Case Number	Income Tax Appeal E152 of 2020
Parties	Commissioner of Domestic Taxes v Dodwell and Company (EA) Limited
Case Class	Civil
Judges	A Mabeya
Advocates	1.Ms Ndungu h/b for Mrs. Makworo 2.Mr. Asiimwe h/b for Ombachi
Case Action	
Case Outcome	Notice of Motion dismissed with costs to the Interested Party
Date Delivered	02 Sep 2021
Court County	Nairobi
Case Court	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Court Division	Commercial and Tax

Commissioner of Domestic Taxes v Dodwell and Company (EA) Limited (Income Tax Appeal E152 of 2020) [2021] KEHC 4 (KLR) (Commercial and Tax) (2 September 2021) (Judgment)
Neutral citation number: [2021] KEHC 4 (KLR)
Republic of Kenya
In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
September 2, 2021
A Mabeya, J
Income Tax Appeal No. E152 of 2020
Between
Commissioner of Domestic Taxes
Appellant
and
Dodwell and Company (EA) Limited
Respondent
(Being an appeal against the Judgment of the Tax Appeals Tribunal delivered on 23rd October 2020 In TAT No. 63 of 2016)
Judgment
1.The appellant conducted an audit of the respondent's business for the period January 2012 and December 2015. By a letter dated 30/11/2016, he raised an additional assessment of Kshs. 99,484,733/= for principal tax, penalties and interest relating to Corporate Income Tax (CIT), Withholding Tax (WHT) and Value Added Tax (VAT).
2.By a letter dated 21/12/2016, the respondent objected to the additional assessment. However, the appellant upheld its assessment vide its decision of 20/2/2017 causing the respondent to file an appeal before the Tax Appeals Tribunal "the Tribunal"). By its decision made on 23/10/2020, the Tribunal partially upheld the respondent's appeal.
3.Being dissatisfied with that decision, the appellant lodged this appeal to set aside part of that decision on several grounds. The Grounds can be summarized into 3 as follows; that the tribunal erred in failing to find that an empty container storage yard does not qualify for industrial building allowance deduction under paragraph 5(1) (a) (iv) (B) of the second schedule of the Income Tax Act, that the tribunal erred in its application of section 56 (1) of the Tax Procedures Act 2015 and section 30 of the Tax Appeals Tribunal Act 2013 which vested the burden of disproving assessment on the taxpayer and that the tribunal erred in failing to find that all services which were disallowed by the appellant were not listed under the second schedule of the VAT Act or were services that were consumed locally.
4.The respondent filed its statement of facts dated 3/2/2021 in opposition to the appeal. It contended that it offers services to non-resident shipping lines, including the handling, storage, repair, and cleaning of empty containers for onward transportation to the non-resident shipping line's destination of choice.
5.That all the activities carried out at the respondent's container yard qualified as processes under paragraph 5(1) (a) (iv) (B) of the second schedule of the Income Tax Act. That the respondent's only business was to provide services to non-resident shipping lines pursuant to Depot Service Agreements, that those services were consumed by shipping lines which were resident outside Kenya. That according to section 2 of the VAT Act 2013, the services the respondent offered to non-resident shipping lines were zero rated for VAT purposes under paragraph 1 of part A of the VAT Act.
6.In his submissions dated 26/2/2021, the appellant submitted that an empty container storage yard did not qualify for industrial building allowance deduction under paragraph 5 (1) (a) (i) (B) of the Second Schedule of the Income Tax Act. That the respondent's yard did not fit into the meaning of 'industrial building' under the Act. That it was therefore erroneous for the tribunal to allow industrial building allowance.
7.It was further argued that storage which was merely necessary and transitory incident of the

conduct of business was not sufficient. The respondent's storage was not an end in test itself and failed the test. That the empty returnable containers were not goods and materials and that what the respondent offered was only maintenance services.
8.It was further submitted that protective and indemnity services and survey and inspection services provided by the respondents were not listed under part A of the second schedule of the VAT Act 2013 as zero rated supplies. That the respondent failed to proof that these services were provided to persons outside the jurisdiction of Kenya.
9.In its submissions dated 4/5/2021, the respondent submitted that the appellant had introduced the issue whether the respondent's yard qualified to be an industrial building. That this was not an issue before the Tribunal as it was not raised by any of the parties. That it was neither raised in the respondent's memorandum of appeal dated 13/12/2020 and is therefore not an issue for determination before this court. That the Tribunal did not have an opportunity to address itself on this issue.
10.It was further submitted that the processes undertaken by the respondent in terms of handling, storage, repair and cleaning of empty containers qualified as 'any process' as provided for in paragraph 5(1)(a)(iv)(B) of the second schedule of the Income Tax Act. That the services offered by the respondent to non-resident shipping lines went beyond only storing the returned empty containers as alleged.
11.I have considered the pleadings, evidence and submissions on record. Before addressing the grounds raised, I wish to address the respondent's contention that appeared to be a preliminary objection. The respondent contended that by submitting on whether the respondent's container yard was not a building hence not entitled to industrial building allowance, the appellant had introduced a new case in its submissions. That the issue was not pleaded in the appellant's memorandum of appeal.
12.With due respect to the respondent, the first ground in the Memorandum of Appeal was that the Tribunal erred in failing to find that an empty container storage yard does not qualify for industrial building allowance deduction under the Income Tax Act. In this regard, the submission on whether the respondent's yard was a building or not under the Act was directly related to this ground. I therefore find that the issue is properly before Court.
13.I now turn to the grounds of appeal as summarized by the Court. On the first Ground, it was the appellant's case that an empty storage yard does not qualify for industrial building allowance under the provisions of paragraph 5 (1) (a) (iv) (B) of the second schedule of the Income Tax Act. It was also its case that the empty containers were not goods or materials.
14.The Income Tax defines an industrial building at paragraph 5 (1) of the second schedule of the Income Tax Act. It provides that;Subject to this paragraph, in this Schedule "industrial building" means—

(a)	a building in use—
	(i) for the purposes of a business carried on in a mill, factory or other similar premises; or
	(ii) for the purposes of a transport, dock, bridge, tunnel, inland navigation, water, electricity or hydraulic power undertaking; or
	(iii) for the purposes of a business which consists in the manufacture of goods or materials or the subjection of goods or materials to any process; or
	(iv) for the purposes of a business which consists in the storage of goods or materials—
	(v) for the purpose of a business consisting of ploughing or cultivating agricultural land as defined in paragraph 22 (other than land in the occupation of the person carrying on the business) or doing any other operation on such land, or threshing the crops of another person; or
	(vi) for the purposes of a business which may be declared by the Minister by notice in the Gazette as being within the provisions of this paragraph either generally, or in relation to a particular class, or in a particular instance within that class;
(b)	a prescribed dwelling-house, that is to say a dwelling-house constructed for and occupied by employees of a business carried on by the person owning such dwelling-house, and which conforms with conditions as may be prescribed;

(c)	a building which is in use as a hotel or part of a hotel and which the Commissioner has certified to be an industrial building where such a building in use as a hotel includes any building directly related to the operations of the hotel contained within the grounds of the hotel complex, including staff quarters, kitchens, and entertainment and sporting facilities;
(d)	a building in use for the welfare of workers employed in any business or undertaking referred to in item (a) of this subparagraph;
(e)	a building in use as a hostel or an educational building, or a building in use for training, provided such building has been certified by the Commissioner for the purposes of this paragraph;
(f)	a building in use as a rental residential building where such building is constructed in a planned development area approved by the Minister for the time being responsible for matters relating to housing;

15.It is not in dispute that the respondent has a yard for storage of empty containers. What is in dispute is whether the yard qualifies as a building for purposes of enjoying industrial building allowance under the Income Tax Act ("the Act"). In other words, is the yard an industrial building.
16.In answering this question, the meaning of the word industrial building has to be ascertained. The Act at paragraph 5(1) (a) (iv) provides that an industrial building is a 'building in use' forthe main purpose of a business which consists in the storage of goods or materials …. In this regard, the question is, did the respondent have a 'building in use'?
17.The respondent submitted that the Act recognizes that a building is a building first and foremost. It called upon the Court to find that a building meant a structure or an erection or an edifice or a construct.
18.*Black's Law Dictionary 2nd ed.* defines a building as;"A structure or edifice erected by the hand of man, composed of natural materials, as stone or wood, and intended for use or convenience.It also offers an alternative definition of a building to be;An edifice erected by art, and fixed upon or over the soil, composed of stone, brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed. Every building is an accessory to the soil, and is, therefore, real estate: it belongs to the owner of the soil".
19.The Income Tax Act makes several references to the word 'building'. Paragraph 24(3)(b) of the Act provides for Investment Deductions and states;"for the purposes of this paragraphd.'Building' includes any building structure…
20.What comes out clearly from the foregoing is that a building is a structure that sits on soil, or land. In this regard, the word building in the Income Tax Act was intended and indeed means in the ordinary sense, a structure.
21.The Act continuously makes reference to the manner in which a building, or a structure, is used. It is the use of a building that is considered when making a determination on whether or not the building in question is an industrial building. It only means that there must be an existence of a building first, for one to consider the use of that building and make a determination of the whether or not the building is an industrial building under the Act.
22.In the present case, the respondent had an empty yard. It stored empty containers in that yard for the benefit of non-resident shipping lines. It also offered other services including handling,

