

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 298 OF 2023

AKUSALA A. BORNFACE.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a Kenyan citizen with tax obligations and a resident of Nairobi.
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 Kenya Revenue Authority 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 the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Parts 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. On 16th February 2021, the Appellant was issued a pre-assessment notice for undeclared turnover of Ksh 1,913,244.89 comprising principal income tax, interest and penalties for the 2016 to 2019 review period.

4. In a letter dated 15th March 2021, the Appellant objected to the Respondent's entire assessment with the Respondent acknowledging the same via iTax platform on 25th March 2021.
5. The Respondent issued its objection decision on 31st May 2021 and confirmed the assessments via iTax platform on the same date.
6. Consequently, the Respondent issued a demand letter for Ksh 1,930,317.00 against the Appellant on 9th June 2021.
7. Aggrieved by the Respondent's objection decision, the Appellant filed its Notice of Appeal dated 12th April 2023 at the Tribunal on 17th April 2023. This was after the Appellant was granted leave by the Tribunal to file an appeal out of time in a Ruling in respect of **Miscellaneous Application No. 27** of 2022 dated 31st March 2023.

THE APPEAL

8. The Appeal was premised on the following grounds as set out in the Memorandum of Appeal dated 12th April 2023 and filed on 17th April 2023;
 - (i) That the Respondent erred in fact and law in making inaccurate findings and conclusions, with the resultant effect of inflating the Appellant's tax obligations by exorbitant amounts in the assessment of the Appellant's tax.
 - (ii) That the Respondent erred in fact and law in its decision to lock out the Appellant from the Voluntary Tax Disclosure Program (VTDP) running from 1st January 2021 to 31st December 2023 covering 5 years preceding 1st July 2020 which was the very period that the Appellant's assessment was predicated upon (2016-2020).

- (iii) That the Respondent acted unlawfully by robbing off the Appellant's legitimate expectation that the said Appellant would benefit from that window of tax disclosure to resolve any tax issues. The statute accorded the Appellant 3 years yet the Respondent curtailed the same by reducing it to a mere 30 days therefore, acting *ultra vires* and in bad faith against the Appellant's legitimate expectation not to be assessed within the period of Voluntary Tax Disclosure Program.
- (iv) That the Respondent erred in fact and in law by issuing an objection decision in response to the Appellant's notice of objection contrary to the laid down provisions of the Tax Procedures Act Section 51 which states that the Commissioner shall make objection decision within sixty(60) days from the date of receipt of the notice of objection; or any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.
- (v) That the Respondent erred in law and in fact by not stating the reasons why the Appellant's objections were rejected, contrary to the right to information enshrined in the Tax Procedures Act and the Constitution of Kenya, 2010.
- (vi) That the Respondent erred in law and in fact in its objection decision by outrightly contravening the doctrine of legitimate expectation that rests on the presumption on the Commissioner to follow certain procedures at arriving at the tax liability and the benefits that accrue from it and the procedural timelines pronounced in statute.
- (vii) That the Respondent erred in law and fact by issuing a demand letter to the Managing Director, National Bank of Kenya, in which the Appellant is an account holder, ordering payment of the said tax amount to the

Respondent, the bank being an agent of the Appellant, without notifying the Appellant through the proper channels and procedures.

APPELLANT’S CASE

9. The Appellant stated as hereunder in his Statement of Facts dated 12th April 2023 and filed on 17th April 2023;
10. That the Appellant’s principal place of business was Nairobi not Eldoret.
11. The Appellant averred that upon receiving the demand letter he objected within the set timelines however, the Respondent was dilatory in rendering its decision within 60 days from the date of receipt of the Appellant’s notice of objection as envisioned in Section 51(11) of the Tax Procedures Act No. 29 of 2015 (hereinafter ‘TPA’).
12. It was the Appellant’s assertion that the failure by the Respondent to act within the set timelines created legitimate expectation to the Appellant that his objection had been allowed and that the Appellant intended to take advantage of the Voluntary Tax Disclosure Program to clear the dispute.
13. The Appellant disputed the assessment confirmation and tax demand by the Respondent and lamented that despite sending a representative, the Respondent directed him to personally travel to Eldoret to resolve the issue yet the Appellant was a resident of Nairobi occasioning great inconvenience to the Appellant.
14. That the Appellant became aware of the Respondent’s agency notices freezing its accounts when he tried accessing his accounts sometimes in December 2021 which had been done without his knowledge or even notification.

