REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 187 OF 2017

NAKURU CEMENT SUPPLIES LIMITED..... APPELLANT

-VS-

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company duly incorporated in Kenya under the Companies Act, Cap 486 (repealed) of the Laws of Kenya. Its principal activity is the sale/distribution of cement for various cement manufacturers.

2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and is charged with the responsibility of assessment, collection, accounting and general administration of tax revenue on behalf of the Government of Kenya.

3. The Respondent issued a Notice under Section 59(1) of the Tax Procedures Act, 2015 dated 26th May, 2016 conveying its intention to commence an investigation or audit into the Appellant's tax affairs on 14th June 2016 and further requiring the Appellant to provide certain documents. The investigations commenced with a meeting between the Appellant and the Respondent on 14th June 2016.

4. During the investigations, it was established that the Appellant had not been filing Corporate Tax returns since 2011 and thus was advised to do so. The Appellant complied with the directive and filed its Corporation Tax returns on 4th November 2016 and the Respondent then proceeded with further investigations.

5. The Respondent issued its audit/investigations findings vide a letter dated 11th July 2017 and requested the Appellant to reconcile the variances by showing how they have accounted for the discounts/credits

6. The Appellant objected to the findings vide a letter dated 14th July 2017 and further requested for a review of the whole audit/verification of the findings. Upon receipt of the said objection letter, the Respondent wrote to the Appellant inviting them for a meeting on Thursday 20th July 2017 to look into the issues raised. The Appellant did not attend this meeting nor did it respond to the letter either.

7. The Respondent proceeded to issue tax assessments totalling Kshs.3,833,386,522.00 on account of Value Added Tax and Corporation Tax for the years 2011 to 2015 upon the Appellant vide a letter dated 14th August 2017.

8. Dissatisfied with the assessment, the Appellant filed its Objection to the above assessments vide a letter dated 15th September, 2016. Upon receipt of the letter of objection, the Respondent wrote to the Appellant on 22nd September 2017 informing them that they did not provide the necessary supporting evidence being the purchases and sales ledgers to enable them process the Objection. The Respondent therefore granted the Appellant 14 days to provide the necessary documentation in support of its Objection.

9. On 12th October, 2017, the Appellant sought a 30-day extension to provide the required documents and information but was only granted 10 more days. The Respondent was of the view that a 30-day extension was impossible as it would surpass the statutory timeframe of 60 days under which an objection must be heard and determined.

10. In the absence of a response from the Appellant, the Respondent issued its Objection Decision dated 10th November 2017, confirming its assessment and demand for VAT of Kshs.209,586,648 and Corporation Tax of Kshs.3,623,799,873 for the years 2011-2015.

11. Aggrieved by the Objection Decision, the Appellant lodged this instant Appeal by way of a Notice of Appeal dated 11th December 2017 and filed its Memorandum of Appeal dated 11th December 2017 on 14th December 2017.

12. In response thereto, the Respondent filed its Statement of Facts dated 12th January 2018.

THE APPEAL

13. The Appeal is based on the following grounds as set out in the Memorandum of Appeal dated 11th December 2017; -

    A. That the Respondent erred in law and fact by exceeding his statutory powers in raising amended assessments for **a** period beyond the scope of the statutory time limit of five years from the date of self-assessment return for the year 2011.

    B. That the Respondent erred in law and fact by failing to provide the Appellant with the evidence from third parties used in amending its self-assessments.

    C. That the Respondent erred in law and fact by serving the Appellant with a defective(*sic*) amending and confirming Notices of Amendment.

    D. That the Respondent erred in law and fact by failing to converse with the Appellant the findings of the tax investigations for discussion before assessing and serving the amended assessment notices.

    E. That the Respondent erred in law and fact by failing to consider the evidence adduced by the Appellant in soft copies in support of purchases claimed and declared sales 'where applicable'.

F. That the Respondent erred in law and fact by failing to accord the Appellant a fair hearing in line with the Constitution of Kenya, 2010 and the Fair Administrative Action Act,

G. That the Respondent erred in law and fact by dismissing the Appellant's grounds of objection without serving them with the reasons for the decision.

14. The Appellant prayed that the Tribunal quashes wholly the Respondent's Objection Decision dated 10th November 2017 and declare that the Respondent's administrative actions were unfair and ultra vires the Constitution and the Fair Administrative Action Act. The Appellant also sought costs of the appeal.

