



REPUBLIC OF KENYA



**I&M Bank Limited v Commissioner of Domestic Taxes (Income Tax Appeal E034 of 2020)
[2023] KEHC 3522 (KLR) (Commercial and Tax) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E034 OF 2020**

FG MUGAMBI, J

APRIL 28, 2023

BETWEEN

I&M BANK LIMITED APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

1. At the heart of this tax dispute is the outcome of a tax audit on the appellant's affairs for years of income 2011 and 2012 with respect to corporation tax and 2012 and 2013 with respect to agency taxes. The result of the outcome was communicated through a letter dated 29th May 2015 captioned Additional Assessment for Years of Income 2011 And 2012 on Corporation Tax and Years 2012 to 2013 for Agency Taxes. It was addressed to the appellant and vide this communication the respondent raised an additional tax assessment of Kshs. 434,247,169/= for the period.
2. The appellant responded vide a letter captioned Notice of Objection, Additional Assessment on Corporation Tax and Agency Taxes dated 26th June 2015. By the said letter the appellant objected to the additional tax assessments, save for the computation of Kshs. 3,767,841/= and promised to 'arrange for prompt payment of outstanding principal tax'.
3. On 25th January 2017, the appellant again wrote to the respondent referring to a meeting that had taken place in August 2015 and to email and other correspondence between the parties. In the letter the appellant prompted the respondent that there had been no formal response to the appellant's objection lodged on 26th June 2015. This was contrary to the requirement of section 51(11) of the [Tax Procedures Act](#) No 29 of 2015 (hereinafter the TPA). In response to the appellant's letter, the respondent issued an Objection Decision dated 13th March 2017 revising the outstanding tax liability to Kshs 238,811,243/= inclusive of penalties and interest. Aggrieved by the respondent's decision, the appellant lodged an



appeal at the Tax Appeals Tribunal (hereinafter the TAT) and judgment was delivered on 30th March 2020 dismissing the appeal in favour of the respondent.

The appellant's case

4. Dissatisfied by the judgment of the TAT, the appellant filed the present appeal by a Memorandum of Appeal dated 30th April 2020 on grounds that;
 - i. The Tax Appeals Tribunal erred in law and in fact in holding that the respondent's Objection Decision issued on 13th March 2017 was validly issued.
 - ii. The Tax Appeals Tribunal erred in law and in fact in failing to find that the respondent's Objection Decision Issued on 13th March 2017 had not been made within 60 days of the commencement of the *Tax Procedures Act* (on or before 19th March 2016) and that the appellant's objection filed on 26th June 2015 ought to have been allowed pursuant to the provisions of section 51 (11) of the *Tax Procedures Act*.
 - iii. The Tax Appeals Tribunal erred in fact and in law in finding that the appellant's letter to the respondent dated 25th January 2017 invoking the provisions of section 51(11) of the *Tax Procedures Act* was an ambush on the respondent by the appellant.
 - iv. The Tax Appeals Tribunal erred in fact and in law in finding that in writing to the respondent on 19th August 2016 and 12th January 2017, the appellant had the effect of allowing the respondent more time to deliberate its objection filed on 26th June 2015 and make a decision
 - v. The Tax Appeals Tribunal erred in law and in fact in finding that under the provisions of section 15(2)(a) of the *Income Tax Act*, for doubtful debts to be allowable, they must be deemed to have been uncollectible by the respondent.
 - vi. The Tax Appeals Tribunal erred in law and in fact in failing to hold that under section 15(2)(a) of the *Income Tax Act*, the respondent had no jurisdiction to prescribe guidelines for the purpose of determining doubtful debts
 - vii. The Tax Appeals Tribunal erred in law and in fact in finding that the *Income Tax Act* considers bad debts and doubtful debts to be one and the same under the provisions of section 15 (2) (a) of the *Income Tax Act*.
 - viii. The Tax Appeals Tribunal erred in law and in fact in failing to find that the respondent was not entitled to rely on the Guidelines on allow ability of bad debts issued under Legal Notice No. 37 of 201 1 in deciding whether or not to allow the deductions the appellant had provisioned as doubtful debts.
 - ix. The Tax Appeals Tribunal erred in law and in fact in relying on the Guidelines on allowability of bad debts issued under Legal Notice No. 37 of 2011 in deciding whether or not to allow the deductions the appellant had provisioned as doubtful debts.
 - x. The Tax Appeals Tribunal erred in law and in fact in holding that the provisions for doubtful debts in respect of Lamsons Industries Limited, Virchand Vipal & Sons Limited, Benir Investments Limited, Limobco



Exporters Limited, Helios Energy Limited, Mr. Chandul Virchand Shah, Ricon Associates (Kenya) Limited, Keval R. Patel & Ajeshkumar V Agravat. Caroline Wanjihia & Company Advocates, Annways Heritage Limited, Samson Keengu Nyamweya and provision for other various debtors be disallowed

5. The appellant further argued his case by way of written submissions. The crux of the submissions with respect to grounds (i) to (iv) was that the respondent issued its Objection Decision on 13th March 2017 outside the prescribed statutory period. According to the appellant the respondent ought to have issued an Objection Decision within 60 days of the notice of objection. It was the appellant's further submission that the respondent was therefore barred by law from claiming the amount since the objection to the respondent's demand was presumed to have been allowed.
6. The appellant further submitted that there was no legal and factual basis for finding that the letters dated 19th August 2016 and 12th January 2017 were an ambush on the respondent and had an effect of giving the respondent more time to deliberate on the objection.
7. On grounds (v) to (x) Counsel submitted that the Guidelines published by the respondent in Legal Notice No 37 of 2011 did not apply to doubtful debts. It was submitted that the tribunal erred in failing to hold that the respondent under section 15(2) of the *Income Tax Act* had no jurisdiction to prescribe guidelines for the purpose of determining doubtful debts. Counsel submitted that the tribunal wrongly applied the said Guidelines and that the appellant had undertaken reasonable steps in the collection of the debts.

The respondent's case

8. In opposition to the appeal the respondent filed a Statement of Facts dated 28th May 2020. It was the respondent's contention that the tribunal did not err in finding that the Objection Decision was validly lodged. The respondent further stated that there was no error on the part of the tribunal in holding that the letter dated 19th August 2016 and 12th January 2017 allowed the respondent more time to deliberate on the appellant's objection.
9. It was the respondent's case that the provisions of section 15(2)(a) of the *Income Tax Act* were well interpreted leading up to the conclusion that bad and doubtful debts were not collectable by the respondent. It was averred that with respect to section 15(2)(a) of the *Income Tax Act* doubtful debts were only deductible after the Commissioner was satisfied that they had become bad. It was contended in this regard that there was no error in relying on the Guidelines issued under Legal Notice No 37 of 2011 in ascertaining whether doubtful debts ought to be allowed.
10. The respondent also filed written submissions to back his cause. It was asserted in submissions that where there was an enquiry or request for a meeting or discussion by a tax payer, the same could not be said to constitute an objection. Counsel submitted that the letter dated 26th June 2015 did not qualify as an objection letter as it simply was suggesting meetings and requesting for time to carry out a review. The respondent submitted that it had acted in good faith in giving the appellant a window to provide further information.
11. On the issue of bad and doubtful debts, Counsel submitted that for them to be allowable, they had to be deemed to have become bad by the respondent according to the Commissioner's Guidelines. It was the respondent's submissions that for a debt to be considered bad then, it ought to have been uncollectible. It was finally submitted that the respondent had made an analysis on the appellant's debtors in order to determine whether the debts were bad or doubtful.



Analysis and determination

12. I have carefully considered the record of appeal, the rival submissions of the parties, decisions cited by Counsel in support of their cases as well as the impugned decision. The grounds of appeal raise two (2) issues for determination namely;
- i. Whether the Objection Decision was validly issued and
 - ii. Whether the tribunal erred in its determination of bad and doubtful debts in line with section 15(2)(a) of the *Income Tax Act*.
13. In considering this appeal, this Court is guided by section 56(2) of the *TPA* which limits appeals from the Tribunal to the High Court on questions of law only. Having said that, I will now proceed to deal with the issues that have been raised.

On the validity of the Objection Decision and the effect of the respondent's failure to timeously consider the applicant's objection to the tax demand;

14. It is not contested that the respondent issued a tax assessment dated 29th May 2015 addressed to the appellant. What is however contested is the notice of objection that the appellant lodged in response to the assessment, which is dated 26th June 2015. The respondent has argued that the same did not qualify as an objection letter as it was simply suggesting meetings and requesting for time to carry out a review and that it was therefore ambiguous. The requirements of such an objection are laid out in section 51(3) of the *TPA* which provides that;
- 3). 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.
15. Having perused the record of appeal that is before me, I find that the appellant satisfied all the necessary requirements for the notice of objection to be deemed as validly lodged in law. For purposes of section 51(3)(a), the objection letter in question is captioned as a Notice of Objection; Additional Assessment on Corporation Tax and Agency Taxes. The letter goes on to address disputed items under the different heads. Before penning off, the appellant states, 'please treat this letter as an objection for corporate tax, withholding tax and VAT assessed in your letter dated 29th May 2015. This to my mind provided sufficient clarity for the respondent to proceed on the basis that this was indeed an objection. Supposing the respondent was correct in his submissions on the invalidity of the objection, (which I have already determined to be otherwise), the avenue open for the Commissioner was to notify the appellant as such. Section 51(4) of the *TPA* provides that;

Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.



16. From the evidence on record, no such communication was made to the appellant. There being no prescribed format that such an objection must take, what mattered therefore is that the objection was clear in substance.
17. This position was emphasized in *Republic v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited* [2018] eKLR where the Court stated:
- ...Since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the tax payer is seeking further particulars or indulgence to enable it pay the taxes demanded.
18. Having found that the objection was validly lodged, it was up to the respondent to consider it and make an Objection Decision. It is this decision and the interpretation of section 51(11) of the *TPA* that lies at the heart of this appeal.
19. The TAT correctly noted that section 51(11) provides for a mandatory period of 60 days within which the Commissioner must issue an Objection Decision. The Tribunal also noted that in the event this is not done, the consequence that flows therefrom is that the objection is deemed allowed. The Tribunal then went on to observe that parties were engaged in communication between the years 2015 and 2017 and as such, as stated in paragraph 109... ‘the Tribunal is faced with the difficulty of when to draw a line i.e when do the 60 days start to run in a situation where the parties are engaging each other with a view to resolving a dispute’.
20. The strict timelines provided for in section 51(11) of the *TPA* has been a subject of extensive litigation. In *Republic v Commissioner of Customs Services Ex-Parte Unilever Kenya Limited* [2012] eKLR the Court held that the TPA requires that where the Commissioner has not made an Objection Decision within 60 days from the date the tax payer lodged the notice of objection, the objection shall be allowed. This means that the issues that the tax payer had raised in the notice of objection will be accepted. In case of a tax assessment, it will be vacated. In other recent decisions including *Equity Group Holdings Limited v Commissioner of Domestic Taxes* (Civil Appeal E069 & E025 of 2020) the Court held that a statutory edict is not procedural technicality. It is a law which must be complied with. Likewise, in *Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another* [2020] it was again reiterated that;
- “The provisions of the TPA are clear that where the Commissioner fails to make a decision on an objection within sixty days, the objection shall be allowed. This means that the objection dated 8th November, 2016 in which the Applicant sought for the revision of the Commissioner’s decision to demand the excise duty amounting to Kshs 127,183,364/= was allowed by operation of the law by dint of Section 51(11) of the TPA. Therefore, the 1st Respondent should not have continued to demand the payment of the excise duty through the letters dated 23rd, November, 2016, 3rd, February, 2017, 3rd, October 2019, 24th October 2019, and 7th, November 2019. All those demands amounted to nothing in law.”
21. There is therefore unanimous consent on this issue. The question raised by the Tribunal on when the 60 days begin to run is readily answered by the law which presents two (2) possible scenarios; either



from the date of receipt of the objection or from the date of receipt of any information required from the taxpayer by the Commissioner. Section 51(11) of the TPA provides in this regard that;

- 11) The Commissioner shall make the objection decision within sixty days from the date of receipt of—
 - a) the notice of objection; or
 - b) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.
22. Having said this, even if, based on the finding of fact by the TAT that there was communication and correspondence exchange between August and September 2015 that culminated to documents being supplied, still the Objection Decision dated 13th March 2017 comes way later than the anticipated 60 days from the date of supply of documents requested by the respondents. There was a long period within which there appears to have been a lull prompting the appellant to sound out the respondent. The period of lull would not have been remedied by the appellant indicating in its communication that it had provided all the information required and that this was its final position in the matter, as suggested by the Tribunal. I again disagree that the letter of 25th January 2017 was an ambush on the respondent. Instead, I understand the apprehension by the appellant, an anxious taxpayer keen to know his fate as required by law.
23. That being the law, the appellant's objection stood allowed as a matter of law the moment the Commissioner of Domestic Taxes failed to render his decision within the 60 days. Section 51(11) is couched in mandatory terms clearly communicating the intention of the legislature in no ambiguous terms. The object and purpose of the TPA emphasizes on the need to provide uniform procedures for consistency and efficiency in the administration of tax laws, as well as effective and efficient collection of tax. It is therefore for the purposes of following policy and legislative prescripts in tax administration that these statutory timelines must be adhered to.
24. This finding effectively determines the 2nd ground of appeal which has now been rendered moot.

Disposition and orders

25. Accordingly, and for all the above reasons, this appeal succeeds. I make the following specific orders:
 - a. That HCCOMMITA No E034 of 2020 be and is hereby allowed;
 - b. That the part of the judgment of the Tax Appeals Tribunal dated 30th March 2020 in Tax Appeals Tribunal Appeal No 72 of 2017 holding that the respondent's Objection Decision was validly issued, and all consequential orders thereto be and is hereby set aside;
 - c. That the part of the judgment of the Tax Appeals Tribunal dated 30th March 2020 in Tax Appeals Tribunal Appeal No 72 of 2017 holding that provisions for doubtful debts in respect of Lamsons Industries Limited, Virchand Vipal & Sons Limited, Benir Investments Limited, Limobco Exporters Limited, Helios Energy Limited, Mr. Chandulal Virchand Shah, Ricon Associates (Kenya) Limited, Keval R. Patel & Ajeshkumar V Agravat, Caroline Wanjihia & Company Advocates, Annways Heritage Limited, Samson Keengu Nyamweya and provision for other various debtors be disallowed and all consequential orders thereto be and is hereby set aside;
 - d. There shall be no orders to costs.



SIGNED, DATED AND DELIVERED AT NAIROBI

THIS 28th DAY OF April 2023

F. MUGAMBI

JUDGE

