

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 54 OF 2020

AL RAHIL TRADING COMPANY LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. The Appellant is a limited liability company incorporated in Kenya whose main business activity is exportation of coffee.
2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 Laws of Kenya, and the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue as well as administration and enforcement of all provisions of written laws set out in Part I & II of the first schedule of the KRA Act and other such functions as may be directed from time to time.

B. BACKGROUND

3. On 11th July 2018 the Respondent issued the Appellant with an additional assessment in respect of Value Added Tax (VAT) to the tune of

Kshs.5,975,000.00. The Appellant being dissatisfied with the additional assessment lodged a notice of Appeal with the Tribunal on 27th February 2020.

C. APPEAL

4. The Appellant Appeals to the Tribunal against the decision issued by the Respondent vide a Memorandum of Appeal dated 26th February 2020. The grounds of Appeal are as follows;
 - a. The Respondent issued default (estimates) assessment on a cancelled invoice (Input VAT) claimed and failed to review and vacate the tac herein despite having received an explanation together with supporting documents.
 - b. The Respondent failed to accord the Appellant fair administrative treatment despite having knowledge to the effect during the period the main director was incapacitated due to health related issues.
 - c. The Respondent failed to notify and communicate effectively to the taxpayer as per the tax procedures Act, 2015.
 - d. The Respondent erred by assuming the company was in operation whereas the company ceases to operate in year 2003 as can be supported by the bank statement.
 - e. The Respondent had erred by not taking into consideration the company main business of coffee export which is VAT exempt.
 - f. The Respondent had overlooked the company correspondences to KRA on dormancy notices as per attached.

- g. The Respondent has not accorded the Appellant a proper opportunity to justify the tax declaration (Input VAT) made.
 - h. The Respondent issued a demand notice on a figure not known to the company and not supported as per company records.
 - i. The Respondent had also assumed the company has a rental income by the declarations that were erroneously made by Altihad using a wrong KRA PIN.
5. The Appellant prays for the following;
- a. That this Honorable Tribunal set aside the Respondent's confirmed additional assessment of Kshs 2,500,000.00 and demand notice of Kshs 2,343,228.00.
 - b. That this Honorable Tribunal makes an order as to cost as it deems expedient and for furtherance of justice.

D. RESPONSE TO THE APPEAL

6. The Respondent responded to the grounds of Appeal in a Statement of Facts dated 24th March 2020 as follows:-
- a. The Appellant Appeal is incompetent as there is an unreasonable delay in filing the Appeal and the Respondent shall file a Preliminary Objection to strike out the Appeal.
 - b. The Appellant was identified as a credit filer. Upon enquiry to provide support for claimed inputs the documents were not provided. The input tax –Invoice No. 1110 dated 30/4/2015 was therefore disallowed.

- c. The Appellant has not provided any records. The Supplier SICA Consultancy did not declare the sale.
 - d. The Appellant alleges that there were no operations and that the company ceases to operate in year 2003 as can be supported by the bank statements. The assessment in question is for April 2015 when the Appellant claimed the inputs. If the operations ceased in 2003 why did the Appellant claim inputs in 2015?
 - e. The Appellant alleges that the Respondent has not accorded the Appellant a proper opportunity to justify the tax declaration (input VAT) made. The Appellant did not object to the assessment nor provide the documents to justify the input.
7. The Respondent prays that the Honorable Tribunal finds that;-
- a. The Appeal be dismissed with costs.

E. ISSUE FOR DETERMINATION

8. This Appeal raises a single issue for determination by the Honorable Tribunal, namely;
- a. *Whether the Appeal is properly before the Tribunal*

F. ANALYSIS

9. From a cursory perusal of the rather thin record before us, we have established that the issue for our determination in this matter is whether the Appeal is properly before the Tribunal in order for us to pronounce ourselves on the

issues therein. The Appellant argues that after receipt of the additional assessment from the Respondent, it filed an objection notice against the same on 21st February 2019. However, the Respondent confirmed the assessment without affording it the opportunity to defend against the taxes demanded and justify the tax declaration on input tax made.

