

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 138 OF 2020**

**CONSOLBASE LIMITED ..... APPELLANT**

**-VS-**

**COMMISSIONER OF INVESTIGATIONS &  
ENFORCEMENT..... RESPONDENT**

## **JUDGMENT**

### **BACKGROUND**

1. The Appellant is a limited liability company duly registered under the Laws of Kenya as a Container Freight Station (CFS) dealing in cargo handling, warehousing and customer clearances.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and is charged with the responsibility among others, for the assessment, collection, accounting and general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent investigated the Appellant's tax affairs covering the financial years 2010-2014 following a reference from the Business Intelligence Office.
4. The Respondent completed its investigations in 2017, whereupon the findings were communicated to the Appellant vide a letter dated 24<sup>th</sup> January 2017, tabulating the Appellant's tax liability at Kshs. 275,242,662/- (inclusive of

penalties and interests) on account of Corporation tax and Value Added Tax on management fees.

5. The Appellant's tax liability was computed based solely on disallowed management fees paid to related companies after the Respondent at the end of its investigations, concluded that no services were rendered.
6. The Appellant lodged its objection vide a letter dated 24<sup>th</sup> February, 2017 contesting the assessments in their entirety.
7. The Respondent in a letter dated 13<sup>th</sup> April, 2017 communicated to the Appellant that the taxes assessed were due and payable. The Respondent categorically stated that the assessment would stand unless the Appellant provided the books of the three related companies to which management fees was paid.
8. There was no communication between the Respondent and the Appellant from 13<sup>th</sup> April, 2017 until September 2019, when the Respondent vide a letter dated 24<sup>th</sup> September 2019 wrote to the Appellant requesting for documents and records including sample VAT 3B schedules and sales ledgers of the three related companies to which management fees was paid.
9. The Appellant responded to the above letter by a letter dated 17<sup>th</sup> October 2019 informing the Respondent that all the documents requested for had been provided to it and hence the Appellant expected that the Respondent was content with its explanations and submissions as no further communication was forthcoming for a period of almost two years. Additionally, the Appellant maintained that the Respondent had not issued an Objection Decision since its Objection dated 24<sup>th</sup> February 2017 and as such, the Appellant's objection was

deemed as having been allowed pursuant to Section 51(11) of the Tax Procedures Act, 2015.

10. The Respondent vide a letter dated 15<sup>th</sup> November, 2019 communicated to the Appellant that its Objection Decision was rendered vide the letter dated 13<sup>th</sup> April, 2017. The Appellant responded on 22<sup>nd</sup> November, 2019 reiterating that the Respondent's letter dated 13<sup>th</sup> April 2017 did not constitute a valid Objection Decision as it lacked certain salient features of an Objection Decision.
11. The Respondent issued a further demand dated 19<sup>th</sup> March 2020, sustaining the initially assessed tax liability of the Appellant at Kshs. 275,242,662.00. This prompted the Appellant to lodge this instant Appeal by filing a Notice of Appeal dated 26<sup>th</sup> March, 2020.

## THE APPEAL

12. The Appellant instituted the Appeal vide a Memorandum of Appeal dated 3<sup>rd</sup> August, 2020 and filed on 4<sup>th</sup> August, 2020. The Grounds of Appeal as stated in the Memorandum of Appeal are as follows; -
  - i. **THAT** the impugned tax decision is illegal and unlawful for purporting to demand for payment of Kshs. 275,242,464.00 after the Appellant's Objection dated 24<sup>th</sup> February 2017 to the assessment dated 24<sup>th</sup> January 2017 was already deemed allowed by dint of Section 51 (11) of the Tax Procedures Act.
  - ii. **THAT** the Respondents acted illegally and or erred in law by:

- a. Contrary to Section 37A (1) (a) of the Tax Procedures Act, issuing assessments against the Appellant in January 2017 in respect of periods before and in the 2013 year of income.
  - b. Contrary to Section 49 of the Tax Procedures Act, failing to give reasons in the assessment for disallowing the Appellant's input VAT claim.
  - c. Contrary to Section 59 (11) of the Tax Procedures Act, purporting to relentlessly demand for payment of disputed taxes in respect of which objection had already been deemed allowed, without any regard to the legality of the subsequent demand.
- iii. **THAT** without prejudice to the above, the impugned tax decision is unlawful and unjustified for purporting to demand for payment of sums where there is no tax liability imposed in law for the transactions in question.
- iv. **THAT** the impugned tax decision is illegal, null and void in totality for breaching mandatory statutory provisions in the Tax Procedures Act.
- v. **THAT** the impugned tax decision violates the Appellant's rights under Article 10, 27, 47, and 48 of the Constitution of Kenya, 2010, therefore is illegal and void.
- vi. **THAT** the Respondent acted illegally in breach of the Appellant's right to access justice by purporting to issue further demand letters dated 3<sup>rd</sup> April, 2020 and 7<sup>th</sup> April, 2020 after lodging of a Notice of Appeal in this Tribunal duly served on 26<sup>th</sup> March, 2020.



vii. **THAT** the impugned tax decision violates the Appellant's legitimate expectation to proper administration of tax law by the Respondent strictly in accordance with the provisions of the Tax Procedures Act, to its detriment.

