

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL NO.60 OF 2017

LIFECARE INSURANCE BROKERS LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is an Insurance Broker and a resident company whose principal registered office and place of business is in Nairobi County.
2. The Respondent is established under Section 3 of the Kenya Revenue Authority Act, Chapter 469 Laws of Kenya charged with the mandate of assessment, collection and receipt of all government revenue.
3. The Respondent issued its Notice of Intention to Audit the Appellant vide its letter of 8th August 2016, which was received by the Appellant on 9th of August 2016, being audit for the years of income, 2013, 2014 and 2015. The same was specifically in respect of excise duty.
4. The Respondent, vide its letter of 18th November 2016, set out its Audit Findings and noted that the Appellant had failed to charge and remit excise duty on the commissions it had earned from Insurance companies and thereby as a result, it raised an Additional Assessment vide its letter dated 18th November, 2016 for Ksh:27,684,872.41 inclusive of penalties and interest being excise duty for commissions earned.
5. The Appellant on receipt of the said Demand, objected to the same vide its letter dated 15th December 2016, which was received by the Respondent on even date.
6. Upon receipt of the Appellant's Objection, the Respondent vide its letter dated 15th February 2017 issued its Objection Decision to the Appellant.
7. Being aggrieved by the Respondent's Objection Decision, the Appellant filed a Notice of Appeal dated 14th March 2017, filed and served on 17th March 2017. It subsequently filed its Memorandum of Appeal and Statement of Facts on 30th March 2017, which documents were subsequently amended and filed on 15th May 2017, to wit the Amended Memorandum of Appeal and the Amended Statement of Facts.
8. Upon service, the Respondent filed its Statement of Facts on 28th April, 2017 and Amended Statement of Facts on 13th June, 2017.

THE APPEAL

9. The Appellant's Amended Memorandum of Appeal dated 15th May 2017 and filed on even date is based on various grounds that can be summarized as hereunder;
- a) THAT the Commissioner erred in Law and in Fact by finding that the Appellant was liable for additional Excise Duty attributing to commissions earned by the Appellant from Insurance Companies.
 - b) THAT the Commissioner erred in Law and in Fact in finding that the onus of deduction/charging Excise Duty and remitting of the same lay with the Appellant rather than finding that the same is the duty of the Insurance Company making the Commission payment to the Appellant, at the time of payment of that Commission.
 - c) THAT the Commissioner erred in Law and in Fact by misconstruing Part III of the Fifth Schedule to the Customs and Excise Duty Act, which places an obligation to levy Excise Duty at a rate of 10% when charging commissions and applying it to the Appellant who does not charge commissions.
 - d) THAT the Commissioner erred in Law and in Fact by not addressing the question of whether or not the Commissions paid to the Appellant by Insurance Companies had already been correctly treated for Excise Duty thus creating double taxation.
 - e) THAT the Commissioner erred in Law and in Fact by failing to exercise its discretion in this matter by not considering the material fact that the applicable Law was abandoned in 2015 with respect to Insurance Companies and thereafter not assessing the amounts allegedly due.
 - f) THAT the Demands of Tax and Excise Duty Assessment dated 18th November 2017, in the amount of Kshs.27,684,872/= as confirmed through the Confirming Notice dated 15th February 2017, is *ultra vires*, arbitrary, excessive and erroneous and has been levied on the Appellant in a manner that contravenes the Law.

THE RESPONSE

10. In response to the Appeal, the Respondent contended as follows;

- a) THAT the Appellant being an insurance company is licensed under the Insurance Act and categorized as a financial institution under Part III of the Fifth Schedule to the Customs and Excise Act Cap 472, Laws of Kenya as amended under Finance Act 2013.
- b) THAT the Appellant earned reinsurance commissions categorized as treaty commissions during the period under review.

