



**Commissioner of Domestic Taxes v Metoxide Africa Limited (Tax Appeal E121 of 2021)
[2022] KEHC 14613 (KLR) (Commercial and Tax) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E121 OF 2021
DAS MAJANJA, J
OCTOBER 31, 2022**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

METOXIDE AFRICA LIMITED RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 30th April 2021 in Tax Appeal No. 268 of 2019)*

JUDGMENT

Introduction and Background

1. The Respondent is engaged in the manufacture of Zinc Oxide. Sometime in 2018, the Commissioner commenced a review of the Respondent's tax declarations. By a letter dated 18th April 2018, the Commissioner informed the Appellant that preliminary information indicated that in the period 1st July 2014 to 31st December 2014, the Respondent used invoices from a supplier for which no deliveries were made to account for input VAT and that the same invoices were used to account for expenses in the Respondent's financial statements thus reducing its income tax liability as well. The Commissioner stated that as it continued analysing information, the Respondent was required to immediately make payment of Kshs. 5,723,504.00 which the Commissioner stated was made up of Kshs. 1,990,784.00 for input VAT claimed and Kshs. 3,732,720.00 for Corporation Tax underpaid.
2. The Commissioner then raised additional assessments for the under declared Corporation Tax amounting to Kshs. 1,941,260.41 through the assessment order dated 20th February 2019. The Respondent objected to the additional assessments through its letter dated 20th March 2019. The Respondent averred that although the assessments were issued on iTax, the same did not meet the threshold of section 31(8) of the Tax Procedure Act, 2015 ("the TPA") as there was no written



- communication to it giving details of the basis of the amended assessments. Thus, the Respondent averred that the assessments were excessive, incorrect and not in accordance with the self-assessment return that was submitted in accordance with section 28(1) of the TPA. The Respondent further complained that it had to follow up with the Commissioner to establish the genesis of the assessments where in an email, the Commissioner stated that from its investigations, it had found that the vehicles that had delivered goods to the Respondent were of a lower load capacity making it impossible to have delivered the weight of the goods as indicated in the delivery notes. In view of this, the cost of sales amounting to KES 11,392,400.00 were disallowed and the additional assessments raised.
3. The Respondent argued that the Commissioner could not disallow the raw materials and also fail to discard the sales generated from the alleged fictitious raw materials. It explained that in a manufacturing entity like the Respondent's, it is impossible to sell finished goods that have not been finished from some raw materials. The Respondent faulted the Commissioner's approach of counterchecking the registration numbers of the subject vehicles with NTSA records stating that this could not be a basis for disallowing the deliveries made. The Respondent stated that it was not its core business to verify registration numbers of lorries that deliver raw materials and the same could not be a basis to disallow purchases. The Respondent asserted that the "substance over form" was that the raw materials were used in the manufacture of finished products and the evidence to that was the sales that were generated which are not in dispute. The Respondent concluded that the additional assessments lacked merit and were to be vacated and the assessments amounting to Kshs. 1,941,261.00 ought to be amended to NIL.
 4. On 10th May 2019, the Commissioner communicated its objection decision to the Respondent ("the Objection Decision"). The Commissioner maintained its earlier position and disallowed the objection due to the fact that the vehicles purported to have delivered the goods at the weighbridge were of lower capacity than the goods delivered. The Commissioner gave an example that a Nissan Sunny saloon car with a tare weight of 1010 kgs delivered goods of 5,200 kgs which raised questions of integrity of the information provided in support of the purchases. The Commissioner thus disallowed the purchases claimed in relation to the said supplies and maintained that the Corporation Tax of KES 1,941,261.00 plus a 75% penalty of KES 1,455,945.00 and accrued interest remained due and payable.
 5. The Respondent appealed against the Objection Decision to the Tax Appeals Tribunal ("the Appeal"). After a review of the record, the Tribunal rendered its judgment on 30th April 2021 where it established that the Respondent's appeal raised only one issue for determination; Whether the Commissioner erred in disallowing the Respondent's purchases. In this respect, the Tribunal considered the Commissioner's disallowance of the Respondent's purchases and the reasons thereof.
 6. The Tribunal stated that from the Commissioner's own pleadings, the Respondent's cost of sales was disallowed on two grounds. First, that the Respondent used invoices from traders selling bogus invoices and second, that the vehicles used to deliver the goods were of lower tare weight than the goods delivered.
 7. On the first ground disallowing the Respondent's cost of sales, the Tribunal opined that the same resembled the 'missing trader' fraud claims by the Commissioner on the VAT system, except in this case it was a Corporation tax assessment. The Tribunal held that the Commissioner did not adduce any evidence before it to the effect that the invoices used by the Respondent to claim purchases were indeed bogus or fraudulent. The Tribunal noted that section 15 of the [Income Tax Act](#) (Chapter 470 of the Laws of Kenya) ("the ITA") entitled taxpayers to deduct the cost of sales but that in order to deduct these costs, the taxpayer must have documentation supporting such costs. The Tribunal held that in this case, the Commissioner was casting aspersions on the veracity of the Respondent's invoices without placing any proof before the Tribunal.



