



REPUBLIC OF KENYA



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. 3 OF 2020

BETWEEN

TUMAINI DISTRIBUTORS COMPANY (K) LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal made on 17TH December 2019 in Nairobi Tax Appeal No. 141 of 2017)

JUDGMENT

Background

1. The appellant (“the Company”) appeals against a decision of the Tax Appeals Tribunal (“the Tribunal”) dismissing its appeal and upholding assessments by the Commissioner of Domestic Taxes (“the Commissioner”) in respect of the following assessments; KRA201700328847, KRA201700328822, KRA201700328806, KRA201700328775, KRA201700328746, KRA201700328720 and KRA201700328672 in which it assessed tax at Kshs. 31,217,489.00.
2. The primary facts leading to this appeal are set out in the record of appeal incorporating the facts before the Tribunal, the respondent’s statement of facts and the judgment of the Tribunal.
3. In September 2016, the Commissioner identified the Company for review and compliance. Following review of documents provided by the Company, the Commissioner claimed that there was under declaration of sales for VAT purposes. It also disallowed certain expenses claimed in respect of the income tax. The Company appointed Davies and Associates Auditors as its Tax Agent to act on its behalf.
4. The Commissioner concluded that the documents furnished by the Company were inadequate to address the issues it had raised and further audience with the Company did not yield any results. It therefore decided to issue additional assessments for Kshs. 31,217,489.00 being Kshs. 8,881,387.00 for VAT and Kshs. 12,682,222.00 for income tax.
5. Thereafter the Commissioner commenced enforcement proceedings by issuing agency notices prompting the Company to lodge objections to the assessments. It also made an application dated 22nd June 2017 to amend its self-assessment. A meeting held between the Company’s Auditor and the Commissioner where the Company was requested to present certain documents which the Commissioner considered but which it found insufficient.
6. Thereafter and by a letter dated 18th July 2017, the auditor on behalf of the Company made an, “*application for amendment for self-assessment for the period 2014 and 2015 (VAT and Income Tax)*” The Company thereafter filed an appeal before the Tribunal on the ground that its application amendment was not resolved despite the fact that it had all the supporting documents including invoices, ledgers and expense records.

Proceedings before the Tribunal

7. The Company moved the Tribunal in respect of the assessments made by the Commissioner. The grounds set out in the memorandum of appeal before the Tribunal were that the additional assessments of the tax were computer generated without the involvement of the taxpayer and that the Commissioner did not verify the source documents including purchases, expense records, creditors and loans taken by the Company over that period or obtain input from the Company in arriving at the assessment. The Company further stated that immediately it realised that the source documents had been left out in computing taxes for the years 2014 and 2015, it made an application dated 19th July 2017 to review the taxes within the prescribed five-year period but the application has not received any attention from the Commissioner.

8. The Company also complained that it made several objections to the assessment issued by the Commissioner on the following dates 19th June 2017, 20th June 2017, 27th April 2017 and 16th March 2017 being KRA 201702904514, KRA 201701845571, KRA201701845752, KRA 201701845892, KRA201701846016, KRA 201701846140 and KRA 201701846374 but the same were not addressed and were rejected without any reasons.

9. The Company further contended that the audit and compliance procedure to arrive at additional tax was not adhered to and that the Commissioner did its own assessment and imposed it on a taxpayer without having formal meetings with the taxpayer. The Company further stated that it forwarded its documents for the year 2014 and 2015 to the Commissioner by the letter dated 19th June 2017 which were acknowledged but not considered or taken into account.

10. In its memorandum of appeal before the Tribunal, the Company sought the following reliefs;

a) Sets aside assessment orders number KRA201700328847, KRA201700328822, KRA201700329906, KRA201700328775, KRA201700328672, and KRA201700328720 till determination is made on the matters addressed in the appeal.

b) Sets aside enforcement orders by the Kenya Revenue Authority enforcement department Nairobi by Asha K. Salim on Equity Bank Olkalou Branch and Kenya Commercial Bank Olkalau.

c) The Tribunal to issue orders to the KRA Nakuru office to allow the taxpayer to review and amend his tax as per 2015 Tax Regulations section 31 (4) (b) (i) for the year 2015 and 2014 based on new evidence adduced.

11. The Commissioner denied the Company's allegations. It stated that the Company through its auditor failed to account fully for VAT on supplies made to it. That further examination of accounts filed showed that VAT was undeclared. It added that the Company failed to prove evidence on account of VAT and expenses claimed in the income statement. It reiterated its assessment and maintained that the Company had not proved any explanation of the variances in its accounts or furnished bank statements or sale invoices to support its case. The Commissioner urged the Tribunal to uphold the assessments and dismiss the appeal.

