



Commissioner of Domestic Taxes v Structural International Kenya Ltd (Income Tax Appeal E089 of 2020) [2021] KEHC 152 (KLR) (Commercial and Tax) (22 October 2021) (Judgment)

Neutral citation: [2021] KEHC 152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E089 OF 2020**

A MABEYA, J

OCTOBER 22, 2021

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

STRUCTURAL INTERNATIONAL KENYA LTD RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal delivered on 21/8/2020 in Tax Appeal No.280 of 2018)

JUDGMENT

1. The appellant issued an Objection Decision on 27/8/2018 against the respondent, confirming the corporation assessment tax amounting to Kshs. 23,955,137.93 being principal tax plus respective penalties and interest. The respondent appealed against the said decision in the Tax Appeal Tribunal (“the Tribunal”).
2. Vide its judgment dated 21/8/2020, the Tribunal upheld the respondent’s appeal and vacated the Objection Decision of the appellant.
3. Being dissatisfied with the judgment, the appellant appealed to this Court setting out 7 grounds of appeal which can be summarized into one, that is; that the Tribunal erred in failing to appreciate the effect of Section 59 of the [Tax Procedures Act](#) as to production of additional documents and the burden of proof.
4. The respondent opposed the appeal vide its statement of facts dated 2/10/2020. It contended that; it had supplied the documents from various suppliers that the appellant had requested for vide its cover letter of 24/8/2018; that the appellant failed to rely on any of the documents supplied to it by the



- respondent and further failed to identify any specific transaction that could otherwise authenticate its aspersions that the respondent was part of the missing traders' evasion scheme.
5. It was further contended that the Tribunal had found that the respondent had discharged its obligation of proving that there was a purchase by providing invoices and proof of payments for the supplies; that the appellant was seeking to penalize the respondent for non-compliance of its suppliers without any basis in law and that the *Tax Procedures Act* did not require the respondent to provide details of the suppliers who the appellant had accepted as their agents for VAT purposes.
 6. Further, that under section 56(2) of the *Tax Procedures Act* 2015 an appeal to the High Court and Court of Appeal is to be on questions of law only, yet the appellant had blatantly disregarded this by alleging facts that it had failed to prove before the Tribunal.
 7. Finally, the respondent contended that if VAT was lost, the proper parties to be involved ought to be the custodians of the ETR machines issued by the appellant and the appellant himself and not the respondent. That the respondent had successfully discharged its burden of proof. It was urged that the appeal be dismissed.
 8. The jurisdiction of this Court as a first appellate Court is well established as set out in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123*. The Court has to re-evaluate afresh the evidence tendered before the lower court and come to its own independent conclusions and findings.
 9. The respondent was assessed and after its objection was declined, it appealed to the Tribunal against the objection decision. It contended that it had tendered all the requisite evidence to prove that it had properly expended the deducted expenses. The appellant on the other hand contended that the respondent had wrongly deducted the expenses in respect of two entities whom it considered to be non-existent. That there were no goods that had been supplied to the respondent by the said two named entities in respect of which it had deducted expenses.
 10. The Court has carefully considered the entire record. The Tribunal found that the issue of VAT was not an issue before it. In this regard, the Court will not deal with that issue but will only deal with the issue as to whether the appellant's decision to disallow expenditure claimed by the respondent in its ascertainment of taxable income for corporation tax was correct.
 11. The appellant submitted that, despite various requests to the respondent to provide evidence to support its expenses, none was provided. That it failed to avail records to the satisfaction of the appellant and that the burden of proof was upon the respondent to challenge the income tax assessments.
 12. It was further submitted that, the respondent's local purchases were only supported by business and tax invoice (ETR) receipts but lacked other records such as delivery notes and stock records. That cash payments were recorded in the respondent's books whilst no actual cash pay-out was made to conceal the trail despite the huge amounts. That the appellant had disallowed the said purchases because the suppliers were entities which had been investigated and found to be involved in illegal VAT refund scheme of printing and selling invoices without actual supply of goods.
 13. To support his submissions, the appellant relied on the cases of, *Silver Chain Ltd v. Commissioner of Income Tax & 3 Others [2016] Eklr*, *Okiya Omtatab Okoiti v. Attorney General & Anor [2020] Eklr*, *Sheria Sacco Society Ltd v. Commissioner of Domestic Taxes [2019] Eklr* and *Mercy Kirito v. Beatrice Nkatha Nyaga & 2 Others [2013] Eklr*.



