

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 90 OF 2021

IDEAL DEVELOPERS & CONSULTANTS LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXESRESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability Company and a registered taxpayer with PIN P051228177M.
2. The Respondent is a principal officer of the Kenya Revenue Authority (KRA). KRA is established under the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya, and is charged with the mandate of administration, assessment and collection of revenue as an agent of the Government of Kenya.
3. On or about September 2020, the Appellant was selected for income tax investigations based on the sector analysis of companies as evidenced by the withholding tax certificates issued. It was established that the Appellant's PIN P051228177M had not been migrated to iTax.
4. The Respondent queried all withholding tax certificates which were issued to the Appellant. It was established that one withholding certificate serial number KRAWFITMSS0076607618 dated 19th June 2018 with the gross amount of Kshs. 241,375,500.00 was issued to the Appellant from Toyo Construction Limited. The Respondent relied on undeclared income from

Toyo Construction Company Limited as evidenced from the withholding tax certificate.

5. In the aforementioned withholding certificate and according to the Respondent, the Appellant purportedly earned income from Toyo Construction Company Limited after the provision of management, professional services / consultancy amounting to the said Kshs. 241,375,500.00.
6. On 9th September 2020, the Respondent wrote to Toyo Construction Limited to provide supporting records in reference to the withholding tax certificate.
7. On 21st September 2020, Toyo Construction Limited responded that the operation and management team were evacuated to Japan and that most operations were suspended apart from its maintenance team. Therefore, at that time they were unable to provide the records requested to the Respondent.
8. On 11th November 2020 the Respondent issued a notice of assessment to the Appellant demanding taxes amounting to Kshs 123,028,405.00.
9. The Appellant objected to the assessment on 10th December 2020. Thereafter the Respondent confirmed the said assessment on 17th December 2020.
10. The Appellant, being dissatisfied and aggrieved by the tax decision, served a Notice of Appeal on the 12th February 2021. Thereafter it filed by its Memorandum of Appeal and Statement of Facts on 26th February 2021 and served the same upon the Respondent the next working day, being 1st March 2021.
11. Upon service, the Respondent filed its Statement of Facts on 29th March 2021.

THE APPEAL

12. The Appeal is premised on the grounds that: -

- a. The Respondent issued an additional assessment inconsistent with Section 15(1) of the Income Tax Act Cap 470 (ITA) which sets out guidelines for ascertaining which income ought to be subjected to income tax.
- b. The Respondent failed to take into account all the expenditure incurred in that year of income which was wholly and exclusively incurred in the production of that income.
- c. The Respondent further contravened Section 27 of the ITA by mismatching the income of the relevant years' activity as per the correct company's accounting periods which resulted in the adoption of incorrect figures of annual income or turnover.
- d. The Appellant complied with the provision of Section 51(3) of the Tax Procedure Act 2015 (TPA) by filing an objection on the additional assessment raised and delivered hard copies of the supporting documents in view of the challenges of not being able to file the same electronically.
- e. The Respondent contravened Section 51(9), (10) and (11) of the TPA as it failed to communicate its decision and the reasons to the Appellant within a period of 60 days contrary to the provisions of the law which stipulate that an objection is deemed to have been accepted if a decision is not communicated within 60 days of receipt of the Notice of Objection.
- f. The Respondent failed to consider and amend its assessment even after the Appellant presented reconciliation workings clearly

demonstrating the duplication of various invoices and inclusion of income invoices not meant for the Appellant.

- g. The Respondent failed to vacate the assessed tax after the Appellant submitted its Notice of Objection and supporting documentary evidence.
- h. The Respondent failed to effectively communicate with the Appellant and sufficiently clarify on the grounds raised before raising the additional assessment.
- i. The assessment raised by the Respondent is very punitive, unreasonable and irrational considering the current economic hardship that the company is undergoing.
- j. If the assessment is not vacated, the Appellant's business is in imminent danger as it could derail and affect the business operations of the company leading to the closure of its operations, thereby occasioning irreparable harm and danger.
- k. The Respondent's decision was made in bad faith as it failed to set out the reasons contrary to the provisions of Section 6(4) of the Fair Administrative Actions Act.

