



**Commissioner of Investigations & Enforcement v Vyas t/a Rocon Enterprises (Income Tax Appeal E144 of 2021) [2022] KEHC 16027 (KLR) (Commercial and Tax) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16027 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**INCOME TAX APPEAL E144 OF 2021**  
**A MABEYA, J**  
**NOVEMBER 25, 2022**

**BETWEEN**

**COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ..... APPELLANT**

**AND**

**MAULIK VYAS T/A ROCON ENTERPRISES ..... RESPONDENT**

*(Appeal from Judgment & Orders delivered by the Tax Appeals Tribunal on 4/6/2021 in Tax Appeal No. 22/2020)*

**JUDGMENT**

1. On March 7, 2019, the appellant raised a tax demand upon the respondent for the financial years 2014 and 2018. The respondent did not respond to the tax demand and the appellant issued a departure prohibition order against him on August 7, 2019.
2. *Vide* an undated letter received by the appellant on November 18, 2019, the respondent applied to lodge his objection out of time. The appellant issued his decision on the same on January 13, 2021 declining the application on the ground that it did not fulfil the requirements of section 57 of the [Tax Procedures Act](#) (“the TPA”).
3. On January 21, 2020, the respondent appealed against the appellant’s decision to the Tax Appeals Tribunal (“the tribunal”). By its judgment dated June 4, 2021, the tribunal ruled in favour of the respondent.
4. Being dissatisfied with the said judgment, the appellant appealed to this court on the following grounds: -
  - a. That the honourable tribunal erred in law and fact by ignoring the import of section 51 (7) of the [Tax Procedures Act](#).



- b. That the honourable tribunal erred in law and fact by failing to appreciate that the Commissioner's decision under section 51 (7) of the [Tax Procedures Act](#) can only be administratively challenged under the judicial review process.
  - c. That the honourable tribunal erred in law and in fact by failing to appreciate that the Commissioner had not issued an objection decision under section 51 (8) of the [Tax Procedures Act](#) and as such there was no appealable decision within the text of section 52 of the [Tax Procedures Act](#).
  - d. That the tribunal erred in law and fact in failing to address the preliminary objection on jurisdiction and therefore erroneously assumed jurisdiction of the dispute.
  - e. That the tribunal erred in law and fact in failing to appreciate the provisions of section 56 of the [Tax Procedures Act](#) and section 30 of the [Tax Appeals Tribunal Act](#) on the issue of burden of proof and transferred contra-statute that burden to the Commissioner.
  - f. That the tribunal erred in law and fact, in making a decision in clear contravention of section 29(2) of the [Tax Appeals Tribunal Act](#).
  - g. That the tribunal erred in ignoring the submissions of the Commissioner in toto and not making any reference to any of the arguments raised therein infringing on the Commissioner's right to a fair hearing under article 50 (1) of the [Constitution](#).
  - h. That the tribunal misapplied the law and facts and therefore arrived at the wrong decision."
5. On the foregoing, the appellant prayed that the appeal be allowed with costs and the impugned judgment of the tribunal set aside and the decision of the Commissioner to invalidate the objection be upheld.
  6. The respondent has not opposed this appeal despite proof of service through the affidavits of service sworn on September 24, 2021 and October 19, 2021 by one Charles Kamonji, an authorised process server.
  7. The court has analysed the entire record. This being a first appeal, this court is enjoined to review and evaluate the evidence before the tribunal and come to its own independent conclusions and findings. See *Selle & another vs. Associated Motor Boat Co Ltd 7 others* (1968) EA 123.
  8. The 8 grounds of appeal can be condensed into the following: -
    - a. That the tribunal erred in law and fact in failing to address the preliminary objection on jurisdiction and therefore erroneously assumed jurisdiction on the dispute.
    - b. That the tribunal erred in law and fact in failing to appreciate the provisions of section 56 of the [Tax Procedures Act](#) and section 30 of the [Tax Appeals Tribunal Act](#) on the issue of burden of proof and transferred contra-statute that burden to the Commissioner.
    - c. That the tribunal erred in ignoring the submissions of the Commissioner and not making any reference to any of the arguments raised therein infringing on the Commissioner's right to a fair hearing under article 50 (1) of the [Constitution](#).



9. The appellant submitted that the jurisdiction of the tribunal had been improperly invoked as he had not issued an objection decision within the context of section 52 of the *Tax Procedures Act*. That the impugned decision was made under section 51(7) of the *Tax Procedures Act* and therefore could not be challenged at the tribunal. That the tribunal failed to consider the appellant's objection challenging its jurisdiction to determine the appeal before it.
10. As already stated, the respondent did not participate in these proceedings.
11. In judgment of June 4, 2021, the tribunal did not consider the objection that challenged its jurisdiction to determine the appeal before it. The judgment was pegged on the determination of only one issue: whether the respondent participated in the missing trader fraud on the value added tax system.
12. *Vide* a letter dated January 13, 2020, the appellant notified the respondent that its late objection application was made 226 days from the expiry of the 30 days where a notice of objection to the appellant's decision ought to have been filed. That this therefore amounted to an unreasonable delay which negated the provisions of section 51(7) of the *TPA*.
13. Section 51(7) of the *TPA* provides that a taxpayer who wishes to dispute a tax decision shall lodge an objection against that decision within 30 days from the date of that decision.
14. Section 51(6) states that a taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection. Subsection 7 thereto provides: -  

“The Commissioner shall consider and may allow an application under subsection (6) if—

  - (a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and
  - (b) the taxpayer did not unreasonably delay in lodging the notice of objection.”
15. The letter of January 13, 2020 declined the application for a late objection by the respondent under section 51(7) of the *TPA*. He did not make or communicate his decision in relation to any assessment under section 52 of the Act.
16. The same having not been an objection decision, it could only be challenged by way of judicial review and not appeal to the tribunal. Definitely the tribunal had no jurisdiction to entertain the appeal before it.
17. On this ground alone, I find appeal to be meritorious and allow the same. I hereby set aside the judgment of the tribunal dated June 4, 2021 and uphold the appellant's decision dated January 13, 2020. Costs to the appellant.
18. It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**A. MABEYA, FCI Arb**

**JUDGE**

