REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 143 OF 2019

BETHSAIDA ENTERPRISES ............................................. APPELLANT

VERSUS

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

JUDGMENT

INTRODUCTION

1. The Appellant is a sole proprietorship owned by Peter Ndung'u Gichigo trading and carrying on business based in Maralal Town.

2. The Respondent is a principal officer who is duly appointed under Section 13 of the Kenya Revenue Authority Act Cap 469 of the Laws of Kenya and is responsible for the control and management, investigations and enforcement and accounting for tax under the Income Tax Act and Value Added Tax Act.

BACKGROUND

3. On the 13th day of April, 2015 the Respondent’s Station Manager visited the Appellant who is situate within Maralal area with a view of conducting routine check on a fact-finding mission on compliance status.

4. Upon the inspection, the Station Manager found out that the Appellant was not registered for VAT yet he was dealing in Vatable items.
5. On 4th May 2015 the Appellant registered for VAT. And On 21st June 2015, he forwarded audited accounts for the year 2014 which were captured on ITMS system on 30th June 2015. The accounts showed a gross turnover of Kshs 4,180,132.00.

6. The Respondent upon checking the Appellant’s iTax for the month of October, 2015 it discovered that the Appellant was filing credit VAT Returns since the date of registration.

7. The Respondent proceeded to conduct an analysis of the Appellant’s ledger and undertook a review of the audited accounts and noted a myriad of issues which were shared with the Appellant.

8. To resolve these issues and anomalies, the parties held several meetings at the Appellant’s premises on 26th October, 2015, 10th December, 2015, 27th January, 2016 and the parties agreed on reconciling the issues and exchanging the necessary documentation.

9. The Respondent thereafter requested the Appellant to lodge and/or file an inventory claim and further amend the VAT for the month of May, 2015 and further requested the Appellant to furnish certain critical documentation.

10. On 24th August, 2017, the Respondent, due to lack of the required information from the Appellant proceeded to give assessments disallowing the inventory claim. The assessment order issued by the Respondent was for Kshs. 2,361,378.00.

11. On 6th October, 2017 the Respondent demanded the assessed VAT of Kshs. 3,821,004.00, inclusive of the penalty and interest thereon.
12. On the same date, 6th October, 2017, the Appellant lodged an Objection. The Respondent declined to consider the Objection for reason that it failed to comply with Sections 51(2) of the Tax Procedures Act, the same having been lodged way out of the statutory timeline of 30 days.


17. This formed the basis of the dispute before the Tribunal.

**APPPELLANT’S CASE**

18. The Appellant set out its case in support of the Appeal through its Memorandum of Appeal and Statement of Facts, together with its written submissions.

19. The main contention in the Appellant’s Appeal is that the Respondent went over and beyond his scope of duty and purported to raise taxes for the period which was not part of the compliance check.
20. The Appellant urges that as a taxpayer he was registered for VAT tax obligation in May of 2015, consequently he directly claimed his VAT refund in May which was registered on iTax as credit on filing for the stated period.

21. He further argues that the then Station Manager, one Mr. Kiptoon verified the inventory and did not disqualify the claim. He posits that the new Station Manager one Mr. Ndambuki is the one who threw the spanner into the works and went ahead to disqualify the rightful taxpayer inventory claim.

22. The Appellant asserts that the taxpayer inventory claim which appeared in May 2015 VAT return as credit was Ksh 1,665,427.00 contrary to Kshs 3,821,004.00 demanded by the Respondent’s inventory claim.

23. The Appellant narrates the steps he underwent with the Respondent with a view of reconciling the claim. He states that vide a letter dated 14th December, 2015 the then Station Manager Mr. Kiptoon gave feedback on the compliance checks and the documents that had been furnished to him by the Appellant and he proposed another meeting for 13th January, 2016.

24. By the Appellant’s letter dated 18th December, 2015, he states that he gave a detailed explanation on the issues raised by the Station Manager. The Appellant laments that he never received any feedback to his grievance.