14. On the other hand, the respondent submitted that it had made adequate responses and availed relevant documentation in satisfaction of the appellant's enquiries. It had carried due diligence on its suppliers. That the appellant had not proved the alleged fraud. That the appellant's decision was irrational and illogical which amounted to the appellant having abused its discretion.
15. In support of its submissions, the respondent relied on the cases of; *John Mbogua Getao v. Simon Parkoyiet Mokare & 4 Others [2017] Eklr*, *Bruce Joseph Bockle v. Coquero Ltd [2014]*, *Salim Juma Oditi v. Minister for Local Government & Others [2008] Eklr* and *Republic v. Commissioner for Income Tax & Another Ex-parte Stockman Rozen (K) Ltd [2015] Eklr*.
16. Section 15(1) of the *Income Tax Act* provides, inter-alia, that: -

“For the purpose of ascertaining the total income of any person for a year of income there shall, subject to section 16 of this Act, be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that income ...”
17. Pursuant to the foregoing provision, the respondent was entitled to deduct all the expenditure it properly incurred in the production of its respective income. The issue is whether the expenditure it deducted was deductible. The respondent contended it was entitled to do so while the appellant contended that there was no supply at all for which any expenses could be deducted.
18. Section 56 of the *Tax Procedures Act* provides:

“In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is wrong”.
19. Further Section 30 of the Tax Appeal Tribunal Act provides: -

“In a proceeding before the Tribunal, the appellant has the burden of proving where an appeal relates to an assessment, that the assessment is excessive.”
20. On the other hand, Section 59 of the *Tax Procedures Act* gives power to the appellant to request production of records and additional information for the purpose of obtaining full information in respect of tax liability of any person.
21. It is clear from the foregoing provisions that, the law burdens the tax payer with the burden of rebutting the tax authorities' decision on the tax payer's tax liability by way of tax decision or an assessment. Further, if the tax authority is not satisfied with the information and documentation supplied by a tax payer, it has a discretion to demand for additional information as well as documents.
22. I think it is important at this juncture to make an observation on the Tribunal's reliance on the case of *Shreeji Enterprises (K) Ltd v. Commissioner of Investigations and Enforcements Tax Appeals No. 58 and 186 of 2019*. In that case, the Tribunal held, inter-alia, that the appellant was not entitled to request for any other documents over and above those set out in section 17 (3) of the *VAT Act*.
23. With greatest respect, that was a wrongful appreciation of the law. Firstly, the provisions of the tax laws are not to be interpreted in isolation but in conjunction with other provisions of the tax laws. See *Okiyah Omtatah Okoiti v Attorney General & Another [2020] Eklr*, per Weldon J.
24. The *Tax Procedures Act*, 2015 is the statute that was enacted to harmonize and consolidate the procedural rules for the administration of tax laws in this country. Section 59 thereof provide to the