13. The Appellant prayed that the Tribunal;-

- a) Allows the Appeal,
- b) Annuls and sets aside the Respondent's assessment dated 24<sup>th</sup> January 2017 and all subsequent demands and declares that the Appellant's Notice of Objection dated 24<sup>th</sup> February 2017 was deemed allowed under Section 51(11) of the Tax Procedures Act,
- c) Awards costs of the Appeal; and
- d) Makes such further orders as befits the ends of justice in this case.

14. In response to the Appeal, the Respondent filed its Statement of Facts dated 13<sup>th</sup> May, 2020 on even date.

15. The Respondent averred that the Appellant's Objection dated 24<sup>th</sup> February 2017 was not deemed allowed by dint of Section 51(11) of the Tax Procedures Act as the letter of 13<sup>th</sup> April, 2017 was a valid Objection Decision. The Respondent added that the law does not specify on the format of an objection decision but rather emphasizes on substance over form.

16. The Respondent averred that the provisions of Section 37A (1) (a) that requires the Respondent to refrain from assessing or recovering (a) taxes, penalties or interest thereon in respect of any period before and during the 2013 year of income was inapplicable in this case by dint of Section 37(A) (3) which allows

the assessment and recovery from taxpayers who were already under investigations.

17. The Respondent submitted that the resultant demand letters were justified since the Appellant had failed to lodge an Appeal against the Respondent's Objection Decision issued on 13<sup>th</sup> April, 2017.
18. Based on the foregoing, the Respondent prayed that the Tribunal finds that the resultant assessment and tax demand for the period 2010-2014 is proper and the same ought to be settled. The Respondent urged that the Appeal be struck out with costs.

## **APPELLANT'S CASE**

19. The Appellant set out its case in support of the Memorandum of Appeal, in the Statement of Facts dated 8<sup>th</sup> April, 2020 and filed on 21<sup>st</sup> July, 2020 and its Written Submissions dated 26<sup>th</sup> April, 2021 and filed on 27<sup>th</sup> April, 2021.
20. The Appellant submitted that the tax decision precipitating this Appeal was the demand notice dated 19<sup>th</sup> March, 2020. It added that the said demand constituted an Appealable tax decision within the confines of Section 12 of the Tax Appeals Tribunal Act, 2013.
21. The Appellant averred that Section 51(11) of the Tax Procedures Act, 2015 requires the Respondent to issue an objection decision to the taxpayer who has disputed a tax decision including an assessment, within 60 days of said objection. The provision states; -

*“Where the commissioner has not made an objection decision within sixty days from the date when the taxpayer lodged a notice of objection, the objection shall be allowed.”*

22. The Appellant added that the Respondent acted illegally and in breach of procedural fairness in tax administration by purporting to demand payment of disputed taxes after an objection was deemed allowed under the above provision, in contravention with Section 51 (11) of the Tax Procedures Act, to the Appellant's detriment.
23. It was the Appellant's contention that the letter of 13<sup>th</sup> April, 2017 referred by the Respondent to as an objection decision did not qualify as an objection decision. Accordingly, the Appellant posited that no objection decision was issued within the statutory period of sixty days.
24. The Appellant asserts that the Respondent's letter of 13<sup>th</sup> April 2017 did not constitute a valid objection decision because:
  - a) Nowhere did the letter mention that it was an 'OBJECTION DECISION' whether in the subject head or in the body.
  - b) The letter did not highlight the Appeal mechanisms available to the Appellant as is required of an objection decision.
  - c) The letter arguably amounted to a mere request for further information by KRA itself. KRA erroneously started a further collaborative process to reconcile its tax records AFTER issuing an assessment instead of BEFORE issuing an assessment as required by the Tax Procedures Act.

25. The Appellant emphasized that even after receiving the documents at the acknowledged meeting of 28<sup>th</sup> March 2017, the Respondent failed to issue any Objection Decision within sixty days thereafter or at all.
26. The Appellant averred that the Respondent proceeded to slumber since its last letter of 13<sup>th</sup> April 2017, an implication that no objection decision was made whether within the 60 prescribed days after lodgement of the Objection dated 24<sup>th</sup> February 2017, or at all. Consequently, the Appellant concluded that its Notice of Objection dated 24<sup>th</sup> February 2017 was deemed allowed upon expiry of sixty days from the date of lodgement by operation of Section 51 (11) of the Tax Procedures Act.
27. Further, the Appellant further averred that the Respondent stirred from slumber two (2) years later and purported to revive its demand by issuing a letter dated 24<sup>th</sup> September 2019 requesting for sales ledgers and VAT3B forms for the 3 related companies that received management fees; and threatening to reissue assessments for the same taxes already objected to despite the fact that its Objection dated 24<sup>th</sup> February 2017 had long been allowed by operation of law.
28. The Appellant averred that it did not waive its statutorily accrued right to rely on its allowed Objection, neither could it competently waive that statutorily accrued right. The Respondent's letter of 24<sup>th</sup> September 2019 was therefore issued illegally in so far as it purported to revisit the initial assessment of 24<sup>th</sup> January 2017 that had long been vacated once the objection was deemed allowed under Section 51 (11) Tax Procedures Act.
29. Nevertheless, the Appellant averred that it provided the said sales ledgers and VAT3 forms to the Respondent on 1<sup>st</sup> October 2019. The Appellant adds that

after the acknowledged receipt of the said documents, the Respondent failed to issue any objection decision within sixty days thereafter, or at all.

