REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 359 OF 2020

TRANSFLEET EPZ LIMITED..................................................APPELLANT

-VERSUS-

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

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya under the
   Companies Act. According to the Appellant, its principal business activities are
   property investments, sales of crushed quarry aggregates, concrete products &
   transport.

2. The Respondent is a principal officer appointed under the Kenya Revenue
   Authority Act, Cap 469 of the Laws of Kenya. Under Section 5(1), the Kenya
   Revenue Authority is an agency of the Government for the collection and
   receipt of all revenues. Further, under Section 5 (2) with respect to the
   performance of its functions under subsection (1), the Authority is mandated
   to administer and enforce all provisions of the written laws as set out in Part 1
   & 11 of the First Schedule of the Act for the purpose of assessing, collecting and
   accounting for all revenues in accordance with those laws.
3. The genesis of the matter emanates from the Respondent carrying out a desk compliance check, where the Respondent noted that the Appellant had rented out its property to EPZs and that specific items in the returns were identified and required clarification.

4. The Respondent issued the Appellant with a notice of assessment on 30th January, 2019 vide email and hard copy requesting it to provide documents. Consequently, the Respondent issued additional assessments to disallow unsupported expenses, and assess estimated income on 2nd May, 2019. The Respondent issued its findings from return review for the period 2015 to 2017 to the Appellant vide a letter dated 6th May, 2019.

5. The Appellant lodged an objection to the assessment on 31st May, 2019. On 6th August, 2019 the Appellant’s agent sent a letter to the Respondent requesting for more time to complete auditing the company and file its returns.

6. The Respondent issued a letter dated 30th September, 2019 to the Appellant informing the Appellant of the Respondent’s intention to disallow interest expenses, raise an estimated assessment for Financial Year 2017 and asking the Appellant to provide documents to support the declaration of rental income.

7. The Appellant’s tax agent wrote to the Respondent where they described the rental income earned as residential and that tax on residential income that had been withheld was final. They further requested the Respondent to amend the assessments in accordance with their objection.
8. The Respondent confirmed the Assessment on 20\textsuperscript{th} November, 2019 and issued an agency notice on 14\textsuperscript{th} January, 2020 on one of the Appellant’s tenants. On 28\textsuperscript{th} January, 2020 the Appellant’s auditors responded that the objection and Appeal process is self-explanatory and that the agency notice should be lifted. The Respondent responded in a letter dated 14\textsuperscript{th} February, 2020 informing the Appellant that the objection was resolved by way of rejection on 20\textsuperscript{th} November, 2019 because it had not provided documents.

9. The Respondent issued an additional assessment on the 2018 return on 27\textsuperscript{th} February, 2020 taking into consideration the withholding credits of withholding tax on commercial rental income already deducted. The Respondent issued a demand notice on the tax areas arising from the 2018 assessment to the Appellant.

10. The Appellant in a letter dated 23\textsuperscript{rd} April 2020 wrote to the Respondent to further object to the Respondent’s enforcement action. On 29\textsuperscript{th} May 2020, the Appellant wrote a letter to the Respondent requesting for more time. In response the Respondent in a letter dated 16\textsuperscript{th} June 2020 wrote to remind the Appellant to provide documents.

11. Being dissatisfied with the Respondent’s decision, the Appellant filed a notice of Appeal to the Tribunal.

**THE APPEAL**

12. The Appellant Appeals to the Tribunal against the decision issued by the Respondent vide a Memorandum of Appeal dated 17\textsuperscript{th} August 2020. The grounds of Appeal are as follows;
a. The Income Tax additional assessments for the years of income 2015, 2016, 2017 on Rental Income is excessive, by reason of some error or mistake of facts in disallowing some expenditures incurred in that year of income which is expenditure wholly and exclusively incurred by Transfleet (EPZ)Ltd in the production of Rental income.

b. The Respondent erred in estimating the Appellant by alleging that the interest expenses charged on loan in the years of income 2015 and 2016 were not wholly and exclusively incurred in the production of income hence disallowed.

c. The Respondent erred in raising and confirming estimated assessment for the year 2017 by alleging that there is no evidence of income earned by the company for the year and yet the same has not been declared.

d. The Respondent erred in appointing new wide garments (k)EPZ ltd as a withholding agent under Section 35(3A) of Income Tax Act Cap 470 and Section 6A: Imposition of residential rental income Tax: is self-explanatory on the limit on rental income to attract Section 35(3)(j) hence mislead the Appellant.

