computed on the basis of the Expected Sales. The Commissioner thus concluded that the Respondent was liable to pay Kshs. 87,094,864.00 as Corporation Tax and VAT.

4. The Respondent objected to the Commissioner's demand through its letter dated 17th October 2018. It noted that following a meeting held on 11th October 2018, they reviewed various aspects of information which the Commissioner required clarification and it was agreed that certain information would be submitted between 15th and 19th October 2018 as the exercise was extensive given the nature of the investigation covering a period of 5 years. The Respondent was therefore surprised when the Commissioner sent the "demand assessment letter" directly to the Respondent without a copy to its known and appointed tax agents, before the agreed process was completed and before the Respondent submitted the documents as discussed at the meeting of 11th October 2018.

5. On the substance, the Respondent objected to the demand on grounds that the banking analysis was erroneous and excessive. For example, it pointed out that in 2014, the Commissioner's banking analysis for Spire Bank was Kshs. 142,385,945.00 whereas the actual bankings were Kshs. 75,845,804.00 hence there was no additional assessment for Income tax and VAT. The Respondent further stated that the Commissioner omitted zero-rated and exempt sales which were not included in VAT3 on the monthly returns.

6. From its own tabulation, the Respondent contended that the Commissioner's demand was excessive and not in compliance with the *Tax Procedures Act*, 2015 ("the TPA") and the *Constitution* and ought to be vacated. The Respondent further objected to the compliance period of 7 days demanded by the Commissioner as it was outside the *TPA*.

7. On 29th November 2018, the Commissioner issued to the Respondent with what it termed as "findings arising from the investigation and assessment thereon" which it titled "Additional Assessment for the years 2013 to 2017". The Commissioner stated that an analysis of the Respondent's bankings for the years of income 2014, 2015, 2016 and 2017 had revealed variances totaling Kshs. 79,215,722.00 hence it charged additional Corporation Tax of Kshs. 49,483,843.00 inclusive of penalties and interest. Based on the variances between the Respondent's self-assessment in the VAT3, Income Tax and recomputed sales, the Commissioner required the Respondent to pay Kshs. 140,027,324.00 as Corporation Tax and VAT. The Commissioner stated that it would send assessment notices in due course and urged the Respondent to treat this letter as a formal assessment and that if it wished to object, it should do so within 30 days from the date of service of the assessment notice in line with section 51 of the *TPA*.

8. The Respondent objected to the Commissioner's findings by its letter dated 21st December 2018. It referred to its Notice of Objection dated 17th October 2018 which the Commissioner had not responded. The Respondent argued that this Objection was now stood over and there was no basis upon which the Commissioner could have come up with the "Additional Assessment dated 29th November, 2018".

9. Without prejudice to the aforestated position, the Respondent reiterated its position in its previous objection dated 17th October 2018. It added that as part of its ongoing cooperation it confirmed that while it was available for the meeting scheduled for 22nd November 2018, it did not receive any response from the Commissioner. It was therefore surprised to receive a fresh demand letter dated 29th November 2018 on 3rd December 2018 instead of a response to its earlier objection. It requested the Commissioner to vacate the assessment of Kshs. 140,027,324.00.

10. The Commissioner issued its objection decision through the letter dated 20th February 2019 ("the Objection Decision"). The Commissioner agreed with the Respondent about the erroneous banking figures of the Spire Bank account and adjusted the same accordingly. It however, rejected the Respondent's explanation on the variances between sales as per VAT3 and Sales account stating that the explanations were inadequate and unsupported by evidence. Further, that the introduction of different set of accounts in the year 2015 and 2016 with different figures with what was filed in iTax was not considered and the variances stood without amendment. For these reasons, the Commissioner amended the Corporation tax assessment to Kshs. 22,460,374.00 and VAT to Kshs. 18,561,419.00 inclusive of penalties and interest making a total of Kshs. 41,021,791.00.

11. The Respondent proffered an appeal to the Tribunal which rendered its judgment on 2nd October 2020. In its decision, the Tribunal framed four issues for determination:

    a. Whether the assessments were based on applicable relevant law and facts?

    b. Whether the Commissioner erred in fact and law by raising additional tax assessments based on the bank balance variances?

    c. Whether the Commissioner erred when issuing additional VAT assessment by subjecting the Respondent's internal conversion process of raw material stock as taxable supplies?

    d. Whether the Commissioner in computing VAT variance, charged zero rated products as taxable supplies?

