



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
INCOME TAX APPEAL NO. 12 OF 2018

HEWLETT PACKARD EAST AFRICA LTD.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

(An Appeal from the Judgment and decree of the Tax Appeal Tribunal Appeal No. 127 of 2016 at Nairobi delivered on 9th March 2018)

J U D G M E N T

1. This is an Appeal from the Judgment of the Tax Appeal Tribunal of **9th March 2018**. The Appellant before that Tribunal and also before this Court is **Hewlett Packard East Africa Limited**. The Appellant is a wholly owned subsidiary of **Hewlett Packard Europe BV**, whose principal office is in **Switzerland**. The Respondent is the Commissioner of Domestic Taxes, who is appointed under Section 13 of the **Kenya Revenue Authority Act** and is responsible for the control and management of the **Domestic Taxes Department** and accounting for tax due under the **Income Tax Act**.

2. The Appellant raised the following grounds before the Tribunal:

- a) That the Respondent erred in fact and in Law by purporting to further amend a Value Added Tax (VAT) notice of amended assessment issued on 29th August 2012 contrary to Section 31(6) of the Tax Procedure Act 2016;*
- b) That the Respondent erred in fact and in Law by failing to recognise that the supply of service by the Appellant to its parent Company, HP Europe, is a continuous supply of services in accordance with Section 13 (2) of the Repealed VAT Act Cap 476 and Section 12 (3) of the VAT Act 2013.*

3. The Respondent in response, by its statement of facts, raised the following issues:

- a) The Appellant's appeal is not properly filed because the Appellant had not settled undisputed taxes;*
- b) The Respondent can legally amend the audit findings of the year 2012 covering the period November 2005 – October 2011;*
- c) The Appellant is liable for payment of undeclared VAT for the year 2012 and VAT on continuous supply for the period November 2011 – October 2015.*

4. The Tribunal, by its Judgment, found that the appeal was incompetent on the ground that the Appellant, as required under **Section 52 (2)** of the **Tax Procedure Act**, had not paid its undisputed taxes before filing the Appeal. The Tribunal also found the Appellant was liable for penalties and interest for declaring VAT late and for effecting payment of the VAT late. The Tribunal found the Respondent exercised its power appropriately in reviewing the assessment in **2016**. In respect to VAT refund the Tribunal found the Appellant's claim was time barred and that the Appellant failed to seek extension of time.

5. The Appellant was aggrieved by the Tribunal's judgment and filed this Appeal with four grounds - that is:

- a) The Tax Appeal Tribunal erred in law and fact in striking out the Appellant's Notice of Appeal and finding that the Appellant's appeal was not properly lodged before the Tribunal;*
- b) The Tax Appeal Tribunal erred in law and in fact in holding that the Respondent was within time to further amend its Notice of Assessment issued on 29th August 2012 in respect to the Appellant's tax affairs for the November 2005 to October 2011 period;*

c) *The Tax Appeal Tribunal erred in law and in fact in holding that the Appellant was liable for penalties and interest for making late payments for VAT in respect of service provided by the Appellant to its parent company, Hewlett Packard Europe BV;*

d) *The Tax Appeals Tribunal erred in law and in fact by holding that the Respondent was not entitled to offset the VAT overpayments of Ksh 20,060,671 against part of the conceded VAT liability of KSH 29,325,195.*

6. The Appellant seeks by this appeal that the Tribunal's judgment and all consequential orders be set aside.

BRIEF BACKGROUND

7. The Respondent carried out an audit of the Appellant's tax affairs for the years **2006 to 2011**. This audit was in relation to Income Tax, VAT, pay as you earn and withholding Tax. After that audit the Respondent demanded from the Appellant, for the audit period **2005 to 2011**, **Ksh 232,795,304/-**. The VAT demanded related to commission earned by the Appellant for providing services to **Hewlett Packard Europe BV** (HP Europe). The Respondent's stand was that those services rendered by the Appellant to HP Europe were subject to VAT.

8. The Appellant conceded to that audit and after receiving a waiver of interest, from the **Cabinet Secretary National Treasury**, the Appellant paid the Respondent the tax and interest.

