

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
APPEAL NO. 55 OF 2018

BOLEYN INTERNATIONAL LTD..... APPELLANT

VERSUS

COMMISSIONER, INVESTIGATION & ENFORCEMENT.....RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. The Appellant is family owned business dealing in importation of Double Coin range of tyres. It is the sole agent for Double Coin range of tyres in East and Southern Africa. This case is an offshoot of investigations done on Bostone Investment which is a sister company of Boleyn International (K) Limited.
2. The Respondent is the Commissioner of Investigation & Enforcement who is appointed pursuant to section 3 of Kenya Revenue Authority Act 469[Herein "KRA Act"].
3. The Respondent's core mandate under section 5 of the KRA Act as read together with the First Schedule of the same Act is, inter alia, to assess, collect and account for all revenues in accordance with the Tax Procedures Act, the Income Tax Act and the Value Added Tax Act accounting and the general administration of tax revenue on behalf of the Government of Kenya.

B. BACKGROUND

4. Vide a letter dated 10th August 2016, the Appellant was served with a notice of intention to audit for the years 2012 to 2015. The scope of this investigative audit was to cover income tax, VAT, PAYE and withholding tax. The Appellant was thus required to avail documents in support of the above-mentioned tax heads. The investigations were to commence on 25th August 2016.

5. The Appellant responded on the 25th August 2016 informing the Respondent that the Company had been investigated for the period of 2007 to 2013 by a team from the Respondent. The team availed a report to that effect, to which the Appellant complied with and paid the additional assessment. Further, the Appellant disclosed that it had stopped trading mid 2013 due to competition in the market brought about by clients importing their own tyres. That the company still has liabilities with the bank which they are still servicing.
6. On the 16th of September 2016, the Respondent wrote back to the Appellant to disclose its findings on allegations that the Appellant was no longer trading. The Respondent found that there were bank deposits in to the Appellant's account after the period the Appellant allegedly stopped trading. The investigations also revealed that the Appellant had been importing on behalf of Multiple Haulers from Double Coin Holdings Ltd of China at a commission 1.5%.
7. The Respondent also took the purchases of Bostone in the years under review and reflected as sales in the books of Boleyn International (K) Ltd. Bostone Investment Limited, the Appellant's sister company, had been purchasing its stock from the Appellant according to the Appellant's purchases ledger of Bostone Investment Ltd. Additionally, the Respondent identified deposits from Bostone Investment Limited into the Appellant's account in the years 2014 and 2015. Consequently, the Respondent notified the Appellant to comply with the notice of intention to audit dated 10th August 2016 within 7 days.
8. The Appellant failed to comply in providing the documents sought by the Respondent. As a result, the Respondent wrote to a number of the Appellant's client requesting documents to enable it determine the Appellant's tax liability.
9. On 6th September 2017, the Respondent concluded its investigations and communicated the same to the Appellant. The Appellant, without providing any documents in support of its position responded to this on 4th October 2017 claiming that an investigation team from the Respondent did an audit on 7th January 2013 and the Appellant abided and paid the outstanding taxes.

On the income as per the bank deposits for the years 2014 to 2016, the Appellant alleged the deposits were loans from other companies for the purpose of paying bank loans. As regards the comparisons between customers' statements and financial statements for the years 2014 to 2016, the receipts from the customers were mostly loan payments received from other companies.

10. On the comparisons between sales as per the VAT 3 and the financial statements, accounts for 2014 were not filed on time hence bringing about the variances of the figure quoted. The Appellant also disclosed that the motor vehicles acquired with loan from NIC bank was loaned to a company with a mutual agreement that the company would repay and the captured in the 2013 audit and paid.
11. The Appellant further disclosed in the response that the food, drinks and household expenses relate to office expenses that the company caters for all staff when on duty. On the issue of motor vehicle benefit, the Appellant responded that the vehicle was a company vehicle used by senior management for official work.
12. The Respondent responded on 13th November 2017 as follows, that;
 - a) The previous investigation findings which were communicated to the company on 7th January 2013 covered the period of 2010 to 2011.
 - b) The previous investigation covered income as per bank deposits for the period of 2010 to 2012. A request was made for returns and signed financial statements for the years 2012 to 2013.
 - c) The Appellant was called upon to explain the variances between the customers' statements and its financial statements.
 - d) The Appellant was called upon to provide copies of the 2014 to 2016 audited accounts and VAT 3 returns.
 - e) Appellant was to provide the agreement between the company, Double Coin Holdings Ltd and Kingston Tyres and indicate the commission earned on the arrangement.

