

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 411 OF 2020

THE REGISTERED TRUSTEES OF AGRICULTURAL SOCIETY OF KENYA.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a society founded in December, 1901 under the name East African Agricultural and Horticultural Society (EAA & AS) and was formed with the central objective to promote agricultural development through agricultural shows.
2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and is charged with the responsibility of inter-alia, assessment, collection, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent vide a letter dated 10th July, 2018 issued the Appellant with a notice of intention to carry out a VAT audit for the period May, 2017 to June, 2018.
4. The parties held a meeting on the 24th July, 2018 when the compliance check was discussed with the Appellant requested to forward detailed analysis of income as shown in the financial statements from the year 2014.
5. The Respondent vide a letter dated the 28th August, 2018 indicated to the Appellant that following the compliance check it was noted that VAT was not charged and accounted for on the various services offered by the Appellant. The Respondent proceeded to make an assessment and demanded for the immediate payment of VAT in the sum of Kshs. 252,824,047.00 in respect of the years 2014 to 2017.
6. The Appellant objected to the assessment vide its letter dated 21st September, 2018.

7. The Respondent issued the objection decision on the 21st November, 2018 confirming the assessment for a sum of Kshs.244,678,033.16.
8. The Appellant being aggrieved with the objection proceeded to file a Notice of Appeal with the Tribunal on the 14th December, 2018.

THE APPEAL

9. The Appellant filed a Memorandum of Appeal and a Statement of Facts both dated 19th December, 2018 and filed before the Tribunal on 20th December, 2018.
10. The Appeal was premised on the hereunder grounds of Appeal as disclosed on the face of the Memorandum of Appeal: -
 - (a) That the Commissioner of Domestic Taxes erred in fact and law by rendering an objection decision for Kshs.244,678,033.16, which amount is whoppingly in excess of the total amount that the Appellant received and or raised on its income during the subject stated period.
 - (b) That the Commissioner of Domestic Taxes erred in demanding open bias against the Appellant by failing to consider all the material evidence presented to him by the Appellant thereby deriving findings that are inherently invalid and without force of law.
 - (c) That the Commissioner of Domestic Taxes erred in law by conducting an audit over subjects against which no statutory notice had been issued in direct contraventions of Section 59 of the Tax Procedures Act, 2015.
 - (d) That the Commissioner of Domestic Taxes erred in fact and law in imposing and confirming taxation, Value Added Tax, in full knowledge that the Appellant carries out Agricultural, Animal Husbandry and Horticultural Services which services are exempt from VAT under the First Schedule, Part II Paragraph 5 of the Value Added Tax Act, 2013.
 - (e) That the Commissioner of Domestic Taxes erred in law and fact in imposing and confirming taxation, Value Added Tax, against the Appellant yet the Appellant is exempted from such taxation. The Exemption Certificate under the Societies

Act and Income Tax Act supplied to the Commissioner of Domestic Taxes were ignored but without any lawful justification.

- (f) That the Commissioner of Domestic Taxes erred in law and fact in imposing and confirming taxation, Value Added Tax, against the Appellant in the full knowledge that the Appellant is a provider of educational and social welfare services to its members as well as the public in general is exempted from such taxation under Part II, Paragraph 11 of the Value Added Tax Act, 2013.
- (g) That the tax assessment as dated 28th August, 2018 and the Notice of Objection decision as dated 21st November, 2018 and received by the Appellant on the same day was so issued in flagrant violation of the Constitution of Kenya, the provisions of the Fair Administrative Actions Act, 2013, The Tax Procedures Act, 2015, The Income Tax and The Value Added Tax Act, 2013 so as to render the entire Respondent's decision as dated 21st November, 2018 unlawful, irregular, illegal, a monumental substantive and procedural legal nullity, null, void and of no consequence.

