

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
APPEAL NO. 42 OF 2018

STEP UP HOLDINGS (K) LTD.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

A. INTRODUCTION

1. The Appellant is a limited liability company duly incorporated under the Companies Act, Cap 486 of the laws of Kenya (repealed), with its principal business activity as offering education services.
2. The Respondent is a principal officer of the Kenya Revenue Authority appointed under Section 13 of the Kenya Revenue Authority Act, Cap 496 of the Laws of Kenya and is charged with the responsibility of assessing, collecting and accounting to the exchequer all revenue.

B. BACKGROUND

3. The Appellant established Step Up Training Institute in 2002. On 1st September 2008, the Appellant concluded a 10 year Memorandum of Understanding with Mt. Kenya University paving way for the two parties to collaborate in offering the University's courses.

4. Subsequently, the Appellant with no contribution whatsoever from the University, established Mount Kenya University Nakuru Campus. The Appellant trading as Mount Kenya University Nakuru Campus, paid to the University collaboration fees in accordance with the express provisions of the Memorandum of Understanding.
5. By a letter dated 24th September 2008, the Appellant sought guidance from the Kenya Revenue Authority on how staff it intended to engage on a part-time basis were to be taxed but received no response.
6. Vide a letter dated 18th October 2011, the Respondent informed the Appellant that it would conduct a compliance check visit covering the period of January 2008 to August 2011. This check was done from 24th October 2011.
7. On 10th February 2012, the Respondent served the Appellant with company estimated assessment notices and contemporaneously issued the Appellant's bankers with agency notices, claiming alleged tax arrears totaling to Kshs. 29,850,000.00.
8. The Appellant's auditors, Messrs. Obwocha & Associates, vide a letter dated 20th February 2012 objected to the assessment and requested its withdrawal. By a letter dated 27th February 2012, the Appellant filed a further objection and served the same on the Nakuru Station Manager, the Regional Commissioner and the Commissioner of Domestic Taxes. This was followed by a further objection dated 12th March 2012 through the Appellant's tax consultants Messrs. Omingo Magara & Associates.

9. The Appellant's directors and auditors visited the Respondent's Nakuru office on Thursday 23rd and Friday 24th of February 2012. During both visits, the Respondent's officers informed the Appellant that;
 - a. Instructions to issue the company estimated assessment notices and agency notices and the figures demanded therein, were received from the Head Office in Nairobi.
 - b. The Respondent was specifically, and only interest in the revenue obtained from the Appellant's collaboration with the University.
 - c. The Nakuru Head office had no power to make any decision on the matter and was waiting for directions from the Head Office in Nairobi.
10. In May 2012, during the pendency of the Appellant's objections, the Respondent's Nakuru Station Manager summoned the Appellant and informed the Appellant that he had been instructed by the Respondent's Head Office to immediately carry out an audit of the Appellant's accounts for the period of collaboration between the Appellant and the University.
11. By a letter dated 11th August 2012, the Respondent forwarded to the Appellant a tax audit and demanded that the Appellant pay Kshs. 25,690,397.00 in alleged tax arrears. The Appellant by a letter dated 4th September 2012 objected to the demand.

12. The Respondent acknowledged receipt of the Appellant's objection on 17th September 2012 and stood over the Corporation tax demand but left out the PAYE, Withholding Tax and Stamp Duty.
13. The Appellant subsequently petitioned the Commission on Administrative Justice. By a letter dated 4th October 2012 in response to the Commission's inquiry, the Respondent stated that it had received information on the likely loss of Government revenue resulting from certain transactions entered into by the Appellant.
14. On 4th October 2012, the Appellant instituted Nakuru Judicial Review No. 59 of 2012. Vide a Judgment delivered on 31st January 2018, the High court declined to deal with the issues raised on the merits stating that they fell within the jurisdiction of the Tribunal in the first instance.
15. On 5th and 8th of March 2018, the Respondent summoned the Appellant's chairman to its offices in Nakuru and demanded to know which of the taxes as demanded the Appellant had issues with and to produce documents in support. Further, on 19th March, the Respondent wrote to the Appellant demanding that the Appellant submits documents in support of its objection.
16. Vide a letter dated 22nd March 2018, the Appellant wrote to the Respondent and among others drew its attention to the pending objections and to the documents annexed to its objection dated 4th September 2012.

