

**REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.142 OF 2015**

PEGRUME LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant is a limited liability company incorporated in Kenya with its registered offices in the said Republic.
2. The Respondent is the Commissioner of Domestic Taxes appointed under and in accordance with Section 3 of the Kenya Revenue Authority, which is established under Chapter 469 Laws of Kenya, charged with the mandate for the assessment, collection and receipt of revenue.

BACKGROUND

3. Sometimes in the year 2004, the Respondent conducted investigations into the Appellant's books of accounts and thereafter on 8/7/2004 requested for records from the Appellant, which were availed on 6/9/2004.
4. Subsequently, several meetings were held and the Respondent sought for more clarification of documents from the Appellant and there followed various communication between the parties on the same resulting into progressive scaling down of the assessed amounts of taxes due to reconciliations that were being done by the Respondent. This resulted into reduction of the initial amount of principal taxes from Ksh:335,410,689 issued in 2005, to a

confirmed amount of Ksh:102,594,821 issued in 2007 as an additional assessment of principal taxes together with interest of Ksh:117,778,467, totalling Ksh:220,323,895 covering the period 2000-2004.

5. The Respondent confirmed the said amount on 14/2/2007 whereupon the Appellant being aggrieved by the same sent a notice of its intention to appeal on 12/3/2007.
6. The Appellant proceeded to lodge its Appeal against the said tax assessment on 23/3/2007 before the defunct VAT Tribunal. It also filed the Memorandum of Appeal together with the Statement of Facts on the same day.

THE APPELLANT'S ARGUMENTS

7. The Appeal is premised on the grounds as set out in the Memorandum of Appeal and the Statement of Facts dated 26/3/2007, with its grounds reproduced as hereunder:-
8. The additional assessment is a result of an audit carried out by the Respondent. The assessment is estimated and excessive and is not in agreement with the returns and records submitted to the Appellant.
9. During the period of the audit, the Respondent raised various queries and requested for details which have duly been given.
10. The Respondent and the Appellant have also held various meetings and to that extent no queries are outstanding.
11. The Respondent has not refuted or confirmed all the explanations given by the Appellant.
12. The Appellant alleges that:
 - a) Details for Safaricom Limited and Telecom have not been given while in fact queries were attended to and the Appellant has not disputed the explanations.

- b) Debtors and creditors have not been explained but ledgers have been submitted to the Respondent and no specific queries have been raised on them.
13. The Assessment includes adjustment in respect of S.A. Pegrume and Co. Limited which is a separate legal entity whose income should not be assessed on the Appellant.
 14. The Appellant proceeded to pray that the Tribunal do amend the assessment or authorize the Respondent to amend the assessment to the correct tax position by amending the additional assessment to nil taxes.
 15. In its oral and written submissions, the Appellant embarked on a detailed argument that the assessments and confirmation by the Respondent were excessive, unprocedural, baseless and should not have been made in the manner that they were made or at all as the Appellant had complied with all requirements raised by the Respondent in respect to documentation and explanations and thereby making the said decision to assess and confirm illegal.
 16. The Appellant argued that pursuant to Section 32A of the VAT Act, Cap 476, Repealed, where the commissioner proposes to amend the assessment in light of an objection, and the person objecting does not agree with the commissioner as to the proposed amendment, the assessment shall be amended as proposed by the Commissioner and he shall cause a notice setting out the amendment and the amount of the tax payable to be served on that person or where the Commissioner refuses to amend the assessment, he shall cause a notice confirming the assessment to be served on that person.

17. The Appellant stated that the Respondent failed to issue such notice to the Appellant, failed to set out reasons for the amendment and further failed to explain whether the Appellant's explanation and documentation were considered or not.
18. The Appellant further stated that the notice referred to above must clearly state to be such notice, state the amount claimed, the legal provisions under which it is made, draw the taxpayer's attention to the consequences of failure to comply and the opportunity provided by the law to contest the finding. This, the Appellant argued was not done by the Respondent.
19. It was argued by the Appellant that a confirmation notice ought to confirm the assessed tax and not amend the assessed tax in the guise of confirming the assessed tax. It stated that the Respondent issued a confirmation notice confirming a different amount i.e Ksh:220,323,895,821, from the amended tax of Ksh:102,594,821 and thereby fell short of adhering to the laid down procedure and contrary to natural justice.
20. The Appellant further argued that with regard to the input tax claim disallowed, it had offered and furnished the Respondent with all the necessary documentation and explanation as supported by several correspondence exchanged between the parties herein.
21. With regard to the undeclared sales to Telkom (K) Limited and Safaricom Limited, the Appellant contented that it addressed all the issues adequately, submitted the required documentation and therefore the decision by the Respondent to assess additional taxes on the same is misguided in both law and fact.
22. Moreover, the Appellant stated that the additional assessments included matters of an entity known as S.A. Pegrume and Company

limited which is a different entity from the Appellant and whose income is separate from that of the Appellant.

23. Furthermore, the Appellant argued that there is no provision in law that the Respondent relied on in demanding penalties for the said additional amendments.
24. The Appellant contended that the Respondent's auditors having audited the Appellant's books of accounts up to the year 2003 and having given the Appellant a compliance certificate are estopped from auditing any accounts of any other year preceding April, 2003.
25. It was the Appellant's contention that the law requires it to keep its records for a maximum of five (5) years and the demand of documents dating to 1998 was in total disregard of the law and the Respondent's assessments ought to be set aside in totality.
26. The Appellant relied on the cases of **O'Donogue v South Eastern Health Board (2005)4 IR 217** and **Kenya Anti-Corruption Commission v Lands Limited and Others Nairobi Misc. App 583 of 2006** to buttress their argument for fair administrative action, to wit, constitutional rights cannot be taken away without due process.

THE RESPONSE

27. The Respondent in its Statement of Facts and Submissions stated that after carrying out preliminary investigations against the Appellant, sent to it a letter of production of records on 8/7/2004 upon its findings showing that the Appellant was not declaring its true tax liability.
28. Subsequently, there were a series of meetings and correspondence between the parties culminating in a demand notice dated

24/2/2005 for unpaid tax amounting to Ksh:335.410,689, to which the Appellant objected to vide their letter of 6/4/2005.

29. The Respondent stated that after subsequent correspondence and meetings between the parties, demand for more records by the Respondent and analysis of the said records, adjustments were done as a result of more explanations from the Appellant and a confirmation of tax assessment made on 14/2/2007.
30. In view of the above, the Respondent submitted that it took into account all the explanations and documents provided by the Appellant and the assessed amounts kept on being scaled down progressively as engagements went on. The Respondent attributed this to the reconciliations that were being done by both parties resulting into a Confirmed Notice of Ksh:220,323,835.
31. The Respondent further contended that the assessment served upon the Appellant was properly and lawfully raised in accordance with Paragraph 9(1)(b) of the VAT Act, (repealed) which empowers it to do so by taking into account, *inter alia*,
- i) The sources of assessments,
 - ii) The amount of the tax in respect of each source stated
 - iii) The recourse that will befall the Appellant in lieu of failure to adhere to the conditions as stipulated in the assessment notice or its rights as provided for in law.
 - iv) The Respondent denied that it assessed tax on S.A. Pegrume transactions and its position is that in the circumstances the Appeal must be dismissed.
32. The Respondent further relied on the case of **Geothermal Development Company Limited –VS- Attorney General and Three**

Others, Petition No. 352 of 2012, High Court, Nairobi to support its argument.

ISSUE(S) FOR DETERMINATION

33. Having carefully studied the Memorandum of Appeal and its grounds, the Statement of Facts, the oral and written Submissions by both parties, the Tribunal is of the view that the issue herein for its determination is as hereunder:-

Whether the Respondent's tax demand including the assessments and confirmation notice against the Appellant were excessive, unprocedural and baseless.

ANALYSIS & FINDINGS

34. The Respondent pursuant to Section 30 of the VAT Act, Cap 476, (Repealed) conducted the investigations on the Appellant's affairs in 2004 for the period 2000-2004, which investigations, according to it showed that the Appellant had under declared its tax liabilities. It therefore requested for documents and/or records from the Appellant on 6/7/2004.
35. It is worth noting that the sequence of events as stated in the background above clearly shows that on 6/9/2004, the Appellant availed some documents which according to the Respondent were only partial. In view of this, there followed a series of meetings and correspondence between the parties, including the Appellant's tax Agents, Fiscal and Taxation Services Limited and PKF Taxation Services Limited. In view of this, the assessed amounts in contention kept on being scaled down by the Respondent as the engagements progressed culminating in a demand notice dated 24/2/2015 of Ksh:335,410,689 which was accompanied by a tax schedule to which the Appellant objected vide its letter dated 6/4/2005.

36. Subsequently, the parties engaged in meetings and further correspondence spurning from 3/5/3005 to 13/6/2006 when another demand letter was sent by the Respondent to the Appellant of Ksh:122,965,714. This was followed by a review by the Appellant's personnel, resulting into a tax adjustment, resulting into a Confirmation Notice on 14/2/2007 for a sum of Ksh:220,323,895.
37. The Tribunal notes that the said notice was duly received by the Appellant's tax agents, Fiscal and Taxation Services Limited who appended their stamp on it on 15/2/2007. The said notice showed the tax due from Pegrume Limited, the Appellant. It did not show any taxes were due from S,A.Pegrume and Company Limited as alleged by the Appellant. In the circumstances the Tribunal makes a finding that, contrary to the ground of Appeal herein, the Respondent did not take into account the transactions of S,A.Pegrume and Company Limited in its tax assessment demand as alleged by the Appellant.
38. On thorough scrutiny of the Notice Confirming Assessment dated 14/2/2007, the Tribunal notes that the same clearly contains the following, *interalia*,:-
- i) Name of tax payer as the Appellant herein.
 - ii) It refers to the Appellant's objection letter dated 27/11/2006.
 - iii) It states the period of audit being February 2000 to March 2004.
 - iv) It states the consequences if the Appellant wishes to Appeal or does not wish to Appeal.
39. In view of the foregoing it is evident that the Appellant's allegations that the said notice was tainted with procedural irregularity and or

impropriety are wanting in its entirety. Therefore its ground of Appeal on this issue is unsubstantiated and must fail.

40. The Tribunal notes further that it is evident that the Appellant's Tax Agents, PKF Taxation Services Limited vide their letter of 12/3/2007, acknowledged in writing the notice confirming the assessment as follows:-

"With reference to the confirming notice (VAT 23) dated 14th February 2007; it is the intention of our client to appeal to the VAT Appeals Tribunal against the said assessment under the provisions of the VAT Act (Cap 476)".

41. After careful perusal of the correspondence exchanged by the parties, the Tribunal notes that the Respondent indeed scaled its assessments downwards from the original demand thereby reducing its initial amount from principal taxes of Ksh:335,410,689 issued in the year 2005 to a confirmed one of Ksh:102,594,824 in 2007.

Consequently the Tribunal agrees with the Respondent that the same was attributable to the reconciliations that were jointly done by the parties based on progressive production of documents, records and information by the Appellant. Therefore it does not agree with the Appellant's argument that the Respondent failed to take into consideration the explanations and/or documents availed by the Appellant.

42. The Appellant in its Memorandum of Appeal and Submissions argued that it did not receive the Respondent's letter dated 2/3/2006. This letter was requesting for further documents being all the source documents used during the sale of goods and avail stock records for the period under review in order to determine the end user of goods imported. It is on record that on 22/3/2006, a firm

known as Fiscal and Taxation Services Limited, acting on behalf of the Appellant as its tax agent, duly acknowledged receipt of the said Respondent's letter dated 2/3/2006. Therefore the Tribunal does not agree with the Appellant's assertion that it did not receive the said letter.

43. The Appellant agreed that its letter of 29/6/2006 was an objection letter it had issued to the Respondent. The Respondent in response thereto submitted that the same was not an objection but a response to its letter dated 4/6/2006. The Tribunal notes that it is on record that the Appellant's letter dated 29/6/2008 in its heading clearly states that it is a reply to a letter dated 13/6/2006 by the Respondent. Consequently, it cannot be argued by any stretch of imagination that it was an objection letter as contended by the Appellant.
44. The Tribunal makes a finding that the Respondent's letter of 14/11/2006 was on additional assessment to which the Appellant objected vide their letter of 24/11/2006. The Respondent confirmed that assessment and served the Appellant's agent on 15/2/2007 together with a covering letter dated 5/2/2007.
45. The Tribunal notes that in its Further Submissions filed, the Appellant conceded that it did not contest receiving the Notice of Confirmation but rather that the same did not conform to the procedure as required by the law. Whereas the Tribunal agrees with the Appellant's contention that elementary practice and law demands that a person be given full information on a case against him and be given reasonable opportunity to present it as held in **O'Donoghue v South Eastern Health Board (2005) 4 IR 217**, it nonetheless disagrees with the Appellant that the Respondent failed

to consider the explanations and documents availed by the Appellant as it has been clearly demonstrated by the sequence of events, to wit, various correspondence and meetings held by the parties. The Tribunal makes a finding that there was communication and/or engagement between the parties and therefore the Appellant's assertion that it was not accorded a fair administrative process is unfounded.

46. The Tribunal has carefully read the Appellant's authorities as relied on and in particular **Petition No.352 of 2012, Geothermal Development Company Limited –VS- Attorney General and Three Others** and proceeds to distinguish the same. The issue therein was whether the Tax demand and the context in which it was issued to the Petitioner was consistent with the provisions of Article 47(1) of the Constitution, which enshrines the right to every person to a fair administrative action. Justice Majanja held that a person dealing with KRA had a legitimate expectation to be served with the Notice of Assessment in the form that is usually issued before enforcement of proceedings would commence. The judge further held that fair and reasonable administrative action demands a taxpayer would be given a clear warning on the possible consequences of non-compliance with a decision before the same is taken. The same court went to hold that since the taxpayer did not receive such notice, stating the amount claimed, the legal provision under which it is made and the consequences of non-compliance, the taxpayer's rights were violated and the court restrained the Respondent from collection of taxes until such time that a proper notice of assessment is issued. In the instant Appeal, the Tribunal notes that the confirming notice of assessment issued by the Respondent is

succinctly clear, containing the necessary requirements and cannot therefore be held to be in violation of the relevant Statute.

47. In view of the foregoing, the Tribunal finds that the Appeal herein lacks merit and the Respondents notice confirming the assessment is hereby upheld. Accordingly, the Appeal is hereby dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 12th DAY OF JULY 2017.

In the presence of:- No Appearance for the Appellant

FRIDAH MWONGERA for the Respondent


JOSEPHINE K. MAANGI
CHAIRPERSON


JOSEPH WACHIURI
MEMBER


BONIFACE DIMMO
MEMBER