

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 700 OF 2021

BROADLINK GENERAL MERCHANTS LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a private limited company incorporated in Kenya under the Companies Act and located in Nairobi, Kenya. It describes itself as a general contractor who also deals in civil works general supplies.
2. The Respondent is a principal officer appointed under 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 revenues. 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 part 1 & 11 of the First Schedule of the Act for the purpose of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Commissioner undertook a compliance check on the Appellant which culminated in the issuance of an assessment vide a letter dated 6th October 2020 with a tax demand of **Kshs 19,232,047.00** for VAT and **Kshs 30,411,985.00** for income tax totaling to **Kshs 49,644,031.00**.

THE APPEAL

4. The Appellant filed his objection notice to the said assessment vide a letter dated the 2nd of November 2020. From the email dated 15th December 2021, the Respondent generally relied on Section 51(3) of the TPA in rejecting the said objection and thereafter proceeded to indicate that all the required documents had not been provided. The Appellant was then advised to remedy its objection application within 14 days.
5. The Applicant thereafter lodged a new/revised objection dated 4th of January 2021. The Respondent thereafter requested for additional information from the Appellant vide e-mails dated the 31st of March 2021, 26th May 2021 and 16th August 2021.
6. The Respondent thereafter proceeded to issue an assessment decision vide a letter dated the 4th of October 2021 advising the Appellant that its objection which was received on the 30th of September 2021 was invalid as it fell afoul of Section 51(4) of the TPA. The Respondent thus proceeded to reject the objection and it stated that the VAT and Income tax due from the Appellant for the period 2015 to 2019 was **Kshs 26,966,787.00** plus the resultant penalties and interests.
7. Being dissatisfied with said objection decision the Appellant filed its Appeal before the Tribunal on 29th October, 2021.

THE APPEAL

8. The Appeal is premised on the following grounds as set out in the Memorandum of Appeal dated 28th October, 2021 filed on 29th October, 2021:-

- a. Failure to notify in writing on invalidity of the Notice of Objection.
 - b. Failure to issue an Objection Decision.
 - c. Failure to consider Exempt Income.
 - d. The Respondent charged tax on gross income.
 - e. Failure to consider cost incurred.
9. The Appellant further pleaded that the correct basis for assessing taxable income be used as stipulated under Section 3(2) (a) (i) of the Income Tax Act 2015.

THE RESPONSE

10. The Respondent in opposition to the Appeal filed a Statement of Facts dated and filed on the 25th November 2021 wherein it averred that:
- a. It carried out a compliance audit on the Appellant for the period between 2015 – 2019. This resulted in the issuance of a letter dated 7th October 2020 where an additional VAT and Income tax due from the Respondent was tabulated as **Kshs 26,966,787.00** plus the resultant penalties and interests.
 - b. The Appellant filed an objection to this assessment vide its letter dated the 2nd of November 202 but failed to attach supporting documents.
 - c. It considered the said objection and issued a notice of invalidity of the said objection vide its letter dated the 15th of December 2020 for the reason that the Appellant had failed to attach the relevant documents to its objection

and that the Appellant had also failed to supply these relevant documents despite the fact that it had received several reminders to comply.

THE APPELLANT'S CASE

11. The Appellant's case is premised on the hereunder filed documents and the proceedings before the Tribunal:-
 - a) The Appellant's Statement of Facts dated and filed on 29th October, 2021 together with the documents attached thereto.
 - b) The Appellant's written submissions dated and filed on 20th May, 2022.
12. The Appellant's contention was that the objection decision dated 4th of October 2021 which confirmed its additional VAT and Income tax liability at **Kshs 26,966,787.00** plus the resultant penalties and interests was illegal.
13. It contended further that the said objection decision was neither an objection decision nor an appealable decision and that it was contrary to Section 51(11) of the TPA.
14. Its argument was premised on the fact that whereas it had lodged a notice of objection dated 4th of January 2021, the Respondent issued its objection on the 4th of October 2021. On the face of it and according to the Appellant the objection decision was issued 273 days after the issuance of the notice of objection and that this was beyond the 60-day statutory period prescribed under Section 51(11) of the TPA.

