Commissioner of Domestic Taxes v W. E. C. Lines (K) Limited (Tax Appeal E084 of 2020) [2022] KEHC 57 (KLR) (Commercial and Tax) (31 January 2022) (Judgment)

Neutral citation: [2022] KEHC 57 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Commercial and Tax

Tax Appeal E084 of 2020

DAS Majanja, J

January 31, 2022

Between

Commissioner of Domestic Taxes

Applicant

and

W. E. C. Lines (K) Limited

Respondent

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 24th July 2020 in

Tax Appeal No. 137 of 2018)

For a service to be deemed an exported service, the determining factor was the location where that service was to be finally used or consumed.

Reported by Kakai Toili

Tax Law *– value-added tax (VAT) – services not subject to VAT - services exported out of Kenya - whether a service that was performed in Kenya for the benefit of a company in a foreign country was considered as an exported service – Value Added Tax, 2013, section 2.****Jurisdiction*** *– jurisdiction of appellate courts – matters to be handled by appellate courts – matters of law - what amounted to matters of law that were to be dealt with by an appellate court.****Statutes*** *– statutory instruments – coming into force of statutory instruments – requirement to table Regulations before Parliament - what was the effect of failure to table Regulations before Parliament within the required time – Constitution of Kenya, 2010, article 94; Statutory Instruments Act, 2013, section 11(4).* ***Contract Law*** *– agency contracts - nature of an agency relationship - what was the nature of an agency relationship"*

Brief facts The respondent was a Kenyan limited liability company and the exclusive local and shipping agent of WEC Lines BV (WEC BV) a company incorporated in the Netherlands pursuant to an agency agreement dated January 1, 2009 (the agency agreement). WEC BV's business consisted of maritime transportation of containerized goods to, from, or through territories and operated vessels calling at various ports in those territories. As WEC BV's agent, the respondent was responsible for representing it in the daily operations related to WEC BV's activities in Kenya. On various dates, the respondent made value-added tax (VAT) refund applications amounting to Kshs 6,440,624.00 for the income period February 2015 to January 2018 to the appellant (the Commissioner) on the basis that it was offering zero-rated services to WEC BV being exported services and supply of taxable services to international sea or air carriers on international voyage or flight. After considering the applications, the Commissioner informed the respondent that it had rejected the same after reviewing the agency agreement because from the agreement, the respondent was paid a commission and that the services offered by the respondent included solicitation of business, customer service, booking, documentation, quotation of rates, collection, administration and forwarding of claims. The Commissioner further cited regulation no. 13 of the VAT Regulations, 2017 in concluding that the respondent's supplies did not qualify as exported services and as such were taxable at 16%. The respondent formally objected and the Commissioner in turn rendered its objection decision where it reaffirmed its earlier decision of rejecting the refund claims. The respondent was dissatisfied with that decision and lodged an appeal at the Tax Appeals Tribunal (the Tribunal). The Tribunal allowed the respondent's appeal and set aside the Commissioner's objection decision subject to the Commissioner's right to verify the respective refund claims before settling the same. Aggrieved by that decision, the Commissioner filed the instant appeal.

Issues

i. Whether a service that was performed in Kenya for the benefit of a company in a foreign country was considered as an exported service.
ii. What amounted to matters of law which were to be dealt with by an appellate court"
iii. What was the effect of failure to table Regulations before Parliament within the required time"
iv. What was the nature of an agency relationship"

