REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 334 OF 2021

JITIHADA FURNITURE CENTRE LIMITED.....APPELLANT

-VS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company duly incorporated under the Laws of Kenya and is a registered taxpayer. Its principal business is in milling coffee commercially.

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 all 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 Respondent sent to the Appellant a letter dated 8th September 2020 notifying it of an intention to do a compliance check.

4. A returns review was undertaken on the Appellant upon which it was established that there were sales variances between Value Added Tax (VAT) and Income Tax (IT). It was noted that the Appellant was not charging VAT

despite being registered for VAT and despite having Vatable supply in the nature of commercial rent.

5. A pre assessment notice was sent to the Appellant on 17th November 2020 via the company's official email address.

6. The Respondent engaged in numerous correspondences and meeting with the Appellant's tax agents to iron out the outstanding issues. On 30th November 2020, the Appellant's tax agent requested for additional time of 30 days since a new auditor had been appointed to look into the Appellant's books. The auditor sent a deposit list, a loan offer form, sales ledgers 2017-2020, loan repayment schedule, and bank statements on 18th December 2020.

7. On 23rd February 2021, the Respondent issued additional VAT assessments on the commercial income declared in the audited accounts.

8. The Appellant objected on 22nd March 2021 after which the Respondent on 21st April 2021 confirmed the VAT assessments for lack of supporting documents and reasons for the Objection.

9. On receiving the objection decision, the Appellant filed a Memorandum of Appeal and Statement of Facts dated 12th June 2021.

THE APPEAL

10. In its Memorandum of Appeal dated 12th June 2021 and filed on 22nd June 2021, the Appellant premised its Appeal on the following grounds:-

    a) That in arriving at the additional assessment, the Respondent:

        i. Relied on the income tax returns filed and raised additional assessment for the periods shown above with the exception of

01/12/2020 where it used rental documents to raise the additional assessment.

ii. Started demanding for the taxes and immediately forwarded the file to the debt enforcement who issued a demand notice for tax in arrears and attached.

b) The Respondent confirmed the assessment orders and started demanding the payment of taxes. The file was then moved to the debt and enforcement department before the verdict on the objection. In addition, the debt and enforcement office issued a demand notice for tax in arrears.

c) The Appellant did not understand why the part for VAT obligation was done in haste and the part for income tax was left hanging yet the letter was for both obligations.

d) The Appellant provided some documents which were partly reviewed and the Respondent did not understand the lease agreement which stated the VAT was to be paid by the tenants.

e) The Respondent did not charge any VAT to the client which they failed to remit to the authorities as required.

11. The Appellant consequently prayed that the Tribunal upholds the Appeal and sets aside the additional assessments raised by the Respondent.

12. In the Appellant's Statement of Facts dated 12th June 2021 and filed on 22nd June 2021, the Appellant averred that there was no under declaration of income and the Appellant has records of the true income and expenditure which if examined will reduce the tax liabilities.

RESPONSE TO THE APPEAL

13. Upon receipt of service to the pleadings, the Respondent replied vide its Statement of Facts dated and filed on 1st October 2021 where it contended that the tax agents of the Appellant were in agreement with the Respondent's findings that the Appellant ought to be charging VAT but was misled by the lease agreements which had shifted the burden to the tenants contrary to Section 5 of the VAT Act.

14. The Respondent averred that after the Appellant's auditor sent the Respondent the documents in the form of a deposit list, a loan offer form, sales ledgers 2017-2020, a loan repayment schedule and bank statements on 18th December 2020, the Appellant went quiet despite the Respondent's numerous attempts to get the Appellant to provide supporting evidence for the expenses claimed.

15. The Respondent further averred that after the Appellant failed to provide the supporting documents for the expenses claimed in the audited accounts, VAT assessments were raised on the commercial income declared in the audited accounts.

16. It was the Respondent's averment that the Appellant Objected to the assessment on 22nd March 2021 but the Objection did not have any reasons in it neither were there supporting documents.

