

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 402 OF 2021**

KCB BANK KENYA LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

**JUDGMENT**

**Background**

1. The Appellant, KCB Bank Kenya Limited, is a banking services provider regulated by the Central Bank of Kenya that operates several bank branches in Kenya and the East African region.
2. The Respondents is a Government agency established under the Kenya Revenue Authority Act, Cap 469 Laws of Kenya. Under Section 5(1) of the Act, the Respondent is charged with the responsibility of assessing, collecting and accounting for government revenue.
3. The Respondent conducted a desktop review of the Appellant's Value Added Tax ("VAT") self-assessment returns and trial balances for the period January 2015 to December 2017 which culminated in the issuance of VAT and Withholding Income Tax ("WHT") assessments dated 15<sup>th</sup> December 2020 amounting to **KShs 61,129,620.00** and **KShs 586,848,050.00** respectively ("the Assessment").
4. The Appellant objected to the assessment vide its letter of objection dated 14<sup>th</sup> January 2021 ("the Objection"). The Respondent replied on 23<sup>rd</sup> March 2021 and requested the Appellant for additional documentation to validate its Objection.

5. The Appellant responded on 30<sup>th</sup> March 2021 and notified the Respondent that the Objection ought to be deemed allowed by operation of the law owing to the fact that the Commissioner failed to respond to the Objection within 60 days pursuant to Section 51(11) of the Tax Procedures Act (TPA).
6. However, the Commissioner wrote back on 20<sup>th</sup> April 2021 and stated that the Appellant's Objection had not been validly lodged due to failure to provide all the relevant documents in support of the Objection pursuant to Section 51(8) of the TPA. The Commissioner proceeded to advise the Appellant to remedy the Objection within 14 days from the date of the letter.
7. The Appellant responded on 4<sup>th</sup> May 2021 and maintained the Commissioner's view was erroneous given that the Commissioner did not request for further documentation, either during the audit exercise or post submission of the Notice of Objection.
8. On 26<sup>th</sup> May 2021, the Commissioner issued an Invalidation Notice on account of the Appellant's Objection failing to adhere to the provisions of Section 51(8) of the TPA and confirmed the Assessment of **KShs 647,977,670.00** to be due and payable.
9. Aggrieved by the Respondent's actions, the Appellant filed a Notice of Appeal on 25<sup>th</sup> June 2021.

## **THE APPEAL**

10. The Appellant's Memorandum of Appeal and Statement of Facts both dated 9<sup>th</sup> July 2021 were filed on 12<sup>th</sup> July 2021. The Appellant set out its grounds of appeal in the Memorandum of Appeal and set out the following issues for determination:

- i. Whether the Commissioner can lawfully invalidate a Notice of Objection after the expiry of 60 days from the date of its submission where the Commissioner had not requested for further documentation to support the Objection;
  - ii. Whether the Commissioner can be said to have notified the Appellant of the invalidity of the Objection “immediately” within the meaning of Section 51(4) of the TPA; and
  - iii. Under what circumstance can the Commissioner request for additional documents, and whether there are time limits set by the law?
11. The Appellant prays that the Respondent’s Assessment be set aside in its entirety.

### **APPELLANT’S CASE**

12. That Section 51(4) of the TPA requires the Commissioner to immediately notify the taxpayer in writing where he considers a Notice of Objection not to have been validly lodged.

*Section 51(4): “Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.”*

13. The Respondent conducted a tax audit on the Appellant and relied on the documents in the Appellant’s possession, which documents it deemed sufficient to issue the assessment.
14. That the Appellant lodged its Notice of Objection to the Assessment within 30 days as per Section 51(2) of the TPA.