Held

1. The court was exercising appellate jurisdiction that was circumscribed by section 56(2) of the Tax Procedures Act (TPA) which provided that an appeal to the High Court or to the Court of Appeal would be on a question of law only. An appeal limited to matters of law did not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.
2. What amounted to matters of law were the interpretation or construction of the Constitution, statute or regulations made or their application to the sets of facts established by the trial court. The court's engagement with the facts was limited to background and context and to satisfy itself, when the issue was raised, whether the conclusions of the trial court were based on the evidence on record or whether they were so perverse that no reasonable tribunal would have arrived at them. The court could not be drawn into considerations of the credibility of witnesses or which witnesses were more believable than others; by law that was the province of the trial court.
3. When a court that was limited to dealing with matters of law had a concern regarding the issues that dealt on facts, then the court would also be limited to re-evaluation of the lower court's conclusions and if the conclusions were erroneous and were not supported by evidence and the law, then the matter became a point of law.
4. Section 11(4) of the Statutory Instruments Act, 2013, which provided that if a copy of a statutory instrument that was required to be laid before Parliament was not so laid in accordance with that section, the statutory instrument would cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void, was mandatory and the consequence of failure to comply with the procedure rendered the VAT Regulations, 2017 void. That requirement was not idle as it was a manifestation of the legislative authority vested in Parliament under article 94 of the Constitution of Kenya, 2010 (Constitution). More particularly, article 94(5) which provided that no person or body, other than Parliament had the power to make provision having the force of law in Kenya except under the authority conferred by the Constitution or legislation.
5. Even if the VAT Regulations, 2017 had not been declared invalid, it was the affirmative duty of the court to give effect not only the Constitution but clear provisions of statute. The VAT Regulations, 2017 ceased to have any effect immediately on the 8th day after the Regulations were not tabled before the National Assembly. The Commissioner could not apply them to the respondent's case as they were at the time null and void.
6. The respondent was an agent of WEC BV and their relationship was governed by the agency agreement. As an agent, any contract or contact made by the respondent to a third party was essentially a contractual relationship between the principal and the third party and all actions by agents were deemed to be those of the principal.
7. Agency was the fiduciary relationship which existed between two persons, one of whom expressly or impliedly manifested assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifested assent so to act or so acted pursuant to the manifestation. The one on whose behalf the act or acts were to be done was called the principal. The one who was to act was called the agent. Any person other than the principal and the agent could be referred to as a third party.
8. A general agent was an agent who had authority to act for his principal in all matters concerning a particular trade or business, or of a particular nature; or to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal. There was no privity of contract between the respondent and the importers of cargo who contract with the principal.
9. The Commissioner had not pointed to any legal authority that displaced the ordinary principal/agent relationship. Therefore, the greatest beneficiary and consumer of the

respondent's services of marketing, customer care and post landing services was its principal WEC BV. It was WEC BV who would benefit from their business being marketed by the respondent. WEC BV would also be the beneficiary of good customer care relations and post landing services offered by the respondent as the respondent was offering those services on behalf of WEC BV and never contracted any third parties, customer and/or importers on its own behalf.

10. Section 2 of the Value Added Tax Act, 2013, defined services exported out of Kenya as a service provided for use or consumption outside Kenya and for a service to be deemed an exported service, it did not matter whether that service was performed in Kenya or outside Kenya. The determining factor was the location where that service was to be finally used or consumed. WEC BV, a company incorporated in the Netherlands stood to benefit from the services offered by the respondent and the services offered by the respondent to them were exported services that were not consumed in Kenya and thus were zero-rated for purposes of VAT. The respondent having made zero-rated supplies was entitled to VAT refunds due to it.

Appeal dismissed.

Orders *costs to the respondent.*

Citations **Cases**

1. *Commissioner of Domestic Taxes v Total Touch Cargo Holland* Income Tax Appeal 17 of 2013; [2018] eKLR — (Explained)
2. *Mati, John Munuvev Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu* Election Petition Appeal 5 of 2018; [2018] eKLR — (Explained)
3. *Keroche Breweries Limited & 6 others v Attorney General & 10 others* Petition 295, 309, 314 of 2015 & Judicial Review 231, 242, 246 & 247 of 2015 (Consolidated); [2016] eKLR — (Mentioned)
4. *Libert Forwarders (K) Ltd v Kenya Ports Authority* Civil Suit 607 of 2001; [2002] eKLR — (Mentioned)
5. *Mutegi Mercy Kirito v Beatrice Nkatha Nyaga& 2 other*s Civil Appeal 48 of 2013; [2013] eKLR — (Mentioned)
6. Otieno & another v Council of Legal Education Civil Appeal 38 of 2018; [2021] eKLR — (Mentioned)
7. *Tax Justice Network- Africa v Cabinet Secretary for National Treasury & 2 others* Petition 494 of 2014; [2019] eKLR — (Mentioned)

