

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 395 OF 2019

MARY WANJIRU KINYUAAPPELLANT

-VERSUS-

COMMISSIONER OF INVESTIGATIONS &
ENFORCEMENT..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a registered taxpayer. She is described in the pleadings as a former Chief Executive Officer of Platinum Distillers Limited, a business engaged in the manufacture, packaging and labelling of alcoholic drinks.
2. The Respondent is a principal officer of the Kenya Revenue Authority, a body established under the Kenya Revenue Authority Act, Cap. 469 of the Laws of Kenya and charged with the responsibility of collection and administration of revenue on behalf of the Government of Kenya
3. On 18th April 2019, the Respondent issued a notice of tax assessment to the Appellant for the years 2014 to 2017 indicating that the Appellant had been filing nil returns for the said period and that analyses of her bank accounts at Equity Bank Limited and Kenya Commercial Bank Limited had revealed receipt of income in the said accounts. The notice demanded payment of Kshs. 249,579,296.00 as total tax due inclusive of penalties and interest.

4. On 25th April 2019, Platinum Distillers Limited, through its director John Ndegwa, responded to the Respondent's letter of 18th April 2019 and requested for extension of time to file its notice of objection. It indicated that the company intended to consolidate all objections in order to respond to all assessments adequately. The Respondent responded on 2nd May 2019 granting the company 20 days to file objections to Excise duty and Value Added Tax (VAT) assessments issued on 29th March 2019 for the Company. The Respondent indicated in the letter that extension of time for objection to corporation tax assessment had however not been granted.
5. On 23rd May 2019, the Appellant issued its notice of objection to the Respondent's tax demand of 18th April 2019. According to the forwarding letter, the notice of objection was a consolidated one and had been issued in objection to the assessments issued to (i) *Platinum Distillers Limited*, (ii) *Mary Wanjiru Kinyua* (the Appellant herein), (iii) *Onesmus Muturi Mburu* (a joint bank account-holder with the Appellant) and (iv) *Michael Njoroge Kigara*.
6. On 22nd July 2019, the Respondent issued its objection decision to the Appellant confirming the total tax owed by the Appellant to be Kshs. 163,897,497.
7. The Appellant, being dissatisfied with the Respondent's Objection Decision, filed the instant Appeal. The Appellant canvassed the Appeal through its Memorandum of Appeal and Statement of Facts dated 19th August 2019 and filed on 27th August 2019.
8. The Respondent opposed the Appeal through its Statement of Facts dated 25th September 2019 and filed on 27th September 2019.

THE APPEAL

9. The Appellant premised the Appeal on the following grounds, THAT: -

- i. The Respondent erred in law and fact by assuming loans advanced to the Appellant as income. The Appellant demonstrated with specific dates and amounts of these loans and the Respondent chose to ignore the explanation and documentation adduced for the same;*
- ii. The Respondent erred in law and fact by not considering the contrast between the Appellant Accounts;*
- iii. The Respondent erred in fact by failing to consider the resolutions appointing personal accounts for purposes of revenue collection for Platinum sales. This exposes the Appellant to double taxation since the same amounts have been taxed for corporation tax under Platinum;*
- iv. The Respondent confirmed the notice of assessment without due regard to all records, explanations and information provided by the Appellant thereby failing to appreciate all issues presented by the Appellant before confirming the assessment;*
- v. The Respondent erred in law and fact by failing to put into consideration the explanation that the personal accounts were made collection accounts for the company via board resolution hence subjecting the taxpayer to double taxation;*
- vi. The Respondent erred in law by charging income tax of 30% as corporate instead of applying the individual graduated rates and without according personal tax relief to the Appellant; and*
- vii. The amounts confirmed by the Respondent of Kshs. 163,897,497 in respect of income tax for the period January 2014 to 2017 is therefore wrong in law and fact and should be annulled.*

10. In its prayers, the Appellant urged the Tribunal to set aside the objection decision by the Respondent or vary it in a manner that is just and reasonable.

