

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 395 OF 2020**

**E.P. DIS KENYA LIMITED.....APPELLANT**

**-VERSUS-**

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

**JUDGMENT**

**BACKGROUND**

1. The Appellant is a limited liability company duly incorporated in Kenya under the Companies Act (Cap 486) Laws of Kenya whose principal activity is distribution of pharmaceutical products, in particular, vaccines.
2. The Respondent is a principal officer of Kenya Revenue Authority, hereinafter referred to as KRA. It is appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, Cap 469. Under Section 5(1) of the Kenya Revenue Authority Act, KRA is an agent of the Government for the collection and receipt of all revenue. Further, under Section 5(2) of the KRA Act, with respect to the performance of its functions under subsection (1), the Authority is required to administer and enforce all provisions of the written laws set out in Part 1 and 2 of the First Schedule of the KRA Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

3. The Respondent issued Corporate Income Tax (CIT) additional assessment orders (the assessments) against the Appellant with respect to the years of income 2016 and 2017 on 20<sup>th</sup> March 2020.
4. Whereas the assessments relate to the aforementioned periods, the Appellant opposed the said assessments as they allegedly reflect years of income 2015 and 2016. The Appellant argues that this is a resultant of a year-end error on iTax which reflects the Appellant as having two year-ends-31<sup>st</sup> March and 31<sup>st</sup> December. The Appellant stated that the correct year end was 31<sup>st</sup> March.
5. In its Memorandum of Appeal, the Appellant detailed the assessments as tabulated herein below:-

<b>Assessment order number</b>	<b>Year-end per assessment</b>	<b>Correct year end per filed returns/signed accounts</b>	<b>Tax due (refund due as per assessment)</b>
KRA202004038838	31/03/2016	31/12/2015	(3,704,187.70)
KRA202004051902	31/03/2016	31/12/2015	(3,704,187.70)
KRA202004057690	31/03/2017	31/12/2016	3,783,309.20

6. Being dissatisfied with the assessments, the Appellant filed an Objection through the letter dated 17<sup>th</sup> April 2020.
7. The Respondent then issued an Objection Decision dated 20<sup>th</sup> July 2020 to the Appellant confirming its assessments with respect to the year of income ended 31<sup>st</sup> December 2016 (erroneously captured as the year of income ended 31<sup>st</sup> March 2017 in the Respondent's Objection Decision). Specifically, the Respondent confirmed an

amount of Kshs 12,254,450.00 which relates to bonafide tax overpayments disclosed in the Appellant's 2016 self-assessment return, hereinafter referred to as SAR.

8. The Appellant was dissatisfied with the Respondent's Objection Decision of 20<sup>th</sup> July 2020 and lodged its Notice of Appeal dated 18<sup>th</sup> August 2020 (though referred by the Appellant as 18<sup>th</sup> July 2020 in error which we hereby note is dated 18<sup>th</sup> August 2020). Subsequently the Appellant filed its Memorandum of Appeal and Statement of Facts on 31<sup>st</sup> August 2020.
9. The Respondent, upon service, filed its Statement of Facts on 29<sup>th</sup> September 2020 and a Witness Statement on 1<sup>st</sup> April 2021.

## **THE APPEAL**

10. The Appeal is based on the following grounds:
  - a. That the Respondent erred in law and in fact by seeking to invalidate the Appellant's Objection dated 17<sup>th</sup> April 2020 on the basis that the Objection did not include all the relevant documents relating to the Objection. The Respondent failed to consider that the Appellant provided all documentation pertaining to this dispute in its Objection dated 17<sup>th</sup> April 2020 and therefore, its objection was validly lodged in accordance with Section 51(3) of the TPA
  - b. That the Respondent's assessments lacked clarity, were generic and did not provide a specific basis for the assessments. The Appellant observes that the assessments ought to have provided

the specific basis for the assessments to enable the company respond appropriately.

- c. That the Respondent erroneously captured the assessment period as relating to the year of income ended 31<sup>st</sup> March 2017 as opposed to the year of income ended 31<sup>st</sup> December 2016.
  - d. That the Respondent erred in law and fact by seeking to disallow valid tax overpayments accruing to the Appellant with respect to the year of income 2016 amounting to Kshs 12,254,450.00 despite documentary evidence availed by the Appellant vide its Objection dated 17<sup>th</sup> April 2020 in support of the tax overpayments.
11. The Appellant through Appendix C1 of its Memorandum of Appeal, annexed the assessments dated 20<sup>th</sup> March 2020. In the Objection, the Appellant advanced various arguments urging the Respondent to reconsider its position as captured in the assessments. Specifically, the Appellant faulted the generic nature of the assessments issued, highlighting the difficulty in analysing the amounts assessed with a view to determining the basis of the assessments and after making inferences as to the basis of the assessments being the rejection of *bona fide* CIT overpayments disclosed under field 13.4 (credits under special arrangements) of the Appellant's 2015 and 2016 SARs provided documentary evidence in support of the CIT overpayments disclosed under field 13.4 of the Appellant's 2015 and 2016 SARs.
12. In Response to the Objection, the Respondent confirmed vide a letter dated 15<sup>th</sup> June 2020 that the assessments relate to tax overpayments disclosed in the Appellant's 2015 and 2016 SARs under field 13.4 as