30. The Appellant averred that it wrote to the Appellant on 17<sup>th</sup> October 2019 protesting the violation of its accrued rights and challenging the unlawful manner in which the Respondent persistently demanded payment yet taxes were not due in light of the allowed Objection, and on a meritorious application of relevant tax law. The Appellant added that it expressed concerns with the Respondent's unlawful and deliberate misconstruction and misapplication of Section 51 (11) of the Tax Procedures Act to its detriment in the said letter.
31. The Appellant submitted that the Respondent's tax decision is patently illegal because the Appellant duly satisfied all information requests and provided documents in a timeous manner. In contrast, the Respondent failed to issue any objection decision whether within sixty days of lodgement on 24<sup>th</sup> February 2017 or within any other period after receiving documents it subsequently requested for.
32. The Appellant further averred that the Respondent has failed to explain its neglect to render any objection decision. Instead, the Respondent has illegally resorted to harassing the Appellant by demanding for payment through letters issued on 15<sup>th</sup> November 2019 (opposed vide the Appellant's letter of 22<sup>nd</sup> November 2019). The Respondent resumed its slumber and again raised a fresh demand on 19<sup>th</sup> March 2020 served on 25<sup>th</sup> March 2020, prompting the filing of a Notice of Appeal in this Honourable Tribunal on 26<sup>th</sup> March 2020.
33. The Appellant adds that even after commencing the Appeal by filing and serving the Notice of Appeal, the Respondent illegally continued to harass the Appellant

demanding payment through phone calls and by issuing further demand letters dated 3th April 2020 and 7th April 2020. The Respondent deliberately violated the Appellant's accrued statutory rights and the right to reasonability and procedural fairness in administrative action.

34. The Appellant submitted that the Respondent's Assessment dated 24<sup>th</sup> January 2017 was unlawful under Section 37A (1) (a) of the Tax Procedures Act for purporting to demand payment of taxes from the period before and during the 2013 year of income. Therefore, the Assessment that was issued in January 2017, for the years 2010, 2011, 2012, and 2013 (or any other earlier period), including any resultant penalties and interest charged, was illegal and therefore should be vacated.

### ***Corporation Tax***

35. The Appellant submitted that it clearly demonstrated to the Respondent and provided the relevant supporting documents as requested to debunk the Respondent's assumption that no services were rendered by the related companies to warrant the payment of the management fees.
36. The Appellant submitted that the management fees paid to the three companies providing management services are tax neutral. If management fees had not been paid, the directors of those three companies would have been paid a similar amount by the Appellant for services rendered. Management fees paid was used to remunerate those Directors for time they spent at the Appellant on behalf of those companies. The Appellant particularly stressed that:
- a. The Respondent cannot disallow management fees genuinely paid by the Appellant to Fastrack Logistics Ltd (FSL), Airwings Ltd (AWL) and

Transfreight Ltd (TFL) in the Appellant's books, and then purport to turn around and tax the income received as management fees by the said FSL, TEL and AWL in their books. The transactions were not designed to avoid tax but were paid as genuine compensation for efforts of the aforesaid Directors and founding shareholders in supporting the establishment of the Appellant's business.

- b. The Appellant also demonstrated that management fees are a tax allowable expense as there is no specific restriction to their deduction under Section 16 of Income Tax Act.
- c. There is no tax loss to the Respondent therefore any disallowance of genuine expense is prejudicial to the taxpayer's legal right to structure their business as they deem fit. The Respondent tabled no evidence of fraud or deliberate intent to evade tax, as purported in the Respondent's Assessment.
- d. Income of Fastrack Logistics Ltd (FSL), Airwings Ltd (AWL) and Transfreight Ltd (TFL) is made up of management fees charged to the Appellant's business income and other operating income from the other activities of these companies. The 3 companies earn income from other trading sources, and are not set up just as shareholder companies.
- e. The Directors' fees were paid by these companies from income generated to compensate the directors for their efforts. PAYE was duly deducted and paid. If these companies were not involved in providing management services, they consequently would not have received management fees and subsequently would not have paid directors' fees for supporting the provision of those services.



