

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
AT NAIROBI
TAX APPEAL NUMBER 108 OF 2023

DACHI LIMITED APPELLANT

~VERSUS~

COMMISSIONER DOMESTIC TAXES..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a private limited liability company duly incorporated and registered under the Companies Act within the Republic of Kenya. Its main form of business is in general construction and related supplies.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya revenue Authority Act, 1995. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5 (2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Parts 1 & 2 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 raised and issued additional assessments of VAT on 29th August 2022 for the period of July 2022 amounting to Kshs. 1,980,560.00.
4. On 29th October 2022 the Appellant lodged an objection to the assessment for the period of July 2022.
5. On 29th November 2022 the Respondent issued an Objection decision confirming the VAT assessment.
6. On receiving the Objection decision and being aggrieved, the Appellant filed a Notice of Appeal on 18th January 2023.

THE APPEAL

7. The Appellant set down its case in the Memorandum of Appeal dated and filed on 1st February 2023 and premised on the following surmised grounds:-
- a) The Respondent erred in fact and law by making decision to demand tax that is based on incorrect and erroneous information.
 - b) The entire tax demanded by Respondent on 29th November 2022 is not lawfully due for the reason that the Respondent in making the assessments relied on incorrect information.
 - c) The Respondent erred in fact and in law in subjecting and charging the additional taxes upon the Appellant contrary to laws of natural justice and fair administrative action.
 - d) The Respondent's assessment is contrary to the law and is procedurally unfair and unreasonable in the circumstances of the case. Since the same is based on the Respondent's erroneous reconciliation of the Appellant records as held by the Respondent.
 - e) The Respondent has acted ultra vires and misapprehensively raised assessments and demanded taxes from the Appellant unduly as there are no due or payable taxes by the Appellant to the Commissioner.
 - f) The Objection decision is erroneous as the Respondent disregarded materials, evidence and documents availed to him, and in addition, misinterpreted and misdirected himself as to the law and facts relating to the Appellant's case.

THE APPELLANT'S CASE

8. The Appellant's case was set out in its;
- a) The Statement of Facts dated and filed on 1st February 2023 together with the documents attached thereto.
 - b) Written Submissions dated 22nd August 2023 and filed on 25th August 2023.

9. The Appellant stated that it duly filed all self-assessment returns in accordance with the requirements of the law.
10. The Appellant averred that sometime on 29th August 2022, the Respondent raised assessments against it demanding payment of Kshs. 1,980,559.84 to which it objected vide objection notices on 26th September 2022. The Appellant argued that this demand by the Respondent was wrongful and is without any legal justification.
11. It avowed that the Respondent acted unfairly and in an oppressive and unjust manner contrary to rules of fair administrative action insisting that it discharged its burden of proof under the law by providing all relevant documents to the Respondent as requested.
12. On whether the additional tax assessments dated 29th August 2022 are lawfully due, the Appellant submitted that the taxes and assessments are illegitimate and illegal and are not due to all extents.
13. The Appellant further submitted that it made genuine supplies and was issued with invoices which it provided to the Respondent together with bank slips as proof of the transaction with suppliers and valid to enable it to claim the VAT inputs.
14. The Appellant submitted that a taxable person who makes transactions in respect of which VAT is deductible as input tax may deduct VAT in respect of the goods or services acquired by him, provided that such goods or services have a direct and immediate link with the business of the claimant and that the relevant documentation is in place to support the claim.
15. On whether the Appellant VAT input claims are valid, the Appellant submitted that it explained to the Respondent that the Appellant's supplier had erroneously declared a sales invoice to the Appellant's sister company, Earthcare Services Limited, instead of Dachi Limited. Subsequently, the Appellant requested its supplier to amend the return which the Appellant's supplier agreed to do.

16. The Appellant submitted that the Respondent has powers to verify and audit transactions of the supplier; powers which the Appellant averred the Respondent conveniently ignored in its realms and misdirected its efforts to the Appellant to allegedly and arbitrarily demand for taxes.
17. On whether the Appellant is entitled to the orders sought, the Appellant submitted that the Respondent's breach of legitimate expectation is contrary to Article 47 of the Constitution and Fair Administrative Action Act, 2015.
18. The Appellant also submitted that the Respondent did not follow any cannons of equity in taxation and fairness causing a procedural impropriety on the Appellant.

The Appellant's Prayers

19. The Appellant prayed for the following from the Tribunal:
 - a) The Appeal be allowed.
 - b) The Objection decision of the Respondent dated 29th November 2022 be set aside and substituted with an order affirming/ allowing the Appellant's objection dated 29th August 2022.
 - c) The assessment made by the Respondent be set aside in its entirety.
 - d) The Tribunal to grant any other relief as may be fair and just in the circumstances.
 - e) Costs of the Appeal be granted to the Appellant.

THE RESPONDENT'S CASE

20. The Respondent's case is premised on:
 - a) The Statement of Facts dated and filed on 17th February 2023 together with the documents annexed thereto; and
 - b) The Written Submissions dated and filed on 13th September 2023.
21. The Respondent averred that the decision to arrive at the assessments was justified and had basis in law as required under the Tax Procedures Act, 2015.

