

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAX APPEAL NO. 209 OF 2023

DANIEL GATERI KAMAU..... APPELLANT

~VERSUS~

COMMISSIONER OF DOMESTIC TAXESRESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a Kenyan citizen living with disability and a resident of Siakago Sublocation, Nthawa Location, Mbeere North.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, the Authority is charged with the responsibility of among others, assessment, collection, accounting, and the general administration of tax revenue on behalf of the Government of Kenya.
3. On 30th June 2022 the Appellant was assessed by the Respondent due to what the Respondent considered as duplicated supplier invoices that had been claimed by another taxpayer.
4. Following the objection to the additional assessment and engagements thereof the Respondent issued the Appellant with an objection decision on 22nd October 2022.
5. Being aggrieved by the Respondent's objection decision, the Appellant filed this Appeal on 14th March 2023 with leave of the Tribunal granted on 17th February 2023.

THE APPEAL

6. The grounds of the Appeal are outlined in the Memorandum of Appeal dated 2nd March 2023 and filed on 14th March 2023 and as summarised hereunder:

- a) That the Respondent erred in law and fact by failing to appreciate the evidence tendered or original invoices confirming the identity of the Appellant.
- b) That the Respondent erred in law and fact by disregarding the constraints envisaged in Section 54(1)(e) of the Constitution of Kenya.
- c) That the Respondent erred in law and fact by violating Section 27(4) & (5) of the Constitution of Kenya for not giving fair treatment to the issues raised by the Appellant.
- d) That the Respondent erred in law and fact by violating Section 54(1)(c) of the Constitution of Kenya which envisages reasonable access to information.
- e) That the Respondent erred in law and fact by abusing the principles of vicarious liability by disallowing invoices filed by the Appellant.
- f) That the Respondent erred in law and fact by disregarding reply letters by the Appellant confirming his position in the allegations raised by him in the letters dated 10th September 2021 and 16th May 2022.
- g) That the Respondent erred in law and fact by issuing additional assessment unfairly, excessively inordinate, all circumstances considered.

THE APPELLANT'S CASE

7. The Appellant's case was set out in its Statement of Facts dated 2nd March 2023 and filed on 14th March 2023 together with the documents attached thereto.
8. The Appellant stated that he was visually disabled and is registered with the National Council of Persons Living with Disability of Kenya. To corroborate this, the Appellant listed several facilities he had visited seeking to salvage his eyesight.
9. The Appellant averred that he is the sole proprietor running a general retail shop with the assistance of his wife. Due to his condition, he had been using a cybercafé to file his monthly and annual tax returns as well as reading and replying to the tax emails from and to the Respondent.

10. The Appellant averred that at times he finds himself on the receiving end when the cybercafé delays in relaying the Respondent's communication and in such circumstances replies without delay.
11. The Appellant argued that failure on his part to respond on time to the emails that requested that he provides queried invoice copies was a weak point in favor of the Respondent, given the timelines set by the tax laws.
12. That the Respondent, before the genesis of issuing additional assessment that has culminated into this Appeal, was aware of the Appellant's condition.
13. The Appellant stated that the bone of contention on his part is the additional assessment that imputed tax debt out of the effect of the letters dated 10th September 2021 and 16th May 2022.
14. The Appellant argued that it is evident from the letter dated 10th September 2021 that the body as introduced states:

'Records held in our office indicate that you made claims of input under the VAT return of December 2019. Further, the same invoices have been claimed by another taxpayer in the same period for similar suppliers.'
15. The Appellant regretted the fact that the contents above were not communicated to him by the cybercafe until when another one was sent by the Respondent on 16th May 2022.
16. The Appellant claimed that he approached the cyber and they admitted mixing up invoices; they apologized saying they handled many customers. He then replied to the Respondent's communication via letter dated 2nd June 2022 which the Respondent received and stamped on 3rd June 2022 and attached three months' original supplier invoices and tax payment e-slip for May 2021, June 2021, and July 2021 so that his office can confirm the bearer was the Appellant as claimed and not as alleged.
17. The Appellant averred that when the notice of additional assessment was sent and communicated to him by the cybercafe, he dispatched original invoices as

demanded by the Respondent, but his wife told him that they could not locate the invoice and returns for April 2021 and August 2021.

