

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 406 OF 2020**

**LIBAN TRADING LIMITED..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

**BACKGROUND**

1. The Appellant is a limited liability company incorporated in Kenya whose principal business activity is the importation and sale of rice.
2. The Respondent is a principal officer of the Kenya Revenue Authority appointed under Section 13 of the Kenya Revenue Authority Act (Cap 469) with the mandate to assess, collect and account for various taxes on behalf of the Government of Kenya.
3. The Appellant was selected for a tax review based on analysis of its import data. A preliminary analysis of this data revealed that the Appellant had imported rice amounting to KShs 740,129,552.00 for the period 2013 – 2015, but filed nil Income Tax returns on the *iTax* portal.
4. The Respondent's analysis of the company's bank statements further established that the Appellant's gross bankings at Gulf African Bank for the years 2013 to 2018 amounted to KShs 3,180,938,906.00.

5. On the basis of the above analyses, the Respondent assessed and demanded taxes amounting to KShs 1,137,632,235.00 for the period 2013-2018. This was communicated to the Appellant in a letter dated 28<sup>th</sup> November 2019.
6. The Appellant objected to the above assessment on 29<sup>th</sup> May 2020. The Appellant was however informed by the Respondent that its objection had been submitted late. In the same letter, the Appellant was advised to seek extension of time in accordance with Section 51 of the Tax Procedures Act ('TPA') in order to file and lodge an objection out of time.
7. The Appellant lodged an application for extension of time to file a late objection on 14<sup>th</sup> July 2020, which application was rejected by the Respondent in a letter dated 21<sup>st</sup> July 2020.
8. The Appellant, being aggrieved, filed a Notice of Appeal on 21<sup>st</sup> August 2020.

### **APPELLANT'S CASE**

9. The Appellant's grounds of Appeal are:
  - (i) THAT the Respondent solely relied upon the Appellant's bankings to raise the assessment whereas not all bank deposits relate to taxable income.
  - (ii) THAT the Respondent failed to perform his legal duty of inspecting the Appellant's books in order to determine the true picture of its financial position and instead relied on bank statements in arriving at the demand notice and assessment.

- (iii) THAT the Respondent erred in law and in fact by disregarding the direct and indirect costs incurred in revenue generation in the computation of the Corporation Tax demanded.
- (iv) THAT the assessment was based on estimates and had no basis in law.

### **RESPONDENT'S CASE**

- 10. The Respondent responded to the Appeal vide its Statement of Facts dated 10<sup>th</sup> December, 2020 and Written Submissions dated 22<sup>nd</sup> April, 2021 and filed on 23<sup>rd</sup> April, 2021 on grounds appearing herein under.
- 11. THAT it conducted an analysis of the Appellant's import data for the years 2013 to 2015 and established that the Appellant had imported rice valued at KShs 740,129,552.00. In view of the large quantities and high CIF values, the Respondent concluded that the imported rice was for sale, and not for personal consumption.
- 12. THAT the Respondent further examined the Appellant's bank statements and the Appellant's sales records and payments obtained from Mshale Commodities, a third-party trading with the Appellant.
- 13. THAT the Appellant had filed nil Income Tax returns, registered its VAT obligation as dormant and not accounted for PAYE during the period under review.
- 14. THAT as a result, the Respondent issued an assessment and tax demand for KShs 1,137,632,235.00 on 28<sup>th</sup> November 2019, which the Appellant objected to on 29<sup>th</sup> May 2020, six (6) months after issuance of the assessment and tax demand.

15. THAT the Appellant's objection was filed outside the statutory timelines contrary to the provisions of the TPA.
16. THAT the Respondent wrote to the Appellant on 29<sup>th</sup> June 2020 informing it that its late objection was not validly lodged and that there were no documents to support the objection. The Respondent proceeded to advise the Appellant to validate its objection by seeking for extension of time as per Section 51 of the TPA.
17. THAT the Appellant sought the extension of time in a letter dated 4<sup>th</sup> July 2020, but did not give sufficient reasons to support the request. The Respondent therefore declined the Appellant's application.
18. THAT the Appellant filed its Memorandum of Appeal with the Tribunal on 8<sup>th</sup> September 2020, two months thereafter.

### **SUBMISSIONS BY THE PARTIES**

#### **a) On Whether the Respondent's assessment is erroneous and excessive.**

19. The Appellant submitted that the Respondent's assessment and tax demand was erroneous and an estimate. That it was based on the Appellant's bank statements and deposits, and had not taken into account costs incurred in the generation of business revenue.
20. The Respondent however submits that under the self-assessment regime, a taxpayer is obliged to file returns declaring all income liable to tax. That in determining the Appellant's income which was liable to tax, the Respondent had, in addition to analysing the Appellant's bank statements, also reviewed the Appellant's import data and self-assessment returns.

