

REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
APPEAL NO. 424 OF 2019

WANG'OMBE HARDWARE LIMITED APPELLANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

A. BACKGROUND

1. The Appellant is a limited liability company registered under the Companies Act CAP 486(repealed) of the laws of Kenya and a registered tax payer.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 496 of the Laws of Kenya and is charged with the mandate to administer and collect tax revenue on behalf of the Government of Kenya.

B. FACTS OF THE CASE

3. The Appellant was incorporated in the year 2012. And is engaged in hardware business in Ol Kalau.
4. A compliance check was carried out on the Appellant's tax affairs for the period of 2015, 2016 and 2017. As a result, additional assessment on income tax was issued on 15th November 2018 amounting to Kshs. 30,496,259.76 for the period between 2015, 2016 and 2017 through assessments KRA201815421723, KRA201815421426 and KRA201815421196, respectively.

5. The Respondent vide a letter dated 15th November 2019 issued a demand of Kshs. 30,496,259.76 inclusive of interest and penalty for the period of 2015-2016,2016-2017 and 2017-2018.
6. Upon receiving the demand notice the Appellant filed an Objection on 11th February 2019 in the iTax system.
7. The Respondent confirmed the assessment on 11th April 2019 and directed the Appellant to pay the tax due, being income tax. Further, the Respondent wrote to the Appellant on the tax arrears due of Kshs. 33,187,640.31 inclusive of penalty and interest as per the assessment.

C. THE APPEAL

8. Aggrieved by the Respondent's Objection Decision issued on 11th April 2019, the Appellant appealed vide the Memorandum of Appeal and the Statement of Facts dated 24th September 2019. The Appellant's position is that the Respondent erred in law and fact in finding that;
 - i. The accounts for the assessed financial periods were filed on time and were based on VAT returns.
 - ii. That as per assessment done, VAT turnovers/sales were inflated for financial years 2015-2016,2016-2017 and 2017-2018 with Kshs 20 Million ,30 Million and 40 Million, respectively, compared to their reported sales/turnover in iTax-portal.
 - iii. That the inflated figures as per the Respondent's assessment led to the principal tax as follows;
 - 2015-2016 Kshs 5,955,508.50 i.e.30% of Kshs 20,000,000.00
6,000,000.00
 - 2016-2017 of Kshs 8,971,500 i.e 30% of Kshs 30,000,000= Kshs
9,000,000/=

- 2017-2018 of Kshs 11,986,797.00 i.e of Kshs 40,000,000.00
Kshs 12,000,000.00
 - iv. That they solved the issues after the assessment was done but no adjustments were made.
 - v. That they are not aware as to how the Respondent raised the amounts of Kshs 20 Million, Kshs 30 Million and Kshs 40 Million for the financial years 2015-2016,2016-2017 and 2017-2018.
9. The Appellant filed a letter on the 5th day of March 2021 addressed to the Tribunal stating that it intends to rely fully on its Statements of Facts and that the assessment was raised out of malicious guesswork and therefore lacks merit. They further submitted that the assessment was fictitious as it had never transacted in such enormous amounts as assessed by the Respondent.
10. The Appellant prayed that the Tribunal finds in its favour and dismisses the Assessment.

D. RESPONDENT'S CASE

11. The Respondent in response to the Appeal filed its Statements of Facts on 22nd October 2019 and its written submissions on 22nd October 2019.
12. The Respondent carried out a compliance check on the Appellant's tax affairs for the period 2015, 2016 and 2017 with a view of confirming its tax compliance status.
13. As a result of the compliance check, the Respondent raised additional assessment taxes and demand of KShs 30,496,259.76 and inclusive of interest on 15th November 2018 and a further additional assessment and demand of income tax on 12th November 2019.

14. The Respondent submitted that the Appellant failed to file the Objection on time as per Section 51 (1) of the Tax Procedures Act. That the Appellant filed the same on 11th February 2019 without seeking for an extension of time from the Commissioner as required under the Law.
15. The Respondent faults the Appellant for failure to file its Objection on time as a result of which it confirmed its assessment in the iTax system on 11th April 2019.
16. The Respondent prays that the Objection Decision dated 11th April 2019 be upheld as it is proper in law and that the Appeal lacks merit and for it to be dismissed with costs.

E. ISSUES FOR DETERMINATION AND ANALYSIS

17. The Respondent has urged the Tribunal to find that the Appellant lodged an Objection out of time. The Tribunal has consequently framed one issue for determination: -

Whether the Appellant's Objection is valid?

18. A closer look at the evidence on record indicates that the Respondent issued a demand notice to the Appellant on 15th November 2018 which the Appellant objected to on the 11th February 2019 and the Commissioner rejected the Objection *in toto* vide its Decision of 11th February 2019. A further demand notice was given on 12th November 2019. It is worthy to note that it is after this demand that the Appellant filed its Memorandum of Appeal on 24th September 2019 and its Statement of Facts on 22nd October 2019.

19. Section 51(2) of the Tax Procedures Act provides that a taxpayer who disputes a tax decision shall first lodge a Notice of Objection to the decision in writing with the Commissioner within 30 days of being notified. We note that the Appellant should have objected against the decision of the Commissioner by the 14th of December 2018.
20. The Tribunal agrees with the Respondent that the Appellant's Objection is invalid having been filed out of time. On this ground alone, the Appeal fails.
21. The Appellant ought to have availed himself the window provided by Section 51(6) of the Tax Procedures Act under which a taxpayer may apply in writing to the Commissioner for an extension of time to lodge a Notice of Objection out of time. The Tribunal notes that the Appellant went ahead to file for an Objection out of time and without invoking this provision.
22. The Tribunal has sufficiently addressed itself on the issue of compliance on statutory timelines in *Giraffe Ark Game Lodge Limited –vs- Commissioner of Domestic Taxes (2018)* where it was held that;
- “..... When a party fails to take advantage of the benefits provided for by the law, it will find itself in an awkward position such as the present Appellant.”***
23. This Tribunal in a similar matter between **Raffia Bags EA Ltd –vs- Commissioner of Domestic Taxes Misc. App.6 of 2018** held that, ***it is incumbent upon the Appellant to seek a remedy as provided under Section 51(6) of the TPA which provides that a tax payer may apply in writing to the commissioner for an extension of time to lodge a notice of objection, which application will be dealt with administratively.***

24. The Tribunal having found that the Objection is invalid according to law, the Tribunal proceeds to have the appeal struck out. The Appellant may in the circumstances go back to the drawing board, correct the errors and file a proper Appeal.

FINAL DETERMINATION

- a) The Appeal is hereby struck out.
- b) Each party to bear its costs of the Appeal.


25. It is so ordered.

DATED and DELIVERED at NAIROBI on this 16th day of April, 2021.


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RICK LUTTA
AIRPERSON


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HELEN BILA
MEMBER


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MWAI MBUTHIA
MEMBER


.....
ELISHAH NJERU
MEMBER


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HABON FARAH
MEMBER