15. It was this computation of statutory time limit of 60 days within which the Respondent was required to respond to its objection decision that it was relying on to have the Respondent's objection decision dated 4th of October 2021 to be set aside.

THE RESPONDENT'S CASE

16. The Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal:-

- a) The Respondent's Statement of Facts dated and filed on 25th November, 2021 together with the documents attached thereto.
- b) The Respondent's written submissions dated 12th July, 2022 and filed on 13th July, 2022.

17. The Respondent states that it had requested the Appellant through several e-mails to provide the relevant documents but the Appellant ignored its request. The said emails have been mentioned in the Respondent's letter of 4th October 2021 where he refers to its previous e-mails of **4th February 2021, 31st March 2021, 26th May 2021, 21st July, 2021, 16th August, 2021 and 17th September, 2021** wherein it had been incessantly requesting for specific documents from the Appellant to no avail.

18. That a meeting was held between the parties on the 8th of September 2021 where the Appellant was advised of the gaps in its documents and that it was afforded an opportunity to avail the documents.

19. That instead of availing the documents as requested , the Appellant responded vide a letter dated the 14th of September 2021 asking the Respondent to vacate the assessment under review.
20. That having failed to obtain the required documents from the Appellant, it proceeded to issue an objection decision on the 4th of October 2021.
21. That an objection is considered validly lodged under Section 51(3) of the TPA only upon the receipt of all relevant documents relating to the objection.
22. That upon receipt of the objection decision dated the 4th of October 2021 the Appellant opted to file an appeal to the Tribunal instead of validating the said objection.
23. That contrary to Section 13(6) of TAT Act, the Appellant has brought new evidence that have never been shared with it prior to filing the Appeal to the Tribunal.
24. That the only prayer available to the Appellant is for the validation of its decision.

THE RESPONDENT'S PRAYERS

25. The Respondent prays that the Tribunal:
 - i. Dismisses the Appeal for lack of merit.
 - ii. Order the Appellant to submit supporting documents to enable the Respondent issue an objection decision.
 - iii. Award the Respondent costs.

ISSUES FOR DETERMINATION

26. The Tribunal upon due consideration of the pleadings and the submissions filed by the parties has identified the following issues for determination:

- a. **Whether the notice of objection was validly lodged.**
- b. **Whether the Respondent erred in assessing the additional tax assessment.**

ANALYSIS AND FINDING

a) **Whether the notice of objection was validly lodged.**

27. The Tribunal determined the sequence of events in this matter to be as follows:

- a. Pursuant to an audit exercise the Appellant was served with a tax assessment from the Respondent dated the **6th of October 2020**.
- b. The Appellant filed an objection dated letter dated the **2nd of November 2020**. This was within the 30 days statutory period as is prescribed in Section 51(2) of the TPA which reads as thus:

“A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.”

- c. The Respondent advised the Appellant that its objection was not validly lodged via an e-mail the dated the **15th of December 2020**. The reason for its invalidity was that the said notice of objection notice was not compliant to the provisions of Section 51(3) (c) of the TPA, because all relevant

documents relating to the objection were not submitted. The Appellant was allowed 14 days within which to remedy his objection notice.

- d. The Appellant lodged another objection notice on the **4th of January 2021**.
- e. The Respondent shared evidence of an e-mail sent to the Appellant on the **4th of February 2021**. The said e-mail has also been mentioned in the Respondent's letter of 4th October 2021 where he refers to its previous e-mails of **4th February 2021, 31st March 2021, 26th May 2021, 21st July 2021, 16th August 2021 and 17th September 2021** wherein the Respondent had been incessantly requesting for specific documents from the Appellant .
- f. The Appellant subsequently wrote a letter dated the **14th of September 2021** requesting for the vacation of the additional assessment for the period 2015 to 2019.
- g. The Respondent responded vide a letter dated the **4th of October 2021** advising the Appellant that its notice of objection filed on the 4th of January 2021, was not validly lodged for failure to attach the relevant documents thereto. It then proceeded to affirm the taxes assessed of **Kshs 26,966,787.00** plus penalties and interest.

28. With regard to validly lodged notices of objection Section 51(3) of the TPA provides as follows:

“(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.”

