



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

TAX APPEAL NO. E106 OF 2020

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

VERSUS

SHAILESH JAGJIVEN DATTANI.....RESPONDENT

(Being an Appeal from the Judgment of the Tax Appeals Tribunal

at Nairobi delivered by Honorable Tribunal on 28th August 2020

in Tax Appeals Tribunal Appeal Number 141 of 2018)

BETWEEN

SHAILESH JAGJIVEN DATTANI.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

MEMORANDUM OF APPEAL

The Appellant was dissatisfied with the Judgment and Orders of the Hon. Tax Appeals Tribunal, issued at **Nairobi Tax Appeals Tribunal Appeal Number 141 of 2018 on 28th August 2020**, and appeals against the whole of the said decision and consequential orders on the following grounds; -

1. The Hon. Tribunal erred in law in shifting the burden of proof to the Appellant contrary to **Section 30 of the Tax Appeals Tribunal Act** and in reading **Section 17 of the Value Added Tax Act** in isolation while ignoring the other relevant tax provisions.
2. The Hon. Tribunal erred in law in failing to find that the Appellant has the powers to raise additional assessments based on the available information.
3. The Hon. Tribunal erred in law in failing to find that the Respondent had failed to avail the documentation to dispute the additional Value Added Tax Assessments.

Reasons wherefore the Appellant prayed of orders that; -

- a. The Objection decision dated 4th July 2018 be upheld.
- b. The Respondent be ordered to pay Kshs.5, 789, 461 being VAT and Corporation Tax of Kshs.10, 855, 240 arrears owed to the Appellant.

RESPONDENT'S STATEMENT OF FACTS

The Respondent filed a response dated **24th January 2021** to the Appellants Memorandum of Appeal as follows; -

1. The suit originated from a demand letter dated 16th April 2018 demanding Kshs.16, 644, 711 being input VAT and Kshs.10, 855, 240 Corporation Tax for the period 2015 to 2017.
2. The Appellant issued additional assessments on the Respondent on 21st May 2018. The Respondent objected to the assessment providing detailed explanations and documents to support its objection as required under **Section 51 of the Tax Procedure Act**.
3. The Appellant rendered its decision on 4th July 2018 confirming the principal VAT amount of Kshs.5, 789, 461 and Corporation Tax of Kshs.10, 855, 240 in addition to penalties and interest. The Respondent filed an Appeal dated 3rd August, the matter was heard at the tribunal on 6th February 2020 and Judgment on the Appeal was delivered on 28th August 2020.
4. This is a case of the Appellant seeking to penalize the Respondent for non-compliance of its suppliers without a basis in law. Further to the foregoing, the Tax Procedures Act does not require the Respondent to provide details of the suppliers who the Appellant had fronted, accepted and registered as their agents for VAT purposes.
5. This realignment was a scheme to collect tax by which the Respondent would be assessed incorrectly. The Applicant in its mandate is the custodian of iTax, VAT and ETR regulatory systems. It was not the responsibility of the Respondent to produce a trader who is purportedly missing.
6. There is no provision in law that puts the tax obligation on the tax payer to inquire or verify the fact that the suppliers hold a valid PIN when the said registration system is housed by the Appellant. **Section 15 (1) of the Income Tax** states that

For the purposes of ascertaining total income of a person for a year of income she be deducted all expenditure incurred in that year of income which expenditure wholly and exclusively incurred by him in production of that income.

7. The Appellant had no basis in law to deny the Respondent the opportunity to claim input tax when apportioning the same on Corporation Tax. Paragraph 77 of the Tribunal's judgment states; as already discussed, **".....at the very core of the VAT system is the right to deduct input VAT. This requires certainty that a taxpayer who complies with the requirements of the VAT Act will be allowed to deduct the input VAT."** This was the case with the Respondent and hence justified to do so.
8. The grounds of Appeal relied upon by the Appellant fail to address the substantive issues raised by the Respondent at the Tax Appeals Tribunal. The grounds relied upon touch on technicalities surrounding the dispute. And should be dismissed with costs to the Respondent.

APPELLANT'S SUBMISSIONS

The Appellant submitted on three issues as follows;

Whether he Tribunal erred in shifting the burden of proof to the Appellant?

The Appellant submitted that the Tribunal erred in law in shifting the burden of proof to the Appellant which finding is bad in law as the law places the burden of proof upon the Respondent.