17. The Respondent contended that it contacted the Appellant's tax agent through numerous phone calls asking it to avail the records to support the objection and that on 21st April 2021, the VAT assessments were confirmed since the Objection was not valid and no supporting documents were availed nor reasons given in the Objection.

18. It was the Respondent's statement that:

a) Section 17(3)(a) of the VAT Act 2013- taxpayers registered for VAT are required to possess an original tax invoice for the supply or a certified copy which the Appellant did not avail.

b) Section 51(3) of the Tax Procedures Act- The objection lodged by the Appellant did not include relevant supporting documents as required by law.

c) Section 51 (4) of the Tax Procedures Act- the Appellant was notified that the objection was invalid but did not avail all the documents requested within the timelines specified.

19. The Respondent, therefore, prayed for an order that the Appeal herein be dismissed with costs to the Respondent.

THE APPELLANT'S CASE

20. Having considered all the pleadings filed by the Appellant in this matter, the arguments fronted by the Appellant are as hereunder.

21. In its submissions dated 26th January 2022, the Appellant contended that it started a new rental business after its business of selling furniture which was not performing well was closed down.

22. The Appellant submitted that it entered into an agreement with tenants who had signed the tenancy lease agreements which stated that they will pay gross rent to the Appellant and remit VAT to the Tax authorities by themselves thus no VAT was withheld.

23. The Appellant further submitted that when the assessments were raised for the years 2016 and 2017, the lease was still in force and binding and the terms could not be altered until expiry.

24. It was submitted that Value Added Tax assessments were also raised for the years 2018, 2019 and 2020, respectively, which were also based on the Income Tax returns filed.

25. The Appellant averred that even though the Appellant had the VAT obligation, it was for the first business line.

26. The Appellant also posited that it did not commit any offence of withholding Value Added Tax and failing to remit to the Kenya Revenue Authority but that its offence was failing to withhold VAT on behalf of the client which makes it liable for the general penalty under Section 63 of the VAT Act No. 35 of 2013 which states that a person convicted under this Act for which no other penalty is provided shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or both.

27. Further, the Appellant opined that there are no outstanding taxes because the documents and records were submitted to the Respondent for review to affirm the terms of the agreement. Secondly, the majority of the tenants have left and following to confirm whether they remitted the taxes is quite a challenge.

THE RESPONDENT'S CASE

28. The Respondent set out its case in the Statement of Facts dated 1st October 2021 and Written Submissions dated 17th February 2022 and supporting documentation attached thereto.

29. The Respondent averred that upon undertaking a returns review on the Appellant there were sales variances between VAT and IT. that it noted that the Appellant was not charging VAT despite being registered for VAT and despite having vatable supply in the nature of commercial rent.

30. The Respondent submitted that the Appellant made admissions in its Memorandum of Appeal and submissions as follows:

    a) *The Appellant provided some documents which were partly reviewed and the Respondent did not understand the lease agreement which were stated the VAT was to be paid by the Tenants;*

    b) *The Appellant did not charge any VAT to the client which failed to remit to the authorities as required; and*

    c) *The Appellant at any time had not committed an offence of withholding Value Added Tax and failed to remit to Kenya Revenue Authority. The offence committed is that they failed to withhold VAT on behalf of the client and are liable for general penalty under the VAT Act no. 35 of 2013, Section 64. It states that a person convicted under this Act for which no other penalty is provided shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or both.*

31. The Respondent reiterated that the Appellant misinterpreted the provisions of the VAT Act to arrive at the conclusion that only a penalty is payable.

32. In its submissions, the Respondent raised one issue for determination: whether the Appellant had an obligation to charge and remit VAT.

33. The Respondent relied on Section 5 of the VAT Act as an answer to the issue it raised for determination.

34. The Respondent contended that the Appellant made an admission that it is only liable to a penalty for failing to charge VAT (or to "withhold") and that the admission that there is an obligation that the Appellant failed to perform renders the question for determination moot and as such, taxes are due from the Appellant.