- f) On the management accounts for Boleyn Group of companies being consolidated and presented to the bank for loan purposes, the Appellant was asked to provide the detailed consolidated accounts for the group.
 - g) The issue of director's house rent was covered in the previous audit and therefore, it still stood.
 - h) The Appellant was requested to provide proof by work tickets for the Porsche Cayenne as well as all the vehicles of the Appellant.
 - i) Provide evidence that the directors receipts relate to travelling and accommodation expenses that directors incur while on official duty.
13. On 8th February 2018, the Respondent raised an assessment of the Appellant's tax liability at Kshs. 154,224,750. The Appellant lodged an objection on 8th March 2018, to which the Respondent asserted did not meet the criteria for raising objections as laid out in Section 51 of the Tax Procedures Act, 2015. The Respondent confirmed the assessment on 10th May 2018.

C. APPEAL

14. The appeal is premised on the following grounds;
- a) The Commissioner erred in fact and in law in dismissing the Appellants Application for review of the Demand Notice dated 8th February 2018.
 - b) The Commissioner erred in fact and in law in assessing Income Tax liability of Ksh.33,703,285, Kshs.22,331,559, Kshs.2,104,228, Kshs.15,251,669 and Kshs.41,628,532 (Totalling Ksh.115,019,273) for the years 2012 to 2016 on the Appellant by treating funds transferred from the sister company and other individual's friendly loans as business income.
 - c) The Commissioner erred in fact and in law in assessing Value Added Tax Liability of Ksh.14,628,203 Kshs.9,386,659 Kshs.403,390 Kshs.8,063,872 and Kshs.22,201,884 (totalling Kshs.31,675,344) for the years 2012 to 2016 on the Appellant by treating funds transferred from the sister company and other individual friendly loans as a taxable supply.

- d) The Commissioner erred in fact and in law in assessing Income Tax liability on a Director in respect of house rent, household items motor vehicle benefit and drawings of Kshs.1,206,873, Kshs1,703,027 Kshs.1,723,237 Kshs.1,442,498 and Kshs.1,451,498 (totalling Kshs.7,530,133) for the years 2012 to 2016 on the Appellant by treating office rent as directors house rent and the company motor vehicle used by senior management for official work as the director's motor vehicle benefit from the company and directors drawings on money used for travelling and accommodation expenses for official duty by the director.
15. The Appellant prays that;
- a) That this Appeal be allowed with costs.
 - b) That the Tax Decision of the Commissioner of the 10th May, 2018 be set aside with costs to the Appellant.
 - c) That the Commissioner be restrained from undertaking any enforcement measures against the Appellant with a view to collecting the sum of Ksh. 154,224,750 including any penalties relating thereto.
 - d) That the Tribunal grant such other orders as it may deem fit.
16. From the Appellant's grounds of Appeal, the following issues arise for determination; -
- a) Whether the Respondent dismissed the Appellant's Application for review of demand notice dated 8th February 2018.
 - b) Whether the Respondent erred in law and fact in charging to tax alleged transfers from related companies.
 - c) Whether the Respondent erred in charging to tax director's benefits.
17. The Respondent proceeds to submit on these issues as hereunder; -
- a) Alleged dismissal of the Applicant's application for review of demand Notice 8th February 2018.
 - a. The Respondent relied on section 51(2) of the Tax Procedures Act, 2015 which provides that a taxpayer who disputes a tax decision may lodge a notice of objection to the decision with the Commissioner within thirty (30) days of being notified of the decision.

- b. The Respondent maintains that for an objection to be considered valid, the same must meet the criteria set under section 51(3) of the Tax Procedures Act, 2015.
- c. The Respondent replied to the objection of the 8th March 2018 via a letter dated 27th March 2018 indicating that the objection had not been validly lodged as required by Section 51 of the Tax Procedures Act 2015.
- d. The Respondent was undertaking its statutory duties when it initiated the process of assessing the Appellant's taxes. There was no malice in the decision to assess the taxes as the Appellant was given ample time and opportunity to provide documents, as has been demonstrated hereinabove, and even lodge a valid objection, but the Appellant failed to do so.

b) Treatment of funds transferred from related companies and friendly loans from third parties as taxable supplies

- a. The Appellant's allegation that transfers from related companies and friendly loans from third parties were treated as taxable supplies for purposes of income tax and VAT was not supported by any documentary proof. The Commissioner used the information available to it determine the Appellant's taxable income in the absence of supporting documents from the Appellant.
- b. Director's income tax liability.
- c. In light of the foregoing, the confirmed additional assessments subject of the Appeal amounting to Kshs. 154,224,750/- are due and payable by the Appellant.

