

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**TAT APPEAL NO. 202 OF 2018**

**JOSEPH MURIITHI NDIRANGU**  
**T/A NDIRANGU HARDWARE.....APPELLANT**

**-VERSUS-**

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

**JUDGMENT**

**BACKGROUND**

1. The Appellant is an individual and sole proprietor trading in the name and style of Ndirangu's Hardware in Nyahururu town within the Republic of Kenya. He is a registered taxpayer of Post Office Box Number 1336- 20300 Nyahururu.
2. The Respondent is a principal officer who is duly appointed under Section 11(4) of the Kenya Revenue Authority Act and is responsible for the control and management of the Domestic Taxes Department and accounting for tax under the Income Tax and Value Added Tax Acts.

**FACTS OF THE CASE**

3. This case was selected as part of the Respondent's Revenue Enhancement Initiatives (REI) under 3rd party (FMIS) data in the year 2015.
4. Additional assessments were raised by the Respondent on the taxpayer for the years 2015 and 2016 to which the Appellant objected to and the

Objections acknowledged on 14<sup>th</sup> February, 2018 (Acknowledgement Numbers KRA201801116775 and KRA201801115884).

5. The Respondent rejected the Objection on 14<sup>th</sup> August, 2018.
6. Being aggrieved by the Respondent's Objection Decision, the Appellant filed a Notice of Appeal on 22<sup>nd</sup> August, 2018 appealing against the Confirmed Assessment Orders Numbered KRA21800945228 and KRA201800850141 with a tax liability totalling Kshs. 8,532,219.63.
7. The Appeal was premised on the following grounds:-
  - a. The officer who did the assessment did not rely on source documents in possession of the taxpayer but instead arrived at the additional tax based on computer variances in the end of the year financial statements and VAT returns on the iTax platform.
  - b. There was no proper engagement to iron out the iTax variances. The officers captured net sales and net purchases i.e. Kshs.14,890,631.00 and Kshs. 156,288,666.00, respectively, for the year 2016 and Kshs.154,344,531.00 and Kshs.152,619,205.00, respectively, for the year 2015 from the iTax system, whereas the financial statements were based on gross sales and gross purchases after adjustments of debtors and creditors.
8. For these reasons, the Appellant prays that the Tribunal be pleased to grant him the following reliefs:-
  - a. Set aside the Assessment Orders Numbers KRA201800945228 and KRA201800850141 which have led to the erroneous tax assessment of Kshs. 38, 532,219.63 (VAT).

- b. Vacate the assessment as per KRA Tax Regulations Act 2015 Section 51(11).

### **The Appellant's Case**

The Appellant argues as follows:-

9. The officers did not address any of the issues in the Objection, but rejected the same without giving any reasons on 14<sup>th</sup> August 2018 contrary to Tax Procedures Act, 2015 Section 51 (11) whereas they would have vacated the assessment after a period of sixty days.
10. The Respondent went ahead to reject the Objection without giving reasons contrary to Tax Regulations(sic) Act 2015 on 14<sup>th</sup> August, 2018.
11. That from the tax records relating to this dispute it is the factual position that:-
  - a. The Commissioner never carried out an audit or a compliance check to ascertain the information on the iTax platform and thus raised additional tax relying on erroneous tax information.
  - b. In assessing the taxpayer's liability on VAT, the KRA officer ignored or omitted to consider source documents and relied on computer variances of sales as reflected in the KRA iTax VAT variance assessment software. The procedure adopted led to the officers arriving at excessive tax which was not based on material facts. The KRA audit officers' reconciliation was entirely centered on iTax computer generated reconciliations as opposed to the source document which is the conventional financial approach.

- c. The net profit would be the same if the KRA officers and the taxpayer engage each other to be able to understand the convention used in preparing the financial statements. The financial statements are not conclusive of VAT dues unless properly interrogated.

## **RESPONDENT'S CASE**

12. The Respondent argues as follows:-

- a. The taxpayer had made some vatiable supplies to Kenya Forestry Services (KFS) in the year 2015, and there had been no evidence of the taxpayer having declared the VAT charged on the supplies in their VAT returns for the periods in question.
- b. The verification process established that the taxpayer declared the said transaction in the month of September 2015. However, there was a mismatch emanating from the taxpayer lumping up his sales and not recognizing purchasers registered for VAT from the final consumers of the sales they made during the relevant periods.
- c. It was established that there were variances observed in the tax returns submitted by the Appellant between Income Tax individual returns against VAT returns during the years 2015 and 2016.
- d. Additional assessments were therefore computed as per the tabulation below:-

### Value Added Tax

Period	2015	2016
Turnover as per IT1 return	179,039,658	164,593,149
Total VAT sales for the year (VAT 57)	154,344,529	141,890,631
Variance	24,695,129	22,702,518
Tax on variance (16%)	3,951,221	3,632,403

