



IN THE REVENUE APPEALS TRIBUNAL ESWATINI

JUDGMENT

CASE NO: RATE/IT019/23

In the appeal between:

RATE/IT019/23

APPELLANT

And

ESWATINI REVENUE SERVICES-

RESPONDENT

THE COMMISSIONER GENERAL

Neutral Citation: RATE/IT019/23 v *Eswatini Revenue Services, The Commissioner for Eswatini Revenue Services (019/23) (2023) RATE 019* (October 2023)

Coram: Ms Khethiwe Dlamini (Chairperson), Mr Musa Hlatshwayo, Ms Ntombenhle Shongwe, and Mr Sandile Dlamini (Members)

Heard: 29 August 2024

Delivered: This judgment is to be handed down electronically by circulation to the parties, legal representative by email and uploaded on email platform. The date for hand-down is deemed to be 13 November 2024

Summary: VAT - Income Tax - No response to objection - Adjustments of VAT returns on non-compliance - Under declaration of standard rated goods - Investigation

The Appellant in the tax period 30 June 2020 alleges it erroneously recorded several errors in the course of the computation of its VAT liability as stated in its VAT returns for that period. Following the Respondent bringing these errors to the Appellant attention, through an initial draft adjustment letter, the Appellant noted the errors. The Appellant in response went on to give the explanations or justification of the issues raised by the draft adjustment letter. The Appellant attributed adjusted amounts to two transposition errors it had made which then resulted in the under declaration of zero-rated goods. The Appellant submits however that the error had no VAT implications as they related solely to zero-rated transactions.

The Respondent having noted the justifications raised by the Appellant to its initial adjustment account, went on to issue a final Notice of Assessment in respect of Income Taxes and not VAT as initially envisaged by the Respondent. Further to which the Respondent then went to transfer the matter for investigation within its investigation structures.

JUDGMENT

- 1) The Appellant is RATE/IT019/23, a company registered in accordance with the Laws of the Kingdom of Eswatini, operating a wholesale retailer of fast-moving goods, whose principal place of business at XYZ.
- 2) The Respondent is described as Eswatini Revenue Services, a semi-autonomous revenue administration agency on behalf of the state, established through the Revenue Authority Act No. 1 of 2008. This organisation operates within the broad framework of government but outside of the civil service. The Commissioner General cited herein his official capacity as the Chief Executive Officer of Eswatini Revenue Service, a legal body charged with the responsibility of revenue collection on behalf of the Government of Eswatini. The Respondents primary mandate is the assessment of all revenue on behalf of the Government.
- 3) The Appellant appeals regarding alleged errors in its VAT returns for the period ending June 30, 2020, which it claims were due to transposition mistakes that led to

underreporting of zero-rated goods, affecting no VAT liability. After the Respondent flagged these errors, the Appellant provided justifications, resulting in a final notice of assessment for Income Taxes instead of VAT. The Respondent then issued final account adjustments and initiated an income tax assessment, transferring the matter for further investigation. The appeal also includes preliminary points raised by the Appellant, suggesting that addressing these initial grounds or points may resolve the appeal without extensive deliberation on its merits.

4) Dissatisfied with the Respondent's decision, the Appellant filed an appeal under section 15(1) of the Revenue Appeals Tribunal Act 13 of 2019. This appeal was submitted to the Tribunal on 23 October 2023.

5) **Issues for determination:**

- a. The Appellant in respect of the point *in limine* raises the following issues for determination:
 - i. Whether an objection was validly lodged.
 - ii. Whether the matter is regulated by the VAT Act of 2011 or the Income Tax Order of 1975.
 - iii. Whether the failure by the Respondent to issue a decision within a period of 90 days or "on receipt" precludes the Respondent from making a decision on the objection.

6) **Appellant's arguments**

7.1 A brief history of the issue is set in the paragraphs that follow; The Appellant sought to appeal firstly and as a preliminary issue (*point in limine*), the decision of the Commissioner general to issue an objection decision well over the 90-day period as stipulated in the VAT Act and/ or the Income Tax Order.

