

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAX APPEAL NO. 1053 OF 2022

COXWELL EXPRESS COMPANY LIMITED APPELLANT

~VERSUS~

COMMISSIONER INVESTIGATIONS & ENFORCEMENT RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya under the Companies Act and its core business engagement is the supplies and general contractors.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, and the Kenya Revenue Authority is mandated with the responsibility for the administration and enforcement of the various statutes set out under the Schedule to the said Act.
3. The dispute giving rise to the Appeal herein arose out of the Respondent's tax investigation findings relating to Income tax for the years 2014, 2015, 2016, 2017, 2018 and 2019 on the 22nd September 2019. Subsequently, the Respondent issued an Assessment Order on 25th January 2022, to which the Appellant objected on the 24th February 2022.
4. The Respondent issued its Invalidation decision on 5th August 2022 rejecting the Appellant's Objection and confirmed its assessment on Corporation tax and

VAT in the sum of Kshs. 105,957,051.00 for the principal tax, penalty and interest respectively.

5. Dissatisfied with the Respondent's aforesaid Invalidation decision, the Appellant lodged its Notice of Appeal dated the 1st September 2022 on the 2nd September 2022.

THE APPEAL

6. The Appellant in its Memorandum of Appeal dated 22nd September 2022 and filed on 23rd September 2022 set out the following grounds of appeal, that;
 - i. The Objection decision by the Respondent dated 5th August 2022 is erroneous in law and fact as it is based on tax assessments that were arrived at by applying an incorrect method of estimating the turnover of the Appellant for the mentioned years of income that do not reflect the true tax position of the Appellant;
 - ii. The Respondent erred in law and fact by failing to consider all wholly and exclusive expenses incurred by the Appellant to generate the taxable income as proved under Section 15 (1) of Income Tax Cap 470;
 - iii. The Respondent erred in law and fact by failing to consider adequately all the grounds of objection filed by the Appellant;
 - iv. The Respondent erred in both law and fact by charging Corporation tax on alleged undeclared gross sales instead of basing the tax on gains or profits as require by law and thus issuing erroneous assessment;
 - v. The Objection decision dated 5th August 2022 if not vacated violates the Appellant's fundamental Constitutional rights to fair administrative action as provided under Article 47 of the Constitution of Kenya;
 - vi. The Appellant is aggrieved by the Respondent's decision not to allow the objection to the assessment despite the Appellant stating clearly the

grounds of objection as required under Section 51 (3) (a) of the Tax Procedures Act, 2015;

7. The Appellant, further, in its Amended Memorandum of Appeal dated 22nd August 2023 and filed on 23rd August 2023 set out further/additional grounds for appeal, that;

vii. The Respondent's attempt to assess periods expressly barred from assessment by virtue of Section 31 (4) (b) of the TPA simultaneously *contra legem* and *ultra vires*. Specifically, vide the Objection decision, the Respondent erroneously demands CIT pertaining to the years of income 2014 – 2016 and VAT with respect to the periods January 2014 – December 2016, inclusive of attendant penalties and interest, despite the impugned period being outside the statutory five-year period within which the Respondent can issue and/or amend an assessment.

THE APPELLANT'S CASE

8. The Appellant has set out its case on, its;

i. Statement of Facts dated 22nd September 2022 and filed on 23rd September 2022 together with the annexed documents thereto;

ii. The Supplementary Statement of Facts dated 22nd August 2023 and filed on 23rd August 2023; and

iii. Written submissions dated 28th September 2023 and filed on 2nd October 2023.

9. The Appellant stated that the Respondent issued the Appellant with tax investigation findings for the years under review 2014 to 2019 premised on summary of bank deposits allegedly not declared in the income tax returns and VAT 3, respectively.

10. The Appellant averred that the Respondent issued it with additional assessments on the 25th January 2022, to which the Appellant objected vide the letter dated 24th February 2022.
11. The Appellant asserted that in its notice of objection to the additional assessment, it adduced several grounds that the assessment was incorrect as it was based on gross bank deposits which included non-sales and other deposits which should not be subjected to tax.
12. That the Respondent vide its letter dated the 5th August 2022 issued its Objection decision disallowing the Appellant's objection in its entirety and confirmed its assessment in the sum of Kshs. 79,898,717.00 being the principal tax.
13. The Appellant contended that the Respondent erroneously with the intent to collect undue taxes used incorrect and excessively high figure that do not reflect the true and fair tax position of the Appellant.
14. The Appellant stated that Respondent erroneously charged both Corporation tax and VAT on IFMIS payments not yet traced in bank statements amounting to Kshs. 39,468,953.00. The Appellant asserted that it did not receive the payments from the IFMIS and did not operate any other bank accounts.
15. The Appellant further stated that the Respondent, with intent to collect undue taxes on bank deposits in the Director's personal account amounting to Kshs. 20,841,200.00, when a company is separate legal entity from the owners and therefore cannot be held liable to any tax liabilities apart from the ones assessed on its operations.
16. The Appellant asserted that Respondent while computing taxes on the alleged undeclared gross sales derived from bank deposits, failed to adjust for the cost incurred to generate the sales before charging the Corporation tax.

