

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 106 of 2018

YOMASON CONTRACTORS LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability Company duly incorporated in Kenya and which at all material times engaged in the business of construction.
2. The Respondent is a principal officer of Kenya Revenue Authority appointed under Section 13 of the Kenya Revenue Authority Act CAP 469 of 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 tax dispute between the parties herein was prompted by the tax compliance investigation conducted by the Respondent in respect of years 2016-2017 for determination of the Appellant's tax liability. In the Respondent's words, it was triggered by the Appellant being in perpetual Value Added Tax (VAT) credit as at December 2016.
4. In exercise of powers conferred by Section 59 of the Tax Procedures Act, 2015 (TPA) the Respondent on 22nd May 2017 issued a notice of intention to verify the Appellant's VAT credits for the period July 2016 to December 2016 as had been reported by the Appellant in its declarations. By the said notice the Respondent listed the documents it required from the Appellant for the verification exercise.
5. From the investigations conducted by the Respondent in the Appellant's tax affairs, the Respondent issued a communication to the Appellant's directors dated 26th September 2017 of preliminary verification findings for the period July 2016 to June 2017.

6. The Respondent computed VAT on sales and purchases, established PAYE and Corporation Tax payable and required explanations and or comments from the Appellant. The Appellant was given seven (7) days to do so.
7. The Respondent found that the Appellant had three (3) ongoing construction projects and at different levels of completion namely Rehabilitation of Engineer Law Courts, construction of students' Dormitories at Magomano High School and Mwenda Andu Harambee Secondary School. The Respondent had been paid by the Judiciary but had not issued out sales invoices for the same contrary to Section 12(1) of the VAT Act 2013.
8. The Respondent found that the Appellant had made VAT claims on purchases in accordance with Section 17 of the VAT Act 2013 and found the same supported by ETR receipts and claimed within the six (6) months provided by law.
9. The Respondent prepared a tax computation which reflected a tax obligation amounting to Kshs. 15,119,802/= due from the Appellant.
10. The Respondent also found that the Appellant had inter alia:-
 - i) Not filed any PAYE return since it commenced operations.
 - ii) Had employees' in its payroll who were within the PAYE threshold but no PAYE had been remitted.
 - iii) A director of the Appellant and the director's children drew monies from the Appellant's bank accounts but the withdrawals were unaccounted for.
 - iv) The Appellant's director had on a monthly basis paid a loan to NIC Bank for one of his sons.
 - v) The Appellant had transferred money to a company by the name Nissaton Pharmaceuticals Ltd which shared common directorships with the Appellant.
11. The Appellant's liability under PAYE was computed at a sum of Kshs. 4,710,344/=.

12. The Respondent found that the Appellant had never filed IT2C returns for the years of income 2015 and 2016. The Respondent issued a Notice to the Respondent requesting for the same.
13. In the communication, the Respondent clarified that the same was a preliminary verification finding and not a tax demand. The Respondent required the Appellant to offer explanations on the issues raised within seven (7) days failing which an additional assessment would be issued and the resultant taxes demanded. The Appellant's summary of taxes amounted to Kshs. 19,830,145/=.
14. On 30th November 2017, the Respondent wrote to the Appellant informing the Appellant that the verification exercise had been completed with the Appellant having provided documents and explanations. The Respondent concluded that the Appellant was in a VAT credit by reason of not declaring sales on the three (3) construction projects whereas the Appellant had claimed input tax on the same.
15. The Respondent also found that the Appellant had failed to account for VAT on sales as the Appellant had filed Nil returns in the period under review. The Respondent computed and demanded Kshs. 11,320,983/= based on the sales figures.
16. The Respondent concluded that the Appellant failed to subject its project employees to PAYE. The Respondent also brought to charge the monies paid by the Appellant on account of director's personal obligations. The Respondent demanded Kshs. 4,710,344/= on account of PAYE. The Appellant was given thirty (30) days to object to the assessment.
17. It is unclear whether the Appellant engaged with the Respondent but on 6th February 2018, the Respondent issued a tax arrears demand requiring the Appellant to immediately pay the assessed taxes amounting to Kshs. 16,031,327/= failing which the Appellant would institute recovery action in accordance with the TPA.
18. Notwithstanding that the Respondent had given a demand for payment before recovery action was taken, on the same date (6th February 2018), the Respondent issued agency notices to the Appellant's bankers demanding recovery of Kshs. 16,031,327/= which was in the demand.

