Rongai Tiles & Sanitary Wares Limited v Commissioner of Domestic Taxes (Tax Appeal E011 of 2020) [2023] KEHC 18546 (KLR) (Commercial and Tax) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18546 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E011 OF 2020

DAS MAJANJA, J

JUNE 16, 2023

BETWEEN

RONGAI TILES & SANITARY WARES LIMITED .... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES .... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 26th February 2020 in Tax Appeal No.163 of 2017)

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal by the Appellant against the decision of Tax Appeals Tribunal ("the Tribunal") dated 26th February, 2020. The appeal is premised on the following 8 grounds contained in the memorandum of appeal dated 9th March 2020 as follows:

    1) The Honourable Tribunal erred in law and fact in finding that the Appellant failed to produce documents sought by the Respondent despite the evidence to the contrary on record.

    2) The Honourable Tribunal erred in law and fact by retrospectively relying on section 51(3)(c) of the Tax Procedure Actto find that the Appellant ought to have provided all the documents to the Respondent, which section was enacted after the institution of the Appeal at the tribunal

    3) The Honourable Tribunal erred in law and fact by dwelling on the form rather than the substance of the Notice of Objection and by holding that the Notice

of Objection dated 15th July, 2017 was invalid and did not conform to the requirements of section 51(3) of the Tax Procedure Act.

4) The Honourable Tax Tribunal erred in law and fact in holding ‘the Objection Decision dated 21st September, 2017, although issued out of time is validated contrary to the various weighty binding authorities by this Honourable Court 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.” Accordingly, the Tribunal acted ultra vires its powers.

5) The Honourable Tribunal erred in law and fact by finding that the Objection decision ought to have been made by 15th September, 2017 in compliance with section 51(11) of TPA while on the other hand holding that the 9 days delay is not an inordinate delay and contrary to the various weighty binding decisions of this Honourable court supplied by the Appellant.

6) The Honourable tribunal erred in law and fact by finding that failure by the Respondent to conduct investigation into the Appellant’s affairs and the late issuance of the Objection Decision outside the mandatory timelines did not infringe on the Appellant’s right to fair administrative action.

7) The Honourable Tribunal erred in law and fact in failing to answer the question as to whether the “banking method’ applied by the Respondent to arrive at the default assessment was erroneous and contrary to Tax laws, international instructions, best practices and Kenyan jurisprudence.

8) The Honourable tribunal erred in law and fact in failing to consider that the taxes imposed by the Respondent were excessive, punitive, unconscionable and contrary to the known principles of tax and our tax laws and *the Constitution* of Kenya.

2. Based on the grounds set out above, the Appellant urges the court to allow the appeal and set aside parts of the Tribunal Judgment which holds that the Notice of Objection dated 15th July 2017 is invalid and does not conform to the requirements of section 51(3) of the *Tax Procedures Act*, 2015 (“the TPA”). It also seeks an order that the Objection Decision dated 21st September 2017 (“the Objection Decision”) although issued out of time is validated and that corporate tax and VAT assessment is due and owing to the Respondent (“the Commissioner”) by the Appellant. In the alternative, the Appellant urges the court to direct the Commissioner to conduct a proper assessment for the year 2014 and 2016 respectively and that it actively involves the Appellant. The appeal has been canvassed by way of written and oral submissions.

3. The background facts leading to the appeal are not in dispute and have been highlighted by the court in its previous rulings. The Tribunal delivered its judgment on 26th February 2020 confirming the Commissioner’s assessment of Kshs. 410,093,385.00 as held in the Objection Decision. Being dissatisfied with the judgment, the Appellant lodged this appeal and together with it, an application dated 9th March 2021 for stay pending appeal. On 6th August 2020, the court granted a conditional order of stay pending appeal. In the course of the proceedings, the court did suggest to the parties to explore the possibility of using the Commissioner’s Alternative Dispute Resolution (‘’ADR”) framework to resolve this matter.