credits under special arrangements. Further, the Respondent sought to invalidate the Appellant's Objection, pursuant to Section 51 (3) of the TPA on the basis that the Appellant failed to provide all relevant documents relating to its Objection. The said letter was annexed to the appeal vide Appendix C3 of the Memorandum of Appeal.

13. In conclusion, the Appellant prays that the Tribunal: -
  - a. Annuls the Objection Decision; and
  - b. Awards the costs of the Appeal to the Appellant.

## **THE RESPONSE**

14. In response to the Appeal, The Respondent filed its witness statement dated 1<sup>st</sup> April 2021. The Respondent also relied on its written submission to prosecute its case. In the witness statement, the Respondent asserted that the Appellant claimed credit in line 13.4 of the Income Tax Return (ITR) that is credit under Section 42 of the Income Tax Return in the years 2016, 2017, 2018 and 2019.
15. The Respondent claimed that it wrote to the Appellant vide a letter dated 23<sup>rd</sup> August 2019 in reference to its credits claimed under Section 42 of the Income Tax Act Cap 470 (ITA) for the years 2016-2019. The Respondent observed that:
  - a. Field 13.4 of the Appellant's ITR returns contain credits other than those relating to Section 42 of the ITA;
  - b. The field is only meant to cater for credits arising from tax paid on foreign income;

- c. Section 42 (1) of the ITA provides that **“this section shall have effect where, under a special arrangement, foreign tax payable in respect of income derived by a person resident in Kenya is to be allowed as a credit against tax chargeable in respect of that income.”**
- d. The Appellant’s returns for the period in issue indicated that the Appellant had declared tax credits under field 13.4 as shown in this table:

YEAR	CREDIT UNDER SECTION 42 IN KES
2016	25,386,268
2017	12,254,450
2018	548,399
2019	19,124,819

16. In view of the foregoing observations, the Respondent averred that it advised the Appellant to provide the following documents and information to enable the Respondent to validate the credits:
- An analysis, narration and supporting evidence of all Section 42 credits as declared in the return field in iTax up to 2019 year of income;
  - A breakdown of any instalment taxes or any other tax liability that the Appellant may have offset against the credits;
  - Credit amount declared in the last manual return before migration to iTax.
17. The Respondent stated that the Appellant claimed credits in line 13.4 of the income tax returns under Section 42 of the ITA (Credit Special Arrangements) as shown hereunder:

YEAR	2016	2017	2018	2019	TOTAL
AMOUNT	25,386,268	12,254,450	548,399	19,124,819	57,313,936
Return No.	KRA2016 03771863	KRA2017 06405137	KRA2018 13774819	KRA2019 137744819	

18. The Respondent also asserted that it wrote to the Appellant vide a letter dated 23<sup>rd</sup> August 2019 with regards to the claimed credits and advised the Appellant:

- a. To use the prescribed template to submit the following information:
  - i. A schedule and copies of remittance/payment advice(s) for installment or balance of tax payments made outside of iTax in support of credits claimed under the section for each year of income; and
  - ii. Schedule and clear copies of the relevant manual withholding certificates and evidence of remittance by the withholder in support of withholding credits claimed under the section for each year of income.
- b. That credits related to manual payments and certificates will be subject to payment validation before being approved for recognition in the iTax system because invalid credits would be disallowed.
- c. To submit claim for refund of overpayment for validation which could be utilized or refund issued for the same in accordance with the provisions of Section 47 of the TPA.
- d. Any overpayments from previous periods in iTax have already been credited to an advance tax account in iTax and should



therefore not be captured manually in the returns. Any such amounts captured manually will be disallowed.

- e. Field 13.4 of the tax return is only meant for tax credits arising from tax paid on foreign income under special arrangements. The Appellant was requested to provide the following details for any such credits:
    - i. Schedule of tax credit of foreign income and supporting documents; and
    - ii. Evidence of special arrangement issued by the Cabinet Secretary (CS) National Treasury.
19. According to the Respondent, the Appellant was then advised to prepare the schedules and supporting documents within fourteen working days to avoid losing its legitimate credits.
20. The Respondent stated that the Appellant failed to respond to the letter dated 23<sup>rd</sup> August 2019 and failed to provide a summary of its tax position for the years on income 2016, 2017, 2018 and 2019 as per the filed income tax self-assessment returns.
21. The Respondent also stated that it wrote a reminder to the Appellant via registered email of the Appellant on 20<sup>th</sup> January 2020 having failed to support the claimed credits which was not responded to. The Respondent stated that it allowed the Appellant more time until 20<sup>th</sup> March 2020.
22. Further, the Respondent asserted that the Appellant did not demonstrate that the credits were related to foreign tax payable in respect of income earned outside Kenya under special arrangement as per Section 42 of the ITA.



