



REPUBLIC OF KENYA



**Commissioner of Domestic Taxes v Cyka Manpower Services Limited (Tax Appeal E037 of 2023)
[2024] KEHC 9386 (KLR) (Commercial and Tax) (11 July 2024) (Interim Judgment)**

Neutral citation: [2024] KEHC 9386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E037 OF 2023
WA OKWANY, J
JULY 11, 2024**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

CYKA MANPOWER SERVICES LIMITED RESPONDENT

*((Being an Appeal from the Judgment of the Tax Appeals Tribunal at Nairobi
delivered on 10th February, 2023 in the Nairobi TAT No. 21 of 2022))*

INTERIM JUDGMENT

Introduction

1. The Appellant is the Commissioner of Domestic Taxes charged with the mandate of collecting taxes in the Republic of Kenya.
2. The Respondent is a limited liability company incorporated under the *Companies Act*, Cap .486 of the Laws of Kenya (now repealed). The Respondent has, since the year 2008 been engaged in the business of providing manpower services in Kenya.
3. The Appellant issued the Respondent with additional tax assessments in respect to Value Added Tax (VAT) and Pay As You Earn (PAYE) for the tax period between January 2016 and March 2016 through a letter dated the 14th June 2021.
4. The Respondent objected to the Appellant's aforesaid Tax Assessment on various grounds that it set out in the objection letters dated the 24th June 2021.
5. The Appellant delivered its objection decision on the 22nd November 2021.



6. Dissatisfied with the objection decision, the Respondent filed an Appeal before the Tax Appeals Tribunal (hereinafter “the Tribunal”), being Nairobi Tax Appeal Tribunal No. 21 of 2021, wherein it argued that the objection decision had been issued beyond the statutory prescribed timelines stipulated under Section 51(11) of the [Tax Procedures Act](#) 2015.
7. Concurrently with the Appeal, the Respondent also filed a Notice of Preliminary Objection on the ground that the Appellant’s objection decision had been issued beyond the statutory prescribed timelines.
8. The Tribunal heard the preliminary objection and allowed it in its ruling delivered on 10th February 2023.
9. The Appellant herein was dissatisfied with the ruling of the Tribunal and, as a result, filed this appeal seeking inter alia orders to set aside the aforesaid decision of the Tribunal dated the 10th February 2023 and further that this Court directs the Tribunal to consider the Respondent’s appeal on merit.

The Appeal

10. The Appellant enumerated the following Grounds of Appeal in its Memorandum of Appeal: -
 - i. The Honourable Tribunal erred in fact and in law by failing to appreciate whereas the Objection was lodged on 6th July, 2021 there was no valid objection within the provisions of section 51 (3) until 11th November, 2021.
 - ii. The honorable Tribunal erred in law and in fact by failing to appreciate the importance of the Respondent’s email dated 18th November, 2021.
 - iii. The Honourable Tribunal erred in law and fact by failing to objectively examine all documents and further misdirected itself as to the import of the Respondent’s letters dated 2nd November, 2021.
 - iv. The Honourable Tribunal erred in law and in fact by failing to appreciate that the Appellant could not have commenced the objection process until a valid Objection is lodged.
 - v. The Honourable Tribunal erred in law and fact failing to appreciate that the Objection decision made on 22nd November, 2021 was made within statutory timelines.
 - vi. That the Honourable Tribunal erred in law and in fact by failing to consider the Respondent’s Objection as well as the Appellant’s Objection decision thereon before arriving at its findings.
 - vii. That the Honourable Tribunal erred in law and in fact in not making a decision on the merits of the case before it and only opted to rely on a procedural issue, which it also based on miss-appreciation of the principles of tax law particularly the provisions of section 51 of the [Tax Procedures Act](#).
11. The Respondent filed a statement of facts dated 18th August, 2023 in response to the Appeal wherein it reiterated the circumstances leading to the filing of the Appeal before the Tribunal following the Appellant’s issuance of additional assessments for the Respondent’s VAT and PAYE for the tax period between January 2016 and March 2016.
12. The Respondent explained that it objected to the tax assessment vide a letter dated 24th June, 2021 and that the Appellant delivered its objection decision on 22nd November, 2021 way beyond the prescribed statutory timelines thereby resulting in the Appeal before the Tribunal as well as a Notice



of Preliminary Objection on grounds that the Appellant's objection decision had been issued beyond the statutory prescribed timelines.

