



Transfleet EPZ Limited v Commissioner of Domestic Taxes (Income Tax Appeal E129 of 2021) [2024] KEHC 5471 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E129 OF 2021**

FG MUGAMBI, J

MAY 13, 2024

BETWEEN

TRANSFLEET EPZ LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal from the judgment of the Tax Appeals Tribunal in TAT Appeal No. 359 of 2020 dated 18th June 2021)

JUDGMENT

1. The appellant, a developer in the Export Processing Zone (EPZ), challenges a tax assessment issued by the respondent following a desk compliance check. The assessment, dated 30th January 2019 and supplemented by a further assessment dated 2nd May 2019, disallowed certain expenses and estimated income for 2015 to 2018, totaling Kshs. 206,973,046, including penalties and interest.
2. Aggrieved by the decision of the respondent which confirmed the tax assessment, the appellant appealed to the Tax Appeals Tribunal (the Tribunal). The Tribunal dismissed the appellant's appeal on 18th June 2021, citing non-compliance of the appellant's objection notices with section 51(3)(c) and section 56(1) of the *Tax Procedures Act* (TPA), leading to the current appeal filed on 14th July 2021.
3. The appellant contests the estimated assessment, arguing that it overlooked legitimate business expenses and deductions. The issues for determination arising from the Memorandum of Appeal as filed by the appellant are the validity of the Notice of Objection, the treatment of interest expenses on credit facilities and the assessment based on rental income.
4. The appeal is opposed by the respondent who filed a Statement of Facts dated 31st January 2022. The appeal was canvassed by way of oral and written submissions.



5. Having carefully considered the pleadings, evidence, submissions and authorities cited by the parties, it is important to point out that by dint of section 56(2) of the *TPA*, appeals from the Tribunal to this Court are only on matters of law. This means that this Court will not re-assess the evidence or re-evaluate factual determinations made by the Tribunal unless to the extent that they amount to a flawed interpretation or application of the law. That said, I now turn to analyze the issues raised by the appellant.

Analysis and determination

The Notice of Objection

6. The respondent contends that it was justified in rejecting the Notice of Objection raised by the appellant for being filed beyond the statutory timelines. Additionally, the appellant failed to submit any supporting documentation despite multiple reminders. Consequently, the tax assessment was confirmed, and the assessed taxes crystallized. The respondent argues that the appeal is therefore invalid as it stems from an invalid objection.
7. The appellant challenges the respondent's submission asserting that the rejection of its Notice of Objection was improper. The appellant contends that the Tribunal should have evaluated the objection's substantive merits instead of focusing solely on procedural compliance.
8. Section 51 of the *TPA* outlines the process for taxpayers to dispute tax decisions made by the Commissioner. Before any legal recourse under different laws can be sought, a taxpayer must first lodge an objection (by way of a notice of objection) to the tax decision under this section. The provision is worded in mandatory terms.
9. As to what constitutes a valid notice of objection, section 51(3) provides that the objection must be made on precise grounds and should state the required amendments. It also requires that taxpayers must have paid all the tax amounts not under dispute or must have formally requested an extension for such payment. Finally, all necessary documentation related to the objection must be submitted. This mandatory threshold is meant to prevent the objection process from being used as a delay tactic against paying due taxes.
10. After perusing the record and in particular correspondence between the parties dated 29th May 2019, 6th August 2019, 30th September 2019, 25th October 2019, 14th February 2020, 21st May 2020, 29th May 2020, it is clear that the appellant did not comply with any of these requirements. I therefore align myself with the finding by the Tribunal's finding expressed as follows:

“From the totality of evidence before us, the appellant's objection notices have not qualified for the threshold established in Section 51 (3) (c) of the *TPA* as none of the correspondences with the respondent during the audit process carry any evidence. On the contrary the record before us supports a case of the respondent being overly indulgent and lenient with the appellant in so far as the provisions of its documents is considered. From the inception of the audit, the appellant has demonstrated indifference in complying with the respondent's requests in providing documents. it is in light of this that we find the appellant is being utterly dishonesty in its submissions in averring that it submitted documents to the respondent in support of the objection notices.”

11. For the appellant to have demonstrated such indolence and then expected the Tribunal to aid the same by ignoring the form of the objection purportedly so as to do justice reflects a disregard for both the established process and the law on the part of the appellant. A valid notice of objection is



essential to initiate the appellate process and legitimize any subsequent appeal to the Tribunal against the Commissioner.

12. I concur with the Tribunal that the notice of objection filed by the appellant was invalid and as such, the taxes as assessed by the respondent had crystalized and were due. Be that as it may, I note that the Tribunal dealt with the other two grounds raised by the appellant and I too will nonetheless determine them for finality's sake.

