



Kayser Investments Limited v Commissioner of Domestic Taxes (Income Tax Appeal E112 of 2021) [2023] KEHC 21649 (KLR) (Commercial and Tax) (18 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E112 OF 2021**

A MABEYA, J

AUGUST 18, 2023

BETWEEN

KAYSER INVESTMENTS LIMITED APPELLANT

AND

THE COMMISSONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal from the Judgment of the Tax Appeals Tribunals delivered at Nairobi on 4th June 2021 in Tax Appeal No. 194 of 2020)

JUDGMENT

1. The appellant is a limited liability company and is in the business of commercial real estate investment.
2. The respondent is a principal officer appointed under the *Kenya Revenue Authority Act*, Cap 469 and is charged with the mandate of assessment, collection and accounting for all revenues and taxes on behalf of the Government of Kenya.
3. The respondent conducted a tax audit on the appellant for the tax period 2016 – 2018 and issued the appellant with a notice of amended assessment dated 14/10/2019. In that assessment, the respondent demanded Corporation Tax of Kshs. 17,683,873/- and Withholding Tax (WHT) of Kshs. 3,118,752/- from the appellant. He disallowed legal fees of Kshs. 8,119,850.49 and landscaping expenses of Kshs. 3,045,000/-.
4. The appellant lodged an objection dated 11/11/2019 outlining the grounds of objection and also provided information and documentary evidence in support thereof. In the objection, the appellant only conceded WHT of Kshs. 1,862,673/-.



5. The respondent issued an objection decision dated 6/4/2020 and amended the tax demand to Kshs. 17,177,760/- for Corporation Tax and Kshs. 3,118,752/- for WTH on non-resident consultant fees. The total assessment therefore amounted to Kshs. 20,296,512/-.
6. The appellant appealed to the Tax Appeals Tribunal (“the Tribunal”) against that decision on 5/5/2020. The Tribunal delivered its judgment on 4/6/2021 in favor of the respondent.
7. Being dissatisfied with that decision, the appellant filed the instant appeal vide a Memorandum of Appeal dated 29/6/2021 setting out 7 grounds as follows: -
 - a. That the Tribunal erred in holding that the respondent’s objection decision made after the lapse of 146 days of the appellant’s objection was within the statutory period of 60 days under Section 51(11) of the Tax Procedures Act (TAT).
 - b. That the Tribunal erred in finding that the appellant’s objection dated 11/11/2019 erroneously referred to as 12/11/2019 was invalid by virtue of section 51(3) of the TAT.
 - c. That the Tribunal erred in failing to hold that the appellant’s rental expenses for the scaffolds and props was a deductible expense under section 15(2) of the Income Tax Act (ITA) as expenses for structural alterations to the premises necessary to maintain the existing rent.
 - d. That the Tribunal erred in holding that the appellant’s expenditure on scaffolds to reinforce and maintain the integrity of the building was a transaction effected for the avoidance or reduction of liability to tax.
 - e. That the Tribunal erred by disregarding and failing to address the issue of withholding tax in its analysis and findings.
 - f. That the unsigned judgment was communicated via email and not read in open court thus invalid and that it was delivered without affording the appellant an opportunity to highlight its submissions which was a violation and breach of its right to due process and fair hearing.
8. The respondent filed his statement of facts dated 22/7/2021 in opposition to the appeal. He contended that after the appellant had lodged its objection, he notified it vide email dated 18/12/2019 that the objection was invalid and needed to be validated in terms of section 51(3) (c) of the TPA as amended by Finance Act 2019 effective date 7/11/2019.
9. That the objection was validly lodged on 25/2/2020 and the objection decision was issued within 42 days which was within section 51(11) of the TPA. He also contended that the appellant’s objection was not valid as per section 51(3) of the TPA.
10. As regards deduction expenses for structural alterations necessary to maintain rental income under section 15(2) of ITA, the respondent contended that the scaffolds were not structural alterations but a necessity to preserve the building from collapsing and thus a permanent feature of the building. That they were not hired to maintain the existing rent and the structure of the building did not change as the building could not support itself without the scaffolds. That they were thus a permanent feature of the building and thus capital in nature.
11. That even though the Nairobi County Government instructed the appellant to reinforce the building, the expenditure was of capital in nature and not revenue expenditure.
12. That the appellant was given a right administrative action that was reasonable and procedurally fair. That the respondent issued a decision based on the available documents produced by the appellant



