

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**TAX APPEAL NO. E321 OF 2023**

ASHUT PLASTICS LIMITED.....APPELLANT

-VERSUS-

KENYA REVENUE AUTHORITY..... RESPONDENT

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## JUDGMENT

### BACKGROUND

1. The Appellant is a private limited company incorporated as such under the laws of Kenya whose principal activity is that of manufacture of plastic products.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, and KRA 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. The Respondent *vide* a letter dated 17<sup>th</sup> May 2023 issued a notice of intention to issue additional assessment of Excise duty for the period August 2022 to April 2023. The Appellant replied through a letter dated 23<sup>rd</sup> May 2023.
4. The Respondent *vide* a letter dated 26<sup>th</sup> May 2023 rejected the Appellant's response and informed the Appellant that the assessment will be issued in the system.
5. Aggrieved by the Respondent's decision the Appellant filed a Notice of Appeal on 22<sup>nd</sup> June 2023.

### THE APPEAL

6. The Appeal is premised on the following grounds as stated in the Memorandum of Appeal dated 20<sup>th</sup> June, 2023 and filed on 22<sup>nd</sup> June, 2023:

- a) That the Respondent erred on matters of law by regarding the Appellant's goods as chargeable under the 1<sup>st</sup> Schedule of the Excise Duty Act of 2015.
- b) That the Respondent erred on matters of fact and law by charging the Appellant's goods Excise duty contrary to the 1<sup>st</sup> Schedule of the Excise Duty Act of 2015 which only provides for taxation of imported plastic articles while the Appellant's goods are locally produced.
- c) That the Respondent erred in fact and laws by finding that the amendments to the Finance Act 2021 vide the Finance Bill 2022 were intended amendments other than assented amendments to the law as per the letter by the Clerk of the National Assembly dated 28<sup>th</sup> July 2022 confirming the amendment.
- d) That the Respondent erred in both law and fact by failing to consider the evidence produced by the Appellant in their objection dated 23<sup>rd</sup> May 2023.
- e) That the Respondent erred in both law and fact by rejecting the Appellants objection dated 23<sup>rd</sup> May 2023.
- f) That the Respondent erred in both fact and law by issuing additional assessment in the system for the sole reason that the Appellants had not amended their return to include the wrongful assessments.

## **APPELLANT'S CASE**

7. The Appellant's case is premised on the following documents:

- a) The Appellant's Statement of Facts dated 20<sup>th</sup> June, 2023 and filed on 22<sup>nd</sup> June, 2023 together with the documents attached thereto.
- b) The Appellant's written submissions filed on 27<sup>th</sup> February 2024 together with the authorities attached thereto.

8. The Appellant stated that it received a tax assessment dated 17<sup>th</sup> May 2023 from the Respondent which demanded Kshs. 257,027,653.09 as Excise duty under the Excise Duty Act, 2015.
9. That upon receipt of the assessment the Appellant wrote an objection to the same on 23<sup>rd</sup> May 2023.
10. That in its objection, the Appellant cited the various changes the law on Excise duty in relation to plastics had undergone since its inception and clearly noted that the same was a novel albeit radical idea meant to curb environmental concerns raised by the industry.
11. That the Appellant also cited that the Excise duty in relation to plastics was introduced when Section 32 of the Finance Act of 2021 through an amendment to the 1<sup>st</sup> Schedule to the Excise Duty Act of 2015 introduced a tax of 10% on articles of plastics of tariff Heading 3923.30.00.
12. That the Appellant also noted that in 2022 cognizant of public outcry as a result of the tax, an amendment was made to the Finance Act 2022 and which added tariff Heading 3923.90.90 as another category of plastic subject to excise duty.
13. That in the objection it also noted and quoted the Hansard Report of 2<sup>nd</sup> June 2022 and the final order paper of the even date, in particular clause 34, that clearly showed that the National Assembly intended to introduce a 10% Excise duty on imported articles of plastic and not locally manufactured ones.
14. That the Appellant further noted that the intended amendment was meant to exclude domestic articles of plastic and such that it read; "Imported articles of plastic of tariff heading 3923.30.00 and 3923.90.90". That however, this was only reflected in the Hansard and not the final amendment.
15. That after and owing to the omission and error in publishing of Section 35 (b) (xiv) of the Finance Act 2022 which failed to add the word "imported" to the amendment, KAM (Kenya Association of Manufacturers) applied for guidance before the Attorney General and the Clerk of the National Assembly *vide* the

letter dated 8<sup>th</sup> August 2022 and to which the Clerk of the National Assembly responded with the letter dated 16<sup>th</sup> August 2022.

