

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 139 OF 2020

DYER & DYER LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant herein is a limited liability company incorporated in Kenya, being an appointed supplier and importer of aircraft spider tracks and assorted services and products but does not hold either an air operator certificate or approved maintenance organization certificate.
2. The Respondent is a principal officer with delegated powers and function of the Commissioner General, and acts for and on behalf of the Kenya Revenue Authority a body established under the provisions of the Kenya Revenue Authority Act, Act No. 2 of 1995 and is the principal agency charged with the responsibility of collection and administration of revenue taxes on behalf of the Government of Kenya.
3. The Respondent analyzed the data in the system of the Appellant, who was an importer but had not declared the imports for Value Added Tax (VAT). Consequently, in line with the provisions of Section 31 of the Tax Procedures Act 2015 (TPA), the Respondent raised an additional assessment covering the

period of 1st December 2016 to 31st December 2016. The assessment issued on 9th October 2018 was for principal VAT of Kshs.338, 174.24 and interest of Kshs.70, 337.32.00 totaling to Kshs. 408,511.55.

4. The Appellant lodged its objection 11 months later on 31st October 2019. The Respondent considered the late objection and approved the same on 16th January 2020. In the letter approving the late objection, the Respondent requested the Appellant to comply with Section 51 (3) (c) of the Tax Procedures Act 2015 and to provide documents that the Respondent listed in order to support the objection.
5. In a letter dated 6th January 2020 the Appellant was requested to avail the documents requested for by the Respondent on or before 20th January 2020. The Appellant did not provide the documents requested for but sought an extension of one week via email in order to provide the documents. The Respondent rejected the objection on 20th February 2020 and confirmed the assessment.
6. Aggrieved by the Respondent's decision, the Appellant lodged the Appeal through a Notice of Appeal dated 6th April 2020.

THE APPEAL

7. The Appeal herein is premised on the following grounds as contained in the Appellant's Memorandum of Appeal dated 6th April 2020;-
 - a. That the Commissioner violated Articles 50 and 159 of the Constitution of Kenya, 2010 by condemning the Appellant unheard.
 - b. That the Appellant's grievances were not addressed on merit.

- c. That the Appellant is an authorized importer of aircraft spare parts by the Kenya Civil Authority vide invoice number SHP-INV-2774 that fall within the realm of exempted goods.
- d. That the Commissioner's assessment was unlawful and contravened clear provisions of the law.
- e. That the decision by the Commissioner disregarded the provisions of the Value Added Tax Act, Part 1, first schedule, specifying and outlining exempt goods.
- f. That the Commissioner erred in law and fact in failing to take into cognizance that the assessment of the disputed tax fell under special goods that were exempted from taxation within the meaning of exempt goods by dint of their nature and application in the aviation industry.
- g. That the Commissioner failed to take into consideration the fact that the Appellant was involved in the business of importing equipment for use by persons involved the business of aircraft maintenance pursuant to the first schedule part 1 Section A of the Value added tax Act.
- h. That the Commissioner erred in law and fact by failing to take into consideration the fact that the goods by the Appellant fell under 8805.10.00 of the Value Added Tax Act.
- i. That the Commissioner erred in law and fact and misdirected himself by violating the provisions of Section 5 (2) of the Value Added Tax Act.

- j. That it is in the best interest of the Appellant as tax payer that they are certain of their tax obligations and the statutory basis of the decision imposed by the Commissioner.
 - k. That the Commissioner erred in law by failing to take into consideration that the Kenyan Tax regime is primarily on that allows self-assessment and declaring nil returns where applicable.
 - l. That the Commissioner violated the provisions of Section 31 of the Tax Procedures Act 2015 in levying an additional assessment without justifying the assessment.
8. In line with the above grounds, the Appellant makes the following prayers;
- a. That this Tribunal sets aside the confirmed VAT assessment amounting to Kshs. 338,174.24.
 - b. That the Commissioner refunds the same amount for unlawful and negligent surcharge of taxable amount of Kshs. 338,174.00.

