



**Ken Iron and Steel Limited v Commissioner of Investigations
and Enforcement (Income Tax Appeal E066 of 2021)
[2023] KEHC 2770 (KLR) (Commercial and Tax) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E066 OF 2021**

**A MABEYA, J
MARCH 31, 2023**

BETWEEN

KEN IRON AND STEEL LIMITED APPELLANT

AND

**THE COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

*(Being an appeal from the judgment and decree of the Tax
Appeals Tribunal at Nairobi delivered on 28th May 2021)*

JUDGMENT

1. The respondent assessed the appellant and issued VAT assessment of Kshs 13,562,515/- for the period of January, 2016 to January, 2018. A further assessment was done and an amount of Kshs 25,429,716/- corporation tax was raised on 9/5/2018 for the same period.
2. The assessment was done following the appellant's interaction with two suppliers namely Darwine Wholesellers Ltd and Fahari Hardware & Building Wholesellers who had been profiled by the appellant as printing and selling ETR invoices without making sales.
3. The respondent gave a notice of objection dated 13/6/2018 to which the appellant made objection decisions dated 3/8/2018 and August 6, 2018, respectively confirming the assessments.
4. The appellant lodged an appeal at the Tax Appeals Tribunal ("the Tribunal") which was dismissed by the Tribunal *vide* its judgment on 28/5/2021.



5. Aggrieved by the said judgment, the appellant has lodged an appeal in this court *vide* a memorandum of appeal dated 7/6/2021 citing 22 grounds of appeal. The grounds of appeal can be summarized into two as follows: -
 - a) The Tribunal erred in failing to consider the objection decision dated August 3, 2018 even after it being captured in the appellant's memorandum of appeal.
 - b) The Tribunal erred in failing to find that the objection decisions were invalid.
 - c) The Tribunal erred in finding that the appellant had not provided sufficient proof to rebut the respondent's assessment.
6. The respondent filed its statement of facts dated 5/7/2021. It contended that for the period of 2016 to 2018, the appellant had claimed input from suppliers amounting to Kshs 84,765,719/- and the computation of tax arising from the input was Kshs 13,562,515/- as VAT and Kshs 25,429,716/- as corporation tax. The respondent's contention was that while it issued two objection decisions dated 3/8/2018 and 6/8/2018, respectively the appellant only filed a notice of appeal with respect to corporation tax thus making the objection decision on VAT uncontested.
7. The respondent further contended that failure to put in a notice of appeal rendered the appeal at the Tribunal invalid. That the two objection decisions showed that there was no supply of taxable goods made by the suppliers and the documents given by the appellant were illegible and the request for original documents was not complied with.
8. The appeal was canvassed by written submissions which I have considered. It was the appellant's submission that the respondent did not address the grounds raised by the appellant on its notice of objection and neither did the respondent disclose the basis, both legal and factual, of its assessments and objection decision. Counsel submitted that failing to lodge a notice of appeal was just a technicality that could be cured by article 159 of the Constitution. It was submitted that the appellant only need to produce tax invoices and corresponding ETRs and thus the burden was on the respondent to show that the evidence produced was not sufficient.
9. On the other hand, the respondent submitted that according to section 13(1) of the Tax Appeals Tribunal Act, the process of filing an appeal started with a notice of appeal and therefore there was no error on the part of the Tribunal in holding that the appeal was not in respect to the objection decision dated 3/8/2018 on VAT. That the documents produced by the appellant were illegible and the request for original documents was not honored.
10. The court has considered each party's contention in the pleadings as well as the submissions. On the first ground the question is whether the tribunal erred in failing to consider the objection decision dated 3/8/2018 despite it being on the memorandum of appeal.
11. It was the appellant's contention that failure to lodge a notice of appeal was a technicality and an excusable default and the tribunal ought to have pronounced itself on the objection decision dated 3/8/2018 on VAT. The respondent on the other hand was of the view that the first step in lodging an appeal is filing a notice of appeal and failure to do so meant that the appellant did not dispute the objection decision dated 3/8/2018.
12. The procedure for appealing against a decision of the Commissioner, in my view, is set out in sections 12 and 13 of the Tax Appeals Tribunal Act. Section 12 provides that in order to dispute a decision of the commissioner a notice of appeal is to be given whereas section 13 provides for the contents of the notice and how it is to be lodged.



13. Section 13 of the [Tax Appeals Tribunal Act](#) sets out the procedure of filing an appeal. It provides: -

- “ 1) A notice for appeal to the tribunal shall
- a) Be in writing or through electronic means;
 - b) Be submitted to the tribunal within 30 days upon receipt of the decision of the commissioner.”

14. From the record, the appellant filed a notice of appeal dated 24/8/2018. The notice clearly stated that the appellant intended to appeal the decision of the commissioner given on 6/8/2018. The appellant did not state that it was desirous of appealing against the objection decision of 3/8/2018. I also note that the appellant did not seek to rectify the default on its part and no explanation had been given as to why the notice of appeal was not filed with respect to the decision of 3/8/2018.
15. A notice of appeal is the foundation of any appeal. It is the one that evinces the intention to dispute the particular decision of the Commissioner that a tax payer is aggrieved with. It's lodging has the effect of giving the Tribunal the jurisdiction or right to hear and determine an appeal against the identified decision. Such a notice ought to be filed within 30 days. Indeed, the Act provides for extension of time thereby showing the importance of that pleading in the process of an appeal.
16. In the present case, no notice was filed with regard to the Commissioner's decision of 3/8/2018 and therefore, the Tribunal's jurisdiction to make a determination on that decision had not been invoked.
17. It was contended by the appellant that the respondent had not raised the issue of the incompetence of the appeal against the decision of 3/8/2018. That since it was not in the respondent's statement of facts, it could not be raised in the submissions. It relied on the decision of [Clips Ltd v Brands Import \(Africa\) Ltd formerly named Brand Imports Ltd](#) [2015] Eklr, in support of that submission.
18. The view the court takes is that, that was a point of law that can be taken at any stage of the proceedings. Since the notice of appeal is the jurisdictional foundation for the Tribunal in entertaining any appeal before it, nothing precluded the respondent from raising it as it did. It never mattered not that the memorandum of appeal challenged that decision.
19. Further, the failure to file the notice was not a technicality curable under article 159 of the [Constitution](#) of Kenya as contended by the appellant. Accordingly, I find no error on the part of the Tribunal and that ground fails.
20. The second ground was that the Tribunal failed to consider that the objection decisions were invalid and illegal. That they did not comply with the provisions of sections 49 and 51(9), (10) and of the [Tax Procedures Act](#) (TAT). That the objection decisions did not address the grounds of the appellant's notice of objection and did not disclose the legal and factual basis. That to that extent, the said decisions were a nullity. The cases of [Republic v KRA Ex parte Funan Construction Ltd](#) [2016] eKLR and [Republic v Kenya Revenue Authority Ex parte Jaffer Mujtab Mohamed](#) [2015] Eklr, were cited in support of those submissions.
21. I have seen both the decisions. They appear at pages 117 and 118 of the respondent's statement of facts. In the relevant part, they both read as follows:

“ Your grounds of objection have been considered and the commissioner's decision as guided by section 51 of the [Tax Procedures Act](#), 2015 on the same is as communicated below.



Notwithstanding your assertion that the company has maintained full records for the purchases disallowed, the Commissioner has established that there was no supply of taxable goods by the suppliers highlighted on our letter of April 16, 2018.”

22. My view is that, looking at the notices, it was clear that the legal foundation for the decision was specified, section 51 of the *TAT*. That the reason for the rejection was that the Commissioner had established that there had been no taxable supply. I am unable to see what was required than that to validate the notices. The notices were sufficient and valid, in my view. Accordingly, that ground also fails.
23. The last ground was whether the Tribunal erred in finding that the appellant had not given sufficient proof to rebut the respondent’s assessment. The genesis of the matter is that the respondent had discovered that the appellant had traded with two companies that had been profiled by the respondent with printing and selling ETR invoices without making actual supplies. The respondent thereafter sent an assessment to the appellant and the appellant filed a notice of objection and the respondent issued two objection decisions.
24. The appellant’s gravamen is that the Tribunal failed to acknowledge that the appellant had given all the copies of the documents required to confirm authenticity of the purchases. According to the appellant, it had discharged its burden of proof and therefore it was upon the respondent to demonstrate that the evidence adduced was not sufficient.
25. It is trite that section 30 of the *Tax Appeals Tribunal Act* and section 56 of the *Tax Procedures Act* places the burden of proof on the tax payer. Section 30 provides that: -
 - “In a proceeding before the Tribunal, the appellant has the burden of proving
 - a) Where an appeal relates to an assessment, that the assessment is excessive; or
 - b) In any other case, that the tax decision should not have been made or should have been made differently.”
26. In *Commissioner of Domestic Services v Galaxy Tools Limited* [2021] eKLR, it was held that: -
 - “Further, the tax Laws reverse the well-known principle of evidence of “he who alleges must prove”. In this regard, the tax authorities would assess what it considers to be the tax due from a taxpayer and the tax laws would burden the tax payer to disprove that the assessment or tax demanded is wrong or incorrect. This is borne by the fact that the assessment and demand is ordinarily made way after the tax payer has assessed himself and made a declaration of what according to him is the tax payable and has already paid such tax. The burden is therefore shifted to the tax payer because, the tax authority has to rummage through the documents of the tax payer years after the tax payer assessed himself and paid what he considered to be his tax liability.”
27. I have perused the record, in a letter dated 19/4/2018, the respondent wrote to the appellant seeking the following documents; the copies of invoices with ETR, the delivery notes, stock records as well as evidence of payments. In its notice of objection dated 13/6/2018, the appellant provided documents in support of its objection which were samples of purchase invoices for the period in dispute and bank statements.
28. In a rejoinder letter dated 21/6/2021, the respondent informed the appellant that the documents in support of its objection were not legible and requested for original documents of invoices, ETR



delivery notes and bank statements. The appellant did not heed that request. What then followed were the objection decisions of 3/8/2018 and 6/8/2018, respectively.

29. From the foregoing, it is not disputed that the documents were provided, however the discrepancy was that the documents could not be of help as they were illegible. The appellant was given an opportunity to provide either the originals thereof or clear copies failed to do so.
30. Under section 59 of the TAT and 43 of the VAT Act had the power to request for those documents. Failing to provide the documents as requested, the burden still laid on the appellant and did not shift to the respondent. The appellant was therefore unable to prove that it had indeed made the purchases and that actual goods were in fact supplied by the traders.
31. In this regard, the Tribunal cannot be faulted for having found that the appellant had not discharged its statutory burden of proof. Having not discharged the burden, the respondent's assessments are not therefore challenged.
32. In the upshot, the court finds no merit in the appeal and the same is hereby dismissed with costs to the respondent.

It is so decreed.

DATED and DELIVERED at Nairobi this 31st day of March, 2023.

A. MABEYA, FCIArb

JUDGE

