



**Commissioner of Domestic Taxes v Sketchers Limited (Tax Appeal E011 of 2023)
[2024] KEHC 5569 (KLR) (Commercial and Tax) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E011 OF 2023
DAS MAJANJA, J
MAY 8, 2024**

BETWEEN
COMMISSIONER OF DOMESTIC TAXES APPELLANT
AND
SKETCHERS LIMITED RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal at
Nairobi dated 23rd December 2022 in Tax Appeal No. 681 of 2021)*

JUDGMENT

Introduction and Background

1. The Appellant (“the Commissioner”) is dissatisfied with the decision of Tax Appeals Tribunal (“the Tribunal”) dated 23.12.2022 that found its objection decision dated 30.09.2021 (“the Objection Decision”) invalid for not being issued in a timely manner. As such, it appeals against the decision through its memorandum of appeal dated 20.02.2023 as follows:
 1. The Honourable Tribunal failed to appreciate the mandatory provisions of Section 51 (3) of the [Tax Procedures Act](#) with regard to the threshold required for a valid objection.
 2. That Section 51(11) of the [Tax Procedures Act](#) is a procedural law. The Tribunal ought to have given more weight to the substantive issue as opposed to procedural technicalities
 3. That the Tribunal erred in both fact and law by failing to consider the relevant material evidence placed before it and thus arriving at a wrong conclusion.
 4. That the Tribunal issued a judgment without considering the arguments raised by the Appellant in its pleadings and the submissions filed before the Tribunal and thereby giving a



one sided judgment to the detriment of the Appellant contrary to the provisions of Section 29 of the [Tax Appeals Tribunal Act](#).

5. That in any event, the delay was not inordinate given the complexity of tax matters.
2. Based on the above, the Commissioner urges the court to allow the appeal, set aside the Judgment of the Tribunal and that the assessments it had raised on the Respondent be upheld. The Respondent has responded to the appeal through its statement of facts dated 31.01.2024.
3. For context, I will highlight a brief background of the facts and issues that emerged between the parties and before the Tribunal. The Respondent is in the business of construction of roads and railways. Between March, April and May of 2018, the Commissioner's iTax system detected inconsistencies between the invoices declared by the Respondent for its VAT input claims and VAT sales declared by various suppliers. The system disallowed the invoices and autogenerated additional assessments amounting to Kshs. 5,458,415.44. The Respondent objected to these assessments on iTax on 10.12.2019. The Commissioner then requested for supporting documents through various correspondences between 07.02.2020 and 10.09.2021.
4. On 30.09.2021, the Commissioner issued the Objection Decision that the Respondent appealed against before the Tribunal which after considering the pleadings and documentation rendered the judgment on 23.12.2022. The Tribunal determined whether the Objection Decision was valid and found in the affirmative. It was of the view that if indeed the Commissioner needed more information from the Respondent, then it ought to have asked within 60 days from 02.12.2020 and that having to ask for more documents more than four months later was deemed to have been done out of time implying that the Respondent's objection was allowed. That whereas the Commissioner had power to ask for documentation to assist in validating the Respondent's objection, in the interest of justice and fairness, it ought to have issued the Objection Decision within reasonable time as prescribed by law. The Tribunal held that pursuing a matter from 15.11.2019 to 30.09.2021 is inordinately too long and that the Commissioner's conduct failed to embrace the provisions of the Fair Administration Action Act and Article 47(1) of [the Constitution](#).
5. The Tribunal therefore found that the Objection Decision ran afoul section 51(11) of the [Tax Procedures Act](#) (Chapter 469B of the Laws of Kenya) ("the TPA") for not being issued within the stipulated timelines and was therefore invalid. As a consequence, the Respondent's appeal was allowed and the Objection Decision that confirmed the additional assessments set aside hence the present appeal.

Analysis and Determination

6. 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).
7. If I am to understand the Commissioner's appeal, it faults the Tribunal for failing to appreciate section 51(3) of the TPA on validity of objection and its interpretation of section 51(11) of the [TPA](#). Section 51(3) of the TPA provides as follows:
 - (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
8. From the provision above, an objection is validly lodged if it precisely states the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; the undisputed taxes have been paid and all relevant documents in relation to the objection have been presented. The use of the words “shall” and “and” connote the mandatory and conjunctive nature of the aforementioned requirements, meaning that a tax payer must satisfy all of them for an objection to be deemed as validly lodged.
9. What then happens when an objection is deemed as not having been validly lodged? The answer is expressly provided for 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.” Once again, the use of the word “shall” demonstrates that the provision is couched in mandatory terms. From the record, it is not in dispute that the Commissioner requested for further information from the Respondent which implies that the objection was not validly lodged as per section 51(3) of the TPA. I will come to the consequence of an objection not being validly lodged later.
10. On the other hand, section 51(11) of the TPA provides that “Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.” The objection having been received by the Commissioner on 10.12.2019 means that as per section 51(11) above, the Commissioner had sixty days from that date to render an objection decision which was to be made latest by 10.02.2020. However, since the Respondent had been asked to avail documents to support the Objection, the Commissioner was to make the Objection Decision within 60 days from the date of receiving these documents as provided for at the time by section 51(11)(b) of the TPA. Therefore, time could only begin to run afresh once the said documents had been availed, otherwise time continued to run. Therefore, even though the Commissioner sought the additional information on 07.02.2020, it still had to issue an objection decision on 10.02.2020 latest. Since the Commissioner had not issued the Objection Decision by this date, it follows that the objection stood allowed as from 11.02.2020 and the Commissioner’s requests for further supporting documents after this date were of no consequence.
11. In *Rongai Tiles & Sanitary Wares Limited v Commissioner of Domestic Taxes* [2023] KEHC 18546 (KLR) the court rejected the argument by the Commissioner that it was not bound by the statutory timelines of section 51(11) if an objection is not validly lodged. Therefore, assuming that the Respondent’s objection was not validly lodged as claimed by the Commissioner, the later still had an obligation to stick within the 60-day timeline of issuing an objection decision. There is also nowhere in the TPA that provides that the Commissioner can only render an objection decision once it receives documents it has sought from a taxpayer. With or without the documents being availed, the Commissioner is still bound to make an objection decision within the timelines set out in section 51(11) of the TPA. I agree with what Mabeya J., said in *Eastleigh Mall Limited v Commissioner of*