Statutes

1. Constitution of Kenya, 2010 article 94(5) — (Interpreted)
2. Statutory Instruments Act, 2013 (Act No 23 of 2013) section 11(1)(4) — (Interpreted)
3. Tax Procedures Act, 2015 (Act No 29 of 2015) section 56(2) — (Interpreted)
4. Value Added Tax Act, 2013 (Act No No 35 of 2013) section 2 — (Interpreted)
5. VAT regulations, 2017 (Act No 35 Sub Leg) — (Interpreted)

Advocates*1. Ms Muruka Advocate, instructed by Kenya Revenue Authority* for the appellant2. *Mr Kimani, SC with him Mr Ruto instructed by Hamilton, Harrison and Mathews Advocates* for the respondent.

Judgment

Introduction and Background

1.The respondent is a Kenyan limited liability company and the exclusive local and shipping agent of WEC Lines BV (“WEC BV”) a company incorporated in the Netherlands pursuant to an Agency Agreement dated January 1, 2009(“the Agency Agreement”). WEC BV’s business consists of maritime transportation of containerized goods to, from or through territories and operates vessels calling at various ports in those territories. As WEC BV’s agent, the Respondent is responsible for representing it in the daily operations related to the WEC BV’s activities in Kenya.

2.On various dates, the respondentmade VAT refund applications amounting to KES 6,440,624.00 for the income period February 2015 to January 2018 to the appellant (“the Commissioner”) on the basis that it was offering zero rated services to WEC BV being exported services and supply of taxable services to international sea or air carriers on international voyage or flight. After considering the applications, the Commissioner, in its letter dated April 18, 2018 informed the Respondent that it had rejected the same after reviewing the Agency Agreement because from the said Agreement, the respondent is paid a commission and that the services offered by the respondent include but are not limited to solicitation of business, customer service, booking, documentation, quotation of rates, collection, administration and forwarding of claims. The Commissioner further cited Regulation No. 13 of the VAT Regulations, 2017 in concluding that the respondent’s supplies do not qualify as exported services and as such were taxable at 16%.

3.The respondentformally objected to this response through its letter dated May 17, 2018and the Commissioner in turn rendered its objection decision on May 25, 2018(“the Objection Decision”) where it reaffirmed its earlier decision of rejecting the refund claims. The Commissioner insisted, inter alia, that only services provided to the vessels themselves and not its owners were zero-rated.

4.The respondentwas dissatisfied with the Commissioner’s Objection Decision and lodged an appeal at the Tax Appeals Tribunal (“the Tribunal”). The Tribunal heard the parties’ arguments and submissions and in its decision framed two issues for determination; whether the provisions of the VAT regulations, 2017 supersede the provisions of the VAT Act, 2013 and whether the respondent’s services are zero-rated for VAT and if so, whether it was entitled to a refund. On the first issue, the Tribunal found that there was no evidence that the VAT Regulations, 2017 were tabled before the National Assembly for approval and therefore the validity thereof was in doubt and even if they were, a subsidiary legislation such as the regulations could not override the respective primary legislation, the VAT Act, 2013.

5.On the second issue, the Tribunal framed two sub-questions; who is the consumer of the agency services provided by the respondentand did the respondentprovide services to WEC BV’s clients, the importers" The Tribunal found that the respondentcarried out agency services as an agent of WEC BV in Kenya and that WEC BV is resident in Netherlands and was thus the recipient and consumer of the agency services and that consequently, the agency services were exported out of Kenya and are therefore zero rated for VAT in accordance with paragraph(1) of the Second Schedule to the VAT Act, 2013, being in respect of exportation of taxable services.

