Cale Infrastructure Construction Company Limited v Commissioner of Customs and Border Control & another (Tax Appeal E234 of 2024) [2025] KEHC 11263 (KLR) (Commercial and Tax) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E234 OF 2024

FG MUGAMBI, J

JULY 31, 2025

BETWEEN

CALE INFRASTRUCTURE CONSTRUCTION COMPANY LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... 1ST RESPONDENT

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT .... 2ND RESPONDENT

(Being an appeal from the judgment of the Tax Appeals Tribunal delivered on 19th July 2024 in TAT Appeal No. E416 of 2023)

JUDGMENT

Background and introduction

1. It is not in dispute that the appellant was subcontracted by Moja Expressway Company Limited (MOJA) to undertake pre-construction works for the Nairobi Expressway Project. These works included mobilization, establishment of a site camp and fabrication yard, and the procurement of construction machinery and materials under Phase 1 of the contractual agreement between MOJA and the appellant. Phase 2 of the project involved the actual construction of the Nairobi Expressway, a 27-kilometre stretch extending from Mlolongo, along Uhuru Highway, to the James Gichuru Road junction in Westlands.

2. Pursuant to the project agreement, the appellant was to be granted tax exemptions in respect of Customs Duty, Value Added Tax (VAT), Import Declaration Fees (IDF), and the Railway Development Levy (RDL). These exemptions applied to motor vehicles, spare parts, equipment, and materials or services imported or procured locally for purposes of constructing the Nairobi Expressway.

3. It is against this background that the respondent undertook an audit of the appellant's operations for the period 2020 to 2022. The audit focused on the appellant's tax compliance in relation to Import Duty, VAT, IDF, and RDL arising from the construction of the Nairobi Expressway Project.

4. Following the audit and subsequent engagements with the appellant, the respondent issued a review decision confirming tax liabilities amounting to Kshs. 6,924,759,976/=. The appellant admitted liability for Kshs. 3,505,951/= and settled the same on 12th July 2023. Dissatisfied with the balance of the tax assessment, the appellant filed an appeal before the Tax Appeals Tribunal (the Tribunal) on 28th July 2023. In a judgment delivered on 19th July 2024, the Tribunal dismissed the appellant's appeal and upheld the respondent's review decision dated 14th June 2023.

5. The present appeal arises from that decision. The appellant filed a Memorandum of Appeal dated 27th July 2023, on three principal grounds:

    a. That the respondent erroneously demanded Kshs. 359,047,353/= in taxes on machinery, equipment, and motor vehicles on the basis that the Nairobi expressway project had been completed, thereby rendering the exemptions no longer applicable;

    b. That the respondent erroneously demanded Kshs. 863,234,745/= in taxes on hardware tools and spares on the assertion that the project had been completed and that the customs security bonds had been cancelled;

    c. That the respondent erroneously demanded Kshs. 5,698,971,927/= in taxes on materials consumed in the project, notwithstanding the Government's express undertaking to settle that liability.

6. I have carefully considered the memorandum and record of appeal, the statement of facts, and the written submissions filed by both parties. I now proceed to address each ground of appeal in turn.

Analysis and Determination

Demand of Kshs. 359,047,353 on Machinery, Equipment & Motor Vehicles:

7. The first issue arising for determination is whether the appellant was entitled to continue enjoying tax exemption in relation to machinery, equipment, and motor vehicles valued at Kshs. 359,047,353/=, on the basis that the Nairobi expressway project had not yet been completed.

8. It is not in dispute that the tax exemption was granted based on a master list submitted by the Ministry of Roads and Transport and approved by the National Treasury, on condition that the goods listed would be used exclusively for the construction phase of the Nairobi Expressway.

9. The Tribunal found, and the respondent has submitted, that the project was completed on 13th May 2022 based on the Completion Certificate issued by the Kenya National Highways Authority (KeNHA), following a joint inspection. This conclusion was reinforced by the subsequent opening of the Expressway to the public on 14th May 2022, and the cancellation of the customs bonds as requested by the State Department for Infrastructure through its letters dated 20th June 2022 and 4th August 2022.

10. The appellant, however, disputes this finding. It argues that the Tribunal erred in equating the issuance of the Completion Certificate with full completion of the project. It submits that under Clauses 17.2 and 17.3 of the project agreement, the project cannot be deemed complete until a Performance Certificate has been issued. It relies on these provisions to assert that construction activities, including the use of hardware tools and spares, were still ongoing well into 2023, and that exemption benefits ought to remain applicable.

11. Clause 17.2(d) of the project agreement provides as follows:

> " If the inspection report concludes that the works have been completed in accordance with the detailed design, and that there are no incomplete works, then the contracting authority shall issue, within seven (7) days following receipt of the inspection report, either:
>
> (a) the Completion Certificate (with the Punch List Items attached); or
>
> (b) if there are no Punch List Items, the Completion Certificate and the Performance Certificate."

12. This provision in my view creates a contractual distinction between substantial and final completion. It is clear from the clause that the Performance Certificate may only be issued where no punch list items exist. Where such items are present, even if they are minor, like in the present case, only the Completion Certificate is issued. Thus, the absence of a Performance Certificate does not, per se, imply that the project is incomplete.

13. In my interpretation, the effect of Clause 17.2(d) was to allow the project to be deemed complete upon issuance of the Completion Certificate, even without a Performance Certificate. The purpose of the Completion Certificate is to confirm that the works have reached a state of substantial completion sufficient for handover and operational use, while the Performance Certificate would then be reserved for confirming the resolution of minor residual works and defects.

14. In the present case, there is no dispute that the Completion Certificate was issued on 13th May 2022, and that the expressway was operational as of 14th May 2022. The Moja Expressway CEO publicly confirmed that over 10 million vehicles had used the road in the six months following its opening. It is noteworthy that the appellants did not question the authenticity or credibility of the newspaper reports relied upon by the respondent. There was no evidence presented to suggest that the reports were fabricated or otherwise unreliable.

15. On that account, I agree with the Tribunal that the appellant cannot, on the one hand, benefit from the commercial operation of the expressway, cancellation of its bonds, and commissioning of the road, and on the other hand claim that the project is still incomplete for purposes of retaining exemption privileges. The issuance of the Completion Certificate under Clause 17.2(d)(A), together with the supporting documentation, conclusively indicates that the construction phase had come to an end.

16. The Tribunal was therefore correct in finding that the tax exemption lapsed upon substantial completion of the project as evidenced by the Completion Certificate. The appellant's reliance on the absence of a Performance Certificate is misplaced in view of the express terms of the project agreement.

Demand of Kshs. 863,234,745 taxes on Hardware tools & Spares:

17. The appellant further challenges the Tribunal's determination requiring it to pay Kshs. 863,234,745/= in taxes on hardware tools and spares, asserting that the Tribunal erroneously relied on the cancellation

of customs security bonds as conclusive evidence that the project had been completed and that the tax exemptions had thereby lapsed.

18. According to the appellant, the Tribunal failed to properly appreciate that the mere cancellation of bonds did not necessarily extend to all exempted items, particularly hardware tools and spares, and that the correspondence relied upon did not expressly indicate that the bonds relating to these specific items had been discharged.

19. The appellant further argues that the Tribunal misdirected itself by treating general references to bond cancellations as sufficient to infer both the full consumption of exempted materials and the cessation of the exemption regime. It maintains that the letters relied upon did not explicitly exclude or address hardware tools and spares, and as such, it was speculative to conclude that the exemption had lapsed with respect to those items.

20. In response, the respondent maintains that the bond cancellation requests submitted to it clearly covered equipment, hardware, spares, and tools, and that these categories were explicitly referenced in both the applications and the accompanying lists.

21. Upon examination of the record, the Tribunal found that the tax exemption granted on 5th June 2020 was anchored on a master list submitted by the State Department for Infrastructure via a letter dated 18th May 2020. This list unequivocally included hardware tools and spares as part of the exempted goods. Subsequently, by a letter dated 26th April 2021, the Director General of KeNHA sought cancellation of customs security bonds in respect of project goods.