13. It was the Respondent's case that it complied with all the procedures and that the Tribunal arrived at the correct decision.
14. The Appeal was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Tribunal correctly interpreted the provisions of Section 51 of the [Tax Procedures Act](#) (TPA).
15. In determining this appeal, I will be mindful of the fact that this court is exercising appellate jurisdiction as 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”.

16. The above provision means that this appeal is limited to matters of law only and does not permit an 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).
17. The instant appeal stems from the additional VAT and PAYE assessment that the Appellant issued to the Respondent who successfully filed a Notice of Preliminary Objection before the Tribunal where it argued that the Appellant's Objection Decision was issued beyond the statutory period provided under Section 51 (11) of the TPA.
18. The Respondent submitted that since its Tax Assessment objection was made on 24th June 2021 the objection was deemed as allowed on 24th August 2021 by dint of the provisions of Section 51 (11) of the TPA. According to the Respondent, the Appellant's objection decision dated 22nd November 2021 was null and void having been issued beyond the sixty days statutory timelines from the date of receipt of the objection.
19. The Appellant, on the other hand, submitted that its decision dated 22nd November 2021 was issued within the stipulated statutory timelines as there were intervening circumstances caused by the correspondence between the parties regarding the said tax assessments.
20. In a rejoinder, the Respondent urged the court to apply the strict interpretation of Section 51 of the TPA and arrive at the conclusion that the objection decision was rendered outside the statutory timelines. For this argument, the Respondent cited the decision in *Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others* [2019] eKLR where it was held as follows: -

“The above principles apply to general interpretation of statutes. However, when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in *Cape Brandy Syndicate v I.R. Commissioners* [1921] 1KB (cited by the appellants), expressed the common law position in this area when he stated;

‘...in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used’. (Emphasis ours)



49. Similar statements have been made in several judgments on tax cases. In *Scott v. Russell (Inspector of Taxes)*, [1948] 2 All ER Lord Simonds expressed:

“... there is a maxim in Income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him.”

This common law position is what pertains here and has been adopted by our courts as good law. In our view there cannot be an equitable construction of income tax legislation. The norm is that a taxing legislation must be construed with perfect strictness whether or not such construction is against the State or against the person sought to be taxed. If, however there is any real ambiguity in a taxing Act, such ambiguity may be resolved in favour of the taxpayer, or, as it is sometimes stated: *contra fiscum*. The following excerpt from the renowned author of *Bennion on Statutory Interpretation*, 5th Edition, summarises the correct position in law as far as interpretation of tax legislation is concerned.

“I find that they cannot tax the applicant twice over *Bennion* adds:-

‘Nevertheless taxation is clearly “penal” within this section of the Code, and must not be enforced by the courts unless clearly imposed. As Evans LJ said in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision so that the taxpayer shall not become liable to tax unless this is clearly and unequivocally the object of the statutory provisions ... The Courts are reluctant to adopt a construction permitting a person’s tax liability to be fixed by administrative discretion....’ This is how this court has regarded the assessment of tax on an arbitrary input-output formula because it is not supported by any law nor is its retroactivity permitted by law...The same principles as above, were accepted and applied in the case of *Cape Brandy Syndicate vs. Inland Revenue Commissioners* [1921] KB 64 where Ronlat J, restated the principle in these words: ‘in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no reason for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly on the language used.’... Again, in the case of *Ramsay Ltd vs. Inland Revenue Commissioner* [1992] AC 300 the same principles were expressed as follows: -

‘A subject is only to be taxed on clear words not upon intendment, or upon the “equity” of an Act’. Any taxing Act of Parliament as to be construed in accordance with this principle.” (Emphasis supplied).



21. The Respondent also referred to the decision in *Commissioner of Domestic Taxes vs. Unga Limited* [2021] eKLR where the Court stated as follows: -

“...The accepted principle in construing a tax statute is that the court is guided by the statutory words themselves and that there is no room for intendment or adopting a purposive approach when the words of the statute are clear and unambiguous.....”

“.....The correctness or otherwise of the time limitation is not an issue for the court to determine, but rather to interpret. To hold otherwise would be to place an implication that goes against clear statutory provision...”