37. The Appellant averred that the management expenses were wholly and exclusively incurred for the business, therefore were allowable for tax purposes under Section 15 (1) of the Income Tax Act. It added that Fastrack Logistics Ltd (FSL), Airwings Ltd (AWL) and Transfreight Ltd (TFL) are logistics companies that offer services to the Appellant. The Appellant faulted the Respondent for making the wrong assumption and taking an erroneous position that services rendered by the related companies were not rendered nor did they contribute to the generation of the Appellant's income.
38. To cement the above position, the Appellant reiterated that: -
- I. The directors engaged by the three companies are high value individuals whose services come at a material cost. Their remuneration is borne through the management fees charged to the Appellant.
  - II. The services of FSL, AWL, and TFL are of material economic value to the Appellant having enabled it to manage and grow its company and business over the years.
  - III. The economic value of the services of FSL, AWL and TFL cannot be overlooked. An establishment like the Appellant cannot operate without engaging consultants with the requisite expertise, preferentially to hiring such staff or engaging consultancy firms which would otherwise escalate the costs of the services.
39. Based on the foregoing, the Appellant concluded that the Respondent reached a wrong tax decision hence the Corporation tax assessment should have been vacated.



## ***Value Added Tax***

40. As regards Value Added Tax, the Appellant averred that there was no legal basis on which the input VAT had been disallowed. The Appellant faulted the move to disallow input VAT on the following rounds;
- i. First, the Respondent's assessment failed to state or to disclose the specific provision of the VAT Act under which input VAT had been disallowed which is a mandatory requirement in every assessment. No reason whatsoever was given for the refusal, contrary to Section 49 of the Tax Procedures Act and to settled judicial precedent.
  - ii. Second, the Respondent's tax decision was unlawful because the Appellant claimed input VAT within the time stipulated in the VAT Act and on items specifically allowed for the claim of input tax. There was no procedural basis for disallowing the claim for input VAT.
  - iii. Third, the management services transactions were tax neutral. The Appellant claimed input VAT, while the companies charging output VAT charged and remitted the same. Moreover, the claim for input VAT was proper because management services are not restricted items for the claim of input VAT.
41. The Appellant submitted that it is therefore improper and unlawful for the Respondent to tax output VAT charged and remitted by the management companies while at the same time disallowing the claim by the Appellant, especially where the same is not restricted in law for the claim of input deduction. The Appellant added that there would be no tax implication in the

case where no management fees were charged since there would be no output VAT and therefore no claim for input VAT.

42. The Appellant further submitted that the Respondent had not lost any revenue on the transactions. The Management companies duly declared output VAT while the Appellant had claimed the input VAT against its output VAT. These are group companies which fact KRA erred by failing to consider, yet they are all local companies.
43. Based on the foregoing, the Appellant urged the Tribunal to find that the Respondent's decision to disallow input VAT claim was equally erroneous, and the assessment for VAT should have been vacated on the above ground.

### ***Violation of Legal and Constitutional Entitlements***

44. The Appellant averred that the Respondent violated Article 10 of the Constitution of Kenya, 2010 by failing to demonstrate dignity, equity, social justice, inclusiveness, equality, non-discrimination, good governance, integrity, transparency and accountability in its decision-making process. The Appellant added that the Appellant made the arbitrary decision to demand payment of Kshs. 275,242,464/- from Appellant in breach of the statutory provisions of the Tax Procedures Act without any transparency or accountability, or even any justification, legal or factual.
45. The Appellant averred that the Respondent acted in breach of Article 27 of the Constitution of Kenya 2010 that guarantees equality and equal protection before the law, including the enjoyment of all rights and fundamental freedoms. The Appellant averred that the Respondent has persisted in issuing demands for payment against the Appellant without any regard to its rights to procedural

fairness and in breach of natural justice. The Respondents discriminated against the Appellant and exposed the Appellant to repeated harassment for the colossal sum of Kshs. 275,242,464.00 without any regard to its rights accrued under the Tax Procedures Act, and refusing to acknowledge that the objection had been deemed allowed under Section 51 (11) of Tax Procedures Act.

46. The Appellant averred that the Respondent acted in breach of Article 47 of the Constitution of Kenya 2010, which guarantees fair administrative action. The Respondent chose to ignore the dictates of mandatory statutory requirements before making its demands by failing to issue an objection decision yet it purports to demand taxes validly objected to in their entirety, contrary to Section 51(11) of the Tax Procedures Act.
47. The Appellant submitted that the actions of the Respondent were in total breach and disregard of the doctrine of legitimate expectation in relation to procedural and substantive fairness through the failure to vacate an assessment as prescribed in Section 51(11) of the Tax Procedures Act, 2015.

### **RESPONDENT'S CASE**

48. The Respondent averred that it analysed the Appellant's objection together with the supporting documents availed and subsequently wrote to the Appellant on 13<sup>th</sup> April 2017, indicating that the taxes assessed by the Respondent on 24<sup>th</sup> January 2017 were tax due and payable.
49. The Respondent averred that there was no communication until 2019 when the Respondent sought to enforce recovery of taxes assessed in view of the fact that no Appeal had been preferred by the Appellant. Following a series of engagements, the Respondent wrote to the Appellant on 24<sup>th</sup> September, 2019

requesting the Appellant to provide documents and records listed in the letter for review.

