

**THE REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 401 OF 2020**

CENTURY FEEDS LTD.....APPELLANT

-VS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. The Appellant is a Company incorporated in Kenya and based in Nakuru whose principal activity is the business of processing of animal feeds. It also deals in sales of raw materials such a maize seeds and gross cotton seeds.
2. The Respondent is a principal officer appointed under Section 11 (4) of the Kenya Revenue Authority and is responsible for the administration and enforcement of various revenue laws among them Income Tax Act, VAT Act.

B. BACKGROUND

3. The genesis of the matter emanates from the Respondent conducting an audit on the Appellant's books of accounts records for the period January 2015 to December 2017.
4. On November 20, 2017 the Respondent requested to be furnished with supporting documents.

5. Consequently, the Respondent issued the Appellant with VAT and Income Tax Assessments vide a letter dated 30th August 2018.
6. The Appellant being dissatisfied with the assessment raised by the Respondent, lodged a Notice of Objection dated 20th September 2018.
7. The Respondent then issued its Objection Decision on 16th November 2018 confirming the assessment as the Appellant failed to give reasonable grounds of objection and to provide relevant evidence in support of their objection.
8. The Appellant being dissatisfied with the Respondent's Objection Decision instituted the appeal herein on 2nd November 2020.

C. APPEAL

9. The Appellant appeals to the Tribunal against the decision issued by the Respondent vide a Memorandum of Appeal.
10. The grounds of appeal are as follows;
 - a. The Respondent erred in not considering the Appellant's self-assessments for the year 2015 and 2016.
 - b. The Respondent has computed VAT on sales that are exempted from VAT as per Schedule 1 of the VAT Act 2013 and failed to allow input VAT.
 - c. The Respondent has failed to include some purchases that were raw materials used in the manufacturing process.
 - d. The Respondent has raised additional income tax way above the margins at the industry.

11. The Appellant makes the following prayers;
 - a. The Respondent should take into account the clients self-agreement.
 - b. The Respondent should take into account the input VAT also factor in the gross margins of the industry.
 - c. The Respondent should allow claiming of input VAT and also allow banking that did not originate from sales.

D. RESPONSE TO THE APPEAL

12. The Respondent responded to the grounds of Appeal through a Preliminary Objection dated 7th October 2020, as follows;
 - a. That the Appellant's Appeal is out of time and is in contradiction to Section 52(1) of the Tax Procedures Act, 2015 as read together with Section 13(1)(b) & (3) of the Tax Appeals Tribunal Act, 2013 and Rule 3(1)(b) of the Tax Appeals Tribunal (Procedure) Rules, 2015 thus in contravention of the law.
 - b. That the application is therefore an abuse of the process of the Tribunal and a waste of resources.
 - c. That the suit is thus fatally defective, lacks merit and must fail.
13. The Respondent also filed a Statement of Facts on 7th October 2020 responding to the Appeal as follows;

- a. The Respondent avers that the decision to arrive at the assessment was justified and had basis in law as required under the Tax Procedures Act, 2015, the Value Added Tax Act, 2013 and the Income Tax Act Cap 470 of the Laws of Kenya.
- b. The Appellant was assessed based on the undeclared and under declaration of income arising from under statements of sales and over statement of purchases and expenses for purposes of income tax. Additionally, the Appellant had failed to declare VAT on the vatable supplies contrary to the provisions of the VAT Act 2013.
- c. In response to the first ground of appeal, the Respondent avers that it was empowered by Section 31 (1) of the Tax Procedures Act, 2015 to amend the Appellant's assessment to ensure that correct amount of tax is payable with respect to the period under review.
- d. In response to the second ground of appeal, the Respondent contends that as at the time of supply and period of assessment, the items in the nature of animal feeds and the materials used in its manufacture were vatable. The exemption was only brought about by the VAT (Amendment) Act 2014 and the Finance Act No. 38 of 2016.
- e. In response to the third and fourth grounds of appeal, the Respondent reiterates that the Appellant overstated its purchases and expenses and understated sales made. Consequently, adjustments were done to arrive at the correct taxable income which adjustments were based on the examination of the documents availed by the Appellant.

- f. The Respondent further avers that the burden of proof is on the Appellant to produce the evidence challenging the Respondent's decision in line with Section 56 (1) of the Tax Procedures Act 2015.
14. The Respondent prays that the Tribunal;
- a. Upholds the Objection Decision dated 16th November 2018.
 - b. Dismiss the Appeal with costs to the Respondent as the same is devoid of any merit.