RESPONSE TO THE APPEAL

9. In response to the grounds of appeal as contained in the Memorandum of Appeal, the Respondent avers as follows;
- a. The Respondent did not condemn the Appellant unheard as the Appellant was notified to comply with Section 51 (1) (c) of the Tax Procedures Act and the Appellant failed to comply with the request for documents even after the Respondent agreed to extend the time it had provided for the documents to be provided.

- b. The Respondent states that for an objection to be valid, compliance with Section 51 (1) (c) of the Tax Procedures Act is mandatory and therefore it is the Appellant who was in breach of the law.
- c. The Respondent further averred that the Tribunal should take note of the fact that the Appellant has not provided the documents requested for by the Respondent even in the Appeal filed herein.
- d. The Respondent affirms that it was not possible to address the Appellant's objection on merits without the documents requested for since the Respondent could not merely rely on the Appellant's word of mouth without supporting documentation.
- e. The Respondent urged the Tribunal to take note of the fact that even though the Appellant's objection was late by 11 months the Respondent indulged the Appellant in order to consider the issues on merit and this was done in good faith in an attempt to settle the dispute on merit. It was the Appellant who failed to discharge its obligation to support its objection with the relevant documentation.
- f. The Respondent states that although the law recognizes the self-assessment regime, the Respondent is empowered by Section 31 to amend such assessment if it has available information. In this case, the Respondent had the import entries by the Appellant which were not declared in the VAT returns and therefore the additional assessment was within the confines of the law. The Respondent was therefore in compliance with Section 5 (2) of the Value Added Tax and all the other relevant provisions of the tax laws.

10. The Respondent prayed that the Appellant's Appeal be dismissed with costs, the additional VAT assessment raised by the Respondent be confirmed and the principal taxes and interest be found due and payable as per the objection decision rendered by the Respondent.

ISSUES FOR DETERMINATION

11. The Appeal herein raises the following issue for determination by the Honorable Tribunal, namely;
 - a. *Whether the Appellant lodged a valid notice of objection, and if so, has dispensed with the burden of proof in this appeal*

ANALYSIS AND FINDINGS

12. It was submitted for the Appellant that whereas it is not in dispute that Section 31 of the Tax Procedures Act 2015 authorizes the Commissioner to amend assessment, it is essential to consider the circumstance when the Commissioner may amend assessments. The TPA 2015 limits the Commissioner's authority to amend an assessment to three main instances as provided in Section 31 (1) (a) to (c) of the Act being; if there is a deficit carried forward under the Income Tax Act, in the case of excess amount of input under the value added tax and, where the tax payer is liable for the correct amount of tax payable.
13. The Appellant in its submissions averred that in the context of this appeal, the Commissioner's authority was limited because there was no deficit carried forward under the Income Tax Act and the goods did not fall within the VAT Act (by dint of the fact that the goods were declared exempt). The Appellant further submitted that in the event that the Appellant's failure to provide documents were to apply, the Respondent under paragraph 4 of his statement

of facts averred that '*the Respondent analyzed the data in its system of the Appellant who was an importer but had not declared the imports for VAT purposes*'. It therefore emerges that the Respondent had information and belief that the Appellant was an importer, and all the goods imported were in the system.

14. It was further submitted for the Appellant that failure to take care and examine the nature of goods imported by the Appellant as falling within the Vat exempt goods would be unreasonable, whimsical, capricious and arbitrary. That as the Respondent noted, since the imported goods were not declared in the system for vat purposes, the next logical question would have been why the goods were not declared. It is only asking this question that the Commissioner would have made a meritorious decision on the basis of the data in system. The Commissioner is therefore deliberately misleading the Tribunal in alleging that the objection decision was made for want of information and later concede that there was available information in the system.
15. In complete opposition to the Appellant's averments and submissions, it is was submitted for the Commissioner that Section 51 of the TPA 2015 deals with objections to tax decisions and Section 51 (2) of the Act requires a tax payer who disputes a tax decision to lodge a notice of objection in writing with the Commissioner within thirty days of being notified of the decision. The Respondent issued the Appellant with an assessment on 9th October 2018. The Appellant had until 9th November 2018 to lodge a notice of objection but lodged the objection more than 11 months later on 31st October 2019. The Respondent approved the Appellant's late objection vide its letter dated 16th January 2020 and requested the Appellant to provide documents in support of its late objection on or before 20th January 2020 in order to align it with the provisions of Section 51 (3) (c) of the TPA.

