

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO 563 OF 2020

PARMAR AJITUNM GABHIRSINMAPPELLANT

-VS-

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

RULING

1. Before the Tribunal is an application filed vide a Notice of Motion dated 13th December 2013 and filed on 14th December 2021. The Applicant seeks for following orders that:

- a. The instant application be certified as urgent and heard ex parte on high priority basis.
- b. The decision dated and delivered at Nairobi on 3rd December 2021 by this Tribunal be stayed pending full hearing and determination of this application.
- c. This Honourable Tribunal be pleased to review its decision dated and delivered on 3rd December 2021 by setting it aside and adopting Alternative Dispute Resolution Agreement dated 29th September 2021 as Consent Decision of this Honourable Tribunal, and/or in the alternative and without prejudice to prayer (c) above,
- d. This Honourable Tribunal be pleased to revive its decision dated and delivered at Nairobi on the 3rd day of December 2021 by setting

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it aside and adopting the consent dated 2nd December 2021 as a decision of this Tribunal as it is or upon execution by the Respondent.

- e. The Respondent be and is hereby directed to sign or execute the Consent dated 2nd December 2021 and file the same with this Honourable Tribunal earlier on or on the same date of hearing of this application or when the Tribunal deems fit.
- f. Any other order as the Honourable Tribunal may deem fit, in the circumstances.

2. The application is premised on the grounds that;

- a. The Appellant herein being dissatisfied with the Respondent's Objection Decision dated 13th November 2020 filed a Notice of Appeal on 1st December 2020 and thereafter on the same date filed its Memorandum of Appeal and Statement of Facts. Upon service the Respondent filed its Statement of Facts on 30th December 2020.
- b. Soon thereafter, the matter was referred for ADR by both parties where upon review of the assessments and further documents as provided by Appellant the parties entered an ADR Agreement dated 29th September 2021.

- c. Under the said agreement, the additional VAT assessment for the period of January 2018 and May 2018 amounting to Kshs 1,625,569.00 was vacated.
- d. The VAT assessment before the period ending 2016 was reviewed from Kshs 1,181,127.00 to Kshs 183,088.00 being the principal tax of Kshs 113,719.00, penalties and interest of Kshs 63,683.00.
- e. Consequently, the Appellant was only obliged to pay the sum of Kshs 183,088.00 being the outstanding tax liability, penalties, and interest thereof by 8th October 2021.
- f. The Appellant in full settlement of the above outstanding sum, paid to the Respondent the said amount on 30th September 2021, receipt of which the Respondent confirmed.
- g. The parties under the said ADR agreement mutually agreed to have the instant Appeal TAT Appeal No. 543 of 2020 marked as settled.
- h. The Appellant in discharge of his duties under the said ADR Agreement made the payment of Kshs 183,000 to the Respondent being the total amount payable by dint of the Agreement.
- i. On 2nd November 2021 the Appellant's tax agent in conduct of the matter wrote an email to the Respondent's counsel enquiring why a consent had not been executed and filed with this Honourable Tribunal and on the same date via email he was informed by one

of the Respondent's counsel (Ms. Sega Nyakan) that the counsel who was handling the matter (Ms Faith Onyango) was away on leave and that she had informed her team members of the matter.

- j. Further, on 2nd December the Appellant through his tax agent wrote an email to the Respondent's counsel Ms. Sega reminding her that a consent had not been signed or filed and that the same was taking too long.
- k. On the same date the Respondent's Counsel, Ms. Judith Kithinji, wrote an email to the Appellant's tax agent informing him that the ADR Agreement had been brought to her attention and Ms Sega would prepare the Consent and send the same to him for execution at the earliest opportunity.
- l. At 6.37 p.m. on the same date Ms Judith sent the consent to the Appellant for execution. Upon execution, the Consent was to be returned to the Respondent for signing and filing thereafter.
- m. The Appellant executed the said consent and on the same 2nd December 2021 at 7.18 p.m. sent it to the Respondent's Ms Judith Kithinji for execution and filing thereof.
- n. Unfortunately, the same was never filed with this Honourable Tribunal in time thus the Decision dated 3rd of December was issued before filing of the Consent.