cleaning and repairing of the empty containers before they were transported to destinations appointed by those non-resident shipping lines. There is no mention of storage of the containers in any structure in the respondent's yard. Having no building as envisaged in the Act, there was no merit in establishing whether the services offered by the respondent qualified to enjoy industrial building allowance under the Income Tax Act.
23.In *Amalgamated Society of Engineers vs. Adelaide Steamship* (1920) 28 CLR 129 at 161-2 Higgins J stated: -"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable.""
24.In the upshot, I find that the Tribunal erred in failing to consider that an empty container storage yard did not qualify for industrial building allowance under the Act. The Tribunal's decision to set aside the appellant's assessment of Corporation Tax of Kshs. 4,367,134/= is hereby set aside.
25.The second and third grounds are inter-twined; that the Tribunal erred in the application of the burden of proof and that it failed to consider that all the services that were disallowed by the appellant were services that were either not listed under the second schedule of the VAT Act, or services that were consumed locally by virtue of the fact that local consumers were invoiced.
26.The respondent's case was that it offered zero rated services as the services were offered to consumers outside Kenya.
27.Section 2 of the VAT Act 2013 defines exported services and provides that;"Service exported out of Kenya means a service provided for use or consumption outside Kenya"
28.It then follows that, for a service to be considered as an export service, the service has to be consumed outside the jurisdiction of Kenya.
29.In *Commissioner of Domestic Taxes v Total Touch Cargo Holland* [2018] Eklr, the court observed that: -"A clear reading of this provision is that 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. Therefore, an exported service will be one which is provided for use or consumption outside Kenya".
30.In the present case, it was the respondent's case that it offered handling, storage, repair, and cleaning of empty container services to non-resident shipping lines. That the shipping lines were not resident in Kenya. That the services offered by the respondent ensured that the non-resident shipping lines can provide its future customers, wherever they may be, with clean and repaired containers. The respondent relied on the Depot Service Agreements between itself and the non-resident shipping lines as evidence.
31.Part A of the second schedule of the VAT Act 2013 provides for zero rated supplies, and includes 'Ship stores supplied to international sea or air carriers on international voyage or flight.' It is evident from the Depo Service Agreement between the respondent and non-resident shipping lines that the respondent's services qualified as 'ship stores supplied to international sea or air carriers on international voyage or flight.' The Tribunal correctly found that the respondent's services were zero rated.
32.The appellant was in agreement that some of the services offered by the respondent were indeed zero rated. However, it contended that there were invoices which were supplied by local consumers meaning that some services were consumed locally.
33.With due respect, there was no reference that was made to those invoices for the court's benefit. It was for the appellant to produce copies of those invoices for the evidentiary burden of proof to shift back to the respondent. This it did not and therefore, its contention remained just that, a mere allegation.
34.The record shows that the Tribunal was alive to the fact that the respondent bore the burden of disproving the appellant's assessment by dint of section 56(1) of the Tax Procedures Act. It also

considered the evidence before it and the legal provisions relied on by the respondent in finding that the nature of services offered were zero rated. The record provided by the respondent, including the Depot Service Agreement, aided the respondent in discharging its evidentiary burden. Accordingly, I find no justification to interfere with the Tribunal's finding in this regard.

35.It then follows that the appellant's appeal is partially successful. The Tribunal's decision of 23/10/2020 is hereby set aside in as far as the Corporation Tax of Kshs. 4, 367, 134/= is concerned. The Tribunals decision setting aside the appellant's assessment of Value Added Tax of Kshs. 82,881,988/= is hereby upheld.

36.Each party shall bear its own costs.

It is so decreed.**DATED** and **DELIVERED** at Nairobi this 2nd day of September, 2021.**A. MABEYA, FCI ArbJUDGE**