15. That it is a mandatory requirement for the Respondent to render an Objection Decision within 60 days of receipt of the Objection or within 60 days of receipt of any further documents from the Appellant. The Respondent did not seek or request for any further documents within the 60-day period.
16. That the invalidity of the Notice of Objection cannot be communicated outside the 60 days' period because the finding of the Objection being invalid is a product of the objection review process which process is capped at 60 days by Section 51(11) of the TPA. The process begins with the review of the Objection and its supporting documentation and terminates when the Commissioner either arrives or fails to arrive at a decision within 60 days.
17. That the Respondent sought to invalidate the Notice of Objection after realizing that there was no any other remedy following the lapse of the 60 days' timeline. Consequently, the Respondent lost its right to allow or disallow the Objection or even to pronounce itself on the validity or otherwise of the Notice of Objection.
18. That the Respondent's request for any additional documentation or information relevant for the review of an Objection should be made within the 60 days window set out under Section 51(11) of the TPA.
19. That the Commissioner issued the Invalidation Notice 132 days after the Objection. This was 72 days after the lapse of the 60-day period provided for under the TPA.
20. That the Objection be deemed allowed given the Commissioner's failure to issue its Invalidation Notice, Objection Decision, or alternatively request for additional supporting documentation, within 60 days of receipt of the Objection.

## **RESPONDENT'S CASE**

21. That the Appellant filed its Objection on 14th January 2021 and the Respondent replied on 23rd March 2021 notifying the Appellant of the invalidity of its Objection, and specifying the necessary documents required to validate the same.
22. That the Appellant responded on 30th March 2021 and informed the Respondent that the 60 days had elapsed from date of submission of the Objection.
23. That the Respondent wrote back on 20th April 2021 and requested the Appellant to validate its Objection by providing supporting documents requested in the Respondent's previous letter dated 23rd March 2021. The Appellant replied on 4th May 2021 but did not provide the documents requested for.
24. That consequently, the Respondent, in a letter dated 26<sup>th</sup> May 2021, notified the Appellant that it did not have a valid objection and therefore had no authority to demand a response from the Respondent within 60 days. The Respondent, by a copy of the same letter, invalidated the Appellant's Objection.
25. That the Appellant's Objection having failed the validity test under Section 51(3) of the TPA, the Respondent was under no obligation to issue an Objection Decision per the provisions of Section 51(8).
26. That having found the Appellant's Objection to be invalid, the time envisaged under Section 51(11) of the TPA was not applicable and Section 51(4) of the Tax Procedures Act 2015 does not specify timelines for issuing a notice of invalid Objection.

## **SUBMISSIONS BY THE PARTIES**

### ***On whether the Respondent's decision to invalidate the Appellant's Objection was lawful.***

27. The Appellant submits that Section 51 of The TPA sets out the dispute resolution process for tax assessments and, where an Objection Decision is not issued within the stipulated period of 60 days, Section 51(11) provides that the Objection shall be deemed to have been allowed.
28. On the other hand, Section 51 (3) of the TPA specifies the essential characteristics of a valid Objection to be: one that states precisely the grounds of objection, the amendments required to be made to correct the decision and the reasons for the amendments. Additionally, the taxpayer is required to have settled any tax not in dispute or entered into a payment arrangement for the same with the Commissioner.
29. The Appellant further submits that pursuant to Section 51(4) of the TPA, the Respondent is required to immediately notify the taxpayer where it considers the Objection not to have been validly lodged. This is in order to enable the taxpayer cure the same. Conversely, where an Objection is validly lodged, the Respondent is required to respond to the same vide an Objection Decision in accordance with Section 51 (8) of the TPA.
30. The Appellate argues that the period for responding to an Objection by issuing an Objection Decision is time-bound under Section 51 (11) of the TPA. Specifically, the Respondent is required to respond to a validly lodged Objection vide an Objection Decision within 60 days of receipt of the Objection.
31. The Appellant avers that where the Respondent requests for additional documents for purposes of reviewing the Objection such request also ought to be made or issued within the 60 days.

