

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 460 OF 2019

AFZAL INDUSTRY SUPPLY LIMITED..... APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya and deals in hardware and industrial spares.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya with the mandate to assess, collect and account for various taxes on behalf of the Government of Kenya.
3. The Appellant was assessed for tax amounting to Kshs 61,122,163.00 inclusive of interest and penalties for the year of income 2016 and Kshs 17,961,726.00 for the year of income 2017. The Notice of Assessment was dated 27th September 2018.
4. The Respondent later issued Agency Notices to the Appellant's bankers and thereafter referred the matter to its debt enforcement team for collection of the tax demanded.

5. The Appellant appealed the Respondent's decision to this Tribunal on 19th September 2019.

APPELLANT'S CASE

6. The Appellant's grounds for the Appeal are:
- (i) **THAT** it received the assessment in December 2018 and objected to it.
 - (ii) **THAT** upon seeking clarification from the Mombasa office, it was informed that the assessment was as a result of not filing its Income Tax for the years 2016 and 2017.
 - (iii) **THAT** it informed the Respondent that due process had not been observed before raising the assessment, i.e., the Appellant had not been informed of the impending assessment.
 - (iv) **THAT** Agency Notices were issued to its bankers on 20th March 2019.
 - (v) **THAT** it also sought to file its returns and the KRA accepted its request, but it was unable to do so due to restrictions by the KRA.
 - (vi) **THAT** it was then informed that its objection had been rejected on the ground that it did not state reasons or grounds for its objections.

RESPONDENT'S CASE

7. **THAT** the Respondent raised an additional assessment on the Appellant after discovering that it had filed VAT returns in years 2016 and 2017, but failed to declare the same income in its income tax returns.

8. **THAT** the Appellant objected to the assessment in a letter dated 27th October 2018.
9. **THAT** the Respondent further wrote to the Appellant requesting for records to support the objection vide a letter dated 11th December 2018.
10. **THAT** the Appellant later sought to file its objection out of time, but the request was rejected on 18th December 2018 pursuant to Section 51 (7) of the TPA.
11. **THAT** the matter was then transferred to the Respondent's debt enforcement department which issued the first demand notice to the taxpayer on 16th January 2019 for recovery of the unpaid taxes.
12. **THAT** a second demand notice was issued on 6th February 2019, while the third demand notice was issued on 7th March 2019. In both cases, but there was no response from the Appellant.
13. **THAT**, consequently, on 20th March 2019, the Respondent invoked Section 42(1) of the TPA, and issued agency notices to the Appellant's bankers to recover the unpaid taxes.

SUBMISSIONS BY THE PARTIES

14. The Appellant submits that tax laws require that a taxpayer be notified intended assessment and also be provided with an opportunity to respond to the assessment.
15. The Appellant also submits that the Respondent did not consider the expenses incurred by the business in computing the Corporation Tax. That the

Appellant, being a trader, buys and sells goods hence there is need to factor in its purchases and expenses.

16. The Respondent, on its part, submits that there was no valid objection by the Appellant. That Section 51(3) of the TPA provides that:

“A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if –

(a) The notice of objection states precisely grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and

(b) In relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.”

17. The Respondent submits that for there to be a valid Notice of Objection, it must conform to the above-mentioned conditions and that the Appellant’s purported letter of objection did not conform to the provisions of Section 51(3) of the TPA.
18. According to the Respondent, the letter was not only open-ended but also wanting in precision. That the letter did not state the amendments required to be made to correct the decision, state the reasons for the amendments and did not include all the relevant documents relating to the objection.
19. The Respondent submits that in the case of **ARROW HI-FI (E.A) LTD.-VS-THE COMMISSIONER GENERAL OF KENYA REVENUE AUTHORITY & 2 OTHERS**, the High Court held that an effective objection as prescribed by

statute must be a clear counter offer as understood in the law of contract or a clear and complete answer to the assessment.