17. On the 29th of March 2018, the Respondent served the Appellant with an objection decision dated 28th of March 2018. Dissatisfied, the Appellant lodged an Appeal with the Tribunal.

C. APPEAL

18. The Appeal herein is pegged on the following grounds as stated in the Memorandum of Appeal dated 9th May 2018:-

- a. That the Respondent erred in law in making the impugned objection decision without including a statement of findings on the material facts and the reasons for the decision as required by the mandatory requirements of Sections 49 and 51 (10) of the Tax Procedures Act, No. 29 of 2015.
- b. That the Respondent erred in law in making the impugned objection decision the Appellant's objections having been allowed by operation of law by dint of the mandatory provisions of Section 51 (8) and (11) as read with Section 113 (1) of the Tax Procedures Act, 2015 and hence the decision is illegal, null and void.
- c. That the Respondent erred in law and in fact in making the impugned objection decision dated 28th March 2018 to uphold illegal taxation of the Appellant.
- d. That the Respondent erred in law and in fact in making the impugned decision dated 28th March 2018 against the weight of evidence presented to it by the Appellant.

19. Accordingly, the Appellant makes the following prayers;

- a. That the Appellant's objections dated 4th September 2012 be allowed and the Respondent's objection decision dated 28th March 2018 be set aside.
 - b. That the Respondent be prohibited from demanding the tax, penalties and interest claimed in the decision dated 10th August 2012.
 - c. That the costs of this Appeal be borne by the Respondent.
20. The Respondent in turn responds to the Appellant's Appeal as follows:
- a. That pursuant to the Judgment of the Court delivered on 31st January 2018, the Respondent proceeded to make an objection decision on 28th March 2018. The said decision made reference to the letter dated 10th August 2012 which outlined a statement of findings on the material facts and reasons for the decision as required by the mandatory requirements of Sections 49 and 51 (10) of the Tax Procedures Act, 2015.
 - b. The Respondent denies that its objection decision dated 28th March 2018 was deemed to have been allowed by operation of law by dint of the provisions of Section 51 (8) & (11) of the Tax Procedures Act, 2015 since it was issued pursuant to the High Court Judgments of 31st January 2018.
 - c. The Judge in the penultimate paragraph of her judgment noted that the Appellant herein exercised the right of appeal which appeal

must be determined before delving into the issues of fact raised with regard to the assessment.

- d. There being an Appeal that was commenced before the coming into force of the Tax Procedures Act, the provisions of Section 113 (4) apply for purposes of recovery of the outstanding taxes.
 - e. That the objection decision dated 28th March 2018 is justified based on the evidence on record, and hence the decision is illegal, null and void. The grounds of objection advanced by the Appellant are not supported by facts to support their assertions.
 - f. The Appellant has not provided all the required documentation to accompany the objection hence the Respondent's position remains correct.
21. In light of the foregoing response, the Respondent prays that this Tribunal upholds the tax assessment (Corporation tax, Withholding Tax, Stamp Duty and PAYE) as having been duly assessed due and payable by the Appellant and that consequently dismiss the Appeal.

D. PARTIES SUBMISSION

THE APPELLANT'S SUBMISSIONS

22. Counsel for the Appellant claims that the disputing question arises from taxes that are alleged by the Respondent to be due from the Appellant as a result of a collaboration between the Appellant and Mount Kenya University between the years 2008 and 2011. The Respondent issued assessment notices on the 10th of August 2012 as against the Appellant for tax allegedly due from the Appellant without providing a statement

of findings and material facts that is contrary to Section 49 and 59 (10) of the Tax Procedures Act.

