REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 181 OF 2007

REPUBLIC .....APPLICANT

VERSUS

COMMISSIONER GENERAL,

KENYA REVENUE AUTHORITY .....1ST RESPONDENT

KENYA REVENUE AUTHORITY .....2 RESPONDENT

EX-PARTE

CONTACT NETWORK LTD

JUDGEMENT

Through the notice of motion application dated 8th March, 2007 the ex-parte Applicant, Contact Network Limited prays:

> **"1. THAT an order of Certiorari do issue to bring into this Honourable Court and quash the decision of the respondents dated 12th February 2007 making assessment of Value Added Tax due from the applicant for the period January 2002 to August 2006.**
>
> **2. THAT an order of Certiorari to issue to bring into this Honourable Court and quash the decision of the respondents as contained in the respondents letter of 12th February 2007 making assessment of PAYE from the applicant for the period January 2000 to August 2006.**

3. **THAT on order of Certiorari to issue to bring into this Honourable Court and quash the decision of the respondents contained in the Statement of Account for the year of income dated 5th February 2007 making assessment of Income Tax from the applicant for the period January 2000 to December 2005.**

4. **THAT an order of Prohibition directed against the respondents forbidding the respondents from taking out enforcement proceedings against the applicant or otherwise attaching, seizing and or destraining the applicant's assets, chattels and or goods.**

5. **<u>THAT</u> an order that the costs of this suit and application be granted to the applicant."**

The application is supported by the statutory statement and the affidavit of the Applicant's Managing Director Shelina Popat and annextures thereto all filed together with the chamber summons application for leave on 1st March, 2007.

The Commissioner General of Kenya Revenue Authority is the 1st Respondent whereas Kenya Revenue Authority is the 2nd Respondent. They oppose the application.

According to the statutory statement, the grounds upon which the relief is sought are:

> **"a) Between the period January 2002 and December 2002 the applicant was carrying on the business of Tour Operator and Travel Bureau, which business was licensed under the Ministry of Tourism and Wildlife. Value Added Tax was not payable.**
>
> **b) The applicant applied for tax amnesty for the period January, 2003 to June, 2004. The amnesty was granted by the 2nd respondent's letter dated 6th January 2005.**
>
> **c) The applicant's auditors Messrs Mitoko & Company, have computed the correct amount of Value Added Tax underpaid at Kshs.1,502,73/=, which amount the applicant has paid to the respondents in full.**
>
> **d) In the circumstances the Value Added Tax assessment is clearly based on estimates.**
>
> **e) Between the years 2000 to 2004 the applicant's business went through very hard time to the extent that the applicant was unable to rent an office.**
>
> **f) The business during the years 2000 to 2004 was being carried out at residential premises where the Managing Director and her mother resided. The rent was being paid by the Managing Director's mother.**
>
> **g) It is therefore not in order to charge and tax telephone, electricity, water and security on the Managing Director of the applicant.**
>
> **h) The applicant's auditors have taken the above matters into consideration and have computed additional PAYE due from the applicant at Kshs.497,269/= which amount has been paid by the applicant in full.**
>
> **i) The applicant paid its total tax liability vide cheque No. 001154 dated 14th November 2006 for Kshs.1,000,000/= and cheque No. 001177 dated 30th November 2006 for Kshs. 1,000,000/=.**
>
> **j) The computation and assessment of the PAYE due from the applicant is therefore based on wrong premises.**
>
> **k) The period years 2000 and 2004 the business of the applicant went through lean times and almost closed down.**
>
> **l) The applicant filed correct accounts with the respondents for the years 2000, 2001, 2002 and 2003 in respect of Income Tax which the respondents ought to adopt.**
>
> **m) The applicant's auditors have made computation and findings showing that the applicant does not have any tax liability for Income Tax for the years 2004 and 2005.**

n) In the circumstances the respondents' computation and assessment which is based on estimates is arbitrary and malicious.

o) The respondents in their actions against the applicant have acted in an arbitrary and malicious manner and have failed to afford the applicant an opportunity for a fair hearing."