16. That in the letter dated 16<sup>th</sup> August 2022 the Clerk of the National Assembly quoted that the Attorney General had filed a similar request for guidance and which he had vide a letter dated 28<sup>th</sup> July 2022 to the Attorney General confirming Clause 34 of the Finance Bill of 2022 to read as follows;

<i>“Tariff Description</i>	<i>Rate</i>
<i>Imported articles of plastic of tariff heading 3923.30.00 and 3923.90.90</i>	<i>10%.”</i>

17. That the Kenya Association of Manufacturers (KAM) then wrote a follow up letter to the Clerk of the National Assembly dated 13<sup>th</sup> March 2023 bringing to the latter's attention that the directive to revise the error under Section 35(b)(xiv), remained unaddressed and further requesting the Clerk's intervention on the same to ensure fair practices between the affected manufacturers and importers of the same.
18. That the Appellant is a local manufacturer of plastics and does not fall within the ambit of the laws cited by the Respondent.
19. That the Appellant was well within its rights to file nil returns for the impugned period and at no time did it act contrary to the law applicable.
20. That the Respondent in retaliation then served upon the Appellant the letter dated 26<sup>th</sup> May 2023 and stated that the law quoted by the Appellant was only intentional and that the same was not assented.
21. That the assertion by the Respondent was wrong and can only be termed as purposefully ignorant of the developments in the law relating to excise duty for plastics.
22. That the Respondent also issued additional assessments and rejected the Appellant's objection dated 23<sup>rd</sup> May 2023.

## **Appellant's Prayers**

23. The Appellant prayed that;

- a) This Appeal be allowed.
- b) The Respondents decision dated 17<sup>th</sup> May 2023 and consequently 26<sup>th</sup> May 2023 demanding Kshs. 257,027,563.09 be struck out in its entirety.
- c) The Respondent, its employees, agents or other persons purporting to act on the Respondent's behalf be barred and estopped from demanding or taking further steps towards enforcement and/or recovery of excise duty, penalties and interests on the Respondent's demand in relation to the instant matter.
- d) The costs of this Appeal.
- e) Any other remedies that the Tribunal deems just and reasonable

## RESPONDENT'S CASE

24. The Respondent's case is premised on the hereunder filed documents:-
- i. The Respondent's Statement of Facts dated 4<sup>th</sup> July, 2023 and filed on the same date together with the documents attached thereto.
  - ii. The Respondent's written submissions dated 21<sup>st</sup> February 2024 and filed on 23<sup>rd</sup> February 2024.
25. The Respondent stated that it analyzed the Appellant's goods of plastic articles through a field audit covering period years August 2022-April 2023. That a post clearance audit letter of intention to conduct a field audit was sent on 17<sup>th</sup> May, 2023 for the period August 2022-April 2023.
26. That during the review it was discovered that the Appellant had been filing nil returns for the said period whereas article of plastics of tariff Heading 3923.30.00 and 3923.90.90 were chargeable to Excise duty at the rate of 10% respectively.