23. The Respondent stated that the special arrangement is stipulated under Section 41 of the ITA and involves relief from double taxation through double taxation agreements (DTA) between Kenya and foreign countries.
24. The Respondent also stated that it subsequently amended income tax returns for the years 2015/16, 2016/17 to disallow the credits since the Appellant did not demonstrate having paid taxes outside Kenya under DTAs as credits under Section 42 of the ITA.
25. It is the Respondent's case that since it did not receive communication or explanations presented by the Appellant, it then disallowed the amounts claimed as credits under Section 42 for the following reasons:
- a. None of the amounts claimed were supported to relate to foreign tax credits claimed under Section 42(1) of the ITA which provides that:  
**“This section shall have effect where, under a special arrangement, foreign tax payable in respect of income derived by a person resident in Kenya is to be allowed as a credit against tax chargeable in respect of that income”.**
26. The Respondent further noted that the Appellant having received the notifications of amended returns filed an Objection to corporate income tax for the years 2015/16 and 2016/17. The Respondent also stated that it issued an Objection Decision to 2015/16, and 2016/17 income tax assessments on 15<sup>th</sup> June 2020. The Respondent also stated that the Appellant responded on 13<sup>th</sup> July 2020 via email and provided its response with information requested earlier.

27. It is the Respondent's case that the Appellant demonstrated that the credits claimed under ITA Section 42 in 2016 were installments taxes paid both manually and via iTax portal. Copies of manual RTGS payment slip for payment of installment tax of Kshs 5,877,971.00 was attached. The rest of the installments were already appearing in the Appellant's iTax ledger save for the first installment paid manually. According to the Respondent, this payment was validated by Finance and is to be captured into the iTax ledger.
28. According to the Respondent, the Appellant's amount claimed through Section 42 of the ITA in 2016 included an amount of Kshs 2,672,291.00 which is sitting at the legacy ledger and will be migrated by the corporate data office to iTax through a credit adjustment voucher which process is ongoing.
29. The Respondent stated that the Appellant had changed its accounting period in 2015 from December to March which caused distortion of the ledger and the Respondent is working to realign it which process is almost complete.
30. With regards to overpayments in 2015 of Kshs 7,571,326.00, the Respondent stated that the amount was credited to advance payment account and claiming again through Section 42 of the ITA amounts to double claim.
31. The Respondent further insisted that the correct provisions of the law for claim of overpaid tax in the matter is Section 47 of the TPA and not Section 42 of the ITA as claimed by the Appellant.

32. It is the Respondent's position that pursuant to Section 47 of the TPA, when a tax payer has overpaid tax under a tax law, the taxpayer may apply to the Commissioner in the approved form for refund of the overpaid tax within five years of the date in which the tax was paid. Therefore, the Respondent maintained that introducing the same credits under field 13.4 is not supported in law and that it also leads the Appellant claiming the same credits multiple times.
33. The Respondent further stated that the Appellant failed to provide any proof or show that there was a special arrangement with the CS Treasury or foreign taxes payable in respect of the income derived by a person resident in Kenya.
34. In conclusion, the Respondent prays: -
- a) That the Appeal be dismissed with costs as it violates mandatory provisions of the law and lacks merit.
  - b) The additional assessment dated 20<sup>th</sup> March 2020 in respect to income tax together with interest and penalties accrued be upheld in its entirety.

## **ISSUES FOR DETERMINATION**

35. The Appellant identified three issues for determination being:
- a. Whether the Appellant's Objection was validly lodged in accordance with the provisions of Section 51(3) of the TPA;
  - b. Whether the Respondent was justified in issuing generic assessments that lacked clarity and sufficient detail to enable the Appellant adequately provide a response; and

- c. Whether the Respondent's attempt to reject *bona fide* tax overpayments disclosed by the Appellant is justified or supported by legislation.
36. On the other hand, the Respondent identified the following issues for determination:
- a. Whether the Appellant was proper in claiming its tax credits under Section 42 of the TPA; and
  - b. Whether the Respondent was justified in validating and processing the Appellant's tax overpayment.
37. The Tribunal has carefully studied the parties' pleadings, submissions and the said issues for determination as framed by the parties. However, we are of the respectful view that the parties issues can be summarized as hereunder;
- a. Whether the Appellant's objection was validly lodged in accordance with the provisions of Section 51(3) of the TPA.**
  - b. Whether the Appellant lawfully claimed its tax credits under the Income Tax Act**
  - c. Whether the Respondent erred in law and fact in issuing the assessments with respect to the years of income 2016 and 2017 to the Appellant.**
38. It is to these issues that the Tribunal will now proceed to analyze and determine.

## ANALYSIS AND FINDINGS

39. It is to these issues that the Tribunal will turn within as hereunder: -

**a. Whether the Appellant's objection was validly lodged in accordance with the provisions of Section 51(3) of the TPA.**

40. The Appellant maintained that it provided all necessary documents required in support of its Objection. On the other hand, the Respondent asserted that the Appellant failed to avail necessary documents to prove that it deserved tax credit.

41. On this issue, the Tribunal refers to Section 51(3)(c) of the TPA which provides as follows: -

**“51(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—  
... (c) all the relevant documents relating to the objection have been submitted”.**

42. The Tribunal holds the view that the documents must be relevant and in support of the Objection. Since the Appellant disclosed overpayments under field 13.4, it then follows that the Appellant had the obligation to provide relevant documents to support the claim under Section 42 of the ITA. The necessary documents include but are not limited to proof of existence of a DTA and proof that tax liability was incurred under the DTA.

43. The Respondent submitted that it wrote to the Appellant vide a letter dated 23<sup>rd</sup> August 2019 with regards to the claimed credits and advised the Appellant to provide relevant documents in support of the Objection but the Appellant did not avail the necessary documents.

The Respondent, in its said letter above, advised the Appellant that upon review of the credits, it required various documentation set therein and enumerated as (i) to (v). In the same letter, the Respondent advised the Appellant that failure to avail the documents would result into the Appellant losing legitimate credits and went further to attach a template for submitting the required documentation. The Tribunal notes the Appellant has not demonstrated to our satisfaction that the said documents were availed by the Appellant.

44. The Appellant, having failed to support the claimed credits, was reminded to do so by the Respondent via the Appellant's registered email on 20<sup>th</sup> January 2020. The Respondent submitted that it allowed the Appellant more time until 20<sup>th</sup> March 2020 but there is no evidence that the Appellant availed the necessary documentation which led to confirmation of the decision.
45. The Tribunal notes that pursuant to Section 30 of the Tax Appeals Tribunal Act as read together with Section 56 (1) of the TPA, the burden lay on the Appellant to prove that the Respondent's demand was incorrect through its objection with the supporting documentation. The Appellant has failed to discharge the said burden.
46. In view of the foregoing analysis, the Tribunal holds that whereas the Appellant lodged the objection within the statutory timelines, it lacked substance to sustain it as the Appellant failed to avail the necessary documents as requested for by the Respondent, pursuant to Section 51(3) (c) of the TPA.

47. Consequently, the Tribunal finds that the Appellant's objection was not validly lodged in accordance with the provisions of Section 51(3) of the Tax Procedures Act.

**b. Whether the Appellant lawfully claimed its tax credits under the Income Tax Act**

**c. Whether the Respondent erred in law and fact in issuing the assessments with respect to the years of income 2016 and 2017 to the Appellant.**

48. Having held herein above in Paragraph 47 that the Appellant's Objection does not meet the threshold under 51(3) of the TPA, the Tribunal is of the view that it will not delve into the remaining issues (b) and (c) as so doing will be an exercise in futility.

49. However, the Tribunal finds it imperative to observe that the parties have discussed at length on the administrative issues regarding the tax assessments, accounting dates and overpayments. This is in view of the fact that from the Respondent's Statement of Facts, it has admitted that the Appellant's amount claimed through Section 42 of the ITA, in 2016, included an amount of Kshs 2,672,291.00 which is sitting at the legacy ledger and will be migrated by the corporate data office to iTax through a credit adjustment voucher which process is ongoing. Hence the process is not complete and therefore in our view and in the interest of justice to both parties, they ought to continue engaging so as to amicably pursue these issues to their logical conclusions.



## FINAL DECISION


50. The upshot of the foregoing is that the Appeal has no merit and the Tribunal makes the following **ORDERS**: -

- a) The Appeal is hereby dismissed.
- b) The Respondent's tax assessment vide its Objection Decision dated 20<sup>th</sup> July 2020 is hereby upheld subject to the Respondent taking into account the administrative matters raised hereinabove in Paragraph 49 of this Judgement.
- c) Each party to bear its own costs.

51. Orders accordingly.

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

  
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**JOSEPHINE K. MAANGI**  
**CHAIRPERSON**

  
.....  
**PATRICIA M. ANAMPIU**  
**MEMBER**

  
.....  
**TANVIR ALI**  
**MEMBER**

  
.....  
**GEOFFREY KARUU**  
**MEMBER**

  
.....  
**DELILAH K. NGALA**  
**MEMBER**