



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

Jarinta (K) Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E083 of 2021) [2023] KEHC 2723 (KLR) (Commercial and Tax) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E083 OF 2021**

A MABEYA, J

MARCH 31, 2023

BETWEEN

JARINTA (K) LIMITED APPELLANT

AND

**THE COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

JUDGMENT

1. The respondent carried out an audit of the affairs of the appellant and on May 24, 2018 assessed the VAT and Corporation Tax at Kshs 188,319,871/- The appellant lodge a notice of objection dated June 21, 2018 but the respondent confirmed the assessment *vide* an objection decision dated July 26, 2018.
2. Dissatisfied by that decision, the appellant lodged an appeal at the Tax Appeals Tribunal (“the tribunal”) which however dismissed the same *vide* its judgment dated May 28, 2020.
3. Being aggrieved by the decision of the tribunal, the appellant has filed this present appeal by a memorandum of appeal dated June 14, 2021 raising 18 grounds of appeal. The grounds can be summarized as follows: -
 - a. That the tribunal erred in failing to address the validity of the assessment and objection decision.
 - b. The honourable tribunal erred in upholding the assessment of Corporation Tax and Value Added Tax at Kshs 188,319,870.56.
4. In opposition to the appeal the respondent filed a statement of facts dated July 15, 2021. It was contended that in January 2017, the respondent received information of traders who were engaging in the missing trader scheme whereby the tax payers would reduce the VAT liability by claiming input tax



- from the said traders. That the respondent analyzed the appellant's sales returns and communicated to the appellant that the Corporation Tax and VAT was due as a result of trading from the blacklisted trader.
5. That the appellant was given an opportunity to provide justifiable grounds as to why the VAT costs should be allowed but failed to produce the same and as a result, the respondent confirmed the assessment. The respondent further contended that the appellants notice of objection did not have any documents to support it despite being given an extension of time to do so.
 6. With respect to VAT and deductible costs, the respondent contended that the appellant's claims had not been fully audited because the appellant had not provided the required documents and more specifically the evidence of actual supply. That since the business the appellant had alleged to have purchased from did not exist, there was no proof that the goods were purchased.
 7. This is a first appeal. The jurisdiction of this court on first appeal is well settled. The court must review and analyze the evidence tendered before the trial court and make its own independent conclusions. See *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123.
 8. The appeal was canvassed by way of written submissions which I have considered.
 9. The appellant submitted that the respondent failed to address the grounds raised in the notice of objection and to state the legal and factual basis of the assessments. Counsel submitted that the appellant was only required to produce the tax invoices and the corresponding ETRs as per section 17(1) of the *Value Added Tax Act*. It was submitted that phantom stock could not be based on an alleged analysis of a third party without giving the applicant the opportunity to verify. Counsel submitted that documentary proof of purchase of the goods had been provided to the respondent.
 10. On the other hand, the respondent submitted that the appellant did not produce any document in its notice of objection to support its claim despite several reminders. Counsel submitted that the appellant's claims for purchasing the goods were not supported by any evidence thus there was no proof of purchases or costs.
 11. It was submitted that since there was no evidence of purchases being made, it was impossible to verify the alleged expenses. Counsel submitted that the appellant was a beneficiary of the missing trader scheme.
 12. I have considered the record, the statement of facts and the submissions by the parties. From the pleadings before court, the grounds of appeal raise two issues. the first issue is with respect to the validity of the respondent's assessment and objection decision while the second issue is whether the tribunal was justified in upholding the assessment of Corporation Tax and VAT at Kshs 188,319,870.56.
 13. On the first issue, the appellant faulted the tribunal for failing to find the objection decision invalid for failing to include a statement of findings on the material facts and the reasons for the decision. In its submissions, the appellant was of the view that section 15(4) of the *Tax Procedures Act* obligated the respondent to inform the appellant where the notice of objection was invalid. The appellant further contended that the respondent was further mandated to take into account the notice of objection before delivering the objection decision and the reasons for the finding.
 14. The respondent on its part submitted that the objection decision was rendered pursuant to section 51 of the *Tax Procedures Act*. That that the appellant had failed to provide documentation to support its claim.



15. Section 51(8), (9) and (10) of the [Tax Procedures Act](#) 2015 provides as follows: -

- “(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".
- (9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.
- (10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.”

16. From the foregoing, it is clear that upon receipt of a notice of objection of the assessment by a tax payer, the respondent is supposed to give his objection decision which should contain a statement of facts on the material findings. In the present case, upon receipt of the objection decision, the respondent issued his objection decision on July 26, 2018. In that objection decision, the respondent stated thus: -

“... Pursuant to section 51(3) of the [Tax Procedures Act](#), we wish to inform you that your notice of objection was not properly lodged as you did not provide evidence to support your objection. Your grounds of objection as set out in your letter remain unsupported ...”

17. It was the appellant's contention that the said decision did not comply with the provisions of the law and was therefore a nullity. That the respondent did not address the issues that had been raised by the appellant in its objection decision. That the appellant had set out its grounds of objection and the entire demanded tax was in dispute. The decision in [Republic v KRA Ex-parte Funan Construction Limited](#) [2016] eKLR, was relied on in support of the submission that the respondent should have given reasons for his decision.

18. Section 51(3) and (4) of the [Tax Procedures Act](#) states as follows: -

- “(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.
- (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.”



19. In order to contextualize the respective parties' contention, it is imperative to reproduce the relevant portion of the appellant's notice of objection. In its notice of objection dated June 21, 2018, appellant wrote: -

“2. Grounds of objection

Factual inaccuracies

1. Jarinta Limited received the specific goods from AL Mina Distributors, Al Rasmint Investment, Bashaha Kenya Enterprises, Denmon Gebneral Agencies, Kishna Enterprises, Muranga Forwarders Ltd, Namolo Enterprise, Oketha Trading Company, Ouma Bulk Hardware, Shamlester Enterprises and Swala General Supplies. The goods are delivered and receipt is recorded in purchase day book. After that, the suppliers raise invoices which are then settled. The goods purchased then go into stock and are sold to customers.
2. The goods are consequently declared in the VAT returns and input VAT claimed against output VAT based on the guidelines provided under the [VAT Act, 2013](#).
3. It is factually and grossly incorrect for KRA to state that Jarinta (K) Limited is making fictitious input VAT claims. We are available to support this process during objection review and to and to provide any documents that may be requested.”

20. While it is evident that the appellant had stated the grounds of objection it did not provide any evidence in support thereof. It is because of that reason that in his objection decision, the respondent indicated that the objection had not been properly lodged. That the grounds remained unsupported. That being the case, I do not think that the respondent's objection decision was not in accordance with the law as contended by the appellant.

21. In this regard, it is clear that the respondent properly indicated that he had no tangible material before him to ascertain the accuracy of the appellant's assertions. In this regard, his findings that the notice of objection was improperly lodged for want of supporting documents cannot be faulted. In the premises, I find no error on the part of the tribunal. The objection decision was valid and legal. That ground fails.

22. The second issue is whether the tribunal was justified in upholding the assessment of the Corporation Tax and VAT at Kshs 188,319,870.56. The assessment of the respondent was borne out of the missing trader investigations. The missing trader is a tax fraud scheme which deals with fictitious invoices and according to the respondent, invoices are produced without there being any taxable supply.

23. The respondent contended that, while carrying out investigations, he observed that the appellant had claimed purchases from traders whom the respondent suspected were not trading. The respondent communicated these findings to the appellant giving it 7 days to provide grounds upon which it had claimed input tax. However, there was no response from the appellant.

24. The appellant submitted that it purchased goods from its suppliers and that it had produced evidence for the purchase. Section 17 of the [VAT Act](#) allows deduction of input tax on taxable supplies. It provides that: -

- “(1) Subject to the provisions of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end



of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies

(2) If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in subsection (3), the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation. Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.”

25. The deductions are subject to providing the required documents as provided for in sections 17(3) and 43 of the VAT tax.
26. In the present case, the appellant in claiming input VAT tax was required by law to provide evidence in support of its claim. It is trite that the burden of proof is on the tax payer to prove that the assessment was excessive or the tax decision was incorrect. This is in accordance to section 56 of the *Tax Appeals Procedures* and section 30 of the *Tax Appeals Tribunal Act*.
27. In its decision, the tribunal stated that to discharge the burden of proof the appellant was supposed to show that actual purchases were done. However, the tribunal found that the appellant had not provided to the tribunal the documents relied on to claim the input tax.
28. I have considered the record. The appellant stated that it had produced the documents to the respondent during the investigations. However, both at the tribunal and before this court, the appellant did not produce those documents. The record shows that the appellant had not produced those documents before the tribunal and when it sought to produce them for the first time in the appeal, the appempt was declined.
29. It is on this basis that I agree with the tribunal that the burden of proof could only have been discharged upon production of the documents to demonstrate that the appellant had actually made the alleged purchases. In the absence of the documents, the burden upon the appellant was not discharged.
30. In *Commissioner of Domestic Taxes v Structural International Kenya Ltd* (Income Tax Appeal E089 of 2020) [2021], the court held that: -

“For the avoidance of doubt, the tribunal is reminded that in matters where the issue is supply of goods, be it for VAT purposes or Corporation Tax, the burden is always on the trader/ tax payer to show that, the documentation set out in the statute and in which he relies on arose out of a commercial transaction. Period. If additional documents, which would be reasonably expected to be in his possession is requested for to verify the alleged transactions, he should produce the same to the commissioner. That is what is expected of a keen and diligent trader.”
31. Having failed to produce evidence to show that the transactions actually took place, this court agrees with the decision of the tribunal that the appellant’s claim was not merited.
32. Accordingly, I find that the appeal has no merit and hereby dismiss the same with costs to the respondent.

It is so decreed.



DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023

A. MABEYA, FCIArb

JUDGE