21. The Respondent submits that the Appellant's objection was submitted late and did not address the issues raised by the Respondent in the tax assessment. Thus, it did not comply with Section 51(3) of the TPA which provides that:

*"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;*
- (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 or has applied for an extension of time to pay the tax not in dispute under section 33(1); and*
- (c) all the relevant documents relating to the objection have been submitted.*

22. The Respondent also submits that the Appellant neither substantiated its assertions nor produced any evidence/records to challenge the Respondent's findings.
23. The Respondent contends that an analysis of the Appellant's bankings with Gulf African Bank revealed that the Appellant's total bankings for the years 2013 to 2018 amounted to KShs 3,180,938, 906.00, yet it had filed nil income tax returns during this period. That in arriving at the taxable income, the Respondent made adjustments to the gross deposits for imports, inter account transfers, reversals and bank charges.
24. The Respondent submits that it also established that direct deposits had been made into the Appellant's directors' bank accounts by customers, an

indication that the directors were trading. However, they had neither declared any income nor filed income tax returns. It was the Respondent's conclusion that the Appellant and its directors were diverting income derived from the business into the directors' personal accounts.

25. The Respondent submits its working including the adjustments made were detailed in the letter of assessment and that the Appellant did not provide additional information to support any costs incurred in revenue generation.
26. The Respondent submits that it used the information available to it to the best of its judgment in raising the assessment.
27. The Respondent contends that the Appellant's request for extension of time to file the objection was declined on merit. Section 51(2) of the TPA requires a taxpayer to file an objection to a tax assessment within 30 days of being notified of the decision. The Appellant filed its objection on 29<sup>th</sup> May 2020, six (6) months after the tax decision.
28. The Respondent also submits that the Appellant only sought an extension to file a late objection after being advised to do so by the Respondent. However, its application did not offer any explanation for the delay and therefore did not validate the objection. The Respondent therefore refused to allow the application.
29. The Respondent maintains that in tax matters the burden of proof is upon a taxpayer to prove that the Commissioner's assessment is wrong. Section 56(1) of the TPA provides that:

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

30. That Section 30 of the Tax Appeals Tribunal Act also places the burden of proof in a proceeding before the Tribunal on the Appellant: Section 30 provides that:-

*“In an appeal before the Tribunal the Appellant has the burden of proving*

*(a) where an appeal relates to an assessment, that the assessment is excessive; or*

*(b) in any other case, that the tax decision should not have been made or should have been made differently.”*

31. The Respondent states that in the absence of evidence to the contrary, the additional income established was properly assessed as income chargeable under the Income Tax Act.

32. That in the case of **BOLEYN INTERNATIONAL LIMITED-VS.- COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT, TAT APPEAL NO. 55 OF 2018**, the Tribunal held that:

*“We find that the Appellant's at all times bore the burden of proving that the Respondent's decisions and investigations were wrong. The Tribunal is guided by the provisions of section 56(1) of the Tax Procedures Act, 2015 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 paragraphs from Pierson V Belder (H.M. Inspector of Taxes)(1956 — 1960) 38 TC 387 to be instructive; but the matter may be disposed of, I think even more shortly in this way: there is an assessment made by the Commissioner upon the Appellant; it is perfectly clearly settled by cases such as in the case of 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 is I accordingly dismiss with costs.”*

**b. On whether the Appellant's Appeal is validly before the Tribunal**

33. The Respondent submits that the Appellant’s Appeal is premature, invalid and ought to be dismissed.
34. Section 51(4) of the TPA mandates the Respondent to notify a taxpayer who has not lodged a valid objection to the same. That the Respondent having informed the Appellant that there was no valid objection, it was incumbent upon the Applicant to remedy the error, but the Applicant did not do so.
35. That Section 51(8) of the TPA obligates the Respondent to consider “a notice of objection validly lodged within time” and either allow the same in whole or in part or disallow it. In this case, there was no valid objection for the Respondent to consider.
36. The Respondent did not issue an Objection Decision since there was no valid objection lodged within time. Therefore, there is no appealable decision for the Tribunal to hear and determine. That Section 3 of the TPA defines an appealable decision as an objection decision and any other decision made under a tax law other than a tax decision.
37. In the circumstances, the Respondent submits that the Appellant’s Appeal on the merits of the assessment cannot be determined by the Tribunal. The prayers sought by the Appellant cannot be granted as the Appellant is in breach of the statutory procedure as set out per Section 51(8) of the TPA.