23. It was submitted for the Appellant that the Respondent claims that these assessment notices were issued after a tip off that was not grounded on anything that as a result of the failure of the collaboration between the Appellant and Mount Kenya University, that the Appellant would flaunt paying taxes for that period. Now the Appellant submits that the said notices were issued without grounding them, without giving them any reasons contrary to the Tax Procedures Act and is therefore opposing the same.
24. The Appellant issued an elaborate objection to the notices and outlined in detail and provided evidence for it that the assessment was inaccurate in many ways, for instance, the Respondent provided PAYE for the part-time lecturers or part-time staff of the Appellant as a block figure of Kshs. 13 Million. The Appellant submitted that the same is inaccurate and the Respondent did not provide any proof of that block figure and inaccurately used a flat percentage of 30% to weigh this PAYE which should not be the case.
25. In addition to that the Respondent alleges that there is tax due from, for instance from the directors of the company, for the purchase of cars which were in the name of the Appellant not in their personal capacity as the directors of the companies. Further to that there is an issue of a provision for withholding tax without providing evidence or providing the source of this transaction of Withholding tax. Therefore the main

issue that the Appellant has against the Respondent is itemization of the said amount.

26. The Respondent claims that this tip off came as a result of the fall out of the collaboration between the Appellant and Mount Kenya University and that as a result of the fall out that the Appellant would wind down and not be able to pay its taxes. In his response to this, the Appellant submits that it's in operation even now. After the Appellant provided an objection to the said assessment notices, the Appellant submits that contrary to Section 51 (8), 51 (11) and 113 (1) of the Tax Procedures Act, that the Respondent did not provide an objection decision within good time. That it only provided or it gave an objection decision in the year 2019 yet the objection by the Appellant was done in 2012. It's the Appellant's submission the time started to run at the point when this objection was launched contrary to the Respondents claim that time started running after the high court decision based on the same circumstances. That is in 2018.
27. It is the Appellant's submission that the High Court decision only stayed the freezing of the Appellant's accounts by the Respondent and it did not state the running of time. Therefore, as a reasonable person or just on the basis of legitimate expectation, the Respondent should have provided even if it's an indication it will issue a decision on the objection within a certain time or some indication so that it's not suspended. It was the legitimate expectation of the Appellant that it would get some indication that the Respondent was actually going to respond, which did not happen. Therefore, the Appellant proceeded to go to court but then

the court referred the matter here because it's to be decided on the issues of facts.

28. Further the Appellant submits that contrary to the claim that the Appellant was trying to flaunt paying tax, it is well within the Respondent's knowledge that one of the directors of the Appellant actually called upon the Respondent to do an audit of its accounts for the year 2008 to 2011 which should not have been the case if the Appellant was duly or truly trying to escape paying taxes.
29. That further to the objection decision the Appellant actually provided audited accounts for the years 2008 to 2011 which proved that it had duly paid its taxes. The Respondent did not consider the elaborate and the detailed evidence as tendered by the Appellant on the issue.

RESPONDENT

30. Counsel for the Respondent submitted that by dint of Section 13(6) of the Tax Appeals Tribunals Act, the Appellant shall be limited to the grounds stated in the appeal to which the decision relates. None of the grounds in the Appellant's Memorandum of Appeal touch on the issues to do with assessments but are on points of law that that any ground that has been raised outside those, this Tribunal ought to disregard.
31. It averred on behalf of the Respondent that there was an assessment raised on 10th August 2012 pursuant to an audit. That audit emanated from previous estimated assessments that were issued on the 7th of February pursuant to Section 75 (A) of the Income Tax Act as it was then. After those estimated assessments there were various meetings

between the Appellant and the Respondent that precipitated in a request for an audit by one of the directors and not a voluntarily requested audit as was submitted by the Appellant.

