



REPUBLIC OF KENYA



KENYA LAW

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Halinto General Distributors Ltd v Commissioner, Investigations and Enforcement (Income Tax Appeal E043 of 2021) [2023] KEHC 22883 (KLR) (Commercial and Tax) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22883 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E043 OF 2021
FG MUGAMBI, J
SEPTEMBER 29, 2023

BETWEEN

HALINTO GENERAL DISTRIBUTORS LTD APPELLANT

AND

THE COMMISSIONER, INVESTIGATIONS AND ENFORCEMENT RESPONDENT

(Being an appeal from the judgment of the Tax Appeals Tribunal at Nairobi dated 16th April 2021 in Tax Appeal No. 221 of 2018)

JUDGMENT

Background

1. The appellant is an electronics company incorporated in Kenya. Its principal business is selling electronics mainly televisions, mobile phones and other assorted items. It sources its merchandise from various suppliers and resells the same locally to its customers.
2. The respondent investigated the appellant over a period of time and issued a tax demand of Kshs. 136,680,530/=. The demand was disputed and later formalized in an assessment dated 16th May 2018. The appellant issued a notice of objection against the assessment on 13th June 2018. The respondent confirmed the assessment through an objection decision dated 24th July 2018.
3. Aggrieved by the said decision, the appellant filed its appeal before the Tax Appeals Tribunal (the Tribunal) which vide its judgment dated 16th April, 2021 dismissed the appeal and upheld the respondent's assessment and objection decision for the sum of Kshs. 136,680,530/=.



4. This decision is what prompted the appeal now before this Court, filed by way of a Memorandum of Appeal dated 11th May 2021. The appeal was canvassed by way of written submissions. The appellant filed submissions dated 9th June 2022 and supplementary submissions dated 15th September 2022, through the firm of ANL Advocates. The respondent's submissions were dated 27th June 2022 and filed through its Counsel, Antony Juma Opondo Advocates.
5. The appellant's submissions dealt with the grounds of appeal as three (3) issues for determination. These are: -
 - i. The validity of the respondent's assessment and objection decision;
 - ii. Sufficient proof of purchase under section 17 (1) of the Value Added Tax (VAT) Act
 - iii. Deduction of expenses

Analysis

6. The Court has carefully considered the pleadings, evidence and submissions of the rival parties as well as the impugned judgment. It appears to me that the main bone of contention is that the Tribunal erred in failing to appreciate the provisions of sections 17 and 43 of the VAT Act and section 59 of the Tax Procedures Act (TPA) as to the production of additional information and documents and the burden of proof.
7. The appellant submitted that although it was merely required to produce tax invoices and corresponding ETRs to be entitled to claim input VAT, it had gone further to provide additional documents that the respondent had demanded. It therefore took issue with more demands for import entries and import records stating that these were arbitrarily demanded and were unnecessary.
8. Although the appellant acknowledged that the respondent was empowered to ask for more documents, this power needed to be exercised reasonably and it was therefore wrong for the respondent to base its objection decision on the alleged failure of the appellant to provide further documents which it was not required by law to produce.
9. In any case, the appellant submitted that it purchased its goods from a list of local suppliers, the evidence of which was availed to the respondent. Under the circumstances, even if the suppliers in question had imported the goods, the appellant could not be expected to provide the import records of the supplier yet it was not involved in the importation.
10. As far as the appellant was concerned, it had discharged its burden of proof when it produced the requested documents to the respondent. The onus had then shifted to the respondent to rebut the prima facie case. It was also incumbent upon the respondent to prove the allegation of fraud and involvement of the appellant in the missing trader tax fraud scheme.
11. The respondent on his part maintained that the Companies which the appellant claimed to have dealt with, were missing traders and existed only on paper. For starters, investigations showed that the imports had entry numbers which did not belong to the alleged suppliers. There was no evidence that the suppliers either purchased goods from other suppliers or imported them or even manufactured goods which they could sell to the appellant. It is for this reason that the respondent disallowed the claim for deduction of expenditure under section 15(1) of the Income Tax Act (ITA) and advised the appellant to produce documents that would prove that it received the supplies from the listed traders.



