

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 281 OF 2020**

**JIPSY CIVIL & BUILDING CONTRACTORS LIMITED..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

**BACKGROUND**

1. The Appellant is a limited liability company incorporated in the Republic of Kenya under the Companies Act Cap 486 of the Laws of Kenya. The Appellant's principal activity is that of civil and building constructions.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act and is responsible for control and management of the Domestic Taxes Department and accounting for taxes due under the law.
3. The Respondent undertook investigations on the Appellant after it was noted that VAT and Income Tax was being withheld and remitted on behalf of the Appellant by the County Government of Kirinyaga, Kenya Rural Roads Authority (KeRRA) and the Kenya Hospital Association but the Appellant was neither filing returns nor paying the requisite taxes.

4. The Respondent issued a Principal Tax Assessment dated 24<sup>th</sup> September 2019 against the Appellant for the period 2013 to 2018 demanding Kshs. 300,011,359.00.
5. Upon receipt of the assessment, the Appellant lodged an objection on 29<sup>th</sup> October 2019, contesting the Respondent's assessment.
6. The Respondent communicated its Objection Decision to the Appellant vide a letter dated 27<sup>th</sup> December 2019, confirming the assessment on grounds that the Appellant's objection was not validly lodged as per the requirements under Section 51(3) of the Tax Procedures Act.
7. Being aggrieved with the Respondent's Objection Decision, the Appellant filed an Appeal on 16<sup>th</sup> July 2020.

## **THE APPEAL**

8. The Appeal is premised on the following grounds as captured in the Memorandum of Appeal filed on 16<sup>th</sup> July, 2020:-
  - i. The additional assessment is excessive, punitive, estimated by some errors or mistakes of fault in the computation of taxable income.
  - ii. Being a construction company most of direct costs were being done on cash basis and from time to time, the directors sourced and bought the materials it could negotiate for better terms thus making withdrawals from the bank to make purchases. Therefore, the director's expenses

were expenditure wholly and exclusively incurred by him in the production of income of the company.

- iii. The Appellant wished to bring to your attention that VAT returns for the year 2014 with effect from January to November were appropriately filed per the VAT law and the same have not been considered while estimated assessment was being raised hence excessive, punitive and not per the income.
- iv. With reference to table no 7 on the VAT payables, the same is exclusive due to interbank transaction thus double taxation.
- v. In the income tax computation of additional assessment, Section 15 deductions allowed were not taken into account hence the tax demanded not due, not accurate, excessive, punitive not per the income.
- vi. In reference to PAYE, the wage earners are 'low-income employees.' The low-income earners' emoluments were not taken into account as they are not taxable.
- vii. Emoluments were taxed at 'corporate rate' instead of 'individual rate' hence excessive.
- viii. No personal reliefs like pension contributions, insurances interest on mortgage, monthly personal relief not graduated while computing PAYE.

- ix. In reference to withholding tax Kshs. 1,596,578.00 expenses note the company has so far engaged the managers and operations. Hence a 'management fee' as analysed does not refer to professional who qualify for withholding tax on legal and audit fee adequately for the same.
- x. Although legal expenses and audit expenses qualify 'Management or Professional fee' this was paid to resident persons 'who have declared the income in their income tax personal revenue and taxed appropriately, we can only be penalized for failure to operate so that no double taxation'.

## **THE APPELLANT'S CASE**

- 9. The Appellant's case is premised on the hereunder material documents and proceedings:
  - i. Statement of Facts filed with the documents on 16th July 2020.
  - ii. Written submissions dated and filed on 23rd April 2021.
  - iii. List of Authorities dated and filed on 23<sup>rd</sup> April 2021.
- 10. On 27<sup>th</sup> May 2021, the parties executed a Partial Consent that was filed before the Tribunal on the same day. Pursuant to the said Partial Consent the parties agreed as hereunder:-
  - i) That the VAT assessment of Kshs 259,319,773.47 be referred to the Tribunal for determination.



