

CASESDIGEST

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**Decisions on
KRA cases**



**KENYA REVENUE
AUTHORITY**

Tulipe Ushuru, Tujitegemee!



**A publication of the
Kenya Revenue Authority**

Vision

A Globally Trusted Revenue Agency Facilitating Tax and Customs Compliance

Mission

Building Trust through Facilitation so as to foster Compliance with Tax and Customs Legislation

Values

Trustworthy, Ethical, Competent, Helpful

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March 2021

Forward

Kenya Revenue Authority is the Government Agency established through the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya with the role of collecting revenue and enforcing tax laws. We are pleased to publish the third edition of the Kenya Revenue Authority (KRA) Cases Digest.

Since the establishment of Kenya Revenue Authority in the year 1995, a number of decisions on various issues have been delivered by courts and tribunals. Some of these decisions have been uploaded on the National Council for Law Reporting website and library.

This case digest is relevant to legal practitioners, scholars, KRA staff and all persons interested in the Authority's operations. We trust that this is the beginning of a journey that will continue where judicial decisions emanating from various dispute resolution bodies setting precedence.

The publication features cases on tax decisions by the Commissioner, objections to tax decisions, validity of objections, objection decisions by the Commissioner and appeals against objection decisions. It highlights salient principles of law as clarified by the courts and tribunals relating to tax decisions, objections and appeals.

I wish to thank the editorial and design team for the concerted efforts made towards the publication of this publication.

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Executive Summary

This volume features cases on tax decisions, objections and appeals. It highlights the interpretation of tax law by the Tax Appeals Tribunal and the courts on the provisions relating to timelines for objections and appeals and legal requirements for both.

In *Nairobi High Court Judicial Review Miscellaneous Application Number 65 Of 2015: Republic Versus Kenya Revenue Authority Ex parte Funan Construction Limited*, the Court held that where agency notices are issued pursuant to the demand for input VAT refund, the provisions of Section 50 of the VAT Act (*now repealed*) are inapplicable. The issue of the failure to follow the due process before the issuance of the Agency Notice therefore does not arise. The objections to tax decisions were required to comply with the legal requirements under the deleted Section 50 of the Value Added Tax Act, 2013. Where they do not comply, they do not constitute valid objections as now required under Section 51 of the Tax Procedures Act, No. 29 of 2015.

In *Civil Appeal No. 158 of 2017: Fleur Investments Limited v Commissioner of Domestic Taxes & Kenya Revenue Authority [2018]* the Court held that where a party has supplied documents to the Commissioner relating to a tax assessment and submitted an objection, it is the responsibility of the Commissioner to ensure safe custody of the documents supplied and to provide certified copies to a taxpayer in case the taxpayer misplaces its copies. Penalizing the taxpayer for not submitting the documents again is like the court blatantly refusing to supply typed proceedings to a party and then penalizing him/her for filing an appeal out of time. An objection lodged upon submission of the required documents within the specified timelines is a valid objection.

The court in *Judicial Review No 117 of 2017: Republic v Commissioner General, Kenya Revenue Authority Ex parte Sanofi Aventis Kenya Limited [2019]* held that the discretionary nature of the Judicial Review remedies means that if a court finds a public body has acted wrongly, it does not have to grant any remedy. Where the law stipulates a procedure for resolution of a dispute, a party should not invoke a different process. In the instant case, the applicant ought to have subjected itself to the appellate process stipulated in the Tax Procedures Act and Tax Appeals Tribunal Act instead of invoking the Judicial Review jurisdiction of the Court. The suit was found to offend the doctrine of exhaustion of remedies for not using the mechanism provided in both the Tax Procedures Act, 2015 and the Tax Appeals Tribunal Act, 2013.

In *Miscellaneous Civil Application No. 243 of 2016: Republic versus Kenya Revenue Authority ex parte New Frarims Wholesalers Limited, Commissioner of Domestic Taxes Revenue Authority, Attorney General, Leakey Auctioneers*, the Court held that once a taxpayer has lodged an objection to an appealable decision, the taxpayer ought to wait for sixty (60) days before taking the next legal step as provided under Section 51 of the Tax Procedures Act, 2015. If the taxpayer moves the Court while the Commissioner is still seized of the objection, it amounts to an abuse of the process of the Court since it is akin to playing lottery with the judicial process. The Court may invoke its inherent powers to end proceedings which amount to abuse of its process.

