



REPUBLIC OF KENYA



**Sea Tech Limited v Commissioner of Domestic Taxes (Income Tax Appeal E084 of 2022)
[2024] KEHC 868 (KLR) (Commercial and Tax) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E084 OF 2022
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

SEA TECH LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an Appeal from the Judgment of the Tax Appeals Tribunal
delivered on 9th September, 2022, in TAT Appeal No. 353 of 2021)*

JUDGMENT

1. This judgment relates to an appeal filed by the appellant against the decision of the Tax Appeals Tribunal (hereinafter “the Tribunal”) dated September 9, 2022, in Tax Appeal Tribunal No. 353 of 2021. The appellant is seeking for orders that:
 - i. The appeal be allowed;
 - ii. The Agency Notice dated June 24, 2021 issued by the respondent to Gulf African Bank Limited and any other agency notices issued by the respondent in relation to the impugned taxes were improper, invalid, null and void;
 - iii. The respondent’s decision, if at all, to invalidate the appellant’s objection dated August 19, 2020 be set aside and the appellant’s objection be upheld;
 - iv. The respondent be directed to correct its data pursuant to the appellant’s application for data correction and the ADR Agreement between the parties;
 - v. The respondent be ordered to pay the appellant’s costs before the Tax Appeals Tribunal; and
 - vi. Any alternative relief the Honourable Court may deem fit to grant.



2. The background facts of the dispute are that the respondent made a tax compliance check on the appellant in the year 2018. It also checked the appellant's amendment done on the appellant's returns at around 9th and October 10, 2018. It also did a tax audit around the year 2020. On June 26, 2018, the Commissioner issued a VAT assessment for the month of October 2017 with a principal sum of Kshs. 34,845,566.00 and an interest of Kshs. 2,238,851.00. The appellant objected to the assessment on July 24, 2018 and the Commissioner issued its decision declining the objection on 21st September, 2018.
3. The appellant being dissatisfied with the decision, filed an appeal at the Tribunal *vide* Appeal No. 311 of 2018 and requested for ADR and subsequently, the parties entered into a consent on April 8, 2019 where the appellant was to pay the outstanding VAT tax of Kshs 2,661,090.00.
4. As a result of the amended self-assessment by the appellant on 9th and 10th October, 2018, the VAT tax liability rose to Kshs. 65,032,367.00. The Commissioner issued a VAT demand notice dated February 18, 2021, for the sum of Kshs. 65,032,367.00 inclusive of penalties and interest.
5. On June 24, 2021, the respondent issued an amended Agency Notice to Gulf African Bank Limited for the enforcement of the alleged taxes in the sum of Kshs. 78,660,863.00.
6. The appellant aggrieved by the Commissioner's action appealed to the Tribunal *vide* Appeal No. 353 of 2021 citing the following grounds:
 - i. That the respondent erred in law and fact, issued an Agency Notice to the applicant's Bankers under section 42 of the [Tax Procedures Act](#), 2015 in the enforcement of alleged taxes due amounting to Kshs. 78,660,863.00;
 - ii. The respondent erred in law and fact in demanding taxes that have already been settled by an ADR Agreement and subsequent consent;
 - iii. That the respondent erred in law and fact by not correcting its data under the appellant's application for correction and the ADR agreement to correct the error on the closing stock that was apparent on the appellant's tax ledger;
 - iv. That the respondent erred in law and fact by dint of section 31 of the [Tax Procedures Act](#) by failing to notify the appellant whether its application for amendment of returns was accepted or declined under section 31(3) of the [Tax Procedures Act](#);
 - v. That the respondent erred in fact and law by not considering the input VAT incurred by the appellant during the period;
 - vi. That the respondent's action of issuing agency notice in the enforcement of alleged taxes due amounting to Kshs. 78,660,863.00 amounts to an abuse of the Honourable Tribunal's and ADR process; and
 - vii. That for the reasons above stated, the appeal should be allowed with costs to the appellants.
7. In its statement of facts, the appellant argued that the amended self-assessment for the year 2018 was erroneously filed by a person not known to it and the Commissioner was notified, but failed to correct the same.
8. The respondent filed its statement of facts dated July 20, 2021, where it averred that the consent reached by the parties did not factor in the new self-assessment by the appellant and neither was the new assessment part of the dispute subject to the ADR. That the Commissioner conducted an audit on the appellant, which was completed on August 19, 2020 and the commissioner invalidated the objection raised and upheld the tax demand.