9. The Respondent carried out another audit of the Appellant's Tax Affairs in the years **2016** for the period **2011- 2015**. In so doing the Respondent found that VAT for the commission earned from services to HP Europe, known as **Return on Value Added Commission (ROVAC)** for 2012 was not declared and that VAT for ROVAC for the period 2011 to 2015 was remitted late.

10. The Respondent on informing Appellant of that finding the Appellant objected by its letter dated **23rd March 2016**. In objecting the Appellant informed the Respondent that the Respondent had not considered that it had a credit of **Ksh 9,371,425/-** carried forward as at **November 2011**.

11. According to the Respondent that objection prompted it to review the compliance check it had done for the period **November 2005 to October 2011** to determine that credit position of the Appellant. It was then the Respondent realized that the computation, done by it, in **2012** for the period **November 2005 to October 2011** wrongly treated VAT as inclusive instead of treating VAT as exclusive.

12. The Respondent's position is that it proceeded to do proper computation for the period **2005 to 2011** and also the period **2012 to 2016** and made additional assessment of **Ksh 258,081,105** and also found that the credit claimed by the Appellant of **Ksh 9,371,425** was not genuine but that it was created by Appellant's failure to declare ROVAC as vatable.

13. The Appellant contents that the Respondent was wrong to rely on **Section 31 (6) (a) (ii)** of the Tax Procedure Act. (TPA) in making further amendment to the initial assessment on VAT. The Appellant termed that amendment as arbitrary abuse of power and breach of legitimate expectation. That the services to HP Europe was in nature continuous supply and accordingly that the proper VAT account should be based on **Section 13 (2)** of the Repealed VAT Act and **Section 12 (3) of VAT Act 2013**.

14. Further that the amendment was due to the Respondent's error in treating the commission – **ROVAC**.

15. I have considered parties submissions and shall proceed to consider the grounds raised in the appeal. In doing so I am conscious of the fact, as provided under **Section 56 (2)** of the tax procedure Act, the appeal before me is on a question of law only.

16. The fact that an appeal before Court, from the Tax Appeals Tribunal, lies on a question of law was considered in the case **OCEANFREIGHT (E.A) LIMITED –VS- COMMISSIONER OF DOMESTIC TAXES [2018] eKLR** where Justice F. Tuiyott stated:

“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 raise 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.”

17. On the first ground of appeal the Appellant faults the Tribunal for striking out its Notice of Appeal.

18. The Respondent argued before the Tribunal by way of Preliminary Objection, but which was heard with the main appeal, that the Appellant filed the appeal in contravention of **Section 52 (2) of TPA**. This Section provides:

“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.”

19. The above Section, in other words invalidates a notice of appeal where there are unpaid undisputed taxes.

20. Although the Appellant, before me, submitted that none of the sum of **Ksh 43,471,433** were undisputed that was contrary to the submissions made on behalf of the Appellant before the Tribunal. Before the Tribunal it was submitted (at **paragraph 23** onwards of the judgment) that the Appellant had entered into arrangement as an alternative to paying tax not in dispute. This is how the Tribunal summarised on undisputed taxes:

“The Appellant stated that Section 52 (2) of the Tax Procedure Act provides that a taxpayer may whilt pursuing a right of appeal against a tax decision entered into an arrangement as an alternative to paying any tax not in dispute. The Appellant argues that indeed it had entered into such an arrangement with the Respondent since the Appellant and the Respondent had numerous correspondences in an attempt to settle the issues raised by the Respondent on the audit of the affairs of the Appellant.

The Appellant through its Tax Agent Deloitte and Touche Certified Public Accountants applied for an offset of the overpayment of VAT against the tax conceded to be payable in the letters dated 17th June 2016 and 28th September 2016.”

21. Clearly from that passage, in the Tribunal’s judgment, it becomes clear that by the time the Appellant filed a Notice of Appeal before the Tribunal there was unpaid undisputed taxes which the Appellants was seeking to offset against an overpayment in VAT. That means the Appellant was in breach of **Section 52 (2) of the TPA**.

22. The submission before me that there were no undisputed taxes is therefore rejected. The finding of the Tribunal that the Notice of Appeal was filed contrary to **Section 52 (2) TPA** is therefore upheld. The Tribunal indeed made a finding that the Appellant paid the undisputed taxes after the Notice of Appeal had been filed before it.