7.2 The Appellant argued that the VAT Act provision (Section 35) that governs that timeous response of an objection stipulates a period of 90 days within which the Respondent can make a decision on a taxpayer's objection. The Appellant further argued in the case of the Income Tax Order where no comparable provision exists

that the strict reading of the Section 52 of the Income tax order actually imposes a stricter timeline for the delivery of an objection decision in that it reads that:

“(3) On receipt of a notice of objection to an assessment, the Commissioner may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance and shall record in the assessment register any alteration or reduction made in the assessment.”

7.3 Thereby imposing an obligation on the Respondent to issue a decision on an objection as soon as the objection is received. It was argued by the Appellant that the time taken by the Respondent to issue an objection decision being a period of seven (7) months is unreasonable and amounts to an allowance of the objection as provided for by the VAT Act.

7.4 The Appellant, in relation to its preliminary matter, argued that if the Tribunal upholds its point, the case should be upheld. In that case, the Appellant seeks costs against the Respondent.

7) Respondent's arguments

8.1 The Respondent in response to the Appellant's arguments buttressing its point *in limine*, sought to first clarify that the resulting assessment that was served on the Appellant was an income tax assessment and not a VAT Assessment, for this reason Section 35 of the VAT Act does not find application on the matter before the Tribunal. Further that it is in fact the Income Tax Order that ought to find application in the matter.

8.2 The Respondent went on to argue that, if however, the Tribunal holds the view that this matter ought to be governed by section 35 of the VAT Act then the Tribunal ought to consider the section in its entirety, most notably Section 35 (5) which states that;

“(5) The Commissioner-General shall only consider an objection submitted under subsection (1) if the person has given sufficient security for the tax due under the assessment and any penal tax that may become payable.”

8.3 The Respondent further argued that essentially in the absence of any security paid for the tax due, the objection is to be taken as though it was never filed as it did not meet the requirements of Section 35 in its entirety. The Respondent argued that the Appellant if electing to base its case for the non-timeous response of the objection, should not do so in taking into account aspects of Section 35 of the VAT Act that are favourable to it, but make reference to the section in its entirety.

8) **The Point in *limine* raised**

9.1 This Appeal was commenced with the advancement of a point *in limine* (preliminary issue) which in its character if upheld has the ability to dispose of the matter in its entirety, thereby obviating the need to deal with the matter on its merits. The point raised must be capable, if successfully raised, of disposing of the matter on the merits.

9.2 Any objection that does not significantly affect the case cannot be raised as a preliminary point. The Tribunal will first consider these objections to determine whether the case should proceed to the main issues.

9) **Members Analysis**

10.1 During the hearing, the Tribunal permitted both parties to submit arguments on both preliminary points and the merits of the application. The Tribunal's decision on the preliminary issues will guide whether it will proceed to consider the merits in the judgment. Additionally, the Tribunal will not summarize the arguments for or against the appeal on the merits in its point *in limine* judgment.

10.2 The Tribunal will address the points *in limine* categorically, ensuring that each preliminary issue is considered thoroughly and distinctly before proceeding to the merits of the application. This approach allows the Tribunal to evaluate the validity and implications of the preliminary points in a clear and structured manner, ensuring that any potential barriers to addressing the substantive matters are fully assessed and resolved.