32. It is the Appellant's assertion that per the provisions of Section 51 of the TPA, the objection review process commences with reviewing of the Objection and any accompanying supporting documentation and terminates when the Commissioner either arrives or fails to arrive at a decision within 60 days.
33. The Appellant contends that any different interpretation of the TPA would invite the possibility of the Respondent exercising its powers outside the 60-day timeframe envisaged for the objection review process and which would result in an absurdity. That in the present instance, the Respondent failed to issue an Objection Decision, request for additional documentation or issue a notice of invalidation within 60 days of receipt of the Objection. It would follow that on the 60<sup>th</sup> day, since no finding of the Objection being invalid had been made, the Objection can only be deemed to have been validly lodged.
34. The Appellant again submits that the Respondent requested for additional documentation 68 days after receipt of the Objection and 8 days after the expiry of the stipulated 60 days. That the Commissioner then issued the Invalidation Notice 132 days after the lodgment of the Objection.
35. The Appellant submits that the High Court and the Tribunal have previously held that where the Respondent is statutorily obligated to provide a decision within a specific timeframe, and where the applicable legislation expressly provides a consequence for the failure to do so, the same must be strictly adhered to. In **Equity Group Holdings Limited-vs-Commissioner for Domestic Taxes [Civil Appeal No. ITA E069 of 2020 and ITA E025 of 2020]**, the High Court determined the consequence of failure by the Commissioner to respond to the Objection lodged by the Appellant (Equity Holdings Limited) within 60 days as provided for under Section 51(11) of the TPA. In the case, the Commissioner had issued an Objection Decision 3 days after expiry of the stipulated 60 days and the High Court overturned

an earlier decision of the TAT and held that the Tribunal erred in terming the failure to issue an Objection Decision within 60 days as a matter of procedural technicality.

36. The Appellant submits that neither an Objection Decision nor a request for additional information was issued within the 60 days, and the Invalidation Notice amounts to an effort by the Respondent to resuscitate a case whose life had ended by operation of the law.
37. The Appellant submits that even in a situation where a taxpayer consents to a delay, the subsequent decisions made by the Commissioner is a nullity. In Republic-vs-Commissioner of Customs Services ex-parte Unilever Kenya Limited [2012] eKLR, Korir J. held that:

*“...The law is however clear and even if the ex-parte applicant had consented to the delay, that would still not have made the respondent’s demand valid. The respondent’s letter dated 18<sup>th</sup> July 2011 means nothing since the respondent’s failure to communicate a decision to the ex-parte applicant by 16<sup>th</sup> April 2011 meant that the respondent had accepted the ex-parte applicant’s application for review. The implication of the respondent’s non-communication within the statutory period of 30 days is that the ex-parte applicant did not owe the taxes demanded by the demand notice of 9<sup>th</sup> February 2011. The respondent’s decision in the letter dated 18<sup>th</sup> July 2011 which revised the tax demand downwards from Kshs. 102,254,601.00 to Kshs. 65,335,378.00 was therefore void from the beginning. The law as it is presumes that by failing to communicate a decision by 16<sup>th</sup> April, 2011 the respondent was telling the ex-parte applicant that its appeal against the tax demand contained in the notice dated 9<sup>th</sup> February 2011 had been allowed and the ex-parte applicant did not owe the respondent any tax in respect of that particular demand. It is clear that the respondent is*

*barred by the law from ever recovering the tax demanded in the letter dated 9<sup>th</sup> February 2011 and revised by the letter dated 18<sup>th</sup> July 2011.”*

38. The above decision was affirmed in **Republic-vs-Commissioner of Custom Services ex-parte Tetra Pak Limited [2012] eKLR**. Similarly, Odunga J., in **Republic v Kenya Revenue Authority ex-parte M-Kopa Kenya Limited [2018] eKLR** observed that:

*[106] “..... In this case the applicant had clearly made what was in substance an objection as envisioned under Section 51 of the Tax Procedures Act, 2015. Accordingly, the Respondent was required to make a decision in respect thereof within sixty (60) days under Section 51 (1) of the said Act. As the Respondent defaulted in making a determination thereon within the prescribed time, the said objection was deemed to have been allowed.”*

39. In **Republic-vs-Commissioner of Domestic Taxes Ex-Parter Fleur Investments Limited [2020] eKLR**, the High Court observed that:

*“As stated above, the Respondent never filed a Replying Affidavit to rebut the averments that it never rendered a decision following the applicant’s objection. There is nothing before me to show that the Respondent made an objection decision as the law requires. By virtue of the clear provisions of section 51(8) and (11) of the TPA, the Respondent is deemed to have allowed the applicant’s objection. I find backing in Republic v Commissioner of Customs Services Ex-Parte Unilever Kenya Limited [14] in which the court stated that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law. The Act requires that where the Commissioner has not made an objection decision within 60 days from the date*

*the taxpayer lodged the notice of objection, the objection shall be allowed. This means that the issues that the taxpayer had raised in the notice of objection will be accepted. In case of a tax assessment, it will be vacated. On this ground alone, the applicant's application succeeds."*