The Appellant's Case

- 11. The Appellant's case is based on the following material documents filed on its part before the Tribunal: -
 - a) The Statement of Facts dated 19th December, 2018 filed on the 20th December, 2018;
 - b) The Appellant's written submissions dated 27th August, 2019 and filed on the even date.
 - c) The Appellant's List and Bundle of Authorities dated and filed before the Tribunal on 27th August, 2019; and
 - d) The Appellant's written submissions dated 13th January, 2020 and filed on the even date.
- 12. The Appellant states that by virtue of its Constitution it is limited in the manner it transacts its business as follows: -

- (a) It is a non-profit making organization with the objective of promoting excellence in agriculture and agribusiness through various educational forums.
 - (b) Does not pay out any dividends or bonus to any of its members and therefore is not engaged in any active business activity.
 - (c) Relies wholly on grants from Government members' contribution as well as fees obtained during the different educational forums that it engages in.
13. The Appellant states that by virtue of its activities and not being engaged in profit making business, it has been exempted from income tax under the Income Tax Act.
14. That the Appellant in organizing its activities engages in various agricultural activities which it offers and conducts in the various or different shows that it conducts throughout the country.
15. That the mode of accounting for the different activities is what the Appellant puts in its books of accounts not largely to show any profit made but amount received and how it is disbursed.
16. That the objection decision as rendered by the Respondent on 21st November, 2018 did not contain or at all the statement of finding on the material facts and the reasons for the said decision.
17. The Appellant stated the confirmed figure of Kshs.244,678,033.16 in the objection decision was plucked out of the air and was baseless as no commensurate amount to the said magnitude was made by the Appellant during the period of the assessment.
18. The Appellant stated that the time between raising of the objection and the issuance of the objection decision was 62 days.
19. The Appellant identified in its written submissions two issues that it called upon the Tribunal to determine being: -
- i) Whether the objection decision rendered by the Respondent on the 21st March, 2018 is a valid and lawful tax decision;

- ii) Whether the Appellant's activities are exempt from the VAT under the Value Added Tax Act, 2013.

a. Whether the objection decision rendered by the Respondent on the 21st March, 2018 is a valid and lawful tax decision;

20. The Appellant submits that the compliance check done by the Respondent was for the period 2017 only. There were no financial details or books of accounts prepared for the year 2018 or at all at the time of compliance check conducted by the Respondent. It cannot be determined on which basis the figure of Kshs.244,678,033.16 was arrived at. That it was unilateral and arbitrary in that case.
21. That the assessment of Kshs.244,678,033.16 was excessive. Even in the Respondent's own document, the letter of assessment dated 28th August, 2018 it was clearly shown that the entire year of 2017 the Appellant made a total of 293,830,245.00. There was no evidence and or basis that the Appellant made an amount that is above the total of Kshs. 293,830,245.00 and much way beyond the said amount for a period of one month, 1st May, 2018 to 31st May, 2018 to attract a total of Kshs.244,678,033.16 as tax.
22. That in the light of the foregoing, the Appellant submits that the assessment by the Respondent is oppressive, arbitrary and unilateral.
23. The Appellant submitted that it is trite law that an assessment that is more than 50% of the total profits made by the taxpayer, must be held as unilateral and oppressive and cannot stand. The Appellant cited the case of ***Silver Chain Limited -Vs- Commissioner of Income Tax & 3 others (2016)eKLR*** where the court held as follows:-

"The totality of my above evaluation is that the applicant was not accorded the right to fair administrative action. The assessment of the tax was unilateral, arbitrary and oppressive. He was entitled to a clear explanation as to how the computation was made. The Respondents' documents indicate that during the period June 2013 to 31st July,2015, the Appellant's total sales were Kshs.55,139,701/=. The amount of principal tax demanded is Kshs.27,825,525/=. This is almost 50% of the sales of the cost of sale and operating expenses are not included. That is why I find the assessment to be oppressive.

.....

The upshot is that the application dated 9th May, 2016 is merited and is hereby granted as prayed.”

24. The Appellant submitted that the principle in the foregoing court decision has been enshrined in difference principles of taxation including that the subject must be taxed in manner that is transparent, accountable, ascertainable and not oppressive.
25. That the Respondent’s decision to impose Kshs.244,678,033.16 being unascertainable and oppressive, cannot therefore stand and must be set side.
26. That the objection decision dated 21st November, 2018 did not state any findings of fact on the material presented before it.
27. The Appellant referred to the objection decision that it deemed to have been simply worded as thus: -

“This is to inform you that your objection application with reference number KRA 201813873507 received on 21st September, 2018 has been fully rejected.”

