



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 57 OF 2015

REPUBLICAPPLICANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

EX-PARTE

NOBLE GASES INTERNATIONAL LIMITED

JUDGEMENT

1. Through the notice of motion application dated 5th March, 2015 the ex-parte Applicant, Noble Gases International Limited prays for orders as follows:

“1.The court be pleased to grant an order of:

- a. **CERTIORARI** to remove to this Honourable Court and quash the Agency Notices dated 10th February, 2015 issued by the Respondent purportedly seeking to recover and/or realize a sum of Kshs. 204,812,902 allegedly due from the applicant, which Agency Notices were served upon the applicant’s bank accounts held with the Victoria Commercial Bank, Kimathi Street Branch and the Diamond Trust Bank, Nation Centre Branch.
- b. **PROHIBITION** prohibiting the Respondent from taking any other step or action purportedly to recover the sum of Kshs. 204,812,902 allegedly due from the applicant.
- c. **MANDAMUS** directed to the respondent compelling him to comply with the requirements of the law according to sections 85 and 86 of the Income Tax Act, Cap 470 Laws of Kenya relating to the respondent’s powers on receipt of objections.

2. The cost of this application be provided for.”

2. The Applicant’s case, as gleaned from the statutory statement and the verifying affidavit of Jaspal Singh Nyotta which were filed together with the chamber summons application for leave on 24th February, 2015, is that it is a limited liability company registered in Kenya whose main business activity is the manufacture of special gases.

3. On 21st November, 2014 the Respondent served the Applicant with a notice of additional assessments of taxes. It is the Applicant’s case that the said additional assessments were erroneous

and on 4th December, 2014 it filed an objection notice pursuant to Section 84 of the Income Tax Act, Cap 470 Laws of Kenya (ITA), which notice was received by the Respondent on the same date.

4. It is the Applicant's case that it has never received the Respondent's decision on the said objection notice as required by Section 85 of the ITA. According to the Applicant, the Respondent instead proceeded to issue agency notices upon the Applicant's bankers, the Victoria Commercial Bank, Kimathi Street Branch and Diamond Trust Bank, Nation Centre Branch, seeking remittance of Kshs.204,812,902 as tax due from the Applicant.

5. It is thus the Applicant's case that the agency notices issued by the Respondent against its bankers are void, illegal and absolutely unenforceable. Further, that the said agency notices were issued in outright contravention of the law.

6. The Respondent opposed the application through a replying affidavit sworn by Meshack Mumo of the Domestic Taxes Department on 27th May, 2015. Mr. Mumo averred that acting on the powers granted by Section 56(1) of ITA and Section 48 of the Value Added Tax Act, 2013 (VAT Act), the Respondent's Taxpayer Registration Recruitment Programme Unit visited the Applicant's premises where it was established that the Applicant had not filed income tax returns for the period 2006 to 2010 and had also failed to remit withholding tax due and payable in respect of construction that was ongoing.

7. The Respondent requested the Applicant to avail some documents but the Applicant did not comply prompting the Compliance Programme Unit of the Respondent to issue the Applicant with a notice to carry out compliance check on the Applicant's tax records for the period 2008, 2009, 2010 and 2011. The Applicant also failed to respond and the matter was referred to the Audit Unit to prevail upon the Applicant to provide the Respondent with the information necessary to confirm the Applicant's tax status. The Applicant was still not fully cooperative.

8. However, acting on documents partly retrieved from the Applicant, the Respondent discovered that the Applicant had not fully complied with the tax regulations as per the requirements of the ITA and the VAT Act with regard to payment of corporation tax, value added tax, withholding tax and Pay as You Earn (PAYE).

9. On 17th February, 2014 the Respondent communicated its findings to the Applicant but the Applicant did not respond. This prompted the Respondent to issue the Applicant with a demand notice dated 31st July, 2014 for tax due and payable as follows: corporation tax – Kshs.198,147,22; value added tax – Kshs.48,274,929; withholding tax – Kshs.685,858; and PAYE –Kshs.5,979,822 bringing the total tax demanded to Kshs.253,087,831.

10. According to the Respondent, the additional assessment notices issued by the Respondent for PAYE and withholding tax for the period 2007-2013 were attached to the said demand notice. The Applicant was duly informed through the said letter that the additional assessments for corporation tax and value added tax would be issued at a later date. It is the Respondent's case that the Applicant did not respond to the tax demand and through a letter dated 10th February, 2015 the Applicant was given a final opportunity to settle taxes due and owing without further delay.

