

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 9 OF 2020

CENTS TRADERS.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a business registered in Kenya. Its principal activity is trading in office stationary, office equipment and other similar items.
2. The Respondent is a principal officer of Kenya Revenue Authority (KRA). KRA is an agency of the Government of Kenya established under the Kenya Revenue Authority Act Cap 469 of the Laws of Kenya and is tasked with the mandate of assessment, collection of revenue and the administration of tax laws within the Republic of Kenya.
3. On 26th July, 2018, the Appellant received two assessment orders from the Respondent as follows:-
 - a) Order No. KRA201812205061 VAT December 2015 Kshs 10,488,130.37 inclusive of late interest.
 - b) Order No. KRA201812206891 VAT November 2016 Kshs 40,616,066.71 inclusive of late interest. Vide its letter dated 8th July, 2019 the Respondent,

wrote to the Appellant advising of tax arrears of Kshs 56,686,778.70 and issued a seven-day notice for the Appellant to settle the same.

4. On 15th July, 2019 the Appellant made an application via the iTax platform to file an Objection out of time.
5. On 24th July, 2019, the Respondent sent an email to the Appellant advising it that the Objection was not lodged in writing and not within the stipulated time, and further that no documents were submitted to support the same.
6. The Appellant did not respond to the Respondent's letter of 24th July, 2019. The Respondent then proceeded to issue agency notices to six of the Appellant's debtors vide letters dated 14th November, 2019 demanding VAT of Kshs 42,216,844.00.
7. On 5th December, 2019 the Appellant wrote a follow-up letter to the Respondent requesting for the Respondent's consideration of the Objection lodged.
8. On 3rd January, 2020 the Appellant wrote to the Tribunal advising of the appointment of M/s WADA Tax Solutions Ltd as its tax agent.
9. Being aggrieved by the Respondent's decision, the Appellant lodged its Notice of Appeal on 9th January 2020 and proceeded to file its Memorandum of Appeal and Statement of Facts on 10th January, 2020.
10. Upon service, the Respondent lodged its Statement of Facts on 7th February, 2020.

THE APPEAL

11. The Appeal is premised on the following grounds:

- a. That the Respondent erred by demanding additional VAT of Kshs 8,250,501.79 in respect of the tax period December 2015 on non-existing sales of Kshs 51,565,636.16.
- b. That the actual value of the sales made in the tax period December 2015 was Kshs 3,226,222.07 and not the value adopted by the Respondent of Kshs 54,791,858.25.
- c. That the Respondent erred by amending the Appellant's VAT return for the tax period December, 2015 on the iTax platform by substituting the actual sales value for the tax period December 2015 of Kshs 3,226,222.07 with the inflated sales value of Kshs 54,791,858.23.
- d. That pursuant to the erroneous amendment of the December 2015 VAT return, an additional tax assessment of Kshs 8,250,501.79 was erroneously issued on the Appellant as demonstrated in the below workings.

December 2015 VAT Return	SALES	VAT 16%
Additional VAT Assessment return	54,791,858.23	8,766,697.32
Original VAT Return	3,226,222.07	516,195.53
Alleged understated sales/output tax	51,565,636.16	8,250,501.79

- e. That the Respondent erred by demanding additional VAT of Kshs 29,557,263.36 in respect of the tax period November 2016 on non-existing sales of Kshs 184,732,896.00.

- f. That the actual value of sales made in the tax period December 2016 was Kshs 24,341,215.72 and not the value adopted by the Respondent of Kshs 209,074,111.72 which forms the basis of part of the additional assessment issued for the tax period November 2016. [discrepancy noted]
- g. That the Respondent erred by amending the Appellant's VAT Return for the tax period November 2016 on the iTax platform by substituting the actual sales value for the tax period November 2016 of Kshs 24,341,215.72 with the inflated sales value of Kshs 209,074,111.72.
- h. That pursuant to the erroneous amendment of the November 2016 VAT return, additional tax assessment of Kshs 29,559,263.36 was erroneously issued as demonstrated in the below workings.

