REPUBLIC OF KENYA

IN THE TAX APPEALS TRIBUNAL

APPEAL NO. 109 OF 2015

VITROCISET S.P.A .....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

BACKGROUND

1. The Appellant is a Foreign Branch of an Italian Company registered in Kenya under the Companies Act, Cap 486 of the laws of Kenya (repealed).The Respondent is established by the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya, as a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and connected purposes.

2. The Appellant entered into an agency agreement with the Italian Space Agency, an agency under the Government of Italia, to carry out certain assignments and to operate the Satellite Tracking and Launching Station at Malindi within the Republic of Kenya.

3. The Respondent conducted an audit on the Appellant having issued a notice of intention to audit the Appellant on Value Added Tax, Corporation Tax, Pay As You Earn, and Withholding Tax for the period

2011 and 2012 under the Income Tax Act, Cap 470 and Value Added Tax, Cap 476 (repealed).

4. The Respondent proceeded to conduct an in-depth audit and the Respondent completed the audit and vide their letter dated 12th July 2013 proceeded to issue assessments follows ;-

a)	Corporation tax	Kshs 27,921,186/=
b)	Withholding Tax	Kshs. 3,720,841/=
c)	Value Added Tax	Kshs.41,213,537/=
	Total	**Kshs.72,855,564/=**

5. The Appellant objected to the Assessment vide their letter dated 7th August 2013 to the additional VAT assessment under Section 32A of the VAT Act and after a series of discussions, the Respondent on 14th May 2014 confirmed notices of assessment on Corporation Tax and Value Added Tax and directed the Appellant's to Appeal to the Local Committee or VAT Tribunal as would be applicable. as follows:-

a)	Corporation Tax	Kshs.21,132,230/=
b)	Value Added Tax	Kshs. 37,323,652/=
	Total	**Kshs.58,455,882/=**

6. The Appellant being dissatisfied with the Commissioner's decision on the confirmed assessments, lodged their notices of appeal to the decision of the Commissioner on assessment on Corporation Tax and Value Added

Tax on 11th June 2014 to the Local Committee in line with the provisions of the Income Tax Act , Cap 470 and Value Added Tax Tribunal respectively.

THE HEARING

7. The Appeal was scheduled for hearing on 19th May 2016 after several mentions to enable the parties discuss and arrive at an amicable settle. The parties were unable to agree and informed the Tribunal that they wished for the disputed to be settled by the Tribunal as they had reached an impasse. The Appellant however informed the Tribunal that they intended to first argue their preliminary objection as filed in the Notice of Motion Application on 18th May 2016 raising a preliminary objection on a point of law which they had raised previously on several occasions but opted to file a formal application in this regard to be determined at the first hearing on the grounds that;

   a. ***The Respondent's response is incurably defective as the same was filed out of time permitted by statute.***
   b. ***The Respondent's response is an abuse of the Tribunal process as the same has been lodged in blatant disregard of the VAT Act (repealed), the VAT Act, 2013 , the Income Tax Act Cap 470 as well as the Tax Appeals Tribunal Act and should therefore be struck out.***
   c. ***The Tribunal lacks jurisdiction to consider the Respondent's Response as the same has been filed without the requisite leave required in law and therefore is irregular, is not valid and is untenable at law.***

8. The application was served upon the Respondent's on the same day of the hearing and the Tribunal granted the Respondent's time to peruse the same and proceed if they were comfortable and also granted the parties chance to file written submissions.

9. It is trite law that the Tribunal should dispose of the Preliminary objection filed first and determine whether it warrants's any merit before handling the substantive Appeal filed by the Appellant. The Tribunal therefore proceeds to consider the merits of the preliminary objection. It is not in dispute that the Statement of Facts filed by the Respondent was filed out of time as both the Memorandum of Appeals were filed on 26th June 2014 and the 27th June 2014 as already stated herein above and the Response thereto filed on 28th February 2016 with the Tribunal and served on the Appellant on 19th February 2016.

