

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**TAX APPEAL NO. 420 OF 2020**

**BASRA BUILDING AND CONSTRUCTION  
COMPANY LIMITED.....APPELLANT**

**-VERSUS-**

**COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. The Appellant herein is a limited liability company duly incorporated and carrying on business within the Republic of Kenya, with the principal activity of building and construction.
2. The Respondent is a principal officer appointed in accordance with Section 13 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5 (1) the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5 (2) 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 as set out in Part 1 & 2 of the First schedule to the Act for the purposes of assessing, collecting and accounting for all revenue in accordance with the various tax laws.

3. The Respondent undertook an analysis of the transactions by the Appellant and noted that the Appellant had not declared all supplies made to Isiolo County Government for the period of 2014 for 2018 in respect of Value Added Tax (VAT) and Income tax. As a result, the Respondent issued the Appellant with a demand for Kshs. 28,767,009.00 on 2<sup>nd</sup> March 2020.
4. The demand was followed by manual income tax and VAT assessment issued by the Respondent to the Appellant vide a letter dated 11<sup>th</sup> March 2020. Consequently, the Appellant lodged an objection to the assessment on 18<sup>th</sup> March 2020.
5. Vide an email correspondence dated 15<sup>th</sup> April 2020 and a letter dated 16<sup>th</sup> April 2020, the Respondent wrote to the Appellant requesting for documents in support of the objection notice. The said email and letter required the Appellant to avail all pertinent documents and information in respect of its objection notice on or before 24<sup>th</sup> April 2020. The Appellant provided its documents on 23<sup>rd</sup> April 2020.
6. On 20<sup>th</sup> May 2020 the Appellant requested for additional two weeks to provide the documents required for review of objection by the Respondent, a request which was granted by the Respondent by extension of the deadline to 1<sup>st</sup> May 2020.
7. The Respondent issued his objection decision on 12<sup>th</sup> May 2020 in which the earlier assessments were confirmed on account of the Appellant's failure to provide documents in support of the objection notice. On 20<sup>th</sup> May 2020 the Respondent raised VAT and income tax assessments on iTax to effect the objection decision.

8. The Appellant objected to the assessments raised on 10<sup>th</sup> June 2020. The Respondent confirmed the assessments on 10<sup>th</sup> and 11<sup>th</sup> August 2020. Aggrieved by the decision the Appellant lodged a notice of Appeal with the Tribunal on 12<sup>th</sup> September 2020.

## THE APPEAL

9. The Appeal herein is premised on the following grounds;
- a. That the Respondent assessed tax on gross income without allowing for purchases and other deductions incurred “wholly and exclusively” in earning the income contrary to Section 15 of the Income Tax Act, Cap 470 of the Laws of Kenya.
  - b. That the Respondent charged tax on income the Appellant had not received.
  - c. That when determining corporation tax for the Appellant for years 2017 and 2018, the Respondent included VAT in the gross amount which goes against accepted accounting and tax principles enshrined in the Income Tax Act.
  - d. That the assessment did not consider the previous amended and additional assessment with respect to 2015 and 2016.
  - e. The assessment did not take into account withholding tax deducted at source of Kshs.514,136.00 by the customer.
  - f. That the Respondent did not consider withholding VAT at source amounting to Kshs.1,248,525.00 when issuing the assessment.

- g. That the Appellant was registered for VAT I 28<sup>th</sup> July 2016 yet the Respondent notionally and fictionally imposed VAT on supplies made before this time.
  - h. That the Respondent charged VAT on Kshs.22,000,000.00 in December 2016 yet there were no supplies for this amount to impose VAT on. For avoidance of doubt, the Appellant neither made any supplies nor earned any income in August through December 2016 having registered for VAT in 28<sup>th</sup> July 2016.
  - i. That the Respondent assessed VAT on income of Kshs.3,518,375.00 in December 2017 and on income of Kshs.9,504,449.00 in December 2018 although both already included VAT. In effect, the Respondent imposed VAT on amounts that already included VAT.
10. In line with the above grounds, the Appellant prays for the following order;
- a. That the entire assessment be annulled and set aside.
  - b. That the Respondent should collect withholding taxes deducted at source from their agent instead of demanding from the Appellant which has already paid it through the withholding VAT system.
  - c. The Respondent to vacate the VAT assessment for the years 2016 as it is not due and give credit for all the VAT withheld by their agent so that it offsets the VAT demanded for 2017 and 2018.
  - d. For income tax, the Respondent to assess the correct tax for 2015, 2017 and 2018 by allowing for purchases and expenses incurred in addition to giving credit for withholding tax deducted at source of Kshs. 514,136.00.