Tribunal Judgment

12. The Tribunal framed two issues for determination. The first was whether the Commissioner followed the correct procedure in assessing the Company's tax liability and the second, whether the Company made an under declaration for VAT purposes on rental income.

13. On the first issue, the Tribunal found that the Company had failed to provide the relevant documents despite several requests by the Commissioner. It also held the parties had meetings hence the claim that there were no meetings was baseless. The Tribunal underscored the importance of self-assessment and held that it was the duty of the taxpayer to make full disclosure in good faith. This duty, it held, was buttressed by **section 33** of the **Value Added Tax Act, 2013** which requires every person to provide all records to an authorised officer for inspection. It further held that the Company comply with its duty to provide full documentation.

14. The Tribunal held that since the Company did not provide all the documents, the Commissioner was correct in reaching the assessment based on the material available. It further held that the Company's conduct of providing a different set of books amounted to an offence under **section 96** of the **Tax Procedures Act, 2015** ("the **TPA**"). The Tribunal reached the conclusion that the Company had failed to discharge its burden under **section 56(1)** of the **TPA** to show that the tax decision was wrong.

The Appellant's Case

15. The appellant's appeal is grounded on the memorandum of appeal dated 17th January 2020. The appeal was supported by written submissions which were highlighted by Mr Thiong'o.

16. The thrust of the appeal is that the Tribunal failed to address the Company's prayer to amend its self-assessment consequently offending **section 31** of the **TPA**. It contended that Tribunal erred by upholding the amended assessment that had been declared incorrect and which the Company had a right to amend under the **TPA**. Further, that the Tribunal violated the Company's right to fair administrative action by failing to analyse the evidence and consequently came to the incorrect conclusion that the Company's corrected accounts were fraudulent and contrary to **section 31** of the **TPA**.

17. Counsel for the appellant, focused his submissions on the fact that the Company applied to amend its self-assessment by the letter dated 18th July 2017. The Company contended that the Commissioner did not respond to its request for amendment or give any reasons to deny the amendment. Counsel pointed out that the Tribunal failed to deal with this issue or appreciate the impact of the Commissioner declining to allow the amendment of the self-assessment.

18. The Company relied on the provisions on **section 31(2)** of the **TPA** which provides that a taxpayer who has made a self-assessment may apply to the Commissioner within a period of 5 years from the date of the assessment to make an amendment to the self-assessment. Counsel submitted that this provision is covered by **section 4** of the **Fair Administrative Action Act, 2015** which requires that the decision be

communicated to the applicant and the reasons for the decisions to be given. He added that the under the **TPA**, the Commissioner was required to respond within 30 days of the application.

19. Counsel for the Company submitted that the Tribunal failed to give reasons for failing to address the appellant's plea regarding the amendment to the self-assessment thereby denying the right to a fair hearing which is an essential element of the right to natural justice. Counsel cited the case of *De Souza v Tanga Town Council [1961] EA 77* where the court held that the rules of natural justice apply to tribunals.

20. As regards the application for amendment of the self-assessment, the Company position was that there were a number of records missing when filing the self-assessment and in providing those documents, the Company complied with **section 31** of the **TPA**. Counsel submitted that the Commissioner ought to have considered all the documents in coming up with the assessments in order to come up with true tax liability. Counsel submitted that the Tribunal failed to evaluate the Company's request and come to the conclusion that the Commissioner failed to act with fairness.

Respondent's Submissions

21. The respondent relied on the statement of facts, written submissions and oral submissions by its counsel, Mr Chabala. Counsel outlined the history of the returns filed by the Company. Its case was that corporation tax in the year 2014 was based on the manual returns submitted by the Company before the introduction of the iTax system. The turnover was based on the original income statement submitted by the Company. A self-assessment return for that period was submitted on 26th March 2015. It was pointed out that no request for amendment was made on the 2014 return thus the original return was taken as the correct financial position. In 2015, the Company declared a NIL self-assessment return on 12th March 2016. The Company applied for amendment of the 2015 return on 27th August 2016 to reflect a profit of Kshs. 26,006 after a gross income of Kshs. 52,127,044. The amendment was approved by the iTax system.

22. As regards the VAT, the Commissioner contended that since the Company dealt in vatable commodities therefore the turnover/income earned in a financial year would translate to sale declared under VAT returns per month for the same accounting year. Based on the declared income and VAT for the year 2014 and 2015, the Commissioner charged VAT on the variance as the basis for the additional assessments. The Commissioner explained that Company was unable to explain the reasons for the variance and source of discrepancies.