In *Tax Appeal No. 3 of 2020: Tumaini Distributors Company (K) Limited Versus Commissioner Domestic Taxes*, the Court held that under Section 51 of the Tax Procedures Act, a person dissatisfied with the decision of the Commissioner on an assessment is entitled to lodge an objection within thirty (30) days. Section 51(6) and (7) of the Tax Procedures Act provide for application for extension of time and the taxpayer is entitled to apply for extension. The application for amendment under Section 31 of the Tax Procedures Act constitutes a separate process and could not implicate or affect the assessments already confirmed by the failure of the Company to lodge its objection in time.

Lastly, in *Petition No 474 of 2019: Total Kenya Limited v Kenya Revenue Authority; Barclays Bank of Kenya Limited, Cooperative Bank of Kenya Limited & Citi Bank N.A. Limited as interested parties*, the Court held that where the Commissioner fails to deliver a written decision to a validly lodged objection there is no reason for the taxpayer to appeal and the taxpayer can directly approach the High Court.

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A. Digest of Cases on Tax Decisions, Objections and Appeals

1. Nairobi High Court Judicial Review Miscellaneous Application Number 65 Of 2015: Republic Versus Kenya Revenue Authority Exparte Funan Construction Limited

Coram: Justice D.V. Odunga .

Date of Judgment: 1st March 2016

Section of the law: Section 32, 45, 46, 50(2)(b) of the VAT Act 2013, Section 51 of the Tax Procedures Act 2015

Key words and Phrases: Input VAT refunds, agency notice, objection to assessment

Implications

Where agency notices are issued pursuant to the demand for refund for input VAT, the provisions of Section 50 of the VAT Act are inapplicable. The issue of the failure to follow the due process before the issuance of the Agency Notice does not arise. The court faulted the decision of the Commissioner to issue agency notices prematurely on 9th February 2015 as the notices had specified that the objection would have been issued within a period of 30 days.

The objections to tax decisions must comply with the legal requirements under Section 51 of the Tax Procedures Act. Where they do not comply, they do not constitute valid objections as required by the VAT Act 2013. There was no failure on the part of KRA to follow rules of natural justice in the issuance of the demand letter and notices of assessment and as such, the actions were not '*ultra vires*'. Funan Construction Company was afforded numerous opportunities to be heard both through exchange of correspondence and meetings.

Background

Funan Construction Ltd was served with a demand letter dated 18th June 2014 for a sum of Kshs 130,864,666/- being Input VAT erroneously refunded by the Authority on the basis of falsified VAT refund claims. The company allegedly objected to the assessment and demand on 23rd June 2014. On 6th November 2014, KRA reaffirmed its position in the letter dated 18th June 2014 relating to the demand for the taxes.

Tax Principles

The objections to tax decisions must comply with the legal requirements under Section 51 of the Tax Procedures Act.

Where they do not comply, they do not constitute valid objections

“

The taxpayer's letter was worded in ambiguous terms thus:

“...we would like to let you know that at this point we cannot say yes or no, to your demand. We need to check on the accuracy of your finding...the tax therefore demanded is disputed...you may revert to the undersigned for any further clarification...”

”

High Court of Kenya

The company was issued with a Notice of Assessment on 9th February 2015 and immediately submitted Notices of Objection through their duly appointed agents on 19th February 2015 and 26th February 2015 within the stipulated 30 days as provided under Section 50 (2) (b) of the VAT Act which Notices of Objection did not state clear grounds of objection but alleged excessiveness.

By a Notice of Motion dated 11th March, 2015 Funan Construction Limited, sought judicial review orders of certiorari to quash the Agency Notices dated 17th February 2015 directed to the African Banking Corporation Limited with respect to the applicant's bank account number 000200000010129 held at African Banking Corporation Limited Koinange Street Branch Nairobi and account number 0010101207426 at Equity Bank Limited.

Funan Construction Limited argued that the Agency Notices issued by the Authority emasculated and disparaged the due process of the law and was an abuse of the Administrative justice systems. It further alleged failure by the Authority to consider the taxpayer's objection to the tax assessment before issuing the Agency Notices to the bank. It claimed that the agency notices freezing the company's bank accounts did not follow the provisions of the VAT Act 2013 and it amounted to procedural lapse in the processing of tax demands by the Authority and to procedural impropriety exposing the company to unfair treatment. It further alleged that the process denied the company an opportunity to be heard on their position that the tax as assessed by the Authority was erroneous and excessive.

