



REPUBLIC OF KENYA



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**Associated Electrical & Hardware Supplies Ltd v Commissioner of Domestic Taxes
(Tax Appeal 16 of 2023) [2024] KETAT 646 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KETAT 646 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
TAX APPEAL 16 OF 2023**

CA MUGA, CHAIR, BK TERER, D.K NGALA, SS OLOLCHIKE & GA KASHINDI, MEMBERS

APRIL 26, 2024

BETWEEN

ASSOCIATED ELECTRICAL & HARDWARE SUPPLIES LTD APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

Background

1. The Appellant is a private limited liability company incorporated in Kenya. Its principal activity is that of supplies and general contractors.
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 Respondent 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 performance of its functions under subsection (1), the Respondent is mandated to administer and enforce all provisions of the Written laws as set out in Part 1 & 1 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenue in accordance with those laws.
3. The Respondent issued the Appellant with an Assessment Order No 20211189499 for Kshs 14,923.104.00 dated 15th June 2021.
4. The Appellant objected to the demand vide its notice of objection dated 13th July 2021 objecting to the assessment in its entirety.
5. The Respondent issued an invalidation notice to the Appellant dated 17th November, 2022 on the grounds that the Appellant did not satisfy the provisions of Section 51(3) of the *Tax Procedures Act* No 29 of 2015 (hereinafter '*TPA*').



6. Dissatisfied with the decision of the Respondent the Appellant filed its Notice of Appeal dated 17th December, 2022 on 9th January 2023.

The Appeal

7. The Appeal is premised on the following grounds of Appeal as stated in the Appellant’s Memorandum of Appeal dated 8th January, 2023 and filed on 9th January, 2023:
 - a. That the objection decision by the Respondent dated 17th November, 2022 is erroneous in law and fact as it is based on the Respondent’s assertion that the tax credits claimed by the Appellant in the tax return were not validly claimed.
 - b. That the Respondent erred in disallowing the withholding tax credits of Kshs 14,923,104.00 claimed by the Appellant on the assertion that they were discharged as credit under special arrangements.
 - c. That the Respondent erred in fact by failing to find that the tax credits relate to manual withholding taxes which meet the requirements of Section 35(3) (f) of the *Income Tax Act*, CAP 470 of Kenya’s Laws (hereinafter ‘*ITA*’).

The Appellant’s Case

8. The Appellant’s case is as set out in its Statement of Facts dated 8th January, 2023 and filed on 9th January, 2023 where it asserted that it objected to the Respondent’s demand of 15th June 2021 on 13th July 2021 and stated precisely the grounds upon which it believed that the additional assessment was illegal and erroneously instituted.
9. The Appellant averred that upon receipt of the Appellant’s objection, the Respondent failed to review the facts of the objection within the timelines provided under the law and proceeded to confirm the assessment of Kshs 14,923,104.00 vide the objection decision dated 17th November 2022 which was 431 days after the statutory period prescribed for making an objection decision by the Respondent.
10. The Appellant averred that the Respondent carried out a desktop review of the Appellant for the year 2015. However, based on Section 23 (3)(c) of the *TPA*, the Appellant is required to retain records for a period of five years from the end of the reporting period to which it relates. It argued therefore that the year 2015 was beyond the five (5) year period allowed and therefore, the Respondent erred and contradicted the provisions of the law by issuing assessment for 2015 year of income. The period of assessment is not within the statutory timeline allowed by law considering the assessment was issued on 15th June 2021.
11. The Appellant contended that the basis of the Respondent’s assessment was disallowed income tax credits amounting to Kshs 14,923,104.00 which the Appellant had claimed under credit u/s 42 (credit under special arrangements) in the self-assessment tax return for 2015 year of income. The Appellant stated that the tax credits were captured under the section prescribed for “credits under special arrangements” in the online self-assessments tax return it submitted for the year of income. Further that it had clearly stated that the tax credits of Kshs 14,923,104.00 related to manual withholding tax credits which are claimable by the Appellant under Section 35(3) (f) of the *ITA*.
12. It was the Appellant’s averment that the i-Tax system at the time of submitting 2015 self-assessment return could not allow the Appellant to enter the manual credits in the prescribed section of the return since the withholding tax credits had not been generated through the online i-tax platform. It asserted that this was during the period when there was a transition from the manual system of filing tax returns



to the online i-Tax system. It argued further that upon consultation with the Respondent's officers, it was advised that for the tax credits to be captured in the online tax return, the credits should be disclosed in the section of the return where "credits under special arrangements" are usually disclosed even though the credits were not issued under the special arrangements but the same were validly claimable under Section 35(3) of the [ITA](#).

