Kastran Motors Limited v Commissioner of Domestic Taxes (Tax Appeal E109 of 2021) [2022] KEHC 11128 (KLR) (Commercial and Tax) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E109 OF 2021

DAS MAJANJA, J

JULY 28, 2022

BETWEEN

KASTRAN MOTORS LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 28th May 2021 in Tax Appeal No.13 of 2018)

JUDGMENT

1. The appellant is a limited liability company whose principal activity is the sale and distribution of motor vehicles as the authorized distributor and dealer of TATA Africa Holdings (K) Limited ("TATA").The respondent("the Commissioner"), in the exercise of its mandate of collection and receipt of all revenue and administration and enforcement of all relevant tax laws, evinced its intention of verifying the appellant's VAT credits and PAYE operations for the period January 2016 to June 2017 through its letter dated August 21, 2017.

2. In the letter, the Commissioner stated that the verification would confirm whether correct declarations and payments were made and it required the appellant provide various books/records/documents for the exercise including sales and purchase invoices and credit/debit notes, Z-Reports and input and output analysis, import and export entries, sales and purchases ledgers, list of creditors and debtors, stock sheets, audited accounts, payrolls and PAYE returns and bank statements. The Commissioner reserved the right to request further documents.

3. On October 13, 2017, the Commissioner communicated its findings of the verification exercise. It stated that there was an undeclared supply of 5 tipper trucks made by the appellant to Dittman Construction Limited ("Dittman") in July 2016 and that Dittman claimed the input VAT as provided

under section 17 of the *VAT Act, 2013*, but the sales were not declared in the VAT returns by the appellant. The Commissioner contended that the supply was for a sum of KES. 26,939,655.00 with a VAT amount of KES. 4,310,345.00 and that Dittman paid a deposit of KES. 1,562,500.00 which was 5% of the consideration for the supply through RTGS to the Appellant's Bank at Diamond Trust Bank and the balance of KES. 29,687,500.00 paid by Kenya Commercial Bank after the Appellant delivered the tippers. That in the release letter, it was found that the appellant had issued an invoice number 1/21007/2016 on 25th July 2016 and the Commissioner held that the supply should have been declared by the appellant in July 2016 as provided for under section 5 of the *VAT Act, 2013*.The Commissioner thus stated that Output VAT had been charged on the undeclared supply and the resulting VAT and interest liable on adjustments made for the same was KES. 4,918,114.00 which the Commissioner demanded.

4. The appellant objected to the Commissioner's findings through its letter dated November 7, 2017. It stated that it had attached the filed tax invoices which were handed over to the Commissioner in October from TATA after the wrong transaction was reversed by TATA and Dittman refused to file the same and that the invoice was reflective of the same units which were sold to Dittman and that the Chassis, Engine and Registration numbers would confirm this since they could never be altered. The Appellant averred that the entire VAT transaction was declared by TATA however it had been to a wrong vendor not Dittman and that Dittman had erroneously claimed the appellant's sale invoice instead of TATA's. The appellant further contended that the defective claim was with the Commissioner and was exhaustively explained with proof and that the audit raised substantive issues which were followed through by TATA to their head office in Mumbai, India to be corrected but that the Commissioner did not wait to see this correction leading to the demand letter.

5. The appellant averred that to pay the demanded amount of KES. 4,310,345.00 plus interest and penalties after the entire month-long explanations, correspondence and proof by the appellant's team would be vexatious, erroneous and miscarriage of facts which was to infer that the Appellant wind up the company forthwith. The appellant lamented that it was it was unfortunate, unfair and prejudicial not to follow the transaction through from beginning to end from the principal, TATA, to Dittman and establish where this taxes could have been placed. The appellant argued that it is an agent and only refers clients to TATA and in the unlikely event they refuse to deal directly due to after sales reasons, it engages in a back-back transaction through the banks and that the entire process is controlled, owned and managed by TATA as the owner of first instance of the units. The appellant explained that the transaction with Dittman ought to be looked at holistically as follows; TATA invoices the appellant, the appellant subsequently invoices Dittman, the appellant will have input VAT and output VAT figures that are matching and have a zero effect, Ditmann is the last in the chain to claim VAT and TATA will be the entity paying the output VAT on the sale. The appellant stated that the aforementioned explanation was now sufficient enough to conclude that there was no instance of non-declaration of VAT on the whole transaction originating from TATA through the appellant as agents to Dittman.

6. In a letter dated December 13, 2017, the Commissioner made its objection decision ("the Objection Decision"). It reiterated its earlier position on the trail of the transactions concluding that there were two separate transactions; supply from TATA to the Appellant and supply from the appellant to Dittman. The Commissioner held that at each transaction, the registered supplier ought to have declared output VAT as follows. TATA invoices the Appellant upon supply of the tippers to them and declares output VAT therein and that the appellant claims input VAT from TATA. Theappellant then invoices Dittman upon supply of the tippers to them and declares output VAT therein and that Dittman claims input VAT. The Commissioner underpinned the facts that the appellant sold 5 tippers to Dittman in July 2016, that the appellant issued a proforma invoice and ETR to Dittman where

Dittman claimed input VAT charged on the supply in August 2016 but that the appellant did not declare output VAT charged on the supply.

7. The Commissioner therefore confirmed the earlier demand of KES. 4,918,114.00 by relying on sections 2, 5(1) and (3) of the VAT Act, 2013 and the fact that the Appellant is a registered person under the VAT Act, 2013 that it supplied 5 trucks to Dittman in July 2016 and that the supply of the trucks is a taxable supply.

8. The appellant was dissatisfied with the Commissioner's Objection Decision and lodged an appeal at the Tax Appeals Tribunal ("the Tribunal"). The Tribunal studied the parties' pleadings, submissions and documentation and rendered a decision onMay 28, 2021. In its decision, the Tribunal stated that there was only one issue for determination, whether the Commissioner erred in law and in fact by raising an additional VAT assessment on the appellant in respect of the sale of the five tippers to Dittman.

9. The Tribunal found that the tippers were contracted for in July 2016 and the same were delivered and paid for in August 2016, which facts the appellant admitted. The Tribunal held that the time of supply of the tippers was therefore August 2016 and that the Appellant should have accounted for the output VAT in the same month as provided for by section 12(1) of the *VAT Act, 2013.* The Tribunal rejected the Appellant's submissions of the mix-up in the transaction between it and its principal, TATA stating that this had no legislative backing and that the parties therein are separate legal entities and taxpayers who ought to account for tax individually. The Tribunal was of the view that the accounting for the sale of the five tippers which occurred in August 2016 ought to have been done within the same month and not October 2017 as was done by the appellant, following which the respective VAT was payable by the 20th day of the following month, that is September 20, 2016. The Tribunal found that the relevant accounting for the sale of the said tippers was accounted for in the wrong month and that the same applied to the related VAT payable and that in view of this, the appropriate remedy would have been for the appellant to amend the self-assessment for October 2017.

10. Consequently, the Tribunal found that the Commissioner did not err in law and in fact by raising an additional VAT assessment on the Appellant in respect of the sale of the tippers to Dittman in August 2016. The Tribunal dismissed the appeal and upheld the Objection Decision.

11. The appellant is aggrieved with the Tribunal's decision and has now appealed to the court through an appeal grounded on the Memorandum of Appeal dated June 25, 2021. The Commissioner filed the Statement of Facts dated July 21, 2021. The parties have also filed written submissions in support of their respective positions along the lines urged before the Tribunal.

Analysis and Determination

12. I have gone through the appeal, the record and submissions of the parties. In resolving this appeal, it is important to point out that this court's appellate jurisdiction is circumscribed by section 56(2) of 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". 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. The Court of Appeal in *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR summarised what amounts to "matters of law" as follows:

> [T]he interpretation or construction of the *Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal

would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.

