



**Nanku Company (Kenya) Limited v Commissioner of Domestic Taxes
(Appeal 205 of 2020) [2023] KETAT 134 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KETAT 134 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
APPEAL 205 OF 2020**

**E.N WAFULA, CHAIR, CYNTHIA B. MAYAKA, GRACE
MUKUHA, AK KIPROTICH & JEPHTAH NJAGI, MEMBERS**

MARCH 10, 2023

BETWEEN

NANKU COMPANY (KENYA) LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

Background

1. The Appellant is a limited liability company incorporated in Kenya under the *Companies Act* and operating a business as a general trader. It is a registered taxpayer.
2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, Cap 460 Laws of Kenya. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) of the *Act* with respect to the performance of its function under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule to the *Act* for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Respondent carried out a verification process of records of the Appellant for purposes of confirming the Appellant's tax compliance status.
4. The Appellant is registered for VAT obligations as per the VAT Act and was awarded a licence to import brown sugar from COMESA region on May 4, 2017, by Agriculture, Fisheries and Food Authority, of 1000 metric tonnes.



5. The review revealed that the Appellant had imported two sugar consignments between January 31, 2017 and July 17, 2017 with CIF value of Kshs 74,926,008.00 and Kshs 67,800,828.00 respectively.
6. The Appellant declared the importation and subsequent sale of the consignment with the value of Kshs 67,800,828.00 but not the other one of Kshs 74,926,008.00.
7. The Appellant had also entered into a pre-importation agreement on January 5, 2017 with IGSAR Group Kenya Ltd to use its permit to import 1000mts of brown sugar from Zimbabwe.
8. The Appellant filed Nil returns for the month of July 2017 despite the import.
9. On June 25, 2018 the Respondent amended the VAT assessments for July 2017 to Kshs 12,041,427.00, inclusive of interest for the brown sugar import of Kshs 74,926,008.00 done on January 31, 2017 and issued an assessment Order.
10. On November 15, 2018 the Appellant objected to the assessment via an application to file late objection.
11. On December 20, 2019 the Respondent allowed the Appellant to file a late objection within 14 days stating the grounds for the same together with supporting documents.
12. On February 14, 2020 the Respondent replied to the Appellant's application for extension of time to file a late Objection, stating that the Appellant had not validated its objection notice. The Respondent also demanded the payment of the assessed taxes in the sum of Kshs 10,848,132.
13. On May 6, 2020 the Appellant requested the Commissioner to amend the additional assessment and take into consideration the Appellant's accumulated credit.
14. On May 20, 2020 the Appellant made an application for late objection to VAT assessment and also requested for withdrawal of the Agency Notice that had been lodged by the Respondent.
15. On May 21, 2020 the Respondent declined to allow the application for late objection and stated that the Agency Notice would not be lifted until the amount in issue is paid in full. The Appellant consequently appealed.

The Appeal

16. The Appeal as premised on the Memorandum of Appeal dated May 27, 2020 and filed on May 29, 2020 raises the following grounds:-
 - a. That the Respondent erred in fact by not applying the matching concept in determining the VAT tax liability for the Appellant. The Appellant demonstrated that the input declared in August 2017 solely relates to output assessed by the Commissioner and captured in July 2017.
 - b. That the assessment was not done in accordance with Section 29(2) of the *TPA* (hereinafter called "the Act") and so is not valid as per the same Act
 - c. That the Respondent erred in fact by failing to consider the many litigations that barred the current directors to act on the issues affecting the company
 - d. That the Respondent confirmed the Notice of assessment without due regard to all records, explanations and information provided by the Appellant thereby failing to appreciate all issues presented by the Appellant before confirming the assessment



- e. That Section 51(3) of the TPA provides for the conditions that need to be fulfilled for a Notice of objection to be treated as validly lodged by a taxpayer. Even though the objection was made by the taxpayer late, the application of late objection was accepted vide a letter from the Commissioner dated December 20, 2019 and validly supported with relevant documents in accordance with the law. To this end, the objection was valid and the taxpayer treated the position communicated under the letter dated May 21, 2020 as the objection decision
- f. That the Commissioner should have considered the documents submitted in support of the objection to render his decision. Where the Commissioner is dissatisfied with the quality and quantity of the supporting documents, his decision could have been varied by such condition instead of rejecting the objection.
- g. That the amounts confirmed by the Respondent of Kshs 10,848,132.00 in respect of VAT for the period July, 2017 is therefore wrong in law and fact and should be annulled.

Appellant's Case

- 17. The Appellant's case is premised on the Statement of Facts dated May 27, 2020 and filed on May 29, 2020 and the Appellant's Written submissions dated July 28, 2022 and filed on August 1, 2022.
- 18. The Appellant states that it started importing sugar on 31st July 2017 through an arrangement with IGSAR allowing it to import 1000mts from Zimbabwe and that under the agreement IGSAR was to pay for all the charges concerning the consignment including duty and the VAT.
- 19. That the Commissioner raised an assessment on June 25, 2018 on the imported sugar and demanded payment as per assessment for Kshs 10,848,132.00. The Appellant argues that in so doing the Commissioner violated the provisions of Section 17(2) of the VAT Act, 2013.
- 20. The Appellant relies on the cases of De Smith, Woolf and Jowell in Judicial Review of Administrative Action and the case of Keroche Industries Ltd v KRA and 5 Others Nairobi HCMA No 743 of 2006, The Commissioner of Income Tax v Vestmont Power (K)Ltd 2006 eKLR and Mangin v Inland Revenue Commissioner (1971) AC 739.
- 21. The Appellant states that the Respondent has not observed how the output and input VAT should be treated. It argues that it was not allowed to amend the assessment and declare the input tax on the month of July 2017 and that consequently its legitimate expectations were thwarted.
- 22. The Appellant argues that it provided all the relevant documents at the objection stage and the Respondent did not review and or ask for further documentation and the Appellant was convinced that its documentation was sufficient.
- 23. The Appellant also relies on the cases of R v National Land Commission & 2 Others Ex parte Archdiocese of Nairobi Kenya registered Trustees [2018] eKLR ; R v KRA Ex parte Yaya Towers Ltd [2008] eKLR; Mungania Tea Factory Ltd 7 Others v Commissioner of Domestic Taxes [2020] eKLR; Westminster Corporation v London & Northwestern Rail Corporation [1905]AC and Highlands Mineral Water Ltd v Commissioner of Domestic Taxes [Tat No O26 of 2020].
- 24. On the basis of the Authorities above quoted, the Appellant submits that the Respondent failed to apply the tenets of administration of justice.
- 25. The Appellant prays for the Respondent's decision to be annulled or varied in such manner as is just and reasonable.



Respondent's Case

26. The Respondent's case is grounded on the Statement of Facts dated July 2, 2020 and filed on the same date and its Written submissions dated August 1, 2022 and filed on August 16, 2022.
27. The Respondent states that the Appellant imported the sugar consignment in dispute and was therefore responsible for the taxes due and owing over the same.
28. The Respondent states that upon the Appellant being served with the Notice of assessment, it lodged an application for late Objection on November 15, 2018 and which application was allowed but the Appellant failed to provide its supporting records thereby violating the provisions of Section 51(3) of the *TPA*.
29. The Respondent relies on the case of *Pearson v Belcher Ch. M* where the Court stated that the Appellant has the onerous duty to show that the assessment made by the Respondent is erroneous.
30. That the Appellant in its submissions states that the assessment ought to have taken into consideration its VAT input and deducted the same in its computation while the Respondent on that issue submits that the Appellant's claim for VAT input was made outside the timelines and states that the same was only raised at the point when the Respondent raised its assessment in June 2018 and that the same ought to have been aligned with the provisions of Section 17 of the *TPA*. The Respondent relies on the case of *Highlands Mineral Water Ltd v The Commissioner of Domestic Taxes* [Civil Appeal No HC[Commercial and Tax Div.] E026 of 2020 and *Commissioner of Investigations & Enforcement v Pearl Industries Ltd* [2022] eKLR to show the necessary requirements for input VAT to be allowed.
31. The Respondent submits that the Notice of assessment was guided by the information it had and also the fact that the Appellant was availed the opportunity to validate its Notice of Objection but it failed to do so.
32. The Respondent submits that the "Matching Concept" brought forth by the Appellant's arguments does not apply to the present matter and relies on the case of *Cape Brandy Syndicate v Inland Revenue Commissioner* [1920] 1KB 64.
33. The Respondent also submits that the appeal filed is premature and invalid as the Respondent was yet to issue an appealable decision in the matter and that the Appellant has no locus to file the Appeal.
34. The Respondent submits that the letter dated February 14, 2020 issued by the Respondent to the Appellant was not a tax decision and the same is not appealable. It relies on the provisions of Section 52 of the *TPA* as to what constitutes an appealable decision.

Respondent's prayers

35. The Respondent prays for the Tribunal to find that:
 - a. The Appellant did not lodge a valid notice of Objection
 - b. The Respondent's assessment order issued on June 25, 2018 being VAT for the months of July 2017 of Kshs 10,848,132.00 together with the resultant penalties and interest be found to be due and payable.

Issues For Determination

36. The Tribunal has considered the facts of the matter and the submissions made by the parties and considers the issues for determination as follows:



- a. Whether there is an appealable decision
- b. Whether The Respondent's tax assessment was justified

Analysis and findings

a) Whether there is an appealable decision

37. The Respondent has in addition to filing a Statement of Facts filed a Notice of preliminary objection, with one of the grounds being that the Appellant did not file a valid Objection to the Respondent's assessment.

38. The Respondent proceeds to argue that a valid Objection has to conform to the provisions of Section 51(3) of the [TPA](#) which provides that:-

“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.”

1. The Appellant on its part argues that the Appellant was not informed of its notice of Objection was invalidity. This does not however seem to be the case on perusal of the documents presented to the Tribunal.

2. A perusal of the Statement of Facts as filed by both the parties show the chronology of the proceedings and the correspondence exchanged between the parties prior to the filing of this Appeal as follows:-

- a. The Respondent issued the Appellant with the VAT assessment Order on June 25, 2018 for Kshs 12,041,427.00 for the sugar import of January 31, 2017 which the Appellant had failed to declare.
- b. The Appellant lodged a manual Objection on November 15, 2018 and an application to lodge a late Objection vide a letter dated October 24, 2019 and it was allowed to so lodge the late objection vide a letter dated December 20, 2019 from the Respondent.
- c. On February 14, 2020 the Commissioner wrote to the Appellant stating that the latter had failed to validate its Objection and demanded the payment of Kshs 10,848,132.00 as the principal assessed



VAT plus the resultant penalty and interest. The Appellant has made its appeal based on the letter of the Respondent of February 14, 2020 aforementioned.

3. The *TPA* clearly lays down the procedures to be followed by a taxpayer aggrieved by the Commissioner's assessment in that such a party ought to file a valid objection to oppose the same as per the provisions of Section 51(3) of the *TPA*.
4. The Tribunal finds that the Appellant has failed to comply with the provisions of Section 51(3) of the *Act* as it did not file a valid objection despite the Respondent having accorded to it an opportunity to do the same. The provisions of Section 51(3) of the *Act* are couched in mandatory terms.
5. The Tribunal is guided by the case of *W.E.C. Lines Ltd v The Commissioner of Domestic Taxes* [TAT Case No.247 Of 2020] where it was held at paragraph 70 while reiterating the holding in *Krystalline Salt Ltd v KRA* [2019] eKLR that:

“Where there is a clear procedure for redress of any particular grievance prescribed by *the constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”. The relevant procedure here is the process of opposing an assessment by the Commissioner.”

44. The Tribunal in the circumstances finds that in the absence of a valid objection there was no objection that could have been considered by the Respondent to precipitate in a decision that could be escalated by an appeal to the Tribunal under Section 52 of the *TPA*. In essence there is no appealable decision to found an appeal before the Tribunal.

Final decision

45. The upshot of the foregoing analysis is that the Appeal is incompetent and unsustainable in law and the Tribunal accordingly proceeds to make the following Orders;
 - a. The Appeal be and is hereby struck out.
 - b. Each party to bear its own costs
46. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

ERIC N. WAFULA CHAIRMAN

CYNTHIA B. MAYAKA GRACE MUKUHA MEMBER MEMBER

ABRAHAM KIPROTICH JEPHTHAH NJAGI MEMBER MEMBER

