Commissioner of Domestic Taxes v Nielsen (Income Tax Appeal E002 of 2021) [2024] KEHC 916 (KLR) (Commercial and Tax) (30 January 2024) (Judgment)

Neutral citation: [2024] KEHC 916 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E002 OF 2021

A MABEYA, J

JANUARY 30, 2024

BETWEEN

THE COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

PETER BONDE NIELSEN ..... RESPONDENT

JUDGMENT

1. The appellant conducted an audit on the business affairs of Oldonyo Laro Estates Ltd (OLE) for the years 2008 to December 2014. On 18/8/2016, the appellant issued an assessment to the respondent for Kshs. 582,107,147/- comprising of Income Tax Kshs. 317,172,210/- and penalties of Kshs. 63,434,442/-. The respondent objected to the assessment on 16/9/2016 and the appellant made issued his objection decision on 11/11/2016.

2. Being dissatisfied by the said decision, the respondent lodged an appeal at the Tax Appeals Tribunal ("the tribunal") and judgment was delivered on 13/11/2020 allowing the appeal.

3. The appellant was aggrieved by the judgment of the Tribunal and lodges this appeal *vide* a memorandum of appeal dated 11/1/2021 citing 5 grounds of appeal which can be summarized as follows: -

    a. That the Tribunal erred in shifting the burden of proof to the appellant and failed to appreciate the provisions of sections 30 of the *Tax Appeals Tribunal Act* (TAT) and 59 of the *Tax Procedures Act* (TPA) on request for and productions of additional documents.

    b. That the Tribunal erred in failing to give due regard to section 54A of the *Income Tax Act* which requires the tax payer to keep records for a period of five years.

c. The Tribunal erred in disregarding evidence of fraud adduced by the appellant with respect to the filing of nil returns and failed to give due regard to sections 73 of the *Income Tax Act* and 31 of the *TPA* on the power to issue additional and/or default assessments.

4. The respondent opposed the appeal vide his statement of facts dated 9/3/2021. He contended that the Tribunal did not err in holding that the appellant had the burden of proving that the applicant was guilty of gross or willful neglect, evasion or fraud since the assessment was made after 5 years. That the Tribunal had correctly held that the respondent produced the required documents for examination. That the appellant failed to distinguish the respondent's business and that of the company.

5. The appeal was canvassed by way of written submissions which I have considered.

6. It was submitted for the appellant that under sections 30 of the *TAT* and 56(1) of the *TPA*, the law placed the burden of proof on the taxpayer. That under section 23 of the *TPA* the respondent was required to keep documents for a period of not less than 5 years. That the respondent was requested to avail several documents but failed to do so. That the Tribunal erred in failing to consider evidence of fraud since the respondent filed nil returns for the years 2008, 2009 and 2010. That in failing to do so, the respondent was guilty of willful neglect, evasion or fraud.

7. For the respondent, it was submitted that he had discharged his burden when he demonstrated that the appellant did not have any justification for charging PAYE on accounts from 2008 to 2010 since the 5year time limit had lapsed. That since the appellant had made allegations of fraud, the burden was upon him to prove fraud.

8. That the respondent discharged the legal burden by providing the necessary documents together with explanations where necessary. That the appellant did not address himself to the documents provided by the respondent. Further, it was the respondent's submissions that he did not receive any business income or employment income in Kenya.

9. I have considered the record, the response and the written submissions. This being a first appeal, I am duty bound to re-appraise the evidence afresh and arrive at my own independent conclusion and findings. See *Selles & anor v Associated Motor Boat Company Ltd & others* [1968] EA 424.

10. The dispute between the parties emanates from the additional assessment by the appellant of Kshs. 582,107,147/- on the respondent. In his appeal before the Tribunal, the respondent had contended that, the appellant was wrong in charging PAYE on funds in his account. That the funds had not accrued or derived in Kenya. That the said funds were loan repayments and could not be brought to charge PAYE thereon.

11. The respondent contended that since the appellant could only assess taxes up to 5 year, the assessment for the period 2008, 2009 and 2010 was invalid, null and void. That since the appellant had asserted that he could make such assessment on the ground of willful neglect on the part of the respondent, it was for the appellant to prove such neglect.

