



Commissioner of Domestic Taxes v Samrat Supermarkets Limited (Tax Appeal E096 of 2020) [2022] KEHC 3403 (KLR) (Commercial and Tax) (25 April 2022) (Judgment)

Neutral citation: [2022] KEHC 3403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E096 OF 2020**

DAS MAJANJA, J

APRIL 25, 2022

**BEING AN APPEAL AGAINST THE JUDGMENT OF THE TAX APPEALS TRIBUNAL
AT NAIROBI DATED 21ST AUGUST 2020 IN TAX APPEAL NO.190 OF 2018**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

SAMRAT SUPERMARKETS LIMITED RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 21st August 2020 in Tax Appeal No.190 of 2018)*

JUDGMENT

Introduction and Background

1. The Respondent is involved in retail business as a supermarket having commenced business in the year 2004. Sometime in April 2018, the Appellant (“the Commissioner”) commenced a review of the Respondent’s tax declarations and communicated its preliminary findings through the letter dated 16th April 2018. According to the Commissioner, between the period August 2014 and January 2018, the Respondent used invoices from some listed suppliers for which no deliveries were made to account for its input VAT and that the same invoices were used to account for expenses in its financial statements thus reducing the Respondent’s income tax liability as well. As a consequence, the Commissioner required the Respondent to pay underpaid taxes amounting to KES 60,095,206.00 as the Commissioner continued to analyse the information it held.
2. In a letter dated 23rd April 2018, the Respondent responded to the Commissioner stating that it was trying to go through all the invoices from the listed suppliers because according to its knowledge, the



- input VAT claimed and invoices were valid. The Respondent therefore requested for more time to complete the exercise and for its director to consult on the issue. The Respondent followed up with another letter dated 27th April 2018 where it submitted copies of invoices to the Commissioner.
3. Between 2nd May 2018 and 10th May 2018, the Commissioner issued various VAT additional assessments in respect of underpaid VAT wherein the Commissioner demanded KES 20,906,054.14 together with interest of KES 5,095,819.60. The Respondent objected to these assessments by the letter dated 28th May 2018 on the grounds that it had claimed input VAT using valid tax invoices which are electronic tax register receipts or ESD compliant and that a file containing the copies of the invoices along with the ETR receipts or ESD signatures had already been submitted to the Commissioner through its earlier letter of 27th April 2018. The Respondent further stated that section 17(4) of the VAT Act, 2013 does not prohibit one from claiming input VAT on the items listed in the Commissioner's schedule and also does not stipulate that the supplier has to pay output VAT for the Respondent to claim the input VAT. The Respondent therefore insisted that the input VAT claimed by it was valid. The Respondent further contended that the tax invoices in question were fully paid to the suppliers thus the tax decision raised by the Commissioner was erroneous and excessive in the light of the Respondent's grounds of objection. The Respondent urged the Commissioner to register its objection and amend the tax demanded to NIL and in the meantime stand over the collection of the tax.
 4. In response to the objection, the Commissioner emailed the Respondent on 11th June 2018 seeking proof of payment, bank statements for the period November 2014 to March 2018 and stock records for the same period to be furnished within seven days of the email.
 5. In the meantime, the Commissioner also issued various income tax additional assessments on 21st May 2018 in respect of underpaid income tax and demanded KES 26,631,885.24 together with interest of KES 5,540,977.08. The Respondent objected to these assessments through its letter dated 7th June 2018 on the grounds that it had claimed purchases using valid purchase documents which were fully paid to the suppliers and that section 45(1) of the *Income Tax Act* allows it to claim expenditure that are wholly and exclusively incurred in the production of business income. The Respondent therefore asserted that the purchases/expenses claimed in its books of accounts are legitimate expenses and should be allowed for tax purposes. It maintained that the amount assessed is not as per the tax returns submitted and thus, the tax decision raised by the Commissioner was erroneous and excessive in the light of the grounds raised. The Respondent urged the Commissioner to register the objection and amend the tax demanded to NIL and in the meantime, stand over the collection of the tax.
 6. In response to the documents requested by the Commissioner, the Respondent responded through its letter dated 25th June 2018 where it indicated that it had sent the bank statements to the Commissioner in soft copy on 20th June 2018 and that the letter was submitting payment details for the invoices in question. On the request for stock records, the Respondent stated that same were huge and bulky and it suggested that the Commissioner physically verify them at its premises.
 7. In response to the objections, the Commissioner made two objection decisions dated 12th July 2018 and 6th August 2018. The Commissioner held that notwithstanding the Respondent's assertion that it has maintained full records for the purchases disallowed, the Commissioner had established that there was no supply of taxable goods made by the said listed suppliers and in this regard, the Commissioner confirmed the assessments as issued.
 8. Being aggrieved by the Commissioner's objection decisions, the Respondent lodged an appeal to the Tax Appeals Tribunal ("the Tribunal"). After considering the record and submissions by the parties,



the Tribunal held that the main and substantive issue for determination was whether the Respondent was entitled to the input VAT as claimed.