28. That the Respondent in making the objection decision neither considered nor demonstrated having considered the Appellant’s submitted facts and material evidence.
29. That the objection decision goes against the express provisions of the Tax Procedures Act, 2015. The Appellant cited Section 51 (10) of the TPA that stipulates as hereunder: -

“An objection decision shall include a statement of finding on the material facts and reasons for the decision.”

30. That the mandatory terms of Section 51 of TPA stipulates that an objection decision as one made by the Respondent on the 21st November, 2018, should have a finding of fact and the reasons for the said decision. When there is a finding of fact then the material evidence presented by a taxpayer would be considered. When there is no finding on the material fact then such finding only indicate that the material evidence presented by the taxpayer was not considered.

31. That contrary to Section 51 (10) of the TPA no reason was given or at all for the Respondent's objection decision.
32. That the failure by the Respondent to consider the material evidence as presented by the Appellant was in breach of Article 47 of the Constitution of Kenya, 2010 which provides as follows:-
- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action the person has the right to be given written reasons for the action”
33. That it was incumbent upon the Respondent in securing the Appellant's right to property to give clear reasons for its tax decision. This would have allowed the Appellant to understand on what facts and reasons the tax liability of Kshs.244,678,033.16 was obtained or derived from.
34. That in pursuant to Article 2(4) of the Constitution of Kenya, 2010 any law or action that is inconsistent with the provisions of the Constitution is null and void and is invalid. The concept applied to the action by the Respondent of delivering a tax decision which is inconsistent with the provisions of the Constitution and therefore cannot stand for being illegal for all intents and purpose and invalid to that extent.
35. The Appellant referred to Section 51 (11) of the Tax Procedures Act which situates as follows:-
- “Where the Commissioner has not made an objection decision within sixty days from the date that the tax payer lodged a notice of the objection, the objection shall be allowed.”*
36. The Appellant submitted that a provision similar to Section 51(11) of the Tax Procedures Act has been the subject of High Court decisions. The Appellant cited the case of ***Republic -Vs- Commissioner of Customs Services ex-parte Unilever Kenya Limited (2012)eKLR*** where the court stated as thus:-
- “The ex-parte applicant says that this tax cannot be paid since it is assumed that the respondent had allowed its application for review when it failed to make a decision within 30 days from the date of the application for review namely 8th March, 2011. The ex-parte applicant's case is squarely premised on*

the interpretation of subsections 4 and 5 of Section 229 of EACCMA. For the purpose of this judgment, I find it necessary to reproduce the entire Section 229 EACCMA which states as follows:-

.....

(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

My understanding of the above quoted section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the respondent in this case has 30 days within which to make and communicate a decision to the taxpayer. If the respondent does not communicate a decision within 30 days, then the respondent "shall be deemed to have made a decision to allow the application." The law is so clear that it can only be interpreted in one way."

37. The Appellant submits that the similar interpretation in the aforecited authority ought to be applied with respect to compliance with Section 51 (11) of the Tax Procedures Act. That a belated objection decision even by one second past the 60 days renders the decision inconsequential and the objection by the taxpayer is deemed to have been allowed automatically by effluxion of time.
38. That the Appellant having lodged and served an objection decision on the 21st September, 2018 the Respondent was expected to issue an objection decision by the 19th November, 2018. The objection decision issued on the 21st November, 2018 is said to have been issued 62 days thereafter. The objection decision issued after the 19th November, 2018 is indicated by the Appellant to be inconsequential and without the force of law.
39. The Appellant contends that in the circumstance the objection lodged on its part stands and the assessment by the Respondent and the objection decision are untenable, invalid and a nullity.