17. The Appellant further asserted that the tax decision and the banking method used to compute the tax liabilities contravenes the provisions of Section 15 (1) of the income tax.
18. The Appellant relied on Section 3 (2) (a) (i) of the Income Tax Act upon which tax is chargeable, includes income in respect of gains and profits from a business for whatever period of time is carried on.
19. That the Appellant contended under the realm of accounting and taxation, a gain is defined as the excess of receipts over expenditure or of sale price over costs, similarly profit is defined as the excess of revenues over expenditure in a business transaction.
20. That the Respondent failed to consider adequately the grounds of objection filed by the Appellant in the objection and consequently erroneously computed taxes from the Appellant.
21. The Appellant in its submissions identified one key issue for determination, being;
 - i. Whether the Respondent acted contra legem in seeking the assess CIT pertaining to the years of 2014 – 2016 and VAT with respect to the periods January 2014 – December 2016, respectively, despite the operation of Section 31 (4) (b) of the TPA restricting the issuance of assessments outside the statutory time limit of five years.*
22. The Appellant submitted that the Respondent acted *contra legem* and *ultra vires* by making assessments beyond the statutory time limits of five years, and further relied on the provisions of Section 31 of the TPA.
23. The Appellant submitted that legislation was not made in vain, and the Respondent ought to comply with the statutory time limits as there is no room

for abrogation, particularly in the cases of public bodies, failure to which such action shall be considered *contra legem* and *ultra vires*.

24. The Appellant further submitted that it remained cognizant that Section 31 (4) (a) of the TPA provides for an exception to this rule, that is, in cases of gross willful neglect, evasion, or fraud by or on behalf of a taxpayer. The Appellant further submitted that, the Objection decision, however, does not raise any allegation or evidence of gross or willful neglect, evasion or fraud by the Appellant and thus the Respondent's departure from the application of Section 31 (4) (b) of the TPA.

25. The Appellant submitted that the mere mention of gross or willful neglect, evasion, or fraud by or on behalf of the Appellant is not sufficient, it must be supported by sufficient evidence indicating instances of gross or willful neglect, evasion or fraud. The Appellant contented that there was no evidence in support of the same to warrant the assessments beyond the statutory limits.

26. The Appellant relied on the flowing authorities;

i. Republic vs. Commissioner of Domestic Taxes Large Taxpayers Office Ex parte Barclays Bank of Kenya Ltd [2012] eKLR.

ii. Stanbic Bank of Kenya vs. Kenya Revenue Authority [2009] eKLR.

iii. TAT Appeal No. 524 of 2019, Nazir Ahmed Akbarali vs. Commissioner of Domestic Taxes.

iv. Africa Oil Kenya BV vs. Commissioner of Domestic Taxes (Tax Appeal E024 & E051 of 2020 (consolidated)) [2022] KEHC 15967 (KLR).

Appellant's Prayers

27. By reason of the foregoing submissions, the Appellant prayed to the Tribunal, that;

- i. The Appeal is allowed.
- ii. The Objection decision be set aside and vacated in its entirety;
- iii. The costs of and incidental to this Appeal be awarded to the Appellant; and
- iv. Any other Orders that the Tribunal may deem fit.

THE RESPONDENT'S CASE

28. The Respondent has set out its case on its;
 - i. Statement of Facts dated and filed on 21st October 2022, together with documents annexed thereto;
 - ii. Supplementary Statement of Facts dated 7th September 2023 and filed on the 8th September 2023, together with documents annexed thereto;
 - iii. Written Submissions dated and filed on 10th May 2023; and
 - iv. Supplementary Written Submissions dated and filed on 11th October 2023.
29. The Respondent stated that it conducted investigations into the tax's affairs of the Appellant which revealed that it had received income from contracts for supply of goods and services to various entities including KPA and the Counties of Mombasa and Kilifi.
30. The Respondent averred that the Appellant's bank accounts at ABC Bank were observed to receive income from the company. Furthermore, some sale deposits were deposited in the Director's bank account, which deposits were adjusted for interbank transfers, loans, granted reversed cheques and other non-trade receipts.
31. The Respondent averred that the IFMIS payments were analyzed to ascertain taxable income by the company. The payments that were traced in the bank statements were added to income established from the bank statements.