27. That based on the finding the Respondent issued additional Excise duty for Kshs. 257,027,563.09 from undervaluation of the imported plastic articles goods within the audit period.
28. That the demand notice was issued under the provisions of Tax Procedures Act. That it clearly communicated the period of the assessment, which covered from August 2022-April 2023 when the Appellant declared the said imports.
29. That the Appellant vide a letter dated 23<sup>rd</sup> May, 2023 objected to the said demand stating that the said imports under the said tariff heading did not attract any taxes by the Respondent.
30. That the Appellant stated that the reclassification by the Respondent under Heading 3923.30.00 and 3923.90.90 was not substantiated nor supported by any workings and the undervaluation amounts provided by the Respondent were unreasonable and erroneous.
31. That as a result, the Respondent confirmed the taxes *vide* its decision letter dated 26<sup>th</sup> May, 2023 as per the Tax Procedures Act
32. The Respondent averred that the assessments were correctly issued and conform to the Income Tax Act. That the Appellant did not provide any evidence that would have altered the assessment. That Section 56(1) of the Tax Procedure Act places the onus of proof in tax objections on the taxpayer who in this case failed to avail evidence that would support a contrary assessment or that would have guided the Respondent at arriving to a different objection decision.
33. The Respondent further averred that examination of the Appellant's records, audited accounts and income tax returns established that the Appellant failed to declare business income by filing nil returns on plastic goods and all their incomes for years of income 2022-2023 respectfully. That the Respondent is empowered under Section 73 of the Income Tax Act 2013 to bring to charge income where the same is established due.

34. The Respondent submitted that the tax was reached at based on the information available and provided by the Appellant and the Commissioner is empowered by Section 29(1) of the Tax Procedure Act to make such decisions. That the assessment was based on the information provided.
35. The Respondent asserted that the Appellant in lodging its objection failed to state the reasons precisely to be addressed in the assessments raised. That in addition, the Appellant failed to properly lodge its objection as provided by Section 51(3) of the Tax procedures Act.
36. The Respondent submitted that the taxpayer despite declaring some income knowingly continued to declare nil returns for the period under review contrary to the provisions of the Income Tax Act. The Respondent averred that according to the Income Tax Act it is the responsibility of any person carrying on business to maintain records of all transactions. That Section 54A(1) and 55(2) of the Income Tax Act provides as follows:-
- “54A(1) A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax and:*
- 55(2) person carrying on a business shall preserve every book of account, and every document which is essential to the explanation of any entry in any book of account, relating to the business for a period of not less than ten years after the year of income to which that book of account or document relates”*
37. The Respondent averred that it is empowered by Section 31 of the Tax Procedures Act 2015 to carry out amendments on assessments where adjustments are due to bring to charge the correct amounts. That the Section provides as follows;-

*“31.(1)Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions,from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that-...”*

38.The Respondent submitted that the Appellant did not file income tax returns for the accounting period August 2022 and April 2023 in contravention of the requirements of the Tax Procedures Act and that the estimated assessment were correct. That Section 94 of TPA provides as thus:

*“Failure to submit tax return or other document*

*(1) A person commits an offence ifthe person without reasonable cause fails to submit a tax return or other document required under a tax law by the due date*

*95.Failure to pay tax*

*A person commits an offence if that person fails to pay tax by the due date.”*

39.The Respondent averred that the Appellant failed to provide the documents requested in support of its objection hence the Excise duty was confirmed. The Respondent insisted that the Tax Procedure Act empowers it to require production of such documents *vide* issuance of notice as deemed necessary in determination of tax liability. That Section 59(1) of TPA provides that:-

*“For the purpose of obtaining full information in respect of the income ofa person or class of persons, the Commissioner may, by notice in writing, require, in the case of the income of a person, that person or any other person, and in the case ofa class of persons, any person-*

*(a)to produce for examination by the Commissioner at the time and Place specified in the notice, any accounts, books of account, and Other documents which the Commissioner may consider necessary; and the*

*Commissioner may inspect such accounts, books of accounts or other documents and may take copies of any entries therein.”*

40. The Respondent denied that the Appellant had paid all its tax dues and reiterated that because of its under-declaration, the Appellant is in debt of Kshs. 257,027,563.09.

### **Respondent's Prayers**

41. The Respondent prayed that the Tribunal considers the case and finds;
- a) That the Respondent's objection decision be upheld.
  - b) That the outstanding tax arrears of Kshs. 257,027,563.09 are due and payable by the Appellant.
  - c) That the confirmed assessments dated 17<sup>th</sup> May, 2023 were proper in law.
  - d) That the Appeal be dismissed with costs to the Respondent.

