



**Commissioner of Domestic Taxes v One Stop Trading Limited (Income Tax Appeal E098 of 2020) [2021] KEHC 130 (KLR) (Commercial and Tax) (15 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E098 OF 2020  
A MABEYA, J  
OCTOBER 15, 2021**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**ONE STOP TRADING LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment and decree of the Tax Appeals Tribunal in Nairobi on 6th August 2020 in TAT No. 328 of 2018)*

**JUDGMENT**

1. The appellant assessed the respondent's tax returns for the period between June, 2016 and November, 2017. Upon conducting investigations, the respondent unearthed a major tax evasion scheme whereby individuals would register companies which turned out to be briefcase enterprises that were not trading in any supplies. They would print and sell Electronic Tax Register (ETR) invoices without actual supplies.
2. The invoices would then be sold to traders who would in turn claim inputs with those invoices, with the objective of evading paying VAT on their sales.
3. Vide a letter dated 16/4/2018, the appellant demanded from the respondent Kshs. 7,963,769/= for VAT and Kshs. 10,994,327/= for Corporation Tax. The respondent objected to the tax assessment vide its letter dated 4/6/2018. Vide a letter dated 13/7/2018, the appellant requested for various documents to enable it evaluate the objection.
4. On 23/8/2018, the respondent availed those documents but the appellant demanded for additional documents which were supplied on 11/9/2018. The appellant however, rendered its objection decision



- on 12/9/2018 and rejected the objection on the grounds that there was no supply of taxable goods that was made to the respondent.
5. The respondent appealed against that decision to the Tax Appeals Tribunal (“the Tribunal”). The Tribunal delivered its decision on 6/8/2020 upholding the appeal. The appellant was aggrieved by that decision and has preferred this appeal.
  6. The appellant set out 4 grounds of appeal in its Memorandum of Appeal dated 24/9/2020. The same can be summarized into 2, viz, that; the tribunal erred in failing to appreciate that input tax under section 17(1) of the *VAT Act*, 2013 is only deductible where there is a taxable supply of goods and the power of the appellant to demand additional information; secondly, that the tribunal erred in finding that the respondent had discharged its legal burden under section 17 (1) of the VAT and the Regulations.
  7. In opposition to the appeal, the respondent filed its statement of facts dated 1/10/2020. It was its case that it had fully demonstrated that it had made supplies hence had a right to the input tax as claimed. That the Tribunal had correctly found that the appellant had not proved the alleged fraud.
  8. The respondent further contended that the ‘missing traders’ actually existed and they did supply goods to the respondent, issued invoices, delivery notes and received payments majority of which was through direct bank transfers. That the respondent made adequate responses and availed relevant documentation including invoices and proof of payments for the supplies in support of its claim. Finally, that the Tribunal correctly found that the liability to pay taxes relating to a taxable supply rested with the person making the supply as per section 5 (3) of the VAT Act.
  9. The parties filed their respective submissions which the Court has carefully considered. The appellant submitted that much as the respondent made a claim for input VAT, it only availed invoices which was not sufficient proof of the supply of goods. That to prove that a supply had occurred, the respondent ought to have submitted additional information including bank account statements, stock control records, stock movement records, delivery notes and any other available documents to show that the purchase occurred and the goods were subsequently transferred and reached the respondent.
  10. That the respondent was under a duty to provide that information and the Tribunal wrongfully held that the request for documentation was an ‘undue burden on the tax payer’. That section 56(1) of the *Tax Procedures Act* placed the burden of proof on the respondent. That the documents provided by the respondent under section 17 of the VAT Act were not enough.
  11. That under paragraph 7 (2) to (4) of the VAT Regulations, the evidence given by the respondent had to be to the satisfaction of the appellant, hence the Tribunal wrongly limited the appellant’s power to demand for additional information.
  12. On the other hand, the respondent submitted that it had complied with all that was requested by the appellant. That the appellant was satisfied with the documents and made no further requests for additional information. That the appellant made an unsupported finding that there was no supply to the respondent by the traders. That it had made a prima-facie case and the burden to prove for lack of supply of goods shifted to the appellant. That the appellant failed to prove fraud.
  13. The Court has carefully considered the record and the submissions of the parties on record as well as the impugned judgment. There are two main inter-related issues arising from the grounds of appeal. The first relates to the production of additional information, and the second relates to the burden of proof. These two issues are related to the provisions of sections 56 & 59 of the *Tax Procedures Act*, section 43 of the VAT Act and section 30 of the Tax Appeals as to the production of additional information and documents, and the burden of proof.



