

THE REPUBLIC OF KENYA  
IN THE TAX APPEALS TRIBUNAL AT NAIROBI  
TAX APPEAL NO 1446.OF 2022

CHEKIBOR INVESTMENT LIMITED..... APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

**JUDGMENT**

**BACKGROUND**

1. The Appellant is a limited liability Company duly incorporated in Kenya under the Companies Act and is registered for VAT obligations.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, CAP 469 of the laws of Kenya. Under Section 5(1) of the Act, the Respondent is an agency of the Government for the collection and receipt of all tax revenue. Further under Section 5(2) of the Act with respect to performance of its functions under subsection (1), the Respondent is mandated to administer and enforce all provisions of the written laws as set out in Parts 1 & 1of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenue in accordance with those laws.
3. The Appellant was assessed for additional Value Added Tax (VAT) for various tax periods in 2018, 2019, 2020 and 2021 in the sum of Kshs. 5,102,778.70 on 20<sup>th</sup> November 2020.

4. The Appellant was dissatisfied with the said additional assessments, and the Appellant made a late objection against the said assessments through iTax on 14<sup>th</sup> October 2021.
5. The Respondent subsequently made a request to the Appellant to provide reason(s) and documentation in support of the Appellant's late objection.
6. On 10<sup>th</sup> December 2021, the Respondent issued an objection invalidation decision and confirmed the assessment of the sum of Kshs. 5,102,778.70 being the principal sum of the tax assessed.
7. Aggrieved by the decision to invalidate the objection and the confirmed assessment, the Appellant filed a Notice of Appeal dated 9<sup>th</sup> November 2022 and filed on 29<sup>th</sup> November 2022.

## **THE APPEAL**

8. The Appellant filed its Memorandum of Appeal on 29<sup>th</sup> November 2022 and set out the following grounds of appeal:
  - (a) That the Respondent erred in fact and in law in issuing estimated VAT assessments for the months of May 2017, June 2018, May and December 2019, February March, April and May 2020 and March 2021.
  - (b) That the said additional assessment taxes amounting to Kshs. 5,102,778.70 are unfounded, excessive and not based on any facts or law.

## **THE APPELLANT'S CASE**

9. The Appellant has set out its case in its Statement of Facts filed on 29<sup>th</sup> November 2022.
10. The Appellant stated that its business is incorporated in Kenya and the core business is but is not limited to construction.
11. The Appellant stated that the assessment issued by the Respondent were for periods May 2017, June 2018, December 2019, February May 2020 and March 2021.
12. The Appellant averred that the Respondent, verbally requested for documents which included but were not limited to bank statements, general ledgers, audited financial statements and reconciliation of turnovers from the Appellant.
13. The Appellant asserted that it did, in fact, supply all the requested documents, which were subsequently reviewed by the Respondent. Additionally, the Appellant stated that numerous meetings took place between the Applicant's representative and the Respondents' representatives.
14. The Appellant asserted that it did not receive any further explanations for the refusal to allow the objection, nor detailed reasons for such refusal. The Appellant contended that the Respondent's demand for taxes, amounting to a principal sum of Kshs 5,102,778.70, is unfounded, excessive, and not based on any material facts provided by the Respondent.

15. The Appellant stated that, in its view, the refusal by the Respondent to consider the evidence provided by the Appellant was unreasonable and unjustified.

### **Appellant's Prayers**

16. The Appellant prayed for orders from the Tribunal that:

- (a) The Notice of Appeal, Memorandum of Appeal and Statement of Facts be deemed to have been filed within time.
- (b) That pending the hearing and determination of the substantive Appeal, the Respondent, its agents and/or workers be barred from attaching any moveable and immovable assets of the Applicant.
- (c) That the demand for Ksh 5,102,778.70 contained in the correspondence by the Respondent to the Appellant dated 10<sup>th</sup> December 2021 be struck out.
- (d) Costs of the Appeal

### **THE RESPONDENT'S CASE**

17. The Respondent has set out its case in its Statement of Facts dated 15<sup>th</sup> June 2023 and filed on 11<sup>th</sup> July 2023.

