

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL No. E515 of 2023

KOFINAF COMPANY LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company duly registered in Kenya and whose principal activity is cultivation, processing, milling, marketing, sale and auctioning of coffee.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority (KRA) Act, and KRA is charged with the responsibility of among others, assessment, collection, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Appellant self-assessed and declared its 2015 original income tax returns on 6th June 2016 for the year ended 31st March, 2015.
4. The Appellant amended the return on 7th June, 2016. On 6th April, 2017 the Appellant lodged an application for relief by way of a request for approval of the amended return and correction of its iTax ledger to reflect the adjusted amounts.
5. The Respondent rejected the Appellant's amended return vide a rejection notice dated 10th July 2017.
6. The Appellant objected to the rejection vide its objection letter dated 10th July, 2017.

7. In response to the objection, the Respondent vide its letter dated 12th October, 2017, offered to review the request for amendment and directed the Appellant to, within 10 days of receipt of the letter, avail various documents in relation to the land transfer.
8. The Appellant requested for an extension of time through a letter dated 23rd October, 2017, for a period of 4 weeks within which it would avail the documents.
9. Subsequently, the Appellant vide a letter dated 7th December, 2017 availed the documents as requested by the Respondent.
10. Thereafter, the Respondent, vide a payment defaulter reminder notice proceeded to demand for payment of Kshs. 487,422,065.79 on 25th October, 2018 in respect of the period between 1st April, 2014 and 31st March, 2015.
11. The Appellant lodged its objection against the Respondent's demand vide its objection letter dated 31st October, 2018 and received by the Respondent on 1st November, 2018.
12. The Respondent vide a letter dated 24th July, 2019 issued a demand of Kshs. 711,001,200.00 covering the periods 1993 to April 2019.
13. On 12th August, 2019 the Appellant lodged its objection against the 24th July, 2019 demand.
14. On 13th September, 2019 the Respondent acknowledged receipt of the Appellant's objection dated 12th August 2019 and stated that it was reviewing the documents the Appellant had provided for ledger reconciliation.
15. The Respondent, thereafter, vide a letter dated 17th October, 2019 wrote to the Appellant to inform it that the documents and information that were availed for ledger reconciliation was ongoing. Additionally, the Respondent informed the Appellant that the demand letter dated 24th July, 2019 was held in abeyance pending the completion of the ledger reconciliation.

16. The Respondent later issued a notice demanding tax arrears amounting to Kshs 564,804,783.00 for the periods April 2014 to April 2019.
17. The Appellant objected to the tax demanded in its entirety vide its objection letter dated 27th August, 2020.
18. After numerous correspondences, the Respondent through an email dated 2nd May 2023 issued a tax decision rejecting the Appellant's data correction of 2015 Income tax company return.
19. The Appellant lodged its objection against the rejection of data correction of the income return for the year ended 31st March, 2015 on 18th May, 2023.
20. The Respondent issued an objection decision on 14th July, 2023 disallowing the Appellant's objection.
21. Following its dissatisfaction with the Respondent's decision, the Appellant appealed by filing a Notice of Appeal to the Tribunal dated and filed on 11th August, 2023.

THE APPEAL

22. The Appeal is premised on the following grounds as stated in the Appellant's Memorandum of Appeal dated 25th August, 2023:-
 - i. That the Respondent erred in law and in fact in rejecting the objection dated 18th May, 2023 lodged by the Appellant on the basis that the objection was time barred yet the Respondent had failed to issue an objection decision to the Appellant's initial objections dated 10th July 2017, 31st October 2018 and 12th August, 2019 within the required timeframe of 60 days as provided for under Section 51(11) of the Tax Procedures Act, 2015.
 - ii. That the Respondent erred in law and in fact in rejecting the objection by the Appellant on the basis that the Appellant's objection

dated 18th October, 2018 objecting to the payment defaulter notice was not a valid objection yet the objection met the requirements under provisions of Section 51 (3)(a) and (c) of the Tax Procedures Act, 2015.