11. The Respondent's position is that the additional assessment notices in respect of PAYE and withholding tax were received by the Applicant on 31st July, 2014 and no objection was raised to the assessments within the 30 days provided by Section 84 of the ITA. It is therefore the Respondent's case that the Applicant cannot purport to have issued an objection notice in December, 2014, four months after receiving notice of the additional assessments.

12. It is the Respondent's case that on 25th November, 2014 it served the Applicant with notice of additional assessment on corporation tax as required under Section 78 of the ITA. According to the Respondent, the investment deduction claim for the years 2007 and 2008 was disallowed after

repeated requests for supporting documents failed to bear fruit. The wear and tear claim was restricted to the year 2011 and disallowed for the other years as there were no supporting documents.

13. It is the Respondent's case that the 30 days within which the Applicant was to file an objection notice expired on 24th December, 2014. Further, that no valid objection notice had been filed as the objection notice allegedly filed by the Applicant was not accompanied by a return of income together with all the supporting documents. It is the Respondent's case that it did not acknowledge the Applicant's objection notice as the same was never received.

14. The Respondent also faults the mode of delivery of the alleged objection notice stating that the same was to be delivered to the address stated in the assessments as South of Nairobi based at Sameer Business Park and not the Return Processing Section at Times Tower where the Applicant allegedly delivered the objection notice.

15. It is the Respondent's case that the act of delivering the objection notice to the wrong address by the Applicant is suspicious. Further, that had the objection notice been delivered at the Return Processing Section at Times Tower it would have been channelled to the proper office.

16. Mr. Mumo exhibited an affidavit sworn on 27th May, 2015 by Newton K Magu of the Respondent's Return Processing Section, in which the deponent averred that although the Applicant's objection notice had a stamp similar to that of the Section, the said objection notice was never received at the Return Processing Section on 4th December, 2014. Mr. Newton Magu also annexed a copy of the Incoming Register for the relevant date to his affidavit so as to demonstrate that the Applicant's objection notice was not received in that office.

17. It is the Respondent's case that the Applicant's authorised auditors who are known to the Respondent and who received copies of all correspondences in connection with the matter are Shilasi and Associates, CPA and not PKF Taxation Services Limited as indicated in the purported objection notice.

18. It is also the Respondent's case that had the objection notice been received and not admitted by the Respondent, the Applicant would have invoked Section 86 of the ITA in preferring an appeal to the Local Committee. The Respondent therefore states that it could not have served the Applicant with a notice of amendment or confirmation of the additional assessments because there was no objection.

19. According to the Respondent, it invoked Section 96 of the ITA to enforce the collection of Kshs.204,812,902 by issuing agency notices after the Applicant failed to respond to the notice of additional assessment. The Respondent contends that the Applicant had not come to Court with clean hands because it did not raise the issue of the objection notice on receipt of the final demand notice dated 10th February, 2015 but instead chose to wait until the agency notices were served on its bankers before proceeding to court to apply for stay of the agency notices. The Respondent asserts that the taxes were due and the agency notices were issued in accordance with Section 96 of the ITA.

20. The Respondent asserts that the Applicant was provided with a breakdown and tabulations of the taxes due and the years they related to after the audit exercise. Further, that the total amount demanded in the agency notices is Kshs.204,812,902 being tax due on corporation tax, PAYE and withholding tax. It is the Respondent's position that no agency notice has been issued in regard to value added tax.

21. The Respondent states that orders of judicial review cannot issue in the circumstances of this case as it was performing its statutory duties within the law.

22. The Applicant filed a further affidavit sworn by its Managing Director, Jaspal Singh Nyotta on 16th July, 2015. Through the further affidavit, the Applicant insists that its case was premised on the fact that the Respondent issued agency notices before addressing its objection notice.
23. It is the Applicant's case that it did not object to the additional assessments issued on 31st July, 2014, in respect to PAYE and withholding tax. The Applicant states that it made payments in respect to those assessments. The Applicant exhibited receipts in support of those payments. It is the Applicant's case that it only objected to the taxes indicated in the additional assessment notices dated 21st November, 2014. It is the Applicant's view that the objection notice dated 4th December, 2014 was properly and actually served upon the Respondent, only 13 days after receipt of the assessment notices and well before the expiry of the statutory period of 60 days.
24. The Applicant avers that it has no knowledge about the Respondent's internal mechanisms of receiving or taking care of the documents delivered to its offices and it cannot be expected to be concerned about the recording of the receipt of the objection notice. The Applicant points out that the Respondent concedes that the stamp on its objection is similar to the official stamp used in its office. It is the Applicant's case that its choice of address does not in any way lessen the statutory validity of its notice of objection.
25. It is the Applicant's case that it did not attach return of income or other documents to its notice of objection as those documents were not applicable in its case.
26. The Respondent, with the leave of the Court, filed a further replying affidavit dated 7th August, 2015. It is the Respondent's case that in the demand notice of 31st July, 2014, the PAYE and the withholding taxes demanded were Kshs.5,979,822 and Kshs,685,858 respectively for the periods between 2007 and 2014. It is the Respondent's case that the PAYE credit slip for Kshs.98,440 exhibited in the Applicant's further affidavit was for the month of August, 2014 only which is below the demand of Kshs.5,978,822 and outside the period for which the demand notice was issued.
27. Further, that the withholding tax payment slip for Kshs.49,664 relates to withholding tax on construction fees of Kshs.997,280 for the month of August, 2014 while the assessment amount demanded was for Kshs.685,858 for the period 2007 to 2013. It is therefore the Respondent's case that receipt numbers F275362 and F275364 for PAYE and withholding tax payments respectively are both for the months of August, 2014, a period outside the assessment period and also not for the demanded assessed amount of Kshs.5,979,822 and Kshs.685,858 as PAYE and withholding tax respectively. It is the Respondent's case that since the Applicant has admitted these taxes, it should pay the amount as demanded.
28. The Respondent insists that it never received an objection notice from the Applicant.
29. Although in their submissions the parties have identified several issues for the determination of this Court, I can only identify one issue for the decision of this Court and this is whether the Applicant served a proper objection notice to the additional assessment of taxes issued to it on 25th November, 2014 by the Respondent.
30. The Applicant concedes that it did not object to the additional assessment notice in respect to PAYE and withholding tax assessed at Kshs.5,979,822 and Kshs.685,858 respectively. It is the Applicant's case that it paid the said taxes. It exhibited through paragraph 4 of the further affidavit of its Managing Director, Jaspal Singh Nyotta receipt No. F275362 for Kshs.98,440 and No. F275364 for Kshs.49,664 being payment for PAYE and withholding tax respectively. However, the Respondent has on its part pointed out that the exhibited receipts are for payment PAYE and withholding tax for August, 2014.
31. I have scrutinised the receipts and other documents exhibited by the Applicant and I agree with

the Respondent that the receipts are indeed for payment of PAYE and withholding tax for August, 2014. This was outside the period for which the additional assessments were made by the Respondent. The amounts paid also vary from the amount demanded in the notice issued by the Respondent on 31st July, 2014. I therefore concur with the Respondent that this amount has been admitted by the Applicant. The same not being the subject of any dispute is due to the Respondent.

32. The parties are in agreement that the demand notice dated 21st November, 2014 conveyed assessment in respect of corporation tax. The Respondent is clear that assessment on value added tax is yet to be communicated to the Applicant. According to the Respondent, this explains why the agency notices were for Kshs.204,812,902 being corporation tax of Kshs.198,147,222, PAYE of Kshs.5,979,822 and withholding tax of Kshs.685, 858.

33. The Respondent accuses the Applicant of non-disclosure of material facts. I agree that in light of the evidence that has been placed before the Court it is clear that the Applicant has a streak of dishonesty. It did not disclose to the Court that it was not challenging the demand of Kshs.5,979,822 as PAYE and Kshs.685,858 as withholding tax since the taxes had been assessed at the time the demand notice of 31st July, 2014 was served.

34. Under Section 84(2) of ITA, the Applicant had sixty days from 31st July, 2014 to object to the PAYE and withholding tax assessments. Those sixty days expired on 1st October, 2014. The notice of objection to tax assessment which the Applicant relied upon is alleged to have been received by the Respondent on 4th December, 2014. The period within which the Applicant could have lodged an objection to the assessment of PAYE and withholding tax had lapsed by that time.

35. The Applicant's lack of candour also emerges in the further affidavit sworn by its Managing Director on 16th July, 2015 through which the receipts confirming payment of the assessed PAYE and withholding tax are exhibited. As already stated, the exhibited receipts are for payment of PAYE and withholding tax for August, 2014. They are not relevant to the assessment and demand made on 31st July, 2014.