- ii) That Corporation Tax assessment amount be revised from Kshs 19,408,109.00 to Kshs 2,815,477.00 comprising of principal tax of Kshs 1,941,708.00 and interest of Kshs 873,769.00.
  - iii) That the Appellant concedes to PAYE assessment of Kshs 26,621,850.80.
  - iv) That the Appellant concedes to the withholding tax assessment Kshs 1,779,321.42.
  - v) That the Appellant concedes to the tax assessed on the director amounting to Kshs 6,252,546.77.
- 11. The hearing and determination by the Tribunal shall to that extent be strictly restricted to the VAT assessment.
  - 12. The Appellant submits that its total revenue for the period 2013 – 2018 is not in accordance with KRA income received as the “Other incomes” stipulated at Kshs. 115,053,860.00 which includes the Appellant’s bank to bank transfers, cash deposits and loan advances from other parties.
  - 13. The Appellant contends that withholding VAT for the period amounts to Kshs. 46,409,822.00, supported by withholding VAT certificates from the Appellant’s clients as available on the iTax platform. There is a variance of Kshs. 1,810,282.00 between the withholding VAT on iTax and what was stated in the Respondent’s tax assessment dated 24<sup>th</sup> September 2019.
  - 14. The Appellant avers that its input VAT from the tax invoices and receipts for supplies for the period 2013 – 2018 were not taken into consideration when calculating the VAT obligation of the Appellant. According to the

Appellant, the input VAT from its bank accounts and from the bank statements amounts to Kshs. 85,448,188.00. These, it avers, constitute payments made to suppliers subject to VAT as per the VAT Act.

15. The Appellant contends that it has also taken liberty to sample various projects that it undertook to completion and if broken down to specific costs, then the input VAT would reduce significantly. A case in point is the Texas Cancer Centre project as attached to the Appellant's Witness Statement where in the Respondent's tax assessment the VAT obligation is Kshs.13,434,955.00 and the Appellant has computed the VAT obligation to be Kshs. 4,067,788.00.
16. The Appellant avers that if all the projects that the Appellant performed were to be taken into account by the Commissioner to ascertain the VAT input, the assessment of VAT of the Appellant will drastically reduce.
17. According to the Appellant, contrary to its legitimate expectations on how the Respondent should assess VAT, the Respondent intentionally and erroneously miscalculated the VAT inputs of the Appellant with intentions of creating an unrealistic figure that has no rational justification.
18. To support its case, the Appellant cited the case in TAT NO. 112 of 2019, **Roser Roofing East Africa Limited vs. Commissioner of Investigation and Enforcement**, where the Tribunal relied on the case of **Noor Maalim Hussein & 4 others vs Minister of State for Planning, National Development & Vision 2030 & 2 others** where the Court observed:

*“If statutory power is exercised in a manner contrary to the drafters or against public interests, the powers can be said to have been exercised capriciously, irrationally and unreasonably. Thus, irrationality and unreasonableness would play a major role and we shall as Courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take in account relevant considerations or act contrary to legitimate expectations.”*

19. The Appellant avers that in this matter, the Respondent acted contrary to legitimate expectations by intentionally omitting to look into specific costs of the Appellant in its projects in order to correctly ascertain the VAT inputs of the Appellant.
20. The Appellant contends that KRA taxed VAT on an erroneous assumption that all the deposits and credit in the Appellant's account were payments from clients hence vatable. According to the Appellant, among the credits in its bank accounts that the Respondent deemed as sales and levied VAT on are loan disbursement, cash deposits and inter-bank transfers.
21. The Appellant submits that the assessment was founded on non-sale credits in its bank account resulted in excessive, punitive and erroneous computation of VAT by the Respondent.

22. It is the Appellant's assertion that the construction industry is unique in terms of how payments are remitted to a contractor. For example, monies are paid to the contractor by the client through raising of payment certificates at various phases of the work. The certificates are credited as full payments thus they can easily be interpreted as sales. The expenses that were directly incurred by the Appellant in purchase of materials, transport costs, specialist work and administrative overheads total to 80% of the certificate payment amount.
23. The Appellant avers that the Respondent arrived at an erroneous conclusion that because of the payment certificates that were issued, all the credits were taxable as sales. The Appellant further avers that, for that reason, the amount that is claimed is unreasonable, unjust, exaggerated and punitive.
24. The Appellant submits that the Respondent abused its statutory powers by treating all the credit entries including cash deposits, inter-bank transfer, refundable loans and financial advance as valuable sales and levying VAT on them.
25. The Appellant contends that the nature of the investigations and assessment as conducted by the Respondent against the Appellant was an abuse of statutory powers.