18. The Appellant believed that submitting those records would substantively address the issue of re-allowing his invoices by exonerating him and holding the other taxpayer who benefitted from his invoices liable. That this was not done. The Appellant averred that he was told to appeal for the additional assessment which he did via the Itax portal and attaching all the invoices he had as per the Respondent's letters.
19. The Appellant stated that he was notified of another email asking for the April 2021 and August 2021 original invoices that were missing. That he went to KRA Embu Regional office and requested the Account Manager for a time extension so that he could liaise with the suppliers for invoice copies.
20. The Appellant averred the Respondent disregarded the arrangement of getting supplier invoices as agreed and proceeded to issue an objection decision and held that the Respondent was extraneously unfair in handling the invoices matter.
21. The Appellant further stated that the Respondent inflicted peril to his account and collaborated with another taxpayer stated by the Respondent in letters dated 10th September 2021 and 16th May 2022 using the Appellant's visual disability and weakness as a conduit which only this course of justice that can absolve and block.
22. The Appellant averred that the Respondent having prior knowledge of his condition never acknowledged the constraints envisaged in Section 54(1)(e) of the Constitution of Kenya and made haste in arriving at the objection decision.
23. The Appellant committed to pay tax amounts assessed before the effects of the 10th September 2021 and 16th May 2022 letters were factored into his tax account.
24. The Appellant committed to producing original copies of the disallowed invoices to the Tribunal at the hearing of the case.

Appellant's Prayers

25. The Appellant requested the Tribunal to;
- a) That this Appeal be allowed, the Objection decision dated 22nd September 2022 be set aside and disallowed invoices in the Respondent's letters dated 10th September 2021 and 16th May 2022 be re-allowed.
 - b) Such further or other orders as the Tribunal may deem just and expedient.

THE RESPONDENT'S CASE

26. In response to the Appeal, the Respondent presented its;
- a) Statement of Facts dated and filed on 14th April 2023,
 - b) Written Submissions dated 27th November 2023 and filed on 28th November 2023.
27. The Respondent averred that it assessed the Appellant on 30th June 2022 due to duplicated invoices as per the attached assessment orders. The Respondent posited that the Appellant had claimed the same invoices claimed by another taxpayer (AMNT) for various months in 2019, 2020, & and 2021 hence, an additional assessment was raised on the affected months.
28. The Respondent stated that the Appellant was sent a letter on invoice verification on 10th September 2021 and 16th May 2022. The invoices were for December 2019 to September 2021. That the same invoices had been claimed by another taxpayer.
29. The Respondent stated that the Appellant responded to the 10th September 2021 letter by providing May 2021 to July 2021 invoices. Subsequently, the Respondent emailed the Appellant on 08th June 2022 in response to the three provided invoices, but no response was received from the Appellant.
30. The Respondent averred that the Appellant was issued with a letter dated 30th June 2022 notifying him of the additional assessment for the duplicate invoices.

It further posed that several phone call reminders were made to the Appellant with no response and email correspondence.

31. The Respondent argued that the Appellant failed to provide additional documents to support its objection and, therefore, it issued the Appellant with an objection decision on 22nd September 2022.
32. The Respondent posited that the Appellant is yet to pay the assessed amount of Kshs 552,865.86 for December 2019, December 2020, January 2021, February 2021, March 2021, April, 2021, August, 2021 and September, 2021 together with penalties and interest thereon, and that the Appellant is now objecting the assessment.
33. The Respondent averred that despite seeing some of the invoices provided by the Appellant, the Appellant did not provide the bank statements and proof of payments to support the invoices. The Respondent also argued that despite reaching out to the Appellant, no supporting documents were presented by the Appellant.
34. The Respondent argued that it is allowed by Section 24(2) of the Tax Procedures Act to assess a taxpayer's liability using any information available to it. To this extent, the Respondent confirmed to have operated within the confines of the law by using the data available following a return review. It is the Respondent's further averment that he did not err in law or fact as he carefully examined the information available to it before issuing the assessment.
35. The Respondent averred that the Appellant's objection was invalidated on the basis that the documentation in support of the objection was not availed despite having been sought.
36. The Respondent argued that it is guided by Section 56(1) of the Tax Procedures Act which provides that in any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
37. The Respondent submitted that Sections 24 and 28 of the Tax Procedures Act provide that the Appellant is to submit a tax return under a tax law and shall

submit the return in the approved form and the manner prescribed by the Respondent.