APPELLANT'S SUBMISSIONS

11. Vide its written submissions dated 18th April 2021 the Appellant contended that the Respondent's assessment and objection decision lacked basis in law and deserved to be annulled by this Tribunal for the reasons set forth hereunder.

i. Personal loans are not considered as taxable income

12. The Appellant asserted that the Respondent breached Section 3(2) of the Income Tax Act (ITA) by failing to consider that sums deposited in the Appellant's bank accounts were loans by Platinum Distillers Limited and personal deposits and therefore did not constitute taxable income.
13. In its table representation of the bank deposits, the Appellant submitted that it received a total of Kshs.58,150,000.00 in the period 2014 to 2015 from one Willy Mwangi for the purchase of a house from Kikuyu Gardens for Mr. Mwangi and that that amount should not be treated as income.

ii. Individual tax assessed at corporate tax rate.

14. The Appellant contended that the Respondent erred in its assessment by applying corporate tax rate of 30% instead of applying the individual graduated rates. She cited Section 34 of the ITA which provides under subsection 1(a) that: -

“tax upon the total income of an individual, other than that part of the total income comprising wife's employment income fringe benefits and the qualifying interest, shall be charged for a year of income at the individual rates for that year of income.”

15. According to the Appellant, the Respondent erred in its assessments by failing to take into account personal relief which is a legal entitlement guaranteed to the Appellant as per Section 29 of the ITA. The Appellant submitted that the Respondent's assessment was contrary to express provisions of the law and should therefore be quashed. It cited the case of *R vs. Kenya Revenue Authority [2009] eKLR* in support.

iii. The Appellant's personal account was used as the company's collection account

16. It was the Appellant's submission that the Respondent subjected her to double taxation when it failed to consider that her personal bank account was merely used as a collection account for Platinum Distillers Limited. The Appellant intimated that the income of the company had been taxed at corporate level and therefore should not be taxed again at individual level as that would be oppressive and illegal.

17. The Appellant mentioned for the attention of the Tribunal that the proceedings in *Tax Appeal No. 394 of 2019 Platinum Distillers Limited vs. Commissioner of Investigations and Enforcement* in which a tax dispute was resolved through alternative dispute resolution and a consent entered before the Tribunal.

18. In her conclusion, the Appellant noted that the Respondent's action was in violation of the ITA and avoidance of double taxation principles of tax law. She faulted the Respondent for failing to exercise best judgment principle in its assessment as enunciated in *TAT No. 117 of 2017 Digital Box Limited vs. Commissioner of Investigations and Enforcement*. She urged the Tribunal to allow the Appeal as prayed.

RESPONDENT'S SUBMISSIONS

19. According to the Respondent, the Appellant was a former director and shareholder of Platinum Distillers Limited during the period of tax assessment. The Appellant filed nil returns during the period even though investigations by the Respondent had revealed that she was receiving income in her bank accounts. The Respondent obtained data from the said accounts and considered all entries making the necessary adjustments in the calculation of net taxable income. Particularly, the Respondent took into account transfers from the company bank accounts and bounced and unpaid cheques when making the computations.
20. After the adjustments, the resultant net bankings were treated as income and brought to charge accordingly leading to the issuance of a notice of assessment on 18th April 2019.
21. According to the Respondent, this assessment was justified in law as it was issued pursuant to Section 28 of the Tax Procedures Act (TPA) which obligates a taxpayer to do a self-assessment and file returns. Under Section 29 thereof, the Commissioner's default assessment only comes in when the taxpayer has failed to discharge its duty under Section 28 of the Act.
22. The Respondent cited the case of **TAT Appeal No. 115 of 2017 Digital Box Limited vs Commissioner of Investigation & Enforcement** to advance the contention that it was justified in analyzing the Appellant's bank statements and issuing assessments therefrom. In the said case, the Tribunal observed that *"Further, the courts have in the past held that the banking analysis test (also known as bank deposit analysis) is an acceptable method of arriving at an assessment. This was held to be so in the case of Bachmann v. The Queen, 2015 TCC 51 where the court stated that: -*

“This Court has recognized that in an appropriate case a bank deposit analysis is an acceptable method to compute income.”

23. The Tribunal in the **Digital Box case** (*supra*) went further to observe that: -

“Once it is established that the method is allowed, the question is whether the method was applied in arriving at a reasonable assessment in the case at hand. The Tribunal is guided by the test set out in CA McCourtie LON/92/191 where it was stated:

“In addition to the conclusions drawn by Woolf J in Van Boeckel earlier tribunal decisions identified three further propositions of relevance in determining whether an assessment is reasonable. These are, first that the facts should be objectively gathered and intelligently interpreted; secondly, that the calculations should be arithmetically sound; and finally, that any sampling technique should be representative and free from bias.”

