



**Commissioner of Domestic Taxes v Step Up Holdings (K) Limited (Tax Appeal E107 of 2020)
[2023] KEHC 21541 (KLR) (Commercial and Tax) (22 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E107 OF 2020
DAS MAJANJA, J
AUGUST 22, 2023**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

STEP UP HOLDINGS (K) LIMITED RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 4th September 2020 in Tax Appeal No.42 of 2018)*

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal by the Appellant (“the Commissioner”) against the decision of Tax Appeals Tribunal (“the Tribunal”) dated 04.09.2020. The appeal is premised on the following 5 grounds as contained in the memorandum of appeal dated 23.10.2020:
 1. That the Tribunal erred in fact and in law by applying the provisions of the [Tax Procedures Act](#) to circumstances which existed prior to its commencement, whose effect was to create new obligations and/or attach new disabilities in regard to events already past which is contrary to the law.
 2. That the Tribunal misdirected itself by finding that for all intents and purposes, the sixty-day period with which the Appellant was supposed to render an Objection Decision, started to run as at the date of filing the objection notice of 4th September 2012.



3. That the Tribunal misapprehended the law in finding that as at 4th October 2012 when leave to commence Judicial Review proceedings was granted, twenty-seven (27) days of the sixty-day statutory period had already lapsed.
 4. That the Tribunal erred in fact by failing to finding that a new law cannot change the legal character of past transactions carried on lawfully upon faith of the then existing law.
 5. That the Tribunal erred in fact and in law by finding that the provisions of Section 51(11) of the [Tax Procedures Act](#) fittingly apply to the appeal before it.
2. Based on the grounds outlined, the Commissioner urges the court to allow the appeal, set aside and dismiss the Tribunal Judgment. The appeal has been canvassed by way of written submissions which are on record. The parties' arguments are apparent from the following procedural history background.
3. In 2002, the Respondent established an educational entity called Stepup Training Institute. In September 2008, it concluded a 10-year Memorandum of Understanding with Mt Kenya University ("the University") for the establishment of Mount Kenya University Nakuru Campus where the Respondent would take up the running and operations of the institution under the name Mount Kenya University Nakuru Campus. The Respondent was to be responsible for inter alia, filing and remitting tax returns to the Commissioner. On 03.10.2011, the Respondent informed the Commissioner that its collaboration with the University had come to an end and that it would no longer be filing and remitting tax returns for the University.
4. The Commissioner proceeded to conduct various compliance audits and checks whereupon it issued a tax demand of Kshs. 25,690,397.00 on 10.08.2012 comprising of Corporation Tax, Withholding Tax, Pay As You Earn(PAYE) and Stamp Duty. By a letter dated 04.09.2012, the Respondent objected to the tax demand. It also filed a suit; Nakuru HC Judicial Review Case No. 59 of 2012 against the Commissioner. The court stayed the decision of the Commissioner pending hearing and determination of the case and upon determination of the matter the court issued a judgment dated 31.01.2018.
5. On 28.03.2018, the Commissioner made the objection decision where it rejected the Respondent's objection and confirmed the earlier assessment and demand ("the Objection Decision"). Aggrieved by this decision, the Respondent appealed to the Tribunal on 26.04.2018. The appeal was resolved by the judgment dated 04.09.2020.
6. In its judgment, the Tribunal determined whether the Objection Decision contravened sections 51 (8), 51(11) and 113(1) of the [Tax Procedures Act](#), 2015 ("the TPA"). The Tribunal observed that the Objection Decision was made before the commencement date of the TPA hence it addressed the issue whether the appeal fit within the framework of the TPA. In light of the saving and transitional clause at section 113(1) of the TPA, the Tribunal found that as at the commencement date of the TPA being 19.01.2016, no appeal had been preferred against the assessment of the Commissioner and that accordingly, the appeal as at 19.01.2016 was against the Government by the provisions of the [Tax Appeals Tribunal Act](#), 2013.
7. Having made this determination, the Tribunal considered whether the Objection Decision contravened section 51 (8) and (11) of the [TPA](#). It stated that section 51 (11) of the TPA mandates the Commissioner to render an objection decision within sixty days from the date an objection notice is lodged by a tax payer. That the Respondent lodged an objection with the Commissioner on 04.09.2012 and for all intents and purposes, time started to run from the date of filing the objection