40. The Appellant submits that whereas the Respondent has the right to request for additional information it did not do so within the 60 days after the Objection was lodged.
41. The Appellant also points out that the words "*all relevant documents*" used in Section 51(3) of the TPA are subjective and a wide term without a defined standard. That what may be deemed relevant by the Respondent may not be deemed relevant by the Appellant. As such documents filed by the Appellant in support of its Objection should therefore be deemed sufficient until the Respondent makes a finding to the contrary. If by the 60<sup>th</sup> day no finding of insufficiency of the documents has been made, the Respondent has only one option, which is to render the Objection Decision.
42. The Appellant is of the view that the Objection ought to be considered allowed to the extent that the Respondent failed to communicate its decision on the same within the 60-day timeframe provided by Section 51 (11) of the TPA. That the Invalidation Notice and any other action post-60 days was out of time and therefore inconsequential.
43. On its part, the Respondent submits that the audit of the Appellant's tax affairs sought to establish the tax liability on the Appellant regarding interchange fee income for 2017 which amounts did not tally. That, in its Objection, the Appellant contended that the January to October 2015 WHT additional assessments were out of time by virtue of the statutory 5-year time limit provided for in the TPA.

44. That pursuant to the provisions of Section 51(4) of the TPA, the Respondent decided to issue a notice of an invalid Objection vide a letter dated 23<sup>rd</sup> of March 2021.
45. The Respondent avers that, in the aforesaid letter, it notified the Appellant of the invalidity of its Objection per the provisions of Section 51(3) of the TPA, and requested the Appellant to provide a detailed ledger and its breakdown in order to review of the objection. However, that the Appellant failed to submit these and other information requested despite acknowledging that there were various categories of interchange fee income that had been captured under interchange fees account in the trial balance.
46. The Respondent submits that Section 51(3) of the TPA sets out the validity threshold for a Notice of Objection to be; statement of the grounds of objection, requisite amendments to correct the decision, reasons for amendments sought, payment of undisputed taxes and provisions of all relevant supporting documents. That this Section employs the use of a conjunctive term 'and' meaning that it is incumbent upon a taxpayer to check each box under Section 51(3) (a) to (c) of the Act accordingly, to successfully lodge a valid Notice of Objection.
47. The Respondent faults the Appellant's assertion that the entire assessment for 2017 should be vacated on the grounds that it was already assessed remained unsupported as the Appellant did not provide a detailed breakdown of the monthly interchange fee income that would helped determine whether there was any overlap in the assessments.
48. The Respondent submits that Section 59(1) of the TPA empowers it to demand production of documents and records in respect of the tax liability or for any other purposes relating to a tax law by notice in writing. That since the Appellant refused to produce documents to support its Objection,

the Respondent was left with no choice other than to disallow the Appellant's Objection.

49. The Respondent submits that its letter dated 23<sup>rd</sup> March 2021 clearly specified that failure to submit the requested documents would invalidate the Objection, and that the Commissioner would only issue an Objection Decision within 60 days after lodgment of a valid Objection.
50. The Respondent avers that that the Appellant failed in its duty to supply the Commissioner with documentary evidence to support the Objection and has also failed to supply the Tribunal with any document in support of its claim that the Respondent's additional assessments were erroneous. Thus, it has not discharged its burden of proof pursuant to Section 56(1) of the TPA which places the burden of proof on the Appellant.
51. The Respondent refers to the case of **Boleyn International Limited-vs-Commissioner of Investigations and Enforcement [Nairobi TAT Appeal No. 55 of 2018]**, in which the Tribunal cited with approval **Pierson-vs-Belder (H.M. Inspector of Taxes) (1956 – 1960) 38 TC 387** and **Norman-vs-Golder 26 T.C. 293** by stating that the onus is upon the Appellant to show that the assessment made upon him is excessive or incorrect.
52. The Respondent asserts that the Appellant is under legal duty to demonstrate to the Tribunal, over and above claiming the Respondent erred in rejecting its Objection, how and to what extent the assessment was erroneous regarding the taxes due and payable. In the absence of such demonstration, the Tribunal must uphold the Commissioner's assessment as a true reflection of the Appellant's tax liability.
53. The Respondent relies on the decisions in the following cases: **Oceanfreight (EA) Limited-vs-Commissioner of Domestic Taxes [2018] eKLR**, **Primarosa Flowers Limited-vs-Commissioner of Domestic Taxes [2019] eKLR** and

Tumaini Distributors Company (K) Limited-vs-Commissioner of Domestic Taxes [2020] eKLR. In the above-mentioned cases the courts held that the burden of disproving a tax assessment by the Commissioner lay with a taxpayer.