20. The Respondent places reliance on Section 51(3) of the TPA which provides that a Notice of Objection must state precisely the grounds of objection to the Notice of Assessment and must be lodged within 30 days of the issuance of the Notice of Assessment. It is the Respondent's contention that the purported letter is not the objection contemplated under Section 51 of the TPA and does not meet the criteria of a valid objection thereunder.
21. The Respondent submits that it did not know exactly what the Appellant was objecting to and that the Appellant ought to have indicated what, in its view, was the correct figure unless it was objecting to the whole figure.
22. The Respondent further submits that the Appellant failed to provide the documentation requested on 11th December 2018 including audited accounts, tax computations for the years under review, the general ledger, the purchases and sales ledger, company bank statements and directors bank statements, receipts/invoices to support expenses and sales/purchase expenses. That in absence of the documents, the Respondent confirmed the taxes due and demanded the same as being due and payable by the Appellant.
23. The Respondent submits that the Appellant's allegation that the Respondent failed to consider the objection is without basis and an unfounded allegation. That in all instances the Respondent did consider the issues raised by the Appellant.
24. The Respondent submits that Section 51 of the TPA empowers it to disallow an objection where it is found that the grounds therein are not sufficient to have the assessment amended or altered in any way.

25. The Respondent submits that the Commissioner has the power, under Section 29 of the TPA, to issue a default assessment based on such information as may be available and to the best of his or her Judgement where a taxpayer has failed to submit a tax return for a reporting period.
26. It is the Respondent's contention that the Appellant did not comply with its statutory obligation under Section 52 (B) (b) of the Income Tax Act of filing its returns for the years of income 2016 and 2017. Furthermore, that the Appellant did not seek for an extension of time under Section 25(3) of the TPA.
27. The Respondent submits that the Appellant failed to set out any reasonable cause for the Commissioner to grant an application for extension of time to file a late notice of objection under Section 51(7) of the TPA.

ISSUES FOR DETERMINATION

28. The Tribunal frames the following single issue for determination:

(i) Whether the Respondent erred by demanding taxes of Kshs 79,083,889.00

ANALYSIS AND FINDINGS

- i. Whether the Respondent erred by demanding taxes of Kshs 79,083,889.00.**

29. The Appellant has argued that due process was not adhered to and that the Respondent had erred in issuing the assessment in dispute. The Appellant submits that it was neither notified of the impending assessment nor given reasons for the assessment. Furthermore, the Appellant submitted that it had provided its audited accounts for the years of income 2016 and 2017 to the

Respondent's Mombasa office on March 2019 and also sought to file a request to be allowed to file late returns. Lastly, the Appellant submitted that the Respondent had applied a rate of 30% on its entire income without deducting the cost of purchases and other allowable expenses incurred in generating the business' income.

30. The Respondent, on its part, submitted that it considered all the issues raised by the Appellant in its objection and followed due process in issuing the assessment, but in the absence of the Appellant providing all the requested information and documentation then it had no choice but to confirm the assessment.
31. With regard to not being informed of the impending assessment, the Tribunal observed that the Appellant has not mentioned or referred to any provision of tax law or statute that it is relying upon. The Respondent submitted that the assessment was raised under Section 29 of the TPA which empowers the Commissioner to issue default assessments whereby a taxpayer has failed to submit a tax return. Section 29 provides that:

(1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment (referred to as a "default assessment") of—

- a. the amount of the deficit in the case of a deficit carried forward under the Income Tax Act (Cap. 470) for the period;***
- b. the amount of the excess in the case of an excess of input tax carried forward under the Value Added Tax Act, 2013 (No. 35 of 2013), for the period; or***

c. the tax (including a nil amount) payable by the taxpayer for the period in any other case.