26. The Appellant relies on the case of **Republic -vs- KRA (exparte J. Mohamed) Civil Application Number 312 of 2011** where the Courts held that:

*“Whereas this Court is not entitled to question the merits of the decision of the taxing authority, that authority must exercise its powers fairly and there ought to be a best exercise of such powers. A taxing Authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such an action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court intervening.”*

27. The Appellant maintains that the decision of the Respondent to levy VAT on the basis of all the sums credited in the Appellant's bank account irrespective of whether they are loan or income is unreasonable, capricious and in bad faith. The Respondent ignored the well settled principle that not all sales are taxable. It should not be allowed to stand.
28. It is the Appellant's submission that on 27<sup>th</sup> December 2019, the Respondent issued an Objection Decision confirming the assessment on the basis that the objection was not validly lodged as per the requirement under Section 51(3) of the Tax Procedures Act. The Appellant cited the said Section that states thus:-

*“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; and*

*(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.”*

29. The Appellant contends that Section 51(3) of the Tax Procedures Act is subject to interpretation that is in tandem with constitutional provisions. Non-compliance with the aforementioned Section is curable and does not render an objection fatally defective to warrant its summary dismissal without according the objector a chance to remedy the alleged error.
30. The Appellant avers that the Respondent is a quasi-judicial body that must exercise its power within the ambits of the Constitutional right to fair administrative action under Article 47 of the Constitution of Kenya, 2010. In dismissing the Appellant’s objection dated 29<sup>th</sup> October 2019 on the basis that it was not validly lodged and without considering it on its merits, the Respondent acted ultra vires and violated the hallowed Constitutional right of the Appellant to fair administrative action.

31. On this the Appellant relied on the **Tax Appeals Tribunal Matter No. 35 of 2018, David Ndii Mwangi vs Commissioner of Investigations and Enforcement**, where the Tribunal pronounced itself as follows:

*“We find that though the Appellant does not contest the results of the audited consequential assessment, we note that its appeal is hinged on, the question of due process on the said registration, assessment and demand of what was found due as revenue as a result of the relevant audit. It is now trite law that fair and reasonable administrative actions demand that the Appellant be notified of the said registration and the consequences as envisaged under Section 8(a) of the TPA is not only a matter of procedural fairness and an import component of natural justice but a mandatory legal requirement.”*

32. The Appellant contends that failure by the Respondent to consider the Appellant’s objection is in itself a sufficient ground to set aside the Respondent’s assessment notwithstanding the veracity and accuracy of the assessment. The Appellant further contends that the omission fatally flaws the entire process of assessment as conducted by the Respondent that precipitated in this Appeal.
33. It is the Appellant’s assertion that the Tribunal should place weight on whether the Appellant indeed owes the Respondent the claimed monies in VAT. The Appellant further avers that the Tribunal should not decide

the case on the basis of the Appellant's non-compliance with the procedural technicalities of the Respondent. Any errors by the Appellant or technical non-compliance ought not deflect the mind of the Tribunal from the main question of whether taxes are owed as alleged by the Respondent.

34. The Appellant argued that through its lens, the two questions of paramount importance in this matter are framed as below:

- a) Has the Appellant proven that the Respondent's VAT computation is fundamentally flawed?
- b) Has the Respondent failed to demonstrate how it arrived at the VAT assessment?

35. According to the Appellant, if the answer to the two questions is in the affirmative, the Appeal should succeed. In its estimation, the answers to both questions are in the affirmative and hence the Appellant's case is meritorious.