APPELLANT'S CASE

15. The Appellant set out its case in support of the Memorandum of Appeal in its Statement of Facts dated 11th December 2017 and subsequently in its Written Submissions dated 19th February, 2021.

16. The Appellant avers that the Respondent sourced information from third party suppliers. An analysis of this information revealed that the Appellant had received discounts/rebates/credits or bonuses on purchases made from these third party suppliers, whereupon vide a letter dated 17th May 2017, the Respondent called upon the Appellant to provide a reconciliation on how the discounts/rebates/credits or bonuses were accounted for. This letter was accompanied by a summary of the monthly purchases and rebates received from the third party suppliers but did not have any supporting documentation.

17. That despite the absence of the supporting documentation, the Appellant responded to the said letter by its letter dated 22nd May 2017 informing the Respondent that it accounted for the rebates/discounts/bonuses by netting them off purchases for purposes of filing VAT and Corporate Tax returns.

18. The Appellant further avers that while in the process of gathering information from the archives, the Respondent proceeded to issue Notices of Amended Assessments covering years 2011 to 2015 dated 14th August, 2017. To the Appellant, the said action was done in bad faith, was unprocedural, unfair and contrary to the rule of law. This is because the period in question was wide and documents had been archived. The Respondent ought to have been understanding and granted the Appellant more time to retrieve the documents.

19. The Appellant avers that the Respondent acted unfairly by making amendments to their VAT and Corporation Tax assessments without providing them with copies of evidence relied on. The Appellant submits that the said action denied them an opportunity to prepare adequately for the defense in compliance with Section 4(3)(g) of the Fair Administrative Action Act as read with Articles 47 and 50 of the Constitution of Kenya, 2010.

20. The Appellant further avers that it analysed the Respondent's assessments and found them lacking in merit owing to errors in computation and analysis of the purchases from each supplier as well as the assumption that the Appellant only purchased cement from the suppliers quoted in the Assessment.

21. The Appellant submits that attempts to settle the matter through Alternative Dispute Resolution were not successful, adding that during the ADR Review, several working meetings and review of documents were carried out but the variances between VAT returns and physical invoices could not be agreed upon.

22. The Appellant argues that the variances were as a result of the Respondent's insistence on being supplied with physical invoices which could not be traced due to the passage of time and movements but the same had been provided to the Commissioner's team when filing the Monthly VAT returns. The Appellant also attributed the variances to casting errors.

23. In its submissions, the Appellant illustrated the Respondent's variances and the Appellant's variance as in the two tables below.

Table 1.1– Respondent's variances

Supplier	KRA	Nakuru Cement	Over-claimed purchases
Paddy Distributors	249,404,246	380,563,696	131,159,450
Paddy Kenya	4,737,724,817	4,920,518,575	182,793,758
Maasai Cement	831,772,426	1,131,633,656	299,861,230
ARM	41,731,139	183,837,317	142,106,178
Bamburi Cement	4,444,973,710	4,444,973,710	-
National Cement	1,288,296,685	1,363,988,909	75,692,224
EAPCC	-	241,894,700	241,894,700
Total Purchases	**11,696,183,951**	**12,667,410,563**	**1,073,507,540**

Table 1.2 – Appellant's variances

Supplier	KRA	Nakuru Cement	Over-claimed purchases
Paddy Distributors	249,404,246	380,563,696	131,159,450
Paddy Kenya	4,737,724,817	4,737,724,817	0
Maasai Cement	831,772,426	925,108,190	93,335,764
ARM	41,731,139	179,107,558	137,376,419
Bamburi Cement	4,444,973,710	4,444,973,710	-
National Cement	1,288,296,685	1,363,988,909	75,692,224
EAPCC	-	241,894,700	241,894,700
Total Purchases	**11,696,183,951**	**12,052,256,956**	**679,458,557**

24. The Appellant maintained that the above variances amounting to Kshs. 679,458,557.00 arose due to failure to produce physical invoices which could not be traced though there was proof from the VAT returns that they had indeed been filed in the monthly VAT returns for those respective years. Therefore, the Appellant rejected the Respondent's variances amounting to Kshs. 1,073,507,540.

25. Guided by the ruling of Majanja J in **Geothermal Development Company Limited vs Attorney General & others, Petition No.352 of 2012**, the Appellant also avers that the amended assessments served on them were defective and not in compliance with the law for;

    A. Failure to state it was an assessment notice.

    B. Failure to quote the authority it was anchored on.

    C. Failure to inform the Appellant of the consequences for non-compliance

    D. Failure to include copies of the third party information to accord the Appellant an opportunity to respond accordingly.