🕒 Issues for determination

1. *Whether the applicant was afforded an opportunity to object to the assessment.*
2. *If the above was done, whether KRA followed the due process subsequent to the objection.*
3. *Whether the taxpayer's objection constituted a valid objection within the meaning of Section 50(2)(b) of the Value Added Tax Act, 2013, and;*
4. *Whether the procedure adopted by the Commissioner in issuing agency notices was ultra vires as alleged.*

🕒 Decision of the Court

The taxpayer's letter of objection dated 23rd June 2014 was worded in ambiguous terms thus; *“...we would like to let you know that at this point we cannot say yes or no, to your demand. We need to check on the accuracy of your finding.....the tax therefore demanded is disputed.....you may revert to the undersigned for any further clarification”.*

Section 51 Tax Procedures Act, 2015

When KRA receives an objection, it must be in a position to know what exactly the taxpayer is objecting to and what is not being objected to.

If it is the figures the taxpayer must indicate what in its view ought to be the correct figure unless the whole figure is objected to.

In other words, the objection cannot be “in the alternative and without prejudice ...”.

High Court of Kenya

The court held that whereas on one hand it indicated that the taxes, were disputed, it is clear from the letter that the Applicant was unable at that stage to determine whether the demand was correct or not since it required time to verify the claim made by KRA. The court held that such a letter is not the objection contemplated under Section 50 of the VAT Act 2013 and does not meet the criteria of a valid objection thereunder. KRA receiving the objection must be in a position to know what exactly the taxpayer is objecting to and what is not objected to.

If it is the figures the taxpayer must indicate what in its view ought to be the correct figure unless the whole figure is objected to. In other words, the objection cannot be “*in the alternative and without prejudice to the foregoing*”.

The judge observed that according to the company, the demand was excessive yet it did not indicate what in its opinion ought to have been the correct figure. The company wanted more time to study its records and the letter indicated factually that an objection will be filed in due course. From the company's perspective, the letter of 26th February 2015 did not consider the letter of 19th February 2015 a valid objection. The judge held that the letter of 26th February 2015 from the company only reiterated the position of the company stated in the letter dated 19th February 2015 with respect to “*excessive assessment, unrealistic and excessive tax demanded*” without shedding light on how much, in the Applicant's view ought to have been demanded. Since the letter dated 19th February 2015 did not constitute a valid objection as per Section 51 of the Tax Procedures Act, the documents exhibited in the letter of 26th February 2015 could not support a non-existent objection.

In its judgment, the court observed that the letter dated 18th June 2014 demanded from Funan Construction Ltd the amount of Kshs130, 864,666.00 which was clearly indicated as refund of VAT based on irregular input claims and particulars thereof were given. The Applicant was required to pay the same within thirty days. The Agency Notices are dated 17th February, 2015 and were clearly way beyond the 30 days. The Applicant cannot therefore be heard to claim that it was unaware that it was required to pay the said amount. The amount was payable under Section 32 of the VAT Act, 2013.

Under the deleted Section 50 of the VAT Act, an objection could only be lodged against an assessment made under the deleted Sections 45 or 46 of the Act. The appellant's case was found to be without merit and dismissed with costs to the Authority

[Read the full judgment here](#)

2. Civil Appeal No. 158 of 2017: Fleur Investments Limited v Commissioner of Domestic Taxes & Kenya Revenue Authority [2018]

Coram: Visram, Karanja & Koome JJ.A

Date of judgement: 20th April 2018

Key words and Phrases: Objection, estimates banking income, legitimate expectation, internal mechanism.

Sections of the Law: Section 73 of the Income Tax Act, Section 45 of the VAT Act, 2013

Implications of the judgment

Where a party has supplied documents to the Commissioner relating to a tax assessment and submitted an objection, it is the responsibility of the Commissioner to ensure safe custody of the documents supplied and to provide certified copies to a taxpayer in case the taxpayer misplaces its copies.

A taxpayer who misplaces or for any other reason needs to refer to any of their documents in the custody of the Commissioner should be able to get certified copies of the same on application and not the other way round. Penalizing the appellant for not submitting the documents again is like the court blatantly refusing to supply typed proceedings to a party and then penalizing him/her for filing an appeal out of time. An objection submitted with all the required documents is a valid objection.

