

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 247 OF 2020

W.E.C LINES KENYA LIMITEDAPPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company engaged in the business of a shipping agent in Mombasa and Nairobi. W.E.C is the local agent of W.E.C Lines B.V incorporated in the Netherlands.
2. The Respondent is a principal officer appointed under Section 11(4) of the Kenya Revenue Authority Act and is responsible for the control and management of the Domestic Taxes Department and accounting for the taxes under the Income Tax Act, Cap 470 of the Laws of Kenya.
3. The Appellant received several additional adjustment orders relating to Value Added Tax (VAT) for the assessment period November 2015 to December 2016 as well as credit adjustment vouchers adjusting VAT credit claims. The adjustment orders and vouchers related to the tax treatment of delivery order fees.
4. The Appellant was issued with audit findings on 28th August 2019, receipt of which was acknowledged on 29th August 2019. On 30th September 2019 the

Appellant lodged an application for extension of time to lodge a Notice of Objection as well as a draft Notice of Objection.

5. On 4th May 2020, the Respondent notified the Appellant that it had admitted the Appellant's application to lodge a Notice of Objection out of time. In that letter, the Respondent, relying on Sections 51 (3) and (4) of the Tax Procedures Act, 2015 (the TPA) notified the Appellant that the Notice of Objection was not validly lodged and required the Appellant to furnish the Respondent with records giving an analysis of fees earned for the period January 2016 to December 2016 broken down under agency fees, bill of lading fees, demurrage fees, delivery order fees (local/transit) goods, administration fees and telex release fees.
6. The Appellant being dissatisfied with the letter dated 4th May 2020 instituted this Appeal vide a Memorandum of Appeal and Statement of Facts both dated 18th June, 2020 and filed on 19th June, 2020.

THE APPEAL

7. The Appellant cited the following as its grounds of Appeal:
 - i) That the Respondent misapplied Section 51(4) of the TPA is not immediately informing the Appellant that the Notice of Objection had not been validly lodged.
 - ii) That the Respondent erred in law and in fact in failing to consider and apply Section 51(11) of the TPA on the timeliness within which Objection Decisions should be made.

- iii) That the Respondent acted illegally by abusing Section 51(11)(b) of the TPA in requiring further information in order to make an Objection Decision; and that the information required was already in the Respondent's possession.
- iv) That the Respondent erred in law and in fact by misapplying Section 51(3) of the TPA by imputing that there were relevant documents relating to the objection that the Appellant had not submitted, which was not the case.
- v) That the Respondent erred in law and in fact by failing to consider and apply Section 51(3)(a) of the TPA which provides for the elements of a valid objection.
- vi) That the Respondent's officers acted in contravention of Section 14 of the Kenya Revenue Authority (KRA) Act which prohibits them from acting dishonestly and negligently.
- vii) That the actions of the Respondent are in violation of Article 47 of the Constitution of Kenya together with the Fair Administrative Actions Act, 2015 ("the FAA Act") which guarantees the Appellant the right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair.
- viii) That the Respondent grossly abused its powers under Sections 51(4), (8) and (11) of the TPA and that this has led to immense anguish, distress, loss and expense to the Appellant.
- ix) That the decision made by the Respondent on 4th May 2020, if allowed, will occasion grave injustice and harm to the Appellant and its business.

THE APPELLANT'S CASE

- x) The Appellant invited the Tribunal to consider the following issues which formed the basis of its submissions in support of its Appeal:
- i) Whether the Respondent, by taking more than 7 months or 210 days to respond to the Appellant's objection, contravened the TPA.
 - ii) Whether the Respondent's conduct infringes on the Appellant's right to fair administrative action.
 - iii) Whether the Appeal is fatally defective as alleged by the Respondent.
 - iv) Whether the letter dated 4th May 2020 constitutes an Appealable decision.
 - v) Whether the delivery order fees, and bill of lading fees form part of custom's value of imported goods.
- a) Whether the Respondent, by taking more than 7 months or 210 days to respond to the Appellant's objection, contravened the TPA.**
8. The Appellant submits that the Respondent violated Section 51(4) of the TPA by responding to the Notice of Objection more than seven months, two hundred and ten (210) days, after the Appellant submitted its Notice of Objection and application for extension of time to file the Notice of Objection.
9. The Appellant contends that Section 51 (4) of the TPA which states that *"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", is drafted in mandatory terms which denotes an unequivocal obligation on the Commissioner, and that there is accordingly no room for delay.

10. The Appellant argues that, although the Section does not impose specific timelines, the use of the word 'immediately' implies that the taxpayer must be informed without delay. The Appellant relies on the definition of the word "immediately" from the Black's Law Dictionary as meaning "*without any delay, instantly, straightaway and at once*" and that "*Immediate means without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch.*"

11. The Appellant relied on two cases:

- i) **Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department ex parte Centrica Investments [2019] eKLR** where the court stated that:

"The word 'shall' when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation."

- ii) **Krystalline Salt Limited v Kenya Revenue Authority [2019] eKLR** where the court stated that:

"The word 'shall' when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The

word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Ordinarily the words 'shall' and 'must' are mandatory..."

12. The Appellant submits that Section 51(4) puts urgency on the Commissioner to inform a taxpayer on the invalidity of an objection so as to allow a taxpayer an opportunity to remedy it as soon as possible; and also, to allow the Commissioner to issue an Objection Decision within the stipulated timelines.

13. It is the Appellant's submission that the Respondent contravened Section 51(11) of the TPA which states that:

"The Commissioner shall make the Objection Decision within sixty days from the date of receipt of—

- (a) the Notice of Objection; or*
- (b) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed."*

14. The Appellant argues that Section 51(11), just like Section 51(4) is couched in mandatory terms and is so clear that it can only be interpreted in one way - where the Commissioner fails to adhere to the 60-day timeline, the Notice of Objection is allowed by operation of the law.

15. The Appellant contended that the Respondent only responded to the objection after 210 days despite reminders from the Respondent of its statutory duty through various letters as set out below:

- i) A letter dated 18th December 2019 to the Policy Division, Commissioner of Domestic Taxes, Kenya Revenue Authority, Mombasa in which the Appellant requested for feedback on the application for extension of time as well as the Notice of Objection. In the letter the Appellant complained that it had been 78 days since the lodging of the application and the Notice of Objection. The Appellant referred the Respondent to Section 51(11) of the TPA on the consequences of the lapse of timelines within which Objection Decisions should be issued.
- ii) A letter dated 2nd March 2020 to the Policy Division, Commissioner of Domestic Taxes, Mombasa in which the Appellant referred to the last communication from the Respondent as having been to indicate that the Respondent was awaiting the reading of the “High Court decision on the shipping cases Appeals” and which the Appellant asserted had been delivered on 7th February 2020. The Appellant complained that it had been 152 days since the lodging of the Notice of Objection; reiterated the import of Section 51 (11) of the TPA; and again, asked the Respondent to respond to the objection.
- iii) A letter dated 16th March 2020 to the Head of Station, North of Mombasa Station, Kenya Revenue Authority Mombasa referring to its two previous

letters and complaining that it had been 164 days since the Objection was lodged. The Appellant expressed concern that the Respondent was frustrating the Appellant as the Appellant could neither approach the Tribunal nor access the rejected VAT refund claims. In that letter the Appellant again referred to the import of Section 51 (11) of the TPA and asserted that as the Objection Decision had not been made within 60 days from the date of lodging the Notice of Objection, the objection was allowed. The Appellant asserted that it was consequently resubmitting its VAT refund claims.

The Appellant asserts that it never received any response to these three letters.

- iv) A letter dated 14th April 2020 to Ms Elizabeth Meyo, the Commissioner of Domestic Taxes, Nairobi. In that letter the Appellant set out the background of the dispute; complained that it was unfair, unlawful, and unprocedural for the Appellant to have to constantly follow up with the Respondent to receive audit findings after the credit adjustment vouchers and additional adjustment orders were made on the I-Tax Portal. The Appellant complained that this was a denial of information which amounted to a violation of Article 35 of the Constitution and alleged that this had contributed to the Appellant being late in filing the Objection. The Appellant further complained that it was in a deadlock as the Respondent was yet to issue a decision, 195 days after the lodging of the objection, as a result of which the Appellant could neither proceed to the Tribunal nor

access the VAT refunds. The Appellant requested for the Commissioner's intervention by reprimanding the officers handling the matter and directing the processing of refunds to the Appellant to the tune of Kshs. 8,573,549.00 since, in the Appellant's submission, the issuance of the Objection Decision was moot by virtue of Section 51(11) of the TPA.