13. Further, in its Statement of Facts, the Appellant's authorized representative averred as follows: -

- a. That the Appellant was served with a Notice of Assessment dated 11th November 2020 for the period January 2018 to December 2018 for an estimated amount of Kshs 79,653,915 inclusive of interest, on corporation tax and Kshs 43,374,490 inclusive of interest on VAT for 2018 year of income.
- b. That the Appellant duly filed the Objection which was acknowledged on the 10th December 2020.

- c. That the Appellant was served with an Objection Decision dated 17th December 2020 rejecting, in full, the Objection filed, without giving a substantive reason and demonstrating by way of workings as to why a decision was made to decline the objection after serving the Respondent with reconciliation workings on the same.
- d. That the Respondent may, at any time, confirm the assessment notice dated 11th November 2020 which could lead to the institution of enforcement measures by the Respondent through further issuance of Agency Notice over its bank accounts.
- e. That the Respondent did not follow due process and exhaust the necessary steps with the Appellant with an objective of resolving the issues beforehand amicably as it declined to have a consultative meeting to discuss and deliberate on the disputed issues.
- f. That the Appellant's Objection is deemed to have been accepted after the Respondent failed to communicate to the Appellant within the time limit as prescribed by the law, that is, 60 days upon receipt of the Appellant's filed Objection.
- g. That the Respondent failed to take into account all the expenditure incurred in that year of income which was wholly and exclusively incurred in the production of income for that year.
- h. That the Respondent failed to consider critical adjustments when analyzing the Appellant's income by failing to consider costs and other relevant allowable deductions which appeared in its ledger.
- i. That the Respondent wrongfully and irregularly failed to vacate the assessed tax after the Appellant submitted its Notice of Objection and supporting documentary evidence.

- j. That the Appellant's business will be severely affected if the Respondent is not restrained by the Tribunal from proceeding with any sort of recovery and enforcement measures.
 - k. That the Appellant's business has experienced massive cash flows difficulties, affecting servicing of its bank loans and payment of its suppliers following the global outbreak of the Covid-19 Pandemic and unless the Tribunal intervenes, the Appellant will continue to suffer massive economic loss at the hands of the Respondent leading to closure of its business.
 - l. That it is in the interest of justice that the Tribunal intervenes in this matter to safeguard the interests of the Appellant as this appeal is meritorious.
14. Further, in its Written Submissions, the Appellant argued on five distinct issues relating to the validity of the Appeal, the validity of the Objection, the validity of the Objection Decision, whether the Respondent could legally demand monies having been paid withholding tax and whether the assessment contravened Section 15(1)(3) and (4) as read with Section 27 of the ITA.
15. The following are some of the authorities cited by the Appellant to buttress its case: -
- a) *TAT Appeal No 163 of 2017: Rongai Tiles and Sanitaryware Limited -V- Commissioner of Domestic Taxes.*
 - b) *Kotile General Contractor Company Limited -V- Commissioner of Domestic Taxes [2020] eKLR.*
 - c) *South Nyanza Sugar Company Ltd -V- Omwando Omwando [2011] eKLR.*

- d) TAT Appeal No. 56 of 2016: Minazini -V- Commissioner of Domestic Taxes.*
- e) Kenya Pharmaceutical Association & another -V- Nairobi City County and the 46 other County Governments & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) [2021] eKLR.*
- f) Stanley Waweru & 6 others -V- National Assembly & 2 others; Institute of Certified Public Accountants of Kenya ICPAK & 2 others.*
- g) Commissioner of Domestic Taxes -V- Kenya Maltings Limited [2013] eKLR.*

16. In conclusion, the Appellant prays that the Appeal be allowed.

THE RESPONSE

17. In its response, the Respondent stated that the Appellant did not provide all relevant documents in relation to the objection pursuant to Section 51 (3) of the TPA and neither provided evidence that the taxes were indeed declared and taxes paid therefrom.
18. Further the Respondent states that it relied on the following provisions of the law:
- a. Section 29 of the Tax Procedures Act on default assessment.
 - b. Section 59 of the Tax Procedures Act on production of records.
 - c. Section 31 of the Tax Procedures Act on amendment of assessment.
 - d. Section 3 of the Income Tax Act on charge to tax.
 - e. Section 3 of the Income Tax Act on charge to tax.

