

REPUBLIC OF KENYA  
IN THE TAX APPEALS TRIBUNAL  
APPEAL NUMBER 4 OF 2016

JOSEPHINE KABURA IRUNGU .....APPELLANT  
=VERSUS=  
COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

**JUDGEMENT**

**BACKGROUND:-**

1. The Appellant is a businesswoman trading in the firm name and style of Roof and All Trading, Reinforced Concrete Technologies and Form Home Builders. Her address is Post Office Box Number 248082, Nairobi.
2. The Respondent is a Government Agency established by the Kenya Revenue Authority Act Cap 469, Laws of Kenya and charged with the mandate of administering the various tax laws on behalf of the Government of Kenya.
3. The Respondent vide it's referenced letter I&E/NBI/DTIS/03/016 of 5<sup>th</sup> August, 2015, pursuant to Section 56(2) of the Income Tax Act issued a Notice to the Appellant to attend an interview at it's offices to discuss tax matters relating to the following business entities:-
  - i) M/s Reinforced Concrete Technologies
  - ii) M/s Form Home Builders and
  - iii) M/s Roof and All Trading

Having failed to elicit any response to the above letter, the Respondent sent a reminder dated 12<sup>th</sup> August, 2015 which also failed to yield a response.

4. On 9<sup>th</sup> September, 2015 the Respondent issued a further Notice requiring the Appellant's attendance at it's offices on or before 23<sup>rd</sup> September, 2015. The Respondent intimated that failure to comply with the notice would leave it with no option other than invoking of the provisions of Section 109(1)(h) of the Income Tax Act Cap 470, Laws of Kenya.
5. On 9<sup>th</sup> December, 2015 vide it's letter Ref. A004697470M the Respondent raised estimated assessments for Income Tax and VAT in the sum of Kes.109,669,188/= and Kes.296,808,076/= respectively.
6. On 16<sup>th</sup> December, 2015 vide it's letter NK/091B/T/15, the Appellant, through her Tax Agent Kimani & Associates objected to the estimated assessments and undertook to file self assessments reflecting a true picture.
7. The Respondent vide it's letter of 24<sup>th</sup> December, 2015 in response to the objection, confirmed the Assessments and advised the Appellant of it's right of Appeal if not satisfied with the position taken against her.
8. The Appellant on 4<sup>th</sup> January, 2016 through her Tax Agent lodged notices of intention to Appeal both confirmations with the Tax Appeals Tribunal and attached thereto the Memoranda of Appeal and the Statements of Facts in support thereof.

9. **THE APPEAL**

During the Hearing of the Appeal Counsel on record (Kimani N.) informed the Tribunal he was unable to proceed as the Appellant was no longer co-operative. In the absence of any reasonable cause being shown by the Appellant for their non appearance. The Tribunal opted to proceed with the Appeal relying on the documents on record and evidence put forth by the Respondent.

10. With regard to the VAT claim, the Appellant relied on the following grounds:-

- i) Withholding Tax has not been considered and deducted;
- ii) Some of the supplies were either exempt or zero rated;
- iii) Input tax has not been considered;
- iv) The Sales are being claimed by the State through Asset Recovery Agency under miscellaneous Application No.524 of 2015 and as such not available for taxes;

It was thus the Appellant's prayer that the Tribunal directs the Respondent to consider all material facts and issue a correct assessment.

11. With regard to the Income Tax claim, the Appellant relied on the grounds below:-

- i) The Income assessed is being claimed by the State through the Asset Recovery Agency under Miscellaneous Application No.524 of 2015 and so the same is not available to pay taxes;
- ii) The Income assessed is estimated and excessive as it has not considered the return and Accounts filed, cost of sales, as well as operational costs.

The Appellant thus prayed the Tribunal directs the Respondent to consider the return and Accounts filed with it

## 12. RESPONSE

In Response the Respondent averred :-

**i) Withholding Tax not considered**

It is the Commissioner's position that there was no evidence provided by the Appellant to support his claim that any Withholding Tax was deducted and paid to the Commissioner. The income considered for the assessment was based on bank deposits which should be net of any Withholding Tax deducted if any;

**ii) Some of the supplies were either exempt or zero rated.**

It is the Commissioner's pleading that no evidence was adduced to demonstrate that any of the supplied was either exempt or zero rated'

**iii) Input tax has not been considered**

It is the Commissioner's pleading that no evidence was adduced to support any claim of input tax.

**iv) The sales are being claimed by the state through the Asset Recover Agency**

Under Section 3 of the Income Tax Act Cap 470, tax is chargeable for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived. Under Section 73(3) of the Income Tax Act, the Commissioner issued the assessments to the best of his judgement as the Appellant did not file/submit returns for the years under review. The question of recovery of the taxes raised is only addressed after the chargeable income is

determined and taxes assessed. The fact that the income being assessed is being claimed by another person does not prevent the Commissioner from determining chargeable income and assessing it accordingly;

- v) The Commissioner wishes to draw the attention of the Tribunal that he was not served with this appeal as stipulated under Section 13(5) of the TAT Act 2013. The Commissioner personally visited the Appellant's office on 22<sup>nd</sup> February, 2016 to receive a copy of the appeal;

It was thus the Respondent's stated position that the Appeal lacked merit and ought to be dismissed.