Background

This was an appeal from the Judgment and/or Order of the High Court of Kenya at Nairobi. The Appellant, Fleur Investment Company, was involved in the business of property Development and landlord. The company leased one of its properties to Tusker Mattresses Limited and Uchumi Supermarkets Limited. The leased properties were sold in the year 2008 at Kshs.135,000,000 as shown in the audited financial statement for the year of income ending 31st December 2008 attached to completed self-assessment income tax return.

The appellant alleged that it had always filed its Income Tax and Value Added Tax (VAT) returns with the respondent dutifully as required by law through its agent M/s Delloite and Touche, and it always disclosed to the 1st respondent all information regarding its income, assets and liabilities.

Misplacement of taxpayer's documents by a taxpayer

The court held that:

"A taxpayer who misplaces or for any other reason needs to refer to any of their documents in the custody of the Commissioner should be able to get certified copies of the same on application".

The Authority conducted a compliance check on the books of the appellant in the year 2013. After the audit for the period 2010-2014, the 1st respondent communicated to the appellant that there was no outstanding tax liabilities relating to Income Tax, PAYE and VAT. It also issued the appellant with a Tax Compliance Certificate for the period up to 2015. Before the compliance date expired, the 1st respondent raised an assessment notice under Section 73 of the Income Tax Act and Section 45 of the VAT Act and demanded payment of whopping Kshs.656,372,183 as Corporation Tax, VAT, penalties and interest owed by the appellant for the years 2008 to 2012. The assessment was based on computations of the appellant's estimated "banking income".

After the assessment, the appellant filed an objection through a letter dated 14th July, 2015. The 1st respondent replied the appellant's objection letter through a letter dated 14th September 2015 indicating objection was not accompanied by any supporting documents that would uphold the objection and that the amounts paid between 2008 and 2012 towards outstanding taxes had been adjusted to reflect the payments but all other amounts raised in the said assessments were still due. It further indicated that the assessments were based on the bank statements during the period under review.

The appellant sought legal redress by way of the Judicial Review motion. In its Notice of Motion dated 18th December 2015 the appellant sought two orders from the High Court. An order to quash the said assessment by the 1st respondent and an order prohibiting the respondents from implementing and effecting the assessment and demand of the amount in question.

The High Court upon review of the documents stated that the applicant had invoked the internal dispute resolution mechanism provided under the Income Tax Act to lodge an appeal and held that the issues raised could have been properly dealt with by the appellate Tribunal rather than by the High Court which does not deal with merits. The court declined to grant the orders sought saying that doing so would mean having to determine the merits of the case and doing so was likely to embarrass the appellate process that the appellant had already initiated and instead of dismissing the Notice of Motion, the learned Judge struck it out with costs to the respondents. The appellant appealed to the Court of Appeal.

Issue

- a) Whether the court had jurisdiction to entertain the suit
- b) Whether the appellant was entitled to legitimate expectation that its objection having been accepted, it should not be assessed again by the respondent objection

Decision of the Court

The appellant's counsel took issue with the learned Judge's finding that in order to have a valid objection with the respondent, it should have been accompanied by the supporting documents even if the same had been filed and accepted by it. The respondent's counsel did not address us on that point.

The Court of Appeal stated that the statement by the High Court was an orbiter remark which was however a misdirection on his part because the respondents upon receipt of all tax records and any other documents from a taxpayer has the responsibility to take proper charge of such documents and ensure they are kept in safe custody. The court went on to state that it is the responsibility of the respondents which it cannot shirk or abdicate and expect another person to take care of.

In point of fact, a taxpayer who misplaces or for any other reason needs to refer to any of their documents in the custody of the respondents should be able to get certified copies of the same from the respondents on application and not the other way round. Penalising the appellant for failing to attach the documents which it had already submitted to the respondents was to say the least high handed and unacceptable. It is like the court blatantly refusing to supply typed proceedings to a party and then penalizing him/her for filing an appeal out of time

[**Read full judgment here**](#)



3. Judicial Review No 117 of 2017: Republic v Commissioner General, Kenya Revenue Authority Ex parte Sanofi Aventis Kenya Limited [2019]

Coram: John M. Mativo

Date of Judgement: 26th November 2019

Key Sections of the law: Section 9(2) of the FAA Act, Section 51 Tax Procedures Act.

