

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO 223 OF 2021

FAR EAST CONNECTION LIMITED..... APPELLANT

-VS-

COMMISSIONER OF DOMESTIC TAXESRESPONDENT

JUDGEMENT

1. The Appellant is a limited liability company incorporated under the Companies Act, CAP 486 of the Laws of Kenya. The Appellant's principal activity is auto care centre and is a registered taxpayer.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue 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 revenue.
3. The Respondent issued an assessment and made demands for Corporation tax and VAT in the sum of Kshs.2,546,081.00 on the basis that the Appellant imported goods with a CIF value of Kshs 42,434,678.00 but failed to make appropriate tax declarations commensurate with the value for the goods imported presumed for sale.
4. The Respondent rejected the Appellant's notice of objection through a letter dated 8th July 2021 on the basis that it was issued late.
5. Following the rejection of the notice of objection the Respondent commenced the process for the enforcement of the payment for the assessed taxes through the issuance of an agency notice on 5th May 2021 directed to the Appellant's bank account at Equity Bank (Kenya) Ltd.

6. The Appellant was prompted by the issuance of the agency notice to commence an appeal against the Respondent's letter of rejection of the late notice of objection, dated 8th July 2020.
7. The Appellant filed a Notice of Appeal dated 12th May 2021.

THE APPEAL

8. The Appellant filed the Memorandum of Appeal and the Statement of Facts both dated and filed before the Tribunal on 17th May 2021. The Memorandum of Appeal was, *inter alia*, premised on the following grounds:
 - a) That the Respondent's assessment was on the assumption that the goods imported by the Appellant had been sold thereby accruing both income tax and VAT.
 - b) That the imported goods were for the purpose of setting up a plant for tannery processing and not for resale.
 - c) That the imported goods lie idle as the plant had not been installed or commissioned.
 - d) That though the Appellant was late in raising the notice of objection the Tribunal ought to uphold Article 159 of the Constitution that requires justice to be administered without undue regard to procedural technicalities.
 - e) That the Respondent can only raise an assessment based on actual facts when sale takes place and not on assumption that goods imported have to be sold.

The Respondent's Case

9. The Respondent's case is premised on the Statement of Facts dated 18th February 2022 and filed on 21st February 2022.
10. The Respondent raised the hereunder factual matters as relates to the circumstances informing the raising of the tax assessment as against the Appellant and the subsequent rejection of the Appellant's late notice of objection:
- a) The Appellant imported tannery and forklifts in 2017 with a CIF value of Kshs.42,434,678.00. A review of the Applicant's tax declarations did not tally with the goods imported and which were presumed to have been for sale.
 - b) That the Appellant was requested to contact the Respondent's officer on or before 5th September 2018 to provide information on the import and the tax declared to avert a default tax assessment.
 - c) The Appellant failed to comply with the request for the information thereby prompting the Respondent to issue an assessment on 11th October 2018 for the period 1st January 2017 to 31st December 2017 for the sum of Kshs.2,546,081.00 being corporation tax and VAT.
 - d) That the Appellant lodged an application for late issuance of a notice of objection on 21st May 2019.
 - e) That vide an email dated 16th June 2020, the Respondent requested the Appellant to provide reasonable grounds for lodging the notice of objection late and to provide documents in support of the grounds for the objection.

- f) The Appellant failed to provide both the grounds for late lodging of the notice of objection and the documents in support of the grounds for the objection thereby prompting the Respondent to reject the application for lodging the notice of objection late, vide a letter dated 8th July 2020.

ISSUE FOR DETERMINATION

11. Both parties in spite of the specific directions of the Tribunal, did not file any written submissions in respect of the Appeal and therefore based on the pleadings separately filed by the parties the issue that distils itself for determination is as follows:

Whether there is an appealable decision before the Tribunal?

ANALYSIS AND DETERMINATION

12. The exercise of the jurisdiction of the Tribunal is founded under Section 12 of the Tax Appeals Tribunal Act which states as follows:

“A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal.”

13. Section 3 of the Tax Procedures Act defines an appealable decision in the following words:

“...means an objection decision and any other decision made under a tax law...”

14. The Appeal before the Tribunal as framed by the Appellant is against both the tax assessment and the Respondent’s rejection of the Appellant’s application to lodge a late notice of objection.

15. The Respondent rejected the Appellant's application for lodging a late notice of objection on the basis that in spite of the Respondent's request to the Appellant to provide any reasonable grounds that could have occasioned the delay in lodging the notice of objection within the required statutory period, the Appellant failed and has since not indicated the cause for the failure to appropriately provide the grounds for the delay.
16. The Respondent is permitted under Section 51(7) of the Tax Procedures Act to enlarge time within which a defaulting taxpayer would have lodged a notice of objection to a tax assessment. The parameters for allowing such an application are clearly spelled out in the following terms:

“The Commissioner may allow an application for the extension of time to file a notice of objection if –

a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

b) the taxpayer did not unreasonably delay in lodging the notice of objection.”

17. The Appellant filed the application seeking to be allowed to lodge a notice of objection out of time after a lapse of a period exceeding one and a half years. Having failed to disclose any reasonable cause that could have possibly prevented it in lodging the notice of objection within the statutory timelines, the Respondent cannot be conceivably faulted in any manner for disallowing the application for lodging a late notice of objection.

18. The Appellant's application seeking to lodge a late notice of objection having been properly rejected for want of grounds in support of the application, the Respondent could not delve into the determination of the merits, or otherwise, of the intended notice of objection. It is equally not lost on the Tribunal that the Appellant completely ignored the request to provide documents to support the notice of objection.
19. In the absence of an objection decision issued on the part of the Respondent, as a consequence of the self-authored situation by the Appellant, there is no appealable decision to be determined by the Tribunal as relates to the tax assessment served upon the Appellant on 11th October 2018.

FINAL DECISION

20. On the basis of the foregoing analysis the Tribunal finds that the Appeal is incompetent and unsustainable in law and accordingly makes the following Orders:
 - a) The Appeal be and is hereby struck out.
 - b) No orders as to costs.

DATED and DELIVERED at NAIROBI this 14th day of April, 2022.


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ERIC NJ WAFULA
CHAIRMAN


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CATHERINE N. MUTAVA
MEMBER


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GABRIEL M. KITENGA
MEMBER


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ELISHAH NJERU
MEMBER


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ABRAHAM K. KIPROTICH
MEMBER