38. The Respondent submitted that this approach is consistent with the strict reading of the statute and the Appellant ought to have submitted the documents and his returns in the prescribed manner,
39. On disability, the Respondent submitted that the Appellant admitted to inability to respond due to sickness but failed to present his tax representative to aid in the filing of returns or the ADR process.
40. The Respondent noted that the Appellant indicated that upon succumbing to disability, the wife and a trusted friend ran the shop.
41. The Respondent stated that Section 15 of the Tax Procedures Act provides for the appointment of a tax representative in the event of disability. Further, Section 16(1) and (2) of the Tax Procedures Act provide for the liability and duties of the appointed representative.
42. The Respondent submitted that the Appellant had a remedy provided by law upon succumbing to the said disability, and the Appellant ought to have notified the Respondent. That even during Alternative Dispute Resolution negotiation, the Appellant did provide the Respondent with an alternative contact or email for reference.
43. On whether the Appellant discharged its burden of proof by providing the relevant documentation in support of its objection, The Respondent submitted that the Appellant is duty bound to keep and maintain proper records for purposes of computation of tax. It cited **Section 23 of the Tax Procedures Act (TPA)** provides for Record-keeping, subsection 1 reads as follows: -

“A person shall-

- i. maintain any document required under a tax law, in either of the official languages;*
- ii. maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and*

iii. subject to subsection (3), retain the document for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.”

44. Further, the Respondent posed that Section 82 of the TPA provides for a penalty for failing to keep documents, the Section reads as follows;-

(1) A person who, without reasonable cause, fails to keep, retain, or maintain a document as required under a tax law without reasonable cause for a reporting period shall be liable to a penalty.

45. Additionally, the Respondent submitted that under Section 51(3) of the TPA, 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; and

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.”

46. Further, that, under Section 51 (8) of the Tax Procedures Act, 2015, where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision". The Respondent cited Section 51(3) of the Tax Procedures Act, 2015 which enjoins the Appellant to provide all documents in support of the objection. The Section reads:

“51. Objection to tax decision

(1)...

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

(a)...

(c) all the relevant documents relating to the objection have been submitted.”

47. The Respondent invited the Tribunal to note that the Appellant in its Appeal has not challenged the assessment on grounds that the Respondent failed to review the documents submitted. It argued that this fact gives credence to the Respondent's position that the Appellant never submitted all the documentation required to support its objection.

48. The Respondent also relied on the Judgment in **Commissioner of Domestic Taxes v Structural International Kenya Ltd (Income Tax Appeal No. E089 of 2020) [2021] KEHC 152 (KLR)** where the High Court held as follows at paragraph 48

"For the avoidance of doubt, the Tribunal is reminded that in matters where the issue is supply of goods, be it for VAT purposes or Corporation Tax, the burden is always on trader/taxpayer to show that, the documentation set out in the statute and in which he relies on arose out of a commercial transaction. Period. If additional documents, which would be reasonably expected to be in his possession is requested for to verify the alleged transactions, he should produce the to the commissioner. That is what is expected of a keen and diligent trader."

49. The Respondent also relied on **Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR Nairobi High Court Income Tax Appeal No. E125 of 2020**, while upholding the above position, the High Court held as follows at paragraph 32 of the Judgment:

"The shifting of the burden of proof in tax disputes flows from the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency. [10] The commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption created by the above provisions is not evidence in itself, the presumption remains until the taxpayer produces competent and

relevant evidence to support his position.[11] If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer."

50. The Respondent further cited **TAT NO. 28 OF 2018- Joycott General Contractors Limited -VS- Kenya Revenue Authority**, in which the Tribunal while dismissing the appeal held that: -

"we find that the Appellant seems to forget that it bears the burden of proof, in law, to demonstrate to this Tribunal that the Respondent's assessment was wrong. Especially with regards to the under-declarations and variance in respect of VAT and income sales. On the contrary, the Appellant has not bothered to substantially traverse the assessment raised. All it has done is to make sweeping and expansive accusations without substantial support."

51. The Respondent concluded that in the present case, that the documents and literature provided did not provide any additional information, which would have led to the change in the assessment regarding errors in the Appellant's profit and loss account.