32. After the assessments there was an objection on the 4th of September. Before the Respondent could respond, a judicial review was filed in Nakuru being Judicial Review Number 59 of 2012. The decision of that Judicial Review that was issued on 31st January 2018 and what Lady Justice Odera had to say in her decision was, *“In the instant case ex parte applicant to appeal and filed an objection with the Commissioner dated 4th September 2012, which has been stayed”* so what the Appellant submitted that the Respondent ought to have given a decision on the objection, is quite to the contrary pursuant to the orders of the Judge. That objection was stayed so that no action could take effect. That the court went further and said the court must await the determination of that appeal before delving into issues so that when delivering that Judgment, it is charged the stay for the Respondent to now proceed with the processes of the objection decision.
33. It is the Respondent’s further submission that at the time of issuing the assessment and the objection, it is pertinent to note that the Tax Procedures Act and the Tax Appeals Tribunal Act were not in force. That there was no time limit as to which the Respondent could respond. That in addition to there being a stay, the Respondent couldn't have responded. The time in this matter started to run immediately after the High Court issued its decision on 28th of March 2018.

34. In response to the first ground of Appeal, the Respondent submitted that in issuing the objection decision the Commissioner relied on Section 51 (8) of the Tax Procedures Act. The Commissioner in this instance proceeded to disallow the objection by issuing an objection decision. Section 51 (8) of the Tax Procedures Act commands the Commissioner to consider an objection and decide whether to allow that objection. That was not the position herein. The Commissioner did not allow in whole or in part or to disallow so that the Commissioner proceeded to disallow and confirmed the assessment.
35. On whether the objection decision contravenes Section 59 of the Tax Procedures Act, as read together with Section 51 (10), the Respondent avers that what was before the Commissioner was an objection and not an application for it to warrant a statement of reasons.

E. ISSUES FOR DETERMINATION

36. The Appeal herein raises but a single issue for determination by this Honorable Tribunal, namely;
- a. Whether the objection decision by the Respondent dated 28th March 2018 is in contravention of the provisions of Sections 51 (8), 51 (10) and 113 (1) of the Tax Procedures Act, 2015?*

F. ANALYSIS

37. From a cursory perusal of the record before us, we note that this matter has been unnecessary protracted mainly due the Appellant herein not approaching the appropriated legal forum for address for its grievances with the Commissioner. No, matter, now that the case is rightly before the Tribunal and considering the actions being appealed against have

accrued well before the commencement date of the Tax Procedures Act, it will be in order for this Tribunal to first address itself on the applicable law; whether the Appeal fits within the framework of the Tax Procedures Act, 2015.

38. On 10th August 2012 the Respondent issued the Appellant with a tax demand and immediately thereafter began enforcement mechanisms through the issuances of agency notices against the Appellant's bankers. The Appellant filed an objection to the Respondent's assessment and demand through a letter dated 4th September 2012. On 4th October 2012, after approaching the High Court at Nakuru, the Appellant was granted leave to file a judicial review application with the Court. The same leave also operated as a stay of proceedings of enforcement and/or demand on the part of the Commissioner.

39. With that brief recapitulation of the facts in this Appeal, it will be mighty prudent of us to first address ourselves to the provisions of Section 113 (1) of the Tax Procedures Act, 2015. It is only after bringing or removing this Appeal entirely within the scope of the Tax Procedures Act, 2015, that the Tribunal can address its mind to grounds of Appeal therein. The said Section 113 (1) of the Tax Procedures Act, 2015 stipulates as thus;

"Subject to this Section, this Act shall apply to any act or omission that occurred or is occurring for which no prosecution has been commenced, or any assessment made against which no appeal has been made, before the commencement date."

40. In our view Section 113 (1) of the Tax Procedures Act, a saving and transitional clause, is aimed specifically at addressing situations where a tax assessment by the Commissioner will be midstream and no appeal

had been made on the same. The question therefore becomes, did the Appellant herein prefer an appeal against the assessment of the Commissioner. We note that in order for a tax payer to prefer an appeal, there must be an appealable decision.

41. Section 2 of the Tax Procedures Act, 2015 defines an appealable decision as;

“Appealable decision” means 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;”

42. Additionally, the Tax Appeals Tribunal Act, 2013 defines an appeal as;

“Appeal” means an appeal to the Tribunal against a decision of the Commissioner under any of the tax laws;”

43. In the premise therefore, we find that as at the Commencement date of the Tax Appeal Tribunal Act, 2015 (19th January 2016), no appeal had been preferred against the assessment of the Commissioner. Accordingly, the Appeal herein, as at 19th January 2016 was and is still against the Government by the provisions of the Tax Appeals Tribunal Act, 2015.

