



Feradon Associates Limited v Commissioner of Domestic Taxes (Income Tax Appeal E005 of 2021) [2024] KEHC 2356 (KLR) (Commercial and Tax) (8 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E005 OF 2021**

A MABEYA, J

MARCH 8, 2024

BETWEEN

FERADON ASSOCIATES LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

1. The respondent audited the affairs of the appellant for the period between January 2012 and September 2015. Pursuant thereto, he issued an assessment on 24/5/2016 for Kshs. 103,943,096/-. The assessment was for Corporation Tax, PAYE, VAT and Withholding Tax together with interest.
2. The appellant objected to the assessment on 23/6/2016 and at the same time made an application to correct an error under section 90 of the *Income Tax Act*. The appellant filed for amendment of self-assessment returns upon correction by the respondent.
3. The respondent issued the objection decision on 22/8/2016 whereby he confirmed an assessment of Kshs 90,375,490/- being Corporation Tax and VAT including penalties and interest. Dissatisfied with the objection decision, the appellant lodged an appeal at the Tax Appeals Tribunal on 29/9/2016. The Tribunal dismissed the appeal vide its judgment made on 9/10/2020 reviewed on 7/9/2020.
4. Being aggrieved by that decision, the appellant preferred this appeal via a Memorandum of Appeal dated 27/1/2021. The appeal is founded on four grounds of appeal which can be summarized into two as follows: -
 - a. That the Tribunal erred in law and in fact by holding that VAT input claims under section 17 ought to be verified.



- b. That the Tribunal erred in failing to evaluate the evidence before it and determining issues that did not form part of the respondent's objection decision.
5. The appeal was opposed by the respondent vide a statement of facts dated 9/3/2021. The respondent contended that the Tribunal did not err in placing an obligation for verification of inputs in line with section 17 of the VAT Act. That there was no error on the part of the Tribunal in addressing the issues before it and on its mandate under section 12 of the Tax Appeals Tribunal Act.
 6. The appeal was canvassed by way of written submissions. The appellant's submissions were dated 4/5/2023 whereas the respondent's submissions were dated 15/7/2023.
 7. It was the appellant's submission that, section 17 of the VAT Act imposed an obligation on the appellant to ensure that the expenses which are incurred wholly and exclusively to make supplies ensure that the input tax claimed is for a period of 6 months. That under section 17 of the Act, the tax payer was under no obligation to prove that the ETR provided was genuine and therefore the Tribunal erred in broadening the scope of the law.
 8. That the respondent had the right to request for more documents but he did not do so but chose to give an objection decision. It was further submitted that all the documents requested by the respondent were availed and this fact was not disputed by the respondent.
 9. On the part of the respondent, it was submitted that it was not enough to provide documents but that there should be evidence of a transaction that took place to establish that there was an actual purchase undertaken. That the burden of proof was on the appellant as the respondent had demonstrated that the pin numbers on the ETRs differed with those of the vendor.
 10. In this regard, the respondent submitted that the Tribunal correctly held that the documents adduced by the appellant did not support a purchase. The respondent submitted that some of the expenses declared by the appellant were fictitious as they were not supported by genuine ETR receipts. That the genuineness of the invoices was an issue for determination by the Tribunal.
 11. I have considered the record, the response and the written submissions. The core issue is with respect to section 17 of the VAT Act whereby the appellant faulted the Tribunal for broadening the scope of the said section. According to the appellant, it had no duty to conduct due diligence on the suppliers and in this case its obligation under section 17 of the Act was to produce the ETR receipts.
 12. On his part, the respondent contended that some of the ETR receipts that were provided by the appellant were not genuine and that therefore, the purchases were unsupported.
 13. Section 17 of the VAT Act provides for credit for input tax. Sub-sections (1) and (2) provides as follows:
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 - (1) Subject to the provisions of this section 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), 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. 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.”

14. A simple reading of section 17(1) of the [VAT Act](#) reveals that input tax is deductible where it is incurred when of taxable good/service is made. This is to say that in order to deduct input tax, a trader must have made actual purchase of taxable supplies. For this reason, a tax payer is required to furnish proof of actual purchase.
15. In the instant case, the appellant had claimed input VAT and produced ETR receipts to support the claim. On the other, the respondent disallowed the documents stating that the same was not genuine.
16. It is not disputed that section 56 of the [Tax Procedures Act](#) and section 20 of the [Tax Appeal Tribunal Act](#) places the burden of proof on the taxpayer. When the appellant produced the ETR receipts, it discharged its evidentiary burden of proof. But when the respondent challenged the authenticity of the documents supplied by the appellant and stated that the ETR receipts were not genuine, the evidentiary burden shifted to the appellant to demonstrate that the same were acquired out of genuine commercial transaction. Based on this, the appellant was required to give additional information and documents to prove that supply actually happened.
17. In this regard, I do not fault the Tribunal for holding that the transactions ought to be supported by an underlying transaction and that therefore, the taxpayer was required to discharge the burden of proof by showing that the documents were genuine.
18. On the second ground, the appellant faulted the Tribunal for determining issues that did not form part of the objection decision. The appellant’s contention was that, the memorandum of appeal filed before the Tribunal did not raise the issue of the authenticity of the invoices supplied.
19. In its judgment, the Tribunal framed issues based on the arguments raised by all the parties in the appeal before it. Issues for determination are ordinarily to be framed by the court from the allegations made in the pleadings or documents lodged by the parties in a suit.
20. In [Devjibhai Bhimji Sanghani & Another v National Bank of Kenya Ltd](#) [1981] eKLR the court observed that: -

“It has been said again and again by the courts of this country, that the primary responsibility to ensure that issues are framed lies on the court, although advocates, too, have a duty to see that this requirement is met. It is therefore the duty of the court to frame such issues as may be necessary for determining the matter in controversy between the parties. In this respect, a court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the real dispute. My own independent research unearthed the case of *Odd Jobs v Mubia*, (1970) EA. 476, in the former court of appeal for East Africa, in support of this proposition. And that issues may go beyond the pleadings, is clear from *Darcy v Jones* (1959) EA 121. Moreover, issues may be amended from time to time as it may appear just to do so.”
21. From the forgoing, in order to ascertain whether input VAT could be allowed, the Tribunal had to establish whether the documents listed in section 17 of the [VAT Act](#) had been availed. The Tribunal addressed the issue of the genuineness of invoices as the same was pertinent in proving the appellants fails.
22. Accordingly, the Court finds that the appellant has not made out a case to warrant the upsetting of the Judgment of the Tribunal dated 9/101/2020. I find no merit in the appeal and the same is dismissed with costs.



It is s decreed.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

A. MABEYA, FCIArb

JUDGE

