

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 461 OF 2021

KADENGOI ENTERPRISES LIMITED..... APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya and registered as a taxpayer.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, 1995. 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 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.
3. The Appellant filed returns on iTax which emanated from a self-assessment. The Appellant failed to pay the amount in the assessment.
4. The Respondent issued an immediate demand to the Appellant on 19th October 2020 and prepared an agency notice dated the same day.
5. On 6th July 2021, the Appellant's Bank had an Agency Notice mailed to it by the Respondent informing it that the accounts had been clamped.

6. The Appellant filed an appeal against the Respondent's decision dated 10th February 2021.

THE APPEAL

7. In its Memorandum of Appeal dated 10th February 2021 and filed on 12th February 2021, the Appellant premised its Appeal on the following grounds:-

- i) The Respondent erred in giving a decision without supporting reasons for its findings as required under Section 51 (10) of the Tax Procedures Act.
- ii) The Respondent erred in law and fact in omitting vital information supplied by the Appellant on sales and expenses which information if factored would have accounted for variations reflected in the Respondent's assessment thereby reducing the tax arrears to an acceptable figure.
- iii) The Respondent erred in law in treating the entire amount in the Appellant's bank account as chargeable income contrary to the provisions of Section 3 (2) of the Income Tax Act which provides only profits are taxable.
- iv) The Respondent erred in facts and law in factoring sales qualifying for VAT remission in computing VAT.
- v) The Respondent erred in facts in omitting the payment on account made by the Appellant during the period under investigation.
- vi) The Respondent erred in fact in not considering credit variances in computing VAT as is the normal procedure in VAT computation.

- vii) The Respondent erred in fact in disregarding the Appellant's evidence tendered as proof of VAT and income tax compliance for the years under review.
 - viii) The Respondent erred in law in disregarding the Appellant's financial records and the Appellant's auditor report clearly showing the Appellant's audited account, proper sales and expenses, and the correct tax liability.
 - ix) The Respondent erred in law in ignoring the market trends, related production costs, and losses in the Appellant's nature of business which the Appellant totally absorbs leading to an exaggerated and erroneous assessment of the tax amount.
8. The Appellant ultimately prayed for judgment against the Respondent for orders that: -
- i) The Respondent's amended tax assessment dated 11th September 2017 be struck out;
 - ii) The Respondent through itself, employees and/or agents be restrained from demanding and or collecting any tax arrears for the period under review from the Appellant;
 - iii) The Appellant be allowed to pay the principal undisputed tax arrears of Kshs 3,954,606.00 in full and final settlement of the tax arrears for the period under review.
9. In the Appellant's Statement of Facts dated 10th February 2021 and filed on 12th February 2021, the Appellant averred that the Respondent erred in:
- i) Omitting payments made to the Commissioner of VAT during the period under review amounting to Kshs. 3,040,929.00.

- ii) Factoring non-business deposits of Kshs. 38,453,065.00 and sales not qualifying for VAT remission amounting to Kshs 8,027,200.00
- iii) Omitting one of the Appellant's bank accounts in their assessment with vatable deposits of Kshs 48,743,002.00 and accounts for Kshs. 26,045,033.00 in expenses which were dismissed by the Respondent's as unsupported expenses without any explanation, rationale, or reasons for their decision as required under Section 51, (10) of the Tax Procedures Act.
- iv) Ignoring higher credit variances declared in VAT57A than the actual sales deposits while considering debit variances arising out of the same situation for VAT computation.
- v) Not considering the Appellant's P&L accounts for 2015 which reports the correct turnover of Kshs. 44,258,914.00 instead of Kshs. 6,549,904.00 used in the tax assessment. This is because the Respondent erroneously relied on the banking records alone.
- vi) Ignorant of the Appellant's nature of business which mostly deals with foreign clients like Chinese who go for lunar holidays every year and that the Appellant has to absorb the losses; its related production costs like security, insurance costs, rent, utility bills, loans, and mechanical breakdowns among others and losses like pilferage which the Appellant totally absorbs leading to an exaggerated and erroneous assessed tax amount.
- vii) The Respondent failed to consider the Average Gross Profit ratios of the Appellant's line of business which is seasonal in nature.