10. Each party presented both written both oral and written submissions with the Appellant relying entirely on the provisions of the Income Tax Act and Value Added Tax Act with regard to requirements on the timelines the Respondent was to file their response and the Respondent relied on the provisions of Article 159 (2)(d) of the Constitution of Kenya 2010 .

THE RESPONDENT/ APPLICANT'S CASE ON THE PRELIMINARY OBJECTION

11. The Respondent argued that the preliminary objection was a mere technicality and did not go to the substance of the Appeal and therefore the Tribunal ought to allow the Statements of Facts, admittedly, filed out of time to be part of the record of proceedings as they were entitled to

fair administrative action and failure to file the Statement of Facts with the stipulated timelines did not go to the root of the Appeal before the Tribunal.

12. The Respondent further argued that the there was no Appeal process in relation to the Value Added Tax matters as the Value Added Tax Act 2013 did not provide for the same and therefore the Appeal relating to VAT assessment was not properly filed before the Tribunal.

ISSUES FOR DETERMINATION

i) What was the Appeal procedure relating to Income Tax disputes from the Commissioner's decision at the time the cause of action arose and what were the applicable Statutes?

ii) What was the Appeal procedure relating to VAT disputes from the Commissioner's decision at the time the cause of action arose which are the applicable Statutes?

iii) Whether the Preliminary objection has merits and satisfies the parameters set out in law to warrant the grant thereof? Whether the Respondent's response is incurably defective?

iv) Who share shall bear the costs?

ANALYSIS AND FINDINGS BY THE TRIBUNAL

13. The Tribunal has been called upon to consider and determine the Appeal processes for two different tax heads that is Income Tax and Value Added Tax. The Tribunal must therefore proceed to determine the two processes

separately and the governing statutes to determine whether it has jurisdiction to entertain the Response filed by the Respondent.

14. The Tribunal shall therefore deal with the Appeal process and procedures under the Income Tax Act first.

15. Prior to 1st April 2015, Appeals relating to Income Tax decisions from Commissioner of Domestic taxes were handled by the Local Committees. The Local Committees became defunct sometime in 2014 with the enactment of the Tax Appeals Tribunals Act, 2013(TATA) which was enacted to replace all other legislations that were governing Tax Appeal processes and stream line the Appeals regime in the Republic of Kenya. The TATA was assented to on 27th November 2013 and commencement date, which was to be by Notice, was gazetted on 1st April 2015 and the Tax Appeals Tribunal (TAT), as we now knows it, commenced operations. The Legislature in its wisdom did not allow for a vacuum and between the time of enactment of TATA and gazettement of the commencement date Appeals arising from the Income Tax Act (ITA) Cap 470 , as provided for under Part X and in particular Section 82 of the ITA was still in force as the said provision only ceased to have effect upon gazettement of the Commencement date of TATA on 1st April 2015. Any aggrieved party therefore would have to adhere to the provisions of the existing legislation to the letter.

16. The Tribunal therefore finds that there was no vacuum with regard to the Appeal procedure in relation to decisions of the Commissioner on

Income Tax related tax heads that was in place as at the time when the confirmed assessment under this head was presented to the Appellant as stipulated in the ITA at Part X of the ITA and specifically Sections 82, 86, 87 and 89 thereof. Under Section 86 of the Income Tax Act, Cap 470 (ITA) of the Laws of Kenya, (now repealed), Section 86 provided as follows; ***Section 86(1) A person who has been served with a notice under section 85(3) may-***

a) If his assessment is based upon or consequent upon a direction issued under section 23 or 24, Appeal from the decision of the Commissioner to the Tribunal;

Section 86:-

(3) where a person other than the Commissioner has failed to give notice of Appeal within a period specified in subsection (1) he may, after depositing with the Commissioner so much of the tax as is payable under section 92(6), or such part thereof as the Commissioner may require, and paying any interest due under section 94, apply to the local committee or the Tribunal, as the case may be, for an extension of time in which to give notice of Appeal, and the local committee or the Tribunal may grant an extension on being satisfied that, The Appellant reasoning being that the debtors alleged to be owing arose purely from business transactions. To absence from Kenya, sickness or other reasonable cause, he was prevented from giving notice of Appeal within the relevant period and that there has been no unreasonable delay on his part.