E. ISSUES FOR DETERMINATION

15. Having carefully considered the grounds of appeal, the submissions of the parties, the authorities cited in support thereof, it is clear to the Tribunal that only one issue falls for determination. We hereby restate this single issue as being:
- a. *Whether the Respondent's Preliminary objection is merited*

F. ANALYSIS

16. The Respondent herein raised a preliminary objection filed with the Tribunal on 7th October 2020, which the Appellant herein has not responded to or made any discernable submissions in respect thereof. We deem it proper therefore, to dispense with before delving into the merits of the substantive tax issues raised through the Appellant's Memorandum of Appeal.

17. The Respondent contends that the Appeal was filed out of time and offends the provisions of Section 52 (1) of the Tax Procedures Act, 2015 as read together with Section 13 (1) (b) & (3) of the Tax Appeals Tribunal Act 2013 and Rule 3 (1) (b) of the Tax Appeals Tribunal (Procedures) Rules 2015. As such the appeal is an abuse of the process of the Tribunal and a waste of resources, hence the need to dismiss it and uphold the Commissioner's Objection Decision.
18. We think it apt to reproduce the relevant provision of the law as relied upon by the Respondent. Accordingly, Section 52 (1) of the Tax Procedures Act, 2015 (TPA 2015) stipulates as follows;

"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)."

19. Section 13 (1) (b) & (3) of the Tax Appeals Tribunal Act, 2013 provide as follows;

"(1) A notice of appeal to the Tribunal shall—

a.

b. Be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.

(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)."

20. The foregoing provision of the law are further elucidated in the Tax Appeals Tribunal (Procedure) Rules, 2015 wherein Rule 3 (1) (b) states as follows;

“A notice of appeal to the Tribunal shall be—

a. ...

b. Submitted to the clerk of the Tribunal within thirty days upon receipt of the decision by the Commissioner.”

21. The substratum of the foregoing provisions of the law insofar as guiding procedures of the Tribunal is concerned espouse that a taxpayer has 30 days following the receipt of an Objection Decision within which, if aggrieved by the decision, he or she may lodge a Notice of Appeal with the Tax Appeals Tribunal. Thereafter, the tax payer has 14 days in which to lodge a Memorandum of Appeal, the Statement of Facts and the impugned tax decision in order for the Tribunal to be properly seized of the appeal. It is these very provisions of approaching the Tribunal that the Respondent contends have been breached by the Appellant in instituting this appeal.
22. Turning to the circumstance of the Appeal before us, following an assessment the Respondent rendered an Objection Decision, which was duly communicated, to the Appellant herein on 16th November 2018. The Appellant filed a Notice of Appeal in respect of this decision on 8th September 2020, almost 2 years since receiving the Objection Decision from the Commissioner.

23. The Respondent submitted that two years is an inordinate delay, a position which the Tribunal wholeheartedly endorses. Our position in this regard is further buttressed by the fact that despite having avenue to seek enlargement of time by set forth grounds in support of such an application, the Appellant herein chose, deliberately that too, to ignore the breaches of statutory timelines it was committing by filing the appeal herein.
24. While in principle this Tribunal, indeed every court of justice, should seek the pursuit of substantive justice, we are not in least bit of the opinion that such a pursuit should result in the reckless wrecking of the rules of procedures that guide the delivery of substantive justice. In this regard, we associate ourselves with the holding in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR*** wherein it was stated thus;

“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...”

25. It is for this reason that we find the Appellant's Appeal offends the statutory timelines set for lodging appeals, hence it is not properly before the Tribunal. Accordingly, we find the Respondent's preliminary objection is merited hence there is no need for the Tribunal to delve into the substance of the Appeal.

G. CONCLUSION

26. The upshot of the foregoing analysis is that the Appeal is incompetent and unsustainable in law. Accordingly, the Tribunal makes the following Orders;


- a. The Appeal be and is hereby struck out.
- b. The Respondent's objection decision dated 16th November 2018 be and is hereby upheld in its entirety,
- c. Each party to bear its own costs.

27. It is so ordered.

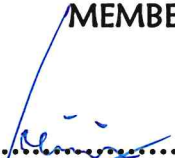
DATED and DELIVERED at NAIROBI this 4th day of June, 2021.


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MAHAT SOMANE
CHAIRPERSON


.....
WILFRED GICHUKI
MEMBER


.....
JOHN KINYUA WANGARI
MEMBER


.....
ROSE WAMBUI NAMU
MEMBER


.....
TIMOTHY CHESIRE
MEMBER