13. The Appellant contended that based on the foregoing, the tax credits of Kshs 14,923,104.00 were validly claimed under the provisions of the law therefore it is illegal and unfounded for the Respondent to demand taxes on withholding tax credits on the basis that the same were wrongly captured in the tax return.
14. It was the Appellant's contention that after conducting the desk review of the Appellant's self-assessment the Respondent ought to have provided its preliminary tax findings within reasonable time to enable the Appellant to respond prior to issuing and confirming the assessment. The Respondent's failure to do so was an act of bad faith as the Appellant was not accorded with an opportunity to be heard. which is against the principle of natural justice. The Respondent's actions were procedurally unfair and violated the Appellant's right to fair administrative action as provided for under Article 47 of the Kenyan Constitution 2010 (hereinafter 'the [Constitution](#)').

Appellant's Prayers

15. The Appellant prayed that the Respondent's assessment be set aside and that the Appellant be awarded the cost of the Appeal.

The Respondent's Case

16. The Respondent addressed the Appellant's grounds of Appeal through its Statement of Facts dated 3rd February, 2023 and filed on even date.
17. In response to the Appellant's grounds of Appeal, the Respondent reiterated its position that the decision issued on 17th November, 2022 was sound in law and that this Appeal was not lodged on the merit of the case but on the invalidation notice issued by the Respondent which issue it chose to address. As such, it reiterated that the contents of the objection application acknowledgement receipt clearly brought out that the objection was not in compliance with Section 51(3) of the [TPA](#). Further the letter dated 17th November 2022 informed the Appellant of its invalid objection since it did not include:
 - i. The grounds of objection
 - ii. The amendments required to be made to correct the decision.
 - iii. The reasons for the amendments
 - iv. The relevant documents relating to the objection.
18. The Respondent contended that despite the indulgence it granted the Appellant, the Appellant refused or declined to provide documentation or information to support its objection and did not provide the grounds of objection contrary to the Appellant's assertion. Further that even with the Appeal herein, the Appellant has failed to attach the documents that would support its case.
19. The Respondent stated that Appellant even failed to support its Appeal with relevant documents and that its averments remain unsupported. Further that the Appellant had also failed to explain the disallowed credit under special arrangements which it claimed related to manual withholding tax credits which are claimable by the Appellant under Section 35(3) (f) of the [ITA](#). It contended that



the reading of Section 35(3)(f) of the ITA does not substantiate the allegations by the Appellant as it provides for dealing with professional or management fees and nothing on the withholding tax credits claimed.

20. The Respondent averred that on a without prejudice basis and in response to the Appellant's allegation on the audit review period, that the assessment was issued beyond the statutory timeline of five years, it stated that it relied on the provisions of Section 42(7) of the ITA which provides that the time limit is six years in respect to any computation of credits under special arrangement. It argued further that it is trite law in tax matters that the burden of proof lies on the taxpayer to prove that a tax assessment is incorrect as espoused in Section 56(1) of the TPA.

Respondent's Prayers

21. The Respondent prayed that its notice of objection invalidation dated 17th November, 2022 be upheld and that this Appeal be dismissed with costs to the Respondent as the same was without merit.

Parties' Submissions

22. The Respondent in this Appeal did not file its written submissions. The Tribunal will therefore only consider the Appellant's written submissions dated 28th August 2023 and filed on even date wherein it established four issues for determination and the same are as analysed below:

i. Whether the Respondent's decision was invalid and time barred.

23. The Appellant contended that the Respondent erred in law and in fact by failing to adhere to the provisions of Section 51(4) and (4A) of the TPA in rendering its decision on the Appellant's objection decision outside the 14 and 60 day timeline provided. The Appellant clarified that it lodged its objection on 13th July 2021 through the i-Tax platform and acknowledgement of the same made. It submitted therefore that Section 51(4) of the TPA provides that the Respondent had 14 days within which to notify the taxpayer in writing that the objection had not been validly lodged. Hence, the invalidation ought to have been by 27th July 2021. It submitted that in the event that the Appellant would have failed to provide the information, and/or documents requested in order to render the objection valid within 7 days, the Respondent would have had 60 days within which to render an objection decision which would have been 25th September, 2021.
24. The Appellant submitted that the Respondent's decision invalidating the Appellant's objection on 17th November, 2022 which was 431 days after receipt of the Appellant's objection was deemed allowed. It submitted that the use of the word "shall" in Section 51(4) of the TPA couches the provisions in mandatory terms and that it has been consistently held that where the Respondent fails to render its decision within the timelines, the objection is automatically deemed allowed. The Appellant relied on the case of *Equity Group Holdings Limited v Commissioner of Domestic Taxes* (Civil Appeal E069 & E025 (2021) KEHC 25 KLR (Commercial and Tax) (23 August 2021).
25. The Appellant submitted that from a plain interpretation of Section 51(4) and by extension 51(11) of the TPA, once an objection has been made, the Respondent's actions are limited, it may allow the objection in whole or in part or disallow it and that if the Respondent does not act on it, the objection is allowed. It submitted further that from the same provisions, the Respondent cannot extend the timelines by ordering a fresh investigation. To buttress its position further the Appellant relied on the decision by D.S Majanja J, in *Subaru Motors Limited v Commissioner of Domestic Taxes* (Tax Appeal (074 of 2020) (2021) KEHC 195(KLR) (Commercial and Tax).