12. On whether the assessments were based on applicable relevant law and facts, the Tribunal referred to the Commissioner's letter of 15th October 2018 (mistakenly referred to as 12th October 2018) where the Commissioner had served the Respondent with a tax demand of Kshs. 65,352,982.00 in respect of Corporation Tax and Kshs. 21,741,879.00 in respect of VAT and informed the Respondent to "arrange to settle the outstanding taxes or provide explanations where available within seven (7) days from the date of receipt of this demand letter". The Tribunal held that this letter was a demand and it agreed with the Respondent that the seven day notice had no legal basis and that though the letter was also referred to as an assessment, it fell short of the requirements of section 29(2) of the *TPA* which requires the Commissioner to notify a taxpayer in writing of the tax assessed under subsection (1) and the Commissioner shall specify, inter alia, the due date for payment of the tax, the penalty, and interest, being a date not less than 30 days from the date of service of the notice.

13. The Tribunal found that the Commissioner gave the Respondent seven days' notice to pay after what it termed as preliminary investigation findings through its letter dated 15th October 2018 without affording the Respondent the 30-day statutory period for it to object to the demand. The Tribunal held that the Commissioner's action was in breach of the *TPA*. It further held that an additional assessment can only be issued where there was an earlier assessment and that the Commissioner's letter dated 15th October 2018 did not fall under any of the types of assessments envisaged by sections 28, 29 and 30 of the *TPA*. The Tribunal concluded that the purported additional assessment issued by the Commissioner on 29th November 2018 was invalid and that the notice of 15th October 2018 and

the subsequent additional assessments were faulty, unprocedural and therefore void as they did not comply with section 29 of the *TPA* .

14. As to whether the Commissioner erred by raising additional tax assessments based on the bank balance variances, the Tribunal held that under section 59(1) of the *TPA*, the Commissioner or an authorized officer may require any person, by notice in writing, to produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person. That in view of this and in the absence of supported audited accounts, the Commissioner was right in using an alternative method. However, the Tribunal held that the said additional assessments had since been found to be invalid for failing to comply with section 29 of the *TPA*.

15. On the issue whether the Commissioner erred when issuing additional VAT assessment by subjecting the Respondent's internal conversion process of raw material stock as taxable supplies, the Tribunal stated that the Commissioner did not in fact err and that the treatment of such a transaction as a sale would be appropriate under the circumstances. That in the absence of a stock movement register and proof of reversing entries of the initially invoiced stock, the Tribunal was not convinced by the Respondent's explanation and consequently, found that the Commissioner was justified in issuing additional VAT assessment in this respect. However, the Tribunal stated that the said additional assessments had since been found to be invalid.

16. On whether the Commissioner in computing VAT variance, charged zero rated products as taxable supplies, the Tribunal noted in as much as the Commissioner took into account some of the reported exempt sales as per VAT3 return and gave a credit of Kshs. 2.4 Million and Kshs. 1.6 Million for the years 2013 and 2014, respectively, the Commissioner ought to have known about the exemption given to Armed Forces Canteen Organization (AFCO) as it had a copy of the exemption letter from the National Treasury dated 15th December 2016. As such, the Tribunal held that the goods supplied to AFCO should not have been subjected to VAT.

17. Regarding Kshs. 8,017,528.00 which the Respondent claimed was a one-off export consignment to Uganda, and thus zero rated for purposes of VAT, the Tribunal directed the Respondent to furnish the relevant export entry, invoice and proof of receipt of funds from the third party within two days, that is by 14th February 2020 after which the Commissioner would file its response within three days of receipt of the said documents. The Tribunal ruled that the Respondent did not comply with the direction which prompted the Commissioner to write to the Tribunal through a letter dated 10th March 2020. During the hearing, the Commissioner had submitted that it had considered and adjusted what the Respondent was able to support with documentation and arising from the aforementioned explanation, the Tribunal found that the Commissioner was justified in raising the additional tax with regard to the said amount. However, the Tribunal found the additional assessment invalid and void ab initio as they did not comply with section 29 of the *TPA*.