9. In its judgment dated September 9, 2022, the Tribunal dismissed the appeal and upheld the respondent's tax demands and assessment. The said judgment is the one which forms the subject of this appeal.
10. The memorandum of appeal filed by the appellant raises the following grounds of appeal-
 - i. The Tribunal erred in law and fact in disregarding the appellant's grounds of appeal;
 - ii. The Tribunal erred in holding that the appellant was liable for the taxes arising from the amended returns;
 - iii. The Tribunal erred in failing to consider and decide on the appellant's grounds of appeal that the respondent erred by not correcting its data under the appellant's application for data correction and the ADR Agreement between the parties;
 - iv. The Tribunal erred in holding that the respondent properly invalidated the appellant's objection dated August 19, 2020;
 - v. The Tribunal erred in failing to hold and should have held that the Agency Notice dated June 24, 2021 for Kshs. 78,660,863.00 issued by the respondent to Gulf African Bank Limited and any other agency notices issued prematurely were improper, invalid, null and void;
 - vi. The Tribunal erred in law and fact in failing to consider the appellant's input VAT which was properly claimable in the period in dispute;
 - vii. The Tribunal erred in failing to follow binding precedent from this Honourable Court;
 - viii. The Tribunal erred in holding that the appellant failed to discharge its burden of proof.
 - ix. The Tribunal erred in dismissing the appellant's appeal and upholding the respondent's tax assessments and demands; and
 - x. The Tribunal erred in not awarding the appellant the costs of the appeal before the Tribunal.
11. By the directions of this Court, the appeal was heard by way of written submissions. Counsel thereafter highlighted their submissions.

Appellant's submissions

12. Mr. Tugei, appellant's learned Counsel condensed ground Nos. 1, 2, 3, 4 and 6 of the appeal and formed one issue for determination, to the effect that the Tribunal erred in holding that the appellant was liable for the taxes demanded. He submitted that the said taxes as demanded by the respondent were erroneous and not ascertained as being due and payable. According to Counsel, outputs declared in the erroneously amended VAT returns upon which the demanded taxes were assessed, did not have corresponding inputs. He contended that the Tribunal failed to consider the evidence placed before it and made a decision that was inconsistent with the law and its own previous decisions.
13. Counsel argued that the Commissioner failed to communicate his decision to the objection within the stipulated timeline and also failed to give the appellant a hearing of the objection, which violated the appellant's right to fair administrative action.
14. Counsel further argued that the appellant's application for data correction, which was based on cogent grounds and in support of which there was adequate material, was similarly not handled appropriately by the respondent. He submitted that despite an ADR Agreement having been reached between the



parties herein, the respondent by declining to correct its data ended up making tax demands that were inconsistent with the said Agreement.

15. Counsel submitted that in the absence of data correction and the appellant's objection having not been considered as required by the law, the taxes demanded by the respondent are not ascertainable as being due and payable. He contended that the figure being claimed was "plucked from the air" and cited the case of *Republic v Kenya Revenue Authority ex-parte Jaffer Mujtab Mohammed* [2015] eKLR, to support the contention that the tax demand made by the respondent could not be ascertained.
16. Ground Nos. 5 and 7 of the appeal were condensed to form the second ground of appeal, to the effect that the Tribunal erred in failing to hold that the agency notice dated June 24, 2021 and any other agency notices issued prematurely by the respondent were improper and invalid. Counsel argued that the Tribunal failed to follow binding precedents from the Courts. He relied on the case of *Republic v Kenya Revenue Authority ex-parte Mary W. Kamau & another* [2012] eKLR, where Githua J., found that the applicants therein were not heard on their objection before the tax assessed earlier was considered as a final assessment and Agency notices were issued to enforce its recovery. The Judge found that the foregoing denied the applicants the opportunity to be heard on their position that the tax as assessed by the respondent was erroneous as it was allegedly not in conformity with financial records held by them.
17. Counsel emphasized that the appellant was condemned unheard as the respondent did not ask for or consider any additional information/documents it may have required for purposes of determining the appellant's objection. He also stated that the Agency Notice issued to Gulf African Bank Limited was issued before the respondent considered the objection by the appellant,
18. Grounds 8 and 9 were condensed together. The appellant's Counsel submitted that the Tribunal erred in holding that the appellant failed to discharge its burden of proof and in dismissing the appellant's appeal. He referred to section 5(1) of the *Tax Procedures Act*, 2015 provides that in any proceedings under that Part, the burden shall be on the Taxpayer to prove that a tax decision was incorrect. He submitted that where the objection is not considered as was the case herein, the tax decision is incorrect for failure to follow due process. Counsel argued that the appellant discharged the burden of proof and the burden shifted to the respondent who failed to demonstrate that the tax decision was correct. Counsel urged this Court to find that the appeal is merited and allow the same.

Respondent's submissions

19. Ms Chelang'at Mutai, the respondent's Counsel submitted that the appellant failed to discharge the burden of proof as provided under section 56(1) of the *Tax Procedures Act*, whereas the onus was on the appellant to show that the assessment made on the company was excessive and incorrect, which it failed to do. Counsel also relied on the decision in the case of *Republic v Kenya Revenue Authority ex-parte Jaffer Mujtab Mohammed* (*supra*), which was cited by the appellant's Counsel in arguing that a taxing authority is not entitled to pluck figures from the air.
20. Counsel submitted that the appellant failed to adduce evidence in support of the allegation that the disputed amount of Kshs. 78,660,863.00 was covered under the ADR agreement. She contended that the appellant has not tendered any evidence to show that there was an unauthorized access to its itax portal. She argued that the ADR Agreement dated 8th April, 2019 covered the additional assessments issued by the respondent for July 2017 but did not cover the self-assessment which formed the subject matter of the dispute.
21. The second issue that the respondent's Counsel addressed is on whether the Agency Notice was lawfully placed in the appellant's bank accounts. It was argued that the appellant having made the



self-assessment had the obligation to make the payment, and in the absence of such payment, the respondent is empowered under section 42 of the [Tax Procedures Act](#), 2015 to enforce payment of unpaid and undisputed taxes.

22. Counsel submitted that section 51 of the [Tax Procedures Act](#) allows the Commissioner to invalidate the objection where the objection fails to meet the threshold. He contended that the appeal herein is not valid and cited section 52(2) of the [Tax Procedures Act](#), 2015, which provides that a notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an agreement with the commission to pay the tax not in dispute under the assessment at the time of lodging the notice.
23. Counsel for the respondent concluded his submissions by stating that this Court has no power to set aside the Commissioner's invalidation notice and that the jurisdiction as to the validity of an objection is the preserve of the Commissioner. Counsel urged this Court to dismiss the appeal, affirm the judgment of the Tribunal and find that taxes of Kshs. 78,660,863.00 are due and payable.

Analysis and determination.

I have considered the Memorandum of Appeal, the Statement of Facts, the Record of Appeal, the parties' respective submissions and the authorities that they relied on. The main issues for determination are-

- i. Whether the appellant was given a chance to object to the tax liability demand; and
- ii. Whether the respondent followed due process in claiming the tax obligation due and payable from the appellant.

Whether the appellant was given a chance to object to the tax liability.

24. Section 51(11) of the [Tax Procedures Act](#), 2015 provides as follows-

“The Commissioner shall make the objection decision within sixty days from the date 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.”

25. The appellant's contention is that the respondent's decision to the objection issued on 2nd September, 2020 was given on the last day, which locked it out from availing any other necessary documents to prove its case.

26. In [Republic vs the Commissioner of Customs Services Ex-parte Unilever Kenya Limited](#) [2012] eKLR, the Court held that-

“.....if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law.”

27. From the wording of section 51(11) of the [Tax Procedures Act](#), 2015, the law is clear that the decision to a tax objection should be issued within sixty (60) days. Bearing the said provisions in mind, it is my finding that the respondent's decision communicated on 2nd September, 2020 was done in a timely manner, and within the stipulated timeline of sixty (60) days. It paved the way for the appellant to take any necessary action which it deemed fit. The appellant filed an appeal, being TAT Appeal No. 311 of 2018, against the objection decision which it later withdrew, thus paving the way for the respondent to enforce the payment of the amount due and payable.



Whether the respondent followed due process in claiming the tax obligation due and payable from the appellant.