- as the appellant did not provide all the documents requested and was unable to demonstrate that it incurred an expense of Kshs. 57,319,310/-. He prayed that the appeal be dismissed.
13. The appeal was canvassed by way of written submissions which were highlighted orally in Court on 14/3/2023. The same have been considered.
 14. From the grounds of appeal and the submissions on record, the grounds can be summarized as: -
 - a. Whether the respondent's objection decision of 6/4/2020 was within the statutory period of 60 days provided under Section 51(11) of the Tax Procedure Act 2015 (TPA).
 - b. Whether the appellant's objection of 11/11/2019 was invalid by virtue of Section 51(3) of the TPA.
 - c. Whether the tribunal erred in failing to address the issue of withholding tax.
 - d. Whether the unsigned judgment dated 4/6/2021 communicated via email without being read in open court was valid and whether the judgment which was delivered before close of the period for highlighting submissions was valid.
 - e. Whether the respondent's decision confirming the assessment of Kshs. 20,296,512/- ought to have been upheld.
 15. The first and second ground are related and will be determined together. The appellant submitted that under section 32 of the Finance Act 2019, the respondent was to make an objection decision within 60 days from the date of receipt of the notice of objection failure to which the objection shall be deemed to be allowed.
 16. That it lodged its objection on 11/11/2019 to which the respondent rendered an objection decision on 6/6/2020 which was 146 days after the objection was lodged.
 17. On his part, the respondent submitted that after the appellant lodged its objection, he notified it vide an email dated 18/12/2019 that the objection was invalid. That it needed to be validated as per section 51(3) (c) of the TPA as amended by the Finance Act 2019 effective date 7/11/2019. That the objection was validly lodged on 25/2/2020 and the objection decision was issued within 42 days which was within section 51(11) of the TPA.
 18. The Tribunal found that the appellant's objection was invalid having not filed the specified records as provided for under section 51(3) (c) of the TPA which had been amended by the Finance Act 2019 and became operational on 7/9/2019.
 19. I have considered the record. It is clear that the objection was made on 11/11/2019. The respondent notified the appellant vide an email dated 18/12/2019 that it had not made a valid objection and that the same needed to be validated in terms of section 51(3) (c) by providing specific records.
 20. The appellant did not respond to that email. It was again prompted on 8/1/2020 to avail the records within 14days failure to which the assessment would be confirmed. The appellant responded on 17/1/2020 and provided part of the requested documents and asked for 14 more days. The appellant lodged those documents on 25/2/2020 and that is when the respondent validly considered the objection as lodged and proceeded to issue an objection decision on 6/4/2020.



21. Section 51 of the TPA which provides that: -

- “ 1. A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.
- (2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.
- (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.
- (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.
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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.”

22. From the foregoing, it is clear that for there to be a valid objection, ‘all the relevant documents relating to the objection’ should be submitted. Once a compliant objection is made, the Commissioner has 60 days to issue an objection decision. If the Commissioner thinks that an objection is not compliant, he is supposed by law to inform the tax payer within 14 days of such fact. That is the requirement of section 51(4) of the TPA. That requirement is in mandatory terms.

23. It is trite that tax laws must be strictly interpreted. The effect of section 51(4) of the TPA is that, once the Commissioner receives an objection by a tax payer, he must consider it and determine if it is valid or not. If he is satisfied that it is not valid, he must communicate that fact to the tax payer within 14 days of receipt of the objection. If he does not, then he will be deemed to have considered the same to be valid and is bound to make an objection decision within the timelines under section 51(11) of the TPA.

24. In the present case, the objection was made on 11/11/2019. The respondent had until the 25/11/2019 to advise the appellant whether the objection was valid or not. He did not do so and therefore the time for objection decision continued to run. He only woke up on 18/12/2019 to advise the appellant that the objection was not valid.



25. To this Court's mind, it was not open to the respondent to extend the time within which he was to advise the appellant of the validity or otherwise of its objection. Having failed to determine that fact and communicate to the appellant of that fact within the timelines provided for in the law, section 51(4) of the Act, he was bound to consider the objection and issue his objection decision by 11/1/2020.
26. It should be noted that the appellant did not respond to the respondent's communication of 18/12/2019 as it was not bound to. The respondent still realised its mistake and prompted the appellant again on 8/1/2020, two days before the expiry of the 60 day period.
27. In this Court's view, the respondent having failed to notify the appellant of the alleged invalidity of the objection within 14 days, he is deemed to have considered it to be valid and was bound to render his objection decision within 60days of 11/11/2019. It does not matter that the appellant heeded the illegal call of having to submit the documents after the 11/1/2019. Two wrongs do not make a right.
28. Accordingly, the Tribunal erred by failing to consider that the respondent did not communicate to the appellant of the alleged invalidity of its objection within the timelines set by the law. The strict timelines set by the tax laws are to be complied with by both the tax payer and the tax authority. The Commissioner cannot be allowed to arrogate himself the discretion to extend time within which he has to act.
29. Accordingly, the objection decision made on 6/4/2020 was a nullity as the appellant's objection was deemed to have been allowed by 11/1/2020.
30. That being the case, the rest of the grounds do not fall for consideration.
31. The upshot is that the appeal is meritorious and is allowed as prayed.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

A. MABEYA, FCIArb

JUDGE