Investigations & Enforcement [2023] KEHC 20000 (KLR) on the importance of the sticking to the timelines of section 51(11) of the TPA as follows:

It is clear from the forgoing that the provisions of section 51(11) of the Tax Procedures Act are mandatory. They are not cosmetic. Parliament in its wisdom knew that in matters tax, time is very crucial as those in commerce need to make informed decisions. If the Commissioner is allowed to exercise his discretion and stay ad-indefinitum before issuing an objection decision, the tax payer would be unable to make crucial decisions and plan his/her business properly."

12. As to whether the timeline set out in section 51(11) is a mandatory or procedural requirement or technicality and whether lateness could be excused or cured by Article 159 of the Constitution, Mativo J.,(as he was then) in Equity Group Holdings Limited v Commissioner of Domestic Taxes [2021] KEHC 25 (KLR) stated as follows:

59. The TAT rightly computed time and pronounced that the Objection decision was rendered out of time. This being the position, then by dint of the above provision, the objection decision is deemed to have been allowed. This position has been upheld in a catena of superior court decisions in this country, among them those cited by the appellant's counsel. In Republic v Commissioner of Customs Services Ex-Parte Unilever Kenya Limited [2012] eKLR the court stated that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law. The act requires that where the Commissioner has not made an objection decision within 60 days from the date the tax payer lodged the notice of objection, the objection shall be allowed. This means that the issues that the tax payer had raised in the notice of objection will be accepted. In case of a tax assessment, it will be vacated.

60. Section 51 (11) of the TPA is couched in peremptory terms. Having correctly found that the decision was made after the expiry of 60 days, the TAT had no legal basis to proceed as it did and to invoke article 159(2) (d).First, there was no decision at all. The decision had ceased to exist by operation of the law. Second, the provisions of section 51 (11) (b) had kicked in. The Objection had by dint of the said provision been deemed as allowed. Third, the TAT had no discretion to either extend time or to entertain the matter further. Fourth, discretion follows the law and a tribunal cannot purport to exercise discretion in clear breach of the law.

61. The TAT premised its decision on the provisions of Article 159 (2) (d) of the Constitution which requires courts to determine matters without undue regard to technicalities of procedure. On the face of a clear statutory dictate, I do not see how the TAT could term the express statutory edict as a matter of procedural technicality. This was a gross misapprehension of the law. Article 159 (2) (d) of the Constitution was not meant to oust express statutory provisions and to open a window for disregard of statutory requirements.

62. The TAT clearly fell into a grave error when it failed to appreciate the difference between a procedural law and substantive law. Procedural law, also called adjective law is the law governing the machinery of the courts and the methods by which rights are enforced. Procedural law prescribes the means



of enforcing rights or providing redress of wrongs. It comprises rules about jurisdiction, pleadings, and practice, evidence, appeal, execution of judgments, representation in court, costs, and other matters. Procedural law is commonly contrasted with substantive law, which constitutes the great body of law and defines and regulates legal rights and duties. Thus, whereas substantive law would describe how two people might enter into a contract, procedural law would explain how someone alleging a breach of contract might seek the courts' help in enforcing the agreement.

63. Substantive law is a statutory law that deals with the legal relationship between people or the people and the state. Therefore, substantive law defines the rights and duties of the people, but procedural law lays down the rules with the help of which they are enforced. The TAT manifestly erred in law by confusing substantive law with procedural law. Article 159(2) (d) of *the Constitution* in clear terms talks about procedural technicalities. A statutory edict is not procedural technicality. It's a law which must be complied with. Parliament in its wisdom expressly and in mandatory terms provided the consequences of failing to render a decision within 60 days. The Objection is deemed to be allowed. That being the law, the appellant's Objection stood allowed as a matter of law the moment the Commissioner of Domestic Taxes failed to render his decision within the 60 days....

13. The above position has been restated by the court in a number of decisions and it will be no different in this case (See *Commissioner of Investigations and Enforcement v Rama Auto Parts* [2023] KEHC 3100 (KLR) and *Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another* [2020] eKLR). The delay by the Commissioner to issue a decision within 60 days of receiving the objection is not a procedural technicality and the Tribunal did not have any discretion to consider the substance of the matter once it determined that the Objection Decision was made late. Once it was determined that the Objection Decision was made late, this also meant that the issue of whether the objection was valid or not was immaterial. There is no provision in the TPA that stipulates that only validly lodged objections have to be determined within 60 days. The Commissioner's delay in delivering the Objection Decision within 60 days of receiving the objection meant that the objection was allowed by operation of law. Failure to render the Objection Decision in time was fatal and the Commissioner could not demand any taxes therein. The Tribunal was therefore correct in its judgment.

Disposition

14. The Commissioner's appeal lacks merit. It is dismissed with no order as to costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI THIS 8TH DAY OF MAY 2024.

A. MABEYA

JUDGE