28. I do agree with both Counsel for the parties herein that a Taxing Authority is not entitled to pluck a figure from the air and impose it upon a Taxpayer as there must be some rational basis for arriving at the figure being claimed. According to the respondent, the amount of Kshs. 78,660,863.00 tax liability that is due and owing from the appellant emanates from the self-amended assessment done by the appellant in the year 2018, which was not subject to the ADR Agreement, therefore the Commissioner was supposed to recover the said amount from the appellant, unless the appellant adduced sufficient proof to show that there was an error in computing the self-amended assessment.

29. Section 28(1) of the *Tax Procedures Act*, 2015 provides thus:

“(1) A taxpayer who has submitted a self-assessment return in the prescribed form for a reporting period shall be treated as having assessed the amount of tax payable (including a nil amount) for the reporting period to which the return relates is the amount set out in the return.”

30. Further, section 31(3) of the Act provides for amendment of the assessment by the Commissioner in the following words-

“(3) Where an application has been made under subsection (2), the Commissioner may—

- a. amend the self-assessment; or
- b. refuse the application, and the Commissioner shall notify the taxpayer in writing of the decision within thirty days of receiving the application.”

31. The Tribunal held that the appellant filed an objection but failed to adduce any evidence to the allegation that the self-amended assessment was an error. The Tribunal found that it was clear from the appellant’s letter dated 10th July, 2020, that the appellant confirmed it was undertaking an amendment to correct the nil returns. It is my finding that the contents of the said letter confirmed that the appellant was positively amending the returns to capture the right figures from its trading, and the same was done.

32. Counsel for the appellant contended that the amendment was done by an unknown person, but failed to adduce any evidence to prove the same. In the circumstances, I am not persuaded that the Tribunal erred in holding that the appellant was liable for the taxes that arose out of the self-amended returns.

33. This Court holds that in the absence of any evidence to prove the appellant’s allegations, the Commissioner lawfully invalidated the objection, and was therefore mandated under the law to demand the taxes due and payable by the appellant.

34. Section 42 of the *Tax Procedures Act*, 2015 provides for the power conferred on the Commissioner to collect taxes from a person owing money to the Taxpayer. The said provisions state thus-

“(1) This section applies when a taxpayer is, or will become liable to pay a tax and —

- a. the tax is unpaid; or



- b. the Commissioner has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for the payment of the tax.
2. The Commissioner may, in respect of the taxpayer and by notice in writing, require a person (referred to as the "an agent")—
 - a. who owes or may subsequently owe money to the taxpayer;
 - b. who holds or may subsequently hold money, for or on account of, the taxpayer;
 - c. who holds or may subsequently hold money on account of some other person for payment to the taxpayer; or
 - d. who has authority from some other person to pay money to the taxpayer, to pay the amount specified in the notice to the Commissioner, being an amount that shall not exceed the amount of the unpaid tax or the amount of tax that the Commissioner believes will not be paid by the taxpayer by the due date.”
35. The Commissioner has the powers to issue an Agency Notice to the bank where an appellant holds an account, ordering the bank to pay the amount specified in the Notice to the Commissioner. In the circumstances, this Court finds that the Tribunal did not err in finding that the Commissioner acted properly in issuing the Agency Notice dated 24th June, 2021 to Gulf African Bank Limited.
36. This Court also finds that the Commissioner’s act of demanding and enforcing payment of the taxes due and payable by the appellant was proper and within the law.
37. A reading of the decision in *Republic v Kenya Revenue Authority ex-parte Mary W. Kamau & another* (*supra*) relied on by the appellant’s Counsel is distinguishable in that in the cited case, the Commissioner failed to respond to the Objection Notice before issuing Agency Notices. In the said case, Githua J., inter alia held thus-

“.....Failure to consider the said objection irrespective of whatever decision the Respondent would have come out with amounted to failure by the Respondent to perform its statutory duty under Section 85 of the Act. Given the substantial amounts involved in the tax assessment, I find that failure to consider the applicant’s objection to the tax assessment before issuing the Agency notices which had the effect of freezing the applicant’s bank accounts without notice was not only a procedural lapse in the processing of tax demands by the Respondent but was a procedural impropriety which exposed the applicants to unfair treatment. It also amounted to a breach of the rules of natural justice which require that no person should be condemned unheard.”
38. The upshot is that the instant appeal has no merit. It is dismissed with costs to the respondent. The decision of the Tribunal is hereby upheld.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:



Ms Nthei h/b for Mr. Wachira for the appellant

Mr. Shijenje h/b for Ms Chelang'at Mutai for the respondent

Ms B. Wokabi – Court Assistant.