29. It is thus clear that a validly lodged notice must contain the following elements;

- a. State the grounds of the objection.
- b. State the specific amendment that the taxpayer requires the Respondent to correct and the reasons thereof.
- c. The taxpayer should pay the amount of tax assessment that is not in dispute or show evidence that he has applied for an extension of time to pay the tax that is not in dispute.
- d. The taxpayer must provide all documents supporting its assertions.

30. The Tribunal's analysis of notice of objection dated the 4th of January 2021 which is the subject of the Respondent's invalidation decision dated the 4th of October is as follows:

- a. It aptly provided for the grounds of objection.

- b. It did not come out clearly on the specific amendment it required the Commissioner to make. For example, its conclusion read as follows:

“You indicated that you disallowed direct expense and local purchases on the grounds that we did not provide the proof. We have the documents to support the transaction and can be availed to you when required either in soft or hard copies. Disallowed the expenses insinuate that there was no cost incurred to generate the income which is not only impractical but unjust.”

From the above it is clear to us that the said letter was not clear and explicit on whether the Appellant wanted the tax reviewed downwards or whether it was proposing that no tax was payable to the Respondent.

- c. Considering that the Appellant’s letter was not clear on whether the entire tax assessment was in dispute, it was difficult to determine whether there was any portion of the tax assessment that it was not disputing and which ought to have been paid prior to validate its notice of objection.
- d. Finally, the notice of objection did not refer to any documents that had been attached to the notice to support its grounds of objection. Considering that the reasons for the initial objection letter dated the 2nd of November 2020 was failure to attach documents; and considering further that the Respondent had written several emails dated 4th February 2021, 31st March 2021, 26th May 2021, 21st July 2021, 16th August 2021 and 17th September 2021 to the Appellant requesting for specific documents. It would have been reasonable

for the Appellant, under the circumstances, to address this issue. This could have been done either by attaching the said document or providing an explanation for its refusal to share the said documents which the Respondent required to decide on the Appellant's pending objection.

31. It is not lost on the Tribunal that the burden of proving that the assessed taxes are not payable lies on the Appellant. This is immortalized under Section 56(1) of the TPA which provides as follows:-

“In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”

32. It was thus, incumbent on the Appellant to dislodge this burden by providing the documents that had been requested by the Respondent and thereafter providing evidence of such compliance. This way it would have discharged its statutory obligation and the evidentiary burden would have shifted to the Respondent to justify its tax assessment by responding to the notice of objection within the 60 days statutory limit period.

33. Our view is that plain and utter refusal to provide the documents required without providing any explanation or cause amounts to direct breach of Section 51(3) of the TPA which was cited by the Respondent as the main reason for declaring the Appellant's notice of objection as invalidly lodged.

34. While faced with a similar situation this Tribunal held as follows in ***Tax, Appeal No. 291 of 2021, Hasus Energy Limited vs Commissioner of Domestic Taxes***

“Having considered the elements required for an objection to be validly lodged, it is clear that the letter to the Respondent dated 1st October 2020 falls short for a valid notice of objection by failing to state the grounds of objection and neglecting to propose the amendments and the reasons for the amendments needed.”

35. The superior courts have also weighed in on this matter of validity of an objection, in *Commissioner of Domestic Taxes v Diara Limited (Income Tax Appeal E007 of 2021) [2022] KEHC 80 (KLR) (Commercial and Tax) (11 February 2022) (Judgment)*, where the High court asserted as thus:

“From the foregoing, it is clear that the Respondent either issued improper objections or made them outside the respective statutory periods. Whenever it was notified of the same, it appears that the Respondent would go mute until the next assessment is raised. In this regard, there were no valid objections by the Respondent as against the Appellant’s tax assessments. This meant that the Appellant’s assessments were confirmed the moment the Respondent’s objections were rejected for whatever reason and the latter failed to take any corrective action.”