Key words and Phrases: Exhaustion of remedies, objection, objection decision

Implications of the judgment

The discretionary nature of the Judicial Review remedies means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Where the law stipulates a procedure for resolution of a dispute, a party should not invoke a different process. In the instant case, the applicant ought to have subjected itself to the appellate process stipulated in the Tax Procedures Act and Tax Appeals Tribunal Act instead of invoking the Judicial Review jurisdiction of the Court. The suit was found to offend the doctrine of exhaustion of remedies provided in a statute.

Background

The applicant, registered in Kenya is a wholly owned subsidiary of Sanofi-Aventis Participants incorporated in France whose main business includes the registration, promotion and marketing of pharmaceutical products on behalf of non-resident related entities within the East African Region. The respondent audited the applicant's business for the period between January 2012 to June 2015 and notified the applicant its Notice of Preliminary Findings detailing a VAT liability of Ksh. 198,548,926/= inclusive of penalties and interests.

The applicant objected to the tax assessment within 30 days on 6th December 2016. The respondent was required to make an objection decision within 60 days from the date of objection failing which the objection stood as allowed. The respondent by a letter dated 6th February 2017 delivered an objection decision affirming its tax decision dated 9th November 2016. This was 63 days from the date of the objection making it time barred.



Where the law stipulates a procedure for resolution of a dispute, a party should not invoke a different process



Issues for Determination

- a) Whether the impugned decision is tainted with illegality.
- b) Whether the applicant is entitled to any of the orders sought.
- c) Whether this suit offends the doctrine of exhaustion of remedies.

Determination

On exhaustion of remedies, the court held that Section 9(2) of the FAA Act provides that the High Court or a subordinate court under Sub-Section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The word "*shall*" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.

It is quite clear that there is nothing to stop the court from applying the proper rules of interpretation as long as they do not cause absurdity so glaring that it could never have been the intention of the legislature to do so. The court found that it was not clear how the 63 days were arrived at. The court calculated the days from 9th December 2016 to 31st December = **22** days excluding the first day. January 2017 Had a total of **31** days while February 2017 was 6 days. The court held that the aggregate was 59 days which were to lapse on 7th February 2017. The computation of the days by both parties were found to be incorrect.

The court held that the respondent did not act *ultra vires* its mandate in the enabling legislation. The decision made by the respondent was found to be lawful. There is nothing to show that the respondent exceeded its statutory powers. The decision has not been shown to be illegal or *ultra vires* or outside its functions. No abuse of such powers has been alleged or proved.

It was the court's view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural. The court held that the applicant was not entitled to the orders sought and dismissed the application with costs to the respondent.



Section 9(2) of the Fair Administrative Actions Act, 2015 provides that the High Court or a subordinate court under Sub-Section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted

[Read the full judgment here](#)

4. Miscellaneous Civil Application No. 243 of 2016: Republic versus Kenya Revenue Authority ex parte New Frarim Wholesalers Limited, Commissioner of Domestic Taxes Revenue Authority, Attorney General, Leakey Auctioneers

Coram: G.V. Odunga

Date of delivery of Judgment: 24th March 2017

Key Articles/Sections of the law: Article 159(2)(c) of the Constitution, Section 46, 51(11) of the Tax Procedures Act, 2015; Section 3 Transfer of Business Act, Chapter 500 Laws of Kenya

Key Words and Phrases:

Implications

Once a taxpayer has lodged an objection to an appealable decision, the taxpayer ought to wait for the said sixty days before taking the next legal step as provided under Section 51 of the Tax Procedures Act. If the taxpayer moves the court while the Commissioner is still seized of the objection, it amounts to an abuse of the process of the court as it akin to playing lottery with the judicial process. The court may invoke its inherent powers to end proceedings which amount to abuse of its process.

Background

The applicant filed a notice of motion application seeking orders of certiorari quash the decision of the 1st and 2nd respondents to impose arbitrary tax arrears upon the applicant and directing the interested party to distrain the applicant's movable goods and chattels. It also sought an order of prohibition prohibiting the respondent from recovering any tax arrears by attaching the applicant's movable goods and chattels or interfering in any manner whatsoever with the business operations of the applicant.