40. The Appellant further submitted that the assessment dated 28th August, 2018 and the objection decision dated 21st November, 2018 being administrative actions ought to comply with the provisions of Section 4(3) of the Fair Administrative Actions Act. The requirements of Section 4(3) of the Act are, inter-alia, that:-
- i) A person to be affected by the decision ought to be granted an opportunity to examine the materials and information relied upon in making the decision;
 - ii) The person ought to be granted the opportunity to be heard and make representations on the said decision.
41. The Appellant submits that the Respondent failed to supply the material that it relied upon to make the assessment of Kshs. 244,678,033.16 and the Appellant was not granted an opportunity to make any representation.
42. The Appellant relied on the case of ***Silver Chain Limited =Vs= Commissioner of Income Tax & 3 Others (supra)*** where the court stated as thus:-

“My view is that disputes involving tax assessment should be dealt with under the legal procedures set up by the law. The respondents are expected to discuss their assessment with a tax payer. If the tax payer is not satisfied with the assessment, an objection form which could be standardized should readily be available to the tax payer to lodge his objection to the assessment.

The totality of my above evaluation is that the applicant was not accorded the right to fair administrative action. The assessment of the tax was unilateral, arbitrary and oppressive. He was entitled to a clear explanation as to how the computation was made....”

b) Whether the Appellant’s activities are exempt from the VAT under the Value Added Tax Act, 2013.

43. The Appellant submits that being engaged in educational activities and for being a social welfare group its activities are by virtue of Part II of the First Schedule to the Value Added Tax exempt from VAT Act, 2013.

44. That in the interpretation of exemptions under tax laws, the law is clear that exemptions are to be liberally interpreted in favour of the taxpayer so as to promote the activities inculcated in those exemptions. The Appellant stated that this was aptly captured in the case of *Commissioner of Income Tax –Vs- Shaan Finance (P) LTD* as cited in *Republic -Vs- Kenya Revenue Authority ex-parte Mkopa Kenya Limited (2018) eKLR* where the court stated as thus” -

“This cannon has particular salience in tax statutes in at least two pertinent ways in these proceedings:-

.....

(b) Exemptions conferred are liberally interpreted in favour of the tax payer so as to promote the activities incentivized by those exemptions - see for example the decision of the Indian Supreme Court in Commissioner of Income tax v Shaan Finance (P) Ltd JT 1998 (2) SC 464.”

51. In the applicant’s submissions it has been authoritatively held an exemption provision cannot be denied its full effect by a circuitous process of interpretation - see the judgment of the Indian Supreme court in Swadeshi Polytex Ltd v Collector of Central Excise, AIR 1990 SC, 301. Yet the Respondent in this case does something worse than circuitous interpretation

96. I therefore have no hesitation in finding that the sudden arbitrary and unexplained about-turn made by the Respondent with respect to the importation of the solar powered televisions amounted to the thwarting of the applicant’s legitimate expectations that the said items were exempt from VAT.”

45. The Appellant referred to Paragraph 11 of Part II of the First Schedule of the Value Added Tax Act which provides as follows with regard to exemption of VAT on services:-

“11. The supply of

- a) Services rendered by educational, political, religious, welfare and other philanthropic association to their members, or*
- b) Social welfare services provided by Charitable organizations registered as such, or which are exempted from registration, by the Registrar of Societies under Section 10 of the Societies Act (Cap 108) or by the Non-Governmental Organization Co-ordination Act (Cap 134) and whose income is exempt from*

tax under Paragraph 10 of the First Schedule to the income tax and approved by Commissioner of Social Services.”

46. The Appellant submitted that it is not disputed that it is an educational institution and is also a welfare group or institution offering various welfare services to its members.
47. That for a body or institution to fall under the category of a welfare group or institution it must be a welfare association and offers services to its members. The services the Appellant renders to its members are clearly stipulated in Article 7 of its Constitution.
48. That the Appellant falls in the category of welfare association as it engages to ensure that farmers and agriculturalist are able to get the necessary information they require to better their farming activities. This is achieved through shows organized by the Appellant which provide forums for the different farmers to learn.
49. The Appellant further states that the activities it engages in provide forum for the information and data distribution offered to both its permanent and non-permanent members. The membership fee paid before attendance of the show entitles non-permanent members to benefit from the shows and exhibitions conducted by the Appellant.
50. That the foregoing activities of the Appellant squarely fit under the exemption as provided under Paragraph 11(a) of the Part II of the First Schedule of the Value Added Tax Act.
51. The Appellant contends that the Value Added Tax being silent on whether the activities the welfare association offers to its members are to be exclusively for its members, the ambiguity is to be interpreted in favour of the taxpayer. Further, that being that the exemption are to be liberally interpreted in favour of the taxpayer, it so follows that the interpretation of Paragraph 11(a) Part II of the First Schedule of the Value Added Tax Act ought to be interpreted in favour of the Appellant, to the extent that its services are exempt from taxation in as much as some of its activities as offered to its members, extend to the general public.
52. The Appellant further contends that it is a charitable organization enjoying exemption under Paragraph 11(b) of Part II of the First Schedule of the Value Added Tax Act. That it falls under the definition of a charitable organization for reason of

