

**REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL No.110 of 2017**

ELIORA ENERGY LIMITED..... APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya whose principal business is the supply and distribution of petroleum products.
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) with the mandate to collect various taxes on behalf of the Government of Kenya.
3. The Respondent, in a letter dated 1st November 2017, notified the Appellant of its intention to carry out a verification exercise of the Appellant's operations under Section 59 of the Tax Procedures Act ("TPA").
4. The verification exercise intended to cover the years of income January 2016 to September 2017 and was brought about by variances noted by the Respondent in the Appellant's sales and purchases figures as declared in the Income Tax returns vis-à-vis the figures declared in the VAT returns and financial statements for the same period.

5. In its letter, the Respondent listed the documents, records and information it required in order to carry out the exercise and stated that the same should be availed to it on or before 15th November 2017.
6. There was no response from the Appellant despite several reminders by way of telephone calls and e-mails to the Appellant.
7. In view of the Appellant failure to respond and make available to documents and information sought, the Respondent proceeded to issue estimated assessments amounting to **KShs 773,510.00** and **KShs 22,513,909.00** for the years of income 2015 and 2016 respectively and communicated this in a letter dated 28th March 2018.
8. The Appellant objected to the assessment on 3rd April 2018. The grounds for its objection were that its profit as per the audited financial statements were **KShs 4,969,315.00** and **1,920,910.00** for the years of income 2015 and 2016 respectively.
9. The Respondent acknowledged the Appellant's letter on 24th April 2018, and requested it to provide the information within fourteen days to enable review the assessment.
10. The Respondent was not satisfied by the information and explanations provided by the Appellant and proceeded to issue an Objection Decision on 4th June 2018 confirming the tax assessment.
11. The Appellant filed a Memorandum of Appeal and Statement of Facts on 18th July 2018 challenging the Respondent's Objection Decision.

APPELLANT'S CASE

12. That the Respondent erred in law and fact by disregarding the Appellant's books of account and records and basing its assessment on unfounded estimates.
13. That the Respondent had failed in its duty to act fairly in the performance of its duty contrary to Article 47(1) on fair administrative action.
14. The Appellant however agreed that it had wrongfully claimed input tax of **KShs 507,754.00** (VAT credit) and that the firm solely made exempt supplies.

RESPONDENT'S CASE

15. The Appellant was identified for a verification exercise due to the inconsistency between the turnover as declared in the Income Tax returns and the VAT returns.
16. That the Income Tax returns declared profits of KShs 545,272.00 and KShs 2,263,779.00 for 2015 and 2016 respectively. The Respondent was of the view that this profitability was low relative to the turnovers for the same years which were KShs 49,693,150.00 and KShs 621,954,615.00 and resulted in profit ratios of 1.1% and 0.364% for 2015 and 2016 respectively.
17. That in the Appellant's returns, closing stock for year 2015 was declared as zero while the opening balance for year 2016 was declared as KShs

586,123,212.00. There was suspicion by the Respondent that this inconsistency resulted in overstating the cost of sales with the effect of understating profit hence the need to verify stocks.

18. That the estimated assessments were issued solely due to the Appellant's failure to produce its records despite much follow up and reminders by the Respondent.

SUBMISSIONS BY THE PARTIES

A. On the estimating of the Appellant's tax liability

19. The Appellant submits that the Respondent's estimate of a profit margin of ten per cent (10%) was arbitrary and did not take into account the available records and books of account which gave a proper indication of the firm's taxable profits.
20. The Appellant also submits that the Respondent did not subject it to a clear and fair administrative process in accordance with Article 47(1) of the Constitution of Kenya in its requests for information.
21. According to the Appellant, the Respondent's communications with regard to the audit emanated from different personnel in the Respondent's office. This therefore made it difficult for the Appellant to know who it was meant to deal with on the matter.
22. The Appellant avers that the estimated mark-up of 10% applied by the Respondent in assessing the additional tax is erroneous due to the failure to take into account other administrative, operational and staff expenses.

23. The Appellant avers that the correct mark-ups from the financial statements declared in its self-assessment returns for the years 2015 and 2016 were 7.09% and 6.11% respectively.