18. The Respondent refuted each and every allegation by the Appellant contained in the Memorandum of Appeal and Statement of Facts.

19. As a preliminary issue, the Respondent stated that present Appeal ought to be struck out as the same is incompetent for the reason the Appeal was filed out of time and without leave of the Tribunal.

20. The Respondent contended that the Appellant had underdeclared its income in the periods under review, which led to the multiple assessments for VAT purposes.
21. The Respondent relied on the provisions of Section 51 (7) of the Tax Procedures Act No. 29 of 2015 (hereinafter 'TPA') to assert that the Appellant was required to give reasons for the late objection alongside supporting documentation for the late objection.
22. The Respondent stated that it gave the Appellant ample time to validate its objection before it issued its decision of 10<sup>th</sup> December 2021 invalidating the late objection by the Appellant.
23. The Respondent asserted that in any event, the Appellant had failed to discharge its burden to prove that the assessments were excessive or improper in line with the provisions of Section 56(1) of the TPA and Section 30 of the Tax Appeals Tribunal Act No. 40 of 2013 (hereinafter 'TAT').
24. The Respondent contended that the Appellant did not provide any documents at the objection stage to dislodge the Respondent's assessments and therefore there was no basis for allowing the Appellant's objection had it been filed within the stipulated timelines.
25. The Respondent averred that the Appeal is unmeritorious because the assessments and the subsequent invalidation decision is proper and duly anchored in law and there is therefore no basis to set aside the assessments

## **Respondent's Prayers**

26. The Respondent prayed to for orders that the Tribunal would:
- (a) Uphold the Respondent's decision as proper and in conformity with the provisions of the law
  - (b) Dismiss the Appeal with costs to the Respondent as the same is devoid of any merit.

### **PARTIES SUBMISSIONS**

27. The Appellant did not file any submissions in support of its Appeal whilst the Respondent's submissions dated 28<sup>th</sup> August and filed on 8<sup>th</sup> September, 2023 were considered by the Tribunal.
28. The Respondent submitted that the Appeal herein was incompetent as it had been filed out of time without leave from the Tribunal. The Respondent relied on Section 13 of TAT which mandates every taxpayer who disputes an appealable decision by the Respondent, to lodge a notice of appeal with the Tribunal within 30 (thirty) of being notified of the decision.
29. The Respondent also submitted that the same Section 13 of the TAT grants the Tribunal discretion to determine an application for leave to file an appeal out of time where there is sufficient cause to do so.
30. The Respondent submitted that in the present Appeal, the Appellant, having failed to file an appeal within the mandatory timelines, submitted an application for an extension of time on 28<sup>th</sup> November 2022, however the same was never heard or determined on its merits and that the Court record can bear witness, to that fact.

31. The Respondent submitted that it is trite law that the issue of time limitation goes to the jurisdiction of the Tribunal and therefore there is no need for ascertainment of facts or probing of evidence, the Tribunal need to only review the law and consider the present Appeal.
32. The Respondent submitted that in the absence of an order granting leave to the Appellant to file an appeal out of time, the present Appeal is incompetent and should be struck out for being time barred. The Respondent, in its submissions went further to identify a single issue for determination which it analysed as follows:

#### **Whether the Respondent was justified in invalidating the Appellant's objection**

33. On this issue, the Respondent submitted that the Appellant was assessed for various periods in 2018, 2019, 2020, and 2021, for the sum of Kshs. 5,102,778.70 as a result of underdeclared incomes in the period under review.
34. The Respondent further submitted that it was not in dispute that the Appellant filed a late objection to the assessments, exceeding 30 days from the date of the assessments.
35. In several correspondence, including electronic mails dated 25<sup>th</sup> October 2021 and 1<sup>st</sup> December 2021, the Respondent requested the Appellant to furnish documents to allow the application for an extension of time to lodge a notice of objection. In this regard, the Respondent submitted that it filed the copies of the said electronic mails.

