

REPUBLIC OF KENYA  
IN THE TAX APPEALS TRIBUNAL AT NAIROBI  
APPEAL NO. 70 OF 2017

AFYA X-RAY CENTRE LIMITED..... APPELLANT  
VERSUS  
COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

**JUDGMENT**

**A. INTRODUCTION**

1. The Appellant **AFYA X-RAY Centre Limited** is a limited liability Company whose major business is the provision of medical services with one Dr. Benjamin Imalingat as its Director. The Appellant has also registered a business entity which trades as (t/a) Plaza X-Ray Services.
2. The Respondent is established under the Kenya Revenue Authority Act, CAP 469 Laws of Kenya. Under Section 5(2), the Kenya Revenue Authority (the Authority) is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) with respect to the performance of its function under subsection (1), the Authority 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.

**B. BACKGROUND**

3. The Appellant was served with a notice of intention to audit on 8<sup>th</sup> August 2016. This audit was to cover the period of 2012 to 2015, with specific focus on the verification of the amounts declared in the income tax returns from employment, business and rental income.

The Appellant was notified to avail its record and books of account for the period of income covered on or before 15<sup>th</sup> August 2016.

4. Consequently, the Respondent conducted an in-depth audit and issued the Appellant with its preliminary findings on 5<sup>th</sup> September 2016. Based on the information and records provided by the Appellant, the investigation established that there was under declaration of sales in that there was a variance between the income received and that declared in the financial statements. That in the analysis of the records it was found that the director withdrew amounts from the company for personal use. Further the Appellant failed to deduct PAYE from the staff on its payroll. In sum, the investigation found the Appellant had a total tax liability of Kshs. 59,010,668.
5. The Appellant was informed that it had seven (7) days from the date of receiving the preliminary findings to avail its responses. This did not happen. As result the Respondent pursuant to the provisions of Section 31 of the Tax Procedures Act (TPA) issued a demand letter on 30<sup>th</sup> November 2016 with the accompanying assessments of Kshs. 60,722,139. The Respondent informed the Appellant of its right to object to the demand as provided in section 51 of the Tax Procedures Act, 2015.
6. Vide a letter dated 30<sup>th</sup> December 2016 the Appellant filed an objection raising concern on the Respondent's computation of corporation tax and PAYE on director's drawings. The Respondent acknowledged receipt of the Appellant's objection and requested for documents in support of the Appellant's objection vide a letter dated 17<sup>th</sup> January 2017. The Appellant was expected to provide these documents by 27<sup>th</sup> January 2017.
7. The Appellant wrote back to the Respondent on 27<sup>th</sup> January 2017, informing the Respondent that it had been unable to collect all the documentary evidence within the short period allocated. That the Appellant disclosed that it paid the undisputed tax on PAYE. Additionally, the Appellant requested for a time extension of 14 days to avail those documents.

8. The Appellant was granted the 14 days extension as requested but did not utilize it. As result the Respondent rendered its objection decision on 28<sup>th</sup> February 2017, confirming the total tax payable by the Appellant of Kshs. 60,545,683. The Appellant was informed of its right to Appeal the decision.

### C. APPEAL

9. The appeal is premised on the following grounds;
  - a) That the Respondent erred in fact in its demand for corporation Tax of Kshs 30,247,106 for the years of income 2012, 2013, 2014 and 2015 as the said demand is excessive and is not based on any material facts that have been provided by the Appellant.
  - b) That the Respondent erred in fact and principle in its demand for PAYE on the company Directors of Kshs 30,298,577 for years 2012, 2013, 2014, 2015 and 2016 as the said demand is excessive and is not based on any material facts that have been provided by the Appellant.
  - c) That the Respondent has used methods or styles not recognized in principle in computing the petty cash receipts in order to increase the revenues of the Appellant and consequently adjust the tax position of the Appellant.
  - d) That the Respondent erred in law in issuing assessments which did not comply with provisions of the prescribed law, the Tax Procedures Act.
10. The Appellant prays that;
  - a) The Respondent's demand for additional taxes and the Confirmation of Assessment dated 28 February 2017 for the years of income 2012 to 2016, on corporation tax and PAYE be struck out in its entirety.
  - b) The Respondent, its employees, agents or other person purporting to act on its behalf be barred and or estopped from demanding or taking any further steps towards enforcement or recovery of principal tax, penalties and interest on the Respondent's demand as stipulated above.
  - c) The costs of this appeal; and
  - d) Any other remedies that the Honourable Tribunal deems just and reasonable.