16. It was Respondent's submission that Section 51 (3) (c) of the TPA is clear that an objection is only valid if it complies with Section 51 (3) (c) of the Act. The law proceeds in Section 51 (4) of the Act to guide the Respondent on how to proceed where the Commissioner determines that an objection notice has not been validly lodged. The Respondent submitted that he dispense with obligation by notifying the Appellant to provide documents in order to make its objection proper. In light of the Appellant's failure to avail these documents, the Respondent rejected the Appellant's objection as there was no proper objection notice before him. In this regard, the Respondent relied on the cases of *Ngurumani Traders Ltd v Commissioner of Investigations and Enforcement (TAT Appeal No. 125 of 2017)* and *Rongai Tiles and Sanitary Ware Ltd vs Commissioner of Domestic Taxes (TAT No. 163 of 2017)*.
17. The Respondent further submitted that Section 56 (3) of the TPA provides that in an appeal by a tax payer to the Tribunal, the High Court or Court of Appeal in relation to an appealable decision, ***the tax payer shall rely only on the grounds stated in the objection to which the decision*** relates unless the Tribunal or Court of allows the person to add new grounds. As similar provision is echoed in the provisions of Section 13 (6) of the Tax Appeals Tribunal Act. The Appellant in complete disregard of these Sections proceeded to appeal on grounds which are outside the decision of the Respondent. The Appellant further disregarded the procedures of this Tribunal and purported to file a witness statement and annex some of the documents it failed to provide before the Commissioner to validate its objection. As such the Appellant should not be allowed to benefit from its non-compliance with the mandatory provisions of the law requiring it to support its objection with relevant documents.

18. It was submitted for the Respondent that the Commissioner's assessment was based on Section 31 of the TPA which empowers the Respondent to amend an assessment by making alteration or additions from the available information and his best judgment. The Appellant has misinterpreted the provisions of Section 31 of the TPA in its submissions by alleging that the Respondent is limited in its power in Section 31 of the TPA. The Respondent submitted that the Tribunal should take note that the Respondent uses the SIMBA system to clear imports by tax payer. Just like the iTax system, the SIMBA system operates on a self-declaration mode. Tax payers enter their details and details of their imports in the system and declare the import VAT payable. The Respondent is at liberty to conduct a post clearance audit to confirm that the tax payer's self-declarations are in accordance with the law. It is pursuant to such a review of the Appellant's entries that the Respondent noted that the Appellant had not declared import vat and raised an additional assessment in using his best judgment. In the regard, the Commissioner placed reliance on the case of ***Digital Box Limited vs Commissioner of Domestic Taxes (TAT No. 115 of 2017)***.
19. On the issue of the burden of proof, the Respondent relied on the provisions of Section 56 (1) of the TPA 2015 which provides that burden shall be upon the tax payer to prove that a tax decision is incorrect. The Respondent relied our holding in ***Boleyn International Ltd vs Commissioner of Investigations and Enforcement TAT No. 55 of 2019***.
20. We have carefully appraised our minds to the parties' pleadings contesting submissions as well as the evidence and authorities in support thereof. We note that there are a number of sub-issues that emerge from the single issue for determination in this Appeal, namely; the status of the Appellant's witness statement and evidence thereunder, the proper interpretation of Section 31 of

the TPA, validity of the Appellant's objection notice and dispensing with the burden of proof in this Appeal.