44. Now, having determined that, we will address ourselves on whether impugned decision of the Commissioner dated 28th March 2018 contravenes the provisions of Section 51 (8) and (11) of the Tax Procedures Act, which provide thus;

“(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

...

(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.”

45. Section 51 (11) of the Tax Procedures Act 2015 mandates the Commissioner to render an objection decision within sixty days from the date an objection notice is lodged by a tax payer. The Appellant herein lodged an objection with the Commissioner on 4th September 2012. For all intents and purposes, time started to run as of the date of filing the objection notice, on 4th September 2102.
46. However, the Appellant was granted leave to file a Judicial Review application on 4th October 2012, by which time twenty (27) days of the sixty day statutory time limit had already lapsed. This leave end the subsequent proceeding of the substantive suit stayed any action on the part of the Commissioner. The implication of this is that the time for rendering an objection decision was equally frozen until the determination of the substantive judicial review suit.
47. The Nakuru High Court delivered a Judgment on the 31st of January 2018. In our assessment this had the import of vacating the stay orders against the Commissioner. Accordingly, time began to run again and the Commissioner had 33 days from the date of the delivery of the Judgment by the Nakuru High Court to render its objections. This means

that the Commissioner should have rendered to the Appellant an objection decision before or by 5th of March 2018. However, the Respondent rendered its decision 28th March 2018 and has tendered any reason explanation for this delay.

48. As such, we find that the provisions of Section 51 (11) of the Tax Appeals Tribunal fittingly apply to the Appeal currently before use. We find that the Respondent simply sat on laurels until 28th March 2018 and the same in law has the implication that the Appellant's objection is deemed allowed. The Respondent as the key institution charged with the administration of all the tax laws in country should have known of these statutory timelines if at all it is seeks to enforcement assessments. As such, it is our considered view that the Appellant's objection is deemed as allowed by law hence making it moot for this Tribunal to address any substantive tax disputes relating to the Commissioner's assessment.

49. In this we are guided by Republic vs. Commissioner of Customs Services Ex-Parte Unilever Kenya Limited [2012] eKLR, in which Korir J stated thus:

“My understanding of the above quoted Section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the respondent in this case has 30 days within which to make and communicate a decision to the taxpayer. If the respondent does not communicate a decision within 30 days, then the respondent “shall be deemed to have made a decision to allow the application.” The law is so clear that it can only be interpreted in one way...The respondent communicated the decision to the ex-parte applicant on 18th July, 2011. By communicating the decision

four months from 16th March, 2011 the respondent was clearly in breach of the provisions of Section 229 EACCMA...The implication of the respondent's non-communication within the statutory period of 30 days is that the ex-parte applicant did not owe the taxes demanded by the demand notice of 9th February, 2011. The respondent's decision in the letter dated 18th July, 2011 which revised the tax demand downwards from Kshs. 102,254,601.00 to Kshs. 65,335,378.00 was therefore void from the beginning. The law as it is presumes that by failing to communicate a decision by 16th April, 2011 the respondent was telling the ex-parte applicant that its appeal against the tax demand contained in the notice dated 9th February, 2011 had been allowed and the ex-parte applicant did not owe the respondent any tax in respect of that particular demand."

G. CONCLUSIONS

50. In light of the foregoing analysis, the Tribunal makes the following Orders;
- a. The Appeal herein is merited.
 - b. The Appellant's objection dated 4th September 2012 is deemed allowed by operation of law.
 - c. The Respondent's impugned decision dated 28th March 2018 is hereby set aside.
 - d. Each party to bear its own costs.

It is so ordered.

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

MAHAT SOMANE
CHAIRPERSON

PATRICIA MAGIRI
MEMBER

TIMOTHY CHESIRE
MEMBER

WAMBUI NAMU
MEMBER