25. The Appellant concedes that indeed the Respondent met him on 27th January, 2016 at 10am at his premises. He states that it was agreed in the meeting that he was to provide ledgers and a few purchase receipts for scrutiny and inventory adjustment.
26. He further asserts, that on 25th February, 2016 he forwarded the ledgers to the Station Manager, however, the inventory adjustment matter was not addressed as it remained contentious and fluid.

27. The Appellant vide its letter of 26th February, 2016 queried the directions taken by the Station Manager whereby the Appellant alleges that the Station Manager had changed the whole exercise to audit contrary to the initial scope which was a compliance check.

28. In its submissions the Appellant urged that the crux of its case hinged on the axis that the Respondent never carried out a compliance check on the inventory to ascertain the information regarding the inventory claim. That it was unlawful for the Respondent to raise an additional assessment on the inventory claim.

29. The Appellant submitted that the Respondent was duty bound to have vacated the assessment after sixty days of the Appellant’s Objection to the assessment.

30. The Appellant concluded by stating that the Respondent failed to address his Objection and consequently the Respondent never rendered an Objection Decision contrary to the Tax Procedures Act, 2015.

31. The Appellant, therefore, urged the Tribunal to set aside the tax assessments by the Respondent as the same went against the law of natural justice and the VAT Act, Cap 476 of the Laws of Kenya.
RESPONDENT’S CASE

32. The Respondent through its written submissions dated 10th December 2020 and filed on even date urged this Tribunal to dismiss the Appeal by the Appellant and uphold the Respondent’s assessment. It insisted that the tax assessment of Kshs. 3,821,004.00 was done in accordance with the law.

33. The Respondent submitted that the Appellant registered for VAT on 4th May 2015. On 21st June 2015, he forwarded audited accounts for the year 2014 which were captured on the Respondent’s ITMS system on 30th June 2015. The Respondent urged that the accounts furnished to it showed a gross turnover of Kshs. 4,180,132.00 which gave an impression that the Appellant in the year 2014 was below the VAT threshold of Kshs. 5,000,000.00.

34. The Respondent asserts that upon checking the Appellant’s ledger on iTax in the month of October 2015, it was established that the Appellant was filing credit VAT Returns from the time of registration. The Respondent undertook an analysis of the ledger which disclosed a myriad of issues to wit; the Appellant was a VAT credit filer for all the months; and secondly that in the first VAT return for May 2015, there was a huge credit of Kshs. 1,665,427.00 and lastly the Appellant was one of the major wholesalers in Maralal Town and hence there was no justification for filing VAT credit returns.

35. The Respondent asserts that having unearthed the foregoing issues it undertook a review of 2014 audited accounts as captured on ITMS system and noted inter alia that there was no opening stock; the closing stock was Kshs. 3,175,991.00; the gross turnover was Kshs. 4,180,132.00 and that the Appellant’s motor vehicle was worth Kshs. 4,140,000.00 at cost.
36. The Respondent submitted through its written submissions that in order to establish how the Appellant was able to purchase VAT taxable items worth Kshs. 10,408,918 within four months (January 2015 – April 2015) giving rise to a VAT of Kshs. 1,665,427.00 in the VAT return, it undertook a review.

37. Pursuant to a letter dated 12th October 2015 and several meetings held, the Respondent informed the Appellant of its intention to undertake a tax compliance check on his operations.

38. The Respondent contends that the Appellant failed to provide various documents requested for by the Respondent. The Respondent only gave VAT assessments. The assessment order was issued on 24th of August 2017.

39. The assessment order issued by the Respondent was for Kshs. 2,361,378.00 being the amount of disallowed VAT inventory of Kshs. 1,665,427.00 and Kshs. 695,951.00 tax arrears for May 2015 – July 2015 which amounts the Respondent submits had not been posted in the purported inventory claim made by the Appellant.

40. The Respondent states that on 6th October 2017 after the Appellant failed to object to the assessment within the statutory thirty days, the Respondent issued a demand notice.