23. Ground two of appeal, before this Court, is directed at the Respondent’s further amended Notice of Assessment.

24. To re-cap the Appellant was audited and was informed of that audit by Respondent’s letter of **15th February 2016**. The Appellant by its letter of **23rd March 2016** raised an issue of a credit balance of **Ksh 9,371,452/-** for **November 2011 VAT**. The Respondent in response submitted that it was at the Appellant’s behest that it undertook review of its (Respondent’s) compliance check for the period **November 2005 to October 2011** to confirm the Appellant’s contention of credit. In undertaking that review the Respondent found the Appellant had an additional tax liability. It is that further amendment that the second ground of appeal is directed at.

25. The relevant law is found in **Section 31 (6)** of the Tax procedure **Act Cap 29**. That Section states:

“Where an assessment has been amended, the Commissioner may further amend the original assessment –

a) Five years after

*i) For a self-assessment, the date the taxpayer submitted the self-assessment return to which the self-assessment relates;
or*

ii) For any other assessment, the date the Commissioner served notice of the original assessment on the taxpayer;

b) One year after the Commissioner served notice of the amended assessment on the taxpayer, whichever is the later.”

26. The Appellant submitted that the Respondent could only further amend its assessment within one year of the amended assessment. The Appellant relied on **Section 31 (6) (ii) (b)**.

27. The Respondent argued that the Appellant having invited it to consider its credit for **November 2011**, the Appellant could not expect the Respondent not to review that period.

28. The Respondent further argued that it was within the provisions of **Section 31 (6) (a) (ii) of Cap 29** that it further amended Appellant’s assessment.

29. The **Tax Appeals Tribunal**, by its judgment, made a finding that it was the Appellant who invited the further assessment when it raised the issue of credit of **Ksh, 9,371,425/-**.

30. I have considered all the opposing submission. Although the Respondent, referring to the definition of assessment in **Section 3 of Cap 29** argued that the said definition included amended assessment, I think it is the provisions of **Section 31 (6)** that should guide this Court to determine whether the further amendment by the Respondent was lawful.

31. **Section 31(6) of Cap 29** is reproduced above. The issue to determine on this ground of appeal is whether the assessment of **29th August 2012** could be further amended within five years thereof as provided under **Section 31 (6) (a) (ii) of Cap 29** or within one year as provided under **Section 31 (6) (b) of Cap 29**.

32. **Section 31 (6) (a) (ii) Cap 29** permits the Respondent to further amend an assessment within five years after:

“(ii) For any other assessment, the date the commissioner served notice of the original assessment on the taxpayer.”

33. Although the Respondent argued that the words in that Section ‘for any other assessment’ also included an amended notice, in referring to **Section 3 of Cap 29**, I differ with that argument. This is because in my view it is necessary for the whole **Section 31 (6)** to be considered to determine when the Respondent can further amend an assessment. When one considers the whole Section then one will see that **Section 31 (6) (b)** provides for further amendment after the Respondent has served notice of amended assessment. In this case the notice of amended assessment was served on **29th August 2012**. It is that notice of amended assessment that **Section 31 (6) (b)** is directed at. If one was to accept the Respondent’s argument that the notice of amended assessment can be further amended as provided under **Section 31 (6) (a) (ii)** it would then mean that **Section 31 (6) (b)** is redundant. I don’t think that was the intention of the **Legislature**. The clear intention of the Legislature is that once the Respondent has given notice of amended assessment it can only thereafter further amend within one year that assessment. In this case the Respondent could further amend assessment in **August 2013** that is within one year from **29th August 2012**.

34. I beg to differ with the Tax Appeals Tribunal on their finding on this ground. I am not of the view that the Appellant’s request for their credit of **Ksh 9,371,425/-** to be considered could legally invite the Respondent to further amend its assessment beyond the period permitted by law, that is **Section 31 (6) (b) of Cap 29**.

35. The Appellant succeeds on the second ground of appeal.

36. The Appellant under ground three of this appeal seeks a finding that the Tribunal erred in holding it was liable for penalties and interest for making late payments.

