



**Geo Chem Middle East v Commissioner of Domestic Taxes (Income Tax Appeal E053 of 2022) [2024] KEHC 6859 (KLR) (Commercial and Tax) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6859 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E053 OF 2022**

**FG MUGAMBI, J**

**JUNE 7, 2024**

**BETWEEN**

**GEO CHEM MIDDLE EAST ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(Being a partial appeal against the judgment of the Tax Appeals Tribunal delivered on the 14th April, 2022 in Appeal No. 252 of 2021)*

**JUDGMENT**

**Background**

1. The appellant is a Dubai based company registered in Kenya for the purpose of, *inter alia*, the inspection, survey and testing of a variety of export and import cargo including petroleum products.
2. The respondent is a principal officer of the Kenya Revenue Authority appointed under section 13 of the [Kenya Revenue Authority Act](#) Cap 469 Laws of Kenya.
3. The appellant entered into a contract with the Kenya Bureau of Standards (KEBS) to carry out inspection and testing of imported petroleum products. The contract was terminated by KEBS and a dispute arose which was resolved through arbitration proceedings. The arbitral tribunal granted an award in favour of the appellant to the tune of USD 15,401,504.70. The arbitral award was, following several appeals, ultimately confirmed by the Supreme Court of Kenya on 18<sup>th</sup> December 2020.
4. Vide a letter dated 7<sup>th</sup> April 2021, the respondent issued to the appellant an assessment for a sum of Ksh 1,084,776,666/= for corporation tax and VAT for the year 2016 and July 2016 respectively. The appellant opposed the assessment through a notice of objection dated 28<sup>th</sup> April 2021 which was found to be invalid by the respondent on the basis that it failed to meet the statutory threshold.



5. The appellant appealed to the Tax Appeals Tribunal (hereinafter the Tribunal) against the respondent's decision of invalidation of the notice of objection. The Tribunal, vide its judgment dated 14<sup>th</sup> April 2022, found it meritorious and set aside the respondent's decision of invalidation of the notice of objection dated 30<sup>th</sup> April 2021.
6. The Tribunal directed the respondent to issue an appropriate objection decision in respect of the appellant's notice of objection dated 28<sup>th</sup> April 2021 and granted it the liberty to specifically request any material documents absolutely necessary in reaching a sound objection decision.
7. The appellant being dissatisfied with part of the judgment of the tribunal appealed to this court against that part of the decision on the following grounds:
  - i. The Tribunal erred in law and violated the stare decisis principle by disregarding the High Court decision in *Geochem Middle East -Vs- Kenya Revenue Authority & 2 Others; National Bank of Kenya & 2 Others (Interested Parties)* (2021) eKLR (Misc Civil Application E231 of 2021) which was directly applicable to the dispute and was extensively submitted upon:
  - ii. Failing to find or hold that the 2016 Arbitral Award (on which the Respondent assessed VAT and corporation tax) was not a receipt of funds under the law and proceedings were taken by the parties up to the Supreme Court and that process concluded on 17th March 2021;
  - iii. Failing to hold and find that the assessment made by the Respondent related to a different entity and consequently the Appellant was a stranger to that assessment;
  - iv. Failing to hold and find that the Appellant was deprived of its contractual and legal entitlements due to the Respondent's wilful conversion of funds paid by Petroleum importers and which the Respondent converted;
  - v. Failing to find or hold that the Respondent had collected, kept, and retained the Appellant's funds totalling Kshs. 256,485,643/20 due to the Appellant as fees under the contract. And that the Respondent could not levy interest or penalties over funds it had all along kept. But was obligated, in fact, to first give credit for the Kshs. 256,485,643/20 belonging to the Appellant before the Respondent could make any claim.
  - vi. The Tribunal erred in law by ignoring, the Appellant's submissions that the High Court decision in *Geochem Middle East -Vs- Kenya Revenue Authority & 2 Others; National Bank of Kenya Ltd & 2 Others (Interested Parties)* (2021) el(I.R (Misc Civ Application E231 of 2021) was not only relevant and applicable to the case but was also binding on the Tribunal.
  - vii. The Tribunal's violation of precedent violates the rule of law and the predictability, certainty, and uniformity that precedent brings to the administration of tax disputes.
  - viii. The Tribunal further erred in fact and in law by purporting reliefs which no party had pleaded for or submitted on and where that relief was not the most appropriate relief in the circumstances of the appeal.
8. Based on the foregoing reasons, the appellant prayed for its appeal to be allowed with costs and the respondent's decision contained in the letter dated 30<sup>th</sup> April 2021 be set aside in its entirety.
9. The respondent opposed the appeal through its statement of facts dated 4<sup>th</sup> July 2022. The respondent contended that the Tribunal was within its mandate in ordering the Commissioner to specifically request any material documents that were necessary in reaching a sound objection decision and that the Tribunal assessed the issue brought before it and dealt with the issues as was within its mandate.