An additional ground that emerges from the Managing Director's affidavit sworn on 28th February, 2007 is that the Applicant had filed an objection to the respondents' tax assessment but the applicant was apprehensive that the respondents may commence enforcement proceedings thus necessitating the filing of these proceedings.

The respondents opposed the application through a replying affidavit sworn on 8th January, 2008 by Mr. I. P. Mwangi a Senior Assistant Commissioner. The respondents' case is that acting on information that the Applicant was under declaring its taxes, the respondents' authorized officers in exercise of statutory powers under the Income Tax Act (Cap 470) and the Value Added Tax (Cap 476) carried out a raid on the premises of the Applicant in order to obtain accurate data and other records so as to assess the taxpayer accurately. At the time of the raid the Applicant's Managing Director was not in thus forcing the respondents' authorized officers to take with them documents and computers for examination. This was done after preparation of an inventory in the presence of the Applicant's tax agent.

After examination of the documents and computers the respondents' authorized officers found that the correct amount of VAT had not been remitted by the Applicant and that an additional amount of Kshs.80,833,185/= was payable for the year 2002. Further, that the Applicant was an events organizer in 2002, and not tour operator and travel bureau as alleged. In support of this assertion, the respondents exhibited an article in the June 2007 Parents magazine in which the Director of the Applicant revealed to an interviewer by the name Tabitha Onyinge that the company was set up in 1995 as an events organizing company and had over twenty employees.

The respondents concede that the Applicant did indeed apply for tax amnesty and a tax amnesty was actually granted to the Applicant for the periods April, June, July, November, December 2003 and February and March, 2004 and that in establishing the amount of VAT due from the Applicant the respondents' officers had deducted the amount which was the subject matter of the amnesty.

It is the respondents' case that it was further established on examination of the seized documents that the Applicant had not remitted PAYE amounting to Kshs.25,812,774/= in respect of several benefits enjoyed by its Managing Director, Shelina Popat, for the years 2000, 2001, 2002, 2003, 2004, 2005 and 2006. Further, that the respondents' officers also established from the records seized that the accounts previously filed by the Applicant were not comprehensive and an estimated assessment indicated that the tax due for the years 2000, 2001, 2003, 2004 and 2005 was an aggregate sum of Kshs.106,176,383/=.

As a result of the findings the respondents' officers through a letter dated 30th October, 2006 wrote to the Applicant seeking an appointment to discuss the tax audit findings and they indeed held a meeting with the Applicant's Managing Director and tax agent on 14th November, 2006 at the Applicant's premises. At the meeting it was agreed that the Applicant's tax agent be given two weeks to peruse the records afresh, including those which the respondents' officers had since returned, to facilitate reconciliation for periods with inadequate information. The Applicant's Managing Director was to contact the respondents after two weeks for further discussions of the findings. According to the respondents, it became apparent in February, 2007 that the Applicant had no intention of contacting the respondents. Telephone calls by the respondents' officers to the Applicant's Managing Director and tax agent went unanswered. It was then that the respondents issued assessments on 12th February, 2007.

The respondents informed the Court that on 12th March, 2007 objection against the assessments was received from the Applicant. It is the respondents' case that the Applicant's decision to file these proceedings concurrently with the objection has left their officers confused as to whether the Applicant

still wanted the objection to be accorded the due process of law.

The respondents assert that they acted intra vires the Income Tax Act and the Value Added Tax when making the assessments and that in the absence of proper books of accounts, documents and records, the respondents' officers had no option but to make an estimated assessment.

The Applicant's Managing Director Shelina Popat swore a supplementary affidavit on 21st May, 2014. Through this affidavit, the Applicant contend that in assessing the tax which is the subject of these proceedings, the respondents did not proceed in accordance with Section 56 of the Income Tax Act and Section 30 of the Value Added Tax Act which mandates them to require a taxpayer by notice in writing to produce any accounts, books of account and other documents for inspection and examination.