26. Further, the Appellant contended that the confirming Notice of Assessment, similar to the amended assessment was defective for;

    A. Failure to outline the legal provisions it was grounded upon'

    B. Failure to specify the incomes allegedly confirmed for the years under investigations

    C. Failure to state the amount of tax confirmed and to be appealed

    D. Failure to specify the communication as an Objection Decision

27. The Appellant argued that in view of such shortcomings, there was no communication of the Objection Decision in time in line with Section 50 (11) of the Tax Procedures Act, 2015.

28. The Appellant also argues that the amended assessment and Objection Decision were served out of the statutory limit of 5 years from the date of self-assessment. To the Appellant, the five-year period in case of income tax ended on 30th June 2017 while that of VAT ended on 20th June 2017 for all returns for 2011. Therefore, the amended assessments raised for 2011 on 17th August 2011 were in contravention with Section 31(4)(b)(i) of the Tax Procedures Act.

29. Based on the foregoing, the Appellant asked this Honourable Tribunal to;-

    a) Quash the Respondent's Objection Decision for want of meeting the statutory legal threshold.
    b) Find that the amended assessments had no basis and should be amended to nil
    c) Find that the 2011 assessments for both VAT and Corporation tax be amended to nil as they were raised out of their statutory time limit
    d) Find that the Respondent acted unreasonably, was unconstitutional, malicious, unprocedural and did not accord the Appellant a fair administrative action.

RESPONDENT'S CASE

30. The Respondent's case is set out in its Statement of Facts dated 12th January 2018 and filed on the same day, its submissions dated 23rd February 2021 filed on 24th February, 2021 along with the Witness Statement of Essie Gikuhi sworn on 8th December 2020.

31. The Respondent avers that it commenced investigations in May 2016 and the audit findings communicated in the letter dated 11th July 2017 covered the years 2011 to 2015. That the delay in concluding the investigations was occasioned by the Appellant's failure to co-operate. In any event, the Respondent submits that the law under Section 29(5) and (6) of the Tax Procedures Act empowers the Commissioner to look further into the accounts and business of the taxpayer where the taxpayer is found to

have wilfully neglected to pay taxes, or have evaded or been involved in tax fraud. The said Section read as below;-

"(5) Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.

(6) Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer."

32. In this case, the Respondent found that the Appellant wilfully and grossly neglected to file its income tax returns and pay correct taxes.

33. The Respondent submits that the Appellant was fully engaged on the issues before confirmation of the assessments. It invited this Tribunal to look at the correspondence exhibited by both parties in the Statements of Facts. The correspondence will show that the Respondent notified the Appellant of the findings, invited them to meetings to discuss issues arising from the investigations and even allowed the Appellant extension of time to validate their objection.

34. Further, the Respondent avers that the Appellant was given ample time to respond to the queries directed to them. The Respondent proceeded to issue notices of amended assessments after the Appellant failed to provide the required information despite being called upon to do so severally.

35. The Respondent avers that the administrative actions taken were fair and just in line with the provisions of the Constitution of Kenya 2010 and the Fair Administrative Actions Act.

36. The Respondent argues that the extension of the 5-year statutory limitation was well within their mandate, drawing from the provisions of Section 29(6) of the Tax Procedures, Act, which empowers the Commissioner to exceed the limit under certain circumstances. Therefore, the Respondent argued that the 5-year limitation was inapplicable in this case.

37. The Respondent averred that the amended and confirmed assessments were in compliance with the applicable laws and made based on a careful consideration of the available evidence. Further, the Appellant failed to provide the specific information requested.

ISSUES FOR DETERMINATION

38. The Tribunal having considered the documentation, pleadings and submissions of the parties is of the view that the issues for its determination are as hereunder;

    A. ***Whether the Appellant was accorded a fair hearing in line with the Standards espoused in the Constitution of Kenya 2010 and the Fair Administrative Action Act?***

    B. ***Whether the amended assessments as confirmed by the Respondent were defective?***

    C. ***Whether the Respondent erred in fact and in law by failing to consider evidence adduced by the Appellant in soft copies in support of purchases claimed and declared 'where applicable'?***

    D. ***Whether the Respondent erred in law and fact in raising amended assessments beyond the statutory limit of five years?***

ANALYSIS AND FINDINGS

39. The Tribunal having considered the above issues wishes to analyse them as herein-below;

    A. ***Whether the Appellant was accorded a fair hearing in line with the Constitution of Kenya 2010 and the Fair Administrative Action Act?***

40. Fair hearing is a cornerstone in the dispensation of justice that can never be overlooked. The Appellant contends that its right to a fair hearing was infringed by the failure of the Respondent to accord it an opportunity to canvass the issues in contention before issuing the Notice of Objection Decision. The Appellant opines that the matter would have been resolved earlier had it been given an opportunity to present its case.

