



REPUBLIC OF KENYA



**KENYA LAW**  
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**Commissioner of Domestic Taxes v Hussein (Income Tax Appeal E064 of 2022)  
[2023] KEHC 2596 (KLR) (Commercial and Tax) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2596 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E064 OF 2022  
JWW MONG'ARE, J  
MARCH 27, 2023**

**BETWEEN**

**THE COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**SAALAH AHMED HUSSEIN ..... RESPONDENT**

**JUDGMENT**

1. The Appellant is a principal officer appointed under section 13 of the *Kenya Revenue Authority Act* and is charged with the responsibility of assessment, collection, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
2. The Respondent is the director of Hidaya Stores Limited, a company incorporated under the *Companies Act* 2015.
3. Briefly, the facts giving rise to this Appeal are that the Appellant carried out investigations on the Respondent's tax affairs for the period 2015-2016 to determine whether the correct tax was declared from his income earned on the basis of emoluments received from directorship from Ali Hidaya Stores Limited.
4. Upon conclusion of the investigations the Appellant established that the Respondent under-declared tax on his income derived from the company and equally failed to establish his source of income in purchase of three motor vehicles being KCB 946Y, KBJ 421Q and KBQ 800J. As a result, an assessment was raised and issued to the Respondent on 8<sup>th</sup> September 2020 on the undeclared taxes accruing.
5. The Respondent objected to the assessment on 7<sup>th</sup> October 2020 and the Appellant issued its objection decision on 30<sup>th</sup> November 2020 confirming its assessment. Dissatisfied with the objection decision, the Respondent filed an Appeal at the Tax Appeal Tribunal (hereinafter 'the Tribunal').



6. The matter proceeded before the Tax Tribunal and the Appeal was determined in favour of the Respondent. It further set aside the additional assessments of Ksh.4,787,812.80.
7. Vide a Memorandum of Appeal dated 5<sup>th</sup> October 2021 the Appellant Appealed against the entire judgement of the Tribunal dated 6<sup>th</sup> August 2021 on the following grounds:-

1. That the Honourable Tribunal erred in law and fact by failing to find that the Respondent's Appeal at the Tribunal was an invalid/ improper Appeal for failing to comply with section 13(2) of the *Tax Appeals Tribunal Act* as it did not indicate the tax decision challenged.
2. That the Honourable Tribunal erred in law and fact in finding that the Respondent was not accorded fair hearing prior to the Appealable decision being made by the Appellant.
3. That the Honourable Tribunal erred in law and fact by misconstruing the Appellants decision dated 30th November, 2020 and finding that the same was improper.
4. That the Honourable Tribunal erred in law and fact by setting aside the Appellant's additional assessment amounting to Kshs. 4,787,812.80 dated 8th September, 2020 on the basis that the Appellant's decision dated 30th November 2020 was improper.
5. That the Honourable Tribunal erred in law and fact by misconstruing the provision of section 51(2) and 51(4) of the *Tax Procedures Act* thereby finding that the Respondent's decision dated 30th November 2020 was issued outside the timelines allowed by law.
6. That the Honourable Tribunal erred in law and fact by failing to find that the Respondent's objection dated 7th October 2020 to an assessment dated 8th September, 2020 was in itself invalid and the final orders made could not ensue.
7. That the Honourable Tribunal erred in fact and law in changing the character of dispute before it and addressing issues not raised by the parties specifically in their pleading.
8. That the Honourable Tribunal erred in law and fact by failing to appreciate that tax statutes are statutes of strict interpretation.
9. That the Honourable Tribunal erred in law and fact in failing to consider the evidence tendered by the Appellant
10. That the Honourable Tribunal misapplied the law and facts and therefore arrived at the wrong decision.”

8. Based on the grounds above the Appellant prayed for the following orders:-

- “(a) (a) The Appeal be allowed with costs to the Appellant.
- (b) That without prejudice to (a) above



- (c) The Honourable does find that the appropriate order in any case was to order the Respondent to lodge a proper objection with the Appellant within the determined period of time.
  - (d) That upon making the finding in paragraph (b) above, the Honourable court does order that the Respondent do furnish the Appellant with a proper objection within a determined timeline.
  - (e) That that upon the failure by the Respondent to furnish a proper objection within the timeline specified, then then the Appellant's assessment be found to be due and payable.
  - (f) That the costs of this Appeal be provided for.”
9. The Respondent did not come on record in this Appeal despite evidence of service upon him.
  10. The court has considered the written and oral submissions filed by the Appellant.
  11. The grounds of Appeal can be condensed to the following issues:
    1. Whether the Tribunal erred in finding that the Appellant's objection decision dated 30/11/2020 was improper.
    2. Whether the confirmed additional assessments were proper and lawful?
    3. Whether there was a proper Appeal before the Tribunal.

**Issue 1: Whether the Tribunal erred in finding that the Appellant's objection decision dated 30/11/2020 was improper.**

12. The Appellant's objection decision was issued in a letter dated 30<sup>th</sup> November 2020 whereby the Appellant noted that the Respondent's objection to its assessment was not validly lodged as stipulated under Section 51(3) of the *Tax Procedures Act*. Based on this the Appellant confirmed its additional assessment of Ksh.4,787,812.80.
13. The Tribunal in its judgement dated 8<sup>th</sup> April 2022 found that there was no requisition of documents prior to the objection which was rejected on the basis of section 51(2) of the *Tax Procedure Act*. It held that there was no communication before and in the objection decision of the relevance or lack thereof of the documentation provided despite the issue having been raised in the objection.
14. The Tribunal was of the view that the Respondent cannot arbitrarily reject documents without giving a valid reason and should have at least alerted the Appellant to enable him to make the necessary amends.
15. The Appellant on its part submitted that its assessment was confirmed in its objection decision as the Respondent failed to satisfy the burden of proof by lodging a valid objection as required under section 51(2) and 51(3) of the Tax Procedure Act demonstrating that the assessment was in any way excessive or erroneous.
16. The Appellant argued that the Respondent was given over 53 days to lodge a valid objection as required by section 51(2) and 51(3) of the *Tax Procedure Act* but he did not furnish the Appellant with any information necessary to challenge the assessment.
17. Section 51(3) and (4) of TPA states:

“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;
- (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 or has applied for an extension of time to pay the tax not in dispute under section 33(1); and
- (c) all the relevant documents relating to the objection have been submitted.
- (4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall within a period of fourteen days notify the taxpayer in writing that the objection has not been validly lodged.”

18. In the Appellant’s objection decision, found on page 105-106 of the record of Appeal, the Appellant submitted that the Respondent’s notice of objection was not validly lodged as stipulated under section 51(3) *Tax Procedure Act* . The Respondent’s objection letter dated 7<sup>th</sup> October 2020 is not found in the record of Appeal therefore the court cannot appreciate its contents.
19. The court notes that prior to the objection decision, the Appellant did not notify the Respondent that his objection was not validly lodged as stipulated under section 51(4) of the *Tax Procedure Act*. In fact the Respondent only became aware that its objection notice was not validly lodged in the objection decision dated 30/11/2020.
20. Section 51(4) of the *Tax Procedure Act* is clear and couched in mandatory terms that the Commissioner has the obligation to notify the taxpayer that a notice has been invalidly lodged within 14 days once it has determined that is the case.
21. I concur with the Tribunal that the purpose of such an immediate notice is to give the taxpayer an opportunity to rectify its objection to the assessment and/or provide additional documents in support of its objection. Failure to give the Respondent such an opportunity is to deny him his right to fair administrative action and is in breach of the Appellant’s legitimate expectation that he would be afforded a chance to support his objection.
22. Legitimate expectation was defined in the Court of Appeal case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR where the court quoted the text book by Pollard, Parpworth And Hughes writing at page 583 in the 4th edition of *Constitutional And Administrative Law: Text With Material*:
- “Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment.”
23. Although the burden of proof is upon the taxpayer to prove an assessment wrong, the Appellant had the obligation to notify him that his objection was not validly lodged and this would then give him the



- opportunity to lodge it correctly and provide all necessary information before an objection decision is issued.
24. In light of the above finding, I am of the opinion that the Appellant's objection decision made without the affording the Respondent an opportunity to amend his objection and/or provide further documentation breached the Respondent's legitimate expectation and right to fair administrative action. I therefore find that the objection decision was improper.
  25. The second issue for determination is whether the confirmed additional assessments were proper and lawful?
  26. In the letter of objection dated 30<sup>th</sup> November 2020, the Appellant confirmed the additional assessment of taxes to be paid by the Respondent to be Ksh.4,787,812.80.
  27. Having found that the objection decision was arrived at without allowing the Respondent the opportunity to support his objection, I find that the additional assessments were also not proper nor lawful.
  28. However, the court cannot set aside the Appellant's assessment in entirety as there may be taxes owed by the Respondent to the Appellant. Thus it would be in the interest of justice to refer the matter back to the Appellant to reconsider the Respondent's objection. The Appellant should notify the Respondent why his objection was invalid and he shall be given an opportunity to rectify the objection and provide relevant documentation.
  29. The third issue for determination is whether there was a proper Appeal before the Tribunal.
  30. The Appellant submitted that the Respondent did not produce the tax decision it was challenging before the Tribunal in its Appeal. That this was brought to the attention of the Tribunal but it failed to make a determination on this issue.
  31. Based on this, the Appellant prayed to have this court find that there was no proper Appeal before the Tribunal which lacked jurisdiction to entertain the Appeal.
  32. It is undisputed that the Respondent did not submit a copy of the tax decision in his Appeal before the Tribunal as required under section 13(2) of the [Tax Appeals Tribunal Act](#) which states:-
    - “(2) (2) The Appellant shall, within fourteen days from the date of filing the notice of Appeal, submit enough copies, as may be advised by the Tribunal, of-
      - (a) a memorandum of Appeal;
      - (b) statements of facts; and
      - (c) the tax decision.”
  33. However upon reading the Appellant's statement of facts dated 19<sup>th</sup> May 2021 found on page 96-99 of the record of Appeal, I note that the Appellant stated that after several reminders to the Respondent, the tax decision was provided to it on 30<sup>th</sup> April 2021. Although the tax decision was not provided by the Respondent upon filing the Appeal, it was provided to the Tribunal and the Respondent on or about 30<sup>th</sup> April 2021 before the Appellant filed its statement of facts in opposition to the Appeal before the Tribunal.
  34. Although the Tribunal erred in failing to make a determination on this issue when the Appeal was before it and the Respondent filed its Appeal without the objection decision, I find that the Appeal before the Tribunal was proper and that the Tribunal had jurisdiction to entertain the Appeal.



35. The upshot of the above is that the Appeal is partially successful. The finding of the Tribunal setting aside the additional assessments of Ksh.4,787,812.80 is quashed.
36. The court orders the Appellant to notify the Respondent why his objection was invalid within 1 week of the delivery of this ruling and in response the Respondent to file an objection in line with the Appellant assessment within 2 weeks of that notification failure to which the Appellant's assessment will be found to be due and payable.
37. In conclusion the court hereby grants the Appellant's prayers (c ), (d) and (e) of the Memorandum of Appeal.
38. Each party has to bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH 2023**

**J. W. W.MONGARE**

**JUDGE**

In the presence of:-

Mr. Nyapara for the Appellant

No appearance for the Respondent

Sylvia- court Assistant