24. Finally, the Honourable Tribunal reiterated the burden of proof when it comes to the banking analysis test and held thus at paragraph 110 of its judgment:

“The onus then was on the Appellant to prove its averment that the banking analysis was misapplied in arriving at the assessment.

25. The Court in **Hole v. The Queen, 2016 TCC 55** opined that:

“There are two primary ways in which a taxpayer can challenge a bank deposit analysis. The first is to prove that his or her records were adequate and thus that his or her income should have been determined using those records. The second, and more common, method is to challenge the actual determination of income made by the Minister under the bank deposit analysis.”

26. In conclusion, the Respondent maintained that the facts in issue in the instant case are not different from those in the *Digital Box case* and further that the Appellant had not discharged her burden of proof as required under the said case. It urged this Tribunal to dismiss the Appeal on those grounds.

ISSUE FOR DETERMINATION AND ANALYSIS

27. Having carefully considered the parties' pleadings, submissions and all documentation provided, the Tribunal is of the respectful view that there is only one issue for determination thus:-

Whether the Respondent's tax assessment was justified.

ANALYSIS AND DETERMINATION

28. **Section 28 of the TPA** places a duty on the taxpayer to self-assess and file self-assessment returns. **Section 29** thereof empowers the Commissioner to make a default assessment where a taxpayer has failed to submit a tax return for a reporting period. The two provisions are reproduced below:

"28. Self-assessment

(1) A taxpayer who has submitted a self-assessment return in the prescribed form for a reporting period shall be treated as having made an assessment of the amount of tax payable (including a nil amount) for the reporting period to which the return relates being the amount set out in the return.

(2) If a taxpayer liable for income tax has submitted a self-assessment return in the prescribed form for a year of income and the taxpayer has a deficit for the year, the taxpayer shall be treated as having

made an assessment of the amount of the deficit for the year being the amount set out in the return.

(3) If a registered person has submitted a self-assessment return in the approved form for a tax period and the taxpayer's total input tax for the period exceeds the taxpayer's output tax for the period, the registered person shall be treated as having made an assessment of the amount of the excess input tax for the period being that amount set out in the return.

(4) A tax return in the approved form completed and submitted electronically by a taxpayer shall be a self-assessment return despite—

(a) the form containing pre-entered information provided by the Commissioner; or

(b) the tax payable being computed electronically as information is being entered into the form.

29. Default assessment

(1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment (referred to as a "default assessment") of—

(a) the amount of the deficit in the case of a deficit carried forward under the Income Tax Act (Cap. 470) for the period;

(b) the amount of the excess in the case of an excess of input tax carried forward under the Value Added Tax Act, 2013 (No. 35 of 2013), for the period; or

(c) the tax (including a nil amount) payable by the taxpayer for the period in any other case.

(2) The Commissioner shall notify in writing a taxpayer assessed under subsection (1) of the assessment and the Commissioner shall specify—

- (a) the amount assessed as tax or the amount of a deficit or excess of input tax carried forward, as the case may be;*
- (b) the amount assessed as late submission penalty and any late payment penalty payable in respect of the tax, deficit or excess input tax assessed;*
- (c) the amount of any late payment interest payable in respect of the tax assessed;*
- (d) the reporting period to which the assessment relates;*
- (e) the due date for payment of the tax, penalty, and interest being a date that is not less than 30 days from the date of service of the notice; and*
- (f) the manner of objecting to the assessment.*

(3) A written notification by the Commissioner of an assessment under this Section shall not alter the due date (referred to as the "original due date") for payment of the tax payable under the assessment as determined under the tax law imposing the tax, and any late payment penalty or late payment interest shall remain payable based on the original due date.

(4) This Section shall not apply for the purposes of a tax that is not collected by assessment.

(5) Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.

(6) Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer."