Section 86 :-

(4) where a person other than the Commissioner has failed to give notice of Appeal within the period specified in subsection (2) he may apply to

the Court for an extension of time in which to give notice of Appeal and the Court may grant an extension on being satisfied.

Section 87.:-

(1) In this section, "appellate body" means the Court, the Tribunal or a local Committee.

(2) In an appeal under section 86 –

(a) the appellant shall appear before the appellate body either in person or by an advocate on the day and at the time fixed for the hearing of the appeal, but

(i) if it be proved to the satisfaction of the appellate body, that owing to absence of the appellant from Kenya, sickness, or other reasonable cause, he is prevented from attending at the hearing of the appeal on the day and at the time fixed for that purpose, the appellate body may postpone the hearing of the appeal for such reasonable time as it thinks necessary;

(ii) in the case of an appeal to a local committee, the appellant may be represented by an agent authorized by him in writing;

(b) the onus of proving that the assessment or decision appealed against is excessive or erroneous shall be on the appellant;

(c) the appellate body may confirm, reduce, increase or annul the assessment concerned or make any other order thereon which it may think fit;

(d) the costs of the appeal shall be in the discretion of the appellate body;

(e) the appellate body shall, within seven days of its decision, cause a notice of the decision and of the date thereof to be issued and that notice shall be served on the parties to the appeal;

(f) where the decision of the appellate body results in an amendment to an assessment, the assessment shall be amended accordingly and the Commissioner shall cause a notice setting out the amendment and the amount of tax payable to be served on the person assessed.

(3) An order made by the Court on an appeal shall have effect, in relation to the amount of tax payable under the assessment as determined by the judge, as a decree for payment of that amount, whether or not the amount of tax is specified in the decree.

and the Income Tax (Local Committees) Rules specifically Rules 4, 5, 6, 7 and 7A

Rule 4:-

Appeal to the clerk within fourteen days after the date on which the appellant gives notice of appeal in writing to the Commissioner pursuant to section 86(1);but where the local committee is satisfied that owing to absence from his normal place of residence, sickness or other reasonable cause the appellant was prevented from presenting a memorandum within that period and that there has been no unreasonable delay on his part, the local committee may extend that period.

Rule 5. :-

A memorandum shall be signed by the appellant and shall set out concisely under distinct heads, numbered consecutively, the grounds of appeal without argument or narrative.

Rule 6.:-

(1) A memorandum shall be accompanied by –

(a) a copy of the confirming notice, the amending notice or the notice of the decision of the Commissioner as the case may be:

(b) a copy of the notice of appeal;

(c) a statement, signed by the appellant, setting out the facts on which the appeal is based and referring to any documentary or other evidence which it is proposed to adduce at the hearing of the appeal; and

(d) a certificate signed by the Commissioner acknowledging receipt of the return of income required by section 52, together with the documents specified in section 54, for the year to which the appeal relates.

(2) .....

Rule 7. :-

Within forty-eight hours after the presentation of a memorandum to the clerk, a copy thereof and of the statement of facts of the appellant shall be served by the appellant upon the Commissioner and upon every other respondent.

Rule 7A. :-

(1) The Commissioner shall, within thirty days of being served with a memorandum and statement of facts in accordance rule 7 file a response,

with the clerk, stating the facts upon which the response is based and specifying any documentary or other evidence that he proposes to adduce at the hearing of the appeal.

(2) The Commissioner shall, upon filing a response in accordance with paragraph (1), serve a copy of the response together with copies of any documents annexed thereto, upon the appellant.

