

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAX APPEAL NO. 111 OF 2018

JEMSON TILES LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS AND
BORDER CONTROLRESPONDENT

JUDGMENT

A. INTRODUCTION

1. The Appellant is a limited liability company incorporated in Kenya with the principal activity of importation and sale of ceramic floor and wall tiles and sanitary ware.
2. The Appellant was chosen for a Post Clearance Audit for the period of 2011 to 2016, pursuant to the provisions of Sections 235 and 236 of the East African Community Customs Management Act, 2004 (hereinafter EACCMA).

B. BACKGROUND

3. Vide a letter dated 3rd August 2016, the Respondent issued the Appellant with a notice of intention to audit for purposes of all import and export entries among other tax heads for the period of January 2013 to September 2016. The letter instructed the Appellant to avail all its records, books of accounts and other supporting documents on or before 22nd August 2016.

4. On 11th April 2017, the Respondent communicated its audit findings to the Appellant through a management letter. Among other things, the audit revealed the Appellant's non-compliance with the provisions of Section 122 of the East African Community Customs Management Act, 2004 (EACCMA). As a result, the Respondent raised an assessment of Kshs. 8,833,994.00.
5. Vide a letter dated 12th April 2017, the Respondent issued the Appellant with a demand notice of Kshs. 8,833,994.00, payable within thirty (30) days failing which penalties would apply as per the provisions of Section 135 of the EACCMA. This was followed by a further demand notice on the 6th of June 2017, requesting for Kshs. 8,833,994.00 as the principal tax, Kshs. 441,700.00 being penalty at 5% and Kshs. 29,108 being default penalty at 2%.

C. APPEAL

6. The Appeal herein is premised on the following grounds:
 - a. The Respondent erred in view of the fact that the audit team merely picked the bulk of the entries and ignored the correct valued as per the valid tax invoices availed to them upon which taxes were duly computed and remitted to the customs department before the goods could be released.
 - b. That the Respondent action is quite alarming. Instead of the Respondent facilitating business, it appears the aim is to muzzle and kill business.
 - c. That the Appellant paid all the taxes as assessed by the Customs Department prior to the goods being released at the port of entry upon importation.

- d. That the Appellant paid taxes on the basis of valid invoices upon which the customs value was based at the port of entry.
 - e. That the additional tax demand by the Respondent is imaginary and not supported.
 - f. That since inception of the Appellant's operations, the Appellant has always complied with the tax laws and regulations as enacted from time to time.
 - g. That despite the fact that the Respondent is fully aware of the provisions of the Tax Procedures Act which stipulates the procedures for tax decisions, objections and appeals, the Respondent ignored and failed to respond to the objection by the Appellant dated 7th June 2017 within the stipulated 60 days in the Tax Procedures Act. It was not until 10th July 2018 (a year later) when the Respondent wrote to the Appellant vide a letter dated 10th July 2018.
7. The Appellant prays that the Appeal be allowed and the Respondent's demand be annulled and thrown out since it lacks in merit and is in breach of the set laws and regulations under the Tax Procedures Act.
8. The Respondent, on the other hand responded to the Appeal as follows:-
- a. In response to grounds 1, 2, 3, 4, 5 and 6 of the Memorandum of Appeal the Respondent states that at all material times it was guided by the Appellant's document's and the applicable provisions of the law.
 - b. It was established that the customs values declared by the Appellant were lower compared to the other similar consignments from the same country by other importers and thus invoked the provisions of the Fourth Schedule to the East African Community Customs Management Act, 2004 which allows the Respondent to use the

transactional value of Identical goods method to assess the customs value of the goods imported.

- c. The Respondent avers that the examination of the provided documents revealed non-compliance with Section 122 as read with 4th Schedule of EACCMA; hence the transactional value of Identical goods method was adopted and applied in valuation.
 - d. The Respondent states that the customs values being based on the Appellant's own documents and information, the Appellant having had sufficient opportunity during the post clearance audit to provide all the documents and information which would have justified the customs declaration cannot be allowed now to allege that the same are based on imaginary values.
 - e. The Respondent avers that though the Appellant disputed the accuracy of the figures they have failed to dispense with the burden of proving the customs values adopted by the Respondent as being erroneous.
 - f. It therefore follows that the demand Notice issued on 12th April 2017 and the subsequent demand Notice reminders were proper and based on law.
9. Accordingly, the Respondent made the following prayers;
- a. That the demand notice dated 10th July 2018 was proper in law and in conformity with the provisions of the East African Community Customs Management Act, 2004.
 - b. That the amount of Kshs. 11,839,328.00 comprising of principal tax and penalties is due and payable to the Respondent; and
 - c. That this Appeal be dismissed with costs to the Respondent as the same is without merit.