- iii. That the Respondent erred in law and in fact in disallowing the Appellant's objection on the basis that the application for amendment of the Appellant's tax return filed on 6th June, 2016 was time-barred yet the amendment return was lodged on the iTax platform on 7th June, 2016 and an application for amendment was lodged on 6th April, 2017 which is within the statutory timeframe for amendment under Section 31(4)(b)(i) of the Tax Procedures Act.
- iv. That the Respondent erred in law and in fact in its assessment of the outstanding Corporate Income Tax on the basis of an erroneous return by the Appellant resulting in the overstatement of the principal taxes, penalties and interest of Income Tax Company for the period of April 2014 to March 2015, yet the Appellant had demonstrated to the Respondent the need for the amendment of the return to exclude gain on disposal of assets which was effected in 2013 when Capital Gains Tax was not applicable on disposal of the said assets.
- v. That in view of the foregoing, the Appellant is apprehensive that the decisions of the Respondent lack in merit, are unlawful and manifestly unjust and that unless the orders sought are granted, the Appellant risks being unjustly compelled to pay for the alleged taxes to the prejudice of the Appellant.

APPELLANT'S CASE

23. The Appellant's case is premised on the following documents:

- i. Its Statement of Facts dated 25th August, 2023 together with the documents attached thereto.
- ii. The Written submissions dated 25th October, 2023 and filed on 26th October, 2023.

24. That the Respondent misdirected itself in rendering its decision contrary to Section 31 (4)(b)(i) of the Tax Procedures Act which provides the timelines required for a taxpayer to lodge a return amendment as five years from the date of filing a self-assessment return. The Section states as follows:

*“(4) The Commissioner may amend an assessment-
(b) in any other case, within five years of-
(i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates;”*

25. That the Appellant filed its return for the tax period of 1st April, 2014 to 31st March, 2015 on 6th June, 2016 and on realization of an error that included gains on the transfer of land, an allowable deduction, in its return, it amended the return on 7th June, 2016 and consequently on 6th April, 2017 lodged an application with the Respondent vide a letter for approval of the amended return and correction of its i-Tax ledger to reflect the correct figures.

26. The Appellant noted that the application for amendment ought to have been made by 6th June, 2021. That its amended return was filed on 7th June, 2016 and the application for amendment was made on 6th April, 2017 which was within the prescribed 5 years time-frame.

27. The Appellant submitted that in determining its application for amendment, the Respondent made requests for relevant documentation and demonstrations in support of the amendment and the Appellant complied and availed the documents within the statutory prescribed time-frame.

28. The Appellant further submitted that its initial amendment was thereafter rejected by the Respondent on the basis that supporting documents were not provided.
29. That the Appellant provided and endeavoured to make follow ups through email correspondence and letters requesting for speedy conclusion of the matter.
30. The Appellant submitted that no decision was issued on the objection dated 10th July 2017. That instead the Respondent issued a payment defaulter notice in respect of the erroneous return. That consequently, the Appellant objected to this notice vide a letter dated 18th October, 2018.
31. The Appellant stated that no decision was issued on the objection dated 18th October, 2018. That instead the Respondent issued a demand covering the periods 1993 to April 2019, and that this included the period of April 2014 to March 2015 which contained the erroneous return that the Appellant had applied to have amended and the Respondent was well aware of the amendment application. That the Appellant vide a letter dated 12th August, 2019 lodged an objection against this assessment.
32. That no decision was rendered with regards to the objection dated 12th August, 2019. That instead the Respondent vide a letter assured the Appellant that the ledger reconciliation process was ongoing.
33. The Appellant asserted that within the five years' time-frame, it made a valid application for amendment and lodged valid objections to the initial rejection of the amendment and the subsequent tax demands from the Respondent. That the Respondent however failed to issue any communication to the effect that the Appellant's application was invalid neither did it issue any decision on the Appellant's objections.
34. That instead the Respondent adamantly raised assessments with regard to the erroneous tax return. That consequently, no amendment was approved by the

Respondent within the five-year time-frame and no objection decision was issued within the prescribed 60 days and therefore the Appellant deemed its objections as allowed in accordance with Section 51(11) of the Tax Procedures Act which provides as follows:

“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.”

35. The Appellant noted that the wording of the above provision is mandatory in nature and the Respondent disregarded the statutory obligation to provide its decision within the 60 days' time-frame, therefore by dint of the provision, the Appellant's objections were deemed allowed

36. That upon lapse of the 60 days the Respondent lost its right to pronounce itself on the objections and the Respondent's pronouncement in its decision dated 14th July, 2023, the decision being appealed against, is an absurdity.