- e. Further, order the Respondent to lift the agency notice as it was erroneously issued.

## **RESPONSE TO THE APPEAL**

11. In response to the foregoing grounds of Appeal, the Respondent states as follows;

- a. Contrary to the Appellant's allegation that the Respondent did not allow for purchases and other deductions incurred wholly and exclusively, the Respondent states that it did not disallow any purchase and expenses. Further, the Respondent states that the Appellant failed to provide documentation to support any additional expenses.
- b. In response to the allegation by the Appellant that tax was charged on income not received, the Respondent aver that tax only charged on income earned by the Appellant as obtained from IFMIS records.
- c. In respect of the years 2017 and 2018 income tax assessment, the Respondent affirms that the assessment was based on IFMIS records and no documents were provided by the Appellant to support its contention that income amount was VAT inclusive.
- d. The Respondent avers that the Appellant did not provide documentation or information on any withholding tax. The Respondent states that there were no withholding tax credits on the Appellant's iTax Ledger and therefore there was no basis for allowing any withholding tax without proof by the Appellant.

- e. The Respondent affirms that the Appellant made taxable supplies of Kshs. 33,367,395 in 2015 and did not declare the same for VAT purposes. The fact that the Appellant registered for VAT on 2016 does not relieve it of the tax liability in 2015. The VAT assessment for 2015 is therefore valid since the Appellant was dealing in taxable supplies in that period.
- f. The Respondent confirms that the Appellant made taxable supplies of Kshs. 26,524,502 in 2016 but declared only Kshs. 4,501,011. The Respondent charged the undeclared supplies in December 2016.
- g. Contrary to the allegation by the Appellant that it did receive the Respondent's objection, the Appellant in paragraph 9 of its statement of facts admitted that it received the objection decision dated 12<sup>th</sup> May 2020.
- h. The Respondent states that the agency notices were issued on 2<sup>nd</sup> July 2020. This was after the confirmation of the assessment was communicated to the Appellant on 12<sup>th</sup> May 2020.
- i. The Respondent also avers that it later raised assessment on iTax on 20<sup>th</sup> May to give effect to its objection decision as per Section 51 (9) of the Tax Procedures Act. The Appellant objected a second time to the assessment on iTax on 10<sup>th</sup> July 2020 which was after 2<sup>nd</sup> July 2020 when the agency notices were issued.
- j. In respect of the assessments for 2017 and 2018, the Respondent states that it charged VAT on the undeclared supplies in the period and did not allow for withholding VAT as they were not available in the Appellant's iTax ledger and the Appellant failed to provide any evidence of withheld VAT.

12. On the basis of the foregoing response, the Respondent prays that the Appellant's Appeal be dismissed with costs and the objection decision be upheld.

## ISSUE FOR DETERMINATION

13. In this Appeal, the following issue falls for determination by the Honorable Tribunal, namely;

*a. Whether the Appeal herein is properly before the Tribunal, and if so, whether the Respondent's confirmed assessment is enforceable*

## ANALYSIS AND FINDINGS

14. This Appeal turns on the question whether the Appeal herein is properly before the Tribunal. More importantly, whether the Respondent's confirmed assessment together with the agency notices dated 1<sup>st</sup> September 2020 are enforceable in law. On the first issue, the Appellant has not made any substantive submission in respect of the late Appeal or why leave for enlargement of time was not sought to admit the Appeal properly before the Tribunal. However, the Appellant did argue that it did not receive the objection decision from the Respondent in order to proffer an Appeal from it. The Appellant in Appeal and notice of motion application dated 26<sup>th</sup> November 2020 seeking stay of the Respondent's agency notices, argued that it only got to know of the objection decision from its bankers on 2<sup>nd</sup> July 2020.
15. On his part the Respondent submitted that the Appeal herein offends the provisions of the Tax Appeals Tribunal Act, 2013 insofar as the statutory timeline for lodging Appeals is concerned. The Appeal further offends the

requirement incumbent upon the tax payer to first seek the Tribunal's indulgence in enlargement of time before lodging an Appeal. In this regard, the Respondent placed reliance on Section 52 (1) of the Tax Procedures Act, 2015 (TPA) as read with Section 13 (1) (b) and 13 (3) & (4) of the Tax Appeals Tribunal Act, 2013 together with Rule 10 of the Tax Appeals Tribunal Rules 2015.