12. The respondent argued that if indeed these suppliers existed, when the respondent questioned the authenticity of the information produced by the appellant, it would have provided further evidence such as PIN certificates to prove that the suppliers were registered persons capable of making taxable supplies. It would also have called the suppliers as witnesses to prove that they actually supplied goods to it or even produced letters from the suppliers testifying to their having supplied the appellant.
13. Section 17 of the VAT Act provides for credit for input tax. Sub-section (3) thereof provides for the documentation that is required for purposes of the credit on input tax. It provides in part as follows:

“The documentation for the purposes of subsection (2) shall be—

 - (a) an original tax invoice issued for the supply or a certified copy;
 - (b) ...
 - (c) ...
 - (d) a credit note in the case of input tax deducted under section 16(2);
 - (e) a debit note in the case of input tax deducted under section 16(5); or ...”
14. Once the appellant provided the documents set out in section 17(3) of the Act as it did, this amounted to prima facie evidence of purchase. The evidentiary burden of proof then shifted to the respondent. It was incumbent on the respondent to prove that his decision was right. The respondent challenged the veracity of the evidence produced by the appellant and asked for more documents to prove that there had indeed been purchases and supplies made by the appellant from the alleged suppliers and that the companies making the supplies actually existed.
15. Based on now consistent judicial pronouncements by this Court on the matter, once the respondent presented its case as aforesaid, the evidentiary burden of proof shifted back to the appellant to prove that the alleged suppliers did exist and that the alleged commercial transactions for VAT input were genuine and that its documentation was legitimate.
16. This explains why the Court in Commissioner of Domestic Taxes V Trical and Hard Limited, (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR) described the burden of proof in tax matters as a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer. The pendulum in this case had stalled at and lay with the appellant as no further evidence was provided in rebuttal. The law recognizes that evidence required in support of transactions for tax purposes is ordinarily in the possession of the taxpayer and that the Commissioner cannot sustain the burden.
17. Section 59 of the TPA and section 43 of the VAT Act empowers the respondent to request for more and additional information to satisfy himself on the taxable income declared. The power to do so was confirmed by the Court in Commissioner of Domestic Taxes V Priyguru Company Limited, (Income Tax Appeal E085 of 2020) [2021] KEHC 132 (KLR). In this case the Court disagreed with a similar submission as that put forward by the appellant, that section 17 of the VAT Act only required a taxpayer to produce certain documents. These, the Court held, were only a bare minimum.
18. Section 59 of the TPA and section 43 of the VAT Act provide for the keeping and production of documents when required by the tax authorities. These documents must be kept for a period of up to five (5) years. The additional information and documents must of course be those which are reasonably expected to be ordinarily in the hands of the tax payer as a business entity carrying out the business that it does.



19. In this case the respondent asked the appellant to produce supplier invoices, payment vouchers, delivery notes, stock records and import records. These, in my view, are documents that a diligent and prudent trader who is genuinely undertaking honest business, would be expected to keep.
20. The justification for this unique position that appears to depart from the general principle that he who alleges must prove was expounded by the Court in the case of *Commissioner of Domestic Services V Galaxy Tools Limited*, [2021] eKLR. The Court explained that:

“This country operates under a self-assessment tax regime. Under this regime, the tax payer assesses self and declares what he considers to be taxable income on which he then pays tax to the authorities. For this reason, the tax laws are coached in a manner that gives the tax authorities wide powers and discretion in ascertaining ex-post facto, what taxable income is. Further, the tax Laws reverse the well-known principle of evidence of “he who alleges must proof”. In this regard, the tax authorities would assess what it considers to be the tax due from a taxpayer and the tax laws would burden the tax payer to disprove that the assessment or tax demanded is wrong or incorrect. This is borne by the fact that the assessment and demand is ordinarily made way after the tax payer has assessed himself and made a declaration of what according to him is the tax payable and has already paid such tax. The burden is therefore shifted to the tax payer because, the tax authority has to rummage through the documents of the tax payer years after the tax payer assessed himself and paid what he considered to be his tax liability.”

21. This position is in tandem with section 112 of the *Evidence Act* which in turn provides that:
- “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
22. In fact, section 30 of the *Tax Appeals Tribunal Act* (TATA) and section 56 of the *TPA* both impose the burden of proof on the tax payer to prove that an assessment is excessive or that a tax decision is incorrect.

Determination

23. For all the foregoing reasons, the appellant cannot be said to have discharged its burden of proving that the assessment by the respondent was wrong. This appeal is therefore devoid of merit and the same is dismissed. The decision of the Tribunal dated 16th April 2021 upholding the objection decision of 24th July 2018 issued by the respondent, is upheld. There shall be no orders to costs.

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

F. MUGAMBI

JUDGE

