



**Commissioner of Domestic Taxes v Applewood Investments Limited (Tax Appeal E211 of 2021) [2024] KEHC 4820 (KLR) (Commercial and Tax) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4820 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
TAX APPEAL E211 OF 2021**

**DAS MAJANJA, J**

**MAY 8, 2024**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**APPLEWOOD INVESTMENTS LIMITED ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 29th October 2021 in Tax Appeal No.386 of 2020)*

**JUDGMENT**

**Introduction and Background**

1. The Appellant (“the Commissioner”) is dissatisfied with the judgment of the Tax Appeals Tribunal (“the Tribunal”) dated 29.10.2021 that found that its objection decision dated 29.07.2020 (“the Objection Decision”) on the Respondent’s objection notice dated 10.01.2020 (“the Objection”) was made outside of the statutory period of 60 days as provided for in section 51(11) of the [Tax Procedures Act](#) (Chapter 469B of the Laws of Kenya) (“the TPA”). It therefore appeals to the court and urges it to uphold the Objection Decision and order the Respondent to pay the Kshs. 12,157,407.15 the Commissioner had assessed as VAT arrears for the month of March 2018.
2. In order to contextualize the appeal, I find that a brief background and highlight of the chronology of events is apposite. The Respondent is a company whose principal business activity is real estate and had at the material time contracted Sichuan Huashi Enterprises Limited whose offices are located at Bamuda Court to develop a plot along Ngong Road within Nairobi County. The Commissioner reviewed the Respondent’s filed VAT returns for the tax period of March 2018 vis-à-vis the suppliers of the same tax period with the sole aim of establishing whether the Respondent was tax compliant.



3. The Commissioner claimed that the Respondent had claimed input VAT in the month of March 2018 against an invoice number 727 dated 16.11.2017 in the sum of Kshs. 4,568,093.29 for which the Architect's certificate was issued and dated 18.07.2017. The Commissioner averred that the time of supply as per section 12(1)(b) of the *Value Added Tax Act*, 2013 was taken as the date of the Architect's certificate which for both invoices was the year 2017 and that under section 17(2) thereof, the Respondent could only claim input VAT within 6 months after the end of the tax period in which the supply occurred and the same had lapsed. Consequently, on 15.11.2019, the Commissioner raised additional automated VAT assessments in the sum of Kshs. 12,157,407.15 being the principal VAT for the period of March 2018. The Respondent lodged the Objection that was received by the Commissioner on 10.01.2020. On 22.07.2020, the Commissioner wrote an email to the Respondent informing it that the Objection was under review and the Respondent was requested to provide some completion certificates so that the review can be finalized and the Respondent was advised to scan and send the same via email due to the Corona pandemic. In response to the email and on even date, the Respondent argued that there is only one completion certificate that is issued when the contractor has finished construction and that since the project was ongoing, the architects would not issue a completion certificate.
4. The Commissioner, having reviewed the Objection then issued the Objection Decision which was sent to the Respondent on 30.07.2020. Aggrieved, the Respondent lodged an appeal with the Tribunal which then rendered the judgment that found that the Objection Decision was made beyond the statutory period of 60 days and thus, the Objection was allowed by operation of law. As stated, this decision is the subject of the present appeal which has been canvassed by way of written submissions and which I shall make relevant references and highlights in my analysis and determination below.

#### **Analysis and Determination**

5. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the *TPA* which provides that

“An appeal to the High Court or to the Court of Appeal shall be on a question of law only”.

This means that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts (See *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR).

6. In its submissions, the Commissioner has collapsed the 6 grounds in its memorandum of appeal into one main issue; whether the Tribunal erred in its finding that the Objection Decision was issued out of time. Section 51 (11) of the *TPA* provides that,

“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.”

7. It is not in dispute that the Objection was received by the Commissioner on 10.01.2020 and therefore, it was expected that the Objection Decision be rendered by 10.03.2020 latest. However, the record indicates that from the time the Objection was lodged and received, the Commissioner only communicated to the Respondent through the email of 22.07.2020 requesting further documents. Whereas the Commissioner has argued that the Objection was filed late and the same was invalid,



there is nothing on record that indicates it informed the Respondent that the Objection was invalid as demanded by section 51(4) of the *TPA* which at the time provided that

“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.”

In any case, I agree with the Respondent that this court, in *Rongai Tiles & Sanitary Wares Limited v Commissioner of Domestic Taxes* [2023] KEHC 18546 (KLR) held that an objection decision ought to be made within 60 days regardless of whether the objection was valid.

8. Further, this issue of the Objection being invalid for the reason of being lodged late was never presented before the Tribunal by the Commissioner. I note that the Commissioner made an attempt to introduce as additional evidence, correspondences where it informed the Respondent that the Objection was invalid as it was late. This attempt was thwarted by the court in its ruling of 13.12.2023 (see *Commissioner of Domestic Taxes v Applewood Investments Ltd*) [2023] KEHC 26591 (KLR)) which found that the Commissioner was only trying to patch up the weak points of its case by introducing additional material which are not relevant in the final determination of the appeal as the said correspondences related to different tax periods such as May, 2018, June, 2018, August, 2018 October, 2018 and not March, 2018 which is the subject matter in question.
9. What remains is that the Commissioner made the Objection Decision on 29.07.2020 and yet the same was to be issued latest 10.03.2020. The Objection Decision was definitely late and the Objection was by operation of law allowed.
10. For the above reasons, I cannot fault the Tribunal for concluding that the Objection Decision was made out of time and consequently, the Objection by the Respondent was deemed allowed by operation of law and the assessment by the Commissioner could not stand.

### **Disposition**

11. The Appellant’s appeal fails and is accordingly dismissed. Each party shall bear its costs.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY 2024.**

**A. MABEYA**

**JUDGE**

