

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL NO. 101 OF 2016

BEMARC LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

A. INTRODUCTION

1. The Appellant is private limited liability company incorporated in 2012 under the Companies Act, Cap 486 (now repealed) Laws of Kenya and domiciled in Kenya and trading in tyres.

2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, 1995. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5 (2) of the Act with respect to the performance of its functions under Sub-Section 1, the Authority is mandated to administer and enforce all provisions of the written laws 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 issued with a notice of intention to carry out an audit in accordance with the provisions of Section 56 of the Income Tax Act, Cap 470 of the Laws of Kenya and Section 48 of the VAT Act, 2013 on 11th September 2015. This was followed by an audit reminder dated 22nd October 2015 and an invitation for interview dated 10th December 2015.
4. On 3rd of February 2016, the Respondent wrote to its Customs Department requesting for the Appellant's customs data for audit purposes. Vide a letter dated 8th February 2016, the Respondent wrote to the Appellant's banker, Equity Bank Limited, requesting for the Appellant's bank statements.
5. Vide a letter dated 23rd March 2016, the Respondent issued the Appellant with an additional assessment undertaken under the provisions of Section 78 (2) (b) of the Income Tax Act and Section 45 of the VAT Act, 2013. The assessment raised a tax liability of Kshs. 30,362,937 against the Appellant to be paid within thirty (30) days.
6. The Appellant vide a letter dated 21st March 2016 lodged an objection decision with the Respondent decry the short notice of the impending assessment. The Respondent responded to the same vide a letter dated 26th April 2016 outlining its futile efforts in reaching the Appellant to conduct the audit even after the time for preparing and availing the documents was considerably extended.
7. By the same letter, the Respondent also informed the Appellant to provide the documents as requested in the notice dated 11th September 2015 in order to assess the objection within the stipulated timeline. This was followed by an email correspondence to the same effect dated 6th May 2016.

8. The Respondent vide a letter dated 2nd June 2016 further wrote to the Appellant requesting for documents in order to assess the objection lodged. The Respondent on the same date informed the Appellant that it would visit its premises in order to examine its records, to which the Appellant agreed. The Respondent held a meeting with the Appellant on 9th June 2016 wherein the Appellant submitted that its records disappeared with a team of employees who were fired after engaging in fraud. That the employees in question also crashed the company's books accounting system.
9. Vide a letter dated 20th June 2016, the Respondent issued the Appellant with an objection decision for an amount of Kshs. 31,489,319.00.

C. APPEAL

10. The Appeal herein is premised on the following grounds;
 - a. That the Respondent failed in his duty and responsibility to examine records of the Appellant despite the same having been availed from the dates demanded in contravention of Section 59 of the Tax Procedures Act 2015. The Respondent infringed on the Appellant's right bestowed under the Tax payer's Charter (a document published by the Respondent).
 - b. That the Respondent acted ultra vires the Constitution of Kenya 2010 on secretly obtaining confidential information from third parties about the Appellant's financial affairs. Specifically, the Respondent obtained bank statements from the Appellant's bankers M/s Equity Bank Limited without due consent from the Appellant. The Appellant was neither served with a court order nor informed

in writing of the Respondent's intention to obtain confidential information from third parties in direct contravention to article 31 (c) of the Kenya Constitution 2010.

- c. That the Respondent failed to explain his workings to the Appellant in contravention of the Tax Payer's Charter (a document published by the Respondent) bill of rights, even after being invited to do so vide the objection letter dated 21st April 2016 and received by the Respondent on 22nd April 2016.
- d. That the Respondent issued a default assessment on income and value added taxes in contravention of Section 29 of the Tax Procedures Act since original tax returns had been submitted by the Appellant relating to the years of income 2012, 2013 and 2014 for income tax and several periods for VAT.
- e. That the demand notice issued by the Respondent under Section 45 (actually deleted) of the VAT Act 2013 was not in line with the spirit and purpose of the requirements under Section 29 of the Tax Procedures Act which would have been correct Section to base the assessment on.
- f. That the Respondent proceeded to issue a default income tax assessment for year 2014 even though the Appellant was never notified of intention to audit as required under Section 59 of the Tax Procedures Act.
- g. That the Respondent demanded for vat arrears before serving the Appellant with a notice of assessment in direct contravention to Part VI Section 29 and 31 of the Tax Procedures Act.

11. The Appellant also makes the following prayers;

- a. That the Respondent's demands are nullified as he acted ultra vires the Constitution of Kenya 2010, Income tax Act, VAT Act, and Tax Procedures Act.
- b. The Respondent be compelled to bear the costs of this Appeal.

12. The Respondent in turn responded as follows;

- a. That the Appellant was given a notice of intention to audit under Sections 56 and 48 of the Income Tax Act Cap 470 and the VAT Act, 2013, respectively, dated 11th September 2015. The intended audit was to commence on the 15th of September 2015 at the Appellant's premises.
- b. That upon receipt of the audit notification, the Appellant visited the Respondent's office to complain about the short audit notice given to him. It was agreed that he be given some time to prepare the records and informs the Respondent when the records were ready for examination. However, the Appellant never came back to the Respondent to report on the progress of the records. Several phone calls made to the Appellant's Managing Director by the Respondent were either not picked or were answered by short text messages indicating that he was in a meeting or in the Gym.
- c. That the Respondent wrote to the Appellant on 22nd October 2015 after failing to either secure an appointment with the Appellant to agree on the commencement dated of the intended audit. Owing to this frustration the Respondent gave a 14 days' notice for the

Appellant to avail the records. However, this notice was ignored in totality by the Appellant.

- d. That the Respondent issued another letter to the Appellant dated 10th December 2015 inviting the Appellant for an interview at the Respondent's offices. The Managing Director indeed visited the Respondent's office on 17th December 2015 but rescheduled the meeting to a period after the festive season. However, this meeting never materialized afterwards.
- e. The Respondent invoked the Commissioner's powers under Section 73 (2) (b) of the Income Tax Act, Cap 479 and wrote to the Appellant's bankers M/S Equity Bank Limited on 8th February 2016 requesting for the company's bank statements which the bank availed.
- f. That the Respondent vide a letter dated 23rd March 2016 issued additional assessment for the period of Jan 2012 to June 2015. The Estimated assessment covered corporation tax Kshs. 4,803,205, VAT of Kshs. 24,807,266 and PAYE of Kshs. 752,646.
- g. That an estimated assessment was issued for the year 2012 while additional assessments were issued for 2013 and 2014 based on the company's bank statements and the customs import data however, it has since been established that the Appellant prepared her first set of accounts in the financial year 2013 covering the period of eighteen months. As such the default assessment issued for the year 2012 will be vacated and only leave the amended assessment for the year 2013 and 2014.

- h. That in spite of the Respondent referring to Section 45 of the repealed VAT Act, in the demand letter, Section 78 (1) of the Tax Procedures Act fortifies the Respondent's action to the extent that the actions taken in this is inconsistent with the intention to assess and serve and demand the taxes arising from that assessment and that any errors or mistakes in the demand letter cannot therefore invalidate the intention to assess demand and seek to collect the taxes arising therefrom.
- i. That the Respondent raised the date error indicated in the Appellant's objection letter as having been dated 21st April 2016 whereas the Respondent's demand letter was dated 22nd April 2016. The Appellant agreed that this was an error on their part.
- j. That whereas the Respondent tried all possible means available to try and obtain the records requested for the audit from the Appellant without success. In particular the Appellant stated during a meeting held on 9th June 2016 that the record requested for were stolen by the employees who also crashed the computer system that they were using to maintain their accounting date. Hence their inability to provide the said records for examination by the Respondent. When asked to confirm these allegations he responded via email dated 13th June 2016 he flatly refused to do so. It is therefore an act of dishonesty and contradiction on the part of the Appellant to now state that all the records were available at their premises whereas they were not.
- k. That whereas there was a meeting held between the Appellant and the Respondent on 9th June 2016 at their business premises, the

Respondent wishes to state that the said meeting was held against the backdrop of the Appellant's commitment of 22nd April 2016 to respond to objected issues and avail the records on the same. As already mentioned above, the Appellant suddenly changed tact and alleged that the records were stolen and the computer system had crashed. During the said meeting, the only matter that was discussed and agreement was in respect of motor vehicle Toyota Fielder that was said to belong to an employee. It was agreed that the Director should not be charged a PAYE benefit on that vehicle. The rest of the issues were not agreed on account of failure to file VAT returns and time lapse for claims of VAT inputs.

I. That the Respondent also wishes to confirm that the tax computations were sent to the Appellant detailing the contents of the objection on realization that the Appellant was not willing to facilitate a positive review of the objected tax issues. Hence VAT amended assessment of Kshs. 25,135,760 and corporation tax of Kshs. 6,020,792 and PAYE of Kshs. 332,767 was communicated to the Appellant.

13. The Respondent prays that this Appeal be dismissed in its entirety for lack of merit and that the Tribunal upholds the Respondent's Objection decision for the additional assessment for the period of January 2012 to June 2015.

