

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL NO. 310 OF 2021

DANKEY PRESS LIMITED.....APPELLANT

VS

**COMMISSIONER OF INVESTIGATION &
ENFORCEMENT.....RESPONDENT**

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated under the Companies Act. It is in the business of supplies.
2. The Respondent is a principal officer of the Kenya Revenue Authority and which Authority is mandated with the assessment and collection of all Government revenue.
3. The matter was initiated by the Respondent upon investigations into the tax affairs of the Appellant on 7th November 2019. The investigations revealed that the Appellant had been paid a sum of Kshs 129,313,302.00 by Migori County between the years 2013 and 2017 and had paid no taxes on the same.
4. The Respondent issued the Appellant with a tax demand for unpaid VAT of Kshs 17,836,317.00 and also issued a notice to appear on the Appellant through the letter of 7th November 2018. The Respondent consequently made further requests for further information and documentation from the Appellant. The Appellant objected to the tax assessment on 10th December 2019 and requested for time to pay the undisputed amount.

5. The Respondent issued its Objection Decision vide a letter dated 16th February 2021, demanding total tax of Kshs 25,811,903.00 with the same being income tax of Kshs 7,039,610.00 and VAT at Kshs 18,772,293.00.
6. The Appellant, being aggrieved by the Objection Decision commenced the Appeal process herein.

THE APPEAL

7. The Appeal is premised on the following grounds as stated in the Memorandum of Appeal dated 8th June, 2021 and filed on the 14th June, 2021:-
 - a. That the Respondent confirmed the notice of assessment without due regard to all records, explanations, information, withholding taxes, and payments provided by the Appellant, thereby failing to appreciate all issues presented by the Appellant before confirming the assessment.
 - b. That Section 51(3) of the TPA, provides for the conditions that need to be fulfilled for a notice of objection to be treated as validly lodged by a taxpayer. We stated precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments as provided in TPA NO. 29 of 2015 was the responsibility of the Commissioner to involve and direct the taxpayer on additional documentation needed.
 - c. The Commissioner's decision is in response to the Objection filed by the Appellant on 10th December 2019. However, additional assessment introduced on initial assessment as included in the final decision.

- d. That the Income tax assessment is based on the Profit Margin ratio of 20% with an assumption that the taxpayer made a profit. The Commissioner approximated profit margin is not based on law. No provision has been made in TPA Act.
- e. That the amounts confirmed by the Respondent of Kshs 25,811,903.00 in respect to Income Tax & VAT for the period 2013, 2014, 2015, 2016, & 2017 is therefore wrong in law, fact, and should be annulled.

APPELLANT'S CASE

8. The Appellant's case is premised on the hereunder filed documents and proceedings before the Tribunal:
 - a. The Appellant's Statement of Facts dated 8th June 2021 and filed on 14th June, 2021 together with the documents annexed to the same.
 - b. The Appellant Written Submissions dated the 3rd June, 2022 and filed on 4th June, 2022.
9. The Appellant Stated that the additional assessment was raised by the Respondent in contravention of Section 31(2) of the TPA.
10. That the Appellant objected to the assessment on 10th December 2019 as provided by law, despite the Commissioner not filing additional assessments on iTax.
11. That the Appellant further had a meeting with KRA officials and provided explanations as per the objections made,

12. That the Appellant did not receive the objection decision from the Respondent over 60 days after objection. This contravenes the requirements for Section 51(2) of the TPA.
13. That the Appellant avers that the objection was not handled carefully and diligently by the Respondent because:
- i. The Appellant is still willing to resolve the matter through ADR,
 - ii. The decision was made outside the timeline provided by the ACT and in contravention of Section 51(11) of the TPA No. 29 of 2015 (hereinafter called the Act),
 - iii. The Respondent failed to look at the objection fully and ask for further documents especially the properly audited financial statements which the Appellant was more than willing to avail or give an explanation as to why they were not possible,
 - iv. While the Appellant agrees to settle the issue is paying the correct amount due, the Respondent has provided calculations which do not express the reality. It is the prayer of the Appellant that an amicable solution be found to settle this.