19. On 7th March 2018, the Appellant's Advocates M/s F. N. Kimani & Associates lodged a Notice of Objection to the Respondent's tax assessment of 6th February 2018. The Objection which was delivered on the same date listed grounds of objection as follows:-

- a) No Notice to pay was made to the Appellant before the Claim was made.
- b) The Respondent did not provide the formula used in arriving at the tax assessment of Kshs. 16,031,327/= and the Appellant was not given an opportunity to verify the same.
- c) The agency notices were issued by the Respondent without affording the Appellant an opportunity to respond.
- d) The Appellant had filed Income Tax returns for years 2015 and 2016.

They requested the Respondent to suspend the agency notices issued to the Appellant's bankers and clients.

20. Notwithstanding the Notice of Objection issued by M/s F. N. Kimani & Associates Advocates aforesaid, the Appellant subsequently appointed M/s Mwaura W. & Associates who on 21st March 2018 lodged a "late objection on the assessment" issued on 6th February 2018. The grounds of objection were as follows:-

- a) The Appellant did not receive any assessments from the Respondent before agency notices were issued to its bankers and clients.
- b) The Appellant had submitted its audited accounts and the Respondent did not seek explanations on the discrepancies between the verification findings and the audited accounts.
- c) The tax demanded by the Respondent was based on estimates.

21. The "late objection" curiously states that the Appellant did not receive the Respondent's assessment and only learnt of the same upon receiving the agency notices issued to its bankers and clients.

22. This, of course, was incorrect with the Appellant's advocates having lodged an objection on 7th March 2018, immediately upon issuance of the assessment and agency notices. The "late objection" was therefore unnecessary.

23. It appears from the limited email correspondence availed to the Tribunal that the parties engaged in an attempt to resolve the Respondent's assessment in the month of May 2018. Explanations were sought by the Respondent and responses were given by the Appellant which do not appear to have resulted in any resolution of the Respondent's action.
24. The Appellant issued its Objection Decision on 21st May 2018 rejecting the Appellant's objection and confirming the assessment dated 30th November 2017. The said objection decision enumerated the reasons for rejecting the objection.
25. The Appellant filed a Notice of Appeal on 7th June 2018 and the Memorandum of Appeal on 16th July 2018.
26. The Respondent in opposition of the Appeal filed its Statement of Facts on 15th August 2018.

THE APPEAL

27. The Appellant's principal grounds of Appeal were as follows:-

a) That the commissioner erred in computation of VAT while analyzing appellant's bank statements since he considered all credits as income whereas some were;

- i) Performance bonds reversal*
- ii) Cheque reversals*
- iii) Loans*
- iv) Insurance claims*
- v) Cash deposits to pay creditors*
- vi) Income from VAT exempt institutions (Schools)*

b) That the commissioner erred in computation of PAYE while analyzing the general ledger and bank statement since he considered most debits as salaries whereas they were;

- i) Wages for the daily/weekly casuals*
- ii) Withdrawals for material purchases e.g sand, stones, murram, quarry dust, ballast, timber poles, etc*
- iii) Refunds to family members who had contributed fund to the company. The company started without funds and therefore the family and friends to the directors contributed and had to be refunded of the same without interest.*

c) That the commissioner breached the contents of Section 51(11) of the tax procedures Act by delivering objection decision 75 days after lodging the objection and at the earliest time possible the appellant shall raise a preliminary objection on a point of law to have the decision quashed and the objection upheld.