36. The Respondent placed reliance on the provisions of Section 51 (7) of the TPA which are as follows:

*"The Commissioner may allow an application for the extension of time to file a notice of objection if-*

*(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and*

*(b) the taxpayer did not unreasonably c in lodging the notice of objection."*

37. The Respondent submitted that, for a taxpayer such as the Appellant herein to prove that it was entitled to file a late objection, it had to produce some information or documentation to satisfy the conditions pre-set out in Section 51(7) of the TPA, demonstrating that it was either out of the Country, sick, or had any other justifiable cause.

38. The Respondent further submitted that in its correspondence and in particular in the electronic mail dated 25<sup>th</sup> October 2021, it also requested for documentation to support the Appellant's grounds of objection as required under Section 51(3) of the TPA which states that:-

*"(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, or has applied for an extension of time to pay the tax not in dispute under section 33(1); and*

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

39. It was the Respondent's submission that the Appellant failed to provide any of the required documents to support both its application for extension of time to file an objection as well as to the substantive objection itself.
40. The Respondent relied on **TAT 724 OF 2022; Alphaquest Designs Limited v Commissioner of Domestic Taxes** where this Tribunal in dismissing the Appeal on account of an invalidation held as follows:

*"The Tribunal is also cognizant of the provisions of the tax laws that place the burden on the taxpayer to prove that a tax decision is wrong. The Tribunal does not think that this burden has been discharged by the Appellant. No material has been placed before the Tribunal to make it believe the Respondent's decision was wrong. The Appellant laid out no basis as to why the requested documents could not be availed to the Respondent. The Appellant has not disputed the taxable sales in question and it admitted in its objection it failed to declare the sales within the stipulated time due to the director's sick and seeks the Respondent to allow It to amend the return. The upshot of the analysis is that the Tribunal finds no reason to feat the Respondent's decision invalidating the objection in this Appeal."*

41. The Respondent therefore submitted that in the absence of the supporting documents, the Respondent had no choice but to invalidate the objection and confirm its assessments.
42. It was the Respondent's submission that in exercise of its mandate, the Respondent considered the information available and to the best of its judgment assessed the correct tax by invalidating the objection and confirmed its assessments.
43. The Respondent relied on Section 56(1) of the TPA and reproduced Section 30 of the TAT to show that in any proceedings that related to tax decisions, objections, and appeals, the burden was on the taxpayer to prove that a tax decision is incorrect.
44. The Respondent further relied on the High Court decision in **Ushindi Limited versus Commissioner of Investigations & Enforcement Kenya Revenue Authority [2020] eKLR** where it was held that:

*"The burden of proof was on the Appellant to raise the specific items and/or aspects of the tax assessment that were manifest errors, wrongfully imposed or not liable to be paid as tax."*

45. The Respondent also relied on the case of **Digital Box Limited versus Commissioner of Investigations and Enforcement [2020]** where the Tribunal held that:

*"The question of burden of proof in taxation matters is provided for under the Tax Procedures Act as well as the Tax Appeals Tribunal Act. Section 56(1) of the Tax Procedures Act states that: "In any proceedings under this Part, the burden shall be on the taxpayer to*

*prove that a tax decision is incorrect." Section 30 of the Tax Appeals Tribunal Act similarly provides that: "In a proceeding before the Tribunal, the Appellant has the burden of proving- (a) Where an appeal relates to an assessment, that the Assessment is excessive; or (b) in any other case, that the Tax Decision should not have been made or should have been made differently." In this case, the Appellant is the one seized of the desire to prove that the Respondent used extraneous information in arriving at its assessment, Thus, according to the provisions of the Evidence Act, the Tax Procedures Act and the Tax Appeals Tribunal Act. the burden of proof falls upon the Appellant.... The Tribunal is of the view that the Appellant did not discharge its burden of proof in showing that the Respondent used extraneous considerations and documents other than those prescribed by the law. The averments made by the Appellant did not amount to evidence."*