10. The Appellant reiterated that it had always been tax compliant and had no intention to evade taxes and the only observable reason for tax arrears if any may be as a result of wrong income/expenses allocation and negligence by the Appellant's then accountants who have since been replaced and the Appellant is willing and ready to clear the undisputed tax arrears in full and final settlement.
11. Seeing as the Appellant did not specifically pray for any orders for the Tribunal to give, and given that an appeal to the Tribunal is against the Respondent's Objection Decision in accordance with the Tax Appeals Tribunal Act, the Tribunal will restrict itself to the determination of the same.

THE APPELLANT'S CASE

12. Considering the fact that the Appellant filed no submissions before the Tribunal, the Tribunal will only limit itself to the Memorandum of Appeal and Statement of Facts filed herein to determine the Appellant's case.

THE RESPONDENT'S CASE

13. The Respondent, vide its Statement of Facts dated 10th September 2021 and filed on even date reiterated that:
 - i) The Appellant filed returns on iTax for taxes but has not paid the taxes to date.
 - ii) The Respondent issued an immediate demand to the Appellant on 19th October 2020 and prepared an agency notice, which was sent to Co-operative Bank Limited and effected in July 2021.

- iii) The Appellant never responded to the demand notice since October 2020 but only filed an application before the Tribunal on 12th July 2021 seeking to suspend/lift the agency notice.
 - iv) The Appellant's contention that the taxes are unfounded, excessive and not based on material facts is not true as the entire tax demanded is a self-assessment by the Appellant itself.
 - v) The tax assessment is not an appealable decision as provided under Section 51(1) of the Tax Procedures Act, 2015. Further, Section 52(2) of the Tax Procedures Act provides that a notice of appeal to the Tribunal shall be valid if a taxpayer has paid the tax not in dispute.
 - vi) An Appeal is anchored on an appealable decision as provided under Section 52(1) of the Tax Procedures Act which provides that a notice of appeal to the Tribunal shall be valid if a taxpayer has paid the tax not in dispute.
 - vii) The subject tax demand is admitted taxes thus the Appellant ought to settle the taxes before they can invoke the jurisdiction of the Tribunal.
14. In its submissions filed on 20th November 2021, the Respondent submitted that the Appellant's Appeal is a nonstarter and must fail for reason that the subject taxes are as a consequence of the Appellant's own self-declaration on the Itax system. Further, the Respondent contended that the issue of unfair actions by the Respondent does not arise at all. That the Respondent's Agency Notice sought to collect already crystalized taxes and that the tax is not in dispute, and in any case, the Respondent issued a demand notice to which the Appellant never responded.
15. The Respondent added that the demand notice and agency notices were issued in October 2020 and the Appellant ignored/failed to settle the taxes.

16. The Respondent relied on Section 51 (1) and (2) of the Tax Procedures Act which speak to the statute to use when raising an appeal; and the fact that anyone who seeks an appeal against a tax decision ought to pay all the taxes that are not in dispute at the time of lodging the appeal. The Respondent also relied on the Black's Law Dictionary's definition of "Shall" mostly as used in statutes or contracts to have imperative or mandatory connotations.
17. The Respondent further, while relying on Section 12 of the Tax Appeals Tribunal Act, submitted that a right of appeal is owed only to a taxpayer who meets any of the following two conditions: 1) the taxpayer pays the tax not in dispute; or 2) the taxpayer enters into an arrangement with the Commissioner to pay the tax not in dispute.
18. The Respondent also submitted that it is on these mandatory terms that this Honourable Tribunal lacks discretion in this matter and the only thing the Tribunal can do is to dismiss the current appeal for want of compliance with the statutory provisions.
19. The Respondent argued that the Appellant, having declared the taxes in their returns had a statutory obligation to settle the same before invoking the jurisdiction of the Tribunal. That the Appellant did not enter into an agreement with the Respondent, thus invalidating its appeal for being in contravention of Section 52(2) of the Tax Procedures Act.
20. The Respondent urged the Tribunal to be guided by the decision in **Income Tax Appeal no. 12 of 2018: Hewlett Packard East Africa V. the Commissioner of Domestic Taxes [2019] eKLR** where the court held:

"In the end it follows that this Court having determined that the Appellant's appeal was not in compliance with Section 52 (2) of Tax Procedure Act, grounds No. 1, 2 and 3 of this appeal are dismissed. They

are dismissed because the appeal before the Tribunal was incompetent in view of Section 52 (2) of the Tax Procedure Act and having been incompetent no appeal can lie on those grounds before this Court.”