The Applicant asserts that it is patently clear from the documents carted away by the respondents' officers that the said officers could have easily computed the Applicant's income and expenses for the years 2002 -2006.

At paragraph 15 of the supplementary affidavit the Applicant's Managing Director exhibits a certain document and avers:

> **"15. <u>THAT</u> from the exhibit "SP 1", which were documents in the respondents' possession after carrying out the raid, the ex-parte applicant's auditor has computed income and expenses for the years 2002 to 2006 to come up with taxable income as follows:-**

Year	**Income**	**Expenses**	**Taxable Income**	**KRA's estimate on Income**
2002	**1,916,500.00**	**2,032,835.45**	**(116,335.45)**	**31,072,642.00**
2003	**4,936,953.00**	**5,957,867.11**	**(1,020,914.11)**	**43,190,973.00**
2004	**13,320,452.00**	**5,930,339.77**	**7,390,112.23**	**60,449,280.00**
2005	**48,268,667.37**	**44,344,138.95**	**3,923,528.42**	**85,279,835.00**
2006	**27,985,680.00**	**20,901,280.00**	**7,084,400.00**	**80,924,992.00."**

The Applicant insisted that its objection to the assessment has never been addressed by the respondents and that is why it has persisted in prosecuting this matter.

From the Applicant's initial pleadings it appears that the Applicant was only faulting the respondents for failing to accord it a hearing and making an irrational decision. Through the supplementary affidavit, the Applicant proceeds to add a third ground namely that in raiding its premises the respondents acted ultra vires the Income Tax Act and the Value Added Tax.

I will start by considering whether the Applicant was accorded a hearing. In the grounds in support of the reliefs sought, the Applicant asserts that it was not accorded a fair hearing before the assessed tax was demanded.

The respondents placed undisputed evidence before the Court that after the examination of the documents retrieved from the Applicant's premises after the raid, the Applicant was invited to discuss the tax findings. Two meetings were held on 14th November, 2006 and 30th November, 2006 and the Applicant, even remitted two cheques of Kshs. one million each. The Applicant then requested for two weeks to go through the documents afresh but never reverted back to the respondents up to February, 2007 when a demand notice was issued. What other opportunity did the Applicant require? The Applicant's

Managing Director and tax agent attended meetings with the respondents' officers but the Applicant's representatives later dropped out of the discussions. The respondents' officers were not under any obligation to beg the Applicant's representatives to attend further meetings. I therefore find that the Applicant was indeed given a hearing. It opted not to take advantage of the opportunity advanced to it and it cannot now blame the respondents.

The second issue is whether the respondents' computation and assessment based on estimates was *ultra vires* or unreasonable. The Applicant presented to this Court a bundle of documents to show that the tax as assessed by the respondents was unreasonable. I have specifically produced in this judgment paragraph 15 of the Managing Director's supplementary affidavit in which the Applicant seeks to demonstrate why the tax assessment was unreasonable.

The respondents on the other hand assert that they are allowed by the tax statutes to make tax assessments based on estimates where they believe that a taxpayer's self assessment is not true or correct.

The power is donated by sections 73 and 77 of the Income Tax Act. Section 73 provides:

> **"(1) Save as otherwise provided, the Commissioner shall assess every person who has income chargeable to tax as expeditiously as possible after the expiry of the time allowed to such person under this Act for the delivery of a return of income.**
>
> **(2) Where a person has delivered a return of income, the Commissioner may —**
>
> **(a) (i) accept the return and deem the amount that person has declared as his self assessment in which case no further notification need be given; or**
>
> **(ii) where the return is in respect of a year of income prior to 1992, accept that return and assess him on the basis thereof;**
>
> **(b) if he has reasonable cause to believe that such return is not true and correct, determine, according to the best of his judgment, the amount of the income of that person and assess him accordingly.**
>
> **(3) Where a person has not delivered a return of income for any year of income, whether or not he has been required by the Commissioner so to do, and the Commissioner considers that the person has income chargeable to tax for that year, he may, according to the best of his judgment, determine the amount of the income of that person and assess him accordingly; but such assessment shall not affect any liability otherwise incurred by such person under this Act in consequence of his failure to deliver the return."**