6.The Tribunal further found that the respondenthad no agreements with the importers and only

interacted with them in its capacity as an agent of WEC BV and that undoubtedly, the importers could have benefitted from the activities of the respondent. Notwithstanding, the Tribunal held that the respondentdid not provide services to the importers. From the totality of the evidence, the Tribunal found that the respondentis registered for VAT and made zero rated supplies and is therefore entitled to the VAT refunds. Thus the Tribunal allowed the respondent's appeal and set aside the Commissioner's Objection Decision subject to the Commissioner's right to verify the respective refund claims before settling the same.

7.It is this decision by the Tribunal that is the subject of this appeal which is grounded on its memorandum of appeal dated 14th September 2020. The Commissioner faults the Tribunal's findings that the VAT Regulations 2017 are in conflict with the parent Act and argues that they complement each other; that the Tribunal failed to appreciate the services rendered by the respondent of marketing, customer care and Post Landing services were used and consumed in Kenya and that the Tribunal failed to take cognizance of the tri-partite transaction between the respondent, WEC BV and the importers thereby failing to appreciate that the respondent was offering management and agency services to WEC BV and local services to the importers.

8.The respondentopposes the appeal. It has filed its Statement of Facts dated 28th October 2020. The appeal was canvassed by way of written submissions.

Analysis and Determination

9.I have gone through the appeal, the record and submissions of the parties. As submitted by the respondent, this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the TPA which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". An appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. The Court of Appeal in John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR summarised what amounts to "matters of law" as follows:(38)[T]he interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.

10.Further, and as has also been submitted by the respondent, in as much as the court cannot interfere with the factual findings of the Tribunal which are conclusive, the Court of Appeal, in Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others NYR CA Civil Appeal No 48 of 2013 [2013] eKLR stated that when a court that is limited to dealing with matters of law has a concern regarding the issues that dealt on facts, then the court will also be limited to re-evaluation of the lower court's conclusions and if the conclusions are erroneous and are not supported by evidence and the law, then the matter becomes a point of law.

11.The issues falling for determination in this appeal are those that have been raised by the Commissioner and that the parties have submitted on. They are whether the VAT Regulations, 2017 are applicable and were in conflict with the VAT Act, 2013, whether the marketing, customer care and post landing services offered by the respondentwere used and consumed in Kenya and whether these services were being offered to third parties, customers and/or importers as the consumers. I will

therefore deal with those issues accordingly.

Applicability of the VAT Regulations

12.As stated in the introductory part, the Commissioner's decision to reject the respondent's VAT refund claims was partly grounded by the Commissioner's citation of regulation 13 of the VAT Regulations, 2017. It is common ground and the Commissioner admitted that these Regulations were never tabled before the National Assembly as is required by section 11(1) of the Statutory Instruments Act, 2013 which provides that "Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before parliament."

13.The Commissioner argued that while the Regulations were not tabled before the National Assembly, they have not been found to be unprocedural and/or illegal and are therefore operational. The respondenton the other hand submitted that the same were void by operation of law pursuant to section 11(4) of the Statutory Instruments Act, 2013 which provides that "If a copy of a statutory instrument that is required to be laid before parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void"

14.The aforesaid provisions are mandatory and the consequence of failure to comply with the procedure renders the regulations void (see Otieno and Another v Council of Legal Education Civil Appeal 38 of 2018 [2021] KECA 349 (KLR) (17 December 2021), Keroche Breweries Limited and 6 Others v Attorney General and 10 Others [2016]eKLR, Tax Justice Network Africa v Cabinet Secretary for National Treasury and 2 Others [2019] eKLR). This requirement is not idle as it is a manifestation of the legislative authority vested in Parliament under article 94 of the Constitution. More particularly, article 94(5) which provides that, ''No person or body, other than Parliament has the power to make provision having the force of law in Kenya except under the authority conferred by this Constitution or legislation.''