32. That the Respondent issued the Appellant with the investigation findings on the 22nd September 2021, which findings established the total income and the Corporation tax and Value Added tax.
33. The Respondent contended that the Appellant objected to the findings on 24th February 2022 and on 5th August 2022 the Appellant was issued with a confirmation of the assessment decision which confirmed the tax payable was Kshs. 105,957,051.00 plus resultant penalties and interest.
34. The Respondent asserted that the Appellant's Appeal as filed contradicts the provisions of Section 52 of the Tax Procedures Act and at the first instance raised a Preliminary Objection to the Appeal.
35. The Respondent averred that the Appellant's Appeal against the confirmation of assessment dated 5th August 2022, was filed on 5th September 2022 and substantive Appeal filed on 23rd September 2022 and that the Appeal as filed is improper and the Respondent shall seek to have the same struck out.
36. The Respondent asserted that it used the information that was available, which was bank deposits and IFMIS payments and relied on Section 31 of the TPA.
37. The Respondent further contended that the findings of the investigations was limited to the information that was available to it and the Appellant has failed to disapprove the same or that it provided any evidence to disprove the Respondent's findings.
38. The Respondent further stated that all the expenses and invoices available were analyzed and those that were not traced (IFMIS) in the bank statement were added to income established from the bank statements.
39. That the Respondent invalidated the Appellant's Objection as it failed to submit supporting documents to the objection, despite being reminded

severally to produce the documents in support of the Objection in line with Section 51 (3) of the TPA.

40. The Respondent averred that the Appellant failed to discharge its burden of proof as is required under Section 56 (1) of the Tax Procedures Act and stated that the burden of proof lied on the Appellant, who has failed to discharge the same.

41. The Respondent maintained that invalidation of the Objection was solely based on the non-compliance of the Appellant to produce supporting documents.

42. That the Respondent has the right to subject undeclared income to taxation, which responsibility is initially bestowed upon the Appellant vide self-assessments.

43. That the Appellant was accorded an expeditious, efficient, lawful, reasonable and procedurally fair treatment.

44. That the Respondent's assertion was that it was empowered under Section 31 (4) of the TPA to assess taxes beyond the stipulated five years on grounds of gross and willful neglect, that the Appellant has grossly under declared the income earned in the period 2015 -2019, while it earned income in 2014 yet it did not file any returns.

45. The Respondent averred that the Objection was declared invalid for failing to meet the requirements of Section 51 (3) of the TPA on 8th March 2022. The Appellant was requested to validate its Objection within 7 days, with a subsequent reminder sent on 18th May 2022.

46. That the Respondent confirmed that it was yet to receive both additional documents requested and/or a valid notice of Objection as per the 2022 amendments and as such the Objection was issued within timelines.

47. The Respondent in its submissions (initial and supplementary) identified four issues for determination, namely;

i. Whether the Respondent erred in assessing bank deposits in determining taxable income during the assessment period;

ii. Whether the Respondent failed to consider all wholly and exclusive expenses incurred by the Appellant to generate taxable income as provided under Section 15 (1) of ITA;

iii. Whether the Respondent considered the Appellant's Objection; and

iv. Whether the Respondent erred in assessing additional tax for the period 2014 and 2015;

48. The Respondent submitted that by virtue of Sections 29 and 31 of the TPA it has the power to issue an assessment based on best judgement and relying in all the information at its disposal.

49. In light of the above, the Respondent submitted it relied on third parties such as the Appellant's bankers.

50. The Respondent further submitted that the tax investigation program must embrace a range of methods and techniques for determining and verifying a taxpayer's income.

51. The Respondent further submitted that indirect methods such as the bank deposits involve the determination of tax liabilities through an analysis of a taxpayer's financial affairs utilizing information from a range of sources beyond the taxpayer's declarations and formal books and records. Bank deposits method is based on the premise that money received must either be deposited or spent.

52. That the Respondent submitted that a detailed analysis of all bank deposits into accounts established several deposits from customers of the Appellant and payments to the suppliers, clearly showing a person's in trade.
53. The Respondent submitted that, having employed the banking method in raising the assessment, the burden of proof shifted the Appellant to explain which of the deposits that had been included in the assessment was not from a taxable source, was already taxed or was not income.
54. The Respondent in its submissions relied on Sections 15 and 54A (1) of the Income tax relating to the deductions allowed in ascertainment of the total income and keeping of records respectively. That the Appellant was granted the opportunity to provide information and evidence in support of its expenses.
55. The Respondent submitted that the assessments were confirmed due and payable in the absence of supporting documents.
56. The Respondent placed reliance on Section 31 (4) of the TPA and submitted that it is empowered to assess taxes beyond the period of five years premised on the grounds, inter alia, gross and willful neglect, the Appellant had grossly under declared the income earned in the period under review.
57. The Respondent submitted that the Appellant did not provide a response to the issue of under declaration raised by the Respondent and non-filing of tax returns.
58. The Respondent while relying on Section 56 (1) of the Tax Procedures Act, submitted that the onus was on the Appellant to demonstrate whether and what information or which documents were omitted by the Respondent in making its decision.
59. The Respondent relied on the following authorities;

