



TAX CASE DIGEST

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KENYA REVENUE
AUTHORITY

Tax Cases Digest

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Typeset and Published by National Council for Law Reporting (Kenya Law)

P.O. Box 10443 - GPO 00100 Nairobi



A Publication of the Kenya Revenue Authority

Vision

A Globally Trusted Revenue Agency Facilitating Tax and Customs Compliance

Mission

Building Trust through Facilitation so as to foster Compliance with Tax and Customs Legislation

Values

Trustworthy, Ethical, Competent, Helpful, Simple

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6. Where a dispute resolution mechanism existed outside Courts, the same be exhausted before the jurisdiction of the Courts was invoked

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FOREWORD

This is the First Edition of the Cases Digest that has been developed and published following a collaboration between the National Council for Law Reporting (Kenya Law) and Kenya Revenue Authority. This digest draws from the decisions of the High Court and Court of Appeal of Kenya on tax disputes and provides analysis of various judgments clarifying the emerging precedents, and the interpretation of the courts on a number of issues. While each case deals with unique issues by both the tax administration and taxpayers, each case lays precedent on a particular question.

A number of decisions on tax disputes have been delivered since independence of the Republic of Kenya. Whereas some of them have been published by the National Council for Law Reporting as part of the cases in law reports over the years, this digest comprehensively consolidates court decisions on tax disputes in a wide array of twelve (12) topical areas from the year 1976 to the year 2022.

The digest presents an important contribution towards the understanding of tax disputes from those on tax assessments by taxpayers; Customs Valuation, liability of tax & customs agents; refunds; investigation and enforcement on compliance issues; Compounding processes; tax decisions, objections and appeals; appeal processes at the Tax Appeals Tribunal, the burden of proof and interpretation of tax laws by both the High Court and the Court of Appeal. It serves as a valuable tool for appraising practitioners, policy makers and taxpayers.

The Kenya Revenue Authority has noted the need of documenting the jurisprudence emanating from the court on tax matters to guide decision making. This case digest will assist legal practitioners, scholars and other stakeholders who are keen on the implementation of tax laws and in the administration of justice in Kenya.

We trust that this is the first step in a journey that will continue and that judicial decisions touching on tax disputes and tax administration will be published on regular basis to enhance knowledge sharing and dissemination. We extend our gratitude to the National Council for Law Reporting and the entire team from the Kenya Revenue Authority for ensuring that this edition of the digest is published leaving guiding footprints on tax law interpretation on various areas as pronounced by the superior courts of record.

CS Paul Muema Matuku, EBS

Commissioner, Legal Services & Board Coordination, Kenya Revenue Authority

EXECUTIVE SUMMARY

Chapter one is on the legal liability of customs and tax agents and highlights the principles governing the principal agent relationships. An employer as the principal is liable for the fraudulent actions of its duly authorized employee who fraudulently imports goods using the employer's identity.

Chapter two focuses on the determination of burden of proof. This part highlights cases on the burden of proof for tax disputes, who bears the burden in the first instance and circumstances under which that burden shifts from the taxpayer to the Commissioner. It is noted that a review of these decisions reveals that the burden of proof is like a singing pendulum during the various dispute stages commencing with the taxpayer in the first instance in line with the provisions of the Tax Appeals Tribunal 2013 and the Tax Procedures Act 2015.

Chapter three highlights cases on tax decisions, objections and appeals. Judgments highlighted on this part guide on the timelines for lodging of objections by taxpayers and for issuing decisions on those objections by the Commissioner, form and contents of objections and the procedures for lodging objections.

Chapter four is on legitimate expectation on tax disputes with an analysis of cases giving interpretation on when the expectation becomes legitimate, the grounds for legitimate expectation and that it is a concept inextricably rooted and having a basis in the law. The analysis of these cases reveal that an expectation that is not based on any lawful legal framework is not legitimate.

Chapter five is on cases on the requirements for keeping and producing records. Since the disputes are primarily determined on the basis of evidence, records form an integral part of important pieces of documentation that supports tax assessments and dispute determination. The cases highlighted in this chapter guide on the duration of keeping records and the obligations to produce those records for tax purposes.

Chapter six covers decisions on the assessment of tax and customs duty under tax and customs laws while Chapter seven cases on enforcement of tax collection through agency notices highlighting the requirements and circumstances which these notices can be issued.

Chapter eight is on cases for refunds of tax and customs duty under tax and customs laws. The decisions in this part guide on when refunds can be made and the guiding legal framework. Chapter nine covers analysis of judgments on compounding of tax and customs cases. This is in instances where taxpayers voluntarily admit tax liability and administratively seek to resolve the matters with the tax administration.

Chapter ten covers decisions on customs valuation highlighting the guiding principles for valuation as provided in the East African Community Customs Management Act 2004. Chapter eleven is analyses cases on prohibition from departure of taxpayers or their management from leaving the Kenyan jurisdiction before meeting their tax obligations while the last chapter is on the requirement for exhaustion of local remedies prescribed in the law for dispute resolution before lodging tax appeals in the Courts.

Based on these decisions, there is emerging jurisprudence on tax dispute resolution and courts are setting standards and principles on these issues. These standards and principles will be relied upon now and in future. The Digest is modelled as a quick guide on the emerging jurisprudence on tax dispute resolution in Kenya and is useful to all legal practitioners who interact with nascent legal issues on tax matters.

December 2023

Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another**Chapter 1: Legal liability of agents****An importer of goods is liable for the fraudulent actions of its duly appointed licensed customs clearing agent**

Headnote: The applicant engaged the services of customs clearing agents who collected, cleared and forwarded various consignments of concentrates to the applicant. The agent informed the applicant through various invoices, that it had paid all taxes due from the applicant for the said period, on the basis of which the applicant paid, in re-imbursement of Kshs. 52,060,600. It later turned out that the representations by the customs agent were fraudulent as KRA issued the applicant with a demand for unpaid taxes. Aggrieved the applicant filed the instant petition on grounds that that the EACCMA 2004 was not an Act of the Kenyan Parliament pursuant to the provisions of section 9 of the Interpretation and General Provisions Act and grounds that it was the respondent's responsibility to ensure that questionable dealings were properly investigated and the liable persons brought to book and charged with any related offences and all steps taken to recover sums from the proper fraudsters. The court held that an importer of goods was liable for the fraudulent actions of its duly appointed licensed customs clearing agent by virtue of sections 147 and 148 of the East African Community Customs. The East African Community Customs Management Act, 2004 was a legally enforceable statute of the Community recognised and applicable in Kenya.

Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another [2016] eKLR

Miscellaneous Civil Application No. 170 of 2010

High Court at Nairobi

GV Odunga

May 23, 2016

Reported by John Ribia

Customs Law – customs clearing agent – principal agent relationship between custom agent and the importer that hired them – role of the Commissioner of Customs in an agency agreement between a customs agent and an importer where the customs agent was fraudulent - whether an importer of goods was liable for the fraudulent actions of its customs clearing agent - whether in arriving at a decision to commence recovery action for undervalued and underpaid taxes, the Kenya Revenue Authority was under an obligation to take action against the customs clearing agent first - East African Community Customs Management Act, 2004 sections 2, 147, and 148.

Customs Law – post clearance audit – power to conduct a post clearance audit – power to conduct a post clearance audit after the goods had been released to the importer - whether the Kenya Revenue Authority was entitled to carry out Post Clearance Audits to verify the accuracy of the entries after the goods had been released from Customs control - East African Community Customs Management Act, 2004 sections 235 and 236.

Legal Systems – sources of law – East African Community Legislation – when did East African Community Legislation become applicable and operational in Kenya - whether section 9(1) of Interpretation and General Provisions Act that provided that an Act would become operational the date it was published in the Kenya Gazette was applicable to the East African Community Customs Management Act - Interpretation and General Provisions Act, Cap 2, section 9(1); Treaty for the Establishment of the East African Community; East African Community Customs Management Act, 2005

Words and Phrases – unreasonableness – definition - includes decisions which have been accorded manifestly inappropriate weight; strictly “irrational” decisions, namely, decisions which are apparently illogical or arbitrary; uncertain decisions; decisions supported by inadequate or incomprehensible reasons; or by inadequate evidence or which are made on the basis of a material mistake or material disregard of fact - De Smith, Woolf and Jowell, 7th Edition at para 11-029

Brief Facts

The applicant, a bottler of carbonated drinks of various brands under the Coca Cola Company franchise,

Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another

engaged in the importation of raw materials, among them, concentrates, for the manufacture of the afore stated products. The applicant engaged Gamma Villa Limited, a customs clearing agent who collected, cleared and forwarded various consignments of concentrates to the applicant. Gama Villa Ltd informed the applicant through various invoices, that it had paid all taxes due from the applicant for the said period, on the basis of which the applicant paid, in re-imbursement of KES. 52,060,600.

On or about November 30, 2009, having been duly informed by Gamma Villa Ltd that all duties due had been settled and upon receipt of the actual goods, the applicant received a demand for unpaid taxes on the basis that the documents submitted by the applicant had major discrepancies. The applicant objected to the demand and the respondent issued two separate agency notices to the applicant's Bankers. The applicant alleged that the EACCMA 2004 was not an Act of the Kenyan Parliament pursuant to the provisions of section 9 of the Interpretation and General Provisions Act, hence its provisions had not been properly brought into force in the Republic of Kenya.

The applicant contended that it was the respondent's responsibility to safeguard government revenue by ensuring that no goods were cleared using fraudulent documentation which could only be done with the connivance, negligence or exceptional complacency in online verification of payments by persons clearing goods over an extended period of over 9 months. Further it was the respondent's responsibility to ensure that questionable dealings were properly investigated and the liable persons brought to book and charged with any related offences and all steps taken to recover sums from the proper fraudsters.

Issues

- i. When did East African Community Legislation become applicable and operational in Kenya?
- ii. Whether section 9(1) of Interpretation and General Provisions Act that provided that an Act would become operational on the date it was published in the Kenya Gazette was applicable to the East African Community Customs Management Act.
- iii. Whether the Kenya Revenue Authority was entitled to carry out Post Clearance Audits to verify the accuracy of the entries after the goods had been released from Customs control.
- iv. Whether in arriving at a decision to commence recovery action for undervalued and underpaid taxes, the Kenya Revenue Authority was under an obligation to take action against the customs clearing agent first.
- v. Whether an importer of goods was liable for the fraudulent actions of its customs clearing agent.

Relevant Provisions of the Law**Interpretation and General Provisions Act (Cap 2), section 9****9. Commencement of Acts**

- (1) *Subject to the provisions of subsection (3), an Act shall come into operation on the day on which it is published in the Gazette.*
- (2) *Deleted by Act No. 18 of 1968, Sch.*
- (3) *If it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or, as the case may be, that provision shall come or be deemed to have come into operation accordingly*

East African Community Customs Management Act, 2004 sections 147 and 148.**147. Liability of duly authorised agent**

147. *A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for (be payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act: Provided that nothing herein contained shall relieve the owner of such goods from such liability.*

Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another**148. Liability of owner for act of duly authorized agent.**

148. An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence: Provided that-

- (i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorised agent unless the owner actually consented to the commission of the offence;*
- (ii) nothing herein contained shall relieve the duly authorised agent from any liability to prosecution in respect of any such offence.*

Held

1. To make decisions based on an instrument which has not acquired the force of law would be a basis for quashing the said decision or prohibiting its implementation. Such decision would not only be premature but outrightly unlawful. Where the procedure stipulated was that certain steps be taken before a particular legal instrument was operationalised, to act on the same before the said steps were undertaken would be a breach of the procedural process necessary for the instrument to be acted upon.
2. Section 9 of the Interpretation and General Provisions Act provided that where in any Act, it was provided that the Act would come into operation at a specified time, or on the occurrence of a particular event, that Act would be deemed to have come into operation at such time or upon that occurrence, notwithstanding the fact that the same had not been published in the Gazette. The East African Community Customs Management Act (the EACCMA) was one of the Acts of the East African Community established by the Treaty for the Establishment of the East African Community. According to EACCMA, its date of commencement was the date appointed by the Council. As opposed to those Acts to which section 9(1) of Interpretation and General Provisions Act applied, the date of the coming into operation of EACCMA was the date appointed by the Council. Section 9(1) of Interpretation and General Provisions Act was inapplicable to the EACCMA. The objection raised with respect to the operationalisation of the Act before gazettment had no legal validity.
3. In view of sections 235 and 236 of EACCMA, the Customs Officer was supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the accrual of demurrage and customs warehouse rent hence the reason for conferment of the powers under section 235 and 236 of the EACCMA to conduct Post Clearance Audits to verify the accuracy of the entries after the goods have been released from Customs control. Therefore the fact that goods had been released to the importer did not preclude the respondent from carrying out post clearance audit to verify the accuracy of the declarations made at the time of the clearance of the goods. Where the said audit disclosed that as there was an undervaluation of import values by the applicant company's agents for customs purposes hence resulting in gross underpayment of duties on the applicant company's imports, the importer would be liable to make good the difference.
4. Where an importer failed to pay the taxes, or part thereof he could not be heard to say that he was not liable for the shortfall due to illegal actions perpetrated by the agent since the liability of the agent did not preclude him from meeting his own obligations to pay taxes. Under the sections 147 and 148 of EACCMA both the owner of the goods and its agent were liable under the Act.
5. Although the term "owner" under EACCMA is wide enough to cover the importer's agents, under sections 147 and 148 of EACCMA, the importer was not absolved from liability simply because its agent was deemed as "owner" for the purposes of EACCMA. The contention by the applicant that the respondent ought only to have recovered the shortfall from the interested party did not hold.
6. In exercising its statutory powers under section 235 and 236 of the EACCMA, the respondent must ensure that such exercise of power was fair and just to the person against whom the same was being exercised. Public authorities must exercise their power diligently, fairly and prudently. A public exercise of power whether permitted or otherwise in a manner that frustrates the purpose for which the power was

Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another

granted amounted to abuse of the same. Abuse of power was one of the grounds upon which a taxing authority's powers could be challenged. A public exercise of power whether permitted or otherwise in a manner that frustrates the purpose for which the power was granted amounted to abuse of the same.

7. Following the post clearance audit, the respondent found that the applicant's imports were undervalued and that the receipts purportedly issued by the National Bank of Kenya were not genuine. That finding was arrived at following inquiries made by the respondent to which the applicant responded. The findings arising from such investigations were obviously findings of fact and the High Court could only interfere therewith if it was shown that the same were unreasonable in the sense that the same were either irrational or disproportionate.
8. Unreasonableness included decisions which have been accorded manifestly inappropriate weight; strictly irrational decisions, namely, decisions which were apparently illogical or arbitrary; uncertain decisions; decisions supported by inadequate or incomprehensible reasons; or by inadequate evidence or which were made on the basis of a material mistake or material disregard of fact. The courts would only interfere with the decision of a public authority if it was outside the band of reasonableness.
9. Whereas, the High Court may well form the view that the prudent thing to do would have been to take appropriate legal action against the interested party before recovering the shortfall from the applicant, it had not been shown that the respondent (KRA) was under an obligation to do so. Failure to take one of the many options available to a person did not necessarily amount to irrationality. The High Court must strive to apply an objective standard which left to the respondent the full range of choices which the legislature was presumed to have intended.
10. A clearing agent was an agent of the importer. However, there may be circumstances where it might be unfair to saddle the importer with the actions or omissions of the agent. If there was corrupt collusion between the agent and the respondent's agent, the importer may well be justified in demanding that action betaken against the agent and the respondent's agents. The applicant's allegation was however a mere conjecture as the applicant did not adduce evidence to that effect. Such conjecture could not be the basis upon which the High Court could hold that the conduct of the respondent militated against its decision to recover customs due from the applicant. Whereas, it may well be unfair to subject the applicant to double payments in respect of the sums it remitted to its agents, such unfairness could not be blamed on the respondent. That was an issue between the applicant and its agent.
11. Where the respondent was not sure whether tax had been paid or not it may well be unreasonable for the respondent to insist that the importer pays the same without carrying out a verification of the same. Where however such verification had been undertaken which led the respondent to the conclusion that the taxes were never paid, as was the contention in the instant case, such conclusion could only be challenged by way of a merit challenge by way of an appeal rather than by way of a process challenge in judicial review.
12. The determination whether taxes were due and if so how much, was not a matter for the judicial review court. It was a matter for the appellate tribunal rather than the instant court.
13. The respondent had the power to carry out the post clearance audit as it did. Before arriving at its decision it was of course obliged to carry out investigations and in so doing was enjoined to hear the parties concerned. The respondent received representations from the applicant and the National Bank of Kenya on the issue whether the interested party duly paid the amount due. According to the respondent the Bank disputed the alleged payments and disowned the receipts alleged to have been issued by it. Confronted with two conflicting versions, the respondent was at liberty to decide which version to believe and it would seem that it believed the bank's version. Whereas that decision may well have not been correct the issue of the correctness thereof was a matter which was beyond the scope of these proceedings. The respondent in its decision could have made a right decision or a wrong one on the merits but that did not warrant the quashing of its decision in those kinds of proceedings.

Application dismissed with costs to the respondents.

Republic v Kenya Revenue Authority & another ex-parte Redington (Kenya Ltd

Mere granting of authority to an institution to issue licences could not make the licensee synonymous with the licensor.

Headnote: The instant case gave interpretation of the provisions of section 145 to 148 of East African Community Customs Management Act, 2004 (EACCMA, 2004) and provided that they did not make the Authority liable for the omissions of the customs agents licenced by it. Mere granting of authority to an institution to issue licences could not make the licensee synonymous with the licensor. Section 147 sought to ensure that the Authority has an option for recovery of tax as liability attached equally between the agent and the owner of the goods.

Republic v Kenya Revenue Authority & another ex-parte Redington (Kenya Ltd [2014] eKLR

Miscellaneous Civil Application Jr 200 of 2011

High Court of Kenya at Nairobi

GV Odunga, J

June 13, 2014

Reported by John Ribia

Customs Law – agency – principal agent relationship between custom agent and the importer that hired them – role of the Commissioner of Customs in an agency agreement between a customs agent and an importer - whether the Kenya Revenue Authority (KRA) was liable to compensate importers who were victims of misrepresentations/omissions made by KRA licensed customs agents to the importers that they represented - East African Community Customs Management Act, 2005 sections 147 and 148.

Brief Facts

The appellant, Redington Ltd, was a Kenyan Company engaged in business of importation and distribution of electronic goods in Kenya. It engaged the services of the 2nd respondent, Jaspa Logistics, a customs agent licensed by the 1st respondent (KRA).

On May 23, 2011 the Authority served a notice on the appellant for payment of unpaid taxes worth KES. 13,212,122. KRA went ahead to impound a consignment of the appellant's goods in July. The appellants objected and asserted that it had released the money to Jaspa Logistics for clearance of goods, while KRA asserted that the declaration made for clearance of the goods were false and fraudulent as no taxes had been paid.

The applicant filed the instant judicial review application where it sought orders of certiorari to quash the demand for payment made by KRA, an order prohibition to stop KRA from issuing any agency notices to its bankers or proceeding with any other enforcement action in purported recovery of the money from it and an order of mandamus to compel KRA to investigate the activities of the agent and prefer criminal charges against it.

Issue

Whether the Kenya Revenue Authority (KRA) was liable to compensate importers who were victims of misrepresentations/omissions made by KRA licensed customs agents to the importers that they represented.

Held

1. Under sections 147 and 148 of the East African Community Customs Management Act (the Act) both the owner of the goods and its agent were liable for any declaration made in respect of the goods and any payment of duties to which the goods were liable under the Act.
2. KRA acted within its jurisdiction in demanding for taxes due in respect of the applicant's goods. It could choose to seek the same either from the applicant or from the interested party. That was its sole

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discretion. The High Court could not direct it on how to exercise that discretion unless the same was being abused.

3. In seeking payment from the applicant and not the interested party, the respondent did not abuse its discretion. The applicant had not shown that the respondent was under a legal obligation to investigate the conduct of the interested party (the customs agent). If the applicant so wished it was at liberty to lodge a complaint with the police for the necessary action. There was no evidence of illegality, irrationality or procedural impropriety to justify the grant of the orders sought.
4. The High Court exercising judicial review jurisdiction was not the right forum for the ventilation of disputes regarding disputed import duties and value added tax.

Application dismissed with costs to the respondent.

SDV Transami Kenya Limited v Commissioner of Customs Services

The Kenya Revenue Authority was empowered to hold the agent liable for the payment of any duty to which the goods were liable and for the performance of all acts in respect of the goods which the owner was required to perform

Headnote: The main issue was whether a tax demand could be made to both a customs agent and an importer who was a known principle. The court held that under section 146(1) of the EACCMA, where the owner of any goods was required or authorized to perform any act then such act unless the contrary appeared may be performed on his or her behalf by an authorized agent. The agent recognized could be an employee of a customs agent duly licensed as such in accordance with the law. Under sections 147 and 148, the respondent was empowered to hold the agent liable for the payment of any duty to which the goods were liable and for the performance of all acts in respect of the goods which the owner was required to perform. An owner of any goods who authorizes an agent to act for him shall be liable for the acts and declaration of such duty by authorized agent. Consequently, the respondent was perfectly right in making a demand against the applicant and interested party as it did in the letter dated December 30, 2010.

SDV Transami Kenya Limited v Commissioner of Customs Services [2012] eKLR

Miscellaneous Application 81 of 2011

High Court at Nairobi

MA Warsame, J

March 28, 2012

Reported by John Ribia

Tax Law – customs laws and processes – agency principle and agent relationship between a custom agent and the importer that hired them – legal tax liability of a custom agent and the importer as the principle – whether a tax demand made by the Commissioner of Domestic Tax could be issued to both the agent and the importer – whether the Kenya Revenue Authority had the power to determine who, between the agent and importer, was liable to pay taxes imposed – East African Community Customs Management Act, sections 147, 148 & 229

Judicial review – grounds for judicial review – natural justice viz a viz legitimate expectation – claim that the demand addressed to both the importer and agent was made in bad faith and was unreasonable – whether the Kenya Revenue Authority committed an unlawful act or exceeded its authority when it made a demand for taxes which was acknowledged to be owing and due from both the agent and importer – whether there was evidence to show that the process followed by the respondent was contrary to the principle of legitimate expectation and natural justice.

Brief Facts

The applicant was an authorized customs agent pursuant to the provisions of sections 147 and 148 of East African Community and Management Act 2004. The Interested Party won a tender and was contracted by the Kenya Power and Lighting Company to supply aluminium conductors. It was contended that the Interested Party entered into an agreement with the applicant to provide clearing, forwarding and handling services on its behalf. Before entering into an agreement, it was alleged the Interested Party made extensive inquiries locally as well as with SDV PLC International Freight Forwarding Company and the inquiries established that the applicant was a reputable clearing agent. It was also contended by the Interested Party that after making inquiries into Kenya Revenue Authority it established that the applicant enjoyed authorized economic operators' status as KRA's duly appointed customs agent.

The Interested Party engaged the applicant to deal with the logistics and clearing of the entire consignment to be delivered to Kenya Power and Lighting Company, which it was importing. It was in line with duties that the applicant opened, import declaration forms and advised the Interested Party on the import duty

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payable. The applicant cleared various goods belonging to the Interested Party and paid certain import duties which it declared was payable in accordance with the correct tariffs. Later the respondent carried out an investigation which disclosed that the applicant declared the wrong tariff, the result of which was that more taxes were said to be due and payable to Kenya Revenue Authority.

The respondent called upon the applicant to pay the sum of Kshs.103,419,275/48 being the under-declared taxes. By a letter dated May 21, 2010 addressed to the applicant and copied to the Interested Party, the Commissioner of Investigations And Enforcement stated that the finding/decision agrees with item description under the correct prevailing rates of taxes were applied on import declaration contained in the audit report of 19th January 2010. The respondent indicated that the demand in the letter of May 6, 2010 still stood.

By a letter dated November 16, 2010, the Commissioner of Customs Services Department demanded tax in the sum of Kshs. 103,419,275/48 from the Interested Party. On January 4, 2011, the *ex parte* applicant lodged an application with the respondent requesting that the demand dated 30th December 2010 be reviewed. It was contended the application for review was made pursuant to the provisions of section 229(1) and 229(2) of East African Custom Management Act. It was the position of the applicant that it did not receive any decision from the respondent within the time frame stipulated in section 229(4) of the said Act. On April 1, 2011, the applicant received a demand for payment of tax of Kshs.123,968,690.94. It was contended that the demand was made against applicant only and not against the Interested Party.

It was submitted that the respondent failed to communicate her decision in respect of the applicant's application for review within the 30 days period as stipulated in the Act. In the absence of such a decision, the respondent had no jurisdiction to claim the tax penalties and interests claimed in her decision dated February 1, 2011. It was submitted that the respondent was acting unreasonably and in excess of her jurisdiction by demanding the tax, penalties and interests in her decision dated April 1, 2011 and also acting in excess of her jurisdiction in threatening to institute recovery measures.

It was also submitted that the respondent was acting inconsistently and in breach of the legitimate expectation created by the post clearance audit report issued by her pursuant to ss.235 and 236 of the Act in which she verified the tariff classifications and computation of the Duty was correctly done. Finally, it was submitted that the respondent acted unreasonably in pursuing the applicant for taxes when the owner of the goods was a disclosed principal known to the respondent. Consequently she urged me to allow the application for orders for prohibition and certiorari with costs against the respondent and the Interested Party.

Issues

- i. Whether a tax demand made by the Commissioner of Domestic Tax could be issued to both the agent and the importer
- ii. Whether the Kenya Revenue Authority had the power to determine who, between the agent and importer, was liable to pay taxes imposed
- iii. Whether the Kenya Revenue Authority committed an unlawful act or exceeded its authority when it made a demand for taxes which was acknowledged to be owing and due from both the agent and importer
- iv. Whether there was evidence to show that the process followed by the respondent was contrary to the principle of legitimate expectation and natural justice.

Held

1. The Kenya Revenue Authority was duty bound by law to investigate all claims and information received from any source to the effect that any party had evaded the lawful payment of taxes. It was pursuant to the said mandate that the Commissioner of Investigations and Enforcement carried out investigations to establish whether the applicant had used the correct tariff in clearing aluminum conductors/cables belonging to the Interested Party. After the investigations, it was discovered and/or established that the applicant had used a wrong tariff classification to clear goods belonging to its client, the Interested

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Party. Through a letter dated May 6, 2010, the respondent called upon the applicant to pay the short levy taxes that had accrued.

2. The respondent's Valuation Tariff section reviewed the matter further and still arrived at the same conclusion as that of the Commissioner of Investigations and Enforcement which was that the applicant had been using a wrong tariff to clear the Interested Party's goods. The ruling was based on samples collected from various importers and invoices provided. The decision was then communicated to the applicant through a letter dated August 17, 2010. Subsequently the applicant by a letter dated September 16, 2010 addressed to the Interested Party acknowledged that a wrong tariff had been used to clear their goods and asked them to pay the short levied taxes.
3. It was clear from the exchange of correspondences that the decision as to the amount and the correct tariff was made on August 17, 2010. Anything after that time, revolved around the person or entity liable or responsible for the payment. The dispute was not whether the amount was due and payable but who was responsible to Kenya Revenue Authority. The issues that arose after August 17, 2010 was a dispute and/or disagreement between the importer and the agent. Nobody was accusing or complaining that actually and indeed the amount was not payable. The applicant agreed and acknowledged a wrong tariff was used resulting in underpayment of taxes. It was a question of a dispute between the importer and the agent. It had nothing to do with the respondent. What happened after August 17, 2010 was a contest between the applicant and the Interested Party in so far as their internal disagreements as to the liability which had accrued in respect of that matter.
4. Section 229(1) of the East African Community Customs Management Act (EACCMA) dealt with decision or omission of the Commission on matters relating to customs. Customs meant the customs department of Kenya Revenue Authority. The decision or omission must be prejudicial to the interests and rights of a particular individual. It meant that a party was affected by a detrimental decision or omission made by the Commissioner or any of his agents. Under section 229(3), the Commissioner may accept an application made outside the mandatory 30 days on reasonable and sufficient grounds for excusing the delay.
5. What the applicant was seeking from the respondent was payments from the Interested party who was the importer of the goods. The applicant was asking for a review of the demand made in the letter dated December 30, 2010. The said letter demanded payment of extra taxes from both the importer and the agent. Where any obligation had been incurred for the payment of any duty, such obligation shall be deemed to be an obligation to pay all duties which were or may become payable or recoverable under the provisions of the East African Community Customs Management Act.
6. Under section 146(1) of the EACCMA, where the owner of any goods was required or authorized to perform any act then such act unless the contrary appeared may be performed on his or her behalf by an authorized agent. The agent recognized could be an employee of a customs agent duly licensed as such in accordance with the law. Under sections 147 and 148, the respondent was empowered to hold the agent liable for the payment of any duty to which the goods were liable and for the performance of all acts in respect of the goods which the owner was required to perform. An owner of any goods who authorizes an agent to act for him shall be liable for the acts and declaration of such duty by authorized agent. Consequently, the respondent was perfectly right in making a demand against the applicant and interested party as it did in the letter dated December 30, 2010.
7. What the applicant was seeking in the letter dated January 4, 2011 was to apportion liability between the importer and itself. The respondent had no jurisdiction to determine who should shoulder all responsibilities or the greatest liability. The letter dated January 4, 2011 was not a review within the meaning of section 229 as alleged by the applicant. It could not be said that the respondent made a decision or an omission relating to custom matters by demanding short levied taxes from the agent and the importer jointly and severally. The respondent had statutory duty, authority, jurisdiction and/or powers to make such a demand under section 147 and 148 of the Act.
8. The applicant supplied the information requested for by the letter dated August 11, 2010. In a letter

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dated August 17, 2010 the respondent concluded that the tariff classification given by the applicant was incorrect. That was within the time frame provided by section 229(5) of the East African Community Customs management Act. Hence the decision envisaged under section 229(1) was made on August 17, 2010. The demand letter dated December 30, 2010 was a follow up to the previous demand made upon the applicant and the Interested Party. Once the respondent had communicated in August 2010 that tax was due, it was incumbent upon the applicant to lodge an appeal within the stipulated or specified period under section 229. That was not done. Therefore, it was not open or available to the applicant to lodge an appeal 5 months after the offensive decision was made. It was not within the jurisdiction and powers of the respondent to entertain an appeal outside the time allowed.

9. There was no valid appeal lodged by applicant under section 229 and the respondent could not be condemned for violating the law when there was no basis to do so. It was not within the powers of the respondent to decide who was liable to pay the taxes. The respondent was allowed to make a choice or election in terms of sections 147 and 148 of the Act. There was no evidence to show that in demanding taxes from the applicant and Interested Party, it acted capriciously and in violation of the law.
10. The respondent treated the applicant and Interested Party in a dignified manner by asking them to sort out the payment due between themselves. It was perfectly right for the respondent to proceed against the respondent or the Interested Party in the absence of bad faith and illegality in its decision. The respondent did not make a phantom judgment against the applicant in a manner to warrant intervention of the court. A decision could not be said to have been made in error simply because the respondent demanded taxes due and payable from the agent and importer. The applicant was not condemned unheard. They participated in the decision from the start to the end.
11. Certiorari could not issue to quash the letters dated December 30, 2010 and April 1, 2011 and there was no bad faith or ulterior motives or unreasonableness that was committed by the respondent in addressing the two letters to the applicant and the Interested Party. An order of prohibition could not issue to prohibit the Commissioner of Customs from demanding taxes which was acknowledged to be outstanding and due by the applicant and the Interested party. An order of prohibition could only issue to prevent a contemplated decision and not one which had already been made. In that case the decision as to the amount payable was made on August 17, 2010. Prohibition could not issue against a decision which had already been made, it can only prevent a making of a contemplated decision.
12. An order of prohibition was powerless against a decision which had already been made before such an order was granted. An order of prohibition operated as to the future to prevent unlawful acts on the part of public bodies or authorities. It was not the case of the applicant that the respondent committed an unlawful act or exceeded its authority when it made a demand for taxes which was acknowledged to be owing and due. In any case there was no evidence of unreasonableness, bad faith, malice or illegality that was committed by the respondent in demanding short levied taxes against the respondent and the Interested Party. It was not the business of the court to apportion liability between the applicant and the Interested Party.
13. It was also not the business of the instant court to review the merits of the decision by the respondent. The court was concerned with the decision-making process. There was no single evidence to show that the process followed by the respondent was contrary to the principle of legitimate expectation and natural justice. Before the decision was made, the respondent involved the applicant and the Interested Party. When the respondent discovered that the applicant had used the wrong tariff to clear the goods of Interested Party, the decision was communicated so as to reach a proper decision. In a letter dated June 30, 2010 the respondent informed the applicant that the matter involved giving a tariff ruling which in effect would help in determining whether the goods in question were correctly classifiable under the heading either 7605 or 7614. The respondent also informed the applicant that it may end up collecting samples from the Interested Party for laboratory analysis.
14. The Interested Party informed the respondent that no samples for laboratory analysis were available since the goods in question were out of stock. It was then that the respondent requested production of

SDV Transami Kenya Limited v Commissioner of Customs Services

copies of import entries and relevant import invoices for the consignment under query. In a letter dated August 11, 2010 the applicant forwarded two sets of entries, invoices and packing list of importations from the two importers namely the Interested Party and M/S Rural Electrification Authority. It was therefore clear that the respondent did not make a decision without giving the applicant and the Interested Party an opportunity to present their position and views. The applicant and the Interested Party participated in the decision-making process and gave valuable inputs and their side of the story before the final decision was made.

15. The respondent demanded the short-levied taxes legally and in accordance with section 135(1) of the East African Community Customs Management Act. It was a statutory duty bestowed upon the respondent which must be exercised without interference in the absence of any violation, omission or acts committed by the respondent.

Application dismissed with costs to the respondent.

Republic v Kenya Revenue Authority Ex-parte African Boot Company Limited

KRA was not liable for fraudulent actions of licensed customs agents.

Headnote: The importer contested a KRA decision demanding payment of Kshs.6,902,658 in taxes, which the company denied owing. The importer claimed it paid the taxes through its customs agent, Hellmann, and argued that KRA's notice violated natural justice as it was issued without a hearing. The court held that when a customs agent engaged in fraudulent activities, the importer could not ask the respondent for compensation. The importer has to bear the loss with fortitude and find a way of recovering the money misappropriated from the customs agent.

Republic v Kenya Revenue Authority Ex-parte African Boot Company Limited [2012] eKLR

Miscellaneous 54 of 2010

High Court at Nairobi

WK Korir, J

February 23, 2012

Reported by John Ribia

***Customs Law** – customs clearing agent – principal agent relationship between custom agent and the importer that hired them – role of the Commissioner of Customs in an agency agreement between a customs agent and an importer - whether a customs agent was an agent of the Commissioner of Customs or an agent of the importer that appointed them - whether the Kenya Revenue Authority (KRA) via the Commissioner of Customs Licenses was liable to compensate importers who were victims of fraudulent activities conducted by customs agents licensed by the KRA - East African Community Customs Management Act, 2005 part XI*

Brief Facts

The applicant (an importer) contested a Kenya Revenue Authority (KRA) decision demanding payment of Kshs. 6,902,658 in taxes, which the company denied owing. The importer contended that it contracted Hellmann Worldwide Logistics Limited (Hellmann/customs agent) to handle all the sourcing, clearing and forwarding. To that end it paid Hellmann for the services and custom duties that were due. The applicant learned that Hellmann had not been remitting to the KRA the sums that were due to it. The applicant contended that it had already paid the money demanded and it was the customs agent that was liable to pay the amount claimed.

Issues

- i. Whether a customs agent was an agent of the Commissioner of Customs or an agent of the importer that appointed them.
- ii. Whether the Kenya Revenue Authority (KRA) was liable to compensate importers who were victims of fraudulent activities conducted by customs agents licensed by the KRA.

Held

1. Part XI of the East African Community Customs Management Act, 2004 which deals with customs agents provided that the Commissioner of Customs only licenses customs agents. The agents however acted on behalf of the importers of goods. The person who appointed the agent to carry out a particular transaction was the importer. The customs agent became the agent of the importer and not the Commissioner of Customs. The respondent did not foist a particular customs agent on a taxpayer. The taxpayer was the one who went out to look for a particular agent to clear goods on his behalf.
2. Just like the Law Society of Kenya (LSK) licenses advocates to practice law, the Kenya Revenue Authority through the Commissioner of Customs licenses customs agents to clear goods and baggage which had been imported into the country. If a lawyer became rogue and misappropriate the client's

Republic v Kenya Revenue Authority Ex-parte African Boot Company Limited

money, the client could not turn to LSK for compensation. The same case applied to custom agents. When a customs agent engaged in fraudulent activities, the importer could not ask the respondent for compensation. The importer has to bear the loss with fortitude and find a way of recovering the money misappropriated from the customs agent. A prudent taxpayer will always monitor the activities of its agent so as to ensure compliance with the law. The only civil duty a taxpayer can do is to report the agent so that the license can be revoked by the respondent.

3. Whereas the customs agent (Hellmann) could have acted in concert with the employees of the respondent so as to defraud it of the money that was meant to pay custom duties; but just as the applicant did not authorize its agent (Hellmann) to steal so did the respondent not authorize its employees to engage in fraudulent activities. May be the applicant could have had a stronger case had it established that Hellmann was the respondent's agent.
4. The applicant was defrauded by its agent. It was unfortunate that the applicant suffered such a big loss. Considering the loss suffered by the applicant, it was in the interest of justice that there should not be orders as to costs

Application dismissed; no orders as to costs.

Republic v Kenya Revenue Authority Ex-parte Alltex EPZ Limited

An employer as the principal is liable for the fraudulent actions of its duly authorized employee who fraudulently imports goods using the employer's identity

Headnote: The appellant was registered as an export processing zone operator under the Export Processing Zones Act and under the East African Community Customs Management Act (the Act) under which it held a license to manufacture goods at its EPZ premises, under a customs security bond. The appellant's employee, authorized to clear goods on its behalf, in collusion with others breached the security bond conditions by importing personal goods on the strength of the security bond of the appellant. The respondent demanded for payment of duties, taxes, interest and penalties amounting to KES 6,561,303 for the unaccounted goods which the appellant contested in the High Court and lost. The appellant then appealed to the Court of Appeal. The Court of Appeal held that an owner or importer of goods was liable for the fraudulent actions of its lawfully authorized agent. Such an owner was liable to pay duty on goods fraudulently imported duty free by its employees on the strength of its security bond. The common law doctrine that a principal was not liable for the actions of its agent did not apply where there were clear provisions of the law. The substance of common law and doctrines of equity applied only in so far as the Constitution or a statute did not apply.

Republic v Kenya Revenue Authority Ex-parte Alltex EPZ Limited [2017] eKLR

Civil Appeal 116 of 2013

Court of Appeal at Nairobi

A Makhandia, K M'Inoti, and AK Murgor, JJA

September 29, 2017

Reported by John Ribia

Customs Law – custom agents – agency relationship between custom agents and its employees - vicarious liability of a custom agent for the acts of its employees – employer liability for employee fraud – where an employee fraudulently represents himself as the employer and imports goods as the importer - whether an employer as the principal was liable for the fraudulent actions of its duly authorized employee who fraudulently imports goods using the employer's identity - East African Community Customs Management Act section 146

Customs Law – imported goods – owner of imported goods – where one falsely represented to be an owner of goods - whether one could be considered an owner of goods if the person held themselves out or represented themselves to be the owner - whether the fact that a customs agent was considered liable for an importer's goods relieved the owner/importer of the goods from liability - whether the fact the owner of goods who had authorised a customs agent to act for him was liable for the acts and declarations of the agent precluded the agent from prosecution for criminal acts – East African Community Customs Management Act sections 2, 147 and 148

Legal Systems – sources of law – common law – circumstances under which common law was applicable in the Kenyan jurisdiction – Judicature Act (Cap 8) section 3(1)(c)

Brief Facts

The appellant was registered as an export processing zone operator under the Export Processing Zones Act and under the East African Community Customs Management Act (the Act) under which it held a license to manufacture goods at its EPZ premises, under a customs security bond.

The security bond, required by regulation 147 of the East Africa Customs Management Regulations, 2006 (the regulations) enabled the appellant to import duty free, goods and raw materials for production of garments for export at its EPZ business. Due to exemption of the EPZ enterprise from duty and taxes, a fairly rigid regime of checks and accountability is put in place under the Act and the regulations made thereunder. Goods imported under the security bond arrangement must be strictly used in the EPZ and the operator is under an obligation to account for all goods imported under its license. Breach of the conditions

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of the bond, such as importation of goods that are not meant for the EPZ business, failure to satisfactorily account for all imported goods, or diversion of manufactured products from the export to the local market, results in the operator having to pay taxes and duties on those goods, together with interest and penalties.

The appellant's employee, authorized to clear goods on its behalf, in collusion with others breached the security bond conditions by importing personal goods on the strength of the security bond of the appellant. The respondent demanded for payment of duties, taxes, interest and penalties amounting to KES 6,561,303 for the unaccounted goods which the appellant contested in the High Court and lost. The appellant then appealed to the Court of Appeal.

On appeal the appellant contended that the agent declared and represented on behalf of the appellant that the goods in question belonged to the appellant and by virtue of that declaration and representation, the goods were exempted from duty. The appellant contended that because it did not in fact own or import the goods in question, it was not the owner within the meaning of the Act and therefore it cannot be liable to pay duty and taxes on them.

Issues

- i. Whether an employer as the principal was liable for the fraudulent actions of its duly authorized employee who fraudulently imports goods using the employer's identity.
- ii. Whether the common law doctrine that the principle was not liable for the actions of its agent overrode the provisions of the East African Community Customs Management Act that placed liability on both the principal and the agent.
- iii. Whether under the East African Community Customs Management Act one could be considered an owner of goods if the person held themselves out or represented themselves to be the owner.
- iv. Whether the fact that a customs agent was considered liable for an importer's goods relieved the owner/importer of the goods from liability.
- v. Whether the fact that the owner of goods who had authorised a customs agent to act for him was liable for the acts and declarations of the agent precluded the agent from prosecution for criminal acts.

Relevant Provisions of the Law

East African Community Customs Management Act, 2004 sections 147 and 148.

147. Liability of duly authorised agent

A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for (be payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act: Provided that nothing herein contained shall relieve the owner of such goods from such liability.

148. Liability of owner for act of duly authorized agent.

An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence: Provided that-

- (i) *an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorised agent unless the owner actually consented to the commission of the offence;*
- (ii) *nothing herein contained shall relieve the duly authorised agent from any liability to prosecution in respect of any such offence.*

Republic v Kenya Revenue Authority Ex-parte Alltex EPZ Limited**Held**

1. Being a first appeal, the court was enjoined to consider both issues of fact and law. The main issues of fact are not in dispute.
2. The line of argument that the trial court erred by ignoring the common law principles on the liability of a principal for acts of an agent had no basis in law. A court of law could not ignore the provisions of a statute and supplant them with principles of common law. Section 3(1)(c) of the Judicature Act provided that the substance of common law and doctrines of equity applied only in so far as the Constitution or a statute did not apply.
3. The liability of the appellant in the instant appeal was to be determined according to the terms of the East African Community Customs Management Act (the Act), which had expressly, comprehensively, and exhaustively addressed the relationship between the owner of goods under the Act and his agent. Section 145 (1) of the Act empowered the Commissioner of Customs to license a person to act as agent for transacting business relating to declaration or clearance of goods. By dint of section 146, where the owner of goods was required or authorised under the customs laws to perform any act, his authorised agent may perform such act on his behalf. The Act was clear that to be an agent, the person must be exclusively in the employment of the owner of the goods. For the purposes of the Act, Peter Muthenya Muindi was an employee as well as an agent of the appellant.
4. Under the Act, whatever the appellant could do relating to declarations or clearance of goods, the agent could do on its behalf. The Act defined owner of goods to include any person being or holding himself or herself out to be the owner, importer, exporter, consignee, agent or the person in possession of, or beneficially interested in, or having control of, or power of disposition over the goods. The use of the word “include” suggested that the definition was not limited only to the persons named in the provision. Under the definition also, a person did not need to be the owner of goods as was commonly understood; it was enough if he held himself out or represented himself to be the owner.
5. Whatever the appellant could have done regarding the declarations, its agent could also do the same on its behalf. Where the appellant could have represented or held itself out as the owner of goods, the agent could do it on its behalf. The agent held out and represented the appellant as the owner of the goods. In law that was as good as though the appellant itself had held out or made the representation.
6. While the agent was deemed to be the owner of goods in respect of which he had made declarations and was personally liable for payment of duties due thereon, the proviso to section 147 of the Act was express enough that the fact that the agent was liable did not relieve the owner of the goods from liability. Under section 148, the owner of goods who had authorised an agent to act for him was liable for the acts and declarations of the agent and may even be prosecuted for any offences committed by the agent, though he cannot be imprisoned unless it was proved that he consented to the commission of the offence. The fact that the owner was liable however did not preclude the agent from prosecution for his criminal acts.

Appeal dismissed with costs to the respondent.

Boleyn International Limited v Commissioner Investigations & Enforcement

Chapter 2: Burden of proof in tax disputes

Duty of the tax payer to comply with statutory requirements with regard to objections and provide records required by the Kenya Revenue Authority

Headnote: The main issue before the court was whether an objector to a tax assessment that did not furnish the revenue authority with the necessary documents to prove its objection was in breach of the requirement of tax payers to furnish the revenue authority with documents so that tax liability may be assessed. The Tax Appeals Tribunal held that the appellant's non-compliance in providing documents was a breach of section 23 of the Tax Procedures Act, 2015 and section and 54A of the Income Tax Act which enjoined the appellant to provide such documents to authorized officers in order that a taxpayer's tax liability may be assessed. As a result, the appellant was deemed not to have met the burden of proof and its appeal was dismissed.

Boleyn International Limited v Commissioner Investigations & Enforcement

Tax Appeal Tribunal
Appeal No. 55 of 2018
M Obonyo, PM Anampiu, Mahat Somane
December 17, 2019

Tax law – tax assessment – objection to a tax assessment – manner of filing an objection of a tax assessment – claim that an objection was not properly in law – where an objection did not reiterate the grounds of objection, the corrections required to be made and the reasons for assessment – whether a tax payer's objection to the tax assessment and value to be paid was proper in law – Tax Procedure Act, 2015, section 51 (3)

Tax Law – objections – mandate of the Kenya Revenue Authority to request documents from a taxpayer – duty of the objector to comply with a request for documents - where a tax payer does not comply to the request - Whether an objector to a tax assessment that did not furnish the revenue authority with the necessary documents to prove its objection was in breach of the requirement of tax payers to furnish the revenue authority with documents so that tax liability may be assessed - Tax Procedures Act, 2015 section 23; Income Tax Act section and 54A

Tax Law – burden of proof – burden of proof in objection proceedings - in objections to tax assessments by the Kenya Revenue Authority, who between the taxpayer and the revenue authority bore the burden of proof - Tax Procedures Act, 2015 section 56(1).

Brief Facts

The appellant was a family-owned business dealing in importation of Double Coin range of tyres and the sole agent in East and Southern Africa. The case was an offshoot of investigations done on Bastone Investment Limited which was a sister company of Boleyn International (K)Limited. The appellant was served with a notice of intention to audit for the years 2012 to 2015 covering income tax, VAT, PAYE and withholding tax and was required to avail documents in support of the above-mentioned tax heads.

The appellant informed the commissioner investigation and enforcement (I&E) that the Company had been investigated for the period of 2007 to 2013 and complied with and paid the additional assessment. Further, the appellant alleged that it had stopped trading mid-2013. The Commissioner I&E found that there were bank deposits in to the appellant's account after the period it had allegedly stopped trading. The investigations also revealed that the appellant had been importing on behalf of Multiple Haulers from Double Coin Holdings Ltd of China at a commission of 1.5%.

The Commissioner I&E also took the purchases of Bostone in the years under review and reflected as sales in the books of Boleyn International (K) Ltd.

The appellant failed to comply in providing the documents sought by the Commissioner I & E. As a result, the Commissioner I&E wrote to a number of the appellant's client requesting documents to enable it determine the appellant's tax liability. On February 8, 2018, the commissioner raised an assessment of the

Boleyn International Limited v Commissioner Investigations & Enforcement

appellant's tax liability at KES. 154,224,750.

Issues

- i. Whether a tax payer's objection that did not state the grounds of objection, the corrections required to be made and the reasons for assessment was proper in law.
- ii. Whether an objector to a tax assessment that did not furnish the revenue authority with the necessary documents to prove its objection was in breach of the requirement of tax payers to furnish the revenue authority with documents so that tax liability may be assessed.
- iii. In objections to tax assessments by the Kenya Revenue Authority, who between the taxpayer and the revenue authority bore the burden of proof?

Held

1. The objection lodged by the appellant did not reiterate the grounds of objection, the corrections required to be made and the reasons for the amendments. Neither did the appellant provide the relevant documents in support of its alleged objection. There was now conceivable way that the respondent would have considered the appellant's objection as the same did not place itself within the parameters of section 51(3) of the Tax Procedures Act, 2015.
2. The respondent's objection was not one of limitation of time but on the requirements under section 51(3) of the Tax Procedure Act, 2015.
3. The appellant had been non-compliant with the respondent's request for documents. The respondent had to result to requesting documents from third parties. The appellant's non-compliance in providing documents was a breach of section 23 of the Tax Procedures Act, 2015 and section 54A of the Income Tax Act which enjoined the appellant to provide such documents to authorized officers in order that a taxpayer's tax liability may be assessed.
4. The respondent was unwavering in engaging the appellant and asking the appellant to provide proof of its objections to the investigations. The appellant was given multiple opportunities to support its objections to the investigations. The Tax Appeals Tribunal was guided by section 56(1) of the Tax Procedures Act. The appellant bore the burden of proof that the respondent's decisions and investigations were wrong, provided that in any proceedings.

Appeal dismissed.

Orders: -

- i. *The respondent's assessment of February 8, 2018 and the objection decision dated May 10, 2018 for the period 2012 to 2016 were upheld.*
- ii. *Each party was to bear its own costs.*

Kenya Revenue Authority v Maluki Kitili Mwendwa

Circumstances under which the burden of proof in tax disputes shifts to the Revenue Authority.

Headnote: In a dispute that centered around the burden of proof in taxation disputes, the High Court held that the taxpayer bore the burden of proof in tax disputes to disprove an assessment made by the Commissioner. The court held that burden of proof under section 56 of the Tax Procedures Act only shifted to the Commissioner once the appellant had provided the relevant facts and circumstances.

Kenya Revenue Authority v Maluki Kitili Mwendwa [2021] eKLR

Civil Appeal ITA E078 of 2020

High Court at Nairobi

JM Mativo, J

August 12, 2021

Reported by John Ribia

Tax Law – burden of proof – reversal of burden of proof – justifications for placing burden of proof on tax payer - whether the burden of proof in tax disputes lay with the Commissioner of Taxes or the taxpayer - what were the justifications for placing the burden of proof on the taxpayer in tax disputes to disprove an assessment made by the Commissioner - what were the circumstances under which the burden of proof in tax disputes shifted from the tax payer to the Commissioner - what was the difference between standard of proof and burden of proof - what was the difference between the legal burden of proof and the evidential burden of proof - whether the respondent established with evidence, that the tax assessment was erroneous or the tax was not due - Tax Procedures Act, Act No. 29 of 2015, sections 30 and 56(1)

Evidence Law – burden of proof – burden of proof in civil cases - balance of probabilities – where there were conflicting factual positions - what were the factors that a court should consider to resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions

Civil Practice and Procedure – appeals – role of appellate courts – circumstances under which an appellate court will reverse factual findings - what were the circumstances under which an appellate court could reverse the factual findings of the trial court

Brief Facts

The appellant profiled the respondent to determine his tax status and established he was not filing tax returns. The appellant used his bank statements from Commercial Bank of Africa and Barclays Bank of Kenya Limited to determine his tax liability and issued him with a default assessment for the years 2009, 2010, 2011, 2012, and 2014 for non-filing of self-assessment returns. It also issued him with an amended assessments for the years 2013 and 2015. The total sum was Kshs. 195,891,196/=inclusive of penalty and interests.

The respondent objected to the assessment, but the Commissioner dismissed the objection. The respondent appealed to the Tax Appeals Tribunal arguing that the appellant erred in fact and in law by seeking to bring to charge funds deposited in its bank account; that the assessment was excessive, erroneous and not based on any material facts. He faulted the appellant for seeking to bring to charge proceeds arising from the sale of capital property sold on behalf of a third party. He contended that the appellant erred in fact and law by assuming and or presuming that the said funds was income which was taxable in accordance to the Income Tax Act. The Tax Appeals Tribunal (TAT) concluded that the respondent failed in his obligations to file the returns and that the appellant was right in assessing the Respondent for 5 years. The TAT partly allowed the appeal and ordered that fine be imposed on the respondent for failure to file returns for the years 2009, 2010, 2011, 2012 and 2014. It quashed the objection decision.

Aggrieved, the appellant filed the instant appeal where it appealed partly against the decision of the TAT. The appellant prayed that the instant court sets aside the part of the TAT's judgement where it held that the appellant ought to have addressed its default and amended assessment demand to Chania enterprises

Kenya Revenue Authority v Maluki Kitili Mwendwa

limited. It urged the instant court to uphold the appellant's default assessment for the years 2009, 2010, 2011, 2012 and 2014 and amended assessments for the years 2013 and 2015 as contained in the appellant's objection decision

Issues

- i. Whether the burden of proof in tax disputes lay with the Commissioner of Taxes or the taxpayer.
- ii. What were the justifications for placing the burden of proof on the taxpayer in tax disputes to disprove an assessment made by the Commissioner?
- iii. What were the circumstances under which the burden of proof in tax disputes shifted from the tax payer to the Commissioner?
- iv. What was the difference between standard of proof and burden of proof?
- v. What was the difference between the legal burden of proof and the evidential burden of proof?
- vi. What were the factors that a court should consider to resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions?
- vii. What were the circumstances under which an appellate court could reverse the factual findings of the trial court?
- viii. Whether the respondent established with evidence, that the tax assessment was erroneous or the tax was not due.

Held

1. The party with the obligation of persuasion bore the burden of proof. The effect of non-persuasion on a party with the burden of proof was that the particular issue at stake in the litigation would be decided against the party. Generally, the taxpayer had the burden of proof in any tax controversy. The tax payer must demonstrate that the commissioner's assessment was incorrect. The taxpayer had a significantly higher burden. The taxpayer must prove the assessment was incorrect. Section 56(1) of the Tax Procedures Act provided that the burden shall be on the taxpayer to prove that a tax decision was incorrect. By use of the word shall, the provision was couched in peremptory terms. Section 30 provided that an appellant had the burden of proof where an appeal related to an assessment or in any case in which an appellant contested a tax decision.
2. The presumption of correctness attached to the Commissioner's assessments or determinations of deficiency. The Commissioner's determinations of tax deficiencies were presumptively correct. Although the presumption was not evidence in itself, the presumption remained until the taxpayer produces competent and relevant evidence to support his position. If the taxpayer came forward with such evidence, the presumption vanished and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer.
3. Under Kenya's system of self-reporting of tax liability, the taxpayer initially decided the extent and amount of his/her statutory obligation to pay tax. The taxpayer in such cases generally possessed the objective evidence. With the exception of filed returns and information provided by the taxpayer, the Kenya Revenue authority was in a poor position to establish an affirmative case. The common-law allocation of the burden of proof to the party in possession of the evidence was appropriate.
4. By placing the burden of proof on the party in possession of relevant information, the possibility of destruction of adverse information was minimized and time was saved by making that party responsible for culling through its own records to meet its burden. Placing the burden of proof on the government in tax cases would detract from those goals. Taxpayers might be tempted to destroy adverse relevant evidence and tax collection costs would increase because of the Kenya Revenue Authority's difficulty in finding relevant information.
5. Placing the burden upon the tax payer was not unconstitutional nor was it contrary to Parliament's intent. There was a distinction between the legal burden of proof and the evidential burden of proof. Those are two different concepts. The Evidence Act places the burden of proving the existence any fact in issue on the party who asserts. The evidential burden existed in the form of a tactical onus to

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contradict, weaken or explain away the evidence that had been led. It was the latter form of burden which may shift from one party to the other. The appellant placed emphasis on the legal burden of prove placed upon the respondent by the law and forgot that the moment the respondent explained the source of the funds, the evidential burden shifted to them to adduce evidence in rebuttal.

6. Placing the burden of proof in tax cases on the tax payer reflected the unique nature of the tax system. The justification was three-fold: -
 - a. the presumption of correctness;
 - b. the government's need for revenue, and,
 - c. the taxpayer's possession of evidence.
7. Regarding the presumption of correctness, the Commissioner cannot sustain the burden because he did not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possessed the evidence relevant to the determination of tax liability. It was fair to place the burden of persuasion on the taxpayer, given that he knew 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 seemed 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 the instant minimum threshold.
8. A presumption of correctness arose from the Commissioner's determination/assessment. The presumption remained until the taxpayer produced competent and relevant evidence to support his/her position. When the taxpayer came forward with such evidence, the presumption vanished and the case must be decided upon the evidence presented.
9. The government's need for a steady flow of revenue was the most genuine, reason for placing the burden of proof on the taxpayer. A tax system in which the burden of proof was borne by the government did little to encourage the preservation of records held by the taxpayer. On the contrary, such a system would lend itself to easy concealment of tax obligation.
10. Burden of proof was a different concept to the standard of proof. The taxpayer's burden of proof comprised two parts:
 - a. establishing, with evidence, the underlying facts on which the law was to operate (and in this regard, the standard of proof to which each fact must be proved is relevant); and,
 - b. that the operation of the law when applied to those facts establishes that the assessment was excessive or erroneous.
11. A tax payer challenging a tax assessment needed to collect and present evidence in order to disprove the Commissioner's position. However, there were some situations where the burden was reversed. The burden may shift based on the stage of the proceedings and the actions taken by the parties.
12. The onus was met when a taxpayer made out at least a *prima facie* (on its face) case. To prove a case on its face you must provide evidence that, unless rebutted, would prove your position. A *prima facie* case was made when the taxpayer could produce unchallenged and uncontradicted evidence. Once the taxpayer has made out a *prima facie* case to prove the facts, the onus then shifts to the Revenue Authority to rebut the *prima facie* case. If the Revenue Authority could not provide any evidence to prove their position, the taxpayer would succeed.
13. However, where the assumptions made by the Revenue Authority were exclusive and peculiarly within its knowledge, a corrective measure must be applied to the typical onus of proof. If the taxpayer had no knowledge with respect to the assumptions made by the Revenue Authority, it would be unfair to require the taxpayer to disprove them. The burden of establishing the facts justifying the assessment of the penalty was on the Revenue Authority.
14. The burden placed upon the respondent by the law was to establish a *prima facie* case. He tendered sale agreements which demonstrated the source of the funds. The agreements were contested and even if they were the Tax Appeals Tribunal believed the testimony. In civil cases, the measure of proof was

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a preponderance of probabilities. Where there were two stories mutually destructive, before the onus was discharged, the court must be satisfied that the story of the litigant upon whom the onus rests was true and the other was false. The question to be decided would always be: which of the versions of the particular witnesses was more probable considering all the evidence as well as all the surrounding circumstances of the case.

15. Where versions collide, the three aspects of credibility, reliability and probability were intermixed, and all three must be examined. That endeavor was not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remained to find the truth. The Tax Appeals Tribunal was persuaded that the respondent's testimony was credible, reliable and probable. On a balance of probabilities, it was satisfied that from the material before it, there was sufficient evidence to show that the taxes were not due.
16. An appeal court was bound by the trial court's findings of credibility, unless they were found to be affected by a material misdirection or to be clearly wrong. The appeal court would only reverse those findings where it was convinced that the findings were wrong. The instant court was any misdirection by the Tax Appeals Tribunal in regard to the finding of credibility or contradictions on the part of the respondent.
17. Ordinarily, appeal courts were reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. Trial courts had advantages that appeal courts did not have. Trial courts were steeped in the matter; they observed witnesses, and were able and required to assess probabilities as they manifest within the circumstances prevailing, and as they apply to the particular witnesses testifying. In the result, unless the factual findings of the trial court were clearly wrong, or unless the trial court would have misdirected itself, those findings were not to be upset on appeal.
18. The record placed before the appeal court did not capture all that occurred at the trial. The disadvantage was that the appeal court was denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanor and body language. On the contrary, that was the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it came to factual findings.
19. The Tax Appeals Tribunal had the benefit of hearing the parties. It had the benefit of assessing the sale agreements. It weighed the credibility of the evidence. All that was required was evidence to support the fact the source of the funds and to confirm that the assessment was erroneous. The respondent having known the source of funds had the option of assessing the company since as he argued, the company was a legal entity. The evidence met the threshold of discharging the burden placed upon the respondent by the law.

Appeal dismissed with costs to the respondent.

Kenindia Assurance Company Limited v Commissioner of Domestic Taxes

The life fund contemplated under section 19(5)(b) of the Income Tax Act had the same meaning as the statutory reserve fund provided for under section 45 of the Insurance Act.

Headnote: The dispute resolved around the classification of the life fund vis-à-vis the statutory reserve fund for purposes of taxation. The High Court held that, the life fund which was a mandatory requirement for an insurance company to carry on long term insurance business and to protect policy holders as provided for under section 45(1) of the HYPERLINK “<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20487>” Insurance Act. The Life Fund was distinct and separate from a statutory reserve which was for the benefit of shareholders. Only the amounts transferred from the life fund and not the statutory reserve were subject to taxation in accordance with section 19(5)(b) of the HYPERLINK “<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20470>” Income Tax Act. The court also held that the burden was in the taxpayer to prove that the decision of the Commissioner was incorrect and appeals to the High Court or Court of Appeal were to be on questions of law only.

Kenindia Assurance Company Limited v Commissioner of Domestic Taxes

Tax Appeal No 2 of 2016
High Court at Nairobi
DS Majanja, J
March 30, 2020

***Tax Law** - income tax - gains and profits of a life insurance company - life fund - meaning of a life fund and meaning of a transfer from the life fund for the benefit of shareholders - whether the statutory reserve fund contemplated under section 45 of the Insurance Act had the same meaning as the life fund contemplated under section 19(5)(b) of the Income Tax Act - Insurance Act (Cap 487), section 45; Income Tax Act (Cap 470), section 19(5)(b).*

Brief facts

In the year 2004, the appellant created a statutory reserve as required under section 45 of the Insurance Act by transferring Kshs. 159,875,000 from its retained earnings of both its life and general business for the year 2004 to the fund. In the year 2010, the appellant capitalized of Kshs. 111,338,000/= which was part of the retained earnings amounting to Kshs. 159,875,000/= that was transferred to the statutory reserve created in 2004. The increase in share capital arising from the capitalization of that amount was deemed to be taxable income for which the Commissioner of Domestic Taxes (the commissioner) issued an initial assessment of Kshs. 32,377,800.

The appellant objected to the assessment. It argued that a transfer would amount to taxable income only if appropriated from the life fund for the benefit of shareholders. It explained that the life fund and the statutory reserve were different and that the amount capitalized was not appropriated from the life fund but from the statutory reserve.

The dispute was entertained by the Tax Appeals Tribunal which upheld the decision of the commissioner and dismissed the objection. The appellant then lodged an appeal at the High Court.

Issues

- i. Whether the life fund contemplated under section 19(5)(b) of the Income Tax Act had the same meaning as the statutory reserve fund provided for under section 45 of the Insurance Act.
- ii. Whether a reserve fund created for the benefit of policy holders and shareholders was within the meaning of a reserve fund as contemplated under section 45 of the Insurance Act.

Held

1. Under section 56 of the Tax Procedures Act, it was the taxpayer that had the burden to prove that a tax decision was wrong and an appeal to the High Court or the Court of Appeal had to be on questions of law only. Questions of law included the question as to whether the conclusions of a trial court were

Kenindia Assurance Company Limited v Commissioner of Domestic Taxes

based on the evidence on record or whether they were so perverse that no reasonable tribunal would have arrived at them.

2. The Income Tax Act did not define the meaning of a life fund, especially as used under section 19 of the Act. The Insurance Act also did not define the meaning of a life fund but under section 46(1), it provided that an insurer carrying on long term business in Kenya had to establish and maintain a statutory fund under an appropriate name in respect of the long term business.
3. The purpose of the statutory fund was to protect policy holders by ring fencing the policy holder's funds from the fluctuations of ordinary business. In the appellant's circumstances, the statutory reserve was created for purposes of keeping retained earning for the benefit of shareholders which was a purpose that was outside the purview of sections 46 and 47 of the Insurance Act. The statutory fund established by the appellant under section 45 of the Insurance Act was in respect of its life assurance business hence the term used to refer to the fund was the life fund.
4. The statutory reserve, which the appellant contended for the benefit of shareholders, was not one of the funds contemplated under the provisions of section 45 and 46 of the Insurance Act as it was not in relation to the long-term business. Section 46(1)(b) of the Insurance Act prohibited application of part of the assets of a statutory fund for payment, application or allocation as dividends or otherwise as profits to shareholders of the insurer except in accordance with subsections 5 and 6 thereof.
5. The statutory fund established under section 45(1) of the Insurance Act and which was a mandatory requirement in order to carry on long-term insurance business including life assurance business was what was contemplated under section 19(5)(b) of the Income Tax Act as the life fund. That definition excluded any other type of statutory fund authorised by the Commissioner of Insurance to support other long-term business for example a bond investment fund.
6. The statutory reserve fund created by the appellant in 2004 for the benefit of shareholders and policy holders was different from the life fund contemplated under section 19(5) of the Income Tax Act. It was not a fund within the life fund.
7. The appellant's circumstances were that there were two separate funds; the life fund and the statutory reserve and for purposes of section 19(5)(b) of the Income tax Act, only a transfer from the life fund for the benefit of shareholders was chargeable. Therefore, the commissioner erred in finding that the capitalized Kshs. 111,338,000.00 from the statutory reserve was not taxed and that the transfer thereof for the benefit of shareholders ought to be taxed. The tribunal also failed to consider the fact that the two funds were distinct and only the life fund fell within the provision of section 19(5)(b) of the Income Tax Act.
8. The court's conclusions on the nature of the statutory reserve fund held by the appellants meant that the issue of double taxation did not arise.

Appeal allowed.

Orders

- i. *The assessment of the Commissioner of Domestic Taxes dated June 7, 2013 and confirmed on February 12, 2014 was set aside.*
- ii. *The judgment of the Tax Appeal Tribunal dated April 15, 2016 was set aside.*
- iii. *The appellant was awarded the costs of the appeal before the tribunal and of the appeal at the High Court*

Tile and Carpet Centre Limited v Commissioner of Domestic Taxes

The Commissioner was entitled to disallow the interest expense under section 16(1)(a) of the ITA

Headnote: The Commissioner of Domestic Taxes argued that the appellant had sourced funds from a credit facility and its total borrowings and overdraft for the years 2011 and 2012 was an aggregate sum of Kshs. 770,580,969/= with an accrued interest expense of Kshs. 84,833,487.00. The Commissioner therefore restricted and disallowed the interest expense relating to the borrowing to the extent of the amount deposited with the appellant's advocates and it raised the additional tax assessment to Kshs. 2,942,539/=. The appellant was aggrieved by the additional assessment and filed an objection that was disallowed, it filed an appeal before the Tax Appeals Tribunal that was also disallowed. Further aggrieved the appellant filed the instant appeal. The High Court held that interest expense was an allowable deduction if it was wholly and exclusively incurred in the production of income. The appellant did not discharge its burden to show that the tax decision of the Commissioner was wrong. There was sufficient evidence to show that the purpose of the borrowing was not, wholly and exclusively incurred by the appellant for the production of income. That money came from the overdraft account; it was deposited with its advocate for the benefit of another company hence it was not available for the appellant for its working capital during that period. The Commissioner was entitled to disallow the interest expense under section 16(1)(a) of the ITA.

Tile and Carpet Centre Limited v Commissioner of Domestic Taxes [2020] eKLR

Tax Appeal 4 of 2016
High Court at Nairobi
DS Majanja, J
March 31, 2020

Tax Law – assessment of tax – objection to a tax assessment – where the commissioner of tax disallowed interest expense on account on the money deposited by the appellant with its advocates - whether the Commissioner of Domestic Tax erred in disallowing interest expense in accordance with section 16(1)(a) of the Income Tax Act on the amount deposited by the appellant with its advocates – Income Tax Act, CAP 470, section 16 (1) (a)

Banking Law – loan agreement – letter of offer – letter of offer that had been signed by the loanee – import - whether a letter of offer of a loan from a bank that was signed by the loanee constituted a loan agreement.

Banking Law – loan agreement – letter of offer – letter of offer that had been signed by the loanee – purpose of loan - whether the purpose of a loan could be determined from the letter of offer from the Bank - whether a loan, extended based on a letter of offer that lacks mention of the borrower's intention to purchase land, can be considered as financing for a land transaction.

Tax Law – deduction - interest expense deduction – overdraft – where a taxpayer claimed that they deserved a deduction for interests in a loan facility acquired for the purpose of purchase of land – claim that the Commissioner of Domestic Taxes erred in assessment - whether the Commissioner of Domestic Taxes erred in not allowing the deduction of interest expenses for an overdraft claimed by a taxpayer company, purportedly for land purchase, when it was demonstrated that the funds were not intended for that purpose - Income Tax Act, Cap 470, section 16(1)(a)

Tax Law – funding source – source of funds to pay a taxpayer's advocate – overdraft vis-à-vis retained earnings - whether the appellant's transactions with its advocates were funded through an overdraft facility or by using retained earnings.

Brief Facts

The respondent had carried out a tax compliance check on the appellant for the period January 2010 to November 2011. It discovered that in July 2010 and October 2010, the appellant deposited with their advocates KES. 15,937,000/= and KES. 149,351,250/= towards the purchase of land. The purchase was being done on behalf of an associated company; Tile and Carpet Development Limited. However, the deal aborted and the money was credited back to the appellant's account in two instalments; KES. 65,288,250/=

Tile and Carpet Centre Limited v Commissioner of Domestic Taxes

and KES. 100,000,000/= in February and March 2011 respectively.

The respondent argued that the appellant had sourced the funds from a credit facility and its total borrowings and overdraft for the years 2011 and 2012 was an aggregate sum of KES. 770,580,969/= with an accrued interest expense of KES. 84,833,487.00. The Respondent therefore restricted and disallowed the interest expense relating to the borrowing to the extent of the amount deposited with the appellant's advocates and it raised the additional tax assessment to KES. 2,942,539/=.

The appellant was aggrieved by the additional assessment and filed an objection. Subsequently, the appeal filed an appeal to the Tax Appeals Tribunal. In the instant matter, the appellant, Tile and Carpet Centre Limited, was appealing against a decision of the Tax Appeals Tribunal (the Tribunal) upholding the assessment of the Commissioner of Domestic Taxes (the Commissioner) dismissing its objection to that assessment. The Tribunal had upheld the decision of the Commissioner to disallow KES. 2,942,539/= claimed as interest expense under section 16(1)(a) of the Income Tax Act.

Issues

- i. Whether a letter of offer of a loan from a bank that was signed by the loanee constituted a loan agreement.
- ii. Whether the purpose of a loan could be determined from the letter of offer from the Bank.
- iii. Whether a loan, extended based on a letter of offer that lacks mention of the borrower's intention to purchase land, can be considered as financing for a land transaction.
- iv. Whether the appellant demonstrated the purpose of borrowed funds to justify the deduction of related interest expenses for corporation tax purposes.
- v. Whether the Commissioner of Domestic Taxes erred in not allowing the deduction of interest expenses for an overdraft claimed by a taxpayer company, purportedly for land purchase, when it was demonstrated that the funds were not intended for that purpose.
- vi. Top of Form
- vii. Whether the appellant's transactions with its advocates were funded through an overdraft facility or by using retained earnings.
- viii. Whether the Tax Appeals Tribunal's findings were justified in confirming the tax liability.

Relevant Provisions of the Law**Tax Procedures Act, Act No. 29 of 2015, section 56****56. General provisions relating to objections and appeals**

- (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.