46. The Respondent submitted that the burden is on the Appellant to prove that it erred in invalidating the objection. In doing so, the Appellant must adduce evidence in form of information and/or documents to support its objection.
47. In this regard, the Respondent submitted that it wrote to the Appellant severally and requested for documents in support of the late objection and gave the Appellant ample time to furnish the same information and/or documentation. The Respondent relied on the case of **Republic V KRA: Proto Energy Limited (2022) eKLR** to submit that the Appellant has the responsibility to maintain records and availing the same when requested to do so. The Appellant failed to discharge the burden of proof by failing to

provide any documents in support of the objection despite several requests by the Respondent.

48. It was the Respondent's submission that it used all the available information and its best judgement and that without availing the records requested, the Appellant cannot claim the assessments are wrong without adducing evidence to support the same.
49. The Respondent submitted that the Appellant failed to discharge its burden of proof in failing to provide the relevant supporting documents. The Respondent therefore maintained that the assessments were issued after consideration of all information provided by the Appellant and in pursuant to the law.

## **ISSUES FOR DETERMINATION**

50. Based on the pleadings, documents and submissions filed by parties, the Tribunal has identified the following issues for determination:
- (a) **Whether the Appeal is competent.**
  - (b) **Whether the Respondent was justified in invalidating the Appellant's objection.**

## **ANALYSIS AND FINDINGS**

### **(a) Whether the Appeal is competent**

51. The Tribunal notes the Respondent's contention that the instant Appeal was filed out of time and that although the Appellant had made an application for extension of time dated 28<sup>th</sup> November 2022, the same was never heard nor determined. It is not in dispute that the objection invalidation decision

was issued by the Respondent on 10<sup>th</sup> December 2021, while the Appellant filed its Notice of Appeal on 29<sup>th</sup> November 2022, close to a year later. The Tribunal relies on Section 13 of the TAT which provides as follows:-

*“Appeal of appealable decision to the Tribunal*

*1) A notice of appeal to the Tribunal shall—*

*(a) be in writing or through electronic means;*

*(b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner [emphasis ours]*

*(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.*

*(3) The Tribunal may, upon application in writing or through electronic means, extend the time for filing the notice of appeal and for submitting the documents referred to in subsection (2).*

*(4) An extension under subsection (3) may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the applicant from filing the notice of appeal or submitting the documents within the specified period...”*

52. The Tribunal has found that indeed, the Appellant’s application for leave to file an appeal out of time was never heard nor determined on merit. There was therefore no order granting the Appellant leave to lodge the appeal out of time.

53. The issue of time limitation goes to the jurisdiction of the Tribunal and hence in the absence of an order granting leave to the Appellant to file an appeal out of time the Tribunal reiterates the holding in **Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd eKLR** where the Court held as follows;

*“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter, is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before judgement is given”*

54. The Tribunal finds and holds that the instant Appeal was lodged without leave being granted for late filing and as a consequence the Appeal is incompetently before the Tribunal.

**(b) Whether the Respondent was justified in invalidating the Appellant's objection.**

55. Having found that the Tribunal has no jurisdiction to entertain the instant Appeal, the Tribunal will not delve into the second issue for determination as the same has been rendered moot.

## **FINAL DECISION**

56. The upshot of the foregoing is that the Tribunal lacks jurisdiction to entertain the instant Appeal and accordingly proceeds to make the following Orders:

(a) The Appeal be and is hereby struck out.

(b) Each party to bear its own cost.

57. It is so ordered.

DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of April, 2024

CHRISTINE A. MUGA  
CHAIRPERSON

BONIFACE K. TERER  
MEMBER

DELILAH K. NGALA  
MEMBER

SPENCER S. OLOCHIKE  
MEMBER

GEORGE KASHINDI  
MEMBER