50. The Appellant responded to the letter, on 17th October 2019 indicating among other things, that the Respondent had not issued a valid objection decision and as such, the objection was deemed to have been allowed as per the provisions of the Tax Procedures Act.
51. The Respondent averred that it issued its objection decision on 13<sup>th</sup> April, 2017 as further communicated in its letter of 15<sup>th</sup> November, 2019. Whereas the Appellant wrote to the Appellant reiterating that no valid objection decision had been issued, the Respondent averred that it was not convinced by the Appellant's arguments, prompting the issuance of a further demand letter on 19<sup>th</sup> March 2020, which triggered the filing of the Appeal before this Honourable Tribunal.
52. The Respondent stresses that it did issue an objection decision specifically through its letter dated the 13<sup>th</sup> of April 2017 and as such was within the provisions of Section 51 (11) of the Tax Procedures Act, which is instructive of the objection process.
53. The Respondent submitted that an objection is deemed allowed only when the Commissioner fails to make a decision within 60 days from the date when the notice of objection was lodged. In this case, the Respondent vide the letter dated the 13<sup>th</sup> of April 2017 clearly stated: -

*"As per our assessments served on 24<sup>th</sup> January 2017, tax liability on the management fees shall be deemed to be a disallowed expense from the books of Consolbase Limited, until it is well established that the three*

*companies have fully declared the received fees as income in their books, and the taxes thereon fully accounted for. Please inform us when the books are ready for examination. In the meantime, please note that our assessment stands un-amended and the tax remains payable as assessed, until this further exercise is concluded.”*

54. The Respondent averred that the letter of 13<sup>th</sup> April, 2017 as evidenced in the above excerpt in so far as it communicated the Respondent’s decision to retain the assessment un-amended, was sufficient communication of the taxes due and payable by the Appellant.

55. In response to the Appellant’s allegations that the objection decision lacked key elements, the Respondent argued that there is no format for an objection decision. What matters is substance and not form, echoing the holding of the Court in the case of **Republic v Kenya Revenue Authority Ex parte M-Kopa Kenya Limited [2018] eKLR** that: -

*“In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the tax payer is seeking further particulars or indulgence to enable it pay the taxes demanded.”*

56. The Respondent urged the Tribunal to apply the above finding to objection decisions which would lead to the observation that what matters is substance rather than form and that the decision should be clear and not ambiguous.

57. The Respondent submitted that in line with Section 51 (11) of the Tax Procedures Act, it considered the Appellant’s objection and disallowed it entirely and

communicated this decision to the Appellant vide its letter dated the 13<sup>th</sup> of April 2017, indicating clearly and unambiguously that the assessment remained un-amended and that the taxes therein were due and payable to the Respondent.

58. The Respondent reiterated that it clearly made what was in substance an objection decision as envisioned under Section 51 (11) of the Tax Procedures Act on the 13<sup>th</sup> of April 2017 which was well within the sixty (60)-day window period, adding that it had until the 24<sup>th</sup> of April 2017 to issue its decision since the notice of objection was lodged on 24<sup>th</sup> February 2017.
59. According to the Respondent, the Appellant's Notice of Appeal was void *ab initio* as it was made three years after the objection decision was issued, whereas Section 13 of the Tax Appeals Tribunal Act as read together with Rules 3 (1) and (2) of the Tax Appeals Tribunal (Procedure) Rules, 2015 dictate that a notice of Appeal to the Tax Appeals Tribunal shall be in writing and shall be submitted to the Tribunal within thirty (30) days of receipt of the decision of the Commissioner. The memorandum of Appeal and statement of facts should be filed within 14 days thereafter.
60. The Respondent averred that the Appellant did not file the Notice of Appeal and Memorandum of Appeal within the stipulated timelines and it is for this reason that this Appeal cannot stand.
61. The Respondent further submitted that the Appellant did not seek leave of this Tribunal to extend the time for filing the Notice of Appeal as required under Section 13 (3) of the Tax Appeals Tribunal Act and **Rule 10** of the Tax Appeals Tribunal Rules.

62. The Respondent submitted that this Appeal as it stands is null and void ab initio for flouting procedural dictates on timelines, whose centrality was emphasized by Justice Majanja in the case of Manuchar Kenya Limited v Commissioner of Domestic Taxes [2020] eKLR as follows: -

*“Timelines are an integral part of litigation and are necessary to ensure that parties rights are determined fairly and expeditiously. While a party has a right to Appeal against a judgment, the right is not open ended. It must be exercised timeously as a judgment settles the legal rights of the parties and marks the end of the dispute. That is why a party, who seeks to revive its right of Appeal must explain the delay, the reason for that delay which must be reasonable in the circumstances. Ouko, P explained this principle in Naphtaly Muyonga v Public Service Commission and Another NRB CA Civil Application No. 278 of 2019 [2020] eKLR as follows:*