9. The Tribunal held that a cursory perusal of the evidence provided by the Respondent indicated that it had indeed met the threshold under section 17 of the [VAT Act](#), 2013 for qualifying for input VAT deduction but that the Commissioner, in disregard of this evidence, had disallowed the Respondent's claim on the premise that its investigations revealed that the Respondent was engaged in a missing trader scheme without any shred of evidence to back its position. That additionally, the Commissioner had, in disallowing the Respondent's right to deduct input VAT claimed the fact that the invoices from all the suppliers in question had all the requirements of a tax invoice and had ETR receipt attached thereon, held that this is not sufficient proof that goods were actually delivered. The Tribunal rejected the Commissioner's line of reasoning stating that was in complete contravention of the standard test established in section 17 of the [VAT Act](#). It further held that to hold otherwise would be to impose obligations on the tax payer over and above those enshrined under section 17 of the [VAT Act](#).
10. The Tribunal found that in considering the Respondent's application, the Commissioner had concerned itself and took into account irrelevant factors such as knowledge of the tax payer of a purported fraudulent scheme and that there was no reasonable way to expect the Respondent to be party to such knowledge and in fact to hold that is to require the Respondent to conduct an in-depth search into the affairs of every supplier it wishes to trade with. The Tribunal stated that this is not commercially viable and as such found that the Commissioner's decision to deny the Respondent its input tax deduction was arrived at through irrelevant considerations.
11. The Tribunal stressed that that once the taxpayer had satisfied the requirement of section 17 of the [VAT Act](#), 2013 in its claim for deduction, its legitimate expectation began to accrue and the Commissioner, by disallowing its claim without a basis in law has grossly injured this expectation. The Tribunal further held that based on the test set out in *Edge Skill Limited v the Commissioner for Her Majesty's Revenue and Customs* (2014) UKUT 38 (TCC); [2014] STC 1174 UT knowledge of connection with fraudulent VAT scheme on the part of the tax payer is abysmally crucial. That even if the Commissioner were to successfully answer the first three limbs of the test in the affirmative, that is was there a VAT loss? If so was it occasioned by fraud? And if so were the Respondent's transactions connected with such a fraudulent loss of VAT? The Commissioner will, most undoubtedly fail on account of the fourth limb, which is, did the Respondent know, or should it have known, of such a connection? The Tribunal was of the considered view that to put a tax payer in the position of knowing or should have known of the fraudulent transactions amounts to amending the law and making new powers which the Commissioner has not. That it had underlying implications that the tax payer should have done some form of investigatory due diligence before trading, if only to safeguard the integrity of its transactions. The Tribunal was unequivocal that the law does not place such burden on any tax payer. That the due diligence mandate a taxpayer has to dispense with is to confirm that it purchased its supplies from a VAT registered person, who has an ETR register.
12. In addition, the Tribunal held that the legal burden of proof normally rests upon the party desiring the court to take action, thus a claimant must satisfy the court or tribunal that the conditions which entitle him to a claim have been satisfied which is in line with the provisions of section 107 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya). The Tribunal noted that the very nature of the Commissioner's allegations was that the Respondent was in a fraudulent scheme to claim input VAT and that the Tribunal has been unequivocal and unrelenting in reminding the Commissioner in similar claims that the standard of proof in fraud is distinctly higher than the normal civil standard of balance of probability and the Commissioner had not attained or satisfied that standard. That it is trite law that any allegations of fraud must be pleaded and strictly proved and the Commissioner had not placed



before the Tribunal any evidence to merit denial of the Respondent's claim for input tax as it is an established principle of law to specifically plead fraud. For the above reasons, the Tribunal came to a dispositive conclusion that the Respondent's appeal was merited allowed, the additional assessments were set aside and the objection decisions were declared null and void.

13. It is this decision that the Commissioner is dissatisfied with and forms the basis of the instant appeal which has been canvassed by way of written submissions where the parties have regurgitated their positions summarized above.

Analysis and Determination

14. It is not in dispute that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the [Tax Procedures Act](#) ("the TPA") which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". The Respondent rightly cites the decision in [Commissioner for Investigations and Enforcement v Menengai Oils Limited](#) [2021] eKLR where the court held that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. On the same issue, the Court of Appeal, in [Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others](#) NYR CA Civil Appeal Mo. 48 of 2013 [2013] eKLR observed that when a court's jurisdiction is limited to dealing with matters of law has a concern regarding factual issues, then the court will also be limited to re-evaluation of the lower court's conclusions and if the conclusions are erroneous to the extent that they are not supported by evidence and the law, then that becomes a point of law.
15. The main issue for determination in this appeal is similar to what the Tribunal dealt with, which is whether the Respondent was entitled to the input VAT as claimed and as a matter of law, whether the Tribunal rightly appreciated the provisions of sections 56 and 59 of the [TPA](#), section 30 of the [Tax Appeals Tribunal Act](#) ("the TATA") and sections 17 and 43 of the VAT Act.
16. The issue of 'missing trader' is not novel and has been dealt with by the Tribunal and the court several times. It is a tax fraud scheme where taxpayers deliberately and fraudulently claim tax rebates from fictitious purchases leading to the taxpayer paying less or no taxes than they should. In [Highlands Mineral Water Limited v Commissioner of Domestic Taxes](#) ML HC ITA No. E026 OF 2020 [2021] eKLR, the court explained how the Kenyan VAT system operates. VAT is a tax chargeable on supply of taxable goods or services made or provided in Kenya and on importation of taxable goods or services into Kenya. It works under the input and output tax system. Output tax refers to the VAT charged on the sales of taxable goods or services, while input tax refers to VAT charged on taxable purchases of goods and services for business purposes. The tax payable is the difference between the output tax and input tax. It is this input tax that the law allows a taxpayer to deduct from their VAT returns that is always subject to abuse and missing trader fraudulent scheme I have highlighted above. In any case, the Respondent is correct to submit that it had the right to deduct input tax from its VATable transactions.
17. The aforementioned position on the VAT system and the Respondent's assertion above is anchored under section 17(1), (2), (3) and (5) of the [VAT Act](#), 2013 which provide as follows:
 17. Credit for input tax against output tax
 - (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.

- (3) 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.

(4)

- (5) Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period:

Provided that any such excess shall be paid to the registered person by the Commissioner where —

- a. such excess arises from making zero rated supplies; or
- b. such excess arises from tax withheld by appointed tax withholding agents; and
- c. such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act or any other written law, or is due for refund pursuant to section 47(4) of the [Tax Procedures Act, 2015](#); and
- d. the registered person lodges the claim for the refund of the excess tax within twenty-four months from the date the tax becomes due and payable.

Provided further that, notwithstanding section 17(5)(d), a registered person who, within a period of thirty-six months prior to the commencement of section 17(5)(b) and (c), has a credit arising from withholding tax, may make an application for a refund of the excess tax within twelve months from the commencement date.

18. The Commissioner is also right to submit that section 43 of the [VAT Act, 2013](#) provides for the requirement that a tax payer is required to maintain records. Further that the Commissioner has the power to request for the production of such records as follows:

43. Keeping of records

- (1) A person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein.



- (2) The records to be kept under subsection (1) shall include—
 - (a) copies of all tax invoices and simplified tax invoices issued in serial number order;
 - (b) copies of all credit and debit notes issued, in chronological order;
 - (c) purchase invoices, copies of customs entries, receipts for the payment of customs duty or tax, and credit and debit notes received, to be filed chronologically either by date of receipt or under each supplier's name;
 - (d) details of the amounts of tax charged on each supply made or received and in relation to all services to which section 10 applies, sufficient written evidence to identify the supplier and the recipient, and to show the nature and quantity of services supplied, the time of supply, the place of supply, the consideration for the supply, and the extent to which the supply has been used by the recipient for a particular purpose;
 - (e) tax account showing the totals of the output tax and the input tax in each period and a net total of the tax payable or the excess tax carried forward, as the case may be, at the end of each period;
 - (f) copies of stock records kept periodically as the Commissioner may determine;
 - (g) details of each supply of goods and services from the business premises, unless such details are available at the time of supply on invoices issued at, or before, that time; and
 - (h) such other accounts or records as may be specified, in writing, by the Commissioner.
- (3) Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorised officer for inspection and shall give the officer every facility necessary to inspect the records.
- (4) For the purposes of this section, the Commissioner may, in accordance with the regulations, require any person to use an electronic tax register, of such type and description as may be prescribed, for the purpose of accessing information regarding any matter or transaction which may affect the tax liability of the person.
- (5) A person who contravenes any of the provisions of this section commits an offence

19. Section 59 (1) of the *TPA* also provides that a tax payer shall produce records when required to do so by the Commissioner as follows:

59. Production of records

- (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.
- 20. Turning to the issue of burden of proof, section 30 of the TATA and section 56 of the TPA impose the burden of proof on the tax payer to prove that an assessment is excessive or a tax decision is incorrect. All these provisions deal with tax matters and cannot be read in isolation, they must be read holistically in view of the subject they address (see Okiya Omtatab Okoiti v Attorney General & another NRB HC Petition No. 156 of 2017 [2020] eKLR).
- 21. In this case, the Commissioner requested for proof of payment, invoices, bank statements and stock records of the Respondent in respect of the impugned transactions. The Respondent provided the documents requested to the Commissioner save for the stock records which it stated were bulky and voluminous and which it suggested that the Commissioner should inspect them at its premises. The record shows that the Commissioner visited the Respondent's premises where it stated that no stock records were availed and that this is what led to the Commissioner's conclusion that there were no actual purchases made.
- 22. The Respondent did not challenge this position by stating that the stock records were actually made available to the Commissioner. All the Respondent challenged was why the Commissioner issued the additional assessments first before coming to verify stock records as according to the Respondent, the latter should have taken place before the former. The uncontroverted fact is that the stock records were never made available to the Commissioner when its officers visited the premises brings to the fore the issue of burden of proof and whether, in light of the documents already with the Commissioner, the Respondent had discharged this burden in light of section 30 of the TATA and section 56 of the TPA which impose the burden of proof on the tax payer to prove that an assessment is excessive or a tax decision is incorrect. Thus, it was incumbent upon the Respondent to prove that the Commissioner's findings above were wrong.
- 23. Since the Respondent did not provide the stock records to the Commissioner, the Commissioner concluded that no actual purchases were made. It must not be lost that this conclusion was arrived at even after the Respondent had submitted the other documents requested by the Commissioner but whose authenticity the Commissioner challenged. While the general rule or requirement under the sections 107 and 108 of the Evidence Act (Chapter 80 of the Laws of Kenya) is that he who asserts must prove, it must also be remembered that a person has the burden of proving facts that are peculiarly within its knowledge as provided by section 112 of the Evidence Act which states 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."
- 24. The Respondent has not argued or shown that the Commissioner's request for documents was unreasonable or not warranted in the circumstances. In any case, stock records are the kind of records that the Commissioner may request the taxpayer to provide under section 43(2)(f) of the VAT Act. By the Respondent failing to produce the stock records, the Commissioner was entitled to reach the conclusion it did. I cannot fault the Commissioner for concluding that the Respondent did not make actual purchases and that no goods were delivered in the absence of stock records or such a satisfactory explanation in that regard from the Respondent.



25. Considering the nature of the matter, it was not really that difficult for the Respondent to disprove the Commissioner's assertions. Apart from providing the stock records, the Respondent could have produced letters from the listed suppliers to the Commissioner asserting that they delivered goods to the Respondent and the same would have been sufficient. It was also open to the Respondent to call the suppliers as witnesses before the Tribunal to affirm that it made those purchases and that the suppliers delivered the goods.
26. The wording of the Commissioner's Objection Decisions were emphatic that "Notwithstanding your assertion that the company has maintained full records for the purchases disallowed, the Commissioner has established that there was no supply of taxable goods made by the suppliers highlighted on our letter of 14th April 2018." The Respondent failed to surmount this position by the Commissioner by furnishing stock records or otherwise producing evidence that the goods were purchased and delivered from the listed suppliers.
27. It is for the above reasons that I respectfully disagree with the Tribunal's findings. The Commissioner never rejected the Respondent's input VAT claims for the reasons that the Respondent had knowledge of a purported fraudulent scheme but for insufficient documentation and want of proof. I find that the Commissioner neither considered irrelevant factors nor required the Respondent to go into unreasonable lengths to prove its purchases as was held by the Tribunal. The Respondent failed to discharge its legal burden of proof and failed to disprove the Commissioner.

Conclusion and Disposition

28. In conclusion, I find and hold that the Tribunal erred in its interpretation and application of sections 56 and 59 of the *Tax Procedures Act* and section 30 of the *Tax Appeals Tribunal Act* and arrived at the wrong conclusion in this matter. It misapprehended the evidence and facts on record and arrived at a decision that was perverse and warrants the intervention of this court.
29. I allow the appeal and set aside the judgment of the Tribunal dated 21st August 2020 and uphold the Commissioner's Objection Decisions dated 12th July 2018 and 6th August 2018.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango

Mr Ngari, Advocate for the Commissioner of Domestic Taxes instructed by Kenya Revenue Authority.

Mr Gitonga instructed by Mwamba Gitonga Advocates for the Respondent.