- c) THAT the Respondent was guided by Paragraph 8 of Part III of the Fifth Schedule to the Customs and Excise Act, Cap 472, Laws of Kenya as amended in the Finance Act 2013. The commissions earned have been expressly mentioned in the Act as chargeable to Excise Tax. Other fees have also been defined in the Act to mean “...any fees, charges...” Which are chargeable to excise tax as per the provisions of the above statutes.
- d) THAT the Appellant did not pay the Excise Duty chargeable on the commissions and other fees earned as required under Section 137(4) of the Customs and Excise Act Cap 472, Laws of Kenya read together with the amendments to Paragraph 8 of Part III of the Fifth Schedule to the Customs and Excise Act as amended by the Finance Act, 2013.
- e) THAT the Respondent therefore issued an assessment to the Appellant for the unpaid excise duties based on the above statutes.
11. While the Appeal was pending hearing, the Appellant, on 4th of October 2019, filed a Notice of Motion dated 3rd October 2019 supported by an affidavit sworn by one Isaac Mugane, the Appellant’s Internal Auditor of even date.
12. The Appeal was fixed for hearing on 7th of October, 2019 wherein the Appellant sought to have its said Application be heard first and a determination on the same be made, on the issue of a Preliminary Objection on a point of law relating to the late filing of the Respondent’s Objection Decision, before delving into the full hearing of the substantive Appeal.
13. Consequently, the Tribunal proceeded to hear the parties on the said Application and directed them to file written submissions to which they duly complied.
14. The Appellant’s Application sought the following Orders:-
- (i) The Appellant’s Notice of Objection dated 15th December, 2016 and received on 15th December, 2016 be declared by this Honourable Tribunal as having been statutorily and automatically allowed by operation of Section 51(11) of the Tax Procedures Act.
 - (ii) The Respondent be permanently restricted from enforcement of the Excise Duty and/or the Tax Decision that is the subject of the Appeal herein, being the taxes and decision communicated by the Commissioner of Domestic Taxes dated 18th November, 2016; in the amount of Kshs.27,684,872/= as confirmed through the Confirming Notice dated 15th February, 2017.
 - (iii) The costs of this Application be awarded to the Appellant.
 - (iv) The costs of the Appeal be awarded to the Appellant.

- (v) Any other Orders that this Honourable Tribunal may deem just and expedient to issue.

ANALYSIS AND FINDINGS

15. The thrust of the Appellant's application is that pursuant to Section 51(1) of the Tax Procedures Act (TPA), the Respondent was compelled by law to have made its decision, being the Objection Decision, with respect to the Appellant's Notice of Objection within sixty (60) days, which it failed to do thereby allowing the Appellant's Objection Notice by operation of the law.
16. The Respondent's argument is that it is an undisputed fact that it received the Appellant's letter of Objection on 15th December, 2016 and replied vide its email of 15th February, 2017. It further submitted that it had an assumption on its part that sixty (60) days lapsed on 15th February, 2017.
17. Furthermore the Respondent accepted that due to inadvertence on its part, its Objection decision was rendered two days late. However it contended that the delay of over sixty days was an inadvertent error for which it invited the Tribunal to invoke the provisions of Article 159(2) of the Constitution and do justice to the parties, stating that it was likely to suffer prejudice in failing to collect the taxes to be employed for the greater public which outweighs the prejudice to be suffered by the Appellant.
18. The Respondent concluded its arguments by stating that in any event the commissions earned by the Appellant are subject to excise duty pursuant to Paragraph 8 of part 111 of the Fifth Schedule to the Customs and Excise Act, Cap 472 Laws of Kenya as amended under the Finance Act, 2013.
16. The Tribunal has carefully considered the Appellant's Application, its grounds and supporting affidavit, together with both parties' submissions. It is of the respectful view that the only issue that begs its determination is whether the Respondent's Objection Decision ought to be deemed allowed having been done out of time.
17. The Tribunal will turn into the relevant statute, namely the Tax Procedures Act, and specifically Section 51 (11) thereof. The same states as hereunder:-

"Where the Commissioner has not made an Objection Decision within sixty days from the date that the taxpayer lodged a Notice of Objection, the Objection shall be allowed."