16. The Respondent further submitted the Respondent's objection decision was rendered on 12<sup>th</sup> May 2020. This was followed by measures to give effect to the assessment by raising assessment orders through the iTax system in line Section 51 (9) of the TPA, 2015. The same was served on the Appellant through electronic format on email within the same day. Accordingly, the Appellant cannot argue that it was not aware of the objection decision. Further, that assuming the Appellant only got to know of objection decision on 2<sup>nd</sup> July 2020 through its bankers, it should have lodged an Appeal no later 2<sup>nd</sup> August 2020. However, in the instance case the Appeal was filed on 14<sup>th</sup> September 2020, thus rendering the Appeal before the Tribunal incompetent. In this regard, the Respondent relied on the case of ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR.***
17. We have appraised our minds to the contending submissions by the parties to this Appeal and find that a proper starting point is the laws that provide the requisite timelines in Appealing against a decision by the Respondent. Afros such we begin with the provisions of Section 52 (1) of the TPA 2015 which stipulates that 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). In this respect Section 13 (1) (b), (3) & (4) provide respectively as follows;



*“1) A notice of Appeal to the Tribunal shall—*

*(a) Be in writing;*

*(b) Be submitted to the Tribunal within thirty days upon receipt of the decision of the Respondent.*

*2)...*

*3) The Tribunal may, upon application in writing, extend the time for filing the notice of Appeal and for submitting the documents referred to in subsection (2).*

*(4) An extension under subsection (3) may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the applicant from filing the notice of Appeal or submitting the documents within the specified period.”*

18. From the above provisions of the Tax Appeals Tribunal Act, 2013, it is clear that a tax payer is enjoined to lodge an Appeal against an Appealable decision of the Respondent within thirty days by lodging a Notice of Appeal. Thereafter, the tax payer is given a further fourteen days to lodge the memorandum of Appeal, the Statement of Facts together with the tax decision and other supporting documents. It is also clear from the above cited Sections of the Act that in circumstance where a tax payer is, for some reason, out of time in lodging an Appeal, the first port of call for such a tax payer would be first seek enlargement of time in accordance with the provisions of Section 13 (3) & (4) of the Act.

19. In the instant Appeal, the Respondent confirmed the assessment on 12<sup>th</sup> May 2020 after the Appellant herein failed to provide documents in support of its objection notice. The confirmed assessment was sent to the one of the emails the parties to this Appeal had been using during the audit and the objection stage. The Appellant however contends that it did not receive the objection decision hence the reason for the late Appeal. The Appellant contended it only got to know of the objection once an agency notice was issued to its bankers on 2<sup>nd</sup> July 2020. If this were indeed true, the Appellant would have immediately filed an application seeking to Appeal out of time. However, that did not happen in this Appeal.
20. In fact the Appellant without so much as taking leave, filed an Appeal out of time with the Tribunal on 14<sup>th</sup> September 2020; close to four months from the expiry of the statutory timeline for filing an Appeal. This in our view demonstrates a level of dishonesty and contempt for this Tribunal on the part of the Appellant. The Statutory timelines provided in the Tribunal's act and the rules and procedures therein are not merely instructive but to afford an opportunity for timely dispensation and resolution of disputes.

In the above regard, we associate ourselves with the holding of the High Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** states:

***“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines.*”**

*Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”*

## FINAL DECISION

21. In light of the foregoing analysis, the Tribunal makes the following Orders;
  - a. The Appeal be and is hereby dismissed.
  - b. The Respondent’s confirmed assessment dated 12<sup>th</sup> May 2020 be and is hereby upheld in its entirety.
  - c. Each party to bear its own costs.
22. It is so ordered.

**DATED and DELIVERED at NAIROBI on this 18<sup>th</sup> day of June, 2021.**



MAHAT SOMANE  
CHAIRPERSON



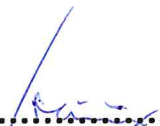
WILFRED GICHUKI  
MEMBER



ROSE WAMBUI NAMU  
MEMBER



JOHN KINYUA WANGARI  
MEMBER



TIMOTHY CHESIRE  
MEMBER