



Commissioner of Domestic Taxes v Ideal Developers & Consultants (Income Tax Appeal E035 of 2022) [2023] KEHC 23739 (KLR) (Commercial and Tax) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E035 OF 2022
A MABEYA, J
OCTOBER 19, 2023**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

IDEAL DEVELOPERS & CONSULTANTS RESPONDENT

(Being an appeal against the judgement of the Tax Appeals Tribunal delivered on 4/3/2022)

JUDGMENT

1. On 11/11/2020, the appellant issued a notice of assessment to the respondent demanding taxes amounting to Kshs.123,028,405/-. The respondent objected to the assessment on 10/12/2020. Consequently, the appellant confirmed the assessment on 17/11/2020.
2. The respondent was dissatisfied with the decision of the appellant and lodged an appeal against it at the Tax Appeals Tribunal (Tribunal). By its judgment of 4/3/2022, the Tribunal found in favour of the respondent and set aside the appellant's objection decision dated 17/12/2020.
3. Vide an amended memorandum of appeal dated 13/4/2022, the appellant appealed to this court against the entire decision of the Tribunal on the following grounds: -
 - “ 1. That the Honourable Tribunal erred in law and in fact by finding that the Appeal filed at the Tribunal despite the Notice of Appeal being filed out of time was valid.
 2. That the Honourable Tribunal erred in law and in fact to find that the respondent's objection is valid.



3. That the Honourable Tribunal erred in law and in fact in failing to find that the Respondent did not provide relevant documents in relation to the objection.
 4. That the Honourable Tribunal erred in law and in fact in failing to find that the respondent did not provide evidence that the taxes were indeed declared and taxes paid.
 5. That the Honourable Tribunal erred in law and in fact by mischaracterizing the Respondent's decision December 17, 2020 as an Objection decision and not an invalidation.
 6. That the Honourable Tribunal erred in law and in fact by failing to construe the natural effect and consequence of annulling an invalidation.”
4. Based on these grounds, the appellant sought that the Tribunal's judgment dated 4/3/2022 be set aside and his demand for taxes be upheld. Further, that in the event the court found that the objection was valid, the dispute be referred back to him to consider the documents/information provided/to be provided by the respondent in its objection.
 5. Despite proof of service of this appeal, the respondent neither appeared nor filed any response to the appeal.
 6. I have considered the record in its entirety and the submissions filed by the appellant. The grounds of appeal can be condensed into three issues for determination: -
 - a) Whether the notice of appeal was validly lodged before the Tribunal.
 - b) Whether the respondent's objection notice was valid.
 - c) Whether the appellant's letter of 17/12/2020 was an Objection Decision or an invalidation.
 7. The appellant submitted that the respondent's notice of appeal before the Tribunal was filed on 12/2/2021 which was outside the statutory period of 30 days under the *Tax Appeals Tribunal Act* (TATA). That the respondent never sought leave for extension of time. That the notice of appeal was therefore invalid and there was no proper appeal before the Tribunal.
 8. On this issue, the Tribunal noted that the memorandum of appeal and statement of facts were received via email on 26/2/2021 although the Tribunal acknowledged receipt of the same on the next working day 1/3/2021 at 9:22 AM. The Tribunal relied on article 159(2) of *the Constitution* in holding that the appeal before it was proper.
 9. Section 13(2) of the *TATA* provides: -

“The appellant shall, within fourteen days from the date of filing the notice of appeal, submit enough copies, as may be advised by the Tribunal, of—

 - a) a memorandum of appeal
 - b) statements of facts; and
 - c) the tax decision.”
 10. The record shows that the appellant did not challenge the notice of appeal before the Tribunal. What he raised was that the memorandum was filed out of time. Be that as it may, it is clear that the impugned