### **ISSUES FOR DETERMINATION**

42. The Tribunal has carefully studied the pleadings and documentation filed by both parties and is of the view that the issues for its determination are as follows:-
- a) *Whether there is a valid Appeal before the Tribunal.*
  - b) *What was the applicable law at the time of assessment.*
  - c) *Whether the Respondent's assessment was justified*

### **ANALYSIS AND FINDINGS**

43. The Tribunal having established the issues for its determination, proceeds to analyse each of them separately as hereunder.

- a) **Whether there is a valid Appeal before the Tribunal.**

44. The chronology of events in this dispute was as follows:

- i. On 17<sup>th</sup> May, 2023 the Respondent issued a notice of intention to issue additional assessment for Excise Duty for the period August 2022 to April 2023.
- ii. The Appellant replied through a letter dated 23<sup>rd</sup> May, 2023.
- iii. The Respondent through a letter dated 26<sup>th</sup> May 2023 rejected the Appellant's objection and informed the Appellant that the assessment will be issued in the system.
- iv. Dissatisfied by the Respondent's letter of 26<sup>th</sup> May 2023 the Appellant filed a Notice of Appeal on 22<sup>nd</sup> June 2023.

45. The Tribunal perused through the documents presented by the parties and noted that in the letter dated 26<sup>th</sup> May 2023 to which the Appellant is appealing against, the Respondent had stated in part as follows;

“... ”

*In view of the above, your objection is hereby rejected and additional assessments issued in the system since you have not amended your returns as requested. Equally, you can not object to your self-assessment hence the outstanding liability for July 2022 remains payable.*

“... ”

46. From the above letter from the Respondent it is evident that the Respondent had not issued any assessment to the Appellant that could enable the Appellant object as provided for under Section 51 of the Tax Procedures Act which state as follows;

*“(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.*

*(2) 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.”*

47. It is the view of the Tribunal that it was only upon being served with an assessment that the Appellant could first object as provided for under Section 51 of the Tax Procedures Act. It further follows that at that point, there was no objection decision that could enable the Appellant to approach the Tribunal with an appeal.

48. Section 3 of the Tax Procedures Act defines an appealable decision as follows;

*“**appealable decision**” means an objection decision and any other decision made under a tax law other than—*

*(a) a tax decision; or*

*(b) a decision made in the course of making a tax decision;”*

49. Going by the provisions of Section 51(1) and Section 3 of the Tax Procedure Act it follows that the Appellant’s Appeal was premature as there was no appealable decision.

50. The Tribunal reiterates its position in the case of **Tax Appeals Tribunal No. 21 of 2018: Tangazo Letu Limited Vs The Commissioner of Investigations & Enforcement** where the Tribunal held as follows:

*“We find that the Procedural guidelines enshrined in the Tax Appeals Tribunal Act and the Tax Procedures Act, among other tax legislations, are not merely instructive but a guide in achieving substantive justice. These rules cannot be cast aside in the quest for achieving substantive justice, as they have deeper roots in the Constitution of Kenya, 2010 to safeguard due process. Accordingly, we are of the considered view that the Appeal herein is improperly before the Tribunal”*

51. The Tribunal is further guided by the Court of Appeal decision in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425**, where it held that;

*“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”*

52. In the circumstances, the Tribunal finds that the Appeal herein is premature and therefore invalid.

53. Having entered the above finding, the Tribunal did not delve into the other issues that fell for its determination as they had been rendered moot

### **FINAL DECISION**

54. The upshot of the foregoing analysis is that the Appeal is incompetent and unsustainable in law. Consequently, the Tribunal makes the following Orders: -

- a) The Appeal be and is hereby struck out.
- b) Each Party to bear its own costs.

55. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of June, 2024**

**ERIC NYONGESA WAFULA  
CHAIRMAN**

**CYNTHIA B. MAYAKA  
MEMBER**

**DR. RODNEY O. OLUOCH  
MEMBER**

**ABRAHAM K. KIPROTICH  
MEMBER**

**TIMOTHY B. VIKIRU  
MEMBER**