November 2016 VAT Return	SALES	VAT 16%
Additional VAT Assessment return	209,074,111.72	33,451,857.88
Original VAT Return	24,341,215.72	3,894,594.52
Alleged understated sales/output tax	184,732,896.00	29,557,263.36

- i. That the Respondent erred by disallowing input tax of Kshs 4,409,079.09 claimed in the VAT return for November 2016 on eligible purchases of Kshs 27,556,744.33.
- j. That the Respondent erred by amending the Appellant's VAT return for the tax period November 2016 on the iTax platform by substituting the actual purchase value for the tax period November 2016 of Kshs 27,556,744.33 which was eligible for input tax claim, with a nil purchase value.

- k. That pursuant to the erroneous amendment of the November 2016 VAT return, an additional tax assessment of Kshs 4,409,079.09 was erroneously issued as demonstrated in the below workings.

November 2016 VAT Return	SALES	VAT 16%
Additional VAT Assessment return	-	-
Original VAT Return	27,556,744.33	4,409,079.09
Alleged understated sales/output tax	(27,556,744.33)	(4,409,079.09)

- l. That the additional tax demand made upon for tax period November 2017 and May 2018, of principal tax amounting to Kshs 17,506.76 and Kshs 28,004.93.00, respectively, in respect to VAT were issued arbitrarily with no basis.
- m. That the tax obligations for the tax periods November 2017 and May 2018 were fully discharged within the timelines stipulated in the VAT Act, 2013 thus no additional tax is due for the aforementioned tax periods.
12. In conclusion, the Appellant prays that:
- a) This Appeal be allowed.
 - b) The Respondent's decision be annulled in such a manner as may appear just and reasonable.

THE RESPONSE

13. The Respondent opposed the Appeal on the following grounds;

- a) The assessments were raised on 26th July, 2018. The Appellant made an application to file out of time on 15th July, 2019. Despite making follow-

up calls and writing, the Appellant did not make any attempt to contact the Respondent to validate the objection. In the circumstances, there was therefore no valid objection lodged.

- b) This was a data driven initiative where the Appellant was found to have made imports and not declared the resultant sales from these purchases. There were also unsupported purchases.
- c) The Appellant was in the list of importers issued to the Tax Service Office (TSO) at the advent of relationship management and sector based compliance monitoring.
- d) As per the import data, the Appellant had imported goods with the following values:-

2013	Kshs 22,359,470.68
2014	Kshs 49,485,379.68
2015	Kshs 42,971,363.47
2016	Kshs 246,660,441.65
2017	Kshs 170,872,518.00

Out of all the above imported goods the Appellant had only declared the following sales in its VAT returns thus indicating under declaration: -

2015 - Kshs 29,024,806.76

2016 - Kshs 184,556.839.00

There were no returns for 2013 and 2014.

- e) The imports from 2013, 2014 and undeclared imports for 2016 were totaled up together and marked up at 20%. In the spirit of fair justice, the marked up sales were less the sales declared in the original returns.

- f) The Appellant was issued an additional assessment on 26th July, 2018 using mark up of 20% on the imports. The input from imports were not allowed since they were beyond the six months allowed. The additional tax due was as tabulated below.

	2015	2016
Total imports	42,971,363	153,944,080
Markup rate	20	20
Sales from imports	51,565,636	184,732,896
Sales in original return	3,226,222	24,341,216
Revised sales	54,791,858	209,074,112
Output tax	8,766,697	33,451,858

14. In conclusion, the Respondent prays that: -

- a. The Tribunal upholds the Respondent's decision to charge a principal tax amounting to Kshs42,216,844.00 inclusive of penalties and interest under Section 38 of the Tax Procedures Act, 2015(TPA).
- b. The Tribunal dismisses the Appeal with costs borne by the Appellant.