Section 77 on the other hand states:

> **"Where the Commissioner considers that any person has been assessed at a less amount, either in relation to the income assessed or to the amount of tax payable than that at which he ought to be assessed, the Commissioner may, by an additional assessment, assess such person at such additional amount as, according to the best of his judgment, such person ought to be assessed."**

It is clear from a reading of the said provisions that the respondents are indeed clothed with powers to estimate taxes payable by a taxpayer in certain circumstances. The respondents have sufficiently shown that those circumstances existed in the Applicant's case. The Applicant did not dispute the fact that it had presented itself as a tour operator and travel bureau which fell in a tax-exempt sector whereas in truth it was in the business of events organization which attracted tax. Honesty is crucial in self-assessment. The moment the Applicant gave false information about its business, it invited the respondents to conclude that its tax returns were not true or correct.

One may be tempted to sympathize with the Applicant and cast aspersions on the respondents' figures. That, however, is not the remit of judicial review. Judicial review is concerned with the process leading to a decision and not the merits of the decision.

The Court of Appeal noted in **PILI MANAGEMENT CONSULTANTS v COMMISSIONER OF INCOME TAX, KENYA REVENUE AUTHORITY**, Mombasa Appeal No. 154 of 2007 that:

> **"As the learned trial Judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process, not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili's account at the bank was or was not liable to tax."**

It would require this Court to go through the documents provided by the Applicant in order to conclude what its income and expenses were. In short, the Applicant is asking this Court to take over the duties of the taxman. Accepting the invitation would amount to usurpation of the respondents' statutory duties in the disguise of reviewing their actions.

The third and final question is whether the respondents acted ultra vires the Value Added Tax Act and the Income Tax Act. The Applicant claims that the raid on its premises was *ultra vires* the provisions of Section 30 of the Value Added Tax Act and Section 60 of the Income Tax Act.

Section 30 of the Value Added Tax Act in place in 2006 provided:

> **"30. (1) For the purpose of obtaining full information in respect of the tax liability of any person or class of persons or any other purposes, the Commissioner or an authorized officer may require -**
>
> **(a) the production for examination, at such time and place as he may specify, any records, books of account, statements of assets and liabilities, or other documents which he may consider necessary for such purposes;**
>
> **(b) the production forthwith, for retention for such period as may be reasonable for the examination thereof, of any records, books of account and other documents which he may specify;**
>
> **(c) any person to attend, at such time and place as may be specified, for the purpose of being examined respecting any matter or transaction appearing to be relevant to the tax liability of any person.**
>
> **Provided that where the person required to produce any records, books of account, statements of assets and liabilities or other documents for examination under this section is a bank or financial institution –**
>
> **(i) the records, books of account, statements of assets and liabilities or other documents shall not, in the course of the examination be removed from the premises of the bank or financial institution or other premises at which they are produced;**
>
> **(ii) the Commissioner or an authorized officer carrying out the examination may make copies of such records, books of account, statements of assets and liabilities or other documents for purposes of any report relating to the examination; and**
>
> **(iii) all information obtained in the course of the examination shall be treated as confidential and used solely for the purposes of the Act.**
>
> **(2) Any person who, without reasonable excuse, fails to comply with any requirement**

made under subsection (1) shall be guilty of an offence and liable to a fine not exceeding fifteen thousand shillings or to imprisonment for a term not exceeding six months or both.

Section 30 of the Value Added Tax Act was drafted in similar terms with Section 56 of the Income Tax Act which provides:

"(1) For the purpose of obtaining full information in respect of the income of any person or class of persons, the Commissioner may, by notice in writing, require, in the case of the income of any person, that person or any other person, and in the case of a class of persons, any person —

(a) to produce for examination by the Commissioner at the time and place specified in such notice, any accounts, books of account, and other documents which the Commissioner may consider necessary and the

Commissioner may inspect any such accounts, books of account or other documents and may take copies of any entries therein;

(b) to produce forthwith for retention by the Commissioner for such period as may be reasonable for their examination any accounts, books of account and other documents which the Commissioner may specify in the notice;

(c) not to destroy, damage or deface on or after service of the notice any of the accounts, books of account and other documents so specified

without permission of the Commissioner in writing:

Provided that in the case of a banker the powers of the Commissioner under this section shall be limited to the inspection of books or documents at the place at which they are kept and to the taking of copies of any relevant entries therein.