22. The Respondent contended that it is not bound by the Appellant's returns or self-assessment, and it is empowered to vary the assessments using any available information in the Respondent's possession as provided by Sections 24(2) and 31 of the Tax Procedures Act.
23. The Respondent averred that it raised the VAT assessment for the period of July 2022 since the Appellant had claimed VAT input from a supplier who had not declared the sale in its VAT return.
24. The Respondent avowed that it disallowed the Appellant's VAT input claim as it did not meet the requirements of Section 17(2)(b) of the Value Added Tax Act.
25. The Respondent asserted that during the objection review stage, the Appellant stated that its supplier had erroneously declared a sales invoice to the Appellant's sister company and that the supplier had agreed to amend the return in question.
26. Subsequently, the Respondent claimed that it requested the Appellant to provide proof that its supplier (Session Blue Contractors) had made an application to amend its returns, failure to which the Respondent would disallow its input VAT. The Respondent reiterated that it disallowed the Appellant's VAT input claim as it did not meet the requirements of Section 17(2)(b) of the Value Added Tax Act.
27. On whether it was justified in issuing the additional assessment, the Respondent in its submissions reiterated its assertions in the Statement of Facts and further submitted that in the absence of a return from the supplier, it disallowed the Input VAT claimed and issued an additional assessment.
28. On whether the Appellant lodged a valid objection, the Respondent submitted that an objection to an assessment lodged by an Appellant must be lodged within 30 days after the decision and must list grounds of objection and be supported by documents.

29. The Respondent submitted that it issued a notice of additional assessment on 29th August 2022 and therefore the Appellant had until 30th September 2022 to object but failed to do so until 26th October 2022.
30. The Respondent submitted that on 7th November 2022 it wrote to the Appellant informing it that the objection was invalid and requested the Appellant to validate the same by providing documents and reasons for late objection.
31. On whether the Appellant discharged its burden of proof, the Respondent submitted that the onus is on the Appellant to prove that the assessment made by the Respondent is incorrect and/or that the documents relied upon by the Respondent in disallowing the tax credits claimed in making the assessments was wrong.
32. The Respondent submitted that in failing to provide the relevant supporting documents, the Appellant failed to discharge its burden of proof.
33. In concluding, the Respondent submitted that the Appeal is not valid and is bad in law and the Tribunal should proceed and dismiss the same.

The Respondent's prayers

34. The Respondent, therefore, prayed for orders that the Tribunal:
 - a) Upholds the Objection decision as proper and in conformity with the provisions of the Law.
 - b) Dismisses this Appeal with costs to the Respondent.

ISSUE FOR DETERMINATION

35. Gleaning through the Memorandum of Appeal, the parties' Statements of Facts, and submissions, the Tribunal puts forth the following as the main issue for determination:

Whether there was a competent Appeal on record.

ANALYSIS AND FINDINGS

36. The Tribunal wishes to analyze the issue as herein-under.
37. The Tribunal noted that the Notice of Appeal was lodged on the 18th January 2023 arising from the grievance with the Objection decision issued on 29th November 2022.
38. For a Notice of Appeal to be deemed as competently lodged, the same ought to be made and/or lodged within the prescribed timelines as set out under Section 13 (1) (b) of the Tax Appeals Tribunal Act, which states:
- “A notice of appeal to the Tribunal shall—*
(b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.”
39. Section 13 (3) of the Tax Appeals Tribunal Act, provides the remedy to any party who wishes to lodge an Appeal out of time, being that any such intended Appellant may seek leave of the Tribunal in writing, seeking an extension of time and leave to file an Appeal out of time. Section 13 (3) reads as follows:-
- “The Tribunal may, upon application in writing, extend the time for filing the notice of appeal and for submitting the documents referred to in subsection (2).”*
40. The Tribunal’s position is that the Appellant ought to have lodged the Notice of Appeal thirty(30) days of the Respondent’s Objection decision, which would have been on or before the 29th December 2022. Yet, the Appellant’s Notice of Appeal was lodged on 18th January 2022, approximately 20 days late and did not seek leave of the Tribunal to file the Notice of Appeal out of time.
41. The Tribunal is further guided by **TAT Appeal No. 1321 of 2022 CKL Africa Limited v Commissioner of Domestic Taxes** where the Tribunal held as thus:-
- “63. The law makes provisions under Section 13 (3) of the Tax Appeals Tribunal Act for any party who lodges its appeal out of time and with reasonable grounds, to seek leave of the Tribunal to file its appeal out if time, the Appellant did not move the Tribunal seeking such Orders.*

64. The timelines provided under Section 47 (13) of the Tax Procedures Act and Section 13 (1) of the Tax Appeals Tribunal Act demand strict adherence and are not discretionary to any party lodging an appeal before the Tribunal.

65. It is the Tribunal's position that there is no proper and valid Appeal before the Tribunal for the exercise of its jurisdiction."

42. The Tribunal finds that the Appeal herein was lodged beyond the statutorily prescribed period and is therefore incompetent and untenable in law. The Appeal is therefore not validly and properly before the Tribunal.

FINAL DECISION

43. The upshot to the foregoing is that the Appeal is incompetent and the Tribunal consequently makes the following orders; -

- a) The Appeal be and is hereby struck out.
- b) Each party bears its own costs.

44. It is so ordered.

DATED and DELIVERED at NAIROBI this 9th day of May, 2024

**GRACE MUKUHA
CHAIRPERSON**

**DR. WALTER ONGETI
MEMBER**

**GLORIA A. OGAGA
MEMBER**

**DR. ERICK KOMOLO
MEMBER**

**JEPHTHAH NJAGI
MEMBER**