14. The dispute herein relates to the credits for VAT input which the respondent had claimed. Section 17 of the VAT Act provides for credit for input tax. Sub-section (3) thereof provides for the documentation that is required for purposes of the credit on input tax. It provides: -
- “(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. a credit note in the case of input tax deducted under section 16(2); or
  - e. a credit note in the case of input tax deducted under section 16(5)”.
15. In paragraph 31 of the judgment, the Tribunal found that the respondent had adduced evidence to support its entitlement to input tax. That the appellant visited the adverse effects of the suppliers on the respondent as they had failed to declare their sales in their self-assessment. That the suppliers fault could not be used as a ground to deny the respondent input tax.
16. The Tribunal further found that the respondent did not produce any evidence to support its claim of fraud. That the appellant was the only body mandated with providing PIN and register persons for purposes of VAT, hence was best placed to curb any illegal printing and selling of ETR's. In this regard, it ought not to have imposed the responsibility on the respondent. That the respondent bore the burden of proof for fraud in accordance to section 107 of the [Evidence Act](#).
17. This country's tax regime is based on a system of self-assessment whereby the tax payer assesses and declares what he deems to be taxable income and pays tax thereon. The tax authorities thereafter ascertain what the taxable income should be. It is upon the tax payer to disprove the assessment. As such, the law of evidence as we know it changes, as now the tax payer is the one to proof the tax authority's assessment to be wrong.
18. Consequently, in the present case, in line with section 17(3) of the VAT Tax, the burden laid with the respondent to produce documentation to support its claim for VAT. From the correspondence produced, the respondent produced all the documents requested for by the appellant. It produced business and tax invoice receipts. I should point out here that, the request for more information and documentation was lawful and in accordance with sections 59 of the [Tax Procedures Act](#) and section 43 of the VAT Act.
19. None of the documents requested by the appellant that the respondent failed to supply. The only documents that were not supplied were the stock movement records. In the letter dated 11/9/2018 by the respondent's advocates, they supplied to the appellant invoices together with mode of payment and the trial balance that had been requested for. They then indicated, "As for the stock movement records, these were back to back sales for which we can provide copies of the sale invoices if requested for".
20. This letter was then immediately followed by the objection decision of 12/9/2018 stating that there had been no taxable supply. In the objection decision, the appellant did not indicate that he had rejected the documents supplied. He did not indicate that the documents supplied were not sufficient. Further, he did not state why he thought there had been no taxable supply.



21. This Court has previously ruled that, for claims under section 17 of the VAT Act, it is upon the tax payer to prove that there had been a taxable supply. The production of the documents set out in that section are only prima facie evidence of supply. If the appellant requires additional information to verify the said documents, he is entitled to the same as of right.
22. Section 7(2) of the VAT Regulations provides for provision of ‘satisfactory evidence’ to support a claim for input tax, and section 7(4) of the Act provides for the appellant’s power to demand for further evidence for a transaction.
23. Once the tax payer produces to the appellant the requested information and documentation, the tax payer then can be said to have discharged his burden and the evidentiary burden then shifts to the appellant to support his assessment. The basis for this is because, a tax payer is required to be a keen trader who should keep his documentation for all commercial transactions that he undertakes for tax purposes.
24. In the proceedings before the Tribunal, the appellant contended that the rejection of input tax was on the basis of lack of sufficient evidence to proof existence of supply of goods. Once the appellant had enough basis to doubt the existence of the suppliers, the respondent was called upon to proof to the appellant that it actually traded and received goods from the suppliers.
25. The record shows that the respondent produced all the documents that the appellant demanded. There was nothing that was requested that was not supplied to the appellant. The only issue the appellant raised was that the ‘missing traders’ either did not file any VAT returns for which the respondent claimed input, or that the returns filed by the supplier was less.
26. With due respect, it was not for the respondent to ensure its suppliers complied with the law, but the appellant. The respondent can only do so much ie. provide and supply to the appellant that which is in its possession and power. This it had done.
27. The appellant having not questioned the veracity of all or any of the documents supplied to it by the respondent, with utmost respect, its insistence on the existence of a fraud in which the respondent might have participated could not arise. There was no evidence that was produced to link the respondent to the alleged fraud. In this regard, I hold that there is nothing on record to suggest that the Tribunal misdirected itself on the burden of proof.
28. Accordingly, I find that the appeal lacks merit and I dismiss the same with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF OCTOBER, 2021.**

**A. MABEYA, FCI ARB**

**JUDGE**