e. The Respondent refused to admit the Notice of Objection and also confirmed the estimated Additional Assessment which were punitive, not as per the income.

f. In the estimated additional assessments for the year 2015 the Respondent did not grant credit of tax on “Management or Professional fee” hence tax credit not granted is punitive, excessive and not payable as it is part of Corporation Tax demanded.
g. The 10% withholding tax under Section 6A, Section 35(3)(j), Section 35(3)(a) and Third Schedule Paragraph 5(j)(a) and paid to the Respondent of Domestic Taxes, was not granted as a credit while the Respondent raised estimated assessment, hence tax demanded is erroneous. Total Tax demanded totals 40% instead of corporate rate.

13. The Appellant prays that the tax Appeal Tribunal;

   a. Orders the Respondent to amend the estimated additional assessment of Kshs 181,204,775.00 per returns and accounts.

   b. Each party to bear their own cost.

RESPONSE TO THE APPEAL

14. The Respondent responded to the grounds of Appeal through a Statement of Fact dated 16th September 2020, as follows;

   a. The Respondent raises a preliminary objection on the following grounds;

      i. That the Appeal filed is improper in terms of Section 51(3) and 56(1) of the Tax Procedures Act and Section 30 of the Tax Procedures Act.

      ii. That the Appeal has been filed upon crystallization of taxes.

      iii. That the Appellants' Appeal is contrary to the provisions of Section 52 of the Tax Procedures Act as read together with Section 13(1) of the Tax Appeals Tribunal since the Appeal has been filled out of time.

      iv. That the Appeal is fatally defective and must fail.
b. The Respondent avers that the Appellant failed to provide documents for verification at the objection decision stage.

c. The Respondent avers that the Appellant’s Appeal is invalid since it is Appealing against confirmed assessment based on its invalid objection.

d. The Respondent avers that the Appellant failed to Appeal within the statutory timelines, thus the taxes crystalized.

e. The Respondent avers that throughout the Appeal, the Appellant has only made allegations that have not been substantiated by evidence and the whole Appeal should be dismissed.

f. The Respondent submits that it has adduced sufficient documentation supporting its assessment on the Appellant.

15. The Respondent prays that the Tribunal;

   a. Dismiss the Appeal for lack of merit.
   b. Uphold the Respondent’s assessment and confirmed assessment.
   c. Award the Respondent the cost of Appeal.

**ISSUE FOR DETERMINATION**

16. In this Appeal the following issue crystallizes for determination by the Honorable Tribunal, namely;

   a. *Whether the Appellant properly objected to the Respondent’s assessment*
ANALYSIS AND FINDINGS

17. The Appellant in its submission made a passing averment in its defense regarding the issue under determination. That the Appellant furnished the Respondent with the income tax returns audited accounts and tax computation for the years of income 2015 to 2017 to enable the Respondent amend the assessment in accordance with the objection. In this regards, the Appellant attached its tax returns.

18. The Respondent submitted that he issued a notice of assessment and raised estimated income assessment on the Appellant. The Appellant responded by sending various correspondences to the Respondent and holding several meetings but failed to provide the necessary documents. The Respondent directed the Tribunal in particular to the letter dated 30th September 2019 wherein he advised the Appellant that it failed to avail documents. Even in its late objection, the Appellant failed to provide documents in support of its objection notice.

19. The Respondent submits that the Appellant’s objection was invalid, having failed to avail the required documents. The objection notices therefore failed to meet the threshold established in Section 51 (3) of the Tax Procedures Act 2015. This, according to the Respondent speaks to the fact that Appellant had failure to dispense with the burden of proof. In this regard, the Respondent placed reliance on the case of Republic vs. Kenya Revenue Authority Ex Parte Funan Construction Limited (2016) eKLR where it was stated as follows: -
"... A Notice of Objection must state precisely the grounds of objection to the Notice of Assessment and must be lodged within 30 days upon issuance of the Notice of Assessment. This provision has received judicial interpretation in Nairobi H.C. Misc. Civil Application No. 534 of 2007; Republic –vs- Kenya Revenue Authority & 2 Others, where the Court expressed itself as follows:

"An objection that does not conditionally state a clear and unambiguous position of the taxpayer and which suggests a discussion or a meeting is not an application under S. 229 (2)...For it to be effective it must unequivocally deal with all aspects of the assessment and specify the taxpayer's position on each with clear answers and figures admitted or not admitted...."

20. We have carefully reviewed and considered the Parties' contesting submissions in this regard. It will be imperative therefore to recapitulate the relevant facts on the genesis of this Appeal for contextual purposes. On 30th January 2019 the Respondent issued the Appellant with a notice of assessment, requesting the Appellant to avail a number of documents. The Appellant did not comply with this requesting leading the Respondent to issue preliminary findings on 6th May 2019. The Appellant consequently objected to the assessment on 31st May 2019.

21. Vide a letter dated 6th August 2019, the Appellant wrote to the Respondent requesting for extension of time in filing its returns upon completion of an ongoing audit it was conducting. On 30th September 2019, the Respondent informed the Appellant that its objection notice was not validly lodged for
want of supporting documents. The Appellant was required to provide the requisite evidence in support of its objection before the Respondent could make a decision on the assessment. The Appellant re lodged an objection with the Respondent on 25th October 2019 requesting the Respondent to amend the assessment, once again without providing documents. These futile efforts lead the Respondent to confirm the assessment on 11th November 2019.

22. From the above narration, the issue before us for our determination is whether the Appellant herein placed a valid objection notice before the Respondent. Inevitably this turns on the question of the status of the assessment should a positive finding be made that the Appellant's objection notices were invalid. In the circumstances it will be judicious for the Tribunal to restate the applicable law on the validity of objection notice. Section 51 (3) of the TPA 2015 stipulates as follows:

"(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;

(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."
23. From the totality of evidence before us, the Appellant’s objection notices have not qualified for the threshold established in Section 51 (3) (c) of the TPA as none of the correspondences with the Respondent during the audit process carry any evidence. On the contrary, the record before us supports a case of the Respondent being overly indulgent and lenient with the Appellant insofar as the provisions of its documents is considered. From the inception of the audit, the Appellant has demonstrated indifference in complying with the Respondent’s requests in providing documents. It is in light of this that we find the Appellant is being utterly dishonesty in its submissions in averring that it submitted documents to the Respondent in support of the objection notices.

24. The Tribunal is therefore guided by the provisions of Section 51 (3) of the TPA which enlist the validity requirements of an objection notice to the Respondent. In order to be valid in law, an objection, in whichever form it is presented to the Respondent must fulfil three pre-conditions; firstly, it must precisely state the grounds of Appeal, the amendments to be made and the reasons for the amendment, secondly, in respect of undisputed taxes, the taxpayer must pay the entire amount of the undisputed taxes or apply for extension of time under Section 33 (1) and, thirdly, the objection must be submitted together with all relevant documents in support of the tax payer’s case. In the Appeal before us, the Appellant has failed to dispense with this mandatory validity threshold especially in respect of the third requirement. We place reliance on our finding in *Ngurumani traders Ltd Vs Respondent of Investigations and Enforcement.*
25. In light of the foregoing finding, we turn our attention to status of the Respondent’s confirmed assessment. This will turn on an interrogation of whether the Appellant has discharged its burden of proof as envisaged in Section 56 (1) of the TPA 2015. We note that the Appellant bore the burden of proof at all material times in this matter both at the objection stage and during this Appeal. The Appellant herein has not produced a shred of evidence in this Appeal to demonstrate, reasonably, to the Tribunal that the Respondent’s assessment was incorrect and the extent of its incorrectness. In this regard, we find instructive the holding Pierson v Belcher (H.M. Inspector of Taxes) (1956-1960) 38 TC 387, wherein it was stated as thus; -

"But the matter may be disposed of, I think, even more shortly in this way: there is an assessment made by the Additional Respondents upon the Appellant; it is perfectly clearly settled by cases such as 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 so. That is sufficient to dispose of the Appeal, which accordingly I dismiss with costs."
FINAL DECISION

26. In light of the foregoing analysis, the Tribunal finds the Appeal herein lacks merit and is dismissed forthwith. Accordingly, we make the following Orders:

   a. The Appeal is hereby struck out.
   b. The Respondent’s objection decision 11th November 2019 be and is hereby upheld in its entirety.
   c. Each Party to bear its own costs.

27. It is so ordered.

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

[Signatures]

MAHAT SOMANE
CHAIRPERSON

WILFRED GICHIKI
MEMBER

ROSE WAMBUI NAMU
MEMBER

JOHN KINYUA WANGARI
MEMBER

TIMOTHY CHESIRE
MEMBER