15.Even if the VAT Regulations, 2017 had not been declared invalid, it is the affirmative duty of this court to give effect not only the Constitution but clear provisions of statute. I therefore hold that the VAT Regulations, 2017 ceased to have any effect immediately on the 8th day after the said Regulations were not tabled before the National Assembly. The Commissioner could not apply them to the Respondent's case as they were at the time null and void.Whether the Marketing, Customer Care and Post Landing services offered by the respondentwere used and consumed in Kenya

16.The parties took diametrically opposed views on this issue. The Commissioner contended that these services were consumed in Kenya as they were offered to customers, third parties and/or importers who were based in Kenya and that the respondent, as an agent, could not offer services to its principal WEC BV. On its part, the respondentsubmitted that all facets of the services it provided as agent were for the benefit of WEC BV, who is the person who used and consumed these services. That these are services provided by a Kenyan entity to a non-resident person and therefore fall within the ambit of the definition of a service exported out of Kenya and are zero-rated for VAT purposes.

17.It is not in dispute that the respondentwas an agent of WEC BV and that their relationship was governed by the Agency Agreement. As an agent, it follows that any contract or contact made by the respondent to a third party is essentially a contractual relationship between the principal and the third party and that all actions by agents are deemed to be those of the principal. This is a settled principle of law and as the respondent submits, the learned authors of Bowstead & Reynolds on Agency define

agency as '……..the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.' They further define a general agent to be '….an agent who has authority to act for his principal in all matters concerning a particular trade or business, or of a particular nature; or to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal.' In this respect therefore, there is no privity of contract between the respondentand the importers of cargo who contract with the Principal (see Libert Forwarders (K) Ltd v Kenya Ports Authority MSA HCCC No 607 of 2001[2002] eKLR).

18.The Commissioner has not pointed to any legal authority that displaces the ordinary principal/agent relationship. Therefore, I have little difficulty in coming to the conclusion that the greatest beneficiary and consumer of the respondent's services of marketing, customer care and post landing services was its principal WEC BV. It is WEC BV who would benefit from their business being marketed by the respondent. WEC BV would also be the beneficiary of good customer care relations and post landing services offered by the respondentas the respondentwas offering these services on behalf of WEC BV and never contracted any third parties, customer and/or importers on its own behalf.

19.Section 2 of the VAT Act, 2013 defines "services exported out of Kenya" as 'a service provided for use or consumption outside Kenya' and as the court in Commissioner of Domestic Taxes v Total Touch Cargo Holland HC ML ITA No. 17 of 2013 [2018] eKLR held, for a service to be deemed an "exported service", it matters not whether that service was performed in Kenya or outside Kenya. The determining factor is the location where that service is to be finally used or consumed. WEC BV, a company incorporated in the Netherlands stands to benefit from the services offered by the respondent as stated above and it follows that the services offered by the respondent to them were exported services that were not consumed in Kenya and thus were zero-rated for purposes of VAT.Whether these services were being offered to third parties, customers and/or importers as the consumers

20.I have already found that the ultimate consumer of the respondent's services was its principal WEC BV and that any contracts entered into by the respondentwith third parties, customers and/or importers were done for and on behalf of the WEC BV and not on behalf of the respondentitself.

Disposition

21.For the reasons I have set out above, I find and hold that the Tribunal did not err in its determination that the respondent, having made zero-rated supplies, is entitled to VAT refunds due to it. The Commissioner's appeal lacks merit is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.D. S. MAJANJA JUDGE Ms Muruka Advocate, instructed by Kenya Revenue Authority for the Appellant.Mr Kimani, SC with him Mr Ruto instructed by Hamilton, Harrison and Mathews Advocates for the Respondent.