Commissioner of Domestic Taxes v Diara Limited (Income Tax Appeal E007 of 2021) [2022] KEHC 80 (KLR) (Commercial and Tax) (11 February 2022) (Judgment)

Neutral citation: [2022] KEHC 80 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E007 OF 2021

A MABEYA, J

FEBRUARY 11, 2022

BETWEEN

COMMISSIONER OF DOMESTIC TAXES .... APPELLANT

AND

DIARA LIMITED .... RESPONDENT

(Being an Appeal from the Judgment and decree of the Tax Appeals Tribunal delivered on 4th December 2020 in Tax Appeal No. 31 of 2017)

JUDGMENT

1. The appellant is a principal officer of the Kenya Revenue Authority; an agency of the Government of Kenya established under the *Kenya Revenue Authority Act*, responsible for the assessment, collection and accounting for all revenues that are due to the government.
2. The respondent is a private limited liability company whose principal activity at the time of the audit was the sale and distribution of cigarettes on behalf of BAT Kenya.
3. The appellant audited the respondent's affairs at various times between 1995 and 2004 for Corporation Tax and Value Added Tax. The respondent issued late objections to the assessments raised resting with the one of 15/9/2005. These objections were rejected by the appellant on the ground that they were filed out of time.
4. On 27/2/2017, the respondent applied to the Tax Appeals Tribunal (“the Tribunal”) to be allowed to file an Appeal out of time which application was allowed by consent on 17/8/2017. In its judgment delivered on 4/4/2020, the Tribunal held that by consenting to the filing of a late appeal, the appellant had accepted the respondent’s late objection.

5. In the premises, the Tribunal partly allowed the appeal by upholding the appellant's Corporate Tax Assessments for the years 1995 to 1997 and ordered that the Corporate Tax Assessments for the years 2000 to 2002 be recalculated. Further, it set aside the VAT assessments for the period January 2002 to March 2004.

6. Being dissatisfied with part of the decision of the Tribunal, the appellant appealed to this Court raising seven grounds of appeal in its Memorandum of Appeal dated 21/1/2021. Those grounds can be summarized as follows: -

   a. THAT the Tribunal erred in failing to appreciate that there was no valid objection that was lodged by the respondent against the appellant's assessment to warrant any issues raised therein to be considered on merit.

   b. THAT the Tribunal erred in law in finding that in consenting to the late filing of the Appeal, the appellant had consented to the late objection.

   c. THAT the Tribunal erred in failing to appreciate that the respondent had failed to provide documents in support of its contentions regarding the VAT assessments by the appellant.

7. The respondent opposed the appeal vide its statement of facts dated 19/2/2021. It contended that; it had lodged a valid objection through its agent Mukiri & Company vide a letter dated 2/7/2004 and reasons were given for the late objection. That in the consent recorded on 17/8/2017, both the late objection and appeal out of time were deemed to be properly filed hence there was a valid objection to the appellant's tax assessments. In its view, the appellant had allowed and validated the late objection by conduct.

8. Further, the respondent contended that it filed its Statement of Facts in the Tribunal on 27/7/2017 together with supporting documents as well as an additional bundle of documents on 28/9/2017 in support of its contentions. That the appellant deliberately neglected to rebut or address the Tribunal on the disputed VAT assessment and did not object to the production of the aforesaid documents before the Tribunal. That this appeal is therefore a clever but desperate attempt by the appellant to argue fresh points on the issue of VAT. It urged that the appeal be dismissed for lack of merit.

9. The Court has carefully considered the record, the respondent's statement of facts as well as the submissions on record.

10. The first ground is whether or not there was a valid objection by the respondent against the appellant's assessments. It was the appellant's contention that there was no valid objection that was submitted by the respondent for it to issue an objection decision that could be appealed against to the Tribunal as by law required. That without a valid objection, the appellant's tax assessments stood as they were by law unopposed. The South African case of Medox Limited v The Commissioner for the SARS (20059/2014) [2015] ZASCA 74 (27 May 2015) was cited in support of those submissions.

11. It was the appellant's case that having failed to object in time, the respondent's appeal to the Tribunal was a non-starter ab initio. It was further submitted that Tax laws are to be interpreted as they are and they are not subject to intendment. That section 32A of Valued Added Tax Act (Repealed) and section 84(2) of *Income Tax Act* (Repealed) set down the procedure for filing valid objections which could not be changed at the convenience of any party.

12. The case of *Council of County Governors v Attorney General & Another (2017) EKLR*, was cited on the rules of statutory interpretation. Further, the case of Metcash Trading Limited v the Commissioner

for the South African Revenue Service and another, was relied on in support of the proposition that verbal precision is essential in the interpretation of a taxation statute and nothing that is not stated is to be read into it.

13. It is imperative at this juncture to examine the procedure set out in the relevant applicable provisions of the law applicable at the time for challenging tax decisions. At the time, the procedure was set out in the repealed *Value Added Tax Act* (VATA) and the *Income Tax Act* (ITA). Section 32A of the VATA (repealed) stated: -

> "(1) A person who disputes an assessment made upon him under paragraph 9 of the Seventh Schedule may, by notice in writing to the Commissioner, object to the assessment.
>
> (2) A notice given under subsection (1) shall not be a valid notice of objection unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within 30 days after the date of service of the notice of assessment; but if the Commissioner is satisfied that owing to absence from Kenya, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving the notice within that period and there has been no unreasonable delay on his part, the Commissioner may, upon application by the person objecting, admit the notice after the expiry of that period and the admitted notice shall be a valid notice of objection".

14. From the foregoing, it is clear that an objection is only considered to be valid if the person dissatisfied with a tax assessment lodges a Notice of objection within 30 days of the date of being served with the same. Such objection should state precisely the grounds on which it is objecting to the assessment.

15. In the present case, it is not in dispute that respondent submitted either improper objections or late objections to the assessments that constituted the tax decisions which were the subject of the appeal before the Tribunal.

16. Firstly, there is an objection dated 2/7/2004 by the respondent for the income tax assessment for the year 2002. This was rejected by the appellant vide his letter of 5/7/2004 on the basis that it was not received within the statutory period set out in section 84(2) of the ITA.

17. Secondly, the appellant raised a VAT assessment for the periods 2002 to 2004 on 12/8/2004 for Kshs. 11,225,138/-. The respondent objected to this vide its letter of 1/9/2004. Being dissatisfied with the objection raised, the appellant responded to this letter vide a letter dated 9/3/2005.

18. Thirdly, on 28/10/2004, the appellant raised an additional Income Tax assessment for the period 2000 – 2002. From the appellant's letter of 17/12/2004, it is clear that the respondent responded to it vide a letter dated 30/11/2004 received on 6/12/2004.

19. Lastly, on 15/9/2005, the respondent's tax agents issued a late objection to the assessments for the years of income 2000 – 2002 and 1995 – 1996. The reason given for the same was that they required enough time to be able to collect all the pertinent information in view of the amounts being demanded by the Appellant.

20. From the foregoing, it is clear that the respondent either issued improper objections or made them outside the respective statutory periods. Whenever it was notified of the same, it appears that the respondent would go mute until the next assessment is raised. In this regard, there were no valid objections by the respondent as against the appellant's tax assessments. This meant that the appellant's

assessments were confirmed the moment the respondent's objections were rejected for whatever reason and the latter failed to take any corrective action.

21. In *Medox Limited V The Commissioner for the SARS (20059/2014) [2015] ZASCA 74*, the Supreme Court of Appeal of South Africa stated as follows: -

> "This court has over the years dealt with provisions worded similarly to S81 (5) of the Act and confirmed that, where no objection is made to an assessment issued by the relevant tax authority, the assessment is final and conclusive as between the tax authority and the tax payer. These decisions have been collected in Commissioner for Inland Revenue v Bowman NO 1990 (3) SA 311 (A) at 316 B C. Further at 316E, Goldstone AJA writing for the court, reiterated that an assessment to which no objection has been made, becomes binding upon the taxpayer as a statutory obligation".

22. When faced with the objection that there were no valid objections upon which any appeal could be considered, the Tribunal held that the filing of the appeal having been consented to, the appellant was estopped from challenging its competency. With greatest respect, the Tribunal was in error. Consenting to bringing an appeal out of time is not consenting to the appeal therein. It is to save the Tribunal's time from exercising its discretion as to the failure to bring the appeal within time. It did not mean that the appellant had consented to the correctness of the matters raised in the appeal.

23. I have looked at the Memorandum of Appeal lodged by the respondent before the Tribunal. The first ground was a challenge on the appellant's rejection of the respondent's objections for lateness and failure to give reasons. In this regard, the first question submitted to the Tribunal was to make a finding whether the appellant's rejection of the respondent's objections was valid or not.

24. In any event, the Tribunal quite correctly framed the first issue for determination as to whether it had the jurisdiction to extend the time for lodging an objection out of time. Despite having framed the issue properly, it veered off the truck and avoided to make a determination thereon by wrongly holding that the consent to lodge the appeal out of time meant that the appellant had consented that the objections were valid and not challengeable. That was a grievous error and the entire decision cannot stand.

25. Had the Tribunal considered the first issue as framed, it would not have delved into considering the other grounds and arrive at the decisions it did.

26. Further, Section 13(3) and (4) of the *Tax Appeals Tribunal Act*, 2013 pursuant to which the application to appeal out of time was allowed, does not in any way address the issue of late objections. In any event, under Section 51(6) and (7) of the *Tax Procedures Act* 2015, the extension of time to lodge a notice of objection against a tax decision is within the province of the Commissioner alone. In the premises, I hold the view that the Tribunal indeed erred by finding that the parties having consented to filing a late appeal consented to allowing a late objection.

27. The totality of the foregoing is that there were no valid objections by the respondent as against the appellant's tax assessments upon which a proper appeal to the Tribunal could be founded. A proper objection on which an objection decision is founded is a conditional prerequisite to a valid appeal to the Tribunal.

28. To that end, the court will not delve into determining the merits or otherwise of the third ground of appeal which encompasses four related grounds as the same has effectively been determined by the above. To make it clear, the Tribunal had no jurisdiction to set aside the VAT assessments whether or not the appellant failed to respond to the additional documents produced by the respondent before the Tribunal.

29. Accordingly, the Appeal is meritorious and is hereby allowed as prayed.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCI Arb

JUDGE