

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL NO. 312 OF 2019

PROFRESH LIMITED.....APPLICANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Applicant is a company incorporated in Kenya under the Companies Act Chapter 486, laws of Kenya.
2. The Respondent is established under Section 3 of the Kenya Revenue Authority Act Cap 469 laws of Kenya charged with the Responsibility of assessment and collection of tax Revenue.
3. On 16th February 2018 the Respondent issued a demand letter against the Applicant for Ksh. 1,548,350.88 being PAYE for the period September 2017-January 2018. This was followed by another demand letter dated 11th September 2018 for Ksh. 3,832,079/= being unpaid VAT and Penalties.
4. On 11th September 2018 the Respondent issued Agency notices to Guardian Bank Limited and CFC Stanbic Bank, against the Applicant for recovery of the demanded taxes.
5. The Applicant vide its letter dated 19th September 2018 requested the Respondent to lift the agency notices it had issued to the Applicant's banks and further proposed to the Respondent a revised repayment plan of the debt in three installments as follows:-
 - a) Immediately Ksh. 1,300,000/=
 - b) 30th October 2018 Ksh. 1,200,000/=
 - c) 30th November 2018 Ksh. 1,332,079/=
6. On 6th February 2019 the Respondent issued additional agency notices to I & M Holdings, Diamond Trust Bank and Kenya Commercial Bank. This was followed by another Agency notice dated 29th April 2019 issued to Paramount Bank Limited.

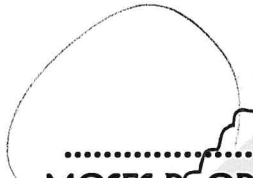
7. On 27th June 2019 the Respondent issued another demand letter for Ksh. 4,419,131/= being unpaid PAYE arrears, Penalties and interest.
8. On 27th June 2019 the Respondent issued a warrant of distress against the Applicant. On the same day, Leakey's auctioneers visited Crescent Business Center and proclaimed various items in the office and parking bay.
9. Consequently, on 5th July 2019 the Applicant filed its Notice of Motion supported with an affidavit of one, Vijay Kumar, a director of the Applicant. The said application sought the following Orders;
 - a) THAT pending the hearing and determination of this Appeal the Respondent be restrained whether by itself , its officers , employees, and/agents from commencing , instituting or proceeding with any enforcement or prosecution actions against the Applicant or its directors and/or officers on account of demand contained in the letter dated 27th June 2019 issued to the Appellant.
 - b) THAT pending the hearing and determination of this entire Appeal an order of injunction be and is hereby issued restraining the Respondent whether by itself, employees, servants and agents or otherwise assigns and /or any person whatsoever Acting on its behalf and/or under its mandate or instruction from alienating, advertising for sale, offering for sale, selling, taking possession of leasing, transferring or otherwise in any manner whatsoever interfering with all that property in the schedule of movable property dated 27th June 2019 attached hereto until this Appeal is heard and determined.
 - c) THAT the Tribunal be pleased to issue any such order that may deem expedient and necessary in the circumstances of the case
 - d) THAT the Respondent be ordered to pay costs of this application.
10. According to the Applicant, the goods proclaimed by the Respondent's agents including the Moto vehicles, furniture and electronics do not belong to the Applicant but to a company known as Balaji Flowers Limited.
11. Moreover the Applicant submitted that it is baffled by the Respondents claim as it has a long-standing VAT refund claims amounting to Ksh. 8,005,340/= with the Respondent and the issuance of the distress notice is hasty and premature.

12. The Respondent in opposing the application filed its Grounds of Opposition and supporting affidavit on 26th July 2019. In summary, it contended that there is no proper appeal before the Tribunal and no issues for determination as the taxes had been admitted and a payment plan given which the Applicant failed to honor.
13. Furthermore, the Respondent averred that there is a clearly laid down procedure relating to making refund claims, which are subject to audit and that they become due and payable after confirmation, which is yet to be done in the Applicant's case.
14. According to the Respondent's averments the taxes due were as a result of self-assessment having been deducted from the Applicant's employees' salaries and were being held in trust for the Respondent as the same was meant to be remitted to it.
15. After hearing the parties together with their pleadings, the Tribunal is of the respectful view that the only issue for determination is whether the Applicant has adduced sufficient reasons for the Tribunal to exercise its discretion in its favour in respect of granting of an order for injunction to restrain the Respondent and or its agents from issuance of agency notices and Notice of Distress to recover its taxes from the Applicant pending the determination of the alleged intended appeal.
16. The Tribunal noted that the Applicant did not challenge the evidence produced by the Respondent that it had admitted the tax liability and indeed submitted a payment plan. No reason was given as to why the Applicant had failed to submit PAYE collected from employees during the period which the tax demand relates to.
17. Section 12 of the Tax Appeals Tribunal Act provides that: **"A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may..... appeal to the Tribunal"**. It is the finding of the Tribunal that any appeal before it should only relate to a disagreement with the commissioner's decision. Furthermore, the Tribunal was unable to stretch its imagination on how a taxpayer can assess PAYE, collect it and dispute its own decision and commitment to remit it to the Respondent.

18. The Tribunal is of the view that an admission of tax liability should be taken as evidence of liability unless it is proved that the admission was made in error, which is not the case herein.
19. The Tribunal refers to the case of **Modern Distributors Vs Ndungu Njeru t/a Ndungu Njeru Filling Station [2006] eKLR**, where the court held as follows **“...The defendant cannot therefore deny that he owes the amount stated in the said cheques that he issued to the plaintiff”**. In the same vein, the Tribunal finds that the Applicant, as the author of its own misfortune cannot appeal against a tax decision which it has already accepted and committed itself to pay.
20. As regards the Applicant’s prayers that the Tribunal issues the same pending the hearing and determination of the entire appeal, the Tribunal is baffled by the same as there is no pending appeal filed by the Applicant. In the circumstances, the Tribunal cannot issue orders in vain.
21. Having carefully considered the parties documentation and submissions it is clear that the Applicant and the said company known as Balaji Flowers Limited share the same director, that is Pasupulati Bhimmrao Vijay Kumar and further that both the Applicant and the said company operate from the same office with same employees, in respect of which the said PAYE arise. Moreover, the said Balaji Flowers Limited has not objected to the Notice of Distress issued by the Respondent.
22. Considering the foregoing findings, the Tribunal holds that the Respondent acted well within the law in issuing the Agency Notices and the Notice of Distress against the Applicant.
23. Consequently, the order that commends itself to the Tribunal is that the Applicant’s Notice of Motion is unmerited and makes the following orders:
 - a) The Notice of Motion dated 3rd July 2019 is hereby dismissed.
 - b) The interim orders issued on 12th July 2019 and 23rd September 2019 are hereby vacated forthwith.
 - c) Each party to bear its costs.

DATED and DELIVERED at NAIROBI this 28th day of February, 2020.

In the presence of No appearance.....for the Applicant
Raphaela Muruga.....for the Respondent


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MOSES B. OBONYO
CHAIRMAN


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JOSEPHINE K. MAANGI
MEMBER


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GABRIEL KITENGA
MEMBER

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