(3) Where a local committee is satisfied that, the Commissioner was for any reasonable ground , unable to file the statement of facts with the clerk within the prescribed period, the local committee may extend the time within which the Commissioner shall file a response

17. The Tribunal having interrogated the laid down procedure set out for Appeals from the decision of the Commissioner relating to Income Tax assessments, for all intents and purposes the law relating to appeals to the Local Committee remained in place until 31st March 2015 and therefore all parties were required to comply with the mandatory provisions of the ITA together with the subsidiary legislations that provided support to the parent legislation.

18. The Tribunal further finds that, parliament in its wisdom incorporated a new Rule 7A to the Income Tax (Local Committees) Rules vide Legal Notice No. 53 of 2013 which in effect required the Commissioner (Respondent herein) to file a response to the Appeal which was a departure from the earlier Rules which had no such express provision and it provides as follows; ***Rule 7A.***

(1) The Commissioner shall, within thirty days of being served with a memorandum and statement of facts in accordance rule 7 file a response, with the clerk, stating the facts upon which the response is based and specifying any documentary or other evidence that he proposes to adduce at the hearing of the appeal. ..

(2) The Commissioner shall, upon filing a response in accordance with paragraph (1), serve a copy of the response together with copies of any documents annexed thereto, upon the appellant.

(3) Where a local committee is satisfied that, the Commissioner was for any reasonable ground , unable to file the statement of facts with the clerk within the prescribed period, the local committee may extend the time within which the Commissioner shall file a response.

19. From the wording of the foretasted Rule, the intention of the legislature was clear and required the Commissioner to file his response within 30 days of being served and in the event that the Respondent was not able to comply then the law allowed him to seek leave of the Local Committee subject to reasonable grounds being given to explain why they were not able to so comply and if satisfied then the Respondent would be granted an opportunity within such set timelines to ensure that they complied.

20. The Tribunal has perused all the proceedings filed before it and notes that no such application was or has been filed or was there an oral application made to the Local Committee or the Tribunal for consideration. The Respondent instead proceeded to admit that they did

not seek leave of the Tribunal to file their response out of time. Further no reasonable grounds were advanced by the Respondent to convince the Tribunal as to the reasons for failing to comply other than the fact that the Respondent relies on Article 159(2)(d) of the Constitution of Kenya 2010 and merely submitted that the preliminary objection raised was a technicality that did not go to the substance of the Appeal and that for there to be fair administrative action they ought to be granted a chance to defend the Appeal.

21. The Tribunal disagrees with the Respondent on this assertion and is in the circumstances satisfied with the submissions of the Appellant that limitation of time of filing a response is instrumental to the administration of Justice and not Just a mere procedural technicality. The legislature would never have provided for the set timelines requiring parties to comply if they opined that it was a mere technical requirement.

22. The Tribunal has also in its deliberations while arrived at its decision, considered the doctrine of laches which provides *vigilantuibus non jura subveniunt* (the law assists the vigilant and not the indolent) and it is not fair and just for a party to sit back and do nothing to defend a cause which is well within their knowledge and when challenged on their failure so to comply they then opt to argue that the fact they have failed to comply is a mere technicality which ought to be disregarded and dispensed with in the interest of administering substantive justice. The Tribunal notes that the sword of justice cuts both ways and therefore

must consider all the facts and the applicable law so as to dispense fair justice to all the parties appearing before it.

23. The Jurisdiction of the Tribunal to entertain the Respondent's defence has been called to question and therefore this cannot be said to be a mere technicality but is a substantive matter that has to be determined and not even the provisions of Article 159(2)(d) of the Constitution of Kenya 2010 can be invoked so as to grant a party a chance to rely on a document that has been clearly filed out of time and further despite being filed out of time the concerned party is unable to demonstrate why they failed to comply with the set timelines to file their response as provided for in law. Laws are not made in vein but must be respected, adhered and followed to the letter failure to which we would have nothing but anarchy in society as individuals would chose when to regard and comply with the legislated laws and when to totally ignore and disregard them at their whim.