**On whether the Respondent complied with Section 51(4) of the TPA in issuing the Invalidity Notice.**

54. The Appellant submits that while Section 51(4) of the TPA provides that where an Objection fails the validity test under Section 51 (3) the Respondent is required to immediately notify the taxpayer in writing of the invalidity, the term “*immediately*” is not defined under the TPA. However, the Oxford Dictionary defines the term “*immediately*” to mean “*without delay*”, “*next to or very close to a particular place or time*” or “*closely and directly*”. The Cambridge Dictionary defines the same to mean “*now or without waiting or thinking*” or “*close to something or someone in distance or time*”.
55. The Appellant submits that the Respondent’s Invalidation Notice does not pass the judicial or ordinary dictionary meaning of word “*immediately*” since it was communicated 132 days after the Appellant lodged its Objection Decision and 72 days after the objection review process was concluded.
56. The Appellant submits that the term “*immediately*” was canvassed in the case of Keshav Nilkanth Joglekar-vs-The Commissioner of Police AIR 1957 SC 28. The Supreme Court of India citing with approval to the decision in Queen-vs-The Justices of Berkshire 1878-79 4 Q.B.D. 469 (471) stated as follows:

*“The question is substantially one of fact. It is impossible to lay down any hard and fast rule as to what is the meaning of the word ‘immediately’, in all cases. The words ‘forthwith’ and immediately’ have the same meaning. They are stronger than the expression*

*'within a reasonable time', and imply prompt, vigorous action, without any delay, and whether there has been such action is question of fact, having regard to the circumstances of the particular case". The same construction has been put on the word "forthwith" occurring in contracts."*

57. The Appellant further refers to the decision of the TAT in **APM Terminals Kenya Limited-vs-Commissioner of Domestic Taxes [Appeal No. 368 of 2019]**. The Tribunal, at Paragraph 128, stated that:

*"To the Tribunal's mind once the statutory 60 days under Section 51 (11) of the TPA in which the Commissioner is obligated to give his Objection Decision lapse, he may be precluded from invoking his powers under Section 51(4) thereof."*

58. The Appellant submits since the Respondent had not commenced the objection review process within the stipulated 60 days it had been stripped off the authority by operation of the law to make any pronouncement under Section 51(4) of the TPA.

59. The Respondent, on the other hand, submits that Section 51(3) of the TPA specifies the criteria to be considered in determining the validity of an Objection including requiring that all relevant documentation in support of an Objection be submitted in order for the Objection to be considered validly lodged.

60. The Respondent submits that the phrase "*all relevant documents*" is not defined under the TPA or any other taxing Act. However, "Dictionary.Com" defines "*relevant*" as "*something that is appropriate or connected to the matter at hand*". Therefore, the term "*relevant*" is subjective and its interpretation would vary from one person to another. What may be considered relevant by the Appellant may not be relevant in

the eyes of the Respondent. For example, the Respondent asserts in Paragraph 18 of its Statement of Facts, that the Appellant should have enclosed evidence to show that Withholding Tax had been accounted for during the period considered to be outside the 5-year time frame whereas according to the Appellant providing such evidence had no consequence to the Appeal since the Appellant was already clear that this period was time-barred and had not admitted that withholding tax was payable in the first instance.