41. The Respondent avers that the Appellant was given ample time to respond to the queries directed to them, failure to which the Respondent proceeded to issue a decision. The Tribunal proceeds to analyse the facts herein to determine as to whether indeed the Appellant had an opportunity to present their case before the Respondent.

42. During the investigations, the Respondent discovered that the Appellant had been receiving rebates, bonuses, and discounts from the cement suppliers for the entire period under review. The Respondent wrote to the Appellant on 17th May, 2016 requesting for a reconciliation of how the said discounts, rebates, and bonuses were accounted for.

43. The Appellant responded vide a letter dated 22nd May, 2017 stating that any credit had been accounted for accordingly by netting off from purchases. However, no further explanations or documentary evidence was provided.

44. The Respondent shared its audit findings vide a letter dated 11th July, 2017 wherein it proposed additional assessments on Corporation Tax and Value Added Tax (VAT), based on the view that the Appellant had overstated their purchases by not accounting for the discounts, rebates, and bonuses given by its suppliers. Noteworthy, vide this letter, the Respondent requested the Appellant to provide them with purchases and sales ledgers, VAT Exemption Certificates and input VAT schedules to demonstrate how the discounts/rebates or bonuses had been accounted for, within a period of 10 days.

45. On receipt of the Respondent's findings, the Appellant requested for a review of the whole audit findings vide a letter dated 14th July, 2017, undertaking to co-operate as may be required.

46. The Respondent invited the Appellant for a meeting to be held on 20th July 2017 or any other convenient date within five days vide a letter dated 18th July, 2017 to discuss issues raised in the audit findings, which the Respondent deemed not sufficiently addressed by the Appellant's response. The Appellant did not respond to the letter dated 18th July, 2017 and neither did it attend the said meeting.

47. The Respondent proceeded to issue additional assessments to the Appellant dated 14th August 2017 which the Appellant objected to vide a letter dated 15th September, 2017.

48. The Respondent requested the Appellant to provide documentary evidence in the form of ledgers to support their claimed purchases and declared sales vide a letter dated 22nd September, 2017. The Appellant was given 14 days to provide the said information.

49. On 12th October, 2017, the Appellant sought a 30-day extension to provide the said information but was only granted 10 days. The Respondent noted that a 30-day extension was impossible as it would surpass the statutory timeframe of 60 days upon which an objection must be heard and determined. It is worth noting that the request for extension of time was made way past the expiry of the 14 days given by the Respondent.

50. The Respondent issued its Objection Decision dated 10th November 2017, confirming its assessment.

51. Based on the foregoing, the Tribunal is convinced that the Appellant was accorded an opportunity to present its case. Further, the parties engaged in an ADR review but were unable to resolve the disputed issues due to what appears to be the Appellant's failure to provide the requested documents nor could it reasonably explain why the documents were not retained as per Section 23 of the Tax Procedures Act. The Appellant was

then invited to a meeting to discuss issues arising from the audit findings which invitation it did not honour. In all, there is no evidence to suggest that the Appellant was never given an opportunity to present its case.

52. The Tribunal finds that the Appellant had an opportunity to present its case contrary to the assertions made in its pleadings.

B. Whether the amended assessments as confirmed by the Respondent were defective?

53. This issue as raised by the Appellant is two-fold. On one hand, it focuses on whether there was sufficient evidence to back up the amended assessments and on the other hand, it looks into the form in which the amended and confirmed notices were issued. Therefore, this issue primarily lies on both the substance and form of the assessments.

