REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL NO.144 OF 2015

STURROCK SHIPPING (K) LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAX.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant is a limited liability company incorporated in Kenya with its registered offices at Harbour House, Mombasa. Its principal activity is of a shipping Agent.
2. The Respondent is the Commissioner of Domestic Taxes appointed under and in accordance with Section 3 of the Kenya Revenue Authority, which is established under Chapter 469 Laws of Kenya, charged with the mandate for assessment, collection and receipt of revenue as an agent of the Government of Kenya.

BACKGROUND

3. On 12/9/2012, the Respondent issued a notice of intention to audit the Appellant's books of account for the period January 2008 to August 2012 to cover the tax heads of Corporation Tax, VAT, Withholding Tax and PAYE. The audit established that the Appellant was not charging VAT on agency fees and commissions, resulting in the Respondent issuing a Notice of Assessment dated 30/5/2013.
4. The Notice of Assessment dated 30/5/2013 was for the sum of Ksh:135,504,219, being Ksh:80,991,178 relating to principal tax and Ksh:54,513,041 relating to interest, being output VAT on agency

services, documentation fees, delivery order fees, crew transport fees and courier fees.

5. The Appellant objected to the Notice of Assessment vide a letter dated 28/6/2013 through its tax agents, to wit, M/s Taxwise Consulting Limited with the purport of the objection being that agency, crew and courier fees are charges by the Appellant to its Principal and further that by law and industry practice the same have been treated as services exported out of Kenya and the Respondent's assessment is therefore erroneous as it offends both the practice in the shipping industry and the relevant statutes.

6. The Respondent rejected the Appellant's objection and confirmed the Assessment vide its letter dated 12/7/2013.

7. On receipt of the confirmation for the disputed tax, the Appellant lodged this Appeal against the said tax assessment on 7/8/2013 before the defunct VAT Tribunal. The Appellant filed the Memorandum of Appeal together with the Statement of Facts on 22/8/2013.

THE APPELLANT'S ARGUMENTS

8. The Appeal is premised on the grounds as set out in the Memorandum of Appeal and Statement of Facts dated 21/8/2013, reproduced hereunder:-

   i) The Appellant is a member of the Kenya Ship Agents Association ("KSAA") who took the initiative to research and prepare a position paper on the conflicting industry taxation position taken by the First Respondent, (who the Appellant herein named as KRA the First Respondent in its pleadings). The Appellant stated that the said position paper was submitted to the Respondent on 24 August, 2012, shown as

"APPENDIX B", who has failed, ignored, neglected and refused to give attention to the matter.

ii) All charges, fees and impositions incurred by importers of goods in connection with the international transport of goods by sea to the port of entry constitute in sum a single cost of freight. The cost of freight/transportation is part of the value of the goods for purposes of assessing import duty and VAT, which is the liability of the importer. The Respondent has erred in law and fact to hold out that some of those ancillary freight charges do not constitute the cost of freight.

iii) The assessment collection and enforcement of customs duty is the sole preserve of the Commissioner of Customs and 'proper officers' thereof. The person liable to account for and pay the duty of customs is the importer of goods and NOT the representative/agent of the shipping line that brought the subject goods. The Respondent has not submitted any evidence or reasons to aver that proper taxes have not been collected by the Commissioner of Customs in respect of the ancillary freight costs. Further, in the event such evidence is available, no reasons have been proffered to demand any uncollected taxes from the Appellant and not the importers.

iv) The Third and Fourth Respondents, as officers of the Domestic Taxes Department of the First Respondent have acted ULTRA VIRES. The Value Added Tax Act, 1989 and the East African Community Customs Management Act, 2004 (EACCMA) by usurping the roles and responsibilities of the Commissioner of Customs given solely to him under the

EACCMA by demanding the payment of a duty of customs, or change of equivalent effect.

v) If the assessment is raised, it will result in significant revenue loss to the Kenyan Exchequer as it would mean that ancillary freight costs should not be subjected to duty and VAT but to local VAT only. Therefore it would be to the greater good of Kenya to overturn the assessment.

vi) If the Respondent's assessment is upheld, it will lead to horrendous ramifications for the entire shipping industry in Kenya, because this is the first ever since the introduction of VAT in Kenya in 1990 for the Respondents to hold out that ancillary freight costs should be subject to local VAT.

vii) The Respondents assessment should not be upheld because it contravenes VAT Public Notice 13 which clearly stipulates a contrary position.

viii) The Respondents have not suffered any revenue loss since the tax demanded has been collected or is collectible by the Customs Services Department. If the Respondents demand is upheld it will sure lead to a double taxation of the same subject.

ix) By law and industry practice, the fees and commissions charged by shipping agencies to their principals have always been zero rated as the services thereof have been treated as exported. As a consequence of the foregoing, the Respondents have affirmed concurrence by entertaining VAT refund claims from the agencies. It is the first time in the history of Kenya's VAT administration that the Respondents are raising such a demand.

x) The demand for VAT on agency fees and commissions by the Respondents would present a serious conflict between the Value Added Tax law and the Income Tax Act, to the detriment of the Respondents and the country.

9. The Appellant prayed that the Respondent's demand as raised is frivolous, misconceived, malicious and an abuse of statutory power and asked the Tribunal to find that if any VAT is payable on the Bill of Lading fees, the Delivery Order, brokerage fees, costs for containers and parking, transport/freight, loading and handling insurance and all other incidental charges levied by the supplier or intermediary to the importer such as cost of telegrams, cable charges, e-mail charges or any other charges above, such VAT would be a duty of custom and it is payable by the importer of the goods.

10. The Appellant submitted both orally and in writing and stated that at all material times the Appellant acted as a Shipping Agent for the Shipping Line and only as such agent and that payment to the Shipping Agent by the Shipping Line is by way of commissions agreed upon between the Appellant and the Shipping Line.

11. The Appellant contended that to effectively deliver goods to the importer, the Shipping Line is required to process certain required documents under the Maritime Law of Kenya. These documents are handled for and on behalf of the Shipping Line by the Shipping Agent whereby the Shipping Line is required to prepare a Bill of Lading, which shows the specific details of the goods shipped on behalf of the importer and giving title in the said goods to the importer.

12. It was the Appellant's argument that the Shipping Line also prepares a Delivery Order which is a document from a shipper or an owner of freight which orders or authorizes the release of the cargo to the importer, which documents are handled by the Shipping Agent on behalf of the Shipping Line.

13. The Appellant proceeded to submit that the Shipping Agent also levies fees known as Bill of Lading fee and the Delivery Order fee on behalf of the Shipping Line, payable by the importer. It argued that the nexus between the Bill of Lading fee and the Delivery Order fee with the shipping line is founded on the fact that the Bill of Lading and the Delivery Order are documents of the Shipping Line intricately connected to the contract of carriage of goods and further that it is the Shipping Line that is obligated to prepare and hand over the said documents to the importer of goods.

14. It was further contended by the Appellant that until the importer has received the goods, such goods are in the process of freight and any fees paid before the importer receives the said goods is part and parcel of the cost of freight.

15. In support of the above argument, the Appellant stated that according to the provisions of the Fourth Schedule to the East African Community Customs Management Act, 2004, herein after referred to as "EACCMA" the value of goods for custom purposes is the transaction value adjusted in accordance to the provisions of Paragraph 9 hereof, i.e. 9(2), a and b which reads;

'the cost of transport of the imported goods to the port or place of importation into the Partner State: provided that in case of imports by air no freight costs shall be added to the price paid or payable';

'loading, unloading and handling charges associated with the

transport of the imported goods to the port or place of importation into the Partner State'.

16. The Appellant contended that the Respondent has not suffered any revenue loss since the tax demanded has been collected or is collectible by the customs services department and that if the Respondent's demand is upheld it will lead to double taxation of the same subject matter.

17. The Appellant further submitted that by law and industry practice, the fees and commissions charged by the shipping agencies, including the Appellant, to their principals i.e. shipping lines, have always been zero rated as the services have been treated as exported.

18. The Appellant submitted that it had in the past received refunds from the Respondent on the basis that its goods were zero rated and entertained the said VAT refund claims for the shipping agencies including the Appellant.

THE RESPONSE

19. The Respondent at the instance of being served with the Memorandum of Appeal and Statement of Facts of the Appellant proceeded to file it's Statement of Facts dated 20/9/2013.

20. In the course of the proceedings, the Appellant raised an objection to the late filing of the Respondent's Statement of Facts dated 20/9/2013 and asked the Tribunal to expunge it from the record. The Tribunal having heard the parties on the Objection agreed with the Appellant and ordered that the same be expunged on the basis that it was filed out of time. The Tribunal however allowed the Respondent to orally interrogate the Statement of Facts filed by the Appellant and proceeded to make submissions on the same.

ANALYSIS AND FINDINGS

21. When the matter came up for hearing the Tribunal, with consent of the parties proceeded to have the parties present both oral and written submissions which was duly done. Thereafter both parties appeared before the Tribunal and highlighted their respective written submissions.

22. The Tribunal has carefully considered the Memorandum of Appeal, the Statement of Facts, the parties Oral and Written Submissions together with the Pleadings herein and is of the considered view that the issues for its determination are as hereunder:-

    a) Whether agency services rendered by the Appellant to its local and international clients including agency fees, delivery order, crew transport, crew fee and courier fees are taxable or zero rated

    b) Whether the said services above ought to be charged to the importers or the Appellant.

    a) Whether the services rendered by the Appellant to its local and international clients, namely, agency fees, delivery order, crew transport, crew fee and courier fees are taxable or zero rated.

23. The Tribunal notes that the Respondent, during its audit process analysed invoices obtained from the Appellant which showed provision of taxable services to its clients without charging VAT contrary to Sections 5 and 6 of the VAT Act, Cap.476, Repealed, and yet the Appellant is a taxable entity with an assigned VAT Number 0114807Q.