35. The Respondent, therefore, submitted that the admission should therefore pose the question of whether the appeal is made improper under Section 52(2) of the Tax Procedures Act which provides as follows:

> ***"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."***

36. The Respondent cited Section 5(1)(a) of the VAT Act which provides that *"VAT shall be charged on a taxable supply made by a registered person in Kenya".*

37. It was submitted that the Appellant's tenants were not the contemplated registered persons for VAT under the VAT Act and that the Appellant is the registered person.

38. The Respondent also placed reliance on Section 5(3) of the VAT Act which provides;

> ***"(3) Tax on a taxable supply shall be a liability of the registered person making the supply and, subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply."***

39. It was the Respondent's position that the Appellant is the registered person making the taxable supply in terms of providing rental units.

40. The Respondent relied on Section 5(4) of the VAT Act which states: *"The amount of tax payable on a taxable supply, if any, shall be recoverable by the registered person from the receiver of the supply, in addition to the consideration."* to buttress its point that it was the responsibility of the Appellant to recover the tax from the tenants in addition to the consideration and that this is a responsibility imposed by the law and cannot

be delegated to the tenant by a tenancy agreement. It was the Respondent's position that the VAT Act placed liability on the Appellant regardless of whether it had recovered the tax from the receiver of the supply or not.

41. The Respondent further submitted that there is a penalty imposed on the Appellant which penalty is an additional punishment and that the Respondent has the liberty to pursue at the risk of foregoing the collection of interest as doing both would amount to double jeopardy.

42. It was submitted that while the Appellant is admitting to the offence, its proposal is captured under Section 66, which provides:

> *" (1) Notwithstanding anything in this Act, if the Commissioner is satisfied that— (a) a scheme has been entered into or carried out; (b) a person has obtained a tax benefit in connection with the scheme; and (c) having regard to the substance of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme did so for the sole or dominant purpose of enabling the person referred to in paragraph (b) to obtain a tax benefit, the Commissioner may determine the tax liability of the person who obtained the tax benefit as if the scheme had not been entered into or carried out."* and that it is no wonder why the Appellant claims thus: *"The Appellant is of the opinion that there are no outstanding taxes because the documents and records were submitted to the Respondent for review to affirm the terms of the agreement. Secondly, the majority of the tenants have left and following to confirm whether they remitted the taxes is quite a challenge."*

43. The Respondent reiterated that the obligation in the Appeal herein arises out of Section 5 of the VAT Act and not withholding VAT under Section 42A of the Tax Procedures Act and that further, the Appellant's tenants are not VAT withholding tax agents.

44. It was the Appellant's assertion that the withholding VAT which the Appellant suggests was its obligation in the case herein is a system that involves the declaration of VAT by both the supplier and his customer who has been appointed as a withholding agent. The Appellant further asserted that when a taxpayer supplies and invoices an appointed withholding VAT agent, the payment for supply is made less the VAT charged or that which ought to be charged. That the agent then withholds the VAT irrespective of whether the supplier is registered for VAT or not and that the agent issues a withholding VAT certificate to the supplier indicating the VAT withheld. It was the Respondent's submission that this certificate entitles the trader to claim back the withheld VAT to avoid double taxation since the same tax is declared and paid by the reader through a VAT3 return and that withholding tax is charged at the rate of 2%.

45. The Respondent cited the case of **Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others [2019] Eklr** where it was held that:

> ***"With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB (cited by the appellants), expressed the common law position in this area when he stated;***
>
> ***'...in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'."***

46. The Respondent relied on Article 210 of the Constitution of Kenya which provides that no tax shall be waived or varied except by legislation and cited the case of **R v County Government of Nairobi & 3 others *ex-parte* Complimentary Schools Association of Kenya (Dagoretti Sub-County Branch) Misc. Appl. No. 539h of 2016** where the court observed:

" When it comes to issues relating to taxation, the first port of call is Article 210 of the Constitution..."