notice that is on 04.09.2012. However, the Tribunal held that the Respondent was granted leave to file the Judicial Review application on 04.10.2012, by which time 27 days of the sixty-day statutory time limit had already lapsed. That this leave and the subsequent proceedings of the substantive suit stayed any action on the part of the Commissioner and the implication of this was that the time for rendering an objection decision was equally frozen until the determination of the judicial review application. The judgment delivered on 31.01.2018 had the import of vacating the stay orders against the Commissioner and accordingly, time began to run again and the Commissioner had 33 days from the date of the delivery of the Judgment to render the Objection Decision. That accordingly, the Commissioner should have rendered an objection decision before on or by 05.03.2018 but the Commissioner rendered its decision on 28.03.2018. The Tribunal held that section 51 (11) of the [TPA](#) applied to the appeal before it and in law, the Respondent's objection was deemed allowed hence making it moot for the Tribunal to address any substantive tax disputes relating to the Commissioner's assessment.

8. As a result, the Tribunal allowed the appeal with the resultant effect that the Respondent's objection dated 04.09.2012 was allowed by operation of law and the Objection Decision was set aside. As stated, it is this decision that has led to the filing of the instant appeal to which I now turn.

Analysis and Determination

9. Before I deal with the substance of the appeal, I propose to deal with the preliminary issue of the incompleteness of the record raised by the Respondent. The Respondent objected to the appeal on the ground that the record of appeal filed did not contain all the documents forming part of the original record before the Tribunal including the typed proceedings or evidence that the Commissioner had applied for them, the judgment, order or the decree appealed from before the court contrary to the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015.
10. Guided by Article 159(2)(d) of the [Constitution](#) which enjoins the court to do substantive justice without regard to technicalities, I allowed the Appellant to file a supplementary affidavit containing all the required documents since it was not disputed the matter was heard before the Tribunal and a judgment rendered. The Appellant filed its Supplementary Record containing all the required documents.
11. In this appeal, the court is called upon to determine the propriety of the Tribunal's decision in respect of whether the Objection Decision contravened sections 51 (8), 51 (11) and 113 (1) of the TPA. This is a matter of law within the appellate jurisdiction of this court as set out in 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".
12. For ease of reference the applicable provisions necessary for resolution of this matter provide as follows:
 - 51 (8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision
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 - (11) The Commissioner shall make the objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.
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113. Transitional and saving

- (1) Subject to this section, this Act shall apply to any act or omission that occurred or is occurring for which no prosecution has been commenced, or any assessment made against which no appeal has been made, before the commencement date.

13. It is common ground that this dispute commenced and the Respondent's objection was lodged before the enactment of the TPA and that the Objection Decision was made after the Act's enactment. It is also common ground that prior to the Commissioner issuing the Objection Decision, the court in Nakuru High Court Judicial Review No. 59 of 2012 issued an order of stay barring any further action by the Commissioner as from 04.10.2012 which remained in force until 31.01.2018 when judgment was delivered.
14. The question before the Tribunal and this court is whether the TPA could be applied retrospectively and whether time for rendering the Objection Decision began running from the date of the Commissioner receiving the objection or from the date of the judgment in Nakuru High Court Judicial Review No. 59 of 2012.
15. To answer the first question, there is no general rule that legislation cannot apply retrospectively. In *S.K. Macharia and Another v Kenya Commercial Bank Ltd* [2012] eKLR, the Supreme Court set out the general principle as follows,
- “[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature”.
16. A reading of section 113(1) of the TPA shows that it has retrospective application on matters in which no prosecution had been commenced, and no appeals had been made in respect of assessments already raised by the Commissioner. This position has been affirmed by the court in *Bipichandra Narandas Raikod & Bhupendra Narendas Raikod t/a Pennyways v Kenya Revenue Authority; I & M Holding Limited (Interested Party)* [2020] eKLR and *Subru Motors Limited v Commissioner of Domestic Taxes* [2021] KEHC 195 (KLR) where it was held that section 113(1) of the TPA was of retrospective effect and I therefore reject the Commissioner's assertion that the Tribunal misinterpreted the law by stating that the TPA applied retrospectively in instances where there was no prosecution commenced or appeals lodged in respect of assessments.
17. It is not in dispute that the Respondent had not appealed against the Commissioner's assessment of 10.08.2012 hence the provisions of the TPA applied to the parties in this case and as such, the Commissioner was bound to issue an objection decision within sixty days from the date of receipt of the objection. This then brings me to answering the second part of the question of when did time begin running?
18. The Commissioner acknowledged receipt of the objection on 04.09.2012. By this time, the TPA was yet to be enacted and under the law existing at the time, there was no time frame within which the Commissioner could render an Objection Decision. It was thus inconceivable and unreasonable to expect the Commissioner to render a decision within sixty days from 04.09.2012 when the law at the time did not demand of it and based on a law that was non-existent at the time. In *Commissioner of Domestic Taxes v Fast Generation Limited* [2022] KEHC 15351, the court considered when time begins to run in light of the fact that the objection was received before the enactment and



commencement of the TPA while the objection decision was made after its commencement. This is what the court had to say:

17. By the time the TPA was coming into effect, an assessment against the Respondent had been made and no appeal had been proffered meaning that the TPA was now applicable to the parties' case from the commencement date. Under section 51(11) of the TPA, the Commissioner was now bound to render an objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.
18. The Commissioner submits that it rendered the Objection Decision within sixty days from the commencement date of the TPA and that this ought to be construed to be in compliance with section 51(11) of the TPA and as per section 113 above. It further submits that it is a misconception of the law to allege that the time for making the Objection Decision had already expired even before the applicability of the TPA which birthed the timelines for objection decisions to be made within sixty days. I agree.
19. There is no legal basis to subject the Commissioner to the timelines of the TPA when it was not in force and when the Respondent presented the objection to it under the ITA which had no timelines on when an objection decision could be made. The only logical, reasonable position to take is for the 60-day period to count or run from the commencement date of the TPA. The commencement date of the TPA is the date when the legal obligation was imposed on the Commissioner to deliver an objection decision within the time prescribed. In this case there was no contest that the Objection Decision was made within sixty days from the commencement date of the TPA. I therefore find and hold that the Objection Decision was lawful was made within time prescribed.
19. Since the commencement date of the TPA was 19.01.2016, the Commissioner was bound from this date to render an objection decision within 60 days therefrom since that is the date the obligation arose. In this case however, the court had issued an order staying any further action in the matter which order was discharged on 31.01.2018. Thus the time period for rendering the objection decision began to run as from this date hence the Commissioner had to issue the decision by 01.04.2018 latest.
20. I therefore accept the Commissioner's contention that it was not reasonable for the Tribunal to subject it to the timelines provided by the TPA prior to its enactment and commencement when there was no statutory obligation to render the decision within a limited time. Once it is accepted that the TPA would apply retrospectively, the most logical position to take in the circumstances was for the time to begin running as from the commencement date of the TPA which the law deems that the Commissioner would have known its legal obligation rather than from the date when the objection was received.
21. I therefore find and hold that the Tribunal erred when it computed time from the date of the Commissioner receiving the objection rather than from the commencement date of the TPA and the decision of the court in Nakuru High Court Judicial Review No. 59 of 2012. The Commissioner, having rendered the Objection Decision on 28.03.2018 means that the same was timely and in accordance with section 51(11) of the TPA.



Conclusion and Disposition

22. As I have allowed the appeal, the next question is whether the court should consider the merits of the Respondent's objection given the Tribunal failed to do so having allowed the appeal before it.
23. Before the Tribunal, the Respondent raised four grounds of appeal in its Memorandum of Appeal dated 8th April 2018 as follows:
 1. That the Respondent erred in law in making the impugned decision without including a statement of findings on the material facts and the reasons for the decision as required by the mandatory requirements of Sections 49 and 51(10) of the *Tax Procedures Act*, Act No. 29 of 2015.
 2. That the Respondent erred in law in making the impugned objection decision the Appellant's objections having been allowed by operation of law by dint of the mandatory provisions of Section 51(8) and (11) as read with Section 113(1) of the *Tax Procedures Act*, Act No. 29 of 2015 hence the decision is illegal, null and void.
 3. That the Respondent erred in law and in fact in making the impugned objection decisions dated 28th March 2018 to uphold illegal taxation of the Appellant.
 4. That the Respondent erred in law and in fact in making the impugned decision dated 28th March 2018 against the weight of evidence presented to it by the Appellant.
24. The Tribunal resolved grounds 2 and 3 of the memorandum appeal. Grounds 1 and 4 which appear to deal with the substance of the Objection Decision were not considered. I therefore reject the Commissioner's contention that there is nothing to be referred to the Tribunal for resolution.
25. For the reasons set out I now make the following dispositive orders:
 - a. The appeal is allowed on terms that the judgment of the Tribunal dated 04.09.2020 is set aside and the Appellant's Objection decision dated 28.03.2018 reinstated.
 - b. The Tribunal is directed to rehear and determine the Grounds 1 and 4 of the Respondent's Memorandum of Appeal dated 08.04.2018.
 - c. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Chabala, Advocate instructed by Kenya Revenue Authority for the Appellant.

Mr Ratemo instructed by S. M. Omae and Company Advocates for the Respondent.

