



ORARO & COMPANY
ADVOCATES

An Affiliate Member of AB & DAVID AFRICA

LEGAL ALERT

**APPEALING TAX APPEALS TRIBUNAL
DETERMINATIONS AT THE HIGH COURT:
COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT V GRAIN BULK HANDLERS
LIMITED**

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Background

In a Judgement delivered on 17th June, 2021 in Income Tax Appeal No. E005 of 2020: Commissioner of Investigations and Enforcement v Grain Bulk Handlers, the High Court dismissed an appeal by the Commissioner of Investigations and Enforcement (“the Appellant”) against the Judgment of the Tax Appeals Tribunal delivered on 18th December 2019.

Issues for determination

The Appellant raised seven grounds of appeal which the Court summarized as follows to arrive at its determination:

1. Whether the respondent’s appeal before the Tribunal was filed out of time;
2. Whether the Tribunal erred in finding that the respondent was not an importer and that no tax was payable on terminal tolerance or that the respondent required a destruction certificate or that the respondent was liable for un-customed goods;
3. Whether the Tribunal erred in finding that the appellant’s documents were inadmissible; and
4. Whether the Tribunal erred in holding that the assessment against the respondent was similar to that of its Managing Director.

The Court’s analysis & decision

1. Whether the Appeal filed out of time (suspension of time by consent)

There was undisputed evidence that after the objection decision, Grain Bulk Handlers (“GBH”) filed a Petition in the High Court in Petition No. 239 of 2012 (the Petition) wherein the High Court suspended the 30-day period for filing an appeal and stayed the proceedings of the Committee. The stay orders were thereafter extended by consent of both parties until determination of the Petition. By this action, computation of time stopped and resumed when the High Court determined the Petition.

After the petition, the GBH appealed to the Tribunal, wherein KRA objected to the appeal on the basis that the GBH’s appeal at the Tribunal was time barred. The Tribunal dismissed the objection.

The High Court found that the appeal at the Tribunal was filed within time given that computation of time was stayed by consent of the parties. As a result, the High Court found that this ground of appeal failed.

2. Whether the GBH was an importer (question of fact in an appeal)

The second ground was that the Tribunal erred in finding that the GBH was not an importer and that no tax was payable on terminal tolerance (grain loss that occurs during transfer from one vessel to another). KRA further claimed that the Tribunal erred in finding

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that the GBH did not require a destruction certificate or that it was not liable for un-customed goods.

The High Court noted that S. 56 (2) of the Tax Procedures Act limits an appeal to the High Court to questions of law only. The Court further noted that the exception to the rule was that a question of fact can give rise to a question of law on a lower court/tribunal's misapprehension of evidence which leads to a bad decision.

On hearing the appeal, the Court found that the KRA failed to demonstrate how the Tribunal's findings on facts were so perverse that it would amount to conversion of a point of fact into a point of law warranting the High Court's intervention. In addition, the High Court found that the KRA failed to prove that the GBH imported grains as no tangible evidence was adduced in this regard. Further no evidence was adduced by KRA to support their allegation that GBH had sold grains to third parties. To the contrary there was sufficient evidence adduced by GBH to demonstrate that any grains released to third parties were undertaken upon instructions of their clients with whom they had executed Service Provision Agreements. The claim of dealing with un-customed goods was therefore unsubstantiated. As a result, this ground of appeal failed.

3. Admissibility and weight of evidence (summary of bank transactions)

KRA argued that the Tribunal erred in finding as inadmissible evidence proving that GBH delivered grains to clients who were not importers. On its part GBH submitted that the Tribunal did not declare the said documents as inadmissible but that they fell short of proving the KRA's claim that income had been earned from sale of grain as had been alleged.

The evidence relied on by KRA in support of the alleged assessment was a banking summary relating to the GBH's director and not the GBH itself. Further, the Tribunal found that the banking summary did not disclose the relevant bank details, account name, account number or bear a signature.

The Court agreed with the Tribunal as the documents did not prove that income had been derived from the Respondent's grain sales and held that this ground of appeal failed.

4. Appeal on an undetermined matter

Lastly, the fourth ground argued by KRA was that the Tribunal erred in holding that the assessment against the GBH was similar to that against the GBH's director. The Court determined that the Tribunal did not make any such determination in its judgment and stated that the KRA could not appeal on an issue that was never determined by the Tribunal in the first instance. As a result, this ground of appeal failed.

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Based on the above, the Judge dismissed KRA's Appeal in its entirety with costs to the Respondent.

Grain Bulk Handlers Limited was represented at the High Court by our tax team led by George Oraro SC, Founding Partner, assisted by Renee Omondi, Tax Partner, Wanjala Opwora, Associate and Nzioka Wang'ombe, Associate.

Disclaimer

*This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact **Renee Omondi** (renee@oraro.co.ke), **Wanjala Opwora** (wanjala@oraro.co.ke), **Nzioka Wang'ombe** (nzioka@oraro.co.ke) or your usual contact at our firm, for legal advice.*



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