28. The Appellant prayed that the Appeal be allowed and that the following Orders be issued:-

- i) That the objection filed on 7th March 2018 be allowed in accordance with Section 51(11) of the tax procedures Act.*
- ii) That the Respondent be ordered to recompute VAT and PAYE payable for the period under review.*
- iii) Any other relief or remedy that this tribunal may deem fit to grant favour of the appellant against the Respondent.*

THE RESPONDENT'S STATEMENT OF FACTS

29. The Respondent opposed the Appellant's Appeal on the following summarized grounds:-

- i) The Respondent notified the Appellant of the verification exercises in issue and communicated its preliminary findings to the Appellant upon carrying out its verification exercise.*
- ii) The Respondent issued an additional assessment dated 30th November 2017 and forwarded the same to the Appellant demanding Kshs. 16,031, 327/=.*
- iii) The Appellant did not object to the additional assessment leading to issue of the agency notices dated 6th February 2018.*
- iv) The Appellant failed to file VAT on sales and further failed to charge PAYE on the director's personal drawings.*
- v) The Respondent therefore prayed as follows:-*
 - a) That the Respondent's objection decision dated 21st May 2018, confirming the assessment of **Kshs. 16,031,327** with respect to VAT and PAYE was proper in law and in conformity with the Laws of Kenya.*

- b) That the taxes of Kshs. 16,031,327 with respect to VAT and PAYE 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.*
- 30. The Parties subsequently undertook the ADR process and recorded a partial Consent wherein the VAT assessment was settled and the assessment in respect of PAYE was left for determination by this Tribunal.
- 31. The Appellant appears to have abandoned the plea that the Appellant's Objection be deemed as allowed on the basis that the Objection Decision was delivered 75 days out of time.
- 32. This was appropriate as it was apparent from the documents filed by the parties that they had engaged in discussions before 11th May 2018 and 18th May 2018 with a view to resolving the lifting of Agency Notices and in such circumstances, it would not be appropriate for the Respondent to issue an Objection Decision.

ISSUES FOR DETERMINATION

- 33. The parties having compromised on the other matters in dispute, only one issue arises for determination: -

Whether the Appellant is liable to pay PAYE as assessed by the Respondent?

- 34. The Respondent assessed PAYE in the sum of Kshs. 4,710,344/= as being due from the Appellant. The same was on grounds that:-
 - i) Unpaid PAYE due from the Appellant's payroll.
 - ii) Unaccounted drawings by a director and his children from the Appellant's bank account.
 - iii) A loan paid by the Appellant on account of his son on a monthly basis.
 - iv) Transfer of some monies from the Appellant to M/s Nissaton Pharmaceuticals Ltd which had some common directors with the Appellant.
- 35. The Respondent had sought explanations and documentation from the Appellant on the aforesaid issues out of which the PAYE assessment was made but submitted that the same was not provided up to the time the Appeal was filed.

36. In answer to the Respondent's request for explanations and documents, the Appellant stated that the director's drawings comprised cash injected into the Company by its director.
37. In the Appellant's written submissions, the Appellant submitted that withdrawals from the Appellant's bank accounts were on account of wages for daily/weekly casuals and withdrawals for purchase of materials and refunds to promoters of the Company.
38. The Appellant faulted the Respondent for relying on documents whose authenticity had not been established.
39. In its submissions, the Respondent stated that the Appellant had a legal burden to discharge to successfully fault the Respondent's tax decision.
40. The Tax Procedures Act 2015 (TPA) under Section 56 (1) thereof provides as follows:-

"In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect"

41. The Respondent submitted that it is empowered to demand information from the taxpayer under the TPA. Section 29 of the TPA provides as follows:-

"29 (1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgment, make an assessment (referred to as a "default assessment") of:-

- a) the amount of the deficit in the case of a deficit carried forward under the Income Tax Act (Cap.470) for the period;*
- b) the amount of the excess in the case of a deficit carried forward under the Value Added Tax Act, 2013 (No. 35 of 2013), for the period; or*
- c) the tax (including a nil amount) payable by the Taxpayer for the period in any other case".*

42. Therefore, where a taxpayer fails to provide the required information, the Commissioner is legally empowered to use his best judgment based on the available information to make an assessment as it was done herein.