36. To buttress its case the Appellant stated that in the locus classicus of **De Souza v Tanga Town Council [1961] 1 EA 77**, the court held that:

*"...the rules of natural justice apply to tribunals. The concept and doctrine of principle of natural justice and its application in justice delivery system is not new, it seems to be as old as the system of dispensation of justice itself. It is no doubt a procedural requirement, but*



*it ensures that a strong safeguard to any judicial, administrative order or action adversely affecting the substantive rights of the individuals.”*

37. It is the Appellant’s submission that the once sustainable business of construction, is now suffocating financially due to the Respondent’s claim. The Appellant further submits that failure of the Honourable Tribunal to quash the VAT assessed by the Respondent will occasion the Appellant further extreme financial hardships.
38. The Appellant contends that the issuance of agency notices and enforcement letters to the Appellant’s banks and clients has crippled its business and rendered it unable to solicit for work. The Appellant further contends that it is not capable of satisfying the erroneous VAT taxes as claimed by the Respondent. Allowing this Appeal will enable the Appellant to resume business and trade again whilst dismissing the Appeal will be tantamount to a declaration of the commercial death of the Appellant, never for it to resurrect again.
39. The Appellant vide its witness statement dated and filed on 23<sup>rd</sup> April 2021 submitted that being a construction company, most of its direct costs are paid in cash on a regular basis. According to the Appellant, its directors sourced and bought materials after negotiations for better terms

prompting them to make regular withdrawals from the Appellant's bank account to make purchases in its ordinary course of business.

40. The Appellant stated that from 2013 to 2018, it paid several companies that attract VAT for goods and services while executing its projects that were not considered in the Respondent's tax assessment. To support this the Appellant attached a table summary of supplies it avers were subject to VAT from its bank statement.
41. The Appellant contended that on various occasions during the 2013 to 2018 period of investigation, it paid VAT through purchase of various goods and services. Whereas some of the companies did not issue ETR receipts the goods and services were vatiable. According to the Appellant, the ones that have been retrieved confirm that the Appellant paid VAT of Kshs 26,947,953.97 during the investigation period which it avers had been factored in the tax assessment. The Appellant attached a breakdown of VAT which it avers supported invoices and ETR for it in confirmation that VAT was paid but not considered by the Commissioner.
42. The Appellant avers that from a project analysis of the Bill of Quantities for the vatiable items in all its projects it was clear that it incurs VAT inputs that the Respondent ought to have put into consideration when calculating the VAT owed by the Appellant. It gave the example of the

proposed Texas Cancer Centre, which it avers that out of the total project costs of Kshs 97,403,422.74, it bought materials from its suppliers to get a VAT input of Kshs 9,357,166.65.

43. The Appellant submitted that such inputs for all the projects that were listed in the assessment were not factored in by the Respondent in computing the VAT owed by it. To support this argument, the Appellant attached a breakdown of purchase items in the Texas Cancer centre Project totalling to Kshs 9,357,166.65.
44. The Appellant avers that the Respondent did not consider its bank-to-bank transfers, cash deposits and loan advances from other parties when computing the VAT due. It submits that the Respondent assumed that all monies that were credited in the bank accounts of the Appellant were sales leading to an overcharge of VAT.
45. The Appellant stated that it should not be punished for any error of commission or omission by the Accountant that it had hired to file its returns. The Appellant avers that none of the Directors of the Appellant are qualified accountants. It maintains that the Appellant had hired an Accountant who may have made some errors in filing of VAT without the knowledge of the Appellant.
46. In its own analysis of the VAT it submitted, the following core issues arise:

- a) The Total Revenue as per the Appellant's assessment in Kshs 2,043,995,583.81 attracting a VAT component of Kshs 281,930,426.00 but as per the Commissioner Tax Assessment it was Kshs 2,203,415,023.92 attracting a VAT component of Kshs. 303,919,313.47 for the investigations period.
- b) The VAT Input from some of the tax invoices and receipts for supplies for the period under investigations amount to Kshs. 26,947,954.00 which the Commissioner did not take into consideration.
- c) The Withholding VAT for the period as per the KRA iTax portal amounted to Kshs.46,409,822.00; whereas the Commissioner has indicated Kshs. 44,599,540.00 as per its tax assessment letter.
- d) The VAT input from the Appellant's bank accounts and from the bank statements in Equity Bank, Family Bank, I&M Bank, KCB and NIC (now NCBA) Bank is so far ascertained as to Kshs.85,448,188.00. These constitute payments made for supplies subject to VAT as per the VAT Act.
- e) The Appellant has also taken liberty to sample various projects that it undertook to completion and when broken down to specific costs then the VAT input would reduce significantly. A case in point is the Texas Cancer Centre project as attached which Respondents' tax

assessment. The VAT obligation is Kshs. 13,434,955.00 and the Appellant has computed the VAT obligation to be Kshs. 4,067,788.00.