24. According to the Respondent, Section 24(2) of the Tax Procedures Act (“TPA”) gives it the discretion of using any other information available to it other than that which has been provided to it or the tax payer’s return to assess the tax payer’s liability. Section 24(2) states:

The Commissioner shall not be bound by a tax return or information provided by, or on behalf of, a taxpayer and the Commissioner may assess a taxpayer's tax liability using any information available to the Commissioner.

25. The Respondent also challenges the Appellant’s allegations that it was unfair to it by virtue of communicating through various personnel. The Respondent avers that correspondences mentioned by the Appellant emanated from one office, Regional Audit Centre, Nairobi East, and were signed by or on behalf of the Chief Manager thereof. All these persons were authorized to deal with the Appellant in their official capacities.

26. The Respondent contends that due to the apparent inaccuracies and gaps in the Appellant’s returns and failure to avail records for verification, the Commissioner invoked Section 59 of the TPA which empowers it to request for the production of records. Section 59 (1) of the TPA provides:

(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes

relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—

(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;

(b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice;
or

(c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.

27. The Respondent submits that since it was not provided with the information and records it sought, it proceeded to amend the Appellant's self-assessment on the basis of information available and to the best of its judgment in accordance to Section 31 of the TPA. Section 31 provides:

(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that—

(a) in the case of a deficit carried forward under the Income Tax Act (Cap.470), the taxpayer is assessed in respect of the correct amount of the deficit carried forward for the reporting period;

(b) in the case of an excess amount of input tax under the Value Added Tax Act, 2013 (No. 35 of 2013), the taxpayer is assessed in

respect of the correct amount of the excess input tax carried forward for the reporting period; or
(c) in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates.

(2) A taxpayer who has made a self-assessment may apply to the Commissioner, within the period specified in subsection (4)(b)(i), to make an amendment to the taxpayer's self-assessment.

(3) Where an application has been made under subsection (2), the Commissioner may—

(a) amend the self-assessment; or

(b) refuse the application, and the Commissioner shall notify the taxpayer in writing of the decision within thirty days of receiving the application.

(4) The Commissioner may amend an assessment—

(a) in the case of gross or willful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or

(b) in any other case, within five years of—

(i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or

(ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment.

(5) Despite subsection (4)(b) (i) the Commissioner shall make an amended assessment on an application of a self-assessment taxpayer under subsection (2) if the application was submitted within the time specified in subsection (4)(b)(i).

(6) Where an assessment has been amended, the Commissioner may further amend the original assessment—

(a) five years after—

(i) for a self-assessment, the date the taxpayer submitted the self-assessment return to which the self-assessment relates; or

(ii) for any other assessment, the date the Commissioner served notice of the original assessment on the taxpayer; or

(b) one year after the Commissioner served notice of the amended assessment on the taxpayer, whichever is the later.

(7) In any case to which subsection (6)(b) applies, the Commissioner shall only amend the alterations or additions made in the amended assessment to the original assessment.

(8) When the Commissioner has made an amended assessment, he or she shall notify the taxpayer in writing of the amended assessment and specify—

(a) the amount assessed as tax or the deficit or excess input tax carried forward, as the case may be;

(b) any amount assessed as late payment penalty payable in respect of the tax assessed;

(c) any amount of late payment interest payable in respect of the tax assessed;

(d) the reporting period to which the assessment relates;

(e) the due date for payment of any tax, penalty or interest being a date that is not less than thirty days from the date of the taxpayer received the notice; and

(f) the manner of objecting to the assessment.

(9) Despite any notification to a taxpayer under this section, the due date for the payment of the tax payable under assessment (referred to as the "original due date") shall not be altered and the late payment penalty and late payment interest shall also remain payable based on the original due date

28. The Respondent avers that the Appellant is misrepresenting facts by claiming that the profit ratios in its self-assessment returns for the years 2015 and 2016 to be 7.09% and 6.11% respectively. The Respondent pointed out that the returns in the Respondent's possession show figures of 1.1% and 0.364% as profit ratios for the same years, and that the Appellant is inadvertently admitting to higher profit than reported.

29. The Respondent cites the case of REPUBLIC-VS-KENYA REVENUE AUTHORITY ex-parte BATA SHOE COMPANY (KENYA) LIMITED [2014] eKLR. In this case, the Court expressed itself as follows:

“...Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman. The taxman on the other hand is entitled to collect up to the last coin that is due from a taxpayer....”

30. The Respondent argues that Section 56(1) of the TPA and Section 30 of the Tax Appeals Tribunal (“TAT”) Act place the burden of proving that the Respondent's decision was incorrect or erroneous on the Appellant.

Section 56(1) of the TPA provides:

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

Section 30 of the TAT Act, meanwhile, states:

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.

31. The Respondent submits that the above position confirmed in the case of PRIMAROSA FLOWERS LIMITED-VS-COMMISSIONER OF DOMESTIC TAXES [2019] eKLR, where the court affirmed decision in the Australian case of MULHERIN VS COMMISSIONER OF TAXATION [2013] FCAFC 115 that:

“...in tax disputes, the tax payer must satisfy the burden of proof to successfully challenge income tax assessments. The onus is on the taxpayer in proving that assessment was excessive by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied.”

B. On the disallowing of the Appellant’s VAT credit amounting to KShs 507,754.00

32. The Respondent submits that the Appellant has conceded to erroneously claiming a VAT credit of **KShs 507,754.00** which ought not to have been claimed given that the firm only dealt with exempt supplies, but has proceeded to appeal against the decision to disallow the same.

ISSUES FOR DETERMINATION

The Appellant having conceded in paragraph two of its Memorandum of Appeal that it was not entitled to claim input tax on its VAT return, the Tribunal finds that only the issue for determination to be:

Whether the Respondent's decision to amend the Appellant's self-assessment return and demand Corporation Tax of KShs 22,513,909.00 for the years of income 2015 and 2016 was lawful and justified.

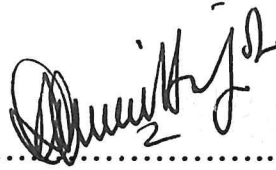
ANALYSIS AND FINDINGS

Whether the Respondent's decision to amend the Appellant's self-assessment return and demand Corporation Tax of KShs 22,513,909.00 for the years of income 2015 and 2016 was lawful and justified.

33. The Respondent, in the Tribunal's view, had legitimate concerns on the integrity of the Appellant's self-assessment returns and was therefore justified in seeking additional information and the production of records which it is empowered to do under Section 59 of the TPA.
34. The Tribunal, for instance, scrutinized the Appellant's audited financial statements and self-assessment returns filed with the Respondent and noted that there was indeed an inconsistency in the gross turnover of the business. Whereas the audited books showed the turnover (revenue) for the year of income as KShs 496,931,505.00, in the self-assessment return the figure appearing therein is KShs 49,693,150.00.
35. The Tribunal also computed the profit margins declared in the Appellant's self-assessment returns to be 1.10% and 0.36% for the years of income 2015 and 2016 respectively contrary to the Appellant's assertion that the figures were 7.09% and 6.11% for the respective years.

36. The Tribunal is satisfied that the Respondent accorded the Appellant an opportunity and adequate time to provide the Respondent with the relevant records and information, but the Appellant did not take advantage of this window. Among the documents produced and relied upon by the Respondent was a list of phone calls made to the Appellant's director on different dates which elicited no response.
37. Matters of tax call for close attention by a taxpayer owing to the potential exposure to punitive sanctions by reason of any default. The Appellant is therefore solely to blame for not having taken the opportunity to engage the Respondent with a view of reducing the estimated tax assessment.
38. The Tribunal is also not convinced by the Appellant's argument that it found it difficult to comply by virtue of correspondence emanating from multiple personnel in the Respondent's office. The Appellant was not able to explain how this prejudiced it and did not exhibit any complaint addressed to the Respondent on the issue of having to deal with different persons.
39. The law places the burden of providing supporting documentation on the Appellant and in the absence of such documentation, the Respondent is left with no option but to assess and apply the law as it did.
40. The Tribunal finds no merit in the Appeal and it is dismissed with an order that each party to bears its own costs.

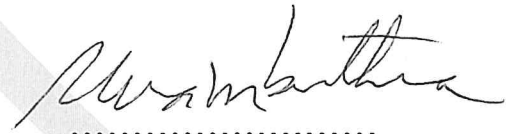
DATED and DELIVERED at NAIROBI this 31st day of March, 2020




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PATRICK LUTTA
CHAIRPERSON



.....
HELEN BILA
MEMBER



.....
MWAI MBUTHIA
MEMBER



.....
ELI NJERU
MEMBER