22. Although the letter did not explicitly preserve the bonds relating to hardware tools and spares, later letters dated 20th June 2022 and 4th August 2022 from the same department expressly listed these items among those for which cancellation was being sought.

23. These were factual findings made by the Tribunal after evaluating the evidence before it. As no error of law has been demonstrated, and considering that this Court is confined to questions of law, there is no basis to interfere with those findings. This position is anchored in Section 56(2) of the *Tax Procedures Act*.

24. In any event, the Tribunal correctly observed that the tax exemption granted to the appellant was conditional upon the provision and maintenance of customs security bonds. The request for, and eventual cancellation of, those bonds signified the end of the construction phase and extinguished the corresponding tax privileges. Once the bonds were released, particularly with respect to hardware tools and spares, the appellant could no longer assert entitlement to duty-free treatment of those items.

25. The Tribunal thus rightly concluded that the appellant's exemption status ceased with the cancellation of the bonds. The appellant could not rely on the subsistence of the defect liability period to justify continued exemption, especially when it had voluntarily discharged the very instrument, the customs bond, that underpinned the exemption. If the appellant intended to preserve the benefit during the defect liability period, it was incumbent upon it to maintain the bonds accordingly.

26. Having failed to do so, and in light of the previous finding of completion of the project, the appellant cannot now fault the consequences. I therefore find no error in the Tribunal's reasoning or conclusion on this issue.

Whether the Respondent erred in demanding Kshs. 5,698,971,927 in taxes on materials consumed in the project that the Government had committed to pay:

27. The appellant challenges the Tribunal's finding that, although the National Treasury had undertaken to bear the tax liability on certain materials consumed in the project, the primary obligation to pay the said taxes nonetheless rested with the appellant. The Tribunal held that in the event of default by the Government in honouring its commitment, the respondent was entitled to recover the taxes from the appellant, since the respondent was not a party to the agreement embodying the undertaking.

28. The appellant contends that the Tribunal erred in attributing the liability to it. It maintains that it had no expectation or reason to believe that the tax burden for these materials would fall on it, given the express commitment by the National Treasury. In its view, once the Government undertook to pay the taxes, the appellant's obligation was extinguished. At the very least, the appellant expected that in the event of non-payment by the Treasury, the respondent, as a fellow government agency, would resolve the matter internally rather than shifting the burden onto the appellant.

29. In response, the respondent clarifies that it did not issue a formal demand for the taxes but merely advised the appellant to follow up with the National Treasury for settlement of the Government's undertaking.

30. As correctly noted by the Tribunal, the parties in this appeal agree that the assessed tax amounting to Kshs. 5,698,971,927/= was indeed due and owing. The bone of contention was not the validity of the assessment but where the liability to settle it lay.

31. Having considered the record, the submissions of the parties, and the Tribunal's reasoning, I find no fault in the Tribunal's conclusion. While it is not disputed that the National Treasury issued an undertaking to pay the tax on certain project materials, the legal duty to pay taxes under the applicable tax statutes remains with the importer, in this case, the appellant.

32. The letter of undertaking did not have the legal effect of transferring the statutory liability from the appellant to the National Treasury, nor did it create an enforceable obligation on the part of the respondent to pursue payment from the Treasury in place of the appellant.

33. The Tribunal was therefore correct in finding that the respondent, not being privy to the arrangement between the appellant and the National Treasury, was under no legal obligation to enforce the undertaking or wait for its fulfilment. In the event of default by the Treasury, the respondent was lawfully entitled to seek recovery from the appellant as the primary taxpayer.

34. It was incumbent upon the appellant, having benefited from the exemption process, to ensure that the undertaking was honoured by the Treasury. The Tribunal rightly held that the existence of the undertaking did not relieve the appellant of its primary tax obligation.

Disposition

35. Accordingly, and for the foregoing reasons, I find that the appeal is devoid of merit. The decision of the Tax Appeals Tribunal dated 19th July, 2024 is hereby upheld in its entirety. Each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2025

F. MUGAMBI

JUDGE