



**Westfield Motors Limited v Commissioner of Domestic Taxes (Tax Appeal
E919 of 2023) [2024] KETAT 1645 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KETAT 1645 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
TAX APPEAL E919 OF 2023
CA MUGA, CHAIR, BK TERER, EN NJERU, E NG'ANG'A & SS OLOLCHIKE, MEMBERS
NOVEMBER 21, 2024**

BETWEEN

WESTFIELD MOTORS LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

Background

1. The Appellant is a company whose principal activity is sales of Toyota Kenya Motor Vehicles.
2. The Respondent is a principal officer appointed under Section 13 of the [Kenya Revenue Authority Act](#), CAP 469 of Kenya's Laws. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Respondent undertook a tax return review of the Appellant for the period 2017 to 2020 wherein the Respondent established that there were undeclared income and VAT. Consequently, on 2nd August 2023, the Respondent send a demand notice for Kshs 44, 933,608.47 for VAT, WHT and income tax for the period under review.
4. Dissatisfied with the finding, the Appellant lodged notices of objection on 11th August 2023 which the Respondent rejected on 25th August 2023 on the basis that the objection was filed late and that it was invalid.



5. The Respondent issued confirmation of assessments dated 1st November 2023. Aggrieved by the decision of the Respondent, the Appellant filed its notice of appeal dated 30th November 2023 on even date.

The Appeal

6. The Appellant's Appeal is founded on the Memorandum of appeal dated and filed on 14th December 2023 wherein the Appellant raised the following grounds of appeal:
 - a. That the assessment was based on an estimated income, which was excessive and did not reflect the Appellant's annual revenues as per the returns.
 - b. That the assessment for year 2020 was done before filing of income tax returns.
 - c. That assessment was based on banking where some credits in the bank did not form part of business income.
 - d. That some cost of sales and operating expenses were disallowed hence making the assessment excessive.
 - e. That the assessment for VAT was based on variance between the VAT returns and audited financial statements hence charging VAT on Zero rated sales that were not included on the VAT returns.
 - f. That the Appellant was operating in losses as reflected in the financial statements.
 - g. That the assessment was based on incorrect debtor's amounts while arriving at expected income in the banking test.

Appellant's Case

7. The Appellant relied on its Statement of facts dated and filed on 14th December 2023. The Appellant also filed its written submissions dated 11th July 2024 and filed on 12th July 2024 and the same were adopted by the Tribunal on 11th September, 2024.
8. The Appellant's case was that the Respondent issued an assessment notice dated 2nd August 2023. Through the notice, the Respondent analysed the taxes payable adding up to Kshs. 44,933,608.47 to which the Appellant objected to on 11th August 2023.
9. The Appellant stated that it engaged with the Respondent to close the matter. The Appellant stated that the Respondent was optimistic to give a decision within the required timelines.
10. After the review, the Respondent confirmed the assessments on 1st November 2023, maintaining the Tax payable as Kshs 28,029,926.57 together with resultant interest and penalties. It is against this decision that the Appellant lodged this appeal.
11. The Appellant submitted that the Respondent's assessment was based on estimated income, which was excessive and did not reflect the company's annual revenues as per the returns because the Respondent failed to perform a proper reconciliation of the bank. It submitted that some of the bank deposits constituted loans and directors' injections to the business, and related parties' transactions.
12. The Appellant also submitted that the Respondent's assessment for the year 2020 was done before filing of income tax returns. To support this submission, the Appellant stated that it had not yet filed



the annual return for the year 2020, hence the Respondent based is calculations on estimations of both revenue and expenses.

13. The Appellant further submitted that the Respondent's assessment was based on banking where some credits in the bank did not form part of business income. It submitted that some of the bank deposits constituted client's deposits, loans and directors' injections to the business, and related parties' transactions.
14. On the issue of whether some of cost of sales and operating expenses were disallowed hence making the assessment excessive, the Appellant avowed that the Respondent disallowed some of the expenses, which were wholly and inclusively used to generate business income. It therefore submitted that this made the assessment excessive. The Appellant submitted that the Respondent's Assessment for VAT was based on variance between the VAT returns and audited financial statements hence charging VAT on Zero rated sales that were not included on the VAT return.
15. It was also the Appellant's submission that the Company was operating in losses as reflected in the financial statements. It submitted that the company's administrative and operating expenses exceeded the revenues; hence the company was operating in losses. It also submitted that the company had losses brought forward to offset the profits that might have been realized in the following years of income.
16. Finally, the Appellant submitted that the Respondent's objection decision dated 1st November 2023 was not proper and not in conformity with the law. It further submitted that the Respondent has experienced some delays in executing the assignment and has been updating the Appellant on the progress which has delayed the completion of the whole ADR process resulting to the hearing of the case.

