



**Commissioner of Investigations & Enforcement v Holwadag
Construction Company Limited (Income Tax Appeal E043 of 2023)
[2024] KEHC 8806 (KLR) (Commercial and Tax) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E043 OF 2023
JWW MONG'ARE, J
JULY 15, 2024**

**BETWEEN
COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT APPELLANT
AND
HOLWADAG CONSTRUCTION COMPANY LIMITED RESPONDENT**

JUDGMENT

1. The Respondent was investigated in regard to supplies made between 2014-2018 to the County Government of Garissa for corporation tax, value added tax and directors' Income taxes obligations. The investigation resulted in the Appellant issuing the Respondent with a tax assessment dated 25/2/2020 for Kshs 24,579,034.00/= being the Respondent's VAT and corporation tax liability plus interest.
2. The Respondent filed an objection to this assessment on 19/8/2020 and the Appellant responded thereto vide an objection decision dated 14/10/2020 whereby it invalidated the Respondent's objection for failure to meet the thresholds that have been placed in section 51 of the [Tax Procedures Act](#).
3. The Respondent being aggrieved by the objection decision, lodged an Appeal against it at the Tax Appeals Tribunal (hereinafter the Tribunal).
4. The Tribunal considered the Appeal and found it meritorious. It set aside the Appellant's objection decision dated 14/10/2020 and referred the Respondent's notice of objection lodged on 19/8/2020 back to the Appellant for consideration on its full merits and ordered the Appellant to issue an appropriate objection decision within 60 days from the date of delivery of the judgement.



5. The Appellant being dissatisfied with the entire judgement of Tribunal and the resulting order filed an Appeal before this court on the following grounds:-

- “ 1. The Tribunal erred in law in failing to determine that the Appellant’s Notice of Objection issued on 19th August 2020 was not a valid objection pursuant to the provisions of Section 51(3) of the *Tax Procedures Act*.
2. The Tribunal erred in law in referring back to the Respondent the Appellant’s Notice of Objection lodged on 19th August 2020 for consideration on full merit and for issuance of a decision within 30 days whereas there is no valid objection lodged by the Appellant for consideration.
3. The Tribunal erred in law in setting aside the Respondent’s decision issued on 14th October 2020 whereas no proper and valid Notice of Objection was lodged.
4. The Tribunal in handling the matter failed to ensure that justice was done to the Appellant by allowing flaws of rules and procedures in handling the matter contrary to the provisions of Article 159(2) and (4) of the *Constitution of Kenya 2022*.
5. 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.
6. The Tribunal erred when it framed wrong issues for determination thus asked itself the wrong questions and in so doing arrived at a wrong conclusion.”

6. Based on the foregoing, the Appellant prayed to have the Appeal allowed and the judgment of the Tribunal set aside. Further that the assessments order issued for the period 2014-2017 issued on 25/2/2020 amounting to Kshs 24,579,034.00/= being VAT and corporation tax be upheld.

7. In opposition to the Appeal, the Respondent filed a statement of facts dated 25/10/2023.

8. The Respondent stated that the Tribunal’s decision was correct, that it duly lodged a valid objection before the Appellant which the Appellant failed to consider and that an application for late objection was lodged with sufficient documents to validate the objection.

9. Further that the Appellant’s decision communicated vide its letter dated 14/10/2020 was in itself invalid and unknown in law and the Tribunal was right to set it aside.

Analysis and Determination:-

10. The Appellant filed written submissions dated 18/9/2023 while the Respondent filed submissions dated 2/11/2023 which I have carefully considered alongside the pleadings and the Record of Appeal filed in this matter. I note that the grounds of Appeal may be condensed to the following issue for determination:-

“ Whether the Tribunal erred in setting aside the Appellant’s objection decision and ordering the Appellant to reconsider the merits of the Respondent’s notice of objection.”

11. I note from the record that the Appellant issued a notice of assessment on 25/2/2020 for the payment of Kshs 4,202,664/= and Kshs 20,376,371= being corporation tax and VAT respectively inclusive of interest. The assessment is found on page 357 of the Record of Appeal.