Income Tax Act, Cap 470, section 16(1)(a)**16. Deductions not allowed**

- (1) Save as otherwise expressly provided, for the purposes of ascertaining the total income of a person for any year of income, no deduction shall be allowed in respect of—
 - (a) any expenditure or loss which is not wholly and exclusively incurred by him in the production of the income;

Held

1. The court's jurisdiction was limited to a question of law only. A decision was erroneous in law if it was one to which no court could reasonably come to which was the same thing as a decision of fact in which there was no evidence to support. Where the issue was misapprehension of evidence, leading to

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a perverse decision or ignoring material evidence or basing a decision of extraneous evidence amounted to points of law that could be taken up on appeal.

2. The Commissioner disallowed the interest attributable to funds lent to its associated company to buy land as the same was not wholly and exclusively incurred by the appellant in production of its income within section 16 of the ITA. The decision was based on two grounds;
 - a. that the appellant deposited money with its advocate to facilitate the purchase of a property for its associated company; and
 - b. that while the appellant was maintaining huge credit facilities with the banks and incurring large interest expense, it was lending its sister company money from the borrowing and that the money was not available to it for generating its income.
3. The letter from the Bank confirmed that it had credit facilities. Each letter of offer constituted an agreement as it was signed by the appellant's directors. In that respect the Tribunal was wrong to come to the conclusion that the documents were insufficient or that they did not show the purpose of the facility. Each letter of offer showed the purpose of each loan facility. None of the letters mentioned the land in Mavoko Municipality. The facilities were not taken for the purpose of financing purchase of that property or at any rate land in Mavoko Municipality.
4. The nature of the transaction evidenced by the MOU was that Tile and Carpet Developments Limited and another company were purchasing shares in Brookman Properties Limited which was purchasing land from Knebworth Investments Limited which owned that property. The documents evidencing the transaction had nothing to do with the appellant and the advocates letter coming years later did not clarify the matter at all. That was why the Tax Appeals Tribunal (the tribunal) was asking for other documents like a sale agreement which would have confirmed what the letter from the advocates was saying. In that respect the Commissioner and tribunal arrived at the correct conclusion that the money deposited with the advocates was not for the purpose of purchasing property for the appellant.
5. The cheques supporting the RTGS transfer were drawn on the appellant's account at the Bank. The evidence that the money was received was evidenced by Bank statements showing that Harit Sheth Advocate refunded the money in two instalments. According to the statement, the account type was titled, "OVERDRAFT ACCOUNT KES." That was the same account that the appellant drew the cheques that supported the transfer of money to its advocates. That money did not come from its reserves or retained earnings; it came from the overdraft account.
6. The evidence adduced displaced the argument that the amount deposited from the advocates came from the retained earnings. Even if the appellant had sufficient reserves, the evidence shows that the money came from the overdraft account and was refunded to the overdraft account. They do not show that retained earnings were available as cash for investment. Nothing would have been easier than to provide a statement of account to show that the appellant was sitting on substantial cash reserve. The Commissioner and the tribunal were right to conclude that if the appellant was cash rich, it would not have taken out facilities to the extent that it was heavily indebted.
7. The conclusions of the Commissioner and the tribunal could be supported by the evidence and were not perverse. The appellant did not discharge its burden to show that the tax decision was wrong. There was sufficient evidence to show that the purpose of the borrowing was not, wholly and exclusively incurred by the appellant for the production of income. That money came from the overdraft account; it was deposited with its advocate for the benefit of another company hence it was not available for the appellant for its working capital during that period. The Commissioner was entitled to disallow the interest expense under section 16(1)(a) of the ITA.

Appeal dismissed.

Jimmy Mutuku Kiamba & 3 others v Ethics & Anti-Corruption Commission & 4 others**The power of the Ethics and Anti-Corruption Commission to involve other state organs in prevention and investigation for Corruption**

Headnote: The petitioner's case was that the Ethics and Anti-Corruption Commission (EACC) launched investigations as per section 7 of the Anti-Corruption and Economic Crimes Act 2003 on the petitioners after receiving information that the petitioners were receiving money in their bank accounts beyond their known source of income. The petitioner contended that EACC proceeded to invoke their inquisitorial powers as per the Income Tax Act without complying with the overseeing provisions of the Constitution as well as the Fair Administrative Actions Act. The petitioners contended that the act of Kenya Revenue Authority (KRA) cooperation with the Ethics and Anti-Corruption Commission (EACC) in the exercise was unconstitutional. The court held that a taxpayer cannot challenge on the mandate of the very bodies mandated by law in the discharge of their duties unless it could be proven and seen that in the discharge of the said duties the decision-making body acted in a manner that was infringing upon the individual rights protected by the constitution.

Jimmy Mutuku Kiamba & 3 others v Ethics & Anti-Corruption Commission & 4 others [2018] eKLR

Petition 7 of 2017
High Court at Nairobi
HI Ong'udi, J
March 20, 2018

Constitutional Law - fundamental rights and freedoms - right to privacy - where the Kenya Revenue Authority inspected and scrutinized the wealth declaration form - whether the act of inspection and scrutiny of wealth declaration forms by the Kenya Revenue Authority was an invasion of privacy of the executor of the form - Constitution of Kenya, 2010 article 31.

Tax Law - Kenya Revenue Authority - mandate - duty to investigate - whether a taxpayer could challenge on the mandate of the very bodies mandated by law in the discharge of their duties.

Brief Facts

The basis of the instant petition was that the 1st and 2nd respondents had investigative powers as per the anti-corruption laws and the Income Tax Act but their conduct was reviewable by a court or tribunal. The 2nd respondent had investigative powers for administration of income tax even though the Income tax was a self-assessment Act in which taxpayers were expected to disclose their income based on honesty and integrity.

According to the petitioners, the 2nd respondent's co-operation in that exercise was unconstitutional in light of articles 232 as read with article 10 of the Constitution. They argue that there should be some precursor to the audits and that the audits should not be random. The petitioners were of the view that the 1st and 2nd respondents assumed that the taxpayer was guilty and his fundamental rights should be disregarded. That their rights to institute court proceedings were provided for under Article 22 (1) of the Constitution. The petitioners re-affirmed that they had a constitutional right to human dignity, freedom and security of the person and freedom from torture

Issue

- i. Whether the act of inspection and scrutiny of wealth declaration forms by the Kenya Revenue Authority was an invasion of privacy of the executor of the form.
- ii. Whether a taxpayer could challenge on the mandate of the very bodies mandated by law in the discharge of their duties

Held

1. Sections 55 and 56 of the ACECA had provisions for a person suspected of having corruptly acquired

Jimmy Mutuku Kiamba & 3 others v Ethics & Anti-Corruption Commission & 4 others

assets to give an explanation. It could not therefore be said that they were condemned unheard in violation of article 50 of the Constitution. Once the matter was filed in court, the person was again given an opportunity to present their case. Investigation involved inspection and scrutiny of documents. Asset declaration forms once surrendered to KRA were examined by the officers of that authority. Such an exercise could not be said, to be invading ones privacy. If the petitioners had any issue with inadmissible evidence, the best forum to address such an issue was the trial court seized of the matter.

2. The 2nd respondent initiated an investigation into the tax compliance status of the 1st petitioner, his family members and associated companies. That was after receiving information from EACC indicating that the 1st petitioner had accumulated a substantial amount of assets and cash amounts into his accounts. The investigation covered the years 2007 – 2014.
3. Under section 11 (3) of the Ethics and Anti-Corruption Commission, the Commission may co-operate and collaborate with other state organs and agencies and any foreign government or international or regional organization in the prevention and investigation for corruption. The 1st respondent was simply carrying out its lawful mandate by involving the 2nd respondent in its investigations, on the part that touched on the 2nd respondent's mandate. The petitioners had not mentioned any single provision of sections 55 and 56 of the ACECA or section 5 of the KRA Act that had been violated by the respondents in their investigations. All allegations by them were generalities which could not suffice in such a petition.
4. The 1st and 2nd respondents discharged their mandate and the only way for the matter to be determined fairly was to allow the matters already filed to be heard fully with all parties being given a chance to articulate their case and the decision rendered. The issue of compensation could only have been considered if the petitioners had proved violation of any of their constitutional rights.

Petition dismissed with costs.

Ocean Freight (EA) Limited v Commissioner of Domestic Taxes

Demurrage charges payable for the late return of containers are part of chargeable income

Headnote: The main issue before the court was whether charges collected on demurrage for containers were chargeable to income tax. The High Court held that burden of proof lay with the taxpayer to prove that the declaration of deemed dividends by the tax payer would be of detriment to his business, that the business would not be able to pay out the dividends and that it was not a means to evade tax liability. Demurrage was defined as a charge due for the late return of ocean containers or equipment. Whether the charge for the late return of the container was called a penalty or rent, it was an income to the owner of the container, which was the shipping line. As the charge on demurrage would be derived from or accrued from Kenya, it was subject to income tax legislation in Kenya. The effect of section 10(1) of the Income Tax Act was to deem the income from demurrage charges on containers to be income which accrued in or was derived from Kenya.

Ocean Freight (EA) Limited v Commissioner of Domestic Taxes

Income Tax Appeal No 13 of 2017

High Court at Nairobi

F Tuiyott, J

February 7, 2020

Taxation Law - income tax - chargeable income - demurrage charges for containers - whether demurrage charges payable for the late return of containers were part of chargeable income - Income Tax Act (Cap 470), sections 2, 10 and 35.

Taxation Law - income tax - withholding tax in relation to demurrage charges for containers - whether shipping line agents that received demurrage fees and consignees that paid demurrage fees, had a duty to ensure that withholding tax was deducted when demurrage fees were paid - Income Tax Act (Cap 470), section 35 and paragraph 3 of the third schedule to the Income Tax Act.

Taxation Law - Value Added Tax (VAT) - assessing VAT chargeable on imported goods - costs that would form part of the value of imported goods - whether a charge for the processing of documents prepared by a shipping line was a cost that was ancillary or incidental to importation of goods or would be treated as part of importation - Value Added Tax Act, No 35 of 2013, section 14(2).

Taxation Law - income tax - chargeable income - transshipment - differences in taxation relating to a transshipment under the Income Tax Act and the East African Community Customs Management Act (EACCMA) - whether withholding tax was chargeable in relation to gains or profits made from a transshipment - Income Tax Act (Cap 470), section 9(1).

Taxation Law - income tax - chargeable income - dividends - failure to declare and distribute dividends allegedly for purposes of tax evasion - circumstances under which the Kenya Revenue Authority would deem dividends on a tax payer - Income Tax Act (Cap 470), section 24.

Words and Phrases - transshipment - definition - the act of taking cargo out of the ship and loading it on another; it could also involve the transfer of cargo to another mode of transportation such as rail or truck - Black's Law Dictionary, 10th Edition.

Words and Phrases - demurrage - definition - a charge due for the late return of ocean containers or equipment - Black's Law Dictionary 10th Edition

Brief facts

The parties asked the court to render one judgment in respect of seven appeals that had some common issues. The first issue was on whether charges collected on demurrage for containers were chargeable to income tax. The second issue was whether VAT was chargeable to post landing charges on processing documents prepared by the appellants. The third issue was whether withholding tax was chargeable on amounts received on account of carriage of transshipment cargo originating from the East African Community. The fourth and last

Ocean Freight (EA) Limited v Commissioner of Domestic Taxes

issue was on the application of section 24 of the Income Tax Act which empowered KRA to deem dividends on a taxpayer if it was satisfied that the only reason for non-issuance of dividends was to evade taxation.

Issues

- i. Whether taxes collected on demurrage for containers were chargeable to income tax.
- ii. Whether Value Added Tax was chargeable to post landing charges on processing documents prepared by shipping lines.
- iii. Whether withholding tax was chargeable on amounts received on account of carriage of transshipment cargo originating from the East African Community.
- iv. When would the Kenya Revenue Authority exercise powers to deem dividends on a tax payer under section 24 of the Income Tax Act on grounds that the only reason for non-issuance of dividends was tax evasion?

Held

1. The purpose of an appeal was to evaluate a matter on the basis of the case presented and argued by parties before the tribunal from which the appeal arose. To allow a party to traverse outside its original case would be to allow it to argue a case that was different from that argued at the Tax Appeals Tribunal (the tribunal) and that would amount to, not arguing an appeal, but presenting a different case.
2. The interpretation of tax statutes called for a strict interpretation of the language used by the legislature. There was no room for any intendment or equity or presumption. One had to look at the language used fairly and nothing was to be read in or implied.
3. Demurrage was a charge due for the late return of ocean containers or equipment. Whether the charge for the late return of the container was called a penalty or rent, it was an income to the owner of the container, which was the shipping line. As the charge on demurrage would be derived from or accrued from Kenya, it was subject to income tax legislation in Kenya. The effect of section 10(1) of the Income Tax Act was to deem the income from demurrage charges on containers to be income which accrued in or was derived from Kenya.
4. In 2018 an amendment was made to section 2 of the Income Tax Act to specifically include demurrage charges in the category of income which accrued or was derived from Kenya. The amended provision defined demurrage charges as the penalty paid for exceeding the period allowed for taking delivery of goods or returning of any equipment used for transportation of goods. Section 35 of the Income Tax Act was amended to expressly provide for withholding tax on demurrage and paragraph 3 of the third schedule to the Income Tax Act was amended to provide the withholding tax rate on demurrage at 20%.
5. Demurrage charges on containers were chargeable to income tax even under the statutory regime that existed at the material time. Any amendments that came later served to reinforce legislation that was already clear and without ambiguity.
6. A reading of section 35(1) of the Income Tax Act and rules 2 and 4(1) of the Income Tax (Withholding Tax) Rules 2007 showed that the person who bore the responsibility to deduct withholding tax was the person who made payment of the income. It was evident that the subject matter demurrage fees, though payable to agents, was money paid to shipping lines, which were non-residents of Kenya. Demurrage on containers was a charge payable to the principals and the shipping agents could only be an agent for those payments.
7. The demurrage fees were payments made by consignees to the relevant non-resident shipping lines. Therefore, ordinarily under section 35(1)(c) of the Income Tax Act the onus was on the consignee to withhold the tax. The purpose of withholding tax with respect to a non-resident was to ensure that taxes were paid on income accrued or derived from Kenya by the non-resident. If the tax was not withheld it was likely to be lost.
8. The agent that collected the demurrage fees, which was an income that attracted a charge on tax, had an obligation to ensure that the tax was withheld before the income was remitted to the non-resident.

Ocean Freight (EA) Limited v Commissioner of Domestic Taxes

That conclusion would not be illogical or oppressive to the shipping agents because even if the shipping agents were to withhold the tax, they would not be withholding part of their income but the income of their principals.

9. In one of the appeals to which the judgment related, *CMA CGM (E) v Commissioner of Domestic Taxes*, Civil Appeal No 14 of 2017, an argument was raised to the effect that a double taxation agreement between Kenya and France provided that only 5% of the gross amount derived in Kenya by a shipping line registered in France was to be taxed in Kenya. Article 2(a) of that agreement was to the effect that the agreement related to sums received by an enterprise on account of carriage of passengers or freight. Given the finding that demurrage on late return of containers was a post-freight income and not part of freight then demurrage was excluded from the double taxation framework.
10. Value Added Tax (VAT) was a tax charged on the supply of goods and services in Kenya and on importation of goods and services into Kenya. Under section 14(2) of the Value Added Tax Act, 2013, unless the context required otherwise, a supply that was ancillary or incidental to the importation of goods had to be treated as part of the importation. The cost of services that were ancillary or incidental to the importation of goods were treated as part of the importation. The issue therefore was whether the document processing fees was ancillary or incidental to importation.
11. The Fourth Schedule of the East African Community Customs Management Act (EACCMA) provided a legal framework for the determination of the value of imported goods. It would include the price actually paid or payable for the goods, transport costs, loading, unloading and handling associated with transportation and the cost of insurance. Where the importation was by air, the freight costs would not be added to the price paid or payable.
12. Post landing expenses that would be excluded from the value of the imports were expenses that were neither transport to the port or place of importation, loading, unloading and handling charges associated with such transport or costs of insurance.
13. The invoiced services were intimately connected with the freight undertaken by the shipping lines and were not additional services which were needed after the goods landed. However, it was not a rule that all services charged by shipping lines were to be treated as services associated or incidental to importation of goods or were to be treated as part of importation. The character of each service had to be interrogated in order to discover its true nature.
14. Transshipment meant the act of taking cargo out of the ship and loading it on another. It could also involve the transfer of cargo to another mode of transportation such as rail or truck. In EACCMA transshipment was defined as the transfer, either directly or indirectly, of any goods from an aircraft, vehicle or vessel arriving in a partner state from a foreign place, to an aircraft, vehicle or vessel, department to a foreign destination.
15. Gains or profits of a non-resident ship owner from carriage of cargo that was embarked on Kenya solely for the purpose of transfer to the ship would not be deemed to be income derived from Kenya. The origin of the cargo would not matter.
16. When the terms “partner state”, “foreign place” and “foreign destination” from EACCMA were inferred into section 9(1) of the Income Tax Act, it would mean that gains or profits from the transshipment could be deemed to be income derived from Kenya. If the intention of the legislation was that the word transshipment as used under section 9(1) of the Income Tax Act would have the same meaning as the one used under the EACCMA, nothing would have been easier than the statute expressly stating so. Shipping tax was levied under the Income Tax Act and so in construing the word transshipment under section 9(1) of the Income Tax Act, reference should be had to its ordinary meaning. Therefore, income from carriage of goods through Kenya solely for outward carriage was not chargeable.
17. The import of section 24(1) of the Income Tax Act was that dividends could not be deemed if it would prejudice or negatively affect the requirements of a tax payer’s business. The provision was intended to check on a tax payer whose only reason for not distributing dividends was to reduce its tax liability. The burden of proof lay with the tax payer to demonstrate that it did not have the ability of paying

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dividend without hurting its business.

18. The respondent alleged that the appellant was capable of declaring a 55, 000, 000/= dividend while the appellant alleged that such a dividend would negatively affect cash flow as it had outstanding trade receivables of KES. 24, 000, 000. There was merit in the appellant's arguments but it failed to provide further proof that it could not make such payments through any other means, for instance, borrowing, without hurting the company.
19. The appellant did not discharge its burden of proof in terms of showing that distribution of dividends would imperil the business of the company.

Appeal partly allowed. Each party to bear its costs.

Orders

- i. *In respect of Appeals No. 29 of 2017, 31 of 2018, 14 of 2017, 13 of 2017 and 3 of 2017, the decision of the tribunal that demurrage relating to the delay of containers post-port was not part of freight was upheld. The decision of the tribunal that the demurrage should be treated as income derived from Kenya and that the shipping agents were liable to ensure the deduction of withholding tax was upheld.*
- ii. *With respect to Appeal No 14 of 2017, the argument that the decision of the tribunal infringed on the provisions of the Avoidance of Double Taxation and Prevention of Fiscal Evasion With Respect to Taxes on Income Agreement between the Republic of France and the Republic of Kenya was without merit and was dismissed.*
- iii. *As regarded Appeals No. 29 of 2017, 31 of 2018, 33 of 2017 and 9 of 2017, the court set aside the decision of the tribunal that delivery order fees was not part of freight and allowed the appeals in that respect.*
- iv. *In respect of Tax Appeal No. 31 of 2018 the court allowed the appeal on the question of assessment of freight tax on the transshipment cargo originating from Uganda, Rwanda, Burundi and Tanzania.*
- v. *With regard to Tax Appeal No. 31 of 2018 the court dismissed the appeal on the question of deemed dividends*

Ushindi Limited v Commissioner of Investigation and Enforcement Kenya Revenue Authority

Exemption in record keeping in dealers of unwrought precious metals only exempts dealers from producing purchase invoices and ledgers that contain identities of the artisanal miners but not any other record that the dealer is mandated to keep under section 54A of the Income Tax Act.

Headnote: The instant matter arose from report from the National Assembly that listed the appellant as a possible gold smuggler. The matter was investigated by Kenya Revenue Authority who issued a notice to the appellant to produce several documents relating to their business under section 54A and 56 of the Income Tax Act, and section 30 Value Added Tax. The appellant filed an unsuccessful objection. Aggrieved the appellant filed an appeal before the Tax Appeals Tribunal that was also dismissed. Further aggrieved, the appellant filed the instant second appeal before the High Court. The High Court held that the burden of proof was on the taxpayer to show that an assessment contains manifest errors. The letter from the Commissioner of Geology and Mines directed to licenced gold dealers took effect after January 6, 2012, and only exempted the dealers from producing purchase invoices and ledgers that contained identities of the artisanal miners but not any other record that the dealer was mandated to keep under section 54A of the Income Tax Act.

**Ushindi Limited v Commissioner of Investigation and Enforcement Kenya
Revenue Authority [2020] eKLR**

Income Tax Appeal E001 of 2019

High Court at Nairobi

MW Muigai, J

February 28, 2020

Civil Practice and Procedure – appeals – appeals to the High Court arising from the Tax Appeals Tribunal – statutory period to file an appeal – where an appeal was filed out of time due to a delay in the release of proceedings and pleadings by the Tax Appeals Tribunal – whether an appeal record filed outside the statutory period was valid if the delay was caused by the late release of proceedings and pleadings by the Tax Appeal's Tribunal – whether an extension of time to file an appeal could be granted in the circumstances – Tax Appeals Tribunal Act, Act No. 40 of 2013, section 32

Tax Law – taxation of traders in unwrought precious metals – income tax – requirement to keep records of receipts and expenses – claim that the Commissioner of Mining's exempted traders of unwrought precious metals from keeping records – Whether the Commissioner of Mining's exempted the appellant from obtaining details identities of the artisanal miners who sold the gold to the appellant thus allowing the appellant not to keep records of receipts and expenses as required by section 54A of the Income Tax Act – whether the Tax Appeals Tribunal erred by confirming the Commissioner of Investigation and Enforcement Kenya Revenue Authority assessment without considering the costs incurred by the appellant in purchasing the gold and acknowledging evident errors – Income Tax Act, Cap 470, section 54A; Unwrought Precious Metal Act, Cap 309, (repealed) section 11

Judiciary – judicial independence – Tax Appeals Tribunal – claims that the Tax Appeals Tribunal was influence to make a decision by the National Assembly – where tax dispute arose from a National Assembly report on gold smuggling that led to the Kenya Revenue Authority investigating the appellant – whether the decision of the Tax Appeals Tribunal was influenced by a report National Assembly that led to the Kenya Revenue Authority investigating the appellant as a possible smuggler of gold

Brief Facts

It was the respondent's case that they analysed the documents and established that the appellant made exports of gold worth KES 2,595,838,877/- and KES 2,940,001,820/- in the years 2010 and 2011 respectively. It was also established that the appellant claimed cost of sales amounting to KES 2,588,274,982 and KES2, 927,880,360 in the years 2010 and 2011 respectively therefore declaring gross profits margins of 0.3% in 2010 and 0.4% in 2011.

Ushindi Limited v Commissioner of Investigation and Enforcement Kenya Revenue Authority

The respondent also established that all the transactions of the appellant were done in cash. During the export of the gold, the appellant exchanged huge amounts of cash in dollars with the importer at the Jomo Kenyatta International Airport. All the Purchase Invoices claimed in the accounts were also allegedly done in cash. The respondent therefore requested the appellant to provide supporting documents for the costs of sales for further analysis.

The Appellant objected to the assessments stating that the appellant was not in a position to provide the requested supporting documents for the cost of sales since they were buying Gold from artisan miners who normally declined to give their personal details and/or tax invoices. The appellant further argued that they maintained records in accordance with Trading in Unwrought Precious Metals Act, CAP 309 which only indicated the date of transaction, nature and weight of the precious metal and the price (if any) without indicating the names or identities of the sellers.

The appellants appealed to the Tax Appeal Tribunal and subsequently to the High Court.

Issues

- i. Whether an appeal record filed outside the statutory period was valid if the delay was caused by the late release of proceedings and pleadings by the Tax Appeal's Tribunal.
- ii. Whether the Commissioner of Mining's exempted the appellant from obtaining details identities of the artisanal miners who sold the gold to the appellant thus allowing the appellant not to keep records of receipts and expenses as required by section 54A of the Income Tax Act.
- iii. Whether the Tax Appeals Tribunal erred by confirming the Commissioner of Investigation and Enforcement Kenya Revenue Authority assessment without considering the costs incurred by the appellant in purchasing the gold and acknowledging evident errors.
- iv. Whether the decision of the Tax Appeals Tribunal was influenced by a report National Assembly that led to the Kenya Revenue Authority investigating the appellant as a possible smuggler of gold

Relevant Provisions of the Law

Income Tax Act, CAP 470,

Section 54 A

54A.Keeping of records of receipts, expenses, etc.

- (1) *A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax.*
- (1A) *For the purposes of this section, the carrying on of business includes any activity giving rise to income other than employment income.*
- (2) *Any person who contravenes the provisions of subsection (1) shall be liable to such penalty, not exceeding twenty thousand shillings, as the Commissioner may deem fit to impose.*

Held

1. A party to proceedings before the Tax Appeals Tribunal (the tribunal) may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party. The record of appeal was clearly filed after the statutory period. The delay caused by the release of proceedings and pleadings by the Tax Appeal Tribunal was not controverted by facts to the contrary. It was also a factor that the Tax Appeal Tribunal was not constituted for a while and hence proceedings could not be certified to facilitate the appeal on time. The delay was not occasioned by the appellant. Since section 32 of Tax Appeal Tribunal Act granted the court discretion to extend the appeal period, in the instant case where circumstances were beyond the appellant, the court granted extension of time and there was a competent appeal.
2. Provisions of section 11 of Trading in UnWrought Precious Metals Act (repealed) were mandatory and compliance could not be waived by the letter from the Commissioner of Geology and Mines. The

Ushindi Limited v Commissioner of Investigation and Enforcement Kenya Revenue Authority

repealed Act did not empower the Commissioner of Geology and Mines to waive compliance of the law. Whereas it was appreciated and recognized that there was a problem; artisanal miners who did not want their identities disclosed and therefore refused to sell gold thus leading to loss of gold and revenue; the process of resolving the problem was not to authorise the gold dealers to circumvent the law. Although he was acquitted of the criminal offence, the acquittal does not sanitize non compliance of section 11 of Trading in UnWrought Precious Metals Act (repealed) and section 54A of Income Tax Act by the appellant.

3. The appellant was challenged to keep records, avail them to the respondent to carry out comprehensive tax assessment. The appellant's reliance on the Commissioner of Geology and Mines letter would only absolve the Company from producing Purchase Invoices and Ledgers that contained identities of the Artisanal miners.
4. All the documents produced were not exempted by the letter of Commissioner of Geology and Mines. The exemption if it at all related only to purchase of gold from the Artisanal Miners and not sale of gold and/or payment thereof. That meant that despite the alleged exemption, keeping of records was compulsory under section 11 of Unwrought Precious Metal Act (repealed). The only consideration sought by the Commissioner of Geology and Mines was continued purchase and keeping of records in spite of artisanal miners non disclosure of identities.
5. The Commissioner of Income Tax sought from the appellant, pursuant to section 54A of Income Tax Act, records from the years 2009, 2010, 2011, and 2012. The letter by the Commissioner of Geology and Mines was of 2012, it took effect on and after January 6 2012 and thereafter and not before that date. That letter could not be relied on before that date. The appellant was presumed to have complied with the law; to keep records, identities of sellers of gold and Purchasers of gold and amounts of gold involved and funds thereof before January 6, 2012, before the exemption of identities of Purchasers was allowed. The letter did not waive the appellant's obligation to keep records and provide documents for tax assessment.
6. The impugned letter was addressed to all licensed gold dealers. The Tax Appeals Tribunal properly directed itself in light of the evidence on record and the relevant legal provisions. The appellant did not comply with section 54A Income Tax Act.
7. The burden of proof was on the appellant to raise the specific items and/or aspects of the tax assessment that were manifest errors, wrongfully imposed or not liable to be paid as tax. It was not raised during the proceedings before the Tax Appeals Tribunal and could not be heard and determined at the appellate stage except raised only as a matter of law.
8. The Tax Appeals Tribunal clearly, stated in the judgment at the outset that the matter was triggered by a Report from the Kenya National Assembly to the respondent, to carry out an investigation into gold that had been allegedly smuggled into Kenya from DRC Congo. The Tax Appeals Tribunal was not approached by anyone to investigate that matter but it was Kenya Revenue Authority. Throughout the proceedings before the tribunal, it was not intimated that any documents, exhibits or statements were presented from the Kenya National Assembly, no witness testified from Kenya National Assembly. The record of appeal had no evidence of interference by and from the Kenya National Assembly. Presumably, the Kenya National Assembly received a complaint which was channelled to the relevant legal institution to investigate, since it related to tax; it was Kenya Revenue Authority.
9. The tribunal did not refer to any party to the proceedings particularly the appellant as "smuggler of gold" instead the tribunal attributed the unlicensed and unregistered artisanal miners were possibly the smugglers of gold as their identities were undisclosed to and by the appellant. The Tax Appeals Tribunal directed its mind to the evidence and law before it and no extraneous matters were depicted either in the proceedings, pleadings and/or judgment.

Appeal dismissed with costs to the respondent.

Kenya Electricity Generating Company Limited v Commissioner of Domestic Taxes

The obligation to pay withholding tax upon assessment by the Commissioner of Domestic Tax

Headnote: The appellant, Kenya Electricity Generating Company Limited (KENGEN) had moved to the High Court to challenge the decision made by the Local Committee for Nairobi. The Local Committee held that the appellant was liable to pay additional withholding tax amounting to Kshs. 289,957,877. The tax was owing from KENGEN's construction of the Olkaria II Geothermal Power Project in Naivasha. The project was funded by foreign financiers, including the International Development Authority (IDA). The respondent conducted a tax audit and concluded that KENGEN was liable to pay to the Commissioner Kshs. 289,957,877/= in respect to withholding tax. KENGEN objected but the Nairobi Local Committee held that the withholding tax was payable by KENGEN. Further aggrieved KENGEN filed the instant appeal where the High Court. The High Court placed the burden of proof on the taxpayer to prove that the Commissioner double taxed them. The court also held that failure of the gazettement meant that the steps which would have turned into reality, the intention and desire to exempt the Olkaria II Geothermal Power Project from withholding tax, were never actualised.

Kenya Electricity Generating Company Limited v Commissioner of Domestic Taxes [2015] eKLR

Income Tax Appeal 6 of 2010

High Court at Nairobi

FA Ochieng, J

January 30, 2015

Tax Law – withholding tax – independent legal obligation to pay tax – where a parastatal had a project in which it engaged contractors but the project and contractors were funded by different entity - whether an institution that funded the payments of contractors of a parastatal could assume an independent legal obligation to deduct withholding tax – whether an institution that funded the payments of contractors of a parastatal would be assumed to be the person making payment for purposes of payment of withholding tax - *Income Act Tax, Cap. 470, sections 2 and 35*

Tax Law – withholding tax – zero rated public projects – compliance measures to be zero rated – legal basis for exemption/zero rating - whether a demand for withholding taxes against KENGEN for a project that sought improve generation of electricity by building a Geothermal Project had a legal basis for exemption for payment of withholding tax in public interest - whether a public entity that undertook a project that sought to be classified as zero rated but did not take the necessary measures for zero rating could be exempt from paying taxes - *Income Act Tax, Cap. 470, section 13; Income Act Tax, Cap. 470, first schedule, paragraph 1*

Brief Facts

The respondent had conducted a Tax Audit covering the income of the appellant for the period between 2001 and 2006. It was the conclusion of the Commissioner of Domestic Taxes that the appellant was liable to pay to the Commissioner Kshs.289,957,877/= in respect to Withholding Tax. The appellant objected to the demand made by the Commissioner, arguing that payments which had been made to the contractors and the consultants in the Olkaria Project were exempt from tax. However, the Commissioner of Domestic Taxes held his ground, and insisted that the Withholding Tax was payable.

The resultant dispute was placed before the Local Committee for Nairobi. After giving due consideration to the matter, the Nairobi Local Committee that the Withholding Tax was payable by the appellant. The decision by the Local Committee culminated into the instant appeal at the High Court.

The appellant requested the court to set aside the decision of Local Committee. In effect, the court was being invited to hold that withholding tax was not payable by the appellant. The court was also invited to

Kenya Electricity Generating Company Limited v Commissioner of Domestic Taxes

order the Commissioner of Domestic Taxes to pay to the appellant the costs of the proceedings as well as the costs of the appeal before the Local Committee.

In answer to the appeal, the Commissioner contended that the decision of the Local Committee was properly founded upon the relevant law, and the factual evidence that was provided by the parties.

Issues

- i. Whether an institution that funded the payments of contractors of a parastatal could assume an independent legal obligation to deduct withholding tax.
- ii. Whether an institution that funded the payments of contractors of a parastatal would be assumed to be the person making payment for purposes of payment of withholding tax.
- iii. Whether a demand for withholding taxes against KENGEN for a project that sought improve generation of electricity by building a Geothermal Project had a legal basis for exemption for payment of withholding tax in public interest.
- iv. Whether a public entity that undertook a project that sought to be classified as zero rated but did not take the necessary measures for zero rating could be exempt from paying taxes.

Held

1. The appellant shot itself in the foot. The appellant seemed to be suggesting that withholding tax was payable, but that it was not the right person to have deducted the said tax from the payments made to the contractors and the consultants. If withholding tax was not payable at all, then there would have been nobody who could be deemed as the proper person to deduct withholding tax. In any event, the appellant appreciated the fact that section 35 of the Income Tax Act imposed the liability to pay tax upon the person making payment.
2. The word “paid” was defined at section 2 of the Income Tax Act to include distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person. As the Olkaria II Geothermal Project was undertaken by the appellant, the contractors and consultants working on that project were doing so for the appellant. Therefore, when those contractors and consultants were being paid for the work they had done, the payments were being made on behalf of the appellant.
3. The International Development Authority did not give work to the contractors and consultants. It was the appellant which gave work to them. But because the appellant did not have its own funds which it could use to pay the contractors and the consultants, the appellant entered into an Agreement with IDA who provided the funding.
4. The appellant had confirmed that it checked and confirmed the work and services for which invoices had been raised, with a view to ascertaining that such work and services had actually been carried out. That further confirmed that it was the appellant, and not IDA, who knew the work and services to be rendered to the project. IDA only made payments on behalf of the appellant. Therefore, IDA could not have assumed an independent Legal obligation to deduct withholding tax. If withholding tax was payable, then it was the responsibility of the appellant to pay it. Therefore, there was nothing irrational about the demand from the respondent, that tax, if payable, be paid by the appellant.
5. Even assuming that the letter by the Ministry of Energy to the Commissioner of Domestic Taxes that provided that the project qualified for zero rating bound the respondent, the letter did not purport to constitute a waiver of withholding tax.
6. The letter made it clear the Project Credit No.3958 qualified for zero rating. However, the Permanent Secretary at the Treasury made it clear that his counterpart at the Ministry of Energy would be required to undertake some more work, with view to giving effect to the intention of achieving tax exemption. There was no evidence that the Permanent Secretary, Ministry of Energy did undertake the requisite tasks which would have led to the achievement of the intended tax exemption. Further, letter from the Permanent Secretary, Treasury, was in relation to a contract that was different from the one in issue in the instant case.

Kenya Electricity Generating Company Limited v Commissioner of Domestic Taxes

7. Legitimate expectation arose for example where a member of the public, as a result of a promise or other conduct expects that he would be treated in one way and the public body wishes to treat him or her in a different way. Public authorities must be held to their practices and promises by the courts, and the only exception was where a public authority has sufficient overriding interest to justify a departure from what had been previously promised. There was no indication that the respondent made any promise to the appellant and thereafter sought to depart from such promise.
8. When the appellant put forward a claim for investment reduction it should have expected the Commissioner to give due consideration to that application. As a part of the exercise of giving consideration to the appellant's application, the Commissioner for Domestic Taxes was obliged to undertake an audit, which would help it in determining whether or not the claim was justified. Therefore, the Commissioner could not be faulted for undertaking the audit. In addition, there was absolutely nothing to show any ulterior motive or bad faith on the part of the Commissioner.
9. The letter dated May 2, 2006 did not give rise to any legal obligation on the part of the Commissioner for Domestic Taxes. The said letter provided information, that the project cited in that letter, qualified for tax exemption. By a copy of that letter, the Permanent Secretary, Ministry of Energy was required to take some actions. It was not the responsibility of the Commissioner of Domestic Taxes to take steps which would have given effect to the intention to have the project exempted from tax.
10. The Olkaria II Geothermal Power Project was meant to benefit the people in Kenya, who would have more electricity available to them. If the cost of production of the additional electricity was made more affordable, the consumers would benefit from such reduction in costs if the benefit of the said reduction was cascaded down to the consumers. For that reason, the desire and intention to have the project exempted from taxation was laudable.
11. The concession in taxation was not intended to benefit the appellant itself. The intended exemption was meant to enhance the greater public interest. However, it was also appreciated that the collection of taxes was also meant to enhance greater public interest. It was neither an end in itself nor was it intended to benefit the Commissioner for Domestic Taxes. There was no legal basis for contention that the demand for payment of withholding tax was against public interest.
12. Exemption from taxation under paragraph 1 of the first Schedule to the Income Tax Act empowered the Minister for Finance to certify that the income of a person from a management or professional fee, royalty or interest be paid free of tax. The Minister could exercise that power in respect to agreements to which the Government was a party, either as principal or as a guarantor. When he exercised that discretion, the Minister would certify the exemption from tax as being in public interest.
13. Pursuant to section 13 of the Income Tax Act, the Minister was required to gazette the exemption: And the appellant readily concedes that that was a legal requirement. Of course, the appellant was under no legal duty to move the Minister to gazette the exemption. However, the failure of the gazettment meant that the steps which would have turned into reality, the intention and desire to exempt the Olkaria II Geothermal Power Project from withholding tax, were never actualised.
14. There was no factual information upon which the court can determine whether or not there was any double taxation, as alluded to by the appellant. Furthermore, the matter was never determined by the Nairobi Local Committee and could not be deemed to arise by way of an appeal. In any event, the appellant appears to be calling upon the court to make assumptions, without any factual material. The absence of factual material meant that the appellant, who had suggested the possibility that there could be double taxation, had failed to discharge the onus imposed on any party who puts forward an assertion: the appellant failed to provide proof of the alleged double taxation. The court could not be drawn into the realm of speculation, on the alleged possible double taxation.

Appeal dismissed with costs to the respondent.

Commissioner of Income Tax v Lerematesho Ltd

The onus of proof relating to an excessive assessment claim lay on the tax payer being assessed

Headnote: The instant appeal was against the High Court's pronouncement that the burden of proof was on the Commissioner to prove that the taxpayer purchased the shares with the aim of making profits and not an investment this in turn would mean that the burden of proof would shift from the tax payer to the commissioner. The Court of Appeal overturned the earlier position and stated that the burden was placed on the taxpayer who was being assessed and not the commissioner.

Commissioner of Income Tax v Lerematesho Ltd [1976] eKLR

Civil Appeal 7 of 1976

Court of Appeal at Nairobi

A Mustafa, JS Musoke, SWW Wambuzi, JJA

May 31, 1976

Tax Law – burden of proof – burden of proof in proving a transaction was of a capital nature and not a business/revenue nature – Commissioner of Income Tax vis-à-vis tax payer - whether the burden of proof to establish if a transaction was of a capital or business/revenue nature lay with the Commissioner of Income Tax or the taxpayer - whether the Commissioner of Income Tax bore the burden of proof to prove change in the taxpayer company's intention, suggesting that the trade in shares was of a business/revenue nature, and not capital - whether the High Court erred in placing the burden of proof on the Commissioner to demonstrate a change of intention on the part of the taxpayer company in its share transactions - East African Income Tax Management Act (repealed) section 103

Tax Law – tax assessment – trading profit vis-à-vis capital gain – failure by the Commissioner of Income Tax to assess the profit from the sale of shares by a business in previous years – implications - whether the Commissioner of Income Tax' omission in assessing the profit from the sale of shares by a business in previous years implies a presumption that such profit was not regarded as trading income subject to income tax, but rather as a capital gain.

Tax Law – assessment of taxes – assessment of tax payable for share purchases and sales – alleged intention to change intention of purchase and sale of shares from capital generation to revenue generation - whether the taxpayer company's activities in purchasing and selling shares at the material time amounted to conducting a business/trade in share dealing - whether there was a change of intention by the taxpayer company to engage in share dealing as a business.

Tax Law – tax appeals – appeals from the Nairobi Local Committee – role of the High Court serving as a first appellate court in tax disputes - whether the High Court, acting as a first appellate court, erred in failing to approach the issues raised in the appeal before it as *res integra* (a case or a point of law that had not yet been examined or resolved)

Brief Facts

The taxpayer company was incorporated with the main object of stock, dairy and produce farming of all kinds, but it also had other objects including those of acquiring and holding shares in any other company having similar objects to it and of carrying on any other business calculated directly or indirectly to render profit to the taxpayer company. There was also an objects clause to the effect that none of the sub-clauses after the first sub-clause shall be deemed subsidiary or auxiliary to the first subclause, which concerned farming. The taxpayer company, since 1967, had been purchasing and selling shares. It was submitted on behalf of the taxpayer company that it was investing its money not immediately needed in the purchase of shares, that was to say, the shares were purchased for investment purposes.

The company was assessed to tax on its income from farming, but in 1971 the appellant (the commissioner) for the first time also assessed the taxpayer company to tax on the profits it made on the sale of its shares.

The taxpayer company appealed against the commissioner's assessment on its profits from sales of shares to tax to the local committee which upheld its objection, and on further appeal, the High Court (Chesoni J) upheld the local committee's decision. The issue in the instant appeal was whether the sale of shares by the

Commissioner of Income Tax v Lerematesho Ltd

taxpayer company in 1971 was in the nature of trade, in which case it would be taxable, or in the nature of capital realisation, in which case it would not be taxable.

Issues

- i. Whether the Commissioner of Income Tax' omission in assessing the profit from the sale of shares by a business in previous years implies a presumption that such profit was not regarded as trading income subject to income tax, but rather as a capital gain.
- ii. Whether the burden of proof to establish if a transaction was of a capital or business/revenue nature lay with the Commissioner of Income Tax or the taxpayer.
- iii. Whether the taxpayer company's activities in purchasing and selling shares at the material time amounted to conducting a business/trade in share dealing.
- iv. Whether there was a change of intention by the taxpayer company to engage in share dealing as a business.
- v. Whether the Commissioner of Income Tax bore the burden of proof to prove change in the taxpayer company's intention, suggesting that the trade in shares was of a business/revenue nature, and not capital.
- vi. Whether the High Court erred in placing the burden of proof on the Commissioner to demonstrate a change of intention on the part of the taxpayer company in its share transactions.
- vii. Whether the objectives stated in the taxpayer company's Memorandum of Association, regarding share transactions, corresponded with the company's actual business or investment activities.
- viii. Whether the High Court, acting as a first appellate court, erred in failing to approach the issues raised in the appeal before it as *res integra* (a case or a point of law that had not yet been examined or resolved)

Held

Per SWW Wambuzi, P; and JS Musoke; JJA

1. The purchases and sales of the shares and stocks in 1971 were carrying on of trade or business in shares pursuant to the wide objects of the taxpayer company. Section 3 of the East African Income Tax Management Act (repealed) provided that the taxpayer company would be liable to pay income tax on the profits resulting from the sales.
2. The original intention of the taxpayer company in purchasing the shares was to invest the company's moneys not immediately required, which original intention had not changed. The sale of the shares was not an operation of trade and or business for profit- making. The sale of the shares was merely realising of an investment to the best advantage. The profits from the sale of the shares held by the taxpayer company in various companies were not liable to income tax.
3. It was common ground:
 - a. that the main business of the taxpayer company was farming;
 - b. that the original intention in purchasing shares by the taxpayer company was to hold such shares as an investment;
 - c. that whether a trade or business has been carried on was a question of fact; and
 - d. that the onus was on the taxpayer to show that the assessment objected to was excessive.
4. Under section 103(d) of the East African Income Tax Management Act (repealed) the High Court acting as an appellate court may confirm, reduce, increase or annul the assessment or make such order thereon as it may think fit. The High Court had to weigh and evaluate the evidence and draw its own conclusions irrespective of any findings of the local committee. The High Court was obliged, regardless of any findings of the committee, to approach every issue of fact as *res integra*, and to make its own findings thereon, and that in so doing it was bound by the provision that the onus was always on the taxpayer to show that the original assessment was excessive.
5. The High Court properly directed its mind to the law applicable except at the conclusion of its judgment,

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the court made no finding of fact to resolve the issue before it.

6. The onus was on the taxpayer to establish that a particular transaction was of a capital and not a revenue nature if he sought thereby to avoid liability for tax. Where the original intention was established there must be evidence to show that there was a change; however, that did not in any way throw any burden of proof on the Commissioner.
7. It was a misdirection on the law for the High Court to hold that in order for the appellant to succeed he had to show that sometime later, in some manner, by some operation or other, the object of buying shares as an investment of the taxpayer company's moneys not immediately required, was reversed and that intention fundamentally altered. That would cut across the provisions of section 103(c) of the East African Income Tax Management Act (repealed) by shifting the burden of proof to the assessor to prove in effect that the assessment was not excessive.
8. It was difficult to discover upon what the commissioners could have based the decision that the realisation of these shares produced profits out of the trading of the company. The purposes indicated were quite inconsistent with the purposes which should animate those who directed the fortunes of a trading company when they were effecting sales of that company's stock-in-trade, be it investments or be it any other kind of property, because the Commissioners go out of their way to state, not that the securities were disposed of in the ordinary course of business or because they thought that would produce a desirable profit, or because they thought that it was a trading operation which was financially beneficial to the company; but the statement that they were disposed of under the circumstances which were set out in the case.
9. The taxpayer company bought shares as an investment of moneys not immediately required for the farming business. It sold shares to realise the investments to the best advantage, which incidentally perhaps released more funds which were not immediately required for the farming business; and shares were bought to invest the unrequired funds. The High Court properly directed itself in finding that the memorandum of association that authorised the taxpayer company to deal in shares also authorised it to invest the company's moneys not immediately required.
10. The instant case was not a single purchase and resale of the shares. It was a scheme over a number of years which resulted in considerable profits in the year in question. No evidence whatsoever was called to rebut the presumption and the proposed evidence to explain the investments was rejected as unnecessary by the High Court. The Court of Appeal was unable to appreciate that the sales were only a realisation to the best advantage of the investments. That explanation was not inconsistent with the purposes, which should animate those who directed the fortunes of a trading company.
11. There was no evidence, for example, to show that there was any threat to the value of the shares which prompted the taxpayer company to sell in order to protect the investments by averting a loss and to buy other shares which were more secure. It was not what business the taxpayer professed to carry on but what business he actually carried on. The taxpayer company had very extensive powers over a wide range of objects.
12. The company should explain the boundaries of its activities. The absence of special staff to do the speculation or the accounting procedure adopted by the taxpayer company would delimit the boundaries of the taxpayer company's activities. If the facts of a case warranted an inference, it could be held that even if the original purpose was to acquire an investment, the owner changed his intention and decided to utilise the asset in trade.
13. With regard to the objects of the taxpayer company, the frequencies of the purchases and sales, the magnitude of the transactions, the magnitude of the advantage on the sales and the explanation of the taxpayer company, the High Court properly directed itself to the issue. The Commissioner was entitled to look at the evidence as a whole in order to decide whether or not the subsequent purchases and sales of shares over the period in question amounted to the carrying on of a trade in shares. It was doubtful if the commissioner's views would alter the nature of the transactions.
14. The High Court would not normally disturb a finding of fact by a trial court unless there was a

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misdirection in law or the wrong principles were applied. In the instant case, however, the High Court did not make any finding of fact. It relied on the findings of fact by the local committee and reached the conclusion that it was satisfied that the original intention of the taxpayer company in purchasing the shares was to invest the taxpayer company's moneys not immediately required, which original intention had not changed. That was the only finding of fact made by the High Court but which, with respect, was based on wrong principles.

Per Mustafa, JA (Concurring)

15. The taxpayer company was incorporated with the main object of stock, dairy and produce farming of all kinds, but it also had other objects including those of acquiring and holding shares in any other company having similar objects to it and of carrying on any other business calculated directly or indirectly to render profit to the taxpayer company. There was also an objects clause to the effect that none of the sub-clauses after the first sub-clause shall be deemed subsidiary or auxiliary to the first subclause, which concerned farming. The taxpayer company, since 1967, had been purchasing and selling shares.
16. The onus of proof relating to an excessive assessment lay on the person assessed. Section 103(c) of the East African Income Tax Management Act (repealed)(the Act), the word trade was defined to include every trade, manufacture, adventure or concern in the nature of trade; and business was defined include any trade, profession or vocation.
17. The instant court was unable to find that the High Court had analysed and evaluated the evidence and come to the conclusion that the taxpayer company had satisfied him that the assessment was excessive: The High Court only referred to such a finding made by the Local Committee and proceeded on that assumption. Since the High Court did not find that the assessment was excessive, there was no question of the Commissioner having to prove any change of intention on the part of the taxpayer company as the onus of establishing that the assessment was excessive was on the taxpayer company.
18. The High Court erred in failing to approach the issues raised in the appeal before it as *res integra* (a case or a point of law that had not yet been examined or resolved). The High Court erred in placing the onus of proof on the Commissioner to show that there was a change of intention on the part of the taxpayer company.
19. Originally the taxpayer company bought shares as an investment. Once the commissioner assessed the taxpayer company to tax on its sale of shares, then the onus of proving that the assessment was excessive was on the taxpayer company under section 103(c) of the Act. The High Court erred in finding that the commissioner's failure to assess tax on such sales prior to 1971 would give rise to a presumption in favour of the taxpayer company, so much so, that the onus of establishing a change of intention would shift to the Commissioner. The fact of assessment itself placed on a taxpayer the burden of proving that it was excessive. If on the evidence the taxpayer could only show that the conflicting views were equally balanced, then the taxpayer would have failed to discharge that onus.
20. From a study of the table of sales and purchases for the years 1968 to 1971 it would seem that the taxpayer company was systematically buying and selling shares. It was empowered by its objects to do so as part of its business. It was possible that the taxpayer company was safeguarding its capital by buying and selling shares, but it was equally if not more possible that it was dealing and trading in shares. No evidence was given as to the state of the shares bought and sold in 1971, why certain shares were bought and why some were sold. If it was the case of the taxpayer company that certain shares had to be sold to forestall depreciation of their value, then evidence to that effect had to be adduced. None was given. The variations in investments, the frequency, nature and magnitude of the transactions and the amounts of profits made could constitute grounds for holding that the original intention in 1967 of

Commissioner of Income Tax v Lerematesho Ltd

buying shares as an investment had changed to trading in shares.

21. The Commissioner did in effect so hold and assessed the taxpayer company to tax on its profits on sales of its shares during 1971. It was then for the taxpayer company to establish that it bought and sold its shares in 1971 as a capital investment or in protection of its capital assets and that the profits constituted a capital gain. The taxpayer company did not discharge that burden, and the commissioner's appeal had to succeed.

Appeal allowed with costs. An assessment by the Commissioner was duly restored.

Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes

Chapter 3: Tax decisions, objections and appeals

A tax payer could apply for self assessment where the Commissioner had started enforcement proceedings

Headnote: The instant matter raised two pertinent issues, the burden of proof in taxation matters and whether a tax payer could apply for self assessment where the Commissioner had started enforcement proceedings. The High Court held that the burden of proof to prove that a decision by the Commissioner was wrong or incorrect was on the tax payer. On the application of amendment for self assessment, the High Court held that when the Commissioner made the assessments, the Company had not made the application for amendment of the self-assessment. Hence the Commissioner's decision could not be judged on the basis of an application that was to be made in the future. The Company could not attempt to show that the tax decision was incorrect on the basis that the Commissioner ought to have considered and allowed it to amend its self-assessment on the basis of the documents it submitted with the application for amendment.

Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes [2020] eKLR

Tax Appeal 3 of 2020
High Court at Nairobi
DAS Majanja, J
June 22, 2010
Reported by John Ribia

Tax Law – tax decision – categorization of a tax decision - what amounted to a tax decision under the Tax Procedures Act – Tax Procedures Act, Act No. 29 of 2015, section 31(2)

Tax Law – objections – appeals against objections – where an appellant added new grounds to an appeal that were not raised in the initial objection - whether in an appeal against a declined tax objection, a tax payer could add new grounds – Tax Procedures Act, Act No. 29 of 2015, sections 31, and 53(3)

Tax Law – self assessment – application for amendment of self assessment – application for amendment of self assessment where the time for filing an objection ran out – import – whether a tax payer could apply for self assessment where the Commissioner had started enforcement proceedings - whether a taxpayer could apply to amend self assessment outside the statutory timeline - whether an application by a tax payer to amend self-assessment could be the basis of an objection under the Tax Procedures Act - Tax Procedures Act, Act No. 29 of 2015, section 31, 51, and 53.

Tax Law – burden of proof – burden of proof in claims that sought to overturn the decision of the Commissioner - who bore the burden of proof to prove that a decision by the Commissioner was wrong or incorrect – Tax Appeals Tribunal Act, Act No. 40 of 2013, section 30

Jurisdiction – jurisdiction of the Tax Appeals Tribunal – jurisdiction to determine a decision filed out of time - whether the Tax Appeals Tribunal had the jurisdiction to determine an appeal filed out of time - Tax Appeals Tribunal Act, Act No. 40 of 2013, section 30; Tax Procedures Act, Act No. 29 of 2015, section 31, 51, and 53.

Brief Facts

The appellant (the Company) appealed against a decision of the Tax Appeals Tribunal (the Tribunal) dismissing its appeal and upholding assessments by the Commissioner of Domestic Taxes in which it assessed tax at KES 31,217,489.00. In September 2016, the Commissioner identified the Company for review and compliance. Following review of documents provided by the Company, the Commissioner disallowed certain expenses claimed in respect of the income tax.

The Commissioner concluded that the documents furnished by the Company were inadequate to address the issues it had raised and further audience with the Company did not yield any results. It therefore decided

Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes

to issue additional assessments for Kshs. 31,217,489.00 for VAT and income tax.

Thereafter the Commissioner commenced enforcement proceedings by issuing agency notices prompting the Company to lodge objections to the assessments. It also made an application dated 22nd June 2017 to amend its self assessment.

A meeting was held between the Company's Auditor and the Commissioner where the Company was requested to present certain documents which the Commissioner considered but which it found insufficient. Thereafter, the auditor on behalf of the Company made an application for amendment of self-assessment for the period 2014 and 2015 (VAT and Income Tax). The Company thereafter filed an appeal before the Tribunal on the ground that its application for amendment was not resolved despite the fact that it had all the supporting documents including invoices, ledgers and expense records.

Issues

- i. What amounted to a tax decision under the Tax Procedures Act?
- ii. Whether in an appeal against a declined tax objection, a tax payer could add new grounds.
- iii. Who bore the burden of proof to prove that a decision by the Commissioner was wrong or incorrect?
- iv. Whether a tax payer could apply for self assessment where the Commissioner had started enforcement proceedings.
- v. Whether a taxpayer could apply to amend self-assessment outside the statutory timeline.
- vi. Whether an application by a tax payer to amend self-assessment could be the basis of an objection under the Tax Procedures Act.
- vii. Whether the Tax Appeals Tribunal had the jurisdiction to determine an appeal filed out of time.

Held

1. Section 56 of the Tax Procedures Act (TPA) circumscribed the jurisdiction of the court in two ways. First, the taxpayer must prove the tax decision was wrong for the court to intervene. Under section 51(3) of the TPA an appeal in relation to an appealable decision was restricted to the grounds on which the objection was made.
2. Section 3(1) of the TPA defined a tax decision to mean assessment, and a decision on an application by a self-assessment taxpayer under section 31(2) of the TPA.
3. Subject to section 53(3) of the TPA, a Company could only rely on the grounds it put forth in the objection to which the decision relates. The taxpayer was entitled to apply for extension of time. Under section 12 of the Tax Appeals Tribunal Act, 2013 (TATA) a person who disputed the decision of the Commissioner on any matter under any tax law was entitled to appeal to the Tribunal. Under section 30 of TATA, the appellant bore the burden of proof in such an appeal.
4. Each objection except one was lodged outside the 30-day period as required by section 51(2) of the TPA. The Commissioner informed the Company that it had rejected the objections on the ground that they were filed late and that no reasons were given for the delay. Instead of applying for extension of time under section 51(6), the Company opted to pursue an application for amendment of its self-assessment under section 31 of the TPA once the Commissioner commenced enforcement proceedings. Thereafter the appellant opted to appeal against the assessments on the ground, *inter alia*, that its application for amendment of the self-assessment had not been considered by the Commissioner. Under section 56(1) of the TPA, the Company bore the burden of demonstrating that Commissioner's decision in reaching the assessments complained of was incorrect.
5. When the Commissioner made the assessments, the Company had not made the application for amendment of the self-assessment. Hence the Commissioner's decision could not be judged on the basis of an application that was to be made in the future.
6. The grounds of amendment of the self-assessment, being a future application, could not have been the basis for the objection. The Commissioner clearly explained that it based its decision the statement of accounts and returns the Company had filed. The Tribunal appreciated that when it held that it was

Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes

the duty of the Company to provide all the documents and that the Commissioner was entitled to rely on the self-assessments and returns lodged by the Company in the absence of any other documents.

7. The Company could not attempt to show that the tax decision was incorrect on the basis that the Commissioner ought to have considered and allowed it amend its self-assessment on the basis of the documents it submitted with the application for amendment. The assessments appealed against had been confirmed once the Company's objections had been rejected for being filed out of time. The Company had not shown that in making the decision to raise the assessments, the decision of the Commissioner was wrong or that the Tribunal reached an incorrect decision.
8. The Company failed to object to the assessments it appealed against to the Tribunal as its objection was filed out of time and rejected. The jurisdiction of the Tribunal was limited to considering the assessments being challenged even though it was clear that the appeal before the Tribunal was also filed out of time in relation to the assessments challenged. The application for amendment under section 31 of the TPA constituted a separate process and could not implicate or affect the assessments already confirmed by the failure of the Company to lodge its objection in time.
9. The conclusions of the Commissioner and the Tribunal in respect of the assessments appealed against were in accordance with the evidence and material available to the Commissioner. The appellant did not discharge its burden of showing that the tax decision was wrong or incorrect. The issue of amendment of the self-assessment was not the subject of the tax decision that was being challenged in the appeal before the Tribunal.

Appeal dismissed with costs to the respondent.

Total Kenya Limited v Kenya Revenue Authority; Barclays Bank of Kenya Limited & 2 others (Interested Parties)

A notice of objection stood allowed if the Commissioner General did not issue a determination on the objection within a 60-day timeline.

Headnote: The petitioner filed the instant petition not to contest a decision made by the Commissioner, but rather to contest the fact that the Commissioner failed to make a decision in the required timelines. The High Court held that where the Commissioner failed to deliver a written decision to a validly lodged objection there was no reason for the taxpayer to appeal and the taxpayer could directly approach the High Court. The consequence was that the objection stood allowed after the lapse of the 60-day timeline.

Total Kenya Limited v Kenya Revenue Authority; Barclays Bank of Kenya Limited & 2 others (Interested Parties) [2020] eKLR

Petition 474 of 2019
High Court at Nairobi
WK Korir
October 15, 2020
Reported by John Ribia

Tax Law – objection to tax assessment – notice of objection – 60 day timeline for the Commissioner General to make a determination on a notice of objection – consequence of not issuing a determination within the 60 day time line – where the Commissioner proceeded to issue demands for tax after the 60 day timeline - whether the failure of the Commissioner General to issue an objection decision to a notice of objection within the timeframe of 60 days meant that the objection stood allowed – whether the Commissioner General acted outside the scope of its powers by issuing agency notices and demanding excise duty in respect to a notice of objection that it failed to render an objection decision within the stipulated timeline - Tax Procedures Act, Act No. 29 of 2015, section 51

Tax Law - objection decision – elements of an objection decision - what were the elements of an Objection Decision issued by the Commissioner General under the Tax Procedures Act - Tax Procedures Act, Act No. 29 of 2015, section 51(10)

Constitutional Law – fundamental rights and freedoms – right to fair administrative action – legitimate expectation – objection to tax assessment – notice of objection – 60 day timeline for the Commissioner General to make a determination on a notice of objection – consequence of not issuing a determination within the 60 day time line – where the Commissioner proceeded to issue demands for tax after the 60 day timeline – where a tax payer had legitimate expectation that the Kenya Revenue Authority would not pursue unpaid excise until the Cabinet Secretary for National Treasury responded to a recommendation by the KRA - whether a recommendation made by the Kenya Revenue Authority (KRA) to the Cabinet Secretary for the National Treasury for waiver of the excise duty that stated that KRA would not pursue the unpaid tax until the Cabinet Secretary responded to the same conveyed a valid expectation that no demand for the taxes would be made until the Cabinet Secretary made a decision - whether KRA pursuing the excise duty against a tax payer when the time for issuing an objection decision had lapsed and where the Cabinet Secretary had not made a decision was procedurally unfair and a breach of the right to fair administrative action – Fair Administrative Action Act, Act No. 4 of 2015, section 7(2)(c); Tax Procedures Act, Act No. 29 of 2015, section 42

Brief Facts

The petitioner, filed a petition seeking a declaration that the respondent was under an obligation to give prior notice as well as a fair hearing to the petitioner prior to appointing a tax agent or attaching any funds held to the credit of the petitioner by the person appointed as a tax agent pursuant to section 42 of the Tax Procedures Act, 2015. The petition averred that the Commissioner failed to make a decision within 60 days as required by 51(11) of the Tax Procedures Act. The petitioners further sought a declaration that the respondent failed to issue any notice or give a fair hearing to the petitioner and that the appointment of the agents was unconstitutional. The petitioner sought restraining orders restraining the respondent from

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appointing interested parties or any other parties as its collection agent. The petitioner did not file the petition to contest a decision made by the Commissioner, but rather to contest the fact that the Commissioner failed to make a decision in the required timelines.

Issues

- i. Whether the failure of the Commissioner General to issue an objection decision to a notice of objection within the timeframe of 60 days meant that the objection stood allowed.
- ii. Whether the Commissioner General acted outside the scope of its powers by issuing agency notices and demanding excise duty in respect to a notice of objection that it failed to render an objection decision within the stipulated timeline.
- iii. What were the elements of an Objection Decision issued by the Commissioner General under the Tax Procedures Act?
- iv. Whether a recommendation made by the Kenya Revenue Authority (KRA) to the Cabinet Secretary for the National Treasury for waiver of the excise duty that stated that KRA would not pursue the unpaid tax until the Cabinet Secretary responded to the same conveyed a valid expectation that no demand for the taxes would be made until the Cabinet Secretary made a decision.
 - a. Whether KRA pursuing the excise duty against a tax payer when the time for issuing an objection decision had lapsed and where the Cabinet Secretary had not made a decision was procedurally unfair and a breach of the right to fair administrative action.

Held

1. The duty imposed by the law which was not discharged by the Commissioner General was the failure to decide on the issues raised in the petitioner's notice of objection dated October 31, 2019. Although the respondent did respond through the letter dated November 7, 2019, the response did not address any of the issues in the notice of objection and it could not be said to be an objection decision. Section 51(10) of the Tax Procedures Act (TPA) provided that an objection decision must include a statement on findings on the material facts and the reasons for the decision. The letter dated November 7, 2019 did not include such a statement or any reasoning and therefore could not amount to an objection decision as defined by the law.
2. Under section 51(11) of the TPA, where the Commissioner failed to make an objection decision within sixty days of the notice of objection, the objection shall be allowed. In line with the provision, the petitioner's objection to the respondent's demand for the amount of Kshs. 72,426,128 stood allowed upon the lapse of sixty days from the date of receipt of the objection and the respondent was no longer authorised to pursue the amount from the petitioner.
3. The respondent made a recommendation to the Cabinet Secretary for the National Treasury for waiver of the excise duty and stated that it would not pursue the unpaid tax until the Cabinet Secretary responded to the same. However, no decision had been made to date by the Cabinet Secretary and therefore the promise by the respondent conveyed a valid expectation that no demand for the taxes would be made until the Cabinet Secretary made a decision.
4. That was on top of the statutory enactment that an objection to a tax assessment not responded to within sixty days was deemed to have been allowed by the respondent. Therefore, the respondent breached the petitioner's legitimate expectation. There was violation of the petitioner's legitimate expectation that its objection had been allowed by the operation of the law. The tax would not be demanded before a decision was made on the respondent's recommendation to the Cabinet Secretary for the National Treasury for the abandonment of the same.
5. The fact that the objection was allowed by the law under section 51(11) of the TPA made the respondent's actions in pursuing the impugned excise duty procedurally unfair hence attracting review by the court under section 7(2)(c) of the Fair Administrative Action Act (FAAA). The issues brought before the Court were within its jurisdiction to hear and determine, and the petitioner had not infringed the doctrine of exhaustion.

Total Kenya Limited v Kenya Revenue Authority; Barclays Bank of Kenya Limited & 2 others (Interested Parties)

6. The petitioner had no other avenue for pursuing justice apart from approaching the court. The petitioner was precluded from pursuing the appeals mechanism available under the TPA as the respondent did not render an appealable decision in response to the petitioner's objection.
7. The petitioner was not given notice of the appointment of the tax agents and the attachment of its accounts. According to section 42 of the TPA, the Commissioner must give notice in writing where it seeks to collect taxes owed by a taxpayer. It was however not expected that the respondent should inform a taxpayer of the measures it intended to take in order to recover taxes that were due. The warning to the petitioner that failure to pay the outstanding excise duty would lead to invocation of enforcement measures was sufficient notice. That however didn't change the fact that the demand for the tax in question by the respondent was erroneous.
8. The respondent had a statutory duty to respond to the petitioner's objection to the tax demand within sixty days but failed to do so hence the objection was deemed allowed. However, the respondent continued to demand the amount from the petitioner, and engaged the interested parties through agency notices. The petitioner had legitimate expectation that it would not be pursued for the excise duty for the period in question as the issue was awaiting the decision of the Cabinet Secretary. The respondent breached its right to fair administrative action.
9. The respondent's failure to render an objection decision in response to the petitioner's notice of objection within the stipulated timeline had resulted in the objection being allowed and therefore the respondent was not in a position to continue to demand the impugned excise duty and to engage the interested parties to collect the tax through agency notices. In doing so the respondent acted in excess of its jurisdiction and in bad faith. Therefore an order of certiorari properly lies in favour of the petitioner.
10. Although it had been proven that the respondent infringed the provisions of the Constitution, the petitioner had not demonstrated in its pleadings or submissions that the respondent defamed it by issuing the agency notices to the interested parties.

Petition allowed.

Orders:

- i. Declaration issued that the decisions and actions of the respondent by way of the agency letters dated August 19, 2019 appointing the interested parties as tax agents pursuant to section 42 of the Tax Procedures Act, 2015 in respect of all monies held to the credit of the petitioner was unconstitutional, null and void.
- ii. A permanent order of injunction was issued restraining the respondent together with the interested parties and/or their employees, servants, agents or any other person appointed by them or acting on their behalf from implementing, obeying, and/or executing the impugned decisions of the respondent as contained in the agency letters/enforcement letters dated August 19, 2019 by which the respondent appointed the interested parties as tax agents in respect of the petitioner.
- iii. An order of certiorari was issued removing into the instant court and quashing the agency letters dated August 19, 2019 issued to the interested parties by the respondent appointing the said interested parties as tax agents and attaching the bank and collection accounts held to the credit of the petitioner.
- iv. Order issued restraining the respondent from appointing the interested parties or any other person or entity as a tax agent against funds held to the credit of the petitioner by the said interested parties or any such other person or entity in respect of excise duty for Jet A1 fuel for the period December 1, 2015 to August 31, 2016.
- v. The petitioner was awarded costs of the proceedings against the respondent.

Republic v Kenya Revenue Authority ex parte New Frarims Wholesalers Limited & 3 others

Tax payers could file judicial review proceedings over objections that were pending before the Commissioner.

Headnote: The instant case revolved around the doctrine of exhaustion of remedies. The tax payer had launched an objection that the Commissioner was in the process of determining. Pending the determination by the Commissioner, the applicant instituted a judicial review application. The court held that once a taxpayer had lodged an objection to an appealable decision, the taxpayer ought to wait for the said sixty days before taking the next legal step as provided under section 51 of the Tax Procedures Act. If the taxpayer moved the Court while the Commissioner was still seized of the objection, it amounted to an abuse of the process of the Court as it was akin to playing lottery with the judicial process. The court may invoke its inherent powers to end proceedings which amount to abuse of its process.

Republic v Kenya Revenue Authority ex parte New Frarims Wholesalers Limited & 3 others [2017] eKLR

Miscellaneous Civil Application 243 of 2016

High Court at Nairobi

GV Odunga, J

March 24, 2017

Reported by John Ribia

Judicial Review – doctrine of exhaustion – application – where an objector sought to file a judicial review application before the Commissioner had issued a decision on the objection – whether the applicant demonstrated exceptional circumstances to allow it to bypass the procedures set out in the Tax Appeals Tribunal and to file for judicial review remedies – whether filing a judicial review application before the Commissioner had determined an objection was a violation of the doctrine of exhaustion of remedies – Fair Administrative Action Act, Act No. 4 of 2015, sections 9(2), (3), and (4)

Brief Facts

The applicant filed a notice of motion application seeking orders of *certiorari* to quash the decision of the 1st and 2nd respondents to impose arbitrary tax arrears upon the applicant and directing the interested party to distrain the applicant's movable goods and chattels. It also sought an order of prohibition prohibiting the respondent from recovering any tax arrears by attaching the applicant's movable goods and chattels or interfering in any manner whatsoever with the business operations of the applicant.

The respondents issued the applicant with tax assessment for the year 2009 of KES 7,753,778.00 following a compliance check at the premises and preliminary examination of the Applicant's books and records for the specified period which revealed that VAT was never paid in full. The applicant objected to the tax assessment which the respondents dismissed on the grounds that the applicant had fraudulently with a view to evade tax declared more taxable purchases than what was in the actual invoices.

Issues

- i. Whether the applicant demonstrated exceptional circumstances to allow it to bypass the procedures set out in the Tax Appeals Tribunal and to file for judicial review remedies.
- ii. Whether filing a judicial review application before the Commissioner had determined an objection was a violation of the doctrine of exhaustion of remedies.

Held

1. The applicant lodged an objection through its letter dated May 23, 2016 which was served upon the respondent on May 24, 2016 and those proceedings were instituted on May 27, 2016. No reason had been advanced as to why the applicant who had properly invoked the statutory remedy could not wait for the alternative process to take its lawful course. The applicant had not demonstrated that judicial review was a more effective and convenient remedy than the statutory laid down dispute resolution

Republic v Kenya Revenue Authority ex parte New Frarims Wholesalers Limited & 3 others

mechanism.

2. Where a statute had provided a remedy to a party, the court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. The position was underpinned via section 9(2), (3), and (4) of the Fair Administrative Action Act.
3. The instant matter was not one which an exemption ought to be considered since the applicant had not even attempted to offer an explanation as to why it bypassed the statutory remedy which it had aptly invoked and instituted these proceedings. Section 51(11) of the Tax Procedures Act gave the respondent sixty days to determine an objection and provides that where the Commissioner had 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.
4. Once a taxpayer had lodged its objection, the taxpayer ought to wait for the said sixty days before taking the next legal step. To move the court while the Commissioner was still seized of the objection, amounted to an abuse of the process of the court as it amounted to playing lottery with the judicial process.
5. The applicant ought to pursue the statutory process provided for under the Tax Procedures Act which it had in fact initiated but for reasons known only to it, abandoned midstream without seeing it through to its logical conclusion. The court was under a constitutional obligation pursuant to article 159(2) (c) of the Constitution to promote alternative dispute resolution mechanisms and it could undertake such mandate if it otherwise readily accedes to request to take over matters which ought to be resolved by other statutory bodies.

Appeal struck out with costs to the respondents.

Republic v Kenya Revenue Authority Ex-Parte Funan Construction Limited

Form and content of an objection.

Headnote: The issues raised in the instant matter was the procedure for issuance of agency notices and the form an objection should take. The court held that where agency notices were issued pursuant to the demand for refund for input VAT, the provisions of section 50 of the VAT Act were inapplicable. The court faulted the decision of the Commissioner to issue agency notices prematurely as the notices had specified that the objection would have been issued within a period of 30 days. The objections to tax decisions must comply with the legal requirements under section 51 of the Tax Procedures Act. Where they do not comply, they do not constitute valid objections as required by the VAT Act 2013. There was no failure on the part of KRA to follow rules of natural justice in the issuance of the demand letter and notices of assessment and as such, the actions were not *ultra vires*. The applicant was afforded numerous opportunities to be heard both through exchange of correspondence and meetings.