ISSUES FOR DETERMINATION

15. Having considered both parties' pleadings, documentation and submission the Tribunal is of the respectful view that the issues that call for its determination are as hereunder: -

- a) **Whether the Appellant's objection dated 15th July 2019 was valid.**
- b) **Whether the Respondent erred in law and fact in demanding additional VAT for the tax periods December 2015 and November 2016.**

ANALYSIS AND FINDINGS

16. Having determined the said issues, the Tribunal will proceed to analyze them hereunder;

a) Whether the Appellant's objection dated 15th July 2019 was valid.

17. The Appellant received two assessment orders from the Respondent on 26th July, 2018. From the records adduced, the Appellant filed its objection vide its letter dated 15th July, 2019 which is about one year later from the time of receiving the assessment. This was after the Respondent had written to the Appellant vide its letter dated 8th July, 2019 asking them to settle the tax arrears within seven days.

18. The TPA offers the Appellant an opportunity to seek leave and apply for extension of time to file a Notice of Objection. Section 51(6) and (7) of the TPA provides as follows: -

“51(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

51(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.”**

19. The Tribunal notes that the Appellant admits, in its submissions of 4th March 2021, Paragraph 4.4.1, that it lodged the objection on 15th July, 2019. It further states on Paragraph 4.4.2 that it responded and cleared the air by answering

the Respondent's queries vide its letter dated 9th September, 2019. We also note that the Objection is annexed to the Memorandum of Appeal in annexures D and E.

20. To satisfy the provisions of Section 51(6) and (7) of TPA, the Appellant was expected to apply in writing, stating the grounds of the late objection and provide supporting documentation as evidence to plead its case. The contents of the Appellant's letter dated 9th September does not in any way meet the said conditions.
21. Further the Appellant's Notice of Appeal dated 9th January, 2020 is appealing the decision of the Respondent dated 26th July 2018. Sections 13(1)(b) and 13(3) of the Tax Appeals Tribunal Act (TATA) stipulate the procedure of filing a notice of appeal and provides as follows;

"13 (1) A notice of Appeal to the Tribunal shall: -

...(b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.

13(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)."

22. From evidence on record, the Appellant filed its objection after more than eleven months, further, it failed to file an application to lodge the objection out of time as provided for under Section 51(6) of the TPA. The Tribunal further notes that the Appellant lodged its Notice of Appeal out of time. It is therefore the Tribunal's view that the Appellant has failed to discharge its obligations to follow the laid down procedures in the TPA and TATA.

23. The assessment having been done on 26th July, 2018 the Appellant has failed to demonstrate to the satisfaction of the Tribunal any reasonable cause that prevented it from filing its objection outside the statutory period. Further, the Tribunal notes that the Appellant equally filed an Appeal out of time without seeking leave from the Tribunal to extend the time to do so. On this front alone this Appeal is incompetent.
24. Consequently, the Tribunal makes a finding that Appellant's objection dated 15th July 2019 was not valid.

c) Whether the Respondent erred in law and fact in demanding additional VAT for the tax periods December 2015 and November 2016.

25. The Tribunal having made its findings in issue (a) above will not delve into the remaining issue herein as doing so would be an exercise in futility.

FINAL DECISION

26. The upshot of the above is that the Appeal lacks merit and fails. Consequently, the Tribunal makes the following Orders: -
- a. The Appeal is hereby dismissed.
 - b. The Respondent's tax demand vide its assessment orders dated 26th July 2018 is hereby upheld.
 - c. Each party to bear its costs.
27. Orders accordingly.

DATED and DELIVERED at NAIROBI on this 25th day of June, 2021.



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JOSEPHINE K. MAANGI
CHAIRPERSON



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PATRICIA M. ANAMPIU
MEMBER



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TANVIR ALI
MEMBER



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GEOFFREY KARUU
MEMBER



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DELILAH K. NGALA
MEMBER