36. The High Court, thereafter proceeded to reiterate the foregoing position when it quoted the celebrated South African case of *Medox Limited V the Commissioner for the SARS (20059/2014) [2015] ZASCA 74*, where the Supreme Court of Appeal of South Africa stated as follows: -

“This court has over the years dealt with provisions worded similarly to S81 (5) of the Act and confirmed that, where no objection is made to an assessment issued by the relevant tax authority, the assessment is final and conclusive as between the tax authority and the tax payer. These decisions have been collected in Commissioner for Inland Revenue v Bowman NO 1990 (3) SA 311 (A) at 316 B C. Further at 316E, Goldstone AJA writing for the court, reiterated that an assessment to which no objection has been made, becomes binding upon the taxpayer as a statutory obligation.”

(Emphasis Added)

37. Having considered the elements required for an objection to be validly lodged and having noted the previous decisions of the Tribunal in regard to validity of an objection and the binding decision of the High court on the same issue the Tribunal arrived at the conclusion that the Appellant was indulged in this case on several occasions to provide supporting documents to justify and or support its tax objection but it failed to do so.
38. The Appellant’s decision not to supply the documents requested by the Respondent was therefore, in direct contravention of Section 51(3)(c) as read with Section 56(1) of the TPA which placed the burden and obligation of providing the requested additional documents on the Appellant.
39. The Tribunal before arriving at its final conclusion finds it is important to bring out the time limit within which the Respondent’s reminder emails were written:

- a. From the 4th of January to 4th February 2021 - 26 days
- b. From 4th of February 2021 to 31st March 2021 - 55 days
- c. From 31st March 2021 to 26th May 2021 -56 days
- d. From 26th May 2021 to 21st July 2021 -56 days
- e. From 21st July 2021 to 16th August 2021 -26 days
- f. From 16th August 2021 to 17th September 2021 -32 days
- g. From 17th September 2021 to 4th October 2021 - 17 days

40. The foregoing analysis affirms that the Respondent did not breach the 60 days statutory time limit prescribed under Section 51(11) of the TPA. This is mainly so for the fact that every time the Respondent issued an email reminding the Appellant of the request to supply the relevant supporting documents the statutory time limit was rebooted and it started to run a fresh.

41. The Tribunal is of the view that a party cannot ignore to comply with its statutory duty to supply documents to the Respondent with the hope that such frustrations would make it possible for it to wind time and thereafter seek solace or salvation under Section 51(11) of the Tax Procedures Act. That could not obviously have been the intention of the Legislature.

42. The Tribunal's interpretation of Section 51(11) of the TPA is that it is intended to protect taxpayers who have lodged notices of objection and the Respondent has failed to either notify the taxpayer at the earliest instance of any invalidity in the

notice of objection or the Respondent has without reference to the taxpayer failed to timeously issue the objection decision, within the 60 day statutory timeline.

43. Flowing from the foregoing analysis, the Tribunal has arrived at a conclusion that the Appellant's notice of objection dated the 4th of January 2021 did not comply with provisions of Section 51(3)) of the TPA to the extent that:-

- a. It failed to make proposals on the amendments that it required applied on the tax assessment, and
- b. The Appellant's refused to provide the documents that had been requested by the Respondent for purposes of validating the notice of objection.

44. Accordingly, the Tribunal finds that the Appellant's notice of objection dated the 4th of January 2021 was not validly lodged.

45. Having come to the finding that the Appellant's notice of objection was not validly lodged, the Tribunal will not delve into the other issue that fell for determination as it has been rendered moot.

FINAL DECISION

46. The upshot of the foregoing is that the Tribunal finds that the Appeal herein is incompetent and unsustainable in law and accordingly makes the following Orders:

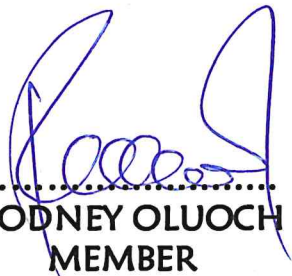
- a. The Appeal be and is hereby struck out.
- b. The Respondent's tax assessment be and is hereby upheld.
- c. Each party to bear its own costs.

47. Orders accordingly.

DATED and DELIVERED at NAIROBI this 5TH day of August, 2022.



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ERIC N. WAFULA
CHAIRMAN



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RODNEY OLUOCH
MEMBER



.....
JOHN KINYUA
MEMBER



.....
HABON FARAH
MEMBER



.....
EDWIN CHELUGET
MEMBER