

THE REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 559 OF 2019

WEBISTIX LIMITEDAPPELLANT

VERSUS

COMMISSIONER FOR DOMESTIC TAXES..... RESPONDENT

JUDGMENT

A. BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya whose principal activity is the provision of logistics and other related support services to the customers of Visual Fusion Global (“VFG”) and Visual Fusion Pty Limited (“VF SA”) in Kenya. The Appellant also imports goods on behalf of its non-resident affiliates into Kenya.
2. The Respondent is a principal officer with delegated powers and functions of the Commissioner – General of the Kenya Revenue Authority (“KRA”), which is a body established under the provisions of the Kenya Revenue Authority Act Cap 469 of the Laws of Kenya and is the principal agency charged with the responsibility of collection and administration of domestic revenue taxes.

B. FACTS

3. In 2017, the Appellant imported goods on behalf of East African Breweries Limited (EABL) worth Kshs. 63,223,477.00. The imported goods were cleared and warehoused by Bollore Transport & Logistics Kenya Limited (Bollore) on behalf of and at the expense of VF SA. Further, VF SA contracted Bollore to export the goods directly to EABL from Bollore's warehouse.
4. The Appellant did not claim any import VAT paid on the goods imported by it into the Country.
5. On 23rd August 2018, the Respondent established that the Appellant did not declare supplies made between May 2017 and July 2017, worth Kshs. 63,223,477/- to East African Breweries Limited.
6. On 17th October 2018, the Respondent issued to the Appellant an income tax assessment of Kshs. 4,779,694.86 and VAT of Kshs. 2,023,151.26, totaling Kshs. 6,802,846.13.
7. On 14th November 2018, the Appellant objected to the assessments manually on the following grounds:-
 - i. The Company was acquired by Visual Fusion Global(VFG), a company incorporated in Mauritius to facilitate/support Visual Fusion Global and Visual Fusion Pty Limited (VF SA), a company incorporated in South Africa in their business activities in Kenya.

- ii. The Appellant was only used as the importer on record but the transaction for supply of the goods in question was between Kenya Breweries Limited and UDV (Kenya) Limited and Visual Fusion Limited.
 - iii. The goods in question were supplied by Visual Fusion Pty Limited (VF SA) under incoterm delivery Duty Paid (DPP) and that all the taxes and duty on them were paid by Visual Fusion Pty Ltd (VF SA).
 - iv. The tax and duty in respect of the goods in question were paid by Bollore which is the company that cleared them into Kenya; and because of the foregoing the Appellant had no taxable supplies in the year 2017.
8. The Respondent did not issue an objection decision upon the lapse of 60 days. The Appellant started to engage the Respondent for a cleanup of its *i-Tax* ledger given that the objection had been allowed. The Respondent in return advised the Appellant to upload a copy of its objection on *i-Tax* to enable the Respondent to speedily address the matter raised by the Appellant.
9. On the 24th of September 2019, as advised by the Respondent, the Appellant uploaded the objection of income tax of Kshs. 3,793,408.62 and Kshs. 2,023,151.26 for VAT.

10. On 16th, October 2019, the Appellant through its tax agents, PricewaterhouseCoopers Limited, wrote an email to the Respondent asking the Respondent to vacate the assessments on *i-Tax* on the basis that the Respondent had not responded to the Appellant's objection within the 60 days stipulated by law.
11. The Respondent issued an objection decision in the form of a confirmation assessment vide *i-Tax* notification dated 22nd November 2019, confirming its original VAT and CIT assessment dated 17th October 2018.

C. APPELLANT'S CASE

12. Being aggrieved by the said decision, the Appellant filed an Appeal before this Honorable Tribunal via the notice of Appeal dated 20th December 2019. The Appellant further filed its memorandum of Appeal and statement of facts on 23rd December 2019 on the grounds that;
 - a) The Respondent erred in law and in fact by issuing an objection decision contrary to the provisions of Section 51(11) of the Tax Appeals Procedures Act, 2015.
 - b) The Respondent erred in law and in fact by failing to issue a statement of findings on the material facts and the reasons for its decision contrary to the provisions of Section 51(10) of the Tax Procedures Act, 2015.

- c) The Respondent erred in law and in fact by assuming and imposing contractual obligations where none existed contrary to the unfettered freedom of contract and imposing Value added Tax and Corporate Income Tax on unsubstantiated sales.

13. The Appellant made the following prayers in its Appeal;

- I. The objection decision of the Respondent dated 22nd November 2019 be vacated in its entirety,
- II. The Honorable Tribunal awards costs incidental to the filing of the Appeal to the Appellant, and;-
- III. The Honorable Tribunal makes any other orders it deems fit.

