



REPUBLIC OF KENYA



**Bashaan Construction & Supplies Company Limited v Commissioner of Domestic Taxes  
(Tax Appeal E052 of 2023) [2024] KETAT 433 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KETAT 433 (KLR)

**REPUBLIC OF KENYA  
IN THE TAX APPEAL TRIBUNAL  
TAX APPEAL E052 OF 2023  
E.N WAFULA, CHAIR, E NG'ANG'A, AK KIPROTICH, EN NJERU & M MAKAU, MEMBERS  
MARCH 22, 2024**

**BETWEEN**

**BASHAAN CONSTRUCTION & SUPPLIES COMPANY  
LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant is a company incorporated pursuant to the provisions of the *Companies Act* and its principal business is in the construction industry.
2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, 1995. Under Section 5 (1), of the Act, the Kenya Revenue Authority (the Authority) is an agency of the Government for the collection and receipt of all tax revenue.
3. On 22nd September 2022, made additional assessments for VAT for the month of February 2022 amounting to Kshs. 1,109,650.40
4. The Appellant lodged its objection on and 15th October 2022.
5. The Respondent issued Objection decision on 3rd December 2022.
6. The Appellant lodged a Notice of Appeal against the additional assessments dated 21st February 2023.

**The Appeal**

7. The Appeal is premised on the following grounds as stated in the Memorandum of Appeal dated on 21st February 2023 and filed on 22nd February 2023: -



- a. That the Commissioner didn't review the supporting documentations the taxpayer provided in making the decision during this stage. This omission by the Commissioner had an undue assessment still in place, which ought to be vacated.
- b. That the director of the company was unwell from late last year and this had made them not to appeal within the provided timelines but the delay is not unreasonable and the Appellant requests this late appeal to be accepted.
- c. That the assessment is erroneous as the taxpayer claimed input tax as per the provisions of section 17 of the VAT act.
- d. That *the Constitution* of Kenya calls for fair administration action i.e. fair hearing to be accorded to all parties before an escalated action be taken. The taxpayer was not accorded such treatment before the assessments were raised.
- e. That the Respondent failed to appreciate the exceptional nature of the taxpayer's business under which the taxpayer operates.

### **Appellant's Case**

8. The Appellant's case is premised on its Statement of Facts dated 21st February and filed on the 22nd February 2023
9. The Appellant averred that the Respondent made additional assessments on 22nd September 2022 on VAT for the month of February 2022 amounting to Kshs. 1,109,650.40
10. The Appellant stated that it felt dissatisfied with the assessment hence applied for an objection on the 15th October 2022.
11. The Appellant stated that the Appellant applied for notice for appeal against the additional Assessment on 20th February 2023.
12. The Appellant stated that the Respondent erred in its decision to issue that Appellant with additional tax assessment in respect of VAT as it does not understand what informed the Commissioner to make such computations and decisions to issue the assessments.
13. The Appellant stated that the Respondent failed to consider the allowable expenditure in the year of income incurred in the production of income, if considered would have reduced the tax assessed significantly

### **Appellant's Prayers**

14. The Appellant's prayers to this Tribunal were for the following orders:
  - a) That the VAT assessment to be vacated.
  - b) That any accrued interest and penalty as a result of the assessment to be waived
  - c) That no enforcement action to be made until the matter under appeal is settled

### **Respondent's Case**

15. The Respondent opposed this Appeal while relying on its:
  - a. Statement of Facts dated 29th March 2023 and filed on 24th March 2024.



- b. Written Submissions dated 23rd October 2023 and filed on 31st October 2023.
16. The Respondent averred that on 01.04.2022, it undertook a VAT return review of the Appellant for the period ranging 1st February to 28th February, 2022. It was established that the Appellant had not availed the requisite documents for the input VAT claimed.
17. That Respondent averred that on 29th September,2022, the Appellant was issued with a pre-assessment order for Value Added Tax for the period commencing 1st February to 28th February 2022 for Kshs.1,109,650.40.
18. The Respondent stated that on the basis of the aforementioned assessment was hinged on section 31 of the *Tax Procedures Act* which gives the Respondent leeway to issue additional assessments based on the available information and best of judgement.
19. The Respondent stated that the Appellant lodged notices of objection wherein the Respondent acknowledged the objection applications dated 11th October and 15th October, 2022, respectively.
20. The Respondent averred that upon receipt of the said notices of objection, the Respondent herein vide a letter dated 18th October,2022 wrote to the Appellant directing it to validate its notice of objection so as to comply with the provisions of Section 51(3) of the *Tax Procedures Act* 2015. That particularly, the Appellant was required to provide statutory required documents in support of the objection failure to which its objection would be invalidated.
21. The Respondent claimed that in the absence of any action from the Appellant, the Respondent proceeded to issue an objection decision dated 3rd December, 2022.
22. The Respondent averred that on 22nd December, 2022, it implemented the objection decision of 3rd December, 2022 in the iTax platform by confirming the assessment due to Appellant.

### **Respondent's Prayer**

23. The Respondent prayed to this Tribunal for orders that:
- a. That the objection decision dated 3rd December 2022 be upheld
- b. That this Appeal be dismissed with costs to the Respondent as the same lacks merit.

### **Issues for Determination**

24. The Tribunal having evaluated the pleadings and submissions of the parties is of the view that there is only one issue that calls for its determination; Whether the Appeal was validly lodged.

### **Analysis and Determination**

25. The Tribunal having determined the issue falling for its determination proceeds to analyse it as hereunder.
26. The Tribunal is guided by Section 13 (1) (b) of the Tax Appeal Tribunal Act where it states;
- “(1) A notice of appeal to the Tribunal shall-
- (b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.”



27. The Tribunal notes that the Respondent issued its Objection decision on 3rd December 2022 whereas the Appellant filed its Notice of Appeal on 20th February 2023 without leave of the Tribunal as required under Section 13 (1)(b) of the *Tax Appeals Tribunal Act*.
28. The Tribunal is guided by the Supreme Court decision in Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, which stated that a Court can only exercise that jurisdiction that has been donated to it by either *the Constitution* or legislation or both and therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
29. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the Court cannot entertain any proceedings and must down its tools as held in The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1.
30. From the foregoing the Tribunal finds that this Appeal stands invalid and fatally defective as it falls foul of Section 13 of the *Tax Appeals Tribunal Act*. To that extent the Tribunal lacks the jurisdiction, which is invoked by filing of notice of appeal, to deal with any subsequently filed appeal.

### **Final Decision**

31. For the reasons set out above, the Tribunal finds that this Appeal lacks merit and accordingly proceeds to issue the following Orders;
  - a. The Appeal be and is hereby struck out.
  - b. Each party is to bear its own costs.
32. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2024.**

**ERIC NYONGESA WAFULA - CHAIRMAN**

**EUNICE NG'ANG'A - MEMBER**

**ABRAHAM K. KIPROTICH - MEMBER**

**ELISHAH N. NJERU - MEMBER**

**MUTISO MAKAU - MEMBER**