D. PARTIES SUBMISSIONS

I. APPELLANT

10. The Appellant submitted that the Respondent carried out a post clearance audit on the books of the Appellant and the Respondent actually confirmed in writing that it was largely happy with the affairs of the business particularly to do with the bookkeeping and records that had been maintained. The only contention in this matter is valuation. The Respondent argued that the values declared were not similar and were not the same to similar goods which the Appellant deals with. However, unfortunately, when the Appellant requested the Respondent to provide the basis of its working, the same was not availed to the Appellant. Accordingly, the Appellant wishes to request this honorable Tribunal to refer to the written submissions and be able to determine the matter.
11. That certainly the price may not be the same and there are various factors that determine the pricing. Those various factors one of them of course is the issue of quality. The other issue is the quantity. The Appellant is in the business of trading in tiles and sanitary wares. Now, these tiles are largely imported from India. The packaging of those tiles may not be necessarily the same with another supplier who deals in similar tiles. The quantities may not be the same, the quality may not be the same and therefore the valuation can never be the same.

II. RESPONDENT

12. On its part, the Respondent avers that a post clearance audit was done and an assessment was done based on the customs values of the goods that the Appellant had imported into the Country. This was done as per the provisions of Section 122 of EACMMA 2004 and the Fourth Schedule

particularly Paragraph 3 which allows the Respondent to do a customs valuation using the values of identical of identical goods.

13. That was the basis of the assessment and the Respondent has given in its annexures the valuation matrixes that were used and an index or rather a table showing how the taxes were arrived at and we pray that the this Honorable Tribunal dismisses the Appeal and confirms the assessment.

E. ISSUES FOR DETERMINATION

14. Having carefully considered the grounds of Appeal, the oral submissions by the parties therein and the authorities cited in support thereof, it is clear to us that only one issue falls for determination by this Honorable Tribunal. We hereby restate this single issue as being;

- a. Whether an Appeal can be preferred against a demand notice?*

F. ANALYSIS

15. The Appeal before us raises a number of substantive tax issues arising from the customs post clearance audit conducted by the Respondent. This is clearly evidenced by the grounds of Appeal as contained in the Appellant's Memorandum of Appeal dated 19th July 2018 and the Respondent's Statement of Facts dated 17th August 2018. However, the Appellant has raised a question of procedural compliance with the procedures enlisted in the Tax Procedures Act, 2015. Accordingly, it is only prudent to ascertain whether these procedures have been flouted and the effect of the same on this appeal before us.

16. The Appellant avers that the despite the Respondent being fully aware of the provisions of the Tax Procedures Act, 2015 which stipulates the

procedures for tax decisions, objections and appeals, ignored and failed to respond to the objection by the Appellant dated 7th June 2017 within the stipulated sixty (60) days in the Tax Procedures Act. That it was not until 10th July 2018 (a year later) when the Respondent wrote to the Appellant.

17. The Respondent on its part starkly objected to the imputations in the Appellant's argument that it was in contravention of Section 51 (8) of the Tax Procedures Act, 2015 by not issuing an objection decision within the statutorily allowed sixty (60) days. The Respondent avers that at no point did it make an objection decision to warrant invoking the said Section 51 (8) of the Tax Procedures Act, 2015.
18. Further, the Respondent contends that its letter dated 12th April 2017, in regard to which the Appellant purports to raise an objection against is clearly stated as a "**demand notice**" for taxes and duties of Kshs. 8,833,994.00 comprising IDF, import duty, VAT and RDL. That a demand notice is an instrument at the enforcement stage and not a tax decision.
19. The Respondent in Paragraph 38 of its Statement of Facts argues thus;

"It therefore follows that a demand notice is not a tax decision for an objection to be tolerated as against it. The Appellant having erroneously filed an objection against a demand notice and acknowledged in the same that he was objecting to a demand notice did not in any way bring the demand notice within the provisions of Section 51 of the Tax Procedures Act, 2015 to require an objection decision within sixty days."

20. A cursory glance at the record before us indicated that the Appellant was issued with a management letter on 11th April 2017 with tax arrears assessed at Kshs. 8,833,994.00. This was followed by a further letter from the Respondent dated 12th April 2017, entitled Demand Notice, calling upon the Appellant to pay the taxes assessed as per the management letter within thirty (30) days.
21. The record further reflects that Appellant acknowledged receipt of the letter of the 12th April 2017 vide an email correspondence dated 12th May 2017. On 7th June 2017, the Appellant herein filed a notice of objection against the demand notice dated 12th April 2017 with the Respondent. The Respondent in turn responded to the objection with a demand notice reminder on the 10th of July 2018.
22. We note that the Respondent has in its Statement of Facts as well as its Submission argued extensively, that a demand notice is not an appealable decision. We find this is not a new argument being advanced by the Respondent as the same argument has been offered time and again with respect to issuance of agency notices. This Tribunal and the higher courts have been unequivocal on the issue of what amounts to an appealable decision. As such, our decision in this case will not be any different and will suffer to restate that position.
23. In the premise therefore, we must examine and reproduce the relevant Sections of the law in this regard. Section 2 of the Tax Procedures Act, 2015 defines a “tax decision” and “appealable decision” as follows;
- “*Tax decision*” means—
- a. *an assessment;*
 - b. *a determination under Section 17(2) of the amount of tax payable or that will become payable by a taxpayer;*

- c. a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under Sections 15, 17, and 18;*
- d. a decision on an application by a self-assessment taxpayer under Section 31(2);*
- e. a refund decision;*
- f. a decision under Section 48 requiring repayment of a refund; or*
- g. a demand for a penalty;”*

24. Section 51 (1) of the Tax Procedures Act, 2015 provides thus;

“A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this Section before proceeding under any other written law.”

