

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 336 OF 2021**

**DELTRACK ICT SERVICES LIMITED.....APPELLANT**

**-VERSUS-**

**COMMISSIONER OF INVESTIGATIONS &  
ENFORCEMENT..... RESPONDENT**

## **JUDGMENT**

### **BACKGROUND**

1. The Appellant is a limited liability company duly incorporated in Kenya under the Companies Act, Chapter 486, (now repealed), Laws of Kenya.
2. The Respondent is a principal officer of Kenya Revenue Authority (KRA). KRA is established under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5(1) of the Act, KRA is an agency of the Government with a mandate for the assessment, collection and receipt of all its revenue.
3. The Respondent conducted investigations into the business affairs of the Appellant for the period 2014-2017, to determine whether it may have under-declared tax in respect to business that was carried out by the Appellant. As a result, the Respondent discovered that the County Government of Migori had paid Kshs.185, 810,132.00 to the Appellant, which was not declared during the filing of returns.
4. Upon completion of investigations, the Respondent, on 13th November, 2019, issued a tax demand for unpaid income tax and VAT amounting to Kshs. 22,483,572.00. However, after review of documents supplied by the

Appellant, the Respondent adjusted the tax demand downwards to Kshs. 12,019,859.00.

5. Subsequently, the Appellant objected to the assessment vide its letter dated 10<sup>th</sup> December, 2019 setting out grounds thereof for the Appellant's consideration.
6. The Respondent considered the Appellant's objection and rendered its Objection Decision on 16<sup>th</sup> February, 2021, informing the Appellant that the objection was not validly lodged and confirmed the additional income tax and VAT assessment of Kshs. 35,239,853.00.
7. Being dissatisfied with the Objection Decision, the Appellant filed its Notice of Appeal on 22<sup>nd</sup> June, 2021. The respective Memorandum of Appeal and Statement of Facts were filed on even date and both documents served upon the Respondent.
8. Upon service, the Respondent filed its Statement of Facts on 19<sup>th</sup> July 2021 and a Witness Statement on 4<sup>th</sup> November, 2021.

## **THE APPEAL**

9. The Appeal is premised on the grounds that: -
  - a) The Respondent confirmed the notice of assessment without due regard to all records, explanations, information, withholding taxes and payments provided by the Appellant thereby failing to appreciate all issues presented by the Appellant before confirming the assessment;
  - b) Section 51(3) of the Tax Procedures Act (TPA) provides for the conditions that need to be fulfilled for a notice of objection to be treated as validly lodged by a taxpayer. That the Appellant stated precisely the grounds of objection, the amendments required to be

made to correct the decision and the reasons for the amendments as provided in the TPA. It was the responsibility of the Respondent to involve and direct the Appellant on additional documentation needed.

- c) The Respondent's decision is in response to the objection filed by the Appellant on 10<sup>th</sup> December, 2019. However, additional assessments were introduced to the initial assessment as included in the final decision;
  - d) Income tax assessment is based on the profit margin ratio of 20% with an assumption that the Appellant made a profit. The Respondent's approximated profit margin is not based on any law.
  - e) The amount confirmed by the Respondent of Kshs. 35,239,853 in respect to income tax and VAT for the period 2014, 2015, 2016 and 2017 is therefore wrong in law, fact and should be annulled.
10. The Appellant further stated that the Respondent's assessment is in contravention of Section 31(2) of TPA.
11. Furthermore, the Appellant stated that it received the Objection Decision from the Respondent over 60 days after the objection, which is contrary to Section 51(11) of the TPA, which states that;-
- “(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed”.**
12. The Appellant stated that from the above provision, it treated the issue as settled and vacated by the Respondent.

13. The Appellant further averred that the objection was not handled carefully and diligently by the Respondent because;

- a) The Appellant is still willing to resolve the matter through Alternative Dispute Resolution (ADR).
- b) The decision was made outside the timeline provided in law and in contravention to Section 51(11) of the TPA.
- c) The Respondent failed to look at the objection fully and ask for further documents, especially the properly audited financial statements which the Appellant was more than willing to avail or give an explanation as to why they could not be availed.
- d) That while the Appellant agrees to settle the issue paying the correct amount due, the Respondent has provided calculations which do not express the reality.

14. In conclusion, the Appellant prays that:-

- a) The Appeal be allowed and the matter be transferred to Alternative Dispute Resolution.
- b) The Tribunal to set aside the additional assessment amount on the basis of incorrect interpretation of law and fact by the Respondent.