10) As to whether there was an objection filed by the Appellant

11.1 The Tribunal in attending to this task, seeks to begin first by establishing that there was in fact an objection that was lodged in the above matter. The Tribunal note from the Appeal record that (save for variances in argument at the hearing of the matter) the question of the awareness of an objection was in fact admitted or conceded by Respondent in several instances, being the Respondent's statement of facts and reason for the decision in its paragraph 10, the Respondent states that;

*"The Respondent, despite **an objection lodged by the Appellant**, made no decision until a letter dated 10 October 2023, **way beyond the stipulated 90 days period** responded to the objection."*

11.2 A letter in respect of the objection in question addressed to the Appellant dated 03/10/23 which states:

*"It is first of all needful to point out that we note the delay in issuing out an **objection** decision on this matter"*

11.3 The Respondent's reply to the Appellant's appeal as lodged with the Tribunal, where in its grounds of dispute of the Appellant's claim states;

*"It is disputed and shall further be advanced in arguments that the Commissioner General or any office acting on his behalf and authority, that the **objection** decision and or response was deliberately not responded to timeously".*

11.4 It is therefore established that indeed there was an objection lodged and a concession by the Respondent issuing the response to that objection was delayed. The Respondent proceeded in its papers to justify the delay in issuing a response to the Appellant's objection by stating that:

11.4.1 the conceded delay was due to the fact that the matter was now under a criminal investigation and a subsequent case pending in

the High Court of Eswatini and thus the matter has been overtaken by events.

11.4.2 *Further that the matter had been referred for review to the audit team and to the Respondent's knowledge, the matter had not been concluded. As such the Respondent awaits the outcome of the review.*

11.5 The Tribunal takes the opportunity as a point of departure to clarify that as to the issue the Respondent brought up for the first time at the hearing of the matter, where the Respondent questioned as to whether, an objection was raised at all by the Appellant, was made in futility given the several prior acknowledgements by the Respondent of the objection.

11.6 It would be disingenuous for the Respondent to raise the questionability of the objection, at the stage of the hearing of the matter whereas in its communications with the Appellant and statement of facts filed with the Tribunal the Respondent acknowledged the objection. It is therefore to be taken that the Respondent accepted the objection without such security. It is therefore settled in the Tribunal's view that there was an objection filed and acknowledged by the Respondent.

11) As to whether this point in limine is to be considered under the VAT Act of 2011 or the Income Tax Order of 1975.

The Tribunal wishes to pronounce itself on the question of whether point *in limine* ought to be considered under the VAT Act of 2011 or the Income Tax order of 1975. Wherein in consideration of all documents presented to the Tribunal as part of the appeal record it is indeed clear that although there is a matter whose initial assessment was a Value Added Tax (VAT) assessment and thereby regulated by the VAT Act. However, its progression culminated in the eventual and final assessment being found to be Income Tax assessments, thereby regulated by the Income Tax Order. The Tribunal is in support of the Respondent that this *point in limine* should be addressed in accordance with the Income Tax Order more specifically under the provisions of Section 52 of the Income Tax Order.

12) As to the requisite time to issue an objection response

13.1 The Tribunal note that section 52 of the Income Tax Order is silent on what is considered the appropriate time (*reasonable time*) to consider an objection. The Tribunal in this regard finds that this is a glaring *lacuna* in the Income Tax Order. Further that this clear gap in the law or *lacuna* in its current form in the Income Tax Order results in the inequitable circumstance in which a taxpayer is left with no recourse to assert its successive rights under the Income Tax Order, should the Respondent fail to deliver an objection outcome within a reasonable time. Thus, in our view, this is a gap that needs addressing as a matter of necessity.

13.2 The Tribunal, though in agreement with the Appellant that the words “*on receipt*” as stipulated in Section 52 (3) have critical bearing on how the Order directs the Respondent to act for the purpose of dealing with an objection response. The Tribunal is of the view that the legislature envisaged that the objection be dealt with “as soon as it is practicable to do so” and within a reasonable time having regard to urgency. In this regard the Tribunal likens this concept of “*on receipt*” to that of “*immediately*” as apparent in other legislations.

