

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 291 OF 2021

HASUS ENERGY LIMITEDAPPLICANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company duly incorporated under the laws of Kenya and is a registered taxpayer. Its principal business is in construction.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, the Authority is charged with the responsibility of among others, assessment, collection, accounting, and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent identified undeclared income for VAT purposes in the course of the normal compliance check on the Appellant's declarations. The income was from Kisii National Polytechnic as seen through the VAT-Withholding Certificate dated 10th June 2019.
4. The Respondent later issued a letter dated 22nd July 2020 notifying the Appellant of the information and informing the Appellant to declare Kshs. 10,785,483.00 received from Kisii National Polytechnic and to pay the taxes due.

5. The Appellant did not respond to the letter and a reminder dated 5th August 2020 was issued.
6. An income tax assessment for the periods 1st June 2019 to 30th June 2019 was issued to the Appellant by the Respondent on 22nd July 2020, and later on 26th August 2020, the Respondent raised an additional assessment totaling Kshs. 1,725,677.04 (exclusive of penalty and interest).
7. The Respondent issued another letter dated 26th August 2020 demanding tax due from the assessment.
8. In response, the Appellant lodged an objection to the assessment in a letter dated 1st October 2020 indicating it lacked access to its emails and didn't have proper means of communication.
9. The Respondent requested for documents from the Appellant to support its objection via a letter dated 14th October 2020; and later, vide an email dated 21st October 2020 reminded the Respondent of the same.
10. The Respondent consequently fully rejected the Objection by the Appellant on 28th January 2021.
11. On receiving the decision, the Appellant filed a Memorandum of Appeal and Statement of Facts dated 9th June 2021.

THE APPEAL

12. In its Memorandum of Appeal dated 9th June 2021, the Appellant premised its Appeal on the following grounds;-
 - a) In determination of the taxable income, the Respondent failed to recognize that the amounts assessed were inclusive of an amount that was

already declared on 20th July 2017 in self-assessment return of the Appellant and the taxes due thereon paid.

- b) The assessment is untrue, dishonest, humongous, unfair, and such an amount will greatly affect the Appellant's business.
 - c) The assessment was issued and the taxpayer was not given notice and ample time to provide the relevant supporting proof of the matter.
 - d) The Respondent made a substantial error in enforcing collection and recovery of the additional assessment of Kshs. 1,725,677.00 through Section 42 of the Tax Procedures Act, by instructing the legal department of the Appellant's bankers.
 - e) The Respondent did not accord the Appellant fair hearing more specifically in considering the substance of the objection and allowing the appellant to provide relevant supporting documents to support its case.
13. The Appellant consequently prayed for judgement against the Respondent that the Honorable Tribunal allows the Appeal against the Respondent's decision dated 29th January 2021.
14. Similar averments were adduced in the Appellant's Statement of Facts dated 9th June 2021.

RESPONSE TO THE APPEAL

15. Upon receipt of the pleadings, the Respondent replied vide its Statement of Facts dated 8th July 2021 and filed on 9th July 2021.
16. The Respondent averred that it relied on the information availed to it by the Respondent during its assessment.

17. The Respondent further averred that Section 56 of the Tax Procedures Act no. 29 of 2015 places the burden on the taxpayer to prove that a tax decision is incorrect. The lack of provision of documentation allowed the Respondent to retain its position on the VAT assessment, which was not a false statement as it stood unrebutted.
18. The Respondent also averred that it gave the Appellant proper notice and time when it informed the Appellant of the tax due vide a letter dated 22nd July 2020; when it issued a reminder letter dated 5th August 2020; and when it issued an additional assessment on 26th August 2020.
19. It was the Respondent's averment that it validly rejected the Appellant's objection on 28th January 2021 as, according to Section 32(2) of the Value Added Tax Act Cap 476, an objection of an assessment needs to be lodged within 30 days after receipt of the Assessment, which Objection was not lodged until 1st October 2020 and without documents to support it.
20. It was the Respondent's position that the enforcement of the collection and recovery of the additional assessment of Kshs. 1,725,677.04 was within its mandate.
21. The Respondent further asserted that Section 59 of the Tax Procedures Act (Supra) gives the Respondent powers to compel production of records as was seen in the case of **Robert K. Ayisi V. Kenya Revenue Authority & Another [2018]eKLR (Petition no.412 of 2016)**.
22. The Respondent reiterated that the decision was made after following the proper guidelines in law, including Section 3 of the Fair Administrative Action Act where the Respondent gave the Appellant a prior and adequate notice of the nature and reasons of the administrative action.