*By observing the timelines set by the rules, the rights of the parties and other litigants to have their cases progress according to the periods of time prescribed by the rules are guaranteed. When the period prescribed for filing an Appeal has expired the decree-holder obtains a benefit under the law to treat the decree final and beyond challenge, and a legal right accrues to him by lapse of time. He has a legitimate expectation that the decree will not be challenged. Conversely, if satisfactory and acceptable explanation for delay is shown, the Court, in exercise of its absolute discretion may excuse the delay and admit the Appeal out of time.”*

63. The Respondent submitted that contrary to the Appellant’s allegation that the assessments were in violation of Section 37A (1) of the Tax Procedures Act, 2015



that requires the Respondent to refrain from assessing or recovering taxes, penalties or interest thereon in respect of any period before and during the 2013 year of income was inapplicable in this case by dint of Section 37(A) (3) which allows the assessment and recovery from taxpayers who were already under investigation. The Respondent maintained that the investigations began way before the coming into effect of the said provision.

64. In response to the Appellant's allegation that the tax decisions arrived at by the Respondent were erroneous and illegal particularly the decision to charge Corporation Tax and VAT with respect to management fees paid by it to three companies: namely: - Fastrack Logistics limited, Airwings Limited, and Transfreight Logistics, the Respondent stated that its initial investigations established that the payments of management fees may have been made whereas no services were rendered. The Respondent averred that this was a clear cut violation of Section 15 of the Income Tax Act Cap 470 of the Laws of Kenya which provides: -

*“For the purpose of ascertaining the total income of any person for a year of income there shall, subject to Section 16 of this Act, be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that income...”*

65. The Respondent submitted that for the management fees to be an allowable expense for purposes of tax, the Appellant has to show that the fees were incurred in the production of the income in question. It was the Respondent's contention that the Appellant in this case failed to demonstrate this. Further,



there was no sufficient nexus illustrated to link the management fees with production of income by the Appellant.

66. The Respondent relied on the decision in the case of **Q. Land Trustees Limited Vs. Commissioner of Inland Revenue [2015] NZIRA 10 (29 June 2015)**, where Judge A.A. Sinclair, in finding that the management fee was not tax deductible by the taxpayer, made reference to the following: -

- i. “That the entry of a management fee expense paid to the subsidiary in the Trust Financial statements did not establish that management services were actually provided;*
- ii. That there was no evidence of any company resolution or agreement between the Trust and the subsidiary for charging of management services;*
- iii. There was no invoice for the management fee or supporting accounts for any of the work allegedly done”.*

67. The Respondent averred it had no option but to disallow the Appellant’s VAT claimed since the Appellant was unable to demonstrate that the purported management fees paid to the three companies were for services offered, a decision that the Appellant was informed of.

68. The Respondent submitted that Section 56 (1) of the Tax Procedures Act 2015 as read together with Section 30 of the Tax Appeals Tribunal Act provides that the burden of proving or disproving the correctness or incorrectness of a tax decision rests on the taxpayer. Consequently, the Respondent maintained that it was upon the taxpayer to discharge this burden and where the burden is not

discharged to the required standard, then the Taxpayer must pay the assessed tax.

69. The Respondent relied on the decision of Justice Mary Kasango in the case of **Sheria Sacco Society Limited V Commissioner of Domestic Taxes [2019] eKLR** to demonstrate that it is incumbent upon the Appellant to prove that the tax amount imposed by the Respondent was incorrect and stated as follows; -

*“The SACCO however needs to appreciate that what the Tribunal was dealing with was an Appeal against the Commissioners’ confirming notice that the SACCO had taxes to pay. When one appreciates that then the submissions of the Commissioner, under this head, are correct that the burden of proof lay on the SACCO. This is what is provided under Section 30(b) of the Tax Appeal Tribunal Act cap 40. That Section provides:*

*In a proceeding before the Tribunal, the Appellant has the burden of proving-*

- a. Where an Appeal relates to an assessment, that the assessment is excessive; or*
- b. In any other case, that the tax decision should not have been made or should have been made differently.*

*The SACCO did not meet that burden of proof.”*

70. The Respondent submitted that the Respondent’s decision did not violate the Appellant’s rights under the Constitution and/or the Appellant’s right to legitimate expectation since the power to levy taxes is founded in the

Constitution of Kenya. In particular, Article 209 of the Constitution of Kenya, 2010 empowers the national government to impose taxes.

71. The Respondent further submitted that Article 210 of the Constitution of Kenya, 2010 provides that no taxes can be levied except as provided by legislation. Consequently, no taxes can be collected without the approval of Parliament. The Respondent averred that it acted within its legitimate mandate in issuing the additional assessments dated 24<sup>th</sup> January 2017 and the objection decision dated the 13<sup>th</sup> of April 2017.
72. Further, the Respondent submitted that it considered the Appellant's representations as well as the documents availed to it before arriving at the objection decision. The Respondent reiterated that despite being required severally to avail proof of the assertion that the purported management fees paid to the three companies listed above were declared in the books of the named companies and taxes paid thereon as required, the Appellant did not do so.
73. The Respondent concluded that it acted within the law by serving the Appellant with additional assessments, which triggered the Appellant's objection and the Respondent's objection decision, against which the Appellant has lodged its Appeal to this Tribunal.
74. The Respondent urged this Tribunal to find that since the Respondent acted in accordance with the applicable provisions of law, there cannot be legitimate expectation contrary to the law. The Respondent added that legitimate expectation arises where representation by a decision maker has created a genuine expectation that is within his power to honour and make good.