21. We begin with the first issue, being the status of the witness statement filed by the Appellant and evidence adduced thereunder. The Respondent has urged this Tribunal to expunge the Appellant's witness statement on the basis that it contains grounds outside the commissioner's objection decision and that the evidence adduced thereunder does not relate to the tax period under assessment. A cursory perusal of the Appellant's witness statement in our view indicates that the Appellant has therein delved into matter of merit beyond the commissioner's objection decision; which was made purely on the basis of the invalidity of the Appellant's objection. This, we find violates the provisions of Section 56 (3) of the TPA which enjoins a tax payer to rely only on the grounds stated in the objection to which the decision relates.
22. We also note, as the Commissioner observed, that evidence adduced through the witness statement does not in any whatsoever relate to the period under assessment. The Commissioner's additional assessment covered the period of 1st December 2016 to 31st December 2016. In contrast, the evidence by the Appellant's witness statement relates to an agreement dated 22nd January 2019, an invoice dated 8th January 2020 and the Appellant's general ledger without invoices in support of the transactions posted in the ledger. It is our view that this evidence fails to comply with the tenets of the evidentiary principle of relevancy insofar as the period under assessment is concerned. In the circumstance, the Tribunal shall therefore oblige with the Commissioner's prayer to expunge the Appellant's witness together the evidence carried thereunder. The same shall have not effect on the proceeding deliberation in this appeal.

23. We now turn our attention to the second issue for our determination; the correct and proper interpretation of Section 31 (1) of the Tax Procedures Act 2015. Before we undertake any analysis on the proper application of this Section, we think it apt to reproduce the same. Accordingly, Section 31 (1) of the TPA 2015 stipulates as follows;

“(1) Subject to this Section, the Commissioner may amend an assessment (referred to in this Section as the “original assessment”) by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that—

(a) In the case of a deficit carried forward under the Income Tax Act (Cap. 470), the taxpayer is assessed in respect of the correct amount of the deficit carried forward for the reporting period;

(b) In the case of an excess amount of input tax under the Value Added Tax Act, 2013 (No. 35 of 2013), the taxpayer is assessed in respect of the correct amount of the excess input tax carried forward for the reporting period; or

(c) In any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates.”

24. The Appellant herein argued that the Commissioner's authority was limited because there was no deficit carried forward under the Income Tax Act and the goods did not fall within the VAT Act (by dint of the fact that the goods were declared exempt). The Tribunal is disinclined to adopt this interpretation for in our view the Appellant's above argument is a product of

misapprehension of the provisions of Section 31 (1) of the TPA, 2015. Section 31 (1) of the TPA in our humble view empowers the Commissioner to amend original assessments by either making alterations or additions to an original assessment on the basis of available information and the Commissioner's best judgment for a particular reporting period. The Section in clauses (a) to (c) underscores the essence and object of the Commissioner's amendment. The Appellant's submission have sought to actively remove it from the scope of Section 31 (1) (a) & (c). While that might be so from the facts of this Appeal, what the Appellant seems oblivious to is the provision of Section 31 (1) (c) of the TPA.

25. Section 31 (1) (c) of the Tax Procedures Act stipulates that the Commissioner may amend an assessment, in **any other case**, to ensure that the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates. The operative phrase in the Section is "**in any other case**" as enlarges the scope of the Commissioner's amendment powers to order that a tax payer may be liable for the correct tax payable for a particular reporting period. As such it is safe to argue that the Act only limits the Commissioner's amendment powers in respect of only Income tax and Value Added Tax. In any other case, this power is expansive and its sole purpose is to ensure that a taxpayer is liable for the correct amount of tax payable. In the circumstances of this Appeal therefore, it is our finding that the Commissioner has properly exercised his powers under Section 31 (1) (c) of the TPA in raising the additional assessment for the period of 1st December 2016 to 31st December 2016.
26. Having so found, we turn our attention to the third issue for determination; on the validity of the Appellant's objection notice. In this regard, we shall begin

with a restatement of the law applicable to the issue of validity of an objection notice. Section 51 (3) of the TPA 2015 this provides as follows;

“(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.”