THE APPELLANT'S PRAYERS

14. The Appellant made the following prayers:
- i. The Tribunal to set aside the additional assessment amount on the basis of incorrect interpretation of Law and fact by the Respondent.

- ii. The Respondent's confirmed assessment be set aside and further requests the Tribunal to consider the substance of the case.
- iii. Further oral and documentary support to be adduced in support of the Appeal during the hearing.

THE RESPONDENT'S CASE

15. The Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal: -
 - a. The Respondent's Statement of Facts dated 13th July, 2021 and filed on the same date together with the documents annexed thereto.
 - b. The Respondent's written submissions dated and filed on 2nd March, 2022.
16. Preliminary investigations on the company revealed that Migori County Government paid the company between the periods 2014 and 2017 a sum of Kshs 136,099,127.00. However, it was revealed that the Appellant company failed to make any tax declarations.
17. Investigations into the affairs of the company were commenced on 14th January 2019 to determine its tax liability for the period 2014 to 2017.
18. On 7th November 2018, the Respondent herein issued the Appellant with a tax demand for unpaid withholding VAT amounting to Kshs 17,836,317.00 and a notice to appear under Section 61 of the TPA.

19. Several requests for information were made to the Appellant to provide documentation and evidence in support of its case.
20. The Appellant filed its objection to the demand on 10th December 2019 with a subsequent request on 21st January 2020 for extension of time to pay the tax not in dispute.
21. The Appellant, on 21st January 2020, requested for an opportunity to provide more documents for review and audit by the Respondent. The same was granted vide the letter of 5th February 2020 and the appellant was also informed that an Objection Decision would be issued upon review of all the documents that would be provided by the Appellant.
22. On 16th February 2021, the Respondent issued its Objection Decision against the Appellant for KES 25,811,903.00 in respect of Income Tax and VAT. The Appellant consequently appealed against that decision.

RESPONDENT'S PRAYERS

23. The Respondent prays that the Appeal be dismissed.

ISSUES FOR DETERMINATION

24. The Tribunal upon due consideration of the pleadings and the submissions of the parties, sets out the issues for determination as follows:
- i. Whether the Appeal is valid.

- ii. Whether the assessment of tax herein by the Respondent was excessive and/or illegal.

ANALYSIS & DETERMINATION

25. The dispute arose out of the Respondent's assessment of Income Tax and VAT on the Appellant.
26. The Respondent in its "objection to tax decision acknowledgement" letter to the Appellant dated 13th December 2020 informed the latter of the necessity to pay any tax amount not in dispute before its objection is considered.
27. The Appellant in its notice of objection dated 10th December 2019 indicated that Kshs 493,000.00 was not in dispute. However, to date, the amount has not been paid as per the records before the Tribunal.
28. Though this issue has also been raised by the Respondent, the Appellant has not touched on it in its appeal documents and submissions.
29. Section 52(2) of the TPA provides as follows in regard to appeals to the Tribunal
"A notice of appeal to the tribunal relating to an assessment shall be valid if the taxpayer has paid the amount not in dispute or entered into an arrangement with the commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice." The Section has been violated by the Appellant.

30. In the circumstances, the Tribunal found that the Appellant's Appeal was invalid. The Tribunal did not accordingly delve into the other issue for determination as the same had been rendered moot.

FINAL DECISION

31. The upshot of the forgoing is that the Appeal is incompetent, invalid, and unsustainable in law. Accordingly, the Tribunal makes the following Orders:

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

It is so ordered.

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



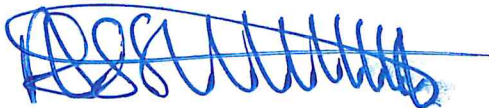
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ERIC N. WAFULA
CHAIRMAN



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CYNTHIA B. MAYAKA
MEMBER



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GRACE MUKUHA
MEMBER



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JEPHTHAH NJAGI
MEMBER



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ABRAHAM K. KIPROTICH
MEMBER