- f. Sections 15 and 16 of the Income Tax Act on deductions allowed and not allowed.
 - g. Section 5 of the VAT Act on charge to tax.
 - h. Section 51 of the Tax Procedures Act on objection to tax decision.
19. Subsequently, in its Written Submissions, the Respondent raised two issues, one regarding the validity of the Appeal and the other related to underdeclared income. To buttress its case, it cited the following authorities:
- a) *TAT Appeal No 93 of 2019: Meera Umoja Kenya – V – Commissioner of Domestic Taxes.*
 - b) *TAT Appeal No 15 of 2020: Tropical Oil Movers Limited -V – Commissioner of Domestic Taxes.*
 - c) *Tractor Den (K) Ltd -V- Commissioner of Domestic Taxes.*
20. In conclusion, the Respondent prays that the Appellant's Appeal be dismissed with costs.

ISSUES FOR DETERMINATION

21. The Tribunal, having carefully and respectfully studied the pleadings, documentations and submissions from both parties, is of the view that the issues that call for its determination are as hereunder: -
- a. **Whether the Appeal is proper before the Tribunal.**
 - b. **Whether the Appellant's Objection is valid.**
 - c. **Whether the Objection Decision is valid.**
 - d. **Whether the Respondent erred in law and fact in raising an additional assessment on the Appellant.**

ANALYSIS AND FINDINGS

22. The Tribunal, having considered the above issues, wishes to analyze the same as hereunder: -

a. Whether the Appeal is proper before the Tribunal.

23. The Respondent avers in its submissions that this Appeal offends Section 13(2) of the Tax Appeal Tribunal Act (TATA) on the premise that the Memorandum of Appeal and the Statement of Facts were filed out of time.

24. Section 13(2) of the TATA, on the procedure for filing an appeal, states as follows: -

“(2) The appellant shall, within fourteen days from the date of filing the notice of appeal, submit enough copies, as may be advised by the Tribunal, of—

(a) a memorandum of appeal;

(b) statements of facts; and

(c) the tax decision.”

25. The Tribunal notes that the Notice of Appeal was filed on 12th February 2021. According to the Respondent, the Memorandum of Appeal and Statement of Facts were filed by the Appellant on 1st March 2021 and the same ought to have been filed on 26th February 2021.

26. The Tribunal notes that the Memorandum of Appeal and the Statement of Facts were both received via email on 26th February 2021, albeit the Tribunal acknowledged receipt of the same on the next working day, 1st March 2021 at 9.22am.

27. Further, it is noteworthy that the Appellant has relied on the Tribunal's holding in *Rongai Tiles and Sanitaryware Limited -vs- Commissioner of*

Domestic Taxes (TAT Appeal no 163 of 2017) where this Tribunal invoked Article 159(2) of the Constitution of Kenya to go around the provisions of Section 51(11) of the Tax Procedures Act where it stated that **“The Tribunal is also guided by the Provisions of Article 159(2) of the Constitution, which enjoins courts of law and tribunals to administer justice in every case without undue regard to procedural technicalities...”**. With the filing-date divergence in both parties’ pleadings being that of a few “working hours”, in the interest of substantive justice, this Tribunal does not intend to veer from its holding in the Rongai Tiles and Sanitaryware Limited case mentioned hereinabove.

28. Accordingly, the Tribunal finds that the Appeal is proper before the Tribunal.

b. Whether the Appellant’s Objection is valid.

29. In response to the Appellant’s Objection, the Respondent stated, via a letter dated 17th December 2020, that the Objection was not validly lodged as per the provisions of Section 51(3) of the TPA.

30. It is the Appellant’s argument that the Respondent’s letter aforementioned, dated 17th December 2020, did not address any of the concerns raised by the Objection, but rather, stated verbatim, the provisions of Section 51(3) of the TPA and alleged that the Appellant’s Objection did not meet each of the four criteria.

31. The Tribunal will now proceed to analyse the Appellant’s Objection vis-à-vis Section 51(3) of the TPA which states, as per the below, on objection to tax decisions: -

“(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.

