

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 83 OF 2023

CROCODILE ENTERPRISES LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited company incorporated in Kenya whose principal business is selling of second-hand clothes.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the laws of Kenya. 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 concerning 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 Appellant was issued with an additional VAT assessment for October 2019 on 25th November 2019. The Appellant objected to the entire assessment on iTax platform and through a letter dated 13th December 2019 with the same being acknowledged by the Respondent on even date.

4. On 16th December 2022, the Respondent issued its invalidation decision rejecting the Appellant's notice of objection.
5. Dissatisfied with the Respondent's invalidation decision, the Appellant filed its Notice of Appeal dated 12th January 2023 at the Tribunal on 23rd January 2023.

THE APPEAL

6. The Appeal was predicated on the Memorandum of Appeal dated 24th January 2023 and filed on 25th January 2023.
 - (a) That the Respondent erred in law in raising additional VAT assessment amounting to Ksh1,225,559.70 vide assessment number KRA201916074260.
 - (b) The Respondent erred in law in disregarding the objection against additional assessment number KRA201916074260 as per letter dated 13th December 2019.
 - (c) The Respondent issued an objection decision without following the laid procedure and failing to consider the letter dated 13th December 2019.
 - (d) The Respondent did not communicate on how additional assessments were raised and the VAT adjustments vouchers amounting to Ksh 1,225,559.76 without consulting the Appellant even an email detailing which invoices were disallowed and why before proceeding to confirm additional assessment.
 - (e) That the Respondent issued its objection decision on 16th December 2022, 3years instead of the 60 days' time limit set in the Tax Procedures Act No. 29 of 2015 (hereinafter 'TPA').

APPELLANT'S CASE

7. The Appellant's case was predicated on its Statement of Facts dated 24th January 2023 and filed on 25th January 2023.
8. The Appellant averred that the VAT return for October 2019 was prepared and submitted online on 19th November 2019 yet the Respondent proceeded to issue an additional assessment for the same month without giving details of the additional assessment.
9. It was the Appellant's contention that the Respondent disregarded grounds of objection in issuing the objection decision as there were no pending issues.
10. The Appellant asserted that the Respondent issued a debit voucher to recover the VAT amount from the Appellant's credit disregarding the law which did not recognize the amount of tax due until objection and hearing and determination of Appeal.

Appellant's Prayers

11. The Appellant's prayed that the Tribunal would:
 - (a) Order the Respondent to accept the filed return
 - (b) Order the Respondent to withdraw all estimated assessments and reverse the debit vouchers

THE RESPONDENT'S CASE

12. The Respondent replied to the Appeal through its Statement of Facts dated 14th February 2023 and filed on an even date.
13. In reiterating its position as stated in the invalidation decision, the Respondent averred that it conducted a VAT returns review on the Appellant's portal for October 2019 where it established variances between VAT as compared to purchases in its income tax returns.

14. The Respondent averred that its decision to arrive at the confirmed assessments was justified and in conformity with Section 51(3)(c), 56(1) and 97 of the TPA as read together with Section 17 of the Value Added Tax Act No. 35 of 2013 (hereinafter 'VAT Act').
15. The Respondent underscored the Appellant's duty in providing the required information to ascertain the correct tax position despite being given ample time refused and or ignored to validate its objection. The Respondent cited Section 51(3) and 59(1) of the TPA in buffering this position.
16. The Respondent claimed that the Appellant failed in its duty of discharging the burden of proof which forced the Respondent to rely on the only documents provided and arrived at its decision using the best available judgement pursuant to Section 29 as read with Section 31 of the TPA.
17. The Respondent asserted that the Appellant did not provide any additional evidence in the form of documents or general ledgers to show that the confirmed assessment was wrong therefore the assessment as issued was legal and procedural and the decision rendered was in accordance with the law.

Respondent's Prayers

18. The Respondent prayed for the following:
 - (a) That the Tribunal dismiss the Appeal with costs; and
 - (b) That the Tribunal would uphold its assessment and decision dated 13th December 2022.

PARTIES' WRITTEN SUBMISSIONS

19. The Appellant's written submissions dated 16th August 2023 were filed on 17th August 2023.
20. The Appellant reiterated grounds as previously stated in its Memorandum of Appeal.
21. The Appellant stated that the Respondent was in possession of all documents in support of the claim of input VAT for October 2019 as clearly stated in the 13th December 2019 objection.
22. The Appellant claimed that the Respondent's actions resulted in unproportioned, unjust, unfair, and excessive punishment. Furthermore, the Respondent erred in law in giving the decision and not taking into consideration the explanation given by the Appellant for the filing of returns that were submitted on time.
23. Respondent's written submissions dated 25th September 2023 were filed on 26th September 2023 wherein the Respondent submitted on three issues for determination as hereunder;
 - (a) **Whether the Respondent's objection decision and assessments raised should be upheld.**
24. The Respondent rehashed its Statement of Facts in justifying its objection decision and assessments raised.
 - (b) **Whether the Objection invalidation notice was valid.**
25. The Respondent claimed that the Appellant failed to lodge a valid objection as the Respondent did not have documents to consider as couched under Section 51(3) of the TPA. The Respondent relied on the case of **Ngurumani Traders Limited v Commissioner of Investigations and Enforcement [TAT No. 125 of 2017]** where the Tribunal held that;

“From the foregoing, the Appellant’s failure to lodge a proper objection meant that the Respondent was at liberty to confirm the assessment...”