75. The Respondent submitted that not all expectations are covered by law; only legitimate expectations are protected. Where the words of a statute are clear and express, they must override any expectation to the contrary, that a party may claim to have, as was summarized in the case of **Republic vs Commissioner of Domestic Taxes and another, ex-parte Kenton College Trust [2013] eKLR**, as follows: -

*“...After reviewing various decisions and books, I have come to the conclusion that for one to successfully rely on the principle of legitimate expectation it must be demonstrated that:*

*(i) The representation underlying the expectation is clear and unambiguous and devoid of relevant qualifications.*

*(ii) The expectation is reasonable*

*(iii) The representation was made by a decision maker and*

*(iv) The decision maker had the competence and legal backing for making such presentations”*

76. The Respondent submitted that the Appellant failed to show that it relied on a representation by the Respondent to its detriment in order to be able to invoke protection under the doctrine of legitimate expectation. In this case the Respondent followed due process as laid out by the law which resulted in the issuance of an objection decision on 13<sup>th</sup> April 2017 and thus there was no contravention of legitimate expectation by the Respondent.

77. The Appellant urged the Tribunal to find that the Appeal is devoid of merit and is not supported by any evidence or facts, and thus dismiss it with costs.

## ISSUES FOR DETERMINATION

78. The Tribunal having considered the documentation, pleadings and submissions of the parties is of the view that the dispute distils into the following issues for determination: -

*i. Whether the Respondent's Objection Decision issued vide the letter dated 13<sup>th</sup> April, 2017 was valid.*

*ii. Whether the Appellant's Objection was deemed allowed by operation of law.*

## ANALYSIS AND FINDINGS

79. The Tribunal having considered the above issues wishes to analyse them as herein below; -

**i. Whether the Respondent's Objection Decision issued vide the letter dated 13<sup>th</sup> April, 2017 was valid.**

80. The Appellant averred that the Respondent did not issue a valid objection decision. On the other hand, the Respondent maintained that it issued a valid objection decision vide its letter dated 13<sup>th</sup> April, 2017.

81. The Appellant argued that the Respondent's letter of 13<sup>th</sup> April 2017 did not constitute a valid objection decision because:

a. Nowhere did the letter mention that it was an 'OBJECTION DECISION' whether in the subject head or in the body.

- b. The letter did not highlight the Appeal mechanisms available to the Appellant as is required of an objection decision.
  - c. The letter arguably amounted to a mere request for further information by KRA itself. KRA erroneously started a further collaborative process to reconcile its tax records AFTER issuing an assessment instead of BEFORE issuing an assessment as required by the Tax Procedures Act.
82. The Tribunal takes cognisance of the fact that there lacks a specific format under which objection decisions must be crafted. However, it is worth noting that the law outlines some of the key features and content that must be evident from an objection decision.
83. The main instructive legal provisions on an objection decision are found in Section 51(8-11) of the Tax Procedures Act, 2015 as follows; -

*“(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.”*

84. The most striking attributes that can be drawn from the above-reproduced legal provisions are that an objection decision is a decision to allow, disallow, or vary an objection that must be issued within sixty (60) days after the lodgement of a valid objection or receipt of the final communication or information from the taxpayer. The decision must include a statement of findings on the material facts and the reasons for the decision.

85. The courts have recognized the evident ambiguity in construing the format and what should be contained in an objection decision. The court in the case of **Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR**, expressed itself as follows; -

*“A notice of the nature issued to enforce collection of taxes must clearly state to be such a notice, state the amount claimed, state the legal provision under which it is made and draw the taxpayers attention to the consequences of failure to comply with the law and the opportunity provided by the law to contest the finding. Such a notice would give the opportunity to any Kenyan to know the case against it and utilise the legal provisions to contest the decision. The right to fair administrative action and the right of access of justice now enshrined in our Constitution demand nothing less.”*

86. From the above case, it is clear that notices aimed at enforcing collection of taxes, such as objection decisions, must be clear in terms so as not to jeopardize the taxpayer's right to access justice.
87. Whereas the Tribunal recognizes that emphasis is on the substance over form in the wording of objection decisions, the law frowns upon an objection decision that is framed in such an ambiguous manner as not to be certain as to whether the tax collector is seeking further particulars or indulgence to enable it make a final determination or is simply communicating its verdict to allow, disallow, or vary its assessment based on the assessment.
88. In determining whether the objection decision met the above standards, the Tribunal wishes to reproduce the wording of the letter of 13<sup>th</sup> April, 2017, the alleged objection decision. The letter reads as follows; -