In *Primarosa Flowers Limited –versus- Commissioner for Domestic Taxes [2019] eKLR* held as follows; -

"In Mulherin vs Commissioner of Taxation [2013] FCAFC115 the Federal Court in Australia held that in tax disputes, the taxpayer must satisfy the burden of proof to successfully challenge income tax assessments. The onus is on the taxpayer in proving that assessment was excessive by adducing positive evidence which demonstrates that taxable income on which tax ought to have been levied."

In *Pz Cussons East Africa Ltd vs Kenya Revenue Authority [2013] eKLR*, the Court opined;

There is an assessment made by the Additional Commissioner upon the Appellant; it is perfectly clearly settled by cases such as Norman vs Golder ,26 T.C.293 that the onus is upon the Appellant to show that the assessment made upon the him is excessive and incorrect and of course he has completely failed to do so. That is sufficient to dispose of the Appeal, which I accordingly dismiss with costs.

See also *Metcash trading Ltd vs Commissioner for South African Revenue Service & Anor CCT3/00 [2000] ZACC21*; that posits **that the burden of proving the Commissioner wrong rests on the vendor...**

Section 56 of the Tax Procedures Act provides that; -

In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

Section 30 of the Tax Appeals Tribunal Act further provides;

In a proceeding before the Tribunal, the Appellant has the burden of proving

a. Where an appeal relates to an assessment, that the assessment is excessive; or

b. In any other case, the tax decision should not have been made or should have been made differently.

The Appellant submitted that the Tax Tribunal ignored relevant tax provisions in arriving at its finding on documentation at Paragraph 45 of its judgment where the Tribunal found that the Appellant was furnished with proof by the Respondent by a bundle of documents that indeed the Respondent purchased goods. The bundle of documents included purchase ledger, invoices, account statements and evidence of payments. This was *prima facie* evidence that the Respondent purchased goods.

In paragraph 47 of the Tribunal's judgment, the Tribunal found that the Respondent furnished documents as provided by **Section 17 of VAT Act** and the Appellant had the burden of proof to furnish information to prove that the invoices submitted by the Respondent were fictitious.

The Appellant submitted as a ground of appeal that the Tribunal did not take into account **Section 43 of Value Added Tax Act** that provides for taxpayer to keep full and true record of every transaction made for 5 years and lists the records required for safe custody and production.

The Appellant submitted that no stock movement record, some purchases did not have delivery notes accompanying the Invoices tabulated in the demand notice of 16th April 2018. The Appellant further submitted that the Respondent did not demonstrate how the goods alleged to have been purchased were ordered recorded and sold.

The Appellant relied on the case of *Tax Appeals Tribunal of 2018 Osho Drapers vs Kenya Revenue Authority* which held;

That for one to claim VAT, there must be a purchase of taxable supply. It is not enough to have documentation listed in Section 17 of VAT Act. The documentation must be supported by an underlying transaction and the taxpayer must furnish proof that there was actual purchase.

RESPONDENT'S SUBMISSIONS

The Respondent submitted that the Appellant made allegations of fraudulent evasion of VAT by the Respondent, either by missing trader or beneficiary.

The allegation of fraud has not been particularized and the burden of proof discharged by proving the allegation.

The Respondent submitted that at the core of VAT system is the right to deduct VAT and requires certainty that the taxpayer complies with requirements of the VAT Act and will then be allowed to deduct the input VAT.

The Respondent submitted that it conducted due diligence that the Suppliers had valid tax invoice, secure ETR receipt showing name & PIN of Supplier and conducted PIN checker on the I-TAX Portal. The Respondent received goods upon payment directly to the Supplier through known legal means bank transfer and had a successful input VAT in the monthly VAT Return through I- Tax.

The Respondent relied on the following cases;

John Mbogua Gitau vs Simon Parkyiet Mokare & 4 Others [2017] eKLR that held;

Allegations of fraud whether in a Constitutional Petition or in an ordinary civil suit had to be specifically pleaded and proved. That in a suit anchored on fraud, the acts of fraud must be particularized with precision and accuracy.

In *Bruce Joseph Bockle vs Coquero Ltd 2014*, the standard of proof where fraud is alleged in civil matters has been held to be higher than ordinary standard of balance of probabilities. The Appellant sought to show that the Respondent was involved in fraudulent evasion of Vat by suggesting that a 3rd party was involved in fraudulent evasion of VAT yet the said Party is not party to these proceedings.

The Appellant is constantly under the watchful eye of the Appellant to ensure correct and complete compliance. If at any point there are anomalies, then the Appellant who is the custodian of the I-tax System must explain the same.