26. To further buttress this position, the Respondent cited the case of **Boleyn International Limited v Commissioner of Domestic Taxes [TAT No. 55 of 2019]** where the Tribunal stated as follows;

“...on 8th March 2018, the Appellant lodged an objection with the Respondent. However, the said objection did not reiterate the grounds of objection, the corrections required to be made and the reasons for the amendments. Neither did the Appellant provide the relevant documents in support of its alleged objection. Therefore, there was no conceivable way the Respondent would have considered the Appellant’s objection as the same did not place itself within the parameters of Section 51(3) of the TPA.”

(b) Whether the Appellant discharged the burden of proof.

27. The Respondent stated that Section 56(1) and Section 51(3) of the TPA placed the onus to show an assessment as excessive or incorrect was upon the Appellant who failed to discharge this burden by providing documents as provided under Section 107 of the Evidence Act. The Respondent relied on the case of **Republic vs Kenya Revenue Authority Ex-Parte Jaffer Mujtab Mohamed (2005)eKLR** where Odunga J stated as follows;

“a taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the court intervening.”

28. The Respondent submitted that the Appellant failed in its duty to provide positive evidence to defray tax liability as couched under Section 56(1) of the TPA. The Respondent relied on the case of **Bemarc Limited vs Commissioner of Domestic Taxes [TAT No. 101 of 2016]** to buffer its position.

ISSUES FOR DETERMINATION

29. The Tribunal having carefully considered the parties' pleadings, documentation and written submissions notes that a single issue distil for determination as follows;

Whether the Respondent's invalidation decision dated 16th December, 2022 and ensuing assessments were justified.

ANALYSIS AND DETERMINATION

30. Having identified a single issue for determination the Tribunal will proceed to analyse it hereinunder:

31. The instant dispute emanated from a VAT returns review on the Appellant's portal for October 2019 where variances between VAT as compared to purchases in income tax returns were established and VAT assessment was made against the Appellant. The Appellant contested this by asserting that it prepared and submitted online VAT returns for October 2019 on 19th November 2019.

23. The Tribunal notes that the Appellant claimed it supplied documents to counter the assessments to which the Respondent contested as being insufficient to defray the assessed tax liability. The Tribunal notes that both Section 30 of Tax Appeal Tribunal Act No. 40 of 2013 (hereinafter 'TAT') and Section 56 (1) of the TPA place the burden of proof in tax disputes upon the taxpayer.

24. The Tribunal notes the Appellant's claim that the Respondent issued a decision without following the laid-out procedure and failing to consider grounds as contained in the notice of objection. The Tribunal relies on Section 24(2) of the TPA which provides as follows:

"The Commissioner shall not be bound by a tax return or information provided by, or on behalf of, a taxpayer and the Commissioner may assess a taxpayer's tax liability using any information available to the Commissioner."

32. The Tribunal observes that on one hand, the Respondent averred that the Appellant failed to properly lodge a valid objection pursuant to Section 51(3) of the TPA; on the other hand, the Appellant stated that the Respondent issued an invalidation decision 3 years later exceeding the maximum statutorily allowed timeline of 60 days as couched under Section 51(11) of the TPA. The Respondent did not offer explanations or rebuttal as to why the invalidation was issued 3 years late. The Tribunal notes that both Section 51(3) and 51(11) of the TPA which provides as follows:

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

- (a) The notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;*
- (b) In relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and*
- (c) All the relevant documents relating to the objection have been submitted"*

51(11) The Commissioner shall make the objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed...”

33. The Tribunal observes that after the Respondent issued the initial assessment on 25th November 2019, the Appellant objected on 13th December 2019 which was within the set timelines pursuant to Section 51(2) of the TPA. The Respondent had until 13th February 2020 (sixty days) to issue its decision but instead issued it on 16th December 2022 which was way beyond the set time lines as contained under Section 51(11) of the TPA. The Tribunal reiterates its position in the case of **Andrew Mukite Musangi V Commissioner of Domestic Taxes (TAT No E163 2021)** that statutory timelines which give rise to substantive rights cannot be extended *suo moto*.

34. It is the Tribunal’s considered view that the Appellant’s objection had been allowed by operation of the law as prescribed under Section 51(11) of the TPA. The Tribunal echoes the holding in the case of **WEC Lines Limited vs Commissioner of Domestic Taxes (TAT 247 of 2020)** which reiterated the holding in **Krystalline Salt Limited v KRA [2019] eKLR** as follows;

“Where there is a procedure for redress of any particular 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. The relevant procedure here is the process of opposing an assessment by the Commissioner.”

35. From the foregoing, the Tribunal is convinced that the Respondent’s invalidation decision dated 16th December, 2022 and the ensuing confirmed assessments were not justified.

FINAL DECISION

36. The upshot of the foregoing is that the Appeal is meritorious and the Tribunal accordingly proceeds to make the following Orders:

- (a) The Appeal be and is hereby allowed.
- (b) The Respondent's invalidation decision dated 16th December 2022 and assessments ensuing therein be and are hereby set aside.
- (c) Each party to bear its own costs.

37. It is so ordered.

DATED and DELIVERED at NAIROBI this 5th Day of April, 2024

**CHRISTINE A. MUGA
CHAIRPERSON**

**BONIFACE K. TERER
MEMBER**

**DELILAH K NGALA
MEMBER**

**GEORGE KASHINDI
MEMBER**

**SPENCER S. OLOLCHIKE
MEMBER**