## **THE RESPONSE**

15. The Respondent stated that it conducted its preliminary investigations on the Appellant which revealed that Migori County Government paid the Appellant Kshs. 185,810,132.00 between the periods 2014 to 2017 but the Appellant failed to make the corresponding tax declarations.

16. The Respondent averred that on 7<sup>th</sup> November, 2018, it issued the Appellant with a tax demand for unpaid VAT amounting to Kshs. 22,483,572.00 and a notice to appear under Section 61 of the TPA.
17. The Respondent further stated that it made a request for information to the Appellant and requested for various documentation. That on 13<sup>th</sup> November, 2019 it issued a tax demand of Kshs. 12,019,859.00 after adjusting the initial demand of Kshs.22, 483,572.00. That the Appellant filed its objection demand on 10<sup>th</sup> December, 2019 together with a request for extension of time to pay the tax not in dispute on the 21<sup>st</sup> January, 2020. That the Respondent issued its Objection Decision on 16<sup>th</sup> February, 2021 for Kshs. 35,239,853.00 in respect of income tax and VAT.
18. According to the Respondent, it considered all the information availed before confirming the assessment in its Objection Decision. That the burden is on the Appellant to raise the specific items and/or aspects of the tax assessment that were erroneously, wrongfully imposed or not liable to be paid as tax, which it has not discharged.
19. The Respondent stated that the Appellant has failed to demonstrate which record or information that it provided that was not considered and therefore the allegation is devoid of any merit.
20. The Respondent stated that it notified the Appellant of the fact that its objection had not been validly lodged as the Appellant had failed to make payment of taxes demanded and which were not in dispute, despite an extension of time for payment of the taxes.
21. The Respondent further stated that the Appellant failed to provide documents in support of its objection despite several requests and therefore the Appellant's objection did not comply with Section 51(3)(c) of the TPA.

22. On the issue of whether the Objection Decision was inconsistent with the additional assessment, the Respondent avers that the investigations revealed that the Appellant received Kshs. 185,810,132.00 from the County Government of Migori. That the Appellant however declared a gross turnover of Kshs. 56,456,153.00 and a taxable income of Kshs. 170,663.00 in its income tax company return for the year 2017.
23. The Respondent further avers that it was guided by Section 31 of the TPA when it used a Gross Profit Ratio of 20% to arrive at the income tax position of the Appellant.
24. The Respondent avers that it established that the Appellant was a nil filer for VAT yet it was making taxable supplies for VAT purposes and its turnovers exceeded the minimum VAT threshold as provided for in Section 34(1) of the VAT Act 2013. That the Respondent therefore computed VAT based on the Appellant's bankings after making the requisite adjustments.
25. The Respondent avers that Section 29 of the TPA allows it to make a default assessment where a taxpayer has failed to submit a tax return for a reporting period, while Section 31 of the TPA allows it to amend an assessment. That in both instances, the Respondent uses information available to it and to the best of its judgment. Hence, the assessments are therefore valid under the law based on the best judgment and available information.
26. The Respondent further averred that upon the review of documents availed and available information that the Respondent's decision included additional assessment for both VAT and income tax that were different from the initial assessment by the Appellant.

27. On the issue of whether the Profit Margin Ratio of 20% is justifiable under the law, the Respondent stated that the Appellant was unable to provide any supporting documents for the business transactions to support any business expenditure that may have been applied to generate the income received and therefore the assessments were in accordance with Section 15 of the Income Tax Act, (ITA).
28. The Respondent further stated that it is empowered by Sections 29 and 31 of the TPA, to use its best judgment and available information which included bank statements, IFMIS data and third-party information from Migori County Government to arrive at the costs and profits of the business.
29. The Respondent stated that it determined and applied a Profit Margin Ratio of 20% from sampled suppliers in the same industry as the Appellant. That based on information available to it and to the best of its judgment, the assessments as issued are correct, valid and due by the Appellant.
30. On the issue of whether the Respondent made assessments when the Appellant was not in existence, the Respondent averred that the Appellant has not produced any evidence to support the contention that an assessment was made for years it was not in existence.
31. The Respondent avers that the Appellant has failed to discharge its burden of proof under Section 56(1) of the TPA and Section 30 of the Tax Appeals Tribunal Act, (TATA).
32. On the issue of whether the Respondent's Objection Decision was out of time, the Respondent avers that it has demonstrated that the Appellant failed to provide supporting documents to its objection contrary to Section 51(3)(c) of the TPA. According to the Respondent, the Appellant therefore did not lodge

a valid objection, and since there was no valid objection and the Appellant failed to validate the same by providing the documents requested for, the Respondent's Objection Decision was not barred under Section 51(11) of the TPA.