27. The Appellant’s notice of objection before us blatantly offends the provisions of the above Section 51 (3) (c) of the TPA but first it would be proper to underscore a brief recapitulation of the facts not in dispute. The Appellant herein was issued with additional assessment on 9th October 2018. The Appellant objected to the assessment on 31st October 2019. The Commissioner, for one reason or the other, indulged the Appellant’s late objection and vide a letter dated 6th January 2020 required the Appellant to avail documents in support of its objection notice on or before 20th January 2020. On 20th January 2020, the Appellant emailed the Respondent seeking one week extension for a conclusive response. The Appellant did not revert to the Commissioner upon the expiry of the one week leading to the Respondent to confirm the assessment.

28. It is in light of the foregoing set of facts that the Commissioner urged the Tribunal to uphold his confirmed assessment as the objection before him was not valid for want of documents. In this regard, the Tribunal is guided by the Provisions of Section 51 (3) of the TPA which enlist the validity requirements of an objection notice to the Commissioner. In order to be valid in law, an objection, in whichever form it is presented to the Commissioner must fulfill three pre-conditions; firstly, it must precisely state the grounds of appeal, the amendments to be made and the reasons for the amendment, secondly, in respect of undisputed taxes, the taxpayer must pay the entire amount of the undisputed taxes or apply for extension of time under Section 33 (1) and, thirdly, the objection must be submitted together with all relevant documents in support of the tax payer's case.
29. In the context of the appeal before us, the Appellant herein has failed to provide documents in support of its objection notice despite repeated time extensions granted to it by the Commissioner. We note that the an objection notice without the supporting documents therefore significantly impedes the Commissioner's ability to consider an objection notice as he will be unable to verify the veracity of the grounds of objection therein. The Appellant's failure to comply with the conditions set forth in Section 51 (3) (c) of the TPA in effect left the additional assessment unaffected. Therefore, we cannot fault the Respondent for confirming the assessment after all the indulgence extended to the Appellant herein.
30. This brings to the final issue for our determination; whether the Appellant herein has dispensed with the burden of proof in this appeal. From of the thin record before us, coupled with the expungement of the evidence adduced through the Appellant's witness statement foregoing parts of our judgment, we note that the Appellant woefully failed in adducing a scintilla of evidence

demonstrate that the Commissioner erred in raising the additional assessment in dispute. All the Appellant has are perceived notions and imputations of incorrectness of the assessment without so much as lifting a finger to illustrate the incorrectness of the assessment. This appreciably points to an underwhelming dispensation of the burden placed upon the Appellant in Section 56 (1) of the TPA 2015. Our finding in this regard is buttressed by our judgment in ***Boleyn International Ltd vs Commissioner of Investigations and Enforcement TAT No. 55 of 2019***, where we relied on the following instructive paragraph in *Pierson v Belcher* (H.M. Inspector of Taxes) (1956-1960) 38 TC 387;

“But the matter may be disposed of, I think, even more shortly in this way: there is an assessment made by the Additional Commissioners upon the Appellant; it is perfectly clearly settled by cases such as *Norman v Golder* 26 T.C 293, that the onus is upon the Appellant to show that the assessment made upon him is excessive or incorrect; and of course he has completely failed to do so. That is sufficient to dispose of the appeal, which accordingly I dismiss with costs.”

FINAL DECISION

31. In light of the foregoing analysis, the Tribunal finds the Appeal herein lacks merit and is dismissed forthwith. Accordingly, we make the following Orders;-

- a. The Respondent’s objection decision dated 20th February 2020 be and is hereby upheld in its entirety.
- b. Each Party to bear its own costs.

32. It is so ordered.

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


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MAHAT SOMANE
CHAIRPERSON


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WILFRED GICHUKI
MEMBER


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ROSE WAMBUI NAMU
MEMBER


.....
JOHN KINYUA WANGARI
MEMBER


.....
TIMOTHY CHESIRE
MEMBER