The respondents issued the applicant with tax assessment for the year 2009 of Kshs. 7,753,778.00 following a compliance check at the premises and preliminary examination of the applicant's books and records for the specified period which revealed that VAT was never paid in full. The applicant objected to the tax assessment which the respondents dismissed on the grounds that the applicant had fraudulently with a view to evade tax declared more taxable purchases than what was in the actual invoices.

The High court held that if the taxpayer moves the court while the Commissioner is still seized of the objection, it amounts to an abuse of the process of the court as it like to playing lottery with the judicial process.

The applicant changed its name from Frarim's Supermarket Limited to New Frarim's Wholesalers Limited with the sons of the Directors taking over from their parents in the new entity. However, the applicant did not issue the notice to the respondents on taking over the business of the taxpayer as provided under the repealed Value Added Tax Act, CAP 476 so that the respondents could raise the issue of the tax liability.



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The applicant ought to have waited for the commissioner's decision before proceeding to institute any suit and as such the suit was premature as envisaged under Section 51 of the Tax Procedures Act. No reason was advanced as to why the applicant who had properly invoked the statutory remedy could not wait for the alternative process to take its lawful course.

Issues for determinations

- a) Whether there was a transfer of the assets of Frarim Supermarkets Limited;
- b) Whether there was transfer of the liabilities of the said taxpayer to the applicant;
- c) Whether the facts from the observation and investigation findings of the respondent were properly applied in arriving at the decision to proclaim against the respondent; and
- d) Whether the Proclamation Notice was properly issued.

Determination by the court

The applicant ought to pursue the statutory process provided for under the Tax Procedures Act which it had in fact initiated but for reasons known only to it, abandoned midstream without seeing it through to its logical conclusion. The court's constitutional obligation pursuant to Article 159(2)(c) of the Constitution to promote alternative dispute resolution mechanisms and it cannot undertake such mandate if it otherwise readily accedes to request to take over matters which ought to be resolved by other statutory bodies.

Section 51(11) of the Tax Procedures Act gives the respondent sixty days to determine an objection and provides that where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of objection is allowed.

The applicant ought to have waited for the Commissioner's decision before proceeding to institute any suit and as such the suit was premature as envisaged under Section 51 of the Tax Procedures Act. The applicant failed to demonstrate that the respondent's decision was tainted with irrationality or unreasonableness to warrant grant of the orders sought herein and the same is dismissed. No reason was advanced as to why the applicant who had properly invoked the statutory remedy could not wait for the alternative process to take its lawful course. The court did not deal with the merits of the application in order to avoid prejudicing or embarrassing the said alternative dispute resolution mechanisms more so as such mechanisms had in fact been invoked and are pending. The Notice of Motion application was dismissed as being incompetent.

[**Read full judgment here**](#)



The tax principles

Under Section 51 of the Tax Procedures Act, a person who is dissatisfied with the decision of the Commissioner on an assessment is entitled to lodge an objection within 30 days.

Section 51(6) and (7) of the TPA provide for application for extension of time when an objection is lodged late.

The taxpayer is entitled to apply for extension of time.

The application for amendment under Section 31 of the TPA constitutes a separate process and could not implicate or affect the assessments already confirmed by the failure of the Company to lodge its objection in time.

Coram: D.S. Majanja, J.

Date of Judgment: 22nd June 2020

Sections of the Law: Section 4 of the Fair Administrative Action Act, 2015, Section 3(1), 31, 33, 51(3) (6) &(7), 53(3) & 56 of the Tax Procedures Act, 2015.

Key words and Phrases: Tax decision, objection, assessment, extension of time

Implications

Under Section 51 of the Tax Procedures Act, a person who is dissatisfied with the decision of the Commissioner on an assessment is entitled to lodge an objection within 30 days. Section 51(6) and (7) of the TPA provide for application for extension of time when an objection is lodged late. The taxpayer is entitled to apply for extension of time. The application for amendment under Section 31 of the TPA constitutes a separate process and could not implicate or affect the assessments already confirmed by the failure of the company to lodge its objection in time.

Background

The appellant appealed against the decision of the Tax Appeals Tribunal delivered on 17th December 2019 in Nairobi Tax Appeal No. 141 of 2017 dismissing its appeal and upholding the assessment of the Commissioner.