- f) In reference to (e) above, if all the projects were broken down to ascertain the VAT input from the contract bill of quantities and the materials purchases, then the VAT inputs would reduce substantially.
- g) These figures fundamentally flaw the VAT assessment by the Respondent and render them incurably faulty. It exposes the VAT assessment by the Respondent as erroneous and contrary to the statutory methodology of computing the same. It further disclosed that no proper investigation was conducted to warrant a valid assessment.

- 47. The Appellant maintained that the Respondent's assessment of VAT is excessive, punitive, estimated by reason of some error or mistake in the computation of VAT inputs and outputs and ought to be set aside.
- 48. In conclusion, the Appellant submitted that it had achieved the requisite standard of proof of on a balance of probabilities to prove its case for setting aside the Respondent's VAT assessment dated 24<sup>th</sup> September 2019.

### **The Appellant's Prayer**

49. The Appellant prayed that this Honorable Tribunal finds that the Respondent's VAT assessment be set aside with costs.

## THE RESPONDENT'S CASE

50. The Respondent's case is premised on the hereunder material documents and proceedings:
- i. Statement of Facts dated and filed on 21st August 2020 together with the documents attached thereto.
  - ii. Witness statement of Eric Murimi Wachira dated 22nd February 2021 and filed on 23rd February 2021 that was adopted in evidence on the 9<sup>th</sup> April 2021.
  - iii. Written submissions dated 27th April 2021 together with the legal authorities filed therewith on the same date.
51. The Respondent submits that the investigation covered the period 2013-2018 after it was established that tax was being withheld on behalf of the Appellant by different institutions, but the Appellant was not filing returns to be able to utilize the said withholding tax credits.
52. The Respondent contends that the Appellant never filed returns in relation to income tax after the year of income 2015, VAT and PAYE despite having transacted in the period, earned money and had taxes due.

53. It is the Respondent's assertion that it reviewed bank statements, the returns filed when the Appellant started its business, withholding certificates, certificates of works and contracts. The Respondent submits that it proceeded to estimate the Appellant's income for the years and further compared the declared income against the legitimate income expected and found that the Appellant under-declared its income.
54. The Respondent contends that in calculating the income for the years not declared, it applied a net profit margin from the other companies in the construction industry. The Respondent avers that it further estimated the expenses the Appellant could have incurred as no evidence was received on the same.
55. According to the Respondent, it calculated the VAT payable from the contracts received and subtracted the withheld VAT to establish the amount owed by the Appellant.
56. It is the Respondent's submission that upon reviewing the Appellant's payroll, the Respondent found that salaries to the tune of Kshs. 75,825,500.00 had been paid out and PAYE was never remitted. Based on the figure, the PAYE was calculated on individual rates in a graduated scale and demanded.

57. The Respondent avers that the Appellant had failed to withhold taxes which were subject to withholding tax and argued that the companies were resident thus it did not see the point of withholding taxes as per the required law.
58. The Respondent contends that despite objecting to the taxes, the Appellant never paid the admitted taxes as per its self-assessment returns which the Respondent had demanded. The Respondent submits that it raised a preliminary objection in its Statement of Facts on grounds that admitted taxes were not paid during objection and at the point of filing the Appeal.
59. Self-assessment returns, the Respondent avers, are the taxpayers means of acknowledging the taxes due based on their own calculations. Accordingly, taxes declared in a self-assessment are due and payable and ought to be paid. The Respondent further avers that despite demanding the sum to be paid by the Appellant, the sum was never remitted.
60. The Respondent relied on the Judgement of the Tribunal in **TAT 164 of 2018 Mobius Motors K Ltd Vs Commissioner DTD** where the Tribunal held that;-

*“17. Bearing that in mind, this Tribunal has had occasion prior to the Appeal hearin to address itself on the question of validity of an appeal before it. In Tax Appeal No. 127 of 2016: Hewlett Packard East Africa*