8. Citing the decision in *Vijay Morjaria v Nansingh Madhusingh Darbar and Another* NRB CA Civil Appeal No. 106 of 2000 [2000]eKLR where the court that the particulars of fraud must be specifically pleaded and proved, the Tribunal held that the Commissioner had not discharged its burden of proof in fraud cases and as such, there was no viable basis for disallowing the Respondent's purchases. The Tribunal considered the Commissioner's contention that the vehicles that delivered the goods to the Appellant did not have the capacity to deliver the goods in question flimsy. It stated that the Commissioner simply took the erroneously recorded plate numbers in the Respondent's delivery book and did a search on the same with NTSA but that no further search was done when the Respondent gave the Commissioner the corrected number plates.
9. The Tribunal further dismissed the Commissioner's assertion that the vehicles that delivered the goods to the Respondent did not have the capacity to deliver the goods in question on the basis that the Commissioner on the one hand had already collected Corporation tax and VAT, while on the other hand arguments the very items used in the generation of this income. The Tribunal stated that "one must be blind not to see the utter travesty such actions would visit upon the tax payer". In the Tribunal's view, what was most important was that the Respondent provided the Commissioner the relevant documents supporting its costs of sales and the Commissioner fell into error for disallowing these costs, which are an entitlement the tax payer enjoys under the provisions of section 15 of the ITA. That the only reason tendered by the Commissioner for disallowing the purchases was that the delivery cars did not match the weight of goods supplied to the Respondent, which argument the Commissioner considered to be short-sighted as it failed to account for the fact the cars in question could have made several trips to deliver the goods in question. In the premises, the Tribunal found that the Commissioner's decision to disallow the Respondent's cost of sales had no rational basis in law. The Tribunal therefore allowed the Respondent's appeal and set aside the Objection Decision in its entirety.
10. It is this decision that has precipitated the filing of the instant appeal by the Commissioner which is grounded on the Memorandum of Appeal dated 28th June 2021. The Respondent responded to the appeal through its Statement of Facts dated 15th August 2021. The parties have also filed written submissions which disposed of the appeal and regurgitate their respective positions I have already summarized above.

Analysis and Determination

11. The court's jurisdiction in exercising appellate jurisdiction is constrained 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". 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:
 - (38) The 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.
12. This means 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 unless the decision is perverse.



13. The main issue for determination in this appeal is similar to what the Tribunal dealt with which is whether the Commissioner erred in disallowing the Respondent's purchases.
14. The Commissioner disallowed these purchases after doubting the veracity of the information supplied by the Respondent in supporting the purchases. I agree with the Tribunal that the Commissioner's conclusion is akin to the now notorious issue of 'missing trader' which 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 and the Government consequently losing revenue.
15. It is not in dispute that section 15(1) of the ITA allows a taxpayer to deduct all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that income. The taxpayer must support the expenditure by appropriate documentation which must be produced when demanded by the Commissioner.
16. 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.
17. Further, section 30 of the *Tax Appeals Tribunal Act* ("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.
18. As stated, the Commissioner impugned the documentation provided by the Respondent maintaining that the Respondent used invoices from a supplier for which no deliveries were made, meaning that the invoices were bogus. The Commissioner further stated that it was not possible for the said vehicles listed in the Respondent's delivery notes to supply the said goods as they were of a lower tare weight than the goods said to be delivered.
19. The question before the court that was also before the Tribunal was whether the Respondent discharged its burden of proof by demonstrating that the Commissioner was incorrect in its decision. It should not be lost that the burden of proof in tax matters is not stationary but is like a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer. The uniqueness of our tax system in placing the evidential burden of proof on the tax payer is neither a mistake nor is it unconstitutional. In *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) the court stated that:



- (48) The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold.
- (49) A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.
20. From the above, it is clear that the evidential burden of proof rests with the taxpayer to disprove the Commissioner and that once competent and relevant evidence is produced, then this burden now shifts to the Commissioner. I have emphasized and underlined 'competence' and 'relevance' because it is only evidence that meets these two tests that demolish the presumption of correctness and swing the burden to the Commissioner (see Kenya Revenue Authority v Man Diesel and Turbo Se, Kenya COMM TA No. E125 of 2020 [2021] eKLR). This means that even if one avails evidence but then it is found that the same is incompetent or irrelevant, then the burden continues to remain with the tax payer. In this case, it was upon the Respondent to prove that the invoices were not bogus and that indeed deliveries were made and the vehicles that made the deliveries were of the requisite weight.
21. In its submissions before the Tribunal, the Respondent stated that the deliveries were made by vehicles with the correct tare weight but that there was a mix-up in recording the vehicles' registration numbers. However, going through the Respondent's objection, I note that this issue of a 'mix-up' in the vehicles' registration was never brought up by the Respondent. The Respondent's position was that there was evidence of finished products which demonstrated that there were raw materials for the same and thus evidence of deliveries. In fact, its response to the Commissioner, the Respondent asserted that, "it is not our client's core business to verify registration numbers of lorries that deliver raw materials."
22. The Tribunal accepted the Respondent's argument of a mix-up in the registration of the vehicles used in the deliveries. I respectfully fault the Tribunal for accepting this argument when it was never raised before the Commissioner in its objection or at all until after the close of the hearing in its submissions. The Tribunal ought to have realized that this argument by the Respondent was nothing but an afterthought and in any case did not counter the Commissioner's argument of how the specific named vehicles could deliver goods that were almost four times above their weight. I further find the Tribunal's conclusion that the vehicles could have made several trips in delivering the goods was based on speculation, unsupported by evidence and mere conjecture. The Respondent, in its letter dated 20th March 2019, never argued that the vehicles delivered the goods in trips. In any event, had the vehicles been doing multiple trips, the Respondent would have produced various delivery notes for the goods which would have captured the correct registration details if at all there was a mix-up in the initial ones.
23. It is my finding that once the Commissioner reviewed the documents and evidence supplied to it by the Respondent and directly challenged the competence, relevance and veracity of the evidence, the burden shifted back to the Respondent to disprove the Commissioner because as I have stated, only competent and relevant evidence can demolish the presumption of the Commissioner's correctness



and shift the burden to the Commissioner. In reality, the Respondent never responded directly to the Commissioner's contention.

24. I therefore find and hold that the Respondent did not discharge its burden of proof before the Commissioner and the Tribunal when the competence, relevance and veracity of its evidence was challenged meaning that the presumption of correctness of the Commissioner's decision remained as such. When the veracity and authenticity of the documents availed have been called into question by the Commissioner, the burden shifted back to the taxpayer, in this case the Respondent, to prove the Commissioner wrong. (See Commissioner Investigations And Enforcement v Sangyug Enterprises(K) Limited (Income Tax Appeal E056 of 2020) [2022] KEHC 59 (KLR) (Commercial and Tax) (4 February 2022) (Judgment) and Commissioner of Investigations and Enforcement v Pearl Industries Limited (Tax Appeal E086 of 2020) [2022] KEHC 51 (KLR) (Commercial and Tax) (31 January 2022) (Judgment)]
25. While the general rule or requirement under the sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) is 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." The Respondent failed to provide details of the correct motor vehicles it claimed made the deliveries and yet such information was peculiarly within its knowledge. The Tribunal's finding that the Respondent had presented the correct vehicle registration details but that the Commissioner failed to counter-check them was also not supported by evidence because no such information was provided to the Commissioner. The Respondent further failed to prove that the Commissioner was wrong in its conclusion that the invoices were bogus as no deliveries were made.
26. Let me also comment on the Tribunal's holding that the Commissioner's disallowance of the purchases by comparing the vehicles' tare weight to the weight of the deliveries was "flimsy". Far from it. The Commissioner's apprehension on the veracity of the delivery documents furnished to it was not idle and the Respondent had a duty, underpinned by statute, to satisfy the Commissioner that the said documents matched the deliveries and that the vehicles used for the deliveries were of the requisite weight. The Commissioner is entitled to ask such questions and call for such documents that would enable it correctly assess the liability of a taxpayer. Thus, it is my finding that the Tribunal mischaracterized and denigrated the role and duty of the Commissioner in this case.

Disposition

27. For the reasons I have set out above, I allow the appeal as the Tribunal erred in its interpretation and application of sections 56 and 59 of the TPA and section 30 of the TATA and arrived at the wrong conclusion in this matter. They misapprehended the evidence and facts on record and arrived at a decision that was not supported by the facts warranting this court's intervention.
28. Consequently, I allow the appeal and set aside the judgment of the Tribunal dated 30th April 2021 with the result that the Commissioner's Objection Decision dated 10th May 2019 is upheld.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2022.

D. S. MAJANJA

JUDGE

Ms Mutai, Advocate, instructed by the Kenya Revenue Authority for the Commissioner of Domestic Taxes.

Mr Tugee instructed by Munyao, Muthama and Kashindi Advocates for the Respondent.