10. Further that the issues brought before the Tribunal touching on the assessment could not be addressed by the Tribunal as the respondent had not made a determination on the said issues. The respondent argued that the Tribunal duly interpreted the *Tax Procedures Act (TPA)* and other relevant statutes to arrive at its decision without delving into issues that were not subject to the decision appealed against by the appellant.
11. Based on the foregoing, the respondent prayed to have the instant appeal dismissed with costs and the decision of the Tribunal be upheld and the appellant be ordered to produce material documents necessary for the respondent to reach a sound objection decision.

### **Analysis and determination**

12. The court has considered the Memorandum and Record of Appeal, the response to the appeal and the parties' respective submissions filed in this appeal.
13. The uncontroverted facts are that the respondent issued an assessment dated 7<sup>th</sup> April 2022 to the appellant whereby it claimed taxes amounting to Kshs.1,084,776,666/= being corporation tax for Kshs.747,451,453/= and Kshs.337,325,213/= as VAT. The assessment letter is found from pages 33 to 35 of the record of appeal.
14. The appellant objected to the entire assessment vide a letter dated 28<sup>th</sup> April 2021 on the grounds that the respondent was in fact holding the sums which the appellant had earned during the performance of the contract and that it had not received any sums due to it under the contract. Consequently, the appellant submitted that no tax, interest or penalty was due. The notice of objection is annexed on pages 36-40 of the record of appeal.
15. On 30<sup>th</sup> April 2021, the respondent responded to the notice of objection and concluded that the objection notice was invalid having failed to meet the requirements of section 51(3) of the *Tax Procedures Act*. It is this decision (annexed on pages 18-19 of the record of appeal) that was the subject of appeal before the Tribunal.
16. In its judgment dated 14<sup>th</sup> April 2022, the Tribunal extracted two issues for determination, which are whether there was an appealable decision for determination before it and whether the respondent was justified in the invalidation of the appellant's notice of objection. These are the 2 issues that the Tribunal proceeded to determine.
17. The Tribunal found that the respondent's decision to invalidate the notice of objection dated 30<sup>th</sup> April 2021 was an appealable decision and further that the invalidation of the notice of objection by the respondent was unconscionable as the respondent was in possession of material information and documents which it could make undue reference to without reference to the appellant.
18. Based on this reason among others, the Tribunal found the invalidation of the notice of objection to be unjust and set it aside.
19. The crux of the appeal before the Tribunal was whether the respondent's decision to invalidate the notice of objection was justified. It was not necessary for the Tribunal to delve into the merits of the assessment at that point but rather the dismissal of the notice of objection. The Tribunal did not err in any way by not delving into issues, as stated in the Memorandum of Appeal before this court, that were not subject to the decision appealed against by the appellant.
20. The appeal before this court is anchored on grounds that seek to have the court consider and analyse the merits of the assessment which was not considered before the Tribunal.



21. Section 51 of the *TPA* is clear about the appeals process and provides that:
- “(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.
  - (2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.
  - (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; and
    - (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).
    - (c) all the relevant documents relating to the objection have been submitted.
    - (4) 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.”
22. Where an objection notice has been invalidated by the Commissioner for want of compliance with the mandatory provisions of section 51 of the *TPA*, the Commissioner has the obligation to inform the taxpayer that the objection was not validly lodged. The taxpayer’s recourse would then be to validate the objection notice based on the shortcomings set out by the Commissioner.
23. The Tribunal noted at paragraph 47 of its ruling that: the respondent is hereby directed to determine and issue an appropriate objection decision in respect of the appellant’s notice of objection dated 28<sup>th</sup> April 2021. The respondent is at liberty to specifically request any material documents absolutely necessary in reaching a sound objection decision.
24. The Tribunal by making this determination steered off the substance of the objection decision, for the respondent to make a finding on the tax dispute. By asking this court to delve into the substantive issues as raised in the Memorandum, of Appeal and which were not substantively considered by the Tribunal, the appellant would be in breach of the doctrine of exhaustion as the *TPA* is already very clear that this court’s jurisdiction can only be invoked by way of an appeal when the Tribunal has adjudicated over the matter.
25. I would therefore align myself with the Tribunal’s finding in setting aside the objection decision and directing the respondent to specifically request for material documents necessary in reaching a sound objection decision. Once such steps have been followed and an objection decision has been made, the taxpayer would be at liberty to appeal against the decision to the Tribunal on the substance and/or merits of the assessment and objection decision of the respondent and thereafter to this court.



**Disposition**

26. I find no reason to interfere with the Tribunal's judgment dated 14<sup>th</sup> April 2022. This appeal is devoid of merit and the same is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7<sup>TH</sup> DAY OF JUNE 2024.**

**F. MUGAMBI**

**JUDGE**