61. The Respondent submits that the potential ambiguity of Section 51(3) (c) triggered the enactment of Section 51 (11) (b) which empowers the Respondent to call for further documents where it deems that documentation provided in support of the Objection to be insufficient. This provision does not limit the number of times the Respondent can request for further documents. Whenever the Respondent calls for further documents, the law grants the Respondent a fresh 60-day duration of time within which to make an objection decision.
62. The Respondent submits that under Section 51(11) of the TPA the Commissioner is only required to issue a decision within 60 days where there is a valid Objection. Thus, the 60 days would only start running once the Commissioner is satisfied that all the relevant documents relating to the Objection have been submitted to his satisfaction.
63. The Respondent reiterates that there is no time limit set by law to stop the Commissioner from requesting for documents to support a taxpayer's Objection. That pursuant to the provisions of Section 51(8) of the TPA, the validity of a Notice of Objection is a pre-condition for the application of Section 51(11).
64. The Respondent faults the Appellant's interpretation of Section 51(4) of the TPA that the issuance of the invalidation notice 68 days after the lodgment

of the Objection render the said notice invalid. According to the Respondent, the Appellant is misguided in view of the fact that Section 51(11) of the TPA is not applicable in the instant case.

65. The Respondent submits that since the TPA does not define the term “*immediately*” and that the section should be interpreted in conformity to the Constitution, specifically Articles 159 and 201. That in the Indian case of **Gangavishan Heeralal-vs-Gopal Digambar Jain and Ors**, the High Court of India interpreted the term “immediately” as follows:

*“The term “immediately”, in my opinion, on the facts and in the circumstances of this case, cannot be assigned that strict meaning as to exclude all mesne time, irrespective of any consideration whether reasonable or not. That would be tantamount to turning protection of law into uncalled for punishment, that is what sometimes happens when reason takes the place of reasonableness rather than blend with it in a happy union.*”

66. The Respondent also refers the Tribunal to **Madho Narayanrao Ghatate-vs-Mt. Watsalabai [AIR 1948 Nag 142]** where Hidayatullah, J. construed the word “forthwith” to mean “within a reasonable time” and quoted with approval the following passage from Maxwell's Interpretation of Statutes (page 143):

*“When a statute requires that something shall be done ‘forthwith’, or ‘immediately’, or even ‘instantly’, it would probably be understood as allowing a reasonable time for doing it.”*

In making its determination, the Court suitably referred to the following observations on pages 102-103 in Volume 37 of Halsbury's Laws of England (3<sup>rd</sup> Edition):

*“Where anything is limited to be done within a “reasonable time” or at a “reasonable hour”, the question what is a reasonable time*

*or reasonable hour must necessarily depend on the circumstances of the particular case, and is, therefore, a question of fact" followed by a comparative look at the terms "immediately" and 'forthwith' as below:*

*"There appears to be no material difference between the terms "immediately" and "forthwith". A provision to the effect that a thing must be done "forthwith" or "immediately" means that it must be done as soon as possible, in the circumstances, the nature of the act to be done being taken into account."*

67. In **Tulsiram-vs-State of Madhya Pradesh** the Supreme Court of India held that: -

*"... the expression 'immediately' is used to convey a sense of continuity rather than a sense of urgency. It is not to be understood to mean the very next instant, the very next hour, that very day or the very next day. It must be construed in its setting. It is no use turning to dictionaries.*

*In the context the expression 'immediately' is only meant to convey 'reasonable dispatch and promptitude' and no more. The idea is to avoid dilatoriness on the part of officialdom and prevention of unnecessary harassment to the accused. But the idea is not to penalize the prosecution and to provide a technical defence. First to construe 'immediately' as meaning 'at once' or 'forthwith' and next to hold delay to be fatal to the prosecution would perhaps be to make Rule 9-A ultra vires Section 13(2). We do not think it is permissible to interpret Rule 9-A in such a way. The real question is, was the Public Analyst's Report sent to the accused sufficiently early to enable him to properly defend himself by giving him an opportunity at the outset to apply to the court*

*to send one of the samples to the Central Food Laboratory for analysis.”*

68. The Respondent avers that in view of the Appellant’s invalid Objection and as already demonstrated, the time envisaged under Section 51(11) of the TPA could not start running. That in any case, Section 51(4) of the Tax Procedures Act 2015 does not say that the notice of invalid objection must be supplied within a period of sixty (60) days, when the term “immediately” means “without delay”.