23. As regards the application for amendment of the self-assessment for the period 2014 -2015 by the letter dated 18th July 2017, the Commissioner acknowledged receipt of the application on 19th July 2017 whereupon it sought to establish the source of discrepancies through a meeting with the Company auditor/tax agent but the Company failed to supply bank statements for the year 2014 and 2015, sale summaries which would have verified the income hence it was unable to review the assessment.

24. Mr Chabala submitted that the Commissioner acted in accordance with **section 31** of the **TPA**. Counsel stated that for the Company to be entitled to apply for an amendment of its self-assessment for the period 2014 and 2015 as sought in the letter dated 18th July 2017, it must meet three conditions. First, the amendment must be to the original assessment. Second, it must provide the necessary information to the Commissioner otherwise the Commissioner is to apply the best judgment and third, the application ought to have been made within five years from the date which the taxpayer submitted the original self-assessment. Based on the foregoing, the Commissioner submitted did not comply with the first and second conditions to warrant consideration of the application.

25. Counsel for the Commissioner submitted that in the letter dated 18th July 2017, the Company was not seeking to amend the original self-assessment as provided under **section 31** of **TPA** since the original return was filed on 12th March 2016. Subsequently, the Company applied for amendment of the 2015 return and that same was automatically approved in the iTax system. Thereafter, the Commissioner issued additional assessments under **section 31** of the **TPA** affecting the tax liability of the Company based on the records submitted by it.

26. Thereafter the Commissioner explained that having noted the discrepancies in the self-assessment returns and the VAT monthly returns and the Company failing to provide explanations for the inconsistencies, it invoked **section 24** of the **TPA** which empowers the Commissioner to assess a tax payers tax liability using any information available to the Commissioner. The result was the additional assessment dated 16th January 2017 from which the Company failed to raise an objection within 30 days as provided in **section 51** of the **TPA**. The Commissioner received the late objections which were considered and rejected and the Company duly notified leaving the Company to seek relief before the Tribunal. In summary the Commissioner submitted that the application of 19th July 2017 for amendment of self-assessment return of 2014 and 2015 for Income Tax and VAT was not applicable to the circumstances of this case.

27. The Commissioner supported the decision of the Tribunal and urged that it came to the correct conclusion in so far as the Company failed to discharge its burden of showing that the tax decision was wrong.

Determination

28. In considering this appeal, this court is guided by **section 56** of the **TPA** which provides as follows:

56.(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

(3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds. [Emphasis mine]

29. The aforesaid provision circumscribes the jurisdiction of the court in two ways. First, the taxpayer must prove the tax decision is wrong for the court to intervene. Under **section 51(3)** of the *TPA* an appeal in relation to an appealable decision is restricted to the grounds on which the objection was made. This begs the question, what is a tax decision. **Section 3(1)** of the *TPA* defines a “tax decision” and for purposes of this case, it means “(a) an assessment” and “(d) a decision on an application by a self-assessment taxpayer under section 31(2) ...”

30. It is not difficult to determine the tax decision or decisions that culminated in this appeal as the Company’s appeal before the Tribunal is against the following assessments; KRA 201700328847, KRA201700328822, KRA201700328806, KRA201700328775, KRA201700328746, KRA201700328720 and KRA201700328672 which it requested the Tribunal to set aside. As a consequence of **section 53(3)** of the *TPA*, the Company can only rely on the grounds it put forth in the objection to which the decision relates.

31. The second aspect of this court’s jurisdiction is that it is limited to, “a question of law only.” What amounts to, “matter of law” was elucidated by the Court of Appeal in **John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others NRB CA EPA NO. 5 OF 2018 [2018] eKLR** where it observed as follows:

[T]he interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.” [Emphasis mine]

32. In order to keep within the confines of the court’s jurisdiction, I propose to examine the manner of challenging a tax decision since it provides a necessary backdrop for resolving the issues raised by the Company in this appeal. **Section 51** of the *TPA* provides as follows:

51(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 immediately notify the taxpayer in writing that the objection has not been validly lodged.

(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner may allow an application for the extension of time to file a notice of objection 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.

(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".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(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.