47. The Respondent consequently prayed that the Honourable Tribunal finds the Appeal herein is unmeritorious and ripe for dismissal.

ISSUES FOR DETERMINATION

48. After considering the pleadings and documentation produced before it together with the submissions of the parties, The Tribunal sets out the following issues for determination:

    a) ***Whether the Appellant's Objection is valid.***

    b) ***Whether the Appellant erred in law and in fact by issuing additional VAT Assessments.***

ANALYSIS AND FINDINGS

49. The Tribunal wishes to analyze the issues identified as herein-under:

    a) ***Whether the Appellant's Objection is valid.***

50. The Respondent contended that the Appellant failed to provide the supporting documents for the expenses claimed in the audited accounts despite numerous requests to the Appellant's auditors.

51. However, the Respondent also confirms that the Appellant's auditor sent the documents in the form of a deposit list, a loan offer form, sales ledgers 2017-2020, a loan repayment schedule and bank statements on 18th December 2020, but went quiet despite the Respondent's numerous attempts to get the Appellant to provide supporting evidence for the expenses claimed.

52. In the instant case, the Tribunal notes that the assessment that is the subject of this Appeal is a VAT assessment made on rental income with no relation to the expenses on the audited accounts and the documents supplied by the Appellant, specifically the sales ledger and the bank statements were sufficient.

53. The Tribunal therefore finds that the Respondent's claim that the Appellant's Objection was not valid by reason that the Appellant did not provide supporting documents to inform the assessment, erroneous.

b) Whether the Appellant erred in law and in fact by issuing additional VAT Assessments.

54. The Appellant entered into an agreement with tenants who had signed the tenancy lease agreements which stated that they will pay net rent to the Appellant and remit VAT to the Tax authorities by themselves.

55. To this, the Appellant acknowledges that it did commit an offence of failing to withhold VAT from the client which makes it liable for the general penalty under Section 63 of the VAT Act No. 35 of 2013 and that the Respondent was only to apply the penalty prescribed under this Section.

56. The Respondent on the other hand relied on Section 5 of the VAT Act where it contended that the Appellant made an admission that it is only liable to a penalty for failing to charge VAT (or to "withhold") and that the admission that there is an obligation renders the question for determination moot and as such, taxes are due from the Appellant.

57. The Respondent further argued that the admission should therefore pose the question of whether the Appeal is made improper under Section 52(2) of the Tax Procedures Act which provides as follows:

"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."

58. The Respondent reiterated that the obligation in the Appeal herein arises out of Section 5 of the VAT Act and not withholding VAT under Section 42A of the Tax Procedures Act and that further, the Appellant's tenants are not VAT withholding tax agents.

59. The Tribunal agrees with the Respondent. It is evident that the Appellant is badly mistaken in its understanding of its obligations under the VAT Act and has demonstrated this by entering into agreements that purportedly transfer its obligations to others, by misunderstanding the concept of withholding VAT from that of charging VAT and by assuming that penalties imposed under Section 63 of VAT Act are a cure to all these wrongdoings.

60. It is therefore the Tribunal's finding that the Respondent did not err in charging VAT on the Appellant's income.

FINAL DECISION

61. Given the forgoing, the Tribunal finds that the Appeal lacks merit and makes the following orders;-

    i. The Appeal be and is hereby dismissed;

    ii. The Respondent's additional VAT assessment dated 23rd February 2021 be and is hereby upheld.

    iii. Each party to bear its costs.

DATED and **DELIVERED** at **NAIROBI** on this **25th** day of **March, 2022.**

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PATRICK LUTTA
CHAIRPERSON

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ELISHAH NJERU
MEMBER

.....
MWAI MBUTHIA
MEMBER

.....
DELILAH K. NGALA
MEMBER

.....
TIMOTHY K. CHESIRE
MEMBER