Republic v Kenya Revenue Authority Ex-Parte Funan Construction Limited [2016] eKLR

Miscellaneous Civil Application 65 of 2015

High Court at Nairobi

GDV Odunga, J

March 1, 2016

Reported by John Ribia

Tax Law – *objections – form and content - what elements should an objection of tax assessment to the Commissioner constitute to be considered to be valid - whether a letter of objection that mentioned that the demand for tax payable was excessive but did not indicate what ought to have been the correct figure was valid – Value Added Tax Act, Act No. 35 of 2013, section 50(2)(b)*

Tax Law – *agency notices – procedure for issuing agency notices - whether the procedure adopted by the Commissioner in issuing agency notices was ultra vires.*

Brief Facts

The applicant was served with a demand letter dated June 18, 2014 for a sum of Kshs 130,864,666/- being Input VAT erroneously refunded by the Authority on the basis of falsified VAT refund claims. The company allegedly objected to the assessment and demand. KRA reaffirmed its position in a letter relating to the demand for the taxes.

The applicants argued that the agency notices issued by the Revenue Authority emasculated and disparaged the due process of the law and was an abuse of the Administrative justice systems. It further alleged failure by the Authority to consider the taxpayer's objection to the tax assessment before issuing the agency Notices to the bank. It claimed that the agency notices freezing the company's bank accounts did not follow the provisions of the VAT Act and amounted to procedural lapse in the processing of tax demands by the Authority and to procedural impropriety exposing the company to unfair treatment. It further alleged that the process denied the company an opportunity to be heard on their position that the tax as assessed by the Authority was erroneous and excessive.

Issues

- i. What elements should an objection of tax assessment to the Commissioner constitute to be considered to be valid?
- ii. Whether a letter of objection that mentioned that the demand for tax payable was excessive but did not indicate what ought to have been the correct figure was valid.
- iii. Whether the taxpayer's objection constituted a valid objection within the meaning of section 50(2)(b) of the Value Added Tax Act, 2013.

Republic v Kenya Revenue Authority Ex-Parte Funan Construction Limited

iv. Whether the procedure adopted by the Commissioner in issuing agency notices was *ultra vires*.

Held

1. Judicial review was concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose was to ensure that the individual was given fair treatment by the authority to which he had been subjected. Therefore in dealing with tax matters, it was not the role of the judicial review court to determine the correctness or otherwise of the tax which was liable or whether the tax payer was liable to any tax at all.
2. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly. The court was perfectly entitled to intervene where it was alleged that the discretion was not being exercised judicially, that was to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice.
3. Whereas the instant court was not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority was not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the court in intervening.
4. Section 50 of the Value Added Tax Act (VAT Act) provided that a Notice of Objection must state precisely the grounds of objection to the Notice of Assessment and must be lodged within 30 days' upon issuance of the Notice of Assessment. The applicant's letter of objection could not be said to be unambiguous. Whereas on one hand it indicated that the taxes, were disputed, the applicant was unable at that stage to determine whether the demand was correct or not since it required time to verify the claim made by the respondent. Such a letter was not the objection contemplated under section 50 of the VAT Act and did not meet the criteria of a valid objection thereunder. The respondent receiving the objection must be in a position to know what exactly the taxpayer was objecting to and what was not objected to. If it was the figures the taxpayer must indicate what in its view ought to be the correct figure unless the whole figure was objected to.
5. There followed an exchange of several correspondences between the parties culminating into the letter dated November 6, 2014 by which the respondent reaffirmed their position in the letter dated June 18, 2014. On February 9, 2015, the respondent served on the applicant a notice of assessment and informed the applicant that it was at liberty to object to the same within 30 days. The applicant contended that it objected vide its letters dated February 19, 2015 and February 26, 2015.
6. The letter from February 19, 2015 by the applicant challenged the prematurity of the agency notices as the period limited for making objection had not run its course. Secondly, the applicant contended that from its preliminary objection, the amount demanded was not payable as the same was excessive. The full picture would only be known after its completion of the evaluation of its records by which time it would be able to file its objection.
7. The letter similarly did not constitute a valid objection. The demand was excessive yet the applicant did not indicate what in its opinion ought to have been the correct figure. That the applicant could not do that was understandable taking into account its position that it was still studying its records. The letter was not, even in the applicant's view, an objection was clear from the letter itself wherein it stated that it would be filing an objection in due course. Since the letter dated February 19, 2015 did not constitute a valid objection, the documents exhibited in the letter of February 26, 2015 could not support a non-existent objection.
8. The Agency Notices however did not indicate the provisions of the law under which they were issued. However, by its letter dated June 18, 2014, the respondent had demanded from the applicant the same amount of Kshs130,864,666.00 which was clearly indicated as refund of VAT based on irregular input claims and particulars thereof were given. The applicant was required to pay the same within thirty days.

Republic v Kenya Revenue Authority Ex-Parte Funan Construction Limited

The agency notices were dated February 17, 2015, clearly way beyond the said 30 days. The applicant could not therefore be heard to claim that it was unaware that it was required to pay the said amount. The said sum was payable under section 32. Under section 50 of the VAT Act, an objection may only be lodged against an assessment made under sections 45 or 46 of the VAT Act since section 50(1) of the VAT Act which dealt with objections stipulates that a person who disputed an assessment made by the Commissioner under sections 45 or 46 may, by notice in writing to the Commissioner, object to the assessment.

9. Under section 45 of the VAT Act, the assessment was undertaken where a registered person failed to submit a return; failed to keep proper books of accounts, records or documents; or failed to apply for registration as a registered person. Section 46 on the other hand applied where the assessment was amended. Those provisions did not apply to situations where what was demanded was refund of the input VAT. Section 50 did not apply to the circumstances of the instant case.
10. The applicant was afforded an opportunity to lodge its objection to the assessment in circumstances where the provisions for the objection were applicable. The applicant's contention that it was not afforded such opportunity was based on the allegation that the agency notice was issued before the expiry of the period for the objection. However, the said notices were issued pursuant to the demand for refund for input VAT and therefore the provisions of section 50 of the Act were inapplicable. The issue of the failure to follow the due process before the issuance of the agency notice did not arise.

Application dismissed with costs.

Republic v Commissioner General, Kenya Revenue Authority Ex parte Sanofi Aventis Kenya Limited

Where the law stipulates a procedure for resolution of a dispute, a party should not invoke a different process.

Headnote: A pharmaceutical company challenged KRA's tax decision, arguing that it was made outside the statutory period and thus legally void. The case examined issues of statutory time compliance in tax decision-making, the process of audit and assessment by KRA, and the legal recourse available for tax objections. The case highlighted the importance of adhering to statutory timelines in tax administration and decision-making processes. It underscored the procedural intricacies in tax disputes and the role of administrative bodies in ensuring lawful and timely decision-making, providing guidance on how statutory deadlines impact the validity of tax decisions. Where the law stipulates a procedure for resolution of a dispute, a party should not invoke a different process. In the instant case, the applicant ought to have subjected itself to the appellate process stipulated in the Tax Procedures Act and Tax Appeals Tribunal Act instead of invoking the Judicial Review jurisdiction of the Court. The suit was found to offend the doctrine of exhaustion of remedies provided in a statute.

**Republic v Commissioner General, Kenya Revenue Authority Ex parte Sanofi
Aventis Kenya Limited [2019] eKLR**

Judicial Review 117 of 2017

High Court at Nairobi

JM Mativo, J

November 26, 2019

Reported by John Ribia

Judicial Review – doctrine of exhaustion – scope – application - what was the scope of the doctrine of exhaustion of remedies - whether the applicant demonstrated exceptional circumstances to allow it to bypass the procedures set out in the Tax Appeals Tribunal and to file for judicial review remedies.

Statutes – interpretation of statutes – interpretation of section 9 the Fair Administrative Action Act - interpretation of the word shall when used in statutes – mandatory vis-à-vis permissive provisions – whether the use of the word “shall” in section 9 of the Fair Administrative Action Act was mandatory or permissive

Statutes – computation of time – calculation of computation of time – determining the first and last day to undertake an action that was time bound by statute - what principles that the court used in computing legislative time prescribed for an activity

Words and Phrases – shall – definition of - used to express a command or exhortation or what is legally mandatory - *The Longman Dictionary of the English Language*

Brief Facts

The applicant, registered in Kenya was a wholly owned subsidiary of Sanofi-Aventis Participants incorporated in France whose main business included the registration, promotion and marketing of pharmaceutical products on behalf of non-resident related entities within the East African Region. The respondent audited the applicant's business for the period between January 2012 to June 2015 and notified the applicant its notice of preliminary findings detailing a value added tax liability of KES 198, 548,926/= inclusive of penalties and interests.

The applicant objected to the tax assessment. The respondent was required to make an objection decision within 60 days from the date of objection failing which the objection stood as allowed. The respondent by a letter dated February 6, 2017 delivered an objection decision affirming its tax decision dated November 9, 2016. That applicant was aggrieved as it contended that it was issued 63 days from the date of the objection making it time barred.

Aggrieved the applicant filed the instant judicial review application. The respondent contended that the

Republic v Commissioner General, Kenya Revenue Authority Ex parte Sanofi Aventis Kenya Limited

applicant approached the court pre-maturely in that he did not exhaust the dispute resolution mechanism laid down by the statute and added that judicial review does not deal with merits of a decision.

Issues

- i. What was the scope of the doctrine of exhaustion of remedies?
- ii. Whether the use of the word “shall” in section 9 of the Fair Administrative Action Act was mandatory or permissive.
- iii. Whether the applicant demonstrated exceptional circumstances to allow it to bypass the procedures set out in the Tax Appeals Tribunal and to file for judicial review remedies.
- iv. What principles that should courts use in computing legislative time prescribed for an activity.

Held

1. The doctrine of exhaustion of administrative remedies arose when a litigant, aggrieved by an agency's action, sought judicial review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.
2. While, exceptions to the exhaustion requirement were not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applied. The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.
3. The decision under challenge was an appealable decision under the Tax Procedures Act. Section 9(2) of the Fair Administrative Action Act (FAAA) provided that the High Court or a subordinate shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law were first exhausted.
4. The use of the word shall in an Act was an absolute enactment that had to be obeyed, or, fulfilled substantially. Some rules were vital and go to the root of the matter, they could not be broken; others were only directory and a breach of them could be overlooked provided there was substantial compliance. It was the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute. The word “shall” when used in a statutory provision imported a form of command or mandate. It was not permissive, it was mandatory. The word “shall” in its ordinary meaning was a word of command which was normally given a compulsory meaning as it was intended to denote obligation. Ordinarily the words “shall” and “must” were mandatory and the word “may” was directory.
5. What constituted exceptional circumstances depended on the facts and circumstances of the case and the nature of the administrative action at issue. Where an internal remedy would not be effective and/or where its pursuit would be futile, a court could permit a litigant to approach the court directly. So too where an internal appellate tribunal had developed a rigid policy which rendered exhaustion futile. There was no definition of exceptional circumstances in the FAA Act, but that court interpreted exceptional circumstances to mean circumstances that were out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. Exceptional circumstances defied definition, but, where Parliament provided an appeal procedure, judicial review would have no place, unless the applicant could distinguish his case from the type of case for which the appeal procedure was provided.
6. Exceptional circumstances could not be discerned in the instant case. There was no attempt to demonstrate that the internal remedy would not be effective and/or that its pursuit would be futile for

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the court to permit the applicant to approach it directly. There was no argument that the appellate tribunal developed a rigid policy, which renders the requirement for exhaustion futile. It had not been established that applying the dispute resolution mechanism would have been impractical.

7. Subject to section 9(4) of the FAAA, an applicant had to first apply to the court and demonstrate the existence of exceptional circumstances. No competent application was presented. No exceptional circumstances were presented.
8. A statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which was proportionate to the interests the party wishes to advance in a suit. Statutory provisions ousting court's jurisdiction must be construed restrictively. The Tax Appeals Tribunal was clothed with jurisdiction to determine the dispute.
9. The provisions of sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules that provided two ways to file a judicial review application had to conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. Judicial review was entrenched in the Constitution.
10. The entrenchment of the power of judicial review as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it was claimed exercised a quasi-judicial function or a function that was likely to affect his rights. The Judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power were now regulated by the Constitution.
11. The applicant ought to have exhausted the available mechanism before approaching a judicial review court. The instant case offended section 9 (1) (2) (3) (4) of the FAAA. The applicant had not satisfied the exceptional circumstances requirement under section 9(4) of the FAAA. The applicant's application offended the doctrine of exhaustion of statutory available remedies.
12. Where a particular number of days was prescribed in the Interpretation and General Provisions Act without there being any exclusion of the application, either in express terms or by necessary implication, the natural inference would be that the legislature intended the section to apply. However, the scope of the act was limited to the computation of days. It did not apply to the calculation of such time when such time in any other unit than days was expressed.
13. Section 57 of the Interpretation and General Provisions Act provided that in reckoning of number of days, when any particular number of days was prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happened to fall on a Sunday or any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday. The first and the last days were to be established solely by reference to the language of the statutory provision under consideration and with due regard to the circumstances of each particular case.
14. The applicant had not established anything either in the language or context of section 51(8) of the Tax Procedures Act or any of the Tax statutes to suggest that the application of section 57 would lead to a repugnancy justifying a departure from the method of computation prescribed in the Interpretation and General Provisions Act.
15. In interpreting statutes, words of a statute must be interpreted in their ordinary, literal meaning. But where to give the words their ordinary meaning would lead to an absurdity so glaring that the legislature could not have contemplated it, or to a result contrary to the intention of the legislature as shown from the context or otherwise, the court may so interpret the language of the statute as to remove the absurdity, and give effect to the intention of the legislature.
16. The TPA provided a 60 days' timeline. The court was bound to interpret the words of section 57 of the

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TPA in their ordinary, literal meaning. There was nothing to stop the court from applying the proper rules of interpretation as long as they did not cause absurdity so glaring that it could never have been the intention of the legislature to do so.

17. The computation of time by both parties was incorrect. It was not clear how the 63 days were arrived at. A simple arithmetic showed that from December 9 to 31, 2016, 22 days were spent excluding the first day. January 2017 gave a total of 31 days while February 2017 gave 6 days. The aggregate was 59 days which were to lapse on February 7, 2017.
18. Illegality was divided into two categories:
 - a) those that, if proved, meant that the public authority was not empowered to take action or make the decision it did; Grounds within the listed first category were *ultra vires* and errors as to precedent facts;
 - b) those that relate to whether the authority exercised its discretion properly. In the listed second category, errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations were grounds within it.
19. The *ultra vires* principle was based on the assumption that court intervention was legitimated on the ground that the courts were applying the intent of the legislature. Parliament had found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power would always be subject to certain conditions contained in the enabling legislation. The courts' function was to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle had been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.
20. The enabling statute conferred mandate upon the respondent to undertake the audit as they did. The audit was communicated and a final decision was made and communicated in writing to the applicant. The applicant never appealed. There was a need to appreciate the difference between formal shortcomings, which went to the heart of the process, and the elevation of matters of subsidiary importance to a level, which would determine the fate of the process. The court was conscious of the ever-flexible duty of a public body to act fairly. However, fairness must be decided on the circumstances of each case. The applicant kept on seeking clarifications after the decision was communicated even after it was informed in writing about its right to appeal.
21. Regard must be had to the facts as a whole in the context of the applicable legislation and the principles involved; and compliance with legal requirements which involved a consideration of the degree of compliance with the law. Tax laws prescribed a time limit for appeal after a decision was made. Essentially, a failure to appeal will result in enforcement action. As a general principle, an administrative authority had no inherent power to condone failure to comply with a peremptory requirement. The Tax Procedures Act did not grant the respondent any discretion when evaluating compliance with the law unless the requirements imposed were immaterial, unreasonable or unconstitutional.
22. The impugned decision was made in a manner that was in conformity with the enabling statutes. The applicant had not demonstrated that the respondent acted *ultra vires*. No abuse of such powers had been alleged or proved. The nature and circumstances of the decision fell into the category of areas which were not disturbed by the courts unless the decision under challenge was illegal, irrational, or un-procedural.
23. *Certiorari* was a discretionary remedy, which a court could refuse to grant even when the requisite grounds

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for it exist. The court had to weigh one thing against another to see whether or not the remedy was the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

24. The writ of prohibition arrested the proceedings of any body, tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such body, tribunal, corporation, board or person. A prohibiting order was similar to a quashing order in that it prevented a tribunal or authority from acting beyond the scope of its powers. The key difference was that a prohibiting order acted prospectively by telling an authority not to do something in contemplation. However, the illegality of the tax decision had not been established.
25. The discretionary nature of the judicial review remedies sought in the application means that even if a court found a public body had acted wrongly, it did not have to grant any remedy. Examples of where discretion would be exercised against an applicant could include where the applicant's own conduct had been unmeritorious or unreasonable, or where the applicant had not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or legally discharge its legal mandate, or where the court considered that an alternative remedy could have been pursued. The *ex parte* applicants ought to have subjected itself to the appellate process stipulated in the TPA and TAT act instead of invoking judicial review jurisdiction. The instant suit offended the doctrine of exhaustion of remedies and offended the mandatory provisions of section 9 (3) (4) of the Fair Administration Act. The applicant had not established any grounds for grant of Judicial orders of *certiorari* and prohibition.

Application dismissed with costs to the respondent.

Fleur Investments Limited v Commissioner of Domestic Taxes & another

Issuance of a tax assessment by the Commissioner after it had reviewed a tax payer's books and issued a tax compliance certificate is irrational.

Headnote: The case concerns the legality and rationality of a tax assessment and demand, including penalties and interests, made by the Commissioner against the appellant where the Commissioner had previously reviewed the appellant's books and issued it with a tax compliance certificate. The Court of Appeal noted that the Commissioner's actions were inconsistent, particularly given the initial issuance of a compliance certificate followed by a substantial tax demand. The Court emphasized the importance of fairness, reasonableness, and the need to consider relevant facts in decision-making by tax authorities. The instant case underscored the necessity for tax authorities to act in good faith, reasonably, and based on accurate information. It also highlighted the importance of upholding legitimate expectations created by the actions of tax authorities and the role of judicial review in addressing arbitrary and capricious administrative actions.

Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR

Civil Appeal 158 of 2017

Court of Appeal at Nairobi

ARM Visram, MK Koome, and W Karanja, JJA

April 20, 2018

Reported by John Ribia

Tax Law – assessment of taxes – assessment of tax payable by the Commissioner – assesment that was done after the Revenue Authority had reviewed the tax payer's books and issued a tax compliance certificate - whether an assessment of taxes that was issued after the Commissioner had already reviewed the books of the tax payer and issued a compliance certificate was irrational

Judicial Review – appeal arising from a judicial review court – circumstances the appellate court could interfere with such a decision - what were the circumstances under which the Court of Appeal could interfere with the judicial discretion of a judicial review court

Jurisdiction – jurisdiction of the High Court – judicial review jurisdiction – claim that the judicial review court did not have the jurisdiction to determine a matter due to the doctrine of exhaustion of remedies - whether the High Court had the jurisdiction to determine a judicial review application that challenged the process the Commissioner arrived at a tax assessment when there was a pending objection before the Income Tax Tribunal

Brief Facts

Fleur Investment Company (the appellant) was a limited liability company involved in carrying out the business of property developers and landlord. Among its properties were three properties that it had leased out to Tusker Mattresses Limited and Uchumi Supermarkets Limited but which properties according to the appellant were sold in the year 2008 at KES 135,000,000. That information was contained in its audited financial statement for the year of income ending December 31, 2008 which was attached to the duly completed self-assessment income tax return (form I.T.C) and which was duly received by the respondents.

The 1st respondent sometime in November, 2013 sought to conduct a compliance check on the books of the appellant. The applicant was issued with tax compliance certificate for the period up to 2015. Before the compliance date expired, the 1st respondent raised an assessment notice under section 73 of the Income Tax Act and 45 of the Value Added Tax Act (VAT Act) and demanded payment of Kshs. 656,372,183 being purported corporation tax, value added tax (VAT), penalties and interest owed by the appellant for the years 2008 to 2012. The assessment was said to have been based on computations of the appellant's estimated banking income. The reasons given for raising the assessment were that the appellant had failed to honour a notice of June 10, 2013 scheduling compliance checks and postponing the same due to various reasons, and allegedly failed to provide supporting documents to the respondents to enable it ascertain its income.

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The appellant read malice in this assessment because firstly, although the meeting had been rescheduled on several occasions, the same had eventually taken place and the respondents had conducted the compliance check and were contented with the results of the audit. Secondly, all the documents requested for had been availed to the respondents to enable it conduct the exercise. Indeed it was after the exercise that the respondents wrote the letter and issued the compliance certificate dated October 24, 2014.

The appellant filed an objection. The appellant also filed a judicial review motion in which it sought two orders from the High Court. An order to quash the said assessment by the 1st respondent and an order prohibiting the respondents from implementing and effecting the assessment and demand of the amount in question. The High Court declined to grant the orders sought saying that doing so would mean having to determine the merits of the case and doing so was likely to embarrass the appellate process that the appellant had already initiated. Aggrieved the appellant filed the instant appeal.

Issues

- i. Whether the High Court had the jurisdiction to determine a judicial review application that challenged the process the Commissioner arrived at a tax assessment when there was a pending objection before the Income Tax Tribunal.
- ii. Whether an assessment of taxes that was issued after the Commissioner had already reviewed the books of the tax payer and issued a compliance certificate was irrational.
- iii. What were the circumstances under which the Court of Appeal could interfere with the the judicial discretion of a judicial review court?

Held

1. The 1st respondent acknowledged having had the meeting with the appellant in which they scrutinized the appellant's books and all the financial statements and other documents they requested after which they issued the compliance certificate. No explanation was given for the huge assessment or the slightly reduced amount.
2. Jurisdiction was everything and without it every act or decision by a court or tribunal was rendered a nullity. Jurisdiction must be acquired before a court can issue a valid judgment or order.
3. The appellant had decided to pursue its dispute through the Income Tax Tribunal by filing a notice but decided to pend the same and moved to the High Court by way of judicial review. There were exceptional circumstances that existed in the instant case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of law were enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court could not sit back and watch such institutions ride roughshod on the rights of citizens who sought refuge under the Constitution and other legislations for protection. The court was perfectly in order to intervene where there was clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice were manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly. The court was perfectly entitled to intervene where it was alleged that the discretion was not being exercised judicially.
4. There were clear inconsistencies in the respondents' responses and actions. The respondents in making the assessment in question proceeded on erroneous state of facts, either mistakenly or mischievously in a bid to punish the appellant for no justifiable reason, and in doing so did not act in good faith whatsoever. Whereas the court was not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority was not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the court in intervening.

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5. In the absence of a rational explanation, one must conclude that the decision challenged could only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constituted a serious abuse of statutory power since no statute could ever allow anyone on whom it conferred a power to exercise such power arbitrarily and capriciously or in bad faith.
6. The respondents plucked the figure from the air. No explanation was given to the appellant as to how that figure was arrived at. No explanation was sought as to the alleged deposits in the appellants accounts. They only realised later that the appellant was a landlord and hence the assessment. From the evidence on record, the respondents were already seized of the information that the appellant was a landlord and that was part of the reasons the audit was sought.
7. One of the reasons given for the arbitrary assessment was that the appellant had refused to avail itself for auditing, yet it was not disputed that the meeting took place, all the books asked for had been availed and the exercise had been successfully carried out and a certificate of compliance issued thereafter. The respondents were guilty of Wednesbury unreasonableness and that made their decision amenable to court intervention by way of judicial review. The circumstances surrounding the matter were exceptional and called for the intervention of the court.
8. The 1st respondent was less than candid when it claimed that it discovered that the appellant was a landlord, if at all, after the tax audit had been done and it appeared to have been driven by malice in imposing the hefty tax without any basis whatsoever. That was a good case for court intervention and the trial court ought not to have struck out the judicial review application, as the same raised issues that were outside the purview of the income tax appeal committee or tribunal regime.
9. It was not necessary to consider the ground on legitimate expectation. Remedies of judicial review were discretionary, and certain parameters or guidelines had been set to guide appellate courts when called upon to interfere with judicial discretion of a trial court. As a general principle, the Court of Appeal would not interfere with such discretion, save on narrow principles:
 - a. the trial court misdirected itself on law; or
 - b. the trial court misapprehended the facts; or
 - c. the trial court took into account of considerations of which it should not have taken account; or
 - d. the trial court failed to take into account of considerations which it should have taken account of; or
 - e. the trial court's decision, albeit discretionary one, was plainly wrong.

Appeal allowed.

Orders:

- i. *Appeal allowed and the impugned ruling dated January 25, 2017 striking out the appellant's notice of motion was set aside.*
- ii. *An order of certiorari issued quashing the decision of the respondents contained in the assessment and letter of demand dated June 29, 2015 and September 14, 2015 directing the applicant to remit an amount totaling KES 656,372,183 and Kshs. 644,342,189 respectively and all consequential orders arising therefrom.*
- iii. *An order of prohibition issued restraining the respondents from implementing and effecting the assessment and demand as contained in the assessment and letter of demand dated June 29, 2015 and September 14, 2015 respectively.*
- iv. *Each party was to bear its own costs both at the Court of Appeal and at the High Court.*

Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others**Chapter 4: Claims of legitimate expectation and conditions it applies**

The tax provisions in the Finance Act 2017 relating to the betting, lotteries and gaming industry are not unconstitutional

Headnote: The court in the instant matter was faced in two main issues, the scope and application of legitimate expectation against legislative provisions that had been properly enacted, and whether tax imposed on the betting, lotteries and gaming industry by the Finance Act 2017 was unfair and burdensome. The court held that legitimate expectation could not be an expectation against the clear provisions of a statute. A decision maker cannot be expected to act against the clear provisions of a statute as that would be illegal and a violation of the principle of the rule of law. As legislation that was lawfully enacted, the impugned legislation would override any expectation. On the gaming tax, the court held that the tax was discriminatory; but it was not shown that persons or entities undertaking similar activities were taxed at different rates. Differential taxation schemes were not unconstitutional.

**Pevans East Africa Limited & another v Chairman Betting Control and
Licensing Board & 7 others**

Petition No 353 of 2017

High Court at Nairobi

J M Mativo, J

December 28, 2017

Constitutional Law – National Assembly – role of the Senate in law-making – legislative competence of the National Assembly with respect to a piece of legislation which dealt with the functions of County Governments – effect of failure to include Senate in the enactment of such a Bill – application of the pith and substance doctrine – whether the Finance Bill which included provisions for taxation in the betting, lotteries and gaming industry could be enacted without the involvement of the Senate given that the betting, lotteries and gaming industry was within the functions of County Governments and that taxation was a function of the National Government – Constitution of Kenya 2010, articles 109 (3), 110 (1) (a), 114, & 209.

Devolution – taxation – the mandate of the National Government to impose taxes and the mandate of the County Government over the betting, lotteries and gaming industry – imposition of taxes in the betting, lotteries and gaming industry – whether there was an interplay of roles between the County Government and National Government with respect to the imposition of taxes in the betting, lotteries and gaming industry – Constitution of Kenya 2010, articles 109 (3), 110 (1) (a), 114, & 209.

Constitutional Law – national values and principles of governance – public participation – circumstances in which public participation would be deemed to be sufficient – whether an enactment would need to incorporate views collected during public participation in order for it to be valid – whether the Finance Act 2017 was enacted in a process that included sufficient public participation – Constitution of Kenya 2010, articles 10 & 118 (1) (b).

Constitutional Law – Parliament – legislative process – presentation of a Bill for presidential assent – power of the President to refuse to assent to a Bill – extent of the powers of the President upon refusing to assent to a Bill – whether the President could make recommendations relating to amendments to be made to a Bill presented to him for assent – Constitution of Kenya 2010, article 115.

Taxation Law – principles of taxation – tax equity – considerations of the Court in assessing whether a tax was unfair and burdensome – nature of proof required for allegations that taxes were imposed discriminatively – whether the imposition of a 35% deterrent tax on revenue in the betting, lotteries and gaming industry under the Finance Act 2017, met the requirements of tax equity.

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to property – considerations of the Court in assessing whether a limitation placed on the right to property was justified – whether imposition of taxes, which were alleged to be excessive, unfair and burdensome, amounted

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to a violation of the right to property – Constitution of Kenya 2010, article 40.

Civil Practice and Procedure – abuse of court process – nature of conduct which would entail abuse of court process – filing a multiplicity of suits for the same cause of action and non-disclosure of material facts – where two different Petitions were filed by two companies whose directorship was composed of the same persons, with respect to the same cause of action, seeking similar reliefs without informing the Court of the interest of the directors in the two companies – whether there was a situation of abuse of court process under the circumstances.

Brief facts

The instant petitions challenged the constitutionality of sections 29A, 44A, 55A and 59B of the Betting, Lotteries and Gaming Act and sections 29, 30, 31 and 32 of the Finance Act 2017.

Initially, the Finance Bill for the year 2016/2017 proposed to impose 50% tax chargeable on revenue from betting, gaming, lotteries and prize competitions with the purpose of regulating and controlling betting. The purpose was to minimize or eliminate gambling amongst the youth. When the Bill was subjected to public participation, the proposed 50% tax was found to be unsuitable and the result was that it was deleted. The Bill was passed by Parliament on May 30, 2017 and presented for Presidential assent with the 50% tax omitted from it.

On the basis of the omission of the 50% tax on revenue from betting, gaming, lotteries and prize competitions, the President declined to assent to the Finance Bill 2017. He proposed a tax rate of 35% to be imposed on revenue in the betting and gaming industry. In response, Parliament implemented the presidential directive and amended sections 29A, 44A, 55A and 59B and re-submitted the amended Finance Act 2017 for presidential assent. The taxes were set to come in force on January 1, 2018. The petitioners challenged the legality of the presidential directive before the court.

Issues

- i. Whether it was necessary to involve the Senate in enacting the Finance Act, 2017 which included provisions for taxation in the betting, lotteries and gaming industry.
- ii. Whether there was sufficient public participation in the enactment of the Finance Act 2017 which amended the Finance Act 2016.
- iii. What was the extent of the President's mandate under article 115 of the Constitution, where a Bill was presented for purposes of presidential assent?
- iv. Whether tax imposed on the betting, lotteries and gaming industry by the Finance Act 2017 was unfair and burdensome.
- v. Whether the petitioners who were engaged in businesses in the betting, lotteries and gaming industry had a legitimate expectation that taxes would not be imposed as a deterrent against the youth involving themselves in activities in the industry.
- vi. Whether the 35% tax imposed on the betting, lotteries and gaming industry by the Finance Act 2017 amounted to a violation of the right to property.
- vii. What was the scope and applicability of the pith and substance doctrine to situations where the National Assembly had exceeded its legislative competence and encroached into the legislative competence of the Senate?

Held

1. When the constitutionality of legislation or the process of its enactment was challenged, the court would determine whether through the application of all legitimate interpretive aids, the impugned legislation and the entire legislative process was capable of being read in a manner that was constitutionally compliant. In interpreting the law, courts would infuse the law with the values of the Constitution.
2. The Senate formed one of the two houses (chambers) of the Parliament. The mandate of the Senate was to safeguard and promote the interests of counties. The Senate had to endeavour to influence national laws and revenue amounts that relate to counties as well as participate in oversight over state officers.

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3. A Bill not concerning County Governments would be considered only in the National Assembly, and passed in accordance with article 122 of the Constitution and the Standing Orders of the National Assembly. A Bill concerning County Governments could originate in the National Assembly or the Senate, and it would be passed in accordance with articles 110 to 113, and articles 122 and 123 of the Constitution and the Standing Orders of the Houses.
4. Under article 110 of the Constitution, a Bill containing provisions affecting the functions and powers of County Governments was within the definition of a Bill concerning County Governments. Section 4, part 2 of the fourth schedule provided that cultural activities, public entertainment and amenities including betting, casinos and other forms of gambling were within the functions and powers of county governments.
5. The doctrine of pith and substance was a legal doctrine in constitutional interpretation used to determine the head of power under which a given piece of legislation falls. The doctrine was primarily used when a law was challenged on the basis that one level of government had encroached upon the exclusive jurisdiction of another level of government. The doctrine stated that where the question arose of determining whether a particular law related to a particular subject (mentioned in one list or another), the court would look at the substance of the matter.
6. In the case of national legislation, the application of the pith and substance test to legislative competence would lead to the conclusion that the Bill's pith and substance placed it wholly within the competence of the National Government, even though certain provisions of the legislation (which were ancillary or incidental) were within the functional areas of county governments. In the case of county legislation, the pith and substance test would lead to the conclusion that the Bill's pith and substance placed it wholly within the functions of county governments although certain provisions of the Bill (ancillary or incidental) were outside of the competence of county governments. The extent of the encroachment of the legislation into matters beyond its legislative competence would be an element in determining whether the legislation was in truth making a law on a subject beyond its competence.
7. A law found to be valid under the pith and substance analysis of the law could also have some incidental effects upon matters outside the Government's jurisdiction. That would be tolerated as the law was classified by its dominant characteristics. The modern approach to constitutional interpretation was to allow for a fair amount of interplay and overlap into the other level of Government's jurisdiction.
8. Pith meant "true nature" or "essence of something" and substance means "the most important or essential part of something. The pith and substance of the impugned Bill was taxation. Taxation was a function of the National Government while betting, casinos and other forms of gambling were functions of county governments. There was some interplay. The modern approach to constitutional interpretation was to allow a fair amount of interplay and overlap into the other level of government's jurisdiction.
9. The preamble of the Finance Bill 2017 stated that it was an Act of Parliament enacted to amend the law relating to various taxes and duties and for matters incidental thereto. The purpose of the legislation was to amend the law relating to various taxes and duties. Under article 209 of the Constitution only the National Government could impose taxes and charges. That would exclude County Governments from the imposition of such taxes and charges.
10. Under article 114 of the Constitution a money Bill included a Bill that contained provisions dealing with taxes. Therefore, a Bill such as the impugned legislation that dealt with taxes was a money Bill.
11. It was an elementary rule of constitutional construction that no one provision of the Constitution was to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject were to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. If any provision, read in its context, could reasonably be construed to have more than one meaning, the Court had to prefer the meaning that best promoted the spirit and purposes of the Constitution and the values stipulated in article 259 of the Constitution.
12. A reading of the provisions of articles 109(3), 110(1)(a) and 114(3) of the Constitution together with article 209(1) of the Constitution which conferred power to impose taxes upon the National

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Government, disclosed no inconsistency in the finding that the imposition of taxes was a function of the National Government and that the Bill was correctly processed. It was not necessary to involve the Senate in the enactment. The pith and substance of the Bill placed it within the functions of the National Government.

13. Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of constitutional dictates. A proper analysis of articles 10, 118 (1) (b) and Standing Order 127 (3) would lead to the conclusion that Parliament was obligated to facilitate public participation and stakeholder engagement in the process leading to the enactment of the impugned legislation.
14. The petitioners admitted that there were discussions and views from various stakeholders some of whom were opposed to the introduction of the taxes. Therefore, prior to the enactment of the impugned legislation, there was sufficient public participation.
15. Public views ought to be considered in the decision-making process and as far as possible the product of the legislative process ought to be a true reflection of the public participation so that the end product bears the seal of approval by the public. The end product ought to be owned by the public. However, public participation would not mean that the collected view would have to prevail. The fact that certain views were not incorporated into an enactment would not justify an invalidation of the enactment.
16. Under article 115(1)(b) of the Constitution, the President had power to refer a Bill back to Parliament for reconsideration by Parliament, while noting any reservations that he had concerning the Bill. The power of a head of state to refuse or to withhold assent to legislation was known as the veto power. In principle, that allowed a president to protect the Constitution, to uphold the balance and separation of powers, to prevent the enactment of rushed or badly drafted legislation and to thwart legislation that served special interests rather than the common good.
17. One of the traditional functions of the presidency was to protect against legislation that was blatantly unconstitutional or that had not been enacted in accordance with the proper constitutional procedure. The President's role was essentially that of a constitutional guardian, whose function was to conduct an executive review of proposed legislation (in contrast to the more widely known judicial review).
18. The President's veto power with respect to legislation was a form of protection against harmful policies and corruption. Presidents could use the power to prevent passage of legislation that they found objectionable on policy or substantive grounds, without having to make any complaint against the constitutional or procedural propriety of the Bill in question.
19. The veto power would be used against legislation that the President was ideologically opposed to and also to prevent the enactment of so-called pork-barrel bills (where legislators voted for public funds to be spent on projects in their own areas) or special-interest legislation (where lobbyists attempted to influence legislators to enact laws that privilege a certain section of society against the common good).
20. The term reservation as used in article 115 of the Constitution referred to a clear statement of the President's objections which gave a reasoned justification for the exercise of powers to refuse to assent to a Bill. That statement gave the President an opportunity to lay out precisely what was wrong with the Bill and specify how the Bill could be improved. In that way the veto power, albeit indirectly, was an agenda setting power through which the President was able to exercise political leadership, to define policy stances to the electorate and put political pressure in legislators.
21. The President's power to state what was wrong with a Bill could be exercised without making recommendations or proposals to Parliament to avoid the danger of the perception of interfering with Parliament's functions. However, to the extent that Members of Parliament had the constitutional safeguard and freedom of rejecting the recommendations, it was unsafe to conclude that they were influenced by the President's proposal.
22. The petitioners bore the burden to demonstrate that Parliament was unduly influenced by the President's recommendation to the extent that they did not exercise their constitutional mandate in passing the Bill. With respect to undue influence, it was worth remembering that under article 115(2) of the

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Constitution, Parliament could amend the Bill in light of the President's reservations or pass the Bill a second time without the amendments.

23. The text proposed by a President with respect to a Bill need not be subjected to other stages that a Bill would be subjected to upon its first introduction, namely; publication, first reading, second reading and third reading. Therefore, in enacting the Finance Bill 2017, there was no breach of procedural requirements.
24. Equity in taxation expresses the idea that taxes should be fair, and was a concept used in all tax policy analysis. However, it is a normative, value-based concept and its interpretation differs across individuals, countries, cultures and time. Since the concept would depend on one's particular perspective as well as the specific circumstances being considered, the concept was at times difficult to apply in practice.
25. Tax equity was commonly discussed according to four definitions of fairness. Those definitions were also normative, and sometimes conflicted, so they too were difficult to apply in practice. Horizontal equity posited that taxpayers who were equally economically situated should be treated equally for tax purposes. Vertical equity posited that taxpayers who were not identical from an economic standpoint, but were differently situated, should be treated differently for tax purposes.
26. A basic theme of tax policy holds that taxes must be levied for a public purpose. The public was taxed to raise money for public purposes and not to support the private needs of individuals. There was no contest on the authority to levy tax and neither was there a question as to whether the tax in the impugned legislation was being levied for a public purpose.
27. The tax in question was a deterrent tax; a sin tax which was aimed at discouraging certain activities. It was explained that the tax complained of was part of government policy to discourage the youth from engaging in the betting, lotteries and gaming industry. That was a legitimate purpose which met the limitation test under article 24 of the Constitution. The reasonableness of the policy was not in question.
28. It was not shown that the tax complained of was punitive. The legislature could not use tax laws as a tool to inflict punishment or assess penalties. A punitive tax would amount to an abuse of the legislature's taxing authority.
29. It was alleged by the petitioners that the tax was discriminatory but it was not shown that persons or entities undertaking similar activities were taxed at different rates. Differential taxation schemes were not unconstitutional.
30. A legitimate expectation would not be an expectation against the clear provisions of a statute. A decision maker would not be expected to act against the clear provisions of a statute as that would be illegal and a violation of the principle of the rule of law. As legislation that was lawfully enacted, the impugned legislation would override any expectation.
31. The right to property as protected under article 40 of the Constitution was not absolute. In assessing whether a limitation to the right was justified it was necessary to determine whether the limitation was proportionate.
32. It was in public interest for taxes to be paid. The impugned legislation was aimed at serving legitimate public interest and it did not infringe on the petitioner's right to property.
33. A person who approached a court or a tribunal for the grant of relief, equitable or otherwise, was under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. If he was found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only had the right but a duty to deny relief to such person.
34. The 2nd petitioner was under a duty to bring to the attention of the court the existence of the first petition. That was even more crucial considering that the petitioners engaged in similar businesses which were regulated by the same law, and that the two petitions challenged the same legal provisions and the core complaint was the same. Additionally, the determination of either case if successful would be beneficial to either of the petitioners.

Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others

35. Due to the relationship between the two companies, the two petitioners, the similarity of their businesses and the similarity of the cases before the court, the non-disclosure on the part of the 2nd petitioner was not innocent. The companies were separate legal entities but they had the same directors.
36. It would have been enough for the petitioners to state that there was a pending petition brought by a different company, a complete legal entity, challenging the same provisions. Also, it would not have been prejudicial to disclose the director's interest in the first petition. Disclosure of that information would have cleared the perception that the second petition was filed to achieve what the first petition did not get because the effect was that the orders sought, if obtained, would benefit both petitioners.
37. A litigant has no right to pursue *pari passu* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Thus, the multiplicity of actions on the same subject matter between the same parties even where there was a right to bring the action would be regarded as an abuse. The abuse lay in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*.

Petition dismissed.

Export Trading Company v Kenya Revenue Authority

Delayed demands for short levied taxes have to be made with sufficient reasons even though legislative provisions allowed for the making of the demands.

Headnote: The case revolved around a determination on whether a demand of a shortfall of duty that was made after four years was unreasonable. The court held that where it was possible to have technological and human errors, it was unfair and unreasonable to demand shortfall of duty four years down the line. It did not absolve the Kenya Revenue Authority from its duty of action in a fair, efficient, expeditious, lawful, reasonable, and with procedural fairness as directed under article 47 of the Constitution.

Export Trading Company v Kenya Revenue Authority

Petition No 148 of 2013

High Court at Nairobi

W A Okwany, J

January 9, 2019

Constitutional Law – fundamental rights and freedoms - right to fair administrative action – belated demands for short levied taxes-where section 135(3) of the East African Community Customs Management Act (EACCMA), allowed the Kenya Revenue Authority to make demands for short levied taxes within 5 years of the initial assessment and payment of taxes – whether there was need for reasons or sufficient explanations to be provided, as part of the right to fair administrative action, for belated demands for short levied taxes made 4 years after the initial assessment and payment of taxes – Constitution of Kenya 2010, article 47.

Judicial Review – grounds for the grant of judicial review remedies - legitimate expectation – whether after the Kenya Revenue Authority had verified entries, the applicable taxation rate and the duty payable as correct, a taxpayer had a legitimate expectation that the duty assessed was correct.

Brief facts

In 2008 and 2009, the petitioner imported rice from Burma, Vietnam and Thailand and the respondent imposed an import duty of 35% which the petitioner paid in full. The respondent alleged that the correct import duty ought to have been 75% and not 35%. That there had been a system and human error in the imposition of import duty. In a letter dated February 27, 2013, the respondent demanded payment of additional taxes related to rice imports amounting to KES. 378,016,680/-.

On or about July 2005, pursuant to the provisions of the East African Community Customs Management Act (EACCMA), 2004, the East African Community (EAC) promulgated the Common External Tariff (CET) which set the import duty rate for rice imported from regions outside the EAC at 75%. The respondent implemented those rates for a short time but reduced them from 75% to 35% for all rice imported from outside the EAC regardless of origin. For Pakistani rice, the Council of Ministers of the EAC issued Legal Notice No. 1 of 2005 on December 15, 2005 which stayed the application of the CET rate of 75%. When two years lapsed, the Council of Ministers of the EAC issued Legal Notice No. EAC/10/2007 on June 18, 2007, suspending the applicability of 75% rate on Pakistani rice, for another 2 years. The respondent continued to maintain an import duty rate of 35% for all rice regardless of the origin, until June 26, 2009 when the rate of 75% was effected in the Simba system. Importers were informed by the respondent that only Pakistani rice imports would have an import duty rate of 35%.

On July 26, 2007, the petitioner sought clarification on the applicable rate after noting that the rate of 35% was imposed for all rice imports in the Simba system despite the passing of Legal Notice No. EAC/10/2007. There was no response to the request for clarification. After the respondent demanded for the payment of additional taxes, the petitioner, on February 18, 2013, sought a review of the respondent's decision for the payment of taxes under the provisions of the East African Community Customs Management Act, 2004.

Export Trading Company v Kenya Revenue Authority

There was no response to the request for a review except that enforcement action was threatened with respect to the additional taxes.

Issues

- i. Whether despite the provisions of section 135(3) of the East African Community Customs Management Act (EACCMA), which allowed the Kenya Revenue Authority to demand for short levied taxes within 5 years, there was need for sufficient reasons to be provided for the making of demands for short levied taxes 4 years after the initial assessment and payment of duty.
- ii. Whether the making of demands for short levied taxes 4 years after the initial assessment and payment of taxes without providing sufficient explanations, was a violation of the right to fair administrative action.
- iii. Whether a taxpayer had a legitimate expectation that the duty assessed by the Kenya Revenue Authority was correct, particularly after its officers had verified entries, the applicable rate and assessed the duty as correct.

Held

1. The importance of taxation for any government could not be gainsaid. However, the processes and procedure related to the collection of taxes had to meet the applicable legal and constitutional thresholds in order to protect the rights of the citizenry.
2. East African Community Customs Management Act (EACCMA) was a valid law that derived its force from the provisions of section 8 of the Treaty for the Establishment of the East African Community, 2000. It came into force on January 1, 2005 and various Kenyan statutes were amended in order to implement it.
3. The fact that the respondent was empowered to conduct post clearance audit and demand short levied duty did not preclude the respondent from doing so in a reasonable, fair, efficient and effective manner. The respondent's obligation to act fairly was guaranteed under article 47 of the Constitution, which provided for every person's right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.
4. The respondent could not be said to have acted fairly or reasonably because it did not furnish the court with a satisfactory explanation as to why the post clearance audit and the subsequent demand for alleged short levied duty was made almost 4 years after the initial assessment and payment of the duty.
5. Section 135(3) of the EACCMA allowed the respondent to make demands for short levied duty within 5 years. However, the respondent should not wait until the tail end of that period to make a demand. There ought to be sufficient reasons as to why the audit and demand were made late and at the tail end of the given period.
6. In the absence of a satisfactory explanation as to why the post clearance audit and resulting demand for short levied duty was made after such a long time, the demand for taxes was irrational and not in tandem with the requirements of article 47(1) of the Constitution. That was especially the case considering that a letter from the petitioner dated July 26, 2007, which sought the respondent's clarification on the applicable duty rate, was not responded to.
7. The identification of the applicable rate of duty and assessment of duty payable was done by the Simba System which was owned and controlled by the respondent. It was therefore unreasonable for the respondent to blame the petitioner by contending that the petitioner was aware of the rate set in Legal Notice No. EAC/10/2007.
8. It was the respondent's officers that verified entries and inspected consignments. Those officers could not be said to have acted as a conveyor belt performing a perfunctory exercise while being oblivious of their solemn duty to provide accurate information regarding the applicable taxation rate.
9. The respondent abdicated its duty to taxpayers by remaining tight-lipped, even when prompted to give clarification by the petitioner on the correct applicable tax rate via a letter dated July 26, 2007, only to demand underpaid taxes several years later. The respondent was expected to verify the entries and the

Export Trading Company v Kenya Revenue Authority

duty payable before clearance of the consignments in question.

10. After the respondent verified the entries in issue, the rate applicable and assessed the duty as correct, a legitimate expectation arose in favour of the petitioner. The petitioner had a legitimate expectation that the assessed duty was correct and the respondent could not hide behind the provisions of the EACCMA and make belated demands for taxes.
11. By failing to inform the petitioner of the applicable taxation rate within reasonable timelines and by purporting to demand alleged short levied taxes six years after the rice consignment was assessed, cleared and sold, the respondent abused its statutory powers. The respondent's demand for taxes was unreasonable, irrational and not in accordance with articles 10 and 47 of the Constitution.

Petition partly allowed.

Orders

- i. Declaration issued that the demand of taxes by the respondent constituted an infringement of the petitioner's rights under articles 40 and 47 of the Constitution.
- ii. Order of certiorari issued to bring to the Court and quash the decision to demand and the demand contained in the respondent's letter dated February 27, 2013.
- iii. A permanent injunction issued restraining the respondent whether by itself, its officers, employees and/or agents from commencing, instituting or proceeding with any enforcement or prosecution against the petitioner or its directors and/or officers in relation to or on account of the disputed taxes in the sum of KES. 378,016,680/- and the interest and penalties claimed therein.

Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another

Demand for taxes on Jet A1 fuel for local use for the period December 2015 to August 2016 found to be unreasonable

Headnote: The main issues before the judicial review court were the applicability of the doctrine of legitimate expectation and whether it was unreasonable for a Commissioner to demand for taxes during the existence of a recommendations to abandon the taxes and after failing to respond to a notice of objection against the payment of the tax had been allowed by operation of the law. The court held that under the doctrine of legitimate expectation, if a public authority led a person or body to expect that the public authority would, in the future, continue to act in a way either in which it had regularly acted in the past or on the basis of a past promise or statement which represented how it proposed to act, then, *prima facie*, the public authority should not, without an overriding reason in the public interest, renege from that representation and unilaterally cancel the expectation of the person. Further, that the applicant had a legitimate expectation that the 1st respondent would not collect taxes that had successfully been objected to by the applicant. Additionally, there were recommendations that demands for the tax would not be made. There was no system put in place for the collection of the tax and that created an impression that the tax would not be collected at all. The demand for the tax was a violation of the applicant's legitimate expectation.

Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another [2020] eKLR

Judicial Review Application No 346 of 2019

High Court at Nairobi

W Korir, J

October 15, 2020

Judicial Review - grounds for judicial review - breach of legitimate expectation - whether a legitimate expectation not to pay tax was in existence when recommendations had been made for the abandonment of the tax, a notice of objection against the tax had been allowed by operation of the law and no system for the payment of the tax had been put in place.

Judicial Review - grounds for judicial review - unreasonableness - whether a demand for tax was unreasonable where a system for the collection of the tax had not been set up, a notice of objection against the payment of the tax had been allowed by operation of the law and there were recommendations for the tax to be abandoned.

Jurisdiction - jurisdiction of the High Court - where there was no decision to appeal against - whether the High Court had jurisdiction where a notice of objection lodged by a taxpayer had not been responded to within the requisite statutory sixty-day period - Tax Procedures Act, No 29 of 2015, sections 3 and 51(11).

Judicial Review - institution of judicial review proceedings - exhaustion of alternative remedies - exceptions to the doctrine of exhaustion - where there was no decision capable of being appealed against at the Tax Appeals Tribunal - whether in a situation where the Commissioner failed to make a decision on a notice of objection by a taxpayer within the requisite statutory period, judicial review remedies were available for any administrative wrongs done before and after the filing of the notice of objection - whether a petition filed against a notice of objection before the Commissioner of Customs and Border Control that had not been decided within the sixty day timeline was a breach of the doctrine of exhaustion of remedies - Constitution of Kenya 2010, article 159(2)(c); Fair Administrative Actions Act, section 9(4).

Brief facts

Without citing an enabling provision of the law, the 1st respondent demanded from the applicant KES. 109,759,855/= being excise duty on locally consumed Jet A1 fuel for the period of December 1, 2015 to August 31, 2016. The 1st respondent sent another demand letter on October 25, 2016 for the same tax but for an increased amount of KES 127,183,364/=. In response, the applicant lodged a notice of objection

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dated November 8, 2016 to which the 1st respondent did not respond within the statutory 60 days allowed for the making of the response. Consequently, the applicant argued that the failure to make a response meant that under section 51(11) of the Tax Procedures Act, the response was allowed and it was not obliged to pay the demanded tax.

Later, on October 3, 2019 and October 24, 2019, the 1st respondent made demands for the payment of the same tax but for a varied amount of KES 109, 759, 855/=.

The applicant contended that it had legitimate expectation that the tax would not be payable until September 2018 as the Kenya Revenue Authority's system explicitly recognized that no excise duty was payable and the 1st respondent did not provide for or allow for the payment of excise duty. The applicant said that it made payments for the tax on November 18, 2019 due to pressure from the 1st respondent and threats of adverse enforcement measures.

The respondents raised a challenge stating that the court lacked jurisdiction to hear and determine the matter and also stated that the matter had been overtaken by events as the applicant had already paid for the tax. They added that an order of prohibition could not be issued to stop what had already been done.

Issues

- i. Whether the High Court had jurisdiction to hear and determine a matter where a notice of objection against demands made for tax had not elicited a response from the Commissioner within the requisite statutory period.
- ii. Whether a petition filed against a notice of objection before the Commissioner of Customs and Border Control that had not been decided within the sixty day timeline was a breach of the doctrine of exhaustion of remedies.
- iii. What were the legal consequences of a failure by the Commissioner to make a decision within sixty days upon receipt of a notice of objection from a taxpayer?
- iv. When would a legitimate expectation be said to be in existence?
- v. When would a decision be said to be unreasonable?
- vi. Whether it was unreasonable for a Commissioner to demand for taxes during the existence of a recommendations to abandon the taxes and after failing to respond to a notice of objection against the payment of the tax had been allowed by operation of the law.

Held

1. The doctrine of exhaustion was recognized under article 159(2)(c) of the Constitution and section 9(4) of the Fair Administrative Action Act. It ensured that parties exhausted all available remedies before seeking judicial review. An exemption to the doctrine was provided under section 9(4) of the Fair Administrative Action Act, under which an application for an exemption could be made where there were exceptional circumstances which warranted it.
2. An appealable decision under section 3 of the Tax Procedures Act was defined as an objection decision and any other decision made under a tax law other than a tax decision or a decision made in the course of a tax decision. There was no decision made in relation to the applicant's notice of objection and therefore the applicant did not have a decision to appeal against at the Tribunal. The applicant faced exceptional circumstances not envisaged under the Tax Procedures Act.
3. Section 51(11) of the Tax Procedures Act was to the effect that where the Commissioner had not made an objection decision within sixty days from the date which the taxpayer lodged a notice of objection, the objection would be allowed. Therefore, the applicant's objection which sought a revision of the 1st respondent's decision was allowed by operation of the law by dint of section 51(11) of the Tax Procedures Act. The 1st respondent should not have continued to demand for payment to be made for that tax and all demands made amounted to nothing in law.
4. Article 47 of the Constitution stated that every person had a right to administrative action which was

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expeditious, lawful, reasonable and procedurally fair. For one to establish that an action or decision was unreasonable it had to be shown that the reasoning was illogical or irrational.

5. The 2nd respondent's letter dated February 10, 2017 stated that an additional tax burden would cripple airlines and it recommended that the 1st respondent should exercise statutory powers to abandon and refrain from recovery of the tax in question. The 1st respondent confirmed that demands for the tax had been put on hold pending the approval of the proposed waiver of the tax. It therefore went against logic that after recommending the abandonment of the tax, that tax was demanded from the applicant. Making a demand under those circumstances was contrary to the provisions of section 37 of the Tax Procedures Act.
6. The 1st respondent acted unreasonably in demanding for the excise duty, and both the 1st and 2nd respondents acted contrary to the applicant's right to fair administrative action under article 47 of the Constitution by failing to properly dispense with their statutory mandates under the Tax Procedures Act.
7. Legitimate expectation referred to the principle of good administration or administrative fairness. If a public authority led a person or body to expect that the public authority would, in the future, continue to act in a way either in which it had regularly (or even always) acted in the past or on the basis of a past promise or statement which represented how it proposed to act, then, *prima facie*, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body.
8. The applicant had a legitimate expectation that the 1st respondent would not collect taxes that had successfully been objected to by the applicant. Additionally, there were recommendations that demands for the tax would not be made. There was no system put in place for the collection of the tax and that created an impression that the tax would not be collected at all. The demand for the tax was a violation of the applicant's legitimate expectation.
9. Article 23(3) of Constitution provided for the grant of various reliefs by the court to a person whose fundamental rights and freedoms had been violated. The applicant was entitled to appropriate reliefs.

Application allowed.

Orders

- i. Declaration issued that as a consequence of the Commissioner's failure to make a decision on the applicant's notice of objection dated November 8, 2016 (and received on November 9, 2016) within the statutory period of sixty days, the said notice of objection was allowed in terms of Section 51(11) of the Tax Procedures Act, 2015.
- ii. Order of certiorari issued bringing into the court for quashing and quashing the Commissioner of Customs and Border Control's demand for excise duty for the period December 2015 to August 2016 as contained in the letters dated August 24, 2016, November 23, 2016, February 3, 2017, October 3, 2019 and October 24, 2019 on Jet A1 fuel for local use.
- iii. An order of prohibition prohibiting the Commissioner of Customs and Border Control whether by himself, his authorised officers and/or agents from demanding the payment of and/or taking any enforcement action of whichever nature in respect of excise duty on Jet A1 fuel for local use for the period December 2015 to August 2016.
- iv. An order of mandamus issued compelling the Commissioner of Customs and Border Control to refund forthwith the sum of Kshs 109,759,854/= paid by the applicant on November 18, 2019 in respect of excise duty on Jet A1 fuel for local use for the period December 2015 to August 2016.
- v. The applicant was awarded the costs of the petition against the respondents.

Pharmaceutical Manufacturing (K) Co Ltd & 3 Others v The Commissioner General of the Kenya Revenue Authority & 2 Others

Zero-rating a supply did not imply exemption from payment of VAT

Headnote: Legitimate expectation ought, in itself be reasonable and not contrary to the express provisions of the law. The strictures of legitimate expectation were not met in the petition. For example, there was no promise or assurance by the State to the 1st appellant that VAT would not be adjusted. No such promise could be made. Whatever exemption was being enjoyed was expressly in accordance to the necessary legislative provisions. The legislative authority resided in the Parliament, and so long as that mandate was discharged in accordance with the Constitution, it could not be challenged.

Pharmaceutical Manufacturing (K) Co Ltd & 3 Others v The Commissioner General of the Kenya Revenue Authority & 2 Others (2017) eKLR

Civil Appeal No. 283 of 2014

Court of Appeal at Nairobi

A. Makhandia, W. Ouko & K. M'inoti, JJA

March 10, 2017

Constitutional Law – fundamental rights and freedoms – right to property – incentive vis-à-vis entitlement – whether deprivation of incentive amounts to infringement of the right to property – whether deprivation of VAT incentive amounted to infringement of the appellant's right to property – Constitution of Kenya, 2010, articles 40 and 260; Value Added Tax Act, 2013, sections 2 and 7(2).

Statutes – interpretation of statutes – Value Added Tax Act (Repealed) – interpretation of section 8 of the VAT Act (Repealed) – whether the provisions of section 8 exempted the appellant from paying VAT on its imports – Value Added Tax Act (Repealed), section 8.

Statutes – interpretation of statutes – Value Added Tax Act, 2013 – interpretation of sections 2 and 7 (2) of the VAT Act, 2013 – whether the provisions of sections 2 and 7 (2) of the VAT Act, 2013 contravened article 201 of the Constitution on the principles and framework of public finance – whether the provisions of sections 2 and 7 (2) of the VAT Act, 2013 contravened article 40 of the Constitution on the right to property – Constitution of Kenya, 2010, articles 40 and 201; Value Added Tax Act, 2013, sections 2, 7(2), 9 (1) (c) and (d) and 57.

Tax Law – Value Added Tax (VAT) – exemption from payment of VAT – exemption from payment of VAT vis-à-vis zero-rating – whether the appellant was exempted from payment of VAT on its imports – Value Added Tax Act, 2013, sections 2 and 7(2).

Civil Practice and Procedure – default judgment – default judgment against the Government – default judgment in enforcement of the provisions of the Bill of Rights under article 22 of the Constitution – whether default and/or interlocutory judgment could be entered against the Government in enforcement of the provisions of the Bill of Rights – Constitution of Kenya, 2010, article 22; Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rule 16.

Brief facts

Following a demand notice from the 3rd respondent requiring the 1st appellant to pay arrears in unpaid import Value Added Tax (VAT) for the period between January, 2008 and November, 2013, the appellants petitioned the trial court for protection claiming *inter alia* that the 1st and 2nd schedules to sections 2 and 7 (2) of the VAT Act, 2013 contravened article 201 of the Constitution on the principles and framework of public finance. That the 1st appellant's rights not to be arbitrarily deprived of property was equally violated by the Act, whose application had the effect of depriving the 1st appellant of the VAT exemptions which it had enjoyed over the years.

The trial court dismissed the petition. The appellants aggrieved by the dismissal instituted the instant appeal complaining *inter alia* that the impugned judgment did not consider article 47 of the Constitution; that the trial court in error did not find that the VAT Act, 2013 discriminated against the appellants as well as other local pharmaceutical manufacturers in Kenya by requiring them to pay VAT on imported raw and

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packaging material while exempting foreign manufacturers of those items; that the trial court ought to have found that there was estoppel, the law having previously exempted the Appellants from payment of VAT; and that the trial court ought to have entered default judgment against the 2nd respondent who did not file any response to the petition or made any arguments before the trial court.

Issues

- i. Whether the local pharmaceutical manufacturers in Kenya were exempted from the application of the law requiring payment of value added tax on its imports.
- ii. Whether by the enactment of value added tax Act, 2013 and the demand to the local pharmaceutical manufacturers in Kenya to pay import value added tax arrears amounted to violation of their right to property.
- iii. Whether zero-rating implied exemption from payment of value added tax.

Relevant Provisions of the Law

Constitution of Kenya, 2010;

Article 40: Protection of right to property

40. (1) *Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—*
 - (a) *of any description; and*
 - (b) *in any part of Kenya.*
- (2) *Parliament shall not enact a law that permits the State or any person—*
 - (a) *to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or*
 - (b) *to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).*

Held

- 1 In the enforcement of constitutional rights and fundamental freedoms, the rules did not provide for default or interlocutory judgment as did the Civil Procedure Rules. Instead it encouraged determination of any violation or threatened violation on merit through a hearing irrespective of the form it took.
- 2 The burden of proving, on a preponderance of evidence, the existence of facts rested on the appellants. To demonstrate that it enjoyed the exemption, the 1st respondent cited section 8 (2) of the repealed Value Added Tax Act (VAT Act) and the fifth schedule (Part B), both of which dealt with zero-rating. Zero-rating was described under section 8 (1) and section 8 (3) of the repealed VAT Act.
- 3 From those provisions and from the concession by the respondents that when those provisions were in force, though the goods in law attracted tax, in terms of section 8 (1) of the Repealed VAT Act, the 1st appellant was not required to pay import VAT since the goods were among those zero-rated for the period between 1995 and 2000. The Eighth schedule, part B, item 22 specified for the zero-rating raw materials for manufacture of medicaments.
- 4 There was evidence that that incentive was removed in 2001 by the enactment of the Finance Act, 2001 which deleted part B, item 22 thus making raw materials for the manufacturing of medicaments subject to import VAT with effect from June 15, 2001. From that date on until 2013, raw and packaging materials for that purpose ceased to be zero-rated but were subject to payment of VAT at the rate of 16%, or any other rate determined by the relevant body. Any VAT refunds, therefore, made to any pharmaceutical manufacturer in respect of those items during that period, if at all, were in error and were, for that reason recoverable.
- 5 Section 135 (1) of the East African Community Customs Management Act, 2004 mandated the respondents, where any duty was short levied or erroneously refunded, to demand payment or a refund, as the case could be, from the person who should have paid the amount or to whom a refund was erroneously made. Such a person was required to pay the amount due upon receipt of the demand.

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The amount due was deemed to be due on the date on which the demand note was served upon him or her. The demand note had to be followed by payment within thirty days of the date of such service, failing which a further duty of a sum equal to five percent of the amount demanded would be due and payable by that person by way of a penalty and a subsequent penalty. But no such demand could be made after five years from the date of the short levy or erroneous refund, as the case could be, unless the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made, as the case could be.

- 6 A refund of VAT would amount to an entitlement, the arbitrary deprivation of which would amount to a violation of right to property. What the 1st appellant enjoyed up to 2000 was a tax incentive, enjoyed subject to the Constitution and the law. The unfettered power of the National Government under article 209 to impose, waive or vary any form of taxation, be the income tax, value-added tax, customs duties and other duties on import and export goods or excise tax, was subject only to one qualification; that no tax could be imposed, waived or varied except as provided by legislation.
- 7 It could not be a violation of the Constitution if the Constitution itself had permitted it. It could not, similarly constitute arbitrary deprivation or an infringement of a right to property if the deprivation, if any, was in accordance with the law. The benefit the 1st appellant claimed to have been entitled to was terminated in the year 2000. There had been no dispensation since then until 2014 with the passage of VAT (Amendment) Act, 2014. The appellants had failed to demonstrate to the court that they enjoyed any exemption or zero-rating on their imports after that period.
- 8 The 2014 amendment to the VAT Act was not a corrective measure informed by the realization by the State that the 2013 Act took away proprietary rights of the local pharmaceutical manufacturers. One of the characteristics of a tax system was flexibility; one which easily responded to changes in the economy and the Government's economic and fiscal goals. There were fiscal conditions prevailing in 2014 and the changing circumstances that necessitated those amendments of 2014. One such obvious circumstance, was the Constitution of Kenya, 2010 where, for example article 201 enjoined the Government in matters of public finance, to, among other considerations, promote an equitable society by fair sharing of the burden of taxation. If the amendments were introduced to right a wrong committed against pharmaceutical manufacturers by the 2013 Act, nothing could have been easier than to provide for a relief in those amendments in the form of a refund to correct those so-called wrongs.
- 9 A dispensation extended in form of exemption or zero-rating in tax for the time being could not constitute a justiciable right. If it was subsequently taken away, the complaint raised in the petition, in that sense, did not meet the constitutional muster of the concept or definition of property under articles 40 and 260.
- 10 Although the appellants had correctly conceded. There could not be an estoppel against a statute, in terms of article 2 (4) of the Constitution, no law could be passed in contravention of the Constitution. Estoppel could not be used to circumvent constitutional provisions and to override express statutory procedures. There could be no estoppel against a statute.
- 11 Before a person could rely on the doctrine of legitimate expectation, that person had to demonstrate that there was an express, clear and unambiguous promise; that the promise was not kept; that as a result, the decision made in breach of that promise affected him by depriving him of some benefit or advantage which either;
 - a. he had in the past been permitted by the decision maker to enjoy and which he could legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or
 - b. he had received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.
- 12 The expectation ought, in itself be legitimate, reasonable and not contrary to the express provisions of the law.

Pharmaceutical Manufacturing (K) Co Ltd & 3 Others v The Commissioner General of the Kenya Revenue Authority & 2 Others

- 13 Those strictures were not met in the petition. For example, there was no promise or assurance by the State to the 1st appellant that VAT would not be adjusted. Whatever exemption the 1st appellant enjoyed; it was expressly for the time being in terms of sections 8(1), (2), and (3) of the VAT Act. No such a promise could be made. If the 1st appellant nursed such an expectation then it was not only mistaken but also unreasonable since the legislative authority resided in the Parliament, and so long as that mandate was discharged in accordance with the Constitution, it could not be challenged. Thus, the reliefs of *certiorari*, *mandamus* or prohibition were not available to the appellants.

Appeal dismissed with costs

Kenya Revenue Authority & Commissioner of Domestic Taxes v Republic (Ex parte) Kenya Nut Company Limited

A Kenyan entity trading with a non-resident person not having a permanent establishment in Kenya, is obliged to deduct and remit withholding tax

Headnote: The instant appeal arose from a decision of the High Court that quashed the decision of the Kenya Revenue Authority to levy withholding tax from a foreign entity after it was disclosed that payment had been made at source. The respondent had accused the appellants of breaching the respondent's legitimate expectation that no withholding tax was expected to be collected by it from foreign traders after it was disclosed that payment had been made at source. The Court of Appeal held that legitimate expectation could only operate within the confines of the law and it could only be legitimate if founded in the law. It could not, however be relied on to shield a person from paying tax. Even though a public body could create legitimate expectation, there had to be an express, clear and unambiguous promise given by a public authority, the expectation itself had to be reasonable, the representation had to be one that the decision-maker was competent to make and there cannot be a legitimate expectation against clear provisions of the law or the Constitution. The appeal was partly allowed.

Kenya Revenue Authority & Commissioner of Domestic Taxes v Republic (Ex parte) Kenya Nut Company Limited

Nairobi Civil Appeal No. 58 of 2015
Court of Appeal at Nairobi
W Ouko, D K Musinga and S Kantai, JJA
April 24, 2020

Tax Law – withholding tax – legal framework governing withholding tax – criteria for charging withholding tax – obligation and duty to deduct and remit withholding tax from a foreign entity trading with a Kenyan entity – whether Kenya Revenue Authority and the Commissioner of Domestic Taxes had jurisdiction to assess withholding tax – whether Kenya Revenue Authority and the Commissioner of Domestic Taxes exceeded their jurisdiction or acted against the law in assessing and demanding for withholding tax in a situation where payment was made at source and when it was not possible to deduct the tax from the overseas agents' commission – Income Tax Act, sections 10, 35 and 96.

Tax Law – withholding tax – penalties and interest charged on failure to deduct or remit withholding tax – which law was applicable to withholding tax between the year 2000 and 2004 – Income Tax Act, sections 35, 72D and 93; Income Tax (Withholding Tax Rules) 2001, rule 14A.

Civil Practice and Procedure – judicial review – nature and scope of judicial review – judicial review orders – orders of certiorari and prohibition – when were orders of certiorari and prohibition issued – whether aspects of merit review of administrative action could be included in judicial review – Constitution of Kenya, article 27.

Administrative Law – legitimate expectation – application of the principle of legitimate expectation – manner of application of the doctrine of legitimate expectation – what were the underlying tenets that guided the application of legitimate expectation?

Brief facts

The appellant carried out a tax audit on the respondent's business between 2002 and 2005. After being given an opportunity to provide an explanation on some of the issues arising from the audit, the respondent was ultimately informed through a letter dated October 1, 2007 that it owed Ksh. 33,534,855 in withholding tax based on the commissions paid to their overseas selling and marketing agents. The appellant assessed and demanded the said amount via a letter dated August 19, 2008 (assessment notice).

The respondent objected to the assessment and insisted that no withholding tax was owed. The respondent filed in the High Court (the trial court) a judicial review application. The trial court found merit in the motion and issued an order of certiorari and quashed, among others, the decision of the appellant contained in the letter dated August 19, 2008. Aggrieved by that decision, the appellant appealed to the Court of

Kenya Revenue Authority & Commissioner of Domestic Taxes v Republic (Ex parte) Kenya Nut Company Limited

Appeal on the grounds that it was the duty of the respondent to ensure that withholding tax was deducted and remitted to the appellants irrespective of whether the proceeds of sale were remitted to it or its agents.

Further, the appellant urged the court to find that the High Court erred when it found that there was no provision in the Income Tax Act that justified the levying of penalties and interests.