33. Under **section 51** aforesaid, a person who is dissatisfied with the decision of the Commissioner on an assessment is entitled to lodge an objection within 30 days. **Section 51(6)** and **(7)** provide for what happens when the objection is lodged late. The taxpayer is entitled to apply for extension of time. Under **section 12** of the **Tax Appeals Tribunal Act, 2013** (“the **TATA**”) a person who disputes the decision of the Commissioner on any matter under any tax law is entitled to appeal to the Tribunal. Under **section 30** of the **TATA**, the appellant has the burden of proving that:

(a) Where an appeal relates to an assessment, that assessment is excessive; or

(b) In any other case, the tax decision should not have been made or should have been made differently.

34. The assessments constituting the tax decisions objected to and appealed against were as follows: KRA 201700328847, KRA201700328822, KRA201700328806, KRA201700328775, KRA201700328746, KRA201700328720 all dated 7th February 2017 and KRA201700328672 dated 25th April 2017. Following each of the assessment, the Company was entitled to lodge its objection and did so in respect of each objection as follows:

Assessment	Objection	Date
KRA 201700328847	KRA 201701846374	16.03.2017
KRA201700328822	KRA 201701846140	16.03.2017
KRA201700328806	KRA 201701846016	16.03.2017
KRA201700328775	KRA 201701845892	16.03.2017
KRA201700328746	KRA 201701845752	16.03.2017
KRA201700328720	KRA 201701845571	16.03.2017
KRA201700328672	KRA 201702904514	27.04.2017

35. It is evident that each objection except the one in respect of KRA201700328672 was lodged outside the 30 day period as required by **section 51 (2)** of the **TPA**. The Commissioner informed the Company that it had rejected the objections on the ground that they were filed late and that no reasons were given for the delay. It appears that instead of applying for extension of time under **section 51(6)**, the Company opted to pursue an application for amendment of its self-assessment by the letter dated 19th July 2017 under **section 31** of the **TPA** once the Commissioner commenced enforcement proceedings.

36. Thereafter the appellant opted to appeal against the assessments on the ground, inter alia, that its application for amendment of the self-assessment dated 19th July 2017 had not been considered by the Commissioner. Under **section 56(1)** of the **TPA**, the Company bears the burden of demonstrating that Commissioner’s decision in reaching the assessments complained of was incorrect.

37. It is not in dispute that when the Commissioner made the assessments in February and April 2017, the Company had not made the application for amendment of the self-assessment dated 18th July 2017 hence the Commissioner’s decision cannot be judged on the basis of an application that was to be made in the future. Further, the grounds of amendment of the self-assessment, being a future application, could not have been the basis for the objection. The Commissioner clearly explained that it based its decision the statement of accounts and returns the Company had filed. The Tribunal appreciated this fact when it concluded that it was the duty of the Company to provide all the documents and that the Commissioner was entitled to rely on the self-assessments and returns lodged by the Company in the absence of any other documents.

38. The Company has attempted to show that the tax decision was incorrect on the basis that the Commissioner ought to have considered and allowed it amend its self-assessment on the basis of the documents it submitted with the application for amendment on 18th July 2017. I reject his contention as the assessments appealed against had been confirmed once the Company’s objections had been rejected for being filed out of time. The Company has not shown that in making the decision to raise the assessments, the decision of the Commissioner was wrong or that the Tribunal reached an incorrect decision in light of the process I have outlined.

39. At the end of the day, the Company failed to object to the assessments it appealed against to the Tribunal as its objections were filed out of time and rejected. The jurisdiction of the Tribunal was limited to considering the assessments being challenged even though it is clear that the appeal before the Tribunal was also filed out of time in relation to the assessments challenged. The application for amendment under

section 31 of the *TPA* constitutes a separate process and could not implicate or affect the assessments already confirmed by the failure of the Company to lodge its objection in time.

40. Before the Tribunal, the Company prayed for an order that the Commissioner be directed to allow it to review and amend its self-assessment for the year 2015 and 2014 based on new evidence adduced. As I have shown, this plea was outside the confines of the tax decisions appealed from and could not be considered by the Tribunal or this court in light of **section 56** of the *TPA*.

Conclusion

41. Having appraised the record, I find that the conclusions of the Commissioner and the Tribunal in respect of the assessments appealed against were in accordance with the evidence and material available to the Commissioner. The appellant did not discharge its burden of showing that the tax decision was wrong or incorrect. The issue of amendment of the self-assessment was not the subject of the tax decision that was being challenged in the appeal before the Tribunal.

Disposition

42. For the reasons I have stated, I dismiss the appeal with costs to the respondent.

DATED and DELIVERED at NAIROBI this 22nd day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Thiong'o instructed by Githinji and Koki Advocates for the appellant.

Mr Chabala, Advocate instructed by the Commissioner of Domestic Taxes, Kenya Revenue Authority.