Interest expenses on the credit facilities

13. The appellant takes issue with the respondent for failing to consider the interest accrued on credit facilities obtained by the appellant. These facilities, according to the appellant, were secured for the express purposes of acquiring two prime movers, augmenting the appellant's working capital, refurbishing its manufacturing plant, and procuring manufacturing equipment.
14. Consequently, it is asserted that these facilities were instrumental in generating the appellant's revenue during the tax periods in question. On this basis, the appellant argues that the interest expense incurred in the generation of this income should have been considered by the respondent as a legitimate business expense and, therefore, an allowable deduction under section 15 of the *Income Tax Act*.
15. The respondent vehemently opposes this claim by the appellant due to a lack of supporting evidence. It is noted by the respondent that documents provided by the appellant, appearing on pages 66 to 93 of the Record of Appeal to support this assertion were not submitted during the initial objection phase or the Tribunal hearing. These documents were only introduced as supplementary submissions to the Tribunal on 24th May 2021.
16. Section 56(1) of the *TPA* is clear that in any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect. This principle has been consistently upheld as evidenced in the case of *Commissioner of Domestic Services V Galaxy Tools Limited*, [2021] eKLR. The Court observed that Kenya operates under a self-assessment tax regime, which mandates taxpayers to calculate and remit taxes based on their own declarations and assessments of what they owe. Within this framework, tax laws empower the Commissioner to retrospectively review and determine the accuracy of the taxes remitted by the taxpayer.
17. Against this background the Court acknowledges that the appellant does not dispute the respondent's claim that the documents intended to support the interest expense claims were not provided at the initial stages but only presented during the Tribunal submissions. The appellant has not offered any compelling reasons for this. I concur with the respondent that evidence cannot be presented by way of submissions. Reflecting on the Tribunal's observations, it is evident that the appellant's approach did not meet the required procedural standards.
18. At paragraph 25 of the Judgment the Tribunal notes that:

“The appellant herein has not produced a shred of evidence in this appeal to demonstrate, reasonably, to the Tribunal that the respondent's assessment was incorrect and the extent of its incorrectness....”
19. Having already stated that the jurisdiction of this Court is limited to matters of law only, it follows that an appeal before the High Court cannot review new factual evidence. This ground of appeal therefore fails on that account.



Rental income

20. The final issue that forms the basis of this appeal is premised on the submission by the appellant that the respondent had appointed the appellant's tenant (New Wide Garments (K) EPZ Limited) as withholding tax agents in respect of rental income. The said tenant withheld and remitted to the respondent the sum of Kshs. 5,387,707/= as amount withheld. It is the appellant's case that the tax withheld on the rent was the final tax and more tax was not payable, contrary to section 76A of the [Income Tax Act](#).
21. While the respondent acknowledges that it had appointed the appellant's tenant as a withholding tax agent, but disputes the appellant's interpretation that the tax withheld is a final tax. According to the respondent, withholding tax on rental income should be considered a credit against the taxpayer's annual returns, not a final tax. Consequently, due to the appellant's failure to file annual returns, the respondent assessed additional rental income taxes totaling Kshs 6,978,718 for the year 2018.
22. In fact, the respondent notes that this was not the only case where the appellant failed to declare rental income. Records indicate that the appellant had other tenants from whom rental income was received but not declared for tax purposes.
23. In dealing with this issue it is important to note that under the [Income Tax Act](#), rental income is explicitly taxable as per sections 3(2)(a)(iii) and 6A. The act of withholding tax from such income is prescribed by section 35(3)(j), but this section does not specify that the withheld amount constitutes a final tax.
24. Although paragraph 5 of the Third Schedule addresses final taxes for certain income types listed under items (a) to (d), it does not clarify the finality of withholding tax on rental income in paragraph 5(ja), which merely sets the tax rate without indicating its finality. In the Court's opinion, the lack of an explicit provision by Parliament regarding the finality of withholding tax on rental income suggests no intention to treat it as a final tax.
25. If Parliament had intended for such tax to be final, it would have clearly stated so, as it has in the preceding sections of the Act. For these reasons the appellant's argument of a legitimate expectation that the withholding tax was a final tax obligation is unfounded, as such expectations must align with the clear stipulations of the law as affirmed in the case of [Republic V Kenya Revenue Authority; Proto Energy Limited \(Ex parte\)](#) (Judicial Review Application E023 of 2021), [2022] KEHC 5 (KLR) (24 January 2022) (Judgment). Since the appellant's expectation contradicts statutory provisions, this ground of appeal also fails.
26. Regarding the undeclared rental income from additional tenants, as earlier stated, the appellant bears the burden of disproving the Commissioner's additional assessment. Without belaboring the point, it is clear that the appellant failed in its duty of providing any evidence of tax paid on rental income received from its other tenants and the assessment by the respondent therefore stands.

Disposition

27. For the reasons that I have stated, this Court upholds the decision of the Tribunal dated 18th June 2021. Consequently, the appeal is found to be devoid of merit and is dismissed with no orders to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