24. The Tribunal shall now considered the submissions by both parties on the Appeal relating to Value Added Tax (VAT) and finds that the Appeal before it was filed on 26th June 2014 and duly served upon the Respondent who responded vide their letter dated 24th June 2014 informed the Appellant that there was an inconsistency of the law as the VAT Act, 2013 did not provide for an Appeal process and there being no mechanism in law in place, the Respondent could not be served with Appeal documents relating to disputes touching on VAT assessments .

25. The Tribunal has perused the communication between the Appellant and the Respondent placed before it and notes that on 14th May 2014 the Respondent did draw the attention of the Appellant to the fact that they could proceed to" ***Appeal either to the Local Committee or the VAT Tribunal as the case may be"*** the Tribunal also notes that the VAT Act 2013 was assented to on 14th August 2013 and came into effect on 2nd September 2013 through Legal Notice No.193 of 30th September 2014 and the Tax Appeals Tribunal 2013 came into effect on 1st April 2015.

26. The Tribunal is required to determine whether Section 32 of the Value Added Tax Act, Cap 476 (now repealed) was still applicable as at the time when the Appellant filed their Appeal or whether with the coming into effect of the VAT, Act 2013 the same was automatically deleted. Having reviewed the various legislations relating to Appeals on VAT, the Tribunal finds that Section 68 (6) of the VAT Act 2013 which provides; "***Unless a contrary intention appears, the commencement of this Act shall not-***

(a).....

(b).....

(c) affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligations, liability, penalty, forfeiture or punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and such penalty forfeiture or punishment may be imposed as if this Act has not been passed; or...."

27. The Tribunal therefore asked itself what the meaning of legal proceeding as provided under Section 68 (6) was and proceeded to determine the definition. The Tribunal notes that the definition attributed thereto in the *Law Lexicon the Encyclopedic Law Dictionary* is ***" Legal proceeding means any proceeding or inquiry in which evidence is or may be given and includes an arbitration"*** It goes further to state that ***" legal proceeding means a proceeding regulated or prescribed by law in which a judicial decision may or may be given"*** and further states that ***" The phrase " legal proceeding", is any proceeding in a court of justice by which a party pursued a remedy which the law affords him. The term embraces any of the formal steps or measures employed in the prosecution or defence of a suit. It refers to the use of a judicial process."*** And finally states that ***"Legal process. The words: legal process" mean all the proceedings in an action or proceeding. Process, whether by writ or by warrant, is legal whenever it is not defective in the frame of it and is issued in the ordinary course of justice from a court or Magistrate having jurisdiction of the subject matter, though there have been error or irregularity in the proceedings previous to the issuance of the process."***

28. From the forgoing definition it is clear that the Legislature in its wisdom, once again, when enacting the Value Added Tax Act, 2013 did not curtail any rights relating to legal proceedings and indeed in the transitional and saving clauses therein at Section 68 (6) (c) of the Value Added Tax Act, 2013 referred to herein above intentionally included the legal proceedings. The Tribunal therefore holds and finds that the Appeal process, being a legal process, that was already provided for under the

Repealed Value Added Tax Act, Cap 476 at Section 32 was therefore saved and still in place even with the coming into effect of the Value Added Tax Act, 2013 so as not disenfranchise any aggrieved party from pursuing an Appeal process on right to administrative action which is a fundamental right enshrined in the Constitution of Kenya 2010 under Article 47 and provides as follows that ***" Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."*** which right cannot be taken away as once a determination is made in the first instance as is the case with the decision of the Commissioner the right of Appeal against such decision follows and it would have been an absurdity if this right had been curtailed.