18. Consequently, the Respondent prays that the Honourable Tribunal finds that;
- a. In the upshot, this appeal is dismissed with costs to the Respondent.
 - b. The Respondent's assessments of 8th February 2018 and objection decision dated 10th May 2018 for the period 2012-2016 be upheld in view of the fact that the provisions of the law were correctly applied.
 - c. The Respondent be allowed to take any enforcement measures against the Appellant with a view to collecting the sum of Kshs. 154,224,750[One Hundred and Fifty-Four Million Two Hundred

and Twenty-Four Thousand Seven Hundred and Fifty Shillings] including any penalties relating thereto.

- d. The Respondent reserves the right to adduce any further oral and/or written evidence during the hearing of the Appeal.

D. PARTIES SUBMISSIONS

I. APPELLANT

19. The Appellant's tax agent averred that the Appellant lodged its objection to the assessment on 8th March 2018. This was within the time frame of 60 days as per the Act. But the Appellant received a response from the Commissioner to the effect that the objection did not have proper grounds. As a result, the Appellant proceeded to the Tribunal with the same documents.
20. On the assessment, the Appellant submitted that it was done before the books of accounts were complete, thus the corporation tax was based on all the income as per the bank statements. The Appellant contends that it deals in the sale of tyres from China and has sister companies in Zambia and Tanzania. The sister companies send the money to the Appellant because there is an agreement between the Appellant and the manufacturer that only the Appellant should credit the account and not the sister companies. Therefore, the Respondent in its assessment dwelled on credits from the sister companies.
21. Finally, the Appellant submitted on the issues of director's expenses. It was argued on behalf of the Appellant that director's expenses were not allowed as per the Act.

II. RESPONDENT

22. The Respondent on the other hand submitted that the Appellant imported tyres from a China based company known as Double Coin Holdings. That the Respondent analyzed the bank statements wherein it was established that there were huge deposits from the Appellant's customers. The Appellant's sales were established from the purchases that were declared by the sister company Bostone Ltd.

The ledgers indicated that there were purchases by Bostone Ltd from the Appellant. These were then compared with the returns filed by the Appellant for the years of income covered by this audit.

23. This revealed that what was in the returns was less than what was in sales ledgers as well as the deposits in the bank accounts of the Appellant. As such there was additional income that was established that was charged to corporation tax and VAT.
24. The Respondent further contended that the Appellant used to procure tyres from the China based company on behalf of the local suppliers as an agent of the China based company. Therefore, the Appellant would receive commission at 1.5 % and the same was charged to corporation tax and VAT. Further, in the year 2014 the Appellant filed Vat returns and declared a sum of Kes.45million. This was not reported in the Corporation Tax so this was also charged to Corporation tax.
25. It was further submitted that in the objection, the Appellant did not provide any grounds of objection neither did the Appellant provide documentation in support. For instance, the Respondent charged the director's benefits, that is, the vehicle benefit, the household expenses, the rent and the food and drinks. The Appellant merely stated that these benefits were not extended to the Directors but without evidence in support and which was reflected in the books of accounts.
26. On the issue of the expenses claimed by the Appellant, the same was not supported as required under Sections 15 and 16 of the Income Tax Act. The Appellant did not qualify the expenses, so the same were disallowed. In summation, the Respondent prayed that the Appeal be dismissed and the assessment be upheld.

E. ISSUES FOR DETERMINATION

27. On careful analysis of the records before the Tribunal and the parties submissions during the highlighting of submissions, the Tribunal finds that the following issues fall for determination;
- a. Whether the Appellant's objection was valid
 - b. Whether the Respondent's assessment was proper in law