Issues

- i. Who had the obligation to deduct and remit withholding tax from a foreign entity trading with a Kenyan entity?
- ii. Whether Kenya Revenue Authority and the Commissioner of Domestic Taxes had jurisdiction to assess withholding tax where payment was made at the source to a foreign entity.
- iii. What amount of penalties and interest would be charged on failure to deduct or remit withholding tax?
- iv. What was the underlying tenet that guided the application of legitimate expectation?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 47 (2)

Fair administrative action

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Held

1. The remedy of judicial review was not concerned with reviewing the merits of the decision, but was concerned with the decision-making process itself. The remedy of judicial review ensured that the individual was given fair treatment by the authority to which he had been subjected. Substitution of the opinion of the court for that of the authority constituted by law to decide the matter in question was not the purpose of judicial review. Merit consideration could be entertained in exceptional cases, especially where it was shown that there was no evidence upon which such a finding could be made so as to render the finding unreasonable.
2. On account of consideration of proportionality and unreasonableness of a decision in issue, analysis of article 47 of the Constitution as read with the provisions of the Fair Administrative Action Act, there was a shift of judicial review to include aspects of merit review of administrative action. However, even if the merit of the decision was undertaken, the court had no mandate to substitute its own decision for that of the administrative body.
3. Orders of certiorari and prohibition were issued as a matter of discretion and judicial discretion was exercisable in the interests of justice, rationally but not capriciously or whimsically. The appellate court could only interfere with the exercise of that discretion if it was satisfied that the trial court misdirected itself in some matter as a result of which it arrived at a wrong decision, or if it was manifest from the case as a whole that the trial court was clearly wrong in the exercise of discretion and accordingly occasioned injustice.
4. Certiorari would issue to quash a decision already made and an order of certiorari would issue if the decision was made without or in excess of jurisdiction, or where the rules of natural justice were not complied with or for such like reasons.
5. Prohibition, on the other hand, was an order from the High Court directed to an inferior tribunal or body which forbade that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lay, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.
6. Under the Income Tax Act and the Kenya Revenue Authority Act, the Commissioner of Domestic Taxes (the Commissioner) wielded immense power and was generally responsible for the control and the collection of, and accounting for, tax. With that, the Commissioner was empowered to assess and recover tax from payers. By the same token he had discretion to, *inter alia*, refrain from assessing or

Kenya Revenue Authority & Commissioner of Domestic Taxes v Republic (Ex parte) Kenya Nut Company Limited

recovering taxes, penalties or interest. From the contents of the letters in question, nothing suggested that the appellants did not have jurisdiction to assess withholding tax, or that they exceeded their powers, or that their actions were in contravention of any law. In addition, the tax assessment was shared with the respondent by the appellant. The latter made comments in their letter to the appellants dated June 29, 2006 and even engaged tax experts, M/s Ernst & Young, to analyse the assessment. Further, there was a meeting between the parties to discuss the issues relating to that audit. At the meeting the respondent was availed an opportunity to state its position by providing certain details and particulars. In arriving at the impugned decision, the appellant had not observed the rules of natural justice.

7. Given its exposure and involvement in international trade, the respondent had the capacity to device practical technique, methods and systems that would ensure collection and remission of tax from source. For instance, provision ought to have been made in the contract between them and the foreign agents to ensure that at the point the commission was paid, withholding tax should have been factored in and thereafter remitted to the respondent.
8. It became the business of the Kenyan entity that was trading with a non-resident person not having a permanent establishment in Kenya, to ensure that withholding tax was deducted from the payment and remitted. That obligation was mandatory. The Kenyan entity was deemed to have full knowledge of the provisions of sections 10, 35 and 96 of The Income Tax Act (the Act).. To enter into a contract with foreign agents which allowed foreigners to deduct and retain at source their commissions without putting in place mechanisms of taking into account withholding tax was not only reckless on the part of the respondent but was also intended to deny the country revenue. The argument that the amount retained by the agents comprised commissions and expenses was immaterial. The respondent was under an obligation to identify and satisfy the appellants what portions were expenses and which ones were commissions.
9. Legitimate expectation could only operate within the law and it could only be relied on when the law had been complied with. It could not, however be relied on to shield a person from paying tax. Even though a public body could create legitimate expectation, for legitimate expectation to arise, there had to be an express, clear and unambiguous promise given by a public authority, the expectation itself had to be reasonable and the representation had to be one that the decision-maker was competent to make. There could not be a legitimate expectation against clear provisions of the law or the Constitution.
10. Amendments to section 35(6) of the Act gave the Commissioner power to impose such penalty as could, from time to time, be prescribed under the Income Tax (Withholding Tax Rules) 2001 (the Rules). Rule 14A of the Rules had prescribed that the penalty for failure to deduct or remit withholding tax for the purposes of section 35(6) of the Act, the Commissioner could impose a penalty equal to 10% of the amount of the tax involved, subject to a maximum penalty of one million shillings.
11. Rule 14A of the Rules was headed and specific to penalty for failure to deduct or remit withholding tax under section 35 of the Act. It was the relevant provision on the point under consideration. It was, however relevant only to that small extent. Rule 14 A of the Rules came into effect by virtue of Legal Notice No. 54 which took effect from July 1, 2004. The withholding tax demanded from the respondent was for the years 2000-2005. Rule 14A of the Rules could not apply to the years between 2000 and June, 2004. That period was covered by section 72D of the Act which had been introduced by Act No. 8 of 1997 and which increased the penalty to 20% from the original 15%. Section 94 of the Act provided that, in addition to the penalty under section 72D of the Act, a late payment interest of 2% per month would also be charged on any amount due until it was fully recovered, provided the interest did not exceed 100% of the principal tax owing. That was the extent to which the percentage payable on the penalty was adjusted.

Appeal allowed with costs. Percentage of penalty adjusted to 10% of the amount of the tax involved, subject to a maximum penalty of Kshs. 1,000,000 for the period July, 2004 to 2005.

Kenya Revenue Authority, Commissioner Customs Services & Julius Musyoki v Darasa Investments Limited**Judicial review orders cannot be issued on disputed facts underlying a dispute**

Headnote: The dispute in the instant case rightly fell within the scope of judicial review which was concerned with the decision-making process rather than the merit consideration of the decision in issue. On the face of it, it would seem the Trial Court could not have declined to hear the matter. However, the refusal by the appellants to clear the sugar was due to failure on the part of the respondent to produce evidence to show that the subject sugar was exempt from duty, that was when matters began to look like perhaps the judicial review forum was not the most efficacious in the circumstances. That was because judicial review did not avail parties' court room processes to thrash out disputed matters. Judicial review remedies were not available in matters where facts were disputed.

**Kenya Revenue Authority, Commissioner Customs Services & Julius Musyoki
v Darasa Investments Limited [2018] eKLR**

Civil Appeal No. 24 of 2018

Court of Appeal at Malindi

Alnashir R.M. Visram, Martha K. Koome, Wanjiru Karanja, JJA

April 11, 2018

Judicial Review - orders - granting of judicial review orders - where there were disputed facts-whether judicial review orders could be issued on disputed facts underlying a dispute - Evidence Act, section 107(1)

Jurisdiction - jurisdiction of the High Court - jurisdiction in judicial review applications - discretion of the High Court to issue judicial review orders-interference with the discretion to issue judicial review orders - what were the circumstances in which the Court of Appeal could interfere with the discretion of the High Court to issue judicial review orders - Fair Administrative Action Act, section 11

Judicial Review - judicial review proceedings - institution of judicial review proceedings - where there was an alternative provided for in statute - whether availability of an alternative remedy was a bar to judicial review proceedings - East African Community Customs Management Act, 2004, section 229 (1); Tax Appeals Act, section 12; Fair Administrative Action Act, section 9(4)

Brief Facts

The Cabinet Secretary of the National Treasury through Gazette Notice No 4536 dated May 12, 2017 gave notice of a general exemption of duty on sugar imported between May 12, 2017 and August 31, 2017. Pursuant to the said waiver, the respondent imported 40,000 tonnes of brown sugar from Brazil, which was loaded in a vessel known as Anangel Sun (the vessel) on July 15, 2017 destined for arrival at a Port in Mombasa, Kenya on or about August 28, 2017. However, due to bad weather conditions on the high seas coupled with the fact that the vessel could not berth at the Mombasa Port because of its sheer size, the projected date of arrival was not met. The vessel proceeded to its next destination, Dubai, where the sugar consignment was offloaded and transhipped.

The Cabinet Secretary for National Treasury vide Gazette Notice No. 9802 amended the first notice to the effect that only the consignments which were shipped before the expiry date in the Gazette Notice 4536 would benefit from the extension of the said Gazette Notice. Thereafter, the respondent's consignment was transhipped from Dubai to Mombasa aboard a vessel known as MV Iron Lady. The consignment arrived at Mombasa between October 28, 2017 and October 30, 2017. The 2nd appellant vide a letter dated November 22, 2017 declined to exempt the respondent's consignment from payment of duty as provided under Gazette Notice No 4536 and as subsequently amended by Gazette Notice No 9801. The 2nd appellant claimed that the consignment did not meet the conditions of the Gazette Notices because of inconsistencies relating to the date of loading, place of inspection, certificate of origin and change of ownership.

Aggrieved by the appellants decision the respondent filed a judicial review application in the trial court. The

Kenya Revenue Authority, Commissioner Customs Services & Julius Musyoki v Darasa Investments Limited

trial court, after hearing the matter, issued orders in favour of the respondent. Aggrieved by the trial court's decision, the appellants filed the instant appeal.

Issues

- i. Whether judicial review orders can be issued on disputed facts underlying a dispute.
- ii. What were the circumstances in which the Court of Appeal could interfere with the discretion of the High Court to issue judicial review orders?
- iii. Whether availability of an alternative remedy was a bar to judicial review proceedings.

Relevant Provisions of the Law**East African Community Customs Management Act, 2004 (EACCMA)****Section 229 (1)**

A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

Tax Appeals Act**Section 12**

A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal.

Fair Administrative Action Act**Section 9(4)**

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

Held

1. Initially, the scope of judicial review and the remedies which could issue thereunder were set out in the Law Reform Act and Order 53 of the Civil Procedure Rules. The grounds upon which such review could be exercised by the trial court were where the administrative decision/action in question was deemed as being *ultra vires* or against the rules of natural justice. Similarly, the judicial review remedies which the trial court could issue were restricted to orders of *certiorari*, *mandamus* and prohibition.
2. Judicial review, judicial review was no longer a strict administrative law remedy as was the case in the past. Judicial review was an administrative law remedy and a constitutional fundamental. The right to fair administrative action, the right to written reasons for adverse administrative action and the right to judicial review of administrative action were enshrined in the Constitution as fundamental rights and freedoms to be enjoyed by every person subjected to administrative action. The remedies which could issue had since expanded from the traditional remedies to declarations, damages and injunctions as set out under section 11 of the Fair Administrative Action Act.
3. Judicial review orders were discretionary in nature and whenever the court was called upon to interfere with the exercise of judicial discretion, as in the instant case, it ought not to interfere with the exercise of such discretion unless it was satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the trial court was wrong in the exercise of discretion and occasioned injustice.
4. Jurisdiction was what clothed a court with the authority to entertain a matter before it and issue appropriate orders. A court either had jurisdiction or it did not have jurisdiction. It could not be inferred or presumed. The trial court erred in holding that the appellants had consented and acquiesced to the Trial Court's jurisdiction by participating in the judicial review proceedings.
5. In light of section 229(1) of the East African Community Customs Management Act, 2004 (EACCMA) and section 12 of the Tax Appeals Act, alternative remedies thereunder did not specifically relate to

Kenya Revenue Authority, Commissioner Customs Services & Julius Musyoki v Darasa Investments Limited

quantum or assessment of tax payable. The wording used thereunder was clear that any decision which was made by the Commissioner or any other officer under the respective Acts was subject to review by the Commissioner under section 229 of the EACCMA and appeal to the Tax Appeals Tribunal. Where the Constitution or statute conferred jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction had to be exercised in accordance with the Constitution or statute.

6. Availability of an alternative remedy was not a bar to judicial review proceedings. It was only in exceptional cases that the trial court could entertain judicial review proceedings where such alternative remedies were not exhausted. A reading of section 9(4) of the Fair Administrative Action Act revealed that the trial court or a subordinate court could, on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.
7. The dispute in the instant case rightly fell within the scope of judicial review which was concerned with the decision-making process rather than the merit consideration of the decision in issue. On the face of it, it would seem the Trial Court could not have declined to hear the matter. However, the refusal by the appellants to clear the sugar was due to failure on the part of the respondent to produce evidence to show that the subject sugar was exempt from duty, that was when matters began to look like perhaps the judicial review forum was not the most efficacious in the circumstances. That was because judicial review did not avail parties' court room processes to thrash out disputed matters.
8. The respondent's contention that it was not given an opportunity to be heard held no water. Such an opportunity was given to the respondent when it was asked to clarify the issues regarding several inconsistencies relating to the date of loading, date and place of inspection, certificate of origin and change of ownership.
9. The 2nd appellant's letter dated November 22, 2017 set out the reasons for the decision thereunder. The duty to give reasons and the nature and extent of the reasons envisaged by article 47(2) of the Constitution was dependent on the character and limits of the administrative discretion conferred on the administrator by the Constitution or law and its application to the facts of the case. The need to take into account relevant considerations and ignore irrelevant facts in the decision making had close nexus with the need to act reasonably. By scrutinizing the requisite shipping documents the appellant could not be said to have taken into account irrelevant matters.
10. Shipping documents were essential in establishing whether the consignment had been shipped within the requisite time frame. One of such requisite documents was a Bill of Lading. Apart from acting as a title to the goods specified thereunder, a Bill of Lading also acted as a receipt of the goods by the carrier, that was, acknowledgment that the goods in question had been received by the owner of the ship or his agent. Consequently, the date on such a Bill of Lading was *prima facie* evidence of the date the goods were loaded onto a vessel.
11. In the instant case there were two sets of Bills of Lading issued on July 15, 2017 in Brazil and October 17, 2017 in Dubai, that raised questions as to when the sugar consignment was loaded onto a vessel destined for Mombasa port. The date upon which the sugar consignment was loaded was uncertain. As the Trial Court accepted matters were disputed and the decision being challenged was fundamentally to do with the date of loading of sugar for a port in Kenya, the trial court erred by proceeding to issue judicial review orders on disputed facts as the underlying dispute of whether the consignment of sugar was loaded between May 12 to August 31, 2017 as per the Gazette Notices remained unresolved.
12. Judicial review remedies were not available in matters where facts were disputed. To the extent that the trial court despite cautioning itself delved deep into the evidence to consider letters dated January 12, 2018 and January 29, 2018 which were authored way after the decision contained in the letter dated November 22, 2017 was made and during the litigation, the trial court acted beyond the scope of its jurisdiction. The trial court substituted its own opinion of the matter with that of the 2nd appellant or the administrator. It was the 2nd appellant's mandate to clear goods according to the law and unless it was established there was a breach of the law, impropriety or unreasonableness, the court could not substitute its own opinion with that of the mandate holder.

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13. Assuming that the letters established that the vessel left the port in Brazil in July, 2017 and was within the Kenya waters, they still did not address the inconsistencies with regard to when the respondent's consignment was loaded in a vessel destined for a port in Kenya according to the two Gazette Notices. The disputed facts were a good candidate for a normal court room trial where parties could conduct discovery, examination and cross examination of witnesses.
14. The 2nd appellant found that the respondent had not established that the consignment had been shipped within the exemption period, hence the issue of legitimate expectation could not arise. The promise made to the general public was that they had to import sugar and provide proof that the consignment of sugar was loaded in a vessel for a port in Kenya within the dates of May 12, to August 31, 2017. In the event that the 2nd appellant found the respondent did not provide clear evidence of the time of loading, there was no legitimate expectation.
15. There was no evidence that the appellants subjected the respondent to differential treatment or discrimination by allowing the consignment of sugar belonging to the other 13 companies who were subject to the amended Gazette Notice to be cleared duty free without complying with the condition attendant thereto. There was no evidence to show that the documents presented by the other 13 importers had the same inconsistencies as those presented by the respondent. The trial court erred in holding that the appellants' decision was unreasonable, unlawful and procedurally deficient.

Appeal allowed.

Orders

- i. *Orders issued by the High Court in the ruling dated February 22, 2018 set aside and substituted with an order dismissing the respondent's application.*
- ii. *Each party to bear its own costs both in the High Court and in the Appeal.*

Five Forty Aviation Limited v Kenya Revenue Authority & 3 others

The enforcement of the repealed Legal Notice No. 100 of 2011, whose effect was to increase Air Navigation Services charges (ANS), as concerned the period before its repeal is unreasonable

Headnote: The main issue before the court was whether the charges applicable before the enactment of Legal Notice No 100 of 2011 would apply to the period when that Legal Notice was in effect due to the fact that it was found unsuitable and was repealed. The Court of Appeal held that the demand notice and agency notices issued after the repeal of subsidiary legislation, Legal Notice No. 100 of 2011 (Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011), created an expectation that the charges and fees would be levied according to the regulations prior to the repeal or under the new regulations. Upon involving the appellant in reforming the charges and upon adoption of the recommendations, the appellant had an expectation that it would not be condemned to pay charges under the repealed Legal Notice. The respondents should have balanced all aspects of unfairness to determine whether in the circumstances, by applying the rates in the revoked Legal Notice, there would be conspicuous unfairness. The respondents did not consider the aspects of unfairness while issuing the demand and agency notices against the appellant and for that reason the notices should have been quashed.

Five Forty Aviation Limited v Kenya Revenue Authority & 3 others

Civil Appeal No 134 of 2015
Court of Appeal at Nairobi
M K Koome, F Sichale & J Mohammed, JJ A
March 31, 2017

Judicial Review - grounds for judicial review - judicial review remedies - expectation and unreasonableness - whether an acknowledgement that a repealed Legal Notice was unsuitable to a certain industry would create a legitimate expectation that such a Legal Notice would not be enforced as far as the period between its enactment and repeal was concerned - whether it was reasonable for such a repealed Legal Notice to be enforced in relation to the period between its enactment and its repeal.

Brief facts

The Minister in charge of Civil Aviation, published Legal Notice No. 100 of 2011 whose effect was to increase Air Navigation Services charges (ANS) as from November 1, 2011. Civil aviation stakeholders complained about the increased charges and regulatory fees. In response, several stakeholder meetings were held and a ministerial committee was constituted. The result was that the ANS charges as well as regulation fees were revised.

Thereafter, the Kenya Revenue Authority issued a demand notice to the appellant seeking ANS charges amounting to 67 million Kenya shillings. The charges were based on Legal Notice No 100 of 2011. The sums for which demand was made related to the period between November 2011 and August 2012. The appellant lodged judicial review proceedings seeking orders of *certiorari* and prohibition to quash the demand letters and the agency notice issued to various banks in relation to the demand for the total sum amounting to KES. 101, 455, 818/=.

The High Court dismissed the judicial review application and found that Legal Notice No 100 of 2011 was in effect until its revocation on November 1, 2012 via Legal Notice No. 110 of 2012, Civil Aviation (Regulatory fees and charges for Air Navigation Services) Regulations, 2012 published on October 5, 2012. The High Court generally found that the Kenya Revenue Authority had not overstepped its mandate in making the demands and seeking to recover the sums allegedly due.

Issues

- i. Whether it was reasonable to demand payments (Air Navigation Services charges) on the basis of Legal

Five Forty Aviation Limited v Kenya Revenue Authority & 3 others

Notice No 100 of 2011, given that the need for the revision and reform of the Legal Notice, as well as its unsuitability to the industry it applied was acknowledged.

- ii. Whether acknowledgement, in the form of setting up revision and reform mechanisms, that a Legal Notice was unsuitable, created a legitimate expectation that the Legal Notice, which was repealed, would not be enforced, as concerned the period between its enactment and its repeal.

Held

1. In judicial review, the High Court was not concerned with the merits of the decision by a public or statutory body. Instead, it had to undertake a consideration of the procedures used to arrive at the decision in order to ensure that the decision took into account the rules of natural justice and due process.
2. The key question was on whether the 1st respondent acted reasonably and fairly by demanding on November 25, 2012, the payment of charges under the repealed Legal Notice. It was noteworthy that during the consultations, the impugned Legal Notice was not set aside. Additionally, Legal Notice No 109 and 110 of 2012, which revoked and revised the impugned Legal Notice could not operate retroactively.
3. The appellant contended that it did not challenge the repealed Legal Notice because of its involvement in the repeal committee whose outcome was the revocation of that Legal Notice. There was a gap or grey area left as concerned what the stakeholders in the industry were to expect after the review. The 2nd respondent, Kenya Civil Aviation Authority, owed a duty of care to clarify to the industry stakeholders what to expect after the review and for that reason the 1st respondent found that demands and notices for payment were unreasonable and unfair.
4. The High Court failed to appreciate the context in which the appellant was operating, including the appellant's involvement in a reform committee set up by the 2nd respondent. Due to that context, the 2nd respondent had a duty to explain to the industry, and also the 1st respondent, the problems related to Legal Notice No 100 of 2011, in the spirit of creating good order in the industry. Calling upon the appellant to pay the charges brought genuine grievances and that was an unreasonable decision which was amenable to judicial review.
5. In executing its mandate, the 1st respondent had discretion to determine the levies or charges payable where it was satisfied that a person or entity had failed to pay taxes. That discretion would not be exercised capriciously or arbitrarily.
6. The respondents admitted that there was a problem with Legal Notice No 100 of 2011 and worked at fixing that problem with industry stakeholders, including the appellant. The 2nd respondent could not simply let the appellant suffer detriment by paying levies and charges which were found unsuitable for the aviation industry.
7. Since the demand notice and agency notices were issued after the repeal of Legal Notice No. 100 of 2011, the appellant was justified in expecting that the charges and fees would be levied according to the regulations prior to the Legal Notice No. 100 of 2011 or under the new regulations. In involving the appellant in reforming the charges and adopting the reform recommendations, there was an acknowledgement from the respondents, which gave the appellant a legitimate expectation that it would not pay charges under the repealed Legal Notice.
8. The respondents did not consider aspects of unfairness in issuing the demand and agency notices against the appellant. For that reason, the notices ought to have been quashed and the matter referred to the 1st respondent to make fresh decisions while taking into account aspects of unfairness in applying Legal Notice No 100 of 2011.

Appeal allowed.

Okiya Omtatah Okioti v Attorney General & another

Chapter 5: Keeping and production of records

The provisions of section 6, 57, 58, 59 and 100 of the Tax Procedures Act 2015 are constitutional and were not contrary to the provisions of the constitution

Headnote: The petitioner contended that the provisions were unconstitutional as it allowed the Kenya Revenue Authority (KRA/ the 2nd respondent) to involve third parties in seeking information on a taxpayer. The petitioner contended that the provisions gave KRA's Commissioner-General (the Commissioner) and his or her authorized officers sweeping powers allowing them to act ultra vires and inconsistently with articles 1, 2, 3 (1), 24, 31 (c), 47 and 50(2) of the Constitution. The petitioner alleged that section 59 of the Act infringed on the right to privacy as protected under article 31(c) of the Constitution. He further asserted that sections 57, 58(2) and 99 reinforced the rogue powers assigned to the Commissioner under section 59 of the TPA. In light of that claim, the petitioner sought that the provisions be declared unconstitutional. The right to privacy could be limited within the law and in the instant case the limitation of the right was done with the aim of protecting the public's interest over the interests of individuals who wished to circumvent the law for their own gain. The coercive powers granted to the KRA by the challenged provisions were aimed at achieving a legitimate purpose. If the Commissioner or his authorized officers acted arbitrarily in the process of exercising those powers, then recourse could be had to the courts by any person aggrieved by the actions of the 2nd respondent's officers.

Okiya Omtatah Okioti v Attorney General & another [2020] eKLR

Petition 156 of 2017
High Court at Nairobi
WK Korir, J
February 20, 2020

Constitutional Law – fundamental rights and freedom – right to privacy – claim that the Kenya Revenue Authority violated the right to privacy during assessment of tax – whether by exercising its powers to ensure tax collection, the Kenya Revenue Authority compromised the tax payer's right to privacy – Constitution of Kenya, 2010, article 30

Constitutional law – fundamental rights and freedoms – right to a fair trial – the right to silence and the right not to incriminate oneself – whether the requirement to furnish the tax collector with information regarding tax liability violated a person's right to silence and the right to not incriminate oneself – Constitution of Kenya, article 50 (2)

Constitutional Law – fundamental rights and freedoms – right to fair administrative action – whether the impugned provisions had safeguards that ensured that the taxpayers received fair administrative action from the tax collector whenever the need arose to put a particular taxpayer through the administrative process – Constitution of Kenya, 2010, article 47

Brief Facts

The petitioner filed the instant petition that expressed his apprehension concerning sections 57, 58(2), 59 and 99 of the Tax Procedures Act No. 29 of 2015 (the Act). The petitioner contended that the provisions were unconstitutional as it allowed the Kenya Revenue Authority (KRA/ the 2nd respondent) to involve third parties in seeking information on a taxpayer. The petitioner contended that the provisions gave KRA's Commissioner-General (the Commissioner) and his or her authorized officers sweeping powers allowing them to act ultra vires and inconsistently with articles 1, 2, 3 (1), 24, 31 (c), 47 and 50(2) of the Constitution. The petitioner alleged that section 59 of the Act infringed on the right to privacy as protected under article 31(c) of the Constitution. He further asserted that sections 57, 58(2) and 99 reinforced the rogue powers assigned to the Commissioner under section 59 of the TPA. In light of that claim, the petitioner sought that the provisions be declared unconstitutional.

Okiya Omtatah Okoiti v Attorney General & another**Issues**

- i. Whether by exercising its powers to ensure tax collection, the Kenya Revenue Authority compromised the tax payer's right to privacy.
- ii. Whether the requirement to furnish the tax collector with information regarding tax liability violated a person's right to silence and the right to not incriminate oneself.
- iii. Whether the impugned provisions had safeguards that ensured that the taxpayers received fair administrative action from the tax collector whenever the need arose to put a particular taxpayer through the administrative process.

Held

1. There existed a rebuttable presumption that a piece of legislation was constitutional until it was proven otherwise. It was the duty of the person who alleged that an Act of Parliament or a provision thereof was unconstitutional to prove that the impugned law was in fact unconstitutional.
2. Section 2 and 4 of the Tax Procedures Act (TPA) mandate to the KRA and its Commissioner were expansive within the realm of tax collection in order to ensure that all taxpayers comply with tax collection and tax return requirements.
3. The right to privacy was an integral concept in a democratic society. The right could however be limited so long as the limitation was within the bounds of existing law and it was done in a manner which was not arbitrary. The right to privacy was not an article 25 right. The right could therefore be limited by the law. Where it was alleged that a constitutional right or fundamental freedom had been infringed it was important to establish whether that infringement was justified in line with article 24(1) of the Constitution.
4. It was obvious why the government collected taxes and why it was important that all taxpayers comply with tax laws. There was therefore a sufficient and substantial reason for the limitation of the right, as it was the KRA's mandate to ensure that all citizens abide by the laws relating to taxes and where they failed to do so they were properly brought to justice with sufficient evidence to support the allegation.
5. There was need to balance the interests of an individual with those of the society at large. In interpreting an Act of Parliament, the document must be read as a whole in order to understand the lawmaker's intention. The provisions which the petitioner claimed were unconstitutional should be read alongside the other provisions of the TPA.
6. The petitioner's argument that the Commissioner could exercise the powers granted by the impugned sections without a warrant does not stand in light of the provisions of section 60 (1) of the TPA. It was obvious that the Commissioner and the authorized officers had to comply with the provisions of section 60 before doing some of the things the petitioner was complaining of. The alleged intrusive and oppressive powers given to the Commissioner were thus blunted and muted by that provision.
7. Tax collection was grounded on constitutional provisions. The tax collector must be facilitated by the laws to achieve that mandate. The laws that facilitated KRA in the execution of its work should comply with the Constitution. The petitioner had not demonstrated that the powers granted to the Commissioner by the impugned provisions were unreasonable and unjustified in a democratic society.
8. If the effect of the measure on the right and freedoms it limits were exceptionally severe on the individual's or group's rights then the measure could not be justified by the purposes it was intended to serve. The effect of the limitation of the right to privacy was minimal as the right was only limited in relation to the tax information of the individual. The limitation did not affect the right to privacy in respect of any other information relating to the individual's family or private affairs. In any case, the powers granted to the Commissioner were only meant to be engaged where there was doubt about the veracity of an individual's tax assessment.
9. The KRA was sworn to confidentiality by Section 6 of the TPA. The provision required the KRA to ensure that any documents or information obtained by the Commissioner or authorized officer in the course of duty shall be confidential. The information or documents could however be disclosed in the administration of a tax law to a variety of stakeholders who had the authority to deal with such

Okiya Omtatah Okoiti v Attorney General & another

information or documents such as the Auditor-General in the exercise of their official duties.

10. The right to privacy could be limited within the law and in the instant case the limitation of the right was done with the aim of protecting the public's interest over the interests of individuals who wished to circumvent the law for their own gain. The coercive powers granted to the KRA by the challenged provisions were aimed at achieving a legitimate purpose. If the Commissioner or his authorized officers acted arbitrarily in the process of exercising those powers, then recourse could be had to the courts by any person aggrieved by the actions of the 2nd respondent's officers.
11. Most of the powers granted to the Commissioner may not be exercisable without a warrant being first obtained. Any evidence obtained in exercise of the powers granted to the Commissioner would be subject to challenge in a criminal trial and the trial court would be entitled to determine the admissibility of such evidence.
12. The "*required records doctrine*" essentially allowed the government to require individuals to keep the kinds of records it most wanted to subpoena and to claim that those "required records" were not privileged, thereby circumventing constitutional limitations on compulsory record-keeping and production of documents. The doctrine allowed the government to acquire certain private documents from individuals by claiming that the same could not be protected under privilege as they were required by the government entity for a given purpose. The required information was that relating to tax liability.
13. The privilege not to incriminate oneself could not be used to get away with a crime nor can it be used to make oneself immune to a duty imposed on all other citizens, especially those who abide by the law. It was on the taxpayers to do their part in properly abiding by the tax law so as to not arouse the suspicions of the KRA who had the mandate to engage with them on the accuracy of their tax compliance. The impugned provisions did not infringe on the rights under article 50 (2) of the Constitution; being the right to silence and the right not to incriminate oneself.
14. Taxpayers were given an opportunity to object to a tax decision and appeal, an appealable decision, to the Tax Appeals Tribunal, the High Court and ultimately the Court of Appeal. A section or sections of a law should not be read in isolation of the other provisions of that law.
15. The impugned provisions were only meant to enforce the tax laws after a taxpayer failed to self-assess for tax purposes or once it was evident that a taxpayer was dishonest. The Act as a whole had safeguards that ensured that the taxpayers received fair administrative action from the tax collector whenever the need arose to put a particular taxpayer through the administrative process. The impugned provisions did not violate the right to fair administrative action as the TPA incorporates provisions which were in line with the requirements of article 47 of the Constitution and the Fair Administrative Actions Act, 2015.
16. The petitioner had not met the threshold of proof required in the institution of constitutional petitions. The petitioner had not argued with reasonable precision how the impugned provisions, or the Act for that matter, violated the right to fair administrative action.
17. The petitioner appeared to hint that the Commissioner had exercised his powers in a rogue manner by referring to newspaper cuttings as evidencing the allegation. Newspaper cuttings did not have any evidential value. Statements contained in a newspaper amounted to hearsay evidence and therefore was inadmissible without formal proof by the maker of the statement before the court.
18. Costs followed the event. However, the court retained the discretion in deciding the issue of the award of costs. That discretion must be exercised judiciously and must not be exercised arbitrarily. It should also be exercised in accordance with reason and justice. The instant case being a constitutional petition, and there being no evidence that the petition was malicious or was brought with a view to wasting the court's time, each party ought to meet their own costs of the petition.

Petition dismissed.

Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex-Parte Unilever Tea Kenya Limited**A tax payer was not obliged to keep records relating thereto for more than 5 years**

Headnote: The *ex-parte* applicant averred that the respondent was exceeding his jurisdiction by demanding documentation that was statute barred as more than five years have lapsed since the supplies to which the decision was related were made reference to Regulation 7(6) of the VAT Regulations a tax payer was not obliged to keep records relating thereto for more than 5 years. The law appreciated that due to financial volatility in business transactions there ought to be a cut-off point so that business people ought to rest assured that after a certain period of time they will not be unduly harassed hence were at liberty to dispose of their records. To suddenly demand records from taxpayers when the law expressly gave them the liberty to dispose of the same was clearly unreasonable.

Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex-Parte Unilever Tea Kenya Limited [2017] eKLR

Miscellaneous Civil Application 668 of 2007

High Court at Nairobi

GV Odunga, J

July 19, 2017

***Tax Law** – assessment of tax – request for records during tax – imposition of additional tax – request for a tax payer’s record that were more than 5 years old and statutorily due for disposal – whether the tax collector’s decision to demand for records that had been in existence for over 5 years was unfair and an abuse of power – whether the decision to impose additional tax was unjustifiable and breached the right to legitimate expectation – whether the applicant was entitled to a refund from the tax collector – Constitution of Kenya, articles 10 and 47; Value Added Tax Regulations, regulation 7(6)*

Brief Facts

According to the applicant, it had been producing and manufacturing tea in Kenya for more than 80 years during which time it had at all times conducted its business with integrity and under independent professional advice. The applicant sought to quash the respondent’s decision wherein it demanded payment of Value Added Tax (“VAT”) and confirmed the applicant’s assessment dated December 21 2006.

The *ex parte* applicant averred that the respondent was exceeding his jurisdiction by demanding documentation that was statute barred as more than five years have lapsed since the supplies to which the decision was related were made and the assessment dated December 21 2006 was issued. Based on the same advice, the *ex parte* applicant averred that as it was not the exporter of the tea, there was no statutory requirement upon the applicant to provide proof of exportation and the respondent had no jurisdiction to demand such proof from the applicant.

The applicant also sought an order of Mandamus compelling the respondent to refund the excess input VAT which had been wrongfully and unlawfully withheld by the respondent. The *ex parte* applicant prayed that the assessment dated March 8 2007 be quashed and an order of Mandamus be granted to compel the respondent to process the applicant’s VAT refunds.

Issues

- i. Whether the tax collector’s decision to demand for records that had been in existence for over 5 years was unfair and an abuse of power .
- ii. Whether the decision to impose additional tax was unjustifiable and breached the right to legitimate expectation.
- iii. Whether the applicant was entitled to a refund from the tax collector.

Held

1. Even though taxation was acceptable and even essential in democratic societies, taxation laws that had

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the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. It was paramount that their provisions must be express and clear so as to leave no room for ambiguity. Any ambiguity in such a law must be resolved in favour of the taxpayer. The court was not entitled to attempt a discovery at the intention of the Legislature but must restrict itself to the clear words of the statute. Whereas the Court appreciated the need to collect taxes, in carrying out their statutory obligations, the tax authorities had to adhere to the law.

2. The business world transacts billions of shillings hence public policy demanded that those who were involved in such transactions had some measure or certainty and predictability in the manner in which they conducted their affairs. It was important that they knew where they stood with respect to their investments and liabilities so that they could order their activities in a certain direction. The financial public in particular required decisiveness and finality in such decisions and they should not be left to harbour apprehension that the steps they took at that time could be reversed and their investments or expenditure wasted by reason of belated actions taken by those in authority after the lapse of time lulled them into a false sense of security that no such adverse action would be taken. The economy with the existing volatile financial markets could not afford to have such uncertainty.
3. The exercise of statutory power must be so undertaken in a manner that was fair and just to the people against whom the same was being exercised. Statutory powers could only be exercised validly if they were exercised reasonably, rationally and properly and no statute ever allowed any public officer to exercise statutory power arbitrarily or capriciously. The exercise of public power whether permitted or otherwise in a manner that frustrated the purpose for which the power was granted amounted to abuse of the same.
4. The respondent by its conduct induced in the *ex parte* applicant a sense of security that it was satisfied with the applicant's explanation for its inability to secure the required documents. It did that by not immediately disputing the *ex parte* applicant's explanation and the subsequent payment of refunds. Whereas legitimate expectation did not derogate from the express provisions of the law, when it came to the consideration of legitimate expectation, it was the effect of the conduct of the authority concerned that came into focus. Where the inability by the taxing authority to discover the actual taxes payable was as a result of concealment by the tax payer, the tax payer could not hide behind legitimate expectation to escape the payment of taxes.
5. Where the taxing authority goes to sleep and as a result lulls the taxpayer into a false sense of security that the taxes in question would not be demanded or pursued, as a result of which the tax payer loses recourse which would have been legally available to it had the tax been demanded promptly, it would be unfair and unjust for the demand to be sustained.
6. In reference to regulation 7(6) of the VAT Regulations a tax payer was not obliged to keep records relating thereto for more than 5 years. There was a good reason for that. It was not that after 5 year the tax payer was likely to run out of storage facilities. The law appreciated that due to financial volatility in business transactions there ought to be a cut-off point so that business people ought to rest assured that after a certain period of time they will not be unduly harassed hence were at liberty to dispose of their records. To suddenly demand records from taxpayers when the law expressly gave them the liberty to dispose of the same was clearly unreasonable.
7. Where the delay in exercising statutory power led to injustice which would otherwise have been avoided and no explanation was forthcoming for such inaction the law must step in to ameliorate the injury. The respondent's actions and inactions legitimately created an expectation on the part of the applicant that the taxes were not payable. Legitimate expectation could arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant could reasonably expect to continue.
8. Regulation 10(1) of the VAT Regulations placed the onus to produce evidence of export on the licenced exporters to whom the applicant sold tea. Prior to January 26, 1999, there was no onus whatsoever on

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the applicant to maintain any form of evidence of exportation as it was not the exporter. Therefore, to demand that the applicant produces records which the law did not oblige it to have in the first place was clearly unreasonable and irrational. To impose a condition that did not exist previously retrospectively was clearly unreasonable.

9. If a public authority delayed in the exercise of its statutory power without justifiable grounds and as a result, the person against whom the power was exercised was exposed to unwarranted injury, the authority may be deemed to have intended to exercise its powers in order to achieve collateral purposes.
10. In the exercise of its mandate the respondent was expected to be guided by the national values and principles of governance in article 10 of the Constitution one of which was integrity. Efficiency in public finance was a component of integrity. A body entrusted with the collection of revenue ought not to be seen to be lethargic in the conduct of its affairs and whereas the law allowed the respondent a period within which to confirm its record, that period ought not to be taken as a derogation of article of 47 of the Constitution that required that administrative action be carried out expeditiously.
11. Since in making its decision the respondent was purportedly applying the law, it was constitutionally obliged pursuant to article 10(1)(c) of the Constitution to comply with the national values and principles of governance and that included the fair administrative action as enshrined in article 47 of the Constitution
12. The respondent was under a constitutional obligation to be efficient and when its failure to adhere to the constitutional decree rendered its decision unfair, the same was liable to be struck out as amounting to abuse of power. On the ground of legitimate expectation, abuse of or wrongful exercise power and irrationality the respondent's decision could not be allowed to stand.
13. The respondent was under an obligation to act upon the applicant's VAT refunds timeously and the failure to do so amounted to a breach of the applicant's right to a fair administrative action under article 47 of the Constitution. A taxpayer who carried own business in accordance with the law was entitled to a refund as a matter of right and the process of verification and processing the claim had, in the word of article 47 of the Constitution, be efficient and expeditious.
14. The financial public required decisiveness and finality in the conduct of their financial affairs and they should not be placed in limbo or a state of uncertainty for unnecessarily too long as to when their money will eventually be refunded to them. The economy with the current volatile financial markets could not afford to have such uncertainty. Therefore, where it had been ascertained that a tax payer was entitled to a refund, such refund ought to be made timeously and without unreasonable delay to enable them invest the same.
15. It would be contrary to justice to compel the applicant to pay the sum demanded by the respondent. To do so would be contrary to substantive fairness which dictates that a body must not act conspicuously unfairly, nor unfairly as to abuse its power, nor in unjustified breach of legitimate expectations.

Application Allowed.

Orders

- i. *An order of certiorari granted quashing the decision and order of the Commissioner of Domestic Taxes dated March 8, 2007 wherein he had demanded payment of Value Added Tax on the applicant's Local Sales for export.*
- ii. *An order of mandamus compelling the Commissioner of Domestic Taxes to refund the excess input Value Added Tax to the applicant which amounted to Kshs. 241,000,000.00 as at December 1 2006 was granted*
- iii. *The respondent shall pay the costs of the proceedings.*

Commissioner of Domestic Taxes v Altech Stream (Ea) Limited

The Tax Payer had the burden of proof to indicate that an assessment was excessive or decision was incorrect

Headnote: The appeal arose from a disputed tax assessment issued by the KRA (the appellant) to the respondent. At the Tax Appeals Tribunal, the tribunal allowed the appeal against the objection decision of the appellant and held that the respondent was entitled to a refund of the excess tax paid to the appellant less KES. 2,124,858.35 being VAT liability for 2013. Aggrieved the appellant filed the instant appeal, with the main question for determination being the burden of proof in tax disputes. The High Court held that section 56(1) of the Tax Procedures Act, 2015 and section 30 of the Tax Appeals Tribunals Act, 2013 vested upon the tax payer with the burden of proof. It was for the tax payer in any proceeding to prove that the tax decision was incorrect or assessment was excessive. The record showed that the respondent not only produced a detailed statement of facts, well supported by documentary evidence, but that it presented a witness at the trial who clarified the issues to the satisfaction of the Tribunal.

Commissioner of Domestic Taxes v Altech Stream (EA) Limited [2021] eKLR

Income Tax Appeal E138 of 2020

High Court at Nairobi

A Mabeya, J

June 30, 2021

Tax Law – tax assessment – disputed tax assessment – burden of proof – where additional evidence was provided by a tax payer with regard to their tax assessment – whether the respondent had discharged the burden of proof by providing sufficient explanations, documentation and witness testimony in support of its position on assessment – Tax Procedure Act, section 56 (1); Tax Appeal Tribunal Act, section 30

Civil Practice and Procedure – appeals – nature of appeals – second appeals – appeals on questions of law only – claim that the appeal to the high court covered matters of fact and was therefore incompetent – whether an appeal from the Tax Appeals Tribunal to the High Court that sought to challenge factual findings was incompetent.

Brief Facts

In 2015, the appellant initiated an audit on the respondent's operations for the years of income 2011 - 2015. The appellant notified the respondent of its audit findings and raised an assessment of KES.190,833,899/- as tax liability for corporation tax, value added tax (VAT) and withholding tax. The respondent objected to the assessment which was rejected by the appellant.

Aggrieved by the objection decision, the respondent filed an appeal in the Tax Appeals Tribunal. The tribunal allowed the appeal and held that the respondent was entitled to a refund of the excess tax paid to the appellant less KES. 2,124,858.35 being VAT liability for 2013. Being dissatisfied with part of the decision of the tribunal, the appellant instituted the instant.

The respondent contended that under section 56(2) of the Tax Procedures Act, an appeal to the High Court or Court of Appeal was on questions of law only. The instant appeal sought to challenge the findings of fact made by the Tribunal, hence the appeal was incompetent and should be dismissed.

It was further contended that there was no basis for the appellant's claim that the tribunal had misapplied the provisions of section 56(1) of the Tax Procedures Act and section 30 of the Tax Appeals Tribunal Act. That the respondent had discharged the burden of proof by providing sufficient explanations, documentation and witness testimony in support of its position. That the onus fell on the appellant to rebut the position which it failed to.

It was further contended by the respondent that although it was required to maintain documents for a period of five years from the end of the reporting date, that was never an issue in the proceedings before the tribunal. That it had lost documentation through no fault of its own and the appellant refused to provide

Commissioner of Domestic Taxes v Altech Stream (Ea) Limited

copies of the respondent's returns filed with KRA to assist in the reconstruction of its documentation to enable it to reconcile the variance. It urged that the appeal be dismissed.

Issues

- i. Whether the respondent had discharged the burden of proof by providing sufficient explanations, documentation and witness testimony in support of its position on assessment.
- ii. Whether an appeal from the Tax Appeals Tribunal to the High Court that sought to challenge factual findings was incompetent.

Held

1. A question of law was one which concerned the interpretation and construction of laws and the application of laws to the facts established by the trial court. The facts were only used by the appellate court to understand the background and context and to satisfy the court that the conclusions arrived at by the trial court was based on the evidence on record. All the grounds of appeal raised by the appellant pointed towards the way the Tribunal interpreted or applied the referred to provisions of the law to the facts. It was not correct that the appeal was incompetent for challenging the decision on facts.
2. Section 56(1) of the Tax Procedures Act, 2015 and section 30 of the Tax Appeals Tribunals Act, 2013 vested upon the tax payer with the burden of proof. It was for the tax payer in any proceeding to prove that the tax decision was incorrect or assessment was excessive. The record showed that the respondent not only produced a detailed statement of facts, well supported by documentary evidence, but that it presented a witness at the trial who clarified the issues to the satisfaction of the tribunal.
3. The respondent discharged its onus thereby shifting the evidentiary burden to the appellant. The appellant failed to discharge the same whereby the respondent was held to have proved its case. Accordingly, the tribunal did not misapply the said provisions either as alleged or at all.
4. In his communication, the appellant requested the respondent to provide him with certain documents. Those documents were well within the five (5) years bracket. The respondent failed to supply those documents but explained that they had been destroyed by a fraudulent employee. The respondent then proceeded to request the appellant to supply it with some of its records in respect of the tax previously filed with KRA. According to the respondent, that was to enable it reconstruct its records.
5. The respondent's evidence regarding the request for records within the five-year bracket was neither denied nor challenged. One would have expected that if the appellant did not agree with the same, he would have raised questions on it. Those would include, that it be supplied with the full particulars of the alleged perpetrator, the date(s) of destruction, evidence of any report(s) made to the authorities and whether that had been disclosed to the respondent's auditors and factored in its previous statement of accounts. Since the appellant was satisfied with the explanation given, as to the missing documents, the tribunal could not be faulted. The evidentiary burden shifted and lay with him.
6. Although the respondent had admitted not to have provided the documents requested, the tribunal was entitled to hold that the respondent had discharged its burden the moment the appellant failed to challenge and/or controvert the same. The appellant having been contented with the explanation given, he could not fault the tribunal for also being contented with the explanation as to the missing documentation.
7. As a sign of good faith, it was incumbent upon the appellant to supply to the respondent the documents relating to the previous returns as had been requested. By refusing to either supply the documents requested or respond to the request, the appellant was deemed to have been satisfied with the explanation given by the respondent and was bound thereby.
8. Whilst section 23 of the Tax Procedures Act burdened the tax payer with the responsibility of keeping the required documents for the noted period, where an acceptable explanation was given, which was accepted by the tax authorities, the burden would be deemed to have been discharged.
9. Both sections 29 (1) and 31 (1) of the Tax Procedures Act allowed the appellant, to make an assessment based on such information as may be available and to the best of their judgment. Some of the documents

Commissioner of Domestic Taxes v Altech Stream (Ea) Limited

crucial for assessment were not available for reason of destruction. The appellant resorted to grossing up withholding tax certificates to determine the taxable income.

10. There was nothing wrong perse in grossing over the withholding tax certificates as a means of determining the taxable income. However, the respondent was able to demonstrate to the satisfaction of the tribunal that in grossing up the withholding tax certificates for the years 2012 and 2013, the same would have amounted to double taxation. The respondent availed a witness who testified before the tribunal and demonstrated the likelihood of double taxation. Her testimony was not impeached.
11. The tribunal found as a matter of fact that; the respondent had matched its withholding tax certificates against the actual invoices. That matching was neither challenged nor faulted. The court could not impeach a finding of fact of the Tribunal unless it was made without evidence or was so perverse to be allowed to stand. That was not the case.
12. The Kshs. 119,536,768/= related to impaired debtors. The respondent contended and proved that the amount had been added back in its tax computation for the year 2013. That was contained in the returns of the respondent for the year in question. The appellant did not challenge those returns. The amount was there and the adding back of the same for purposes of tax computation could not be denied neither was it challenged.

Appeal dismissed.

Commissioner of Domestic Services v Computech Limited

Once a taxpayer adduces relevant evidence regarding a disputed assessment, the burden of proof shifted to the tax collector.

Headnote: The main question before the High Court was the circumstances under which the burden of proof in tax disputes shifted from the tax payer to the tax collector. The High Court held that section 107 of the Evidence Act provided that the party who alleged the existence of a fact must prove the same. The respondent had established a case, through documents, that it had purchased goods from the two 'missing traders'. Upon discharging that burden, the evidentiary burden then shifted to the appellant to justify his assessment.

Commissioner of Domestic Services v Computech Limited [2021] eKLR

Income Tax Appeal E097 of 2020

High Court at Nairobi

A Mabeya, J

June 24, 2021

***Tax Law** – assessment of tax – disputed tax assessment – burden of proof in a disputed tax assessment claim – where a tax regime was based on self-assessment – claim that the Tribunal had erroneously shifted the burden of proof to the tax collector – whether upon a tax payer submission of relevant documents to disprove a tax assessment, the burden shifted on the tax collector to disprove the documents – Tax Procedure Act, sections 56 (1)*

Brief Facts

Vide a letter dated April 16, 2018, the appellant issued a tax demand to the respondent following a review of the respondent's tax declarations. In its review, the appellant had found that the respondent had used for the period of June 2016 to July 2016, invoices from suppliers to account for input VAT. The same invoices were used to account for expenses in the financial statements thereby reducing the respondent's income tax liability. A tax assessment of KES.37,079,093.00 was raised against the respondent.

The respondent was aggrieved by the tax assessment and appealed against the decision to the Tax Appeals Tribunal (the tribunal). The tribunal delivered its judgment allowing the appeal. Being dissatisfied with the said judgment, the appellant appealed against the said decision and consequential order vacating the assessments of VAT of KES.12,897,228/- and corporation tax of KES.24,897,228/-

In opposition to the appeal, the respondent contended that the tribunal had considered all the relevant material placed before it and correctly held that the evidence before it supported the respondent's purchases and sales, the respondent's entitlement to a credit refund and that the respondent was not involved in any fraudulent VAT scheme.

It further asserted that it had discharged its burden of proof under the law as it had produced the relevant documentary evidence in support of its claim which the tribunal appreciated. That on the other hand, the appellant had not provided any evidence to support its allegation of fraud by the respondent.

Issue

Whether upon a tax payer submission of relevant documents to disprove a tax assessment, the burden shifted on the tax collector to disprove the documents.

Held

1. There was no issue before the Tax Appeals Tribunal (the tribunal) about insufficiency of records. The only record missing was the stock movement record. The tribunal could not be faulted for finding that the documents relied on by the respondent as sufficient, it could not be faulted. The appellant did not show what sort of documents were lacking or had failed to back the respondent's claim for the Tribunal

Commissioner of Domestic Services v Computech Limited

to be held to have erred in its finding.

2. The respondent provided the tribunal with evidence of: purchase orders, invoices, delivery notes, withholding VAT certificates, payments made to the suppliers for the goods delivered, agreements, delivery notes and invoices made to the respondent's customers for the goods delivered by the suppliers and sold to the respondent's customers. That documentary evidence was in the record of appeal and was not impeached.
3. There was no fault with the tribunal on its finding on the evidence adduced. Having produced the documents which were *prima facie* evidence of trading, the evidentiary burden of proof shifted to the appellant. The appellant did not impeach any of the said documents. Neither did he challenge them. The respondent had discharged its burden of proof under section 56(1) of the Tax Procedures Act.
4. All that the appellant alleged was that the alleged 2 suppliers did not supply the alleged goods and that the monies paid to them by the respondent found its way back to the respondent. The appellant did not offer any evidence to prove that allegation. It should have, for example pointed out in the bank statement of the respondent the alleged back payments by the said suppliers.
5. Section 107 of the Evidence Act provided that the party who alleged the existence of a fact must prove the same. The respondent had established a case, through documents, that it had purchased goods from the two 'missing traders'. Upon discharging that burden, the evidentiary burden then shifted to the appellant to justify his assessment.
6. In attempting to justify his assessment, the appellant alleged that the respondent had been involved in fraud. That was an allegation by the appellant himself and not the respondent. It was that allegation that the tribunal required the appellant to prove. The allegation of fraud was made by the appellant in answer to the respondent's case. It was for the appellant to prove that allegation.
7. The appellant having alleged fraud on the part of the respondent, he bore the burden of proving that allegation. He failed to provide the specifics of the same as well as evidence to support the same. The tribunal's judgment was sound.

Appeal dismissed with costs.

Commissioner of Domestic Services v Galaxy Tools Limited

Tax legislation imposed the burden of proof on the tax payer to prove that an assessment was excessive or a tax decision was incorrect

Headnote: Section 30 of the Tax Appeals Tribunal and section 56 of the Tax Procedures Act imposed the burden of proof on the tax payer to prove that an assessment was excessive or a tax decision was incorrect. Section 59 of the Tax Procedures Act and section 43 of the VAT Act, 2013 provide for keeping and production of documents when required by the tax authorities.

Commissioner of Domestic Services v Galaxy Tools Limited [2021] eKLR

Income Tax Appeal E088 of 2020

High Court at Nairobi

A Mabeya, J

July 5, 2021

Tax Law – tax assessment – self assessment and declaration of tax – burden of proof in assessment of tax – where the tax payer had the obligation to avail necessary documents on tax assessment – who had the burden to prove that tax assessed and declared was accurate and proper in a tax regime based on self-assessment – when does the burden of proof shift – whether a tax payer that produced additional documents to disprove a tax assessment and that had the said documents challenged by the tax collector for being untrue, bore a burden of proof to prove the accuracy/legality of the documents - whether upon the shift of the burden of proof from a tax payer to the tax collector upon presentation of documents in objection proceedings, the burden may be shifted back to the tax payer to prove the validity of the documents produced - Tax Appeals Tribunal, section 30; Tax Procedures Act, sections 56 and 59; Value Added Tax Act, section 43

Tax Law – value added tax – suppliers – proof of goods having been supplied - conclude vis-a-vis prima facie evidence - whether documents produced by a tax payer to prove that it was supplied of goods for purposes of disproving an assessment of Value Added Tax was conclusive or prima facie evidence of purchase of the said goods – Value Added Tax Act, sections 17 and 43.

Brief Facts

On July 18, 2018, the Commissioner of Domestic taxes issued an objection decision confirming an assessment amounting to KES.1,698,702.00 for value added tax (VAT) and KES.3,210,651.00 for corporation tax against the respondent.

Aggrieved by the decision, the respondent appealed to the Tax Appeals Tribunal stating that it had complied with the provisions of section 17 of the VAT Act, by providing the Commissioner with invoices, delivery notes and payment schedules for the supplies. The Commissioner indicated that it had established that there were 10 suppliers from whom Galaxy Tools Ltd that had allegedly made purchases from who, either were not trading in the alleged goods or were not trading at all. As a consequence, the Commissioner requested for further information and documents outside those set out in section 17 of the VAT Act to verify or satisfy himself on the tax the subject of the dispute.

The Commissioner informed the tribunal that Galaxy Tools Ltd involved itself in missing trader fraud and was unable to produce valid documents as required under the Tax Procedures Act. The tribunal held that having produced the documents, the taxpayer furnished sufficient proof of purchase. The appellant, aggrieved by the tribunal's decision appealed to the High Court.

Issues

- i. Whether a tax payer that produced additional documents to disprove a tax assessment and that had the said documents challenged by the tax collector for being untrue, bore a burden of proof to prove the accuracy/legality of the documents.

Commissioner of Domestic Services v Galaxy Tools Limited

- ii. Whether upon the shift of the burden of proof from a tax payer to the tax collector upon presentation of documents in objection proceedings, the burden may be shifted back to the tax payer to prove the validity of the documents produced.
- iii. Whether documents produced by a tax payer to prove that it was supplied of goods for purposes of disproving an assessment of Value Added Tax was conclusive or *prima facie* evidence of purchase of the said goods.

Held

1. Kenya operated under a self-assessment tax regime. Under that regime, the tax payer assessed self and declared what he considered to be taxable income on which he then paid tax to the authorities. The tax laws were framed in a manner that gave the tax authorities wide powers and discretion in ascertaining *ex-post facto*, what taxable income was.
2. The tax Laws reversed the well-known principle of evidence of he who alleges must prove. In that regard, the tax authorities would assess what it considered to be the tax due from a taxpayer and the tax laws would burden the tax payer to disprove that the assessment or tax demanded was wrong or incorrect.
3. The assessment and demand was ordinarily made way after the tax payer has assessed himself and made a declaration of what according to him was the tax payable and had already paid such tax. The burden was therefore shifted to the tax payer because the tax authority had to rummage through the documents of the tax payer years after the tax payer assessed himself and paid what he considered to be his tax liability.
4. Section 30 of the Tax Appeals Tribunal and section 56 of the Tax Procedures Act imposed the burden of proof on the tax payer to prove that an assessment was excessive or a tax decision was incorrect. Section 59 of the Tax Procedures Act and section 43 of the VAT Act, 2013 provide for keeping and production of documents when required by the tax authorities.
5. Sections of a law should not be read in isolation of the other provisions of that law. The impugned provisions were only meant to enforce the tax laws after a tax payer failed to self-assess for tax purposes or once it was evident that a tax payer was dishonest. The Act as a whole had safeguards that ensured that the taxpayers received fair administrative action from the tax collector whenever the need arose to put a particular taxpayer through the administrative process.
6. What the respondent had done in producing the invoices, the delivery notes and payment schedules was only *prima facie* evidence of purchase. On producing the said documents, the evidentiary burden of proof shifted to the appellant. The appellant in answer not only queried the said documents but informed the tribunal that; he had carried investigations on the alleged suppliers and concluded that they never existed, that there was no supply of any goods at all. That the documents produced did not contain critical details to support any reasonable commercial transaction.
7. The evidentiary burden of proof shifted back to the respondent to show that its documentation was legitimate. That would have been by production of other transactional documentation to support the legitimacy of the alleged transactions. It was at that juncture that sections 59 of the Tax Procedures Act and section 43 of the VAT Act kicked in.
8. Section 59 of the Tax Procedures and section 43 of the VAT Act gave power to the appellant to request for more and additional information to satisfy himself on the taxable income declared or matters tax. Some of the documents to be kept by a tax payer and which should be availed to the appellant were, copies of invoices, copies of stock records, details of each supply of goods and services among others.
9. The details that were disclosed to the Tribunal regarding what the appellant had unearthed was sufficient to ask the respondent to support its contention. However, it would seem that the tribunal was already biased against the appellant as it had concluded that the appellant could not ask for documents that were not required under legislation. That in requesting for the additional information, the appellant was acting outside his powers. That was an error that led the tribunal to arrive at a wrong decision.
10. The alleged investigation report was not produced in evidence. The court was alive to the fact that,

Commissioner of Domestic Services v Galaxy Tools Limited

such investigations and the resultant reports were ordinarily confidential, they could relate to other entities and if they were produced, they could be highly prejudicial not only to the tax authorities' future investigations but also the entities named therein who may not be participating in the subject proceedings.

11. The gist of what concerned the respondent was communicated to it and was availed to the tribunal by way of the statement of facts. In such circumstances, what was required was for the appellant to give full and sufficient details of the investigation and the outcomes as concerned the particular tax payer, sufficient for the tax payer to respond to the allegations. That was done in the instant case.
12. It would suffice if the appellant should put such information by way of affidavit by the concerned investigator to the extent that the same may be part of the evidence to be submitted to the Tribunal. The tribunal did not appreciate the purport, letter and spirit of section 59 of the Tax Appeals Tribunal and section 43 of the VAT Act as to additional information and documents required to support commercial transactions for tax purposes. The tribunal further failed to appreciate the burden of proof set out in section 30 of the Tax Appeals Tribunal Act. In effect, the tribunal shifted the burden of proof to the appellant which was contrary to law.
13. The appellant had demonstrated that there was loss of VAT in the subject transactions. There having been no supply of any goods, the respondent could not be said to have been innocent in the transactions. As a reasonable businessman, it was expected of it to keep all the transactional details of the subject transactions. It was only then that it would have satisfied the appellant and the court that it was innocent in the fraud perpetrated by the missing traders whom the appellant had concluded were in the business of selling air and invoices to colluding traders.

Appeal allowed.

Leah Njeri Njiru v Commissioner of Investigations and Enforcement Kenya Revenue Authority & another

Chapter 6: Assessment of tax and customs duty under tax and customs laws

Taxpayers bear the burden of proof in tax disputes

Headnote: The question before the court was whether the Commissioner should presume the expenses of a taxpayer were correctly submitted by a taxpayer where the said taxpayer had not kept proper records of receipts and expenses. The court held that business entities are afforded an opportunity to deduct all their expenses on their total income, such that only their profit is subject to tax as their personal income. Pursuant to section 54A (1) business should keep records of all their expenditures so as to prove as such. The burden of proof lies on the taxpayer to demonstrate that a tax assessment is faulty. Further, the taxpayer is obligated to prove the extent of their expenses to include the cost of operating the business.

Leah Njeri Njiru v Commissioner of Investigations and Enforcement Kenya Revenue Authority & another [2021] eKLR

Tax Appeal E002 of 2020
High Court at Nairobi
DAS Majanja, J
March 26, 2021
Reported by John Ribia

Tax Law – burden of proof – burden to prove expenses – responsibility of a tax payer to keep record of receipts and expenses - who bore the burden of proof in tax disputes - whether the Commissioner should presume the expenses of a taxpayer were correctly submitted by a taxpayer where the said taxpayer had not kept proper records of receipts and expenses.

Brief Facts

The respondents carried out an investigative tax audit in 2015 on the appellant, for the tax period of January 2008 to December 2015. From the investigation, the Commissioner discovered that despite making a substantial amount, the appellant had not declared any income. Consequently, the 1st respondent issued the appellant with an additional income tax assessment amounting to KES 127,462,486.00 as principal taxes on income earned from business.

Subsequently, the appellant sought to resolve the issue through a letter dead January 30, 2017. Later, the parties embarked on a series of meetings and exchange of correspondence either view to resolving the dispute. In the course of these meetings, the appellant provided additional information which the 1st respondent used to calculate her tax liability at Kshs. 306,176,144.00 inclusive of penalties and interest accrued. Following his, the appellant made an objection to which the 1st respondent issued an objection decision on March 29, 2017. Further aggrieved by the decision the parties resorted to alternative dispute resolution mechanism that resulted in reduction of the appellant's tax liability from KES 306,176,144.00 to KES 18,006,461.00. The latter amount formed the basis of the matter that in Income Tax Appeal No. 79 of 2019. The decision of the tribunal was in contention in the instant judgment.

The principal arguments made by the appellant were that Commissioner had arrived at an irrational and unreasonable assessment by failing to factor in operating expenses of the business. She also argued failure by the Commissioner to issue a notice of Assessment.

Issues

- i. Who bore the burden of proof in tax disputes?
- ii. Whether the Commissioner should presume the expenses of a taxpayer were correctly submitted by a taxpayer where the said taxpayer had not kept proper records of receipts and expenses.

Leah Njeri Njiru v Commissioner of Investigations and Enforcement Kenya Revenue Authority & another

Held

1. Even though the Tax Appeals Tribunal did not resolve the issue of audits, there was evidence that the assessments were forwarded to the appellant through her agents at the material time. Further, following those assessments, the appellant lodged an appeal which was settled by the objection. The ground of appeal that the Commissioner's assessments for the years 2008, 2009, 2011 and 2014 were invalid as the Commissioner did not issue any Notice of Assessment for those years lacked merit and was dismissed.
2. Section 56 of the Tax Procedures Act provided that appeals to the High Court or to the Court of Appeal shall be a question of law only.
3. The schedules of income and expenditure did not indicate the nature of expenditure and the expenditure was not supported by any other documentation. It was absurd that a business earning an income of KES 40,218,168.00 would incur a mere expense of KES 8,402,579.00. It was equally absurd that a business earning such amount would not document its expenditure. For example, each entry would be supported by documents like supply contracts, utility bills, invoices and delivery notes from suppliers, petty cash vouchers, or wage books.
4. The appellant's contention that the Commissioner ought to have presumed the expenses incurred by her in light of the nature of her business and income she was making notwithstanding that the expenses were unsupported was a misapprehension of the burden of proof. The burden of proving one's income and expenses lay with the taxpayer. The only way the Commissioner could have allowed deductions of expenses as per section 15(1) of the Income Tax Act (ITA) was if they were supported to its satisfaction. That was in line with section 54A(1) of ITA which required tax payers to keep records of receipts and expenses.
5. Under section 56(1) of the Tax Procedures Act (TPA), the taxpayer bears the burden of proving that the tax decision was incorrect. The Commissioner arrived at the revised assessment of KES 18,006,461.00 after correspondence and meeting between it and the appellant. The appellant was able to present her case to the fullest extent. At the Tribunal, the appellant did not demonstrate the tax decision was wrong. The Tribunal could not be faulted for accepting the conclusions reached by the Commissioner.

Appeal dismissed with costs to the respondent.

Rabai Operation & Maintenance Limited v Commissioner of Domestic Taxes

A tax payer does not have to be registered under ITMS for it to benefit from deduction of input VAT.

Headnote: The central issue revolved around the appellant's right to deduct input VAT from output VAT under the Value Added Tax Act, Cap. 476 (repealed). The case analyzed the interpretation of VAT Act provisions, particularly section 11, in conjunction with the seventh schedule regarding VAT return filings. The dispute included assessing the impact of technical issues in the Integrated Tax Management System (ITMS) on the appellant's ability to comply with VAT return filing requirements. The court evaluated the evidential burden in tax compliance disputes, focusing on the appellant's challenges in VAT registration and the legitimacy of its claims for input VAT deduction. The decision ultimately hinged on statutory interpretation and the proper application of VAT regulations. The court held that the only conditions for a tax payer to deduct input VAT were the ones outlined in section 17 and subject the VAT Regulations. That was; a taxpayer did not have to file monthly VAT returns for them to be able to deduct input VAT under section 11 of the VAT Act. The Commissioner's insistence that a tax payer had to be registered under ITMS for it to benefit from deduction of input VAT was not supported by section 11 of the VAT Act 2013.

Rabai Operation & Maintenance Limited v Commissioner of Domestic Taxes [2019] eKLR

Tax Appeal 7 of 2017
High Court at Nairobi
MM Kasango, J
October 4, 2019
Reported by John Ribia

Tax Law – value added tax – credit for input tax against output tax - whether the appellant had a statutory right to claim input VAT from output VAT in the context of VAT registration and payment processes - Value Added Tax Act, Cap. 476 (repealed) section 11

Tax Law – value added tax – deduction of value added tax – Integrated Tax Management System - whether a tax payer was only entitled to deduct value added tax when it was registered under the Integrated Tax Management System (ITMS) - whether the appellant's inability to file VAT returns due to alleged technical issues with the Integrated Tax Management System (ITMS) affected their right to deduct input VAT, and if that constituted a violation of their constitutional rights

Statutes – interpretation of statutes – interpretation of section 11 of the Value Added Tax Act, Cap. 476 (repealed) – interpretation of paragraph 7 of the seventh schedule of the Value Added Tax Act, Cap. 476 (repealed) - whether the provisions of section 11 of the VAT Act should be read independently or in conjunction with paragraph 7 of the seventh schedule, particularly in the context of filing VAT returns and claiming input VAT.

Brief Facts

The appellant started trading in 2009 with a PIN which it used to pay all its taxes. On the basis of that PIN, the appellant regularly deducted input value added tax (VAT) from output VAT as required by section 11 of the Value Added Tax Act. The appellant was however unable to file returns because it had not been set up on Integrated Tax Management System (ITMS) system due to a system technical problem. The Commissioner and the Tribunal acknowledged that the appellant paid VAT monthly which was as a resultant of deduction of input VAT from output VAT.

The Commissioner however argued that a tax payer should be assigned PIN together with being registered under ITMS system for it to be obligated to charge and account for VAT. Further, that the fact that the appellant was able to remit VAT should not be contrived as having complied with the registration for claiming input VAT. That it was only after registration on ITMS that a taxpayer can claim input VAT.

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The Commissioner on that basis issued the appellant with VAT assessments, which after objection were revised to Kshs. 17,965,918 for the period 2008 to 2010. the appellant appealed the assessment, however the Tax Appeal Tribunal dismissed the appellants appeal and held that the appellant was not registered for VAT. the appellant being aggrieved by the Tribunal's decision, appealed to the High Court which was the subject of the instant judgment.

Issues

- i. Whether the appellant had a statutory right to claim input VAT from output VAT as per section 11(1) of the Value Added Tax Act, in the context of VAT registration and payment processes.
- ii. Whether the provisions of section 11 of the VAT Act should be read independently or in conjunction with paragraph 7 of the seventh schedule, particularly in the context of filing VAT returns and claiming input VAT.
- iii. Whether a tax payer was only entitled to deduct value added tax when it was registered under the Integrated Tax Management System (ITMS).
- iv. Whether the appellant's inability to file VAT returns due to alleged technical issues with the Integrated Tax Management System (ITMS) affected their right to deduct input VAT, and if that constituted a violation of their constitutional rights.

Relevant Provisions of the Law**Value Added Tax Act, Cap. 476 (repealed) Section 11****11. Credit for input tax against output tax**

- (1) *Subject to the regulations and to the other provisions of this Section, input tax or tax withheld by a tax withholding agent may, at the end of either the tax period in which the supply, importation or withholding of tax occurred, or the next following tax period, be deducted and to the extent and subject to the exemptions provided under this Section, from the tax payable by him on supplies by him (referred to as 'output tax') in that tax period:*

Provided that no input tax or tax withheld may be deducted-

- (a) *More than twelve months after that input tax becomes due and payable pursuant to Section 13 or the tax is withheld, as the case may be; or*
- (b) *In the case of a motor vehicle or other assets purchased under a hire purchase or a lease financing agreement, more than twelve months after the issuance of a letter of undertaking or a clearance certificate for purposes of proviso to subsection (1A)",*

- (1A). *No input tax or tax withheld shall be deducted under subsection (1) unless a registered person is in possession of-*

- (a) *A tax invoice issued under Paragraph (1) of the Seventh Schedule; or"*

Held

1. When interpreting tax statutes, one had to look at what was clearly said in the statute. Tax statutes should not have hidden meaning. One should be able to look at the language and know what the statute provides for.
2. Section 11 of the VAT Act provided that its application was subject to regulations and to the provisions of the section. The section provided for deduction of input VAT on condition that no input tax may be deducted more than 12 months after the input tax becomes due and payable. The other condition for deduction was that the tax payer, wishing to deduct input tax, must be in possession of a tax invoice.
3. There was no provision in section 11 of the VAT Act which made it conditional to fulfilment of paragraph 7 of the seventh schedule. The intention of the legislature did not include the fulfilment of paragraph 7 of the Seventh Schedule. The Commissioner was in error to argue that section 11 was subservient to paragraph 7 of the seventh schedule or that they were to be read together.
4. The Tribunal erred to hold that section 11 VAT Act could be construed in reference to a paragraph of

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a Schedule to the Act. It was principle of law that a rule or (schedule subsidiary legislation) could not override or be construed to contradict the provisions of the Act. The provisions of the Section 11 of the Act cannot be construed to be contradicted by a Paragraph of Schedule. Section 11 recognizes that it is subject only to the regulations. There was no regulation that contradicted the provision of section 11.

5. The appellant, since it was conceded that it deducted input VAT within the twelve months in section 11 and had the invoices it qualified by that statutory provision to deduct input VAT. The requirement for VAT monthly returns was not a condition for such deduction under Section 11.
6. The Commissioner made very swiping remarks on the issue and the need for VAT returns for purposes of qualifying to deduct input VAT. It conceded that the appellant remitted VAT tax through real-time gross settlement (RTG) yet argued that the appellant was not registered for VAT but was registered for other tax purpose. That argument went contrary to the Commissioner's submission that when the appellant began trading tax payers were being issue with one PIN for purpose of paying taxes.
7. The Commissioner's insistence that a tax payer had to be registered under ITMS for it to benefit from deduction of input VAT was not supported by section 11 of the VAT Act. The Tax Appeals Tribunal fell in error in holding that the appellant was not registered for VAT, yet as stated before tax payer was issued with a PIN identifier for purpose of submitting tax, which the appellant had been issued with.
8. The Commissioner also erred to submit that the appellant failed to submit evidence of its difficulty to registering under ITMS. The evidence was clear. It was in the appellant tax consultant letter of February 17, 2012, addressed to the Commissioner and it was also in the error reports which evidence the appellant's attempts to register under ITMS in the internet. Those error reports showed that the appellant attempted to register under the Kenya Revenue Authority integrated tax management. The evidence by the appellant sufficiently met the evidential threshold and the burden shifted to the Commissioner. The fact that the appellant often requested assistance of the Commissioner's officers in Mombasa the Commissioner could have obtained information from its employees in Mombasa to either confirm what the appellant stated or disprove it. The Commissioner failed to rebut that evidential burden of proof. The instant court did not uphold the Tax Appeals Tribunal's finding that the appellant did not prove it had difficulty accessing ITMS system.

Appeal allowed.