**Whether there is a valid appeal before the Tribunal?**

69. The Respondent submits that Section 3 of the Tax Appeals Tribunal Act as read with Section 52 of the TPA, defines “*appealable decision to mean an Objection and any other decision made under a tax law other than a tax decision or decision made while making a tax decision*”. It is the Respondent’s contention that there was no Objection Decision or any appealable decision made under any tax law that is being appealed against. Thus, this purported Appeal is a nullity *ab initio* and ought to be struck out.
70. The Respondent submits that whereas Section 51(1) of the TPA provides for the procedure of objecting to tax decisions, Section 51(8) of the Act provides that, “*Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner’s decision shall be referred to as an “objection decision.”*”
71. It is the Respondent’s opinion, there is no valid Objection or any appealable decision made under any tax law worth appealing against. That the Appellant’s actions are in blatant disregard to the doctrine of exhaustion; it ought to have complied with the laid down procedures before invoking the jurisdiction of the Tribunal.

72. The Respondent relies on the decision in the case of **Godfrey Osotsi-vs-Amani National Congress [2019] eKLR** which set out an elaborate analysis of the rationale for the doctrine of exhaustion. Mativo J. held that:

*“Where there is a clear procedure for redress of any grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”*

73. The Respondent however reiterates that issuing a notice of objection after sixty-eight 68 days after receipt of a taxpayer’s notice of objection is not unreasonable in the circumstances. That this position is supported by the decision in **HMCE-vs-L Rowland and Co (Retail) Ltd ([1992] STC 647)** where it was held that that the reasonable inquiry time envisaged includes time to consider any information provided as part of that inquiry. The 53-day period taken up with the Tax Authority’s consideration of the information provided by the Appellant was not unreasonable delay in considering or actioning the correspondence.

## **ISSUE FOR DETERMINATION**

74. The Tribunal frames the key issue for determination to be:

**Whether the Respondent’s decision to invalidate the Appellant’s Objection was lawful.**

## **ANALYSIS AND FINDINGS**

*Whether the Respondent’s decision to invalidate the Appellant’s Objection was lawful.*

75. The Appellant submitted that it objected to the Respondent's assessment vide a Notice of Objection dated 14<sup>th</sup> January 2021. However, that the Respondent did not give a response until 23<sup>rd</sup> March 2021, 68 days after the Objection had been lodged.
76. In its letter dated 23<sup>rd</sup> March 2021, the Respondent sought more documents from the Appellant ostensibly to review the Objection which request the Appellant disagreed with. By a letter dated 30<sup>th</sup> March 2021, the Appellant notified the Respondent that the Objection ought to be deemed allowed by operation of the law owing to the fact that the Commissioner did not respond to it within 60 days pursuant to Section 51(11) of the TPA.
77. The Appellant also pointed out to the Respondent that under Section 51(4) of the TPA, the Respondent was obliged to immediately notify the taxpayer in writing if the Respondent was of the view that the Objection did not meet the validity test under Section 51(3).
78. The Respondent nonetheless was adamant that the Appellant's Objection was not validly lodged due to failure to provide all the relevant documents to support it and the two parties failing to agree, the Respondent issued an 'Invalidation Notice' on 26<sup>th</sup> May 2021, informing the Appellant that its Objection was not validly lodged pursuant to the provisions of Section 51(8) of the TPA, and further confirmed the Assessment of **KShs 647,977,670.00** to be due and payable.
79. The Respondent further contended that there is no Objection Decision or any appealable decision made under any tax law that is being appealed against and that the Appeal herein is a nullity and should be to be struck out.

80. The Respondent also averred that Section 51(3) of the TPA sets out the validity threshold for a Notice of Objection and this includes provision of all relevant supporting documents. That the taxpayer's responsibility to ensure that its Objection complied fully with the provisions of Section 51(3) and for the same to be considered to have been validly lodged.
81. The Respondent's argument is that the Appellant's Objection having been found to be invalid, the Respondent was under no obligation to issue an Objection Decision and this position is supported by Section 51(8) of the TPA.
82. On whether the Appellant's Objection was validly lodged, the Tribunal agrees with the Appellant's contention that the Respondent is compelled to inform the taxpayer immediately if the Respondent considers the Objection not to have been validly lodged.