13.3 In seeking guidance in judicial pronouncement in this area the Tribunal noted in reference to this subject, cases such as that of the case of ***Gangavishan Heeralal vs Global Digambar and Ors***, where reference was made to the case of ***Madho Narayanrao Ghatate v. Mt. Watsalabai***, (AIR 1948 Nag 142) where it was opined by Hidayatullah, J., where he construed the word “*forthwith*” occurring in the very sub-rule under the present scrutiny to mean “***within a reasonable time***”. He further quoted with approval the following passage from Maxwell's Interpretation of Statutes on page 143 of the report that:

"In all cases where the word "forthwith" occurs it must ordinarily be understood to mean 'within a reasonable time'.

and:

"When a statute requires that something shall be done 'forthwith', or 'immediately', or even 'instantly' [Tribunal interchanging for “on receipt”], it would probably be understood as allowing a reasonable time for doing it."

13.4 In amplification of this view the court in the above matter went on to comment on what then a “reasonable time” would connote. Where it noted observations outlines in volume 37 of Halsbury’s laws of England (3rd Edition) which notes the following;

“Where anything is limited to being done within a “reasonable time” or at a “reasonable hour”, the question is what is a reasonable time...”

Noting that;

*“There appears to be no material difference between the terms “immediately” and “forthwith”. A provision to the effect that something must be done “immediately” or “forthwith” **means that it must be done as soon as possible**, in the circumstances, with the nature of the act to be done being taken into account”.*

13.5 As part of its deliberations as to what is considered reasonable particularly for purposes of issuing an objection decision, the Tribunal had the occasion to consider the Income Tax legislations of the following countries: South Africa, the Kingdom of Lesotho, Rwanda, Ghana, Kenya as well as Australia and Canada, to establish typical timelines imposed for issuing objection decisions. The findings were that the number of days to issue an objection range from 60 – 90 days. This exercise was particularly guiding to the Tribunal as to the prevalent practice in as far as the reasonability consideration for the time within which a tax administration should respond to an objection notice.

13.6 In our view, the tax legislation showed similarities to the Eswatini Income Tax Order. This the Tribunal viewed to the inclination of the Eswatini Legislature as to what a reasonable period within which the administrator ought to respond to an objection. It is noted that of the two time periods seen to be applicable in other jurisdictions it is the most favourable for the tax administrator. For this reason, the Tribunal aligns itself with the view of that, being the reasonable period within which a tax administrator ought to respond to an objection.

13.7 It is the Tribunals finding in this regard that though not explicitly stipulated in the Income Tax Order, it was within reason that the Respondent responded within a period not exceeding 90 days to the Appellant’s objection letter. The period of 7

months as computed by the Appellant and not controverted by the Respondent is gross miscarriage of Justice.

13) As to the consequences of the delay in issuing an objection response.

14.1 Admittedly, as far as Section 52 of the Income Tax Order, the Order is also silent as to what is the corresponding consequence for failure to issue the objection within that time. This lack of clarity is viewed as a significant gap in the order, which could unfairly disadvantage innocent taxpayers.

14.2 In the futile attempt to obtain court pronouncements as to what becomes the appropriate manner to deal with such a case in both the Eswatini Tax Jurisprudence and international jurisdictions (as this is often a clearly regulated area), in the present case it falls squarely on the Tribunal to deliberate as to what should be considered as a reasonable time frame in which the Respondent should have given an outcome for the objection decision and what the consequence of the failure to adhere to that timeline is.

14.3 The case involves determining a reasonable time frame for the Respondent to issue a decision on an objection, highlighting the Tribunal's role in addressing this issue within Eswatini's tax jurisprudence and international norms. The focus is on assessing the consequences of not adhering to the established timeline for decision-making.

14.4 Due to gaps in the Income Tax Order regarding consequences for delayed responses, the Tribunal examined practices from various jurisdictions to determine the implications of failing to respond to an objection in a timely manner.

14.5 There were two (2) possible consequences found for non-response within the stipulated time which were either, (1) that the objection is "**deemed to have been allowed**" (as apparent in the Eswatini VAT Act) or (2) that the Commissioner has "**disallowed the decision**" thereby allowing them to engage the next step of the process being the right to appeal such a decision. The South African and Canadian position in fact clearly express that the taxpayer is to make an

application to the competent court to have their application (merits of the objection) granted.