Appellant's Prayers

17. The Appellant urged the Tribunal to make the following findings:
 - a. That the Respondent's claim that the income as per banking test, sales data vs audited accounts to be understated is invalid.
 - b. That the Respondent's claim that there is negative variances in VAT3 returns against the accounts is incorrect and invalid.
 - c. The Respondent's claim that the cost of sales was overstated in the years 2017 to 2019, due to variances between purchases as per VAT3 and income tax is incorrect and invalid.
 - d. That the Respondent's claim that some of the expenses to be overstated is incorrect and invalid.
 - e. That the Respondent's claim that inventories were understated in the year 2018 is incorrect and invalid.
 - f. That the Respondent's claim that trade payables to be overstated is incorrect and invalid.
 - g. That the Respondent's claim that Withholding on professional fee was not done be declared incorrect and invalid.
 - h. That the Respondent's objection decision dated 30th November, 2023 is improper in law.



Respondent's Case

18. The Respondent relied on its Statement of facts dated 1st March 2024 on even date. The Respondent also filed its written submissions dated 6th August 2024 on even date. The Respondent's written submissions were adopted by the Tribunal on 11th September, 2024.
19. The Respondent's case was that it undertook a tax return review of the Appellant for the period 2017 to 2020 after which it established that there were undeclared income and VAT. On 2nd August 2023, the Respondent then issued a demand notice for Kshs 44, 933,608.47 for VAT, Withholding Tax and income tax for the period under review.
20. The Respondent stated that the basis of the aforementioned assessment was hinged on section 31 of the *Tax Procedures Act*, CAP 469B of the Laws of Kenya (hereinafter "TPA"), which gives the Respondent leeway to issue additional assessments based on the available information and best of judgement.
21. The Respondent's case was that the Appellant lodged notices of objection on 11th August 2023. Upon receipt of the notices of objection against the assessment, the Respondent stated that it requested the Appellant to validate notices of objection on 17th August 2023 to comply with the provisions of section 51(3) of the TPA. It also stated that the Appellant was required to provide statutory required documents in support of the objection failure to which their objection would be invalidated. The Respondent argued that in the absence of satisfactory explanation from the Appellant, the Respondent proceeded to issue confirmation of assessment notices dated 1st November 2023 which dissatisfied the Appellant hence it file this Appeal.
22. The Respondent raised a preliminary objection on the ground that the Appeal is incompetent for non-compliance with section 13(b) of the Tax Appeal Tribunal Act, CAP 469A of the Laws of Kenya (hereinafter "TATA"). In response to the grounds of appeal, the Respondent stated that upon review of Appellant's grounds of objection, the Respondent requested the Appellant to provide documents so as to validate its objection but the Appellant failed to provide the documents requested hence the objection was invalidated.
23. The Respondent relied on the provisions of section 51(3) of the TPA, which provides that taxpayers have to submit all the relevant documents relating to the objection for the objection to be valid. The Respondent stated that save for the notice of objection and the grounds for objection, no other document was adduced in support of the objection application lodged by the Appellant. The Respondent maintained that the Appellant did not provide the requisite documents therefore; it failed to validate their objection pursuant to section 51 of the TPA. As such, the Respondent invalidated the objection.
24. According to the Respondent, section 24 of the TPA allows a taxpayer to submit tax returns in the approved form and manner prescribed by the Respondent though the Respondent is not bound by the information provided therein and can assess for additional taxes based on any other available information and to the best of its judgement.
25. The Respondent stated that pursuant to section 56 of the TPA and 30 of the TATA, a burden lies on the Appellant to prove that it has discharged its tax liability. The Respondent stated that this burden was never discharged as no satisfactory documentary evidence was availed to the Respondent to enable it render a meritorious decision in the circumstances.