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

32. On whether the Appellant precisely stated the grounds for the Objection, the Tribunal notes that the Objection Notice dated 10th December 2020 definitely mentioned a number of grounds on both pages of the said Objection. Some of the grounds mentioned include no notice or intention served on the Appellant prior to issuance of the assessment and the assessment being inconsistent with the provisions of Sections 15(1 and 4) and 27 of the ITA.
33. On the amendments required to be made and the reasons for the amendments, the Tribunal notes that Paragraph 8 of the Objection has stated the amendments required to be made and given the relevant reasons. The Appellant’s Objection asked the Respondent to make amendments based on grounds raised in Paragraphs 2 to 5 of the Objection, which reasons were summarized in Paragraph 8.
34. On whether the documents were availed to the Respondent, the Respondent in its Statement of Facts, Paragraph 9, has stated that **“the Appellant did not provide all relevant documents in relation to the Objection...”**. As a back-up to this statement, the Tribunal would have expected to see a tangible request of specific documents by the Respondent.
35. Further, the Objection letter of 10th December 2020 mentions that the Appellant submitted **“relevant returns and information for clarification on**

the matter raised and humble request that the assessment be vacated and adapt the correct tax status for the company...”. Other than this statement, it is not clear to the Tribunal what documents were submitted and which documents were still pending.

36. The upshot of the above is that the Tribunal finds that the Appellant’s Objection is valid.

c. Whether the Objection Decision is valid.

37. The Appellant avers that other than copy-pasting the provisions of Section 51(3) of the TPA, the 17th December 2020 letter by the Respondent, which was the “Objection Decision” has no statement of fact nor reasons for the decision contrary to Section 51(10) of the TPA.

38. The Appellant further submits that the Respondent erred in fact and in law by issuing an Objection Decision that failed to meet the mandatory requirements of Section 51(10) of the TPA since it failed to provide the Appellant with a statement of findings on the material facts and the reasons for the decision.

39. Section 51(10) of the TPA lays down what the Objection Decision must contain. The said Section provides as follows:

"51 (10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision."

40. Therefore, Section 51(10) requires that an Objection Decision should contain the statement of findings on the material facts and the reasons for the decision. Having perused the letter of 17th December 2020, the Tribunal notes that after having quoted Section 51(3) of the TPA, the Respondent stated that the Objection did not:

i. “State precisely the grounds of objection,

ii. State the amendments required to be made to correct the decision

iii. State the reasons for the amendments

iv. Include all the relevant documents relating to the objection”

41. It is only by a stretching of the imagination that one could perceive the above “Objection Decision” to contain these mandatory requirements. The Tribunal is left guessing as to the Respondent’s response on the grounds raised or documents provided.

42. To buttress its case, the Appellant shines a spotlight on the Tribunal’s decision made in the case of *Minazini Enterprises Vs Commissioner of Domestic Taxes (Tax Appeal Number 56 of 2016)* which stated as follows:

“The Objection decision issued by the Respondent on 4th April 2016 did not include a statement of facts and reason for the decisions. The Respondent averments that the audit queries, audit findings and various correspondences as a substitute for a statement of facts or reasons for the decision is not convincing and as such the tribunal does not attach any weight to the reasons so advanced. Indeed, the action of the Respondent contravene the object and purpose of the TPA as stipulated under Section 2...”

43. It is interesting to note that neither in its Statement of Facts, nor Written Submissions, does the Respondent indulge the Appellant in responding to the grounds raised in the Objection. This raises a question as to the level and intensity of engagement between the parties prior to the assessment and the Objection Decision.

44. At this juncture, and especially given, though notwithstanding the amounts in question, the Tribunal would like to stress the importance of due process,

proper engagement and thorough documentation. Lack of this can either lead to shortage of, or delay in, justice.

45. In light of the foregoing, the Tribunal finds that the Objection Decision does not meet the validity threshold envisaged under the Tax Procedures Act and is therefore not valid.

d. **Whether the Respondent erred in law and fact in raising an additional assessment on the Appellant.**

46. Having made the above findings, the Tribunal will not delve into the remaining issue (d) above as the same is moot.

FINAL DECISION

47. The upshot of the foregoing is that the Appeal is merited and consequently, the Tribunal makes the following **ORDERS**: -

(a) The Appeal succeeds.

(b) The Respondent's Objection Decision dated 17th December 2020 is hereby set aside.

(c) Each party to bear its own costs.

48. **ORDERS** accordingly.

DATED and DELIVERED at NAIROBI on this 4th day of March, 2022.


.....
JOSEPHINE K. MAANGI
CHAIRPERSON


.....
PATRICIA M. ANAMPIU
MEMBER


.....
TANVIR ALI
MEMBER


.....
GEOFFREY KARUU
MEMBER


.....
WAMBUI NAMU
MEMBER