Orders:-

- i. *The Tax Appeal Tribunal's judgment of December 9, 2016 was set aside.*
- ii. *The Commissioner's decision dated November 8, 2012 was annulled.*
- iii. *The appellant was awarded costs of the appeal*

Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes

A tax payer could apply for self assessment where the Commissioner had started enforcement proceedings

Headnote: The instant matter raised two pertinent issues, the burden of proof in taxation matters and whether a tax payer could apply for self assessment where the Commissioner had started enforcement proceedings. The High Court held that the burden of proof to prove that a decision by the Commissioner was wrong or incorrect was on the tax payer. On the application of amendment for self assessment, the High Court held that when the Commissioner made the assessments, the Company had not made the application for amendment of the self-assessment. Hence the Commissioner's decision could not be judged on the basis of an application that was to be made in the future. The Company could not attempt to show that the tax decision was incorrect on the basis that the Commissioner ought to have considered and allowed it amend its self-assessment on the basis of the documents it submitted with the application for amendment.

Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes [2020] eKLR

Tax Appeal 3 of 2020
High Court at Nairobi
DAS Majanja, J
June 22, 2010
Reported by John Ribia

Tax Law – tax decision – categorization of a tax decision - what amounted a tax decision under the Tax Procedures Act – Tax Procedures Act, Act No. 29 of 2015, section 31(2)

Tax Law – objections – appeals against objections – where an appellant added new grounds to an appeal that were not raised in the initial objection - whether in an appeal against a declined tax objection, a tax payer could add new grounds – Tax Procedures Act, Act No. 29 of 2015, sections 31, and 53(3)

Tax Law – self assessment – application for amendment self assessment – application for amendment of self-assessment where the time for filing an objection had run out – import – whether a tax payer could apply for self assessment where the Commissioner had started enforcement proceedings - whether a taxpayer could apply to amend self assessment outside the statutory timeline - whether an application by a tax payer to amend self-assessment could be the basis of an objection under the Tax Procedures Act - Tax Procedures Act, Act No. 29 of 2015, section 31, 51, and 53.

Tax Law – burden of proof – burden of proof in claims that sought to overturn the decision of the Commissioner - who bore the burden of proof to prove that a decision by the Commissioner was wrong or incorrect – Tax Appeals Tribunal Act, Act No. 40 of 2013, section 30

Jurisdiction – jurisdiction of the Tax Appeals Tribunal – jurisdiction to determine a decision filed out of time - whether the Tax Appeals Tribunal had the jurisdiction to determine an appeal filed out of time - Tax Appeals Tribunal Act, Act No. 40 of 2013, section 30; Tax Procedures Act, Act No. 29 of 2015, section 31, 51, and 53.

Brief Facts

The appellant (the Company) appealed against a decision of the Tax Appeals Tribunal (the Tribunal) dismissing its appeal and upholding assessments by the Commissioner of Domestic Taxes in which it assessed tax at KES 31,217,489.00. In September 2016, the Commissioner identified the Company for review and compliance. Following review of documents provided by the Company, the Commissioner disallowed certain expenses claimed in respect of the income tax.

The Commissioner concluded that the documents furnished by the Company were inadequate to address the issues it had raised and further audience with the Company did not yield any results. It therefore decided to issue additional assessments for KES 31,217,489.00 for VAT and income tax.

Thereafter the Commissioner commenced enforcement proceedings by issuing agency notices prompting the Company to lodge objections to the assessments. It also made an application dated June 22, 2017 to

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amend its self assessment.

A meeting was held between the Company's Auditor and the Commissioner where the Company was requested to present certain documents which the Commissioner considered but which it found insufficient. Thereafter, the auditor on behalf of the Company made an application for amendment of self-assessment for the period 2014 and 2015 (VAT and Income Tax). The Company thereafter filed an appeal before the Tribunal on the ground that its application for amendment was not resolved despite the fact that it had all the supporting documents including invoices, ledgers and expense records.

Issues

- i. What amounted a tax decision under the Tax Procedures Act?
- ii. Whether in an appeal against a declined tax objection, a tax payer could add new grounds.
- iii. Who bore the burden of proof to prove that a decision by the Commissioner was wrong or incorrect?
- iv. Whether a tax payer could apply for self assessment where the Commissioner had started enforcement proceedings.
- v. Whether a taxpayer could apply to amend self-assessment outside the statutory timeline.
- vi. Whether an application by a tax payer to amend self-assessment could be the basis of an objection under the Tax Procedures Act.
- vii. Whether the Tax Appeals Tribunal had the jurisdiction to determine an appeal filed out of time.

Held

1. Section 56 of the Tax Procedures Act (TPA) circumscribed the jurisdiction of the court in two ways. First, the taxpayer must prove the tax decision was wrong for the court to intervene. Under section 51(3) of the TPA an appeal in relation to an appealable decision was restricted to the grounds on which the objection was made.
2. Section 3(1) of the TPA defined a tax decision to mean assessment, and a decision on an application by a self-assessment taxpayer under section 31(2) of the TPA.
3. Subject to section 53(3) of the TPA, a Company could only rely on the grounds it put forth in the objection to which the decision relates. The taxpayer was entitled to apply for extension of time. Under section 12 of the Tax Appeals Tribunal Act, 2013 (TATA) a person who disputed the decision of the Commissioner on any matter under any tax law was entitled to appeal to the Tribunal. Under section 30 of TATA, the appellant bore the burden of proof in such an appeal.
4. Each objection except one was lodged outside the 30-day period as required by section 51(2) of the TPA. The Commissioner informed the Company that it had rejected the objections on the ground that they were filed late and that no reasons were given for the delay. Instead of applying for extension of time under section 51(6), the Company opted to pursue an application for amendment of its self-assessment under section 31 of the TPA once the Commissioner commenced enforcement proceedings. Thereafter the appellant opted to appeal against the assessments on the ground, *inter alia*, that its application for amendment of the self-assessment had not been considered by the Commissioner. Under section 56(1) of the TPA, the Company bore the burden of demonstrating that Commissioner's decision in reaching the assessments complained of was incorrect.
5. When the Commissioner made the assessments, the Company had not made the application for amendment of the self-assessment. Hence the Commissioner's decision could not be judged on the basis of an application that was to be made in the future.
6. The grounds of amendment of the self-assessment, being a future application, could not have been the basis for the objection. The Commissioner clearly explained that it based its decision the statement of accounts and returns the Company had filed. The Tribunal appreciated that when it held that it was the duty of the Company to provide all the documents and that the Commissioner was entitled to rely on the self-assessments and returns lodged by the Company in the absence of any other documents.
7. The Company could not attempted to show that the tax decision was incorrect on the basis that the

Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes

Commissioner ought to have considered and allowed it amend its self-assessment on the basis of the documents it submitted with the application for amendment. The assessments appealed against had been confirmed once the Company's objections had been rejected for being filed out of time. The Company had not shown that in making the decision to raise the assessments, the decision of the Commissioner was wrong or that the Tribunal reached an incorrect decision.

8. The Company failed to object to the assessments it appealed against to the Tribunal as its objections were filed out of time and rejected. The jurisdiction of the Tribunal was limited to considering the assessments being challenged even though it was clear that the appeal before the Tribunal was also filed out of time in relation to the assessments challenged. The application for amendment under section 31 of the TPA constituted a separate process and could not implicate or affect the assessments already confirmed by the failure of the Company to lodge its objection in time.
9. The conclusions of the Commissioner and the Tribunal in respect of the assessments appealed against were in accordance with the evidence and material available to the Commissioner. The appellant did not discharge its burden of showing that the tax decision was wrong or incorrect. The issue of amendment of the self-assessment was not the subject of the tax decision that was being challenged in the appeal before the Tribunal.

Appeal dismissed with costs to the respondent.

Interactive Gaming & Lotteries Limited v Kenya Revenue Authority

A tax payer that disputed the Commissioner's assessment of tax payable had alternative remedies to it other than judicial review

Headnote: The main issue before the Court of Appeal was the procedure a tax payer should follow in filing objection proceedings. The Court of Appeal held that there were elaborate processes under the Income Tax Act and the Value Added Tax Act giving the taxpayers an opportunity to object to assessment notices as received. Taxpayers were required to object against the assessment notices to make the Kenya Revenue Authority duty bound in law to consider the same and if the dispute was not settled, processes in the statutes give appropriate remedies to the Taxpayer. It was wrong for a taxpayer to file judicial review proceedings after receiving assessment notices when the appropriate remedy was to file objection proceedings before the Commissioner.

Interactive Gaming & Lotteries Limited v Kenya Revenue Authority [2018] eKLR

Civil Appeal 175 of 2016
Court of Appeal at Nairobi
SO Kantai, F Sichale, JJA
September 28, 2018
Reported by John Ribia

Tax Law – dispute resolution – dispute by a tax payer against the Commissioner's assessment of tax – whether a tax payer that disputed the Commissioner's assessment of tax payable had alternative remedies to it other than judicial review - Value Added Tax Act (Cap 476) (repealed) section 50

Brief Facts

The parties in the subordinate court were the appellant (as plaintiff) who sued Flint East Africa Limited as 1st defendant (Flint), Safaricom Limited as 2nd defendant (Safaricom) and the respondent as 3rd defendant (Kenya Revenue Authority (KRA)). It was stated in the plaint that the appellant was the promoter of a public lottery being carried out under a public lottery permit issued by the Betting Control and Licensing Board to run for a period from October 1, 2010 to December 31, 2010 and that the period was extended to March 15, 2011. It was further stated that Flint was the holder of Short Code Platform 6969 assigned to it by Safaricom and other mobile service providers for its own purpose or on behalf of third parties that may appoint it as a Premium Rate Service Provider (PRSP). It was further stated that through an invoice dated January 14, 2011 Flint had sought payment from Safaricom of KES 93,975,040.88 exclusive of Value Added Tax for the period ending December 31, 2010 but that lottery had continued up to January 17, 2011 by which time Safaricom had collected a further amount of KES 52,480,592.74 exclusive of value added tax. A net sum of KES 146,455,633.28 was said to be owing to Flint on behalf of the appellant from Safaricom in unremitted lottery revenue.

The subject of the instant appeal however was that KRA had confirmed on oath in the subordinate Court that it was not claiming any taxes from the appellant and that a finding to that effect was made by the court in the judgment delivered on April 30, 2014. The appellant went on to state that it was incorporated on September 17, 2010 and could not have any tax liability by December 31, 2010 and that the lottery that gave rise to the funds held by Safaricom was run in December 2010 and January, 2011 and KRA was aware that proceeds of the lottery had never been received by the appellant. It was alleged by the appellant that KRA had confirmed in the proceedings in that suit that Safaricom had deducted value added tax and withholding tax and remitted it directly to KRA and that a claim for tax could not be made again

Issue

Whether a tax payer that disputed the Commissioner's assessment of tax payable had alternative remedies

Interactive Gaming & Lotteries Limited v Kenya Revenue Authority

to it other than judicial review.

Held

1. Nowhere in the proceedings in any of the suits particularly in the interpleader proceedings was the issue of taxes due either from the appellant or Flint an issue before any court. The issue of taxes due from itself was neither an issue nor was it dealt with at the High Court. The evidence of the Revenue Authority was to the effect that the issue of taxes was not an issue at all in the interpleader proceedings.
2. Interpleader proceedings such as those that were before the High Court were filed by a party who was in possession of funds or other property ownership of which was claimed by adverse or various parties. Safaricom was holding money which was claimed by the appellant, Flint and the respondent. The respondent was entitled to collect that money directly from Safaricom using various provisions of taxation law if it was owed taxes by a party doing business with or through Safaricom. Safaricom therefore took the appropriate route of approaching the court for orders to determine who amongst the competing parties was entitled to the money it held.
3. That money was held out of the lottery and the respondent had not collected taxes due to itself from the said lottery. The issue of whether or not the respondent was owed taxes by the appellant was not and could not have been an issue in interpleader proceedings. A court in such proceedings could not determine taxes due to the respondent as the only issue before a court in such proceedings was a determination of the ownership of money or other property held by a party who has no claim to the same. Flint, the appellant and KRA had competing claims to money held by Safaricom and the court found that the money belonged to the appellant with appropriate fees due to Flint as per agreement. The High Court did not determine what level of taxation applied to the money to be released by Safaricom to the appellant and to Flint.
4. The trial court found that judicial review was not the appropriate remedy since there was a process provided in tax laws on how to challenge an assessment served on a taxpayer by the Commissioner of KRA. Under section 84 of the Income Tax Act a procedure was set out which obligated a person on whom an assessment had been made and who disputed the same to object the same to the Commissioner of Income Tax or Commissioner of VAT, as the case may be. Taxation laws set out an elaborate procedure for a person who disputed the assessment to object or appeal against the same.
5. Section 84 of the Income Tax Act was to the effect that a person who disputed an assessment made upon him may by notice in writing to the Commissioner object to the same. The section set out the steps such a person must take for the objection to be valid. Under the Value Added Tax Act, No. 35 of 2013 which replaced the Value Added Tax Act (Cap 476) (repealed) there was established an appeals tribunal for purposes of hearing appeals under that Act. Section 50 of that Act required a person who disputed an assessment made by the Commissioner to by notice in writing object to the assessment. An elaborate procedure for that objection was set out in the Act, including an appeal to the High Court.
6. There were elaborate processes under the Income Tax Act and the Value Added Tax Act giving the appellant an opportunity to object to assessment notices as received. He was required to object against the assessment notices and had it done so the respondent was duty bound in law to consider the same and if the dispute was not settled, processes in the statutes gave appropriate remedies to the appellant. It was wrong for the appellant to file judicial review proceedings after receiving assessment notices when the appropriate remedy was to file objection proceedings before the Commissioner. The matter before the trial court was incompetent. The appeal had no merit.

Appeal dismissed with costs to the respondent.

Kenya Revenue Authority v Universal Corporation Ltd

KRA's obligation in meeting commitments it had made.

Headnote: The issue before the court was on KRA's role in processing refunds and in meeting commitments it had promised to meet. KRA was obligated to meet its tax commitments to the tax payers either as self-assessed or upon assessment by the KRA. KRA was duty bound to exercise its statutory power with due diligence and as prescribed for by the law namely within the time frame permitted for by law to allow a tax payer claim a refund it was entitled to in law within the time frame stipulated for within the law. Tax law with penal consequences must be interpreted with great caution and that any ambiguity in such a law must be resolved in favour of a tax payer. The penal consequence in the law was that the appellant was mandated to demand short levied taxes as and when assessed while the ambiguity in the said law arose from the failure to provide a window for the affected taxpayer to apply for late refund for such short levied tax demanded for after the period for claiming a refund has long lapsed.

Kenya Revenue Authority v Universal Corporation Ltd [2020] eKLR

Civil Appeal 150 of 2018

Court of Appeal at Nairobi

RN Nambuye, W Karanja, and J Mohammed, JJA

August 7, 2020

Reported by John Ribia

Statutes – interpretation of statutes – import of the use of the word may in section 9(1) of the Fair Administrative Action Act - import of the use of the word may in section 229(1) of the East African Community Customs Management Act, 2004 - whether the use of the word may in section 9(1) of the Fair Administrative Action Act imposed an elective or mandatory obligation on administrative bodies - whether the use of the word may in section 229(1) of the East African Community Customs Management Act, 2004 connoted a mandatory obligation on the tax payer to lodge an application for review.

Tax Law – short levied taxes – recovery of short levied taxes – claim that the procedure used was unfair – where KRA claimed that it had entered into similar arrangements with other tax paying companies conducting the same business - whether the gain made by the appellant in recovering short levied taxes from the respondent was proportional to the total loss the respondent stood to suffer on account of inability to recover refunds lawfully due to it and which it would have rightfully claimed had it not been for the appellant's inaction and default in failing to demand for the same timeously - whether such an action was unfair - whether the fact that a Revenue Authority entered into similar arrangements with companies similar to a person it demanded tax from bore any significance to the tax payer and to the courts.

Words and Phrases – doctrine of proportionality - a principle requiring the administrative authority when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberty or interests of a person affected by the decision and the purpose which it pursues - Judicial Review of Administrative Action, Desmith Woolf and Jowel, Fifth Edition (pg 594-596)

Brief Facts

The respondent sought against the appellant judicial review (JR) orders namely an order of certiorari to quash the decision by the appellant requiring the respondent Company to pay the appellant Kshs 427,918,033 as value added tax (VAT) for the period of January, 2008 to October, 2013, an order of prohibition against the appellant prohibiting it from purporting to take any action against the respondent's company in an attempt to recover the sum of Kshs 427,918,033 and an order of prohibition against the appellant prohibiting it from purporting to take any action that may violate the rights of the respondent's company.

The appellant explained that it was in the exercise of its lawful and legitimate mandate under the relevant law that the appellant conducted a tax audit on several Companies (the affected companies) inclusive of the respondent that were importing the subject raw materials which established that the said Companies were declaring the subject raw materials as exempt from VAT, when the said subject raw materials attracted

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VAT at the rate of sixteen percent (16%). That precipitated the appellant to variously raise short levied tax assessment demands against the affected companies. The demand directed at the respondent was in respect of an amount of Kshs 427,918,033 for the period between January 1, 2008 and October 31, 2013 (five (5) years), in compliance with section 235 (1) of the EACCMA and regulation 7 (6) of the Value Added Tax, Tax Regulation 1994.

The appellant conceded that in 2005, the EACCMA, came into force and replaced the Customs and Excise Act, Cap 472, (repealed); and that section 114 and paragraph 16 of the fifth Schedule exempted the subject raw materials from duty; that the subject raw materials remained Zero Rated for VAT purposes between the years 1995 and 2012 which years were not covered under the short levied taxes audit exercise in issue; that from January 1, 2008 to October 31, 2013, the respondent was neither exempted from paying VAT under the second and third Schedule nor were the goods imported listed in the zero rated VAT tax under the fifth schedule of the repealed VAT Act Cap 476 (repealed).

Issues

- i. What principles should courts apply in interpretation of tax laws?
- ii. Whether the use of the word may in section 9(1) of the Fair Administrative Action Act imposed an elective or mandatory obligation on administrative bodies.
- iii. Whether the use of the word may in section 229(1) of the East African Community Customs Management Act, 2004 connoted a mandatory obligation on the tax payer to lodge an application for review.
- iv. Whether the gain made by the appellant in recovering short levied taxes from the respondent was proportional to the total loss the respondent stood to suffer on account of inability to recover refunds lawfully due to it and which it would have rightfully claimed had it not been for the appellant's inaction and default in failing to demand for the same timeously.
 - a. Whether such an action was unfair.
- v. Whether the fact that a Revenue Authority entered into similar arrangements with companies similar to a person it demanded tax from bore any significance to the tax payer and to the courts.
- vi. Whether the doctrine of proportionality was properly invoked and applied in the circumstances of the instant appeal.

Relevant Provisions of the Law**East African Community Customs Management Act, 2004, section 229(1)****229. Arrival Overland**

- (1) *A person directly affected by the decision or Application omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the commission or omission lodge an application for review of that decision or omission.*

Held

1. In the interpretation of tax law, courts utilized the following principles:
 - a. tax legislation must be strictly construed. Nothing should be read or implied in it and in the event of any ambiguity arising in the interpretation of tax law, then the ambiguity must be resolved in favour of a tax payer.
 - b. The subject should not be taxed unless the words of the taxing statute unambiguously imposed the tax upon him.
 - c. The taxing laws that had the effect of depriving citizens of their property by imposing pecuniary burdens resulting in penal consequences must be construed with caution.
2. The use of the word "may" in section 9(1) of the Fair Administrative Action Act was merely elective and not mandatory. Since citation of the said Act indicated explicitly that it was assented to on May 27, 2015, and commenced on June 17, 2015 it had no application to events that triggered the litigation

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resulting to the instant appeal. It was accordingly discounted.

3. The mandatory requirement in section 229(1) of the EACCMA was limited to the time line within which to lodge the application for review, while the use of the word “may” in section 230(1) of the EACCMA though related to the forum for adjudication, there was nothing in it to oust the jurisdiction of the court. The trial court could not be faulted for declining to accede to the appellant’s request for him to down tools and reroute the respondent to pursue its remedy before the Tax Appeals Tribunal.
4. Judicial review was not only a unique and special jurisdiction. Whereas the right to apply for a judicial review relief was entrenched in section 8(2) of the Law Reform Act, the jurisdiction to entertain the judicial review applications was donated by order 53 of the Civil Procedure Rules and the requisite rules made thereunder. None of the provisions provided that the Tax Appeals Tribunal provided for in section 230 of the EACCMA had mandate to entertain judicial review proceedings and pronounce itself on claims anchored in judicial review jurisdiction.
5. It was only through judicial review that the appellant’s administrative actions could be reviewed and on that account found the tribunal appellate process though available as an alternative remedy for redressing the respondent’s grievances against the appellant less convenient, effective, beneficial and inappropriate in the circumstances to redress the respondent’s grievances against the appellant and which circumstances according to the learned Judge vested the court with judicial review jurisdiction which we find was well founded both on the facts and in law. The appellant’s complaint of want of jurisdiction in the trial court to determine the respondent’s claim against the appellant was rejected.
6. There was no basis to fault the trial court on its conclusions on legitimate expectation. Although there was no dispute that the respondent was obligated to meet its tax commitments to the appellant either as self-assessed or upon assessment by the appellant and demand to that effect issued by the appellant to the respondent for meeting the same, the appellant was duty bound to exercise that power with due diligence and as prescribed for by the law namely within the time frame permitted for by law to allow the respondent claim a refund they were entitled to in law within the time frame stipulated for within the law. Nowhere in its contestations either before the trial court nor before the instant court on appeal were there any suggestion that its policing role over the respondent had primacy over the respondent’s right to recover taxes lawfully due to it subject to lodging for such refunds within the time stipulated for within the law upon meeting the respondent’s demands for those short levied taxes.
7. The process employed by the appellant as a tax authority statutorily mandated to exercise its policing powers over the respondent as the tax payer obligated to pay either self-assessed or demanded tax was not only unfair but also irrational and therefore infringed on the respondent’s legitimate expectation that demand for any short levied taxes would be made timeously to enable them claim refunds to which they were legally entitled.
8. The trial court’s findings were in tandem with the principle that guide interpretation of tax law with penal consequences, namely, that tax law with penal consequences must be interpreted with great caution and that any ambiguity in such a law must be resolved in favour of a tax payer. The penal consequence in the tax legislation invoked by the appellant was that which mandated the appellant to demand short levied taxes as and when assessed and demanded for; while the ambiguity in the said law arose from the failure to provide a window for the affected tax payer to apply for late refund for such short levied tax demanded for after the period for claiming a refund had long lapsed.
9. The default resulting in the belated audit and demand for the short levied taxes against the respondent was not occasioned by fraud perpetrated by the respondent but the appellant’s own conduct of failure to subject the said raw materials to value added tax (VAT) after the repeal of the Finance Act 2001, and the institution of the Simba Automated Clearing System which automatically exempted the subject raw material from payment of VAT processes, over both of which the respondent had no policing power or control. The doctrine of legitimate expectation was properly invoked and applied by the learned trial court in the circumstances of the instant appeal.
10. The appellant as the indisputable public authority charged with the mandate of carrying out tax audits

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for purpose of detecting and enforcing recovery of short levied taxes in the first instance and as the chief administrator of the tax law in the second instance, was aware of the respondent's right to be requested to meet its obligation with regard to any short levied taxes that may be found due and payable from it in a time frame that would allow the respondent an opportunity to claim a refund to which the appellant had not disputed that the respondent was indisputably entitled to in law.

11. In an instance where the appellant failed to explain itself for inaction, the trial court could not be faulted for finding its action of moving to recover the short levied taxes at a time when the respondent was not in a position to recover the same unfair, irrational and unreasonable.
12. The appellant's gain in recovering the short levied taxes from the respondent at that point in time was not proportional to the total loss the respondent stood to suffer on account of inability to recover refunds lawfully due to it and which it would have rightfully claimed had it not been for the appellant's inaction and default in failing to demand for the same timeously, and which move the trial court properly found unfair.
13. The appellant's decision was irrational because no reasonable public authority properly directing its mind to the issue would have failed to realize that its decision to demand for the said short levied taxes at that point in time was not only unfair but also unjust. It was unreasonable because no justification was given for the appellant's action of moving at that point in time to penalize the respondent for the appellant's mistakes arising from it having in place a system of operations established and managed by itself which led to the late discovery that there were short levied taxes owed to it by the respondent.
14. The issue of eight (8) other companies that never complained and those others that entered into an arrangement with the appellant to meet their payment were irrelevant considerations in the circumstances of the instant appeal as they were neither contested at the trial nor ruled upon by the trial court and did not now therefore fell for consideration on appeal, especially when the circumstances under which those other companies came to the above arrangements with the appellant were not part of the rival pleadings and facts that fell for interrogation by the trial court. Those were inconsequential to the ultimate determination of the judicial review proceedings that the trial court was seized of and the trial court rightly found that argument illogical.

Appeal dismissed with costs to the respondent.

Commissioner of Domestic Taxes v Ocean Freight (East Africa) Limited

Factors to consider in determining whether one is an employee of a company for purposes of taxation

Headnote: The appeal revolved around the application of sections 15(1), (2)(a) and 16(1)(a) of the Income Tax Act in determining the taxable income of a person. It was held that section 15 and 16 of the Income Tax Act required that before any expenditure can be deducted from a person's taxable income it ought to have been exclusively incurred in the production of the said income. The question whether the person was integrated into the enterprise or remained apart from and independent of it had been suggested as an appropriate test, but was likewise only one of the relevant factors, for the modern approach was to balance all of those factors in deciding on the overall classification of the individual. The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer, stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contribution.

Commissioner of Domestic Taxes v Ocean Freight (East Africa) Limited [2018] eKLR

Civil Appeal 10 of 2018

Court of Appeal at Malindi

ARM Visram, MK Koome, and W Karanja, JJA

September 27, 2018

Reported by John Ribia

Tax Law – income tax – bad debts in shipping – bad debts arising out of unpaid freight charges - whether bad debts arising out of unpaid freight charges of a shipping company that was represented by Kenyan agents were debts of the shipping company and therefore not allowable against the income of the agent - Income Tax Act, Cap. 470, section 15(2)(a)

Tax Law – income tax – salary payments made to directors and captains of an international shipping company represented by Kenyan agents - whether expenses incurred against the employees of a shipping company represented by Kenyan agents were allowable against the income of the agents for purposes of taxation - whether directors and Captains of an international company represented by Kenyan agents were employees of the agent for purposes of establishing whether their salaries were wholly and exclusively incurred for production of the respondent's income - Income Tax Act, Cap. 470, section 15(2)(a)

Brief Facts

The appeal revolved around the application of sections 15(1), (2)(a) and 16(1)(a) of the Income Tax Act in determining the taxable income of a person. An audit was carried out by the Commissioner of Domestic Taxes (the appellant) on Ocean Freight (East Africa) Limited's (the respondent) account for the period running from 2002 to 2006 (audit period). Pursuant to an agency agreement between the respondent and Mediterranean Shipping Company S.A (MSC) which carried out shipping business, the respondent acted as MSC's agent in Kenya. On the basis of the said audit the appellant demanded for payment of KES 51,319,757 as corporation tax arrears for the audit period. Additionally, by another letter of even date the appellant also demanded from the respondent as an agent of MSC, a sum of KES 53,417,116 as tax arrears for non-resident income earned during the audit period by MSC.

The respondent objected to the corporation tax demand. The objection was on the grounds that the appellant had failed to take into account the respondent's deductible expenses under section 15 of the Income Tax Act. Specifically, the appellant had not factored in that the salaries and emoluments of two of the respondent's employees who also acted as directors, namely, Captains Tommaso Castellano and Fiorenzo Castellano (the Castellanos) were deductible expenses as against the respondent's income. The respondent contended that the appellant failed to take into account that outstanding and written off freight were bad debts within the meaning of section 15(2)(a) and subject to deduction from the respondent's taxable income. The appellant did not agree with the objection raised and communicated as much to the respondent.

Commissioner of Domestic Taxes v Ocean Freight (East Africa) Limited

Aggrieved the respondent approached the Income Tax Local Committee (the committee) that found that the bad debts arising out of the unpaid freight charges were debts of MSC and were not allowable against the income tax of the company and that the Castellanos were employees of MSSC and therefore the expenses incurred on their behalf were not allowable against the income of the company. the respondent lodged an appeal in the High Court against the Committee's decision which was allowed. Aggrieved the appellant filed the instant appeal.

Issues

- i. Whether bad debts arising out of unpaid freight charges of a shipping company that was represented by Kenyan agents were debts of the shipping company and therefore not allowable against the income of the agent.
- ii. Whether expenses incurred against the employees of a shipping company represented by Kenyan agents were allowable against the income of the agents for purposes of taxation.
- iii. Whether directors and Captains of an international company represented by Kenyan agents were employees of the agent for purposes of establishing whether their salaries were wholly and exclusively incurred for production of the respondent's income.

Held

1. There was no cogent evidence to demonstrate that the Castellanos were employed by the respondent. Apart from the letters dated December 15, 2000 more evidence was required to establish their employment by the respondent. Taking into account that the application for renewal of the Castellanos working permits indicated that they were employees of Mediterranean Shipping Company S.A (MSC) a fact which was admitted by the respondent. There was also no documentary evidence e.g. payslips tendered to show that the respondent paid their salaries or remitted P.A.Y.E on their behalf. The High Court erred in finding that the salaries in question were deductible under section 15 of the Income Tax Act.
2. The exercise of the appellant's discretion under section 15(2)(a) of the Income Tax Act to determine what amounts to a bad debt was not in issue. It was clear from the Committee's decision that unpaid freight charges were not considered as bad debts for the reason that the Committee believed that they were incurred by MSC and not the respondent.
3. There was no contention that there were freight charges which were not paid and which the respondent was not able to recover from the debtors, yet the respondent was supposed to indemnify MSC for the loss. The instant court was not persuaded that such were not bad debts as found by the Local Tax Committee. On the contrary, they were bad debts which ought to have been considered when computing the tax payable. The issue as to whether the commissioner had discretion or not to allow the bad debts was not addressed by the Local Tax Committee. The issue was whether the said Committee was right in its finding that the bad debts could not be taken into account because the respondent was not authorised by MSC to give credit to her customers. The High Court could not be faulted for finding that the Committee had misapprehended the agency agreement on that issue.
4. Despite the respondent objecting to the demand for non-resident income tax, the said objection neither formed part of the dispute referred to the Committee nor was it considered in the appeal to the High Court.

Appeal partly allowed.

- i. *The Court of Appeal set aside the High Court's finding that the Castellanos' salaries were deductible from the respondent's taxable income.*
- ii. *The bad debts arising out of the unpaid freight charges were allowable against the income tax of the respondent.*
- iii. *Each party was to bear their own costs.*

Gibb Africa Limited v Kenya Revenue Authority

Chapter 7: Agency notices under tax and customs laws**Issuance of Agency Notices to Tax Payers ought to conform to the Law**

Headnote: The instant dispute arose from KRA issuing agency notices against a tax payer that claimed not to have the funds to pay the taxes as it had not been paid by the Government of Kenya for the services rendered. The petitioner filed the instant petition claiming that the agency notices issued violated the petitioner's rights to fair administrative action and to property. The High Court held that the agency notices were issued within the requisite legal procedure and had not been shown to be unreasonable or in breach of the petitioner's rights. The petition was dismissed.

Gibb Africa Limited v Kenya Revenue Authority [2017] eKLR

Petition 4 of 2017
High Court at Nairobi
JM Mativo
November 9, 2017

Constitutional Law – fundamental rights and freedoms – the right to fair administrative action – claim that the manner of issuance of agency notice was contrary to the statutory provisions and violated the tax payer's right to fair administrative action – where an agency notice was issued against a tax payer that was awaiting payment from the government - whether agency notices issued by KRA to a tax payer who was yet to receive payment for services offered to the Government of Kenya were issued in violation of the right to fair administrative action – Constitution of Kenya, 2010, article 47; Fair Administrative Action Act, section 4 (3); Tax Procedure Act, section 42.

Constitutional Law – fundamental rights and freedoms – the right to property – balancing the right to own property and payment of demanded tax – agency notice - effect of agency notice on tax payer's property - whether the issuance of agency notices that led to the bank accounts of the tax payer being frozen were a violation of the tax payer's right to property - whether the existence of an agency notice would violate a tax payer's right to property - Constitution of Kenya, article 40.

Jurisdiction – jurisdiction of the High Court – jurisdiction of the High Court to determine a constitutional petition – where a constitution petition requested for judicial review remedies – whether the High Court could issue judicial review orders in a constitutional petition – Constitution of Kenya, 2010, articles 23 (1) and 165(1)

Tax Law – agency notices – objection to agency notices on grounds that the wrong amount was levied - whether an objection to tax notice on grounds that it was issued for an incorrect tax amount could be resolved by way of a constitutional petition - Tax Procedures Act section 32; Income Tax Act section 83

Brief Facts

The respondent audited the petitioner's business and raised a tax demand of Kshs. 112,981, 522. The respondent wrote back claiming that the Government owed it Kshs. 500 million and lack of payment had affected its operations, including payment of taxes. The respondent issued thirteen agency notices to various entities and demanded that the recipients of the said notices pay the sum of Kshs. 283,737,490 being the sum of taxes allegedly due from the petitioner. Due to the said notices, its bank froze its account crippling its operations, hence it could not meet its obligations and that the discounted sum of Kshs. 208,513,902 owed to the petitioner by the Government could be utilized to pay the unpaid taxes. The petitioner challenged the agency notices issued to it on grounds that it violated its rights and fundamental freedoms in the Bill of Rights under the Constitution and International Convention on Social Economic Rights. The petitioner cited violation of articles 40 (1) and 47 (1) of the Constitution and section 4 of the Fair Administrative Action Act and stated that the respondent acted in bad faith, improper motive and violated its right to legitimate expectation. The petitioner invited the court to declare that the agency notices violated its right to

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fair administrative action, null and void and quash the same. Also sought was a declaration that the notices violated its right to property and that the respondent was only entitled to KES. 166,719,702/= being the principal taxes payable upon the petitioner being paid by the Government.

In opposition to the petition the respondent stated that it was forced to issue an agency notice after the petitioner failed to honour the various demands made to it. It was averred that in the event that the petitioner disputed the amounts demanded, then the right forum to adjudicate the dispute was the Tax Appeals Tribunal. The respondent denied the existence of an agreement with the petitioner and stated if such an agreement existed, then the same was without prejudice and that having been served with the notices as per the law, it was upon the agents to respond to the respondent stating the amount they each owed to the petitioner and not the petitioner to direct the respondent on how the agency notices were to be served. In addition, the delay by government ministries and agents to pay the petitioner was independent of the petitioner's operations to recover tax arrears, hence, the respondent acted within the law and that there was a danger of the government losing revenue if the agency notices were lifted.

Issues

- i. Whether agency notices issued by KRA to a tax payer who was yet to receive payment for services offered to the Government of Kenya were issued in violation of the right to fair administrative action.
- ii. Whether the issuance of agency notices that led to the bank accounts of the tax payer being frozen were a violation of the tax payer's right to property.
- iii. Whether the High Court could issue judicial review orders in a constitutional petition.
- iv. Whether an objection to tax notice on grounds that it was issued for an incorrect tax amount could be resolved by way of a constitutional petition.

Held

1. On principle, a court was bound to entertain proceedings that fell within its jurisdiction. A court had no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Article 165(1) of the Constitution established the High Court and vested in its vast powers including the power to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened. It also had jurisdiction to hear any question respecting the interpretation of the Constitution. The High Court had supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. In addition, the High Court could call for the record of any proceedings before any subordinate court or person, body or authority and could make any order or give any direction it considered appropriate to ensure the fair administration of justice. Article 23 (1) granted the High Court authority to uphold and enforce the Bill of Rights.
2. The High Court had powers to grant judicial review orders or fashion such reliefs as could be appropriate to meet the ends of justice. Such orders could be granted in a constitutional petition such as the instant petition if warranted. Thus, the objection premised on the ground that the matter ought to have been filed as a judicial review failed.
3. Section 32 of the Tax Procedures Act and section 83 of the Income Tax Act established a clear procedure for adjudicating disputes arising from the decision of the Commissioner of Income Tax which included the agency notices. Where a specific dispute resolution mechanism was prescribed by the Constitution or a statute, parties should resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court. The above provisions of the law established a dispute resolution mechanism.
4. The right of access to court was foundational to the stability of an orderly society. It ensured the peaceful, regulated and institutionalised mechanisms to resolve disputes. The right of access to court was a bulwark against vigilantism, and the chaos and anarchy which it caused. Construed in the context of the rule of law, access to court was indeed of cardinal importance. As a result, very powerful considerations would

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be required for its limitation to be reasonable and justifiable. That was the test the court should bear in mind when invited to decline jurisdiction.

5. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy. The need for an effective remedy in a case could justify the court in taking the exceptional course of entertaining a dispute where the court was satisfied that the laid down statutory mechanism may not provide an effective remedy to the aggrieved party or if it was clear that the dispute disclosed by the facts substantially or wholly lay outside the scope of the laid down statutory mechanism. It should be clearly established that a significant injustice had probably occurred or will occur and that there was no alternative effective remedy within the statutory established mechanism.
6. The petitioner raised issues touching on violation of its constitutional rights which could not be addressed in the statutory laid down dispute resolution mechanism. The instant court had powers to entertain the case and determine whether or not the petitioner's rights to legitimate expectation and fair administrative action had been violated or threatened. An effective remedy for such violations if proved was not available through the legal mechanism under the relevant tax laws. The laid down mechanism could not address constitutional violations such as those alleged in the petition. The entire legal system, including tax laws must accord with the broader values of the Constitution. The courts were obliged to prevent the restriction of those rights if they were directly threatened.
7. The "deepest norms" of the Constitution should determine whether the alleged breach of a fundamental right involved explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. The actions complained of in the instant proceedings must be scrutinised to decide whether they accord with the demands of the Constitution. Thus, the dispute was properly before the court.
8. Public bodies, no matter how well-intentioned, may only do what the law empowered them to do. Agency notices must conform to the doctrine of legality. If the agency notice had no foundation in law, then, it would amount to undermining the legality principle which, was inextricably linked to the rule of law. The 1st respondent was constrained by the doctrine of legality to enforce the law by ensuring that its decisions including the impugned agency notices conform to the relevant provisions of the law.
9. Article 47 of the Constitution provided that every person had a right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. The Fair Administrative Action Act was enacted to illuminate and expand the values espoused under article 47 of the Constitution. Section 4(3) of the Act provided the broad parameters which bodies undertaking administrative action had to adhere to.
10. Judicial review was concerned with the process a statutory body employed to reach its decision and not the merits of the decision itself. Once it had been established that a statutory body had made its decision within its jurisdiction following all the statutory procedures, unless the decision was shown to be so unreasonable that it defied logic, the court could not intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court.
11. The purpose of judicial review was to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review could not be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates. Section 7(2) of the Fair Administrative Action Act provided for grounds of review which included bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.
12. The existence of an agreement between the petitioner and respondent regarding payment of its tax obligations was contested. If at all there was an agreement, it was not honoured. The agency notices were issued in conformity with section 42 of the Tax Procedures Act. If at all the respondent issued a notice for an incorrect tax amount, then that was a tax dispute and could be resolved through the existing statutory mechanisms but not by way of a constitutional petition.

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13. The notices did not in any manner offend the relevant provisions of the tax laws or the Fair Administrative Action Act, in light of the provisions of section 42 of the Tax Procedures Act and the principle of legality which required the first respondents' actions to conform with the law. The respondent was statutorily mandated to collect taxes as provided under the law and provided its action fall within the law, the court would not intervene. The agency notices were in conformity with the law and were not tainted by illegality either on the alleged unreasonableness or otherwise.
14. The agency notice was reasonably related to a legitimate purpose, that was to enable the respondent fulfill its statutory mandate of collecting taxes. In determining reasonableness, relevant factors include: -
 - a. whether there was a valid, rational connection" between the agency notice and a legitimate and public interest to justify it, which connection could not be so remote as to render the agency notice arbitrary or irrational. Collecting taxes lawfully due was a legitimate purpose.
 - b. the second consideration was whether there were alternative means of exercising the asserted right that remain open to the affected person. The petitioner had the option of questioning the amounts or validity of the notice under the statutory laid down mechanism.
15. The court should, as far as possible, avoid any decision or interpretation which would bring about the result of rendering the system unworkable in practice or create a situation that would go against clear provisions of the law governing the subject in issue. In the instant case, the law and the agency notice in question were designed at maintaining and ensuring collection of taxes and performance of the functions of the respondent.
16. The agency notice had not been shown to be unreasonable and or violating the petitioners right to fair administrative action as alleged. It was logically related to the legitimate purpose of collecting revenue as provided under the law. It did not deprive the petitioner the opportunity to challenge the amounts at the right forum if not properly tabulated or if unreasonable.
17. An expectation whose fulfillment required that a decision-maker should make an unlawful decision, could not be a legitimate expectation. It was inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arose. There were good reasons why that should be so: an official could not be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.
18. Statutory words overrode an expectation howsoever founded. Thus, a decision maker could not be required to act against clear provisions of a statute just to meet one's expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in rule of law. There could not be legitimate expectation against the clear provisions of a statute. The first respondent's decision was grounded on the relevant statutory provisions, in particular section 42.
19. The petitioner stated that agency notices violated its right to property under article 40 of the Constitution in that if the agency notices were left to stand, the petitioner's debtors could comply with them in which event the respondent would collect multiple times more than what was legally due. That was rather speculative and the question of what was legally due could be determined by way of an objection as stipulated under the law.
20. The Right to property was not absolute. A common way of determining whether a decision that limits rights was justified was by asking whether the decision in question was proportionate. It was in public interest that taxes must be paid. The agency notices did not infringe on the petitioner's rights to property. The petitioner was not challenging its tax obligations.

Petition dismissed with no orders as to costs.

SBI International Holdings Ag Kenya v Commissioner, Customs and Border Control, of Kenya Revenue Authority

Parties ought to exhaust the available statutorily provided mechanism before resorting to Judicial Review, unless exempted from doing so

Headnote: The main issue before the court was whether the East African Community Customs Management Act provided for both the substantive and procedural law hence ousting any necessity of applying the Tax Procedures Act to matters customs. The High Court held that section 229 of the East African Community Customs Management Act dealt with both decisions and omissions and provided that the remedy available was to lodge an application for review of that decision or omission with the Commission. Further the issuance of agency notices was clearly a decision and a decision could be right or wrong. Where a decision was wrong the remedy was provided for under section 229 of the East African Community Customs Management Act 2004. In that event, the applicant was required to lodge an application to the Commissioner in writing within thirty days of the date of issuance of the agency notices seeking review of that decision after which the Commissioner would then be obligated to, issue a decision on the application for review as provided for under Section 229 (4) of the East African Community Customs Management Act 2004. If dissatisfied by a decision of the Commissioner issued under Section 229, the applicant would then have had the liberty to appeal the said decision to the Tax Appeals Tribunal, which was vested with the jurisdiction to hear appeals from the review decision of the Commissioner.

SBI International Holdings Ag Kenya v Commissioner, Customs and Border Control, of Kenya Revenue Authority

Judicial Review Miscellaneous Civil Application E009 of 2021

High Court at Machakos

GV Odunga, J

November 30, 2021

Statutes – interpretation of statutes – East African Community Customs Management Act (EACCMA) vis-à-vis the Tax Procedures Act – where a taxpayer was issued with an agency notices under the EACCMA – whether an agency notice could be issued to enforce provisions of the East African Community Customs Management Act – whether the East African Community Customs Management Act provided for both the substantive and procedural law hence ousting any necessity of applying the Tax Procedures Act to matters customs – East African Community Customs and Management Act, 2004, sections 229 and 230.

Customs Law – agency notice – objection to agency notice – doctrine of exhaustion of remedies – where a party filed a constitutional petition to object to an agency notice instead of filing an appeal to the Tax Appeals Tribunal – whether an objection to agency notice could be resolved by way of a constitutional petition – East African Community Customs and Management Act, 2004, sections 229 and 230.

Brief Facts

The applicant sought judicial review orders against the respondent. According to the applicant, the respondent issued agency notices against the applicant's bank accounts under section 131 of the East African Community Customs Management Act, 2004 (EACCMA). As a consequence, the applicant's bankers issued a notification to the applicant that the said accounts were immediately attached and that the funds therein would anytime from then be paid to the Kenya Revenue Authority.

The applicant contended that the said agency notices were illegal, premature, unprecedented abuse of power, grossly irrational and issued in extremely bad faith, warranting immediate invocation of the court's jurisdiction to urgently intervene, to forestall the otherwise devastating prejudice to the applicant, violating the fundamental right to a fair administrative action.

According to the respondent, whereas the applicant wanted the court to buy into the idea that the agency notices were not an appealable decision hence the need to appear before the court, the notion of an appealable

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decision was a creation of the Tax Procedures Act that had no basis in customs matter such as the one being dealt with. Hence, the application before the court lacked merit, was calculated to curtail the respondent's ability to collect due taxes and should therefore be dismissed with costs to the respondent.

Issue

- i. Whether an agency notice could be issued to enforce provisions of the East African Community Customs Management Act
- ii. Whether the East African Community Customs Management Act 2004 provided for both the substantive and procedural law hence ousting any necessity of applying the Tax Procedures Act to matters customs.
- iii. Whether an objection to agency notice could be resolved by way of a constitutional petition

Held

1. The remedy of judicial review was concerned with reviewing not the merits of the decision of which the application for judicial review was made, but the decision-making process itself. The purpose of the remedy of judicial review was to ensure that the individual was given fair treatment by the authority to which he had been subjected and that it was no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court was observed, the court would, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.
2. The purpose of judicial review was to ensure that the individual was given fair treatment by the authority to which he had been subjected. Such proceedings were not concerned with the determination of the question whether the applicant was liable to pay the taxes demanded or not.
3. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly. Accordingly, the court was perfectly entitled to intervene where it was alleged that the discretion was not being exercised judicially, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. Judicial review had become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.
4. The authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority was not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court in intervening.
5. The decision whether or not to grant judicial review orders was an exercise of judicial discretion. The court's requirement that the alternative procedure ought to be exhausted prior to resorting to judicial review was in accord with judicial review being very properly regarded as a remedy of last resort. However, the applicant would not be required to resort to some other procedure if that other procedure was less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.
6. Section 229 of the East African Community Customs Management Act 2004 (EACCMA) was not worded in the same manner as section 51 of the Tax Procedures Act, 2015. While the latter only dealt with decisions, the former dealt with both decisions and omissions. The East African Community Customs Management Act 2004 provided for both the substantive and procedural law hence ousting any necessity of applying the Tax Procedures Act to matters customs.
7. Section 229 of the East African Community Customs Management Act dealt with both decisions and omissions and provided that the remedy available was to lodge an application for review of that decision or omission with the Commission. Further the issuance of agency notices was clearly a decision and a decision could be right or wrong. Where a decision was wrong the remedy was provided for under section 229 of the East African Community Customs Management Act. The applicant was required to

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lodge an application to the Commissioner in writing within thirty days of the date of issuance of the agency notices seeking review of that decision after which the Commissioner would then be obligated to, issue a decision on the application for review as provided for under section 229 (4) of the East African Community Customs Management Act 2004. If dissatisfied by a decision of the Commissioner issued under section 229, the applicant would then have had the liberty to appeal the said decision to the Tax Appeals Tribunal, which was vested with the jurisdiction to hear appeals from the review decision of the Commissioner.

8. Whichever way one looked at the impugned step, whether as an omission or a commission, the remedy for the same was prescribed under section 229 of the East African Community Customs Management Act. Therein lay the first distinction between the instant case and *Republic vs. Kenya Revenue Authority Ex Parte Jaffer Mujtab Mohamed Nairobi Miscellaneous Civil Application No. 312 of 2011* a decision that was arrived at based on the provisions of the Income Tax Act as read with the provisions of the Tax Procedures Act. It was, based on the said enactments, that the court found in the above case that the action of issuing the agency notices was premature as the period stipulated for challenging the decision had not run out and that the effect of the respondent's action would have been to scuttle the appellate process. However, where the provision dealt with both actions and omissions and what was provided was the maximum period for lodging an objection as in the instant case, the argument of prematurity of the enforcement action may not be of any assistance to the applicant. Therefore, whether one argued that there was a decision or not, the end result was the same that the applicant ought to have resorted to the prescribed remedy.
9. The issue of the respondent issuing the tax decision and allowing for the appeal review period of thirty days to lapse, before making the decision having regarded the appeal, before enforcement could be undertaken through the agency notices, could not arise.
10. Failure to consider representations similarly amounted to an omission which fell squarely under ambits of section 229 of the EACCMA. On the other hand, if the argument was that the facts themselves exonerated the applicant from payment of duty, that would go to the merit of the respondents decision. The issue of a decision on the merits would then have to be dealt with under section 230 of the East African Community Customs Management Act 2004.
11. The applicant's grievances could have been properly dealt with under the provisions of sections 229 and 230 of the EACCMA. No convincing reasons have been given as to why the applicant opted to bypass the set mechanisms which were not any less appropriate, convenient, effective and/or beneficial. Hence the Notice of Motion was misconceived and incompetent.

Application struck out with costs to the respondent.

Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments

It was compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching the High Court for judicial review

Headnote: A tax payer that was aggrieved of the issuance of an agency notice sought reprieve at the High Court via a judicial review application. The applicant had not appealed the decision before the Tax Appeals Tribunal. The High Court held that it was compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the Fair Administrative Action Act. The person seeking exemption must satisfy the court, first that there were exceptional circumstances, and, second, that it was in the interest of justice that the exemption be given. Section 9(4) of the Fair Administrative Action Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments [2019] eKLR

Judicial Review Application 447 of 2018

High Court at Nairobi

JM Mativo, J

February 25, 2019

Judicial review – application for judicial review – process for application of judicial review – application for leave as a prerequisite in institution of a substantive judicial review application – the importance of application for leave in judicial review – whether application for leave was a prerequisite in instituting of a substantive Judicial Review application – Law Reform Act, CAP 26, sections 8 & 9; Civil Procedure Rules, 2010, Order 53
Constitutional Law – constitutional applications – judicial review as a constitutional principle – judicial review as a constitutional remedy for violation of rights – the impact of entrenchment of judicial review within the constitution – whether a citizen citing violation of constitutional rights or challenging an administrative action or a decision of a tribunal required the leave of court to apply for judicial review – Constitution of Kenya, 2010, articles 23 (3) (f), 47 and 48; Fair Administrative Action Act, section 7

Jurisdiction – jurisdiction of the High Court – jurisdiction to determine disputes where an applicant had not exhausted the available remedies – exhaustion of existing dispute resolution mechanisms – whether the High Court acting as a judicial review court had the jurisdiction to determine a suit that challenged the issuance of an agency notice against a tax payer where the tax payer had not exhausted the available remedies – Fair Administrative Action Act, section 9

Brief Facts

The *ex parte* applicant sought the courts leave to apply for an order of certiorari for the purposes of quashing agency notices/ orders of the Commissioner for Investigations and Enforcement Department and an order of Prohibition to prohibit the Commissioner for Investigation and Enforcement Department from issuing any further agency notices. The *ex parte* applicant further prayed that the leave if granted to operate as a stay of the agency notice and orders until the determination of the substantive application or until further orders of the court.

The *ex parte* applicant submitted that the Tax Appeals Tribunal was not sitting nor was it properly constituted, hence, the reason why the *ex parte* applicant moved to the High Court. He urged the court to grant the leave sought. He contented that a notice must be issued to the tax payer, and, that the agency notice was a matter of the last resort, hence, it must be preceded by an assessment under the act. He argued that no assessment was done, and, that, the procedure followed was improper.

The respondent argued that the agency notices were properly issued. He pointed out that the *ex parte*

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applicant seemed to have a predetermined effort to obtain the orders and cited the existence of a similar suit in this Division, being JR No. 448 of 2018 and that the directors of the *ex parte* applicant in the said case and the present case were the same. It was argued that the *ex parte* applicant did not deserve any of the orders sought. He urged the court not to usurp the respondents powers especially where the tax recovery process had begun. He contended that the proper forum for the *ex parte* applicant to lodge his claim was the Tax Appeals Tribunal.

Issues

- i. Whether application for leave was a prerequisite in instituting of a substantive judicial review application.
- ii. Whether a citizen citing violation of constitutional rights or challenging an administrative action or a decision of a tribunal required the leave of court to apply for judicial review.
- iii. Whether the High Court acting as a judicial review court had the jurisdiction to determine a suit that challenged the issuance of an agency notice against a tax payer where the tax payer had not exhausted the available remedies.

Held

1. The leave of court was a prerequisite to making a substantive application for judicial review with a view to filtering out frivolous applications and the grant or refusal involved an exercise of judicial discretion. The test to be applied was whether the applicant had an arguable case. Thus, the first step in the judicial review procedure involved the mandatory leave stage. The leave stage was used to identify and filter out, at an early stage, claims which may be trivial or without merit.
2. At the leave stage an applicant had to show that:
 - a. there was sufficient interest in the matter otherwise known as *locus standi*;
 - b. that he/she was affected in some way by the decision being challenged;
 - c. that he/she had an arguable case and that the case had a reasonable chance of success;
 - d. the application must be concerned with a public law matter, that was, the action must be based on some rule of public law; and
 - e. the decision complained of must have been taken by a public body, that was a body established by statute or otherwise exercising a public function.

All those tests were important and must be demonstrated.

3. At the leave stage, the applicant had the burden of demonstrating that the decision was *illegal, unfair and irrational*. The applicant must persuade the court that the application raised a serious issue. That was a low threshold. A serious issue was demonstrated if the judge believed that the applicant had raised an arguable issue that could only be resolved by a full hearing of the judicial review application. If the court was not persuaded, leave would be denied and the matter proceeded no further.
4. Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules had to conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. The governing statute and the resultant decision must be interpreted through the prism of article 47 of the Constitution.
5. The entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. First, parties, who were once denied judicial review on the basis of the public-private power dichotomy, should access judicial review if the person, body or authority against whom it was claimed exercised a quasi-judicial function or a function that was likely to affect his rights. Second, the right to access the court was constitutionally guaranteed. That made the requirement for leave unnecessary. Third, an order of judicial review was one of the reliefs for violation of fundamentals rights and freedoms under article 23(3)(f) of the Constitution. Fourth, section 7 of the Fair Administrative Action provided that any person who was aggrieved by an administrative action or decision could apply for review of the administrative action or decision. Section 7(2) provided for grounds for applying for Judicial Review.
6. Court decisions should boldly recognize the Constitution as the basis for judicial review. Judicial review

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had become a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. Time had come for Kenyan courts to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on that front. Courts must develop judicial review jurisprudence alongside the mainstreamed theory of a holistic interpretation of the Constitution. Judicial review was no longer a common law prerogative, but was a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power were regulated by the Constitution.

7. It was time for Parliament to consider the relevancy and constitutionality of the provisions of the Law Reform Act and the Civil Procedure Rules, 2010 which prescribed that a litigant had to seek court's leave before approaching the court. The Constitution guaranteed access to justice. The right to approach the court received a seal of constitutional approval, courtesy of article 48 of the Constitution. The constitutional guarantee to the right to access courts fundamentally shifted the ground and rendered the provisions of the Civil Procure Rules, 2010 and the Law Reform Act that required a party to seek courts leave to approach the court obsolete.
8. It was imperative that where a dispute resolution mechanism existed outside courts, the same be exhausted before the jurisdiction of the courts was invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brew. The exhaustion doctrine was a sound one and served the purpose of ensuring that there was a postponement of judicial consideration of matters to ensure that a party was first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. That accorded with article 159 of the Constitution which commanded courts to encourage alternative means of dispute resolution.
9. Exceptions to the exhaustion requirement were not clearly delineated, however, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applied. The High Court could, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.
10. Section 9(1), 9(2) and 9(3) of the Fair Administrative Action Act used the word 'shall'. The word "shall" when used in a statutory provision imported a form of command or mandate. It was not permissive, it was mandatory. The word shall in its ordinary meaning was a word of command which was normally given a compulsory meaning as it was intended to denote obligation.
11. A proper construction of section 9(2) and (3) led to the conclusion that they were couched in mandatory terms. The only way out was the exception provided by 9(4) which provided that notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considered such exemption to be in the interest of justice. Two requirements flowed from the subsection (3). First, the applicant had to demonstrate exceptional circumstances. Second, on application by the applicant, the court could exempt the person from the obligation.
12. What constituted exceptional circumstances depended on the facts of each case. The circumstances had to be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. The need for the circumstances of the case to be exceptional meant that those circumstances had to be well outside the normal run of circumstances found in cases generally. The circumstances did not have to be unique or very rare but they had to be truly an exception rather than the rule.
13. It was compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the Fair Administrative Action Act. The person seeking exemption must satisfy the court, first that there were exceptional circumstances, and, second, that it was in the interest of justice that

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the exemption be given. Section 9(4) of the Fair Administrative Action Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

14. The impugned decision constituted administrative action as defined in section 2 of the Fair Administrative Action Act. Therefore, an internal remedy had to be exhausted prior to judicial review, unless the *ex parte* applicant could show exceptional circumstances to exempt it from that requirement. Additionally, what constituted exceptional circumstances depended on the facts and circumstances of the case and the nature of the administrative action in issue.
15. Factors taken into account in deciding whether exceptional circumstances existed were whether the internal remedy was effective, available and adequate. An internal remedy was effective if it offered a prospect of success, and could be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it could be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. An internal remedy was adequate if it was capable of redressing the complaint.
16. The exception to the exhaustion requirement was particularly likely where a party pleaded issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value was at stake. Indeed, in the instant case, no convincing argument was advanced.
17. Where there was an alternative remedy or where Parliament had provided a statutory appeal process, it was only in exceptional circumstances that an order for judicial review would be granted. In determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism was the real issue to be determined and whether the appeal mechanism was suitable to determine it. In the instant case, no argument was advanced that the available mechanism was not adequate.
18. A statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who might not have audience before the forum created, or who might not have the quality of audience before the forum which was proportionate to the interests the party wished to advance in a suit. Statutory provisions ousting court's jurisdiction must be construed restrictively. That argument was not advanced before the instant court.
19. A court was bound to entertain proceedings that fell within its jurisdiction. A court had no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction was determined on the basis of pleadings and not the substantive merits of the case.
20. The *ex parte* applicant was aggrieved by a tax decision. The matter fell within the ambit of the Tax Procedures Act. That was the nature of the dispute before the court. No amount of coloring could change the pith, substance and character of the case.
21. The *ex parte* applicant ought to have exhausted the available mechanism before approaching the court. The case offends section 9 (2) of the Fair Administrative Action Act. The *ex parte* applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the Fair Administrative Action Act. It was a requirement under the above sections that an applicant applies for exemption. The *ex parte* applicant never applied for an exemption, hence, its argument that the Tax Appeals Tribunal was not sitting or was not properly constituted could not assist. The suit offended the doctrine of exhaustion of statutory available remedies. It offended the provisions of section 9(2)(4) of the Fair Administrative Action Act.

Application dismissed with costs to the respondent.

Republic v Commissioner General, Kenya Revenue Authority Ex-Parte Martin M. Mugi

Issuing an agency notice after making differing demands on the amount of tax due went against the legitimate expectation of a tax payer

Headnote: The main issue was whether the High Court could issue judicial review orders against the Kenya Revenue Authority for agency notices issued without following the requisite procedure. The High Court held that the process used to arrive at the issuance of the agency notice was unreasonable, as it was based on contradictory information given to the applicant, which raised an inference that the amount of taxes demanded from him were arbitrary. The decision to issue an agency notice would have an onerous effect on the applicant's rights, and a reasonable process would have clarified the differences in the figures of tax demanded, before issue of the agency notices. Issuing an agency notice after making differing demands on the amount of tax due went against the legitimate expectation of a tax payer

Republic v Commissioner General, Kenya Revenue Authority Ex-Parte Martin M. Mugi [2018] eKLR

Judicial Review Application 445 of 2012

High Court at Nairobi

P Nyamweya, J

July 18, 2018

Jurisdiction – jurisdiction of the High Court – jurisdiction to determine a judicial review application – claim that the applicant had not exhausted the existing remedies before approaching the High Court for judicial review – claim that the issues raised fell under the jurisdiction of the Tax Appeals Tribunal – whether the High Courts judicial review jurisdiction could be invoked in a matter that questioned the issuance of agency notices by the Kenya Revenue Authority

Judicial review – grounds of judicial review – natural justice – where an objection with regard to the amount of tax demanded was issued by the tax payer – where agency notices were issued despite existence of an objection to the tax demanded – whether the rules of natural justice were breached when the Agency Notices were issued

Judicial review – legitimate expectation – duty to issue an agency notice upon assessment of tax – where an agency notice was issued despite the existence of differing tax demands due to be paid by a tax payer – where a tax assessment was based on contradictory information – whether issuing an agency notice after making differing demands on the amount of tax due went against the legitimate expectation of a tax payer – whether the decision to issue agency notices with respect to a tax payer's bank account was unreasonable and breached the tax payer's legitimate expectation

Brief Facts

The applicant, an advocate of the High Court, was aggrieved with the assessment of taxes due from him by the respondent and thereby filed a judicial review application. The applicant stated that the genesis of the instant application was a request he lodged through his auditors, for a tax compliance certificate, whereupon he was issued with a demand for tax arrears. He averred that he then presented his annual reports, and his financial statements together with his book of accounts, which showed that he had paid all taxes and what was remaining were penalties for late payment. However, the respondent placed an agency notice with his bankers, Kenya Commercial Bank, meaning that he could not transact business with regard to funds held in the account; and he requested his auditors to carry out discussions with the respondent. However, that the issue was not conclusively discussed and the agency notice still persisted, even after the applicant and his auditors sent letters to the respondent requesting the lifting of the same.

It was the applicant's case that the respondent's actions were not only illegal but in breach of its statutory and common law duties, prejudicial to himself and his trade as an advocate; and that he has all along been paying taxes as required albeit sometimes late, which had attracted penalties which he offered all along to pay.

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According to the applicant, the respondent was uncertain of the amount owing as tax from him, and based on that uncertainty its decision to issue an agency notice was based on unreasonable and shaky grounds.

The respondent argued that it had the power to undertake the actions it did against the applicant, as provided under the Kenya Revenue Authority Act, Income Tax Act and Value Added Tax Act. It was further argued that the application was founded on the fundamental misapprehension of the jurisdiction of the High Court, and that the proceedings were an abuse of the court process. According to the respondent, the instant court lacked jurisdiction to entertain the matter for the reason that there was a legal framework and forum to substantively litigate the issues in dispute. The respondent finally submitted that the judicial review orders sought were not tenable.

Issues

- i. Whether the high court's judicial review jurisdiction could be invoked in a matter that questioned the issuance of agency notices by the Kenya Revenue Authority.
- ii. Whether agency notices that were issued despite the existence of an objection to the tax demanded against was unreasonable and breached the tax payer's legitimate expectation.
- iii. Whether agency notices that were issued despite the existence of an objection to the tax demanded against breached the rules of natural justice.

Held

1. Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it was only in exceptional circumstances that an order for judicial review would be granted. It was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case, and ask itself what was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.
2. The sections relied upon by the respondent to challenge the High Court's jurisdiction, section 82 of the Income Tax Act and section 32 of the Value Added Tax Act, had been repealed, and replaced by section 52 of the Tax Procedures Act and the provisions of the Tax Appeals Tribunal Act. The repealed sections, which were the sections applicable at the time of filing of the applicant's application, established the Tax Appeals Tribunal. The then sections 84 and 85 of the Income Tax Act and sections 32 and 33 of the Value Added Tax Act (repealed), in addition provided that a matter became subject of an appeal at the Tax Appeals Tribunal, once an objection had been made by the person who disputed an assessment of tax, and the respondent had made a decision on the said objection. Therefore, the appealable decision that was to be subject to the jurisdiction of the Tax Appeals Tribunal was the respondent's decision on an objection.
3. What was being challenged by the applicant was not the respondent's decision on his objection, but the process it used to issue the impugned agency notices. Therefore, the applicant was not precluded from invoking the High Court's judicial review jurisdiction. The subject of his application was the propriety of the process taken by the respondent in issuing the agency notices, rather than a decision on an objection by the applicant.
4. The purpose of the remedy of judicial review was to ensure that the individual was given fair treatment by the authority to which he had been subjected. To substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question was not part of that purpose.
5. The remedy of judicial review was concerned with reviewing not the merits of the decision of which the application for judicial review was made, but the decision-making process itself. The High Court was not concerned with the issue whether the applicant was liable to pay the taxes demanded or not. That was an issue that went to the merit rather than the process.
6. The respondent explained in considerable detail why there were different amounts of tax due that were stated in its letters dated August 6, 2003, September 30, 2004, July 11, 2012 and July 13, 2015. Three

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different amounts of tax had been indicated in the letters before the impugned Agency Notices were issued. The process used to arrive at the issuance of the agency notice was unreasonable, as it was based on contradictory information given to the applicant, which raised an inference that the amount of taxes demanded from him were arbitrary. The decision to issue an agency notice would have an onerous effect on the applicant's rights, and a reasonable process would have clarified the differences in the figures of tax demanded, before issue of the agency notices.

7. Issuing an agency notice after making differing demands on the amount of tax due went against the legitimate expectation of a tax payer that the respondent should state the amount of tax due to it with clarity and unambiguity, as it was mandated to do under the applicable provisions of the law. By its various representations to the applicant it had not reached a decision on the amount of tax due and payable.
8. The respondent breached the rules of natural justice when issuing the impugned agency notices. Even though the respondent provided evidence of a demand notice issued to the applicant and a reminder of the same for payment of the necessary tax, it also annexed a response to the demand notices by the applicant's accountant wherein the applicant denied owing the tax demanded. There was evidence of communication by the applicant with the respondent seeking clarification as regards the amount of tax that was demanded. The respondent still proceeded with the agency notices with respect to the demanded amount of tax while knowing that the amount was disputed. The applicant was not given the opportunity to prove the payments he had alleged to have made.
9. The applicant had sought orders of *certiorari*, prohibition, and *mandamus*. The respondent had acted unreasonably, in breach of the applicant's legitimate expectations and in breach of the rules of natural justice. The applicant was entitled to the order sought of *certiorari* to quash the agency notices placed by the respondent with the applicant's bankers, Kenya Commercial Bank.
10. The agency notices would be quashed, hence there was no longer any reason to grant the prohibition sought. If the respondent still intended to proceed with its claim, it would have to start the process afresh in accordance with the law, and there was no longer any threat present of an illegal action. In addition, the respondent could not be prohibited from undertaking its statutory duties of assessing the tax due and enforcing payment of the same from the applicant, which tax was yet to be ascertained.
11. The court could not determine the amount of tax due from the applicant and whether it had been paid. It could not direct the respondent to issue the applicant with a tax compliance certificate.

Application partly allowed.

Orders

- i. *An order of certiorari quashing the agency notices dated October 3, 2012 was issued to the Manager, Kenya Commercial Bank, Kipande House Nairobi, placed by the respondent on the applicant's accounts with Kenya Commercial Bank for the sums of Kshs 1,829,296/= and Kshs 1,523,616/=.*
- ii. *The deposit made by the applicant herein of Kshs 1,600,000/= was to be immediately released to the applicant.*
- iii. *The respondent would bear the costs of these proceedings.*

Republic v Kenya Revenue Authority Ex-parte Alltex EPZ Limited

An employer as the principal is liable for the fraudulent actions of its duly authorized employee who fraudulently imports goods using the employer's identity

Headnote: The appellant was registered as an export processing zone operator under the Export Processing Zones Act and under the East African Community Customs Management Act (the Act) under which it held a license to manufacture goods at its EPZ premises, under a customs security bond. The appellant's employee, authorized to clear goods on its behalf, in collusion with others breached the security bond conditions by importing personal goods on the strength of the security bond of the appellant. The respondent demanded for payment of duties, taxes, interest and penalties amounting to Kshs. 6,561,303 for the unaccounted goods which the appellant contested in the High Court and lost. The appellant then appealed to the Court of Appeal. The Court of Appeal held that an owner or importer of goods was liable for the fraudulent actions of its lawfully authorized agent. Such an owner was liable to pay duty on goods fraudulently imported duty free by its employees on the strength of its security bond. The common law doctrine that a principal was not liable for the actions of its agent did not apply where there were clear provisions of the law. The substance of common law and doctrines of equity applied only in so far as the Constitution or a statute did not apply.

Republic v Kenya Revenue Authority Ex-parte Alltex EPZ Limited [2017] eKLR

Civil Appeal 116 of 2013
Court of Appeal at Nairobi
A Makhandia, K M'Inoti, and AK Murgor, JJA
September 29, 2017
Reported by John Ribia

Customs Law – custom agents – agency relationship between custom agents and its employees - vicarious liability of a custom agent for the acts of its employees – employer liability for employee fraud – where an employee fraudulently represents himself as the employer and imports goods as the importer - whether an employer as the principal was liable for the fraudulent actions of its duly authorized employee who fraudulently imports goods using the employer's identity - East African Community Customs Management Act section 146

Customs Law – imported goods – owner of imported goods – where one falsely represented to be an owner of goods - whether one could be considered an owner of goods if the person held themselves out or represented themselves to be the owner - whether the fact that a customs agent was considered liable for an importer's goods relieved the owner/importer of the goods from liability - whether the fact the owner of goods who had authorised a customs agent to act for him was liable for the acts and declarations of the agent precluded the agent from prosecution for criminal acts – East African Community Customs Management Act sections 2, 147 and 148

Legal Systems – sources of law – common law – circumstances under which common law was applicable in the Kenyan jurisdiction – Judicature Act (Cap 8) section 3(1)(c)

Brief Facts

The appellant was registered as an export processing zone operator under the Export Processing Zones Act and under the East African Community Customs Management Act (the Act) under which it held a license to manufacture goods at its EPZ premises, under a customs security bond.

The security bond, required by regulation 147 of the East Africa Customs Management Regulations, 2006 (the regulations) enabled the appellant to import duty free, goods and raw materials for production of garments for export at its EPZ business. Due to exemption of the EPZ enterprise from duty and taxes, a fairly rigid regime of checks and accountability is put in place under the Act and the regulations made thereunder. Goods imported under the security bond arrangement must be strictly used in the EPZ and the operator is under an obligation to account for all goods imported under its license. Breach of the conditions

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of the bond, such as importation of goods that are not meant for the EPZ business, failure to satisfactorily account for all imported goods, or diversion of manufactured products from the export to the local market, results in the operator having to pay taxes and duties on those goods, together with interest and penalties.

The appellant's employee, authorized to clear goods on its behalf, in collusion with others breached the security bond conditions by importing personal goods on the strength of the security bond of the appellant. The respondent demanded for payment of duties, taxes, interest and penalties amounting to Kshs. 6,561,303 for the unaccounted goods which the appellant contested in the High Court and lost. The appellant then appealed to the Court of Appeal.

On appeal the appellant contended that the agent declared and represented on behalf of the appellant that the goods in question belonged to the appellant and by virtue of that declaration and representation, the goods were exempted from duty. The appellant contended that because it did not in fact own or import the goods in question, it was not the owner within the meaning of the Act and therefore it cannot be liable to pay duty and taxes on them.

Issues

- i. Whether an employer as the principal was liable for the fraudulent actions of its duly authorized employee who fraudulently imports goods using the employer's identity.
- ii. Whether the common law doctrine that the principle was not liable for the actions of its agent overrode the provisions of the East African Community Customs Management Act that placed liability on the both the principal and the agent.
- iii. Whether under the East African Community Customs Management Act one could be considered an owner of goods if the person held themselves out or represented themselves to be the owner.
- iv. Whether the fact that a customs agent was considered liable for an importer's goods relieved the owner/importer of the goods from liability.
- v. Whether the fact the owner of goods who had authorised a customs agent to act for him was liable for the acts and declarations of the agent precluded the agent from prosecution for criminal acts.

Relevant Provisions of the Law

East African Community Customs Management Act, 2004 sections 147 and 148.

147. Liability of duly authorised agent

A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for (be payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act: Provided that nothing herein contained shall relieve the owner of such goods from such liability.

148. Liability of owner for act of duly authorized agent.

An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence: Provided that-

- (i) *an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorised agent unless the owner actually consented to the commission of the offence;*
- (ii) *nothing herein contained shall relieve the duly authorised agent from any liability to prosecution in respect of any such offence.*

Held

1. Being a first appeal, the court was enjoined to consider both issues of fact and law. The main issues of fact are

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not in dispute.

