



REPUBLIC OF KENYA



**KENYA LAW**

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**Commissioner of Domestic Taxes v Saj Ceramics Limited (Income Tax Appeal E093 of 2022)  
[2024] KEHC 3641 (KLR) (Commercial and Tax) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3641 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E093 OF 2022  
JWW MONG'ARE, J  
APRIL 15, 2024**

**BETWEEN**

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

**AND**

**SAJ CERAMICS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein issued additional Value Added Tax (VAT) assessments totaling Kshs.30,745,278.78/= to the Respondent for January 2018 to May 2018, citing inconsistencies between input VAT claims and output VAT declared by suppliers. The Respondent objected to these assessments on iTax, stating that all input VAT claims were valid and any discrepancies were promptly corrected. After review, the Appellant partially allowed the objection, vacating an assessment of Kshs.29,295,565.40/= but rejecting invoices worth Kshs.1,449,713.38/=. The Respondent paid VAT on some invoices but disputed Kshs.1,329,772.38/=. The Respondent then filed Tax Appeal No. 465 of 2021// at the Tribunal challenging the Appellant's decision.\*\*
2. This Appeal therefore arises out of the judgment of the Tribunal at Tax Appeal Tribunal at Nairobi in Income Tax Appeal No. 465 of 2021 dated 11<sup>th</sup> March, 2022 wherein Respondent's appeal was allowed and Appellant's Objection Decision dated 21<sup>st</sup> June, 2021 demanding Kshs.1,449,713.38/= was set aside.
3. The Appellant filed the Memorandum of Appeal dated 6<sup>th</sup> December 2022 against the whole of the said decision on the following grounds:-
  - a. The Tax Appeal Tribunal erred in finding that the Respondent had discharged its burden of proof in establishing that its input VAT claim was valid.



- b. The Tax Appeal Tribunal erred in setting aside the Appellant's Objection Decision dated 21<sup>st</sup> June, 2021 demanding Kshs.1,499,713.38/=.
4. The Appellant prayed for orders that:-
  - a. The Appellant's Assessment order dated 15<sup>th</sup> November 2019 and the objection decision dated 21<sup>st</sup> June, 2021 demanding Kshs.1,499,713.38/= be found to be proper in law and upheld.
  - b. The Court finds that the Respondent did not properly discharge its burden of proof in establishing that its VAT claim was valid.
    - c. The costs of this Appeal; and
    - d. Any other remedies that the court deems just and reasonable.
5. The Respondent filed the Statements of Facts dated 15<sup>th</sup> March 2023 and stated that it had provided all the original tax invoices together with ETR receipts and even went further to provide supporting documentation such as excerpts of its bank statements, withholding tax certificates and ledger accounts. The Respondent therefore discharged its burden of proving that it was entitled to claim input VAT as such the burden shifted to the Appellant to produce evidence challenging the same.
6. In submission, the Appellant maintained that Section 23 [Tax Procedure Act](#) as read with Section 43 [VAT Act](#) provides for the request for extra documentation over and above the invoices. Delivery notes, purchase orders and confirmation notes from Respondent's suppliers are records the Respondent would ordinarily have in its possession while carrying out its business. That the request by the Appellant in demand of these documentation to support the prima facie evidence in form of invoices provided by the Respondent was legal and reasonable. Therefore, it was incumbent upon the Respondent to comply with the Appellant's demand by submitting the documentation for ease of execution of Appellant's mandate.
7. In contention, the Respondent submitted that Section 43(2) of the [VAT Act](#) provides a list of the records to be kept by a taxpayer which list does not indicate that delivery notes, purchase orders or confirmation notes are to be kept. The provision provides that other than the documents listed in that section, a taxpayer is to keep such other accounts or records as may be specified in writing by the Commissioner. The Appellant did not specify in writing that these records should be availed.
8. Having considered the Appeal, submissions as well as the record of Appeal; I find that the issue that arises for determination is "whether the Tax Appeal Tribunal erred in finding that the Respondent had discharged its burden of proof in establishing that its input VAT claim was valid?"
9. The court is cognizant of the requirement that under Section 56(2) of the [Tax Procedures Act](#), an appeal to the High Court or Court of Appeal is on questions of law only.
10. It is not in dispute that the Respondent was allowed to claim input VAT under Section 17(1) of the [VAT Act](#) which provides:-
  - "(1) Subject to the provisions of this Act 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.”