41. The Respondent submits that the Appellant had until 24th September 2017 to lodge an Objection to the assessment issued on 24th August 2017. The Respondent indicates that there was no Objection lodged within the statutory timelines and this fact is undisputed by the Appellant.
42. The Respondent stated that the Appellant having failed to object to the assessment within the timelines provided by the TPA, the taxes assessed crystallized. The Respondent was therefore within the law to make a demand for payment on 6th October 2017.

43. In support of this assertion the Respondent drew the attention of the Tribunal to Section 51(2) of the TPA which provides that a taxpayer who disputes a tax decision has to lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

44. The Respondent’s main submission is that the Appellant failed to lodge an Objection to the assessment within the timeframe provided under the law, consequently the Respondent could not sanitize the Notice of Objection by the Appellant.

45. The Respondent concluded that its tax assessment of Kshs. 3,821,004.00 was hinged on the letter of the law and should therefore be upheld and the Appeal dismissed since it is incompetent and lacks merit.

ISSUES FOR DETERMINATION

46. After a careful examination of the pleadings on record, the Tribunal has considered the pleadings, the submissions by the parties along with the documentation filed by each party and narrowed down to one issue for determination: -

Whether the Objection dated 6th October, 2017 was valid?
ANALYSIS AND FINDINGS

Whether the Objection dated 6th October, 2017 was valid?

47. The relevant statutory provision on matters of lodging and/or filing of Objections, Objection Decisions and Appeals is Section 51 of the TPA as reproduced hereunder;

“(1) 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.

(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;

(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under Section 33(1) and;

(c) all the relevant documents relating to the objection have been submitted.

(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.

(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.
(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(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".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) 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.”

48. For the Tribunal to make a finding on this issue, it shall briefly revisit the facts herein.

49. It is an uncontroverted fact that the Respondent issued the Appellant with the impugned assessment order on 24th August, 2017. Rightfully, the Respondent has submitted and indeed the Tribunal agrees that the Appellant had thirty days to lodge a Notice of Objection as provided under Section 51(2) of the TPA. The thirty days lapsed on 24th September, 2017.
50. The Tribunal is alive to the fact that the Appellant filed his Notice of Objection on 6th October, 2017 which was twelve days after the thirty-day time limit for filing an objection. The question that abounds before the Tribunal is this, whether the notice of objection was valid having been lodged out of time.

51. The law presupposes that where a party fails to lodge an Objection within the prescribed timeframe, the party is enjoined under Section 51(6) of the TPA to apply in writing to the Commissioner for an extension of time to lodge the objection. We have perused the Appellant’s pleadings and the entire Memorandum of Appeal and the Statement of Facts and nowhere has he pleaded that he applied for an extension of time to lodge a late objection as envisaged under the statute.

52. The Appellant’s agent CS Davies Deogratias Mudambo did not address this issue raised by the Respondent opting to state in his written submissions that the Respondent was supposed to have vacated the assessment after sixty days of the Appellant’s Objection. The Appellant’s agent must have proceeded on the assumption that the Objection filed was within time and the Respondent had not issued an Objection Decision. This issue was not argued to the required standard by the Appellant before the Tribunal.

53. The Respondent has urged the Tribunal to reject the Appellant’s Appeal on two other grounds; first that the Notice of Objection filed by the Appellant did not meet the prescription under Section 51(3)(a) and (b) of the TPA by stating the precise grounds of objection and; second, that the Appeal was filed on 20th March 2019 out of time.

54. The Tribunal does not need to deal with these two aspects of the Respondent’s challenge to the Appellant’s Appeal having found that the Notice of Objection was lodged out of time.
55. The Tribunal therefore upholds the Respondent’s Objection and the Appeal is hereby struck out. The Appellant can avail himself the remedies available under the law to lodge a fresh Notice of Objection if he deems it necessary.

**FINAL DETERMINATION**

56. The Tribunal therefore finds as follows: -

   a) The Appeal be and is hereby struck out.
   b) Each Party to bear its costs of this Appeal.

57. It is so ordered.

**DATED and DELIVERED at NAIROBI on this 16th day of April, 2021.**

[Signatures]

patrick lutta
Chairperson

heLEN Bila
Member

MWAI MBUTHIA
Member

ELISHA NJERU
Member

HABON FARAH
Member