4. The Appellant presented its workings and documents to the Commissioner and after negotiations, the parties entered into a partial agreement where the Income Tax liability was reduced from Kshs. 168,261,906.00 to Kshs. 1,553,639.00. The parties agreed to refer the issue of input VAT deductions to the court for determination. This understanding was encompassed in an ADR Agreement dated 2nd October 2020 ("the ADR Agreement") executed by the Appellant's counsel and the Commissioner's representative. Although the Commissioner attempted to avoid the ADR Agreement, this court, by the ruling dated 10th December 2021, adopted it as a preliminary decree of this court.

5. By the Notice of Motion dated 26th January 2022, the Appellant sought leave to file additional documentary evidence it produced in the ADR process in this appeal. The court, by the ruling dated 13th June 2022, dismissed the application.

6. Following the ADR agreement, the remaining issue left for determination is whether the Appellant should pay VAT in the sum of Kshs. 152,711,659.00 inclusive of penalties and interest demanded by the Commissioner.

Analysis and Determination

7. Although several issues have been raised, both parties agree that the court is being called to determine whether the Appellant's objection was invalid for not being in conformity with section 51(3) of the TPA and whether the Objection Decision was also invalid having been made outside the statutory period of 60 days contrary to section 51(11) of the TPA and if so, whether this was fatal or excusable by Article 159(2)(d) of the *Constitution*.

8. 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—
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> 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;
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> 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

9. 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.

10. 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.

11. According to the record, the Commissioner received the Appellant's objection on 17th July 2017 and on 21st August 2017 it notified the Appellant that the objection was not validly lodged in accordance with section 51(3) of the TPA. In response, the Appellant, in a letter erroneously dated 15th July 2017 but received by the Commissioner on 28th August 2017, contended that the objection had fulfilled the statutory threshold as the precise grounds of objection and the amendments required to be corrected were stated therein and that no portion had been conceded and as such, no payment was due.

12. On 21st September 2017, the Commissioner issued the Objection Decision. 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 17th July 2017, it means that under as section 51(11), the Commissioner had sixty days from that date to render an objection decision which was to be made latest by 17th September 2017. The Objection Decision having been made on 21st September 2017 was thus late by four days.

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.

14. Having found that the Objection Decision was rendered late, the next issue that calls for the court's determination is whether the lateness or delay was fatal or whether it could be excused or cured by Article 159 of *the Constitution* as held by the Tribunal. When a similar question was put before Mativo J.,(as he was then) in *Equity Group Holdings Limited v Commissioner of Domestic Taxes* (Civil Appeal E069 & E025 of 2020) [2021] KEHC 25 (KLR) (Commercial and Tax) (23 August 2021) (Judgment). this is what he stated:

> 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.
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> 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 extent 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 perms provided the consequences of failing to render a decision with 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....

15. I agree with the above reasoning. The Tribunal in this case also fell into grave error when it determined that the delay in section 51(11) of the TPA was a procedural technicality capable of a constitutional cure under Article 159. The Tribunal did not have any discretion to consider the matter further once it determined that the Objection Decision was made late. Further, 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.

16. The Commissioner's delay in delivering the Objection Decision within sixty 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.

Disposition

17. I accordingly allow the appeal. The Tribunal's decision of 26th February 2020 be and is hereby set aside with the consequent effect that the Respondent's Objection Decision dated 21st September 2021 is also set aside and the Appellant's Notice of Objection dated 15th July 2017 is deemed as allowed in

accordance with section 51(11) of the *Tax Procedures Act*, 2015. This decision shall not affect the ADR Agreement dated 2nd October 2020 and the consequent preliminary decree.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023.

D. S. MAJANJA

JUDGE

Mr Mola instructed by Mola, Kimosop and Njeru Advocates for the appellant.

Mr Chabala, Advocate instructed by Kenya Revenue Authority for the Commissioner of

Domestic Taxes.