29. It is critical to note at the onset that by virtue of the above provisions, every taxpayer has a duty to file tax returns for each reporting period failure to which the Commissioner has the mandate to make a default assessment based on the information available to him or her.
30. In the instant Appeal, the Appellant filed nil returns for the period 2014 to 2017. Investigations by the Respondent revealed receipt of deposits in the Appellant's bank accounts. which the Respondent treated as income leading to the assessment of Kshs. 163,897,497.00 as total tax due, inclusive of penalties and interest. The Appellant objected to this assessment on the grounds that: -
- (a) the Respondent treated loans granted to the Appellant as income,
 - (b) that the Respondent failed to consider company resolutions designating the Appellant's bank accounts as revenue collection accounts for Platinum Distillers Limited leading to double taxation and
 - (c) that the Respondent did not consider contra entries in the Appellant's bank statements while making the assessment.
31. To support her case, the Appellant adduced, among other documents, a copy of a board resolution by Platinum Distillers Limited allowing her to use her personal accounts as collection accounts for the company. The said resolution is dated 1st January 2014 and is signed by one Michael Kingara, purportedly a director of Platinum Distillers Limited. No CR12 form or any other documentation was availed by the Appellant to confirm that the signatory was indeed a director of the Company. The resolution is general in nature and does not specify which personal account(s) were to be used in the revenue collection exercise.

32. From the Respondent's assessment, the Appellant held three bank accounts. two of which were held in her name alone while the third account was jointly held by the Appellant and one Onesmus Muturi Mburu. Based on the Respondent's analysis, the three accounts received a total of Kshs. 425,463,574.00 during the tax period. This amount was adjusted taking into account bounced/unpaid cheques and by distributing the net banking in the joint account on a 50:50 ratio thus leading to a reduction of the taxable income to Kshs. 413,544,539.00.
33. Even though the Appellant alleged that the amounts received in the accounts were payments for the company, she did not endeavour, as one would expect, to demonstrate the same by producing receipts or any other relevant documents in support. These being her personal accounts, *prima facie*, she received funds on her own behalf during the period. In that case, the Appellant ought to have presented to the Tribunal a breakdown of what was received on her own behalf against the collections for the company. She did not endeavour to do that. Instead, the Appellant made a general claim that all the funds received were payments for the company.
34. **Section 56(1) of TPA** places the burden on the taxpayer to prove that a tax decision is incorrect. It reads:-

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

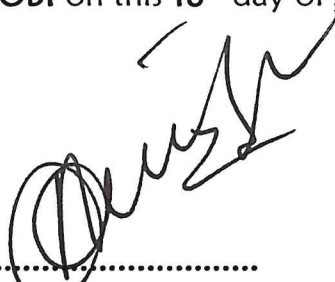
35. Based on the preceding analysis, the Tribunal finds that the Appellant failed to demonstrate that indeed the funds received in her accounts were payments to Platinum Distillers Limited. Having failed to do so, the only cogent conclusion would be that the funds were the Appellant's income in which case, the Appellant was obligated to pay taxes. Consequently, the Appellant's claim on account of double taxation fails.

36. On the Appellant's assertion that personal loans were treated as income, the Tribunal finds that the Appellant did not cite a single loan facility that was granted to her nor produce any loan agreements to prove the same. In the absence of supporting evidence, this assertion equally fails.
37. Lastly, the Appellant contended that the Respondent assessed individual taxes at the Corporate tax rate of 30% instead of the individual graduated rates. In response, the Commissioner asserted that the Appellant had not declared any income during the period despite the unexplained deposits in her account. As such, the Respondent treated the deposits as business income and computed tax thereon accordingly at the rate of 30% using the mark up method having taken into account all the supported expenses.
38. In the circumstances and there being no evidence to the contrary, the Tribunal is persuaded that the deposits in the Appellant's accounts could only qualify as business income and not employment income. Thus, the graduated PAYE rate and the relief thereon cannot apply at all.

FINAL ORDERS

39. The upshot of the foregoing is that the Appeal lacks merit and thus the Tribunal makes the following orders: -
- i. The Appeal be and is hereby dismissed,
 - ii. The Objection Decision dated 22nd July 2019 confirming the Assessment of Kshs. 163,897,497.00 together with the resultant interest and penalties be and is hereby upheld.
 - iii. Each Party to bear its costs
40. It is so ordered.

DATED and DELIVERED at NAIROBI on this 18th 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



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HABON FARAH
MEMBER