In response the Respondent contends as follows;

11. The assertion that the in-depth audit was carried out in half a day is untrue. The Respondent maintained Timesheets for the hours spent at the Appellant's premises as well as in the Respondent's office working on the audit file. The notice with an initial interview and tour of business premises on 23<sup>rd</sup> August 2016 as already demonstrated in appendices 8 & 10 above. The Appellant was however, not ready with the documents which had been requested on the Notice of Intention to Audit letter.
12. The Appellant called for bank statements from his respective banks which were then availed to the Respondent who then reviewed them from the Appellant's office on 24<sup>th</sup> & 25<sup>th</sup> August 2016.
13. Having analyzed the documents over two weeks' period, preliminary audit findings were formally communicated to the appellant on 6<sup>th</sup> September 2016.
14. Subsequent to the preliminary audit findings, the Appellant did not come forth with any explanations nor did it provide evidence to counter the findings. Having not heard from the Appellant, the Respondent proceeded to issue a demand for the assessed additional taxes via its letter dated 30<sup>th</sup> November 2016 and received by appellant on 13<sup>th</sup> December 2016
15. The allegation that the Respondent merely accumulated all the credit entries in the bank statements is untrue. In arriving at the total deposits, the Respondent made adjustments for any contra-entries, returned cheques, reversal entries and inter-account transfers.
16. The Respondent had previously requested for a breakdown of the amounts that constituted returned cheques and any contra-entries that the Appellant felt were left out which also the Appellant failed to provide (see appendix 5 above).

17. The joint bank account in the name of Dr. Anne and Benjamin Imalingat was one of the accounts that the Appellant used for purpose of depositing cash receipts from clients and it is therefore factual that this was income earned by the Appellant regardless of whether the income was deposited in a joint account. The Appellant during the interview revealed that client's monies are deposited into four different accounts namely:
- i. Bank of Africa a/c no:1011170007-for cash deposits
  - ii. Commercial Bank of Africa a/c no:0151599001-for EFT
  - iii. Bank of Africa a/c no:01004950008 for cheque receipts.
18. The Appellant revealed during the initial interview that some of the income from client's deposits which constitute business income of the Appellant are banked into the Director's personal bank. Additionally, an in-depth audit, the Respondent established that the director as a separate entity had no other income besides his rental income which is banked in different bank accounts from these listed above (NIC and Consolidated bank). It is therefore true that the deposits in the banks listed above, including the Director's personal bank account relate to incomes derived from the Appellants business activities unless proved otherwise.
19. The Respondent used the documents availed to it at arriving at the taxable sales figures. The Appellant claimed that part of these cash deposits related to monies previously withdrawn from another of the Appellant's bank. The Respondent further requested the appellant through a letter dated 17<sup>th</sup> January 2017 ( to provide detailed summaries to support the assertion that these were in fact not client's deposits of which he failed. The Respondent was therefore justified in treating these deposits as revenue accruing to the Appellant.
20. The Appellant took into account any contra-entries while arriving at income of the Respondent. The Respondent also requested for a breakdown of the amounts that constituted contra-entries which the Appellant felt were left out. The appellant failed to provide such evidence (Appendix 5)

21. The Appellant's allegation that they incurred expenses that the Respondents disregarded in arriving at the taxable amounts is not true. Some of these expenses include purchase of materials from various suppliers such as:
  - (i)Fuji Kenya Services
  - (ii)Dental Supplies Ltd
  - (iii)Alpha Medical Manufacturers Ltd among others
  - (iv)Kenya Re Towers (Landlord).
  
22. The Respondent hereby states that the Appellant already claimed these expenses in their financial statements and no such expenses have been disallowed by the Respondent at arriving at the tax amounts. The Respondent taxed only the under-declared incomes which were arrived at by comparing the declared revenues vis-à-vis expected sales. The issue of the expenses doesn't apply therefore because these were fully claimed and allowed in their financial statements.
  
23. For the Respondent to allow any additional expenses beyond what was claimed in the financials as per the provisions of section 16 of the Income Tax Act, the Appellant has to demonstrate that these expenses were wholly and exclusively incurred in the production of income. The Appellant did not provide a record of these additional expenses therefore the Respondent had no basis for allowing the same. This explanation applies for the other expense items and capital allowances which had already been claimed.
  
24. The Appellant was asked to provide evidence to support how the drawings were utilized and that they are purportedly used to pay office cash expenses and settling debt which they failed to provide ( Appendix 5)
  
25. The drawings made by the Appellant's directors were charged as benefits pursuant to the provisions of Section 37 of the Income Tax Act, the onus of proof that these drawings were not channeled to personal uses is on the director who failed to provide these reconciliations even after request for the same ( Appendix 5)

26. The allegations that the Respondent was provided with substantive evidence of instances where the Appellant used the cash withdrawals for purposes of making payments with relation to furtherance of the business is not true. The Respondent requested the Appellant to provide this information on several instances but they failed to do so.
27. The Respondent provided a detailed analysis to the Appellant on softcopy on the computation of petty cash receipts as summarized in table III.
28. These petty cash amounts relate to items whose payments were done from the office kitty, amounts as presented in the draft financial statements of 2013,2014, 2015.In the year 2012, an average of the three was taken as the Respondent did not provide the financial statements for that year.

ADMINISTRATIVE EXPENSES	2013	2014	2015
Directors Fees	240,000	300,000	300,000
Rent & Rates	1,250,000	1,480,000	1,480,000
Telephone, Transport & postage	332,520	398,520	492,693
Printing and Stationery	698,524	411,000	413,960
Repairs and Maintenance	175,800	574,200	673,969
Staff uniform	66,200	66,200	55,260
Office expenses	596,338	822,100	746,923
Miscellaneous Expenses	11,255	20,120	43,880
	3,370,637	4,067,940	4,207,506

29. The assertion that the Appellant's objection clearly informed The Respondent that the notices of assessments were invalid and that the respondent failed to review the information provided is untrue. The objection was not accompanied by supporting documentary evidence and the Respondent reverted requesting for the same via a letter dated 17<sup>th</sup> January 2017
30. (Appendix 5 ). The Appellant Responded after ten days requesting for an additional fourteen days to substantiate their objection claims which was granted. They however did not honor the commitment and having not heard from the Appellant in the desired timelines and the Respondent not having been privy to any information that negated the audit findings confirmed the assessments as per the audit findings.
31. The objection decision dated 28<sup>th</sup> February 2016 was communicated to the taxpayer and received on 2<sup>nd</sup> March 2017 as per provisions of Section 51(9) of the Tax Procedures Act (Appendix 7 ).
32. Consequently, the Respondent prays that the Appellant's Appeal be dismissed as the same is baseless and the Commissioner's additional assessment be upheld.

#### **D. PARTIES SUBMISSIONS**

##### **I. APPELLANT**

33. The Appellant contends that this audit was undertaken not in accordance with the laws that the Respondent is supposed to follow viz. the Income Tax Act. It is also very clear that this issue of lack of records was orchestrated by the Respondents themselves when they put themselves in very serious timelines and not by the Appellant. The witness has actually conceded that they were under very serious timelines and they undertook an audit in a record two days. They had no time to look or to seek for these documentation from the Appellant due to their own internal timelines.

34. As much as we understand that the burden of proof is normally on the Appellant it would also be extremely unfair to allow the Respondent to undertake shoddy audits and impose them on tax payers simply because the burden of proof is on the Appellant.
35. Thirdly, again just to prove in acting in accordance to other laws that we are not aware of but the Income Tax Act, the Respondent has not recognized one cost that they did by themselves which is the Directors fees. They want to collect PAYE on it but they do not want to allow it as an expense for corporate tax purposes in accordance with the Income Tax Act. Simply KRA wants to collect from both the credit side of the bank statement by calling it an income for Corporate Tax and to also collect from the debit side by calling it a Director's fee. That is what we call double taxation in simple words.
36. The Respondent is also probating and reprobating by allowing the credit side to be income when it is collected in cash. But when expenses are paid for in cash they disallow it. Why the double standards? We pray that you allow this appeal and dismiss the objection decision of the Respondent the Appellant prayed.

## II. RESPONDENT

37. The Respondent seeks to rely on its Statement of Facts dated 11<sup>th</sup> of May 2017 as well as the Submissions dated 11 of October 2019 and the witness statement by Joan Kimotho dated 11<sup>th</sup> October 2019. The Respondent submits that during the audit it was established that client deposits were being made in a particular bank account flagged out in page 3 of our submissions paragraph 19 that is the Bank of Africa account ending with 0007. This is what the Respondent considered in coming up with the adjustments for the amounts that had been under declared. So the assessments were raised on this client deposits that were in that particular bank account and therefore chargeable to Corporation Tax.

38. On the issue of PAYE the Respondent established that the Director of the appellant company one Benjamin Imalingat withdrew lump sums from the said bank account Bank of Africa 0007 for personal use. And it was established it was for personal use because the director could not prove how these cash withdrawals were being used to offset office expenses as alleged. Therefore the Respondent treated these drawings and subjected them to PAYE as per section 5 (2) of the Income Tax Act.

39. This was an incomplete records case. There is a place where the Appellant has alleged that the Respondent used unrecognized records to compute the taxes that were assessed. However the witness has clearly brought out that this was an incomplete records case. All that was provided was the bank statements and therefore that is what was relied on.

#### **E. ISSUES FOR DETERMINATION**

The following issues crystalize for determination by this Tribunal;

- a) Whether the Respondent's assessment was justified in law

#### **F. ANALYSIS**

##### ***Whether the Respondent's assessment was justified in law***

40. It was submitted on behalf of the Appellant that the assessment was not justified as it depended solely on the Appellant's bank statements. In response, the Respondent avers that it requested for the Appellants records and books of account as manifested in the notice of the intention to audit dated 8<sup>th</sup> August 2016. However, the Appellant availed only the bank statements. In particular, the Respondent justifies its assessments on the premise that it had indulged the Appellant by granting them the additional 14 days to avail, after tabling the preliminary findings on 5<sup>th</sup> September 2016.

41. This Honorable Tribunal is once again called upon to determine the status of an assessment where the key document relied on by the Respondent is the taxpayer's bank statements. In anatomizing this issue, it is incumbent upon the Tribunal to underscore that it is the duty of the taxpayer to avail its records and books of accounts as requested by the taxing authority. And there is no shortage of tax statutes commanding the taxpayer in this regard. For instance, Section 23 of the Tax Procedures Act provides;

*23 (1) A person shall—*

- (a) Maintain any document required under a tax law, in either of the official languages;*
- (b) Maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and*
- (c) Subject to subsection (3), retain the document for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.*

Additionally, section 54A of the Income Tax Act, states;

*54A (1) A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax.*

42. In the instant case, the Appellant was in the notice of intention to audit required to avail its books of accounts on or before 25<sup>th</sup> August 2016 for purposes of ascertaining its tax liability. Thereafter, the Respondent communicated its preliminary findings to the Appellant on 5<sup>th</sup> September 2016, to which the Appellant raised concerns in terms of the computation of corporation tax and PAYE. By a letter dated 27<sup>th</sup> January 2017, the Appellant sought additional time in order to avail the documents and settle the concerns raised with the preliminary findings. The Appellant failed to provide its records.

43. From the foregoing chain of events, it is our understanding that the Appellant failed in its duty in providing these documents, in order that a comprehensive audit of its affairs be done. Accordingly, the Respondent can hardly be faulted for raising the assessment in accordance with the availed documents.

Moreover, the Appellant had the opportunity to counter the Respondent's findings after the preliminary finding and after the confirmation of the assessment. Both are instances, where the Appellant could have produced its books of accounts to counter the Respondent's assessment, after all the Appellant by law bears the burden of proof. Section 56 (1) of the Tax Procedures Act, 2015 provides that the burden shall be on the taxpayer to prove that a tax decision is incorrect. This Tribunal is guided by holding in *Mulherin vs Commissioner of Taxation (2013) FCAFC 115* as relied upon by Makau J in *Primarosa Flowers Limited vs Commissioner of Domestic taxes (2019) eKLR* where it was held thus;

*The onus is on the taxpayer in proving that assessment was excessive by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied...*

44. Be that as it may, this Tribunal notes disappointingly that this issue has become a rich source of monotonous and unintelligent litigation. Given, the Appellant bears the duty of availing records and books of accounts. The Respondent is required to undertake the assessment using all the records provided. This Tribunal's hands are tied insofar as intendment and implications into tax statutes are concerned. However, we would be remiss if we did not point this conduct of the Respondent relying solely on bank statements is likely to cause prejudice of untold measures to all taxpayers.
45. The Tribunal is concerned with the status, or better yet, the validity of an assessment that has relied only on bank statements. It is common knowledge that every deposit in an account is not necessarily income to the account owner. The Respondent in this case could have used industrial margins to determine the Appellant's profits and then subject that figure to the 30% rate for corporate tax rather than a topline 30% on the bank deposits.
46. The Respondent also collected from both the credit and debit side of the bank statement with regards to the PAYE all the while not allowing it as an expense for purposes of corporate tax. If this is allowed, the Appellant will suffer the effects of double taxation. The Tribunal is of the considered view that a taxpayer should not be overburdened all in the name tax collection.

Correlatively, the taxing authority should not collect more than is due from a taxpayer. The Tribunal relies on *Republic vs Kenya Revenue Authority ex-parte Bata Shoe Company (Kenya) Limited [2014] eKLR* where it was held; *Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman. The taxman on the other hand is entitled to collect up to the last coin that is due from the taxpayer.*

47. That being the case, we find that the assessment as it currently stands is in breach of the basic accounting principles that if allowed will be prejudicial to the Appellant. Secondly, the Respondent has to be put on notice because it has become habitual to rely on bank statements and raise an assessment against taxpayers. This, in our humble opinion is unacceptable if at all we are concerned with giving unto Caesar only that which is due.

## G. DETERMINATION

48. From the foregoing analysis, the Tribunal makes the following orders;
- a) The Respondent to recompute the Appellant's tax liability taking into account the industry practice and usage.
  - b) Each party to bear its own cost.

DATED and DELIVERED at NAIROBI this 17<sup>th</sup> of day of December 2019.

In the presence of:-

Sharon Olbara .....for the Appellant

Lydia Nganga .....for the Respondent

MOSES B. OBONYO  
CHAIRMAN

MAHAT SOMANE  
MEMBER

PATRICIA MAGIRI - ANAMPIU  
MEMBER

TIMOTHY K. CHESIRE  
MEMBER