54. The Appellant contends that the Respondent erred in law and fact by failing to give reasons for declining the grounds of objection. However, we note that the letter dated 10th November, 2017 dismissing the Objection and confirming the additional statements read in part;

> *"Your letters of objection did not provide supporting evidence to your grounds of objection and this was brought to your attention vide our letters to you dated 22/09/2017 and 13/10/2017.*
>
> *On 12/10/2017 vide your letter dated the same day you applied for extension of time to be able to compile and supply to us the required documents. Your request was granted but was limited to 10 days vide our letter to you dated 12/10/2017 and despite numerous reminders you have failed to provide the same documents to date...*
>
> *.... In view of the above, we note that you have not supported your arguments and consequently the assessments on the same have now been confirmed."*

55. From the excerpt above, it is clear that the reason for the dismissal of the Objection was given, disproving the assertions made by the Appellant. Therefore, the argument that reasons were not given for the dismissal of the Objection fails in its entirety.

56. Noting that the dismissal of the Objection was based on the Appellant's failure to supply information demanded by the Respondent, the Tribunal proceeds to examine whether the same constitutes a valid ground for the dismissal of the Appellant's Objection.

57. **Section 54 A of the Income Tax Act** requires every person carrying on business to maintain records of all transactions. The Section provides that:

> *"A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax. (1A) For the purpose of this Section, the carrying on of business includes any activity giving rise to income other than employment income*".

58. The Appellant has a duty to submit records to the Commissioner under **Section 58 of the Tax Procedures Act, 2015**. The Section provides that:

> *"(1) Notwithstanding anything to the contrary in any written law, an authorised officer may inquire into the affairs of a person under any tax law and shall at all times have full and free access to all lands, buildings, places to inspect all goods, equipment's, devices and records whether in the custody or control of a public officer or of a body corporate or any other person and may make extracts from or copies of those records*
>
> *(2) An officer acting under subSection (1) may require the owner or employee or a representative of the owner of the business to give him all assistance and to answer all questions relating to the inquiry."*

59. **Section 59 of the Tax Procedures Act, 2015** requires the Taxpayer to produce records pertaining to tax investigations as follows;

> *"(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing to-*
>
> *a) Produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person.*
>
> *b) Furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice or*
>
> *c) Attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person."*

60. The Taxpayer has a duty to keep its records for a period of 5 years in accordance with the provisions of **Section 23 of the Tax Procedures Act, 2015** which states that:

> *"(1) A person shall-*
>
> ***(a)** Maintain any document required under a tax law, in either of the official languages*
>
> ***(b)** Maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained and*
>
> ***(c)** subject to subsection (3) retain the document for a **period of five years** from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law."*

61. The Tribunal has reproduced the above statutory provisions to highlight the legal position that it is the responsibility of the Taxpayer (the Appellant herein) to keep records and produce them to the Respondent when called upon to do so. Apparently, the Appellant did not produce any of such documentation to challenge the assessment.

62. The Appellant averred that the challenges in the production of the documents was instigated by the passage of time and movements, a claim that was not substantiated.

63. Section 23(1) of the Tax Procedures Act, 2015 requires a taxpayer to maintain documents required under any tax law for a period of 5 years from the end of the reporting date. The assessment in dispute commenced in 2016 and related to the years 2011 to 2015. Clearly, this was within the 5-year period that the Appellant was required to maintain its documentation. Without any other plausible explanation, the Appellant was required to provide all the requested documentation. It is also worth noting that the Appellant was unable to produce such documentation required even for a single year.

64. The centrality of the requirement to produce necessary documentation when called upon to do so by the Respondent is buttressed by the provisions of **Section 56(1) of the Tax Procedures Act,** which states;

> ***"(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect."***

65. Since the burden is solely on the Appellant to prove that the tax decision is incorrect, it would have been prudent for the Appellant to produce the required documents so as to challenge the assessments, without such proof the Tribunal cannot find a basis to fault the assessments.

66. In **Tumaini Distributors Company (K) Limited and Commissioner of Domestic Taxes [2020] eKLR,** the High Court in determining the issue as to whether the Commissioner followed the correct procedure or correctly assessed a company's tax liability found out that the Appellant had failed to provide the relevant documents despite several requests by

the Commissioner. The High Court upheld the decision of the Tribunal, holding that since the Appellant had not provided all the documents, the Commissioner was right in reaching the assessment based on the material available.

67. In its submissions, the Appellant agrees that there were variances which could not be agreed upon by the Appellant and the Respondent during the ADR review. The Appellant maintained that the variances (indicating unsupported or allegedly overstated purchases) stood at Kshs. 679,458,557.00 whereas the Respondent's figures indicated that the variances stood at Kshs. 1,073,507,540.00.

