Commissioner of Domestic Taxes v Ashok Shah & Mital Shah t/a Smityss Trading (Income Tax Appeal E068 of 2023) [2024] KEHC 6322 (KLR) (Commercial and Tax) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6322 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E068 OF 2023

A. ONG'INJO, J

MAY 30, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

ASHOK SHAH & MITAL SHAH T/A SMITYSS TRADING ..... RESPONDENT

JUDGMENT

1. The Respondent applied for a refund of Kshs. 51,838,841/- being excess VAT withholding VWH credits. The Appellant upon conducting a compliance check issued a report dated 30th June 2020 where it rejected the refund claims. The Appellant issued several credit adjustment vouchers totaling to Kshs. 51,834,841/- and the Respondent objected to the same in a letter dated 11th September 2020. The Appellant in a letter dated 22nd September 2021 informed the Respondent that the review exercise had been completed and the application for refund had been rejected.

2. The Appellant being aggrieved by the Judgment and orders of the Tax Appeals Tribunal dated 20th January 2023 lodged the appeal herein vide Memorandum of Appeal dated 16th May 2023 on the following grounds: -

    1. The Honourable Tribunal erred in law and fact by holding that the Appellant's objection decision dated 22nd September 2021 was not valid.

    2. The Honourable Tribunal erred in law and fact by failing to consider the Appellant's case on merit.

    3. The Honourable Tribunal erred in law and fact by failing to establish that there was no valid refund application by the Respondent under Section 47 (1) under the *Tax Procedures Act*.

4. The Honourable Tribunal erred in law and fact by ordering the Appellant to process the Respondent's refund claim for excess VAT within 90 days when the same had already been utilized by the Respondent leading to double claim and/or enrichment.

5. The Honourable Tribunal misdirected itself on both facts and law and thereby arrived at the wrong, erroneous and absurd findings/decision.

3. The Appellant prayed that; -

1. The appeal be allowed and the judgment and subsequent orders of the Tax Appeals Tribunal dated 20th January 2023, be set aside.

2. The objection decision dated 22nd September 2021 be upheld.

3. Cost of this appeal and proceedings at the Tax Appeals Tribunal to be awarded to the Appellant.

4. The appeal was canvassed by way of written submissions dated 29th February 2024 and 5th December 2023 for the Appellant and Respondent Respectively. The said submissions were highlighted on 19th March 2024.

5. The Appellant's submissions as highlighted on 19th March 2024 are that the Respondent partnership business applied for VAT refund claim on excess input tax resulting from zero rated supplies. That verifications and engagements were done and the applications rejected on the ground of Wrong Refund Type since the credit emanated from excess withholding credit on supplies to major customers and not zero rated supplies. That credit adjustment vouchers were nevertheless issued for tax offset and which the system has fully utilized the amounts in the withholding set-offs.

6. The Appellant also submitted that the Respondent moved to the Tax Appeals Tribunals to challenge issuance of the credit adjustment vouchers and the Tribunal ordered refund of the excess VAT claim notwithstanding the credit adjustment vouchers.

7. The Appellant identified one issue for determination, that is, whether refund ordered by the Tribunal amounted to double payment and an unjust enrichment. They went further to confirm that parties were in agreement that the refund was due and the only point of departure was the mode of refund. It was contended that the credit adjustment vouchers issued to the Respondent were fully utilized and there was nothing remaining to be refunded. It was argued that the decision of the Tribunal implies that public funds would be utilized to pay the Respondent over and above the utilized Credit Adjustment Vouchers in the sum of Kshs. 51,838,841/- The Appellant submitted that this would amount to unjust enrichment and that the Tribunal decision should be set aside and the appeal allowed.

8. Mr. Kirui for the Respondent while highlighting submissions said that the objection decision by the Appellant dated 22nd September 2021 was issued outside the statutory timelines under Section 51(11) of the *Tax Procedures Act* 2015 which requires the Appellant to render a decision within 60 days from the date of receipt of objection. That it was therefore deemed that the Respondent's objection was allowed by operation of the law.

9. According to the Respondent, Notice of Objection was filed on 11th September 2020 and it was not until on 22nd September 2021 that the Appellant made a decision. This decision was rendered beyond

the 60 days required by the law and pursuant to the decision in Republic v Commissioner of Domestic Taxes ex parte Fleur Investment Ltd (2020) eKLR, Hon. Mativo, J. (as he then was) held: -

> " I find backing in Republic v Commissioner of Customs Services Ex-Parte Unilever Kenya Limited in which the court stated that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law. The act requires that where the Commissioner has not made an objection decision within 60 days from the date the tax payer lodged the notice of objection, the objection shall be allowed. This means that the issues that the tax payer had raised in the notice of objection will be accepted."

10. The Respondent also relied on the finding in Equity Group Holdings Ltd v Commissioner of Domestic Taxes (2021) eKLR and Nicholas Kiptoo arap Korir Salat v IEBC & 6 Others (2013) eKLR to argue that the Appellant failed to make objection decision within the strict timelines and hence the Respondent's objection was allowed by operation of the law.

11. The Respondent also submitted that they lodged a valid refund application as per Section 47 of the *Tax Procedures Act* and that they did not utilize the Credit Adjustment Vouchers since their business collapsed when the Appellant failed to process their application for VAT withholding credit which was their Working Capital. Hence the Credit Adjustment Vouchers which were issued on 12th and 25th August 2020 could not be utilized. They therefore prayed that the decision of the Tribunal dated 20th January 2023 should be upheld as it was not erroneous.