2. The line of argument that the trial court erred by ignoring the common law principles on the liability of a principal for acts of an agent had no basis in law. A court of law could not ignore the provisions of a statute and supplant them with principles of common law. Section 3(1)(c) of the Judicature Act provided that the substance of common law and doctrines of equity applied only in so far as the Constitution or a statute did not apply.
3. The liability of the appellant in the instant appeal was to be determined according to the terms of the East African Community Customs Management Act (the Act), which had expressly, comprehensively, and exhaustively addressed the relationship between the owner of goods under the Act and his agent. Section 145 (1) of the Act empowered the Commissioner of Customs to license a person to act as agent for transacting business relating to declaration or clearance of goods. By dint of section 146, where the owner of goods was required or authorised under the customs laws to perform any act, his authorised agent may perform such act on his behalf. The Act was clear that to be an agent, the person must be exclusively in the employment of the owner of the goods. For the purposes of the Act, Peter Muthenya Muindi was an employee as well as an agent of the appellant.
4. Under the Act, whatever the appellant could do relating to declarations or clearance of goods, the agent could do on its behalf. The Act defined owner of goods to include any person being or holding himself or herself out to be the owner, importer, exporter, consignee, agent or the person in possession of, or beneficially interested in, or having control of, or power of disposition over the goods. The use of the word “include” suggested that the definition was not limited only to the persons named in the provision. Under the definition also, a person did not need to be the owner of goods as was commonly understood; it was enough if he held himself out or represented himself to be the owner.
5. Whatever the appellant could have done regarding the declarations, its agent could also do the same on its behalf. Where the appellant could have represented or held itself out as the owner of goods, the agent could do it on its behalf. The agent held out and represented the appellant as the owner of the goods. In law that was as good as though the appellant itself had held out or made the representation.
6. While the agent was deemed to be the owner of goods in respect of which he had made declarations and was personally liable for payment of duties due thereon, the proviso to section 147 of the Act was express enough that the fact that the agent was liable did not relieve the owner of the goods from liability. Under section 148, the owner of goods who had authorised an agent to act for him was liable for the acts and declarations of the agent and may even be prosecuted for any offences committed by the agent, though he cannot be imprisoned unless it was proved that he consented to the commission of the offence. The fact that the owner was liable however did not preclude the agent from prosecution for his criminal acts.

Appeal dismissed with costs to the respondent.

Commissioner of Domestic Taxes v Sony Holdings Limited

Chapter 8: Refund of tax and customs duty under tax and customs laws

If a refund claim is neither allowed nor rejected within the specified timeline, a taxpayer is entitled to claim the refund in its returns in subsequent years until the matter is resolved.

Headnote: The main issue before the court was whether tax refunds were time bound and whether tax refunds could be used to settle liabilities of a parent company of a tax paying company that applied for a refund. The High Court held that in accordance with section 47(3) of the Tax Procedures Act, the Commissioner ought to make a decision on a Taxpayer's Refund application within 90 days. If the refund claim was neither allowed nor rejected within the specified timeline, the taxpayer was entitled to claim the refund in its returns in subsequent years until the matter was resolved. The Commissioner bore the burden of proof to prove the refunds were paid off to the parent company.

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Tax Appeal E053 of 2020

High Court at Nairobi

DAS Majanja, J

May 13, 2023

Reported by John Ribia

Tax Law – tax refunds – erroneous tax refunds – import - whether the commissioner could demand tax refunds made in error to a tax payer – Tax Procedures Act, Act No. 29 of 2015, section 48

Tax Law – overpayment of taxes – powers available to the Commissioner to address overpayment of taxes - whether the law allowed for the rollover of tax credit claims and the implications of such actions - whether the commissioner was entitled to use overpayment of taxes to settle other tax liabilities - whether the Tax Appeals Tribunal misapplied the law by allowing the respondent to roll over the credit claim annually, potentially leading to a double claim - whether the Commissioner utilise a tax refund of a taxpayer company to offset and clear liabilities owed by the taxpayer company's parent company - whether the Commissioner met the burden of proof to show that the refund owed to a tax payer company were used to offset the liabilities of the parent company of the tax payer company - Tax Procedures Act, Act No. 29 of 2015, section 47(4)

Law of Evidence – documentary evidence – claim that irregular handled evidence had been utilized by a trial court to reach a decision – appeal by party affected by the adversely presented evidence - whether the Tax Appeals Tribunal's erred handling of evidence that had been irregularly introduced thereby impacting the Commissioner's right to be heard.

Brief Facts

The Commissioner appealed against the decision of the Tax Appeals Tribunal that Sony Holdings was entitled to a refund claim amounting to KES 33,187,669.00 and that it was also entitled to carry forward tax credits until it was lawfully offset or refunded. After experiencing significant losses in 2013, Sony Limited, the owners of a popular shopping mall in Nairobi, applied for income tax refunds for the for the years 2013 and 2014. The Commissioner subsequently conducted a refund audit covering the years 2013 and 2014 pursuant to section 47(2) of the Tax Procedures Act (TPA) in 2016 to ascertain the claim.

The Commissioner issued an agency notice against the refund for the purpose of offsetting the tax liabilities of Sony Limited's parent company, Atlantic Group (K) Limited for an aggregate amount of KES. 25,577,401.00. However, the Commissioner did not complete the offset and so Sony Limited continued to reflect it as a tax credit which the Commissioner rejected these tax credits through the issuance of Income Tax Claim Rejection Orders.

Sony Holdings Limited formally objected. The Commissioner rejected the objection and affirmed its position in its decision. In the decision, the Commissioner informed the Sony Holdings that the Refund had been processed and used to offset its tax liabilities and those of its parent Company leaving a balance of KES

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3,350,138.00 due to be refunded to the respondent.

The Commissioner further stated that the refund could only be claimed once and not in subsequent years as it was extinguished once the claim was lodged and accused Sony Holdings Limited of making a fraudulent claim by claiming a refund to which it was not entitled to contrary to section 97(b) of the TPA. Sony Holdings Limited subsequently appealed the Commissioner's decision.

The Tax Appeals Tribunal allowed the appeal and held that Sony Holdings was entitled to the refund claim of KES 33,187,669.00, that it was entitled to carry forward the credit until the same is lawfully set off or refunded. It further revoked the Tax Rejection Orders and directed that they be removed from Sony's iTax Platform. Aggrieved, the Commissioner filed the instant appeal at the High Court.

Issues

- i. Whether a taxpayer could only make a refund claim once whereupon the claim was extinguished notwithstanding that it had not been settled.
- ii. Whether a tax refund claim can be carried forward in subsequent years after an initial claim.
- iii. Whether the law allowed for the rollover of tax credit claims and the implications of such actions.
- iv. Whether the application of refunds to offset other tax liabilities was conducted in compliance with relevant tax statutes.
- v. Whether the Tax Appeals Tribunal misapplied the law by allowing the respondent to roll over the credit claim annually, potentially leading to a double claim.
- vi. Whether the commissioner was entitled to use overpayment of taxes to settle other tax liabilities.
- vii. Whether the commissioner could demand tax refunds made in error to a tax payer.
- viii. Whether the Commissioner can utilise a tax refund of a taxpayer company to offset and clear liabilities owed by the taxpayer company's parent company.
- ix. Whether the Commissioner met the burden of proof to show that the refund owed to a tax payer company were used to offset the liabilities of the parent company of the tax payer company.
- x. Whether the Tax Appeals Tribunal's erred handling of evidence that had been irregularly introduced thereby impacting the Commissioner's right to be heard.

Held

1. Section 56(2) of the Tax Procedures Act provided that an appeal to the High Court or to the Court of Appeal shall be on a question of law only. In exercising appellate jurisdiction, apart from dealing with issues of interpretation of the law, the court was guided by the settled principle that in so far as the facts were concerned the court's engagement with them was limited to background and context and to satisfy itself that the conclusions reached by the Tax Appeals Tribunal were based on the evidence on record and were not so perverse that no reasonable tribunal would have arrived at them.
2. The respondent was entitled a refund of KES 33,187,669.00. The refund audit findings confirmed the amount. In the objection decision the Commissioner confirmed that the refund had been partially utilised to offset liabilities. The Commissioner admitted that the respondent was entitled to the refund but justified why the respondent could not be paid or the sum appropriated in the manner requested by the respondent.
3. Section 47 of the Tax Procedures Act (TPA) underpinned the taxpayers statutory right to apply to the Commissioner for a refund. It imposed on the Commissioner the duty to consider the application, audit the claim if necessary, and thereafter make a decision on it within 90 days of application. Under section 47(4), the Commissioner was entitled to apply the overpayment to settle any other tax liabilities of the taxpayer. If any refund had been made in error, under section 48 of the TPA, the Commissioner may demand the amount so erroneously paid and the taxpayer shall pay it.
4. Despite communicating to the respondent the refund audit findings, the Commissioner failed to make decision within 90 days as provided by sections 47(3) of the TPA. That communication was ambivalent and did not amount to a decision. Since the refund claim was neither denied nor rejected, the respondent was entitled to claim the refund in its returns in subsequent years until the matter was

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resolved.

5. There was nothing in the TPA that stated that a taxpayer could only make a refund claim once whereupon the claim was extinguished notwithstanding that it has not been settled. The Commissioner's contention that the respondent had committed an offence by making a claim that it genuinely believes it was entitled to when the Commissioner had not dealt with its application for the refund was rejected.
6. A refund was due to the appellant as agreed, what remained was a simple exercise, proof of payment. That was where the respondent failed. Under section 56(1) of the TPA, the respondent bore the burden of proving that the tax decision was incorrect before the Tribunal. The respondent discharged the burden by showing the Commissioner had not made a decision on the Refund or in fact paid or appropriated the refund as set out in the objection decision. The burden then shifted to the Commissioner to show that the refund decision had been made and that the refund had, in fact, been applied in accordance with the position set out in the objection decision.
7. The objection decision was the affirmative evidence the Commissioner had indeed processed the refund and applied it to clear other liabilities including those of Atlantic leaving KES 3,350,138.00 to be paid over to the respondent. There was no evidence on record that part of the refund had been set off against Atlantic's tax liabilities or that the surplus had been received by the respondent. There was no find any reason to depart from the Tribunal's factual findings in this respect.
8. The evidence, in as much as the Tribunal considered that it had been irregularly introduced, was taken into account. The tribunal reached the conclusion that the evidence was of no consequence in light of the Commissioner's letter dated of January 25, 2017 which the Tribunal was referring to and not a letter dated January 15, 2018 which did not exist on the record.
9. The evidence after the communicating to the respondent the audit findings, the Commissioner proceeded with verification of the refund claim and came to the conclusion that the respondent had income tax liabilities amounting to KES 214,661,464.00. The objection decision was grounded on the fact that the Commissioner had already used the refund to offset certain liabilities including those of Atlantic and refunded the balance of KES 3,350,138.00 to the respondent and that it could not claim refunds in subsequent years. The position expressed in the evidence was inconsistent with the position taken by the Commissioner in the objection decision. The Commissioner could not purport, on the one hand, to have utilised the refund to clear liabilities owed by Atlantic and when the respondent appealed, change tact and assert that it used the same refund to offset other tax liabilities owed by the respondent. In the event the Commissioner came to the conclusion that further verification of the respondent's affairs revealed other liabilities, nothing would have been easier than for it to issue and serve tax assessments and demands to the respondent for the outstanding taxes. No tax assessments were produced or demands served on the respondent in respect of these fresh liabilities.
10. Section 48 of the TPA entitled the Commissioner to demand from the taxpayer any refund made in error. If the Commissioner had acted in accordance with the objection decision and subsequently come to the conclusion that the refund was made in error, nothing would have been easier than to demand tax erroneously appropriated or refunded.
11. If the instant court and Tribunal were to accept the evidence, it would undermine the Commissioner's position set out in the objection decision to the extent of holding that it was based on a false premise. The Commissioner's contention that the Tribunal did not consider the evidence was rejected. The Tribunal could not be faulted for the course it took and the conclusion it reached in that regard.
12. The Tribunal correctly held that the respondent was not only entitled to the refund but also entitled to carry the credit forward until it was resolved, it followed that the tax rejection orders could not stand. The Tribunal's decision was correct in that regard as the revocation of the tax rejection order was a direct consequence of finding that the refund was due to the respondent.
13. The Commissioner's position in the instant appeal wholly inconsistent with the position it had taken in the objection decision that it appropriated the refund to clear certain liabilities of the respondent and it's holding company leaving KES 3,350,138.00 to be paid to the respondent.

Appeal dismissed with costs to the respondent.

Commissioner of Domestic Taxes v Unga Limited

Tax authorities should adhere to principles of legitimate expectation and the detrimental impact of arbitrary reversals in decisions on taxpayers.

Headnote: The instant case involved a dispute over a value added tax (VAT) refund claim by Unga Limited (respondent) against the Commissioner of Domestic Taxes (appellant). The claim amounted to KES 189,958,332.00 for the period between June 2012 and April 2013. The Commissioner initially acknowledged the processing of the refund but later withdrew the confirmation, leading to Unga Limited challenging the Commissioner's decision at the Tax Appeals Tribunal. The instant case underscored the importance of consistency and fairness in tax administration, particularly in matters of tax refunds. It highlighted the need for tax authorities to adhere to principles of legitimate expectation and the detrimental impact of arbitrary reversals in decisions on taxpayers. There existed no provision of the law that allowed the Commissioner to withhold a Taxpayer's refund claim on the basis that the Taxpayer might accrue future tax liabilities that may be offset by the tax credits.

Commissioner of Domestic Taxes v Unga Limited [2021] eKLR

Tax Appeal E033 of 2020
High Court at Nairobi
DAS Majanja, J
January 29, 2021
Reported by John Ribia

Tax Law – default assessment – default assessment of taxes by the Commissioner where a tax payer had failed to file tax returns – limitation of this power to five years – where the Commissioner issued a default assessment out of time – implications - whether the Commissioner of Taxes had the power to make a default assessment where a tax payer had failed to file a tax return after the expiry of the statutory period of five years – Tax Procedures Act, Act No. 29 of 2015, section 29, and 47(4)

Tax Law – tax refunds – where the Commissioner had assessed, approved and indicated that a tax payer's refund was awaiting payment – withdrawal of such refund – withdrawal with promise refund will offset future liabilities - whether a tax payer that had their tax refund assessed, approved and awaiting payment by the Commissioner had a legitimate expectation that such refund would not be withheld - whether the commissioner of taxes had the power to withdraw a tax refund in anticipation of a tax liability - whether a taxpayer was entitled to carry forward a tax credit claim in subsequent years and the legal implications of such actions - Tax Procedures Act, Act No. 29 of 2015, section 29, and 47(4)

Tax Law – assessment of tax payable – self assessment by the tax payer – where a tax payer filed self assessment out of the statutory timelines – consequences of filing self assessment out of time when the tax payer was applying for a refund - whether a tax payer was limited in time as to when it can file a self-assessment and the consequences thereof particularly in reference to the power of the Commissioner to refund the taxpayer excess tax - Tax Procedures Act, Act No. 29 of 2015, section 29, and 47(4)

Statutes – interpretation of statutes – interpretation of tax legislation – principles - what were the principles applicable in interpreting tax statutes

Brief Facts

The appeal was a dispute over a value added tax (VAT) refund claim of KES 189,958,332.00 which Unga Limited lodged with the Commissioner for the period between June 2012 and April 2013. The Commissioner informed Unga that its VAT refund claims totalling Kshs. 189,958,332.00, were all processed and in the Finance Department and unfortunately also informed the Taxpayer that the National Treasury had put a freeze on payment of all refund claims prior to December 31, 2013.

Vide a letter dated June 27, 2017, the Commissioner withdrew the letter wherein it had confirmed processing the VAT refund claim. It based its actions on adjustments which Unga should have made in its financial

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records and which were not made. The overall effect of the adjustments was to wipe out the entire VAT refund claim for the period June 2012 and April 2013 which had been approved.

Unga objected to the decision by the Commissioner and after reviewing its Objection, issued an Objection Decision dated September 15, 2017 wherein it reiterated its position in rejecting the VAT tax refund. Unga Ltd subsequently challenged the Commissioner's decision at the Tribunal. In its judgment, the Tribunal determined that the VAT Refund to Unga Ltd amounting to KES 189,958,332.00 was due and payable. Aggrieved by that decision, the Commissioner filed an appeal against the Tribunal's Judgement at the High Court.

Issues

- i. Whether a tax payer was limited in time as to when it can file a self-assessment and the consequences thereof particularly in reference to the power of the Commissioner to refund the taxpayer excess tax.
- ii. What were the principles applicable in interpreting tax statutes?
- iii. Whether a tax payer that had their tax refund assessed, approved and awaiting payment by the Commissioner had a legitimate expectation that such refund would not be withheld.
- iv. Whether the commissioner of taxes had the power to withdraw a tax refund in anticipation of a tax liability.
- v. Whether the Commissioner General had the power to make a default assessment where a tax payer had failed to file a tax return after the expiry of the statutory period of five years.
- vi. Whether a taxpayer was entitled to carry forward a tax credit claim in subsequent years and the legal implications of such actions.

Held

1. The court was bound to give tax laws a strict interpretation. In construing a tax statutes, a court was guided by the statutory words themselves. There was no room for intendment or adopting a purposive approach when the words of the statute were clear and unambiguous.
2. The law placed a time limitation on the Commissioner but not on the tax payer. The correctness or otherwise of the time limitation was not an issue for the court to determine, but rather to interpret. To hold otherwise would be to place an implication that went against clear statutory provision.
3. Under section 29 of the Tax Procedures Act (TPA), the Commissioner was empowered to make a default assessment when a tax payer failed to file a tax return. That power was limited in time to five years under section 29(5) thereof. There was an expectation that the Commissioner would move with haste in doing so before the statutory time line expired. Where the taxpayer submitted a late return, the Commissioner was empowered under section 83 of the TPA to impose a fine.
4. Both parties agreed that the 1998 tax return could not be traced. The Tribunal arrived at the conclusion that it was not filed but that the re-submission was valid. The Tribunal, noting the time limitation placed on the Commissioner under section 29(5) of the TPA, found that the Commissioner could not interrogate the 1998 return unless it admitted that the same had been legally filed.
5. When Unga filed its re-submitted 1998 tax return by the letter dated December 1, 2015, it also filed its 1998 tax computation, supporting schedules and a copy of the 1998 audited financial statements. The Commissioner was thus in possession of all the relevant facts within its possession to either reject or admit the same entirely. The Commissioner raised issues of 'discrepancies' without stating clearly what they were. If the Commissioner did not dispute the self-assessment, it was empowered to fine Unga Limited for late submission under section 83 of the TPA. Instead, the Commissioner withdrew its letter of October 7, 2014, without disputing the validity of the VAT tax refund claim.
6. The Commissioner acted contrary to the principles of legitimate expectation. It confirmed that Unga's VAT refund had been processed and approved and was awaiting payment. The exercise was not perfunctory and by the time the Commissioner informed Unga that its refund was ready, it must have satisfied itself that Unga complied with the provisions of the VAT Act. Even when it withdrew

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the approval, the Commissioner did not dispute the validity of the claim. As a public body, the Commissioner was required to act in good faith and in line with the precepts of fair administration. The Commissioner failed to communicate the discrepancies and to what extent it contended that the claim was unverifiable. It simply cancelled the entire tax refund.

7. The Commissioner may not withhold a refund in anticipation of a tax liability. That was borne out section 47(4) of the TPA which provided that a refund was what was paid over when the Commissioner had applied overpayment to, payment of any other tax owing by the taxpayer under the tax law, and payment of a tax owing by the taxpayer under any other tax law.
8. The Commissioner did not demonstrate before the Tribunal that Unga owed any tax under the VAT Act, Income Tax Act or any other law which could be applied before the refund. In any case, the letter of October 7, 2014 was clear that the VAT refunds were all processed which meant that by that time, the Commissioner had conducted the verification required. It could not be said that it was acting as a conveyor belt.
9. Tax laws should be interpreted strictly and leave no room for intendment. The law regarding the procedure for filing self-assessment, the consequences for late filing and of failure to file were clearly set out in the TPA . There was nothing in those provisions, that allowed the Commissioner to circumvent those provisions and none can be implied on reading of the statutes. No other provision of the law was pointed out that allowed the Commissioner circumvent the strictures of section 29(5) of the TPA by implication. Nor was the Tribunal decision an open door for gaming the system as the Commissioner suggested. The Commissioner had already conducted audit before confirming the VAT refund was due to Unga. The Commissioner had not demonstrated the Tribunal erred in its findings.

Appeal dismissed with costs.

Highlands Mineral Water Limited v Commissioner of Domestic Taxes

The period for claiming input value added tax begins to run when the supply/ importation occurs.

Headnote: The question before the court was when a tax payer could claim input value added tax (VAT). The court held that section 17(1) and (2) of the VAT Act, permitted the taxpayer to claim input tax at any time provided the claim fell within 6 months from period which the supply or importation occurred notwithstanding that the VAT return was filed late. However, the Commissioner may disallow input VAT claims relating to purchases made outside the 6-month window period from the date of supply provided in section 17(2) of the VAT Act.

Highlands Mineral Water Limited v Commissioner of Domestic Taxes [2021] eKLR

Tax Appeal E026 of 2020

High Court at Nairobi

DAS Majanja, J

May 13, 2021

Reported by John Ribia

Tax Law – value added tax – credit for input tax against output tax - circumstances in which a tax payer could claim input tax - period for claiming - whether the period for claiming input value added tax began to run when the supply or importation occurred, or, when the return was filed – whether late filing precluded a taxpayer from claiming input value added tax - whether input value added tax claims made 6 months after end of the tax period were allowable - Value Added Tax Act, section 17

Tax Law – value added tax – returns – returns filed out of time – consequences – powers of the Commissioner - whether the Commissioner of Domestic Taxes had the power to disallow input tax based on late filing of a return - Value Added Tax Act, sections 17, and 44.

Brief Facts

The Commissioner conducted a compliance check exercise on the appellant's tax transactions. Thereafter, the Commissioner issued the appellant with its findings of the exercise. The Commissioner took the position that the appellant filed its VAT returns late. Consequently, it disallowed input VAT in the late returns for the period of January 2014 to April 2017 claiming the input VAT was time barred in accordance with section 17(2) of the Value Added Tax Act, 2013 (VAT Act). The appellant objected but the Commissioner disallowed the appellant's input tax claims for the years of income 2014 to 2017 and proceeded to assess the appellant's value added tax (VAT) liability inclusive of penalties and interest amounting to KES. 155,402,525.00.

Aggrieved by the Commissioner's decision, the appellant lodged an appeal at the Tax Appeals Tribunal which was dismissed. Aggrieved by the decision of the Tax Appeals Tribunal, the appellant appealed to the High Court and sought the interpretation and application of section 17(1) and (2) of the VAT Act.

Issues

- i. What were the circumstances in which a tax payer could claim input tax?
- ii. Whether the period for claiming input value added tax began to run when the supply or importation occurred, or, when the return was filed.
- iii. Whether late filing precluded a taxpayer from claiming input value added tax.
- iv. Whether the Commissioner of Domestic Taxes had the power to disallow input tax based on late filing of a return.
- v. Whether input value added tax claims made 6 months after end of the tax period were allowable.

Held

1. Tax statutes must be interpreted strictly, leaving no room for intendment or implication.
2. Value added tax (VAT) was chargeable on supply of taxable goods or services made or provided in Kenya

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and on importation of taxable goods or services into Kenya. It works under the input and output tax system. Output tax refers to the VAT charged on the sales of taxable goods or services, while input tax refers to VAT charged on taxable purchases of goods and services for business purposes. The tax payable was the difference between the output tax and input tax.

3. The right of deduction of input tax was an integral part of the VAT scheme as a taxable person who made a transaction in respect of which VAT was deductible may deduct the VAT in respect of goods and services acquired by him provided that such goods and services have a direct and immediate link with the output transaction in respect of which VAT was deductible.
4. Section 17 of the Value Added Tax Act (VAT Act) dealt with, credit for input tax against output tax and showed that the input tax on a taxable supply to or importation made by a registered person may, at the end of the tax period in which the supply occurred, be deducted by the registered person from the tax payable by the person on supplies by him in that tax period, which under section 2 of VAT Act meant one calendar month or such other period as may be prescribed in the regulations, to the extent that the taxable supply was acquired to make taxable supplies. However, under the proviso, input tax shall be allowable for a deduction within 6 months after the end of the tax period in which the supply occurred.
5. The plain and unambiguous language of section 17 of the VAT Act was clear that the only conditions provided for a Taxpayer to qualify for input VAT were:
 - a) that the input tax was incurred on a taxable supply made to or on importation made by a taxpayer at the end of the tax period,
 - b) that the input tax was deducted by a registered person on taxable supplies made by him; and
 - c) that the input tax was to be allowable for deduction within six months after the end of the tax period in which the supply or importation occurred.
6. Section 17 did not deal with or mention the filing or otherwise of VAT Returns. The 6-month period of claiming input VAT began to run when the supply or importation occurred and not necessarily when the return was filed. If a taxpayer filed a VAT return say, 7 months after when the supply or importation occurred, then the input tax claimed on that return could not be allowed.
7. The proper way of claiming input tax was by filing the appropriate return. Section 44 of the VAT Act dealt with submissions of returns and the consequences thereof. It required every registered person to submit the VAT Return in respect of each tax period not later than the twentieth day after the end of that period. Before amendment and deletion of the subsequent sections, the Commissioner was empowered to extend time for filing the return as long as the application was made prior to submission of the return. The law imposed a penalty on a person who failed to submit a return as required.
8. Sections 17 and 44 of the VAT Act should not be conflated as they dealt with different subjects. Section 17 fell within Part VI of the Act dealing with deduction of input tax and provided for, credit for input tax against output tax, while section 44 fell under Part XI dealing with invoices, records, returns and assessment and provided for, submissions of returns. Both subjects were different.
9. Section 44 dealt with submissions of returns and consequences of failure to submit such return within the time prescribed. The only power donated to the Commissioner under section 44, as it provided at the time, was to extend time for filing the return. The court could not locate any power donated to the Commissioner, either under sections 17(1) and (2) or section 44, to disallow input tax based on late filing of a return. Further, the power donated to the Commissioner to condone late filing is only in relation to the penalty for late filing and not whether the Tax payer is entitled to credit for input tax against output tax.
10. The Tax Appeals Tribunal expressed the view that accepting the appellant's position would create a dangerous precedent where taxpayers would no longer see the need to adhere to timelines specified under the VAT Act for submitting returns since they could always pay penalties and claim back input tax after late filings and that would render meaningless sections 17(2) and 44(1) of the VAT Act. That argument did not find any support in the language and scheme of the VAT Act. Section 44 penalised

Highlands Mineral Water Limited v Commissioner of Domestic Taxes

the late filing of VAT returns by imposing a penalty. On the other hand, section 17 did not provide a carte blanche for claiming input tax whenever the return is filed late. A tax payer could only claim input tax within specific and prescribed period after the end of the tax period in which the supply or importation occurred. Any claim outside the 6 months was time barred and could not be allowed under the express terms of section 17 hence the fear that a taxpayer would make a claim merely by paying the penalty was not borne out by the express statutory language.

11. Section 17(1) and (2) of the VAT Act, permitted the taxpayer to claim input tax at any time provided the claim falls within 6 months from period in which the supply or importation occurred notwithstanding that the VAT Return was filed late. The fact of late filing did not preclude a taxpayer from claiming input VAT and that this claim ought to be allowed as long as return was filed and claimed within six months from the date of supply or importation. Neither section 17 nor section 44 of the VAT Act permitted the Commissioner to disallow input VAT claim on the ground that the VAT Return was filed outside the period permitted. The Commissioner's power was limited to allowing an extension of time for filing the return upon an application whose effect was to relieve the tax payer from the penalty or accept the return and demand the appropriate penalty.
12. The Tax Appeals Tribunal and the Commissioner erred by holding that any input tax claimed in a return filed by the appellant out of time was disallowed. However, Commissioner was not at fault for disallowing input VAT claims relating to purchases made outside the 6-month window period from the date of supply provided in section 17(2) of the VAT Act.

Appeal partly allowed.

Orders:-

- i. *Appeal allowed to the extent that the Commissioner had no power under section 17 of the VAT Act to disallow an input VAT claim for the reason of late filing as long as the claim was made within 6 months after the end of the tax period within which the supply or importation was made.*
- ii. *Any input VAT claims by the appellant made 6 months after end of the tax period could not stand irrespective of late filing of the VAT Returns.*

Tata Chemicals Magadi Ltd v Commissioner of Domestic Taxes (Large Taxpayers)

Kenya Revenue Authority is constitutionally bound to process a Taxpayers VAT refunds timeously.

Headnote: The main issue before the court was the role of the Kenya Revenue Authority to make timeous refunds of value added tax. The High Court held that the failure to pay value added tax (VAT) tax refunds to an entity amounted to a violation of a tax payer's rights as per article 47 of the Constitution of Kenya, 2010. KRA was under an obligation to make value added tax refunds timeously

Tata Chemicals Magadi Ltd v Commissioner of Domestic Taxes (Large Taxpayers) [2014] eKLR

Petition No. 476 of 2013

High Court at Nairobi

D S Majanja, J

April 14, 2014

Constitutional law - fundamental rights and freedoms - right to fair administrative action - whether the failure to pay Value Added Tax (hereafter VAT) tax refunds to an entity amounts to a violation the right to fair administrative action - Constitution of Kenya, 2010, article 47

Tax Law - value added tax – tax refunds - right of a taxpayer to timeous processing of VAT refunds – whether the Kenya Revenue Authority (KRA) was under an obligation to make value added tax refunds timeously - Value Added Tax Act, Cap 476, (Repealed) sections 11(2)(a), and 32A

Brief Facts:

The petitioner was a limited liability company engaged in the business of manufacturing Soda ash and salt in Kenya while the respondent was an office established under the Kenya Revenue Authority (KRA) mandated to administer Value Added Tax (VAT) and Income Tax in accordance with the applicable statutes under the general control and direction of KRA. The petitioner exported approximately 90% of its soda ash and as a result was in a perpetual credit position as a result of supplying zero rated goods thus entitling them to VAT refunds. Following an earlier petition by the petitioners still on the subject of VAT refunds, the respondent had paid up a portion of the total amount then later sent an email to the petitioner's purporting to set off the balance to the tune of KES 235 million hence the present petition seeking to quash this decision.

Issue:

- i. Whether the failure to pay Value Added Tax tax refunds to an entity amounts to a violation of its rights as per article 47 of the Constitution of Kenya, 2010
- ii. Whether the Kenya Revenue Authority (KRA) was under an obligation to make value added tax refunds timeously

Held:

1. The purpose of article 47 of the Constitution of Kenya, 2010 was to uplift the standards of administrative action by providing constitutional standards and as such the national values and principles of governance articulated in article 10 of the Constitution of Kenya, 2010 among them good governance, integrity, transparency and accountability must be infused in administrative action.
2. Government had a public duty to effect change to any unprogressive arrangements, such as those that could characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in that regard, ordinary statutory arrangements could not qualify the constitutional provisions. On that account, the respondent had no justification for failing to make VAT refunds timeously.
3. The correspondence from the respondent to the petitioners that KES 235 million was used to set off claims was in violation of the petitioners rights since initially the agreement between the two parties

Tata Chemicals Magadi Ltd v Commissioner of Domestic Taxes (Large Taxpayers)

was for the money to be held in bond on behalf of the petitioners. There was no other agreement for the money to be set off against other tax liabilities. Further, the correspondence did not elaborate as to why the respondents unilaterally decided to effect a set off and moreover the contentious sum was still subject to a pending appeal. Thus the purported set off of KES 235 million was without legal basis and hence quashed. The respondent was directed to deal with the appeal lodged in respect of the outstanding amount of KES 234,968,183.

4. The duty of the respondent to process and pay VAT refunds was set out in the Value Added Tax Act (Repealed). The court could not step into the business of the respondent and the Exchequer in extension to tell them how to do their job. Rather, the court was more desirous of protecting the rights of a taxpayer who carried on his business in a legitimate manner and was entitled to a refund as of right.

Petition allowed, order of mandamus granted directing respondent to deal with the appeal relating to the sum in contention, respondent to process and pay out to the petitioner their VAT refund within 90 days of the judgement and costs to be borne by the respondents.

Louis Dreyfus Company (K) Limited v Kenya Revenue Authority

Failure of the Commissioner respondent to a tax payer's application is a breach of the tax payer's right to fair administrative action

Headnote: The main question before the court were the consequences of the commissioner not responding/determining an objection. The court held that the statutory provisions for refund of overpayment of value Added Tax provided a procedure to be followed both by the tax collector and the taxpayer claiming the refund. When the tax collector failed to respond to a taxpayer's application, they were deemed to be in breach of the statutory requirements and thus the taxpayer was free to seek redress from a court of competent jurisdiction. Further failure to respond to a tax payer's application was deemed to be a breach of the tax payer's right to fair administrative action.

Louis Dreyfus Company (K) Limited v Kenya Revenue Authority (2021) eKLR

Petition 62 & 64 of 2019 (Consolidated)

High Court at Nairobi

WK Korir, J

March 11, 2021

Reported by John Ribia

Tax Law – value added tax – withholding value added tax – refund of withholding value added tax – enabling provision - whether Kenyan tax law recognised applications for refund of withholding value added tax

Tax Law – value added tax – withholding value added tax – refund of withholding value added tax – where the commissioner did not respond to a tax payer's objection on refund of withholding value added tax – consequences of not responding – whether failure by the Commissioner General to respond to an objection of overpayment of withholding value added tax meant that the same was refundable – Tax Procedures Act, 2015 sections 47 and 51

Jurisdiction – jurisdiction of the High Court – jurisdiction to determine a constitutional petition on a tax payers objection – where the petition arose from the failure of the Commissioner General to respond to a tax payer's objection - whether failure by the Commissioner General to respond to an objection to a tax assessment essentially mean that the Tax Appeals Tribunal lacked jurisdiction to determine such a matter - whether failure by the Commissioner General to respond to an objection to a tax assessment essentially meant that the Tax Appeals Tribunal lacked jurisdiction to determine such a matter - Tax Procedures Act, 2015 sections 47 and 51

Constitutional Law – fundamental rights and freedoms – right to fair administrative action – where a petitioner contended that their tax objection was not determined by the Commissioner - whether failure by the Commissioner General to respond to an objection was a violation of the tax payer's right to fair administrative action – Constitution of Kenya, 2010 article 47; Tax Procedures Act, 2015 sections 47 and 51

Statutes – constitutionality of statutes – constitutionality of section 47(5) of the Tax Procedures Act - where it was contended that the impugned provision was unconstitutional for raising inequality between the tax payer and the tax collector - whether section 47(5) of the Tax Procedures Act was unconstitutional in so far as it allowed the Kenya Revenue Authority to refund overpaid tax within a period of two years from the date of the application for refund and only imposed interest on any unpaid amount after the period of two years - Tax Procedures Act, 2015 section 47(5); Constitution of Kenya, 2010 article 27(1)

Constitutional Law – remedies – remedies against a statutory body – separation of powers – remedies available to a tax payer who sought a refund of overpaid taxes and whose objection was not determined by the Commissioner General - whether in declaring that a tax refund was payable to the tax payer by the tax collector, the High Court would be usurping the roles of the tax collector.

Civil Practice and Procedure – res judicata – principles – applicability – where it was contended that the question of the constitutionality of section 47(5) of the Tax Procedures Act on grounds that it legislated inequality between the tax payer and the tax collector was res judicata - whether the instant petition was res judicata to Ericsson Kenya Limited v Attorney General [2014] eKLR in that it alleged inequality between the tax payer and

Louis Dreyfus Company (K) Limited v Kenya Revenue Authority

the tax collector – Civil Procedure Act, Cap. 21, section 7.

Brief Facts

The petitioner filed two consolidated matters being petition No. 62 of 2019 and 64 of 2019 filed by the same against the respondent, Kenya Revenue Authority. Petition No. 62 of 2019 (the first petition) related to an alleged overpayment of Value Added Tax (VAT) of Kshs. 122,016,195 for the period between November 2016 and July 2017 by the petitioner. The petitioner claimed that it made an application for a refund of withholding value added tax (WHVAT) by letter dated December 18, 2017 and filed with the respondent on December 19, 2017 in accordance with the provisions of section 47 of the Tax Procedures Act and did not receive any response from the Commissioner.

Petition No. 64 of 2019 (the second petition) also relates to an alleged overpayment of WHVAT of KES 164, 586,437 during the 2016 year of income. The petitioner contended that it made an application for a refund through a letter dated March 29, 2018. The petitioner contended that its claim was rejected by the Commissioner through a letter dated June 20, 2018 but received on July 26, 2018. The Commissioner, nevertheless, acknowledged the tax overpayment by the petitioner.

The respondent rejected the petitioner's claims asserting that the overpaid WHVAT was not payable as there was no express provision in the Value Added Tax Act, 2013 ('VAT Act') and Value Added Tax Regulations, 2017 ('VAT Regulations') authorizing refund of overpaid WHVAT. It was the petitioner's case that the Commissioner was required under section 47(3) of the Tax Procedures Act to notify a taxpayer on its application for refund within 90 days of receiving the said application. The petitioner, further, averred that it had not received a response by the time of filing of the first petition.

The petitioner, further, stated that it filed a notice of objection dated July 26, 2018 to the Commissioner's refund decision but the Commissioner did not respond. It was the petitioner's assertion that its objection was deemed to have been allowed by virtue of section 51(11) of the Tax Procedures Act since the Commissioner failed to make a decision on the objection within the 60 days provided therein.

The Commissioner, in its grounds of opposition contended that the petitions did not meet the threshold of a constitutional petition; that the question of the constitutionality of section 47(5) of the Tax Procedures Act was *res judicata* as the issue was determined in the case of *Ericsson Kenya Limited v Attorney General* [2014] eKLR; further the petition offended the provisions of section 52 of the Tax Procedures Act which provided for an appeal against a tax decision to the Tax Appeals Tribunal; also, under section 17(5) of the VAT Act excess credit of tax withheld at 6% was not subject to refund; and, that there was no provision for the claimed refund under the VAT Act and the VAT Regulations.

Issues

- i. Whether Kenyan tax law recognised applications for refund of withholding value added tax.
- ii. Whether failure by the Commissioner General to respond to an objection to a tax assessment essentially meant that the Tax Appeals Tribunal lacked jurisdiction to determine such a matter.
- iii. Whether failure by the Commissioner General to respond to an objection to a tax assessment by the Commissioner granted the High Court the jurisdiction to determine petitions challenging the assessment.
- iv. Whether failure by the Commissioner General to respond to an objection of overpayment of withholding value added tax meant that the same was refundable.
- v. Whether failure by the Commissioner General to respond to an objection was a violation of the tax payer's right to fair administrative action.
- vi. Whether section 47(5) of the Tax Procedures Act was unconstitutional in so far as it allowed the Kenya Revenue Authority to refund overpaid tax within a period of two years from the date of the application for refund and only imposed interest on any unpaid amount after the period of two years.
- vii. Whether the instant petition was *res judicata* to *Ericsson Kenya Limited v Attorney General* [2014] eKLR in that it alleged inequality between the tax payer and the tax collector.

Louis Dreyfus Company (K) Limited v Kenya Revenue Authority

- viii. Whether in declaring that a tax refund was payable to the tax payer by the tax collector, the High Court would be usurping the roles of the tax collector.

Relevant Provisions of the Law

Tax Procedures Act, Act No. 29 of 2015, sections 47 and 51

47. Refund of overpaid tax

- (1) *When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within five years of the date on which the tax was paid.
Provided that for value added tax the period of refund shall be as provided for under the Value Added Tax Act, 2013 (No. 35 of 2013).*
- (2) *The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.*
- (3) *The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within ninety days of receiving the application for a refund.*
- (4) *Where, in relation to an application for a refund made under this section or made under any other tax law, the Commissioner is satisfied that a taxpayer has overpaid a tax, the Commissioner shall apply the overpayment in the following order—*
 - (a) *in payment of any other tax owing by the taxpayer under the tax law;*
 - (b) *in payment of a tax owing by the taxpayer under any other tax law; and*
 - (c) *any remainder shall be refunded to the taxpayer.*
- (5) *The Commissioner shall repay the overpaid tax within a period of two years from the date of application, failure to which the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years.*

51. Objection to tax decision

- (1) *A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.*
- (2) *A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.*
- (3) *A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—*
 - (a) *the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and*
 - (b) *in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.*
- (4) *Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.*
- (5) *Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.*
- (6) *A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.*
- (7) *The Commissioner may allow an application for the extension of time to file a notice of objection if—*
 - (a) *the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and*
 - (b) *the taxpayer did not unreasonably delay in lodging the notice of objection.*
- (8) *Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow*

Louis Dreyfus Company (K) Limited v Kenya Revenue Authority

it, and Commissioner's decision shall be referred to as an "objection decision".

- (9) *The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.*
- (10) *An objection decision shall include a statement of findings on the material facts and the reasons for the decision.*
- (11) *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.*

Held

1. Where a statute had provided an alternative dispute resolution mechanism, a court must exercise restraint and allow the statutory process to take its course before exercising its jurisdiction. The Tax Appeals Tribunal Act provided that the Tribunal was mandated to hear appeals filed against any tax decision made by the Commissioner.
2. The failure to respond to the claim in the first petition placed the petitioner in a quandary. It could not take any action as the decision-maker had not made a move. In the circumstances the only recourse the petitioner had was to seek the court's intervention as the respondent had not made a decision that could be escalated to the Tax Appeals Tribunal (TAT) as per the provisions of section 52 of the Tax Procedures Act.
3. The High Court could not run away from its adjudicative responsibility where the statutory body authorized to hear a dispute had been rendered incapable of hearing such a dispute due to action or inaction by one of the parties. The respondent's failure to respond to the petitioner's application for refund giving rise to the first petition and the objection which was the subject of the second petition denied the petitioner a tax decision to take to the TAT. The petitioner had no viable remedy. As such, the High Court has jurisdiction to hear and determine the petitions.
4. There was an overpayment of withholding Value Added Tax by the petitioner, which the respondent had not refunded to date. For the reason that the petitioner's applications for refund of overpaid tax were yet to be determined by the respondent, the High Court could not make a finding in the instant judgement on the alleged violation of the petitioner's right to property. By failing to respond to the petitioner's objection to the second claim, the respondent was deemed to have accepted that the overpaid tax was refundable.
5. The petitioner filed refund applications with the respondent in accordance with section 47 of the Tax Procedures Act. In the application letter in respect of which the first petition had been filed, no response was received whereas in the letter giving rise to the second petition a response was given but the petitioner's objection to that decision was never addressed. The respondent had a statutory responsibility to comply with the timelines set in the revenue laws. A failure on the part of the respondent to comply with the statutory requirements violated the rights of the taxpayers to fair administrative action under article 47 of the Constitution.
6. The respondent violated the petitioner's right to fair administrative action by failing to make a decision on the petitioner's application for refund of overpaid tax in one case and failing to make an objection decision in the other case. The statutory timelines were never complied with.
7. The respondent was entitled to interpret the tax laws as it deemed fit. However, it had a duty to ensure that it complied with what the law required of it under sections 47 and 51 of the Tax Procedures Act. The petitioner's claims for refund of overpaid taxes were left in suspense by the respondent resulting in the violation of the petitioner's constitutional and statutory right to fair administrative action. The petitioner was entitled to know the decisions made by the respondent on its applications so that it could move to the Tax Appeals Tribunal if it was aggrieved by the decisions.
8. The respondent's assertion that the petitioner's applications for refund of overpaid taxes were premised on the wrong statute and non-existent provisions of the VAT Act (as at time of filing the petition) did

Louis Dreyfus Company (K) Limited v Kenya Revenue Authority

not shield it from the requirement to provide administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair as required by article 47 of the Constitution. There was a violation of its right to fair administrative action in regard to both claims.

9. A party could only successfully raise the doctrine of *res judicata* as a defence by demonstrating that:
 - a) the suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.
10. The instant petitions were not *res judicata*. Although *Ericsson Kenya Limited v Attorney General* [2014] eKL addressed one of the issues raised in the instant petitions and was determined by a court of competent jurisdiction, the issues raised in these petitions were not directly and substantially in issue in the former suit and neither were they between the same parties. The provisions that were the subject of litigation in the former case were only similar but not the same with the provision that was being challenged in those cases. The respondent's assertion that the petitioner's case was *res judicata* was without merit and was rejected.
11. Courts presumed that every Act of Parliament was constitutional. The court in deciding whether a provision of a statute was constitutional or not was required to determine the object and purpose of the challenged statute. For the court to arrive at the correct decision it was important that it discerned the intention expressed in the Act itself regarding not only its purpose but also its effect.
12. The petitioner being a taxpayer could not compare itself with a state agency mandated to collect tax. The roles of the taxpayer and the tax collector in the tax regime were diametrically opposed and it could not be said that there was discrimination when different standards were applied to them. There was nothing unconstitutional in section 47(5) of the Tax Procedures Act.
13. The fact that interest only accrued on pending refunds after two years did not render section 47(5) of the Tax Procedures Act unconstitutional. Declaring section 47(5) unconstitutional would give the respondent free rein as it would not be bound to make refunds of overpaid tax within two years and neither will it be obligated to pay interest on any tax refund made after two years from the date of the application for refund.
14. In considering the appropriate reliefs, the court must bear in mind the statutory mandate of the respondent. The court should also take into account the circumstances of the petitions. Section 47 of the Tax Procedures Act confirmed that there was a procedure to be followed when an application for refund of overpaid tax was made. In respect of the first petition, the application for refund stalled at section 47(1) since the petitioner's application was not responded to by the respondent within 90 days as required by section 47(3). The provision did not state what happened where the respondent failed to reply to an application for refund of overpaid tax.
15. The appropriate remedy was therefore to declare the respondent in violation of the petitioner's right to fair administrative action under article 47 of the Constitution and provide remedies that would ensure the petitioner's application was addressed by the respondent.
16. For the second petition, the petitioner made an objection under section 51(1) of the Tax Procedures Act to the decision made by the respondent under section 47(3) of the Act. The meaning of section 51(11) was that where the Commissioner did not make a decision on an objection that was properly filed within sixty days from the date it was lodged by the taxpayer then the objection was deemed to have been allowed.
17. The respondent did not make an objection decision on the petitioner's insistence through the lodged objection that the overpaid tax was refundable within the law. By virtue of section 51(11) of the Tax Procedures Act, the petitioner's objection was deemed to have been allowed in that respect. The issue whether the claimed amount or part of it was refundable and the manner in which any refundable

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amount was to be applied was never addressed by the respondent.

18. The petitioner came across as having understood that its application for refund was yet to be considered. The orders sought by the petitioner, if granted, would result in the High Court usurping the statutory powers granted to the respondent to deal with applications for payment of overpaid tax. Courts should not usurp the powers of statutory bodies. The court must give room to the respondent to execute its mandate.

Petition partially allowed.

Orders:-

- i. *As it pertained to petition No. 62 of 2019*
 - a) *Declaration issued that the respondent in failing to respond to the petitioner's application dated December 18, 2017 for refund of overpaid tax of KES 122,016,195 violated the petitioner's right to fair administrative action under article 47 of the Constitution.*
 - b) *The petitioner's application dated December 18, 2017 for refund of overpaid tax of KES 122,016,195 was remitted back to the respondent for consideration in line with the provisions of section 47 of the Tax Procedures Act, 2015 or any other law as deemed appropriate by the respondent.*
 - c) *If at the end of 90 days from the date of the instant judgement the respondent would not have responded to the petitioner's application for refund, the application shall be deemed to have been allowed and an order of mandamus shall issue forthwith directing the respondent to refund to the petitioner the sum of Kshs. 122,016,195 being overpaid tax.*
- ii. *As it pertained petition no. 64 of 2019:*
 - a) *The petitioner's objection dated July 26, 2018 to the respondent's tax decision dated June 20, 2018 that overpaid withholding Value Added Tax was not refundable in law was deemed to have been allowed under section 51(11) of the Tax Procedures Act, 2015 as a result of the respondent's failure to make an objection decision under section 51(8) of the Tax Procedures Act, 2015.*
 - b) *Declaration issued that the respondent's failure to process the petitioner's application dated March 29, 2018 in accordance with section 47(2) and (4) of the Tax Procedures Act, 2015 for a refund of overpayment of withholding Value Added Tax of KES 164,586,437, after the same was deemed allowed by the operation of the law violated the petitioner's right to fair administrative action under article 47 of the Constitution.*
 - c) *The petitioner's application dated March 29, 2018 was remitted to the respondent to be addressed solely in the terms of section 47(2) and (4) of the Tax Procedures Act, 2015.*
 - d) *If the respondent failed to make a determination within 90 days from the date of the instant judgement, an order of mandamus shall issue compelling the respondent to forthwith refund the petitioner the claimed sum of KES 164, 586,437.*
- iii. *Costs of the consolidated petitions were awarded to the petitioner.*

Commissioner of Domestic Taxes v Metoxide Limited

Whether it was mandatory for a tax payer to prove a taxable supply or importation in order to be entitled to a refund on input Value Added Tax

Headnote: The court dealt with Value Added Tax (VAT) deductions and the burden of proof in tax disputes. The key issue was whether Metoxide Limited could claim refunds on input VAT without concrete proof of taxable supply or importation. The court emphasized the taxpayer's responsibility to prove the incorrectness of tax decisions and maintain transaction documents for five years. The judgment highlighted the requirements for a taxpayer to claim a refund and the Commissioner's discretionary power to request additional information to verify self-assessments. Ultimately the court held that for a taxpayer to validly claim for input tax refund on VAT, then there must be proof that they received a taxable supply in the absence of which such claim would not be valid.

Commissioner of Domestic Taxes v Metoxide Limited

(Income Tax Appeal E100 of 2020) [2021] KEHC 3 (KLR) (Commercial and Tax) (2 September 2021)

(Judgment)

A Mabeya, J

Statutes – interpretation of statutes – Value Added Tax Act – interpretation of section 17(1) of the Value Added Tax on credit for input tax against output tax – what amounted to taxable supply or importation for which a tax payer could base its claim for input tax refunds – whether it was mandatory for a tax payer to prove a taxable supply or importation in order to be entitled to a refund on input VAT – Value Added Tax Act, section 17(1).

Evidence Law – burden of proof – burden of proof on proceedings relating to tax objections and appeals – who bore the burden of proving that a tax decision was incorrect – shift of burden of proof – where a claim that a tax payer was supplied with taxable goods was contested – who bore the burden of proving that the taxable goods were supplied – when would that burden shift - Tax Procedures Act, section 56(1).

Tax Law – systems of taxation – self-assessment system – what amounted to self-assessment of tax – the requirement for the Commissioner of Domestic Taxes to assess the tax payer in order to ascertain whether the tax remitted was proper or not – whether it was mandatory for the tax payer to keep transaction documents in safe custody for a period of 5 years - documents required for a tax payer to be entitled to claim a refund – whether the Commissioner of Domestic Taxes had the discretion to ask for additional information to satisfy himself as to the self- assessment made by a tax payer - Tax Procedures Act, section 59; Value Added Tax Act, sections 17(3) and 43.

Brief facts

In the tax period between July and December 2014, the respondent received supplies which were subjected to VAT payments and later claimed for input tax deduction. The appellant rejected the respondent's application for input tax deduction on the grounds that one of the respondent's suppliers, Harsidhi Enterprises Limited (impugned entity) was involved in illegal printing of ETR invoices. Consequently, the appellant issued an objection decision on the basis that the respondent did not receive any taxable goods from the impugned entity. Aggrieved by the objection decision, the respondent appealed against it to the Tax Appeals Tribunal (tribunal). The Tribunal allowed the appeal ordering that the respondent was entitled to claim input tax.

Aggrieved by the decision of the Tribunal, the appellant lodged the instant appeal arguing, among others, that the Tribunal erred in holding that the respondent had discharged its burden of proof and in holding that the impugned entity that was accused of illegal profiting and selling of ETR invoices had to first be brought before it by the appellant before the appellant's accusation against it could hold against the respondent. The appellant contended that some of the proof of delivery by the respondent was by a vehicle which could not have practically ferried the alleged supplied goods.

Issues

- i. Whether it was mandatory for a tax payer to prove a taxable supply or importation in order to be entitled to a refund on input Value Added Tax.

Commissioner of Domestic Taxes v Metoxide Limited

- ii. Who bore the burden of proving that a tax decision was incorrect and when would that burden shift?
- iii. What were the documents required for a tax payer to be entitled to claim a refund?
- iv. Whether the Commissioner of Domestic Taxes had the discretion to ask for additional information to satisfy himself as to the self- assessment made by a tax payer.

Relevant provisions of the Law

Value Added Tax Act

Section 17(1):

“Subject to the provisions of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies.”

Held

1. Section 17(1) of the Value Added Tax Act (VAT Act) provided that input tax on a taxable supply to or importation made by a registered person could be deducted by the registered person from the tax payable on supplies but only to the extent that the supply or importation was acquired to make taxable supplies. The central issue in the instant case was whether there was proof of a taxable supply for which the respondent could base its claim for input tax refunds. According to section 56(1) of the Tax Procedures Act, the taxpayer had the burden of proving that a tax decision was incorrect.
2. The Kenyan system of taxation was based on self-assessment. The tax payer assessed self and remitted what they considered to be the tax due to the tax authorities. In that regard, the tax laws mandated the appellant to later on assess the tax payer in order to ascertain whether the tax remitted was proper or not. Ordinarily, the assessment was made years after the tax had fallen due and been paid or the economic activity or commercial transaction for which the tax arose had been undertaken. It was for that reason that the tax laws shouldered the tax payer with the burden of disproving the correctness of the appellant's tax decision. In so doing, the law required the tax payer to keep transaction documents in safe custody for a period of 5 years so that on assessment, the tax authorities were able to access them accordingly.
3. There was nothing unexpected by those provisions as the economic activity or commercial transaction by which the tax arose was undertaken by the tax payer, the self-assessment was by the tax payer and the transactional documents were always in the possession and custody of the tax payer.
4. Since the instant case dealt with input tax deduction, it was upon the respondent to prove that it was entitled to the same contrary to the findings of the appellant.
5. Considering the wording in section 17 of the VAT Act, the important words were taxable supply to, or importation made by. In order for a trader to be entitled to a refund on input VAT, he had to prove a taxable supply or importation. The basis of the refund was not just evidence of payment of the claimed VAT, but prove that there was a taxable supply or importation for which the tax was paid and therefore input tax was claimable.
6. The court was aware of the documents required under section 17(3) of the VAT Act for one to be entitled to claim a refund. However, where the appellant was doubtful, he was entitled to ask for additional information to satisfy himself as to the self- assessment made by a tax payer. That was under section 59 of the Tax Procedures Act and section 43 of the VAT Act. The respondent produced invoices and evidence of payment to show that it had paid the impugned entity for the materials delivered. The Tribunal relied on those documents in holding that the respondent had discharged its burden under section 56 of the Tax Procedures Act.
7. Even though the respondent contended that it had production documents to show that it had consumed the raw materials supplied by the impugned entity, it did not produce any requisition orders or delivery

Commissioner of Domestic Taxes v Metoxide Limited

orders corresponding with the production documents relied on. That was so because the respondent admitted that it had many suppliers of the subject raw materials and that the impugned entity was just one of the many suppliers.

8. The existence of the production records could not be proof that the materials used were the ones supplied by impugned entity. The respondent ought to have produced evidence of the supply of the taxable goods specifically by the impugned entity. The production records could as well have been in respect of the goods from the other suppliers. It was for the respondent to prove that the impugned entity supplied it with taxable goods. That was possible for a prudent trader who kept its documentation. That was what was expected of all traders.
9. The respondent having produced the documents it did, the evidentiary burden shifted to the appellant. The appellant retorted that the impugned entity had been profiled to be selling ETR invoices and receipts and was supplying nil goods. The appellant proceeded to produce a delivery note from the respondent which glaringly cast doubt as to the alleged delivery of the raw materials in question. With that, the evidentiary burden of proof shifted to the respondent to prove that it had been supplied with taxable goods by the impugned entity. It was expected that the respondent could have provided and produced to the Tribunal copies of requisition orders, delivery orders or notes, copies of stock records, details of each supply of goods in the name of the impugned entity. All those records were in the custody and possession of and special knowledge of the respondent. It chose not to produce them.
10. The appellant produced one purported delivery by the impugned entity and demonstrated to the Tribunal that a vehicle purported to have made the delivery was a Nissan Sunny. It was common knowledge and the court took judicial notice that such a vehicle could not have made delivery of a whopping 5200kg of the subject raw material.
11. The Tribunal erred in holding that the respondent had discharged its burden under section 56 of the Tax Procedures Act. The documents produced by the respondent did not prove that the impugned entity had supplied the respondent with taxable goods. That ground succeeded.
12. The profiling of entities was done by the appellant. The appellant having stated so in its statement of facts and the same not having been denied, the said fact remained uncontroverted and therefore the truth. That which was not denied or challenged was admitted. In the circumstances of the instant case, the appellant was not required to produce any further evidence of the profiling.
13. The insistence that there ought to have been proof of charging with a criminal offence or the bringing of the impugned entity before the Tribunal was out of order. The issue at the Tribunal was whether the respondent had been supplied with any taxable goods by the impugned entity or not. It was the respondent to prove the supply and not to shift the burden of proof to the appellant. That ground also succeeded.
14. The accusation that the Tribunal failed to consider the appellant's statement of facts and submissions could not be said to be groundless. The Tribunal did not analyze and juxtapose the appellant's case as contained in the statement of facts or as submitted against that of the respondent. The Tribunal could have ignored the appellant's assertions probably because it considered the appellant's statement of facts to have been filed out of time and therefore not worthy to look at. That ground succeeded.

Appeal allowed.

Republic v Kenya Revenue Authority (KRA) Ex-parte Fuji Motors EA Limited

Chapter 9: Compounding of Tax and Customs offences

Owners of the goods cannot be held criminally liable for acts of the agents unless common intention is proved

Headnote: The main question before the court was the legality of KEBS standards passed without public participation and without being considered by Parliament. The court was also tasked to determine the liability of a principal to have their goods forfeited for the illegal actions of its customs clearing agents. The High Court held that the owner of goods was liable for acts done by clearing agents and such goods may be forfeited despite the innocence of the owner regarding wrongful acts of the agents. However, owners of the goods cannot be held criminally liable for acts of the agents unless common intention which was required under section 21 of the Penal Code was demonstrated. Section 219 of EACCMA granted the Commissioner the right to either impose a penalty or forfeit the goods depending on the offence. If the offences admitted were punishable by forfeiture, then and only then could the vehicles be forfeited. Additionally, section 216 of EACCMA empowered the Commissioner to dispose off prohibited and restricted goods that had been detained.

Republic v Kenya Revenue Authority (KRA) Ex-parte Fuji Motors EA Limited [2014] eKLR

Miscellaneous Civil App Jr 41 of 2013

High Court at Mombasa

EM Muriithi, J

August 5, 2014

Reported by John Ribia

Customs Law – Commissioner of Customs and Border Control – powers – enforcement of standards - whether in undertaking its mandate in customs, Kenya Revenue Authority could make reference to and apply standards made by the Kenya Bureau of Standards

Customs Law – standards – duties and taxes paid for goods that violated standards – import - whether duties and taxes paid for goods that violated standards set under the Kenya Bureau of Standards Act could be refunded - whether paying taxes for goods that violated standards set under the Kenya Bureau of Standards Act in essence made the goods allowable into the ports of Kenya - East African Community Custom Management Act, 2004, sections 148, 191, 200, 203, 210, 216 and 219; Kenya Bureau of Standards Act, Cap. 209, section 9; Kenya Bureau of Standards (KEBS) Code 1515:2000

Customs Law – principal agent relationship – liability of a principal for the agent's illegal actions – forfeiture of goods - under what circumstances would a principal's goods would be liable for forfeiture for criminal offences of the principal's agent under the EACCMA - East African Community Custom Management Act, 2004, sections 148, 191, 200, 203, 210, 216 and 219

Customs Law – forfeiture of goods – condemnation of goods – enabling provisions – circumstances allowing forfeiture and condemnation - what were the circumstances in which seized goods at customs could be condemned - whether goods seized under sections 191, 200, and 203 of the EACCMA provided for the liability of forfeiture of goods - East African Community Custom Management Act, 2004, sections 148, 191, 200, 203, 210, 216 and 219

Statutes – subsidiary legislation – standards set under the Kenya Bureau of Standards Act - Kenya Bureau of Standards (KEBS) Code 1515:2000 - legality of subsidiary legislation passed without having been through parliament - whether subsidiary legislation/standards set by KEBS under section 9 of the Kenya Bureau of Standards Act was valid without having been laid in Parliament, in accordance with section 34 of the Interpretation and General Provisions Act - whether the Kenya Bureau of Standards (KEBS) Code 1515:2000 imposing restriction on the importation of motor vehicles over the age of 8 years from the year of manufacture is illegal and/ or unconstitutional.

Republic v Kenya Revenue Authority (KRA) Ex-parte Fuji Motors EA Limited

Constitutional Law – national values and principles of governance – public participation – application to legislation adopted before the Constitution of Kenya, 2010 - whether the Kenya Bureau of Standards (KEBS) Code 1515:2000 that were adopted before the coming into force of the Constitution of Kenya 2010 (the Constitution) were liable for retrospective application of requirements of public participation under the Constitution – Constitution of Kenya, 2010 article 10 and 94(6); Kenya Bureau of Standards Act, Cap. 209, section 9; Kenya Bureau of Standards (KEBS) Code 1515:2000

Brief Facts

On various dates around December 2009, Fuji Motors EA Limited (the applicant) imported 17 motor vehicles through its clearing agents. The Kenya Revenue Authority (KRA/the respondent) impounded and detained the motor vehicles on the grounds of alleged illegality by the agents. Six vehicles were detained due to allegations of fake manifests, three vehicles were detained on allegations of fake manifests and overage, one vehicle was detained on allegations of overage, three vehicles were detained on allegations of hacking of an officer's account and four vehicles were detained without any stated allegations.

The clearing agents admitted to the offences which were compounded thereafter. The respondent failed to clear the 17 vehicles and continued detaining them. Aggrieved, the applicant made a judicial review application in which sought for orders of *mandamus* to compel the respondent to release the detained motor vehicles.

The applicant averred that it should not be punished for the wrong actions of its agents as the acts were done outside the scope of agency and as such the applicant should not have been held liable for them. The appellant also averred that the clearing agents had already admitted to the offences which were thereafter compounded and the penalties paid fully. As such the vehicles should be released. The appellant also averred that the Kenya Bureau of Standards Code 1515:2000 ("KEBS Code") which the respondent relied on to detain the overage vehicles was illegal and unconstitutional as it was not laid before parliament. The appellant also averred that the respondent had denied it a fair opportunity for hearing to give reasons and show cause why the vehicles should be released.

Issues

- i. Whether the Kenya Bureau of Standards (KEBS) Code 1515:2000 that imposed restriction on the importation of motor vehicles over the age of 8 years from the year of manufacture is illegal and/ or unconstitutional.
- ii. Whether the Kenya Bureau of Standards (KEBS) Code 1515:2000 that were adopted before the coming into force of the Constitution of Kenya 2010 (the Constitution) were liable for retrospective application of requirements of public participation under the Constitution.
- iii. Whether subsidiary legislation/standards set by KEBS under section 9 of the Kenya Bureau of Standards Act was valid without having been laid in Parliament, in accordance with section 34 of the Interpretation and General Provisions Act.
- iv. Whether in undertaking its mandate in customs, Kenya Revenue Authority could make reference to and apply standards made by the Kenya Bureau of Standards
- v. Whether duties and taxes paid for goods that violated standards set under the Kenya Bureau of Standards Act could be refunded.
- vi. Whether paying taxes for goods that violated standards set under the Kenya Bureau of Standards Act in essence made the goods allowable into the ports of Kenya.
- vii. Under what circumstances would a principal's goods be liable for forfeiture for criminal offences of the principal's agent under the East African Community Custom Management Act?
- viii. What were the circumstances in which seized goods at customs could be condemned?
- ix. Whether goods seized under sections 191, 200, and 203 of the East African Community Custom Management Act provided for the liability of forfeiture of goods.

Republic v Kenya Revenue Authority (KRA) Ex-parte Fuji Motors EA Limited

Held

1. The Kenya Bureau of Standards (KEBS) Code 1515:2000 that imposed a restriction on the importation of motor vehicles over the age of 8 years from the year of manufacture standard was made and adopted before the coming into force of the Constitution of Kenya 2010 (the Constitution) and the constitution could therefore be applied retrospectively. However, it had not been shown that the adoption of the Kenya Bureau of Standard Code 1515:2000 offended articles 10 and 94(6) of the Constitution (on public participation and the mandate to make subsidiary legislation).
2. While there was need for public participation even in the making of subsidiary legislation in accordance with article 10 of the Constitution, there was no evidence by the applicant, as he was bound to prove, that the preparation of the Standard 1515:2000 did not involve public stakeholder consultation by the Kenya Bureau of Standards before the standard was adopted.
3. Section 9 of the Standards Act provided for the making of the Kenya Standards by the KEBS and adoption by the Minister without the requirement of parliamentary approval. Section 9 on the declaration of Standards complied with the requirements of article 94(6) of the Constitution and was not unconstitutional. The fundamental purpose of the regulations and the circumstances of the case including the length of usage of the regulations were important considerations. The lack of their being laid before Parliament was not an invalidating fact.
4. The Kenya Standard 1515:200 was valid and made in accordance with the enabling statute, the Standards Act. Without challenging the constitutionality of the statute itself, the applicant could not challenge the constitutionality of the regulations made *intra vires* the Act.
5. Section 210 of East African Community Custom Management Act (EACCMA) provided for forfeiture of goods. The respondent was mandated to restrict the importation of motor vehicles older than 8 years from date of manufacture under Section 18 paragraph 1 of Parts A and B of the Second Schedule to the EACCMA. The respondent had statutory power under section 5 of its establishing Act, the Kenya Revenue Authority Act to administer all the laws set in Parts 1 and 2 of the Act including the EACCMA.
6. In enforcing the EACCMA which had provision for prohibited and restricted goods, the respondent must make reference to the Standards established with respect to different goods by the Kenya Bureau of Standards under the Standards Act. In so doing, the respondent did not usurp any powers of the Kenya Bureau of Standards. It merely enforced within its own mandate under section 18 of EACCMA the Standard set by Kenya Bureau of Standards.
7. The mere payment of taxes did not compel the release of the motor vehicles which were liable to be forfeited under the EACCMA. Taxes paid in respect of vehicles which were over 8 years from the date of registration could be refunded. There can be no estoppel against statute.
8. The applicants' agents were, as confirmed by the compounding of the offences, guilty of criminality with respect to their attempt to clear the goods by fake manifests and hacking of the respondent's computer system. The court would not enforce an illegal contract or transaction or a cause of action arising *ex turpi causa* (action arising from an immoral cause) and that once the facts of the illegality had been brought to the attention of the court at any stage of the proceedings including appeal, the court must fulfill its duty under overriding rule of public policy. Courts did not lend their assistance to the enforcement of illegal transactions. That would affect the clearance of the goods for which the fake manifests and hacking were utilized.
9. The consequences of compounding an offence are set out in section 219 of the EACCMA. Condemnation of seized goods liable to forfeiture can only be done upon compounding of an offence if the goods were liable to be condemned by virtue of the offence or in the words of the statute, 'in connection with the offence.' The forfeiture that the Commissioner may in discretion order upon the compounding of the offences of fake manifests as alleged would only be such goods as were involved in the fake manifests and not goods liable to forfeiture by virtue of being prohibited or restricted goods. Sections 191, 200 and 203 under which it was alleged by the respondent that the applicant's agents committed offences did not have liability to forfeiture of the goods. Accordingly, forfeiture for the other goods liable to

Republic v Kenya Revenue Authority (KRA) Ex-parte Fuji Motors EA Limited

forfeiture on account of being prohibited goods or restricted goods must be dealt with in accordance to section 216 of the EACCMA.

10. Section 148 of the EACCMA provides for criminal liability of the owner for the offences of the agent. In the instant case, in accordance with principles of criminal law, the prosecution must, in prosecuting the owner of goods for the offence committed by the agent, show common intention to commit the offences under section 21 of the Penal Code. The condemnation of goods liable to forfeiture was unaffected by the innocent action of owner.
11. The goods were liable to forfeiture notwithstanding that the acts for which forfeiture arises were the actions of the agents. However, with regard to the goods which did not meet the Kenya Standard 1515:2000, their forfeiture was based on their being prohibited or restricted goods and it was immaterial that the agents committed additional offences of fake manifests and hacking during the clearing process. If the offences of fake manifests and hacking were compounded by the Commissioner, details of which were not disclosed, the forfeiture would be lifted with regard to goods liable to forfeiture on account of false declarations leaving only those liable to forfeiture on the ground of contravening the Standard 1515:2000.
12. Orders of *mandamus* would issue to direct the performance of a public duty. Such a duty will exist in the instant case with regard to the goods which, not being prohibited or restricted, have had the applicable taxes paid on them and were not otherwise liable to forfeiture. So that *mandamus* can properly issue where it was shown that the vehicles imported by the applicant were not affected by the Standard 1515:2000 and were not liable to forfeiture. *Mandamus* would also issue where it was shown that the respondent had failed to comply with the procedure set out in the enabling Act in dealing with a matter. The respondent did not give an account for the detention of four motor vehicles. The detention of the motor vehicles was unjustified unless they offended the Kenya Standard 1515:2000 making them liable to forfeiture.
13. The respondent did not, in accordance with section 216 of EACCMA commence proceedings for condemnation of such goods as were liable to forfeiture for reasons other than being prohibited or restricted goods on account of being overage under the Kenya Standard 1515:2000. Such of the goods that were not affected by the Standard must be released to the applicant in accordance with sub-section (2) of that section.

Application partly allowed

Orders

- i. *Order of mandamus issued with respect of such of the applicant's goods the subject of the proceedings that were not affected by the Kenya Standard 1515:2000, as at the date of entry.*
- ii. *The parties were at liberty pursuant to clause 6 of the Legal Notice No. 78 of 2005 to negotiate reshipment or return of the remainder of the vehicles that offend the Kenya Standard 1515:2000 as the less grievous option to the destruction of the goods.*
- iii. *Each party was to bear their own costs.*

Republic v Kenya Sugar Board & Another Ex-Parte Western Investments

Compounding an offence could not be used as reason to deny release of a tax payer's goods and to cancel their importer licence.

Headnote: The issue before the court was whether compounding an offence could be used as reason to deny release of a tax payer's goods and to cancel their licence. The High Court held that the compounding of an offence was final and could not be used as a reason to deny release of the taxpayer's goods or the cancellation of a taxpayer's importation certificate. There cannot be further existing illegality after the Commissioner had compounded the offence in terms of section 219(e) of the Act. There was no provision of the law or any regulation quoted that would allow an administrative body the unfettered power to cancel the certificate of registration already issued, without prior information or chance to the applicant to be heard on the issue.

Republic v Kenya Sugar Board & Another Ex-Parte Western Investments

Misc Appli 593 of 2008

High Court at Nairobi

GMA Dulu, J

September 29, 2009

Reported by John Ribia

Statutes – priority of statutes – Act vis-à-vis subsidiary legislation - East African Community Customs Management Act vis-à-vis the Sugar Regulations - whether when it came to registration of sugar importers, the provisions of the East African Community Customs Management Act were subsidiary to the provision of the Sugar (Imports, Exports and by products) Regulations 2003.

Judicial Review – guiding rules – applicability of the Civil Procedure Rules - whether the provisions of the Civil Procedure Rules were applicable to judicial review proceedings

Tax Law – offences – compounding offences - penalties – whether compounding an offence could be used as reason to deny release of a tax payer's goods and to cancel their importer licence - whether the Kenya Revenue Authority had the authority to cancel the certificate of registration of a sugar importer without prior information or chance for the licence holder to be heard - East African Community Customs Management Act, 2004 section 219

Brief Facts

The applicant, Western Investment, in November 2007 imported 19 containers of sugar and 8 containers of rice and falsely declared all the imports as rice and paid the resultant duties and taxes. The applicant had also imported that sugar without a certificate of importation as required by Regulation 8 of the Sugar (Imports, Exports and by products) Regulations 2003. The 2nd respondent, (Kenya Revenue Authority/KRA), issued a notice of seizure and following verification the applicant sought compounding by the Commissioner under section 219 of the East African Custom's Management Act, 2004 and duly paid fines in the sum of KES 620,000/= and additional duties and taxes in the sum of KES 8,300,727/= and in addition paid customs warehouse rent in the sum of KES 493,350/=.