12. The appellant faulted the Tribunal for shifting the burden of proof to him as opposed to the tax payer. The appellant's position was that the respondent failed to avail certain documents with respect to the income received from Planicia Estates S.l as dividents, money received from Green Oak Energy and evidence of donations from the trust.

13. In tax matters the onus of proving that an assessment is wrong always lies with the tax payer and the justification is that the taxpayer has the knowledge and possession of the documents or evidence for

disproving a tax liability. This is in line with section 51(1) of the *TPA* and section 30 of the *TAT* which provide: -

> " In a proceeding before the tribunal, the appellant has the burden of proving—
>
> a. where an appeal relates to an assessment, that the assessment is excessive; or
>
> b. in any other case, that the tax decision should not have been made or should have been made differently."

14. In *Republic v Kenya Revenue Authority; ex-parte Proto Energy Limited* (JR Appn E023 of 2021) [2022] KEHC 5 (KLR), it was held that: -

> " The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold. A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented."

15. In its judgment, the Tribunal held that the appellant had issued an assessment from the respondent from the period of 2008 to 2010 but failed to demonstrate that the appellant knowingly or negligently failed to declare the taxable income.

16. From the record, it is not in dispute that the appellant had filed nil returns in the years 2008 to 2010. By virtue of section 31(4) of the *TPA*, the appellant amended the said returns. The appellant's position was that, in the said years, the respondent had been operating several commercial ventures in Kenya and upon examination of his bank accounts issued the assessment.

17. Section 31(4) of the *TPA* provides: -

> " (4) The Commissioner may amend an assessment—
>
> a. in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or
>
> b. in any other case, within five years of—
>
> i. for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or

ii. for any other assessment, the date the Commissioner notified the taxpayer of the assessment."

18. Similarly, section 29 (5) and (6) of the *TPA* provides as follows: -

> "(5) Subject to Subsection (6), an assessment under Subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.
>
> (6) Subsection (5) shall not apply in the case of gross or willful neglect, evasion or fraud by a taxpayer."

19. In *Commissioner of Domestic Taxes v Airtel Networks Kenya Limited* (Income Tax Appeal E062 of 2022) [2023] KEHC 25059, the court observed: -

> "On what amounts to gross or willful neglect, it would be instances where there is proof of an intentional gross deviation of what is reasonably accepted on the part of the tax payer."

20. By law, all amendments ought to be done within five years. In the same breath section 23 of the *TPA* and section 54A of the *Income Tax Act* require a tax payer to keep documents for that period of assessment. The exception to this rule is found in section 31(4) of *TPA* which gives the appellant leave to issue an assessment beyond five years when there is evidence of gross or willful neglect, fraud or evasion.

21. In this regard, for the appellant to rely on the conditions set out in section 31(4) aforesaid, it is upon him to demonstrate the instances whereby the tax payer was at fault. The appellant must demonstrate through evidence, that the tax-payer is guilt of willful neglect or fraud or evasion in order to rely on section 31(4) aforesaid.

22. In the present case, I have not found for example, any request made to the respondent for the accounts of all the companies in which he has interest in the subject period. There is no evidence to show that the respondent was requested for information regarding dividends or fees paid by the many companies that he is involved in.

23. As regards the assertion that OLE was receiving paying clients who were making payments for those services abroad which was then transferred to the respondent in Kenya later, that evidence was lacking. All the appellant was to do was produce such evidence and the principle of neglect, fraud and evasion would have kicked in. But without such evidence, I do not see how the Tribunal can be faulted.

24. I looked at the documents and explanations given by the respondent in his objection. In rejecting the same, the appellant did not give reasons for their rejection. The rejection of the same should have had a basis and not just peremptorily and/or capriciously.

25. The other issue is that there was no evidence to show that it was the respondent who collapsed the various meetings that were called to clarify on the Objection. If the appellant would have proved that fact and/or demonstrate that there were specific further documents and/or information that was sought from the respondent but not availed, then the complaint as to the shifting of the burden of proof would have succeeded. That lacking, the Tribunal cannot be faulted.

26. In view of the foregoing, the court finds that the appeal is not merited and the same is dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE