

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 262 OF 2020

BON BOREHOLE DRILLERS LIMITED APPELLANT

VERSUS

**COMMISSIONER OF INVESTIGATIONS &
ENFORCEMENT..... RESPONDENT**

JUDGMENT

BACKGROUND

1. The Appellant is a private limited liability company incorporated in 2016 under the Companies Act. Its principal activity is the drilling of boreholes and related activities.
2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469. Under Section 5(1), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of revenue. Further, under Section 5(2), with respect to the 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 Part 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. The Respondent carried out an investigation into the Appellant's tax affairs and realised that the Appellant was a non-filer for both Income Tax and VAT for the period under review.
4. The Respondent issued a Demand Notice dated 2nd March 2018 on the outstanding tax assessment in the sum of Kshs. 6,279,054.92 in respect of both VAT and Income Tax.

5. The Respondent engaged the Appellant on several occasions which culminated in a proposed payment plan dated 15th May 2018 that was never honoured by the Appellant.
6. The Appellant issued a Notice of Objection via iTax system dated 18th October 2019, objecting to the Respondent's additional assessment. The Respondent communicated its Objection Decision to the Appellant vide a letter dated 16th December 2019 confirming the assessments in the aggregate sum of Kshs. 6,279,054.92 in respect of VAT and Income Tax.
7. The Respondent issued the Appellant with an Agency Notice on 31st March 2020 in order to secure payment of the taxes owed by the Appellant.
8. Being dissatisfied with the Respondent's Objection Decision, the Appellant issued a Notice of Appeal dated 23rd April 2020 and subsequently filed an Appeal before the Tribunal on 6th July 2020.
9. The Appellant filed a Notice of Motion dated 10th July 2020 under a Certificate of Urgency, seeking for inter alia, the lifting of the Agency Notice and extension of time to file the Appeal.
10. The Tribunal issued a Ruling delivered on 28th August 2020 allowing for extension of time to file the Appeal and lifting the Agency Notices.

THE APPEAL

11. The Appeal is premised on the following grounds as captured in the Memorandum of Appeal filed on 6th July 2020:
 - i. That the Commissioner erred in law and fact by refusing to recognise input taxes deducted by the Appellant.
 - ii. That the Commissioner erred by rejecting the Appellant's late objection.

- iii. That the Appellant had not carried out some of the jobs that led to the assessment.

THE APPELLANT'S CASE

12. The Appellant's case is premised on the hereunder filed documents and proceedings before the Tribunal:

- i. The Appellant's Statement of Facts dated 25th June 2020 and filed 6th July 2020 together with the documents attached thereto.

13. The Appellant stated that in March 2018, the Respondent issued it with an assessment for the following amounts:

Tax Obligation	Amount – Kshs
VAT	6,259,054.92
Income Tax	20,000.00
TOTAL	6,279,054.92

14. According to the Appellant, it only received the assessment in early 2019. It started engaging the Respondent through its then tax agent until mid-2019. Unfortunately, it added, its tax agent passed on before fully prosecuting the case. It then appointed another tax agent who filed an objection to the assessment on 18th October 2019.

15. The Appellant explained that the basis for the objection was that it had not done some of the jobs indicated by the Respondent. It insisted that in some of assessments, there were substantial inputs omitted in arriving at the VAT payable.

16. According to the Appellant, during the objection process, the Respondent verbally advised it to apply for waiver of interests & penalties upon settlement of any principal that would arise, due to the Appellant's serious financial limitations.

17. The Appellant reiterated that the Respondent's rejection of its late objection is not proper and supported. Thus, it argued, the Respondent should be compelled to accept the objection and cancel the assessment with any interests and penalties thereof.
18. The Appellant prayed that this Honourable Tribunal considers the case and:
 - i. Set aside and annul the Respondent's Objection decision.
 - ii. Allow the Appeal.

THE RESPONDENT'S CASE

19. 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 8th October 2020 together with the documents attached thereto.
 - ii. The Respondent's written submissions dated 3rd June 2021 and filed on the same day together with the legal authorities filed therewith.
20. It was the Respondent's submission that it carried out an investigation on the Appellant's account. The investigation revealed that the Appellant was a non-filer for both Income Tax and VAT for the period under review. It explained that it generated an assessment on 2nd March 2018 following unclaimed Withholding VAT on the supplies made by the Appellant to various customers.
21. According to the Respondent, the Appellant's PIN was therefore suspended for being a non-filer and a demand was issued to the Appellant on outstanding tax on 2nd March 2018 and the Appellant was granted one month to pay.

22. It was the Respondent's assertion that it engaged the Appellant on several occasions asking it to pay the outstanding tax which it promised in a proposed payment plan dated 15th May 2018. However, the promise was never honoured.
23. The Respondent affirmed that a final reminder was sent on 26th July 2018 via email giving the Appellant seven (7) days to respond to demand for the payment of the taxes due.
24. It was the Respondent's submission that on 18th October 2019, the Appellant lodged a late objection. Through the iTax platform notification, the Respondent requested the Appellant to avail supporting documents which it did not. Thus, it issued its Objection Decision on 16th December 2019 confirming the assessment. There being no response from the Appellant, the Respondent stated, the case was profiled for debt collection and enforcement. A 14-day demand letter was sent to the Appellant on 16th January 2020. Another reminder notice was sent on 2nd March 2020 and a final reminder sent on 30th March 2020.
25. Due to the Appellant's unresponsiveness, the Respondent submitted, an Agency Notice was issued on 31st March 2020 in order to secure the payment of taxes owed by the Appellant. The Appellant thereafter requested for suspension of the Agency Notice and filed an application at the Tribunal seeking the lifting of the Agency Notice and extension of time to file the Appeal.
26. It was the Respondent's submission that a Ruling was delivered on 28th August 2020 allowing for extension of time to file the Appeal and lifting the Agency Notices.
27. According to the Respondent, the Appellant did not lodge a valid objection as the same was lodged out of the statutory timeline. It argued that for an objection to be considered as valid, a taxpayer ought to lodge

a Notice of Objection within 30 days of receipt of an assessment as provided for in Section 51 of the Tax Procedures Act.

28. The Respondent submitted that the assessment was generated and communicated to the Appellant on 2nd March 2019. The Appellant objected to the assessment on 18th October 2019 which was 8 months down the line. This, the Respondent insisted, is a perfect ground to invalidate an objection based on the powers conferred to it by the tax statutes.
29. The Respondent explained that the Appellant is fond of breaching the provision of the law and failed to exercise its right pursuant to Section 51(6) of the Tax Procedure Act which allows the Appellant to apply for extension of time to lodge an objection.
30. The Respondent averred that equity aids the vigilant and not the indolent. As such, the Appellant cannot sit on its rights expressly provided for under the law and only to come to this Honourable Tribunal to seek sympathy of the Tribunal.
31. The Respondent contended that the Appellant having been informed by the Respondent that its objection was invalid for reason that it was time barred had only one recourse which is to appeal to the Respondent. Until this is done, the appeal before the Tribunal is prematurely lodged and that the same ought to be dismissed with cost to the Respondent.
32. According to the Respondent, having established that the Appellant's objection was time barred and therefore invalid, the Appeal on this head is premature and a perfect one for dismissal with costs to the Respondent.
33. Despite the Appellant lodging a late objection, the Respondent submitted, it also did not avail supporting documents to rebut the Respondent's assessment as provided for under 51(3) (c) of the Tax Procedure Act 2015. This was despite several requests by the Respondent. Accordingly, it failed

to discharge its burden of proof as provided for under Section 56(1) of the Tax Procedure Act.

34. The Respondent reiterated that the Appellant failed to discharge its burden in proving that the Respondent's tax decision is incorrect as per the provisions of Section 56(1) of the Tax Procedures Act and therefore the Objection Decision dated 16th December 2019 is proper in law.
35. The Respondent also asserted that the VAT assessments were generated following unclaimed Withholding VAT after the Appellant had supplied vatable supplies to various customers. The Appellant had seven (7) Withholding certificates that had not been claimed.
36. The Respondent contended that the Appellant's ledger showed that an Income Tax withholding certificate for tax withheld by the Diocese of Lodwar had not been claimed. The Respondent further contended that it is these inconsistencies between supplier and purchaser information which the Appellant did not resolve at the inconsistency and objection review stages. According to the Respondent, the Appellant was tasked to provide documents to support its assertions and it failed to provide all the requested documents during the required period.
37. The Respondent explained that the VAT assessment is therefore factual based on the comparisons between the supplier and purchaser VAT declarations. The Respondent further explained that it is empowered by Section 31(1) of the Tax Procedures Act to use the information available to it to make the original assessment. Having failed, refused and/or neglected to provide records of purchases, the Respondent argued, it was justified to amend or alter the original assessment.
38. The Respondent reiterated that the Appellant is under a statutory duty under Section 93 (1) of the Tax Procedures Act to keep and maintain records that may be required in accordance with a tax law, and it was

therefore incumbent on the Appellant to provide such records as and when required.

39. It was the Respondent's averment that the Appellant failed to provide any documents. Therefore, the Respondent used its best judgment based on the available information i.e., the unclaimed withholding VAT certificates to issue an assessment and the Objection Decision.
40. It was the Respondent's submission that the Appellant filed a late objection contrary to Section 51(2) of the Tax Procedures Act but failed to meet the requisite conditions for filing a late objection. It also failed to provide any documents to support the objection as per Section 51 (7) of the Tax Procedures Act. Accordingly, the Respondent argued, the late objection was invalid.
41. Section 17(3) (a) of the VAT Act 2013, the Respondent argued, requires taxpayers registered for VAT to possess an original tax invoice for the supply or a certified copy which the Appellant did not avail in two instances i.e., when inconsistency notices were issued and when they lodged an objection.
42. According to the Respondent, it confirmed the assessments after the Appellant failed to provide documents to support the objection. Therefore, the decision was given after allowing the Appellant ample time to support its objection.
43. The Respondent prays that this Tribunal considers the case and finds that:
 - i. The Appellant's Appeal be dismissed for lack of merit.
 - ii. The Respondent's VAT Assessments KRA201801526796 for Kshs. 3,044,365.20, KRA201801526762 for Kshs. 494,112.00, KRA201801526750 for Kshs. 608,000.00, KRA201801526705 for Kshs. 2,047,794.08 and KRA201801526684 for Kshs. 552,704.00 be upheld.

- iii. The Respondent be awarded the costs of the Appeal.

ISSUE FOR DETERMINATION

44. Upon due consideration of the Appeal documents and the response by the Respondent buttressed further by its written submissions the Tribunal determined that the Appeal crystallizes into a single issue being: -

Whether the assessments and the subsequent Objection Decision were merited.

ANALYSIS AND FINDINGS

59. The Tribunal having determined the issue that has precipitated for its consideration hereby proceeds to analyse and make appropriate findings on the issue.
60. The assessment as against the Appellant was triggered by investigations informed by the failure on the part of the Appellant to claim withholding taxes retained by its suppliers and for non-filing of both Income Tax and VAT returns.
61. The Appellant's late notice of objection was, on 16th December 2019, rejected by the Respondent. The tax assessment was confirmed following the Appellant's failure to, inter alia, provide any relevant documents in support of its objection to the assessment.
62. The Appellant in an extremely casual manner presented its Appeal before the Tribunal vide the Memorandum of Appeal and Statement of Facts filed on 6th July 2020, without the slightest care to file any document in support of the Appeal. Even the ordinary minimum requirement for the filing of a tax decision under Appeal was disregarded.
63. It is not lost on the Tribunal that subsequent to the lifting of the Agency Notice and enlargement of time for the filing of the Appeal, the Appellant

was least bothered in having the Appeal appropriately presented. The direction to have the Appeal determined by way of written submissions was equally completely ignored by the Appellant.

64. It is trite law that the burden of proof to discredit a tax decision is upon the taxpayer challenging the decision. This is well immortalized under Section 56(1) of the Tax Procedures Act which reads as follows:

“In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”

65. In this particular Appeal the Appellant had the burden to discharge in demonstrating to the Tribunal that the tax assessment and the subsequent Objection Decision were erroneous and completely unsustainable based on the evidence that the Appellant ordinarily ought to have adduced to discredit the tax assessment. The Tribunal is guided by Section 30 of the Tax Appeals Tribunal Act in determining the party that bears the burden of proof under this particular circumstances. The Section provides as follows:

“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.”

66. In the circumstances the Tribunal finds that the Appellant having failed to adduce any material evidence to discredit the Objection Decision, the tax assessment by the Respondent was merited and sustainable.

FINAL DECISION

67. On the basis of the foregoing analysis the Appeal lacks merit and the orders that commend themselves to the Tribunal are as follows:


- a) The Appeal be and is hereby dismissed.
- b) The Objection Decision issued on 16th December 2019 confirming the tax assessment in the sum of Kshs. 6,746,975.36 be and is hereby upheld.
- c) Each party to bear its own costs.

68. It is so ordered.

DATED and DELIVERED at NAIROBI on this 28th day of January, 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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ABRAHAM K. KIPROTICH
MEMBER



.....
ELISHAH NJERU
MEMBER