- o. The Appellant maintains that the Decision of this Honourable Tribunal delivered on 3rd December 2021 was arrived at without due consideration of the above Consent and ADR Agreement which were material disclosures necessary for just determination of the Appeal.
 - p. Accordingly, the Appellant asserts that the Agreement and Consent constitute new material evidence warranting this Honourable Tribunal to review as the same was made on the face of the record.
 - q. It is in the interest of justice that this Honourable Tribunal grants the orders as prayed for in the application.
3. The application was supported by an Affidavit deponed by John Odwako Messo, the Tax agent for the Appellant, on 13th December 2021 and filed on 14th December 2021.
 4. The Application was uncontested.
 5. At issue was whether the Tribunal should recognize an unsigned ADR Agreement and consequently stay its decision in favour of the agreement.

Analysis and determination

6. The facts leading to this Application are that the Applicant filed an Appeal before the Tribunal and by consent with the Respondent, agreed that the matter be withdrawn from hearing for the parties to resolve their dispute through the ADR mechanism established by the Respondent. The Appellant

states that the parties engaged each other, and an agreement was drawn following which it executed its part, but the Respondent has refused to sign. It is requesting the Tribunal to recognize the unsigned agreement and record the Appeal as settled by consent.

7. Section 28 of the Tax Appeals Tribunal Act on withdrawal of Appeals from hearing before the Tribunal for parties to engage outside the Tribunal provides as follows:

“(1) The parties may, at any stage during proceedings, apply to the Tribunal to be allowed to settle the matter out of the Tribunal, and the Tribunal shall grant the request under such conditions as it may impose.

“(2) The parties to the appeal shall report to the Tribunal the outcome of settlement of the matter outside the Tribunal.”

8. The nexus between the Tribunal and the ADR mechanism is found in Article 159 of the Constitution where it is provided that;

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) ...

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).

(Emphasis added)

Clause 3 provides as follows:

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights.

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.”

9. Thus, ordinarily and pursuant to Article 159 (2)(c) of the Constitution, the Tribunal allows parties to withdraw disputes from hearing before it for resolution under the ADR mechanism. The mechanism is not established by an independent statute as is the Tribunal and even if it was, it does not operate under the direction of the Tribunal. Thus, the parties engage each other independent of the Tribunal.


10. An agreement between the parties outside the Tribunal essentially means that there is no dispute for the parties to argue before the Tribunal and therefore, the Tribunal is ordinarily inclined to accept agreements made during the dispute resolution engagements. The parties extract the material components of the agreement through a consent that is filed for the necessary endorsement by the Tribunal as if it was its decision in the matter.

11. The Tribunal has no role in the dispute resolution conducted outside it and can only rely on the terms of the agreement made by the parties who must sign the same as proof that they have agreed on the terms therein.
12. Decisions made by the Respondent in the course of the pendency of the appeal are not appealable decisions in the context of Section 2 of the Tax Procedures Act or review decisions under Section 229 of the EACCMA and therefore a decision of either party to refrain from signing a dispute resolution agreement cannot be appealed against before the Tribunal.
13. Having no supervisory mandate over the dispute resolution mechanism the Tribunal is reluctant to accept the Appellant's entreaty to direct the Respondent to sign the impugned agreement.

Disposition

14. The gist of the foregoing is that the Tribunal finds that the Application lacks merit and makes the following orders:
 - a. The application be and is hereby dismissed.
 - b. No orders as to costs.
15. It is so ordered.

DATED and DELIVERED at NAIROBI this 8TH day of April, 2022


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ERIC N. WAFULA
CHAIRMAN


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CATHERINE N. MUTAVA
MEMBER


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GABRIEL M. KITENGA
MEMBER


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ELISHAH NJERU
MEMBER


.....
ABRAHAM K. KIPROTICH
MEMBER

TAT