36. In **Republic v Kenya Revenue Authority ex-parte Cimbria (EA) Ltd, Nairobi H.C. Misc. Application No. 1388 of 2002**, R.P.V Wendoh, J correctly captured the legal position on the importance of candid disclosure when she noted that:

“An Applicant approaching the court for leave to commence Judicial Review proceedings is under a duty to make a full and frank disclosure to the court of all material facts and known impediments to Judicial Review and that disclosure should include whether there is an alternative remedy, if there has been a delay, adverse authority, or if there is statutory ouster, to name but some.”

37. Even in a situation where an applicant deserves the issuance of judicial review orders, failure to disclose material facts can indeed lead to denial of orders. Judicial review is a remedy premised on good faith and any party who approaches the court for relief must always be candid in respect of all the issues that are relevant to the application.

38. Section 84 of the ITA provides an opportunity to a taxpayer to dispute an assessment of tax by the Respondent by objecting through a notice in writing. The window to object to an assessment is open for sixty days from the date of the service of assessment but the period may be extended by the Commissioner upon application by a taxpayer. For an objection to be valid, it is to be accompanied by a return of income together with all supporting documents, where applicable.

39. The Applicant claims it delivered an objection dated 4th December, 2014 at the Respondent's Return Processing Section at Times Tower, Nairobi. The Respondent has vehemently denied receiving such a notice.

40. The Respondent has gone ahead to produce evidence showing that it did not receive the Applicant's objection notice. The Applicant on the other hand insists that its objection notice was received. It relies on the stamp on the copy of the objection notice as evidence of receipt of the notice by the Respondent.

41. The Respondent concedes that the stamp on the Applicant's notice of 4th December, 2014 is similar to the one used in its Return Processing Section. The Applicant is indeed correct that it has no control over internal procedures of the Respondent. Even with its already established lack of candour on the part of the Applicant, I think it would be going overboard to find that the stamp on the copy of the objection was not obtained from the office of the Respondent. To do so would amount to attributing criminal conduct to the Applicant without any evidence to support such a conclusion.

42. There is no evidence that the Respondent has launched investigations into the source of the stamp impression, for indeed it would amount to criminal conduct for a party to exhibit forged documents in Court. In a contest between a citizen and a public organisation, the citizen is always disadvantaged. This is a fact that this Court takes into account.

43. It is also noted that the final demand and the agency notices were all issued on 10th February, 2015. The Applicant could not have therefore had an opportunity of reminding the Respondent about its objection to the assessment. The Respondent's allegation that the Applicant dashed to this Court without enquiring about the objection notice is therefore not acceptable. The Applicant had no otherwise as its objection to the tax assessment had not been addressed.

44. In the circumstances of this case, I find that the Applicant lodged a notice of objection to the assessment of corporation tax in the sum of Kshs.198,147,222. Whereas Section 96 of ITA provides for appointment of a person as an agent of a taxpayer for purposes of remittance of taxes that are due to the Respondent, such notice can only issue where the law has been complied with. In this case the issuance of the agency notices had no legal basis. There was need to first address the Applicant's objection to the tax assessment before issuance of the agency notices.

45. In the case at hand, the Applicant's objection needed to be processed as per the provisions of Section 85 of the ITA. The Applicant cannot be told it ought to have lodged an appeal under Section 86 of the ITA, for an appeal could only be lodged after the Applicant had been informed of the outcome of its objection.

46. From the facts placed before the Court, I find that the issuance of agency notices in respect of corporation tax amounting to Kshs.198,147,222 was premature as the Applicant's notice of objection to tax assessment dated 4th December, 2014 had not been addressed. The agency notices issued on 10th February, 2015 to the Applicant's bankers (Victoria Commercial Bank, Kimathi Street, Nairobi and Diamond Trust Bank, Nation Centre Branch, Nairobi) are thus called into this Court and quashed in so far as they relate to the corporation tax assessed at Kshs.198,147,222.

47. The agency notices are however valid and lawful in respect to the claim of Kshs.5,979,222 as PAYE and Kshs.685,858 as withholding tax. The Applicant's bankers named in the said agency notices are therefore mandated to comply and collect the said PAYE and withholding tax.

48. Since there is doubt as to whether the Applicant's objection was indeed received by the Respondent, the Applicant's notice of objection to assessment is deemed to have been served with effect from the date of this judgement. The Respondent is therefore directed to deal with the same in accordance with Section 85 of the ITA.

49. I have intentionally avoided addressing the Respondent's claim that the Applicant's objection is not a proper objection. That is an issue to be determined by the Respondent in the first instance and any dispute that may arise will be addressed through the appellate process established by the ITA.

50. Owing to the outcome of this application, I direct each party to meet own costs of the proceedings.

Dated, signed and delivered at Nairobi this 14th day of April, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT