

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO 37 OF 2020

KAIMBAGA ENTERPRISES LIMITED.....APPELLANT

-VERSUS-

**THE COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT.....RESPONDENT**

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company duly incorporated in Kenya under the Companies Act, Cap 486 of the Laws of Kenya (now repealed) of the Laws of Kenya. Its principal activity is the supply of construction materials, road construction, maintenance and gravelling.
2. The Respondent is a principal officer of Kenya Revenue Authority (KRA). KRA is established under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5(1) of the Act, KRA is an agency of the Government for the assessment, collection and receipt of all Government revenue.
3. The Respondent embarked on investigations into the business affairs of the Appellant and its directors for the period 2013-2018 to determine whether they may have under-declared income in view of business that was carried out by the Appellant in the form of various contracts awarded by the County Government of Nyandarua.

4. Upon completion of investigations, the Respondent computed the taxes payable by the Appellant herein and issued a notice of tax assessment for Ksh: 4,188,068.74 vide its letter dated 14th October 2019. The Respondent issued this assessment based on third party information reviewed and its best judgement pursuant to the provisions of Section 31 of the Tax Procedures Act 2015, hereinafter referred to as TPA.
5. Subsequently, the Appellant objected to the assessment vide its letter dated 12th November, 2019 setting out grounds thereof for the Appellant's consideration.
6. The Respondent considered the Appellant's objection and rendered its objection decision pursuant to the provisions of Section 51(8) of the TPA on 31st December, 2019 informing the Appellant that the objection was not validly lodged and confirming that taxes assessed by the Respondent on 14th October, 2019 were due and payable from the Appellant.
7. Being dissatisfied with the Objection Decision, the Appellant filed its Notice of Appeal on 29th January, 2020. The respective Memorandum of Appeal and Statement of Facts were filed on 13th February, 2020 and both documents served on the Respondent.
8. Upon service, the Respondent filed its Statement of Facts on 16th March, 2020 and a Witness Statement on 25th March, 2020.

THE APPEAL

9. The Appeal is premised on the grounds that:-
- (a) The Respondent erred in law and fact by failing to consider the Appellant's disputes raised in its letters dated 12th November, 2019 and 18th December, 2019 in reaction to the Respondent's tax demand/assessment dated 14th October 2019;
 - (b) The Respondent erred in law and fact in its assessment dated 14th October, 2019 for reasons that the same was excessive and not in accordance with the Appellant's accounts;
 - (c) The Respondent erred in law and fact by failing to disclose to the Appellant its previous assessment which formed the basis of its complaint and subsequent arraignment in court of the Appellant's directors in Nyeri Criminal case no. 503 of 2019, *R Vs Catherine Wanjiku, Henry Gathiga, Gathioro General Contractors and Supplies Ltd and Kaimbaga Enterprises Ltd*;
 - (d) The Respondent erred in law by failing to consider the Appellant's proposal to pay the tax in dispute in equal monthly instalments of Kshs 80,000.00 considering the colossal amount of tax amounts involved which it is unable to make a singular payment of Kshs 1,634,310.90. It further stated that it would be in the interest of justice that it is granted the time and be allowed the instalments requested to pay the undisputed tax;
 - (e) The Respondent erred in its assessment dated 14th October, 2019 by failing to consider the profit margin for the income for the years 2013-2018;
 - (f) The Respondent's decision dated 31st December 2019 is unlawful as it lacks a statement of findings on the material facts and the reasons for the decision which constitute the minimum

- compulsory requirements for such a decision as clearly stipulated under Section 51(10) of the TPA; and
- (g) The Respondent erred in failing to appreciate the law relating to tax assessments' disputes and objections.
10. The Appellant contended that the Respondent erred in its assessment dated 14th October 2019 by failing to consider the recommended profit margin of 15% as opposed to the margin it arbitrarily decided to impose in its computation of 40%.
11. The Appellant is categorical that it does not dispute the sum of Kshs. 1,634,310.90 as tax payable but stated that the said amount was huge and that it proposed to settle the amount in instalments of Kshs.80,000.00 per month until payment in full. The Respondent did not grant the request and did not give reasons for the refusal when issuing the Objection Decision dated 13th December, 2019.
12. In conclusion, the Appellant prays that:-
- (a) The Appeal be allowed;
 - (b) The Objection Decision by the Respondent dated 31st December 2019 be set aside; and
 - (c) The Appellant be allowed to pay the tax not in dispute in monthly instalments of Kshs. 80,000.00.

THE RESPONSE

13. The Respondent stated that the Appellant's directors as listed by the Registrar of Companies are Catherine Wanjiku Njeri and Agnes Wanjiku Kuria and that they are the signatories to the bank accounts held by the Appellant.

14. The Respondent carried out investigations into the affairs of the Appellant to establish whether it had declared all income earned for the period under review both for the company and the directors and to establish if any taxes had been evaded and if so, to bring any undeclared income to charge and to initiate proceedings against the Appellant for tax evasion, if any.
15. The Respondent stated that it conducted the investigations into the affairs of the Appellant and its directors for the period 2013-2018 to determine whether the Appellant may have undeclared income in view of business carried out by the Appellant in form of contracts awarded by the County Government of Nyandarua.
16. The Respondent relied on the Appellant's bank statements and requested for documentations in relation to the Appellant from the County Government of Nyandarua.
17. Upon completion of the investigations, the Respondent computed the taxes payable by the Appellant and issued the notice of tax assessment for Kshs. 4,188,068.74 vide a letter dated 14th October, 2019. The Respondent stated that it issued the assessment based on third party information which it reviewed pursuant to Section 31 of the TPA. The Appellant objected to the assessment through a letter dated 12th November, 2019.
18. The Respondent also stated that it was informed by the Appellant through the letter dated 18th December, 2019 that it had carried out reconciliation of its books and had computed income tax payable of Kshs. 506,187.20 and VAT of Kshs. 1,128,123.70 which it committed to pay in monthly instalments of Kshs: 80,000.00 but had not been paid by the date the Respondent filed its Statement of Facts.

19. The Respondent stated that it considered the Appellant's objection and rendered its Objection Decision pursuant to Section 51(8) of the TPA on 31st December 2019 informing the Appellant the objection was unsuccessful and confirming the taxes assessed by the Respondent on 14th October, 2019 as due and payable.
20. On whether the tax demand dated 14th October, 2019 and Objection Decision dated 31st December, 2019 are proper in law, the Respondent stated that they are valid because the Appellant failed to file a valid objection and that it failed to provide additional information as had been requested to do on 10th January, 2019 and on 17th April, 2019.
21. It is the Respondent's case that the Appellant's objection did not meet the threshold that is provided for under Section 51(3) of the TPA because it did not state with precision the grounds of objection or the reasons for the amendment. In addition, the Respondent avers that the Appellant did not provide evidence in support of its objection.
22. The Respondent further stated that, contrary to Section 59(1) of the TPA, the Appellant failed to avail bank statements and account opening documents as requested in the letter dated 10th January, 2019. It further stated that the Appellant failed to avail copies of contract agreements between it and the County Government of Nyandarua and the respective copies of tender documents, copies of payment vouchers, bank transfer documents, all contract certificates for work done and detailed payment schedules and statement of account, as was required vide the letter dated 17th April, 2019.

23. The Respondent further submitted that the Appellant failed to demonstrate that its tax decision was incorrect as required under Section 56(1) of the TPA.
24. The Respondent also submitted that it later discovered that the County Government of Nyandarua had awarded the Appellant a contract worth Kshs 11, 281,237.07 exclusive of VAT. To corroborate the information from the County Government, the Respondent stated that it obtained the Appellant's bank statement which indicated that the Appellant received Kshs 12, 409,360.80 inclusive of VAT. The Respondent then computed VAT from the said contract.
25. The Respondent, in addition, submitted that whereas the Appellant registered for income tax obligation on 16th July, 2015 and VAT obligation on 1st July, 2015 while the iTax Roll-out dates were 1st January 2016 and 1st August 2015 respectively, the Respondent established that the Appellant filed nil income tax return for the financial year 2015 and did not file iTax returns for the years 2016, 2017, and 2018. In respect of VAT, the Appellant had filed nil monthly VAT returns from July 2015-June 2016 but later amended its nil returns for the months of April, May, June and July 2016 on the 21st of March 2019 to reflect payment positions.
26. Apart from the above, the Respondent alleged that the Appellant failed to file returns contrary to Section 24 of the TPA.
27. In view of the foregoing, the Respondent prays that;
 - a. The Objection Decision dated 31st December, 2019 confirming the assessment of Kshs. 4,188,068.74 being the VAT of Kshs. 2,468,808.21 and Income Tax of Kshs.

1,719,260.53 together with the resultant penalty and interest thereon be upheld.

- b. This appeal be dismissed with costs to the Respondent as the same is without merit.

ISSUES FOR DETERMINATION

28. The Tribunal has carefully studied the parties' pleadings and submissions and is of the respectful view that the issues that call for its determination are as hereunder: -

- (a) Whether the Appellant's notice of objection was validly lodged pursuant to the provisions of Section 51(3) of the Tax Procedures Act.**
- (b) Whether the Respondent erred in law and fact in its tax assessment in respect to Corporation tax and VAT.**

ANALYSIS AND FINDINGS

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

- (a) Whether the Appellant's notice of objection was validly lodged pursuant to the provisions of Section 51(3) of the Tax Procedures Act.**

30. The Respondent submitted that the Appellant's objection did not meet the provided threshold under Section 51(3) of the TPA because it did not state with precision the grounds of objection or the reasons for the amendment. Further, the Respondent avers that the Appellant did not provide evidence in support of its objection.

31. The Tribunal is of the view that this is a paramount issue that determines whether there is a valid appeal or not and which will determine whether the Tribunal has jurisdiction to determine the Appeal.
32. Section 51(3)(a) and (b) of the TPA provide as follows:
- “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.”**
33. The Tribunal has examined the two-page notice of objection dated 12th November, 2019 and notes that the Appellant has raised two issues: first, that it admits owing Kshs 1,117,696.55 as a result of its accountant’s analysis of its bank statements and its director’s explanations for the amounts appearing thereon during the period of review. The Appellant attached its bank statements and requested for more time to avail the remaining documents which were in the custody of Anti-Corruption Commission for investigations. The Appellant avers that it was never served with a tax assessment as provided for under Section 31 of the TPA when the Respondent served the tax investigation notices dated 5th February, 2019.
34. As to the objection notice and the Respondent’s assertion that the same does not meet the threshold as envisaged under the TPA, the Tribunal finds it imperative to delve into the said notice in details.

35. The Appellant's notice of objection is dated 12th November, 2019. We note that the Respondent's tax demand for Corporation tax and VAT, vide its letter dated 14th October, 2019 is aptly elaborate in its workings, with schedules of payments from the County Government of Nyandarua showing how the Appellant was paid for various supplies/contracts. In its objection to the said demand, the Appellant states that its accountant, having done an analysis of its bank statements together with its directors' explanations, admitted owing a sum of Kshs.1,117,696.55. However, other than just stating the same, it does not show how it arrived at its workings with supporting documentation to demonstrate that the Respondent's workings are incorrect.
36. The Appellant further averred that its documents were within the custody of a third party for further investigations, namely Anti-Corruption Commission and that it would revert in due course. It did not attach any evidence in support of this assertion.
37. Furthermore, the Appellant asserted that it was not served with the tax assessment. In so doing, the Appellant bears the burden of proof pursuant to Sections 107 and 108 of the Evidence Act and Section 56(1) of TPA to prove that the Respondent was wrong. This can only be done by pleading the facts with precision which the Appellant, in its notice of objection, failed to discharge.
38. The High Court, while dealing with the burden of proof in taxation matter in **Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes [2020] eKLR**, held that the taxpayer has the burden to prove that a tax decision is wrong.

39. Furthermore, the Tribunal has studied the provisions of Section 31 of the TPA referred to by the Appellant in its pleadings and notes that the same deals with amendment of assessments. We find that it is clear from the records that the Respondent's tax assessments in respect to Corporation tax and VAT dated 14th October, 2019 were served upon the Appellant upon conclusion of the investigations. In the circumstances, we will not delve further into the issue.
40. In view of the foregoing analysis, the Tribunal is of the view that the notice of objection does not state precisely the grounds of objection, the amendments required to be made to correct the Respondent's tax decision and the reasons for the amendments.
41. Furthermore, the Tribunal notes that the Appellant admitted owing some amount of taxes way back, on 12th November 2019 and proposed to liquidate the same by monthly instalments of Kshs.80.000. However, up to and including the hearing in April 2021 it did not demonstrate to us that it has paid any amount due as relates to the admitted taxes. Therefore the Appellant's objection is invalid pursuant to Section 51 (3)(b) of the TPA, which states that an objection will be valid if,
- “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.”**
42. The Appellant, in its objection dated 12th November 2019, stated that it admitted owing a sum of Kshs. 1. 117, 696.55. However, in its Memorandum of Appeal filed on 13th February 2020, ground number 4 thereof, it pleaded that the sum Kshs 1,634,310.90 was not disputed. Though there is a variance in the admitted amount

by the Appellant itself, what is clear is that the Appellant has admitted that it owes the Respondent some amount. The Appellant proposed to liquidate the undisputed amount in instalments of Kshs. 80,000.00 per month until payment in full.

43. The Tribunal has considered the relevant law relating to extension of time to pay tax, being Section 33 of the TPA. The same provides as follows;

“(1) A taxpayer may apply in writing to the Commissioner for an extension of time to pay a tax due under a tax law.

(2) When a taxpayer applies for an extension the Commissioner may, if the Commissioner is satisfied that there is reasonable cause-

**(a) grant the taxpayer an extension of time for payment of the tax;
or**

(b) require the taxpayer to pay the tax in such installments as the Commissioner may determine.

(3) The Commissioner shall notify the taxpayer in writing of the decision regarding the application for extension of time, within 30 days of receiving the application for extension of time.

(4) Where a taxpayer who has been permitted to pay a tax by installments under subsection (2) defaults in the payment of an installment, the whole balance of the tax outstanding at the time of default shall become immediately payable.

(5) Despite being granted an extension of time to pay a tax or permission to pay a tax due by instalment by the Commissioner, a taxpayer shall be liable for any late payment interest arising from the original date the tax was due for payment”.

44. The Appellant's admission of the taxes due, together with its proposal on the instalments payment is vide its letter dated 18th December, 2019. It proposed to liquidate the same by monthly instalments of Kshs. 80,000.00 till payment in full.
45. In its Objection Decision dated 31st December, 2019, the Respondent whilst issuing the same also rejected the Appellant's proposal and stated that the same fell outside the Respondent's recommended four monthly instalments. We find that the same was issued within the statutory timeline of thirty days as provided for under Section 33 of the TPA.
46. Furthermore, the Appellant maintains that it was not informed why the proposal to liquidate the undisputed amounts in instalments was refused. Although the Respondent did not address this issue in its pleadings, we find that the same was contained in its Objection Decision dated 31st December 2019. For avoidance of doubt, the same states in part as follows;
- "In your letter of objection dated 18th December, 2019, the Company has committed to pay Kshs.1,634,310.90 in monthly instalments of Kshs. 80,000.00. Kindly note that this payment plan is not acceptable since it falls outside the recommended number of instalments, which is, 4 monthly instalments".** We find that the same gives a reason therein, though issued simultaneously with the Objection Decision.
47. Though the Tribunal notes that Section 33 of the TPA is silent on the reasonable installments that are allowable, the Respondent has submitted that its policy only allows for payment in four installments. We further note that the Appellant's proposal was not acceptable to the Respondent and the parties did not agree on

a payment plan. Section 33 of the TPA is specific to only the Respondent having the discretion to allow for extension of time for tax payments. In this regard, the Tribunal will therefore not delve further into the issue.

48. Consequently, the Tribunal makes a finding that the Appellant's notice of objection was not validly lodged pursuant to the provisions of Section 51(3) of the Tax Procedures Act.

b) Whether the Respondent erred in law and fact in its tax assessment in respect to Corporation tax and VAT.

49. The Tribunal having made its findings in issue (a) above will not delve into the remaining issue herein as doing so would be an exercise in futility.

FINAL DECISION

50. The upshot of the foregoing is that the Appeal is not merited and the Tribunal makes the following Orders:-

- (a) The Appeal is hereby struck out.
- (b) The Respondent's tax assessment confirmed vide its Objection Decision dated 31st December, 2019 for the sum of Kshs. 4,188,068.74 is hereby upheld.
- (c) Each party to bear its own costs.

51. It is so ordered.


DATED and DELIVERED at NAIROBI this 18th day of June, 2021.


.....
JOSEPHINE K. MAANGI
CHAIRPERSON


.....
PATRICIA M. ANAMPIU
MEMBER


.....
TANVIR ALI
MEMBER


.....
GEOFFREY KARUU
MEMBER


.....
DELILAH K. NGALA
MEMBER