The Respondent submitted that the Appellant further claimed that based on its Investigation Report, the Respondent was a beneficiary of a fraudulent scheme to evade payment of VAT. The Appellant did not avail the Report.

In *Samura Engineering Ltd & 10 Others vs Kenya Revenue Authority [2012] eKLR*, the Court held that the Business Intelligence Report available to the Respondent on 2nd June 2011 and formed the basis of search & seizure was to be placed in Court so that the Court may make its own assessment and conclusions to determine whether the action the Respondent took was reasonable.

Similarly, in the instant case, the Appellant did not present the Investigation Report which led to the conclusion that the Respondent was a participant or beneficiary of fraud for the Tax Tribunal to make its own assessment and conclusions whether the finding was reasonable.

DETERMINATION

After considering the memorandum of appeal and statement of facts and submissions by Counsel on behalf of parties, the issues on appeal are;

- a. Whether the Tribunal erred in shifting the burden of proof to the Appellant?
- b. Whether the Tribunal ignored relevant tax provisions in arriving at its finding on documentation.
- c. Whether the Tribunal ignored evidence and submissions of the Appellant in arriving at its judgment?

a. Whether the Tribunal erred in shifting the burden of proof to the Appellant?

The Appellant submitted that the Tribunal erred in law in shifting the burden of proof to the Appellant which finding is bad in law as the law places the burden of proof upon the Respondent and relied on the case of

Section 56 of the Tax Procedures Act & Section 30 of the Tax Appeals Tribunal Act speak to the burden of proof the Appellant ought to discharge to prove the tax decision incorrect or assessment incorrect. The evidence that ought to be tendered is stipulated by **Section 38 of the VAT Act** as follows;

Evidence In any proceedings, whether criminal or civil, under this Act—

(a) other than upon an appeal, a certificate from the Commissioner stating that any amount is due from any person by way of tax, or other liability under this Act, shall be conclusive evidence that the amount is due and payable from that person;

(b) the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax; and

(c) a statement by the Commissioner that a person is registered or is not registered under this Act, shall be conclusive evidence of the fact unless that person proves the contrary

The Appellant took issue with Paragraph 46 47 & 48 of the Tax Tribunal Judgment as follows;

Once a Taxpayer adduces evidence that discharges his burden, the burden shifts to the Commissioner to demolish such evidence. The Tax Tribunal relied on the Canadian case of *Hickman Motors Ltd vs Canada 1977 CanLII 357(SCC)*;

The taxpayer's initial onus of demolishing the Minister's exact assumptions is met where the Appellant makes out a prima facie case. Where the Minister's assumption is demolished by the Appellant, the onus shifts to the Minister to rebut the prima facie case made out by the Appellant and to prove the assumptions.....The law is settled that unchallenged and uncontrolled evidence demolishes the Minister's assumptions.

Although the current tax laws provide that the burden of proof falls lies with the Appellant to prove tax was paid or that the Respondent's assessment was wrong, it cannot have been the intention of the Legislature to put the taxpayer in a position where he would be required to produce any document that the Taxman require. In demanding the production of documents that are not prescribed by legislation, the Tax Authority should be guided by reasonableness, the nature and circumstances of the trader otherwise it would as it occasionally does, demand information ad nauseum.

Whereas, the Tax Appeals Tribunal was concerned with the unreasonable demand of documents by the Respondent, it was necessary to comply with mandatory provisions of law and ensured that the Appellant in the Tax Tribunal ensured that the documents were produced according to the statutory checklist and was sufficient to disclose the underlying transaction. Only then would, the burden shift in terms of the allegation by the Respondent of alleged fraud arise. In this case the statutory provisions override case-law as Section 17 & 43 of VAT Act are mandatory.

Whether the Tribunal ignored relevant tax provisions in arriving at its finding on documentation on whether the Appellant had furnished proof of purchase?

The Tax Law provides in **Section 17 (3) VAT Act** the prescribed documents to be produced & **43 (2) VAT Act** outlines the specific documents required and these documents ought to be in safe custody for the documents to be provided within 5 years.

The Respondent submitted that they produced bank records, deliver notes and payment records. The Tax Appeals Tribunal had set the threshold of a *prima facie* in claim for VAT as follows;

Tax Appeals Tribunal 159 of 2018 Osho Drapers vs Kenya Revenue Authority which held;

That for one to claim VAT, there must be a purchase of taxable supply. It is not enough to have documentation listed in Section 17 of VAT Act. The documentation must be supported by an underlying transaction and the taxpayer must furnish proof that there was actual purchase.

