



**Commissioner of Investigations & Enforcement v Renova Limited (Income Tax Appeal E069 of 2023) [2024] KEHC 12803 (KLR) (Commercial and Tax) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12803 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E069 OF 2023**

**WA OKWANY, J**

**OCTOBER 17, 2024**

**BETWEEN**

**COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ..... APPELLANT**

**AND**

**RENOVA LIMITED ..... RESPONDENT**

*(An Appeal from the judgement of the Tax Appeals Tribunal delivered on 17th March, 2023 in Tax Appeal Tribunal No. 820 of 2021)*

**JUDGMENT**

**Introduction**

1. The Appellant is a principal officer appointed under Section 13 of the Kenya Revenue Act charged with the mandate is the receiving, collecting and accounting for Government revenue and enforcement of all relevant tax laws.
2. The Respondent is a limited liability company incorporated in Kenya, whose principal activity is the provision of interior design solutions.
3. The Appellant conducted tax investigations on the Respondent and issued a tax demand for the period 2016 to 2020 for income tax and VAT in the sum of Kshs. 400,178,403. The assessed amount was however later revised to Kshs. 148, 260,193.00 in the objection decision.
4. The Appellant was aggrieved by the said decision and appealed to the Tax Appeals Tribunal (TAT) through a Notice of Appeal dated 7<sup>th</sup> December 2021.



5. The Tribunal noted that the Appellant and Respondent filed nearly similar documents before it. The TAT also noted that the Appellant acknowledged the receipt of the Respondent's documents and did not request for any further or specific documentation from the Respondent.
6. The Tribunal found that the Respondent was therefore justified in its belief that it had discharged its burden of proof under section 56(1) of the TPA and section 30 of the TAT Act when it supplied the documents that the Appellant had requested and that the burden, therefore shifted to the Appellant to consider the documents and issue its objection decision by giving reasons for its decision as provided under section 51(10) of the *Tax Procedures Act* (TPA).
  - i. "An objection decision shall include a statement of findings on the material facts and the reasons for the decision"
7. The Tribunal noted that the Appellant's main reason, in its objection decision, that the Respondent had not produced documents, was prejudicial to the Respondent. The Tribunal held that Appellant's conduct of denying the Respondent a fair chance to object to its tax decision by concealing information that could have assisted the Respondent to upset or cause the Appellant to amend its decision was unfair, inequitable and illegal as it contravened the provisions of section 31(1) of the TPA which required the Commissioner to exercise best judgment when making an assessment.
8. The Tribunal addressed the failure, by the Appellant, to consider the Respondent's invoices on the basis that they were lumped together and held that the same was unfair, unreasonable and a contravention of section 15 of the *Income Tax Act*, section 13(5) and 16(2) of the VAT Act since the Appellant did not even inform the Respondent, prior to the objection decision, that it needed it to unbundle its invoices.
9. The Tribunal delivered its judgment on 17<sup>th</sup> March 2023 wherein it allowed the Respondent's appeal against the Appellant's objection decision.
10. The Appellant was dissatisfied with the Tribunal's decision and lodged its Appeal before this court on 17<sup>th</sup> April 2023.

## **The Appeal**

11. The Appellant listed the following grounds of appeal in its Memorandum of Appeal: -
  - i. That the Honourable Tribunal erred in law by failing to consider that tax is a public interest matter and thus erred in vacating all assessments based on it taking issue with the Appellant's finding that the documents offered were inadequate thus occasioning an injustice to the public and leaving the Appellant with no recourse to recover taxes due.
  - ii. That the Honourable Tribunal erred in fact and in law in failing to appreciate the provisions of section 59 of the *Tax Procedures Act* 2015 which expressly gives power to the Appellant to request the production of records and additional information which can fully satisfy the Appellant where he is of the view that the information given is insufficient.
  - iii. That the Honourable Tribunal thus erred in law by failing to appreciate that the duty and obligation to keep sufficient and proper documents and produce them on demand lies within a taxpayer and thus, a taxpayer cannot be allowed to benefit from an illegality i.e. failure to keep sufficient and proper documentation for tax purposes.
  - iv. That the Honourable Tribunal failed to appreciate and/or give due regard to the provisions of sections 43 of the VAT of the VAT Act 2013, section 54A of the *income Tax Act* and section



23 of the *Tax Procedures Act*; applicable to the dispute which requires a taxpayer to keep transactional records for a period of five years.

- v. That the Honourable Tribunal erred in law in shifting the burden of proof to the Appellant contrary to the express provisions of section 30 of the *Tax Appeals Tribunal Act*.
  - vi. That the Honourable Tribunal erred in law by failing to appreciate that the Appellant in exercising quasi-judicial powers is a master of his own procedure and discretion.
  - vii. That the Honourable Tribunal framed the wrong issues for determination thus asked itself the wrong questions and in so doing arrived at a wrong conclusion.
12. The Respondent responded to the Grounds of Appeal through the Statement of Facts wherein it highlighted the genesis of the case as stated hereinabove in the introductory part of this judgment.
  13. The appeal was canvassed by way of written submissions which I have considered.

### **The Appellant's Submissions**

14. The Appellant submitted that it wrote to the Respondent requesting to be supplied with the documents in support of the Respondent's objection.
15. The Appellant listed the said documents as follows: -
  - I. Audited financial accounts for the years ended 2015, 2016, 2017, 2018 and 2019.
  - II. All sales invoices for the years 2016, 2017, 2018, 2019 and 2020.
  - III. All purchases invoices for the years 2016, 2017, 2018, 2019 and 2020.
  - IV. Trial balances for the years 2015, 2016, 2017, 2018 and 2019.
  - V. All imports documents for the years 2016, 2017, 2018, 2019 and 2020.
  - VI. General/nominal ledgers for the years 2016, 2017, 2018, 2019 and 2020.
  - VII. All bank statements for the accounts held by Respondent and the Directors in the years 2016, 2017, 2018, 2019 and 2020.
16. The Appellant stated that the Respondent furnished it with some records relating to the banking and building costs and that it arrived at its decision after allowing all the costs that the Respondent had supported, with evidence.
17. The Appellant submitted that it then computed the undeclared sales after considering the declarations in the IT2C returns, undeclared specific invoices, double counted invoices and audited accounts.
18. The Appellant emphasized on the obligations of a tax payer, under the law, to keep a record of all the business transactions for purposes of tax accountability.
19. It was submitted that the essence of record keeping, by a tax payer, is so that the records may be used during the computation of taxes subject to the confirmation of their authenticity by the taxing authority.
20. The Appellant submitted that it reached its objection decision after allowing all the costs that the Respondent had supported, with documents.
21. The Appellant noted that whereas the Tax Appeals Tribunal found that it did not provide any evidence to prove that it was not furnished with all the evidence and that it was the duty of the Appellant to ask



for the unsupplied documents, the Appellant maintained that it was specific on the documents that it required from the Respondent.

22. It was submitted that the Respondent did not demonstrate, by way of evidence, that it complied with Section 51 (3) of the Tax Procedure Act.
23. The Appellant submitted that it had the mandate to invalidate the tax payer's objection whenever it has reasons to believe that they are contrary to Section 51 (3) (c) of the Tax Procedure Act which provides for the contents of a valid objection for this argument, the Appellant cited the decision in [\*Republic vs. Kenya Revenue Authority, ex parte M-kopa Kenya Ltd Nairobi High Court Judicial Review Application No. 599 of 2017\*](#) where it was held: -
  - “ 106. In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the taxpayer is seeking further particulars or indulgence to enable it pay the taxes demanded.”
24. The Appellant submitted that the Respondent did not discharge its burden of proof as provided under Section 30 of the [\*Tax Appeals Tribunal Act\*](#). The Appellant cited the decision in *Pz Cussons East Africa Ltd vs. Kenya Revenue Authority* [2013] eKLR quoted in the decision in *Pearson vs. Belcher CH.M Inspector of Taxes* (Tax cases vol. 38) where it was stated that: -
  - “ There is an assessment made by the Additional Commissioners upon the Appellant; it is perfectly clearly settled by cases such as *Norman v Golder*, 26 T.C. 293, that the onus is upon the Appellant to show that the assessment made upon 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.”
25. On the claimed input VAT, the Appellant relied on the provisions of Section 17 of the VAT Act and submitted that it considered the purchase invoices for imports between 2016 and July 2020 which were time barred as at 29<sup>th</sup> December 2020 and stated that they were not allowable.
26. The Appellant submitted that its assessment for both VAT and Income Tax were properly explained and that it charged tax on undeclared income based on the documents that the Respondent provided.

### **The Respondent's Submissions**

27. The Respondent submitted that the Tribunal's judgment dated 17th March 2023 is not only sound but lays good precedence on addressing the issue of production of documents by taxpayers in tax disputes. The Respondent added that taxpayers have unfortunately been at the receiving end of arbitrary and unreasonable demands from the Appellant under the guise of “failure to produce documents”.
28. According to the Respondent, the conundrum has always been, what really amounts to sufficient documentation and the criteria that should be used to establish if a taxpayer has indeed produced all the requisite documentation.
29. It was submitted that even though tax is a public interest matter, the Tribunal did not err in its judgment vacating all assessments as it found that the documents produced by the Respondent were adequate and that the Respondent was justified to believe it had discharged its burden of proof according to section 56 of the [\*Tax Procedures Act\*](#) as read together with section 30 of the [\*Tax Appeals\*](#)



Tribunal Act. Reference was made to the case of Waweru - Chairman & 3 others (Suing as Officials of Kitengela Bar Owners Association) vs. National Assembly & 2 others (Constitutional Petition E005 of 2021) [2021] KEHC 455 (KLR) where the court held that: -

“Taxation by a state is necessary for the life of a nation because it sustains the public welfare and public good. Nevertheless, the power to tax is very delicate, vulnerable to abuse by those in authority...”

30. The Respondent supported the Tribunal’s observation that the Appellant conveniently used ‘the lack of sufficient documents’ while issuing its objection decision without specifying the documents that had allegedly not been provided or according the Respondent an opportunity to provide the said documents before making the impugned objection decision. For this argument, the Respondent cited the case of Mureithi & 2 others (For Mbari ya Murathini Clan) vs. Attorney General & 5 Others 2005[2006] 1KLR 443, where the court observed that: -

‘justice, is not a cloistered virtue and that where justice is done and public interest upheld, it is acknowledged by the Public at Large, the sons and daughters of the land and the angels of heaven sing and dance and heaven and earth embrace’

31. The Respondent submitted that the Tribunal appreciated the relevant provisions of the TPA and found that it had provided all the documents that the Appellant requested it to produce and noted that the Appellant did not ask for any further documentation before issuing the objection decision.

32. The Respondent argued that it was cooperative and willing to resolve the dispute amicably as the record revealed that it had informed the Appellant of the documents that were too voluminous and invited them to view the said documents in their offices in line with the provisions of Section 58 of the Tax Procedures Act which empowers the Appellant to access any building or land to inspect goods, records and among other things.

33. The Respondent’s case was that at no time did it refuse to supply the Appellant with any documentation to assist it with the reconciliation of the alleged tax liability as the Tribunal even noted that both parties had similar documents which the Appellant had used to reduce the tax liability. According to the Respondent, it established a prima facie case by supplying the requisite documentation after which the burden shifted to the Appellant to rebut the prima facie case.

34. The Respondent maintained that it adhered to the requirements of section 59 of the Tax Procedures Act by producing the relevant documents and allowed the Appellant access to its offices to review further documents which were too voluminous to be transported.

35. The Respondent reiterated that it provided the records of invoices to ascertain the expenses incurred in the course of business which invoices the Appellant arbitrarily disallowed for purposes of deduction of expenses as stipulated in section 15 of the income tax act on the ground that the invoices were lumped together. It was submitted that failure to consider the Respondents documents on the basis that they were lumped together was unfair as at no time did the Appellant inform the Respondent to unbundle the documents. For this argument, the Respondent cited the decision in Kenya Revenue Authority vs. Man Diesel & Turbo Se, Kenya [2021] eKLR where it was held that: -

“ 31. ...Generally, the taxpayer has the burden of proof in any tax controversy. The tax payer must demonstrate that the commissioner’s assessment is incorrect. The taxpayer has a significantly higher burden. The taxpayer must prove the assessment is incorrect.



32. The shifting of the burden of proof in tax disputes flows from the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency. The commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption created by the above provisions is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position. If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer.
36. The Respondent agreed with the findings of the Tribunal when it held that: -
- “the Appellant did not inform the Respondent, prior to the objection decision that it needed to unbundle its invoices. How then was the Respondent to know that its invoices needed to be split and that this could be a reason for their rejection? It would have been fair and equitable to give the Respondent the opportunity to correct this anomaly before condemning it unheard.”
37. The Respondent urged this court to dismiss the instant appeal for lack of merit and to uphold the Tribunal's decision of 17<sup>th</sup> March 2023. The Respondent also prayed for the costs of the appeal.

### **Analysis and Determination**

38. I have carefully considered the record of appeal and the parties' respective submissions together with the law and the authorities that they cited. I find that the following issues fall for my determination: -
- a. Whether the Respondent had discharged its burden of proof according to section 56(1) of the [\*Tax Procedures Act\*](#) and closely related to this issue is whether the Appellant considered all the documents provided by the Respondent in arriving at its assessment.
  - b. Whether the Appellant's claim for VAT input claim was time barred.

### **Burden of Proof**

39. The gist of this appeal is the issue of the documents that the Appellant requested for in the exercise of its mandate of assessing the taxes due from the Respondent. The Appellant supported its objection decision by stating that it was arrived at after considering all the documents that the Respondent had provided to support their costs of sales administration expenses, establishment costs and the finance costs.
40. The Respondent, on the other hand, faulted the Appellant for conveniently using the phrase 'the lack of sufficient documents' while issuing its objection decision without specifying the documents that had allegedly not been provided or according the Respondent an opportunity to provide the said documents before making the impugned objection decision. It was the Respondent's case that it discharged its burden of proof upon supplying the Appellant with the documents that it had requested for after which the burden shifted to the Appellant to prove that the taxes were still due.
41. Section 43 (1) of the Value Added Tax (VAT) provides as follows: -
- 43.



- (1) A person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept for a period of five years from the date of the last entry made therein.
42. Section 54A (1) of the *Income Tax Act* also contains a similar provision for the keeping of records by businesses for purposes of computation of taxes. The section stipulates as follows: -
- i. A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax.
43. A tax payer desirous of filing an objection to an assessment of tax is required to comply with Section 51 (3) of the TPA which states as follows:-
- (3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—
- a. the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;
- b. in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and
- c. all the relevant documents relating to the objection have been submitted.
44. Under Section 58 of the TPA, a taxpayer is obligated to submit records to the Commissioner. The Section provides as follows: -
- i. Notwithstanding anything to the contrary in any written law, an authorised officer may inquire into the affairs of a person under any tax law, and shall at all times have full and free access to all lands, buildings, places to inspect all goods, equipment, devices and records, whether in the custody or control of a public officer, or of a body corporate or of any other person, and may make extracts from or copies of those records.
45. Section 59 of the TPA requires the taxpayer to produce all records relating to tax investigations. The section provides as follows: -
- i. For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to—
1. produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
2. furnish information relating to the tax liability of any person in the manner and by the
3. time as specified in the notice; or
4. attend, at the time and place specified in the notice, for the purpose of giving evidence in
- ii. respect of any matter or transaction appearing to be relevant to the tax liability of any person.



46. Section 23 of the TPA requires a taxpayer to keep records for a period of 5 years while Section 93 of the same Act makes it an offence for a person who fails to keep, retain or maintain records, during a reporting period, without reasonable excuse. Section 23 stipulates as follows: -

(1) A person shall—

- a. maintain any document required under a tax law, in either of the official languages;
- b. maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and
- c. subject to subsection (3), retain the document for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.

47. In the instant case, it was not disputed that the Respondent filed its objection to the Appellant's tax assessment and that it, at the Appellant's request, provided the relevant documents relating to the objection. The Tribunal also noted that the parties herein filed almost similar documents before it. The Tribunal made the following findings on the issue of whether the Respondent supplied the Appellant with all the requisite documents: -

“ 34. The Appellant and the Respondent filed near similar documents. Both parties seem to agree that the Appellant acted on the Respondent's letter dated the 17<sup>th</sup> of February 2021 requesting for documents.

35. More crucially, whereas the Respondent confirmed that it received the documents it had requested from the Appellant, it argued that it was not provided with all the documents that it required. However, it did not provide any evidence before the Tribunal to confirm that it had asked for further documents from the Appellant, or that it notified the Appellant that the documents it had provided were insufficient.

36. It is the view of the Tribunal, that fairness and proper exercise of judgment would have required the Respondent to write an email, letter or communicate with the Appellant in any way it deemed fit to inform it that it required specific documents, or that the documents that it had asked for had not been provided or that the documents provides were insufficient, or in this case, that the invoices provides were lumped together and there was need to provide invoices that were not lumped together. This was not done.

37. The Appellant, therefore, clearly had no way of knowing that it was required to supply further documents or that there was need for it to supply invoices that were not lumped together to aid the Appellant in arriving at a fair and just tax assessment. In the premises the Respondent was thus within its right to assume and believe that it had discharged its burden of proof under Section 56 (1) of the TPA and 30 of the TAT Act when it supplied the documents required. The burden, therefore shifted to the Respondent to consider the documents and



issue its objection decision while giving reasons for its decision as is provided for in Section 51 (10) of the TPA which reads thus:

“An objection decision shall include a statement of findings on the material facts and the reasons for the decision.”

38. In this case, the Commissioner’s statement of findings and reasons for the objection decision was premised on the Appellant’s failure to provide documents and yet the same provided. It then proceeded to issue an objection decision against the Appellant without giving it the chance, right and opportunity to supply the documents required. The outcome of this is that the Commissioner intentionally adopted a strategy of concealing relevant information from the Appellant and only coming out to reveal this relation information at the last minute and in the objection decision from where it knew that the law could not allow the Appellant to provide the documents required so as to rebut or vacate the assessment.
39. Moreover, as a holder of a public office, the Respondent is obliged to exercise its powers reasonably, rationally and within the law. The Respondent’s conduct in this matter, as has been described above, amounted to arbitrary, unreasonable and capricious exercise of power which amount to an illegality as was discussed in the cases of:-
  - a. *Republic v Kenya Revenue Authority Jr Misc. Civ. Application 478 of 2014* where it was held: “While appreciating that the Respondent has powers to assess and demand payment of taxes due, it was submitted that statutory powers can only be exercised validly if they are exercised reasonably, rationally and properly and that no statute ever allows any public officer to statutory power arbitrary or capriciously.”
  - b. *Republic v Kenya Revenue Authority ex parte Aberdare Freight Services Limited* [2004] eKLR at page 20 where Nyamu J (as he was then) stated that: “It is now accepted principle in this field of law that statutory powers and duty must be exercised and performed reasonably.”

48. My finding is that the Tribunal properly analyzed the evidence that was presented before it and arrived at the correct verdict that nothing stopped the Appellant from asking the Respondent to supply it with further documents if found that the documents that had been supplied with were not sufficient.

49. Sections 56 of the TPA and Section 30 of the TAT Act provide as follows:-

Section 56 of the TPA

1. In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
2. An appeal to the High Court or to the Court of Appeal shall be on a question of law only.
3. In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.



## Section 30 of the TAT

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, that the tax decision should not have been made or should have been made differently.

50. I further find that upon supplying the Appellant with all the documents that it had requested for, the Respondent discharged its burden of proof which thereafter shifted to the Appellant to deliver an objection decision together with reasons for the said decision. In the instant case, the reason advanced by the Appellant was that the Appellant did not provide documents which reason is, in my humble view, far from the truth going by the undisputed fact that not only did the Respondent supply the required documents, but also that at no time was the Respondent asked to supply further documents. Indeed, Section 51(10) of the TPA states that: -

An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

51. In *Commissioner of Domestic Taxes vs. Trical and Hard Limited (Tax Appeal E146 of 2020)* [2022] it was held that: -

“it is clear that the evidential burden of proof rests with the taxpayer to disprove the Commissioner and that once competent and relevant evidence is produced, then this burden now shifts to the Commissioner. I have emphasized and underlined ‘competence’ and ‘relevance’ because it is only evidence that meets these two tests that demolishes presumption of correctness and swings the burden to the Commissioner. This means that even if one avails evidence but then it is found that the same is incompetent or irrelevant, then the burden continues to remain with the tax payer.”