68. The Tribunal notes that the Appellant has not challenged the figures by the Respondent and the resultant variance with the appropriate documentation or any form of reconciliation of the variances and neither has the Appellant at any point in question disputed the authenticity of the source of the information with relevant supporting documents.

69. It is the Tribunal's considered view that the assessments were not substantively defective as the Appellant failed to discharge its burden of proof in disproving the assessments. The Respondent made its assessments and decision relying on the material information that was available to it.

70. On the second limb of the argument that the notices of amending and confirming the assessment were defective in form, the Appellant relied on the case of **Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR,** where **the** court observed as follows;

> ***"A notice of the nature issued to enforce collection of taxes must clearly state to be such a notice, state the amount claimed, state the legal provision under which it is made and draw the taxpayers attention to the consequences of failure to comply with the law and the opportunity provided by the law to contest the finding. Such a notice would give the opportunity to any Kenyan to know the case against it and utilise the legal provisions to***

contest the decision. The right to fair administrative action and the right of access of justice now enshrined in our Constitution demand nothing less."

71. The Appellant was of the view that the Assessment Notice was defective in form in that it failed to state that it was an assessment notice, failed to quote the authority it was anchored on, failed to inform the Appellant of the consequences of non-compliance, and that it failed to include copies of the third party information to accord the Appellant an opportunity to respond accordingly.

72. The last point referring to the failure by the Respondent to provide copies of the third party information to the Appellant lacks merit in the sense that the Appellant confirmed in their submissions that the third parties were its Suppliers. A summary of the information was provided to the Appellant in the form of audit findings. In addition, the same was readily available to the Appellant owing to the business dealings between the third parties (suppliers) and the Appellant, who were the sources of the said information.

73. It is important to consider the context in which the above **Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR (supra)** was decided. The case was a Constitutional Petition alleging infringement of the right to a fair hearing. The Petitioner was served with a Letter titled 'Tax Demand' that enlisted the tax arrears of the Petitioner, requiring him to make payment promptly. The court agreed with the Petitioner's assertions that the 'tax demand' could not be construed as an Assessment Notice as it never mentioned the term 'assessment' and lacked several elements required of an Assessment Notice such as the consequences for non-compliance and allusion to the authority it was anchored on.

74. Distinguishing it from the present case, the case sought to highlight the key elements that should be evident from an Assessment Notice. As such, it did not dictate any specific format or what such a notice should resemble. The procedural and substantive laws have not come up with a

model format to be followed when drawing up the notices. It requires the drafter to objectively ensure that the elements set out in the cited case are evident in the communication.

75. The Tribunal finds that the Notices issued by the Respondent met the criteria as the elements cited by the Appellant are indeed captured in different parts of the said Assessment Notice. Therefore, the argument that the Notices were defective in form lacks merit and fails in its entirety.

76. Having addressed the issue of the provision of documents requested by the Respondent and validity of the form of assessments issued by the Respondent, the Tribunal proceeds to address the Appellant's claim that the Respondent failed to consider evidence adduced by the Appellant.

C. ***Whether the Respondent erred in fact and in law by failing to consider evidence adduced in soft copies in support of purchases claimed and declared 'where applicable'?***

77. The Appellant contends that it provided crucial information in soft copies to the Respondent that could have been used to support purchases claimed and declared sales where applicable.

78. Record keeping is a statutory duty imposed on the taxpayer and is required to avail such information when called upon to do.

79. The Respondent was consistently clear on the information that they needed supplied, being 2011-2015 purchase ledgers in support of the monthly purchases submitted and 2013 sales ledgers in support of the monthly figures reported as depicted in the various correspondences. The Respondent indicated that the Objection could not be processed in the absence of such information.

80. The Tribunal in the Appeal ***Tradeline Express Kenya Ltd. V Commissioner of Investigations Enforcement (TAT Appeal No. 111 of 2019)*** held that the Commissioner is bound to look at all the documentations provided

unless the information requested was specific from the onset. The Tribunal expressed itself thus;

> ***"The Tribunal is of the respectful view that unless the Respondent was looking for <u>specific documentation</u> which the Appellant failed to provide it ought to have considered the documentation provided or be specific in what document it sought from the Appellant. It failed to do so."***

81. In the present Appeal, it is clear that the Respondent was specific on the information and documents needed, being 2011-2015 purchase ledgers in support of the monthly purchases submitted and 2013 sales ledgers in support of the monthly figures reported, which the Appellant failed to provide. Up to this point, the Tribunal finds that the Respondent was not bound to consider the alleged evidence provided in soft copies.

