

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 248 of 2018

NEW AGE DEVELOPERS & CONSTRUCTION CO. LTD.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

1. The Appellant is a limited liability Company duly incorporated and carrying on the business of construction and or property development.
2. The Respondent, the Commissioner of Domestic Taxes, is an agent of the Kenya Revenue Authority and appointed under Section 13 of the Kenya Revenue Authority Act (CAP 469) Laws of Kenya with the mandate to collect various taxes including but not limited to Value Added Tax (VAT) and Income Tax (IT).
3. The Respondent issued the Appellant with a Notice for Production of Records under Section 59 of the Tax Procedures Act upon obtaining information relating to the Appellant's trading activities on the iTax system.
4. The Respondent's concern related to what it considered the Appellant's under declared sales for the year 2015 and the Appellant's failure to file VAT returns from February 2016. The Respondent suspected that the Appellant did not declare all the income for the period under the Respondent's review.
5. To this end, the Respondent required the Appellant to produce documents in support of its financial activities.
6. On 15th May 2017, the Appellant's General Manager wrote to the Respondent acknowledging receipt of the Respondent's Notice and

requesting for more time to retrieve its records. It is not clear whether the Respondent responded to the Appellant's letter.

7. By a letter dated 31st August 2017, the Respondent demanded for tax liability for the period January to December 2015. In the said demand the Respondent made reference to a letter of 14th June 2017 sent to the Appellant. This letter is unavailable to the Tribunal as none of the Parties has attached the same to their documents.
8. The Respondent demanded Kshs. 480,773,300.00 on account of VAT and Kshs. 88,806,368.00 as corporation tax. The Respondent therefore required a total of Kshs. 569,579,688.00 from the Appellant. The Respondent equally advised the Appellant to object to the tax findings if it disagreed or was dissatisfied with the tax demand.
9. The Appellant filed an objection and dispatched the same via the iTax system on 26th September 2017 and its agent further submitted a letter dated 14th November 2017 to the Respondent detailing further grounds of objection. The agent also submitted a separate letter of even date applying to be allowed to amend errors or mistakes in the certain VAT returns.
10. The Respondent issued an objection decision on 22nd November 2017 rejecting the objection giving reasons for the rejection and maintaining its demand for taxes.
The Respondent advised the Appellant to appeal in accordance with the law. The objection decision was delivered to the Appellant on the same day.
11. The Appellant opted not to immediately exercise its rights of appeal but on 28th May 2018, Maina Kinyua & Company Certified Public Accountants, on its behalf, dispatched an "objection" to the assessment of 31st August 2017.
The Tribunal is unable to comprehend the reason for the Appellant doing this having earlier lodged an objection on 26th September 2017 and 14th November 2017 which was rejected by the objection decision of 22nd November 2017. It should be understood that once an objection decision is made and served on a taxpayer, the door for lodging any objection is shut.

12. In the Respondent's reply of 12th June 2018, the Appellant's attention was drawn to the objection decision of 22nd November 2017 and advised to abide by the Tax Procedures Act and the Tax Appeals Tribunal Act.
13. The Appellant's agents proceeded to file this Appeal praying for a waiver of filing of the tax appeal within 30 days of the objection decision for among other reasons; that the Appellant's accounting system crashed.
The Appellant also prayed that the Respondent's objection decision of 22nd November 2017 be set aside.
14. The Tribunal finds that the Appellant has filed this appeal without following due procedure.
15. Section 12(1) of the Tax Appeals Tribunal Act required the Appellant to give a written notice to the Commissioner before appealing to the Tribunal though this is not mandatory.
16. Section 13 of the Tax Appeals Tribunal Act made it mandatory for the Appellant to prepare a written Notice of Appeal and submit the same to the Tribunal within thirty days.
17. The Appellant is also mandatorily required to file the Memorandum of Appeal, Statement of Facts and the tax decision within fourteen days of filing the notice of appeal.
So to speak, there are specific documents to be filed within strict timelines.
18. The document that would trigger an action in the Tribunal is the Notice of Appeal. The Appellant did not file this primary document.
19. Section 13(3) of the Tax Appeals Tribunal Act gives this Tribunal discretion to extend time for filing of a Notice of Appeal or submitting documents relating to an appeal on terms on application by a party.

20. The Appellant has in this appeal prayed that the requirement of filing the Appeal within 30 days be waived. This is an order that the Tribunal cannot grant in the manner sought.
21. The proper procedure open to the Appellant was to first move the Tribunal to have time extended or enlarged for filing of the Notice of Appeal. Should the extension be granted, it would automatically follow that fourteen days from the date of filing the Notice of Appeal, the Appellant should lodge the Memorandum of Appeal and the accompanying documents without seeking leave.
22. It is inappropriate to have the Appellant make this prayer as one of the final prayers in the appeal. The Appellant would have made an application for extension of time in such circumstances if it had in existence a notice of appeal but fourteen days had passed before lodging an appeal. It must be noted that no submissions were made in respect of this plea by the Appellant.
23. Even if the Tribunal were inclined to grant this prayer, the same would be a nullity as the procedure requiring the filing of the Notice of Appeal cannot be wished away.
24. The Appellant has besought the Tribunal to embrace the spirit of Article 159 of the Constitution of Kenya, 2010 requiring that substance be embraced rather than form.
25. The Tribunal finds that the issue of “form” has no place in the present appeal.

Even if the Tribunal was to apply this article, doing so will result in a violation of statutorily defined procedures. Article 159 of the Constitution was not crafted to aid parties brazenly flout statutory provisions.

26. Having made the observations herein, the Tribunal finds that the Appeal is improperly before it and is hereby struck out with no order as to costs.

DATED and DELIVERED at NAIROBI this 31st day of March, 2020



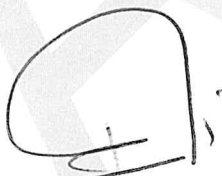
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PATRICK LUTTA
CHAIRPERSON



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HELEN BILA
MEMBER



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MWAI MBUTHIA
MEMBER



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ELI NJERU
MEMBER