14.6 The Tribunal in considering which consequence of the two above to impose as a consequence in the current matter note that the most plausible to grant the Appellant an effective remedy is that of ***“deeming the objection to have been allowed”***. This is because the remedy of disallowance would at this point have no effect as the Appellant has already engaged its right of appeal which is the sole purpose of the disallowance remedy. Further that, to impose that remedy would be a further infringement of the Appellant’s right to have their appeal dealt with timeously within the prescripts of the Act which envisages that an appeal may be engaged by an Appellant within twenty-one (21) days after the objection response as stipulated in Section 54 (2) of the Income Tax Order. The Tribunal finds therefore that the Respondent in failing to issue an objection response within at most a 90-day period, was deemed to have allowed the objection of the Appellant on the terms as stipulated in its objection letter.

14.7 The Tribunal is of the considered view that the Respondent's defence claiming a lack of response due to the matter being referred for an audit investigation was unsupported by Section 52 of the Income Tax Order, which does not suggest that any intervening activities justify the Commissioner’s failure to make a decision. In essence, any actions taken after an objection is filed do not allow the Commissioner to interfere with the established legal processes for objections and appeals as defined by the Act. It is our considered view that, it is not up to the Respondent to choose how to handle an objection; rather, the law strictly dictates their actions and binds them to follow it. Section 52 (3) of the Income Tax Order specifies that action on an objection should occur "on receipt," which the Tribunal interprets to mean promptly after it is received. In the absence of defined reasonable timelines, the Tribunal has determined that this should occur at least within a 90-day period.

14.8 The Tribunal finds it perplexing that the Respondent did not promptly inform the Appellant that the matter had been referred for an audit investigation in response to the objection, only mentioning this after a follow-up. The Tribunal emphasizes that the Respondent, as the custodian of the relevant statutes,

must adhere strictly to the regulated processes for objections outlined in the law, rather than disregarding them at will.

14.9 The Tribunal is perplexed by the Respondent's claim that the delay in responding was due to the matter being referred to auditors. It questions when the Respondent intended to inform the Appellant of this status, highlighting a lack of clarity in their timeline. The Tribunal emphasizes that a notice of objection initiates a legal process designed to protect the Appellant's rights to internal remedies, appeals, and access to the courts. Failing to provide the necessary response to the objection denies the Appellant the chance to pursue these rights. If there were any intervening processes that affected this timeline, basic decency would require the Respondent to inform the Appellant and clarify how this impacts their legal rights.

14.10 The Tribunal is of the considered view that the conduct of the Respondent is to the Tribunal indicative of the Respondent's disposition to place minimal if any regard to the nature and importance of the processes of objections and appeals and does not see them as rights of significance to the taxpayer, and as such that it can manipulate these rights at will. The Tribunal views this outlook as sharply contrasting with the legislature's intention, which sought to establish these rights due to their significance. Although the Income Tax Order lacks specific timelines, the legislature recognized the importance of protecting taxpayers' rights through these processes.

14.11 The Tribunal asserts that the Respondent, as the custodian and administrator of the country's tax laws, acted with deliberate disregard for the legal principles underlying these laws, constituting an abuse of their authority. The Tribunal refuses to support the Respondent's behaviour by accepting their version of events. Instead, it strongly condemns this conduct.

14.12 Due to the lack of jurisprudence in Eswatini, the Tribunal looked to rulings from Kenyan courts, where similar issues have been addressed multiple times, though under different subjects. Such a case in point is that of *Kenya Commercial Bank Limited ("KCB") vs Commissioner of Domestic Taxes, TAT No.167 of 2018* which came before the Kenya Appeals Tribunal where cases such as the one before the Tribunal offer much guidance.

