

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL No. 303 of 2018**

**ANCHOR PROPERTY CONSULT LTD.....APPELLANT**

**VERSUS**

**THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT**

**JUDGMENT**

- 1) The Appellant is a duly registered limited liability company which engages in real estate business.
- 2) The Respondent the Commissioner of Domestic Taxes is an agent of the Kenya Revenue Authority and appointed under Section 13 of the Kenya Revenue Authority Act (CAP 469) Laws of Kenya with the mandate to collect various taxes including but not limited to Value Added Tax (VAT) and Income Tax (IT).
- 3) The Appellant's appeal stems from the Respondent's letter dated 21<sup>st</sup> August 2017 demanding Value Added Tax (VAT) of Kshs. 15,621,607.00 and Corporation Tax of Kshs. 6,483,801.00 with penalties and interest thereon for the period January 2015 to December 2015.
- 4) The Appellant lodged an appeal on 11<sup>th</sup> October 2018 challenging the Respondent's additional assessment.
- 5) The Respondent filed a Statement of Facts dated 6<sup>th</sup> August 2018 on 7<sup>th</sup> August 2018 and contemporaneously filed a Preliminary Objection therewith.
- 6) The parties thereafter filed and exchanged their respective written submissions.

- 7) When the Appeal came up before the Tribunal for hearing, M/s Patricia Leparashao, appearing for the Respondent urged the Tribunal to determine the Appeal on the basis of the Preliminary Objection. Mr. John Maina Kinyua, the Appellant's agent, was of a different view praying that the appeal be determined without regard to the Preliminary Objection.
- 8) The Respondent's Preliminary Objection is based on the following grounds:-
  - i) The Appellant's appeal was filed out of time and without leave of the Tribunal.
  - ii) The Appellant failed to lodge an objection against the Respondent's tax decision and even then, the same was not lodged within 30 days provided by law.
- 9) Before delving into the Preliminary Objection, it will be in order to set out the events preceding the filing of the Appeal in order to validate or invalidate the Appellant's actions as the Respondent urges the Tribunal to do.
- 10) The Respondent on 4<sup>th</sup> May 2017 issued a Notice for Production of Records addressed to the Respondent's Managing Director stating that it obtained some information from its system relating to the Appellant indicating that the Appellant made purchases from related parties and other suppliers totaling Kshs. 236,661,701/26 in financial year 2015. The Respondent further noted that the Appellant had not declared sales of Kshs. 2,475,071/95. The Notice was received by the Appellant on the same.
- 11) The Appellant's General Manager on 15<sup>th</sup> May 2017 responded to the Respondent's Notice of Production of Documents denying the value of transactions referred to and requesting for more time to look through their records to verify before giving a comprehensive response. The Appellant's letter was received in the Respondent's Regional Audit Centre, Nyeri on 19<sup>th</sup> May 2017.

12) On 14<sup>th</sup> June 2017, the Respondent issued a demand letter for Tax Arrears for year 2015. The Respondent's letter refers to a Notice for Production of records dated "10<sup>th</sup> May 2017" which has not been produced.

Whether this demand letter has any bearing with the Notice of 2<sup>nd</sup> May 2017 referred to hereinabove, it is not easy to tell as it similarly does not make mention of the Appellant's letter of 15<sup>th</sup> May 2017 requesting for more time.

13) Notwithstanding, the Respondent demanded tax arrears for year 2015 constituting VAT and Corporation Tax.

14) The Respondent on 31<sup>st</sup> August 2017, issued another demand for tax to the Appellant's Managing Director referring to its letters of 15<sup>th</sup> May 2017 and 14<sup>th</sup> June 2017 in respect of the tax for year 2015. Once again, the Tribunal has not sighted the letter of 15<sup>th</sup> May 2017.

15) In this demand, the Respondent informed the Appellant that it had established discrepancies in the income declared which affected both VAT and Corporation Tax. The said discrepancies had resulted in additional taxes being assessed against the Appellant as follows:-

	<u>Kshs</u>
(i) Value Added Tax	15,621,607.00
(ii) Corporation Tax	<u>6,483,801.00</u>
TOTAL	<u><b>22,105,408.00</b></u>

The same included interest and penalties.

16) The Respondent then informed the Appellant of its right to object to the assessment within thirty days from the date of assessment if it disagreed therewith.

Dispatched with the letter were detailed schedules relating to the Respondent's audit findings.

17) The Appellant appointed M/s Ileri Karuraa & Company, Certified Public Accountants, to address the Respondent on the demand. It is unclear when the Appellant's agent was appointed but by a letter

dated 14<sup>th</sup> November 2017, they lodged an objection to the Respondent's demand for Corporation Tax dated 31<sup>st</sup> August 2017. The grounds of the Appellant's Objection are contained in the letter.