F. ANALYSIS

Whether the Appellant's objection was valid

28. The Appellant lodged an objection to the Respondent's assessment of its tax affairs. In response, the Respondent notified the Appellant that the said objection was not valid as it failed to meet the requirements of section 51 of the Tax Procedures Act, 2015. Section 51 (3) (a) of the Tax Procedures Act enjoins a party lodging an objection to state precisely the grounds of objection, the amendments required to be made to correct the decision and the reasons for the amendments. Further, section 51 (3) (c) directs a party raising an objection to provide all the relevant documents relating to the objection. These are the requirements that make an objection valid in law.
29. By perusing the documents on record, this Honorable Tribunal must then confront the question whether the Appellant lodged a valid objection. We must evaluate whether the Appellant's attempt to raise an objection met the threshold established above under section 51 of the Tax Procedures Act, 2015.
30. On 8th March 2018. The Appellant lodged an objection with the Respondent. However, the said objection did not reiterate the grounds of objection, the corrections required to be made and the reasons for the amendments. Neither did the Appellant provide the relevant documents in support of its alleged objection. Therefore, there was no conceivable way the Respondent would have considered the Appellant's objection as the same did not place itself within the parameters of section 51 (3) of the Tax Procedures Act, 2015.

31. The Appellant in its oral submissions contended that its objection was within the time limit of 60 days. It is worth pointing out the assumption which underlies this submission is unreservedly false and unpersuasive. In so submitting, the Appellant imagines that the issue at hand is one of limitation of time and not of the actual validity of its objection. In factual terms however, the Respondent's letter dated 27th March raised the issue of the Appellant's objection falling short of the requirements enlisted in section 51 (3) of the Tax Procedures Act, 2015. The Respondent did not address the Appellant on its objection being out of time. Therefore, it appears to the Tribunal that the Appellant's submissions on whether the objection lodged was proper in law, are littered with entirely vague statements and miscomprehension of facts which we can only imagine are styled to mitigate or entirely avoid its tax liability.

Whether the Respondent's assessment was proper in law

32. In conducting this assessment, the Respondent requested documents in support of its trading operations for the period of 2012 to 2015. The Appellant responded by claiming that it had been audited for the period in question by a team from the Respondent on 7th January 2013 and that the Appellant has since stopped trading. In response, the Respondent clarified that previous audit covered the period of 2010 to 2011 and a report was given to the Appellant on 7th January 2013. The Respondent once again requested for the documents from the Appellant in order to assess its tax liability. The Appellant failed to comply with request.
33. The Tribunal finds that the Appellant has been non-compliant with the Respondent's request for these documents. As a result the Respondent resorted to requesting for information and documents from third parties as reflected in *Annexure BL4* of the Respondent's statement of facts. The tribunal finds the Appellant's non-compliance in providing documents to be in breach of section 23 and 54A of the Tax Procedures Act, 2015 and the Income Tax Act respectively which enjoin the Appellant to provide such documents to authorized officers in order that a taxpayer's tax liability may be assessed.

34. Once the Appellant concluded its investigation based on the documents provided by the third parties, the same was communicated to the Appellant through the letters dated 6th September 2017 and 13th November 2017. All this time, the Respondent had been unwavering in engaging the Appellant and asking the Appellant to provide proof of its objections to the investigations. The Appellant was given multiple opportunities to support its objections to the investigation findings. We find that the Appellant at all times bore the burden of proving that the Respondent's decisions and investigations were wrong. The Tribunal is guided by the provisions of section 56 (1) of the Tax Procedures Act, 2015 which states;

In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

Further, the Tribunal finds the following paragraph from *Pierson v Belcher (H.M. Inspector of Taxes) (1956-1960) 38 TC 387* to be instructive;

*But the matter may be disposed of, I think, even more shortly in this way: there is an assessment made by the Additional Commissioners upon the Appellant; it is perfectly clearly settled by cases such as *Norman v Golder 26 T.C 293*, that the onus is upon the Appellant to show that the assessment made upon him is excessive or incorrect; and of course he has completely failed to do so. That is sufficient to dispose of the appeal, which accordingly I dismiss with costs.*

G. DETERMINATION

35. In light of the foregoing analysis, the Tribunal makes the following order;
- a) The Appeal herein is hereby dismissed
 - b) The Respondents assessment of 8th February 2018 and objection decision dated 10th May 2018 for the period 2012-2016 are hereby upheld.
 - c) Each party shall bear its costs.

DATED and DELIVERED at NAIROBI this 17th of day of December 2019.

In the presence of:-

Tom Mc Awoorfor the Appellant

Fridah Mwangerafor the Respondent

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MOSES B. OBONYO
CHAIRMAN

.....
MAHAT SOMANE
MEMBER

.....
PATRICIA MAGIRI - ANAMPIU
MEMBER

.....
TIMOTHY K. CHESIRE
MEMBER