



REPUBLIC OF KENYA



KENYA LAW

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**Builders Junction Limited v Commissioner of Investigations and
Enforcement (Income Tax Appeal E073 of 2021) [2023] KEHC 24805 (KLR)
(Commercial and Tax) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E073 OF 2021
EC MWITA, J
SEPTEMBER 29, 2023**

BETWEEN

BUILDERS JUNCTION LIMITED APPELLANT

AND

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

*(Appeal from the judgment of the Tax Appeals Tribunal
dated 13th May 2021 in TAT No. 237 of 2018)*

JUDGMENT

1. Builders Junction Limited (Builders Junction), a limited liability company in the business of general supplies, filed a claim for input VAT and costs. The Commissioner of Investigations and Enforcement (the Commissioner), investigated Builders Junction's sales data and bank statements based on what its customers had declared in their respective returns and established that Builders Junction's claim for input VAT was from a missing trader, Al Imran Investments.
2. The Commissioner communicated its findings to Builders Junction in a letter dated 19th April 2018, and gave Builders Junction 7 days to provide justifiable grounds why the claim for input VAT and costs should be allowed, failing which, an assessment would be issued.
3. Builders Junction did not comply within the timeline, prompting the Commissioner to issue a notice of assessment dated 24th May 2018 under section 51 of *Tax Procedures Act* (TPA) for Kshs. 2,421,440, being VAT of Kshs. 842,240, and corporation tax of Kshs. 1,579,200 for the period 2015 – 2016 under section 31 of the *TPA*.



4. Builders Junction filed a notice of objection dated 21st June 2018 to the assessment. The Commissioner issued an objection decision on 26th July 2018 to the effect that the notice of objection was invalid due to lack of evidence to support the grounds as required under section 51(3) of the [TPA](#).
5. Builders Junction filed an appeal before the TAT and after hearing the appeal, the TAT dismissed the appeal and upheld the objection decision. The TAT held that Builders Junction had failed to discharge the burden of proving that it had incurred the costs claimed. Builders Junction had not provided documents to show actual purchase of the goods.
6. The TAT further held that Builders Junction had provided documents outside time and after parties had filed their submissions, without leave. The TAT concluded that those documents were inadmissible and expunged them from the record.

Appeal to this court

7. Builders Junction being dissatisfied with the TAT decision, lodged this appeal through a memorandum of appeal dated 11th June 2021 raising several grounds of appeal which can be summarised as follows:
 1. The Tax Appeals Tribunal erred in holding that there was Value Added Tax (VAT) in the sum of Kshs. 842,240.00 and Corporation Tax in the sum of Kshs. 1,579,200.00 due as assessed and demanded by the Commissioner.
 2. The Tribunal fundamentally erred by failing to consider the issues, facts and evidence placed before it, in particular, failed to address the issue of the legality and validity of the assessment dated 24th May, 2018 and the Objection Decision dated 26th July, 2018 as raised by the Appellant.
 3. The Tribunal erred in failing to find and hold that the Commissioner had failed to provide reasons for the rejection of the VAT input claims contrary to section 49 of the [TPA](#) and failed to hold the raising of an assessment for Kshs. 2,421,440.00 to be invalid and against statute.
 4. The Tribunal erred in failing to find that the Objection Decision was invalid since the Commissioner failed to immediately notify the appellant that its Notice of Objection was invalid.
 5. The Tribunal erred in failing to find and hold that the Objection Decision was, in any event, invalid as it did not include a statement of findings on the material facts and the reasons for the decision as provided in section 51(10) of the [TPA](#).
 6. The Tribunal erred in failing to find and hold that the Commissioner's reliance on section 51(3) of the [TPA](#) was misplaced as the reason given for the rejection of the Objection, namely, failure to provide supporting documents, is not one of the grounds in that section 51 for summary rejection of objections.
 7. The Tribunal erred in failing to appreciate and consider section 17 (1), (3) of the [VAT Act](#) as well as regulation 7 of the [VAT Regulations](#), 2017 that a person shall be entitled to a deduction of input tax incurred for trading stock on hand at the date that the person becomes registered.
 8. The Tribunal erred in failing to find that section 15(1) of the [Income Tax Act](#) is applicable to the appellant's expenditure incurred for purposes of production of its income despite the respondent being provided with evidence in support of the purchases and has without any reasonable factual or legal justification opted to ignore the same.