The 1st respondent, the Kenya Sugar Board, had given the applicant a certificate of importation in May 2008 allowing it to import sugar. The 2nd respondent on June 30, 2008 informed the Kenya Ports Authority that delivery of the applicant's goods could be made to the consignee as it had paid the owing fines, duties and taxes. Upon requesting for the release order, the applicant learnt that the 1st respondent had written a letter dated June 23, 2008 to the 2nd respondent stating that the certificate of importation which it had issued to the applicant earlier was revoked. The 1st respondent also gave a directive halting the processing of sugar imports and for the goods to be forfeited.

The applicant felt aggrieved by the decision of the 1st respondent as it had not been informed of the drastic decision and was not given a chance of hearing thus breaching rules of natural justice. The applicant sought

Republic v Kenya Sugar Board & Another Ex-Parte Western Investments

for the decision to be quashed by an order of certiorari and the respondents to be compelled to release the goods by an order of *mandamus*.

The respondents averred that the applicant, by applying for the compounding of the offence had acknowledged that it engaged in illegality. Granting the applicant, the orders requested would be enabling the applicant to further its illegality. The respondents also argued that an order of *mandamus* should only be issued in instances where an administrative entity had failed to do an act it was legally required to do. In the instant case there was no law which placed a duty on the respondents to grant the applicant, a certificate of importation and release the goods. The respondents were merely required to exercise discretion in making those decisions

Issues

- i. Whether when it came to registration of sugar importers, the provisions of the East African Community Customs Management Act were subsidiary to the provision of the Sugar (Imports, Exports and by products) Regulations 2003.
- ii. Whether the Kenya Revenue Authority had the authority to cancel the certificate of registration of a sugar importer without prior information or chance for the licence holder to be heard.
- iii. Whether compounding an offence could be used as reason to deny release of a tax payer's goods and to cancel their importer licence.
- iv. Whether the provisions of the Civil Procedure Rules were applicable to judicial review proceedings.

Held

1. The applicant was involved in an illegality, both under the Customs Laws as well as the Sugar Regulations. The provisions of the East African Community Customs Management Act (EACCMA) which were in the main Act of Parliament were superior to the Sugar Regulations, which was a subsidiary legislation.
2. Under section 219 of the EACCMA, the Commissioner had powers to compound an offence. There could be no existing illegality after the Commissioner compounded the offence in terms of section 219(e) of the EACCMA.
3. The Civil Procedure Rules did not apply to judicial review proceedings. Therefore Order XXIX of the Civil Procedure Rules (repealed) was inapplicable. The *ex-parte* applicant was the correct party to come to the instant court as *ex-parte* applicant.
4. The 1st respondent had discretion, that discretion had already been exercised when they issued the certificate of registration of the applicant as a sugar importer. At the instant stage, the court was not dealing with the discretion to issue the certificate of registration as a sugar importer, but the cancellation of the certificate already issued.
5. The instant case was a classic example of two or more government agencies not acting in unison, (1st respondent, the 2nd respondent, and the Permanent Secretary for Agriculture) and pushing the blame on a third party.
6. There was no legal provision that would allow the 2nd respondent the unfettered power to cancel the certificate of registration already issued, without prior information or chance to the applicant to be heard on the issue. The 1st respondent had a statutory duty to regulate the sugar industry in the country. However they had to act reasonably, fairly and within the requirements of principles of natural justice.
7. The 2nd respondent had compounded the offences already committed, had collected taxes duty and fine and was duty bound to release the sugar as the Commissioner in his own wisdom had not condemned the subject cargo. At the time the 2nd respondent collected taxes, the 1st respondent had issued a certificate of registration of the applicant as a sugar importer. The 2nd respondent was duty bound to release the sugar, save for communication from the 1st respondent. Under section 219(e) of the EACCMA, the decision of the Commissioner was final.
8. The 1st respondent had acted unreasonably and contrary to the principles of natural justice. There was

Republic v Kenya Sugar Board & Another Ex-Parte Western Investments

nothing that the Government would lose, having collected all taxes and duties due. There was no offer from the 2nd respondent to refund the taxes and duties collected. The 2nd respondent could not be forced by a Permanent Secretary in the Ministry of Agriculture, who did not appear to have any statutory role under the applicable Acts of Parliament to refund taxes and duties already collected. That was what the said permanent Secretary purported to do in his letter. The letter was of no legal effect.

Application allowed; orders of certiorari and mandamus granted as prayed for.

Republic v Kenya Revenue Authority Ex-Parte Midworld Enterprises International Limited & Commissioner for Income Tax

Only authorised officers of a company listed under section 41(2) of the VAT Act may give an admission of an offence and a request for compounding of an offence under section 55 of the VAT Act.

Headnote: The question before the court was who in a company had the legal authority to issue consent for the procedure of compounding of an offence under section 55 of the Value Added Tax Act (VAT Act). The High Court held that only authorised officers of a company listed under section 41(2) of the VAT Act may give an admission of an offence and a request for compounding of an offence under section 55 of the VAT Act. An admission by any other person is invalid.

Republic v Kenya Revenue Authority Ex-Parte Midworld Enterprises International Limited & Commissioner for Income Tax (2018) eKLR

Judicial Review Application 61 of 2012

High Court at Mombasa

EM Muriithi, J

April 30, 2018

Reported by John Ribia

Tax Law – charges – form and content - what details should a charge to a taxpayer from the Commissioner have to be valid - whether a charge made against a taxpayer company that did not have sufficient detail as regards the offence and the penalty to allow the company through its representative to make an informed choice between a prosecution in court or the Commissioner's compounding procedure was valid – Value Added Tax, Act No. 35 of 2013, section 55

Tax Law – value added tax – compounding an offence – consent - officers of a company that had the legal authority to consent to a company to undergo the procedure for compounding of an offence – burden of proof to prove that the consent issued was valid - which officers of a company had the legal authority to consent for a company to undergo the procedure of compounding an offence – who bore the burden of proof to prove that the person who gave consent on behalf of the company to undergo the procedure of compounding an offence under section 55 of the Value Added Tax Act was duly authorized to do so - Value Added Tax, Act No. 35 of 2013, section 55; Companies Act, Act No. 17 of 2015, section 34; Evidence Act, (Cap. 80) section 109

Constitutional Law – fundamental rights and freedoms – right to fair trial – where a taxpayer had been issued with a charge by the Commissioner but their request for a hearing date had been denied - whether the Commissioner in failing to grant a taxpayer a hearing date for a charge it had issued was unfair, ultra vires, and a breach of the right to a fair trial – Constitution of Kenya, 2010, article 50; Value Added Tax, Act No. 35 of 2013, section 55

Judicial Review – availability of remedy to instances where alternative remedy existed – judicial review as an alternative remedy to address instances where a taxing authority had acted in excess of their mandate - whether judicial review was available as an alternative legal remedy to the Commissioner's final orders that were non appealable under – Value Added Tax Act, Act No. 35 of 2013, section 55(2)(e)

Brief Facts

The Kenya Revenue Authority (the respondent) visited the ex-parte appellant's business premises and discovered the use of an unfiscalised Electronic Tax Register (ETR) machine which was not generating Z reports. The respondent found the appellant's accountant at the business premises at the time of this inspection and issued him with summons to appear before it on April 25, 2022. The accountant admitted that the applicant was using an unfiscalised ETR and requested the respondent to compound the offence as provided with section 55 of the Value Added Tax Act (VAT Act). The offence compounded was contravention of regulation 4 of the Value Added Tax (Electronic Tax Register Regulation) 2004. The applicant was fined Kshs.500, 000

Aggrieved, the applicant sought for orders of *certiorari* and prohibition via the instant judicial review application to quash the decision and prevent the respondent from enforcing the decision. The applicant

Republic v Kenya Revenue Authority Ex-Parte Midworld Enterprises International Limited & Commissioner for Income Tax

alleged that the offence was only clearly communicated at trial via an affidavit and not at the time it was compounded. The applicant also averred that the respondent exerted duress on its accountant to obtain the admission and request for compounding. The applicant also averred that the accountant was not an officer of the company who was allowed to admit an offence on behalf of the company. The applicant also alleged lack of fair opportunity for hearing as the respondent denied it chance to call the ETR supplier who could have given the explanation required.

Issues

- i. What details should a charge to a taxpayer from the Commissioner have to be valid?
- ii. Whether a charge made out against a tax payer that did not have sufficient detail regarding the offence and the penalty to allow the tax payer to make an informed choice between a prosecution in court or the Commissioner's compounding procedure was a violation of the taxpayer's right to fair trial.
- iii. Whether the charge made against a taxpayer company did not have sufficient detail as regards the offence and the penalty to allow the company through its representative to make an informed choice between a prosecution in court or the Commissioner's compounding procedure of section 55 of the Act was valid.
- iv. Which officers of a company had the legal authority to consent for a company to undergo the procedure of compounding an offence under section 55 of the Value Added Tax Act?
- v. Who bore the burden of proof to prove that the person who gave consent on behalf of the company to undergo the procedure of compounding an offence under section 55 of the Value Added Tax Act was duly authorized to do so?
- vi. Whether the Commissioner in failing to grant a taxpayer a hearing date for a charge it had issued was unfair, *ultra vires*, and a breach of the right to a fair trial.
- vii. Whether judicial review was available as an alternative legal remedy to the Commissioner's final orders that were non appealable under section 55(2)(e) of the VAT Act.

Held

1. There could be no valid exercise of power or, put another way, power to act contrary to statute or in excess of power granted by statute. Due process of the law set in the statute must be followed. Before a valid exercise of power under section 55 of the Value Added Tax Act (VAT Act) was possible, the ingredients of an offence under the VAT Act for which a fine was prescribed must be demonstrated. Otherwise its exercise in vacuum amounted to pretended power which was invalid. The power of the Commissioner under section 55 of the VAT Act for the compounding of offences did not crystallize until in accordance with the provision.
2. The person alleged found guilty of the offence was a corporation, the admission and request for the Commissioner to deal with the offence under section 55 rather than through prosecution in Court must be done by an authorized officer of the corporation. Section 34 of the Companies Act recognized a director or secretary or other authorized officer of the corporation as having authority of the company to bind it. There was no evidence that the company authorized the accountant who signed the alleged admission and request for compounding of the offence, expressly or by implication. Section 41 (2) of the VAT Act also recognized the limitation of the company officers who were capable of binding and being liable for actions of the company.
3. Whereas service upon an accountant of a corporation was good service for purposes of summonses both under order 5 rule 3 of the Civil Procedure Rules, and for purposes of the Value Added Tax Act, an admission and request for compounding of the offence with the effect of compromising the tax payer's right to a fair trial before the court through compounding procedure of section 55 of the Value Added Act could be executed by an officer other than the officers recognized by Company Law as representing the company so as to constitute an act of the company.
4. Section 55 of the VAT Act on the Commissioner's powers of compounding an offence being in the nature of alternative dispute resolution must depend on the consent of the parties. Such consent must

Republic v Kenya Revenue Authority Ex-Parte Midworld Enterprises International Limited & Commissioner for Income Tax

be given to an officer of the corporation in case of a corporation or by duly authorised agent such as an advocate. There was no evidence that the accountant was a duly authorised agent for purposes of giving consent to the waiver of the applicant's right to fair trial for the alleged offences guaranteed under article 50 of the Constitution. As a party who sought to rely on the alleged consent by request for compounding, the respondent had the evidential burden of proof under section 109 of the Evidence Act to prove the accountant's authority to enter a valid admission and request for compounding, which burden it did not discharge. In acting on the powers under section 55 without the necessary ingredients of a valid admission of the offence and request for compounding by an authorized officer of the suspect corporation, the respondent acted *ultra vires* or outside the statutory power, and his action was subject to quashing by an order of certiorari.

5. Even if the accountant could be taken as a proper officer to represent a corporation for purposes of entry of admission and request under section 55 of the VAT Act, the charge made against the company did not have sufficient detail as regards the offence and the penalty to allow the company through its representative to make an informed choice between a prosecution in court or the Commissioner's compounding procedure of section 55 of the Act.
6. There was no evidence that regulation 6 of the Value Added Tax (Electronic Tax Registers) Regulations 2004 and the penalty for breach thereof under regulation 9 was brought to the attention of the company any time before the purported compromise of the offence leading to the compounding of the offence and imposition of a 'fine' of KES 500,000/-. In his pretended exercise of the powers under section 55 of the Value Added Tax Act, the Commissioner's representative was in breach of the rule of natural justice as to fair hearing in failing to give the full detail of the charges against the company and prescribed penalty therefor to permit informed choice between the full-scale court trial of the charges and a compounding of the offence under section 55 of the VAT Act.
7. The company been made aware of the heavy penalty of KES 500,000/- prescribed under Regulation 9 of the Regulations, it may have opted for a full trial on the merits of the charges before a court of law rather than allowing the Commissioner to deal with the alleged offence under section 55 of the VAT Act.
8. The respondent summoned the *ex parte* applicant to attend the Commissioner on April 25, 2012 and refused the *ex parte* applicants request for hearing on the April 26, 2012 when its director and the supplier of the ETR machine would have attended to respond to the issues raised in the charges against the company. The respondent was unfair in his dealing with the *ex parte* applicant by failing to grant the request for a hearing date when the applicant would respond to the charges and in bamboozling the accountant into admitting the charges. The respondent were in breach of the rule of natural justice as to fair hearing.
9. There existed no alternative remedy under the Value Added Tax Act because, in accordance with section 55 (2) (e), an order of the Commissioner under the section shall be final and not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court. The existence of alternative remedy was not a bar to judicial review for excess of jurisdiction or *ultra vires*.
10. The court was unable to find that unreasonableness within the Wednesbury Principles. The decision of the respondent may be impugned on the two grounds of error of law and breach of the rule of natural justice.
11. The particular manifestation of the duty to act fairly which was presently involved was that part of the recent evolution of Kenya's administrative law which may enable an aggrieved party to evoke judicial review if he could show that he had a reasonable expectation of some occurrence or action preceding the decision complained of and that that reasonable expectation had not in the event been fulfilled.

Application allowed, no orders as to costs.

Republic v Kenya Revenue Authority Commissioner of Customs & Excise & 2 Others

The Commissioner of Customs and Border Control could only compound offences where the person liable admitted the offence in writing.

Headnote: The applicant, a long haul transporter, contested the decision of the Commissioner of Customs and Border Control on ground that the offences of transporting local goods on trucks licenced for transit goods, failure to produce the original transit goods licences, erasing the inscription 'transit goods' from the trucks and failure to produce letter authorising the transport of local goods on transit goods licenced trucks, were not provided for under law. The High Court held that an offence can be compounded where there was a provision which provided so, and in such an instance the Commissioner would not be found to have acted *ultra vires*. Section 219 of the East African Community Customs Management Act, 2004 (EACCOMA) empowered the Commissioner, where he was satisfied that any person had committed an offence under the Act in respect of which a fine was provided or a thing was liable to be forfeited, compound the offence and may order that such a person pay a sum not exceeding the amount of the fine which the person would have been liable if he or she has been convicted of the offence. The Commissioner could only compound the offences where the person liable admitted the offence in writing. The application was dismissed as the offences were provided for under regulation 4 of the East African Community Customs Management Regulations, 2006.

Republic v Kenya Revenue Authority Commissioner of Customs & Excise & 2 Others

Judicial Review 631 of 2009

High Court at Nairobi

DAS Majanja, J

June 19, 2012

Reported by John Ribia

Customs Law – licence to carry transit goods – violation of licence – remedies available to a tax payer that had violated the said licence s - whether judicial review was available as a remedy to a tax payer that had contravened the licence s to carry transit goods under the East African Community Customs Management Act but was yet to be charged in a court of law - East African Community Customs Management Act, 2004, section 219; East African Community Customs Management Regulations, 2006 regulation 104; Criminal Procedure Code, Cap. 75, section 106, Constitution of Kenya (repealed) section 77(2)(b)

Customs Law – licence to carry transit goods - offences associated with the licence - offences of transporting local goods on trucks licence d for transit goods, failure to produce the original transit goods licence s, erasing the inscription 'transit goods' from the trucks and failure to produce letter authorising the transport of local goods on transit goods licence d trucks – whether the offences were provided for under the East African Community Customs Management Act and/or the East African Community Customs Management Regulations - East African Community Customs Management Act, 2004, section 219; East African Community Customs Management Regulations, 2006 regulation 104.

Brief Facts

The applicant, Modern Coast Builders and Contractors Limited, was at the material time, a long haul transporter. The 1st respondent (Commissioner of Customs and Border Control) had licence d the applicant's motor vehicles to carry transit goods under regulation 104 of the East African Community Customs Management Regulations 2006 (EACCM Regulations). On October 20, 2009 the applicant's vehicles were loaded with fertilizer at the Port of Mombasa. The items were to be transported to Nairobi. On that same date the respondents' agents impounded and detained the vehicles at Mariakani Transport Monitoring Unit on the grounds that the vehicles were transporting local goods yet they were only licence d to transport transit goods. Thereafter, the respondents' officers proceeded to compound several offences including transporting local goods on trucks licence d for transit goods, failure to produce the original transit goods

Republic v Kenya Revenue Authority Commissioner of Customs & Excise & 2 Others

licence s, erasing the inscription 'transit goods' from the trucks and failure to produce letter authorising the transport of local goods on transit goods licence d trucks. Pursuant to the compounding, the fine of KES 60,000.00 was ordered together with an order that the local goods be transferred to local trucks but the offer to compound was rejected by the applicant with the result that the trucks remained at the Mariakani Transport Monitoring Unit parking area.

The applicant being aggrieved by the decision filed an application via a filed a judicial review application in which it sought orders of *certiorari* and mandamus to quash the decision and compel the respondents to release the vehicles. The applicant majorly averred that the offences compounded were not provided for by any written law. The applicant alleged that the decision of the respondents was illegal, *ultra vires* and baseless. The respondents, countered that the EACCM Regulations provided for the offences and as such they could compound them.

Issues

- i. Whether the offences of transporting local goods on trucks licenced for transit goods, failure to produce the original transit goods licences, erasing the inscription 'transit goods' from the trucks and failure to produce letter authorising the transport of local goods on transit goods licenced trucks were provided for under the East African Community Customs Management Act and/or the East African Community Customs Management Regulations.
- ii. Whether judicial review was available as a remedy to a tax payer that had contravened the licence s to carry transit goods under the East African Community Customs Management Act but was yet to be charged in a court of law.

Held

1. Regulations 104 of the East African Community Customs Management Regulation, 2006 (EACCM Regulations) set out how transit goods were to be treated for the protection of the revenue. Regulation 104 provided *inter alia*, for the licensing of vehicles carrying transit goods by the Commissioners, the mode of identification of trucks licence d to carry transit goods and the manner in which transit goods were conveyed. The regulations were made pursuant to section 251 of EACCMA, 2004 which empowered the Council of Ministers to make generally for giving effect to the provisions of the Act. Under section 251(2) any regulations made under subsection (1) may provide that any person contravening any of the provisions thereof committed an offence and may provide a penalty for the infraction. Such a penalty was enacted under regulation 215 which provided that a person who committed an offence under the regulations was liable to a fine not exceeding five thousand dollars. The applicant's vehicles were issued with licences to carry transit goods in accordance with regulation 104.
2. The applicant misapprehended the Commissioner's powers under EACCMA, 2004. Contrary to the assertions by the applicant, the Commissioner's powers and offences for which it was accused had a firm legal foundation and there was no basis for impugning them. Specific violations of the Act and the regulations were disclosed to the applicant and the respondents were entitled to impound the vehicles. The vehicles could not be permitted to contravene the conditions of licence nor breach the regulations for the carriage of transit goods for the specific offences.
3. The Commissioner was thereafter entitled to compound the offences in accordance with section 219, EACCMA, 2004. Section 219 empowered the Commissioner, where he was satisfied that any person had committed an offence under the Act in respect of which a fine was provided or a thing was liable to be forfeited, compound the offence and may order that such a person pay a sum not exceeding the amount of the fine which the person would have been liable if he or she had been convicted of the offence. The Commissioner could only compound the offences where the person liable admitted the offence in writing.
4. There was evidence to suggest that the applicant had breached the conditions of its transit licences and the EACCM Regulations. The Commissioner was entitled to take steps to charge the applicant or in

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any case compound the offence. Were it not for the instant proceedings, the applicant would have been charged in a court of law for the offences.

5. As the applicant had not been charged with any criminal offence before a court of law, the provisions of section 77(2)(b) of the repealed Constitution and the provisions of section 134 and 137 the Criminal Procedure Code were not applicable.
6. A consent order was recorded by the parties where the applicant was permitted to transfer the local cargo to non-transit licenced trucks and the impounded vehicles released. The respondents' actions as set out in the depositions were in accordance with the provisions of the law, were not *ultra vires*, baseless or made in bad faith to harass the applicant.

Application dismissed with costs to the respondents.

New Yako Supermarket Limited v Kenya Revenue Authority

Courts decline to issue temporary injunction against KRA because the Authority served public interest.

Headnote: The main issue before the court was whether a temporary injunction in a suit challenging the legality of Kenya Revenue Authority (KRA) compounding an offence could issue considering KRA served the public interest. The High Court held that temporary injunctions granted to stay settlement orders in suits challenging the legality of compounding of an offence should be subject to terms and conditions in light of the fact that Kenya Revenue Authority served public interest of collecting taxes for the public benefit.

New Yako Supermarket Limited v Kenya Revenue Authority [2021] eKLR

Constitutional Petition 11 of 2020

High Court at Eldoret

OA Sewe, J

September 15, 2021

Reported by John Ribia

Tax Law – offence – compounding an offence - whether a temporary injunction in a suit challenging the legality of Kenya Revenue Authority (KRA) compounding an offence could issue considering KRA served the public interest – Tax Procures Act, Act No. 29 of 2015, section 109

Civil Practice and Procedure – constitutional petitions – conservatory orders – conditions precedent - what conditions did an applicant in a constitutional petition need to fulfil to be granted conservatory orders – Constitution of Kenya, 2010 articles 22 and 23; Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rules 23 and 24

Brief Facts

On the May 5, 2020 the Kenya Revenue Authority (the respondent) seized 156 cartons of assorted alcoholic products from a warehouse at Rupa in Eldoret Town belonging to New Yako Supermarket Limited (the petitioner). That was done on the ground that the products had been affixed with counterfeit excise stamps, contrary to section 28 of the Excise Duty Act, 2015. The respondent summoned the petitioner's director to its offices and ordered him to pay a penalty in the sum of Kshs. 5,000,000 after compounding the offence under section 109 of the Tax Procedures Act.

That prompted the petitioner to approach the Court via a petition decrying the violation of the Constitution and provisions of the Excise Duty Act. The petitioner also applied for an injunction to prevent the respondent from recovering KES 5,000,000 pursuant to the settlement order dated 1 May 14, 2020.

The applicant alleged that the actions by the respondent violated its right to property, right of access to justice and right to fair hearing under articles 40, 48 and 50 of the Constitution respectively. The applicant also alleged that the duty to affix duty stamps on products was on the manufacturers, importers and distributors. The applicant emphasized that it was not a manufacturer, an importer or a distributor but a mere retailer who had no duty to verify the genuineness of the excise duty stamps. The applicant stated that despite showing the respondent that it was a mere retailer the respondent still unjustifiably went ahead to issue the settlement order.

The respondent replied that it conducted mock purchases and made a formal visit for fact-finding which revealed that the applicant was selling alcohol products bearing counterfeit excise duty stamps. The respondent also stated that it had exercised due diligence before imposing the penalties and as such the allegations of harassment and bias were unfounded. The respondent also stated that the applicant had willingly admitted to the compounded offence and that the settlement order was a binding instrument that could not be set aside. The respondent also asked the court to impose conditions if granted orders of injunction.

Issues

New Yako Supermarket Limited v Kenya Revenue Authority

- i. Whether a temporary injunction in a suit challenging the legality of Kenya Revenue Authority (KRA) compounding an offence could issue considering KRA served the public interest.
- ii. What conditions did an applicant in a constitutional petition need to fulfil to be granted conservatory orders?

Held

1. Being a constitutional petition, it was expected that interim relief be sought by way of a conservatory order, pursuant to rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Nevertheless, it was the duty of the High Court to consider the application in the spirit of article 159(2)(d) of the Constitution with a view of determining whether the orders prayed for were warranted; granted that proof of a *prima facie* case was pertinent in respect of applications for temporary injunction as well as for purposes of conservatory orders.
2. An applicant for conservatory orders for purposes of articles 22 and 23(3)(c) of the Constitution must satisfy the court as to the following three considerations:
 - a) that he/she had a *prima facie* case with a high likelihood of success;
 - b) that the petition would be rendered nugatory; and
 - c) that public interest weighed in his/her favour.
3. The penalty of Kshs. 5,000,000/= was imposed pursuant to section 109 of the Tax Procedures Act. The court had to bear in mind the public interest aspect of the matter; and the duty of the respondent to ensure compliance with the relevant fiscal laws for the benefit of all. The prayer for temporary injunction was untenable and was declined.

Application partly allowed.

Order:-

- i. *Pending the hearing and determination of the instant petition, there be stay of the implementation of the respondent's decision contained in the Order for Settlement dated May 14, 2020 requiring the petitioner to make payment in the sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) as penalty on condition that the petitioner furnished a bank guarantee for the said sum of KES 5,000,000/= within 15 days from the date of the instant ruling.*

Watershop Ltd, Naivasha v Kenya Revenue Authority & another

A party must state all material facts relating to the suit in any *ex-parte* judicial review application.

Headnote: The applicant filed a judicial review application contesting a decision by the Kenya Revenue Authority but failed disclose all material facts. The court held that a party must state all material facts relating to the suit in any *ex-parte* application. Failure amounted to deceiving a court which had placed its trust on the applicant. Any order or advantage obtained pursuant to an *ex-parte* application that failed to disclose all material facts would be withdrawn by the court upon realisation of the dishonesty. A settlement order entered pursuant to section 109 of the Tax Procedures Act was not subject to appeal and allowing an appeal against it would be an express contravention of the law.

**Watershop Ltd, Naivasha v Kenya Revenue Authority & another [2022]
eKLR**

Application E1095 of 2020

High Court at Nairobi

J Ngaah, J

January 27, 2022

Reported by John Ribia

Judicial Review – applicant's duties – duties to grant full disclosure of material facts - whether a judicial review motion in which the applicant had not disclosed all the material facts was invalid.

Judicial Review – doctrine of exhaustion of remedies – Tax Appeals Tribunal – jurisdiction determine appeals from objections – where an applicant favoured judicial review as opposed to approaching the Tax Appeals Tribunal - whether a complaint against a revenue authority that some of its goods/products did not attract excise duty depending on how they were packaged was a dispute that could be determined by a judicial review court.

Brief Facts

Section 109 of the Tax Procedures Act 2015 enabled the 1st respondent to compound offences and imposed fines. Under the provision, a taxpayer could admit of committing an offence and request for a compounding of the offence in writing. Thereafter the taxpayer paid a fine not more than he would have been liable to pay had he been found guilty of the offence in a judicial process.

On July 17, 2020, the 1st respondent issued a public notice reminding those engaged in the business of refilling, packaging and bottling water that they had a duty to pay excise tax. The 1st respondent broadened that category to include water refilled by customers who use their own bottles at water vending machines.

On July 29, 2020, the 1st respondent seized the applicant's goods and deposited them in a customs warehouse for the reason that the goods had been offered for sale without excisable stamps contrary to sections 28, 40 and 41 of the Excise Duty Act, 2015 together with the regulations made thereunder. As a reaction to that seizure, the applicant on August 5, 2020, made a request for settlement of a case under section 109 of the Tax Procedures Act after it admitted having committed offences under sections 28, 40 and 41 of the Excise Duty Act 2015. It requested the commissioner to deal with the case under the provisions of section 109 of the Act.

The 1st respondent thereafter compounded the offence as required under section 109 of the Act and ordered the applicant to pay a penalty of five million Kenya Shillings. A comprehensive audit had to be carried out. The applicant filed an *ex-parte* application to the court asking for leave to file a substantive motion on September 9, 2021. In the *ex-parte* application the applicant failed to mention to the court the fact that it had admitted to the offences alleged and requested for the compounding of offences pursuant to which there had been a settlement order in conformity with section 109 of the Tax Procedures Act.

The court was not aware of the applicant's omissions and granted leave for the applicant to file a substantive motion. In the substantive motion the appellant challenged the 1st respondent's decision to broaden the category of bottled water subjected to excise duty to include water sold at vending machines in which

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customers refill their own containers. The ground of challenge was lack of consultation and participation before the decision was made. The Court noticed that the substantive motion contained material and decisive facts which were not mentioned in the *ex-parte* application.

Issues

- i. Whether a judicial review motion in which the applicant had not disclosed all the material facts was invalid.
- ii. Whether a complaint against a revenue authority that some of its goods/products did not attract excise duty depending on how they were packaged was a dispute that could be determined by a judicial review court.

Held

1. According to section 109 of the Tax Procedures Act, (the Act), the Commissioner General was empowered to compound offences where he was satisfied that a person has committed an offence under any tax law and in so doing, he may order the offender to pay a fine that would ordinarily be imposed if the offender had been convicted by a court of law. The power to compound offences was subject to the offender admitting the offence or offences in writing and requesting the commissioner to deal with the offences as prescribed under the provision of the law.
2. The applicant understood that excise stamps were not required under the potable (sic) water standard-KS EAS 12: 2018. Excise stamp was only applicable under packaged water standard-KS EAS 153:2018. But having admitted committing the prescribed offences, the applicant's understanding of when and where the excise stamps were to be affixed would be of little or no consequence.
3. The Commissioner made an order of settlement pursuant to the provisions section 109 of the Act. The commissioner compounded the offence as required under section 109 of the Act and ordered the applicant to pay a penalty of Five Million Kenya Shillings. He ordered further that a comprehensive audit be carried out. The facts were not disclosed to the court when the applicant sought for leave to file the substantive motion for the prerogative orders of *certiorari* and prohibition.
4. When the applicant sought for leave to file the motion for judicial review, it never disclosed that it had filed with the 1st respondent a request for settlement of a case in accordance with the provisions of section 109 of the Tax Procedures Act, 2015 and that an order for settlement had been made.
5. The managing director of the applicant admitted that he offered for sale excisable products without offering excise stamp contrary to those provisions of the law. In doing so, he understood that any order made by the commissioner under that particular provision was final and not subject to appeal.
6. The applicant never disclosed that upon admission of the offences, an order of settlement of the case under section 109 of the Tax Procedures Act, 2015 was made against him by the Commissioner and that he was ordered to pay KES 5 Million subject to a comprehensive audit, probably of the company's accounts or returns. It was in bad faith for the applicant to file these proceedings essentially questioning the same offences which he had admitted committing.
7. The applicant was guilty of non-disclosure of facts material to his application. If those facts were known to the court, it was unlikely that leave would have been granted. The applicant ought not to have been heard.
8. While the applicant has narrowed his application on the notice of July 17, 2020, that notice could not be isolated from the subsequent events that ensued after it had been published; those events would certainly include seizure of the applicant's goods not necessarily for non-compliance with the notice but for non-compliance with the provisions of the Excise Duty Act on the requirement of excise stamps which the impugned notice made reference to.
9. It was incumbent upon the applicant to disclose to the court that even though it complained about the notice of July 17, 2020, it had subsequently admitted committing offences with respect to certain provisions of the Excise Duty Act and that it had been penalized for those offences. By suppressing the material facts, the court would be entitled to assume that the applicant was simply seeking to circumvent

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the order for settlement that was made by the commissioner considering that the court was never told whether the fine imposed was paid or not.

10. The applicant was well aware that that the settlement order under section 109 of the Act was not subject to appeal and rather than confront it directly, it preferred attacking the notice. If the applicant's prayers were granted in terms of the motion, the applicant would end up achieving the same results that the law appeared to have barred it from achieving. Allowing the application would be tantamount to allowing an appeal against the settlement order contrary to the express provisions of section 109 of the Act.
11. The applicant's complaint was a tax dispute. If its mitigation when it requested for settlement of a case was anything to go by, its complaint was simply that some goods or products did not attract excise duty depending on how they were packaged. The appropriate forum to determine the dispute would have been the Tax Appeals Tribunal.
12. Where there was an alternative remedy provided by an Act of Parliament which was as effective, the court ought to ensure that the dispute was resolved in accordance with the relevant statute. The applicant's motion was misconceived and an abuse of the process of the court.

Application dismissed with costs.

Harleys Limited v Commissioner of Domestic Taxes

Chapter 10: Customs Valuation Cases

Customs administration can depart from the use of the primary method of valuation if it doubted the correctness or accuracy of the declared value

Headnote: The case revolved around customs valuation dispute. The main issue was whether customs authorities were justified in departing from the transaction value declared by an importer when there were credible doubts concerning the accuracy of the declared value. The Tax Appeals Tribunal held that The Authority could depart from the use of the primary method of valuation that was the transaction value method, if it doubted the correctness or accuracy of the declared value. The fact that the law provided for six different methods of valuation was proof that the transaction value method could not be proper in all cases and the Customs administrations could not be forced to accept the declared value in every case notwithstanding how ridiculously low those were.

Harleys Limited v. Commissioner of Domestic Taxes

TAT No. 449 of 2020

Tax Appeal Tribunal

EN. Wafula, CP, Mutava, GM Kitenga, AK Kiprotich, E Njeru, Members

October 29, 2021

Reported by John Ribia

Customs Law – burden of proof – burden of proof in a dispute on customs valuation - whether the burden of proof rests with the importer to substantiate the declared transaction value when customs authorities challenge its accuracy.

Customs Law – customs valuation – transactional value method vis-à-vis the deductive value method - whether customs authorities were justified in departing from the transaction value declared by an importer when there were credible doubts concerning the accuracy of the declared value - whether the application of alternative customs valuation methods, in place of the transaction value, adheres to established procedural and legal standards, thereby providing a guideline for future assessments – Customs and Excise Act (Cap 427) section 127; East African Community Customs Management Act, 2004 section 122(1)

Brief Facts

The appellant imported a consignment of medicaments. Before the goods were cleared through customs, the respondent reviewed the customs declared and as a result the appellant was required to pay additional taxes amounting to Kshs. 3,224,742.00

The appellant argued that the respondent should not have departed from the transaction value of the goods and that there was a procedural flaw in the respondent's actions of using deductive value to determine the customs value of the goods. The respondent on the other hand argued that it reviewed the value because it doubted the accuracy of the appellant's declaration and therefore used deductive method as there was no information on identical or similar goods as those in the impugned consignment.

Issues

- i. Whether the burden of proof rests with the importer to substantiate the declared transaction value when customs authorities challenge its accuracy.
- ii. Whether customs authorities were justified in departing from the transaction value declared by an importer when there were credible doubts concerning the accuracy of the declared value.
- iii. Whether the application of alternative customs valuation methods, in place of the transaction value, adheres to established procedural and legal standards, thereby providing a guideline for future assessments.

Held

1. Transaction value was the primary method of customs valuation. There existed other five methods of determination of customs value which must be applied in sequence. The subsequent methods of valuation sought to arrive at a value that most closely approximated the transaction value where customs

Harleys Limited v Commissioner of Domestic Taxes

administrations had doubts as to the correctness of the value declared by the importer.

2. Customs administration must be satisfied with the information provided by the importer. The satisfaction of the Commissioner was a preponderance of facts surrounding the transaction itself and not least previous importations of identical or similar goods of the same class. Many customs administrations weighed the declared transaction value against test values which appeared in customs data base and were ideally used as a risk management tool. Adverse variation between the declared value and the test values invite customs doubts as to the correctness and accuracy of the declaration. The use of customs valuation databases was recognised in the WCO guidelines on application of Decision 6.1 regarding cases where customs administration have reasons to doubt the truth or accuracy of the declared value.
3. Customs administration could depart from the use of the primary method of valuation if it had doubted the correctness of accuracy of the declared value. That the law provided for six different methods of valuation was proof that the transaction value method may not be proper in all cases and the customs administrations could not be forced to accept the declared value in every case notwithstanding how ridiculously low those were.
4. There was a predictable trend in the instant dispute where the net effect of the respondent's suspicion led to a review of the values declared by the appellant. The remedy available was for the importer to successfully challenge the respondent's decision through production of documentary evidence. The appellant did not produce any documentary evidence to support its allegation that the respondent's decision of applying deductive method was wrong or should have been made differently. It was not enough for the appellant to state that the respondent was wrong in departing from the primary method of valuation.
5. The commercial documents furnished by the appellant in its bundle of appeal did not address the concerns raised by the respondent as to the fact that the value declared by the appellant for the impugned goods was considerably lower than those declared for goods of the same category previously imported by the appellant. The respondent did not err in applying deductive method to appraise the customs value declared for the appellant's goods.

Appeal dismissed.

Orders:

- i. Objection dated September 21, 2019 upheld.*
- ii. Each party was to bear its own costs.*

Glaxosmithline Kenya Ltd v Commissioner of Customs & Border Control

The Kenya Revenue Authority does not have discretionary powers to rely on alternative methods of valuation without following the laid-out process

Headnote: The case fundamentally explores the adherence to procedural fairness and correct application of customs valuation methods under the East African Community Customs Management Act, 2004 (EACCMA). The main issue for determination was whether it was legally permissible for customs authorities to deviate from the transaction value method when determining the customs value of goods. The value of goods ought to be determined in accordance with the Fourth Schedule and import duty shall be paid on that value. As such the Authority does not have any discretionary powers to rely on alternative methods without following the procedure or directives laid out in the Fourth Schedule to EACCMA.

Glaxosmithline Kenya Ltd v Commissioner of Customs & Border Control

TAT No. 340 of 2020

Tax Appeals Tribunal

P Lutta, CP; E Njeru, M Mbuthia, D Ngala, and T Chesire, Members

October 29, 2021

Reported by John Ribia

Customs Law - customs valuation – transaction value method vis-à-vis the deductive value method — circumstances where it was it legally permissible for customs authorities to deviate from the transaction value method when determining the customs value of goods – procedural fairness - whether the customs authority's actions in confirming and issuing a customs valuation decision, without following established due process - whether it was legally permissible for customs authorities to deviate from the transaction value method when determining the customs value of goods - under what circumstances was it legally permissible for customs authorities to deviate from the transaction value method when determining the customs value of goods - East African Community Customs Management Act, 2004 section 122(6) and note 1 to paragraph 6 the Interpretative Notes in Part II of the Fourth Schedule

Brief Facts

The appellant, GlaxoSmithKline (Kenya) Limited, contested the decision by the Commissioner of Customs & Border Control, which used the Deductive Value Method for valuing the appellant's imported goods, Sensodyne Repair and Protect, despite the appellant's use of the Transaction Value Method.

The appellant contended that the assessment was as a result of a post clearance audit (PCA) exercise which fact was also alluded to by the respondent in its statement of facts. It was the appellant's contention that the respondent's decision was made without any consideration of the appellant's views or concerns. Additionally, that the PCA process which resulted to the respondent's decision did not comply with the provisions of East African Community Customs and Management Act (EACCMA), and EAC Customs Post Clearance Audit Manual.

The appellant contended that it declared the value of its product, SRP, using the Transaction Value method (Method 1) pursuant to the Fourth Schedule of the EACCMA, the EAC Customs Valuation Manual and the World Trade Organization Agreement on Customs Valuation.

Issues

- i. Whether the customs authority's actions in confirming and issuing a customs valuation decision, without following established due process.
- ii. Whether it was legally permissible for customs authorities to deviate from the transaction value method when determining the customs value of goods.
- iii. Under what circumstances was it legally permissible for customs authorities to deviate from the transaction value method when determining the customs value of goods?

Held

1. The fact that East African Community Customs and Management Act (EACCMA) applied to the East

Glaxosmithline Kenya Ltd v Commissioner of Customs & Border Control

African Community (EAC) Partner States, and the key purpose of the EAC Customs Post Clearance Audit (PCA) Manual was to ensure uniform interpretation and application of customs post clearance audit provisions in the Community, a PCA process undertaken by the respondent ought to adhere to the processes and procedures set out in the EAC Customs PCA Manual. The respondent thus contravened accepted method envisaged in EACCMA.

2. The manual was a publication of the EAC Secretariat which was the executive organ of the Community and the provisions of section 122(6) of EACCMA since the PCA exercise had a direct nexus to, had a direct nexus to, and resulted in the upliftment of duty on the appellant's product by the respondent.
3. The Fourth Schedule, which is the reference point in determining the value of imported goods liable to *ad valorem* import duty, provides for six (6) methods of determining the customs value of imported goods, namely: transaction value method (method 1); transaction value method of identical goods (method 2); transaction value method of similar goods (method 3); deductive value method (method 4); computed value method (method 5); and fallback value method (method 6).
4. Note 1 to Paragraph 6 the Interpretative Notes in Part II of the Fourth Schedule to the EACCMA (Interpretive Notes) gave guidance that the term unit price at which goods were sold in the greatest aggregate quantity meant the price at which the greatest number of units was sold in sales to persons who were not related to the persons from whom they buy such goods at the first commercial level after importation at which such sales took place. Notes 6 and 7 to paragraph 6 of the Interpretive Notes provided that general expenses included direct and indirect costs of marketing the goods, and that the figures for purposes of deduction of profit and general expenses should be determined based on information supplied by or on behalf of the importer unless the importer's figures were inconsistent with those obtained in sales in the Partner States of imported goods of the same kind.
5. The appellant made available the respondent GSK's TP documentation and valuation methodology and the schedules of prices supporting the same. However, there was no evidence that that information was considered by the respondent in arriving at its decision. The respondent did not demonstrate to the appellant or the Tax Appeals Tribunal whether it observed 'the circumstances of sale test provided for paragraph 2 of the Interpretive Notes to the fourth schedule by examining relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at in order to determine whether or not the relationship had influenced the price.
6. The respondent did not provide or advise of the formula or computation on how it determined the transaction value applied using the deductive value method and whether its application of the method was pursuant to the guidelines of paragraph 6 of the Fourth Schedule to the EACCMA. The respondent's decision was arbitrary and not objective. The respondent had not demonstrated that relationship between the appellant and its suppliers influenced the valuation to justify its application of an alternative method to the transaction value method.
7. Section 122(4) of the EACCMA allowed a customs officer the right to satisfy themselves as to the truth or accuracy of any statement, document or declaration. This position is also supported by Text 1.1 of the Commentary by the WCO Technical Committee on Customs Valuation (TCCV). However, in doing so, the TCCV also advised (in Decision 6.1) that in so doing, Customs administrations should not prejudice legitimate commercial interests of the importer. The processes and procedures leading to the collection of taxes must meet the relevant legal and constitutional thresholds in order to ensure the citizen's rights were not violated or threatened with violation. The respondent erred in its decision to depart from the use of the transaction value method in valuing the appellant's goods.

Appeal allowed.

Orders:

- i. *The respondents review decision dated June 26, 2020 was set aside.*
- ii. *An order for re-assessment of the import duty payable by the appellant on Sensodyne Repair and Protect, 75ml (SRP) using the transaction value method within sixty (60) days.*

Maxam Limited v Commissioner of Customs & Border Control

The Transaction Value Method, despite being the primary method of valuation, was not the only method for customs valuation.

Headnote: The case involved a dispute over customs valuation. The appellant challenged the respondent customs authority's decision to reject the transaction value declared by the appellant for its imported goods and instead assess a higher customs value using other valuation methods and data from an internal database. The importer argued the declared transaction value should be used. Customs rejected that and used a higher value based on an internal database. The court ruled that customs could only use other methods to verify value and importers must prove their declared value is accurate. Customs acted fairly and importers can challenge decisions, but the burden is on them. EACCMA valuation methods. Customs had authority to verify declared values against test values and databases without public consultation. The burden was on the importer to show the declared value was accurate against commercial realities. Customs followed fair procedures and its adjustments based on available data were not arbitrary. Importers could dispute the assessments, but the burden of proof was on them to show the customs agency's valuation was wrong. In essence, the tribunal affirmed customs' powers to substantiate and adjust transaction values through alternative valuation methods and internal data sources, subject to general administrative law principles of fairness and reasonableness.

Maxam Limited v Commissioner of Customs & Border Control

TAT No. 201 of 2019

Tax Appeal Tribunal

EN Wafula, CP; Mutava, AK Kiprotich, and GM Kitenga, Members

July 9, 2021

Customs Law - valuation of customs - valuation methodologies - primacy of transaction value method - whether the transaction value method is the sole or primary method for determining customs value - East African Community Customs Management Act, 2004 section 122 and paragraph 2 and 9 of part 1 of the fourth Schedule

Customs Law - valuation of customs - verification of declared values - authority and obligations of customs officers - standards and procedures for questioning accuracy - whether customs officers have the authority and obligation to verify and potentially reject declared transaction values by importers, and if so, the standards and procedures they must follow in questioning the accuracy of information provided - East African Community Customs Management Act, 2004 section 122 and paragraph 2 and 9 of part 1 of the fourth Schedule

Customs Law - valuation of customs - use of test values, databases and objective data - need for consultation or public participation - whether there was need for consultation or public participation by customs authorities when they use test values, databases, and other objective data to trigger doubts about declared transaction values.

Customs Law - valuation of customs - rejection of declared values - burden of proof and evidence standards - what was the burden of proof and standard of evidence required for customs authorities to reject an importer's declared transaction value and make an adjustment to the customs value assessment.

Customs Law - valuation of customs - procedural fairness - administrative law requirements - whether customs authorities were bound by procedural fairness and administrative law requirements, such as providing reasons and considering evidence from the importer, when reviewing and adjusting declared transaction values.

Customs Law - valuation of customs - challenging customs decisions - scope of review - whether importers can effectively challenge decisions by customs authorities in choosing valuation methods and making assessments and adjustments based on data available to them.

Brief Facts

The respondent carried out a verification exercise on goods imported by the appellant and made a tax demand for the amount KES 1,465,249 against the appellant. The appellant objected to the tax demand. The Commissioner of Investigations and Enforcements confirmed the assessment. The appellant dissatisfied, filed the instant appeal.

Maxam Limited v Commissioner of Customs & Border Control

The appellant contended that it was not informed of the reasons for review of its declared values, yet it challenged the use of an internal database by the respondent on the grounds that it was not consulted before implementation of the database. The respondent argued that the database was assembled with information obtained from stakeholders.

It was the appellant's case that it supplied the respondent with the relevant documents to with the invoices and the payment slips but that the respondent blatantly failed, neglected and/or refused to pay regard to the same. The appellant insisted that the respondent failed to explain the method it used to arrive at the higher tax demanded despite several inquiries from the appellant.

Issues

- i. Whether the transaction value method is the sole or primary method for determining customs value under the East African Community Customs Management Act.
- ii. Whether customs officers have the authority and obligation to verify and potentially reject declared transaction values by importers, and if so, the standards and procedures they must follow in questioning the accuracy of information provided.
- iii. Whether there was need for consultation or public participation by customs authorities when they use test values, databases, and other objective data to trigger doubts about declared transaction values. What was the burden of proof and standard of evidence required for customs authorities to reject an importer's declared transaction value and make an adjustment to the customs value assessment.
- iv. Whether customs authorities were bound by procedural fairness and administrative law requirements, such as providing reasons and considering evidence from the importer, when reviewing and adjusting declared transaction values.
- v. Whether importers can effectively challenge decisions by customs authorities in choosing valuation methods and making assessments and adjustments based on data available to them

Held

1. The transaction value method was not the only method of determining value. Section 122 and the Fourth Schedule to the East African Community Customs Management Act (EACCMA) required the customs value of imported goods be determined using one of the Six methods of valuation. Paragraph 2 and 9 of part 1 of the fourth Schedule to the EACCMA however emphasized that the transaction value method was the primary method.
2. One of the primary roles of customs in the clearance of goods was to verify values declared by importers to ensure that the methods were properly applied. In particular, the purpose of verification of customs valuation was to *inter alia* ensure that declared value was realistic considering commercial practices of the industry and identical or similar goods. The obligation was drawn from section 122(4) of the EACCMA that provided that nothing in the fourth schedule was to be construed as restricting or calling into question the rights of the proper officer to satisfy oneself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.
3. Customs administrations had developed test values determined based on Customs value determined in past import transactions occurring at about the same time between unrelated buyers and sellers of identical or similar goods, deductive or computed values calculated for identical or similar goods, and any other information available to it as triggers of doubts to the truth or accuracy of the particulars or of documents produced in support of declarations made by the importers.
4. The respondent was not satisfied with the information provided. Although the EACCMA did not set the standard of satisfaction of proof to satisfy the respondent, such a standard would be substantially met if information was provided to show that the value declared closely estimated the test values or that the test values were not realistic considering commercial practices of the industry and identical or similar goods.
5. Databases on customs were administrative tools used by customs administrations the world over and

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are not an invention of a kind requiring public participation. Although the EACCMA did not set the standard of satisfaction of proof to satisfy the respondent, such a standard would be substantially met if information was provided to show that the value declared closely estimated the test values or that the test values were not realistic considering commercial practices of the industry and identical or similar goods. The EACCMA did not lay any burden on the respondent, to satisfy the appellant.

6. The action taken by the respondent to review declared value based on objectively collected data was not arbitrary and the appellant had failed to prove that the assessment by the respondent was wrong.

Appeal dismissed.

Orders:

- i. *The Objection decision dated March 27, 2019 was upheld.*
- ii. *Each party was to bear its costs.*

Pernod Ricard Kenya Ltd v Commissioner of Customs & Border Control

The procedure applicable in disregarding the transaction value method in valuation of customs

Headnote: The appeal case centered on a demand for additional customs duties of Kshs 697 million issued to Pernod Ricard Kenya Ltd by the customs authority. The procedure applicable in disregarding the transaction value method in valuation of customs was the central issue. The customs authority demanded additional duties from Pernod Ricard Kenya Ltd, rejecting the declared transaction values of its imports from related brand owners. Key considerations were whether the relationship influenced prices, satisfying procedural requirements like providing written grounds to the importer before dismissing transaction values, and properly applying alternative valuation methods like transaction value of identical/similar goods. The Tax Appeals Tribunal held that the customs authority failed to follow due process by not justifying its doubts over transaction values in writing and not disclosing comparable data used, violating customs valuation rules.

Pernod Ricard Kenya Ltd v. Commissioner of Customs & Border Control

TAT No. 25 of 2018

Tax Appeal Tribunal

MB Obonyo, CP; N Mutava, A Kiprotich, W Gichuki, and G Kitenga, Members

March 6, 2020

Reported by John Ribia

Customs Law – valuation of customs – customs valuation vis-à-vis transfer pricing - whether there was a distinction between customs valuation and transfer pricing in assessing the value of imported goods for customs and tax purposes – East African Community Customs Management Act, 2004, Agreement on Implementation of Article VII of the GATT

Customs Law – valuation of customs – compliance with international standards – whether the customs values of imported goods were determined in compliance with international and regional customs valuation standards, including the Agreement on Customs Valuation under the WTO and relevant regional customs management acts – East African Community Customs Management Act, 2004, Agreement on Implementation of Article VII of the GATT article 4

Customs Law – valuation of customs – related party transactions - influence on transaction value – arm length transaction requirement - integrity of customs valuation under international standards - whether the transaction values declared for imported goods were influenced by the relationships between the taxpayer and its affiliated brand owners, thereby potentially leading to a valuation that did not accurately reflect an arms-length transaction, as required by customs valuation standards - East African Community Customs Management Act, 2004, fourth schedule, paragraph 2(2)(a)

Customs Law – valuation of customs - justification for customs value adjustment – evidence requirements for customs value adjustment - what evidence did customs authority need to justify an adjustment of customs value - East African Community Customs Management Act, 2004, fourth schedule

Customs Law – valuation of customs – marketing and branding costs - whether costs associated with marketing and branding operations should be included in the customs value of imported goods – Agreement on Implementation of Article VII of the GATT, interpretative notes to article 1, paragraph 1(b)

Customs Law – valuation of customs - valuation methodologies - deviation from transaction value method - applicability of the transaction value method - circumstances allowing deviation from the transaction value method - related party influences – where there were discrepancies in transaction values - whether the transaction value method of customs valuation was appropriate under the specific circumstances of alleged influences from related party transactions and noted discrepancies in the transaction values, necessitating a reassessment of the valuation accuracy and compliance with legal standards - East African Community Customs Management Act, 2004, fourth schedule

Customs Law – customs demands – statutory limitations on customs demands - legal permissibility of demands for additional customs duties beyond statutory limitations, requirements for evidence of fraud or willful neglect

Pernod Ricard Kenya Ltd v Commissioner of Customs & Border Control

- whether it was legally permissible for customs authorities to demands for additional customs duties for periods beyond statutory limitations without evidence of fraud or willful neglect - East African Community Customs Management Act, 2004, section 135(3); Tax Procedures Act, section 29(5)

Customs Law - procedural fairness in customs decisions – process of issuance of additional custom duties - due process requirements, provision of written explanations by customs authorities - whether act of a customs authority to calculate additional customs duties based on the transaction value of identical goods but failing to provide the source of the information for the computation to the tax payer was unprocedural and unfair.- whether the customs authorities complied with due process requirements by not providing written explanations for their decisions when issuing and justifying demands for additional custom duties - Agreement on Implementation of Article VII of the GATT, article 1, paragraph 1

Brief Facts

Pernod Ricard Kenya Limited, (the appellant) part of the Pernod Ricard Group headquartered in France, was engaged in marketing and distributing various international liquor brands in Kenya. Following an audit, the Commissioner of Customs and Border Control issued a demand for additional customs duties amounting to Kshs. 697,149,482 for imports between July 2012 and December 2016. The assessment included import duty, excise duty, value added tax, import duty fee, and road development charges.

The appellant contested the demand on several grounds, primarily arguing that the customs value was inappropriately uplifted beyond the transaction value of identical goods, which was not justified by the evidence provided. The appellant also claimed that the customs value was influenced by a related party relationship, which should not in itself invalidate the transaction value method according to customs valuation principles.

On appeal both parties had alluded to the similarity between customs valuation and transfer pricing approaches and in particular regarding the circumstances and conditions when transaction value should not be accepted. Furthermore, each party used both approaches to buttress their case.

The appellant contended that the respondent provided computations of additional customs duties based on the transaction value of identical goods but did not provide the source of the information for the computation or the basis it used in arriving at the uplifted customs value on the basis of the transaction value of identical goods, making it impossible for the appellant to defend its position in respect of same. The respondent contended that it had used the transaction value of identical goods imported by Siamanda, an importer who was not related to the foreign exporter from whom the appellant was also importing from. Furthermore, it could not provide information to the appellant because such information was of a confidential manner. The appellant argued that imports by Siamanda could not be used as test cases because Siamanda was the respondents customer. It argued that in its business model, Siamanda never purchased goods directly from the brand owner. Rather, it would purchase from the respondent who would then purchase from the brand owner and then the brand owner would ship the goods directly to Siamanda. Furthermore, it is not Siamanda but the appellant who actually paid the import duties.

The respondent contended that it had rejected the appellants declared values because the relationship between it (the appellant) and the foreign brand owners had influenced the transaction value. There was no dispute that there was a sale of goods to related parties. The respondent also contended that remittances in respect of brand marketing operations should have been used to adjust the transaction values declared by the appellant.

Issues

- i. Whether there was a distinction between customs valuation and transfer pricing in assessing the value of imported goods for customs and tax purposes.
- ii. Whether the customs values of imported goods were determined in compliance with international and regional customs valuation standards, including the Agreement on Customs Valuation under the WTO and relevant regional customs management acts.

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- iii. Whether the transaction values declared for imported goods were influenced by the relationships between the taxpayer and its affiliated brand owners, thereby potentially leading to a valuation that did not accurately reflect an arms-length transaction, as required by customs valuation standards.
- iv. What evidence did customs authority need to justify an adjustment of customs value?
- v. Whether costs associated with marketing and branding operations should be included in the customs value of imported goods.
- vi. Whether it was legally permissible for customs authorities to demands for additional customs duties for periods beyond statutory limitations without evidence of fraud or willful neglect
- vii. Whether act of a customs authority to calculate additional customs duties based on the transaction value of identical goods but failing to provide the source of the information for the computation to the tax payer was unprocedural and unfair.
- viii. Whether the transaction value method of customs valuation was appropriate under the specific circumstances of alleged influences from related party transactions and noted discrepancies in the transaction values, necessitating a reassessment of the valuation accuracy and compliance with legal standards.

Held

1. Section 29(5) of the Tax Procedures Act provided that tax assessments under section 29(6) could not be made after five years immediately following the last date of the reporting period to which the assessment related. The only proviso was instances of gross or willful neglect, tax evasion or fraud by a tax payer. Although the respondent could not be estopped from executing its statutory duty, it could only exercise such duties beyond the statutory period in the case of fraud or wilful neglect. The respondent did not provide evidence that there was wilful neglect or fraud on the part of the appellant. The respondent was estopped from demanding short levy of revenue beyond the statutory period of five years.
2. Customs valuation and transfer pricing approaches were different and could not yield the same objective value. Customs valuation and transfer pricing were rooted in entirely different disciplines. Customs belonged to the sphere of indirect taxation and transfer pricing belonged to the area of direct taxation. Customs valuation was governed by domestic laws based on the applicable customs code (EACMA). At its core, transfer pricing was a part of corporate income taxation, the tax that primarily targeted the income earned by companies. That means that transfer pricing was audited after a tax return was filed, which was usually at the earliest after the taxable year had closed, and was dependent on financial statements and specific transfer pricing documentation. Therefore, different sets of rules applied, different valuation regimes, different mechanisms of collection of the taxes and different systems for auditing whether the taxes were correctly reported.
3. While the objective of transfer pricing was to allocate profits within a multinational enterprise the same way as would be allocated between independent enterprise, customs valuation sought to harmonize customs rules and ensure level playing field among trading nations. The scope of transfer pricing was wide as it covered the profits of the taxpayer and all cross border intercompany trade including trade in goods, services, intangibles and financing while customs valuation was narrow and concerned itself only in international trade in goods. Moreover, the taxable event in transfer pricing was triggered by passing of ownership while in customs valuation the taxable event was the release of good for free circulation. In addition, transfer pricing targeted only related enterprises while customs valuation targeted everyone who imported goods into a customs territory. Moreover, in Transfer Pricing, the motivation was to decrease the value of imported goods while in customs valuation the motivation was to increase the value of goods. Furthermore, there were differences in the valuation methods. For instance, in order to establish the existence of a comparable transaction, transfer pricing rules look for companies that performed similar functions. In customs valuation, the circumstances of sale test focused on product similarity to identify comparable transactions.
4. Despite the existence of essential coincidence between the two sets of rules (customs valuation and

Pernod Ricard Kenya Ltd v Commissioner of Customs & Border Control

transfer pricing), values determined under transfer pricing methods can also be used for customs valuation under the current legislation unless of course it is to be treated as a fail back method. The most appropriate approach to be adopted in resolving the instant dispute was the customs valuation approach.

5. The Tokyo Round Valuation Code, (the Agreement on Implementation of Article VII of the GATT), established a positive system of Customs Valuation based on the price actually paid or payable for the imported goods. It was intended to provide a fair, uniform and neutral system for the valuation of goods for customs purposes, conforming to commercial realities. The Agreement on Customs Valuation (ACV) was incorporated in the EACCMA. The agreement was specific that the various methods of valuation must be applied in sequence. Thus except in the case of article 4 of the ACV where an importer may request reversal of the order of application between the deductive value method and the computed value method, transaction method was to be applied before transaction value of identical or similar goods and so on until the fifth method. A cardinal rule was that the customs value should be objective, not arbitrary or fictitious and should be reflective of commercial reality.
6. The rules of customs valuation specified actions to be taken in cases where customs had doubts as to the value declared. Thus in the event that the transaction value method was deemed not being applicable, customs value had to be determined by another method in the hierarchical order prescribed under the rules. The rubric that ran through the ACV was that transaction values declared by the importer should be accepted for customs purposes subject to adjustments based on objective and quantifiable data.
7. Customs valuation required that customs used the information provided by the importer and customs had reasons for rejecting that information, to state the reasons why. Thus when a declaration was made and the customs officer had reason to doubt the truth or accuracy of the particulars or of documents produced in support of a declaration, the customs officer should ask the importer to provide further explanation, including documents or other evidence to prove that the declared value represents the total amount actually paid or payable for the imported goods. If that information was rejected, customs should state why the information should be rejected. There was no room for arbitrary or fictitious valuation.
8. If after receiving further information, or in the absence of a response, the customs officer still had reasonable doubts about the truth or accuracy of the declared value, it may be deemed that the customs value of the imported goods cannot be determined by the transaction value method. However, before making a final decision, customs should communicate to the importer, in writing, if requested, the grounds for doubting the truth or accuracy of the particulars or documents produced and the importer shall be given a reasonable opportunity to respond.
9. The respondent argued that the appellant did not make a request for explanation on the ground for doubting the truth or accuracy of the particulars of valuation. Such requests needed not be in writing and it was the respondent who was required by law to state the grounds for suspicion in writing. The respondent was at fault in failing to communicate its grounds to the appellant. Article 1 paragraph 1 of the ACV provided that the customs administration had grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requested, the communication of the grounds shall be in writing.
10. The respondent was in a position to disclose its reasons for rejection of rejecting declared transaction values without compromising the confidentiality of third parties.
11. The transactions between Siamanda and the exporter as done through the appellant could not have been termed as an arm's length transaction between the foreign exporter and Siamanda. Transaction value of identical goods could not be objectively be determined. That method was not appropriate in the instant case. Values declared for such transactions could not be adopted as values of identical goods for purposes of customs valuation. Simply put, they were prices between the respondents and its customers and thus not fit for purpose as transaction values of identical goods in the world of customs valuation.

Pernod Ricard Kenya Ltd v Commissioner of Customs & Border Control

12. The procedure applied by the respondent to review the transaction value using values declared by Siamanda was wrong as the respondent did not follow due process.
13. Notionally, it was logical to conclude that a party could not sell to itself. However, that on itself was not reason for rejection of declared customs value. Paragraph 2(2)(a) of the Fourth Schedule to the EACCMA provided that the fact that the buyer and the seller were related shall not in itself be a ground for regarding the transaction value as unacceptable. In such a case the circumstances surrounding the sale shall be examined and transaction value shall be accepted provided that the relationship did not influence the price.
14. Various tests may be used to determine whether a relationship affected the price of an unrelated importer the tests check whether the transaction value closely approximates.
 - a. a test value previously accepted by the proper officer.
 - b. the transaction value in sales to unrelated buyers of identical or similar goods for export to the Kenya;
 - c. the customs value of identical or similar goods as determined under the provisions of paragraph 6 of the fourth Schedule to the EACMA;
 - d. the customs value of identical or similar goods as determined under the provisions of paragraph 7 of the fourth Schedule to the EACMA;
 - e. Some administrations stored past valuation data in a database and use those as test values.
15. The relationship had affected the price of goods imported by the Appellant from related companies. There was difficulty in obtaining a transaction value of identical goods imported by an unrelated party because the appellant was the sole importer of the brands and the fact that even imports by Siamanda were under the control of the appellant. The respondent should have considered the transaction value of Similar goods imported by unrelated parties as the most appropriate method of determining the customs value.
16. Expenses related to brand marketing operations incurred by the seller on behalf of the importer and vice versa should be considered not under customs valuation but under domestic corporate taxation and value added tax regimes.

Appeal allowed.

Orders:

- i. The part of the demand in respect of short levy for the period beyond 5 years was vacated.*
- ii. The appellant's goods were to be valued using transaction value of similar goods.*
- iii. Remittances related to marketing operations be addressed under the provisions of the Income Tax Act and the Value Added Tax Act and not be used to adjust transaction values determined under the EACCMA.*
- iv. No orders as to costs.*

Republic v Kenya Revenue Authority Ex-parte Neolife International Limited

The Commissioner of Domestic Tax may apply different valuation methods depending on the circumstances of each case

Headnote: The Commissioner of Domestic Tax may apply different valuation methods depending on the circumstances of each case. The fact that the Commissioner departed from a method used in assessing a previous transaction does not raise legitimate expectation.

Republic v Kenya Revenue Authority Ex-parte Neolife International Limited [2018] eKLR

Judicial Review Miscellaneous Application 586 of 2017

High Court at Nairobi

P Namweya, J

November 23, 2018

Judicial review – doctrine of exhaustion of remedies – whether availability to remedies was a bar to judicial review – whether the available remedies could offer the proper recourse to a party as opposed to judicial review – whether the application challenging the legality and propriety of the process leading to issuance of a demand by the Commissioner was proper – Constitution of Kenya, 2010, article 159 (2) (c); Fair Administrative Action Act, section 9(2), (3), and (4)

Customs Law – customs valuation – royalties – treatment of royalties in customs valuation – whether royalties formed part of transactional value for purposes of customs valuation.

Judicial review – grounds of judicial review – illegality, irrationality and unreasonableness – whether the Commissioner's action to undertake a post-clearance audit of the applicant's documents, assess additional tax and apply the transaction value method of valuation of the custom value of the tax payer's goods amounted to an illegality – whether the use of the transaction value method as opposed to the deductive value method by KRA in computing the value of the goods during the period of post clearance audit was lawful – whether the use of the Transaction Value Method and Deductive Value Method by the Commissioner was irrational and unreasonable

Judicial Review – legitimate expectation – principles of legitimate expectation – where a tax collector applied different methods of valuation – whether a tax payer had a legitimate expectation that a customs post clearance audit would be done using the deductive value method as opposed to the transaction value method – whether fact that KRA departed from a method of valuation used in assessing a previous transaction raised legitimate expectation for use of the same method on a different valuation exercise involving the same tax payer.

Brief Facts

The *ex parte* applicant was a registered company carrying on the business of selling, supplying and distributing food supplements in Kenya. The dispute arose from a customs post clearance audit carried out by the respondent on the applicant's import and export operations for the year 2010 to September 2015, resulting to a demand for extra taxes on the basis that the royalties paid by the applicant to its parent company GNLD-US was a consideration for which the value could not be ascertained at the time of importation, and was thus part of the transaction value for custom purposes.

The applicant consequently moved the court and sought judicial review remedies. The applicant's position was that the Transaction Value Method used by the respondent in computing the value of the goods during the period of post clearance audit was not the lawful method to be used and that the applicant legitimately expected the respondent to use the deductive method of valuation as it had done in its previous dealings.

Issues

- i. Whether the application challenging the legality and propriety of the process leading to issuance of a demand by the Commissioner was proper
- ii. Whether the use of the transaction value method as opposed to the deductive value method by KRA

Republic v Kenya Revenue Authority Ex-parte Neolife International Limited

in computing the value of the goods during the period of post clearance audit was lawful.

- iii. Whether a tax payer had a legitimate expectation that a customs post clearance audit would be done using the deductive value method as opposed to the transaction value method.
- iv. Whether fact that KRA departed from a method of valuation used in assessing a previous transaction raised legitimate expectation for use of the same method on a different valuation exercise involving the same tax payer.
- v. Whether royalties formed part of transactional value for purposes of customs valuation.

Held

1. Under section 9(2), (3) and (4) of the Fair Administrative Action Act and under article 159(2)(c) of the Constitution, one ought to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving the court for judicial review proceedings. However, the court was also granted discretion to exempt an applicant from such mechanisms in exceptional circumstances.
2. The appellate process provided for in section 12 of the Tax Appeals Tribunal Act mainly dealt with the merits of a decision made by the respondent, and would not be an efficacious remedy if what was in challenge was the decision-making process, which was properly in the remit of the High Court. The applicant was challenging the legality and propriety of the process leading to the demand by the respondent, and the application was thus properly before the instant court.
3. Section 235 of the East African Community Customs Management Act made provisions with regard to the duty of production of documents relating to goods. Section 236 imposed certain powers on the Commissioner upon an inspection and audit of documents as produced per section 235. The power to demand for any duties or taxes due upon such an audit was provided for under section 135. Lastly, section 122 of EACCMA provided for the manner in which the customs value of goods shall be determined for purposes of imposing import duties.
4. The fourth schedule to the EACCMA in turn in its interpretation section stated that paragraphs 2, 3, 4, 5, 6, 7 and 8 of the schedule define how the customs value of imported goods was to be determined. Further, that the methods of valuation were set out in a sequential order of application, and the primary method for customs valuation was defined in paragraph 2, and it was only where the customs value could not be determined under the provisions of paragraph 2, that the value will then be determined by proceeding sequentially through the succeeding paragraphs. Paragraph 2 of the fourth schedule in that regard provided that the customs value of imported goods shall be the transaction value, which was the price actually paid or payable for the goods when sold for export to the Partner State which was adjusted in accordance with the provisions of paragraph 9.
5. The respondent's actions to undertake a post clearance audit of the applicant's documents, assess additional tax thereon, and to also apply the transaction value method as the primary method of valuation of the custom value of the applicant's goods were clearly allowed by the provisions of the law. The respondent did not make any error of law or substantive illegality in reaching its decision of August 4, 2017.
6. A determination of that ground would require a merit examination of the materials and evidence that was before the respondent to find out whether in applying the transaction value method it acted rightly or wrongly in law, which was not the purpose of judicial review.
7. Both the applicant and respondent annexed various correspondence that demonstrated discussion between them on the issue of the valuation method employed by the respondent before the impugned decision was made by the respondent. The respondent in the said correspondence in addition explained why it chose the transaction value method as opposed to the deductive value method as its valuation method. The court was reluctant to find that the use of the transaction value method was shrouded in secrecy and was procedurally unfair.
8. The court had power to set aside a decision on the ground that the decision was irrational in its defiance

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of logic or of accepted standards. That no sensible person who had applied his mind to the question to be decided could have arrived at it.

9. The respondent gave the reasons why it chose to apply the transaction value method and deductive value methods in the two respective valuations, which were both methods of valuation provided by law. In addition, there were different considerations at play in the two decisions made by it. In the decision of July 20, 2017 the respondent considered the relationship between the applicant and supplier of goods and the retail prices of the imported goods, while in the decision of August 4, 2017, the respondent examined the terms of the licence agreement between the applicant and its parent company in terms of royalty payment, in reaching a conclusion that payment of royalties was a condition of sale of the imported goods.
10. The provisions of the fourth schedule to the EACMMA addressed those circumstances, and how they determine the valuation method to be used. That included when the relationship between an importer and supplier of goods influenced the use of the transaction value method. The issue of when royalties or payments made by the buyer for the right to distribute or resell the imported goods shall or shall not be added to the price actually paid or payable for the imported goods, depending on whether or not such payments were a condition of the sale for export was also covered in the fourth schedule. The respondents' decisions could not be said to be irrational, as they were supported by reasons and the law.
11. It would also be going beyond the permissible limits of merit review for the court to examine the circumstances that obtained during the two different valuations and the evidence that was before the respondent to find out if the methods of valuation were justified, as that would be tantamount to making a decision on the substantive propriety and correctness of the respondent's decisions, which was beyond the acceptable limits of merit review on the ground of reasonableness.
12. In order to successfully rely on the doctrine of legitimate expectation there was need to demonstrate that the promise was made by an authorised public officer; was reasonable; and was within the law. Any promise made outside the law could not be legitimate and thus could not give rise to any expectation. It was also necessary that an applicant placed all the facts before the public authority before the assurance was given to them.
13. The principles of legitimate expectation could be succinctly set out as follows:
 - a. there had to be an express, clear and unambiguous promise given by a public authority;
 - b. the expectation itself had to be reasonable;
 - c. the representation had to be one which was competent and lawful for the decision-maker to make;
 - d. there could not be a legitimate expectation against clear provisions of the law or the Constitution.
14. No legitimate representation was created by the respondent's letter dated July 20, 2017 that applied the deductive value method of valuation, as firstly, it was limited to the circumstances of that particular valuation and it could not therefore be found that there was a persistent practice by the respondent to apply the deductive value method. It could not be concluded that there was a representation in that letter that the respondent would apply the deductive value method for all valuations of the applicant's goods to the exclusion of the transaction value method, as to do so would be contrary to the applicable provisions of the law. That allowed for different methods to be applied depending on the circumstances of each case.
15. The remedy of a declaration was normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that followed from a quashing order, the existence or extent of a public body's powers and duties, the rights of individuals or the law on a particular issue. For damages to be granted in judicial review, an applicant must also establish a free-standing right to compensation for example arising from a tort, contract or restitution, which was usually only possible by way of ordinary proceedings, and as such damages were a rare remedy in judicial review proceedings. The respondent was acting within its powers and mandate, and did not act unreasonably or violate the applicant's legitimate expectation.