82. In any event, the Appellant has not advanced a plausible reason to justify why the specific documents requested, were not provided and further, how the documents provided in "soft copies" would supplement the information requested. The Tribunal is therefore convinced that the Respondent was not bound to consider the information provided in soft copies in arriving at its assessment.

D. Whether the Respondent erred in law and fact in raising amended assessments beyond the statutory limit of five years?

83. The Respondent argued that it acted within the confines of the law to raise the amended assessments beyond the statutory limit of 5 years. The Respondent relied on the provisions of Section 29(6) of the Tax Procedures Act, 2015 in its submissions, arguing that where a taxpayer is found to have wilfully neglected to pay taxes, or have evaded or been involved in tax fraud, the 5-year period prescribed in Section 29 (5) of the Tax Procedures Act, 2015 does not apply. The Commissioner then has power to look further/ earlier into the accounts and business of such taxpayer. The Section reads;

"Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.

29(6) further states Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer."

84. However, the Tribunal is of the view that the Respondent misdirected itself in relation to the Section of the Tax Procedures Act, 2015 applicable in this issue. The Appellant did not submit further on this issue beyond stating that the 'law' imposes a statutory limit of five years in relation to the issuance of amended assessments.

85. Section 29 of the Tax Procedures Act, 2015 deals with default assessments, being assessments made in instances where the taxpayer has failed to file their returns, and hence the idea of 'default assessments'. It is worth noting that the Appellant had already filed their returns, albeit late. Uncontroverted evidence from the Respondent shows that the Appellant filed their Corporate Tax Returns on 4th November, 2016 for the years 2011 to 2015. Therefore, the Appellant had already filed its returns by the time the amended assessments were issued by the Respondent.

86. Having that in mind, the applicable provision of the Tax Procedures Act, 2015 is Section 31, which relates to amended assessments, which the Respondent issued to the Appellant.

87. Section 31(4) of the Tax Procedures Act, 2015 provides that;

"The Commissioner may amend an assessment—

(a) In the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or

(b) In any other case, within five years of—

(i) for a self-assessment, the date that the (self-assessment) taxpayer submitted the self-assessment return to which the self-assessment relates; or

(ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment."

88. The answer to the issue as to whether the Respondent erred in law and fact in exceeding the statutory limit of five years lies in the interpretation of this provision. In the case of ***Mount Kenya Bottlers Ltd & 3 Others v Attorney General & 3 Others NRB Civil Appeal No. 164 of 2013 [2019] eKLR***, the Court of Appeal cited with approval the case of **Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB** where it was held that that in interpreting a tax statute there is no room for any intendment or implication. Therefore, tax statutes should be interpreted in a strict sense as they are worded.

89. A plain interpretation of Section 31(4)(a) of the Tax Procedures Act, 2015 leads to the conclusion that self-assessments may be amended at any time in the case of gross or wilful neglect, evasion, or fraud by/or on behalf of the taxpayer. This appears to be the main argument fronted by the Respondent that the Appellant was wilfully or grossly negligent by not filing its returns, thus justifying the decision to go beyond the five-year limit.

90. Further, Section 31(4)(b)(i) of the Tax Procedures Act, 2015 limits the period for issuance of amended assessments in relation to a self-assessment to within five (5) years of such self-assessment. The Corporate tax returns for the years 2011 to 2015 were filed on 4th November, 2016. It is at this date that the time started running with respect to issuance of amended assessments for the declared periods.

91. The Tribunal therefore holds that the Respondent did not go past the 5 year limit since the Appellant only filed its Corporation Tax returns on 4th November 2016 for the years 2011 to 2015 where after the

Respondent issued its assessments within the set time limit of five (5) years.

FINAL ORDERS

92. The Tribunal therefore makes the following final Orders:-

1. The Appeal is dismissed

2. The Respondent's Objection decision dated the 10th day of November, 2017 is hereby upheld confirming the assessment of Kshs. 209,586,698.00 for VAT and Kshs.3,623,799,873.00 for Corporation Tax.

3. Each party shall bear its own costs.

93. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** on this **16th** day of **April, 2021.**

.....
PATRICK LUTTA
CHAIRPERSON

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HELEN BILA
MEMBER

.....
MWAI MBUTHIA
MEMBER

.....
ELISHAH NJERU
MEMBER

.....
HABON FARAH
MEMBER