29. The Tribunal further finds that the provisions of Section 22 of the Interpretations and General Provisions Act Cap 2 which the Respondent has relied on in its submissions, states that ***"the repealed law remain in force until substituted provisions come into operation"*** , became applicable on 1st April 2015 when the Tax Appeals Tribunal Act, 2013 came into effect and by virtue of Section 43 of the TATA Section 32 of the VAT Act, Cap 476 which related to the Appeal process of decisions relating to Value Added Tax matters emanating from the Respondent was repealed as provided for in the marginal notes of the TATA. If this was not the case then the Respondent would not have vide their own letter dated 14th May 2014 directed the Appellant to ***"either Appeal to the Local Committee or the VAT Tribunal as the case may be".*** This action clearly demonstrates that the Respondent was well aware that the law relating to VAT Appeals was still in force as at the time when the

Commissioner made his decision on the assessment so as to warrant them to refer the Appellant to the two bodies which ever was applicable.

30. The Tribunal therefore finds that the Appellant properly proceeded to lodge their Appeal by relying on the provisions of Section 32 of the Value Added Tax Act Cap 476 (now repealed) and therefore the Respondent ought to have filed their response thereto as provided for under Rule 8 of the Value Added Tax Subsidiary Regulations which provides as follows:

"(1) The Commissioner shall, if he does not accept any of the facts of the appellant, within twenty-one days after service thereof upon him under rule 7, file with the secretary a statement of facts together with ten copies thereof and the provisions of rule 6(c) shall mutatis mutandis apply to the statement of facts.

(2) At the time of filing a statement of facts pursuant to paragraph (1), the Commissioner shall serve a copy thereof, together with copies of any documents annexed thereto, upon the appellant.

(3) If the Commissioner does not desire to file a statement of facts under this rule, he shall forthwith give written notice to that effect to the secretary and to the appellant, and in that case the Commissioner shall be deemed at the hearing of the appeal to have accepted the facts set out in the statement of facts of the appellant."

31. The Respondent has in the circumstances clearly failed to comply with the provisions of the law by not filing their Statement of Facts within the

stipulated timelines which would in effect go to the substance of the Appeal and cannot be treated as a mere technicality on compliance hence the reason why limitations are set by the legislation aforesaid and further unlike the processes accorded under the Income Tax (Local Committees) Rules there was no window of opportunity granted to the Respondent to seek leave to file their response out of time, which they did not, and therefore what is left for the Tribunal to determine at the time of hearing the Appeal is the effect of Rule 8 (3) of Value Added Tax (Tribunal) Rules, 1990 The Tribunal therefore cannot grant to the Respondent that which the law had not intended in the first instance.

32. The Tribunal now turns to the provisions of Section 15(1) of the Tax Appeals Tribunal Act, 2013 which provides;

"(1) The Commissioner shall, within thirty days after being served with a copy of an appeal to the Tribunal, submit to the Tribunal enough copies as may be advised by the Clerk, of—

(a) a statement of facts including the reasons for the tax decision; and

(b) any other document which may be necessary for review of the decision by the Tribunal."

33. The Tribunal further finds that in the disputed Statement of Facts filed by the Respondents on 18th February 2016, the Respondent did not challenge the Jurisdiction of the Tribunal and has only done so by way of their submissions in responses to the Preliminary Objection raised by the Appellant who have prayed that the Respondent's Statement of Facts be expunged from the record. The Tribunal has, with great respect, been

