

**REPUBLIC OF KENYA  
IN THE TAX APPEALS TRIBUNAL  
TAX APPEAL NO. 2 OF 2015**

**AWALE ALI HASHI ..... APPELLANT**

**VERSUS**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. The Appellant is a sole proprietor operating a petroleum transportation business registered as A H Awale Company, but the same was registered in the Respondents' system as a partnership business. The Respondent stated that the Appellant did not inform it about the changes within the business.
2. On 12<sup>th</sup> October 2011, the Respondent wrote to the Appellant for submission of the books of accounts and some additional documents for the period covering the inception of the business till the date of the letter, under Section 56 of the Income Tax Act (Cap 470) and Section 30 of the Value Added Tax Act (Cap 476).
3. A preliminary interview was carried out and the Appellant's accountant, Mr David Kembu confirmed that the Appellant would respond to the letter. Subsequently, the Respondent had a meeting with Mr Said (Mr Awale's Son and a partner in the business) to explain the findings of the investigation.
4. Further, in response to the letters dated 14<sup>th</sup> March 2012, 22<sup>nd</sup> March 2012 and 12<sup>th</sup> April 2012 by the Mr S M Nzioki of Nzioki Tax Consultants, the Respondent wrote on 20<sup>th</sup> April 2012 outlining their findings.
5. On 23<sup>rd</sup> April 2012, Nzioki Tax Consultants, representing the Appellant, wrote to the Respondent that the information given to the Respondent by the accountant Mr David Kembu was mostly exaggerated and in some ways untrue as the accountant and the

Appellant fell out and the accountant was trying to blackmail them by giving wrong information.

6. The Respondent replied on 11<sup>th</sup> May 2012 seeking some valid supportive documents to confirm that the cash deposits in the bank account were not attributable to taxable income. The documents sought were bank withdrawal and deposit slips, VAT withholding tax certificates and receipts and/or invoices for all other expenses to support the workings availed by the tax consultants.
7. Further correspondence from the tax consultants dated 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> August 2012 could not satisfy the requirements by the Respondent as communicated by the Respondent on 21<sup>st</sup> August 2012 and 13<sup>th</sup> November 2012.
8. The Respondent sent a letter referenced I&E/DTIS/NBI/6/011 dated 8<sup>th</sup> March 2012 to the Appellant confirming the assessments dated 12<sup>th</sup> July 2012. The Tribunal noticed that the letter dated 8<sup>th</sup> March 2012 confirmed an assessment dated 12<sup>th</sup> July 2012 (which is subsequent to the date of the confirmation letter) and noticed that the date was wrongly written instead of 8<sup>th</sup> March 2013.
9. Having been aggrieved by the decision of the Respondent dated 10<sup>th</sup> March 2013 the Appellant sent a Notice of Intention to Appeal vide its tax consultants' letter dated 21<sup>st</sup> March 2013. Three Memoranda of Appeal were filed on 20<sup>th</sup> February 2013 for the years 2008, 2009 and 2010. Subsequently a consolidated Memorandum of Appeal was filed on 27<sup>th</sup> March 2013 together with the Statement of Facts.
10. The Respondent filed its Statements of Facts on 16<sup>th</sup> April 2013.
11. Hearings in accordance with Rule 9(2) of the Income Tax Act (Local Committee) Rules, 1974, was fixed by the Local Committee for 24<sup>th</sup> June 2013, 26<sup>th</sup> August 2013 and finally 18<sup>th</sup> November 2013, when the Appellant was asked to reply within 7 days to all the issues raised in the Respondents' letter dated 7<sup>th</sup> November 2013.
12. The determination of the case was scheduled by the Local Committee for 3<sup>rd</sup> July 2014 and a Hearing Notice issued by the Local Committee on 23<sup>rd</sup> June 2014 in accordance with Rule 9(2) of the Income Tax Act (Local Committee) Rules, 1974.

13. During the pendency of the proceedings with the Local Committee, the matter was adjourned at the meeting held on 4<sup>th</sup> July 2013, with a view to resolving the tax issues therein.
14. The matter at this stage was referred to the Tax Appeals Tribunal for determination as the Tax Appeal Tribunal Act 2013 had been enacted.
15. When the Appeal came up for hearing on 20<sup>th</sup> January 2016, Mr Nzioki, representing the Appellant made an application for adjournment on the grounds that the Appellant, holding dual citizenship, could not to be traced.
16. Mr Nzioki also confirmed that Mr Ali was over 75 years old when the matter was initially raised and he was only discussing with Mr Ali's son, who travelled from US and expressed his willingness to continue with the appeal.
17. The Local Committee had five meetings and at some point the lorries that Mr Ali was operating were caveated by the Respondent. At this stage, Mr Ali's son stated that they had no life in this country. The Appellant had two offices one in Eastleigh and one in Industrial Area and a hotel in Nairobi, which were found locked at all times.
18. Ms Njiru, representing the Respondent, confirmed that the caveats were lifted when the Appellant came forward for discussions.
19. The Matter was adjourned to 17<sup>th</sup> February 2016 for Mention and it was agreed that the matter would proceed to hearing if no consent was reached.
20. On 23<sup>rd</sup> May 2016, the Appellant stated before the Tribunal that most of the issues were resolved and the Respondent was served and acknowledged receipt.
21. Out of the eight grounds, only one on expenses had not been agreed upon and the parties were ready to proceed to hearing on it.