15. The Appellant averred that contrary to legitimate expectation, the Respondent acted *ultra vires* and in bad faith by denying the Appellant the opportunity to utilize the VTDP covering the assessment period to restate the correct tax position. The Appellant further stated that he had legitimate expectation that tax issues should be handled fairly as demanded by the Fair Administrative Action Act that any person being the subject of a process should be fully aware of what they are up against which was not the case in the present Appeal.
16. The Appellant asserted that by virtue of Section 15(1) of the Income Tax Act, CAP 470 of the laws of Kenya (hereinafter 'ITA'), the Respondent is estopped from denying the Appellant the opportunity to claim input tax when apportioning the same in the ultimate assessment.
17. The Appellant avowed that it was improper, unfair and un-procedural for the Respondent to arbitrarily apply arithmetically unsound computations in order to arrive at higher taxes for the Appellant, and then ambush the Appellant with a rejection of Appellant's valid objection outside the legal timelines.

Appellant's Prayers

18. The Appellant's prayers to the Tribunal were that:
 - (a) The Tribunal finds the Respondent's objection decision dated 31st May 2021 was filed out of time and consequently annul the entire tax assessment as issued with costs.
 - (b) The Tribunal permits the Appellant to disclose his tax obligations within the Voluntary Tax Disclosure Program with zero penalties.
 - (c) The Tribunal declares the Respondent's actions arbitrary, capricious, unreasonable, unfair and contrary to administration of justice and

legitimate expectation of the Appellant; and consequently, bar or estop the Respondent's employees or agents/other persons from demanding or taking any further steps towards enforcement or recovery of principal tax, penalties and interest

- (d) The Tribunal awards general damages for loss of business, making funds inaccessible and embarrassment as a result of Agency Notices which paralyzed the Appellant financially.

THE RESPONDENT'S CASE

19. The Respondent has responded to the Appeal through its Statement of Facts dated and filed on 17th May 2023.
20. The Respondent restated its position as laid out in its objection decision and further claimed that its decision to arrive at the assessment was justified and had basis in law.
21. The Respondent averred that upon receipt of the Appellant's objection, it requested for records for review purpose; that however, the Appellant failed to avail records to support the grounds of objection pursuant to Section 51(3) of the TPA which resulted in the Respondent issuing its objection decision.
22. In response to ground (i) as laid out in the Memorandum of Appeal, the Respondent was categorical that Section 31 (1)(c) of the TPA empowers it to amend assessments in ensuring that taxpayers pay tax owed. In buffering this position, the Respondent cited Section 24 (2) of the TPA which reads as follows;

"The Commissioner shall not be bound by a tax return or information provided by, or on behalf of, a taxpayer and the

Commissioner may assess a taxpayer's tax liability using any information available to the Commissioner."

23. The Respondent asserted that the burden was upon the Appellant to demonstrate that the assessment was erroneous/ incorrect which had not been done.
24. In response to grounds (ii) & (iii), the Respondent averred that whereas VTDP was premised on taxpayer's material disclosure of facts relating to its tax affairs, the Respondent was at liberty to assess the Appellant when the same had not been done. It was not an unfettered ticket allowing the Appellant to disclose inaccurate tax affairs.
25. In response to grounds (iv) to (vii), the Respondent reiterated that its objection decision was issued well within timelines and satisfied the requirements of the law. The Respondent was adamant that the Appellant did not provide contrary evidence to the assessments while its grounds of Appeal were insufficient.

Respondent's Prayers

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

PARTIES WRITTEN SUBMISSIONS

27. The Appellant's written submissions dated 28th August 2023 were filed on 29th August 2023. In its submissions, the Appellant addressed the background of the case, facts of the Appeal, rule of law and application of laws on facts.

28. The Appellant contended that the Respondent had treated its case in a way that was contrary to the provisions of the TPA. Moreover, it was the Appellant's assertion that the amount demanded was inflated but could be regularized by way of self-disclosure under VTDP which availed the Appellant 100% exemption from any penalties during the window to disclose any tax obligations as anchored in law.
29. The Appellant stated that the Respondent did not dispute that it issued objection decision outside the stipulated 60(sixty) days as couched under Section 51(11) of the TPA.
30. Additionally, the Appellant averred that the Respondent surreptitiously and without any color of right or backing of the law enforced its decision to freeze accounts of the Appellant just about when the Appellant was preparing documents in order to benefit from the VTDP which tremendously prejudiced, and pecuniarily embarrassed the Appellant.
31. In buttressing its position, the Appellant contended that the Respondent violated the following provisions of the TPA as read with the Fair Administrative Action Act No. 4 of 2015; Section 37D, 43(2), 51(1), 51(4), 51(8), 51(11) of the TPA as read with Section 4(1) and 7(1)(b) of the FAA.
32. The Appellant was adamant that he had been indeed mishandled by the Respondent who had erected insurmountable hurdles not recognized by law in every step. To buffer this position, the Appellant cited the case of **Mount Kenya Bottlers Limited & 3 Others v Attorney General & 3 Others NRB CA Civil Appeal No 164 of 2013[2019] eKLR** where it was held that the principle of tax statutes must be construed strictly.
33. The Appellant averred that the Respondent had issued preservation instructions to the Managing Director of National Bank of Kenya where the Appellant was an account holder without notification to the Appellant and

for more than the statutorily provided timelines. That even after lifting of the agency notices by the Tribunal, the Respondent still went ahead to freeze the Appellant's accounts for 16 months, actions which singly and cumulatively prejudiced the Appellant. The Appellant quoted the case of **Kenya Revenue Authority v Pevans East Africa Limited [2020]eKLR** where the court held that;

“...the purpose of Section 43 of the TPA is to allow KRA to preserve a taxpayer's money in the hands of a third party without notice to the taxpayer for a limited period of time before moving the court for formal orders of preservation. The court faulted KRA for not serving the Preservatory Order.”