(ii) Whether the Respondent was justified in conducting an audit review outside the 5-year review window.

26. The Appellant contended that the Respondent conducted the audit review on the Appellant tax affairs for the year 2015 on or about the month of June 2021 and consequently issued an assessment order on 15th June, 2021 which was carried out in bad faith for having been conducted after an inordinate period of time without reasonable causes. It submitted that pursuant to Section 23 (1)(c) of the TPA, a taxpayer is only required to retain tax records/documents for a period of 5 years. The Appellant argued that the Respondent on the other hand avoided a mention of Section 23(1) (c) of the TPA and instead latched on Section 42(7) of the ITA which only applies to computation of credits under special arrangements. Further that the provision of Section 42(7) of the ITA speaks to different scenarios and it is plain that the Respondent was ardent on scuttling the straightforward issues herein.
27. The Appellant submitted that whereas Section 23(1)(c) of the TPA speaks to record keeping and expressly provides for a 5 years limit on validity of tax documents, Section 42(7) of the ITA is a follow up on Section 41 of the ITA on credit under special arrangements. It averred that the Respondent was wrong to review and conduct an assessment on tax returns outside the timelines provided under both sections of the Acts. It asserted that in the absence of fraud, the Respondent could not vest itself with the powers to whimsically conduct assessments on taxpayer's affairs long after the statutory periods and especially after 5 years.

(iii) Whether the Respondent was justified in disallowing the Appellant's claim for tax credit.

28. The Appellant submitted that although the tax credits were captured under the Section prescribed for credits under special arrangements in the online self-assessment tax return for the year of income, it clearly stated in the objection that those credits related to manual withholding tax credits which are claimable by the Appellant under Section 35(3)(f) of the ITA. It submitted further that the tax credits of Kshs 14,923,104.000 were validly claimed under provisions of the law and it would be illegal and unfounded for the Respondent to demand taxes on withholding tax credits on the basis that the same was wrongly captured in the tax return.

iv. Whether the Respondent infringed on the Appellant's right to fair administrative actions under Article 47 of the Constitution.

29. The Appellant submitted that it is entitled to Constitutional rights, freedoms and guarantees including but not limited to Articles 47(1) and 47(2) of the Constitution and that the Respondent is bound by the foregoing provisions of the law. The Appellant submitted that whereas the Respondent is authorized by law to carry out tax assessments, the same cannot be done whimsically and at the behest of the Respondent's individual officers who carry out tax assessments at will and in blatant disregard of the provisions of the law. It argued that public authorities must therefore exercise their power diligently, fairly and prudently.
30. It was the Appellant's submission that the Respondent's action of failing to render a decision within the expected timelines by the Respondent without any notification to the Appellant and not giving any reason for the same amounted to breach of the Appellant's right to fair administrative action as enshrined under Article 47 of the Constitution.
31. To buttress its case, the Appellant relied on the following cases;
- a. Judicial Service Commission v Mbalu Mutava & another (2014) eKLR



- b. *Republic v Commissioner of Cooperatives Ex-Parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd* (1999) 1EA 245(CAK)
- c. [*Republic v Kenya Revenue Authority Ex-Parte Aberdare Freight Services Ltd*](#) (2004) eKLR.
- d. *Doody v The Home Secretary of State* (1993) 1 All ER 151
- e. [*Republic v Commissioner of Customs Ex-Parte Mulchand Ramji & Sons Ltd*](#) (2010) eKLR.

Issues for Determination

32. The Tribunal having perused through the parties' pleadings, documentation and the Appellant's submissions and is of the considered view that there are two issues for determination as outlined below:
- a. Whether the Respondent invalidation of the Appellant's notice of objection was proper in law.
 - b. Whether the Respondent is statute barred in raising an assessment outside the 5-year statutory timeline.

Analysis and Findings

33. The Tribunal will proceed to analyse the issues identified for determination as hereinunder:
- a. Whether the Respondents invalidation of the Appellants notice of objection was proper in law.
 - 1. The Tribunal reviewed the documentation availed and found that the Respondent issued the Appellant with an assessment order dated 15th June 2021 for Kshs 14,923,104.00. Thereafter, the Appellant issued its notice of objection vide its letter dated 13th July 2021 stating its grounds of objection. The Respondent then issued an invalidation objection to the Appellant dated 17th November, 2022 wherein it stated that the Appellant's objection had not been validly lodged in accordance with the provisions of Section 51(3) of the [*TPA*](#).
 - 2. Section 51(3) of the [*TPA*](#) provides as follows:
 - “A notice of objection shall be validly lodged by a taxpayer under subsection (2) if –
 - a. The notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments
 - 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 or has applied for an extension of time to pay the tax not in dispute under section 33(1) and
 - c. All relevant documents relating to the objection have been submitted.”
36. The Respondent had cited the above Section in reiterating that the objection application acknowledgement receipt was not in compliance with Section 51(3) of the [*TPA*](#).
37. The Tribunal has perused the documentation adduced by the parties and has noted that both the online objection application acknowledgement receipt dated 14th July 2021 and the Appellant's notice



of objection dated 13th July 2021. While it is true the objection application acknowledgement receipt does not comply with Section 51(3) of the TPA, the notice of objection dated 13th July 2021 does. In any case the physical notice of objection has an earlier date and specifies the grounds of objection. It is inconceivable that the Respondent chooses to dwell on the online objection and ignore the said letter dated 13th July, 2021 which encapsulated the Appellant's notice of objection which was also attached with its bundle of documents in the annexure marked '2'. It is therefore the Tribunal's view that the Respondent's reason for its inaction on the said letter fails.

38. Section 51(4) of the TPA stipulates what the Respondent ought to do after determining that a notice of objection has not been validly lodged. It provides as follows:

“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.”

39. The Tribunal notes that from the evidence adduced by the Appellant, its notice of objection was dated 13th July 2021. As such, the Respondent was expected to invalidate the Appellant's objection by 27th July, 2021. However, the letter through which the Respondent invalidated the Appellant's notice of objection was dated 17th November 2022 and was written a more than a year after the Appellant notified it of its objection.

39. The Tribunal notes that where a notice of objection has been validly lodged, the Respondent has the option of either accepting it whole, in part or disallowing it in its entirety. Whichever decision is made by the Respondent would require it to issue the objection decision within 60 days as provided for by Section 51(11) of the TPA. In either case, the Respondent is required to either issue the invalidation notice 14 days from 13th July, 2021 or issue an objection decision 60 days from 13th July, 2021. It is the Tribunal's considered view that the Respondent failed to conform to the requirements of Section 51 (11) of the TPA.

40. The Tribunal alludes to the holding in the case Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 (2021) KEHC 25 KLR which was as follows:

“The word “shall” when used in a statutory provision import a form of command or mandate. 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.....

.....Substantive law was a statutory law that dealt with the legal relationship between people or the people and the State. Therefore, substantive law defined the rights and duties of the people, but procedural law lay down the rules with the help of which they were enforced. Article 159(2) (d) of the Constitution talked about procedural technicalities. A statutory edict was not a procedural technicality. It was a law which had to be complied with. Parliament in its wisdom expressly and in mandatory terms provided the consequences of failing to render a decision within 60 days. The objection was deemed to be allowed. The appellant's objection stood allowed as a matter of law the moment the Commissioner of Domestic Taxes failed to render his decision within 60 days.”

31. The Tribunal further relies on the holding of the Court of Appeal in the case of Speaker of the National Assembly v James Njenga Karume (1992) eKLR where the Court held as follows:

“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.”

41. In view of the foregoing the Tribunal finds that the Appellant’s notice of objection is deemed allowed by operation of the law since the Respondent’s notice of invalidation was wrongly issued and was therefore improper in law.

(b) Whether the Respondent is statute barred in raising an assessment outside the 5year statutory timeline.

42. Having determined that the Appellant’s notice of objection was deemed allowed by operation of the law, the Tribunal will not delve into the second issue as the same has been rendered moot.

Final Decision

43. The upshot of the foregoing is that the Appeal is meritorious and succeeds. The Tribunal accordingly proceeds to issue the following Orders: -
- a. The Appeal be and is hereby allowed.
 - b. The Respondent’s invalidation decision dated 17th November, 2022 be and is hereby set aside.
 - c. Each Party to bear its own costs.
44. It so ordered

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

CHRISTINE A. MUGA - CHAIRPERSON

BONIFACE K. TERER - MEMBER

DELILAH K. NGALA - MEMBER

SPENCER S. OLOLCHIKE - MEMBER

GEORGE KASHINDI - MEMBER