21. The Tribunal was referred to Section 28(1) of the Tax Procedures Act which provides that any self-assessment made by a taxpayer shall be treated as an assessment of tax payable for the financial period to which the return relates. The Respondent submitted that the Appellant’s self-declaration on Itax is its own tax assessment which needs to be settled immediately. That there is no dispute for determination and if the Appellant wished to challenge the enforcement action, it needed to settle the taxes due.
22. The Respondent made the following prayers to the Tribunal:
- i) That the Tribunal be pleased to dismiss the appeal in its entirety as it is a waste of precious judicial process.
 - ii) That the Appellant be ordered to pay the outstanding taxes of Kshs 5,473,661 immediately.
 - iii) That the Tribunal awards the cost of this Appeal to the Respondent.

ISSUES FOR DETERMINATION

23. After considering the pleadings and documentation produced before it together with the submissions of the parties, the Tribunal sets out two issues for determination:
- i) Whether there is a valid appeal.*
 - ii) Whether the Respondent erred in demanding taxes that were declared by the Applicant in its self-assessment.*

ANALYSIS AND FINDINGS

24. The Tribunal wishes to analyze the issues above as herein-under:

i) Whether there is a valid appeal.

25. Section 28 of the Tax Procedures Act provides as follows with regard to tax arising from self-assessment:-

“Self-assessment (1) 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 a nil amount) for the reporting period to which the return relates being the amount set out in the return.”

26. The Respondent averred that the Appellant made a self-assessment which is immediately due and payable as soon as it is filed. That the same is not in dispute thus not up for consideration by the Tribunal.

27. It therefore follows that the tax arising from the self-assessment was due and payable as soon as the return was filed by the taxpayer.

28. Section 50(1)(b) of the Tax Procedures Act states as follows:

“in the case of a self-assessment, the production of the original return of the self-assessment or a document under the hand of the taxpayer shall be conclusive evidence of the contents of the return.”

29. The fact that the subject assessment is a self-assessment has not been denied by the Appellant. Accordingly, the Tribunal considers the same to be a fact not in dispute and true under the circumstances. The Tribunal thus finds that the subject assessment herein is conclusive proof of a tax due and payable.

30. Section 52 of the Tax Procedures Act provides as follows with regard to validity of an appeal against a tax assessment:-

“(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

“(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”

31. In its Memorandum of Appeal, the Appellant stated verbatim as thus:

“The Respondent erred in law in disregarding the Appellant’s financial records and the Appellant’s auditor report clearly showing the Appellant’s audited account, proper sales and expenses, and the correct tax liability.”

32. From the preceding paragraph it is evident that the Appellant indeed conceded to there being an alternative “correct tax liability” which it believes to be liable for instead of what the Respondent demanded for.

33. The Appellant has, however, not proffered any evidence that it has either paid the tax not in dispute or entered into any arrangement with the Respondent to pay the tax that was not in dispute.

34. Accordingly, the Tribunal finds that this Appeal is invalidly filed before it and must fail and will therefore not delve into further analysis and findings on the remaining issue for determination herein as so doing will be an exercise in futility.

FINAL DECISIONS

35. The upshot of the above is that the Tribunal makes the following Orders:-

- i) The Appeal be and is hereby struck out.
- ii) The Respondent's demand notice dated 20th October 2020 be and is hereby upheld
- iii) Each party shall bear its costs.

36. It is so ordered.

DATED and DELIVERED at NAIROBI on this 11th day of March, 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