(2) The Commissioner shall notify in writing a taxpayer assessed under subsection (1) of the assessment and the Commissioner shall specify—

- a. the amount assessed as tax or the amount of a deficit or excess of input tax carried forward, as the case may be;*
- b. the amount assessed as late submission penalty and any late payment penalty payable in respect of the tax, deficit or excess input tax assessed;*
- c. the amount of any late payment interest payable in respect of the tax assessed;*
- d. the reporting period to which the assessment relates;*
- e. (e)the due date for payment of the tax, penalty, and interest being a date that is not less than 30 days from the date of service of the notice; and*
- f. the manner of objecting to the assessment.*

(3) A written notification by the Commissioner of an assessment under this section shall not alter the due date (referred to as the "original due date") for payment of the tax payable under the assessment as determined under the tax law imposing the tax, and any late payment penalty or late payment interest shall remain payable based on the original due date.

(4) This section shall not apply for the purposes of a tax that is not collected by assessment.

(5) Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.

(6) Subsection (5) shall not apply in the case of gross or willful neglect, evasion or fraud by a taxpayer.

32. It is indeed not in contention that the Appellant failed to comply with its statutory obligation of submitting its income tax self -assessment returns, as provided for by Section 52B of the ITA, for the two years of income 2016 and 2017. In view of the Appellant not having filed its self-assessment returns then the Tribunal finds that the Respondent did not err by issuing a default assessment especially considering the fact that the Appellant had submitted VAT returns which showed that it had earned income in the years under review.
33. As to the Appellant's second argument that it had provided the Respondent with its audited accounts and also sought to file late returns, the Tribunal has not seen any evidence to show that these were provided to the Respondent and the Respondent failed to consider the same in raising the assessment. Whereas the Tribunal has seen the Respondent's letter 11th December 2018 which letter requested the Appellant to provide additional information and records, including the audited accounts for the period under review, no evidence has been presented to the Tribunal to show that the Appellant complied with the said request. The Respondent clearly indicated in the letter that the information and documents requested were to aid the latter in reviewing the Appellant's objection to the tax assessment.
34. The Tribunal is of the considered view that having been issued with a default assessment, it was incumbent upon the Appellant to provide the Respondent

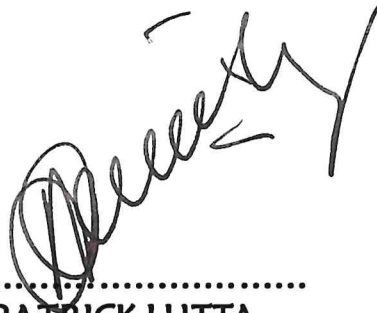
with the necessary information and documentation to prove that the default assessment was incorrect or that certain adjustments needed to be made to the assessment. Since there is no evidence of correspondence to suggest that the Appellant had done so, the Tribunal is left with no choice but to find that the Respondent did not err by issuing the assessment or fail to follow due process in raising the assessment. The Tribunal wishes to point out that the Appellant ought to have taken advantage of this opportunity to engage the Respondent and show that the assessment was incorrect.

35. Lastly, the Appellant submitted that the Respondent did not deduct the cost of purchases and other allowable expenses while computing the Corporation Tax. Again, the Tribunal takes cognizance of the fact that the Appellant has not placed before it any evidence to support this contention. The Appellant ought to have provided its computation with supporting documents to show that this is the case but there was none in its pleadings. As such, the Tribunal finds no reason to agree with the Appellant.
36. In view of the foregoing, it is the Tribunal's considered view that the Respondent did not err or contravene the law in the issuance of the default assessment.

FINAL DECISION

37. The Tribunal makes the following final Orders:-
 - i. The Appeal be and is hereby dismissed.
 - ii. Each party to bear its own costs.
38. It is so ordered.

DATED and DELIVERED at NAIROBI on this 23rd day of July, 2021.



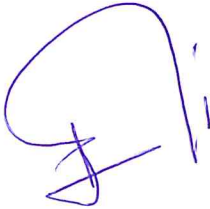
.....
PATRICK LUTTA
CHAIRPERSON



.....
HELEN BILA
MEMBER



.....
MWAI MBUTHIA
MEMBER



.....
ELISHAH NJERU
MEMBER



.....
HABON FARAH
MEMBER