10. The Appellant further contends that the additional assessment is based on the erroneous assumption that the Appellant's business was still operational, even though it ceased trading in 2003 as can be supported from the bank statements.
11. Additionally, that the Respondent overlooked the Appellant traded in coffee which is Value Added Tax exempt, the correspondence to the revenue authority on the dormancy notices and the explanations that the invoices on which it claimed input was not declared by the consultant.
12. On his part Respondent made a preliminary objection on the basis that the Appellant's Appeal is not properly before the Tribunal as there is no objection decision on record or issued by the Respondent in this matter.
13. It was submitted for the Respondent that the Appellant, contrary to its assertion that it filed a notice of objection to the assessment, did not in fact follow the laid down procedure envisaged in Section 51 of the Tax Procedure Act, 2015 (TPA).
14. The Respondent submitted that Section 51 of the TPA enjoins a tax payer aggrieved by a tax decision to lodge with the Respondent a notice of objection notice detailing precisely the grounds of objection. Further, that Section 51 of

the TPA lays down a mandatory internal mechanism of dispute resolution which the Appeal herein offends.

15. We have reviewed the parties' submissions and shall before proceeding to make any substantive pronouncement in the matter determine whether the Appeal herein is properly before us. In this respect therefore we are guided by the provisions of Section 12 of the Tax Appeals Tribunal Act, 2013 which stipulates that a person who disputes the decision of the Respondent 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 Respondent, Appeal to the Tribunal. This Section is predicated on the existence of a decision by the Respondent from which an Appeal may be proffered. The question is did the Respondent in the context of this Appeal make a decision?
16. The Appellant was issued with an additional assessment on 11th July 2018. It purported to have objected to the said assessment. However, upon perusal of the record, we find there is no evidence of the existence of such an objection being lodged by the Appellant, neither is there an objection decision by the Respondent.
17. Our conclusion from these facts is that the Appellant has chosen to deliberately mislead the Honorable Tribunal, in a bid, maybe, that we shut our eyes to the fact it has circumvented the provisions of Section 51 of the TPA 2015.
18. Section 51 (1) enjoins a taxpayer aggrieved by an assessment or a tax decision by the Respondent to lodge a notice of Objection with the Respondent within 30 days of receipt of the said assessment or tax decision. As we have established the Appellant herein has not complied with this requirement neither has it

offered the Tribunal a reasonable explanation for failing to comply with this requirement.

19. We find this to offend the provisions of Section 51 of the TPA in totality as the Section provides for an internal dispute resolution mechanism, which as the evidence before us will collaborate, has not been utilized. This also offends the doctrine of exhaustion insofar as the Appellant herein has approached the Tribunal without first attempt to the first forum of redress. As such, we are in agreement with the Respondent that this Appeal is not properly before the Tribunal as the Appellant herein has failed to comply with the redress mechanism provided for under Section 51 (1) of the TPA.
20. In this regard we associate ourselves with the Court of Appeal holding in ***Speaker of the National Assembly v James Njenga Karume [1992] eKLR*** wherein it was stated that-; “Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
21. Similarly, in ***Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry 1756 Others***, the Court of Appeal provided the rationale and justification for this doctrine as follows;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a

postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts... This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

G. CONCLUSION

22. In light of the foregoing analysis, the Tribunal makes the following Orders;
 - a. The Appeal is hereby struck out.
 - b. Each party to bear its own costs
23. It is so ordered.

DATED and DELIVERED at NAIROBI on this 21st day of May 2021.



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MAHAT SOMANE
CHAIRPERSON



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WILFRED GICHUKI
MEMBER



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ROSE WAMBUI NAMU
MEMBER



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JOHN KINYUA WANGARI
MEMBER



.....
TIMOTHY CHESIRE
MEMBER