- effect that the Commissioner has the power to call for production of records as well as information that he may require for tax purposes. Those documents and information is not limited and to the extent that the shreeji case sought to limit the same, that was contrary to law and is of no effect.
25. The reason for such far reaching legislation on information and document requirement by the tax laws is well founded. This country's tax regime is one of self-assessment. A tax payer assesses self and pays what he considers to be the tax payable to the authorities. The tax authorities only come to assess the tax payer months, if not years, later. It is the tax payer who knows and has in his possession the evidence, by way of documents and information, that relates to his taxable income. The Commissioner only comes in to satisfy himself that the returns made by the tax payer are correct. It is for this reason that the law permits the Commissioner to call for further and additional documents and/or information in ascertaining the taxable income of a tax payer.
 26. The foregoing leads to the second reason why the Tribunal's holding in the Shreeji Case (*supra*) was wrong. This is the tax payer who has all the evidence and information regarding his income and therefore, the one burdened with the burden of disapproving the Commissioner's decision.
 27. In the present case, the appellant assessed the respondent and informed it that some of the expenses deducted were in respect of alleged supplies from suspect suppliers. He specified the suspect suppliers as Ramsa Steel & Hardware Trading ("Ramsa") and Arav Hardware & Glass Enterprises ("Arav"). He informed the respondent that, he believed that the said entities never existed and only supplied air and not goods. That they had been involved in the business of only selling ETR invoices.
 28. In response the respondent produced ETR tax invoices, delivery notes and other documents. By doing so, the evidentiary burden of proof shifted to the appellant. To rebut the same, the appellant informed the Tribunal that, he had carried out investigations and established that; the suspect entities were shown to be supplying goods that they were not registered for nor were not importing, only existed on paper, had suspended their Pin Numbers and none came forward to complain. That he had therefore concluded that these entities, "missing traders" were not only a sham but were involved in a fraud of printing and selling ETR Vat invoices to traders such as the respondent. That he had therefore requested for more documents and information from the respondent to prove that there were goods were actually supplied but the respondent failed to provide the same.
 29. Having tendered such information and evidence before the Tribunal, the evidentiary burden of proof shifted back to the respondent to support its invoices and other documents to show that, it had not bought the alleged invoices but that the said invoices were actually issued in the ordinary course of business transactions with the subject entities.
 30. What the respondent did was to tender huge documents in its appeal before the Tribunal. The Tribunal found that these documents had discharged the respondent's burden of proof. The respondent contended before me that the present appeal was defective as it was not based on matters of law but facts that the appellant had failed to prove before the Tribunal.
 31. In [Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga & 2 Others \[2013\] Eklr](#), the Court of Appeal held: -

"An appellate court will not ordinarily differ with the findings on a question of fact, by a trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law. This is a demonstration that there will be occasion when facts or evidence matter in determining a question of law".



32. In the present case, the Court has considered the determination of the Tribunal and found that it was not based on evidence before it. That is a question of law which squarely falls for the determination by this Court.
33. The Court, as already stated, has considered the documents which the respondent produced before the Tribunal. What was before the Tribunal was whether the assessment by the appellant was proper. Whether there was evidence that the ETR Invoices produced by the respondent were in respect of actual goods supplied. The only dealings that were questioned by the appellant and which the respondent was required to prove to be genuine were those that related to the two entities, Ramsa and Ava.
34. However, what the respondent did was to produce many documents relating to 10 other entities. There were documents relating to Orion Hardware & Renovaters, Punjani Electrical Ltd, Kay Construction Company, Bhuva Transporters Ltd, Juja Blocks Ltd, Ephamu General Merchants, Ideal Manufacturing, Muhli Transporters, Yogi Corp (EA) Ltd and Tononoka Rolling Mills Ltd.
35. For Ramsa, the respondent produced invoices, delivery notes and an excel Ledger Account. As for Avav, the respondent only produced invoices and excel Ledger Account.
36. There was marked difference in the documentation relating to the other unquestioned suppliers (set out in paragraph 34 above) from those of the suspect entities. Whilst the delivery notes for the other suppliers were signed for, none of the delivery notes for Ramsa was signed nor dated. There were no delivery notes for Avav.
37. While most of the other suppliers had purchase orders, all the orders for both Ramsa and Avav were verbal. The invoices for Ramsa were 39 in number and dated between 11/5/2016 and 15/9/2016. Those for Avav totaled 45 and were between 5/5/2016 and 30/9/2016.
38. The excel accounts that were produced for the two entities were for Equity Bank and Bank of Baroda. They were for the period 7/9/2016 to 20/11/2017 for Avav and 7/9/2016 to 7/6/2017 for Ramsa.
39. From the foregoing, it is clear that there were invoices for the period May, 2016 and 14/9/2016 in respect of the said entities that were not covered by the Ledgers that were produced before the Tribunal. Further, the Ledgers did not show for what purpose or in respect of which invoice the alleged payments were being made. The respondent did not attempt to match the alleged cash payments with any of the invoices.
40. It should be recalled that, the appellant complained that it had requested for more information and documents to verify the alleged supplies but none was forthcoming from the respondent. This included the cashbook which was very crucial in this case because the transactions between the respondent and the suspect entities were alleged to have been on cash basis. Failure to produce the cash book, notwithstanding the huge sums involved, in my view was against the respondent.
41. In view of the foregoing, the Tribunal held without evidence that the respondent had discharged its burden of proof. It further erred when it held that the appellant had failed to point out which of the respondent's documents was unsatisfactory.
42. The record would show that, when Mr. Otieno, Learned Counsel for the appellant had started to point out the shortcomings in the respondent's documents, the Chairman of the Tribunal advised him that his time was over. (It is clear at pgs. 29 and 30 of the typed proceedings of the Tribunal that when Mr. Otieno, Advocate had only explained the entry for 22/7/2016, Invoice No. 1836 for Avav, the Chairman informed him that his time was up).



43. Here, I will reiterate what the Court stated in Commissioner of *Domestic Services v Galaxy Tools Limited* [2021] Eklr: -

“What the respondent had done in producing the invoices, the delivery notes and payment schedules was only prima facie evidence of purchase. On producing the said documents, the evidentiary burden of proof shifted to the appellant. The appellant in answer not only queried the said documents but informed the Tribunal that; he had carried investigations on the alleged suppliers and concluded that they never existed, that there was no supply of any goods at all. That the documents produced did not contain critical details to support any reasonable commercial transaction. All this was laid bare before the Tribunal.

On the foregoing, the evidentiary burden of proof shifted back to the respondent to show that its documentation was legitimate. This would have been by production of other transactional documentation to support the legitimacy of the alleged transactions. It is at that juncture that sections 59 of the *Tax Procedures Act* and section 43 of the VAT Act kicks in”.

44. In the present case, with all the discrepancies in the documentation of the respondent, the evidentiary burden had shifted back to it to prove that it had not purchased the subject ETR invoices from the suspect entities, but that they were as a result of genuine commercial transactions undertaken in the course of its business.

45. The ETR Invoices and ledges Accounts were not evidence enough to prove that there had been genuine commercial transactions between the respondent and the suspect entities. There needed to be more to prove that fact.

46. In the view of this Court, the Tribunal failed to consider the evidence before it. It casually looked at the record and decided to condemn the appellant. It failed to evaluate the evidence produced before it but casually held that the respondent had discharged its burden of proof which it had not.

47. A good example is the holding that there was evidence of payment from Equity Bank and Bank of Baroda. With due respect, the Ledgers that were produced never specified for which invoices the entries made therein were for. There were invoices in respect of the suspect entities which were issued outside the period covered by the said Ledgers as already stated above, ie between May, 2016 and 14th September, 2016. What was there to verify them? Nothing. Yet the Tribunal was of the view that the burden of proof had been discharged.

48. For the avoidance of doubt, the Tribunal is reminded that in matters where the issue is supply of goods, be it for VAT purposes or Corporation Tax, the burden is always on the trader/tax payer to show that, the documentation set out in the statute and in which he relies on arose out of a commercial transaction. Period. If additional documents, which would be reasonably expected to be in his possession is requested for to verify the alleged transactions, he should produce the same to the commissioner. That is what is expected of a keen and diligent trader.

49. I think I have said enough to show that this appeal is meritorious. I allow the same with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE

