



Hardware Trading Stores Limited v Commissioner of Domestic Taxes (Tax Appeal E018 of 2023) [2025] KEHC 3606 (KLR) (Commercial and Tax) (24 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3606 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E018 OF 2023
AA VISRAM, J
MARCH 24, 2025

BETWEEN

HARDWARE TRADING STORES LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 19th May, 2023 in Tax Appeal No. 108 of 2020)

JUDGMENT

Introduction and Background

1. The Appellant is dissatisfied with the decision of Tax Appeals Tribunal (“the Tribunal”) dated 19th May, 2023, that found that the Appellant was unable to effectively object to the Respondent’s (“the Commissioner”) additional assessments on the Appellant’s VAT returns in the months of January - May 2018. As such, the Appellant appealed against the said decision through its Memorandum of Appeal dated 16th June, 2023, in the following terms: -
 1. The Tribunal erred in law in failing to find that the Respondent did not issue a valid Objection Decision and thereby upheld a decision that was rendered out of time.
 2. The Tribunal erred in law in finding that the Appellant did not effectively object to the Respondent’s assessment
 3. The Tribunal erred in law in failing to find that the Appellant had lodged a valid objection to the Respondent’s assessment



4. The Tribunal erred in law in failing to consider that the Appellant did not receive any request for additional documents from the Respondent.
 5. The Tribunal erred in law in failing to consider all the issues before it for determination and thereby arrived at an incorrect finding
 6. The Tribunal erred in failing to properly exercise its discretion and/or improperly fettering its discretion
 7. The Tribunal erred in law in failing to find that the Respondent had clearly failed in upholding the Appellant's right to fair administrative action
2. The Appellant urged this Court to allow the appeal, and sought to set aside the decision of the Tribunal which upheld the Commissioner's Objection Decision dated 10th March, 2020 ("the Objection Decision"). The Commissioner responded to the appeal through its Statement of Facts dated 15th January, 2024.
 3. The background to the dispute, is as follows:- The Appellant is a company based in Nakuru that deals in hardware, paints, and glass. On 15th November, 2019, the Commissioner's iTax system detected inconsistencies between the invoices declared by the Appellant for its VAT input claims and VAT sales declared by various suppliers for the months of January -May 2018. The system disallowed the invoices and autogenerated additional assessments amounting to Kshs. 7,367,721.30/-.
 4. The Appellant objected to these assessments on iTax on 25th November, 2019. The Commissioner in turn, alleged that it emailed the Appellant on 20th January, 2020, requesting for specific records and or documentation in support of the objection, but that the Appellant failed to respond to this request. Accordingly, on 10th March, 2020, it rendered the Objection Decision confirming the assessments.
 5. Aggrieved by the said confirmation, the Appellant lodged an appeal with the Tribunal, which after due consideration rendered its judgment issued on 19th May, 2023. The Tribunal found that there was a single issue for determination, namely, whether the assessments issued by the Commissioner were proper?
 6. In its judgment, the Tribunal found that the allegation by the Appellant that it never received the email communication from the Commissioner dated 20th January, 2020, was on balance, without basis. In reaching the said conclusion, the Tribunal relied on an annexed copy of an email provided by the Commissioner. The Tribunal was of the opinion that on balance, the Appellant had not tendered sufficient evidence, documentary or otherwise, to prove that it had not received the e-mail, or that the said e-mail address used by the Commissioner did not belong to it.
 7. Additionally, the Tribunal found that the Appellant had not provided the Commissioner with any documentation or records in support of its objection and to disprove the Commissioner's assessments. Accordingly, the Tribunal reached the conclusion that the Appellant's objection failed to comply with Section 51(3) of the *Tax Procedures Act* (Chapter 469B of the Laws of Kenya) ("the TPA"), in terms of the validity of the objection, which requires all relevant documentation to be submitted by the objecting party. The Tribunal therefore found that having had sufficient time to respond, and provide the necessary information and records, and having failed to do so, the Commissioner had acted within the law. Aggrieved by the said decision, the Appellant filed the present appeal.
 8. This Court directed that the appeal be disposed of by written submissions. I have considered the Record of Appeal, Statements of Facts filed by each of the parties, and the submissions of the parties,



the same form part of the record, and I will make relevant references as may be appropriate in my analysis and determination below.

Analysis and Determination

9. In determining this appeal, I am cognizant of the fact that this Court is exercising appellate jurisdiction that is circumscribed by Section 56(2) of the TPA which provides that “An appeal to the High Court or to the Court of Appeal shall be on a question of law only”. This means that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts (See John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR and [Commissioner of Domestic Taxes v Ibangua Investments Co. Ltd \(Tax Appeal E093 of 2023\)](#) [2023] KEHC 26013 (KLR) (Commercial and Tax) (30 November 2023) (Judgment)).
10. Although several issues have been raised, the Court is called upon to determine whether or not the Appellant’s objection was invalid for its failure to conform with Section 51 (3) of the [Tax Procedures Act](#), 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 is fatal.
11. Section 51(3) objection to a tax decision states as follows:
 - (3) 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.
12. Based on the provisions 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 documentation in relation to the objection had been presented. The use of the word “shall” and “and” connote the mandatory and conjunctive matter of the requirements set out above, meaning that it taxpayer is bound to satisfy all the above requirements for an objection to be deemed as validly lodged. The Respondent submitted as much, and relied on the fact that this had not been done by the Appellant, and further, that the Appellant had been given plenty of time to do so.
13. The next question, is what then happens when an objection has not been validly lodged? Section 51 (4) provides expressly for such a scenario. The same provides as follows:-

51(4) 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. (Emphasis mine)
14. Once again, the use of the word “shall” as set out above, affirms that the said provision is couched in mandatory terms.



15. Based on the record before me, it is not in dispute that the Appellant lodged the Notice of Objection on the 25th day of November 2019 and acknowledged by the Respondent on the same day. Further, the (disputed) email sent by the Commissioner to the Appellant was emailed on 20th January, 2020. It is not clear if the said email was a notification by the Commissioner to the Appellant, stating that the objection is not validly lodged pursuant to Section 51(4), the same merely states that the Appellant was required to present certain documents for verification by 28th January, 2020.
16. Based on the law set out above, once the Tribunal found that the Appellant had failed to comply with the requirements of a valid objection, it ought to have further considered, whether or not the Commissioner carried out the mandatory action of serving it with a notice within the stipulated period of time. This, in my view, was an oversight on the part of the Tribunal. Looking at the record, it is evident that the Commissioner did not issue any such notice, or if he did, the same was issued outside of the mandatory time line. The record shows that the e-mail sent by the Commissioner, does not state that it was intended as a Section 51 (4) Notice and in any event, if it was intended to carry out that purpose, it ought to have issued 14 days from 25th November, 2019, the very latest date being 10th December, 2020. This was not the case.
17. Given the failure on the part of the Commissioner to comply with the statutory timelines set out above, I find that the Tribunal erred when it reached the conclusion that the Appellant failed to provide the appropriate records having been notified and given adequate time to do so. I find that no such notice was issued.
18. On 10th March, 2020, the Commission issued the Objection Decision. Section 51 (11) of the TPA provides as follows:-

The Commissioner shall make the Objection Decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.
19. Based on the timelines above, which are not in dispute, I further find that the Objection Decision was outside the statutory timelines provided by Section 51 (11) quoted above. The decision ought to have been rendered at the very latest, by 25th February, 2020. This was not done.
20. Having found that the Objection Decision was rendered late, the question is whether or not the said delay is fatal? In *Equity Group Holdings Limited v Commissioner of Domestic Taxes* [2021] KEHC 25 (KLR), the court states as follows:-
 - 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* [36] 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.
 60. Section 51 (11) of the TPA is couched in preemptory 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 extend 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.

21. Guided by the above, I find that the Tribunal erred by failing to apply the mandatory provision found at Section 51(11) to the delay on the part of the Commissioner, which delay was not a fact in dispute. Further, I would add that there is no provision in the TPA that stipulates that only validly lodged objections have to be determined within 60 days.
22. Therefore, the Commissioner's delay in delivering the Objection Decision within 60 days of receiving the same, 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.

Conclusion and Disposition

23. Based on the reason above, I find that the Appellant's appeal is with merit and the same is allowed. The Tribunal decision of 19th May, 2023, is set aside with the consequent effect that the Respondent Objection Decision dated 10th March, 2020, is also set aside. The Appellants' Notice of Objection dated 25th November 2019 is deemed as allowed in accordance with section 51 (11) of the [Tax Procedures Act](#), 2015.
24. Each of the parties to bear their own costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF MARCH, 2025

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

.....Court Assistant
.....for Appellant
.....for Respondent