*Section 51(4): "Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged."*

83. Whereas the statute has not given exact timelines or defined "*immediately*", the Tribunal notes that the notification by the Respondent took place after the expiry of 60 days, i.e., the period within which an Objection should be reviewed and determined.
84. This Tribunal when called upon to answer the above question in **APM Terminals Kenya Limited-vs-Commissioner of Domestic Taxes [Appeal No. 368 of 2019]** that powers under 51 (4) may be subjected to certain timelines and once the statutory 60 days under Section 51(11) of the TPA, within which Commissioner is obliged to issue an Objection Decision lapse, then

the Commissioner is precluded from invoking the powers under Section 51(4) thereof.

85. The Tribunal finds concurrence with the views expressed by Odunga J., in **Republic v Kenya Revenue Authority ex-parte M-Kopa Kenya Limited [2018] eKLR** that once the Appellant had lodged an Objection as contemplated under Section 51 of the TPA, then the Respondent was required to make a decision within sixty (60) days under Section 51 (11) of the Act. The Respondent's failure to make a determination thereon within the prescribed time meant that the Objection was deemed to have been allowed.”
86. The Tribunal wishes to reiterate that by allowing the Respondent to invalidate a taxpayer's Objection after the expiry of 60 days defeats the purpose which Section 51(11) intended to achieve by ensuring that Objections are reviewed and decisions thereon communicated within the specified period.
87. In the recent case of **Equity Group Holdings Limited-vs-Commissioner of Domestic Taxes [2021] eKLR**, the High Court emphatically stated that a decision relating to an Objection by the Commissioner after the expiry of 60 days is null and void. Mativo J., stated that:

*60. Section 51 (11) of the TPA is couched in peremptory terms. Having correctly found that the decision was made after the expiry of 60 days, the TAT had no legal basis to proceed as it did and to invoke Article 159 (2) (d). First, there was no decision at all. The decision had ceased to exist by operation of the law. Second, the provisions of section 51 (11) (b) had kicked in. The Objection had by dint of the said provision been deemed as allowed. Third, the TAT had no discretion to either extend time or to entertain the matter further. Fourth, discretion follows the law and a tribunal cannot purport to exercise discretion in clear breach of the law.*

*63. The TAT manifestly erred in law by confusing substantive law with procedural law. Article 159(2) (d) of the Constitution in clear terms talks about procedural technicalities. A statutory edict is not procedural technicality. It's a law which must be complied with. Parliament in its wisdom expressly and in mandatory terms provided the consequences of failing to render a decision with 60 days. The Objection is deemed to be allowed. That being the law, the appellant's Objection stood allowed as a matter of law the moment the Commissioner of Domestic Taxes failed to render his decision within the 60 days. This being the correct legal position, it is my finding that the 1st appeal succeeds.*

88. In arriving at the above-mentioned decision, the High Court relied on the judgment in Republic-vs-Commissioner of Customs Services ex-parte Unilever Kenya Limited [2012] eKLR, where Korir J., stated that:

*“My understanding of the above quoted section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the respondent in this case has 30 days within which to make and communicate a decision to the taxpayer. If the respondent does not communicate a decision within 30 days, then the respondent “shall be deemed to have made a decision to allow the application.”*

89. In light of the foregoing, the Tribunal finds that the Respondent erred by invalidating the Appellant's Objection after expiry of 60 days pursuant to Section 51(11) of the TPA. The Appellant's Objection stands allowed by operation of law.

## FINAL DECISION

1. The Appeal succeeds and the Tribunal makes the following final orders;
  - i. The Appeal be and is hereby allowed.
  - ii. The Respondent's Notice of Assessment of **KShs 647,977,670.00** dated 15<sup>th</sup> December, 2020 be and is hereby set aside
  - iii. The Respondent's Invalidation Notice dated 26<sup>th</sup> May, 2021 be and is hereby set aside.
  - iv. Each party to bear its own costs.

**DATED and DELIVERED at NAIROBI on this 4<sup>th</sup> day of March, 2022.**



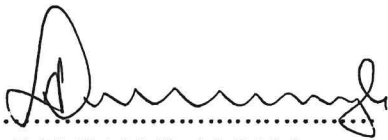
.....  
**PATRICK LUTTA**  
**CHAIRPERSON**




.....  
**ELISHAH NJERU**  
**MEMBER**



.....  
**MWAI MBUTHIA**  
**MEMBER**



.....  
**DELILAH K. NGALA**  
**MEMBER**



.....  
**TIMOTHY K. CHESIRE**  
**MEMBER**