34. The Appellant averred that the Respondent's enforcement action was already time-barred thus was committing an illegality because the objection was allowed by effluxion of time. The Appellant cited the following authorities to support its argument;

- a) **Republic v Kenya Revenue Authority Ex-Parte M-Kopa Kenya Limited [2018]Eklr.**
- b) **Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another [2020] eKLR.**

35. It was the Appellant's assertion that the Respondent abused discretion by transgressing against the positive provisions of the law against the legitimate expectation of the Appellant. In buffering this position, the Appellant cited the following authorities;

- a) **Kenya Revenue Authority & 2others v Darasa Investment Limited [2018] eKLR .**

b) Kenya Revenue Authority v ECO Bank Kenya Limited & 3 others; Kanyango (Interested Party) (Miscellaneous Application E015 of 2022) [2022] KEHC 41 (KLR) (Commercial and Tax) (31 January 2022) (Ruling).

36. The Appellant asserted that the failure by the Respondent to file any written submissions was an acknowledgement of the gross error in administrative action against the Appellant and indication of conceding the Appeal as unopposed as was held in the case of **Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another** [2020] eKLR (supra).

ISSUES FOR DETERMINATION

37. The Tribunal having carefully considered the parties' pleadings, documentation and Appellant's submissions notes that a single-issue call for its determination as follows:

Whether the Respondent complied with statutory timelines when issuing its objection decision dated 31st May, 2021.

ANALYSIS AND DETERMINATION

38. The Tribunal will proceed to analyse the single issue for determination identified as hereunder.

39. The genesis of the instant Appeal was that a review/ scrutiny of the Appellant's withholding tax certificates revealed the Appellant did not declare all the income tax turnover totaling Ksh. 1,913,244.89 for the 2016 to 2019 review period. The Appellant contested these assertions in its own objection which the Respondent opposed and confirmed vide its objection decision which in turn compelled the Appellant to seek the intervention of the Tribunal when it lodged the Appeal.

40. The Tribunal notes that the Appellant contested the Respondent's objection decision as having been lodged outside the legal timeframe of 60(sixty) days, this has not been controverted by the Respondent. The Tribunal notes that upon receipt of the pre-assessment notice, the Appellant lodged its notice of objection on 15th March 2023 this was countered by the Respondent's objection decision dated 31st May 2023, Seventy-Six (76) days later. The Tribunal relies on Section 51(11) of the TPA which reads as follows;

“(11). The Commissioner shall make the objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.”

41. The Tribunal reiterates the Court's position when faced with a similar matter in the case of **Equity Group Holding Limited V Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020) [2021] KEHC 25 (KLR)** where the court held that;

“...the TAT rightly computed time and pronounced that the objection decision was rendered out of time. This being the position, then by dint of the above provision, the objection decision is deemed to have been allowed. This position has been upheld in a catena of superior court decisions in this country, among them those cited by the appellant's counsel. In Republic V Commissioner of Customs Services Ex-Parte Unilever Kenya Limited, the court stated that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law. The law requires that where the Commissioner has not made an objection decision within 60 days from the date the taxpayer lodged the notice of objection, the objection shall be allowed. This means that the issues that the taxpayer had raised in the notice of objection will be accepted. In case of a tax assessment, it will be vacated...”

42. From the foregoing, the Tribunal is of the view that the Respondent did not comply with statutory timelines when issuing its objection decision dated 31st May, 2021 since the same had been overtaken by the operation of the law.

FINAL DECISION

43. The upshot of the foregoing is that the Appeal is merited and the Tribunal accordingly proceeds to make the following Orders:

- (a) The Appeal be and is hereby allowed.
- (b) The Respondent's objection decision dated 31st May 2021 be and is hereby set aside.
- (c) Each party to bear its own costs.

44. It is so ordered.

DATED and DELIVERED at NAIROBI this 5th Day of April, 2024.

**CHRISTINE A. MUGA
CHAIRPERSON**

**BONIFACE K. TERER
MEMBER**

**DELILAH K NGALA
MEMBER**

**GEORGE KASHINDI
MEMBER**

**SPENCER S. OLOLCHIKE
MEMBER**