37. That indeed the above averments by the Appellant have recently been affirmed by the High Court at Nairobi in the case of **Eastleigh Mall Limited - versus- Commissioner of Investigations & Enforcement (Income Tax Appeal E068 of 2020) [2023]** wherein the Court observed that the provisions of Section 51(11) of the Tax Procedures Act are mandatory and not cosmetic, the timelines set are mandatory and not a procedural technicality. That therefore, failure to issue an objection decision within 60 days means that the objection had been allowed.

38. The Appellant submitted that its objection met all the requirements of a valid objection under Section 51(3)(a) and (c) of the Tax Procedures Act which provides as follows:

“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;

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

39. In support of the above averments the Appellant further made reference to the Court's observation in **Republic -versus-Kenya Revenue Authority Ex parte Mkopa Kenya Limited (2018)** where it was held as follows;

“In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the tax payer is seeking further particulars or indulgence to enable it pay the taxes demanded. In this case the applicant had clearly made what was in substance an objection as envisioned under section 51 of the Tax Procedures Act, 2015. Accordingly, the Respondent was required to make a decision in respect thereof within sixty (60) days under section 51 (11) of the said Act. As the Respondent defaulted in making a termination thereon within the prescribed time, the said objection was deemed to have been allowed.”

40. The Appellant noted that from the above provision an objection is considered to be validly lodged if it precisely states the grounds for objection, the amendment required to be made to correct the decision and the reasons for amendment.

41. The Appellant asserted that in its objection to the payment defaulter notice, it clearly outlined its ground for objection at paragraph 2 and stated the ground verbatim as,

“The return filed was erroneous as it did not capture gain on disposal of assets, an allowable deduction. Kofinaf filed an amended return with the allowable deduction of the gain on disposal on 7th July 2016..... We lodged an amended return on behalf of Kofinaf refer to Appendix 2. Following this KRA had requested various information to prove the amendment above was valid. We attach Appendix 3 and 4 which are letters filed with KRA providing the above information requested. In the letters we provide documentation relating to the land transfer and supporting documentation as requested.”

42. The Appellant noted that under Section 51(3)(a) of the Tax Procedures Act, 2015 provision, an objection is considered to be validly lodged if it precisely states the amendments to be made to correct the decision and the reasons for the amendment. That to this end in its objection the Appellant outlined the required amendment was for data correction of its i-Tax ledger and approval of the amended return to reflect the true position of its returns.
43. The Appellant further noted that under Section 51(3)(c) of the Tax Procedures Act, 2015, an objection is considered to be valid if all the relevant documents relating to the objection have been submitted. That the Appellant in its objection provided supporting documents in support of its objection and on further request from the Respondent the Appellant endeavored to comply and availed the requested information. That based on the provisions of the Tax Procedures Act, 2015 the Appellant submitted that the Respondent erred in its decision by regarding the Appellant’s objection as invalid.
44. The Appellant noted that a taxpayer is only allowed to amend its return on the iTax platform once. That any subsequent amendment can only be undertaken by the Respondent on application by the taxpayer.
45. That in light of the above, the Appellant submitted that it filed its original return and amended return on the i-Tax platform and was issued with an e-

return acknowledgement receipt. That i-Tax is a system that was developed and is managed by the Respondent, and to this end therefore, the Respondent was well aware of the amended return on the system and was subsequently informed of the same by the Appellant's application for approval of the amended return.

46. The Appellant further noted that in light of the above and in light of the fact that the Respondent had not issued any decision on the Appellant's objection to rejection of the amended return, the Respondent therefore misdirected itself on the legal provision and failed to predicate its decision on material facts and erred in terming the Appellant's application for amendment as time-barred.

47. The Appellant noted that its original return resulted in a tax liability of Kshs.297,208,576.00, and that this tax liability was premised on an erroneous tax computation. That the Appellant had erroneously included the gains on disposal of assets yet these gains were not subject to capital gains tax since they were effected in 2013 and the provision for capital gains tax was effected on 1st January, 2015 by the amendments to the Eight Schedule of the Income Tax Act by the Finance Act 2014 as follows under Paragraph 2, Eight Schedule of the Income Tax Act:

"2. Taxation of gains

Subject to this Schedule, income in respect of which tax is chargeable under section 3(2)(f) is the whole of a gain which accrues to a company or an individual on or after 1st January, 2015 on the transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015."

48. That to remedy the error, the Appellant filed an amended return and indicated the correct provision for the gain on disposal and as a result the Appellant was in a tax loss position of Kshs. 669,597,108.00 and a withholding tax credit of Kshs.1,325,644.00.

49. That for the Tribunal's clarity, the Appellant illustrated under three tables the following: (i) the workings of the erroneous tax computation; (ii) the workings of the gain on disposal of property; and (iii) the workings of the amendment to the erroneous return.
50. That based on the workings it provided, it is the Appellant's assertion that the correct position is that there was no tax payable for the period April 2014 to March 2015 as the adjusted profit for the period was adjusted by the tax losses brought forward amounting to Kshs. 669,597,109.00. Additionally, the Appellant asserted that it is also entitled to a refund for this period as a result of withholding tax credits amounting to Kshs. 1,325,644.00.
51. That in light of the above, the Appellant averred that it endeavored to engage the Respondent in an effort to have the data on its i-Tax ledger amended within the statutory time-frame. That it is therefore outrageous and in bad faith for the Respondent to allege that the Appellant did not attempt to make an application for tax return amendment or an objection to the Respondent's assessment and demands based on the erroneous return.
52. It is therefore the Appellant's case that the Respondent's assessment for outstanding Income Tax Company and its decision dated 14th July, 2023 is without legal basis.
53. That in **Eastleigh Mall Limited-versus- Commissioner of Investigations & Enforcement (Income Tax Appeal E068 of 2020)**, the High Court observed as follows:

“It is clear from the forgoing that the provisions of section 51(11) of the Tax Procedures Act are mandatory. They are not cosmetic. Parliament in its wisdom knew that in matters tax, time is very crucial as those in commerce need to make informed decisions. If the Commissioner is allowed to exercise his discretion and stay ad-infinitum before issuing an objection decision, the tax payer would be unable to make crucial decisions and plan

his/her business properly. The timelines set are mandatory and not a procedural technicality.”

Appellant’s Prayers

54. The Appellant prayed that this Honourable Tribunal finds in the Appellant's favour and determine that:-

- i. The Respondent's objection decision dated 14th July, 2023 be hereby set aside;
- ii. The tax demand issued by the Respondent in respect of Income tax in the total amount of Kshs.656,793,822.31 and the accrued penalties and interest thereon is without legal basis and is hereby vacated;
- iii. Costs of this Appeal be awarded to the Appellant; and
- iv. Any other orders that this Honourable Tribunal may deem fit.

RESPONDENT’S CASE

55. The Respondent’s case is premised on the hereunder filed documents and proceedings before the Tribunal: -

- i. The Respondent’s Statement of Facts dated and filed on 15th September, 2023 together with the documents attached thereto.
- ii. The Respondent’s written submissions dated 20th November, 2023 and filed on 21st November, 2023.

56. The Respondent averred that the Appellant filed its self-assessment Income tax returns for the tax period 1st April, 2014 to 31st March, 2015 with tax due of Kshs 297,208,576.70 on 6th June, 2016.

57. The Respondent further averred that the Appellant stated that soon after filing the said returns it noted errors whereby gains accrued from property transfer

were included in the financials and therefore sought to amend the returns immediately on 7th June, 2016.

58. The Respondent stated that from the i-Tax work flow the return amendment request was placed on 7th June, 2016 and completed on 10th July, 2017.
59. The Respondent stated that the application for amendment was rejected on 10th July, 2017 vide notice 35761841 for failure to avail the evidence of the amendment.
60. The Respondent demanded from the Appellant taxes due of Kshs. 487,422,065.79 being principal taxes together with penalties and interest vide a defaulter notice 62319424 of 25th October, 2018.
61. The Respondent averred that the Appellant wrote vide a letter dated 31st October, 2018 following up on the amendment application.
62. The Respondent submitted that on 19th October, 2022 the Appellant wrote an email through its tax agents following up on the return amendment application rejected in 2017.
63. That the Respondent vide various email correspondences on diverse dates informed the Appellant that the request for return amendment was declined due to non-provision of documentation and the lapse of the 5 year statutory timeline for amendments.
64. The Respondent submitted that the Appellant through its tax agent wrote a letter dated 18th May, 2023 objecting to the data correction of Income tax return for the year ended 31st March, 2015.
65. That the Respondent reviewed the objection together with the supporting documents and issued the objection decision vide a letter dated 14th July, 2023 rejecting the application for amendment for being time barred.
66. That the Appellant dissatisfied with the Respondent's objection decision instituted an Appeal at the Tax Appeals Tribunal on the 11th August, 2023.

67. That Section 24 of the Tax Procedures Act, 2015 allows a taxpayer to file returns but further provides that the Commissioner is not bound by the information provided therein and can assess the tax liability based on any other available information.
68. That Section 77 of the Income Tax Act and Section 31 of the Tax Procedures Act, 2015 allow the Respondent to issue additional assessments where a taxpayer has been assessed of a lesser amount based on any additional available information and to the best of his judgement.
69. The Respondent averred that Section 31 (2) of the Tax Procedures Act, 2015 allows a taxpayer to amend self-assessment returns within 5 years of submission of the self-assessment return.
70. The Respondent stated that the Appellant first applied for amendment of the return for the tax period April 2014 to March 2015 on 7th June, 2016 and it was rejected on 10th July, 2017.
71. The Respondent submitted that the Appellant contended that the original return did not capture the gain on disposal of assets as an allowable deduction. That the Appellant sought to amend the original self-assessment to make an adjustment for the allowable deduction and bring the revised tax position to a credit of Kshs. 669,597,108.00.
72. The Respondent stated that i-Tax allowed the Appellant to re-apply for amendment after the rejection of the first application within 5 years from 10th July, 2017 which time lapsed on 6th June, 2021.
73. The Respondent averred that the Appellant's contention that its letter dated 31st October, 2018 is an objection which was not responded to is erroneous and misleading as the amendment application had already been rejected on 10th July, 2017.

74. The Respondent further averred that a reading of the said letter clearly shows that the same is a follow up on the amendment application which matter had already been finalized and a rejection notice issued on 10th July, 2017.
75. The Respondent further averred that the Appellant's letter dated 31st October, 2018 did not seek to set aside the Respondent's rejection notice dated 10th July, 2017 rejecting the amendment application.
76. The Respondent stated that the Appellant's argument that the letter dated 31st October, 2018 was an objection does not suffice as the Appellant, yet again, lodged another objection vide the letter dated 18th May, 2023.
77. The Respondent further stated that if the Appellant was indeed convinced that the letter dated 31st October, 2018 was an objection it would then have proceeded to the Tax Appeals Tribunal and not to lodge the objection dated 18th May, 2023.
78. The Respondent submitted that the Appellant failed to reapply for amendment of the self-assessments returns on iTax as is allowed within 5 years of the rejection of the first application.
79. The Respondent averred that the objection decision dated 14th July, 2023 is proper based on the information available to the Commissioner and best judgement.
80. That the Respondent is cognisant of the fact that the tax regime in Kenya is of a self-assessment nature and the Appellant was under a duty to declare its Income tax return as provided for in Section 52B (1) of the Income Tax Act Cap 470. Section 52B (1) provides as follows:

“Notwithstanding any other provisions of this Act-

(a) Every individual chargeable to tax under this Act shall for any year of income commencing with the year of income 1992, furnish to the commissioner a return of income, including a self-assessment tax of his tax

from all sources of income, not later than the last day of the sixth month following the end of his year of income; and

(b) Every person, other than an individual chargeable to tax under the Act, shall for any accounting period commencing on or after 1st January 1992 furnish to the commissioner a return of income, including a self-assessment of his tax on such income, not later than the last day of the sixth month following the end of the year of income.”

81. That Section 28(1) of the Tax Procedures Act, 2015 provides for self-assessment. Section 28(1) provides as follows:

“A taxpayer who has submitted a self- assessment return in the prescribed form for a reporting period shall be treated as having made an assessment of the amount of tax payable (including nil amount) for the reporting period to which the returns relate being the amount set out in the return.”

82. That under Section 31(2) of the Tax Procedures Act, 2015, the Appellant is allowed to make an application for amendment of self-assessment returns within 5 years. The Section provides as follows;

“A taxpayer who has made a self-assessment may apply to the Commissioner, within the period specified in subsection (4)(b)(i), to make an amendment to the taxpayer's self-assessment.”

83. That where an application for amendment of self-assessment returns has been made, the Respondent can amend the self-assessment returns or refuse the application.

84. That Section 31(2) of the Tax Procedures Act, 2015 provides as follows;

“Where an application has been made under subsection (2), the Commissioner may-

(a) amend the self-assessment; or

(b) refuse the application,

and the Commissioner shall notify the taxpayer in writing of the decision within thirty days of receiving the application.”

85. The Respondent averred that the decision to allow or refuse an application for amendment of self-assessment returns by a taxpayer is discretionary and dependent on whether the application is supported with documentary evidence.

86. That in *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021) [2022]KEHC 5 (KLR) (24 January 2022) (Judgment)* it was stated that:

“The law as evidenced by the sections invoked by the applicant permits the Respondent to not only investigate tax evasion but also to request for information to make an informed decision whether or not to allow amendment of returns. To allow or disallow the amendment must pass the legal requirements. The applicant's failure or omission to supply the requested information is its own undoing in this case. By failing to provide the information sought, the applicant was ill advised on the uniqueness of tax law which places a high degree of burden on a tax payer prove correctness or otherwise of its returns.

To further illustrate this point, under our system of self-reporting of tax liability, the taxpayer initially decides the extent and amount of his/her statutory obligation to pay tax. The taxpayer in such cases generally possesses the objective evidence. Certainly, with the exception of filed returns and information provided by the taxpayer, the Revenue authority is in a poor position to establish an affirmative case. The common-law allocation of the burden of proof to the party in possession of the evidence is clearly appropriate.”

87. That Section 58 of the Tax Procedures Act, 2015 grants the Respondents power to inspect the records of the Appellant to ascertain the tax liability. The Section provides as follows:

“(1) Notwithstanding anything to the contrary in any written law, an authorized officer may inquire into the affairs of a person under any tax law, and shall at all times have full and free access to lands buildings, places to inspect all goods, equipment, devices and records, whether in the custody or control of a public officer or a body corporate or of any other person, and may make extracts from or copies of those records.”

(2) “An officer acting under subsection (1) may require the owner or employee or a representative of the owner of the business, to give him all assistance and to answer all questions relating to the inquiry.”

88. That the Respondent is mandated under Section 59 of the Tax Procedures Act, 2015 to request for documents that relate to the tax liability of the Appellant.

89. The Respondent averred that the onus is upon the Appellant to prove that the Respondent's rejection notice for amendment return is incorrect as provided in Section 56(1) of the Tax Procedure Act 2015 which places the burden of proof upon the Appellant in tax matters.

90. That the Appellant applied for amendment of self-assessment returns but failed to provide the documents requested by the Respondent to support the said application.

91. The Respondent further relied on the following cases:

- i. *Wilken Telecommunication Limited vs. Commissioner of Domestic Taxes TAT No. 195 of 2021.*
- ii. *Zulma Traders Limited vs. Commissioner of Investigation & Enforcement [2018].*
- iii. *Kenya Revenue Authority vs. Maluki Kitili Mwendwa [2021] eKLR.*

- iv. *Primarosa Flowers Ltd vs. Commissioner of Domestic Taxes [2019] eKLR.*
- v. *Mbuthia Macharia vs. Annah Mutua Ndwiga & Another [2017] eKLR*

Respondent's Prayers

92. The Respondent prayed that the Tribunal finds:

- i. That the objection decision dated 14th July, 2023 confirming principal Income tax of Kshs. 297,189,631.70 together with penalties and interest thereon be upheld.
- ii. That this Appeal be dismissed with costs to the Respondent as the same is without merit.

ISSUES FOR DETERMINATION

93. The Tribunal has considered the pleadings and documentation filed by both parties and is of the view that the issues for its determination are:

- i. **Whether the Respondent's objection decision was within the statutory timelines**
- ii. **Whether the application for amendment of return by the Appellant was within the statutory timeline**
- iii. **Whether the Respondent's assessment was justified**

ANALYSIS AND DETERMINATION

94. The Tribunal having ascertained the issues for its determination as set out above proceeds to deal with the same as hereunder.

i. Whether the Respondent's objection decision was within the statutory timelines

95. This dispute arose from the Respondent's action of raising tax assessments based on a rejected amended return by the Appellant.
96. The Appellant argued that the Respondent's objection decision was issued out of time and therefore its amendment was allowed by operation of the law.
97. The Respondent on its part argued that its objection decision was issued properly and in line with the provisions of the TPA.
98. The Tribunal noted that the objection decision dated 14th July, 2023 was in relation to a decision by the Commissioner dated 2nd May, 2023 which stated that once a return amendment task is rejected in the i-Tax system, the taxpayer is allowed to initiate another amendment within 5 years of the date of amendment. The Respondent further stated that the Appellant should therefore have initiated another amendment by 6th June, 2021.
99. The Tribunal posits that the question as to whether the objection decision was within time is answered by analysing the Notice of Appeal and Appeal documents as lodged by the Appellant and as relates to the Appeal before us. In this regard, the objection decision is dated 14th July, 2023 in relation to an objection dated 18th May, 2023.
100. Section 51 of the Tax Procedures Act provides as follows regarding objection decisions by the Commissioner:
- “(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".*
- (9) The Commissioner shall notify in writing the taxpayer of the objection decision*

and shall take all necessary steps to give effect to the decision, including, in the case

of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts

and the reasons for the decision.

(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.”

101. The Tribunal notes that the Appellant’s objection was submitted on 18th May, 2023 at which point the 60 day time-line under Section 51(11) commenced. The 60 days thereafter lapsed on 17th July, 2023.

102. The Commissioner issued its objection decision on 14th July, 2023 and the Tribunal therefore finds that the objection decision was within the statutory time-line.

ii. Whether the Appellant’s application for amendment of self assessment return was within the statutory time-line

103. Section 31 of the TPA provides as follows regarding the amendment of self-assessment returns:

“(2) A taxpayer who has made a self-assessment may apply to the Commissioner, within the period specified in subsection (4)(b)(i), to make an amendment to the taxpayer’s self-assessment.

(3) Where an amended self-assessment return has been submitted under subsection (2), the Commissioner may accept or reject the amended self-assessment return and where he rejects, he shall furnish the taxpayer with the reasons for such rejection within thirty days of receiving the application.

(4) The Commissioner may amend an assessment—

....(b) in any other case, within five years of—

(i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or....

(5) Despite subsection (4)(b) (i) the Commissioner shall make an amended assessment on an application of a self-assessment taxpayer under subsection (2) if the application was submitted within the time specified in subsection (4)(b)(i).”

104. The Tribunal notes that the Appellant made application to amend its self-assessment return on 7th June, 2016. The Tribunal further notes that the return that this amendment related to was lodged in the i-Tax system on 6th June, 2016. Therefore, a five year time-line as per Section 31 4(b)(i) commenced on 6th June, 2016 and ended on 6th June, 2021.
105. The Tribunal, noting the above timelines, finds that the Appellant indeed presented its amendment application within the 5 year time-line.

iii. Whether the Respondent’s assessment was justified.

106. The Tribunal gleaned through the parties’ pleadings and established that the chronology of events, in relation to the dispute before the Tribunal was as follows:
- i. The Appellant’s self-assessment made on 6th June, 2016 for the year ended 31st March, 2015.
 - ii. The application to amend this return made on 7th June, 2016.
 - iii. The Respondent’s rejection notice to the application to amend the return dated 10th July, 2017.
 - iv. The Appellant’s objection letter to the rejection notice dated 10th July, 2017.

- v. The Respondent's reply to the Appellant's objection dated 12th October, 2017. in which the Respondent requested the Appellant to avail the following documents within 10 days:
 - a) An official valuation report by the Ministry of Land and Physical Planning for Stamp Duty purposes;
 - b) An application for Stamp Duty and evidence of payment;
 - c) Land registration forms and evidence of payment of registration fees at the time of transfer of land to the purchasers;
 - d) An asset valuation report by CB Richard Ellis Limited independent valuers in 2012; and
 - e) Evidence of payment for the land by purchasers including bank statements, within 10 days from receipt of the request.
- vi. A letter by the Appellant dated 23rd October, 2017 requesting for an extension of time for a period of 4 weeks within which it would avail the documents.
- vii. A letter by the Appellant dated 7th December, 2017 availing the documents as requested.
- viii. A Payment Defaulter Reminder Notice Number 62319424, by the Respondent, dated 25th October, 2018, demanding Kshs. Kshs.487,422,065.79.
- ix. A letter by the Appellant dated 31st October, 2018.
- x. A demand letter by the Respondent, dated 24th July, 2019, for an amount of Kshs. 711,001,200.00, covering the periods 1993 to April 2019.
- xi. An objection dated 12th August, 2019 by the Appellant lodged against the demand of 24th July, 2019.

- xii. An acknowledgement letter by the Respondent dated 13th September, 2019 .
 - xiii. A letter by the Respondent dated 17th October, 2019 informing the Appellant that ledger reconciliation was ongoing and that some of the documents required internal review before the Respondent could issue any update. Additionally, the Respondent informed the Appellant that the demand letter dated 24th July, 2019 was held in abeyance pending the completion of the ledger reconciliation.
 - xiv. The Appellant's objection letter dated 27th August, 2020.
 - xv. A follow up letter by the Appellant dated 22nd August, 2022.
 - xvi. An email dated 26th October, 2022 making reference to a meeting held on the same day.
 - xvii. Email correspondences between 19th October, 2022 and 5th July, 2023.
 - xviii. An email by the Respondent dated 2nd May, 2023 issuing a tax decision rejecting the Appellant's data correction of 2015 Income Tax Company Return.
 - xix. An objection by the Appellant dated 18th May, 2023.
 - xx. The Respondent's objection decision dated 14th July, 2023.
107. The Tribunal confirms that while the Appellant sought to amend its self-assessment return within the 5 year time line envisaged under Section 31 of the TPA, this amendment was rejected by the Respondent vide a rejection notice dated 10th July, 2017; on the basis that the Appellant had failed to avail evidence in support of the amendment of the return.
108. The Tribunal has reviewed the Appellant's pleadings and noted that the Appellant stated that it provided the requisite documentation to the Respondent on 7th December, 2017 after various correspondences between the parties. The letter submitting these documents was attached to the Appellant's pleadings and this averment has not been disputed by the Respondent.

109. Thereafter, the Respondent issued a Payment Defaulter Reminder, amounting to Kshs. 487,422,065.79, on 25th October, 2018 to which the Appellant responded on 31st October, 2018.
110. The Tribunal perused the letter dated 31st October, 2018, which the Appellant claimed was an objection, and confirmed that it was a follow up letter relating to the amendment of the Appellant's 2015 return and the payment defaulter notice.
111. The Tribunal posits that based on the correspondences in the pleadings, the Respondent undertook a separate exercise of reconciliation that encompassed various tax periods including the period covered by the Appellant's year 2015 self-assessment return. This exercise culminated in the Respondent's objection decision of 14th July, 2023. It is notable that at no point during this period did the Appellant escalate the dispute to the Tribunal after supposed late responses, by the Respondent, to any of its objections.
112. Section 51(12) of the TPA provides as follows regarding Appeals to the Tribunal:
- “A person who is dissatisfied with the decision of the Commissioner under subsection (11) may appeal to the Tribunal within thirty days after being notified of the decision.”*
113. The Tribunal notes that the course of this dispute presented various instances at which the Appellant should have exercised its right of appeal. Specifically, after the Appellant's objection letter to the rejection notice dated 10th July, 2017 to which the Respondent replied on 12th October, 2017; the Appellant was within its rights to Appeal to the Tribunal, but did not. Additionally, when the Appellant lodged an objection letter dated 31st October, 2018 and subsequently the Respondent replied by issuing a demand letter on 24th July, 2019; the

Appellant was within its rights to Appeal to the Tribunal but did not. Notably, the Appellant only filed an Appeal in 2023.

114. It is therefore. apparent that the instant Appeal, while having been lodged in time as far as the objection decision dated 14th July, 2023 is concerned, relates to subject matter regarding previous decisions by the Respondent to which the Appellant did not appeal in a timely manner.
115. To the extent that the Appellant did not exercise its right of Appeal in the highlighted instances above, the Tribunal finds that, under the circumstances, the Respondent was justified in issuing the objection decision and the resultant assessment.
116. To emphasise the need for parties to follow laid out procedures to address grievances, the Tribunal relied on the High Court case of *Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR* where it was held that-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

FINAL DECISION

117. In view of the foregoing, the Tribunal finds that the Appeal is not merited and accordingly makes the following Orders: -
- i. The Appeal be and is hereby dismissed.
 - ii. The objection decision dated 14th July, 2023 be and is hereby upheld.
 - iii. Each Party to bear its own costs.

118. It is so ordered.

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

ERIC NYONGESA WAFULA

CHAIRMAN

CYNTHIA B. MAYAKA

MEMBER

DR. RODNEY O. OLUOCH

MEMBER

TIMOTHY B. VIKIRU

MEMBER

ABRAHAM K. KIPROTICH

MEMBER