As correctly submitted by both parties the law places a time limitation on the Commissioner but not on the tax payer. The correctness or otherwise of the time limitation is not an issue for the court to determine, but rather to interpret. To hold otherwise would be to place an implication that goes against clear statutory provision

22. The Respondent noted that not only did the Appellant not furnish the Tribunal with evidence of the alleged intervening correspondences, but that the said correspondences were sent on 2nd, 5th and 18th November 2021, way after the expiry of the sixty (60) days period within which the Appellant ought to have delivered its decision. According to the Respondent, the Appellant should have delivered the objection decision on or before 24th August 2021.

23. Section 51 (11) of the *Tax Procedures Act*, I note that the said Section states as follows: -

The Commissioner shall make the objection decision within sixty days from the date of

- a. The notice of objection; or
- b. Any further information the Commissioner may require from the tax payer, Failure to which the objection shall be deemed to be allowed.”

24. My finding is that Section 51 (11) is clear and unambiguous on the issue of timelines for the making of the objection decision. Having noted that the objections were lodged on 24th June 2021, I find that the Appellant should have delivered its objection decision on or before the 24th August 2021. As I have already noted in this judgment, this was not the case as the decision was delivered much later on 22nd November 2021. I therefore find that the Tribunal arrived at the right decision in allowing the Respondent’s preliminary objection and finding that the objection decision was invalid having been made outside the statutory timelines. I find guidance in the decision in *Equity Group Holdings Limited vs Commissioner of Domestic Taxes (2020)* eKLR where the Court stated as follows when dealing with a similar issue: -

“.....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.

25. My finding is that the intervening actions could only have broken the chain of causation if the said actions had occurred within the 60 days period between 24th June 2021 and 24th August 2021 when the Appellant was supposed to have rendered its objection decision. In the instant case, I note that the alleged intervening actions relate to correspondence that took place long after the expiry of the stipulated 60 days in November 2021.
26. The appellant also argued that the objections lodged by the Respondent on 24th June 2021 were not valid because they did not meet the test set out under Section 51 (3) of the TPA. It was the Appellant's case that the Tribunal misdirected itself in its decision as the Respondent did not substantiate the objection by tendering evidence to support its objection. Reference was made to Section 59 (1) of the TPA which stipulates that: -
- “(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to—
- (a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
 - (b) Furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice;
 - (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.”
27. In a rejoinder, the Respondent submitted that its objections met the validity test as set out in Section 51 (3) of the TPA as the Appellant did not tender any proof before the Tribunal to show that it informed the Respondent that the objections were not valid. The Respondent added that it informed the Appellant of its willingness to cooperate with its officers in the audit. The Respondent cited the provisions of Section 51 (4) of the TPA which provides for the action the Appellant should have taken in the event it found that the objections were not valid.

Section 51(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.



28. Section 51 (4) of the TPA stipulates as follows: -

“..... 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 and request the taxpayer to submit the information specified in the notice within seven days after the date of the notice....” [Emphasis mine].

29. I have perused the objections that the Respondent lodged with the Appellant following the Tax Assessment and I am satisfied that the Respondent complied with the provisions of Section 51 (3) of the TPA. I have also perused the documents that the Appellant presented before the Tribunal and I note that none of the said documents show that the Appellant notified the Respondent that its objections were invalid as required by the provisions of Section 51 (4) of the TPA. I therefore find the Respondent’s objections dated the 24th June 2021 were valid.

30. Turning to the Appellant’s argument that it was not duty bound to deliver its decision within 60 days since the Respondent’s objections were invalid, I find that the court has already made a decision on the validity and does not need to belabor the point further. Be that as it may, even assuming, for arguments sake, that the objections were invalid, I find that Appellant was still under a duty to render its objection decision within 60 days. This is the position that was adopted in *Rongai Tiles & Sanitary Wares Limited v Commissioner of Domestic Taxes (Tax Appeal E011 of 2020)* [2023] KEHC 18546 (KLR) (Commercial and Tax) where it was stated as follows: -

13. .The Commissioner has argued that it is not bound by this time if an objection is invalidly lodged. I reject this argument and agree with the Tribunal that going by the wording of section 51(11) of the TPA above, the Objection Decision ought to have been made within 60 days regardless of whether the objection was valid. I therefore find that the Objection Decision was outside the statutory timelines provided by section 51(11) of the TPA.

31. For the reasons that I have stated in this judgment, I find that the instant appeal is not merited and I therefore dismiss it with costs to the Respondent.

32. Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