(2) The Commissioner may, by notice in writing, require a person entitled to or in receipt of income, whether on his own behalf or as representative of another person, to attend at such time and place specified in such notice for the purpose of being examined as to his income or the income of the other person or any transaction or matter appearing to be relevant thereto.

(3) The Commissioner may exercise the powers conferred on him by this section in relation to a year of income at any time prior to the expiry of seven years after such year of income:

Provided that where the Commissioner has reasonable cause to believe that fraud or gross or wilful neglect has been committed in connection with, or in relation to, tax for a year of income, the Commissioner may exercise those powers in relation to any year of income."

With respect to the Applicant's counsel, I must state that those sections did not in any way oust the respondents' powers to raid the premises of a suspected non-compliant taxpayer as was then provided by Section 31 of the Value Added Tax Act which stated:

"31. (1) An authorised officer may, at all reasonable times, enter without warrant any premises upon which any person carries on business, or in which he has reasonable grounds to believe that a person is carrying on business, in order to ascertain whether this Act is being complied with (whether on the part of the occupier of the premises or any other person) and on entry he may -

(a) require the production of, and may examine, make and take copies of, any record, book, account or other document kept on the premises relating, or appearing to relate to the provision of any taxable supply;

(b) take possession of and remove any record, book, account or other document which he has reasonable ground for suspecting to be, or to contain, evidence of the commission of any offence under this Act;

(c) require the occupier of the premises or any person employed therein to answer questions relating to any record, book, account or other document, or to any entry therein, and to render such explanations, and give such information, in respect of the business concerned as the authorized officer may require for the exercise of his functions under this Act;

(d) require any safe, container, envelope or other receptacle in the establishment to be opened;

(e) at the risk and expense of the occupier of the premises, open and examine any package found therein;

(f) take and retain without payment such reasonable samples of any goods as he may think necessary for the exercise of his functions under this Act.

(2) Where an authorised officer enters any premises in exercise of the powers conferred by subsection (1), he may take with him such persons as he considers necessary for the carrying out of his functions under this Act.

(3) Any person who -

(a) resists, hinders or obstructs, or attempts to resist, hinder or obstruct, an authorised officer acting under this section; or

(b) fails to comply fully with any requirement made under this section; or

(c) makes any statement in response to any such requirement, knowing it to be false or incomplete in any material particular, or not having reason to believe that it is true or complete in all material respects; or

(d) procures or attempts to procure, any means, any other

person to act as aforesaid, shall be guilty of an offence.

The Applicant has not alleged or proved that the raid was not conducted in accordance with the provisions of the said Section 31 of the Value Added Tax Act. There was therefore nothing illegal in the raid on the Applicant's premises.

The Applicant claims that its objection to the tax assessment was never addressed by the respondents. The respondents have reasonably replied that after it was served with the pleadings in these proceedings and the objection, it did not know how to proceed with the objection. The Applicant had opted to pursue two parallel processes and the respondents may not have known whether pursuing the objection would have amounted to contempt of Court.

Looking at the pleadings placed before this Court, it is apparent that the Applicant has not established any wrongdoing on the part of the respondents to warrant the issuance of the orders sought. The Applicant's case fails and the same is dismissed with costs to the respondents. The respondents will proceed to consider the Applicant's objection in accordance with the relevant law. For avoidance of doubt the

objection will be treated as if it was filed on the date of the delivery of this judgment.

Dated, signed and delivered at Nairobi this 27th day of November, 2014

W. KORIR,

JUDGE OF THE HIGH COURT