37. The main activity of the Appellant is marketing and promotion of the sales of **Hewlett Packard in East Africa** for its parent company **Hewlett Packard Europe BV**. The Appellant was a party to a miscellaneous Service Agreement, dated **1st November 2005**, with **Hewlett Packard Company USA**. Under that service Agreement the Appellant was required to provide certain services to **HP USA** and other **HP Group of Companies** in order to achieve efficiencies within the group and take advantage of specific resources in particular locations.

38. The Appellant provided services to HP Europe under the said agreement and received commission referred to as **ROVAC (Return on Value Added Commission)**. That agreement provided, under **clause 2.4** that the provider, in this case the Appellant, would invoice the service “recipient monthly (or, if agreed to in writing quarterly or on some other periodic basis).”

39. It is not disputed by the Respondent that the Appellant, by an email dated **6th August 2012** agreed with HP Europe to amend the agreement to provide that the Appellant was expected to raise invoices for the payment of **ROVAC** for services rendered on quarterly basis.

40. Although the Respondent submitted that the Appellant, according to the service Agreement, invoiced HP Europe monthly, it does seem, in making that submission, to have failed to consider the agreement for invoicing was changed to be quarterly.

41. The importance of determining whether the invoicing was monthly or quarterly is because it determined when VAT was payable by the Appellant. Under the **VAT Act 2009**, which was applicable from 2011 to 2013 period, particularly **Section 13 (1) (c)** provides tax is chargeable when “an invoice is issued in respect of supply.” The Respondent submitted that **Section 13 (2) of VAT Act 2009** provided where there is continuous supply of services the “tax shall become due and payable at the time each determination or metered reading.” The Respondent argued that the Miscellaneous Agreement, the date of raising invoice was ascertainable and not continuous as argued by Appellant.

42. Both parties agree that the Appellant’s VAT for the **year 2013** was governed by **VAT Act No. 35 of 2013**, particularly **Section 12**.

43. It is important to state that the Tribunal found in favour of the Appellant, that is that the email of **6th August 2012** had changed the period of invoicing, in respect to the **Miscellaneous Agreement**, to quarterly, the Tribunal however made a finding that even though the invoicing period was quarterly the Appellant failed to make payment of VAT, in respect to **ROVAC** in **November 2014** for **August 2014** to **October 2014**. The Tribunal found that there was a two months delay in VAT payment on the Appellant’s part.

44. In my view that issue of late payment of **VAT** was not subject of the appeal before me. But in case the Appellant intended it to be subject of this appeal I find that the finding of the Tribunal on the late payment of **VAT** is a factual finding which is not subject to appeal before this Court.

45. Ground four of this appeal relates on whether the Appellant was entitled to offset the VAT overpayment of **Ksh 20,060,671/-** against its VAT liability of **Ksh 29,325,192/-**.

46. The Tribunal made a finding, by looking at the parties correspondence, and found that the Appellant had failed to lodge its claim for refund of its over payment within **12 months**, as set out in **Section 24 VAT Act Cap 476 (2009)**. The Tribunal then found that this meant that its said claim was time barred.

47. That determination of the Tribunal was not based on any ground of appeal before it. The Tribunal therefore, as rightly submitted by the Appellant, assumed jurisdiction on the issue of refund which was not before it. The Tribunal, as provided under **Section 13 (6)** is limited to determine an appeal before it on the grounds of appeal before it. The issue of refund was not in the grounds of appeal before the Tribunal.

48. In the end it follows that this Court having determined that the Appellant’s appeal was not in compliance with Section 52 (2) of Tax Procedure Act grounds Nos. 1, 2 and 3 of this appeal are dismissed. They are dismissed because the appeal before the Tribunal was incompetent in view of Section 52 (2) of the Tax Procedure Act and having been incompetent no appeal can lie on those grounds

before this Court.

49. On the fourth ground, the Court having found that the Tribunal made a determination on an issue not before it the Appellant succeeds. Therefore the order of the Tribunal that the Appellant was not entitled to refund of Ksh 20,060,671/- is hereby set aside. But for the avoidance of doubt the Appellant, however, cannot, on the basis of that finding seek an automatic refund; it will need to follow the lawful process of claiming that refund.

50. The Appellant has only succeeded on one ground which cannot entitle it to costs and accordingly I do order each party do bear their own costs in this appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE APPELLANT

.....FOR THE RESPONDENT