Republic v Kenya Revenue Authority Ex-parte Neolife International Limited

Orders: -

- i. The respondent may apply different valuation methods depending on the circumstances of each case and the fact that the Commissioner departed from a method used in assessing a previous transaction did not raise legitimate expectation.*
- ii. Royalties formed part of the transactional value for purposes of customs valuation.*

Duncan Ziyantai Murashiki v Commissioner General, Kenya Revenue Authority & 3 others

Chapter 11: Departure Prohibition Orders

Departure prohibition order under section 45 of the Tax Procedures Act is constitutional.

Headnote: The petition resolved around the constitutionality of section 45 of the Tax Procedures Act (TPA). The court held that section 45 of the TPA served the lawful purpose of ensuring that the State fulfills its constitutional mandate of ensuring fair distribution of the tax burden. The departure prohibition order was a tool for enforcing tax obligations on those who may wish to evade taxes. The court deemed the limitation justifiable under article 24 of the Constitution.

Duncan Ziyantai Murashiki v Commissioner General, Kenya Revenue Authority & 3 others [2021] eKLR

Petition 176 of 2018
High Court at Nairobi
WK Korir, J
September 22, 2021
Reported by John Ribia

Constitutional Law – fundamental rights and freedoms - right to human dignity; right to access justice; right to fair hearing; the freedom of movement; right to fair administrative action; and the freedom and security of a person – claim that section 45 of the Tax Procedures Act that limited the freedom of movement of persons who may leave Kenya without paying taxes - whether section 45 of the Tax Procedures Act violated the right to human dignity, right to access justice, right to fair hearing, the freedom of movement, and the freedom and security of a person – Constitution of Kenya, 2010 articles 28, 29(a), 39(2), 47, 48, and 50(1); Tax Procedures Act, Act No. 29 of 2015, section 45.

Constitutional Law – fundamental rights and freedoms – limitation of fundamental rights and freedoms – justification - what factors to be taken into account, when considering whether a limitation of a right or fundamental freedom was justifiable - whether the use and need of a departure prohibition order under section 45 of the Tax Procedure was justified under article 24 of the Constitution considering its purpose to detain persons who may leave Kenya without paying a tax that was due or will become payable by the person - Constitution of Kenya, 2010 article 24; Tax Procedures Act, Act No. 29 of 2015, section 45.

Statutes – constitutionality of statutes – constitutionality of section 45 of the Tax Procedures Act - whether section 45 of the Tax Procedures Act was unconstitutional because the person upon whom a departure prohibition order was issued was never given an opportunity to be heard or make representations prior to issuance of the order or to even institute court proceedings.

Judicial Review – doctrine of exhaustion of remedies – where the applicant was issued by a departure prohibition order under section 45 of the Tax Procedures Act that limited a foreign national who owed taxes to the State was a breach of the tax payers right to fair administrative action - whether the remedy of judicial review was available to a party who had been issued with a departure prohibition order but had not exhausted the appeal mechanisms available under the Tax Procedures Act – Tax Procedures Act, Act No. 29 of 2015, section 45

Brief Facts

The petitioner's case was that a person upon whom the departure prohibition order was issued was never given an opportunity to be heard or make representations prior to issuance of the order or to even institute court proceedings. It was urged that section 45 of the Tax Procedures Act was unconstitutional and prejudiced the following constitutional rights:

- a person's rights the right to human dignity under article 28;
- the right to freedom and security of person, which includes the right not to be deprived of freedom arbitrarily or without just cause under article 29(a);
- the right to freedom of movement under article 39(2);

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- d) the right to fair administrative action under article 47;
- e) the right to access justice under article 48; and
- f) the right to fair hearing of a dispute that can be resolved by the application of the law before an impartial court or tribunal under article 50(1) of the Constitution of Kenya, 2010.

The 1st and 2nd respondents on the other hand contend that one of the considerations by the Parliament while enacting the impugned provision was to ensure that taxes were collected from persons who wanted to leave the country with the intent of absconding their tax obligations. According to the 1st and 2nd respondents, the rationale of section 45 of the TPA was that once a taxpayer left Kenya there could be no way to recover the tax debt unless a specific clause exists through a multilateral treaty with the country to which the person emigrates.

Issues

- i. Whether section 45 of the Tax Procedures Act was unconstitutional because the person upon whom a departure prohibition order was issued was never given an opportunity to be heard or make representations prior to issuance of the order or to even institute court proceedings.
- ii. Whether section 45 of the Tax Procedures Act violated the right to human dignity, right to access justice, right to fair hearing, the freedom of movement, right to fair administrative action; and the freedom and security of a person.
- iii. What factors should be taken into account, when considering whether a limitation of a right or fundamental freedom was justifiable?
- iv. Whether the use and need of a departure prohibition order under section 45 of the Tax Procedure was justified under article 24 of the Constitution considering its purpose was to detain persons who may leave Kenya without paying a tax that was due or will become payable by the person.
- v. Whether the remedy of judicial review was available to a party who had been issued with a departure prohibition order but had not exhausted the appeal mechanisms available under the Tax Procedures Act

Held

- 1. The High Court had jurisdiction to hear and determine the instant petition as it was premised on the contention that section 45 of the TPA was unconstitutional as it violated or limits various constitutional rights. The duty of determining the constitutionality of statutory provisions fell squarely within the jurisdiction of the High Court.
- 2. The High Court had a duty under article 259 of the Constitution to interpret the Constitution in a manner that promoted its purposes, values and principles, that advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, in a manner that contributed to good governance, and in a manner that protected and promoted the purposes and principles of the Constitution. In determining the constitutionality of a statutory provision, the court was required to read the impugned provision against the constitutional provisions allegedly violated by it.
- 3. States imposed taxes within their jurisdiction on their citizens and businesses as a way of raising revenue. Without taxes governments would be unable to meet the development demands of their countries in sectors such as health, education and administration. The role played by well-utilized taxes in the development of a country could not be disputed. Taxes also played a big role in the improvement of a country's economy leading to job creation and improvement of the standards of living.
- 4. The power to impose tax in Kenya was vested in the national government under article 209(1) and (2) of the Constitution. The principles that governed public finance were captured in article 201 of the Constitution. In order to ensure the responsibility of paying taxes was shared equally and fairly among taxpayers, the government had a duty to ensure that the tax owed was remitted and not evaded. Taxes were directly linked to the development of a nation and their collection had a public interest element. Failure by the government to ensure that the tax due and owed was collected amounts to failure to

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fulfill its constitutional mandate which was realized through the Kenya Revenue Authority.

5. Section 45 of the TPA restricted the right to freedom of movement and the right to leave Kenya as protected by article 39(1) and (2) of the Constitution. Article 24 provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
6. Among the factors to be taken into account, when considering whether a limitation of a right or fundamental freedom was justifiable, were the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual did not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose. Article 24(3) required the State or any person seeking to justify a particular limitation to demonstrate to the court, tribunal or other authority that the requirements of the article had been satisfied.
7. For section 45 of the TPA to be enforced, the 1st respondent must have reasonable grounds informing the issuance of the departure prohibition order. The provision applied to all persons as it did not distinguish between a citizen and a foreign national. The provision was clear as to whom an order shall be issued against. A written copy was required to be issued as soon as practical. What 'as soon as practical' means was not specified. The essence of a departure prohibition order was to curtail evasion of taxes and any knowledge of such an order prior to its issuance would be counterproductive to its goal. The section provided that a person will be stopped from leaving the country as long as the tax liability exists. The departure prohibition order could only be revoked by Commissioner once the tax was paid in full or satisfactory arrangements were made for the payment of the tax.
8. Section 45 of the TPA served the lawful purpose of ensuring that the State fulfills its constitutional mandate of ensuring fair distribution of the tax burden. The departure prohibition order was a tool for enforcing tax obligations on those who may wish to evade taxes. The petitioner had not shown that there were other reasonable alternatives which the State could use to collect taxes from those who may want to leave the country without meeting their tax obligations. The provision was compliant with the requirements of article 24 of the Constitution on limitation of certain rights. The rights that were limited by the deployment of a departure prohibition order were rights which could be limited as long as the provisions of article 24 of the Constitution had been complied with.
9. Section 45(9) of the TPA had been interpreted by the petitioner to mean that the entities and persons mentioned therein had a blanket cover of protection and hence immune to legal proceedings for their actions. The legislation was clear in its wording that the protection provided was only for anything lawfully done under section 45. The lawfulness of State actions was dictated by the Constitution which bound all people under article 2(1) of the Constitution. Any action that was not in line with the Constitution and the law will be rendered null and void once reviewed by the courts.
10. Once a person affected by a decision deemed the same to be unlawful, it was only the courts and the tribunals which could determine the lawfulness of the impugned action. The entities and persons named in section 49(5) of the TPA were not the persons to determine the lawfulness of their actions. The provision did not add much value to the TPA but it could not be said to be unconstitutional as it did not bar access to the courts and tribunals.
11. A departure prohibition order by its very nature imposed a significant restriction on the rights of the affected taxpayers as it deprived them of their liberty to travel outside Kenya, the rights to human dignity and freedom and security of the person. The drafters of the statute recognized the impact of that restriction on a person's liberty and freedom of movement hence the intentional wording in section 45(1) of the TPA applied when the Commissioner had reasonable grounds to believe that a person may leave Kenya without paying a tax that was due or will become payable by the person. The critical phase in the process of determining whether to issue a departure prohibition order was whether there

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were reasonable grounds which made it desirable to curtail a person's right to move out of Kenya prior to discharging a tax obligation or making satisfactory arrangements for payment of the tax.

12. All matters arising in regard to the enforcement of the provision fell within the remit of the Tax Appeals Tribunal established under section 3 of the Tax Appeals Tribunal Act, 2013. The petitioner was at liberty to approach the Tribunal if he found that the DPO was issued in contravention of the law.

Petition dismissed. Each party was to bear their own costs.

Gupta Umesh Subhash & another v Kenya Revenue Authority & 2 others

Challenging a departure prevention order via judicial review proceedings as opposed to the available appeal mechanisms under the Tax Procedures Act violated the principle of exhaustion of remedies.

Headnote: The appeal raised the question which was the right mechanism to challenge a departure prevention order. The court held that challenging a departure prevention order via judicial review proceedings as opposed to the available appeal mechanisms under the Tax Procedures Act violated the principle of exhaustion of remedies.

Gupta Umesh Subhash & another v Kenya Revenue Authority & 2 others [2021] eKLR

Petition 155 of 2019
High Court at Nairobi
WK Korir, J
September 22, 2021
Reported by John Ribia

Judicial Review – doctrine of exhaustion of remedies – challenge of a departure prevention order via judicial review as opposed to the available appeal mechanisms - whether challenging a departure prevention order via judicial review proceedings as opposed to the available appeal mechanisms under the Tax Procedures Act violated the principle of exhaustion of remedies - Tax Procedures Act, Act No. 29 of 2015, section 45

Statutes – constitutionality of statutory provisions – constitutionality of section 45(9) of the Tax Procedures Act, 2015 - whether section 45(9) of the Tax Procedures Act, 2015 (that provided an appeal mechanism against departure prevention orders) was unconstitutional for taking away the right of a taxpayer to challenge a departure prohibition order.

Brief Facts

The petitioners raised the question of whether the 1st petitioner's constitutional rights to fair administrative action, freedom of movement and fair hearing were infringed by the respondents issuance of a departure prevention order. The petitioners asserted that the section 45(9) of the Tax Procedures Act, 2015 (TPA) was unconstitutional for taking away the right of a taxpayer to challenge a departure prohibition order.

The respondents urged the Court to find that section 45(9) of the TPA constitutional. They contended that the provision could not be read in isolation but should be read together with the definitions of the terms appealable decision and tax decision under section 3. Further, that the provision was very clear that it would only protect an action that was done lawfully. The provision did not protect all actions and it was only the judicial institutions which could determine whether the actions of the Commissioner were lawful or not.

Issues

- i. Whether challenging a departure prevention order via judicial review proceedings as opposed to the available appeal mechanisms under the Tax Procedures Act violated the principle of exhaustion of remedies.
- ii. Whether section 45(9) of the Tax Procedures Act, 2015 (that provided an appeal mechanism against departure prevention orders) was unconstitutional for taking away the right of a taxpayer to challenge a departure prohibition order.

Held

1. Article 159(2)(c) of the Constitution provided that courts were obligated to hold off hearing and determining matters for which alternative dispute resolution mechanisms had been provided. It was only after the alternative mechanisms and remedies had been exhausted that the courts should engage in the matters.
2. The principle of exhaustion of alternative remedies was firmly rooted in Article 159 of the Constitution

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and serves the purpose of directing disputes to cheap, faster and reconciliatory dispute mechanisms before the adversarial court system was engaged. The authority of the alternative dispute resolution bodies must therefore be respected and affirmed by the courts.

3. There were questions raised by the petitioners which the court could not delve into as they did not raise any constitutional questions. The court could not determine whether the respondents should have pursued the petitioners for the underpaid tax or whether the departure prohibition order was served on the proper person as those were issues that squarely fall within the jurisdiction of the Tax Appeals Tribunal. The court would be offending the principle of exhaustion of statutory remedies were it to address those issues in the pretext of dealing with constitutional questions.
4. Section 52 of the Tax Procedures Act, 2015 sets up an appeal procedure. An appealable decision was defined in section 3 as an objection decision and any other decision made under a tax law other than a tax decision, or a decision made in the course of making a tax decision.
5. The petitioners were objecting to the issuance of a departure prohibition order under section 45 of the Tax Procedures Act, 2015. That was a matter appealable to the Tax Appeals Tribunal. A party was entitled to appeal to the High Court under section 53 of the Tax Procedures Act, 2015 but that right could only be exercised against the decision of the Tax Appeals Tribunal. An appeal could only lie to the High Court or Court of Appeal on a question of law.
6. The petitioners ride on the claim that Section 45(9) of the Tax Procedures Act, 2015 was unconstitutional in an attempt to give their case some constitutional foundation. The impugned provision did not bar access to courts. It was a provision that added no value to the Tax Procedures Act but there was nothing unconstitutional about it as it did not expressly deny an aggrieved party an opportunity to access the Tax Appeals Tribunal or the High Court. The judicial authorities were the organs to determine whether anything done by the respondents was lawful or not.

Petition dismissed, each party was to bear their own costs.

Republic v Kenya Revenue Authority, Commissioner Enforcement and Investigations & Commissioner of Domestic Taxes Ex parte Jonathan Adrian Jackson

Application to stay a departure prohibition order dismissed.

Headnote: In a judicial review application in which the applicant sought to stay a departure prohibition order without exhausting the appeal mechanisms, the court held that the *ex parte* applicant had the opportunity of securing his right of movement under section 45(7) of the Tax Procedures Act, and to mitigate any prejudice he may suffer as a result of the departure prohibition order. The application was dismissed.

Republic v Kenya Revenue Authority, Commissioner Enforcement and Investigations & Commissioner of Domestic Taxes Ex parte Jonathan Adrian Jackson

Judicial Review Miscellaneous Application E067 of 2020

High Court at Nairobi

P Nyamweya, J

April 26, 2021

Reported by John Ribia

Judicial Review – doctrine of exhaustion of remedies – where the applicant was issued by a departure prohibition order under section 45 of the Tax Procedures Act – where the applicant sought to stay the DPO without exhausting appeal mechanisms - whether a judicial review court could issue stay orders against a departure prohibition order where the existing appeal mechanisms to challenge the order had not been exhausted. – Tax Procedures Act, Act No. 29 of 2015, section 45; Fair Administration Act, Act No. 4 of 2015, section 9

Judicial Review – remedies – stay orders - what were the circumstances under which a court would grant stay of proceedings in a judicial review action

Brief Facts

Space Investments Limited, owed taxes amounting to Kshs. 823,770,478 to the Kenya Revenue Authority (KRA/1st respondent). KRA issued a departure prevention order against the *ex parte* applicant (director of Space Investments Limited) on the basis of the tax arrears who subsequently challenged the assessment at the Tax Appeals Tribunal. The applicant lost the appeal to before the tribunal and preferred the matter to the High Court, which appeal was yet heard or determined.

Pending the determination of the appeal the applicant filed the instant judicial review proceedings in which it sought a stay of the departure prohibition order pending determination of the judicial review application and pending the determination of the appeal.

Issues

- i. What were the circumstances under which a court would grant stay of proceedings in a judicial review action?
- ii. Whether a judicial review court could issue stay orders against a departure prohibition order where the existing appeal mechanisms to challenge the order had not been exhausted.

Held

1. Where the action or decision was yet to be implemented, a stay order could normally be granted in such circumstances. Where the action or decision was implemented, then the Court needed to consider the completeness or continuing nature of such implementation. If it was a continuing nature, then it was still possible to suspend the implementation.
2. There was the Departure Prohibition Order has been effected and is continuing. It was decision that was amenable to stay as it was of a continuing nature, as it would take effect if and when the *ex parte* applicant intended to travel out of the Country.
3. In exercising the court's discretion to grant a stay, courts should consider cases where the stay would affect third parties and the general public. It involved balancing the interests of an applicant with the

Republic v Kenya Revenue Authority, Commissioner Enforcement and Investigations & Commissioner of Domestic Taxes Ex parte Jonathan Adrian Jackson

wider public interest, and requiring undertakings as to damages where the stay would prevent a third party from benefitting from a decision. Where granting a stay had the effect of depriving an individual of his or her liberty, the court had to be satisfied that the public body had acted unlawfully, and that there was cogent evidence of the risks that would result if the individual were to be released as held. Permission to apply for judicial review and for stay may be refused if there was an adequate alternative remedy that is available, as exemplified by section 9 of the Fair Administrative Action Act.

4. There was already a judgment in favour of the respondent that had not been stayed or set aside. Furthermore, the judgment was for the payment of taxes by a company in which the *ex parte* applicant was a director, which was an issue of public interest, as taxes are utilized for the provision of public services. While the respondent's decision was likely to affect the *ex parte* applicant's constitutional right to freedom of movement, the instant case was a case where both the respondent's accrued right, and the risk that would result to both the respondent and public if the subject tax liability was upheld, justified a decision to limit the *ex parte* applicant's freedom of movement.
5. The *ex parte* Applicant also has the opportunity of securing his right of movement under section 45(7) of the Tax Procedures Act, and to mitigate any prejudice he may suffer as a result of the departure prohibition order. These provisions obviated the need for the instant court to require any security for the tax demanded in the judgment, which would have been the alternative option given the sums involved in the judgment entered on behalf of the respondents.

Application dismissed.

Republic v Kenya Revenue Authority & another; Sylvia Kaimuri Kaumbuthu & 2 others Ex Parte**The departure prohibition order does not have a requirement for prior notice before imposition as it would set off the person(s) subject of investigations to prior flight**

Headnote: The main issues before the court were whether the departure prohibition order (DPO) imposed on an applicant was *ultra vires* and in breach of the applicant's right to fair administrative action, and whether the remedy of judicial review was available to a party who had been issued with a departure prohibition order but had not exhausted the appeal mechanisms available under the Tax Procures Act. The High Court held that the issue of the DPO was authorized by statute and it may be revoked in the discretion of the Commissioner under section 45 of the Tax Procedures Act. The section did not have a requirement for prior notice before imposition of a departure prohibition notice, a requirement which would set off the persons subject of investigations to prior flight. That section 45(7) of the Tax Procedures Act 2015 had a statutory mechanism for the removal of a departure Prohibition Order through application to the Commissioner. The court did not need to intervene in the instant matter as there existed statutory remedies which the applicants had not exhausted.

Republic v Kenya Revenue Authority & another; Sylvia Kaimuri Kaumbuthu & 2 others Ex Parte [2019] eKLR

Judicial Review Application 190 of 2019

High Court at Nairobi

JM Mativo, J

November 14, 2019

Reported by John Ribia

Constitutional Law – *fundamental rights and freedoms - right to fair administrative action – claim that issuance of a departure prohibition order under section 45 of the Tax Procedures Act that limited a foreign national who owed taxes to the State was a breach of the tax payers right to fair administrative action - whether the departure prohibition order imposed on the applicant was ultra vires and in breach of the applicant's right to fair administrative action – Constitution of Kenya, 2010 article 47; Tax Procedures Act, Act No. 29 of 2015, section 45.*

Judicial Review – *doctrine of exhaustion of remedies – where the applicant was issued by a departure prohibition order under section 45 of the Tax Procedures Act that limited a foreign national who owed taxes to the State was a breach of the tax payers right to fair administrative action - whether the remedy of judicial review was available to a party who had been issued with a departure prohibition order but had not exhausted the appeal mechanisms available under the Tax Procures Act – Tax Procedures Act, Act No. 29 of 2015, section 45*

Brief Facts

KRA (the 1st respondent) had been carrying out investigations into the tax affairs of the applicants for the period 2015-2018 to establish claims that the Applicants had been conducting business whose income is taxable in Kenya since 2015 without declaring the correct income. The investigations revealed that the applicants had been carrying out business with various clients and thus had inflows into their banks accounts in Kenya which they neither disclosed nor paid taxes on.

KRA contended that the 1st Applicant's omission of income from returns constituted offences under section 97 (a) and (c) of the Tax Procedure Act, 2015. Further that the 2nd Applicant who was a co-director of the 3rd applicant and who was a non-resident based in Juba Sudan and registered had never filed any returns despite registering for the obligation as a non-resident.

The 1st respondent invited the 1st and 2nd applicants for a meeting which they did not attend. At that point the 1st respondent made the decision to impose a departure prohibition order when upon investigations that the applicants had failed to declare huge sums of income at close to 1.2 Billion for the 3rd applicant and 56 Million for the 1st applicant, and that the 1st applicant who was a co-director of the 3rd applicant who is a

Republic v Kenya Revenue Authority & another; Sylvia Kaimuri Kaumbuthu & 2 others Ex Parte

non-resident based in Juba South Sudan had failed to file tax returns despite registering for the obligation as a non-resident.

Aggrieved the applicants filed the instant judicial review application seeking orders of *certiorari* to quash the decision of the Commissioner. The applicants urged that there had been no tax determined to be due from them and therefore the prohibition order was premature.

The 1st respondent explained that the departure prohibition order was based on the tax obligation under the undeclared incomes and the non-resident status of the applicants, he need to secure personal attendance of the 1st and 2nd applicants and the likelihood of flight of the applicants in view of the magnitude of the tax obligation facing them. The 1st respondent also indicated that the applicants had no known asset in the country.

Issues

- i. Whether the departure prohibition order imposed on the applicant was ultra vires and in breach of the applicant's right to fair administrative action under article 47 and the Fair Administrative Action Act 2015;
- ii. Whether the remedy of judicial review was available to a party who had been issued with a departure prohibition order but had not exhausted the appeal mechanisms available under the Tax Procures Act

Held

1. The commissioner had power to impose a departure prohibition order under section 45 of the Tax Procedures Act, 2015 (TPA/the Act) where he had reasonable grounds to believe that a person may leave Kenya without paying a tax that was or will become payable by the person; or a tax that was or would become payable by a company in which the person was a controlling member. The power of the Commissioner was exercisable on reasonable grounds and the Commissioner and others who acted on such power were protected from civil and criminal liability, under section 45 (9) of the Act.
2. It was established that the 1st respondent took action under the tax procedures act following unproductive meetings called by the regulator at which the applicants failed to attend and provide all the required documents for the purpose after investigations had found a case of undeclared income inflows into the bank accounts of the applicants in Kenya which they had neither disclosed not paid taxes on.
3. The process of determination of tax had revealed huge undeclared income for which tax would accrue and in their failure to declare and file returns the applicant had committed offences under the law. The power to impose a departure prohibition notice existed on account taxes both established and therefore payable and those that would become payable. Taxes may be become due from the applicants upon the conclusion of the on-going investigations. On the evidence, it could not be held that the Commissioner acted unreasonably without any reasonable grounds for believing that taxes may become due from the applicants who in view of the residential status in the country may leave the country without paying the taxes.
4. The issue of the departure prohibition order was authorized by statute and it may be revoked in the discretion of the Commissioner under section 45 of the Tax Procedures Act. The section did not have a requirement for prior notice before imposition of a departure prohibition notice, a requirement which would set off the persons subject of investigations to prior flight.
5. The departure prohibition order gave consistently with the right to fair administrative action Article 47 and section 4 of the Fair Administration Action Act. The applicants were informed as to the reasons or the infringement of their right to travel and they may consequently take remedial action as contemplated by the right to fair administrative action.
6. The explanation by the 1st respondent that the 3rd *ex parte* applicant did not have any known assets in Kenya was not wholly unreasonable as to support an allegation of bias. An allegation of bias against a statutory body carrying out its mandate under Statute was a serious allegation which required on the test of balance of probabilities strong and cogent evidence to prove. The *ex parte* applicants did not on

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the evidence before the court discharge the heavy burden in accordance with a plaintiff's duty under section 107 and 108 of the Evidence Act.

7. The applicants had not demonstrated that the provisions of section 45 of the Tax Procedures Act unconstitutionally violated the applicants' right to movement under article 39 for being unreasonable in terms of article 24 of the Constitution and unjustifiable in an open and democratic society based on human dignity, equality and freedom. The 1st respondent was not unreasonable in issuing the departure prohibition order.
8. Section 45(7) of the Tax Procedures Act 2015 had a statutory mechanism for the removal of a departure Prohibition Order through application to the Commissioner. A constitutional or judicial review court shall not interfere where there was constitutional and or statutory mechanism for redress of the particular grievance. The court did not need to intervene in the instant matter as there existed statutory remedies which the applicants had not exhausted. No leave of court was urged to exempt the applicants from the requirement to exhaust the remedy under the Statute.

Petition dismissed, no order as to costs.

Nichani v Kenya Revenue Authority & another

A judicial review court could not determine a challenge on an imaginary administrative action.

Headnote: The applicant sought for judicial review orders against the Kenya Revenue Authority for a departure prohibition order (DPO) that had allegedly been issued by it. The court did not find evidence of issuance of a DPO. The court held that it been called upon to adjudicate on an imaginary dispute. There was no dispute capable of determination by the court.

Nichani v Kenya Revenue Authority & another (Constitutional Petition E042 of 2021) [2022] KEHC 13588 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)

Constitutional Petition E042 of 2021

High Court at Nairobi

AO Mrima, J

September 30, 2022

Reported by John Ribia

Judicial Review – *justiciable actions – where an administrative action that was challenged had not yet occurred - whether a judicial review court could determine the legality of an administrative action that had not yet occurred.*

Brief Facts

The petitioner instituted the proceedings seeking an order of *certiorari* to remove to the High Court and quash the decision of the 1st respondent, KRA, in issuing a departure prohibition order (DPO) against the petitioner; and an order of *mandamus* to compel the KRA and Director General of Immigration Services, (the 2nd respondent), to grant full customs and immigration access to the petitioner and his family upon re-entry into Kenya. The petitioner deposed that he was Kenyan citizen with both a Kenyan national identity card and passport. He sought orders of judicial review on the allegation that Kenya Revenue Authority, had issued a departure prohibition order against him making him stranded and unable to travel from India back to Kenya.

KRA opposed the application on the grounds that the petitioner had failed to furnish the Court with the DPO allegedly issued to him. KRA contended that the petitioner had failed to establish that it requested KRA to lift the DPO. The failure by the petitioner to provide such particulars meant that the petitioner failed to demonstrate how his constitutional rights were violated. As a consequence, the orders could not be granted since there was nothing to quash.

In the alternative, KRA submitted that the petitioner only adduced correspondence on a tax demand notice by Skyton Limited. KRA's interpretation of the complaints raised by the petitioner was that the issues gave rise to a tax dispute whose original jurisdiction lay in the Tax Appeals Tribunal. The petitioner had thus failed to demonstrate that he had exhausted all available avenues in seeking redress

Issue

Whether a judicial review court could determine the legality of an administrative action that had not yet occurred.

Held

1. The matter before court was premised on the alleged issuance of a DPO. If no DPO was ever issued as alleged, then the matter ends there. Since despite averring, the petitioner did not avail evidence of the alleged DPO. The petitioner did not as well adduce any evidence of his inability to travel out of India or to enter Kenya on the basis of the alleged DPO. Not even any correspondence from the 1st respondent and/or the immigration offices in India or Kenya was availed in support of the allegation. The allegation was not corroborated by any of the said members of the petitioner's family who were also alleged to

Nichani v Kenya Revenue Authority & another

have been restricted in their movement as a result of the DPO.

2. The allegation by the petitioner that the 1st respondent issued a DPO against him was just but a bare one. Since there was no evidence of issuance of any DPO, then the alleged dispute could only be imaginary. There was no dispute capable of determination by the court.

Appeal struck out with costs.

Bare v Kenya Revenue Authority & another**Legal requirements relating to the content of a departure prohibition order.**

Headnote: The court was determining the legal requirements relating to issuance of a content of a departure prohibition order. The court held that Although section 45(6) of the Tax Procedures Act provided that a departure prohibition order would remain in force until it was revoked by the Commissioner, that order should not be a blanket ban on a person from travelling out of Kenya, especially where the tax debt remained undisclosed to the party affected by the departure prohibition order. Section 45 of the Tax Procedures Act was applicable when the Commissioner had reasonable grounds to believe that a person could leave Kenya without paying a tax that was or would become payable by the person or by a company in which the person was a controlling member. The author of the departure prohibition order did not disclose or demonstrate that he believed that the petitioner would leave Kenya without paying tax. It was wrong for a departure prohibition order to be issued to anyone on mere suspicion that the person owed some tax that was not determinable. The departure prohibition order was fatally defective as it failed to comply with explicit key statutory requirements set out in section 45(2) of the Tax Procedures Act.

Bare v Kenya Revenue Authority & another (Constitutional Petition 45 of 2020) [2021] KEHC 458 (KLR) (Constitutional and Human Rights) (25 February 2021) (Judgment)

Constitutional Petition 45 of 2020

High Court at Nairobi

JA Makau, J

February 25, 2021

Reported by John Ribia

Tax Law – departure prohibition order – legal requirements for issue of a departure prohibition order – requirement for notice and an opportunity to be heard - what were the legal requirements to be met for the issuance of a valid departure prohibition order - whether the issuance of a departure prohibition order, without giving prior and adequate reasons and an opportunity to be heard to the affected person, was a violation of the right to fair administrative action - whether the issuance of a departure prohibition order, that did not comply with legal requirements as to content, was a violation of the affected person's economic rights and freedom of movement - Tax Procedures Act, section 45(2), 45(6), and 51; Constitution of Kenya, 2010 article 39

Brief facts

The 1st respondent obtained court orders and search warrants in Milimani Chief Magistrate's Court being Misc. Criminal Application Numbers 3438 and 3439 both of 2019 in order to carry out a search at the premises of City Gas East Africa Limited. The search was conducted and various items and documents were seized as a result. On the basis of the court orders and a letter from the 1st respondent's Commissioner in Charge of Investigations and Enforcement asking the Director of Immigration to bar the 1st respondent from leaving Kenya during the investigation period, a departure prohibition order was issued against the petitioner.

At the conclusion of the investigations the departure prohibition order was not lifted, it continued in force. Further, as would be expected at the conclusion of investigations, the 1st respondent's office did not return the goods seized during the search. The petitioner claimed that failure to allow him to travel negatively impacted on his business and denied him an opportunity to earn his livelihood. The petitioner's truck was involved in an accident in Arusha, Tanzania and his request to the 1st respondent's Commissioner for Investigations and Enforcement to be allowed to travel to Arusha remained unanswered. The petitioner filed a petition to challenge the constitutionality of the departure prohibition order while alleging that it violated his economic rights as well as his right to freedom of movement.

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Issues

- i. What were the legal requirements to be met for the issuance of a valid departure prohibition order?
- ii. Whether the issuance of a departure prohibition order, without giving prior and adequate reasons and an opportunity to be heard to the affected person, was a violation of the right to fair administrative action.
- iii. Whether the issuance of a departure prohibition order, that did not comply with legal requirements as to content, was a violation of the affected person's economic rights and freedom of movement.

Held

1. The requirements relating to a departure prohibition order were set out in section 45 of the Tax Procedures Act. They were the name and address of the person affected by the order and the amount of tax that was payable or would become payable by that person or the company in which the person was a controlling member or tax representative. Those requirements were mandatory. In the departure prohibition order issued against the petitioner, the petitioner's address was missing and also the amount of tax payable was not set out.
2. Where the tax debt was established and disclosed, there was no problem in issuing a departure prohibition order but where it was not disclosed, the 1st respondent could not act arbitrarily and issue a departure prohibition order.
3. Although section 45(6) of the Tax Procedures Act provided that a departure prohibition order would remain in force until it was revoked by the Commissioner, that order should not be a blanket ban on a person from travelling out of Kenya, especially where the tax debt remained undisclosed to the party affected by the departure prohibition order.
4. The petitioner became a director of City Gas East Africa Limited on January 31, 2017 and the tax obligation in question went as far back as the year 2010. It was unfair for the 1st respondent to blame the petitioner for the period he was not in charge of City Gas East Africa Limited.
5. The departure prohibition order was fatally defective as it failed to comply with explicit key statutory requirements set out in section 45(2) of the Tax Procedures Act.
6. Section 45 of the Tax Procedures Act was applicable when the Commissioner had reasonable grounds to believe that a person could leave Kenya without paying a tax that was or would become payable by the person or by a company in which the person was a controlling member. The author of the departure prohibition order did not disclose or demonstrate that he believed that the petitioner would leave Kenya without paying tax. It was wrong for a departure prohibition order to be issued to anyone on mere suspicion that the person owed some tax that was not determinable.
7. Article 47 of the Constitution guaranteed the petitioner the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Further, the Fair Administrative Action Act provided details as to the steps that the 1st respondent ought to have taken before issuing the departure prohibition order. Under section 4(3)(a) and 4(3)(b) of the Fair Administrative Action Act, the 1st respondent ought to have given the petitioner prior and adequate reasons for the proposed administrative action as well as an opportunity to be heard and make representations in that regard. Those provisions were flouted with impunity by the 1st respondent.
8. The petitioner wrote to the 1st respondent requesting for permission to travel to Arusha as his truck had been involved in a road traffic accident in Tanzania. The 1st respondent's Commissioner for Investigations and Enforcement did not respond to the letter. There was no justification for not allowing the petitioner to travel to Arusha, Tanzania.
9. Section 51 of the Tax Procedures Act demonstrated that a decision about the tax obligation had to have been made first by the 1st respondent and if a taxpayer was not satisfied he was required to lodge an objection against such a decision within 30 days. Without dealing with the issue of the tax that was payable, it was premature to issue the departure prohibition order.
10. Article 39 of the Constitution guaranteed the right to freedom of movement including the right to leave

Bare v Kenya Revenue Authority & another

and enter Kenya. A decision to limit the petitioner's movement had to be based on sufficient grounds and not mere suspicion.

11. In issuing the departure prohibition order, 1st respondent violated the petitioner's economic rights as well as his right to freedom of movement.

Petition allowed.

W.E.C Lines v Commissioner of Domestic Taxes

Chapter 12: Exhaustion of Remedies on Tax Dispute Resolution

A letter stating that the tax payer's objection was invalid did not constitute an appealable decision

Headnote: Where there was a clear procedure for redress of any particular grievance prescribed by the constitution or an act of parliament, that procedure should be strictly followed. Additionally, any special procedure provided for by law must be strictly followed since the special procedures exist for a good reason. Failure to follow a clear procedure for redress of any particular grievance prescribed by law, renders the orders sought moot.

W.E.C Lines vs Commissioner of Domestic Taxes

TAT Appeal No 247/2020

E.N. Wafula, Chairperson; C N Mutava, A.K Kiprotich, G M Kitenga, Members

March 28 2021

***Tax Law** – appeals – the tax appeal tribunal – an appeal against the orders of the commissioner of domestic tax decision disallowing an objection filed out of time – whether a letter by the Kenya Revenue Authority indicating that an objection filed by a tax payer was filed out of time, could be subjected to an appeal at the Tax Appeals Tribunal*

Brief Facts

The appellant received several additional assessment as a result of which it lodged an application for extension of time to lodge a notice of objection as well as a draft notice of objection. However, the respondent informed the appellant that the Objection was invalid and that it was required to furnish the respondent with records of fees earned.

The appellant, dissatisfied with the letter dated May 4, 2020, instituted the appeal on June 18, 2020 and filled it on June 19 2020. According to the appellant, the Tribunal was to consider 5 main issues namely: (1) whether the respondent contravened the TPA by taking more than 7 months to respond to the appellant's objection; (2) whether the respondent's conduct infringed on the appellant's rights to fair administrative action; (3) whether the appeal was fatally defective as alleged by the respondent; and (4) whether the letter dated May 4, 2020 constituted an appealable decision and whether the delivery order fees and bill of lading fees formed part of customs value of imported goods.

On their part, the respondents stated that it reclassified the income as taxable at the general rate of 16% as per the income breakdown availed for the period November 2014 to 2015 and raised corresponding adjustments in October 2017 which resulted to additional assessment.

According to the respondent the issues that fell for determination were: (1) whether the letter dated May 4, 2020 constituted an appealable decision; (2) whether delivery order fees, which were post importation charges formed part of the customs value of the goods; and who between the Commissioner of Customs and the Commissioner of Value Added Tax should collect VAT on delivery order fees.

The respondent argued that the letter dated May 4, 2020 was a decision on an application for extension of time and not an objection decision and therefore did not constitute an appealable decision for purposes of a substantive appeal. The Respondent relied on the definition of an appealable decision as provided for under section 3 of the Tax Procedure Act.

Issues

Whether a letter by the Kenya Revenue Authority indicating that an objection filed by a tax payer was filed out of time, could be subjected to an appeal at the Tax Appeals Tribunal.

Held

The Tribunal was mandated to only hear and determine appealable decisions. The respondent's letter stating

W.E.C Lines v Commissioner of Domestic Taxes

that the appellant's objection was invalid did not constitute an appealable decision and it ought to have taken steps to validate the same before appealing to the Tribunal. From the upshot, the Tribunal dismissed the appeal on the grounds that the same was improperly before it.

Appeal dismissed.

Republic v Kenya Revenue Authority Exparte CMC Di Ravenna (Kenya)

A person who was dissatisfied with an appealable decision could appeal the decision to the tribunal in accordance with the provisions of the Tax Appeals Tribunal Act of 2013

Headnote: Under section 52 of the Tax Procedures Act, a person who was dissatisfied with an appealable decision could appeal the decision to the tribunal in accordance with the provisions of the Tax Appeals Tribunal Act of 2013. Section 12 of the Tax Appeals Tribunal Act in that regard provided that a person who disputed the decision of the Commissioner on any matter arising under the provisions of any tax law could appeal to the tribunal.

Republic v Kenya Revenue Authority Exparte CMC Di Ravenna (Kenya) [2019] eKLR

Judicial Review Miscellaneous Application 471 of 2018
High Court at Nairobi
P Nyamweya, J
May 22, 2019

Judicial review – dispute resolution mechanisms – doctrine of exhaustion of available dispute resolution mechanisms – statutory underpinning of the doctrine of exhaustion – the application of the doctrine of exhaustion in tax law – whether there existed viable and exceptional reasons that justified the bypassing of the Tax Appeals Tribunal as a viable dispute resolution mechanism – whether the applicant had exhausted the available dispute resolution mechanisms and the application was properly before court – Constitution of Kenya, 2010, article 47; Fair Administrative Action Act, sections 9 (1) (2) (3) & (4)

Civil Practice and procedure – sub judice – the test to be utilized to determine if a matter was sub-judice – whether the application filed was sub judice and ought to be dismissed – whether the parties in the two suits were the same; the issues raised or subject matters of the suits were the same; and the matter was pending before a Court clothed with appropriate jurisdiction.

Brief Facts

It was the applicant's contention that it made an application on diverse dates to the respondent seeking refund of the VAT. They contended the respondent through its letter dated June 19, 2018, declined its application for refund of VAT and informed it that the Project was not Zero rated; the private ruling on December 20, 2016 and respondent's letter dated May 16, 2017, were issued in error, and further demanded KES 333,220/=. That action was what had aggrieved the applicant, who was claiming violation of its legitimate expectation, and that it was not notified as required under section 68(1) of the Tax procedures Act.

A preliminary objection was filed. The respondent submitted that the application was *sub judice*. It was submitted that the applicant was guilty of material non-disclosure as they failed to disclose that there was an appeal pending before the Tax Appeals Tribunal challenging the respondents objection decision rendered on June 19, 2018 which touched on the private rulings and VAT which were the subject of the application before the instant Court.

In closing, the Respondent submitted that the decision it rendered on June 19, 2018 was an appealable decision, and the applicant had already lodged an appeal at the Tribunal. They pointed out that the applicant has not exhausted the statutory mechanism for appeal provided for under the Tax Procedures Act and the Tax Appeals Tribunal Act, and had not provided before the Court any exceptional circumstances in the public interest that existed for filing judicial review in the circumstances. Therefore, that the instant application was premature and should be dismissed for non-compliance with mandatory provisions of section 9(2) of the Fair Administrative Action Act.

Republic v Kenya Revenue Authority Exparte CMC Di Ravenna (Kenya)

Issue

- i. Whether there existed viable and exceptional reasons that justified the bypassing of the Tax Appeals Tribunal as a viable dispute resolution mechanism.
- ii. Whether the parties in the two suits were the same; the issues raised or subject matters of the suits were the same; and the matter was pending before a Court clothed with appropriate jurisdiction.

Held

1. A Preliminary Objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The effect of a preliminary objection if upheld, rendered any further proceedings before the court impossible or unnecessary.
2. Under section 52 of the Tax Procedures Act, a person who was dissatisfied with an appealable decision could appeal the decision to the tribunal in accordance with the provisions of the Tax Appeals Tribunal Act of 2013. Section 12 of the Tax Appeals Tribunal Act in that regard provided that a person who disputed the decision of the Commissioner on any matter arising under the provisions of any tax law could appeal to the tribunal.
3. If indeed a matter was found to be *sub judice*, the effect was to oust the jurisdiction of a Court to deal with the same issue. That was thus a pure point of law that had been raised by the respondent. The test to be utilized to determine if a matter was *sub judice*, was whether the parties in the two suits were the same; whether the issues raised or subject matters of the suits were the same; and whether the matter was pending before a Court clothed with appropriate jurisdiction. Therefore, the court would not be delving into the facts of the two cases in that regard, as the applicable test involved matters that were regulated by law, or self-evident from the pleadings in the two cases.
4. The parties in Nairobi Tax Appeals Tribunal No. 114 of 2018 - CMC Di Ravenna vs Commissioner of Domestic Taxes were also parties in the present application. The Tax Appeals Tribunal also had jurisdiction under section 12 of the Tax Appeals Tribunal Act to hear and determine the appeal filed by the applicant. The Court also took judicial notice of the fact that the Tax Appeals Tribunal had been reconstituted and was fully operational by Gazette Notice No.3620 published on April 15, 2019 in Kenya Gazette Vol. CXX1-No 46. Lastly, the orders the applicant sought in the appeal in Nairobi Tax Appeals Tribunal No. 114 of 2018 - *CMC Di Ravenna vs Commissioner of Domestic Taxes* and in that application were on the respondent's decision dated June 19, 2018, which decision was an assessment and demand of tax, and after taking into account the issues raised by the applicant.
5. As the issues raised in the instant application were still pending before the 1st Respondent, sections 9(2) (3) and (4) of the Fair Administrative Action Act were therefore operative, as the applicant was yet to exhaust the alternative review mechanisms, and no viable exceptional reason existed why it should be exempted from the proceedings before the Tax Appeals Tribunal.
6. The requirements of Order 53 of the Civil Procedure Rules as regards applications for leave to commence judicial review require the application to be accompanied by a statement specifying the relief sought and grounds on which it was sought, and the facts relied upon to be verified by affidavits. Given that the nature of the Applicant's case could change depending on the decision made by the Tax Appeals Tribunal, it may be prudent and more orderly for the applicant to commence fresh proceedings, if it was still desirous of moving the Court for judicial review orders.

Application struck out with no orders as to cost.

Blitz Logistics Limited v Commissioner General Kenya Revenue Authority & another; Bidco Africa Limited (Interested Party)

It was only in exceptional cases that the High Court could entertain judicial review proceedings, where such alternative remedies were not exhausted

Headnote: It was only in exceptional cases that the High Court could entertain judicial review proceedings, where such alternative remedies were not exhausted. In determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

Blitz Logistics Limited v Commissioner General Kenya Revenue Authority & another; Bidco Africa Limited (Interested Party)

(Judicial Review Application E074 of 2022) [2023] KEHC 616 (KLR) (Judicial Review) (9 February 2023)
(Ruling)

Neutral Citation: [2023] KEHC 616
High Court at Nairobi
AK Ndung'u, J
February 9, 2023

Judicial review – application for judicial review – exhaustion of alternative remedies – jurisdiction of the High Court to determine an application of judicial review where alternative mechanisms were available – whether there were exemptions to the requirement of exhaustion of alternative remedies– whether the High Court could entertain judicial review proceedings, where alternative remedies were not exhausted

Brief Facts

The applicant filed an application seeking judicial review orders. However, the respondents filed a preliminary objection contesting the jurisdiction of the court to determine the matter. The respondent argued that the application offended the doctrine of exhaustion of remedies and the provision of section 9 (2) & (3) of the Fair Administrative Actions Act, 2015, which primarily deferred the jurisdiction of the trial court until all remedies available under any written law were first exhausted.

Issue

Whether the High Court could entertain judicial review proceedings, where alternative remedies were not exhausted.

Held

1. A preliminary objection must be one that raises a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of discretion. From a cursory glance at the preliminary objections as drawn, it was quite clear that the same raised a pure point of law as the court would be grappling with the question whether the application offended the doctrine of exhaustion of remedies under Section 9(2) of the Fair Administrative Actions Act. The underlying issue that unlocked the impasse in the instant matter was whether the court had jurisdiction to determine the dispute in light of the principles in the doctrine of exhaustion.
2. The high court had jurisdiction to review impugned administrative action by way of judicial review. Section 9(2) of the FAAA placed a caveat to the exercise of that jurisdiction. The court could not review an administrative action or decision under the FAAA unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law were first exhausted.
3. Pursuant to section 9(4) of the FAAA, it was upon the applicant by application to demonstrate before

**Blitz Logistics Limited v Commissioner General Kenya Revenue Authority & another; Bidco Africa Limited
(Interested Party)**

the court exceptional circumstances warranting such party's exemption from the obligation to exhaust any remedy if the court considers such exemption to be in the interests of justice. In the instant suit, no application had been made in that regard and thus no exemption was available to the applicant. The applicant fell afoul of section 9 of the Fair Administrative Action Act which provided for exhaustion of available mechanisms.

4. The issue that the 1st respondent's decision to disable their PIN and access to the online tax platform was done without notice to it (applicant), and without an opportunity to be heard could be properly ventilated, first, before the Commissioner in an application for review, and secondly, if the applicant be aggrieved by the results of the review, by way of an appeal at the Tax Appeals Tribunal and a further appeal to the High Court as would be deemed necessary.

Application dismissed. Preliminary objection upheld.

Krystalline Salt Limited v Kenya Revenue Authority

Where a dispute resolution mechanism existed outside courts, the same be exhausted before the jurisdiction of the Courts was invoked

Headnote: It was imperative that where a dispute resolution mechanism existed outside courts, the same be exhausted before the jurisdiction of the Courts was invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brewed. The exhaustion doctrine was a sound one and served the purpose of ensuring that there was a postponement of judicial consideration of matters to ensure that a party was first of all diligent in the protection of their own interest within the mechanisms in place for resolution outside the courts. That accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

Krystalline Salt Limited v Kenya Revenue Authority [2019] eKLR

Judicial Review 359 of 2018

High Court at Nairobi

JM Mativo

June 10, 2019

Statutes – interpretation of statutes – manner of interpretation of statutes – interpretation and construction of Tax Laws – interpretation of section 52 (1) of the Tax Procedure Act – the interrelation between section 52 (1) and the doctrine of exhaustion – whether the requirements on exhaustion applied to section 52 (1) of the Tax Procedure Act regarding appeal of appealable decisions to the Tribunal – Fair Administrative Actions Act, section 2 & section 9 (1) (2) (3) & (4)

Judicial review – dispute resolution mechanisms – doctrine of exhaustion of available dispute resolution mechanism – statutory underpinning of the doctrine of exhaustion – the application of the doctrine of exhaustion in tax law – whether there existed exceptional circumstances that allowed the court to address the judicial review application made despite availability of alternative dispute resolution mechanisms – Constitution of Kenya, 2010, article 47; Fair Administrative Action Act, sections 9 (1) (2) (3) & (4)

Brief Facts

Before the instant court was an application seeking leave to institute judicial review proceedings for grant of orders of *Certiorari* to quash the respondent's decision declaring the applicant to be a payer of KES. 1,358,754,214 being Tax allegedly due from Water Resources Management Ltd. It was alleged that the decision was taken in violation of due process as laid out in the Tax Procedures Act and in contravention of the Constitution.

In addition, the applicant also sought leave to apply for an order of prohibition prohibiting the respondent from serving agency notices upon its bankers or freezing its bank accounts or suspending its PIN or threatening, intimidating, harassing, prosecuting it or enforcing or implementing the demand notices served upon it.

Further, the applicant prayed that the leave so granted operate as stay of any decision, action, implementation and/or enforcement proceedings against it or howsoever otherwise premised on the Demand Notices. Lastly, the applicant prayed that the court should issue any other orders it deemed just and fair in the circumstances, and the costs of the application.

On October 24 2018, the court invited the parties to address the court on the doctrine of exhaustion of administrative remedies and the implication (if any) of section 9 (2) of the Fair Administrative Action Act to the case.

Issues

- i. Whether the requirements on exhaustion applied to section 52 (1) of the Tax Procedure Act regarding

Krystalline Salt Limited v Kenya Revenue Authority

appeal of appealable decisions to the Tribunal.

- ii. Whether there existed exceptional circumstances that allowed the court to address the judicial review application made despite availability of alternative dispute resolution mechanisms.

Held

1. Interpretation was the process of attributing meaning to the words used in a document, be it a Constitution, legislation, statutory instrument, policy or contract having regard to the context provided, by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. Statutory provisions must be construed purposively and in a contextual manner. Accordingly, courts were constrained by the language used. Courts may not impose a meaning that the text was not reasonably capable of bearing.
2. Enforcement of Tax Statutes was a necessary tool to enforce the power of the State to impose taxes and charges as stipulated in article 209 of the Constitution. More significant was article 210 of the Constitution which provided that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.
3. The enforcement of Tax Statutes could have an impact on constitutionally guaranteed rights. The litmus test was whether such limitation will pass constitutional muster. Tax statutes had to be understood purposively because the Tax laws were umbilically linked to the Constitution. The court had to seek to promote the spirit, purpose and objects of the articles 209 and 210 of the Constitution. The court had to prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional and statutory meanings. In searching for the purpose, it was legitimate to seek to identify the mischief sought to be remedied. The provision must be understood within the context of the grid, if any, of related provisions and of the Constitution as a whole.
4. The text was often the starting point of any statutory construction, but the meaning it bore had to pay due regard to context. That was so even when the ordinary meaning of the provision to be construed was clear and unambiguous. It was an elementary rule of statutory construction that all the provisions bearing upon a particular subject were to be brought into view and be interpreted to effectuate the greater purpose of the instrument. Thus, the relevant provisions of tax laws must be construed together in order to get its full meaning. In interpreting a statute, the courts would fail in their duty if they did not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual, which was certain to subvert the societal goals and endanger the public good.
5. A court of law had to try to determine how a statute should be enforced. There were numerous rules of interpreting a statute, but the most important rule was the plain meaning rule. The starting point of interpreting a statute was the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.
6. It was not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision was plain and unambiguous. The court could not rewrite, recast or reframe the legislation for the very good reason that it had no power to legislate. The court could not add words into a statute. Courts decide what the law was and not what it should be. The court of course adopted a construction which would carry out the obvious intention of the legislature.
7. All that the court had to see at the very outset was, what does the provision say? If the provision was unambiguous and if from that provision the legislative intent was clear, the other rules of construction of statutes need not be called into aid. They were called into aid only when the legislative intention was not clear. But the court would not be justified in so straining the language of the statutory provision as to ascribe the meaning which could not be warranted by the words employed by the Legislature.
8. The touchstone of interpretation was the intention of the legislature. The legislature could reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.
9. To properly understand and interpret a statute, one must read the text closely, keeping in mind that

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the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one. Courts generally assumed that the words of a statute meant what an “ordinary” or “reasonable” person would understand them to mean. If the words of a statute were clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

10. Section 3 of the Tax Appeals Tribunal established the Tax Appeal Tribunal to hear appeals filed against any tax decision made by the Commissioner. Section 12 of the act provided that a person who disputed the decision of the Commissioner on any matter arising under the provisions of any tax law could, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal. The proviso to that provision provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings. The phrases to note in those two provisions were “*any tax decision and subject to the provisions of the relevant law.*”
11. On the other hand, section 52 (1) of the Tax Procedures Act provided that a person who was dissatisfied with an appealable decision could appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act. The act defined an appealable decision as an objection decision and any other decision made under a tax law other than— a tax decision; or a decision made in the course of making a tax decision. The word any other decision under the tax laws was significant.
12. Section 52 (1) was to be construed together with section 12 of the Tax Appeals Tribunal which provided that “*...subject to the provisions of the relevant law.*” The impugned decision was made pursuant to the provisions of section 42 of the Tax Procedures Act. From the phrase “*...subject to the provisions of the relevant law,*” three key points emerged.
 - a. The impugned decision was taken pursuant to section 42.
 - b. Section 52 (1) defined an appealable decision. The words “*any other decision under the tax laws*” in section 52 (1) was significant. The impugned notice fell under the definition in section 52 (1). To hold otherwise would amount to intellectual dishonesty given the clarity of the provision.
 - c. Within the meaning of section 2 of the Fair Administrative Action Act, the Act provided that unless the context otherwise required— “administrative action” included the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
13. The impugned decision being an administrative action within the meaning assigned to it under the Fair Administrative Action Act, it followed that the provisions of section 9(1)(2)(3) & (4) of the Fair Administrative Action Act would apply. The requirement for exhaustion of available remedies applied. Those provisions were couched in mandatory terms.
14. The question of exhaustion of administrative remedies arose when a litigant, aggrieved by an agency’s action, sought Judicial Review of that action without pursuing available remedies before the agency itself. The court had to decide whether to review the agency’s action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings failed to produce a satisfactory resolution.
15. It was imperative that where a dispute resolution mechanism existed outside courts, the same be exhausted before the jurisdiction of the Courts was invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brewed. The exhaustion doctrine was a sound one and served the purpose of ensuring that there was a postponement of judicial consideration of matters to ensure that a party was first of all diligent in the protection of their own interest within the mechanisms in place for resolution outside the courts. That accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.
16. While exceptions to the exhaustion requirement were not clearly delineated, courts had to undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including

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level of public interest involved and the polycentricism of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applied. In exceptional circumstances, the court had to find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

17. The reasons cited by the applicant did not qualify to be exceptional circumstances. Even if the court was to be persuaded that the reasons cited did qualify and or met the exceptional circumstances requirement tests, an applicant was required to apply to the court for an exemption.
18. It was argued that the Tax Appeals Tribunal lacked quorum in that it was not properly constituted. That argument failed because as the law stood, the applicant was required to apply to court for an exemption fit the exceptional requirement test. No such application was filed. The applicant was not absolved from applying for an exemption as provided under the law.
19. If the argument that the respondent refused to give its decision to the applicant under section 42 (6) of the Tax Procedure Act was correct, the applicant never sought orders from the court seeking orders to be supplied with alleged reasons. In any event, the requirement for an applicant to apply for exemption still applied, the test being, the applicant had demonstrated exceptional circumstances.
20. Since the decision was an appealable decision before the Tax Appeal Tribunal, the argument that no efficacious remedy could be obtained from the tribunal also collapsed. A reading of the relevant provisions revealed a well thought dispute resolution mechanism and deliberate vesting of power to the Tribunal to determine tax disputes.
21. The Fair Administrative Action Act flowed from article 47 of the Constitution; hence, it had a constitutional underpinning. One cannon of constitutional construction provided that provisions of the Constitution had to be construed in a holistic manner. As the right to a fair Administrative Action and the right to be heard were construed, one had to bear in mind articles 209 and 210 of the Constitution. The statutory provisions governing imposition of taxes had a constitutional underpinning. The Constitution contemplated a situation whereby KRA would have the power to impose and collect taxes.
22. The instant case was a tax dispute triggered by a decision taken pursuant to the relevant tax law. It did not raise a constitutional question at all to warrant invoking the court's jurisdiction. A constitutional question was an issue whose resolution required the interpretation of a constitution rather than that of a statute. The issues raised in the case could be resolved by interpreting the facts and the relevant statutes. When determining whether an argument raised a constitutional issue, the court was not strictly concerned with whether the argument would be successful. The question was whether the argument forced the court to consider Constitutional rights or values.
23. Section 9(2) of the Fair Administrative Action Act provided that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant was sub-section (3) which provides that the High Court or a subordinate Court *shall*, if it was not satisfied that the remedies referred to in sub-section (2) had been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section (1).
24. The word *shall* in the above provisions was worth noting. The word "*shall*" when used in a statutory provision imported a form of command or mandate. It was not permissive, it was mandatory. The word *shall* in its ordinary meaning was a word of command which was normally given a compulsory meaning as it was intended to denote obligation. A proper construction of section 9(2) & (3) of the Fair Administrative Action Act led to the conclusion that they are couched in mandatory terms. The only way out was the exception provided by section 9(4).
25. What constituted exceptional circumstances depended on the facts of each case and it was not possible to have a closed list. What constituted exceptional circumstances depended on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would

Krystalline Salt Limited v Kenya Revenue Authority

not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal had developed a rigid policy which rendered exhaustion futile. Those requirements had not been shown to exist in the instant case.

26. There was no argument that the appellate tribunal had developed a rigid policy, which rendered the requirement for exhaustion futile. It had not been established that the dispute was purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of the instant case suggested otherwise. It had not been shown that the mechanism was not effective nor has it been demonstrated that the *ex parte* applicant could not obtain an effective remedy from the Tribunal.
27. It was compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the Fair Administrative Action Act. The person seeking exemption must satisfy the court, *first* that there were exceptional circumstances, and, *second*, that it is in the interest of justice that the exemption be given. Section 9(4) of the Fair Administrative Action Act postulated an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. The applicant had first apply to the court and demonstrate the existence of exceptional circumstances.
28. The law was that Section 9(4) of the Fair Administrative Action Act postulated an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. The law contemplated a situation where by an applicant made his application, demonstrated the existence of exceptional circumstances and consistent with rules of fair play, afforded the other party the opportunity to respond or disapprove his case and leave it to the court to determine.
29. The impugned decision constituted an administrative action as defined in section 2 of the Fair Administrative Action Act. An internal remedy had to be exhausted prior to Judicial Review, unless the *ex parte* applicant could show exceptional circumstances to exempt it from that requirement.
30. The instant case offended section 9 (2) of the Fair Administrative Action Act. The applicant did not apply for an exemption, as the law required nor had it satisfied the exceptional circumstances requirement under section 9(4) of the Fair Administrative Action Act. The applicant's application offended the doctrine of exhaustion of statutory available remedies.

Application dismissed with no orders as to cost.

Hewlett Packard East Africa Ltd v Commissioner of Domestic Taxes

A further amendment to a tax assessment can only be made within 1 year, by the Commissioner of Domestic Taxes, after the giving of notice of the amended assessment

Headnote: With regard to the further amendment to the tax assessment of August 29, 2012 done in the year 2016, there was an issue as to whether it could be done within 5 years as provided for in section 31 (6) (a)(ii) of the Tax Procedure Act or it could only be done within one year as provided in section 31 (6)(a)(ii) of the Tax Procedure Act. However, a further amendment could only be made under section 31 (6) (b) of the Tax Procedure Act after the respondent had served a notice of amended assessment. The clear intention of the Legislature was that once the respondent gave notice of the amended assessment it could only further amend it within a year under the terms of section 31(6)(b) of the Tax Procedure Act.

Hewlett Packard East Africa Ltd v Commissioner of Domestic Taxes

Income Tax Appeal No 12 of 2018

High Court at Nairobi

Mary Kasango, J

May 9, 2019

Jurisdiction – jurisdiction of the High Court – nature and extent of the High Court’s jurisdiction in an appeal against the decision of the Tax Appeal Tribunal – jurisdiction relating to matters of law only – whether an issue relating to whether VAT payments were made within the required timeframe was a matter of fact – Value Added Tax Act 2009, section 13 (1)(c).

Statutes – interpretation of statutory provisions-interpretation of section 31(6) of the Tax Procedure Act – time within which a further amendment to a tax assessment could be made by the Commissioner of Domestic Taxes – whether such a further amendment could be made within five (5) years or within a year – Tax Procedure Act, No 29 of 2015, section 31(6).

Appeals – appeals to the High Court from the Tax Appeal Tribunal – notice of appeal – requirements relating to filing a notice of appeal for an appeal from the decision of the Tax Appeal Tribunal – payment of undisputed taxes – effect of failure to pay undisputed taxes – Tax Procedure Act, No 29 of 2015, section 52(2).

Brief facts

The appellant appealed against the decision of the Tax Appeal Tribunal. At the Tribunal, the appellant challenged the respondent’s decision to further amend a Value Added Tax (VAT) notice of amended assessment issued on August 29, 2012 whilst stating that the decision went contrary to section 31(6) of the Tax Procedure Act 2016. The further amendments were made in the year 2016.

The Tribunal’s findings were that the appeal was incompetent since the appellant had not paid its undisputed taxes before filing the appeal as required under section 52 (2) of the Tax Procedure Act. The Tribunal also found the appellant liable to pay penalties and interest for late declaration and payment of VAT. Additionally, the Tribunal found that the respondent acted appropriately in reviewing the tax assessment in 2016 and that the appellant’s claim for a tax refund was time barred and no extension of time had been sought.

Issues

- i. What was the nature and extent of the High Court’s jurisdiction in an appeal against the decision of the Tax Appeal Tribunal?
- ii. Within what period could a further amendment to a tax assessment be made by the Commissioner of Domestic Taxes?
- iii. What was the effect of filing a notice of appeal before the Tax Appeal Tribunal without having paid undisputed taxes as required under section 52(2) of the Tax Procedure Act?
- iv. Whether an issue relating to late payment of VAT was an issue of fact.

Hewlett Packard East Africa Ltd v Commissioner of Domestic Taxes

Relevant provisions of the law
Tax Procedure Act, No 29 of 2015;
Section 31(6);

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.*

Held

1. The High Court's jurisdiction related only to questions of law but issues of fact were capable of giving rise to questions of law. An erroneous conclusion although based primarily on factual evidence would be a point of law.
2. Section 52(2) of the Tax Procedure Act had the effect of invalidating a notice of appeal where there were unpaid undisputed taxes. It was clear that when the appellant filed the notice of appeal, it had unpaid undisputed taxes which it sought to offset against an overpayment in VAT. Therefore, the notice of appeal was filed contrary to section 52(2) of the Tax Procedure Act.
3. With regard to the further amendment to the tax assessment of August 29, 2012 done in the year 2016, there was an issue as to whether it could be done within 5 years as provided for in section 31 (6) (a)(ii) of the Tax Procedure Act or it could only be done within one year as provided in section 31 (6) (b) of the Tax Procedure Act. However, a further amendment could only be made under section 31 (6) (b) of the Tax Procedure Act after the respondent had served a notice of amended assessment. The clear intention of the Legislature was that once the respondent gave notice of the amended assessment it could only further amend it within a year under the terms of section 31(6)(b) of the Tax Procedure Act.
4. The appellant had arranged to raise invoices for the payment of Return on Value Added Commission (ROVAC) for services rendered on a quarterly basis. That was important as invoicing on a monthly or quarterly basis determined when VAT was payable by the appellant and whether payment was made late and ought to attract interest and penalties. Under section 13 (1)(c) of the Value Added Tax Act 2009, which was applicable in the year 2011 to the year 2013, VAT was chargeable when an invoice was issued in respect of supply.
5. The issue of late payment of VAT was not the subject of the appeal before the Court. If it was intended to be before the Court by the appellant, it was still the case that it was a factual issue which could not be the subject of an appeal before the Court.
6. The Tribunal found that the appellant failed to lodge a claim for a refund for overpaid VAT within 12 months as required under section 24 of the Value Added Tax Act and the claim was therefore time barred. However, the determination by the Tribunal was made without that issue on a refund being placed before the Tribunal. The Tribunal was legally constrained to determine only issues brought before it for determination.

Appeal partly allowed.

Orders

- i. The order of the Tribunal that the appellant was not entitled to refund of Ksh 20,060,671/- was set aside. The applicant was to follow the applicable lawful process of claiming the refund.*
- ii. Each party to bear its own costs*

Wangari v Kenya Revenue Authority & another

Where a dispute resolution mechanism existed outside Courts, the same be exhausted before the jurisdiction of the Courts was invoked

Headnote: It was imperative that where a dispute resolution mechanism existed outside Courts, the same be exhausted before the jurisdiction of the Courts was invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brewed. The exhaustion doctrine was a sound one and served the purpose of ensuring that there was a postponement of judicial consideration of matters to ensure that a party was first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.

Wangari v Kenya Revenue Authority & another

(Constitutional Petition 8 of 2020) [2022] KEHC 411 (KLR) (5 May 2022) (Ruling)

Neutral Citation: [2022] KEHC 411 (KLR)

High Court at Nairobi

J Ngugi, J

May 5, 2022

Constitutional Law – dispute resolution – exhaustion of available remedies – where there was a clear procedure for redress of a particular grievance – whether the court was precluded from addressing the issues raised due to the doctrine of exhaustion of available dispute resolution mechanisms – Constitution of Kenya, 2010, article 159

Brief Facts

The matter concerned Bank Account Number 100xxxx held by the petitioner with the 2nd Respondent. The petitioner's case was that the 1st respondent alleged that the petitioner was a director of an enterprise known as Njewanga Enterprises, which the 1st respondent claimed owed it a sum of KES. 19,946,829.19 in unpaid taxes. The petitioner said that despite her contestations that she was not affiliated with the said enterprise, the 2nd respondent, upon instructions from the 1st respondent proceeded to freeze her bank account, thereby denying her access to it.

The petitioner claimed that the 1st respondent was unlawfully demanding her to pay the alleged sum and that she stood to be greatly prejudiced by the respondents' conduct. It was upon that allegation that the petitioner filed the instant petition in which she claimed violation of her right to fair administrative action under article 47 and her right to property under Article 40 of *the Constitution*.

The 1st respondent filed a preliminary objection contending that the issues raised could be properly addressed at the Tax Appeal Tribunal.

Issue

Whether the court was precluded from addressing the issues raised due to the doctrine of exhaustion of available dispute resolution mechanisms.

Held

1. The High Court had unlimited jurisdiction under article 165 of the Constitution. However, the Courts developed the exhaustion doctrine, as a prudential doctrine, in consonance with the Constitution pursuant to article 159 thereof as a judicial policy aimed at ensuring access to justice and the efficient administration of justice.
2. The agency notice issued was an appealable decision by dint of section 52 of the Tax Procedures Act. The arguments the petitioner raised regarding the agency notice before the instant court could find their home at the Tax Appeals Tribunal. The exhaustion doctrine was of esteemed juridical lineage in Kenya and was in line with article 159 of the Constitution. Where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should

Wangari v Kenya Revenue Authority & another

be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there were good reasons for such special procedures.

3. It was imperative that where a dispute resolution mechanism existed outside Courts, the same be exhausted before the jurisdiction of the Courts was invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brewed. The exhaustion doctrine was a sound one and served the purpose of ensuring that there was a postponement of judicial consideration of matters to ensure that a party was first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. Article 159 of the Constitution commanded the Courts to encourage alternative means of dispute resolution.
4. The suit was not ripe. The petitioner ought, in the first instance, to approach the Tax Appeals Tribunal as stipulated in section 52 of the Tax Procedures Act as read with section 12 of the Tax Appeals Tribunal Act, 2013, and only get to Court as a last resort. It was not demonstrated that the alternative forum created by statute was inaccessible, un-affordable, would amount to unreasonable delay or was otherwise ineffective.

Petition dismissed, preliminary objection upheld.

Bin Abdulrahim & Sons v Kenya Revenue Authority

The applicant had no reason for approaching the court before exhausting the procedure provided by statute

Headnote: The application before the instant court was in the nature of an application for a preservatory order. That kind of order was available before the Tribunal. The applicant had no reason for approaching the court before exhausting the procedure provided by statute. The applicant had not established a *prima facie* case.

Bin Abdulrahim & Sons v Kenya Revenue Authority [2017] eKLR

Commercial Case 4 of 2017

High Court at Malindi

WK Korir

September 28, 2017

***Jurisdiction** – jurisdiction of the high court – exhaustion of available remedies – where an application for injunction was made before an applicant could exhaust available remedies – whether orders of injunction could be made where an applicant had not exhausted available remedies – whether the orders sought could be granted by another forum of dispute resolution – Tax Procedure Act, section 51*

Brief Facts

Following a compliance check conducted on the applicant's business by the respondent, the applicant was notified that it had outstanding VAT, corporation tax and withholding tax amounting to Kshs. 119,326,030.53. The applicant responded to the said claim on August 2, 2016. It was the applicant's case that its response was never addressed. January, 31, 2017 it was notified by its bankers that the respondent had ordered the freezing of its account. The Applicant once again wrote to the respondent seeking answers to the issues it had raised. It subsequently moved to the court through the instant application. It was the Applicant's position that the attachment of its account was illegal as no notice had been issued as required. Further, that the attachment had paralysed its business.

The Respondent's position was that the applicant was before the wrong forum. Reliance was placed on Section 51 of the Tax Procedures Act, 2015 which provided that a taxpayer who wished to dispute a tax decision shall first lodge an objection against the tax decision in accordance with the decision before proceeding under any other written law. The respondent contended that the applicant had not lodged a notice of objection with the Commissioner in respect of the tax decision which was the subject of the case. Further, that any objection which the applicant may have had was overtaken by time as an objection to a tax decision ought to be lodged within thirty days.

Issue

Whether orders of injunction could be made where an applicant had not exhausted available remedies.

Held

1. A *prima facie* case in civil cases was a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter
2. In order to determine whether an applicant has an arguable case, the court would consider the pleadings before it. The court was not expected to extensively comment on the case before it since that would result in a determination of the same without a proper hearing.
3. Establishing that a court or tribunal before which a case was filed had jurisdiction was one of the ways of demonstrating an arguable case. A party with a strong case taken before the wrong forum could not be said to have a *prima facie* case.
4. The Tax Appeals Tribunal Act, 2013 established the Tribunal for the management and administration

Bin Abdulrahim & Sons v Kenya Revenue Authority

of tax appeals. The core business of the Tribunal was to hear appeals filed against any tax decision made by a commissioner appointed under Section 13 (1) of the Kenya Revenue Authority Act, 1995. Under Section 12 of the Tax Appeals Tribunal Act, a person who disputed the decision of the commissioner on any matter arising under the provisions of any tax law may, upon giving notice in writing to the commissioner, appeal to the Tribunal. Section 18 of the same Act provided that where an appeal had been filed the Tribunal could stay the implementation of the decision under review pending the determination of the appeal.

5. Section 51 of the Tax Procedure Act provided the procedure for objecting to a tax decision. Sections 52 to 54 provides that an appeal from the decision of the commissioner can be appealed to the Tribunal. The appellate channel was open all the way to the Court of Appeal.
6. The applicant had not demonstrated that it had lodged a valid objection before the Commissioner. One of the prayers in the application for a restraining order was to allow the applicant to file an objection “within 30 days before the Disputes Tribunal.” Nothing stopped the applicant from filing a matter before the Tribunal. Seven months down the line, the applicant was yet to file any case before the Commissioner or the Tribunal. It seems that the applicant was only attempting to delay its eventual appointment with the respondent. A stay would not rescue the applicant since only the Tribunal can help it.

Application dismissed.