22. The Appellant resubmitted an Amended Memorandum of Appeal on 3<sup>rd</sup> June 2016.

### **APPELLANT'S ARGUMENTS**

#### **The Appellant's arguments are based on the Amended Memorandum of Appeal**

23. The Respondent ignored tax exempt sales in ascertaining the Value Added Tax.
24. The Respondent varied its assessment from Kshs.75,060,579. to Kshs.125,663,756. creating a difference of Kshs.50,603,177.
25. The Respondent erred in charging Value Added Tax considering the additional sales being the "difference between the bankings and the sales declared in the VAT Returns" as not all sales are taxable sales and also the period of the banking and the date of invoice differ significantly and hence matching the sales with the bankings is not proper.
26. The Respondent ignored the fact that most of the sales of the Appellant are export sales that were tax exempt while the Appellant paid tax for the local taxable sales or the tax was withheld by the customers (VAT Agents).
27. That the Respondent failed to understand that all payments from Uganda were in US Dollars, hence the Appellant had to open a corresponding Kenya Shilling account in the same bank for the purposes of converting the US Dollars into Kenya Shillings for use in Kenya. Hence, the taxing of Kenya Shilling bankings for export sales to Uganda is not proper.
28. The Appellant borrowed heavily from NIC Bank, Diamond Trust Bank, CFC Stanbic, Gulf African Bank etc for buying Prime Movers and Trailers and the repayment is made by using the accounts in the same bank and hence the deposits in those banks could not be considered as sales for the purpose of levying Value Added Tax.
29. The bankings during the period 1<sup>st</sup> January 2005 to 31<sup>st</sup> December 2007 were very low as compared to the declared sales and the bankings during the period 1<sup>st</sup> January 2008 to 31<sup>st</sup> December 2010

were very high as compared to the declared sales while the Respondent chose to pick the later part to suit their purpose by ignoring the first part.

## RESPONDENTS' ARGUMENTS

30. The compliance audit covered the period 2004 to 2010.
31. The compliance audit exposed huge variations between the sales declared in the VAT Returns and the bankings as per the bank statements.
32. The Appellant failed to declare any "zero rated" sales in the VAT Returns as per the paragraph 9 of the VAT Regulations.
33. The Appellant did not keep records contrary to paragraph 7 of the VAT Regulations. Due to this fact, the Appellant failed to produce the supportive documents as requisitioned by the Respondent.
34. The Appellant claimed to transport petroleum products to Uganda. In accordance with the paragraph 10 of the VAT Regulations "Subject to section 8 of the Act and the Fifth Schedule to the Act, any taxable goods or taxable services exported by a registered person shall be zero-rated if there is evidence of exportation consisting of :-
  - (a) A copy of the invoice showing the sale of the goods or services to the purchaser; and*
  - (b) In the case of goods, copies of the bill of lading, road manifest or airway bill, as the case may be; and*
  - (c) In the case of goods, the export entry duly certified by the proper officer of customs at the port of export, is maintained on file by the registered person for examination by an authorised officer on demand; and*
  - (d) In the case of sugar and all excisable goods, a certificate signed by the Commissioner of Customs that the goods have been examined and loaded into sealable vehicles or containers under a tamper proof seal and seal number duly endorsed on the export entry.*

35. The Appellant, in a letter dated 7<sup>th</sup> June 2012, did admit that he had under declared his income in his self-assessment and financial statements.
36. Further, the Respondent reiterated that the Appellant, in under declaring his income, intended to defraud the Respondent of Kenya Shillings One Hundred and Twenty Five Million Six Hundred Sixty Three Thousand Seven hundred and Forty Six (Kshs.125,663,746.)

### **TRIBUNAL'S OBSERVATIONS**

37. The Tribunal is of the opinion that there are serious lapses on the part of the Appellant in filing the self-assessment returns.
38. In the final submissions, the Respondent also adjusted all earlier disputed transactions in the bank statements, whichever could be justified by the Appellant to the satisfaction of the Respondent.
39. The Respondent considered and allowed substantial expenditure and the final assessment of the additional tax was reduced substantially to Kshs.7,789,464. for the period covering 2008 to 2010 in the absence of satisfactory explanations and production of supporting documents by the Appellant.

### **FINDINGS**

40. The Tribunal finds the adjusted amount of Kshs.7,789,464. and any interest and penalty thereon is payable by the Appellant.

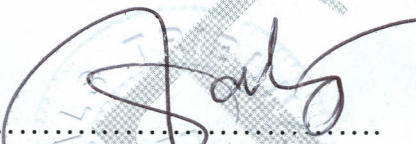
The Appeal is hereby dismissed and there shall be no order as to costs.


DATED and DELIVERED at NAIROBI this. 22<sup>nd</sup> day of May 2017

In the presence of:-

SAMUEL NZIOKI for the Appellant

VICTOR MOSWETI for the Respondent

  
.....  
GEOFFREY KATSOLEH  
CHAIRPERSON

  
.....  
DANIEL TANUI  
MEMBER

  
.....  
GABRIEL KITENGA  
MEMBER

  
.....  
FRANCIS K. KIVULLI  
MEMBER

  
.....  
PONANGIPALLI V.R. RAO  
MEMBER