23. The Respondent averred that it gave the Appellant an opportunity to be heard and to make representations in that regard and had not violated any rights of the Appellant.
24. It was the Respondent's contention that the allegations as laid out in its Memorandum of Appeal and Statement of Facts are unfounded in law and not supported by evidence.
25. The Respondent, therefore, prayed for the Tribunal to enter a judgment against the Appellant for orders that:
- a) The Appellant's Appeal be dismissed with costs;
 - b) The additional assessments raised by the Respondent be confirmed and principal taxes, interests and penalties be found due and payable by the Appellant.
 - c) The Appeal be dismissed with cost to the Respondent.

THE APPELLANT'S CASE

26. Given that the Appellant did not file any submissions, and having traversed all the pleadings filed by the Appellant in this matter, the Tribunal surmised from the Memorandum of Appeal and Statement of Facts the following to be the Appellant's case:-
27. The Appellant averred that the VAT assessment raised by the Respondent is untrue as it did not consider what had already been declared in the self-assessment return.
28. The Appellant further averred that the Respondent, instead of amending the same to capture the difference went ahead and issued an assessment that is inclusive of what had already been declared and paid.

29. It was the Appellant's assertion that the matter could have been rectified at the objection stage and the Appellant is ready to provide relevant supporting documents.

THE RESPONDENT'S CASE

30. The Respondent set out its case in the Statement of Facts dated 8th July 2021 and the Written Submissions dated 2nd December 2021.

31. In its submissions, the Respondent fronted two issues for determination: being whether the Appellant validly objected to the assessments issued and whether the assessments raised by the Respondent would be upheld by the Honorable Tribunal.

32. On the first issue, the Respondent submitted that the Appellant failed to provide any relevant documents to support its late objection dated 1st October 2020. As a result, it was the Respondent's submission that the objection failed to meet the requirements of Section 51(3) of the Tax Procedures Act, 2015.

33. The Respondent urged the Tribunal to be guided by the case of **Tumaini Distributors Company K Limited V. Commissioner of Domestic Taxes [2020] eKLR** where the court dismissed the Appellant's appeal by holding as follows:-

"It is evident that each objection except the one in respect of KRA201700328672 was lodged outside the 30-day period as required by Section 52 (2) of the TPA. the commissioner informed the Company that it had rejected the Objections on the ground that they were filed late and that no reasons were given for the delay"

34. The Respondent submitted that the Appellant was notified of the assessment and requested several times to produce documentary evidence to support the

objection which included: the reason for the late objection, bank statements, invoices to support purchases and expenses incurred accompanied by proof of payment of the same.

35. The Respondent also submitted that reminders were sent to the Appellant advising on the need to provide supporting documents which the Respondent did not respond to.
36. The Respondent relied on Sections 51(3) and 56 of the Tax Procedures Act in reiterating that the Appellant failed to discharge its burden by deliberately failing to provide the requisite documentation to support the objection that it had lodged.
37. It was the Respondent's contention that the Appellant has not proved why the taxes should not be collected. That the Appellant had not provided proof of payment of any taxes; and that the Appellant only claims that the taxes are "humongous" without giving reasons why.
38. The Respondent further stated in its submissions that it had given the Appellant several chances to regularise its objection by giving it time to provide documents. The Respondent relied on what the Tribunal held in **TAT no. 55 of 2018 Boleyn International Ltd -v- Commissioner of Investigations and Enforcement** as follows:

*"we find that the Appellants at all times bore the burden of proving that the Respondent's decision and investigations were wrong. The Tribunal is guided by section 56(1) of the Tax Procedures Act, 2015 which states: In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect. Further, the Tribunal finds the following paragraphs from **Pierson v Belder (H.M Inspector of Taxes)(1956 - 1960)38 TC 387** to be instructive; but the matter may be disposed of, i*

think even more shortly in this way: there is an assessment made by the commissioner upon the Appellant; it is clearly settled by cases such as in the case of Norman V Golder 26 T.C. 293, that the onus is upon the Appellant to show that the assessment made upon him is excessive or incorrect; and of course he has completely failed to do so. That is sufficient to dispose the appeal, which is accordingly dismissed with costs.”

39. On this, the Respondent submitted that the Appellant failed to raise a valid objection and that the only recourse for the Appellant is to validate its objection for the Commissioner’s consideration or appeal first to the Commissioner.
40. The Respondent also relied on **TAT Miscellaneous Application 38 of 2019Kotile General Contractors Company Limited v Commissioner of Domestic Taxes** where the Tribunal held as thus:

“As provided by the above Section, the taxpayer upon receiving notification from the Respondent that its Notice of Objection was deemed invalid had one recourse: to appeal to the Commissioner. Once the appeal to the Commissioner was considered and a decision reached, then the Applicant would have recourse to lodge an appeal before the Tribunal. Until such process is followed, the application at hand is premature and therefore fails.”; to argue that the appeal is improperly before the Tribunal in the first instance as the Respondent has not been given a chance to review the Appellant’s grievances.

41. On the second issue raised by the Respondent for determination, the Respondent averred that its conduct throughout the whole process has been beyond reproach as it gave the Appellant ample time to comply and amend its returns; it gave the Appellant reasons for it to amend its returns; and that the Appellant failed to provide documents supporting its objection which

invalidated the objection in contravention of Section 59 of the Tax Procedures Act.

42. The Respondent relied on the case of **PZ Cussons East Africa v Kenya Revenue Authority [2013] eKLR** which relied on the case of **Pierson v Belder (supra)**
43. The Tribunal was urged by the Respondent to be guided by the case of **Primarosa Flowers Limited v Commissioner of Domestic Taxes [2019] eKLR** which relied on the Australian case of **Mulherin vs Commissioner of Taxation [2013] FCAFC 115** where it was held that: *“The onus is on the taxpayer in proving that assessment was excessive by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied.”* it was the Respondent’s contention that the Appellant failed to discharge the burden of proving that the additional assessment by the Respondent was incorrect.
44. The Respondent submitted that it had adhered to the Fair Administrative Actions Act, 2015 as it gave the Appellant prior and adequate notice to file returns, regularize its objection, and an opportunity to be heard and provide a fair hearing before arriving at the decision.
45. The Respondent prayed that the Tribunal:
 - a) Upholds the Objection Decision of the Respondent and order the Appellant to pay the confirmed tax assessments.
 - b) Finds that the Respondent was justified in demanding the VAT taxes.
 - c) Upholds the taxes for the months of June and October 2019 amounting to Kshs. 2,591,540/-
 - d) Dismisses the Appeal with costs to the Respondent.

ISSUES FOR DETERMINATION

46. The Tribunal puts forth the following issues for determination:

a) Whether the Objection is validly lodged?

b) Whether the Respondent erred in confirming the additional assessments?

ANALYSIS AND FINDINGS

47. The Tribunal wishes to analyse the issues identified as herein-under:

a) Whether the Objection is validly lodged

48. The Respondent raised an additional assessment totaling Kshs. 1,725,677.04 (exclusive of penalty and interest) demanding tax due from the assessment on 26th August 2020.

49. In response, the Appellant lodged an objection to the assessment in a letter dated 1st October 2020 indicating it lacked access to its emails and didn't have proper means of communication. After which the Respondent then issued its Objection Decision on 15th May 2020. These facts are not disputed between the parties.

50. Section 51(2) & (3) of the Tax Procedures Act states as follows as relates to notices of objection:

“(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and

(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.”

51. From the foregoing, for an Objection to be considered validly lodged a Notice of objection must contain the following elements:

- a. It must be in writing;
- b. It must be lodged with the Commissioner within thirty days of the taxpayer being notified of the tax decision;
- c. It must state the grounds of objection;
- d. It must state the amendments required to be made to correct the decision; and
- e. It must state the reasons for the amendments;

52. In the case of **Republic v Kenya Revenue Authority Ex-Parte Funan Construction Limited [2016] eKLR** the court laid emphasis on the decision made in the case of **Nairobi H.C. Misc. Civil Application No. 534 of 2007; Republic –vs- Kenya Revenue Authority & 2 Others, Ex-parte Arrow Hi-fi (E. A.) Limited** where it held as follows:


“An objection that does not conditionally state a clear and unambiguous position of the taxpayer and which suggests a discussion or a meeting is not an application under S229 (2)...For it to be effective it must unequivocally deal with all aspects of the assessment and specify the taxpayer’s position on each with clear answers and figures admitted or not admitted....”

53. Having considered the elements required for an objection to be validly lodged, it is clear that the letter to the Respondent dated 1st October 2020 falls short of the threshold for a valid notice of objection by failing to state the grounds of objection and neglecting to propose the amendments and reasons for the amendments needed.
54. The Appellant was indulged by the Respondent to provide documents in support of its objection via a letter dated 14th October 2020; and later, vide an email dated 21st October 2020 but that too, the Appellant failed to provide.
55. Accordingly, the Tribunal does not consider the purported notice of objection as validly lodged and as being sustainable in law.
56. Having concluded that there was no valid objection, the Tribunal will not delve into the other issue that fell for determination as it has been rendered moot.

FINAL DECISION

57. Given the foregoing analysis, the Tribunal finds the Appeal to be incompetent and accordingly makes the following Orders;-
- i. The Appeal be and is hereby struck out.
 - ii. The Respondent's additional assessment dated 26th August 2020 be and is hereby upheld.
 - iii. Each party to bear its costs.
58. It is so ordered.

DATED and DELIVERED at NAIROBI on this 11th day of March, 2022.


.....
ERIC N. WAFULA
CHAIRMAN


.....
CATHERINE N. MUTAVA
MEMBER


.....
GABRIEL M. KITENGA
MEMBER


.....
ABRAHAM K. KIPROTICH
MEMBER


.....
ELISHAH NJERU
MEMBER