*Limited Versus Commissioner of Domestic Taxes, the Tribunal was faced with a similar scenario as herein and held as follows:*

*“The Tribunal in the circumstances finds that the appeal is incompetent and unsustainable in law as the Notice of Appeal was lodged by the Appellant in complete disregard of the mandatory provisions of Section 52(2) of the Tax Procedures Act, 2015. The part payments made on the part of the Appellant were subsequent to the filing of the Notice of Appeal and there is absolutely no arrangement in place as regards to the payment even of the outstanding balance of the tax not in dispute.”*

61. The Respondent contends that tax laws are to be interpreted strictly. However, the Appellant submits that the Respondent was wrong in dismissing its objection on grounds that the admitted taxes were not paid.
62. The Respondent further cited Hon Korir J. in the **Republic v Kenya Revenue Authority ex-parte Bata Shoe Company (Kenya) Limited [2014] eKLR** where he stated that:

*“Secondly, ‘....one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.’ (Per Rowlatt, J in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64 at 71*

*approved by Viscount Simons LC in Canadian Eagle Oil Co. Ltd v Regein [1945] 2 All ER 499, [1946] AC 119.”*

63. The Respondent urged the Honorable Tribunal to uphold its decision and that of the Superior Court in finding that admitted taxes must be paid at the point of objection and at the point of filing the Notice of Appeal.
64. Regarding VAT, the Respondent submits that by virtue of Sections 29 and 31 of the Tax Procedures Act it has the power to issue assessments. The Appellant filed its VAT returns in the month of July 2015 to December 2015 and never filed its VAT returns again. The Respondent further stated that from the VAT returns filed, the Appellant further failed to remit the taxes due.
65. The Respondent argues that the assessment was done in line with the information available to the Respondent and to its best judgment. The Respondent submits that it based its VAT assessment on the established income of the Appellant, an issue that the Appellant admitted to at the hearing and the withholding VAT certificates.
66. It is the Respondent's assertion that at all times, the burden to disprove the assessment was on the Appellant. Its failure to discharge of this burden cannot be placed on the Respondent.

67. The Respondent relied on the Judgement of the Tribunal in **TAT Appeal No. 55 of 2018 Boleyn International Ltd vs Commissioner of Domestic Taxes** where it was stated that:

*“We find that the Appellant at all times bore the burden of proving that the Respondent’s decision and investigations were wrong. The Tribunal is guided by the provisions of Section 56 (1) Of the Tax Procedures Act which states:*

*“In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect”.*

*Further, the Tribunal finds the following paragraph from Piersons vs Belcher (H.M. Inspector of Taxes) (1956-1960) be instructive:*

*“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.”*

68. The Respondent avers that the Appellant’s failure to apply for input VAT and prove its expenses cannot be occasioned on the Respondent. The Respondent in line with the best practice estimated expenses based on

industry practice and deducted the same as evidenced in the assessments raised and agreed to in its statement of facts.

69. The Respondent further submits that Section 56(1) of the Tax Procedures Act places the burden of proof on the taxpayer at all times. Where a taxpayer fails to discharge of the burden, the same does not move to the Commissioner.

70. Legitimate expectation, the Respondent argues, cannot run afoul the law. The Respondent cited **Invollate Wacike Siboe v Kenya Railways Corporation & Another [2017] eKLR** where it was held that:

*“The same position applies to legitimate expectation; no legitimate expectation can arise if effectuating the expectation would result in violation of a statute. The contours of the doctrine are well mapped. Legitimate expectation arises where representation by a decision maker has created a genuine expectation that is within his power to honour and make good. The law however does not protect any expectation; it protects only legitimate expectations. Where the representation is one, which the decision maker is not competent to make, reliance on it cannot in law give rise to legitimate expectation. Hence legitimate expectation cannot arise when the decision maker is acting ultra vires his or her powers. In addition, 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.*

*On the same note, where a public authority has made a representation that it does not have power to make, it is not estopped from asserting the correct position in law.”*

71. It is the Respondent’s submission that the Appellant argued that it had input VAT credits that ought to be accounted for. This, according to the Respondent, is subject to Section 17 of the VAT Act which states:

*“(2) If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in subsection (3), the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation.*

*Provided that the input tax shall be allowable for deduction within six months after the end of the tax period in which the supply or importation occurred,”*

72. The Respondent maintains that its actions were in accordance with the law and in line with the evidence given by the Appellant. The burden of proof cannot be shifted. The Respondent further contends that it has given a rationale for its assessment and has justified the figures therein so as to stand by the tax demanded.