26. The Respondent relied on the provisions of section 109 of the Evidence Act, CAP 80 of the Laws of Kenya (hereinafter "Evidence Act") which provides thus:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

27. In light of the foregoing, the Respondent stated that the Appellant's assertions that the assessments did not reflect the company's annual returns were incorrect and misleading. The Respondent maintained that the Appellant was granted ample time to avail documentation in support of the objection but the Appellant failed to do so.
28. In its submissions, the Respondent identified three issues for determination. First, whether the Appellant's objection was valid; second, whether the Respondent's invalidation objection Notice is valid; and thirdly, whether the assessment is proper in law and whether Appellant discharged its burden of proof.
29. On whether the appellant's objection was valid, the Respondent avowed that the notice of objection was invalid. It submitted that on 25th August 2023 it issued the Appellant with a notice under section 51 (3) of the TPA informing the Appellant that the objection was not a valid objection because it had failed to provide documentations to support the objection. It maintained that the since the Appellant failed to validate the objection, the Respondent invalidated it.
30. On whether the Respondent's invalidation objection notice is valid, the Respondent submitted that pursuant to amendments by the Finance Act 2021, Section 51(11) of the TPA at the time stated as follows:

"The Commissioner shall make the objection decision within sixty days from the date of receipt of—

The notice of objection; or

Any further information the Commissioner may require from the taxpayer,

Failure to which the objection shall be deemed to be allowed."

31. The Respondent submitted that the Appellant failed to respond to its electronic mail request dated 17th August 2023 to provide statutory required documents in support of the objection. It relied on the case of Ngurumani Traders Limited v Commissioner of Investigations and Enforcement TAT No. 125 of 2017; Boleyn International Limited v Commissioner of Domestic Taxes TAT No. 55 of 2019; Greenroad Kenya Limited v Commissioner of Domestic Taxes TAT Appeal No. 538 Of 2021; Nick Kikalos and Helen Kikalos v United States of America, No. 2:98 CV 618. 313 F. supp. 2d 876 (2003); and Digital Box Ltd v Commissioner of Investigation & Enforcement 2019) EKLK to support the position that where the Appellant's fails to lodge a proper objection, the Respondent is at liberty to confirm the assessment.
32. On whether the assessment is proper in law, the Respondent submitted that the Appellant was assessed in accordance with Section 31(1) of the TPA, which allows the Respondent to use best judgement and available information to make its decision. The Respondent cited the case of the Commissioner For Her Majesty's Revenue And Customs Tc/2017/02292 Saima Khalid Appellant v the Commissioners for Her Majesty's Respondents Revenue & Customs to support the position that the Respondent is allowed to apply 'best of their judgment' which requires the commissioners to fairly consider all



material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due.

33. The Respondent also submitted that the Appellant failed to discharge the burden of proof under Section 56(1) of the TPA. It submitted that the Appellant failed to keep documents as mandated under section 23 of the TPA and that therefore the Appellant was unable to adduce the documents when Respondent required them. The Respondent cited section 59(1) of the TPA which requires the Appellant to produce supporting documents for examination but the Appellant failed to produce them.

Respondent's prayers

34. The Respondent prayed that the confirmation assessment notice dated 1st November, 2023 be upheld and that this Appeal be dismissed with costs to the Respondent as the same lacked merit.

Issues for Determination

35. The Tribunal having considered the parties' pleadings, documents and written submissions puts forth the following issues for determination:
- a. Whether the Respondent's confirmation assessment notice dated 1st November, 2023 offends section 51(11) of TPA.
 - b. Whether the Appeal is incompetent for non-compliance with section 13(b) of TATA.

Analysis and Findings

36. The Tribunal wishes to analyse the issues as hereunder.

a. Whether the Respondent's confirmation assessment notice dated 1st November, 2023 offends section 51(11) of TPA.

35. The Tribunal raises and analyses this issue suo moto since the Appellant did not raise it. The Respondent issued its findings and demand of taxes vide a letter dated 2nd August 2023. The Appellant lodged notices of objection on 11th August 2023. The Respondent stated that it sent an electronic mail on the 17th August, 2023 requesting the Appellant to provide documents. The said electronic mail was neither on record nor attached to the Respondent's documents and the documents requested were therefore not listed. The Respondent invalidated the objection and issued multiple Confirmation Assessment notices dated 1st November 2023. Section 51(4) of the TPA provides as follows:

“(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall within a period of fourteen days notify the taxpayer in writing that the objection has not been validly lodged and request the taxpayer to submit the information specified in the notice within seven days after the date of the notice.”