*"RE: NOTICE OF OBJECTION TO TAX ASSESSMENT FOR THE YEARS 2010-2014*

*Reference is made to your notice of objection dated 24<sup>th</sup> February 2017 and your response dated 9<sup>th</sup> March 2017.*

*In your above referred letter, and as explained by your tax agent in the meeting held on 28<sup>th</sup> March, 2017, we take note that the management fees were paid to related companies namely;*

- 1. Fastrack Logistics Ltd*
- 2. Transfreight Ltd*
- 3. Airwings Ltd*

*As per our assessments served on 24<sup>th</sup> January 2017, tax liability on the management fees shall be deemed to be a disallowed expense from the books of Consolbase Limited, until it is well established that the three companies*



*have fully declared the received fees as income in their books, and the taxes thereon fully accounted for. Please inform us when the books are ready for examination. In the meantime, please note that our assessment stands un-amended and the tax remains payable as assessed, until this further exercise is concluded.*

*In view of this, you are therefore requested to avail the books of the three companies for examination.*

*Yours Faithfully .... ”*

89. The said letter is ambiguous and does not clearly indicate whether it was an objection decision or a request for documentation. It appears on the face of the letter that it was an outright request to the Appellant to provide further documentation.
90. In defining an objection decision, Section 58(8) of the Tax Procedures Act, 2015 provides that: -

*“when 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"** (emphasis ours).*

A literal reading of this Section leads to the conclusion that an objection decision is plainly a decision to allow (wholly or partially) an objection.

91. The Respondent's letter of 13<sup>th</sup> April, 2017 did not meet the threshold of an objection decision as contemplated under the Tax Procedures Act. The fact that the Respondent did not bother to mention whether in the heading or the body

that the same was an objection decision or even reiterate the legal provisions under which the same was issued is an indication that for all intents and purposes, the Respondent did not mean it to be an objection decision.

92. The Tribunal therefore finds that the letter dated 13<sup>th</sup> April, 2017 did not constitute a valid objection decision.

ii. **Whether the Appellant's Objection was deemed allowed by operation of law.**

93. As set out above, an objection decision must be issued within sixty (60) days upon the lodging of the objection or after the receipt of any further information the Commissioner may require from the taxpayer.
94. There was apparently no communication between the Appellant and the Respondent from 13<sup>th</sup> April 2017 when the Respondent wrote a letter requesting books of the three related companies from the Appellant to 24<sup>th</sup> September 2019 when the Respondent wrote another letter to the Appellant requesting sales ledgers and VAT 3B for the said three related companies.
95. The documents requested were provided to the Respondent on the 1<sup>st</sup> October, 2019. The Respondent ought to have issued an objection decision within 60 days from the date the requested documents were received (1<sup>st</sup> October, 2019).
96. Further, it is puzzling how the Respondent waited a record two years upon requesting for 'books of the three related companies' which were not provided. The Respondent ought to have issued its objection decision citing the failure to provide the requested documents as the basis of its objection decision.

97. The Tribunal finds it untenable for the Respondent to zealously posit that it delivered its objection decision on 13<sup>th</sup> April, 2017 whereas on 24<sup>th</sup> September, 2019 it was calling upon the Appellant to provide documents (namely sales ledgers and VAT 3B samples), in respect of the same assessment issued on 28<sup>th</sup> January 2017, an indication that the investigations were still ongoing and no decision had been made.
98. It cannot lie in the mouth of the Respondent to allege that the letter of 13<sup>th</sup> April 2017 is an Objection Decision when it failed to immediately recover the assessed taxes.
99. The Tribunal notes that failure by the Respondent to communicate any findings to the Appellant after being supplied with documents created a legitimate expectation on the part of the Appellant that the tax issue had been resolved. The two-year delay is unexplained. The Respondent is expected to act timeously and in a fair manner to give a tax payer such as the Appellant some certainty with regard to its tax obligations.
100. Having established that the Respondent did not issue a valid objection decision, the question as to whether the Respondent erred in disallowing the management fees paid to the related companies and accordingly raising assessments in respect of VAT and Corporation Tax is rendered moot.

## FINAL DECISION

101. The upshot of the foregoing analysis is that the Appeal succeeds and the Tribunal makes the following Orders; -

- a) The Appeal be and is hereby allowed.
- b) The Respondent's letter dated 13<sup>th</sup> April, 2017 did not constitute a valid objection decision.
- c) The Respondent's tax demand dated 19<sup>th</sup> March 2020 be and is hereby set aside.
- d) Each party to bear its costs

102. It is so ordered.

**DATED and DELIVERED at NAIROBI on this 25<sup>th</sup> day of June, 2021.**



.....  
**PATRICK LUTTA**  
**CHAIRPERSON**



.....  
**HELEN BILA**  
**MEMBER**



.....  
**MWAI MBUTHIA**  
**MEMBER**



.....  
**ELISHAH NJERU**  
**MEMBER**



.....  
**HABON FARAH**  
**MEMBER**