73. The Respondent avers that the VAT Act calls for input VAT to be claimed 6 months after the end of the tax period in which the supply occurred. There is no provision for the extension of time to claim input VAT. The time to claim input VAT, it argues, is not based on the date returns are filed but on the date the supply occurred thus amending the assessment does not change the period in which one can claim input VAT.
74. The Respondent relied on the Judgement of Hon. Korir J in **Republic V Kenya Revenue Authority Exparte Bata Shoe Company Kenya Limited [2014] eKLR** where it was stated that:

*“The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by lord Donovan in Mangin v Inland Revenue Commissioner [1971] AC 739: First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate expectation tax avoidance devices. As Turner, J said in his (albeit dissenting) judgement in Marx v Inland Revenue Commissioner [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.*

*Secondly, ‘....one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumptions to a tax. Nothing is to be read in, nothing is to be implied.*

*One can only look fairly at the language used.’ (Per Rowlatt in Cape Brandy Syndicate v Inland Revenue Commissioner [1921] 1 KB 64 at 71 approved by Viscount Simons LC in Canadian Eagle Oil Co. Ltd v Regeim [1945] 2 ALL ER 499, [1946] AC 199*

*Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation might be adopted.*

*Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid in its construction.*

*....Hence, the governing principle in this. When constructing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein.”*

75. The Respondent avers that the time to claim input VAT cannot be extended by any party or body with administrative powers as the law is clear on the timelines.



76. The Respondent further cited the Tribunal where it held in **TAT 147 of 2017 Applewood Investment Limited vs Commissioner Domestic Taxes** that:

*“The Appellant cannot ask the Respondent to extend the time to claim input VAT as the Respondent cannot be compelled to perform duties that it has no powers to do as is clearly envisioned in legislation. In REPUBLIC VS KRA EX-PARTE LAB INTERNATIONAL (K) LTD (2011) eKLR THE Court while dealing with the issue of Section 17(2) of the VAT Act held as follows:*

*“The Commissioner cannot impose responsibility with motives outside statute. the Respondent’s hands are tied to abiding with the provision of Section 17(2) where the allowable claim time frame is six (6) months to which the Appellant did not adhere to thus the claim was validly disallowed since there is no provision in law that allows the extension of time to claim input VAT. Had the Appellant complied with the timeline, then the claim would have been considered.”*

*Having considered the said provisions of the law, namely, Section 17 (2) of the VAT Act, 2013 and Section 31 (4) of the TPA, it is clear that the statutory timelines therein are not contradictory as Section 31 (4) of the TPA refers to timelines given for self-assessment whereas Section 17 (2) of the VAT Act refers to timelines in respect of claims of input VAT. The*



*Tribunal finds that the Appellant has failed to demonstrate any ambiguity or contradiction as alleged.”*

77. The Respondent maintained that based on the above Judgement, it was clear that the 6 months given in statute are to be adhered to strictly. It further stated that the Tribunal also grappled with the issue of input VAT in the Appeal **TAT No. 30 of 2018 Highland Mineral Water Ltd vs Commissioner Domestic Taxes** where it found that:

*“The wording of Section 17 (2) in the Tribunal’s view, is clear and unambiguous and cannot be interpreted to have any other meaning. The Tribunal therefore disagrees with the Appellant’s contention that six month cut off period should apply to the period the VAT return relates to irrespective of the date of submission of the return”*

78. The Respondent urged the Tribunal to stand by the decision of TAT No. 257 of 2018 **Foresight Infrastructure Inc vs Commissioner of Domestic Taxes** in which this Tribunal differentiated the case therein and **Rabai Operation and Maintenance Ltd vs Commissioner of Domestic Taxes**.
79. The Respondent submits that at all times, the Appellant was registered for VAT thus the Judgment of **Rabai Operation and Maintenance Limited** would be inapplicable to the Appellant.