38. That the effect of the provisions of Section 51(8) is that upon failure on the part of a taxpayer to file a valid objection, the tax decision by the Respondent stands by operation of the law.
39. It is the Respondent's contention that the Appellant filed its objection six (6) months late. That this delay was unreasonable and no reason has been provided for the same. The Respondent deemed this matter closed upon expiry of the statutory timelines for filing an objection.
40. The Respondent submits that six months of unexplained delay was unreasonable and would result in the Respondent's right being prejudiced. Indeed, the Respondent had indeed inferred that the Appellant was satisfied with the tax decision.

### **ISSUES FOR DETERMINATION**

41. The Tribunal has considered that the Respondent has raised the issue as to whether the Appellant complied with the statutory timelines while filing this Appeal. This is a primary issue which has to be disposed of before the merits can be considered.
- In the premises, the Tribunal frames a single issue for determination as follows:-

**Whether the Appellant's Appeal is valid.**

### **ANALYSIS AND FINDINGS**

#### **Whether the Appellant's Appeal is valid**

42. Section 51 of the TPA on objections to tax decision provides that:

*“(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.*

*(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.*

*(3) 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.*

*(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.*

*(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.*

*(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.*

*(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—*

*(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and*

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

*(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".*

*(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.*

*(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.*

*(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed."*

43. The Appellant was required by law to object to the Respondent's assessment and tax demand within 30 days of its issuance. The Appellant was issued with an assessment and tax demand on 28<sup>th</sup> November, 2019. In accordance with the law, it was required to lodge an objection thereto with the Respondent if dissatisfied. The Appellant did not lodge any objection with the Appellant as by law required but objected to the assessment on 29<sup>th</sup> May, 2020 – six months later.

44. Having filed the late objection, the Respondent did not consider the same but advised the Appellant to seek an extension of time to validate the objection. The Appellant did so by a letter dated 14<sup>th</sup> July, 2020 but the

Respondent refused to grant the extension of time on grounds that the Appellant did not give sufficient reasons to support the request.

45. The Respondent communicated his rejection of the application for extension of time by a letter dated 21<sup>st</sup> July, 2020 consequent upon which the Appellant filed a Notice of Appeal with the Tribunal on 21<sup>st</sup> August, 2020.
46. The Appellant's Notice of Appeal is expressed to be brought against the Respondent's decision dated 21<sup>st</sup> July, 2020 declining the application for extension of time.
47. The Appellant subsequently filed this Appeal on 8<sup>th</sup> September, 2020 expressed to be an appeal against the "Respondent's objection decision" of 21<sup>st</sup> July, 2020.
48. A careful look at the body of the Appeal, it does not address the Respondent's letter of 21<sup>st</sup> July, 2020 declining the extension of time but substantially challenges the Respondent's tax demand dated 28<sup>th</sup> November, 2019.
49. If there are no grounds of Appeal against the letter of 21<sup>st</sup> July 2020, the Tribunal cannot entertain grounds relating to the tax demand of 28<sup>th</sup> November, 2019 in respect to which there is no objection decision or Notice of Appeal.
50. Even if the Tribunal's was to consider the Respondent's refusal contained in the letter of 21<sup>st</sup> July, 2020, in its view, the Appellant's application for a late objection did not provide any compelling reasons for the delay and that a delay of six months was unreasonable.

51. Since the Appellant's Memorandum of Appeal and prayers are predicated on the Respondent's decision contained in the letter of 28<sup>th</sup> November, 2019, the Tribunal cannot consider the Appellant's plea on grounds that there exists no valid objection, objection decision and Notice of Appeal upon which the Appeal can stand.
52. The Appellant can only have itself to blame for failing to take the appropriate steps to protect its interests.
53. For the reasons stated, the Tribunal is left with no alternative but dismiss this Appeal.

#### **FINAL DETERMINATION**

54. The Tribunal makes the following final Orders:
- i) The Appeal be and is hereby dismissed.
  - ii) Each party to bear its own costs.
55. It is so ordered.

DATED and DELIVERED at NAIROBI on this 4<sup>th</sup> day of June 2021.



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PATRICK LUTTA  
CHAIRPERSON



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HELEN BILA  
MEMBER



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MWAI MBUTHIA  
MEMBER



.....  
ELISHAH NJERU  
MEMBER



.....  
HABON FARAH  
MEMBER