18. In sum, the Tribunal held that the Commissioner, in purportedly issuing the assessments and giving the taxpayer a notice of seven days to pay the demanded tax contravened the laid down legislation and the Respondent's right to fair administrative action is recognized in Article 47 of the *Constitution* which entitles every taxpayer to administrative action that is lawful, reasonable and procedurally fair. The Tribunal allowed the appeal and set aside the Objection Decision dated 20th February 2019 and ordered each party was to bear its costs.

19. The parties are dissatisfied with various aspects of the Tribunal's decision hence the appeals. They were canvassed by way of written submissions restating the positions outlined above.

Analysis and Determination

20. This court's appellate jurisdiction is circumscribed by section 56(2) of the *TPA* which provides that, "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". Essentially, this means that 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 (see *Bashir Haji Abdullahi v Adan Mohammed Nooru and 3 Others* NRB CA Civil Appeal No. 300 of 2013 [2014] eKLR and *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR). What the court is to determine is whether the Tribunal arrived at a conclusion that was supported by the law and the evidence before it.

21. The issues raised in this appeal are primarily legal and procedural matters. Even though the Commissioner raised six issues in its Memorandum of Appeal, it has condensed them to one issue in its submissions being whether the Tribunal could subject the letter of 15th October 2018 to the legal threshold under section 29 of the *TPA*. The Respondent also invites the court to determine whether the said letter as an assessment, is valid and meets the threshold under section 29(2)(e) of the *TPA*. The Respondent's cross-appeal mainly challenges the Tribunal's finding on costs and urges the court to award it costs for both the appeal at the Tribunal and its cross-appeal.

22. The Commissioner submits that its letter dated 15th October 2018 was not an 'assessment' but a Preliminary Investigations Finding and no final decision had been arrived hence the it was not an assessment and it was not necessary for it to comply with the requirements of section 29(2) of the *TPA*. The Respondent, on the other hand, submits that the letter was a tax demand requiring the settlement of taxes within seven (7) days which takes the form of an assessment as contemplated under section 29 of the *TPA*.

23. The TPA and the *Income Tax Act* (Chapter 470 of the Laws of Kenya) ("the ITA") both define an "assessment" to include an "assessment, instalment assessment, self-assessment, additional assessment, default assessment, advance assessment and amended assessment, and includes any other assessment made under a tax law". Further, section 29(1) and (2) of the *TPA* dealing with assessments provides as follows:

    29. Default assessment

    (1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment (referred to as a "default assessment") of—

    a. the amount of the deficit in the case of a deficit carried forward under the *Income Tax Act* (Cap. 470) for the period;

    b. the amount of the excess in the case of an excess of input tax carried forward under the *Value Added Tax Act*, 2013 (No. 35 of 2013), for the period; or

    c. the tax (including a nil amount) payable by the taxpayer for the period in any other case.

    (2) The Commissioner shall notify in writing a taxpayer assessed under subsection (1) of the assessment and the Commissioner shall specify—

a. the amount assessed as tax or the amount of a deficit or excess of input tax carried forward, as the case may be;

b. the amount assessed as late submission penalty and any late payment penalty payable in respect of the tax, deficit or excess input tax assessed;

c. the amount of any late payment interest payable in respect of the tax assessed;

d. the reporting period to which the assessment relates;

e. the due date for payment of the tax, penalty, and interest being a date that is not less than 30 days from the date of service of the notice; and

f. the manner of objecting to the assessment.

24. The resolution of this issue in this appeal turn on the interpretation of the application statutes; the *ITA* and *TPA*. The general principle is that interpretation of tax statutes is strict and leaves no room for intendment, implication or presumption. One has to look at what is clearly said and nothing is to be read in or implied (see *Cape Brandy Syndicate v I.R. Commissioners* [1921] 1 KB 64 and *Stanbic Bank Kenya Limited v Kenya Revenue Authority* CA Civil Appeal No. 77 of 2008 [2009] eKLR). Thus, a notification will be deemed as an assessment under section 29(1) and (2) above if it contains all the statutory elements; the amount assessed as tax, the amount assessed as late payment penalty, the amount of late payment interest, the reporting period to which the assessment relates, the due date for payment of the tax, penalty and interest being a date that is not less than thirty days from the date of service of the notice and the manner of objecting to the assessment.