14. In its submission, the Appellant narrowed down the issues to be determined by the Tribunal as follows;-

- i. Whether the Respondent's objection decision as issued on 22nd November 2019 being three hundred and seventy-three (373) days after lodgment of the Notice of Objection contrary to the provisions of Section 51(11) of the Tax Procedures Act, 2015 is merited in law;
- ii. Whether the Respondent's objection decision issued without any statement of facts on the material facts and reasons for the decision contrary to the provisions of Section 51 (10) of the Tax Procedures Act, 2015 is merited in law; and
- iii. Whether the Respondent erred in law and in fact by assuming and imposing contractual obligations where none existed contrary to the unfettered principle of freedom of contract and subsequently

imposing VAT and CIT assessments totaling to **Kshs. 6,514,547/-** on unsubstantial sales.

15. The Appellant submits that the provisions relating to the filing of notices of objection and issuance of objections are clearly set out under Section 51 of the TPA, 2015. Further, there is no legal requirement stating that a notice of objection needs to be formalized by being uploaded on the Respondents' *i-Tax* platform. So long as the notice of objection was done in writing, the same was duly in compliance with the provisions of Section 51(2) of the Tax Procedures Act, 2015.
16. It is the submission of the Appellant that it never received any communication on the invalidity of its notice of objection and thus the objection be deemed as duly filed in accordance with the law.
17. The Appellant relied on the following cases in its submission;-
 1. ***Republic Versus the Commissioner of Customs Services Ex parte Unilever Limited [2012] eKLR (Misc Civil Application No 181 of 2011).***
 2. ***Republic V Commissioner of Customs Services Ex-Parte Unilever Kenya Limited [2012].***

D. RESPONDENT'S CASE

18. The Respondent avers that between May 2017 and July 2017, the Appellant supplied goods worth Kshs. 63,223,477.00 to East African Breweries Limited, an income that was not declared. On 17th October 2018, the

Respondent issued income tax assessment of Kshs 4,779,694/- and VAT of Kshs. 2,023,151.26 totaling to Kshs. 6,802,846/-.

19. The Respondent avers that on the 14th of November 2018, the Appellant objected manually and failed to object on *i-Tax* portal which is the platform that was used to issue the assessment.
20. The Respondent contends that the Appellant made taxable income in the said months and failed to declare the same and that this income was generated in Kenya during the 2017 year of income.
21. The Respondent further contends that the Appellant failed to provide documentation to show that proper taxes had been paid and thus failed to discharge its burden of proof under Section 56(1) of the Tax Procedures Act.
22. It is the Respondent's position that it would only have issued an objection decision after the Appellant formalized its objection by uploading it on the *i-Tax* portal. As such, the Respondent holds that the sixty days as provided for under Section 51(11) of the Tax Procedures Act, 2015, started running after the Appellant uploaded its objection on *i-Tax* portal and not from the 14th November 2018. According to the Respondent, the process is fully automated and involves automatic generation of an Objection Application and Acknowledgment Receipt before generating an Objection Decision

23. The Respondent in its submissions relied on the case of ***Mwahima Mwalimu Masudi Vs Independent Electoral and Bounderies Commission & 3 others (2017) Eklr***, where the High Court relied on ***Nicholus Kiptoo Arap Korir Salat vs IEBC & 6 others***(Supra) and urges the Tribunal to overlook the procedural technicalities such as lapse of time and rather look at the substantive justice.
24. The Respondent also relied on the case of ***Equity Group Holdings Limited Vs Commissioner of Domestic Taxes TAT No. 27 of 2017*** where the Commissioner delayed for 3 days in issuing its objection decision and the Tax Appeals Tribunal held that such delay was not inordinately late. The Respondent also submitted that the Tribunal, in the case of ***Fortune Container Depot Limited vs Commissioner of Domestic Taxes TAT No. 24 of 2018*** allowed an objection 24 days late and stated that the delay of 24 days did not occasion any prejudice upon the Respondent.
25. The Respondent further submits that the Tribunal has repeatedly allowed various taxpayers to file their Notices of Appeal out of time and urged the Tribunal to balance the scales of justice and tip it in favor of the Respondent.
26. The Respondent submitted that Section 51(11) of TPA should be interpreted in conformity to the Constitution of Kenya, 2010 and in particular Articles 159 and 201 as was held in the cases of ***Philip Chemwolo & Another v Augustine Kubende (1986) eKLR*** and also in the case of ***Republic vs District Land Registrar, Uasin Gishu & Another (2014) eKLR***.

27. The Respondent states that tax and revenue collection are matters of public interest and should be protected by ensuring that justice prevails. It is the Respondent's position that public policy dictates that Government revenue must be paid as and when it is due.
28. In conclusion, the Respondent urged the Tribunal to dismiss the Appeal and deem the taxes due and owing to the Appellant.

E. ISSUE FOR DETERMINATION

29. The Tribunal has concluded that for the other aspects of the Appeal to be determined, it would first have to deal with the validity of the Respondent's objection decision dated 22nd November 2019. The issue thus framed for determination is;-

- i. Whether the Appellant's objection decision dated 22nd November 2019 is deemed to have been allowed.

F. ANALYSIS AND DETERMINATION

- i) **Whether the Appellant's objection decision dated 22nd November is deemed to have been allowed**

30. The Appellant raised its objection to a tax decision made by the Respondent on 17th October 2018. The Respondent confirmed this objection and issued its decision on the 22nd of November 2019. The Respondent contends that the Appellant erred by failing to lodge its objection on the *i-Tax* platform

while the Appellant holds that the law only provides that a notice of objection needs to only be in writing.

31. Section 51 (1-4) of the Tax Procedures Act, 2015 provides as follows:-

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

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

(3) A notice of objection shall be treated as validly lodged by a taxpayer under Subsection

(2) if—

(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and

(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.

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

32. The Tribunal is persuaded that the law requires the Appellant to lodge its notice of objection in writing and nothing more. The law does not expressly provide that the same has to be uploaded in the Respondent’s *i-Tax* system. While the Appellant is required to file its notice of objection in the manner prescribed under Section 51(1-4) and the Respondent is obligated to make its objection decision and notify the Appellant per Section 51(8) of the Tax Procedures Act to act as follows:

“Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide whether to allow the objection in whole or in part, or disallow it, and the Commissioner’s decision shall be referred to as an “objection decision”.

33. The Tribunal places reliance on the distinguished case of ***the Republic V Commissioner of Customs Services Ex-Parte Unilever Kenya Limited [2012]*** where the Court stated as follows:-

“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.”

34. In this regard, the Tribunal associates itself with the findings of the court in the case of ***Republic v Commissioner Of Custom Services Ex parte Tetra Pak Limited [2012] eKLR*** where it was held that;-

*“I fully associate myself with the holding by my brother Korir J in ***Republic Versus The Commissioner of Customs Services Ex parte Unilever Limited [2012] eKLR (Misc Civil Application No 181 of 2011)*** where while dealing with a similar matter, Korir J held that non-communication of the Respondent’s decision within the statutory period of 30 days meant that the Applicant’s application for review had been allowed by operation of the law (S229(5)) and that the tax payer did not thereafter owe the taxes that had been demanded by the Respondent. By making her decision on the Applicant’s application slightly over two months after receiving it and in communicating her decision six months later, the Respondent grossly violated the provisions of Section 229(4) of the Act and under Section 229(5), the respondent was in law presumed to have accepted the Applicant’s application for review.”*

35. Section 51 (11) of the TPA provides as follows: -

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

36. The wordings of this Section are not permissive but rather mandatory. The Tribunal therefore notes that, failure by the Respondent to issue an objection decision within sixty days meant that the Appellant’s objection automatically stood allowed. The direction by the Respondent that the Appellant lodges its objection by uploading it on the *i-Tax* platform as stated before, is not a legal requirement. The Appellant’s uploading of the objection on 24th September 2019 can under no circumstances be deemed to be the date of lodging the objection. To the Tribunal’s mind, the Appellant’s objection is that that was lodged on 14th November 2018. The Respondent never faulted the same and choose not to issue any objection decision.

37. The Tribunal has, in some instances allowed late issuance of objection decisions by the Respondent as submitted extensively by the Respondent. However, the Tribunal distinguishes this Appeal from the decided cases on the basis that, in the instant case, the Respondent delayed for 313 days in issuing its decision.

38. In view of the foregoing, the Tribunal finds that the delay is inordinate and is left with no alternative but to find that the objection decision on 2nd March 2019 was time barred.

39. Consequently, the Appellant’s objection dated 14th March 2018 is allowed.

G. FINAL ORDERS

40. The Tribunal therefore issues the following orders:-

- ii) The Respondent's objection decision issued on 22nd November 2019 is time barred.
- iii) The Appellant objection lodged on 14th November 2018 be and is hereby allowed.
- iv) The Respondent's assessments issued to the Appellant dated 17th October 2018 be and are hereby set aside.
- v) Each Party to bear its own costs.

41. It is so ordered.

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


PATRICK LUTTA
CHAIRPERSON


HELEN BILA
MEMBER


ELISHAH NJERU
MEMBER


MWAI MBUTHIA
MEMBER

HABON FARAH
MEMBER