D. ISSUES FOR DETERMINATION

14. Having carefully considered the grounds of Appeal and the rival submissions by the parties herein, we find that a single issue arises for determination by this Honorable Tribunal, namely:-

- a. *Whether the Respondent's assessment of the Appellant's tax liability is proper in law given that the Appellant failed to provide the documents and books of accounts as requested for by the Commissioner?*

E. ANALYSIS

15. What is before us is a classic case of the Commissioner going out of his way to accommodate a tax payer in terms of extension of time to provide the books of accounts and other business records, only for the same to be frustrated by the tax payer. The record before us is ridden with evidence illustrative of the Commissioner's patience with the tax payer in this Appeal. As such, we find that our findings in this matter will be marked with stark brevity as the issue for determination in this Appeal is one which this Tribunal has had occasion to pronounce itself on.
16. In this respect, we find it necessary to reproduce the relevant laws on the matter for determination, namely productions of records and documentations. The tax statutes in this jurisdiction place a burden on every tax payer being assessed to maintain and produce their tax records and documentation. This is, for instance reflected in the provision Section 23 (1) of the Tax Procedures Act, 2015 which stipulates thus;

"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 Sub-Section (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.”

17. Similarly, Section 43 (1) of the VAT Act 2013, provides as follows:-

“A person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein.”

18. Section 54 A (1) of the Income Tax Act, Cap 470 of the Laws of Kenya provides as thus;

“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.”

19. All the above-cited Sections of the various tax laws in force today mandate the tax payer to maintain records of their business and personal activities. The Commissioner then in turn is mandated to request for these documents when undertaking an assessment for purposes of ascertaining the full tax liability of the individual under assessment. Section 59 (1) of the Tax Procedures Act, 2015 categorically states;

“For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to—

- a. *produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;*
- b. *furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or*
- c. *Attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.”*

20. The Respondent herein in compliance of this Section issued the Appellant with a notice of intention to audit under Sections 56 and 48 of the Income Tax Act and the VAT Act 2013, respectively, on 11th September 2015. This was followed by numerous reminders as reflected in the letters dated 22nd October 2015, 10th December 2015 and 26th April 2016 among others, all requesting for productions of documents.

21. Seeing as its efforts to conduct an audit were being frustrated by the Appellant's non-responsiveness, the Respondent vide a letter dated 8th February 2016 wrote to the Appellant's bankers to wit M/s Equity Bank Limited requesting for the Appellant's bank statements. Similarly it wrote to its Customs Department on 3rd February 2016 seeking the Appellant's customs data. It is on the basis of these that the Respondent issued an additional assessment on 23rd March 2016 to which the Appellant objected on 22nd April 2016.

22. The Respondent categorically informed the Appellant after it lodged the objection notice, vide a letter dated 2nd June 2016 to provide its records

and documentation in support thereof in order to properly deal with the notice of objection. This culminated in a meeting between the parties, wherein the Appellant informed the Respondent that its records “disappeared” with a team of employees who were fired after engaging in fraud. Further, that the same employees also crashed the Appellant’s computer system where the books of accounts were stored.

23. Ironically, the Appellant did provided the Commissioner any evidence in support of this sweeping and expansive allegations, which we think are perversely designed to delay the Respondent from conducting an audit or rendering an objection decision. Neither, has it availed a shred of evidence before this Tribunal to back these allegations. Accordingly, we find that the Appellant has failed in its mandatory obligation of providing records of business activity upon request by the Commissioner.
24. The Appellant in its Statement of Facts at paragraph 14 claims that it provided the records for the Commissioner’s examination. Again, no evidence of this was availed before Tribunal. In fact, we find it interest telling that for an individual facing a hefty assessment of Kshs. 31,489,319.89, the Appellant does not substantively disputes the specific tax issues raised in the additional assessment or the objection decision. This, coupled with the burden placed on a tax payer by the provisions of Section 56 (1) of the Tax Procedures Act, 2015 only serve to buttress our position that the Appellant failed in its responsibility to provide its records and documents for examination by the Respondent.

F. DETERMINATION

25. In light of our analysis and findings herein, the following Orders commend themselves to us:-

- a. The Appeal herein is dismissed.
- b. The Respondent's objection decision for the additional assessment for the period of January 2012 to June 2015 is upheld.
- c. Each party to bear its own costs.

It is so ordered.

DATED and DELIVERED at NAIROBI on this 4th day of September, 2020.

**MAHAT SOMANE
CHAIRPERSON**

**PATRICIA MAGIRI
MEMBER**

**TIMOTHY CHESIRE
MEMBER**

**WAMBUI NAMU
MEMBER**