25. The impugned letter dated 15th October 2018 only contains computed principal taxes. It does not mention any amount assessed as late payment penalty or late payment interest. It calls for payment of principal taxes within 7 days rather than payment of the principal tax, penalty and interest after 30 days of receiving the notification. Further, the letter does not inform the Respondent of the manner of objecting to the assessment. All these omissions demonstrate that this letter does not meet the threshold of an 'assessment' under section 29 of the *TPA*.

26. Juxtaposing the letter dated 15th October 2018 and the one dated 29th November 2018, it is clear that the latter clearly provides for the assessed principal taxes, penalty and interest. The Commissioner expressly states that it is a formal assessment where the assessment notices were to follow. It informed the Respondent of the manner in which it could object to the assessment within 30 days from the date of receipt if it so wished. I therefore find that the letter dated 29th November 2018 fits within the definition of an assessment under section 29 of the *TPA* as opposed to the letter dated 15th October 2018.

27. The Tribunal held that the letter dated 15th October 2018 was not an assessment as envisaged under section 29 of the *TPA* hence it faulted the additional assessment dated 29th November 2018 on the ground that an additional assessment can only be issued where there was an earlier assessment. That since the letter dated 15th October 2018 was not an assessment, the purported additional assessment issued by the Respondent on 29th November 2018 is invalid.

28. In the Tribunal's view, an additional assessment has to be founded on or made further to an assessment or valid assessment. I find that that there is no basis for this conclusion as it is not supported by the *TPA* or *ITA* as there is no definition of 'additional assessment' in both statutes.

29. A reading of 73(2)(b) of the *ITA* indicates that the Commissioner may make an additional assessment following a self-assessment return by the taxpayer if it believes that such a return is not true or correct according to its best judgment. Further, section 92A(2) of the *ITA* makes reference to the due date payment for tax on an 'additional assessment' made by the Commissioner under section 73(2)(b) of the *ITA*. Given the aforesaid statutory provisions, I do not agree with the Tribunal that an additional assessment only follows a previous assessment made by the Commissioner. An additional assessment by the Commissioner may be made after a taxpayer's self-assessment. I do not find any error in the Commissioner issuing an additional assessment stemming from dissatisfaction of the Respondent's own self-assessment returns.

30. In the foregoing, I do not find any reason why the Tribunal invalidated the additional assessment dated 29th November 2018 when the same was a valid assessment under section 29 of the *TPA*. The record indicates that the Respondent made a valid objection and the Commissioner issued an Objection Decision as required by law. In addition, I find and hold that the issue of due process and fair administrative action under Article 47 of the *Constitution* did not arise as the Respondent was invited to offer explanations to the positions taken by the Commissioner in both instances, which explanations and objections were given by the Respondent as evidenced in its letters dated 17th October 2018 and 21st December 2018. The Commissioner's appeal is merited on this ground.

31. I note that the Tribunal dealt with the substance of the Respondent's appeal and made specific findings on the key issues. The Tribunal however invalidated the Objection Decision on the ground that the additional assessment was null and void. The Respondent did not cross-appeal on the substance of the Tribunal's decision hence I uphold the Objection Decision subject to the Tribunal's findings.

32. The Commissioner's appeal has succeeded. There is no reason why it should not be awarded costs of this appeal. This will be in tandem with the basic rule that costs follow the event (see *Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 4 others* [2014] eKLR).

Disposition

33. For these reasons, I grant the following orders:

    a. The cross-appeal by the Respondent dated 26th February 2021 be and is hereby dismissed.

    b. The appeal by the Appellant dated 17th November 2020 be and is hereby allowed to the extent that the judgment of the Tax Appeals Tribunal delivered on 2nd October 2020 in Tax Appeal No. 112 of 2020 be and is hereby set aside to the extent of the finding that the assessment of 29th November 2018 is invalid.

    c. The Commissioner's Objection Decision dated 20th February 2019 subject to the Tribunal's findings on the assessment dated 29th November 2018 be and is hereby upheld.

    d. The Respondent shall bear the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango.

Mr G. Ochieng, Advocates instructed by Kenya Revenue Authority, the Appellant.

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