In September 2016, the Commissioner identified the company for review and compliance check. The Commissioner reviewed the documents provided by the company and noted that there was under declaration of sales for VAT purposes. It also disallowed certain expenses claimed in respect of the Income Tax. The appellant submitted inadequate documents to address the issues it had raised and further audience with the company did not yield any results. Commissioner issued additional assessments for Kshs. 31,217,489.00 being Kshs. 8,881,387.00 for VAT and Kshs. 12,682,222.00 for Income Tax and commenced enforcement proceedings by issuing agency notices prompting the company to lodge objections.

At the Tribunal, the appellant alleged that the additional assessments were computer generated without its involvement and that no verification was done for the source documents in arriving at the assessment. The company stated that immediately it realized that the source documents had been left out in computing taxes for the years 2014 and 2015 and that its objections were rejected without reasons.

Requirement of Section 56, Tax Procedures Act, 2015

The appellant did not discharge its burden of showing that the tax decision was wrong or incorrect.

Section 51(4) Tax Procedures Act

No extension of time requested

The assessments appealed against had been confirmed once the Company's objections had been rejected for being filed out of time

The Commissioner denied the company's allegations stating that the company through its auditor failed to account fully for VAT on supplies made to it. That further examination of accounts filed showed that VAT was undeclared, the company failed to prove evidence on account of VAT and expenses claimed in the income statement and reiterated the assessment. The company had not proved any explanation of the variances in its accounts or furnished bank statements or sale invoices to support its case. The Commissioner urged the Tribunal to uphold the assessments and dismiss the appeal.

The Tribunal framed two issues for determination. The first was whether the Commissioner followed the correct procedure in assessing the company's tax liability and the second, whether the company made an under declaration for VAT purposes on Rental Income. On the first issue, the Tribunal found that the company had failed to provide the relevant documents despite several requests by the Commissioner. The Tribunal underscored the importance of self-assessment and held that it was the duty of the taxpayer to make full disclosure in good faith as provided by Section 33 of the Value Added Tax Act, 2013 which requires every person to provide all records to an authorized officer for inspection.

The Tribunal held that since the company did not provide all the documents, the Commissioner was correct in reaching the assessment based on the material available. It further held that the company's conduct of providing a different set of books amounted to an offence under Section 96 of the Tax Procedures Act, 2015 ("the TPA"). The Tribunal reached the conclusion that the company had failed to discharge its burden under Section 56(1) of the TPA to show that the tax decision was wrong. The appeal to High Court was confined to matters of law only.

Issues for determination

- a) Whether the Commissioner's tax decision was incorrect.
- b) Whether the appellant was entitled to amend its self-assessment returns.

Determination by the Court

As to whether the Commissioner's tax decision was incorrect, the court held that the appellant did not discharge its burden of showing that the tax decision was wrong or incorrect. The assessments appealed against had been confirmed once the company's objections had been rejected for being filed out of time.

On the second issue, amendment of the self-assessment was not the subject of the tax decision that was being challenged in the appeal before the Tribunal. The plea was outside the confines of the tax decisions appealed from and could not be considered by the Tribunal or the court in light of Section 56 of the TPA.

[Read the full judgement here](#)

6. Petition No 474 of 2019: Total Kenya Limited v Kenya Revenue Authority; Barclays Bank of Kenya Limited, Cooperative Bank of Kenya Limited & Citi Bank N.A. Limited as interested parties

Coram: Justice Weldon Korir

Date of Judgment: 15th October 2020

Section of the law: 42, 51(8), (9) & (11), 52 & 53 of the Tax Procedures Act, 2015; Section 12 of the Tax Appeals Tribunal Act, 2013; Section 7(2)(j) of the Fair Administrative Actions Act, 2015

Key words and Phrases: agency notice, Objection, objection decision, legitimate expectation, fair administrative action.

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Section 51(11) of the Tax Procedures Act, 2015

Where the Commissioner fails to deliver a written decision to a validly lodged objection within sixty days (60) from the date of receipt of the objection or within sixty days (60) from the date of request for additional documents, the objection is deemed to have been allowed.

Implications

Where the Commissioner fails to deliver a written decision to a validly lodged objection there is no reason for the taxpayer to appeal and the taxpayer can directly approach the High Court.

Background

The Petitioner, Total Kenya Limited, filed the petition seeking a declaration that the respondent is under an obligation to give prior notice as well as a fair hearing to the petitioner prior to appointing a tax agent or attaching any funds held to the credit of the petitioner by the person appointed as a tax agent pursuant to Section 42 of the Tax Procedures Act, 2015. The petitioners further sought a declaration that the respondent failed to issue any notice or give a fair hearing to the petitioner and that the appointment of the agents was unconstitutional. The petitioner sought restraining orders restraining the respondent from appointing interested parties or any other parties as its collection agent.

The petition averred that the Commissioner failed to make a decision within 60 days as required by 51(11) of the Tax Procedures Act. The petitioner did not file the petition to contest a decision made by the Commissioner, but rather to contest the fact that the Commissioner failed to make a decision.



The petitioner averred that there existed a legitimate expectation created by the respondent that it would not proceed with any enforcement measures before responding to the petitioner's notice of objection to the demanded tax and before a decision is made on the oil marketers' request to the National Treasury for waiver of the demanded tax. The petitioner stated that the failure of the respondent to notify it in writing of the decision on its objection lodged on 1st November 2019 breached of Section 51(8) and (9) of the TPA. Furthermore, the petitioner contended that the respondent's failure to respond to the issues raised in the objection.

The petitioner asserted that the respondent in its replying affidavit had admitted receiving its objection dated 31st October, 2019 but instead of considering the objection and giving a written decision within sixty days as required by Section 51(8), (9) and (11) of the TPA, it had demanded settlement of the disputed taxes within two weeks after which it proceeded to issue the impugned agency notices. The petitioner contended that since it has not received any appealable decision as contemplated by Section 52 of the TPA, the assertion by the respondent that it ought to have filed proceedings before the Tax Appeals Tribunal ('Tribunal') is hollow in law and untenable.

Issue for determination

- a) *Whether the respondent made a decision on the petitioner's notice of objection within the sixty days stipulated in Section 51 of the TPA.*
- b) *Whether the court has jurisdiction to hear and determine this matter*
- c) *Whether the petitioner had a valid legitimate expectation*
- d) *Whether the respondent infringed the petitioner's right to fair administrative action; and*
- e) *Whether the petitioner is entitled to the orders sought*

Format of Objections

"In my view since there is no format for making an objection, what is required is the substance rather than the form.

What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the taxpayer is seeking further particulars or indulgence to enable it pay the taxes demanded ..."

High Court

The duty imposed by the law which was not discharged by the Commissioner is the failure to decide on the issues raised in the petitioner's notice of objection. Although the respondent gave a response, it did not address any of the issues in the notice of objection and it cannot therefore be said to be an objection decision. An objection decision must include a statement on findings on the material facts and the reasons for the decision. Where the Commissioner fails to make an objection decision within sixty days of the notice of objection, the objection shall be allowed. Petitioner's objection to the respondent's demand for the amount of Kshs. 72,426,128/= stood allowed upon the lapse of sixty days from the date of receipt of the objection

The fact that the objection was allowed by the law under Section 51(11) of the TPA makes the respondent's actions in pursuing the impugned Excise Duty procedurally unfair hence attracting review by the court under Section 7(2)(c) of the FAAA. The issues brought before the court are well within its jurisdiction to hear and determine, and the petitioner has not infringed the doctrine of exhaustion.

*There was no appealable decision to be taken before the Tribunal under Section 52 of the TPA as no decision was made by the Commissioner in the first place. The court in making its decision relied on the holding in **Republic Vs Commissioner of Domestic Taxes Mkopa Limited** where it was held that:*

"In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the taxpayer is seeking further particulars or indulgence to enable it pay the taxes demanded. ... the respondent was required to make a decision in respect thereof within sixty (60) days under Section 51(11) of the said Act. As the Respondent defaulted in making a determination thereon within the prescribed time, the said objection was deemed to have been allowed... In the premises the question of existence of an alternative remedy does not arise in the circumstances."

A declaration was issued declaring that the decisions and actions of the Respondent by way of the agency notices appointing the interested parties as tax agents pursuant to Section 42 of the Tax Procedures Act, 2015 in respect of all monies held to the credit of the Petitioner were unconstitutional. A permanent order of injunction was issued restraining the respondent from enforcing the agency notices. An order of certiorari was issued quashing the agency notices issued to the interested parties appointing them as agents and order is issued restraining the respondent from appointing the interested parties or any other person or entity as a tax agent against funds held to the credit of the petitioner.

[Read full judgement here](#)

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Tulipe Ushuru, Tujitegemee!

