



Case Number:	Miscellaneous Application 38 of 2019
Date Delivered:	02 Oct 2020
Case Class:	Civil
Court:	Tax Appeal Tribunal
Case Action:	Ruling
Judge:	ERIC N. WAFULA (CHAIRMAN), NGINA MUTAVA (MEMBER), WILFRED N. GICHUKI (MEMBER), ABRAHAM K. KIPROTICH (MEMBER) & GABRIEL M. KITENGA (MEMBER)
Citation:	Kotile General Contractors Company Limited v Commissioner of Domestic Taxes [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
MISC. APP. NO. 38 OF 2019

KOTILE GENERAL CONTRACTORS COMPANY LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

Background

1. The Appellant is a limited liability a company based in Isiolo County whose principal business activity is construction and supplies.
2. The Respondent is a principal officer appointed under the Kenya Revenue Act for purposes of collection and accounting of Government Revenue and related purposes.
3. The Respondent issued an additional tax assessment on 9th June 2019. The Appellant objected to the assessment on 15th July 2019.
4. On 10th September 2019 the Respondent wrote to the Appellant notifying it that its objection dated 15th July 2019 was filed out of time and therefore rejected by the Respondent.
5. The Appellant being dissatisfied with the Respondent's decision filed a Notice of Motion to the Tribunal to be granted leave to file its Memorandum of Appeal and Statement of Facts out of time.
6. The Appellant filed a Notice of Motion dated the 8th day of November, 2019 seeking the following orders:
 - a. That the Appellant be granted leave to file its Memorandum of Appeal and Statement of Facts, out of time.
 - b. That this Honorable Tribunal be pleased to order the Respondent to recognize all the allowable expenses incurred by the Applicant while undertaking the contract and that the Respondent to vacate all the interest accrued.
 - c. That the Appellant filed its Notice of Appeal on time that was on 9th October 2019.
 - d. That there be no costs in relation to this application.
 - e. That the Respondent is demanding VAT, without any assessment hence we find the demand letter to be malicious and in bad faith.
 - f. That the Respondent put on hold any enforcement action against the Appellant until the matter is heard and determined by the

Honorable Tribunal.

Grounds for Application

7. The Appellant cited the following as the grounds upon which its application was premised:

- a) That the Appellant actually did construction of water kiosks, cattle troughs and masonry tanks. While undertaking the tasks it incurred expenses allowable for the purpose of the construction (labour, materials, transport, rent & investment deductions). The taxpayer's books have been audited.
- b) That the Respondent in doing the assessment ought to have used profit margin, income based on industry statistics.
- c) That if the assessment is maintained as status quo the Appellant will suffer prejudice.
- d) That the Appellant was never in written or in electronic form on the intention by the Respondent to raise an assessment nor did he ever notify of the intention to carry out an audit as required by Tax Procedures Act 2015 Chapter VI Section 28-31 by the Respondent. The Respondent needed to have filed estimated assessments, as there was only nil return(original).
- e) That the Appellant's director have been of ill health and could not therefore get sufficient time to instruct his tax agent to represent the Appellant in the tax dispute. Medical report is attached.

Grounds for Opposition

8. The Respondent through Ground of Opposition dated the 29th day of November, 2019 opposed the application citing the following grounds:-

- a. That the Respondent issued additional assessments on 9th March 2018.
- b. That the Applicant objected to the additional assessments on 15th July 2019 contrary to Section 51(2) of the Tax Procedures Act, 2015 which stipulates that a Notice of Objection ought to be lodged within 30 days of being notified of the tax decision.
- c. That the Respondent immediately notified the Applicant that its objection was invalid, but the Applicant failed and/or neglected .to remedy the invalidity.
- d. That the Applicant's application is incompetent as it seeks to be granted leave to file its appeal out of time yet what it seeks to appeal is not an appealable decision.
- e. That the Applicant can only appeal the Respondent's decision to the effect that its objection was invalidly lodged to enable this Honourable Tribunal determine whether the objection is valid or invalid.
- f. That upon determination by this Honourable Tribunal on the issue of validity or invalidity of the objection lodged, the Applicant can then either proceed to await the Respondent's Objection Decision on the objection or seek an extension of time to lodge a Notice

of Objection in accordance with Section 51(6) of the Tax Procedures Act, 2015 or choose to abandon the objection altogether and pay the taxes assessed.

g. That the Applicant is clearly guilty of [aches and is in violation of express provisions of the Tax Procedures Act and Tax Appeals Tribunal Act.

Tribunal's Analysis and Findings

9. The application at hand addresses both the Notice of Objection that was filed late and filing of the Memorandum of Appeal. What appears to be at issue is what the Appellant ought to have done upon its Notice of Objection being rejected on account of it being out of time. The Tribunal will address itself to the Appellant's objection as it is of the view that the issue of the Memorandum of Appeal is premature.

10. The Tax Procedures Act is the custodian of processes related to tax administration in Kenya. Section 51 of the Act in particular deals with objections and in allowing a taxpayer to make an objection, it provides thus:

"(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

(3) A notice of objection shall be treated as 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; and

(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).

(c) all the relevant documents relating to the objection have been submitted"

11. In the case at hand, the Applicant upon receiving an assessment from the Respondent filed its Notice of Objection. The Respondent notified the Applicant that the objection was invalid as it was filed outside of the 30-day period after receipt of the assessment. That the Notice of Objection was filed outside of the 30-day period as required under the Tax Procedures Act has not been disputed.

12. Section 51 of the Tax Procedures Act goes on to provide what should happen in such a case. The Section states:

"(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.

(5) Where the tax decision.....

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision

13. As provided by the above Section, the taxpayer upon receiving notification from the Respondent that its Notice of Objection was deemed invalid had one recourse: to appeal to the Commissioner. Once the appeal to the Commissioner was considered and a decision reached, then the Applicant would have recourse to lodge an appeal before the Tribunal. Until such process is followed, the application at hand is premature and therefore fails.

Orders of the Tribunal

14. After considering the submissions of both parties and the documents supporting the Notice of Motion and the opposition thereof, the Tribunal orders that:

a) The Appellant is at liberty to file an application for leave to lodge the objection to the tax assessment out of time with the Respondent as provided under Section 51(6) of the Tax Procedures Act.

b) The application is dismissed.

c) No orders as to costs.

DATED and DELIVERED at NAIROBI this 2nd day of October, 2020.

ERIC N. WAFULA

CHAIRMAN

NGINA MUTAVA

MEMBER

WILFRED N. GICHUKI

MEMBER

ABRAHAM K. KIPROTICH

MEMBER

GABRIEL M. KITENGA

MEMBER



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