its main objective being for educational purpose and for offering community services.

53. That for a charitable organization to benefit from the exemption under Paragraph 11(b) its ought to prove the following:-

“a. That either they are;

i) They are registered as charitable organization; or

ii) Registered as such under Non-Governmental Organization Co-ordination Act; or

iii) Are exempt from Registration under the Societies Act.

b. That they are exempt from tax under the Income Tax Act.”

54. That the Appellant had established that it is exempt from registration under the Societies Act through provision of a Certificate of Exemption issued to it and by demonstration that it is exempt from Income tax under Paragraph 7 of Part 1 of the First Schedule of the Income Tax Act that provides as follows:-

“Profits or gains of an agricultural society accrued in or derived from Kenya from any exhibition or show held for the purpose of the society which are applied solely to such purpose, and in the interest on investment of such society.”

The Appellant produced its Income Tax exemption certificate.

55. The Appellant concluded that it has satisfied the conditions to fall for exemption under the provisions of Paragraph 11(b) of Part II of the First Schedule of the Value Added Tax Act, 2013.
56. The Appellant prays that the Tribunal sets aside the Value Added Tax assessment totaling to Kshs.244,678,033.16 and accordingly annul the Value Added tax demand and the objection decision as issued by the Respondent dated the 21st November,2018.

THE RESPONDENT’S CASE

57. The Respondent’s case is premised on the hereunder pleadings and documents as filed by the Respondent before the Tribunal:-

- a) The Respondent's Statement of Facts dated 11th January, 2019 filed on the same date;
- b) The Respondent's Submissions dated and filed on the 31st December, 2019;
- c) The Respondent's Supplementary List of Documents dated and filed on 5th November, 2020;
- d) The Respondent's Supplementary Submissions dated 15th March, 2021 filed on 16th March, 2021.

58. That from the itax records the Respondent noted the Appellant was registered for VAT and had withholding VAT credits which had not been utilized because it had failed to declare the corresponding income yet it was offering vatable services. Consequently, there was need to do a compliance check to establish the amount of VAT not paid by the Appellant for the time it registered for VAT obligation.
59. That the Respondent advised the Appellant that due to the nature of the issues and tax amount involve the scope of the audit would be extended to the year. The audit was carried out leading to the assessment and demand for VAT of Kshs.252,824,047.00 on the 28th August, 2018.
60. The Respondent identified and submitted on the following issues:-
- a) What is the effective date of registration for purposes of VAT assessment
 - b) Whether the objection notice issued by the Appellant was valid
 - c) Whether the Respondent erred by conducting an audit over subjects against which no statutory notice had been issued in contravention of section 59 of the Tax Procedures Act, 2015
 - d) Whether the Appellant's activities are exempt from VAT under the Value Added Tax Act, 2013.

a) What is the effective date of registration for purposes of VAT assessment

61. The Appellant made reference to Section 34(1) of the VAT Act, 2013 which stipulated that the threshold required for registration for VAT is making taxable supplies of value of five million shillings or more in any period of twelve months.
62. The Appellant states that the year 2014 was taken as the effective date of the Appellant's registration for VAT obligation on the grounds that an analysis of the income streams provided by the Appellant and invoices sampled clearly confirmed that the Appellant was giving taxable services with the exception of investment income which was not proper to charge. In the circumstances the assessment was proper and well grounded.
63. The Respondent contends that the power to collect VAT is provided in the Value Added Tax Act and the assertion by the Appellant that it is exempted from taxation under the Income Tax Act is erroneous. Exemptions under the Income Tax Act cannot apply in the VAT regime.

b) Whether the objection notice issued by the Appellant was valid

64. The Appellant submitted that for there to be a valid objection it must conform to the provision of Section 51(3) of the Tax Procedures Act that 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 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 taxes due under the assessment that is not in dispute."