13. The Respondent argued that the taxpayer under declared sales for VAT purposes for the years 2015 and 2016, and thus lowering the amount of taxes payable by them as per the information with the authority and supported its action by relying on of Section 31(1) (c) the Tax Procedures Act 2015 which states as follows:-

*“31. (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-*  
*(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.”*

14. The Respondent further argued that the Appellant did not avail any evidence to support his claim that the basis of the assessment was erroneous. Section 56(1) of the Tax Procedures Act 2015 places the burden of proof that the tax decision issued by the Respondent is incorrect on the Appellant. The Section states as follows:-

*“56. (1) in any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”*

15. The Respondent cited the case of *Sheria Sacco Society Limited vs. Commissioner of Domestic Taxes [2019] eKILR* where the High Court ruled that the onus of proof is upon the Appellant as stipulated under Section 40 of the Tax Appeals Tribunal Act.
16. The Respondent avers that the taxpayer contravened the law by grossly under declaring sales for VAT purposes during the periods mentioned contrary to the provisions of *Section 31(4)(a) of the Tax Procedures Act 2015*, the Commissioner may amend an assessment, *“in the case of gross or willful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time”*
17. Consequently, the assessments were issued in accordance with Section 29(1) of the TPA.
18. The Respondent prays that this Honourable Tribunal finds that:
  - a) The Respondent’s confirmation of assessments dated 19<sup>th</sup> July 2018 for the period July 2015 to January 2017 be upheld.
  - b) The taxes due and unpaid amounting to Kshs. 8,576,321.00 together with interest thereon be paid.
  - c) That this Appeal be dismissed.
  - d) That the Appellant be compelled to pay costs to the Respondent.

## **ISSUES FOR DETERMINATION**

The Tribunal has framed the following issues for determination:-

- i) Whether the Objection Decision was valid.
- ii) Whether the Additional Assessments were properly raised.

## **ANALYSIS AND FINDINGS**

### **i) Whether the Objection Decision was valid.**

19. The Appellant has argued that the Objection Decision was made after the expiry of sixty days and without giving any reasons for rejecting the Appellant's objection which is contrary to Section 51(11) of the Tax Procedures Act.
20. The Respondent on the other hand denies this allegation and has, in support of its position, tendered a copy of the confirmation letter dated 12<sup>th</sup> April, 2018.
21. Having considered the arguments of both parties, the Tribunal observes that the Appellant objected to the Assessments on 14<sup>th</sup> February, 2018 and the Objection decision was made on 12<sup>th</sup> April, 2018 which was within the sixty day period stipulated in the law.
22. Further, the Respondent in the Objection Decision letter stated "*we hereby give you notice that the Assessment is confirmed as we are not prepared to amend in accordance with your objection.*" The Respondent thus gave its reason for confirming the Assessment.

23. The Appeal therefore fails on this ground.

**ii) Whether the Additional Assessments were properly raised.**

24. The Appellant has argued amongst other grounds that the Assessments were erroneous because the Respondent did not conduct an audit neither did its officer examine the Appellant's primary documents nor engage the Appellant for clarification of how his tax figures filed with the Respondent were arrived at.

25. The Respondent on the other hand argued that the Appellant did not avail any document and neither did he tender any proof to support his claim despite having been requested to do so. Consequently, the Respondent had no alternative but to raise the Additional Assessments in accordance with its own findings as authorised by law.

26. Having considered the arguments of both parties, the Tribunal notes that the Appellant's claims and averments were not supported by any evidence and agrees with the Respondent's position that the onus of proving that the Assessments were erroneous was upon the Appellant in accordance with Section 56(1) of the Tax Procedures Act. In the absence of such proof, the Respondent was well within law to raise the Additional Assessments to the best of its ability as authorised by Sections 31(1) (c) and the *Tax Procedures Act 2015*.

27. The Appeal therefore fails on this ground as well.



## FINAL ORDERS

28. In view of the findings above, it is hereby ordered as follows:-

- a. The Appeal be and is hereby dismissed.
- b. The Objection decision dated 14<sup>th</sup> August, 2018 confirming assessments for the aggregate sum of Kshs. 8,532,219.63 is hereby upheld.
- c. Each party to bear its costs.

29. It is so ordered.

**DATED and DELIVERED at NAIROBI on this 28<sup>th</sup> day of May, 2021.**



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**PATRICK LUTTA**  
**CHAIRPERSON**



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**HELEN BILA**  
**MEMBER**



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**MWAI MBUTHIA**  
**MEMBER**



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**ELISHAH NJERU**  
**MEMBER**



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**HABON FARAH**  
**MEMBER**

