

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 52 OF 2020

JOMIGE AGENCIES LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company operating from Mombasa and deals in construction. The Appellant has been in operation since 4th June, 2004 and it was registered for VAT obligation on 26th October, 2004.
2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5(1), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenues. Further, under Section 5 (2) with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 11 of the First Schedule of the Act for the purpose of assessing, collecting and accounting for all revenues in accordance with those laws.
3. On 5th July 2019 the Respondent carried out an analysis of purchases claimed by purchasers and sales declared by suppliers on the KRA iTax system for the period January to May 2018. As result, inconsistency notices were sent to the Appellant vide its email address.

4. The Appellant failed to resolve the inconsistencies highlighted within the timeframe specified leading the Respondent to issue Value Added Tax (VAT) additional automated assessment. The Appellant was issued with a VAT automated assessment on 15th November 2019 based on the inconsistent information on comparison of returns filed by its suppliers.
5. The Appellant as a result lodged an objection notice with the Respondent on 18th November 2019, which was rejected on 17th January 2020. The notice of objection was rejected on the ground that the Appellant failed to provide documents in support of its objection despite being reminded vide email correspondence on 3rd December 2019 to avail the requisite documents.
6. According to Section 17(3) (a) of the VAT Act 2013 the taxpayers registered for VAT are required to possess an original tax invoice for the supply or a certified copy which the taxpayer did not avail in two instances i.e. when inconsistency notices were issued and when it lodged an objection.
7. The Respondent rejected the objection and confirmed the assessment by issuing an Objection decision on 17th January 2020 and issued the Appellant with the Confirmation Assessment Notice on 22nd January 2020. Aggrieved by the decision, the Appellant filed a notice of Appeal with the Tribunal on 13th February 2020.

THE APPEAL

8. The Appeal herein is premised on the following grounds as enlisted in the Appellant's Memorandum of Appeal dated 13th February 2020;

- a. The documents were requested in short notice that is two days before the objection and at that time the active director was not in office as his children were hospitalized.
- b. All the purchased invoices claimed were valid.

RESPONSE TO THE APPEAL

9. The Respondent through his Statement of Facts avers as follows;

- a. On 5th July 2019 an analysis of purchases claimed by purchasers and sales declared by suppliers were ran on the KRA iTax system for the period January to May 2018. Inconsistency notices were then sent to the Appellant's email address for resolution.
- b. The Appellant then lodged an invalid objection notice on iTax on 18th November 2019 which was rejected on 17th January 2020. It was noted that the Appellant failed to avail documents in support of its objection and the Appellant was notified of the documents required via email on 3rd December 2019. The Appellant failed to provide documents as request in support of its objection notice and the same was rejected on 17th January 2020.
- c. According to Section 17(3) (a) of the VAT Act 2013 the taxpayers registered for VAT are required to possess an original tax invoice for the supply or a certified copy which the Appellant did not avail in two instances i.e. when inconsistency notices were issued and when they lodged an objection.

- d. In accordance to Section 31 (1) of the Tax Procedures Act the Respondent issued VAT automated assessments based on inconsistent information between VAT returns of Appellant's suppliers and input VAT claimed by the Appellant.
- e. The Appellant has a statutory duty to furnish specific information requested by the Respondent that is necessary to facilitate the investigation process and also to support its position.
- f. The Respondent states that the, burden is on the Appellant to furnish the Respondent with documents in its custody that support its position as provided in the Tax Procedures Act.
- g. The Respondent states that it acted in his jurisdiction as provided in Section 31 of the Tax Procedures Act in issuing the assessment/demand as well as Section 51(9) of the Tax Procedures Act while issuing the Objection decision.
- h. The Respondent based his assessment on information availed by the Appellant, and the Respondent's best judgment as provided by Statute Law and within his jurisdiction.

ISSUE FOR DETERMINATION

- 10. In this Appeal, a single issue crystallizes for determination by the Honorable Tribunal, namely;
 - a. *Whether the Tribunal can grant the Respondent's oral application for dismissing the Appeal herein for non-appearance of the Appellant.*

ANALYSIS AND FINDINGS

11. After carefully reviewing the record before together with the Respondent's submissions at the hearing of the Appeal on 21st April 2021, the Tribunal notes that the Appellant herein has not been appearing in court and has failed to prosecute the Appeal. It is in light of this that the Respondent orally moved the Tribunal for dismissal of the Appeal. In the circumstances, the Tribunal has been called upon to be guided by the provisions of Section 27 (2) of the Tax Appeals Tribunal Act, 2013. Section 27 (2) of the Tax Appeals Tribunal provides as follows;

“If an appellant fails, without reasonable cause, to appear for the hearing of the proceedings, the Tribunal may dismiss the Appeal.”

12. The above provisions of Section 27 (2) of the Act must be read in tandem with the provisions of Rule 18(1) and (3) of the Tax Appeals Tribunal (Procedure) Rules 2015 which further stipulate as hereunder;

“(1) When neither party attends on the day fixed for hearing, if satisfied that the notice of hearing was duly served to the parties, the Tribunal may dismiss the Appeal or give such orders that it may deem appropriate.

(2) ...

(3) Where only the respondent attends and if the Tribunal is satisfied that notice of hearing was—

(a) Duly served, it may dismiss the Appeal;”

13. As we have earlier held in *Tax Appeal No.168 of 2017, Agency for Peace and Development vs Respondent of Investigations and Enforcement*, the above provisions of the Act and Rules empower the Tribunal to dismiss an Appeal for non-appearance of the Appellant. From the Respondent's oral application and as can be glance from a cursory perusal of the record, the Appellant has been consistent in its non-appearance. In the premise therefore we cannot deny the Respondent's application to have the matter dismissed. As such, we find the Respondent's application is merited and dismiss the Appeal forthwith.
14. The attendant effect of our foregoing finding is that the confirmed assessment stands and the Respondent is at liberty to take enforcement measures. However, the Appellant's is not left without remedy. As per the provisions of Section 27 (5) of the Tax Appeals Tribunal, the Appellant is at liberty for good cause for nonattendance being shown apply to the Tribunal for reinstatement of the Appeal.


FINAL DECISION

15. In light of the foregoing finding, the Tribunal makes the following Orders; -
- a. The Appeal herein be and is hereby dismissed.
 - b. The Respondent's confirmed assessment dated 17th January 2020 be and is hereby upheld.
 - c. Each party to bear its own costs.
16. It is so ordered.

DATED and DELIVERED at NAIROBI on this 18th 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