CASES DIGEST

ISSUE 8 | June 2022

Decisions on KRA cases

Kenya Revenue Authority

Tulipe Ushuru, Tujitegemee!

KENYA REVENUE AUTHORITY

Tulipe Ushuru, Tujitegemee!

A publication of the

Kenya Revenue Authority

Vision

A globally trusted revenue agency facilitating tax and customs compliance

Mission

To enhance mobilization of government revenue and to facilitate growth in economic activities and trade by ensuring compliance with tax and customs laws

Values

Trustworthy, Ethical, Competent, Helpful, Simple

Forward

Kenya Revenue Authority is the Government Agency established through the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya with the role of collecting revenue and enforcing tax laws. We are pleased to publish the 8th edition of the Kenya Revenue Authority (KRA) Cases Digest.

A number of decisions on various issues have been delivered by courts and Tribunals since the establishment of the Kenya Revenue Authority in the year 1995. This digest documents judicial jurisprudence as determined by Courts in Customs and tax cases.

This case digest focuses on refund of taxes and duties under the tax and customs laws respectively. It highlights the judgements issued by the Courts setting out guiding principles on the matters.

The digest is relevant to legal practitioners as reference point as precedent, scholars as a reference tool for training and reading, KRA staff and all persons interested in the Authority's operations as a guide on decisions relating to the tax matters.

I wish to thank the editorial and design teams for the concerted efforts made towards the publication of this 8th edition of the Kenya Revenue Authority cases digest.

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Executive Summary

This volume features cases on refund of tax and customs duty under tax and customs laws. It highlights the interpretation of the law by the courts on the provisions relating to tax refunds. In *High Court Tax Appeal No. E053 Of 2020 Commissioner Of Domestic Taxes Versus Sony Holdings Limited [2021] eKLR,* the court held that where the commissioner fails to make a refund decision within 90 days as provided for by section 47(3) of the Tax Procedures Act leading to a situation where the refund claim is neither denied nor rejected, the taxpayer is entitled to claim the returns in subsequent years until the matter is resolved. The court emphasized that it did not find anything in the Tax Procedures Act or that the commissioner pointed to any provision of the law which states that a taxpayer can only make a refund claim once whereupon the claim is extinguished notwithstanding that it has not been settled.

In *Tax Appeal No. E033 OF 2020 Commissioner of Domestic Taxes versus Unga limited [2021] eKLR,* the court upheld the decision of the Tax Appeals Tribunal, that the commissioner may not withhold a refund in anticipation of a tax liability. This was borne out of section 47(4) of the Tax Procedures Act that defines a refund as what is paid over when the commissioner has applied overpayment to payment of any tax owing by the taxpayer under the tax law. The court further stated that the commissioner did not demonstrate that Unga limited owed any tax under any tax laws which could be applied before the refund and violated Unga Ltd. Legitimate expectation by keeping them waiting for more than two years for their refund application to be resolved.

In *Income Tax Appeal E0100 of 2020 Commissioner of Domestic Taxes v Metoxide Ltd. [2021] eKLR,* the court held that the burden of proof lies on the taxpayer to prove a taxable supply or importation in order to be entitled to a refund on input Value Addition Tax. Since section 56 of the Tax Procedures Act lays the burden on a taxpayer to prove a tax decision is incorrect, it was therefore, upon the taxpayer to prove that they were entitled to tax deductions on the taxable supply. The court further stated, that the basis of the refund is not just evidence of the claimed VAT but proof that there was a taxable supply or importation which the tax was paid and therefore input tax claimed. It was also held that the commissioner is entitled to ask for additional information where the VAT refund is doubtful and satisfy that the self-assessment made by the taxpayer is in accordance to section 59 of the Tax Procedures Act and section 43 of the Value Addition Tax Act.

In *Tax Appeal No. E026 of 2020 Highlands Mineral Water Ltd v Commissioner of Domestic Taxes [2021] eKLR* the court held that section 17(1) and (2) of the VAT Act, permits the taxpayer to claim input tax at any time provided the claim falls within 6 months from period which the supply or importation occurred notwithstanding that the VAT Return is filed late. In other words, late filing does not preclude a taxpayer from claiming input VAT and that this claim ought to be allowed as long as Return is filed and claimed within six months from the date of supply or importation. Neither section 17 nor section 44 of the VAT Act permits the Commissioner to disallow input VAT claim on the ground that the VAT Return was filed outside the period permitted. The Commissioner's power is limited to allowing an extension of time for filing the return upon an application whose effect is to relieve the Tax payer from the penalty or accept the return and demand the appropriate penalty.

In *Petition No. 62 OF 2019: Louis Dreyfus Company (K) Limited v Kenya Revenue Authority [2021] eKLR*, the court held that the Commissioner's argument that the application for refund of overpaid tax was not responded because the Petitioner submitted a manual refund application instead of using the online iTax system in accordance with the guidelines might indeed be valid but it did not explain why it treated the two claims from the same taxpayer differently having replied to one application despite both applications being lodged manually. The court held that by failing to respond to the Petitioner's objection to the second claim, the Commissioner was deemed to have accepted that the overpaid tax was refundable. What only remained was for the particular claim to be subjected to the procedures in Section 47 of the Tax Procedures Act. Further, failure to make a decision on the Petitioner's application for refund on overpaid tax in one case and failing to make an objection decision in the other case violated the Petitioner's right to fair administrative action. On the issue of Constitutionality of Section 47(5) of the TPA, the court affirmed the position that the Petitioner being a taxpayer cannot compare itself to a state agency mandated to collect tax. The roles of the taxpayer and the tax collector in the tax regime are diametrically opposed and it cannot be said that there is discrimination when

different standards are applied to them. Accordingly, the Commissioner was ordered to consider the Petitioner's refund applications on merit and make a determination of the same within the statutory timelines of 90 days.

In *Petition No. 476 Of 2013: Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers) [2014] eKLR*, the court held that The taxpayer who carries on their business in accordance with the law and applies for a refund is entitled to the refund as a matter of right. The process of verification and processing the claim must, in the words of Article 47(1) of the Constitution, be efficient and expeditious. The Court held that he decision by the Commissioner to set off Kshs.235 million was unconstitutional and a violation of the petitioner's right under Article 47 of the Constitution. The Commissioner was further directed to determine the objection relating to the sum of Kshs 234,968,183/= and consider, process and pay out in accordance with the law, part of the Petitioner's VAT refund outstanding from the total of Kshs 742,815,181/= claimed.

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A.Digest of Cases on Assessment of taxes and duties

1. High Court Tax Appeal No. E053 of 2020 Commissioner of Domestic Taxes Versus Sony Holdings Limited (Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 27th March 2020 in Tax Appeal Tribnunal No. 376 of 2018)

Judge: D.S MAJANJA, J

Date of judgment: 13th May 2021

Keywords: Income Tax Refund, Burden of proof, Offset.

Sections of the law: 47 of the TPA, Section 97(b) of the TPA

Section 47(1) Tax Procedures Act

(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).

Implications

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

Background

The Commissioner appealed against the decision of the Tax Appeals Tribunal that Sony Holdings was entitled to a refund claim amounting to Kshs. 33,187,669.00 and that it was also entitled to carry forward tax credits until it is lawfully offset or refunded. After experiencing significant loses 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 ("the 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 by filing its Notice of Objection dated 28th September 2018. The Commissioner rejected the objection and affirmed its position in its decision contained in the letter dated 23rd October 2018. 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. 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.

In analysing the Appeal, the Tribunal allowed the appeal and held that Sony Holdings was entitled to the refund claim of Kshs. 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 by this decision, the Commissioner filed its Appeal at the High Court.

Section 47(3) Tax Procedures Act

(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

Issues for determination

a) Whether the Respondent was entitled to the Refund and whether the reasons given by the Commissioner are justified in law.

b) Whether the Commissioner had effected the Refund as tabulated in the Objection Decision.

c) Whether the Tribunal erred in directing that the Commissioner to remove Tax Rejection Orders 20148039985 of 4th January 2018, 20148051943 of 30th August 2018 and 20148036599 of 16th October 2017 from the Respondent's iTax platform.

Decision of the Court

The Court stated that "Despite communicating to the Respondent the Refund audit findings by the letter dated 25th January 2017, the Commissioner failed to make decision within 90 days as provided by sections 47(3) of the TPA. This communication was, in my view, ambivalent and did not amount to a decision. I therefore hold that 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 resolved.

I do not find anything in the TPA, nor has the Commissioner pointed to any provision of the law, that states that a taxpayer can only make a refund claim once whereupon the claim is extinguished notwithstanding that it has not been settled. Additionally, I reject the Commissioner's contention that the Respondent has committed an offence by making a claim that it genuinely believes it is entitled to when the Commissioner has not dealt with its application for the refund."

The Commissioner asserted in their Objection Decision that it 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 Sony Holdings. No evidence was afforded to reiterate that the assertions of the Objection Decision had been effected.

Section 48 of the TPA entitles 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.

Due to the inconsistencies of the Commissioner's actions and a lack of evidence to affirm its assertions, the Court subsequently dismissed the Commissioner's Appeal and affirmed the Tribunal's decision.

Read full judgment here

2. High Court Tax Appeal No. E033 OF 2020 Commissioner of Domestic Taxes versus Unga Limited (Being an Appeal from the Judgment of the Tax Appeals Tribunal at Nairobi delivered on 4th March 2020 in Nairobi Tax Appeal Tribunal No. 156 of 2017)

Judge: D.S MAJANJA, J

Date of judgement: 29th January 2021

Key words and Phrases: VAT Refund, legitimate expectation, Section 47 of the Tax Procedures Act

Sections of the Law: Section 23(1), 28, 29 47 of the Tax Procedures Act

Commissioner cannot withhold the VAT refund in anticipation of tax liabilities arising

"The Tax Procedures Act is on existing liabilities at the time of payment of the refund. Holding on to a refund payment by the Respondent in anticipation of a tax liability which has not crystallised in this case is not supported by law."

Implications of the judgment

When analysing a Taxpayer's Refund claim, the Commissioner ought to only consider existing liabilities not future or anticipated liabilities. There exists no provision of the Law that allows 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.

Background

The appeal is a dispute over a Value Added Tax (VAT) refund claim of Kshs. 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, "are 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 31st December 2013.

Vide a letter dated 27th June 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 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 15th September 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 Kshs. 189,958,332.00 was due and payable. Aggrieved by this decision, the

Commissioner filed an appeal against the Tribunal's Judgement at the High Court.

Issue

Whether the tax payer is 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.

Decision of the Court

In agreeing with the decision of the Tax Appeals Tribunal that the Commissioner was on the wrong in withholding the VAT refund in anticipation of tax liabilities arising, The learned Judge, Majanja J stated that I agree with the Tribunal that the Commissioner may not withhold a refund in anticipation of a tax liability. This is borne out section 47(4) of the TPA which provides that a refund is what is paid over when the Commissioner has 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."

Further, 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 7th October 2014 was clear that the VAT refunds were all processed which means that by that time, the Commissioner had conducted the verification required

The Court further found that the Commissioner had violated the Unga Limited's legitimate expectation by keeping them waiting for more than 2 years for their refund application to be resolved. The Judge further stated that as a public body, the Commissioner is 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.

The High Court subsequently agreed with the decision of the Tribunal and dismissed the Commissioner's Appeal by upholding that The Tax Procedures Act is on existing liabilities at the time of payment of the refund. Holding on to a refund payment by the Respondent in anticipation of a tax liability which has not crystallised in this case is not supported by law.

Read full judgment here

Section 47(4) of the TPA

"a refund is what is paid over when the Commissioner has 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."

3. Commissioner of Domestic Taxes v Metoxide Limited (Income Tax Appeal E100 of 2020) [2021] KEHC 3 (KLR) *(Beign an appeal against the Judgment of the Tax Appeals Tribunal No. 162 of 2020 delivered on 6/8/2020)*

r
Judge: A MABEYA, J

Date of judgement: 2nd September 2021

Key words and Phrases: refund on input VAT, burden of proof

Sections of the Law: Section 17 & 43 of the Value Added Tax Act**,** Section 56&59 of the TPA

Implications of the judgment

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.

Background

In the tax period between July and December 2014, the respondent received supplies that were subjected to VAT payments and later claimed for an input tax deduction. The appellant rejected the respondent's application for an input tax deduction on the grounds that one of the respondent's suppliers, Harsidhi Enterprises Limited (impugned entity) was involved in the 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 that could not have practically ferried the alleged supplied goods.

Issues

a) Whether it was mandatory for a trader to prove a taxable supply or importation in order to be entitled to a refund on input Value Added Tax.
b) Who bore the burden of proving that a tax decision was incorrect and when would that burden shift?
c) What were the documents required for a tax payer to be entitled to claim a refund?
d) Whether the Commissioner of Domestic Taxes had the discretion to ask for additional

Meaning of taxable supply to, or importation made by.

"In order for a trader to be entitled to a refund on input VAT, he has to prove a taxable supply or importation. The basis of the refund was not just evidence of payment of the claimed VAT, but proof that there was a taxable supply or importation for which the tax was paid and therefore input tax was claimable" D.S. Majanja

information to satisfy himself as to the self- assessment made by a tax payer.

Decision of the Court on the issues

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. Since the instant case dealt with an input tax deduction, it was upon the respondent to prove that it was entitled to the same contrary to the findings of the appellant.

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 proof that there was a taxable supply or importation for which the tax was paid and therefore input tax was claimable.

Where a VAT refund claim is doubtful, the appellant is entitled to ask for additional information to satisfy himself as to the self-assessment made by a taxpayer as per section 59 of the Tax Procedures Act and section 43 of the VAT Act. Proof of payment and production documents to an entity does not discharge the burden of proof in a VAT refund claim as production records could not be proof that the materials used was the ones supplied by the impugned entity. However, 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 such as 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.

The respondent having not discharged its burden of proof, it followed that 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.

Read the full judgment here

4. High Court Tax Appeal No. E026 of 2020 - Highlands Mineral Water Limited V Commissioner of Domestic Taxes [2021] eKLR

C

Coram: D.S. Majanja

Date of Judgement: 13th May 2021

Key Sections of the law: Section 17(1) & (2) & 44 of The Value Added Tax Act,

Key words and Phrases: refund on input VAT, late return filing

Implications of the Judgment

A taxpayer can claim input tax at any time provided the claim falls within 6 months from period which the supply or importation occurred notwithstanding that the VAT Return is filed late

Implications of the judgment

Section 17(1) and (2) of the *VAT Act*, permits the taxpayer to claim input tax at any time provided the claim falls within 6 months from period which the supply or importation occurred notwithstanding that the VAT Return is 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*.

Background

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 by its letter dated 16th November 2017. In essence, 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* ("the *VAT Act*").

The Commissioner issued its Objection decision on 1st February 2018 where it disallowed the Appellant's input tax claims for the years of income 2014-2017 and proceeded to assess the Appellant's 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 Tribunal which at the conclusion of the hearing dismissed the Appellant's appeal and confirmed the Commissioner's assessment and demand.

The Tribunal in arriving at its decision considered whether the Commissioner was justified in disallowing input tax claimed by the Appellant due to late filing of its VAT returns and or whether payment for late submission penalty for the VAT return by the Appellant allowed it to deduct input tax beyond the prescribed time. The Tribunal held that the wording of **section 17(2)** of the ***VAT Act*** is clear and ambiguous and that where a tax payer filed its VAT return late, then the input VAT should only be allowed for deductibility to the extent that it is within 6 months at the time of filing the return. The Tribunal referred to **section 44** of the ***VAT Act*** which required the Tax payer to have filed its VAT Return not later than the twentieth day after the end of that period unless the tax payer has sought and obtained an approval from the Commissioner for an extension of time to submit the return late. The Tribunal therefore concluded that the 6-month limit would only cease to apply where the tax payer has sought and obtained the Commissioner's approval to submit a late return. The Tribunal also took the position that the payment of a penalty for late filing of a VAT return does not give a taxpayer the right to claim input tax outside the 6-month period unless the Commissioner has approved the late filing.

Aggrieved by the decision of the 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 for Determination

a) Interpretation of section 17 (1) and (2) of the VAT Act and the implications thereof.

Determination by the High Court

The right of deduction of input tax is an integral part of the VAT scheme as a taxable person who makes a transaction in respect of which VAT is 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 is deductible.

The court was of the view that **section 17** of the VAT Act does not deal with or mention the filing or otherwise of VAT Returns and the plain and unambiguous language of **section 17** of the ***VAT Act*** is clear that the only conditions provided for a Taxpayer to qualify for input VAT deduction are:

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 is deducted by a registered person on taxable supplies made by him; and
c) That the input tax is to be allowable for deduction within six months after the end of the tax period in which the supply or importation occurred.

The court further stated that the proper way of claiming input tax is by filing the appropriate return. Section 44 of the *VAT Act* deals with submissions of returns and the consequences thereof. It requires 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 failure to which the law imposes a penalty on a person who fails to submit a return as required.

The court stated that, sections 17 and 44 of the *VAT Act* should not be conflated as they deal with different subjects. Section 17 falls within PART VI of the *Act* dealing with deduction of input tax and provides for, *"Credit for input tax against output tax"* while section 44 falls under PART XI dealing with Invoices, Records, Returns and Assessment and provides for, *"Submissions of returns"*. Both subjects are different and section 44 deals 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. There is no 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.

The court held that section 17(1) and (2) of the *VAT Act*, permits the taxpayer to claim input tax at any time provided the claim falls within 6 months from period which the supply or importation occurred notwithstanding that the VAT Return is filed late. In other words, the fact of late filing does not preclude a taxpayer from claiming input VAT and that this claim ought to be allowed as long as Return is filed and claimed within six months from the date of supply or importation. Neither section 17 nor section 44 of the *VAT Act* permits the Commissioner to disallow input VAT claim on the ground that the VAT Return was filed outside the period permitted.

Conditions to claim input VAT relating to Purchases made

*"The plain and unambiguous language of **section 17** of the **VAT Act** is clear that the only conditions provided for a Taxpayer to qualify for input VAT deduction are:*

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 is deducted by a registered person on taxable supplies made by him; and
c) That the input tax is to be allowable for deduction within six months after the end of the tax period in which the supply or importation occurred."

." Justice D.S. Majanja.

The Commissioner's power is limited to allowing an extension of time for filing the return upon an application whose effect is to relieve the Tax payer from the penalty or accept the return and demand the appropriate penalty.

Accordingly, the Tribunal and the Commissioner erred by holding that any input tax claimed in a return filed by the Appellant out of time is disallowed. 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***.

Read the full judgment here

5. High Court Petition No. 62 Of 2019: Louis Dreyfus Company (K) Limited V Kenya Revenue Authority (As Consolidated with Petition No. 64 Of 2019) Louis Dreyfus Company (K) Limited V Kenya Revenue Authority.

Judge : W. Korir.

Date of delivery of Judgment: 11th March 2021.

Key Articles/Sections of the law: Article 47 of the Constitution of Kenya, 2010, Section 47 Tax Procedures Act, Section 52 Tax Procedures Act

Key Words and Phrases: Refund, Withholding VAT, Right to Fair Administrative Action

Implications

The statutory provisions for refund of overpayment of value Added Tax provides a procedure to be followed both by the tax collector and the taxpayer claiming the refund. When the tax collector fails to respond to a Taxpayer's application, they are deemed to be in breach of the statutory requirements and thus the taxpayer is free to seek redress from a Court of competent Jurisdiction.

Implications of the Judgment

The statutory provisions for refund of overpayment of value Added Tax provides a procedure to be followed both by the tax collector and the taxpayer claiming the refund. When the tax collector fails to respond to a Taxpayer's application, they are deemed to be in breach of the statutory requirements and thus the taxpayer is free to seek redress from a Court of competent Jurisdiction.

Background

The judgment was in respect of two consolidated matters being petition No. 62 of 2019 and 64 0f 2019 filed by the same Petitioner, Louis Dreyfus Company (k) Limited, against the same Respondent, Kenya Revenue Authority.

The first petition, Petition No. 62 of 2019 relates 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 claims that it made an application for a refund of Withholding VAT (WHVAT) by letter dated 18th December, 2017 and filed with the respondent on 19th December 2017 in accordance with the provisions of section 47 of the Tax Procedures Act and did not receive any response from the Commissioner.

The second petition, Petition No. 64 of 2019, also relates to an alleged overpayment of WHVAT of Kshs. 164, 586,437 during the 2016 year of income. The Petitioner avers that it made an application for a refund through a letter dated 29th March 2018. According to the Petitioner, its claim was rejected by the Commissioner through a letter dated 20th June, 2018 but received on 26th July, 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 is 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 26th July, 2018 to the Commissioner's refund decision but the Commissioner did not respond. It is the Petitioner's assertion that its objection was deemed to have been allowed by virtue of Section 51(11) of the TP 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 offends the provisions of Section 52 of the Tax Procedures Act which provides 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% is not subject to refund; and, that there is no provision for the claimed refund under the VAT Act and the VAT Regulations.

The Commissioner also challenged the jurisdiction of the Court asserting that the Petitioner had brought the matter to the wrong forum as the Tax Appeals Tribunal Act, 2013 ('TAT Act') provides that the Tax Appeals Tribunal ('Tribunal') is the body mandated to deal with tax disputes.

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General Presumption on constitutionality of statutory provisions

This principle was captured by ***the Court of Appeal of Tanzania in the case of Ndyanabo v Attorney General [2001] EA 495 thus****: "Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative."*

Issues for determination

a) Whether this Court has jurisdiction to hear and decide this petition in light of the jurisdiction bestowed upon the Tribunal by the TAT Act;

b) Whether the Commissioner violated the Petitioner's right to property and fair administrative action;

d) Whether Section 47(5) of the Tax Procedures Act is unconstitutional for being discriminatory in nature;

Determination by the court

The Commissioner's argument was that the application for refund of overpaid tax was not responded because the Petitioner submitted a manual refund application instead of using the online iTax system in accordance with the guidelines. Further, pursuant to Section 73 of the Tax Procedures Act, the Commissioner had issued a notice informing the public that the correct avenue for lodging claims for VAT refunds with effect from the 31st October, 2015 was the iTax system. It was the Commissioner's argument that Section 47(1) of the TP Act required that an application for a refund of overpaid tax be made in the "approved form" and the approved form in the circumstances was the iTax system. It was thus the Commissioner's position that there was no proper claim for refund in respect of the first petition.

The court said that the Commissioner's argument might indeed be valid but it did not explain why it treated the two claims from the same taxpayer differently. It was noted that although both applications for refund were lodged manually, the Commissioner replied to one application and ignored the other. This action could only mean that it accepted applications for refund of overpaid tax lodged both manually and through the iTax system.

The Court further stated that 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 Commissioner had not made a decision that could be escalated to the Tribunal as per the provisions of Section 52 of the Tax Procedures Act.

The Court held that in the circumstances of the case the Petitioner had no viable remedy. Thus the Constitutional and Human Rights Division of the High Court had jurisdiction to hear and determine the Petitions.

It was clear and undisputed that there was an overpayment of WHVAT by the Petitioner, which the Commissioner had not refunded. The said arguments go into the substance of the dispute between the parties herein. In view of the decision to be arrived at in the judgement, the Court did not find it necessary to address the issue as to whether the law allowed a refund of WHVAT.

It was, nevertheless, noted that by failing to respond to the Petitioner's objection to the second claim, the Commissioner was deemed to have accepted that the overpaid tax was refundable. What only remained was for the particular claim to be subjected to the procedures in Section 47 of the Tax Procedures Act. As such, the Commissioner 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.

The Court held that, in determining whether a given statutory provision is constitutional, it was important to start with the general presumption that every Act of Parliament is constitutional. This principle was captured by **the Court of Appeal of Tanzania in the case of Ndyanabo v Attorney General [2001] EA 495 thus**: "*Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative."*

The Learned Judge was therefore persuaded by the decision of Majanja J, in case of **Ericsson Kenya Limited v Attorney General & 3 others [2014] eKLR.** The Petitioner being a taxpayer cannot compare itself to a state agency mandated to collect tax. The roles of the taxpayer and the tax collector in the tax regime are diametrically opposed and it cannot be said that there is discrimination when different standards are applied to them. There is therefore nothing unconstitutional in Section 47(5) of the Tax Procedures Act. The fact that interest only accrue on pending refunds after two years does not render Section 47(5) of the Tax Procedures Act unconstitutional. Indeed, declaring Section 47(5) unconstitutional will give the Commissioner free rein as it will 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.

In both Petitions, the Commissioner was ordered to consider the Petitioner's refund applications on merit and make a determination of the same within the statutory timelines of 90 days.

Read the full judgment here

6. High Court Petition No. 476 of 2013: Tata Chemicals Magadi Limited V. The Commissioner of Domestic Taxes

***Coram**: D.S Majanja*

***Date delivered:** 14th April, 2014*

***Key Words**: VAT Refund, Set-off,*

***Sections of the Law:** Article 47 of the Constitution*

Implications of the Judgment

The Value Added Tax Act provides for payment of value added tax refunds. When a taxpayer requests the tax collector for payment of VAT refund, it is incumbent upon the tax collector to access the prayers of the taxpayer through its various divisions and respond to the requests made in a timely and efficient manner. As it stands, a taxpayer claiming a VAT refund is entitled to receive it and the failure to process it timeously is a violation of its right to fair administrative action protected under Article 47 of the Constitution.

Background

The petitioner is engaged in the business of manufacturing Soda Ash and salt in Kenya. The petitioner exports approximately 90% of it soda ash and as a result it is in a perpetual credit position as a result of supplying zero rated goods which entitles the petitioner to VAT refunds.

The Petitioner contends that the Commissioner has failed to make payment of VAT refunds totalling to Kshs 742,815,182/= and is apprehensive that future VAT refunds will not be settled as well. The Petitioner complains that the failure to receive VAT refunds has placed it in a precarious financial situation that has jeopardised its export market position and has had a negative impact on its customer base.

The Petitioner averred that the Commissioner had not dealt with its objection but instead in an email dated 3rd September 2013 informed the Petitioner that Kshs 235 million would be set off against refunds due to it. The petitioner's issued demand letters dated 13th and 23rd September 2013 querying the unlawful set off but no response was forthcoming from the Commissioner. The petitioner sought to quash the decision to set off the Kshs 235 million on the ground that the set off is unlawful and a violation of its right to fair administrative action under Article 47 of the Constitution.

The Commissioner asserted that the Petitioner was subjected to an audit and the findings communicated by the letter dated 1st February 2013. The findings, which included assessments, were that out of the Kshs 1,147,601,158/= claimed, Kshs. 697,715,548/= would be disallowed sum and Kshs 449,885,610/= would be refunded. The Commissioner informed the Petitioner that an issue had been raised by their Investigations and Enforcement Department over Kshs 234,968,183/=.

Thereafter the Commissioner, Investigation and Enforcement wrote the letter dated 16th April 2012 which demanded that the Kshs 234,968,183/= be

paid within 30 days. The Commissioner claimed that the sum was due to under declaration and fraudulent clearance of goods. The Commissioner further stated that the parties held several meetings which culminated in an agreement that the Commissioner could withhold Kshs. 235 million in escrow pending conclusive and expeditious resolution of the unresolved tax demand. The Commissioner further averred that as a result of the agreement, it included the Kshs. 235 Million as part of the tax refund disallowed pending the determination of the dispute. The respondent stated that it was mindful of the petitioner's position hence it withheld the amount in five tranches between March 2013 and August 2013.

The Petitioner prayed that the Commissioner's actions be declared to be in contravention of the Constitution of Kenya, 2010, the set off amounting to Kshs. 235,000,000 be set aside and the refund of Kshs. 742,815,181 be allowed.

Issues for Determination

a. Whether the Commissioner is entitled to set off the sum of Kshs 235 million from the petitioner's refunds.

b. Whether the failure to pay the petitioner's VAT tax refunds is a violation of the petitioner's rights

.Determination of the issues by the Court

The Court said that the purpose of Article 47 is to uplift the standards of administrative action by providing constitutional standards (see Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 [2012] eKLR). The national values and principles of governance articulated in Article 10 among them good governance, integrity, transparency and accountability must be infused in administrative action. In regard to processing of VAT refund claims, Ojwang' J., (as he then was) in the case of Republic v Kenya Revenue Authority exparte L.A.B International Kenya Limited observed that, "In practical terms, Government has a public duty to effect change to any unprogressive arrangements, such as those that may 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 this regard, ordinary statutory arrangements cannot qualify the constitutional provisions. On this account, the respondent has no justification for failing to make VAT refunds timeously."

The issue of the sum of Kshs 235 million withheld is intimately connected with the pending objection. The letter of assessment from the respondent dated 1st February 2013 indicated that amount of unpaid taxes amounted to Kshs 234,968,183/=. The Commissioner, Investigation and Enforcement in the letter dated 16th April 2012 indicated that the amount was due in 30 days causing the petitioner to file a review of the decision by its letter dated 15th May 2012. While the parties agreed to hold the amount of Kshs 235 million in escrow as evidenced by the letter dated 12th October 2012, the respondent issued an amended assessment in accordance with section 32A of the VAT Act (Repealed). However, in respect of the disputed sum, the respondent noted as follows, "For taxes amounting to Kshs. 234,968,183 raised by our Investigations and Enforcement Department (IED) - will address this issue directly under a separate cover."

In light of the correspondence, the Court found that while there was an agreement to hold the sum of Kshs 235 million in escrow, the agreement was superseded by the letter dated 30th October 2013, in which the Commissioner addressed the objection and amended the assessment. The issue of the Kshs 234,968,183 remained unaddressed particularly in view of the fact that the petitioner had lodged an appeal against the decision by its letter of 15th May 2012. The court held that the purported set-off of Kshs 235 million was without legal basis and as such the decision contained in the email dated 3rd September 2013 was quashed. As no decision had been made in respect of the Kshs 234,968,183, the Commissioner was directed to deal

with the objection/appeal.

Read the full judgment here

The Court stated that it could not step into and prescribe the manner in which the Commissioner and by extension by the Exchequer should run its affairs. What the Court is concerned about is that legal rights protected by the Constitution are enforced and legal obligations are fulfilled. The taxpayer who carries on their business in accordance with the law and applies for a refund is entitled to the refund as a matter of right. The process of verification and processing the claim must, in the words of Article 47(1) of the Constitution, be efficient and expeditious. Out of the total amount claimed, the Commissioner had not stated the position of Kshs 414,898,448/= outstanding being the amount of Kshs 742,815,181/= claimed in the petition less the Kshs 180,015,248/= already paid and Kshs 148,001,485/= proposed to be paid in instalments. The sum of Kshs 414,898,448 ought to be processed and paid expeditiously. The Judge again echoed the words of Ojwang' J., in **Republic v Kenya Revenue Authority ex-parte L.A.B International Kenya Limited** (Supra) that, "Given the safeguards in the Constitution, which clearly apply to the applicant herein, the Court does not accept the respondent's plea that it subject to certain structural inefficiencies which are traceable to other organs of Government, or to the provisions of ordinary statute law."

The Court declared the decision by the Commissioner to set off Kshs.235 million as unconstitutional and a violation of the petitioner's right under Article 47 of the Constitution, the Commissioner was further directed to determine the objection relating to the sum of Kshs 234,968,183/= and for the Commissioner to consider, process and pay out in accordance with the law, part of the Petitioner's VAT refund outstanding from the total of Kshs 742,815,181/= claimed.

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Tulipe Ushuru Tujitegemee!