REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 338 of 2021

PESALUS SUPPLIES LIMITED................................................................. APPELLANT

-VERSUS-

COMMISSIONER FOR INVESTIGATION &
ENFORCEMENT................................................................. RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a private company whose principal activity is supplies and is a registered tax payer.

2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 460 Laws of Kenya. Under Section 5 (1), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) with respect to the performance of its function under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

3. The Respondent vide a letter dated 7th November 2018, issued the Appellant with findings of tax investigations and demanded for payment of VAT of Kshs 12,847,032.

4. On 8th May 2019, the Respondent vide a letter to the Appellant’s Tax Agent requested additional documents. The Appellant through its tax agent responded on 29th May 2019.

6. The Respondent acknowledged the Appellant's objection letter on 13th December, 2019 where it required the Appellant to make immediate payment of undisputed tax before the objection is considered.

7. The Appellant vide a letter dated 21st January 2020 requested for additional time to pay the undisputed tax. The Respondent responded through a letter dated 5th February 2020 allowing the Appellant additional 60 days to make full payment of the taxes not in dispute.

8. The Respondent issued its Objection Decision vide a letter dated 16th February 2021 confirming taxes in the amounts of Kshs 12,827,032.00 for VAT and Kshs 4,817,637.00 for Income Tax all totaling to principal taxes amounting to Kshs 17,664,669.00.

9. The Appellant being dissatisfied with the Respondent's Objection Decision filed this Appeal on 22nd June 2021.

THE APPEAL

10. The Appeal as stated in the Memorandum of Appeal dated 15th June, 2021 and filed on 22nd June, 2021 was premised on the following grounds:

i. That the Respondent confirmed the notice of assessment without due regard to all records, explanations, information, withholding taxes and payments provided by the Appellant thereby failing to appreciate all issues presented by the Appellant before confirming the assessment.
ii. That Section 51(3) of the TPA, provides for the conditions that need to be fulfilled for a notice of objection to be treated as validly lodged by a taxpayer. That the Appellant stated precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments as provided in TPA No. 29 of 2015 was the responsibility of the Commissioner to involve and direct the taxpayer on additional documentations needed.

iii. That the Commissioner decision is in response to the objection filed by the Appellant on 10th December 2019 however additional assessment introduced an initial assessment as included in the final decision.

iv. That Income tax assessment was based on the profit margin ratio of 20% with an assumption that the taxpayer made a profit. The Commissioner approximated profit margin was not based on law. No provision has been made in TPA Act.

v. That the amounts confirmed by the Respondent of Kshs 17,664,669.00 in respect to Income tax & VAT for the period 2014, 2015, 2016 & 2017 was therefore wrong in law, fact and should be annulled.

THE APPELLANT'S CASE

11. Appellant’s case was premised on the hereunder filed documents and proceedings before the Tribunal:

   a) The Statement of Facts dated 15th June 2021 and filed on 22nd June 2021 together with the attached documents thereto.

   b) The Appellant’s written submissions dated 17th January 2022 and filed on the same date.
12. The Appellant submitted that an additional assessment was raised by the Respondent in contravention of Section 31(2) of the Tax Procedures Act.

13. The Appellant contended that it objected to the assessment on 10th December 2019 as provided by law despite the Commissioner not filing additional assessment on iTax.

14. That the Appellant had a meeting with KRA officials and provided explanations as per the objections made.

15. That the Appellant did receive the objection decision from the Respondent over 60 days after objection. This contravenes the requirements of Section 51(11) of the Tax Procedures Act No 29 of 2015. From this observation, the taxpayer treated the issues as settled and vacated by the Commissioner.

16. The Appellant averred that the objection was not handled carefully and diligently by the Respondent because:

   a) The Appellant was still willing to resolve the matter through ADR.

   b) The decision was made outside the timeline provided by the Act and in contravention of Section 51(11) of the TPA.

   c) The Respondent failed to look at the objection fully and ask for further documents especially the properly audited financial statements which the Appellant was more than willing to avail or give an explanation as to why they were not possible.

   d) While the Appellant agrees to settle the issue is paying the correct amount due, the Respondent had provided calculations which does not express reality. It was the prayer of the Appellant that amicable solution be found to settle the matter.
17. In its written submissions, the Appellant averred that it declared its Income
tax for the period 2017. That the Respondent in its letter dated 16th February
2021 noted on page 2 Income tax assessment that the Appellant declared
2017 income amounting to Kshs 47,374,250.00

18. The Appellant stated that it filed Income tax for 2017 and made payment via
payment slip ref 2020180001315012. That this ought to have been taken into
consideration in the final tax assessment decision dated 16th February 2021.
That part of the supplies were tax exempt as that time solar.

19. The Appellant contended that Profit Margin Ration of 20% was over
estimated, a reasonable rate could still be determined through actual expenses
matched to income. The Respondent to share sample size of the industry,
region, and similarities of the population used to decide to apply 20%. That
it was still hopeful that the Respondent would apply the Profit Margin Ratio
where no filing has been done and no document have been supplied which
in its case the documents have been provided and filing registered in the
system.

20. That the tax assessment for both Income tax and VAT as indicated in the letter
dated 16th February 2021 for the period 2014, 2015, 2016 and 2017 was for
a period when the Appellant was not in existence as it was not incorporated
as a corporate body. That the entity acquired registration on a later date than
the assessed periods 2014 & 2015, 2016 and 2017. That “registered person”
means any person registered under Sixth Schedule; VAT 2013. That the
Respondent should address the assessment within the provisions of the

The Appellant’s Prayers

21. The Appellant prayed that;
a) The Appellant requested the Tribunal to set aside the additional assessment amount on the basis of incorrect interpretation of law and fact by the Respondent.

b) The Respondent’s confirmed assessments be set aside and further requested the Tribunal to consider the substance of the case.

THE RESPONDENT’S CASE

22. The Respondent’s case is premised on the hereunder filed documents and proceedings before the Tribunal:

i. The Respondent’s Statement of Facts dated 22\textsuperscript{nd} July 2021 and filed on 24\textsuperscript{th} July 2021 together with the documents attached thereto.

ii. The Respondent’s written submissions dated 18\textsuperscript{th} November 2021 and filed on 19\textsuperscript{th} November 2021.

23. The Respondent stated that it conducted tax investigations into the business affairs of the Appellant for the tax period months of December 2014 to May 2017 with a view of establishing whether the Appellant was tax compliant.

24. The Respondent submitted that the tax investigations revealed that for the period under review the Appellant was paid by Migori County Government for supplies made to it but the said supplies were not declared in the Appellant’s filed tax returns.

25. It was the Respondent’s submission that Section 24 of the Tax Procedures Act allows a tax payer to file returns but further provides that the Commissioner is not bound by the information provided therein and can assess the tax liability based on any other available information.
26. That the Respondent in the ordinary course of its statutory mandate requested for a number of documents from the Appellant to enable it correctly compute its taxable income for the years under audit but the Appellant was unable to supply the documents.

27. According to the Respondent, Section 77 of the Income Tax Act allows the Respondent to issue additional assessments where a taxpayer has been assessed of a lesser amount based on any additional available information and to the best of his judgement.

28. The Respondent averred that the Appellant was paid by Migori County Government a sum of Kshs 93,140,984.00 yet the Appellant declared gross turnover of Kshs 47,376,250.00 and a paltry income of Kshs 82,873.00 in its Income tax returns for the tax period year of 2017.

29. It was the Respondent’s assertion that the Appellant filed Nil VAT returns for the period under review yet it had reached the VAT threshold provided for under Section 34(1) of the VAT Act, 2013.

30. The Respondent averred that the additional VAT assessment was based on the Appellant’s bankings.

31. The Respondent contended that a Gross Profit Margin of 20% sampled from suppliers in the same industry was applied to arrive at the additional Income tax assessment. That the Appellant failed to avail documentation in support of its business expenditure.

32. The Respondent added that the Appellant failed to avail documentation as required under Section 23, Section 58 and 59 of the Tax Procedures Act to enable the Respondent ascertain its tax liability.
33. The Respondent submitted that the additional VAT and Income tax assessments were based on the payments made to the Appellant by Migori County Government for supplies the Appellant made which the Appellant failed to declare for both VAT and Income tax purposes.

34. The Respondent insisted that it is empowered under Sections 29 and 31 of the Tax Procedures Act, 2015 to issue additional assessments based on available information and his best judgement.

35. In its written submissions the Respondent stated that the Appeal was invalid as the Appellant had not paid the undisputed taxes of Kshs 2,400,000.00

36. That the Appellant through its Advocates to wit Sagana Biriq & Company Advocates vide the letter dated 10th December, 2019 the Appellant admitted to taxes of Kshs 2,400,000.00 and vide a letter dated 21st January, 2021 sought extension of time to pay which was allowed vide the letter dated 5th February, 2020.

37. The Respondent stated that the Appeal herein was invalid for unpaid undisputed taxes as provided under Section 52(2) of the TPA.

38. Regarding whether the objection decision was proper in law, the Respondent submitted that the Appellant was requested on various occasions vide letters dated 8th May, 2019 and 14th November 2019, 13th December 2019 and 5th February, 2020 to avail documents in support of its objection to the tax demand.

39. The Respondent insisted that the Appellant lodged an invalid objection on VAT contrary to Section 51(3) of the TPA as no documents in support of the objection were provided.
40. The Respondent added that Sections 58 and 59 of the TPA empowers it to enquire into tax affairs of a taxpayer and examine documents to establish the tax liability.

41. The Respondent submitted that the Appellant was unable to support business expenditure which prompted it to apply the Profit Margin ratio of 20% based on average margin.

42. The Respondent further contended that the Appellant was mandated under Section 54A of the Income Tax Act and to keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers for purposes of computation of tax.

43. The Respondent stated that despite having sought for supporting documents from the Appellant on various occasions vide correspondences dated 8th May, 2019, 14th November, 2019, 13th December, 2019 and 5th February, 2020 the Appellant failed to provide the documents.

44. That Section 30 of the Tax Appeals Tribunal Act and Section 56(1) of the TPA places the burden of proof upon the Appellant to prove that the assessment was excessive.

The Respondent’s Prayer

45. The Respondent prayed that:

a) The objection decision dated 16th February 2021 confirming the assessment of Kshs 17,664,669.00 being VAT of Kshs 12,847,032.00 and Income tax of Kshs 4,817,637.00 for the years 2014, 2015, 2016 and 2017 be upheld.
b) This Appeal be dismissed with costs to the Respondent as the same was without merit.

ISSUES FOR DETERMINATION

46. The Tribunal upon due consideration of the pleadings, documents and the written submissions filed on the part of both parties was of the view that the issues that crystalized for its determination were:

   a) *Whether there was a valid Appeal before the Tribunal.*

   b) *Whether the Appellant's objection was valid.*

   c) *Whether the Appellant's objection was allowed by operation of Section 51(11) of the TPA.*

   d) *Whether the Respondent's Objection Decision dated 16th February 2021 was proper in law.*

   e) *Whether the Respondent erred in the assessment of VAT on the Appellant.*

   f) *Whether the Respondent erred in the assessment of Income Tax on the Appellant.*

ANALYSIS AND DETERMINATION

47. The Tribunal having appropriately ascertained the issues that fell for its determination shall proceed to make an analysis on the issues as hereafter.

   a) *Whether there was a valid Appeal before the Tribunal.*

48. The Respondent submitted that the Appeal was invalid as the Appellant had not paid the undisputed taxes of Kshs 2,400,000.00. That the Appellant
through its Advocates to wit Sagana Biriq & Company Advocates vide the letter dated 10th December, 2019 it admitted to taxes of Kshs 2,400,000.00 and vide the letter dated 21st January, 2021 sought for extension of time to pay which was allowed vide the Respondent’s letter dated 5th February, 2020.

49. Section 52(2) of the TPA Provides as follows in relation to validity of Appeals filed to the Tribunal:

“A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”

50. A perusal of the documents presented at the Appeal, the Tribunal noted that in a letter dated 10th December, 2019 by Sagana, Biriq & Co. Advocates on behalf of the Appellant, stated in part as follows;

“Our Client has corroborated and carried out reconciliation in the several meetings that they have had with you. In the reconciliation, the amount of tax they do not dispute as payable is Kshs 2,400,000/- Our client humbly requests under Section 51(3)(b) of the Tax Procedures Act, 2015 for extension for a period of six (6) months within which to pay the undisputed tax”

51. From the above letter by the Appellant it was manifestly clear that the Appellant conceded to taxes amounting to Kshs 2,400,000.00 which it ought to have paid or entered into a payment arrangement with the Respondent prior to filing an Appeal as required under Section 52(2) of the TPA.

52. The Appellant on the other hand neither addressed this issue in its submissions nor demonstrated with evidence that it had made payment of the undisputed
amounts or entered into any arrangement with the Respondent in relation to its payment.

53. In absence of any evidence of payment or any payment arrangement with the Respondent regarding the undisputed taxes, the Tribunal found that the Appellant’s Appeal was in contravention of Section 52(2) of the TPA and therefore invalid.

54. Having determined that there was no valid appeal before it, the Tribunal did not delve into the other issues that fell for its determination as they had been rendered moot.

FINAL DECISION

55. Based on the foregoing analysis the Tribunal determined that the Appeal lacks merit. The Orders that accordingly recommend themselves are as follows: -

   i) The Appeal be and is hereby struck out.

   ii) The Objection Decision dated 16th February, 2021 be and is hereby upheld.

   iii) Each party to bear its own costs.

56. It is so ordered.
DATED and DELIVERED at NAIROBI on this 11th day of March, 2022.

ERIC N. WAFULA
CHAIRMAN

CATHERINE N. MUTAVA
MEMBER

GABRIEL M. KITENGA
MEMBER

ABRAHAM K. KIPROTICH
MEMBER

ELISHAH NJERU
MEMBER