16. The Appellant contends that the Respondent finally responded to the letter dated 14th April 2020 vide its letter dated 4th May 2020 in which the Respondent, inter-alia, requested for further documents. The Appellant argues that the request for further documents was an attempt to cunningly take advantage of Section 51(11)(b) in order to have the 60-day timeline start to run a fresh from the date of provision of the requested documents.
17. The Appellant argues that the Respondent had numerous opportunities to inform the Appellant of the alleged invalidity due to the lack of documentation during its numerous follow ups but failed to do so. This, it is argued, amounts to an abuse of power. The Appellant submits that however, and in any event, the Respondent had obtained all the requisite documents during the audit of the Appellant and that accordingly the alleged invalidity was non-existent.
18. The Appellant argues that the Respondent's failure to comply with the statutory timelines meant that its objection was allowed statutorily. Section 51(4) of the TPA, and Section 51 (11) of the TPA are couched in mandatory terms. The Respondent failed to adhere to the statutory timelines despite

being aware of the law and despite the reminders from the Appellant as well as numerous office visits. The Appellant relied on:

- i) **Lifecare Insurance Brokers Limited v Commissioner of Domestic Taxes Appeal No. 60 of 2017** where this Tribunal stated that “...pursuant to Section 51 (11) of the TPA, the Respondent was compelled by law to have made its decision, being the Objection Decision, with respect to the Appellant’s Notice of Objection within sixty (60) days...which it failed to do thereby allowing the Appellant’s objection notice by operation of the Law.”

The Appellant submitted that in the Lifecare decision the Respondent was late by 2 days compared to 210 days in this case, and despite the letters written by the Appellant in this case and the numerous visits by the Appellant to the Respondent’s offices.

- ii) **Republic V Commissioner of Customs Services Ex-Parte Unilever Kenya Limited [2012] eKLR** where the court held that:

“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...The respondent communicated the decision to the ex-parte applicant on 18th July 2011. By

communicating the decision four months from 16th March 2011 the respondent was clearly in breach of the provisions of Section 229 EACCMA...The implication of the respondent's non-communication within the statutory period of 30 days is that the ex-parte applicant did not owe the taxes demanded by the demand notice of 9th February 2011. The respondent's decision in the letter dated 18th July 2011 which revised the tax demand downwards from Kshs. 102,254,601.00 to Kshs. 65,335,378.00 was therefore void from the beginning. The law as it is presuming that by failing to communicate a decision by 16th April 2011 the respondent was telling the ex-parte applicant that its Appeal against the tax demand contained in the notice dated 9th February 2011 had been allowed and the ex-parte applicant did not owe the respondent any tax in respect of that particular demand."

b) Whether the Respondent's conduct infringes on the Appellant's right to fair administrative action

19. The Appellant submits that the Respondent acted in violation of all known principles of fair administration in contravention of Article 47 of the Constitution which provides that: *"Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"*.
20. The Appellant cited Section 7(2) of the Fair Administration Act, 2015 ("the FAA Act") which states that:

“A court or Tribunal under subsection (1) may review an administrative action or decision, if—

...

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

(c) the action or decision was procedurally unfair.

...

(h) the administrative action or decision was made in bad faith.

...

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.

(k) the administrative action or decision is unreasonable.

...

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates.

(n) the administrative action or decision is unfair.

(o) the administrative action or decision is taken or made in abuse of power.”

21. It is the Appellant’s submission that the Respondent violated Section 7(2)(b) of the FAA Act by failing to immediately inform the Appellant that the objection was not valid; and by failing to issue the decision within the timelines set out under Section 51 (11) of the TPA.

22. The Appellant further submits that by failing to issue the Appellant with the audit findings in good time to allow the Appellant lodge the objection and by failing to make an Objection Decision in time or to communicate to the Appellant in good time, and thereby holding the Appellant's affairs in abeyance, the Respondent acted in bad faith and procedurally unfairly in contravention of Section 7(2) (c) of the FAA Act.
23. The Appellant asserts that the failure to give audit findings in the first place and the subsequent issue of unsigned audit findings was a deliberate attempt to frustrate the Appellant and to prevent the Respondent's officers from accountability.
24. The Appellant relied on **Doody vs. The Home Secretary of State [1993] 1 All ER 151** as cited in **Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex-Parte Unilever Tea Kenya Limited [2017] eKLR** where it was held that:
- “Where an Act of Parliament confers administrative power there is a presumption that it will be exercised in a manner which is fair.”*
25. The Appellant submits that the delay in making a decision was intentionally orchestrated by the officers of the Respondent in order to frustrate the Appellant. The Respondent's officers knew that the Appellant could not obtain a tax compliance certificate when there were pending matters with the KRA. The Appellant relied on **Republic V Commissioner of Customs & Ex Parte: Mulchand Ramji & Sons Limited [2010] eKLR** where it was held that:

“A power may be abused in various ways for example, when one acts beyond his limits of power, or acts irrationally or acts for an improper purpose or seeks to frustrate the legitimate expectation of another. Every public body or officer is expected to act fairly in decision making, so that if he does not, then he is deemed to abuse his powers.”

26. The Appellant further contended that the Respondent’s decision via its letter of 4th May 2020 was unreasonable in that there was no justification for the Respondent taking 7 months to make the type of decision contained in the letter dated 4th May 2020. It was argued that it need not have taken the Respondent 7 months to realize that the objection was lacking in information.

27. The Appellant quoted **Republic v Kenya Revenue Authority Ex Parte Style Industries Limited 2019]** eKLR where the court stated that:

“If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such

that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.”

28. The Appellant further argues that the conduct of the Respondent’s officers violated Section 14 of the KRA Act which provides that:-

“Any person employed by the Authority shall be personally liable for any act or omission done or committed in the performance of his functions under this Act, if having regard to the circumstances of the case such act or omission—

- (a) is done or committed wilfully or dishonestly by such person.*
- (b) is attributable to the negligence of such person; or*
- (c) is done or committed by such person in contravention of any provision of this Act or regulations made thereunder or any other written law.”*

c) Whether the Appeal is fatally defective.

29. In response to the Respondent’s preliminary objection premised on Section 9 of the FAA Act, the Appellant contends that it has exhausted all alternative remedies and put the Respondent to strict proof on remedies not exhausted.

30. The Appellant submits that it has complied with applicable internal mechanisms of the Respondent. The Appellant filed its Notice of Objection together with the application for extension of time on 30th September 2019.

The Respondent was required to give its decision to the objection within 60 days under Section 51(11) of the TPA. The Respondent wrote a letter dated 4th May 2020, 210 days later stating that the objection was not valid as the Appellant had not provided all relevant documents. The Appellant contends that it had complied with the Respondent's internal mechanisms; and that there was no internal mechanism within the Respondent under which the Appellant could have complained about the Respondent's alleged failure to comply with the TPA.

31. In response to the assertion by the Respondent that the Appeal is defective for failure to comply with Section 51 (1) and (2) of the TPA. The Appellant relies on the definition of a tax decision by the TPA as:

- (a) an assessment
- (b) a determination under Section 17(2) of the amount of tax payable or that will become payable by a taxpayer.
- (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under Sections 15, 17, and 18.
- (d) a decision on an application by a self-assessment taxpayer under Section 31(2).
- (e) a refund decision.
- (f) a decision under Section 48 requiring repayment of a refund; or
- (g) a demand for a penalty.

(Emphasis supplied) to submit that the tax decisions made by the Respondent which necessitated the lodging of the objection was the VAT refund rejection notices together with the tax adjustment vouchers.

32. The Appellant disputes that it should have objected to the letter dated 4th May 2020 as this would, in the Appellant's submission, constitute to an objection to a decision concerning an objection. This would be unworkable and impracticable and would lead to anomalous and illogical results. It would be absurd as it would lead to uncertainty as to when the objection process would end.
33. The Appellant relies on **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** where the court stated that "*There are important principles which apply to the construction of statutes such as:- (a) presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result; (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result...*"

34. The Appellant submits that the process provided by law provides an end to objections when the Objection Decision is made. Once the Objection Decision is made, the law provides for an Appeal mechanism.

d) Whether the letter dated 4th May 2020 constitutes an Appealable decision.

35. The Appellant cites the definition of an Appealable decision as provided in Section 3 of the TPA which states that:

"Appealable decision" means an Objection Decision and any other decision made under a tax law other than—

(a) a tax decision; or

(b) a decision made in the course of making a tax decision.

(Emphasis supplied)

36. The Appellant submits that the Respondent's decision of 4th May 2020 constitutes an Appealable decision as it addresses the content of the objection made on 30th September 2020 and that an Appealable decision is not just restricted to an Appealable decision but includes any other decision under a tax law.

37. The Appellant further relies on Section 12 of the TPA to submit that Appeals lie where a person "disputes the decision of the Commissioner **on any matter arising under the provisions of any tax law...subject to the provisions of the relevant tax law**, upon giving notice to the Commissioner in writing..."

38. The Appellant contends that these proceedings were provoked by the Respondent's failure to comply with Sections 51(4) and (11) of the TPA and relies on **Republic v Commissioner of Domestic Taxes Ex-Parte I & M Bank Limited [2017] eKLR** where the Court held that:

*"The wording of the above Section is clearly wide to encompass any matter arising under the provisions of any tax law. In this case what provoked these proceedings according to the applicant was the failure by the Commissioner to comply with Section 51(9) of the **Tax Procedures Act**. No one doubts that such a failure clearly falls within a matter arising under the provisions of any tax law in this case the **Tax Procedures Act**."*

e) Whether the delivery order fees, and bill of lading fees form part of custom's value of imported goods.

39. The Appellant relies on **Ocean Freight (E.A) Limited v Commissioner of Domestic Taxes [2020] eKLR** where the High Court rendered judgment on 7 Appeals including on **High Court Income Tax Appeal Number 29 of 2017 WEC Lines (K) Limited versus The Commissioner of Domestic Taxes**.

40. It is contended that in this case, the High Court held that document processing fees, including bill of lading fees, and delivery order fees are charges incidental to the cost of importation and are to be treated as part of the cost of importation (freight) under the East African Customs Management Act, 2004. Accordingly, the Appellant submits that the VAT on documentation fees is supposed to be accounted for by the importer as customs duty.

41. The Appellant further contends that the Tax Appeals Tribunal in **TAT Appeal No. 137 of 2018 WEC Lines Kenya Limited versus The Commissioner of Domestic Taxes** has already expressed itself on the VAT treatment of services provided by the Appellant to its Principal. The Tribunal held that:

“WEC Kenya, the Appellant had no agreements with the importers and only interacted with them in its capacity as an agent of its principal, WEC BV. Undoubtedly the importers could have benefited from the activities of the Appellant. Notwithstanding, the Tribunal finds that the Appellant did not provide any service to its importers.”

The Appellant’s Prayers

42. The Appellant prays that:

- i) That the decision made by the Respondent on 4th May 2020 be declared illegal, null and void as it does not adhere to the law.
- ii) That the Notice of Objection dated 30th September 2019 be declared allowed by operation of the law.
- iii) That the Respondent be compelled to process the Appellant’s VAT refunds amounting to Kshs. 8,573,549.00 within 21 days.
- iv) Costs against the Respondent.
- v) Any other remedies that the Tribunal deems fit.

THE RESPONDENT'S CASE

43. The Respondent filed its Statement of Facts on 14th December 2020. The Respondent asserted that the Appellant applied for VAT refunds on i-Tax on various dates between November 2015 and January 2017.
44. The Respondent conducted a verification of the VAT refunds claims between May 2017 and October 2018 and established that the Appellant had classified the income from delivery order fees as zero-rated income in its monthly VAT3 returns.
45. The Respondent avers that it reclassified the income as taxable at the general rate of 16% as per the income breakdown availed for the period November 2014 to December 2015 and raised corresponding adjustments in October 2017 resulting in an additional assessment of Kshs 5,865, 929.00. A copy of the additional assessment was produced and marked as KRA 1 setting out the breakdown.
46. The Respondent averred that the Appellant failed to avail the breakdown of income for the period January 2016 to December 2016 to establish the delivery order fees earned in that period. Accordingly, the Respondent derived the delivery order fees income for the year 2016 based on the proportion for the year 2015 and adjustments made in the returns for June 2019.
47. It is the Respondent's submission that the Appellant lodged an application for late objection to the refund adjustments on 30th September 2019 and that the Respondent through a letter dated 4th May 2020 allowed the

Appellant's application for late objection and notified it to avail the records for the period January 2016 to December 2016 in order to comply with Section 51 (4) of the TPA for a valid objection.

48. The Respondent contends that the Appellant has never availed the documents requested in the letter dated 4th May 2020 and that therefore the Appeal is premature.
49. The Respondent framed three issues for determination namely:
- i) Whether the letter dated 4th May 2020 constitutes an Appealable decision?
 - ii) Whether delivery order fees, which are post-importation charges form part of the customs value of the goods:
 - iii) Who between the Commissioner of Customs and the Commissioner of Value-Added Tax should collect VAT on delivery order fees?
50. The Respondent submits that the letter dated 4th May 2020 was a decision on an application for extension of time and not an Objection Decision, and therefore does not constitute an Appealable decision for purposes of a substantive Appeal.
51. The Respondent relied on the definition of an Appealable decision as provided for in Section 3 of the TPA (cited above) and submits that the letter dated 4th May 2020 is a decision on an application for extension of time which does not constitute an Appealable decision for purposes of a substantive Appeal. The Respondent contends that a request for documentation in order to assist the Respondent make an Objection

Decision cannot constitute an Objection Decision. The Respondent maintains that the Appeal is therefore premature.

52. The Respondent submitted that the services provided by the Appellant in the preparation of the bills of lading and delivery orders are taxable services under the VAT Act. Accordingly, the Appellant ought to have remitted taxes with regard to the supply of these services.
53. The Respondent disputes that the services offered by the Appellant in the preparation of documents form part of the customs value of the goods on the basis that these are post-landing expenses. The Respondent argues that the charges are local as they relate to services supplied in Kenya and accordingly the income is accrued within Kenya and subject to tax.
54. The Respondent submits that this Tribunal in its decision of 27th March 2015 disallowed the Appellant's Appeal and agreed with the Respondent's position that the services provided by the Appellant are taxable services under the VAT Act and do not therefore form part of the customs value. Accordingly, the Appellant ought to have remitted VAT with regard to the supply of those services.
55. In response to the submission that the taxes are collected by the Commissioner for Customs, the Respondent submitted that the taxes are collected by the Commissioner of Customs for convenience but that they are levied under the VAT Act and ought to be assessed and accounted for by the Commissioner for Domestic Taxes.

56. The Respondent therefore submits that it was justified in its assessment and subsequent confirmation of the same. It argues that the decision of this Tribunal that bill of lading and delivery order charges do not form part of the 'Customs Value' of the goods is legally sound and tenable under the VAT Act and the East African Community Customs Management Act.
57. The Respondent further submits that the Tribunal's decision that demurrage fees are in the nature of rent for use of property of the international carrier is correct and in tandem with the provisions of the Income Tax Act.

The Respondent's Prayers

58. The Respondent prays that the Tribunal finds in its favour and dismisses the Appeal with costs.

ISSUES FOR DETERMINATION

59. After considering the pleadings and documents filed together with the submissions of both parties the Tribunal was of the view that the issues for determination in this dispute could be summarised as follows:

- i) Whether the Respondent erred in failing to issue an Objection Decision within 60 days.*
- ii) Whether there was a valid Appeal before the Tribunal.*

ANALYSIS AND DETERMINATION

Whether the Respondent erred in failing to issue an Objection Decision within 60 days

60. This dispute emanates from reclassification of income from delivery fees for the period November 2014 to December 2015 from zero-rated to taxable under the general rate of 16%. The reclassification resulted in an additional assessment of Kshs 5,865,929.00. The assessment followed verification of VAT refund claims lodged by the Appellant through iTax on various dates between 2015 and 2017.
61. The Appellant on 30th September 2019 applied for an extension of time to lodge its Notice of Objection. Together with the application, it filed a draft Notice of Objection objecting to the VAT refund claim adjustments and additional assessments. The Appellant further wrote letters dated 18th December 2019 and 2nd March 2020 asking the Respondent to reply to its objection dated 30th September 2020.
62. The Respondent granted an extension of time to file objection on 4th May 2020. In its letter, the Respondent asked for an analysis of the fees charged for the period January to December 2016 broken down under agency fees, bill of lading fees, demurrage fees, delivery order fees administrative and telex release fees.
63. The TPA puts various timelines for both taxpayers and the Respondent to adhere to. This is to ensure fair administration as enshrined in the Constitution of Kenya, 2010. Section 51(2) of the TPA provides that objections must be filed within 30 days. The TPA provides respite to taxpayers who may fail to meet the deadline by allowing the taxpayer to Appeal to the Commissioner for an extension of time to file the objection

(See Section 51(6) of TPA). Whether the taxpayer is granted the extension to file the Appeal is at the Commissioner's discretion. The TPA does not, however, provide a time within which the Commissioner must respond to an application for such extension of time.

64. In this case, the Appellant made an application under Section 51(6) of the TPA. It also attached its draft Notice of Objection. Until the Commissioner grants the application for extension of time to file the objection, the objection cannot be deemed to have been lodged. Thus, the 60 days within which the Respondent must issue an Objection Decision only start running upon the extension of time being granted. In this case, the extension of time was granted on 4th May 2020. Upon receiving the letter allowing the extension of time, the Appellant lodged this Appeal on 4th June 2020.
65. Whereas we empathise with the Appellant and understand its frustration, we are bound by the provisions of the law which gives the Commissioner the discretionary powers in granting the extension of time. As was stated in **Partington v. AG [1869] LR 4 HL**.

"As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable

construction, certainly such a construction is not admissible in a taxing statute, where you simply adhere to the words of the statute.”

66. Though we may wish to impose a time limit during which the Commissioner must respond to such requests this is beyond our jurisdiction. It is not upon the Tribunal to impose its views of what it thinks the law ought to read. Rather Wiles J stated in **Lee v Bude and Torrington Junction Railway Co: 1871** stated:

“Are we to act as regents over what is done by parliament with the consent of the Queen, lords and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law. the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them.”

67. Thus, we find that the objection was filed on 4th May 2020 which is the date on which the Commissioner admitted it. Accordingly, the Respondent was still within the legally allowed period of 60 days to issue the Objection Decision.

68. Section 52(1) of the TPA provides that:

“A person who is dissatisfied with an Appealable decision may Appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013.”

70. An Appealable decision is defined in Section 2 of the TPA as *“an objection decision and any other decision made under a tax law other than—*

(a) a tax decision; or

(b) a decision made in the course of making a tax decision.”

71. Thus, according to the definition provided in Section 2 of TPA as to what constitutes an Appealable decision, a taxpayer may only Appeal where there is a valid objection decision. According to the provisions of Section 51 of the Tax Procedures Act, an Objection Decision arises:

“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.”

72. In this case, there is no Appealable decision. Upon receiving the notice extending time the Appellant should have allowed the Respondent the 60 days it is allowed under law to respond. Accordingly, we are of the view that the Appeal is premature. Our decision is informed by the findings of the court in **Krystalline Salt Limited vs Kenya Revenue Authority [2019] eKLR** where it stated that:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

73. We therefore find that the Appeal is invalid due to lack of an Appealable decision. Having found that the Appeal is invalid, the Tribunal could not delve into the substantive issues in the Appeal.

FINAL DECISION

74. On the basis of the foregoing analysis the Appeal is premature and the Tribunal makes the following Orders:-

- i) The Appeal is hereby struck out.
- ii) Each party to bear its own costs.

75. It is so ordered.

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



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ERIC N. WAFULA
CHAIRMAN



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CATHERINE N. MUTAVA
MEMBER



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ABRAHAM K. KIPROTICH
MEMBER



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GABRIEL M. KITENGA
MEMBER