25. Section 52 (2) further stipulates;

“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](#)).”

26. Additionally, Section 3 of the Tax Appeals Tribunal Act, 2013 establishes the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner. Section 12 of the Act provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal.

27. In our view, the above Sections of the law warrant no detailed explanation. However, for avoidance of doubt, and for the future reference of the Commissioner, we are obliged to find that any decision

made by the Commissioner is ideally an appealable decision. Section 52 (1) of the Tax Procedures Act cited above is to be construed together with Section 12 of the Tax Appeals Tribunal which provides “...subject to the provisions of the relevant law.” The impugned decision was made pursuant to the provisions of Section 135 of the East African Community Customs Management Act, 2004 Act which provides as follows:

“(1) Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.

(2) Where a demand is made for any amount pursuant to sub-Section (1), the amount shall be deemed to be due from the person liable to pay it on the date on which the demand note is served upon him or her, and if payment is not made within thirty days of the date of such service, or such further period as the Commissioner may allow, a further duty of a sum equal to five percent of the amount demanded shall be due and payable by that person by way of a penalty and a subsequent penalty of two percent for each month in which he or she defaults.

(3) The proper officer shall not make any demand after five years from the date of the short levy or erroneous refund, as the case may

be, unless the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made, as the case may be.”

28. From the phrase “...subject to the provisions of the relevant law,” three key points emerge as the High Court held in *Krystalline Salt Limited v Kenya Revenue Authority [2019] eKLR*, in determining whether an agency notice was an appealable decision. First, whether the impugned decision was taken pursuant to the above Section. We find no difficulty answering this question in the affirmative nor is there an argument before me to suggest otherwise.
29. Second, whether the decision is an appealable decision within the above provision. As stated above, the Act defines an appealable decision” as an objection decision and any other decision made under a tax law other than— (a) a tax decision; or (b) a decision made in the course of making a tax decision. The words “any other decision under the tax laws” are significant. The impugned notice falls under the above definition. To hold otherwise would amount to intellectual dishonesty given the clarity of the provision and the decisions of the higher courts in the country.
30. Thirdly, the High Court considered whether the impugned decision is an administrative decision within the meaning of Section 2 of the Fair Administrative Action Act. Section 2 of the Fair Administrative Action Act provides that “..., unless the context otherwise requires— “administrative action” includes— (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act,

omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

31. We find the High Court's analogy in the above cited decision holds true in the Appeal currently before. Accordingly, we adopt the same and the conclusion becomes irresistible that the Respondent's decision dated 10th July 2018 is an appealable decision. It thus appears that the mansion of unimaginative construction of what amounts to or qualifies as an appealable decision as adopted by the Commissioner must be dissembled doorjamb by doorjamb.
32. If this Honorable Tribunal were to adopt the Respondent's construction of what amounts to an appealable decision, then there would be no need in creating an appeal system, both the Kenya Revenue Authority's internal appeal system and the appeals to the Tax Appeals Tribunal, in the first instance. The Commissioner's word or assessment of a tax payer's liability would be final. In such a situation, we find the yardstick, like in all systems where power is not checked, would be personal and without transparency thus leading to abuse of powers vested.
33. Fortunately for the Appellant herein, that is not the case. The Tax Procedures Act, 2015 created an elaborate system of appeals, not just for the benefit of the tax payer, though mainly for their benefit but also to act as guide to the Commissioner in dispensing with his mandate. The Commissioner in this case has failed to be so guided in reaching the conclusion that the Appellant was misguided in lodging an objection against the demand notice as the same did not amount to an appealable decision.

34. In light of the foregoing analysis, especially having found that the demand notice by the Respondent is an appealable decision, we must now turn our attention to the effect of the same. In our assessment, the effect of our analysis above is that the Appellant's objection notice dated 7th June 2017 was properly before the Respondent and not erroneous as claimed.
35. The Respondent responded to the Appellant's objection notice through a demand notice reminder dated 10th July 2018 rather rendering an objection decision as stipulated in law, specifically, Section 51 (11) of the Tax Procedures Act which provides as follows;
- “The Commissioner shall make the objection decision within sixty days from the date of receipt of—*
- a. the notice of objection; or*
- b. Any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.”*
36. The Respondent's misguided construction of what amounts to an appealable decision coupled with the fact he rested on his laurels for a while before rendering an objection decision which he is mandated to do, lead us to the irresistible conclusion that the objection notice lodged by the Appellant is deemed allowed by law and the amounts purported as being taxes in arrears are no longer accruing.

G. DETERMINATION

37. In light of the foregoing analysis, the Tribunal makes the following Orders;

- a. The Appeal herein is merited.
- b. The Respondent's demand notice dated 12th April, 2017 is hereby set aside.
- 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**