unable to appreciate the cogency of the argument presented by the Respondent especially as it runs in diametric opposition to the trite practices under judicialism , that he who has a grievance against another, on a matter of legal character, has the perfect freedom to invoke the jurisdiction of the Tribunal, in this case, the Respondent had the opportunity to have lodged the preliminary objection in the first instance to challenge the Appeal relating to the VAT assessment upon being served with the Appellant's Statement of Facts. The Respondent chose not to, instead they went ahead and filed their Statement of Facts in respond to the Appellant's Appeal. It's only after they were served with the preliminary objection challenging the validity of their response by the Appellant, that they were jolted from their slumber and they proceeded to advance the argument that by repeal of the Value Added Tax , Cap 476 on 2nd September 2013 the Appeal process was equally thrown out the window with the rest of the provision and totally disregarding the provisions of Section 68 of Value Added Tax Act , 2013 whose marginal notes clearly refer to Repeal of Cap.476, transitional and saving provisions and in particular Section 68 (6) (c) thereof which clearly provide that legal processes shall not be affected by the coming into effect of the Value Added Tax Act,2013. The deliberate failure by the Respondent to file their Statement of Facts in accordance to the timelines stipulated by the law is an omission that goes to the root of the Substantive legislation and rules of Appeal. The same rules and laws which the Respondent requires the Appellant to observe when filing an Appeal and compliance with in calculating and paying due taxes to the Commissioner.

34. The Tribunal therefore shall not hesitate to invoke its powers in accordance with the law, as failure to do so shall mean utter confusion in the Tribunal corridors as there shall no longer be any reason for adhering to the Statutory legislations, Rules of the Tribunal and other related legislation as has already been demonstrated hereinabove, even when they have been violated with impunity as is the case herein by the Respondent due to the deliberate action by the Respondent's of failing to file their Statement of Facts within the prescribed timeline as provided for in law.

35. The Tribunal also finds that whereas discretion is granted to it to receive any other documents which may be necessary for review to assist it in its deliberations when rendering its decision ~~by~~, the documents referred to are supplemental to and additional to those which ought to have been filed together with the Statement of Facts and not the Statement of Facts itself. Section 15(2) the TAT Act, 2013 further goes to provide that;

> ***"The Tribunal may require the Commissioner to submit to the Tribunal additional documents that, in the opinion of the Tribunal, may be in the Commissioner's possession or control."***

36. The Tribunal does not operate in a vacuum and is guided by section 26 of the TAT, Act 2013 whichprovides;

> ***The Tribunal shall ensure that every party to proceedings is given a reasonable opportunity to —***
>
> ***(a) Present his case; and***

(b) Inspect any documents in relation to the proceedings and make submissions.

And Section 30 of TAT Act 2013 provides;

In a proceeding before the Tribunal, the Appellant has the burden of proving —

(a) where an Appeal relates to an assessment, that the assessment is excessive; or

(b) in any other case, that the tax decision should not have been made or should have been made differently.

37. From the foregoing provisions, the Respondent shall have the opportunity to orally cross-examine the evidence adduced by the Appellant pertaining to this case, refer to the documents filed by the Appellant in their Statement of Facts and also the right to file their written submission within the time frame given by the Tribunal. This is a right that cannot be taken away from the Respondent even though the Tribunal has expunged their Statement of Facts from the record as the same were filed out of time contrary to the mandatory provisions of Section 15 of TAT, Act 2013 which provides that;

15. (1) *The Commissioner shall, within thirty days after being served with a copy of an appeal to the Tribunal, submit to the Tribunal enough copies as may be advised by the Clerk, of—*

(a)a statement of facts including the reasons for the tax decision; and

(b)any other document which may be necessary for review of the decision by the Tribunal.

(2) The Tribunal may require the Commissioner to submit to the Tribunal additional documents that, in the opinion of the Tribunal, may be in the Commissioner's possession or control.

DECISION OF THE TRIBUNAL

1. The Tribunal having entered the above findings on the Preliminary Objection upholds the same and directs that the Appeal proceed for hearing.
2. There shall be no orders as to costs on the preliminary objection.

DATED and DELIVERED at NAIROBI this 16th day of NOVEMBER 2016

In the presence of:-

GEORGE ICAGHINDI ...for the Appellant

NAFTALI OYUGI for the Respondent

.....

MOSES BUYUKA OBONYO
CHAIRPERSON

.....

BONIFACE DIMMO
MEMBER

.....

DANIEL TANUI
MEMBER

.....

LILIAN RENEE OMONDI
MEMBER

.....

FRANCIS KIVULLI
MEMBER