- decision was dated 17/12/2020. It is not clear when it was served upon the respondent. The notice of appeal was supposed to be issued within 30 days of receipt of the decision dated 17/12/2020.
11. The general rule is that, he who alleges must prove. See sections 107 and 108 of the *Evidence Act*. It was upon the appellant to present before the Tribunal and this Court evidence on when his decision of 17/12/2023 was communicated to the respondent. This he failed and there is no basis on which this court can hold that the filing of the notice of appeal on 12/2/2021 was out of time.
 12. In any event, the issue of the delayed filing of the notice of appeal not having been raised before the Tribunal, the same cannot be validly raised before this court.
 13. As to the filing of the Memorandum of appeal, this together with the statement of facts were received via email by the Tribunal on 26/2/2021. Although the Tribunal acknowledged receipt of the same on 1/3/2021, the email was sent and received within the 14 day window as stipulated in the TATA. It would be draconian to dismiss the appeal based on this alone as this would violate article 159 of *the Constitution* as to substantive justice rather than technicalities.
 14. The appellant's contended that the respondent failed to comply with section 51(2) as read together with section 51(3) of the *Tax Procedures Act* (TPA) which places an obligation on the respondent to challenge an assessment by lodging a valid objection.
 15. Section 51(3) of the TPA provides: -
 - “ 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.”
 16. The notice of objection dated 10/12/2020 was at pages 16 and 17 of the record of appeal. I have scrutinised it. Paragraphs 1 to 5 of the notice consisted of specific grounds of objection to the appellant's decision. The respondent raised a number of grounds of objection and gave suggestions on the amendments required to correct the decision. Under Paragraph 8 of the objection notice, the respondent listed 3 amendments that it requested the appellant to make to its assessment.
 17. On whether documents were availed to the appellant, the respondent stated in its objection notice that it had submitted 'relevant returns and information for clarification on the matter raised' and under paragraph 6 requested for an opportunity to avail all necessary support documents as shall be requested by the appellant for all possible clarification and determination of the correct tax position.
 18. I agree with the Tribunal that it is not clear which documents were submitted and which documents were still pending from the respondent. The respondent itself indicated in the objection that it was willing to submit all such documents as the appellant would have requested. None were requested. In this regard, I find that the objection notice satisfied the criteria under section 51(3) of the *TPA* and was validly lodged.
 19. The appellant submitted that the Tribunal's decision failed to appreciate the nature and character of his decision of 17/12/2023. That the said decision was an invalidation and not an objection decision.



20. The Tribunal found that the letter dated 17/12/2020 was an objection decision which did not meet the validity threshold envisaged under the TPA and was therefore not valid.
21. The court has already found that the respondent's objection notice was valid. Section 51(4) of the TPA states: -
- “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.”
22. The appellant issued an assessment to which the respondent filed a valid objection notice. The appellant responded to the objection notice vide a letter dated 17/12/2020. The appellant argued that its letter of 17/12/2020 was not an objection decision but an invalidation.
23. On being served with the appeal before the Tribunal, the appellant filed a statement of facts wherein he stated in paragraphs 6, 7 and 8 as follows: -
- “6. On November 11, 2020, the respondent issued a notice of assessment demanding taxes amounting to Kshs.123,028,405.
7. The appellant objected to the assessment on December 10, 2020 and requested the Respondent to amend the decision by vacating the assessment.
8. The appellant confirmed the assessment on December 17, 2020.”
24. From the foregoing, it is clear that at the very first opportunity the appellant had to explain himself, he clearly admitted in his statement of facts that the letter of 17/12/2020 confirmed the assessment. If the letter confirmed the assessment, it follows that the same was an objection decision and not otherwise.
25. Had the appellant considered his letter of 17/12/2020 to be anything than an objection decision, nothing would have been easier than for him to indicate as much in the letter itself or in his statement of facts before the Tribunal. Having not done so, the issue being raised now is but an afterthought.
26. In the subject letter, the appellant merely stated that the respondent's objection notice did not include all the relevant documents relating to the objection. He did not specify the documents that he was referring to. If the letter was an invalidation as claimed, the appellant would have requested the respondent to submit specific information within 7 days of the invalidation. This is as provided for under section 51(4) of the *TPA*. Instead, the letter dated 17/12/2020 rejected the respondent's objection notice on the basis that it was not validly lodged.
27. In this regard, I make a finding that for all intents and purposes, the letter dated 17/12/2020 was an objection decision from the appellant.
28. Section 51(10) of the TPA provides: -
- “An objection decision shall include a statement of findings on the material facts and the reasons for the decision.”
29. The appellant's objection decision did not include a statement of findings nor reasons for the decision as is required in the above stated section. In the premises, the objection decision was invalid.
30. In view of the foregoing, I find the appeal to be without merit and dismiss the same with costs.



It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