13. The main issue for determination by the court is whether the Tribunal erred in holding that the Commissioner was right to raise additional VAT assessment on the Appellant in respect of the sale of the five tipper trucks to Dittman.

14. In *Highlands Mineral Water Limited v Commissioner of Domestic Taxes* ML HC ITA No E026 OF 2020 [2021] eKLR, the court explained that 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 where 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 (see also *Rabai Operation & Maintenance Limited v Commissioner of Domestic Taxes* ML TA No 7 of 2017 [2019] eKLR).

15. The charging provision for VAT is found under section 5(1) of the *VAT Act,2013* which provides as follows:

> Charge to tax
>
> (1) A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on—
>
> (a) a taxable supply made by a registered person in Kenya;
>
> (b) the importation of taxable goods; and
>
> (c) a supply of imported taxable services.

16. It is not in dispute that under section 12(1) of the *VAT Act,* 2013, the time of supply of VATable goods or services is the earlier of the date on which the goods are delivered or services performed or the date on which the invoice for the supply is issued or the date on which payment for the supply is received, in whole or in part. There is also no dispute that the Appellant issued a proforma invoice to Ditmann sometime in July 2016 that the appellant delivered the tippers and Dittman paid for the same sometime in July and August 2016. The earlier of these events is the issuance of the invoice which means that the time of supply of the tippers was July 2016. It is further not in dispute that under section 44 of the *VAT Act, 2013*, every registered person shall submit a return, in the prescribed form and manner, in respect of each tax period not later than the twentieth day after the end of that period. Under section 2 of the *VAT Act, 2013*, "tax period" means 'one calendar month or such other period as may be prescribed in the regulations' meaning that the Appellant ought to have submitted a return at least by the 20th of the following month, being August 20, 2016.

17. The appellant conceded that it never filed the return in respect of the sale of the tippers on time but that the same was filed in October of 2017. The Commissioner rejected this contention submitting that the declaration made by the appellant in October 2017 could not have been for the transaction made in August 2016 as the input claimed therein was not allowable under section 17(2) of the *VAT Act,2013* which provides that:

> Credit for input tax against output tax

(1) Subject to the provisions of this Act 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)—

(a) the person does not hold the documentation referred to in subsection (3),or

(b) the registered supplier has not declared the sales invoice in a return, 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.

18. Going through the appellant's return for the period October 2017(Pgs. 103-105 of the record of appeal), I note that the Appellant made an input VAT claim of KES. 4,222,043.41 against an output VAT declaration of KES. 4,341,824.83. I agree with the Commissioner that if indeed this was the declaration for the July 2016 supply of the tippers to Dittman, then no input VAT could have been claimed as it was outside the six-month statutory period allowed for claiming input VAT. I also agree that the return does not indicate whether the output VAT was in respect of the sale to Dittman hence one could not fault the Commissioner for concluding that the return of October 2017 did not relate to the said supply of July 2016.

19. I therefore find that even though the Appellant declared the sum of KES. 4,341,824.83 in its self-assessment VAT return for the period October 2017, the same was not in respect of the supply to Dittman that occurred in July 2016. No VAT was remitted by the Appellant for the supply of the tippers to Dittman and the Commissioner was right to demand the same from the Appellant. Even if I was to find that the declaration of October 2017 was in respect to the said supply, the Appellant would still be liable as no input VAT could have been allowed on the supply meaning that the Appellant was obligated to remit the entire amount of KES. 4,341,824.83 without any deductions, which it did not.

20. I agree with the Commissioner and the Tribunal that the supposed mix up/error between theappellant and TATA had nothing to do with the supply between the Appellant and Dittman and that theappellant was obligated to file its return at the time of the supply just as Dittman did on its part.

Disposition

21. For the reasons I have set out above, I find and hold that the Tribunal did not err in its findings. This appeal lacks merit and is dismissed with costs the Respondent.

SIGNED AT NAIROBI BY

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022.

D. CHEPKWONY

JUDGE