ANALYSIS

43. The Tribunal has looked through the communication exchanged between the Appellant and Respondent with regard to the tax dispute and noted that the Respondent consistently requested for documentation and explanations from the Appellant. Either information or documentation was not given by the Appellant or if given, the same was not satisfactory or adequately supported.
44. The Respondent in its communication of Preliminary Verification Findings dated 26th September 2017 informed the Appellant of the possible tax obligations and required explanations failing which additional assessment could issue and the resultant tax demanded.
45. On 30th November 2017, the Respondent communicated to the Appellant the completion of the verification exercise for VAT credits together with the findings on PAYE for the period January 2016 to July 2017. The Respondent by the same communication issued the Appellant with an assessment and notified the Appellant of its right to object.
46. Having received no objection, the Respondent went ahead and issued the agency notices of 6th February 2018 for recovery of the assessed taxes which remained unpaid.
47. The Tribunal noted that it is the issuance of the Agency Notices that triggered the Appellant to act on the assessments from the Respondent. The details of what transpired in the interactions between the Appellant and the Respondent have been elaborately explained in the earlier parts of this Judgment.
48. The Tribunal has considered the submissions brought in support of the Appeal and noted that the Appellant stated that the PAYE assessed by the Respondent had been “expounded on each item backing their explanation”. The Respondent on the other hand submitted that the Appellant produced no documents to satisfy it that the PAYE as assessed was wrong or excessive.
49. Of the two positions, the Tribunal agrees with the Respondent that the Appellant did not provide documents when required to do so.
50. The Appellant in its submissions admitted owing PAYE amounting to Kshs. 176,094.24.00 and attached a computation of the same. The Tribunal considered such an admission to be too late in time and the computation to be irregularly introduced.

51. The Appellant in all its pleadings and documents denied being liable for any PAYE and an attachment to the written submissions of a computation of part of the PAYE allegedly owed is inconsistent with its Appeal, particularly when it was introduced at submissions stage without giving the Respondent an opportunity to interrogate the same. By reason of the irregularity, the Tribunal disregarded the contents of the attachment as doing otherwise would result in grave injustice to the Respondent. It would have been prudent for the Appellant to seek leave of the Tribunal to introduce the new information in order that the Respondent can be heard on the same.
52. The Tribunal concurs with the findings in Daniel Otieno Nigore -Vs- South Nyanza Sugar Co. Ltd (2018) eKLR cited by the Respondent where the High Court held that:-

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded”.

53. For the Tribunal to decide in favour of the Appellant, the Appellant had a duty to demonstrate that there existed documents and information capable of explaining why the PAYE assessment was not due from it which it provided the Respondent with but the Respondent disregarded. Even then, such documents and information must be those that would discharge the Appellant as a taxpayer from the assessment or other tax liability.
54. Having found that the Appellant did not provide the evidence required, the Tribunal is left with no alternative but to allow the law to take its course. This is to say, Section 29(1) of the TPA must be applied. The Respondent was therefore within its mandate to make a default assessment on PAYE against the Appellant.
55. In answer to the single issue framed in this Judgment, the Tribunal finds that the Appellant is liable to pay the PAYE as assessed by the Respondent.

FINAL ORDERS

56. With due regard to the partial Consent recorded and endorsed in respect of the objection decision as to the VAT assessment the Tribunal makes the following Orders:-

- i) The Appeal be and is hereby dismissed as relates to the claim on PAYE.
- ii) Each party to bear its costs.

DATED and DELIVERED at NAIROBI this 28th day of August, 2020



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PATRICK LUTTA
CHAIRPERSON



.....
HELEN BILA
MEMBER



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MWAI MBUTHIA
MEMBER



.....
ELISHAH NJERU
MEMBER