52. From the extract of the Tribunal’s decision that I have already highlighted in this judgment, it is clear that the Tribunal also addressed the Appellant’s failure to consider the Respondent’s invoices because they were lumped together and held it to be unfair, unreasonable and in contravention of section 15 of the *Income Tax Act*, section 13(5) and 16(2) of the VAT Act since the Appellant did not even inform the Respondent prior to the objection that it needed it to unbundle its invoices. The said sections stipulate as follows: Section 15 ITA states that:-

- i. 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, and where under section 27 of this Act any income of an accounting period ending on someday other than the last day of such year of income is, for the purpose of ascertaining total income for any year of income, taken to be income for any year of income, then such expenditure incurred during such period shall be treated as having been incurred during such year of income.”

Section 13 (5) of the VAT Act

- (5) In calculating the value of any services for the purposes of subsection (1), there shall be included any incidental costs incurred by the supplier of the services in the course of making the supply to the client:



Provided that, if the Commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.

Section 16(2) of the VAT Act

(2) A registered person who issues a credit note under this section shall reduce the amount of his output tax in the tax period in which the credit note was issued by an amount that bears the same proportion to the tax originally charged as the amount credited bears to the total amount originally charged and the amount of tax so credited shall be specified on the credit note.

53. My take is that the exercise of assessment of tax by the Appellant takes a collaborative approach where both the Commissioner and the taxpayer engage in mutual correspondence that is akin to reconciliation of accounts with a view to exchanging relevant information so as to arrive at the correct amount of taxes due, if any. It is in this collaborative spirit that the Appellant was expected to seek further clarification through the unbundling of the invoices by the Respondent so as to arrive at the correct tax assessment.

54. I find that overlooking the invoices supplied by the Respondent merely because they were lumped together occasioned a grave injustice to the Respondent by denying it an opportunity to clarify the contents of the said invoices. The Tribunal held the same view when it rendered itself as follows in the impugned judgment: -

“48. It is apparent from the foregoing provisions of the ITA and VAT Act that in arriving at its tax assessment, the Respondent is legally bound to consider all the allowable expenses that may have been expended by the Appellant. This statutory right is an entitlement and cannot be taken away by a wave of the hand or the excuse that the Respondent is not able to unbundle the Appellant’s invoices.

49. In this matter the Respondent has not even explained to the Tribunal the difficult and or the inconvenience that it faced and which made it difficult to request the Appellant to unbundle its invoices and or to explain why it could not unbundle its invoices. The absence of such an explanation adds to the more reason why its actions cannot be sustained in law.

50. The Tribunal forms the view that the Respondent’s conduct in this case would lead any reasonable man to the conclusion that the Commissioner kept quiet and concealed vital information from the Appellant intentionally so as to prejudice it. This is confirmed by the fact that it only revealed this information in its objection decision at the very last minute, when the Appellant had already been prejudiced and had no way of remedying the situation.

51. The sum total of the Respondent’s action is that it resulted in the Appellant paying more tax than what it is legally required to pay. This situation was discussed in Kenya Bankers Association v Kenya Revenue Authority [2018] eKLR, where Justice Odunga quoted the following passage with approval from the case of Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] 2 KLR 240, where court stated as follows: -

“It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the



application of the above principles that money is not lawfully due... Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings – what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law.”

55. On the issue of whether the Appellant’s claim for VAT input was time barred, the Tribunal found that its determination on the issue of whether the Appellant considered all the documents supplied by the Respondent resulted in the vacation of the Respondent’s tax assessments as stated in the objection decision. I similarly find that the decision on the issue of documents has the effect of rendering the issue of VAT input claim moot.
56. For the reasons that I have stated in this judgment, I find that the instant appeal is not merited and I therefore dismiss it with no orders as to costs.
57. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS  
THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**W. A. OKWANY**

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**JUDGE**