37. The Tribunal notes the Respondent's assertions that since the Appellant failed to validate its objection, it confirmed the assessments. The Objection Application Acknowledgement Receipts on record confirm that the Respondent received the Appellant's notice of objection on 11th August 2023. In this regard, Section 51(4A) of the TPA provides as follows:

“(4A) Despite subsection (3), where a taxpayer fails to provide the information required under subsection (4) or fails to provide the information within the specified period, the



Commissioner may make an objection decision within sixty days after the date on which the notice of objection was lodged.”

38. The Tribunal’s notes the Respondent’s case that it invalidated the objection after the Appellant failed to provide documents in support of the objection and that consequently, the Respondent issued its Confirmation Assessment notices dated 1st November 2023. The Respondent also stated that since the Appellant failed to validate its objection, it confirmed the assessments. The Objection Application Acknowledgement Receipts on record confirms that the Respondent received the Appellant’s notice of objection on 11th August 2023.
39. The impact of Section 51(4A) of TPA is that whether the taxpayer provides documents or not, the Respondent has to issue its decision 60 days after the date on which the notice of objection was lodged. The Respondent acknowledge receipt of the Appellant’s notice of objection on 11th August 2023. Through a letter dated 25th August, 2023 the Respondent invalidated the Appellant’s objection and it ought to have requested the Appellant to provide further documents as a pre-requisite to its invalidation notice. Accordingly, the Tribunal’s view is that the Respondent ought to have issued its objection decision on or before 10th October 2023. However, the Respondent issued its Confirmation Assessment notices dated 1st November 2023 in breach of the provisions of Section 51(4A) of TPA.
40. Section 51(11) of the TPA provides as follows:
- “The Commissioner shall make the objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.”
- The Tribunal can infer that the issuance by the Respondent of Confirmation Assessment Notices dated 1st November 2023 amounted in effect to the issuance of its objection decision. However, since the Appellant objected on 11th August 2023 it would have been expected that the Confirmation notices ought to have been issued on or before 10th October, 2023.
41. On Numerous occasions the Tribunal has held that where the Respondent fails to issue its objection decision within 60 days as provided for under section 51(4A) of TPA, the taxpayer’s objection stands allowed by operation law. This position is supported by the following holding by the High Court in the case *Eastleigh Mall Limited v Commissioner of Investigations & Enforcement Income Tax Appeal E068 of 2020*:
- “It is clear from the forgoing that the provisions of section 51(11) of the [Tax Procedures Act](#) are mandatory. They are not cosmetic. Parliament in its wisdom knew that in matters tax, time is very crucial as those in commerce need to make informed decisions. If the Commissioner is allowed to exercise his discretion and stay ad-indefinitum before issuing an objection decision, the taxpayer would be unable to make crucial decisions and plan his/her business properly. The timelines set are mandatory and not a procedural technicality.”
42. Further, in *Republic v Commissioner of Customs Services Ex-Parte Unilever Kenya Limited [2012] eKLR*, the court held that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law.
43. Consequently, The Tribunal finds and holds that the Respondent’s confirmation assessment notices dated 1st November, 2023 offend section 51(11) of TPA and the Appellant’s notice of objection of 11th August 2023 is therefore deemed as allowed by operation of law.



44. Having established the foregoing, the Respondent's objection that the Appeal is incompetent for non-compliance with section 13(b) of TATA could not arise and does not arise. The other issue identified for determination is rendered moot by the Tribunal's findings and the same will not be examined.

Final Decision

45. The upshot to the foregoing is that the Tribunal finds that the Appeal succeeds and consequently makes the following Orders:
- a. The Appeal be and is hereby allowed.
 - b. The Preliminary Objection is hereby dismissed.
 - c. The Respondent's confirmation assessment notices dated 1st November, 2023 be and are hereby set aside.
 - d. Each party to bear its own cost.
46. It is so Ordered.

DATED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF NOVEMBER, 2024.

CHRISTINE A. MUGA - CHAIRPERSON

BONIFACE K. TERER - MEMBER

ELISHAH N. NJERU - MEMBER

EUNICE N. NG'ANG'A - MEMBER

OLOLCHIKE S. SPENCER - MEMBER