11. Further to the above, Section 17(3) of the [VAT Act](#) provides a list of the documentation required for a claim on input VAT as below:-

The documentation for the purposes of subsection (2) shall be—

- (a) an original tax invoice issued for the supply or a certified copy;
  - (b) a customs entry duly certified by the proper officer and a receipt for the payment of tax;
  - (c) a customs receipt and a certificate signed by the proper officer stating the amount of tax paid, in the case of goods purchased from a customs auction
  - (d) a credit note in the case of input tax deducted under Section 16(2); or
  - (e) a debit note in the case of input tax deducted under Section 16(5).
12. *Vide* a letter dated 21<sup>st</sup> June 2021, following a review of the documents submitted by the Respondent, the Appellant partially accepted the Respondent’s objection by allowing input tax that was fully supported while disallowing input tax that was not fully supported.
13. The Appellant contended that the Respondent having failed to provide supporting documents to support its objection, the Respondent had failed to discharge its burden of proof in proving that the Appellant’s tax decision was incorrect as provided under Section 56(1) of the [Tax Procedures Act](#) which provides that:-
- “In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”
14. The import of the above provision is that it is for the tax payer in any proceeding to prove that the tax decision is incorrect or assessment is excessive. According to the Tribunal, the Respondent discharged this burden as evidenced by tax invoices and banking slips as well as the withholding tax certificates supplied to the Commissioner during the audit process and that based on them, the Respondent had dispensed with its duty in law for deduction in respect of input tax.
15. The Tribunal in its holding stated that in demanding production of documents the Appellant should be guided by reasonableness to the extent that when it demands for documents that are not prescribed to be kept in law; it should be guided by industry norms and ask for documents ordinarily kept by particular business and not what the taxman in its view believes should have been kept.
16. The Appellant submitted that the invoices as were submitted did not meet legal threshold as they were not similar to the ones issued by the supplier. Therefore, the Appellant requested further documentation from the Respondent and these included: delivery notes, purchase orders and confirmation notes from its suppliers as confirmation for the transactions.
17. The court disagrees with the Tribunal on its finding that the documents sought by the Appellant from the Respondent were not documents that would ordinarily be kept the taxpayer. The requirement to produce further documents stems from a statutory and legal obligation required of the Respondent to adhere to Section 23 [Tax Procedures Act](#) as read with Section 43 of the [VAT Act](#). Under these provisions, the Respondent is legally bound to keep all records of every transaction it made and further avail all these records to the Appellant for the purpose of ascertain liability and compliance thereof.



18. The Appellant has a right to satisfy itself the documents presented to it by the taxpayer are capable of discharging the burden imposed on it. In the instant case once, the Appellant rejected the Respondent's documents, the burden shifted back to the Respondent, as the taxpayer, to prove that the said documents are genuine.
19. The court reiterates the holding in *Republic v Kenya Revenue Authority; Proto Energy Limited* (Exparte) (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) where the court stated that:-

“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 taxpayers' evidence must meet this minimum threshold.

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. It is thus the courts finding that the Tribunal erred in its interpretation and application of Sections 56 and 59 of the *Tax Procedures Act*, Sections 17 and 43 of the *VAT Act*, 2013 and Section 30 of the *Tax Appeals Tribunal Act* and arrived at the wrong conclusion in this matter.
21. The upshot of the above finding is that the Court allows the Appeal and holds and finds that the Respondent did not properly discharge its burden of proof in establishing that its VAT claim was valid. Therefore, the Appellant's Assessment order dated 15<sup>th</sup> November 2019 and the objection decision dated 21<sup>st</sup> June, 2021 demanding Kshs.1,499,713.38/= is upheld.
22. Having satisfied itself that the Appeal as filed has merit, the court notes that costs follow the event. The court therefore orders that costs of this appeal are to be borne by the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF APRIL, 2024.**

**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

Ms. Saadia holding brief for Ms. Kithinji for the Appellant.

Ms. Chepkwony for the Respondent.

Amos- Court Assistant