12. The Respondent's Notice of Objection to the assessment was dated 19/8/2020 and the subsequent objection decision from the Appellant is dated 14/10/2020. The Notice of Objection and objection decision are annexed on page 357 and 348 respectively of the Record of Appeal.
13. In the objection decision, the Appellant notified the Respondent that its objection had not been validly lodged as it did not meet the provisions of section 51 of the *Tax Procedures Act* (TPA) 2015 as the objection was received beyond the stipulated time of thirty days and that it did not state precisely the grounds of objection, the amendments required to be made and the reasons for the amendments. Based on this, the objection was rejected in totality and the assessments were confirmed by the Appellant.
14. Section 51 of the *TPA* is the guiding statutory provision in the circumstances before the court. It states:-
 - “(2) 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;
 - (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.
 - (4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall within a period of fourteen days notify the taxpayer in writing that the objection has not been validly lodged.
 - (5) ...
 - (6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.
 - (7) ...
 - (7A) The Commissioner shall notify the taxpayer of the decision made under subsection (7) within fourteen days after receipt of the application.
 - (8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and the Commissioner's decision shall be referred to as an "objection decision.”
15. In the present the Appellant's assessment was issued on 25/2/2020 and the Respondent filed its objection to it on 19/8/2020. The objection was filed almost 6 months later in contravention of the



provisions of section 51(2) of the TPA which requires an objection to be filed within 30 days of being notified of the decision.

16. I have analysed the contents of the Notice of Objection. It merely states the grounds of objection in a numbered format but does not include the amendments required to be made to correct the decision and the reasons for the amendments. Further I note that there no documents attached to it to support the grounds of objection.
17. The law has placed an obligation on the taxpayer to persuade the Appellant that its assessment is incorrect. This was stated in the case of Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR where it was held:-

“The import of the above provisions is that the party with the obligation of persuasion (what Wigmore termed the risk of non-persuasion) is said to bear the burden of proof.[9] The flip side of the foregoing is the effect of non-persuasion on a party with the burden of proof which is that the particular issue at stake in the litigation will be decided against him/her. Generally, the taxpayer has the burden of proof in any tax controversy. The taxpayer must demonstrate that the commissioner’s assessment is incorrect. The taxpayer has a significantly higher burden. The taxpayer must prove the assessment is incorrect.”

18. It is therefore my finding that the notice of objection by the Respondent did not meet the requirements set out in section 51 of the TPA and was therefore invalid ab initio. The fact that the objection was filed inordinately late meant that it was invalid from the onset and the Respondent’s recourse was to lodge an application with the Appellant for the extension of time to file it.
19. I therefore agree with the submissions of the Appellant that the Tribunal erred in not finding that the notice of objection was invalid and in referring it back to the Appellant for consideration on full merit.
20. I find that in the circumstances, the Appellant’s decision of 14/10/2020 which rejected the Respondent’s notice of objection was justified as no proper and valid notice of objection was lodged.
21. It is my observation arising from the record equally the Appellant was required under section 51(4) of the TPA to notify the Respondent within 14 days that its notice of objection had not been validly lodged. The Appellant did not comply with this provision as it only notified the Respondent through its objection decision on 14/10/2020, about 2 months later. It is my view that this late notification does not negate the fact that the Respondent’s notice of objection was invalid from the onset thus justifying the Appellant’s rejection of it.
22. The upshot of the foregoing is that this court finds that Appeal before the court is meritorious and the same is allowed as prayed. Subsequently, the judgment of the Tribunal is set aside and the assessment order issued for the period 2014-2017 issued on 25/2/2020 amounting to Kshs 24,579,034.00/= being VAT and corporation tax is hereby upheld.
23. Costs follow the event. The Appeal has been successful. I award costs of this Appeal to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-



1. Ms. Onyango for the Appellant.
2. Mr. Tarus holding brief for Mr. Kamwara for the Respondent.
3. Amos - Court Assistant