18. The said Act and in particular Section 51 provides for the statutory procedure to be followed from receipt of an assessment Notice in respect of a tax dispute to Objection Decision and thereby provides for a dispute resolution mechanism for tax assessments by the Respondent. In the instant case, it is an undisputed fact that since the Respondent is pursuant to Section 51 (11) of the TPA given sixty days to

determine the Appellant's Objection, but failed to do so, it thereby denied the Appellant an opportunity to exercise its statutory right of deeming its Objection as allowed.

19. The Tribunal is alive to the fact that the wording used under Section 51(11) is "shall be allowed". The legislature in its wisdom had the same couched in mandatory terms. Consequently, the Respondent has not demonstrated to the satisfaction of the Tribunal why we should ignore the clear words of the relevant statute established to resolve tax disputes of such nature and continue to entertain the Appeal any further. The Tribunal is cognizant of the fact allowing the Respondent's mere argument that there was an error of omission on its part would be setting dangerous precedence in tax matters.
20. The Respondent submitted that the Tribunal ought to consider Article 159 of the Constitution and not delve into technical procedures. However, the Tribunal disagrees with this assertion and notes that the Respondent having issued its Objection Decision in contravention of the applicable law, it cannot purport to invoke the provisions of Article 159 of the Constitution to validate an incompetent Objection Decision.
21. The Tribunal further refers to the **SUPREME COURT CASE OF RAILA ODINGA AND 5 OTHERS VS. IBEC AND 3 OTHERS (2013) eKLR AND DAVID OCHIENG VS. SDA CHURCH (2012) eKLR**. These cases among others emphasize and reiterate the principle that Appeals filed out of time and without leave of Court is not a mere technicality that can be saved by Article 159 of the Constitution or the overriding objective. Failure to adhere to strict deadlines as provided by statute is not a technicality. The Constitution is not a panacea to the failure by the Respondent to do what it is obligated to do under stipulated law. The Respondent has itself to blame on its laxity and the law will not aid the indolent.
22. Accordingly, the Tribunal finds that Section 51(11) of the Tax Procedures Act applies strictly and where the Commissioner has not made a Response within sixty days, the Appellant's Objection is allowed statutorily. In the instant case as the Respondent defaulted in making a determination on the Appellant's Objection within the prescribed period, the same was allowed by operation of the law. Consequently there was no reason for the Appellant to have appealed herein.
23. In the premises, the Tribunal finds that the Respondent's Objection Decision is not legally valid as it was issued out of the stipulated timelines in law and the Tribunal has no powers to extend the same as it is incapable of extension.
24. Consequently the Tribunal finds that pursuant to Section 51(1) of the Tax Procedures Act (TPA), the Respondent was compelled by law to have made its decision, being the Objection Decision, with respect to the Appellant's Notice of Objection within

sixty (60) days, that is by 13th February 2017, which it failed to do thereby allowing the Appellant's Objection Notice by operation of the law.

25. In view of the foregoing, the order that commends itself to the Tribunal is that the Appellant's Notice of Motion dated 3rd day of October, 2019 is merited and is hereby allowed.

26. Consequently, the Tribunal will not delve into the rest of the issues relating to the merits of the Appeal.

DECISION

27. The upshot of the above is that the Tribunal makes the following ORDERS:-


- a) The Respondent's Objection Decision dated 15th February 2017 is hereby expunged and its Additional Assessment against the Appellant vide its demand of 18th November, 2016 for Kshs.27,684,872.41 is hereby vacated.
- b) The Appellant's Objection vide its letter dated 15th December 2016 is hereby allowed by operation of law.
- c) There will be no order as to costs.

28. Orders accordingly.

DATED and DELIVERED at NAIROBI this 18th day of December 2019.

In the presence of

Bahati Mwanuyefor the Appellant
Chelang'at Mutaifor the Respondent


JOSEPHINE K. MAANGI
CHAIRPERSON


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RICHARD ROTICH
MEMBER


.....
TANVIR ALI
MEMBER


.....
GEOFFREY KARUU
MEMBER


.....
DELILAH K. NGALA
MEMBER