### 13. ISSUES FOR DETERMINATION

In relation to the Income Tax Claim whether:-

- i) The Income assessed is being claimed by the Asset Recovery Agency vide Miscellaneous Application 524 of 2015 and thus not available to pay taxes;
- ii) The Income assessed is estimated, excessive and has not considered the Returns and Accounts filed, costs of sales and operating costs;

### 14. In relation to the Value Added Tax (VAT) Claim withheld:-

- i) Withholding Tax has been taken into consideration and deducted;
- ii) Some of the supplies were exempt or zero rated;
- iii) Input was considered and finalized;
- iv) The sales are being claimed by the State through the Asset Recovery Agency in Miscellaneous Civil Application No.524 of 2015 and thus not available for taxes,

## 15. ARGUMENTS

INCOME ASSESSED BEING THE SUBJECT OF MISCELLANEOUS CIVIL APPLICATION NO.524 OF 2015 AND THUS NOT AVAILABLE FOR TAXES

- i) The Appellant argued that both the VAT and Income Tax being demanded were the subject of Miscellaneous Civil Application No.524 of 2015 filed by the Asset Recovery Agency and was simply not available for payment of taxes.
- ii) The Respondent hinged its claim on Section 3 of the Income Tax Act Cap 470 in reiterating tax is chargeable for each year of income upon all the income of a person, whether resident or non-resident which accrued in or was derived in Kenya.
- iii) The Respondent further stated that under Section 73(3) of Income Tax Act, it issued the assessments to the best of its judgement as the Appellant failed to file or submit returns for the year under review.
- iv) The issue of recovery of the taxes raised is only addressed after the chargeable income is determined and taxes assessed. The fact that the income being assessed is being claimed by another entity does not prevent the Respondent from determining chargeable income and proceeding to assess it accordingly.

## 16. WITHHOLDING TAX NOT CONSIDERED

The Appellant alleged in her Memorandum that Withholding Tax had not been taken into consideration and deducted. The Respondent resulted the foregoing by stating no evidence was tendered in support of this contention that Withholding Tax had been deducted and remitted to the Respondent.

**17. SUPPLIES EXEMPT OR ZERO RATED**

The Appellant alleged in its Memorandum that some of the supplies were exempt or zero rated. In response the Respondent pleaded that no evidence was adduced to demonstrate that any of the supplies was either exempt or zero rated.

**18. INPUT TAX NOT CONSIDERED**

- i) It was the Appellant's contention, input tax was not considered in computation of the tax due from her. Once again the Respondent was categorical no evidence in support thereof was tendered.
- ii) The Appellant pleaded the income assessed was estimated and excessive and failed to consider the Return and Assets filed cost of sales and operating expenses. The Respondent's rebuttal to this was that it lacked to the best of its judgement as the Appellant did not file or submit returns for the years under review, neither was any evidence tendered in support of the costs of sales and operating costs.

**19. ANALYSIS AND FINDINGS**

We have analyzed the issues of Withholding Tax, Input Tax, Exempts and Zero Rated Supplies together with the allegation of estimated and excessive taxation simultaneously. It is not in dispute that beyond the allegations in the pleadings no evidence in support thereof was tendered at the pleadings stage nor at the Hearing. We have also not had sight of the Returns and Accounts allegedly filed to assist us in determining whether the Assessment was not only an estimate but excessive .

20. The Tribunal was not persuaded to consider the fact that the Appellant was being pursued by another Agent as a Defence to the Assessment raised. This is informed by the fact that tax liability is not hinged on the ability to pay but rather the liability. It would be setting a dangerous precedent if an Assessee tax liability was pegged to other liabilities that may be due and owing in respect of other Agencies or individuals . The upshot of the forgoing is that the proceeding in Miscellaneous Civil Application No.524 of 2015 are an irrelevant consideration in determining the Appellant's tax liabilities in the instant Appeal.

21. **CONCLUSION**

- i) It is patently clear that on all the grounds of Appeal in the memorandum the Appellant besides the allegations contained in the Pleadings never tendered any evidence in support thereof orally or documented. The Tribunal is in agreement with the Respondent that a claim on the income in question by another party is an irrelevant consideration. Any such claim is just that Section 17(1) of the VAT 2013 does allow credit for input tax. The onus is placed on the Appellant to await documentary evidence of taxable inputs incurred. Further the Income Tax Section 15(1) provides that “for the purpose of ascertaining the total income of a person for a year of income there shall,..... be deducted all the expenditure incurred in that year of income which expenditure is wholly and exclusively incurred by him in the production of that income”,
- ii) The Income Tax goes on at Section 54A(1) to place the burden of recording keeping in support of any deductible

expenses on the Assessee. This burden is reinforced by didn't of Section 30 of the Tax Appeals Tribunal.

22. The Tribunal in reaching it's determination finds support in "PZ Cussons East Africa Limited =vs= Kenya Revenue Authority (2013)eKLR where Justice D.S Majanja in making reference to Dearson =vs= Belcher CH.M. Inspector of Taxes - Tax Cases Volume 38, inter alia, made it clear "the onus is upon the Appellant to show that the assessment made upon him is excessive and incorrect...". In our respectable view, there was no attempt to discharge that burden on the part of the Appellant.
23. By reason of the foregoing the Tribunal finds that the Appeal lacks merit and it is hereby dismissed with no Order as to costs.

DATED and DELIVERED at NAIROBI this 24<sup>TH</sup> Day of MAY, 2017

In the presence of:- No Appearance for the Appellant

FRIDAH MWONGERA & VICTOR MOSWETA for the Respondent

.....  
MOSES BUYUKA OBONYO  
CHAIRPERSON

.....  
JOSEPH WACHIURI  
MEMBER

.....  
PHILOMENA KIROKEN  
MEMBER

.....  
JOLAWI O. OBONDO  
MEMBER