- i. TAT Appeal No. 551 of 2021 Atronix Limited vs. Commissioner DTD.
- ii. Commissioner Investigations and Enforcement vs. Kidero (Income Tax Appeal E028 of 2020) [2022] KEHC 52 (KLR) (Commercial and Tax).
- iii. Leah Njeri Njiru vs. Commissioner of Investigations and Enforcement Kenya Revenue Authority & another [2021] ELR.
- iv. TAT Appeal No. 404 of 2019 Michael Ndichu Mburu vs. Commissioner of Domestic Taxes.

Respondent's Prayers

60. By reason of the foregoing the Respondent prayed to the Tribunal that;
- i. The Respondent's confirmed assessment of Kshs. 105,957,051.00 be upheld; and
 - ii. The Appeal dismissed with costs to the Respondent as the same lacks merit.

ISSUES FOR DETERMINATION

61. Vide the partial consent dated and filed on the 26th September 2023 and adopted as an Order of the Tribunal on 24th October 2023, the parties agreed on all issues in the Appeal save for the dispute on Corporation tax and VAT tax for the periods 2014 and 2015
62. The Tribunal having carefully considered the pleadings and submissions made by the parties, is of the considered view that the Appeal herein distils into a single issue for its determination;

Whether the Respondent was justified in its assessment for Corporation Tax and VAT for the period 2014 and 2015?

ANALYSIS AND DETERMINATION

63. The Tribunal having identified the issue for determination shall analyze the same as herein under;

64. The Respondent issued its assessment to the Appellant on 25th January 2022 and the periods outstanding for the Tribunal's determination are the years 2014 and 2015.

65. Section 29 (5) and (6) of the Tax Procedures Act, provides;

“(5) Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.

“(6) Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer.”

66. From the above provision of the law the Respondent is prohibited from making assessments for taxes the period whereof is beyond five years. The Respondent's assessments were issued on 25th January 2022 for taxes arising from the years 2014 and 2015, which is beyond the statutory period as the same span to periods of eight and seven years, respectively.

67. It is to be understood that the law provides for grounds upon which the Respondent can rely upon to make assessments beyond the statutory period. Section 31 (4) (a) of the Tax Procedures Act empowers the Respondent and provides for the grounds upon which an assessment beyond five years may be done, it provides;

“(4) The Commissioner may amend an assessment—

(a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or”

68. It follows that, for the Respondent to issue an assessment beyond the statutory period, it must demonstrate that the Appellant acted with gross or willful neglect, evasion or fraud by or on behalf of the Appellant.
69. It was the Respondent's position that the Appellant acted in a gross and willful negligence as the Appellant had grossly under declared the income earned in the period under review.
70. That the Respondent was required to demonstrate and tender evidence as well as particulars in support of such allegations of gross and willful neglect. The Respondent merely alleged gross and willful neglect without supporting the same.
71. The Tribunal is guided by the case of **Africa Oil Kenya BV vs. Commissioner of Domestic Taxes (Tax Appeal No. E024 & E051 of 2020 (Consolidated)) [2022] KEHC 15967 (KLR)**, where the court held;

“45. On the issue I agree with the Tribunal that the Commissioner did not allege, let alone prove any willful neglect on the part of the appellant. Wilful or gross neglect entails an intentional or reckless failure to carry out a legal duty. There is no evidence on record of such conduct on the appellant's part. The Appellant's position on various tax liabilities were consistent and at no point did it admit liability or demonstrate that it willfully neglected to pay the taxes demanded by the Commissioner.....”

72. It was the Tribunal's observation that Respondent ought to have gone a notch higher beyond the mere mention that the Appellant was grossly and willfully negligent and demonstrated the intent of the Appellant to execute and achieve the mischief it accused it of.

73. Consequently, the Tribunal finds that the Respondent was not justified to issue the assessments on Corporation tax and VAT beyond the statutory period of five years.

74. The upshot of the foregoing is that the Appeal is merited.

FINAL DECISION

75. The Appellant's Appeal having been found to be merited the Tribunal issues the following orders;

- a) That the partial judgement entered by consent on the 24th October 2023 be and is hereby confirmed.
- b) The Appeal regarding the assessment covering the period 2014 and 2015 be and are hereby set aside.
- c) Each party to bear its own costs.

76. It is so ordered.

DATED and DELIVERED at NAIROBI this 8th Day of March, 2024

ROBERT M. MUTUMA
CHAIRPERSON

MUTISO MAKAU
MEMBER

ELISHAH N. NJERU
MEMBER

BERNADETTE GITARI
MEMBER

MOHAMED A. DIRIYE
MEMBER