33. In view of the foregoing, the Respondent prays that: -

- a) The assessment for Kshs. 35,239,853.00 together with the penalties and interest be found to be due and payable as per the Respondent's Objection Decision issued on the 16<sup>th</sup> February 2021; and
- b) This Appeal is without merit and the same be dismissed with costs to the Respondent.

## **ISSUES FOR DETERMINATION**

34. The Tribunal has carefully studied the parties' pleadings and submissions and is of the respectful view that the issues that call for its determination are as hereunder: -

- (a) Whether the Appeal is valid.**
- (b) Whether the Appellant's notice of objection is valid.**
- (c) Whether the Respondent's Objection Decision is valid.**
- (d) Whether the Respondent erred in law and fact in issuing the tax assessments on the Appellant for the period 2014 to 2017.**

## **ANALYSIS AND FINDINGS**

35. It is to these issues that the Tribunal will turn to as hereunder: -

- (a) Whether the Appeal is valid.**

36. The Tribunal notes that the Respondent, in its Statement of Facts states that the Appellant's objection did not meet the provided threshold under Section 51(3) of the TPA because the Appellant failed to make payment of the tax which was not in dispute, despite an extension of time for payment of the same.
37. The Tribunal is of the respectful view that before delving into the issue of validity of the Appellant's Objection, we will first determine whether the Appeal is valid pursuant to Section 52(2) of the Tax Procedures Act (TPA).
38. Furthermore, it is worth noting that the issue of whether there is a valid appeal or not is paramount as the same will determine whether the Tribunal has jurisdiction to make a determination in respect to any other issues emanating from the Appeal herein, including the validity of the Appellant's Objection.
39. Section 52(2) of the TPA provides as follows;

***“52. Appeal of appealable decision to the Tribunal  
... (2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice”.***

40. The Tribunal has examined the two-page notice of objection dated 10<sup>th</sup> December, 2019 issued by the Appellant's tax representative and notes that the Appellant admits owing the Respondent a sum of Kshs 250,000.00 as a result of its reconciliation in several meetings that it had with the Respondent. The Appellant thus requested for a three (3) month extension to enable it pay the said undisputed tax. For avoidance of doubt, the said letter states in part as follows;

*“...Our client has corroborated and carried out reconciliation in the several meetings that they have had with you. In the reconciliation, the amount of tax they do not dispute as payable is Kshs. 250,000. Our client humbly requests ... for extension for a period of three (3) months within which to pay the undisputed tax...”*

41. The Tribunal further notes that the Respondent in its letter dated 5<sup>th</sup> February 2020, granted the Appellant sixty (60) days within which to pay the undisputed tax.
42. Moreover, the Appellant having admitted owing some amount of tax, proceeded to propose to liquidate the same within three (3) months. However, up to the date of writing this Judgement, the Appellant has failed to demonstrate to us that it has paid any amount due as relates to the admitted tax.
43. The upshot of the foregoing is that the Appeal is in contravention of Section 52(2) of the TPA since the Appellant, in response to the Respondent’s allegation of non-payment, has not furnished the requisite documentary evidence to the Tribunal that payment of the admitted tax was made prior to the filing of the Appeal. The Appeal therefore does not meet the validity threshold envisaged in law.
44. Consequently, the Tribunal makes a finding that the Appeal is not validly lodged.
  - b) Whether the Appellant’s notice of objection is valid.**
  - c) Whether the Respondent’s Objection Decision is valid.**
  - d) Whether the Respondent erred in law and fact in issuing the tax assessments on the Appellant for the period 2014 to 2017.**

45. The Tribunal having made a finding that the Appeal is not validly lodged, is of the respectful view that delving into the remaining issues (b), (c) and (d) referred to hereinabove will be an exercise in futility.

## FINAL DECISION

46. The upshot of the foregoing is that the Appeal is not merited. Consequently, the Tribunal makes the following **ORDERS**: -

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

47. It is so ordered.

**DATED and DELIVERED at NAIROBI on this 11<sup>th</sup> day of March, 2022.**

  
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**JOSEPHINE K. MAANGI**  
**CHAIRPERSON**

  
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**PATRICIA M. ANAMPIU**  
**MEMBER**

  
.....  
**TANVIR ALI**  
**MEMBER**

  
.....  
**GEOFFREY KARUU**  
**MEMBER**

  
.....  
**WAMBUI NAMU**  
**MEMBER**