9. The Tribunal fundamentally erred in failing to take cognisance of the fact that the appellant duly issued the respondent with copies of invoices and corresponding ETR, proof of payments, delivery notes and store records for all its purchases as is normal business practice, a fact that was confirmed by the Respondent's witness and their authenticity remains uncontested.

Submissions

8. This appeal was disposed of through written submissions with oral highlights.

Junction Builder's submissions

9. Builders Junction submitted that the Commissioner's assessment and objection decision were both invalid in that the Commissioner summarily dismissed the notice of objection for lack of evidence. Builders Junction faulted the Commissioner for failing to address its grounds of objection and disclose the legal and factual basis for the assessment and objection decision.
10. Builders Junction relied on sections 49, 51 (8), (9) and (10) of the *TPA* to argue, that the Commissioner's objection decision was not backed by any legal provisions. Builders Junction again relied on *I & M Ltd v Commissioner of Domestic Taxes*, (TAT Appeal No. 398 of 2021) on that point.
11. According to Builders Junction, the Commissioner ought to have issued an invalidity notice immediately within the period specified in section 51(4) upon its determination that notice of objection did not meet the threshold under section 51(3).
12. Builders Junction blamed the TAT for holding that it was required to furnish further documents to show that the invoices related to the purchase of the goods in question. Builders Junction asserted that it sufficiently discharged the burden of proof by availing tax invoices, corresponding ETRs, copies of the RTGS for the invoices and delivery notes, thus the onus shifted to the Commissioner to rebut the prima facie case.
13. Reliance was placed on *Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya* (ITA No. E125 of 2020) [2021] eKLR. According to Builders Junction, it was not its responsibility to confirm where its suppliers sourced the goods from.
14. Builders Junction again relied on *Karshan Limited v Commissioner of Domestic Taxes*, (TAT Appeal No. 123 of 2018), for the proposition that the Commissioner should have furnished information to prove that the invoices it had submitted to support its VAT refund claims were fictitious, but not merely allege that the documents presented were not sufficient to prove purchase and delivery of the goods.
15. Builders Junction took the view, that the Commissioner failed to satisfy the standard of proof required for a fraudulent claim more so, in relation to missing trader schemes. Builders Junction urged that the appeal be allowed with costs, and that the impugned judgment be reversed and substituted with an order setting aside the objection decision and assessment.

Commissioner's submissions

16. The Commissioner opposed the appeal through a statement of facts and written submissions. The Commissioner argued that Builders Junction did not avail requisite documents to support its objection, though given an opportunity to do so. According to the Commissioner, Builder Junction's attempt to put in the documents before the TAT late and also before this Court in this appeal was rejected.



17. The Commissioner relied on section 51(3) (a) of *TPA* on the validity of a notice of objection. The commissioner further relied on *Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya* [supra]; *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (24 November 2000), and section 56 of *TPA* to the effect that the tax payer bears the burden to prove that a tax decision is incorrect.
18. The Commissioner asserted that Builders Junction had not come to equity with clean hands since failure to maintain documents, file returns and avail documents are offences under sections 93 and 94 of the *Tax Procedures Act*.
19. The Commissioner urged the Court to dismiss the appeal with costs and uphold the TAT's decision.

Determination

20. I have considered this appeal, submission and the decisions relied on. I have also read the record of the TAT and the impugned decision. The core issues that arise for determination are: whether the objection decision was valid; whether the appellant supplied sufficient evidence to the Commissioner and whether the TAT erred in dismissing the appeal.
21. Builders Junction's case is that the Commissioner's objection decision was invalid because no reasons were given for the decision and provisions of the law on which the decision was made. The appellant cited section 51 of *TPA* to support its argument.
22. The Commissioner supported the decision of TAT that the objection decision was valid; contained reasons therefor; that Builders Junction did not provide sufficient documents and that the assessment was proper.
23. The Commissioner's case was that Builders Junction's claim for input VAT was not justified because the record the suppliers was nonexistent. Builders Junction had not provided sufficient supporting documents to prove the claim and therefore, this was a case of a missing trader where fictitious invoices from Al Imran Investments had been used to claim in put VAT. Builders Junction further failed to avail more documents when given an opportunity to do so.

validity of the objection decision

24. Builders Junction lodged an objection dated 21st June 2021 to the Commissioner's assessment dated 24th May 2021. The commissioner considered the objection and issued an objection decision dated 26th July 2018, stating:

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 remain unsupported.

The letter went on to inform Builders Junction that it should treat objection decision as confirmation of the of the assessment.

25. Section 51 (2) of *TPA* requires a taxpayer who disputes a tax decision to lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.
26. Under section 51(3), a notice of objection is to be treated as validly lodged by a taxpayer, 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.

27. I have perused the notice of objection Builders Junction lodged with the Commissioner. The notice complied with the requirements in subsection (2) and therefore was validly lodged.
28. Subsection (4) states that where the Commissioner determines that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner is to immediately notify the taxpayer in writing that the objection has not been validly lodged. This is the argument Builders Junction relied on to argue that the Commissioner was under obligation to notify it that the objection was not validly filed.
29. Although the Commissioner stated that the objection was not properly lodged, the reason the Commissioner gave was that the Builders Junction did not provide evidence to support your objection. The grounds of objection set out in the notice of objection remain unsupported.
30. What is clear from the objection decision was reason why the objection could not succeed. That is; Builders Junction did not attach or provide evidence to support the objection. The law requires the Commissioner to provide reasons for rejecting the objection. The Commissioner indeed gave a reason for rejecting the objection. This court is unable to agree with Builders Junction that the objection decision was invalid.

Sufficient documents

31. The other issue is whether sufficient documents were provided to support the objection. Builder's junction argued that it provided sufficient documents to support its case but the Commissioner dismissed the objection and the TAT failed to appreciate this fact.
32. I have read the decision of the TAT on this aspect of the appeal. The TAT stated at paragraph 68 of its decision that the Commissioner's position was that the objection was not supported but only contained a promise to provide document that may be required. The TAT then stated:
 - (69) The Appellant failed to show cause not only then but also during the objection process and the only logical conclusion would be that the Appellant had no proof of any actual supply from Al Imran Investments.
33. I have perused the Notice of Objection dated 21st June 2018 annexed to the record of appeal before this court. There are no documents attached to that the notice of objection to demonstrate that indeed documents were given before the TAT that support the Appeal.
34. Builders Junction had the duty to produce documentary evidence to support its objection before the Commissioner and also before the appeal before the TAT. In an objection to the Commissioner, appeal to the TAT and to this court, the Tax payer, as the appellant bore the burden of proof that the Commissioner's decision or that of the TAT, was wrong.
35. In *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* (supra), Krieglner J, writing for the Constitutional Court of South Africa, observed:
 - [22] ...The burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self-assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns



and averments relating thereto. Consequently the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand. (emphasis)

36. In the present appeal, it was Builders Junction's duty to provide documents when objecting to the assessment to enable the Commissioner review, reconsider, amend or allow the objection. In the absence of evidence that documents were provided at the time of the objection which the Commissioner ignored and the TAT failed to appreciate such anomaly, this court is unable to fault the finding of fact by the TAT, that Builders Junction did not provide documents to support its objection.

Whether TAT erred in dismissing the Appeal

37. A reading of the record and decision of the TAT shows that the TAT considered all the issues that were raised in the appeal before it and rendered reasoned determinations on each issue. This court has also re-evaluated the evidence on record and is satisfied that the TAT properly applied itself to the facts, evidence and the law in reaching the conclusion that the appeal before it was for dismissal.
38. For my part, I see no reason to fault the TAT or interfere with the findings of fact and the law, given that the TAT properly considered the issues that were raised before it. More importantly, the issue of input VAT claim was a question of fact to be supported by documents. The foundation of this appeal just like the appeal before the TAT was documentary evidence.
39. The TAT Made a finding that there was no proof that Builders Junction purchased the goods or incurred the expenses, but merely made averments that the purchases were real. Absent of supporting documents, this court would be acting without basis if it held the TAT to have been at fault.
40. The upshot is that this appeal fails and is dismissed. Each party shall however bear own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

E C MWITA

JUDGE

