



**Commissioner of Domestic Taxes v Hubei Hongyuan Power
Engineering Company Limited (Income Tax Appeal E172 of 2023)
[2024] KEHC 9104 (KLR) (Commercial and Tax) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E172 OF 2023
JWW MONG'ARE, J
JULY 25, 2024**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

**HUBEI HONGYUAN POWER ENGINEERING COMPANY
LIMITED RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 8th September 2023 in Tax Appeal No.818 of 2022)*

JUDGMENT

Introduction And Background

1. The Appellant (“the Commissioner”) is dissatisfied with the decision of Tax Appeals Tribunal (“the Tribunal”) dated 8th September 2023 that found its decision dated 14th June 2022 (“the Objection Decision”) was not proper in law for being issued outside the statutory timeline. The Commissioner, through its Memorandum of Appeal dated 31st October 2023 now seeks that this decision of the Tribunal be set aside in its entirety. The Respondent has responded to the appeal through its Statement of Facts dated 28th February 2024.
2. For context, I will highlight a brief background of the facts and issues that emerged between the parties and before the Tribunal. The Respondent is in the business of retail sale of construction materials. On 15th November 2019 the Commissioner issued the Respondent with auto generated Value Added Tax(VAT) additional assessments for the period between April and May 2018 amounting



to Kshs.2,784,274.04/=. On 8th June 2020 the Respondent objected to the assessments on iTax and on 14th June 2022 the Commissioner made the Objection Decision confirming the assessments.

3. Aggrieved, the Respondent lodged an appeal at the Tribunal where it complained that the Objection Decision was made without notifying it and that it only came to know of the same on visiting the Commissioner's Tax Service Office (TSO) on other matters. On its part, the Commissioner stated the Respondent's appeal before the Tribunal was out of time and was thus defective. In respect of the substance of the appeal, the Commissioner stated that the Respondent lodged a late objection without giving reasons or supporting evidence for the lateness of the objection as required by section 51(7) of the Tax Procedure Act (Chapter 469B of the Laws of Kenya) ("the TPA").
4. That the Respondent was further reminded through email l on 5th March 2021 and 15th April 2021 to make a proper application and support its late objection. However, the Respondent failed to do so and thus the late objection was rejected as it was not supported by any evidence. The Commissioner averred that accordingly, the assessments were confirmed and enforcement process initiated on 14th June, 2022 as there was no objection on record.
5. After the Tribunal hearing the Appeal filed before it, the Tribunal made its findings and in its judgment set out the following issues for determination; Whether the Objection Decision was proper in law, whether the Notice of Appeal dated 1st August 2022 was proper in law and whether the Respondent was liable for the tax demanded for by the Commissioner.
6. On the propriety of the Objection Decision, the Tribunal observed that whereas the Respondent was late in lodging its objection, the Commissioner acknowledged receipt of the objection and issued a notification of the lateness of the objection to the Appellant on 5th March 2021 and on 15th April 2021, almost 11 months later contrary to the provisions of section 51 (4) of the TPA. It was the Tribunal's position that 11 months after the lodging of the notice of objection was inordinately long for the Commissioner to inform the Appellant of the same and that the provision of section 51 (4) of the TPA is framed in mandatory terms and calls for strict adherence by the Commissioner.
7. Accordingly, the Tribunal held that the Commissioner, having failed to notify the Respondent of the invalidity of its objection within the stipulated time is deemed to have allowed the same and was obligated to issue an objection decision with 60 days thereof in accordance with section 51 (11) of the TPA. The Commissioner however, issued an objection decision on 14th June 2022 fully rejecting the objection dated 8th June 2020 which was 676 days beyond the date when the Objection Decision ought to have been issued and by which time the Respondent's objection was deemed to have been allowed by operation of the law pursuant to the provisions of section 51 (11) of the TPA.
8. The Tribunal thus found that the Objection Decision was not proper in law and having held as such, it stated that it would not delve into the other issues its had framed for determination as the same had been rendered moot.
9. It is for the above reasons that the Respondent's appeal at the Tribunal was allowed and the Objection Decision set aside hence triggering the present appeal before this court, which has been canvassed by way of written submissions. Having carefully considered the written submissions that were highlighted orally before this court, I shall in my analysis and determination make references to later in this decision.

Analysis And Determination

10. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the TPA which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". This means that an appeal before this court



is limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts (See *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR)

11. Thus, the issue for determination before the court is whether the Tribunal arrived at a judicious decision in finding that the Objection Decision was not proper in law. It is not in dispute that the Respondent lodged the objection with the Commissioner on 8th June 2020 through iTax.
12. It is also not in contention that this objection was filed out of time. However, filing a late objection is not fatal as section 51(6) of the TPA provides that "A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection." The Respondent made this application on the said 8th June 2020 and whereas the Commissioner stated that the Respondent did not provide reasons for the late objection, the record indicates that in its iTax objection application, the Respondent stated that the reason for the late objection was "No Access To Email. The Person With The Email Credentials Has Been Away From Kenya From Late Last Year". After this application of extension of time to lodge a notice of objection has been filed, section 51(7) of the TPA provides as follows:-
 - (7) The Commissioner shall consider and may allow an application under subsection (6) if—
 - (a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and
 - (b) the taxpayer did not unreasonably delay in lodging the notice of objection.
 - (7A) The Commissioner shall notify the taxpayer of the decision made under subsection (7) within fourteen days after receipt of the application
13. The reading and simple interpretation of the provisions above is that the Commissioner is obligated to consider a late filing application and is also obligated to make a decision on the same within fourteen days after receipt of the application. However, a perusal of the record indicates that the Commissioner only sent reminders on 5th March, 2021 and 15th April, 2021 to the Respondent to make a proper application and support its late objection. Assuming that these reminders were the Commissioner's decision that it had rejected the late objection application, then the same was clearly outside the 14-day statutory period provided above.
14. If no decision is made on the late objection application within 14 days, it is deemed that the application has been validly lodged within time and section 51(11) of the TPA kicks in where it provides that "Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed." Since the late objection application was deemed allowed 14 days after the application, that is at least by 22nd June 2020, it follows that the Commissioner had sixty days from that date to render an objection decision which was to be made latest by 22nd August 2020. Since no objection decision was made as of this date, it follows that the Respondent's objection was allowed by operation of law. I am in agreement with the Tribunal finding that any decision by the Commissioner after this date was out of time.
15. This court has been consistent that once an objection decision is rendered late, the consequences are fatal and cannot be excused or cured by Article 159 of *the Constitution* (See *Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020)* [2021] KEHC 25 (KLR) (Commercial and Tax) (23 August 2021) (Judgment)], *Commissioner of Investigations and Enforcement v Rama Auto Parts (Income Tax Appeal E183 of 2021)* [2023] KEHC 3100 (KLR)



(Commercial and Tax) (14 April 2023) (Judgment) and Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another [2020] eKLR)]

16. In *Rongai Tiles & Sanitary Wares Limited v Commissioner of Domestic Taxes (Tax Appeal E011 of 2020)* [2023] KEHC 18546 (KLR) (Commercial and Tax) (16 June 2023) (Judgment) the court (Majanja J.) further rejected the argument by the Commissioner that it was not bound by the statutory timelines of section 51(11) if an objection is not validly lodged. Therefore, assuming that the Respondent's objection was not validly lodged, the Commissioner still had an obligation to stick within the 60-day timeline of issuing an objection decision. I agree with what Mabeya J., said in *Eastleigh Mall Limited v Commissioner of Investigations & Enforcement (Income Tax Appeal E068 of 2020)* [2023] KEHC 20000 (KLR) (Commercial and Tax) (17 July 2023) (Judgment) on the importance of sticking to the timelines of section 51(11) of the TPA as follows:-

It is clear from the forgoing that the provisions of section 51(11) of the *Tax Procedures Act* are mandatory. They are not cosmetic. Parliament in its wisdom knew that in matters tax, time is very crucial as those in commerce need to make informed decisions. If the Commissioner is allowed to exercise his discretion and stay ad-infinitum before issuing an objection decision, the tax payer would be unable to make crucial decisions and plan his/her business properly.

17. In sum, it is my finding that the Tribunal did not err in coming to a determination that the Objection Decision was not proper in law. The Respondent's objection was deemed allowed as the Commissioner did not make a decision within 14 days as demanded by section 51(7) of the TPA and that the Commissioner further failed to render a decision within 60 days as demanded by section 51(11) of the TPA. Failure to render the Objection Decision in time was fatal and the Commissioner could not demand any taxes therein and by the time the Respondent was lodging the appeal with the Tribunal, its objection had already been allowed by operation of law. The Tribunal was therefore correct in its judgment and I find no reason for the court to interfere with it.

Conclusion And Disposition

18. It is for these reasons that I find and hold that the Commissioner's appeal lacks merit and the same is hereby dismissed but with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Nyaga holding brief for Mr. Nyapara for the Appellant.

Ms. Muinde holding brief for Mr. Kioko for the Respondent.

Amos - Court Assistant