12. The Respondent also relied on the decision of Korir, J. in Republic v Commissioner of Customs Services ex parte Unilever Kenya Ltd (2012) eKLR in interpreting Section 229 (4) of the East Africa Community Management Act, 2004 which mandated commissioner to render a tax decision within 30 days failing to which the objection is deemed allowed. The court held as follows: -

> " My understanding of the above quoted section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the respondent in this case has 30 days within which to make and communicate a decision to the taxpayer. If the respondent does not communicate a decision within 30 days, then the respondent "shall be deemed to have made a decision to allow the application." The law is so clear that it can only be interpreted in one way... The respondent communicated the decision to the ex-parte applicant on 18th July, 2011. By communicating the decision four months from 16th March, 2011 the respondent was clearly in breach of the provisions of Section 229 EACCMA... The implication of the respondent's non-communication within the statutory period of 30 days is that the ex-parte applicant did not owe the taxes demanded by the demand notice of 9th February, 2011. The respondent's decision in the letter dated 18th July, 2011 which revised the tax demand downwards from Kshs. 102,254,601.00 to Kshs. 65,335,378.00 was therefore void from the beginning."

Analysis and Determination

13. This court has considered the grounds of appeal, the opposition by the Respondent by their Statement of Facts as well as submissions and authorities by respective parties and the mandate of this court in such an appeal is to consider questions of law pursuant to Section 56 of the Tax Procedure Act which provides: -

    1. In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

2. An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

3. In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.

14. The issues that arise for determination are: -

1. Whether the tribunal erred in holding that the objection decision was invalid

2. Whether the respondent was entitled to a refund

15. On the first issue as to whether the objection decision issued on 22nd September 2021 was invalid, Section 51 (11) of the *Tax Procedures Act* provides: -

> " where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed."

16. Although the Appellant did not make any submission regarding this issue, it is apparent from the record that the notice of objection was filed on 11th September 2020 and the objection decision was issued on 22nd September 2021 after a period of over 1 year. The time limit set by the Section 51(11) of the *Tax Procedures Act* is 60 days and the same had long lapsed.

17. In the case of *Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020*) [2021] the court observed that: -

> " Section 51 (11) of the TPA is couched in peremptory terms. Having correctly found that the decision was made after the expiry of 60 days, the TAT had no legal basis to proceed as it did and to invoke article 159(2) (d). First, there was no decision at all. The decision had ceased to exist by operation of the law. Second, the provisions of section 51 (11) (b) had kicked in. The Objection had by dint of the said provision been deemed as allowed. Third, the TAT had no discretion to either extent time or to entertain the matter further. Fourth, discretion follows the law and a tribunal cannot purport to exercise discretion in clear breach of the law.
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> 61. The TAT premised its decision on the provisions of Article 159 (2) (d) of *the Constitution* which requires courts to determine matters without undue regard to technicalities of procedure. On the face of a clear statutory dictate, I do not see how the TAT could term the express statutory edict as a matter of procedural technicality. This was a gross misapprehension of the law. Article 159 (2) (d) of *the Constitution* was not meant to oust express statutory provisions and to open a window for disregard of statutory requirements."

18. Similarly, in Republic v Commissioner of Customs Services Ex-Parte Unilever Kenya Limited (2012) eKLR the court was of the view that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law.

19. The same position was upheld in Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & Another (2020) eKLR where it was held that: -

> " The provisions of the TPA are clear that where the Commissioner fails to make a decision on an objection within sixty days, the objection shall be allowed. This means that the objection dated 8th November, 2016 in which the Applicant sought for the revision of

the Commissioner's decision to demand the excise duty amounting to Kshs 127,183,364/= was allowed by operation of the law by dint of Section 51(11) of the TPA. Therefore, the 1st Respondent should not have continued to demand the payment of the excise duty through the letters dated 23rd, November, 2016, 3rd, February, 2017, 3rd, October 2019, 24th October 2019, and 7th, November 2019. All those demands amounted to nothing in law."

20. Mabeya, J. while also dealing with the same issue under Section 51 (11) of the *Tax Procedures Act* in *Eastleigh Mall Limited v Commissioner of Investigations & Enforcement (Income Tax Appeal E068 of 2020)* [2023] KEHC 20000 (KLR) (Commercial and Tax) (17 July 2023) (Judgment) pronounced himself as follows: -

> "It is clear from the forgoing that the provisions of section 51(11) of the *Tax Procedures Act* are mandatory. They are not cosmetic. Parliament in its wisdom knew that in matters tax, time is very crucial as those in commerce need to make informed decisions. If the Commissioner is allowed to exercise his discretion and stay ad-infinitum before issuing an objection decision, the tax payer would be unable to make crucial decisions and plan his/her business properly. The timelines set are mandatory and not a procedural technicality."

21. From the foregoing dictums and the provision of Section 51 (11) of the *Tax Procedures Act*, it is mandatory for the Commissioner to adhere to the statutory timelines provided for by law and give its objection decision within 60 days. In the present case, it is not in dispute that the objection decision herein was filed outside the prescribed timelines. This court therefore is in agreement with the decision of the Tribunal that the Appellant's failure to issue its objection decision within 60 days was fatal. The notice of objection was therefore allowed by operation of the law.

22. Having found that the objection decision was made out of the statutory period provided for under Section 51(11) of the *Tax Procedures Act*, the court will not delve into the other issue as the same will amount to an academic exercise.

23. In the upshot, this court finds no merit in the appeal and the same is dismissed. The decision of the Tax Appeals Tribunal delivered on 20th January 2023 is hereby upheld. The Appellant to bear cost of the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 30TH DAY OF MAY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Esther - Court Assistant

Mr. Shijenje Advocate for the Appellant

Mr. Kirui Advocate for the Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Shijenje: I pray for stay of 30 days. I also pray for a copy of the judgment.

Mr. Kirui Advocate: 14 days is sufficient.

Order: Copies of judgment to be supplied to the parties. Stay of 14 days granted.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

30.5.2024