24. It is worth noting that the Appellant offers agency services for international shipping lines in Kenya at a predetermined commission. It also offers other services namely but not limited to

delivery order, document processing, crew transport and courier. These services are offered and commissioned locally with payments received from abroad from international clients. The Appellant then earns a commission from the said services.

25. The Tribunal, from the foregoing, finds that the Appellant has two main sources of income, namely Agency commission earned for acting on behalf of the non-resident principal being the shipping line whereas the second source of income relates to charges levied by the Appellant on consignees subsequent to goods landing in Kenya, which charges are for the various services enumerated above.

26. The Appellant argued that it is the legal responsibility of the importers to declare such fees as part of freight costs in form C 36 and then account for the duty and VAT hereof. The Tribunal makes a finding that this argument is untenable since the customs referred to as Form C36 provides operational and subsisting process or formula for computing a customs value. Indeed upon perusal of the said Form C36 under part C of the same, it clearly excludes port landing costs in determination of a customs value. Therefore it is only logical that the Bill of Lading and the Delivery Order charges, which are part and parcel of the port landing charges, are excluded in determining customs value. The Tribunal does not therefore agree with the Appellant's argument on this issue.

27. The Tribunal further notes that pursuant to Paragraph 9(2) of the Fourth Schedule to the EACCMA, the permissible freight charges are restricted to the costs of the port of landing or place of importation and the port landing charges are to that extent excluded.

28. Having carefully considered the authorities and submissions of both parties and in view of the foregoing, the Tribunal respectfully finds that the charges levied by the Appellant for the services referred to herein before do not constitute part of customs value and the taxes in respect thereof are not capable of being collected by the Respondent's Customs Department.

29. It is a finding of the Tribunal that in the circumstances herein, the Respondent has not usurped the roles and responsibilities of the Commissioner of Customs and has not acted ***ultra vires*** the VAT Act and EACCMA as alleged by the Appellant. Indeed the Tribunal takes cognizance of the law to the effect that the Commissioner of Customs does not collect duties on local services, but rather on the goods imported into the country and the same is done pursuant to EACCMA.

30. The Appellant argued that the services rendered for Agency, crew and courier constitute charges by the Appellant to its Principal i.e. the Shipping Line and further that by law and industry practice these services are treated as services exported out of Kenya and are therefore zero rated, thereby placing the Appellant in a VAT credit position. The Appellant went further to state that the said credits have been previously claimed as VAT refunds and the Respondent has happily honoured and paid the claims.

31. It is worth noting that the Respondent admitted that it did refund the same, but submitted that the same was done in error based on a misguided belief that the services were zero-rated and has subsequently demanded the amounts so paid from the Appellant, pursuant to Section 2(1) of the said VAT Act. In any event, the said refund would not invalidate and or absolve the Appellant's legal

liability herein. The Tribunal therefore finds that said taxes are taxable under the relevant Statute.

32. Consequent to the above and pursuant to Section 6(1) of VAT Act Cap 476, now repealed, the Tribunal finds that tax is chargeable on any supply of services or goods made in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried out by such person. Moreover, Section 5 of VAT Act, Cap 476, charges tax on supply of goods and services in Kenya and on the importation of goods and services. Hence charges levied by the Appellant are chargeable to VAT which services having been rendered in Kenya post landing to the imported goods and in furtherance of the Appellant's business as a shipping agent.

b) Whether the said services above ought to be charged to the Importers or the Appellant.

33. The Tribunal finds that the recovery of a tax on a taxable supply is the legal responsibility of the registered person making the supply, and that tax becomes due and payable at the time of supply, subject however to the provisions related to the accounting and payment of the same. It has been demonstrated before the Tribunal that the Appellant was indeed a registered person with a VAT registration number 0114807Q.

34. The Tribunal is satisfied that the Appellant was under legal liability to collect the VAT on the charges levied in regard to the various services enumerated above. Consequently, the Appellant is hereby held liable for the payment of VAT on the same, for the relevant period under review. It does not matter that the Respondent previously made refunds to the Appellant as the said act of refunds

by the Respondent does not invalidate the operation of the relevant Statute herein.

35. The upshot of the above is that the Tribunal finds that VAT is collectible from the Appellant and not the importers of the goods in respect of whom the Appellant rendered the said services.

36. The Tribunal finds that the Appeal herein lacks merit and the same is hereby dismissed with no order as to costs and upholds the assessment of the confirmed additional VAT charged by the Respondent.

DATED and DELIVERED at NAIROBI this 7TH DAY OF JULY 2017.

In the presence of :- KARANJA KAMUNTO (TAX WISE CONSULTING LTD) **for the Appellant**

NO APPEARANCE **for the Respondent**

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JOSEPHINE K. MAANGI
CHAIRPERSON

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JOSEPH WACHIURI
MEMBER

.....
BONIFACE DIMMO
MEMBER