65. That the Appellant continuously engaged the Respondent through meetings, letters and emails on the outstanding issues to the assessment for a period of more than 60 days from the date of the assessment leaving the Respondent with no choice than facilitate the Appellant on resolving the tax issues at hand.
66. The Respondent submitted that the objection decision was late by just six days within which all through the sixty day period the Respondent was engaging the tax

payer all through to give them an opportunity to provide documents for review and to resolve the tax issues arising

67. The Respondent urged the Tribunal to determine if the 6 days is inordinate delay while relying on the case of ***Utalii Transport Company Limited & 3 Others Vs NIC Bank Limited & Another [2014] eKLR*** where Justice Gikonyo stated as follows:-

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.”

68. The Respondent further relied on the case of ***Allan Vs. Sir Alfred Mc Alphine and Sons Ltd [1968]1 all ER 543*** where Justice F. Azangalala states as follows:-

“The defendant must show:

- i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.*
- ii. That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.*
- iii. That the defendants are likely to be seriously prejudices by the delay. This may be prejudice at the trial of issues between themselves and the Plaintiff or between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial.”*

69. The Respondent further urged the Tribunal to be guided by Article 159(2)(d) of the Constitution of Kenya, 2010 which provides that courts and tribunals shall administer justice without undue regard to procedural technicalities.

c) Whether the Respondent erred by conducting an audit over subjects against which no statutory notice had been issued in contravention of Section 59 of the Tax Procedures Act, 2015.

- 70. The Respondent states that it issued a notice of intention to carry out a compliance check in accordance with Sections 58 and 59 of the Tax Procedures Act and the notice was received by the Appellant on 10th July, 2018.
- 71. That the Respondent by virtue of Section 29(5) of the Tax Procedures Act can review records dating five years back for purposes of making a default assessment.
- 72. That the Respondent was well within his powers in conducting an audit relating to the period prior to the scope as provided in the notice. The Appellant availed documents for the period prior to the one specified on the notice, thereby enabling the Respondent carry out its audit and issue assessments.

d) Whether the Appellant's activities are exempt from VAT under the Value Added Tax Act, 2013.

- 73. The Respondent submits that the Appellant's activities that have been brought to tax are not VAT exempt as alleged.
- 74. That Schedule Two, Three and Five of the VAT Act, 2013 provides for all exempt goods, except services and zero rated supplies, respectively, to which the services offered by the Appellant do not apply.
- 75. The Respondent submits that the Appellant holds shows in various major towns of the country where it leases space to exhibitors for various purposes, offers other services such as advertising outdoor, catering sees, tickets and car park. All these are taxable supplies under Section 2 of the VAT Act,2013.
- 76. That following the admission by the Appellant that the majority of the participants in the exhibition offer agro based services the Respondent submits that these exhibitors are the ones offering agro based services and the Appellant lets space to them, a service that is taxable. That in any event the assessment was limited only to the services offered by the Respondent not the exhibitors.
- 77. The Respondent submits that the Appellant started filling VAT returns and paying taxes from May, 2018 which meant that the Appellant was in agreement with the

issues raised during the compliance check more specifically the fact that it makes taxable supplies.

78. The Respondent urged that the demand issued is different from the assessment raised in the system due to difference in the months used for interest calculation. It was not possible to raise the assessment for earlier years in the system hence the assessment was done in May, 2018. However, the principal and penalty remain the same.
79. The Respondent prays that the Tribunal upholds the assessment of VAT of Kshs.244,678,033.16.