14.13 In this matter, similarly to one before the Tribunal the Commissioner of Domestic Taxes having failed to issue a response within the required period sought to raise a technicality after the fact of an “invalidly filed objection” by the Appellant. The Appellant in the above case successfully argued before the Kenya Tax Appeal Tribunal that its objection ***ought to be allowed by operation of the law, owing to the fact that the Commissioner had failed to respond to the objection within the 60 days stipulated by Section 51(1) of the Tax Procedures Act.*** Arguing further that the Respondent only sought to invalidate the Appellant’s notice of objection ***after realizing that there was no other remedy following the lapse of the 60-day timeline.***

14.14 The Appellant successfully argued further that the Respondent had consequently lost its right to allow or disallow the objection or even pronounce itself on the validity or otherwise of the Notice of objection. A further point argued successfully by the Appellant that the Respondent ought to have sought any additional information during the 60-day period.

14.15 The Kenya Tax Appeal Tribunal in upholding the Appellant’s’ appeal made reference to the cases of ***APM Terminals Kenya Limited vs the Commissioner of Domestic Taxes [Appeal No.386 of 2019]*** where it was held that;

*“Once the statutory 60-days under Section 51(11) of the TPA, within which the Commissioner is obliged to issue an objection lapse, then the Commissioner is **precluded** from invoking powers under 51(4) thereof”*

14.16 As well as the case of the ***Republic v Kenya Revenue Authority ex-parte M-Kopa Kenya Limited [2018] eKLR***, where it was stated that;

“Once the Appellant had lodged an objection as contemplated under Section 51 of the TPA, then the Respondents was required to make a decision within 60 days under Section 51(11) of the Act. The Respondent’s failure to make the determination within the prescribed time meant that the Objection was deemed to have been allowed”

14.17 The Kenya Tax Appeal Tribunal in the KCB case emphasized that by allowing the Respondent to invalidate the taxpayer's objection after the expiry of the 60 Days this would defeat the purpose which Section 51(11) of the TPA intended to achieve, which is ensuring that objections are reviewed, and decisions thereon communicated within the specified period. The Tribunal is of the view that endorsing the Respondent's claims would undermine the objectives of the country's tax laws, which are designed to uphold and respect taxpayers' rights to object and appeal adverse decisions made by the tax administrator.

14) As to an award for costs

15.1 As precursor to the consideration of the award for costs the Tribunal wishes to remind parties that an award for cost is strictly regulated by Section 18 of the Revenue Appeals Tribunal Act of 2019, where one of the acceptable grounds for granting costs is where 'the decision of the Commissioner General' is held to be unreasonable.

15.2 The Tribunal in this judgment has clearly pronounced itself in the body of this judgement as to the unreasonableness of the Respondent in its actions regarding this matter, thus it would follow that the entitlement for cost as moved by the Appellant find justification for purposes of Section 18 (a) of the Revenue Appeals Tribunal Act of 2019.

15.3 In this appeal, the Tribunal found the points in *limine* raised by the Appellant to be valid. The key reason for their decision was the Respondent's delayed response. As a result, the appeal is upheld, and the Tribunal concludes its proceedings at this point. The Tribunal acknowledges that there was sufficient basis for the Appellant to raise these points, ultimately ruling in their favour.

15) ORDER

In light of the foregoing the Tribunal therefore issues the following orders:

1. The Appellant's Appeal point *in limine* hereby upheld.
2. The objection as contained in the Appellant's objection letter dated 19 March 2023 is therefore deemed to be allowed.
3. The Respondent is ordered to pay the Appellant's costs.

MS KHETHIWE DLAMINI
CHAIRPERSON OF THE TRIBUNAL

I Agree.

MR MUSA HLATSHWAYO
MEMBER OF THE TRIBUNAL

I Agree.

MR SANDILE DLAMINI
MEMBER OF THE TRIBUNAL

I Agree.

MS NTOMBEHLE SHONGWE
MEMBER OF THE TRIBUNAL

Appearances:

For Appellant:

Mr Kenneth Simelane

For Respondent:

Mr Bongsipho Dlamini (with him Ms Bongekile Nsingwane
and Thandokuhle Khumalo)