80. The Respondent contends that at no point was VAT charged on inter-bank transfers and loans but was levied on income received from construction projects undertaken by the Appellant and evidenced by the project certificates or certificates of work. The Respondent further contends that no evidence has been adduced by the Appellant to prove the same.
81. The Respondent avers that the Appellant admitted to the income as assessed by the Respondent which was the basis of the VAT assessment. Therefore, the averment by the Appellant cannot hold water as the VAT assessment is derived from the admitted income of the Appellant which was used to compute VAT.

### **Respondent's Prayers**

82. The Respondent prays that this Tribunal considers the case and finds that;
- i. Upholds the spirit of the law.
  - ii. Dismiss the Appeal with costs.

### **ISSUES FOR DETERMINATION**

83. The Appeal herein raises the following issues for our determination, namely;
- i. Whether the Appellant's Appeal was Valid.

- ii. Whether the Respondent erred in its assessment of VAT on the Appellant.

## **ANALYSIS AND FINDINGS**

### **i. Whether the Appellant's Appeal was Valid.**

84. The Respondent submitted that admitted taxes were not paid prior to filing its Notice of Objection and prior to filing the Appeal. According to the Respondent the self-assessment returns are the taxpayers means of acknowledging the taxes due based on their own calculations.
85. The Respondent insisted that despite objecting to the taxes, the Appellant never paid the admitted taxes as per its self-assessment returns which the Respondent had demanded.
86. On its part the Appellant contends that Section 51(3) of the Tax Procedures Act is subject to interpretation that is in tandem with Constitutional provisions. According to the Appellant, non-compliance with the aforementioned Section is curable and does not render an objection fatally defective to warrant its summary dismissal without according the objector a chance to remedy the alleged error.

87. The Appellant further stated that the Respondent is a quasi-judicial body that must exercise its power within the ambits of the Constitutional right to fair administrative action under Article 47 of the Constitution of Kenya, 2010.

88. The Tribunal disagrees with the Appellant. Section 51 (3) of the Tax Procedures Act states as thus:-

*“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; and (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.”*

89. Additionally, Section 52(2) of the Tax Procedures Act states as follows:-

*“A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”*

90. The above statutory provisions are couched in mandatory language. We are of the view that non-compliance with the aforementioned mandatory Sections is not curable in the manner the Appellant argued.

91. The Tribunal notes the Consent as executed between the parties and in the absolute interests of justice upholds it. The Tribunal's hands are, however, tied in so far as Sections 51(3) and 52(2) are concerned in respect of validity at the point of objection as well as at the point of Appeal. The Tribunal has previously commended itself in the most unequivocal terms on the validity of any objection or Appeal lodged and filed, respectively, in contravention of the foregoing mandatory statutory provisions and there is no cause to depart from such previous findings.
92. Consequently, the Tribunal finds that the Appellant's notice of objection and the subsequent Appeal herein were not valid and are unsustainable in law.

**ii. Whether the Respondent erred in its assessment of VAT on the Appellant.**

93. Having established that the Appellant's notice of objection and subsequently the Appeal were not valid, The Tribunal will not delve into this issue as the issue has been rendered superfluous.

## FINAL DECISION

94. Based on the foregoing analysis, the Tribunal finds that the Appeal is not merited and makes the following Orders:-

- i) Judgment is hereby partly entered in terms of the Partial Consent dated and filed before the Tribunal on the 27<sup>th</sup> day of May, 2021.
- ii) The Respondent's Objection Decision dated 16<sup>th</sup> July 2020 is, subject to the purport of the foregoing Partial Consent, hereby upheld.
- iii) Each party to bear its own costs.

95. It is so ordered.

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of June, 2021.**

  
.....  
**ERIC N. WAFULA**  
**CHAIRMAN**

  
.....  
**CATHERINE MUTAVA**  
**MEMBER**

  
.....  
**GABRIEL KITENGA**  
**MEMBER**

  
.....  
**ABRAHAM KIPROTICH**  
**MEMBER**