ISSUES FOR DETERMINATION

80. The Tribunal upon due consideration of the pleadings, documents and the written submissions filed on the part of the separate parties identified the hereunder issues as the ones falling for determination in the Appeal: -
- a. Whether the Appellant's notice of objection dated 21st September, 2018 is deemed to have been allowed following the Respondent's failure to timeously issue the objection decision.
 - b. Whether the Appellant enjoys any exemption from the payment of VAT under the VAT Act, 2013.
 - c. Whether the Appellant is liable for payment of the amount of VAT on the services identified in the assessment and demand.

ANALYSIS AND DETERMINATION

- i) **Whether the Appellant's notice of objection dated 21st September, 2018 is deemed to have been allowed following the Respondent's failure to timeously issue the objection decision.**

81. The Tribunal shall deal with this issue as a material issue that goes to that very core of the jurisdiction of the Tribunal to deal with the Appeal and is one such issue that has the potential to summarily dispose off the Appeal in entirety.
82. In pursuant to Section 51(11) of the Tax Procedures Act, the Respondent is enjoined to issue an objection decision within a period of 60 days upon receipt of a notice of objection lodged by a taxpayer or upon receipt of any further information that the Respondent may require from the taxpayer to facilitate the review of the notice of objection for the purposes of the issuance of the objection decision. Section 51(11) of the TPA reads as follows:-

“Where the Commissioner has not made an objection within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.”

83. The failure on the part of the Respondent to timeously address a notice of objection and issue an objection decision within the statutory timeline of 60 days has drastic legal implications to the extent that the notice of objection is allowed and the tax assessment accordingly deemed to have been entirely vacated.
84. There was a suggestion, though not pleaded in the Statement of Facts by the Respondent to the effect that the notice of objection was invalid. The nature of the invalidity of the objection decision was not disclosed at all.
85. In pursuant to Section 51(4) of the TPA the Respondent was enjoined to immediately notify the Appellant in writing that the objection had not been validly lodged were the Respondent to determine that the notice of objection lodged by the Appellant had not been validly lodged in compliance with the threshold for validity immortalized under Section 51(3) of the TPA.
86. We note that at no material time prior to the issuance of the objection decision on the 21st November, 2018 did the Respondent intimate to the Appellant of its notice of objection being invalid for any cause whatsoever. In fact the objection decision did not contrary to Section 51 (10) of the TPA include a statement of finding on any material fact and reasons for the decision to reject the objection on the part of the Respondent.

87. It is an unequivocally admitted facts on the part of the Respondent that the objection decision was issued on its part outside the statutory period of sixty days. The Appellant lodged the notice of objection on the 21st September, 2018 and the Respondent issued the objection decision on the 21st November, 2018 which was two days outside the mandatory statutory timeline.
88. The Respondent submitted that the delay of two days in the issuance of the objection decision was not inordinate and is to that extent excusable.
89. The Respondent further urged the Tribunal to find that the failure to timeously issue an objection decision within 60 days upon receipt of a tax payer's notice of objection is a mere technicality curable by Article 159 of the Constitution of Kenya, 2010 that enjoins the Tribunal to dispense justice without any undue regard to procedural technicalities.
90. A consideration of Section 51(11) of the Tax Procedures Act leads to unmistakable conclusion that a default in the issuance of an objection decision within the statutory timeline has extremely drastic and irredeemable consequences. The wording in terms of the consequences of the default leaves the Tribunal with absolutely no discretion with the use of the word shall be allowed.
91. The objection decision is ordinarily what founds many of the appeals and informs the exercise of jurisdiction on the part of the Tribunal to the extent that it is the objection decision that constitutes an appealable decision. To signify the importance of an objection decision Section 3 of the Tax Procedures Act defines an "*appealable decision*" to mean, inter-alia, an objection decision.
92. The compliance with the statutory timelines in the issuance of an objection decision is to that extent a fundamental and substantive statutory obligation on the part of the Respondent that cannot be whimsically termed as a "mere procedural technicality". Reliance on Article 150 of the Constitution of Kenya, 2010 does not in itself offer an omnibus cure to every transgression on clear statutory provision and obligation. This was more aptly captured by the Court of Appeal in ***Nicholas Kiptoo Arap Korir Salat –Vs- Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR*** when Justice Kiage stated as thus:-

"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew

defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

93. The Respondent made spurious submissions that during the intervening period in between the date the Appellant lodged the notice of objection and the date when the Respondent issued the objection decision there was engagement between the parties through meetings and correspondences purportedly calculated to facilitate the Appellant on resolving the tax issues at hand. There was no iota of evidence adduced on the part of the Respondent to lend credence to such an engagement that would have otherwise had the effect of enlarging the time within which the Respondent would have ordinarily been enjoined to issue the objection decision.
94. The consequences of the default on the part of the Respondent to timeously issue an objection decision within the mandatory statutory timeline were well settled in the case of ***Republic –Vs- Commissioner of Customs Services ex-parte Uniliver Kenya Limited (2012)*** when the court stated as follows:-

“The ex-parte applicant says that this tax cannot be paid since it is assumed that the respondent had allowed its application for review when it failed to make a decision within 30 days from the date of the application for review namely 8th March, 2011. The ex-parte applicant’s case is squarely premised on the interpretation of subsections 4 and 5 of Section 229 of EACCMA. For the purpose of this judgment, I find it necessary to reproduce the entire Section 229 EACCMA which states as follows:-

.....

(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

My understanding of the above quoted section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the respondent in this case has 30 days within which to make and communicate a decision to the taxpayer. If the respondent does not communicate a decision within 30 days, then the respondent "shall be deemed to have made a decision to allow the application." The law is so clear that it can only be interpreted in one way."

95. The upshot of the foregoing is that the notice of objection issued by the Appellant on the 21st September, 2018 stands allowed in terms of the provisions of Section 51(11) of the Tax Procedures Act and accordingly the tax assessment on VAT issued on the 28th August, 2018 for the sum of Kshs. 252,824,047.00 stands vacated in its entirety.
96. In any event the validity of the objection decision was similarly challenged for being in contravention of Section 51(10) of the Tax Procedures Act for want of a finding on material facts raised in the notice of objection and failure to give reasons for the rejection of the objection.
97. The objection decision issued by the Respondent on the 21st November, 2018 was gauged in the following terms:-

"This is to inform you that your objection application with reference number KRA 201813873507 received on 21st September, 2018 has been fully rejected."

98. Section 51(10) of the Tax Procedures Act provides as follows with regard to the contents of an objection decision statutorily expected to be issued following receipt of a validly lodged notice of objection:-

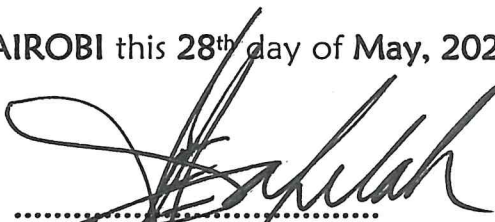
“An objection decision shall include a statement of findings on the material facts and the reason for the decision.”

99. A cursory perusal of the objection decision issued on the 21st November, 2018 on the part of the Respondent clearly and undeniably falls short of the mandatory statutory threshold for an objection decision as it manifestly lacks a finding on the material facts raised in the Appellant’s notice of objection dated the 21st September, 2018 and there is obviously no reason given for the rejection of the notice of objection in its entirety.
100. It is therefore equally the finding of the Tribunal that the objection notice issued by the Respondent on the 21st November, 2018 was incompetent and completely unsustainable under the provisions of Section 51(10) of the Tax Procedures Act, 2015.
101. With the notice of objection lodged on the part of the Appellant having been deemed as duly allowed and/or found to be legally incompetent the other issues falling for determination are hereby rendered superfluous.

FINAL DETERMINATION

102. On the basis of the foregoing analysis the Appeal succeeds and the Tribunal accordingly makes the following **ORDERS**: -
 - a. The Objection decision dated the 21st November, 2018 is hereby struck out.
 - b. The Appellant’s notice of objection dated 21st September, 2018 is hereby deemed to have been allowed in its entirety on the part of the Respondent.
 - c. Each party to bear its own costs.
103. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May, 2021.


.....
ERIC NYONGESA WAFULA
CHAIRMAN


.....
CATHERINE N. MUTAVA
MEMBER


.....
GABRIEL M. KITENGA
MEMBER


.....
ABRAHAM K. KIPROTICH
MEMBER

