

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAX APPEAL NUMBER 36 OF 2022

ANTOMACKS COMPANY LIMITED..... APPELLANT
-VERSUS-
COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated under the Companies Act, 2015 laws of Kenya and domiciled in Kenya. It is in the business of providing services of electrical installation.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 laws of Kenya. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Under Section 5(2) of the Act with respect to the performance of its function under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Parts I and II of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Respondent conducted an audit of the Appellant's tax affairs for the 2017 tax period and noted that Appellant had declared sales worth Kshs. 10,791,267.00 in its 2017 tax returns yet its VAT returns were nil.

4. On 17th May, 2021 the Respondent issued additional assessments amounting to Kshs. 1,726,603.00 being principal tax.
5. The Appellant lodged its objection to the assessments on 14th June, 2021 on the iTax platform and the Respondent requested additional documents which the Appellant provided. Nonetheless the Respondent rejected the Appellant's letter of objection and issued an objection decision on 2nd December, 2021.
6. Aggrieved by the decision of the Respondent, the Appellant filed a letter to the Tribunal dated 12th January, 2022. However, by a Notice of Motion dated 5th September, 2022 and filed on 12th September, 2022, the Appellant moved the Tribunal to allow it to serve an amended Memorandum of Appeal and Statement of Facts.
7. The Tribunal in its orders dated 28th September, 2022 granted the Appellant leave to file an Amended Memorandum of Appeal and Supplementary Statement of Facts by 29th September, 2022.

THE APPEAL

8. The Appellant premised its Appeal on the grounds as set out in its Memorandum of Appeal dated 5th September, 2022 and filed on 12th September, 2022 which were as follows:
 - (a) That the Respondent erred in law and in fact in making the decision to charge VAT on the project, Ethiopia-Kenya Power System Interconnection HVDC Transmission line (hereinafter 'the Project') part of which was undertaken by the Appellant and was exempt from custom duties and VAT.

- (b) That the Respondent erred in law and in fact in disregarding the letter dated 10th December, 2015 and another dated 23rd November, 2015 from the National Treasury exempting the said project from customs duties and VAT.
- (c) That the Respondent erred in law and fact in assessing the exempted services espoused in the letters from the National Treasury.
- (d) That the Respondent erred in law and fact in assessing the exempted services espoused in their letter from National Treasury.
- (e) That the Respondent erred in law and in fact by taxing the Appellant whereas the project he was working on was tax exempt and all other aspects and sub-contractors were not taxed save for itself.
- (f) That the Respondent erred in law and in fact in finding that the Appellant should pay VAT on the exempted project despite having had income tax withheld on its payments and having paid all income taxes due.
- (g) That the Respondent erred in law and infact in failing to recognise that the Appellant had not charged VAT for services rendered in respect of the project as it was VAT exempt.
- (h) That the Respondent erred in law and fact demanding taxes without any basis in law, in relation to the project which was exempted from Custom duties and VAT.

- (i) That the Respondent erred in law and acted contrary to equity, unfairly, arbitrarily, unreasonably and against the legitimate expectation of the Appellant in assessing VAT on the said Project.

APPELLANT'S CASE

9. The Appellant has set out its case in the Statement of Facts dated 5th September, 2022 and filed on 12th September, 2022 in which it stated as hereunder.
10. That in 2017 it was contracted by Larsen & Toubro Limited for the project which was exempted from Customs duties and VAT as outlined in letters dated 23rd November, 2015 and 10th December, 2015 from the National Treasury.
11. The Appellant stated that it signed the contract with Larsen & Toubro Limited, paid income taxes required and was issued with Withholding Tax Certificates dated 20th April, 2017. The Appellant began work of the project and that was the only service it offered in the year 2017.
12. That the Appellant had tax withheld on all invoices it sent to the head contractor and further, paid all income taxes. The Appellant however, did not charge VAT for services it provided to the Project.
13. That the Respondent issued demand notices of the said amounts dated 6th April and 14th July, 2022 respectively. The Appellant had documentation to prove that it did not charge VAT for the services rendered as the project was exempt from VAT. It was also not in dispute that the Project which was the subject of these proceedings was tax exempt.

14. The Appellant at all times adhered to the relevant tax legislation and met its obligations at all times.

15. On 28th November, 2023, the Tribunal admitted the evidence of both Mr. Anthony Kiiru Marubu and John Gikima as evidence in chief for the Appellant. Both witnesses rehearsed the Appellant's Statement of Facts and decried the fact that the Appellant was being forced to pay triple taxation. The both Witnesses admitted that the Appellant did not charge VAT for the work in respect of the Project which was in their view tax exempt. Both witnesses indicated that the Appellant had discharged its tax liabilities by paying the requisite Income Taxes.

Appellant's Prayers

16. The Appellant therefore made the following prayers to the Tribunal:
 - (a) That the assessed amount be set aside on the basis of incorrect interpretation of law and fact by the Respondent.
 - (b) That the Respondent's confirmed assessment be set aside and that the Tribunal considers the substance of the case.

RESPONDENT'S CASE

17. The Respondent's case was as set out in its Statement of Facts dated and filed on 11th March, 2022 together with its supplementary Statement of Facts dated 14th October 2022 and filed on 21st October, 2022 wherein it stated as hereunder.

18. The Respondent conducted an audit on the Appellant's tax affairs for 2017 tax period and noted that the Appellant had declared sales worth Kshs. 10,791,267.00 in its 2017 income tax returns.
19. The Respondent compared the Appellant's income tax returns with its VAT returns for the same period and the comparison revealed that the Appellant had filed NIL returns.
20. That on 17th May, 2021, the Respondent issued an additional assessment in respect of a principal tax of Kshs.1,726,603.00 on the variance in the i-Tax platform.
21. The Appellant lodged its objection to the assessments on 14th June, 2021 on i-Tax. The Respondent requested the Appellant to provide documents to support the objection application and the Appellant complied and provided the following documents:
 - (i) Audited financial statement for the year 2017;
 - (ii) Bank statements for January 2017 to December 2017; and
 - (iii) Exemption certificate between M/S Larsen and Touro Limited and National Treasury.
22. The Respondent established that the Appellant was sub-contracted by a company known as Larsen & Toubro Limited to erect HVDC overhead line from KEN-AP 9 near Loglogo to EN-AP 16 near Kinamba. Larsen & Toubro Limited communicated officially to the Respondent on 24th September 2019 on the Appellant's VAT exemption. There was no feedback from the Respondent on the Appellant's VAT exemption status.

23. The Appellant relied on the exemption certificate provided by National Treasury to Larsen & Toubro Limited not to charge VAT despite the Appellant being a registered person and having failed to obtain a remission letter from the Respondent.
24. The Respondent issued its objection decision on 2nd December 2021. The Respondent's objection decision was further informed by the letter dated 10th December 2015 from the National Treasury which provided for exempt services concerning the Project.
25. In its Supplementary Statement of Facts, the Respondent addressed the issues raised by the Appellant in its Supplementary Statement of Facts.
26. In response to ground (a) of the Appeal a closer examination of the exemption certificate issued by the National Treasury on 23rd November, 2015 revealed that the Appellant was not a party to the exemption issued by the Ministry of Finance and that it came in as a sub-contractor who did not supply directly to the exempted project.
27. In response to ground (b) the Respondent in arriving at its objection decision considered the communication from the National Treasury and found the same to be specific to Larsen & Toubro Limited and did not cover the Appellant, who was a third party to the arrangement.
28. In response to ground (c), the Respondent relied on the letter dated 10th December, 2015 and subsequent exemption certificate availed by the Appellant, the interpretation was that the exempt Project was between Kenya Electricity Transmission Company (hereinafter 'KETRACO') and

Larsen & Toubro Limited. The Appellant is considered a stranger to the exemption and ought to have regularized the exemption by applying to the Respondent for authorisation not to levy VAT.

29. In response to ground (d) the basis of the assessment was turnover variance date. An inquiry into the genesis of the variance revealed that the Appellant was subcontracted to supply vatable services to Larsen & Toubro Limited but failed to factor in VAT in its invoices. The Appellant did not supply directly to the Project and should have charged and accounted VAT being a VAT registered person or sought for approval from the Respondent not to levy VAT.
30. In response to ground (e) the Respondent stated that tax administration of VAT is informed by the VAT Act No. 35 of 2013 (hereinafter 'the VAT Act') whereas income tax is administered by the Income Tax Act, Cap 470 of the laws of Kenya (hereinafter 'ITA'). The assessment in dispute was guided by the VAT Act.
31. In response to ground (f) the Appellant misinterpreted the provisions of the law on its obligation to levy and account for VAT as a duly registered VAT obligation holder.
32. In response to grounds (g) and (h) the Respondent reiterated its earlier averments in the preceding paragraphs of its Supplementary Statements of Fact (i.e.; paragraphs 12-23).
33. The Respondent stated that the Appellant's allegations as laid out in the Memorandum of Appeal and Statement of Facts were unfounded in law, not supported by evidence and the Respondent expressly denied them.

Respondent's Prayers

34. Reasons wherefore, the Respondent prayed that based on the above grounds the Appeal be dismissed with costs to it and the objection decision dated 2nd December, 2021 be upheld.

PARTIES WRITTEN SUBMISSIONS

35. Both parties were to file written submissions on or before 13th December, 2023 as directed by the Tribunal on 28th November, 2023. The Appellant did not file written submissions whilst the Respondent's written submissions were filed 6 days after the date on which they were to be filed and served and were therefore not considered by the Tribunal as they stand expunged from the record.

ISSUES FOR DETERMINATION

36. The Tribunal having considered the parties pleadings and documents puts forth the following single issue for determination:

Whether the Objection Decision was justified.

ANALYSIS AND FINDINGS

37. The Tribunal wishes to analyse the single issue identified for determination as hereunder.
38. This dispute arose from the review of returns carried out by the Respondent wherein it was apparent that there was a variance between the VAT and income tax declarations of the Appellant in respect of the 2017 year of income. The Appellant availed the documents requested, which included its audited financial statements and bank statements in respect of the 2017 year

of income. The Appellant also provided exemption certificates between Larsen & Toubro Limited and the National Treasury.

39. The Tribunal's has reviewed the documents and found that the said exemption certificate did not exist but there was a series of correspondence between the National Treasury, Ministry of Energy and Petroleum, Larsen & Toubro Limited and the Appellant. On 23rd November, 2015, in a letter copied to Larsen & Toubro Limited, the Principal Secretary National Treasury wrote to the Principal Secretary in the Ministry of Energy and Petroleum informing the said Principal Secretary in the said Ministry of the approval of remission of Customs duties and VAT in respect of motor vehicles, motor cycles, materials and equipment being imported or purchased locally by Larsen & Toubro Limited for plant design, supply and installation on behalf of KETRACO on 20th November, 2015.
40. The Tribunal's finding is that in the said letter dated 23rd November, 2015, the Principal Secretary, National Treasury advised on the commencement (7th August, 2015) and completion (28th September, 2018) of the Project and that it was funded by Agence Francaise de Developpement (hereinafter 'AFD'). The Principal Secretary, National Treasury proceeded to list all the items that were to be imported or purchased locally then concluded by advising the Principal Secretary, Ministry of Energy that for each of the listed items, it would be expected to facilitate processing of exemption letters by providing to the National Treasury the invoices, IDF, Airway bill or Bill of lading, packing lists and other relevant documents.
41. The Tribunal notes that on 10th December, 2015, the Principal Secretary, National Treasury wrote to the Respondent informing it that the Principal Secretary, Ministry of Energy and Petroleum was to provide it with relevant

documents to facilitate processing of exempt services. However, in the said letter, the Principal Secretary, National Treasury stated expressly that the letter did not include exemption of goods from VAT and that the Appellant would have been required to make a separate application for the exemption from VAT of goods for use in the Project.

42. The Tribunal further notes that any application for exemption of goods from VAT would be made in accordance with established protocol. The last paragraph of the said letter stated as follows in bold writing:

“Please be advised that this is NOT an exemption letter”

43. The Tribunal has reviewed a letter dated 24th September, 2019 addressed by Larsen & Tubro Limited to the Respondent copying the Ministry of Energy and Ketraco and enclosing in the said letter, an invoice from the Appellant requesting remission of taxes.

44. Section 56 (1) of the Tax Procedures Act, No. 29 of 2015 (hereinafter ‘TPA’) provides as follows:

“In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”

45. The Tribunal cites the case of **Mbuthia Macharia vs. Annah Mutua Ndwiga & Another Civil Appeal No. 297 of 2015 [2017] eKLR**, wherein the Court of Appeal when dealing with the issue of burden of proof observed as follows:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the

evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence”

46. The Tribunal finds that the Appellant believes that its services were exempt from VAT. The Tribunal, having reviewed the letters, notes that the Project was exempted from Customs duties and VAT. However, protocol was established through those letters on how such applications would be individually approved on a piece meal basis. In other words, for each transaction, for example in respect of exemption from Customs duties, there was a requirement for certain documentation to be provided in order for exemption to be granted. In respect to application for VAT exemption, there was established protocol on how such applications would be made.
47. The Appellant, in the view of the Tribunal appeared to be unaware of the established protocol and even during the oral hearing, it attempted to pass the blame to Larsen & Tubro Limited. However, since the Appellant was sub-contracted by Larsen & Tubro Limited, it is a business that is independent and separate from Larsen & Tubro Limited. The Tribunal further notes in view of the foregoing, that the exemption was not granted to the Appellant but to Larsen & Tubro Limited. The Appellant should therefore have charged VAT on its invoices and filed the requisite returns pursuant to Section 44 of the VAT Act as Larsen & Tubro Limited had the right to make a claim for refund of the VAT even in the case where it would have inadvertently paid the VAT.

48. The Tribunal is of the view that Larsen & Tubro Limited were liable to pay VAT or to claim the same since the exemption was granted to them directly. Section 62 of the VAT Act provides as follows:

“62. Burden of proof

In any civil proceedings under this Act, the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax.”

49. In this regard, the Tribunal finds that the burden of proving whether the goods and services were exempt from VAT was that of Larsen & Tubro Limited and not the Appellant. Accordingly, the Appellant was not automatically entitled to the exemption from VAT in respect of the services it offered to Larsen & Tubro Limited on the Project.
50. The Tribunal finds that pursuant to Section 56(1) of the TPA, the Appellant failed in discharging its burden of proving that the objection decision was incorrect. Accordingly, the objection decision dated 2nd December, 2021 was justified.

FINAL DECISION

51. The upshot to the foregoing is that the Appeal lacks merit and the Tribunal accordingly proceeds to make the following Orders: -
- (a) The Appeal is hereby dismissed.
 - (b) The objection decision dated 2nd December, 2021 is hereby upheld.
 - (c) Each party to bear its own costs.

52. It is so ordered.

DATED and DELIVERED at NAIROBI this 5th Day of April, 2024

**CHRISTINE A. MUGA
CHAIRPERSON**

**BONIFACE K. TERER
MEMBER**

**DELILAH K NGALA
MEMBER**

**GEORGE KASHINDI
MEMBER**

**SPENCER S. OLOLCHIKE
MEMBER**