The Respondent produced documents but did not confirm that these documents supported underlying contract to prove actual purchase.

The Appellant admitted records/documents produced by the Respondent and questioned that there was no Stock movement record, some purchases did not have delivery Notes accompanying the invoices in the demand Notice of 16th April 2018.

Section 43 (2) VAT Act outlines specific documents for safe keeping and production as follows;

The records to be kept under subsection

(2) 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.

These requirements of safe custody and production of documents are stipulated by law and ought to be complied with by Claimants. The Respondent's letter of 16th April 2018 by the Appellant sought documents from the Respondent as listed and not farfetched or unreasonable. These documents are to confirm the underlying transaction of purchase.

This Court gleaned at the Respondent's Statement of Accounts by Diamond Trust Bank and there are business names of Suppliers /Purchasers outlined but there are numerous transactions that are based on Sale Receipt and Cash Sales. Therefore, even if as alleged by the Respondent who is in charge of I- Tax Portal and ETR cannot on the basis of Sale Receipts & Cash Sales in the absence of more documents to confirm the underlying transaction.

Secondly, the documents produced did not disclose in all transactions 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;

The Tax Tribunal at paragraph of the Judgment agreed with the Respondent on exposition of the law, that the right to claim input tax is hinged upon the underlying requirements of the transaction as outlined in the VAT Act being met. According to Section 17 (1) VAT Act, Input tax is deductible where it incurred on purchases that it made. Yet in the process although the Respondent produced documents they were not as required by law above and were not sufficient to prove purchases in all transactions.

“**input tax**” means—

- (a) tax paid or payable on the supply to a registered person of any goods or services to be used by him for the purpose of his business; and**
- (b) tax paid by a registered person on the importation of goods**

Therefore, this Court finds that the Respondent did not avail documents as required by **Section 17 (3) & 43 (2) of VAT Act**

And did not establish *prima facie* case to warrant payment of VAT by Respondent.

Section 17 (2) of VAT Act provides as follows;

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 or services to be used by him for the purposes of his business;

Was there fraudulent evasion of VAT as alleged by Respondent at the Tax Appeals Tribunal?

The Respondent during the Appeal proceedings before the Tax Appeal Tribunal raised at Pg 6, the issue/claim of missing trader and stated that investigations were conducted by Investigation and

Enforcement Department and were relying on the findings. In one case, the Respondent indicated that Butis General Suppliers alleged they sold the Appellant stationary but in their records, Butis General Suppliers have no record of such goods bought , imported or sold. Secondly, Invoices were produced and the owners of the Invoices were not confirmed. The invoices had no background of the purchases and no other documents were produced to back up these transactions.

The Court agrees with the Respondent in this Appeal that the Appellant ought to prove investigations and findings/outcome of the investigation to the Tax Appeal Tribunal and the Court to verify the claim or allegation of missing trader.

In this instance the burden of Proof did not shift but by virtue of the legal requirement that he who alleges must prove that is housed in **Sections 107 -109 of Evidence Act**, the Respondent in the Tribunal claimed fraud and therefore by virtue of the allegation, the burden was on the Respondent to prove. At this stage, whereas missing trader fraud may exist ,in this specific case it was not proved to be the case; instead the proved facts is/are insufficient documents to confirm payment of VAT and underlying transaction of purchase and supplies made. This would hardly be fraud which requires an ingredient of falsity or deceit which is not the case here or at least has not been proved.

The Appellant's claim that the Tax Appeals Tribunal failed to consider evidence and submissions of the Appellant that is not borne out by the record from the Tax Appeal Tribunal Proceedings and Judgment. The Proceedings Pages 6-11 is a detailed record of the Respondent at the Tax Appeal Tribunal. The Judgment Pg 10- 15 are the facts and submissions by the Respondent. The Tribunal in Analysis and Findings considered the Respondent's case but came to a different outcome as entitled to do.

DISPOSITION

- 1. The Appeal is allowed on the basis of Respondent's non compliance of Section 17 (3) & 43(2) VAT Act.**
- 2. The Respondent failed to prove claim of missing trader fraud in this instance.**
- 3. The Respondent shall comply within 90 days present relevant /requisite documents to Appellant.**
- 4. Each Party to bear its own costs.**

DELIVERED SIGNED 7 DATED IN OPEN COURT ON 30TH JULY 2021.

M.W.MUIGAI

JUDGE