- 18) While issuing an objection decision by a letter dated 22<sup>nd</sup> November 2017, the Respondent referred to an objection lodged by the Appellant via iTax on 26<sup>th</sup> September 2017 but the objection has not been produced. The best one can find with respect to this particular objection is the Respondent's email of even date attaching an Objection Application Acknowledgement Receipt dispatched via the iTax system. The Respondent otherwise informed the Appellant that it will communicate on the Objection.
- 19) The Appellant equally did not exhibit the Objection leaving the Appellant and Respondent the only privileged persons to have benefit of the contents thereof.
- 20) The Tribunal advises parties in tax disputes to endeavor and attach or exhibit in their pleadings communication or documents exchanged between them to assist in following the chronology of events, determine whether timelines have been met and the substance thereof.  
Many such documents may be statutory and could easily determine the fate of a party's case except, where the communication was without prejudice, and therefore privileged.
- 21) The Respondent's objection decision communicated to the Appellant that its objection had been rejected and proceeded to issue Confirmation Assessment Notices.

The Appellant required to pay VAT assessed at Kshs. 46,575,022.00 and Corporation Tax of Kshs. 9,513,800.00. The Appellant was also reminded of its rights of appeal against the Objection Decision under the law.

- 22) After the Respondent's Objection Decision was issued, the Appellant appears to have instructed his agent herein to "object" to the assessment of 31<sup>st</sup> August 2017 and apply for extension of time to lodge an "objection".

- 23) The Appellant's agent's objection dated 18<sup>th</sup> September 2018 was delivered to the Respondent's office on 26<sup>th</sup> September 2018. Interestingly, the objection also appears to bear another date stamp of "27<sup>th</sup> September 2017" as the date of receipt by the Respondent! It is unclear whether the Respondent replied.
- 24) The Tribunal considers that the Appellant's agent's letter of 18<sup>th</sup> September 2018 is of no effect as the Appellant had lodged a proper objection on 26<sup>th</sup> September 2017, within the statutory timelines, followed by the further objection of 14<sup>th</sup> October 2017. The law as crafted has no provision for submission of a separate or subsequent objection after the initial one.
- 25) Upon receipt of the Respondent's objection decision of 22<sup>nd</sup> November 2017, the Appellant was required to file a Notice of Appeal and subsequently appeal to this Tribunal.
- 26) The Appellant appears not to have given the Notice of Appeal to the Commissioner and proceeded to straight away lodge this appeal which prompted the Respondent's Preliminary Objection.
- 27) Section 52(1) of the Tax Procedures Act, provides as follows:-

***"A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).***

This provision gives a taxpayer a choice to appeal against an objection decision. The procedural law applicable thereafter is the Tax Appeals Tribunal Act.

- 28) The Tax Appeals Tribunal Act provides as follows:-

***Section 12: "A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the***

***Commissioner, appeal to the Tribunal, Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings”.***

Section 13: ***A notice of appeal to the Tribunal shall-***

***(a) be in writing;***

***(b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.***

29) The Appellant and his agent have not complied with these provisions of the law. Giving the Commissioner notice of appeal is not mandatory but filing the same with the Tribunal is a mandatory requirement of the law as this is the foundation of an Appeal.

30) A notice served alerts the Commissioner that an appeal is likely to be proffered against an objection decision issued upon which the Commissioner is expected to prepare in the event of the actual appeal being filed.

31) By filing the appeal without first notifying the Commissioner and filing the same Notice of Appeal with the Tribunal, the Appellant has jumped the gun and this appeal is pre-mature and therefore improperly before the Tribunal and thus fit for striking out.

32) The Tribunal has maintained this position in other appeals filed by other Appellants' related to the Appellant herein where no notice of appeal has been filed.

33) It would have been useful for the Appellant and his agent to take advantage of Section 13(3) of the TAT Act and Rule 10 of the Tax Appeals Tribunal (Procedure) Rules to apply for extension of time.

34) The Appeal being pre-mature is hereby struck out.

35) Each party shall bear its costs of the Appeal.

DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of March, 2020



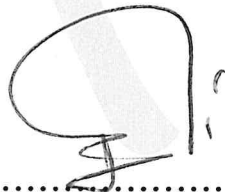
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**PATRICK LUTTA**  
**CHAIRPERSON**



.....  
**HELEN BILA**  
**MEMBER**



.....  
**MWAI MBUTHIA**  
**MEMBER**



.....  
**ELI NJERU**  
**MEMBER**