Respondent's Prayers.

52. The Respondent prayed that the Tribunal:

- a) Upholds the Respondent's objection decision dated 22nd September 2022
- b) Dismisses the Appeal with costs to the Respondent as the same is devoid of any merits.

ISSUE FOR DETERMINATION

53. The Tribunal has carefully studied the parties' pleadings and submissions and is of the respectful view that the issue that calls for its determination is as hereunder:

Whether the objection decision dated 22nd September was justified.

ANALYSIS AND FINDINGS

54. The Appellant stated that he was visually disabled and is registered with the National Council of Persons Living with Disability of Kenya.
55. That he went to KRA Embu Regional office and requested the Account Manager for an extension of time so that he could liaise with the suppliers for invoice copies.
56. The Appellant averred the Respondent disregarded the arrangement of getting supplier invoices as agreed and proceeded to issue an objection decision and held that the Respondent was extraneously unfair in handling the invoices matter.
57. The Respondent averred that it assessed the Appellant on 30th June 2022 due to duplicated invoices. The Respondent posited that the Appellant had claimed the same invoices claimed by another taxpayer for various months in 2019, 2020, & and 2021 hence, an additional assessment was raised on the affected months.
58. The Respondent averred that despite seeing some of the invoices provided by the Appellant, the Appellant did not provide the bank statements and proofs of payment to support the invoices. The Respondent also argued that despite reaching out to the Appellant, no supporting documents were presented by the Appellant.
59. On disability the Respondent submitted that the Appellant admitted to inability to respond due to sickness but failed to present his tax representative to aid in the filing of returns or the ADR process.
60. The Tribunal has perused through documents provided by both parties and considered the pleadings thereof. The Tribunal notes that the Respondent confirmed having received some invoices from the Appellant and all that was required were bank statements.

61. The Respondent admitted to having the details of the other taxpayer who claimed the same invoices as the Appellant. In the circumstances, it is the Tribunal's view that the only party who has access to documents of both parties and is capable of verifying details that have been submitted by both taxpayers is the Respondent.
62. The Tribunal is of the view that though the burden of proof rests with the taxpayer, the pendulum began oscillating towards the Respondent at the point it was aware of the third party involved in the invoices in contention. Further, given that some of the invoices were seen by the Respondent, the Respondent ought to have settled this issue by simply engaging the other taxpayer in question and verifying all documents at its disposal. The burden of proof for taxpayers should not imply that the Respondent goes into complete slumber in the administration of tax matters.
63. Conversely, the Tribunal notes the Appellant's disability circumstances. Section 15 of the Tax Procedures Act provides for a tax representative as follows:
- “(1) A person is the tax representative of another person for the purposes of this Act or a tax law, in the case of— (a) an individual under a legal disability, if that person is the guardian or other legal representative who receives or is entitled to receive income on behalf, or for the benefit, of the individual;*
- (2) In this section— “individual under a legal disability” includes a minor or an individual who is unable to comply with the requirements of a tax law because he or she is impaired by a physical or mental disability;”*
64. The Appellant should consider appointing a tax representative and notify the Respondent of engagements regarding his tax affairs. While the Tribunal appreciates the unique circumstances in which the Appellant finds himself, the law has provided remedies regarding managing tax affairs that he can utilise to mitigate the limitations that come with the disability.

65. Considering the physical disability challenges of the Appellant, the documents availed and the pleadings by both parties, the Tribunal is of the considered view that there is need for the Respondent to relook at the documents presented by the Appellant.

FINAL DECISION

66. The upshot of the foregoing is that the Appeal is merited and the Tribunal accordingly makes the following Orders: -

- a) The Appeal be and is hereby partially allowed.
- b) The Respondent's objection decision dated 22nd December 2021 be and is hereby set aside.
- c) The Respondent to review all the documents at its disposal and those in possession of the Appellant and render a decision within 60 days of the date of delivery of this Judgment.
- d) Each party bears its own costs.

67. Orders accordingly.

DATED and DELIVERED at NAIROBI this 22nd day of March, 2024

**GRACE MUKUHA
CHAIRPERSON**

**DR. WALTER ONGETI
MEMBER**

**DR. ERICK KOMOLO
MEMBER**

**JEPHTHAH NJAGI
MEMBER**

**GLORIA A. OGAGA
MEMBER**