



Manguzi Hardware Limited v Commissioner of Domestic Taxes (Income Tax Appeal E080 of 2021) [2023] KEHC 1984 (KLR) (Commercial and Tax) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E080 OF 2021**

A MABEYA, J

MARCH 10, 2023

BETWEEN

MANGUZI HARDWARE LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

1. The respondent conducted an audit on the appellant on the suspicion that the appellant was involved in a missing trader scheme. The respondent's findings were communicated to the appellant via a letter dated 9/4/2018 stating that the appellant's tax liability amounted to Kshs 148,761,731.34 inclusive of VAT and Corporation Tax.
2. On 24/5/2018, the respondent gave a notice of assessment for the said amount for which Kshs 51,743,210.90 constituted VAT whereas Kshs. 97,018,520.44 was Corporation Tax. The appellant objected to the assessment by a letter dated 21/6/2018 to which the appellant issued an objection decision on 26/7/2018. The appellant lodged an appeal at the Tax Appeals Tribunal ("the Tribunal") but the Tribunal dismissed the same on 28/5/2021.
3. Being dissatisfied by that decision, the appellant appealed to this court vide a Memorandum of Appeal dated 14/6/2021 raising 18 grounds of appeal. Those grounds can be summarized into two as follows:-
 - a. The Tribunal erred in failing to hold that the objection decision was invalid.
 - b. The tribunal erred in holding that the appellant failed to discharge its burden of proof.
4. The appeal was opposed by the respondent through her Statement of Facts dated 15/7/2021. She contended that she had received information regarding six traders who upon investigation it was established that the taxpayers would reduce VAT liabilities by claiming input tax from the said traders.



She stated that the appellant was a beneficiary of the missing trader scheme as it had claimed input VAT from the traders. That she afforded the appellant seven days to provide grounds as to why the VAT input costs should be allowed but the appellant failed to comply. It was stated that the appellant's objection to the notice of assessment did not have any supporting documents thus the respondent had nothing to review.

5. The respondent further contended that there was no proof of the purchases or costs that was tendered to the Tribunal and that it was the appellant's duty to furnish the specific information requested for by the respondent. That the appellant had not been fully audited in respect to VAT claims because the information requested by the commissioner was not availed by the appellant.
6. The appeal was canvassed by way of written submissions which I have considered.
7. The appellant submitted that the objection decision was invalid for it failed to disclose the basis both legal and factual for the assessments and the decision. That the appellant was only required to produce the tax invoices and the corresponding ETRs and the same was achieved. It was further submitted that the appellant was not entitled to cross check and confirm the import records of its suppliers to ascertain whether or not they are reachable to the respondent. That the burden was on the respondent to prove that the evidence given by the appellant was not sufficient.
8. On the other hand, the respondent submitted that it was difficult to ascertain whether the expenses were incurred and whether they were deductible as the schedule of deductions given by the appellant was not sufficient proof. That the assessment was still valid since the appellant had failed to provide the supporting documents required by the respondent. It was the respondent's submissions that the appellant was required to give justification for the input VAT so as to ensure that the VAT was collected from a chain of supplies. That the appellant had contravened section 42 of the [VAT Act 2013](#) which requires tax invoices to be issued for taxable supplies. It was submitted that the appellant was a beneficiary of the missing trader scheme.
9. I have considered the record, the statement of facts and the submissions by the parties. The first ground as summarized by the Court is that the Tribunal erred in failing to hold that the objection decision was invalid. The appellant's position is that the objection decision dated 26/9/2018 was invalid as it did not address the grounds raised in the appellants notice of objection and did not give legal and factual justification or basis.

Section 51(8), (9) and (10) of the [Tax Procedures Act](#) 2015 provides: -

- “8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".
 - 9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.
 - 10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.”
11. From the foregoing, the respondent is obligated to notify the tax payer of the objection decision which ought to have the statement of findings of the material facts as well as the reasons for the decision. I



- have perused the respondent's letter dated 26/7/2018 which is the objection decision under section 51 of the [Tax Procedures Act](#).
12. In that letter, the respondent stated that the notice of objection was not properly lodged as the appellant had not provided evidence to support its objection and thus confirmed the assessment of Kshs 148,761,731.34.
 13. Section 51 of the [Tax Procedures Act](#) does not provide a format or structure of how an objection decision should appear. The requirement is for the respondent to give her findings and the reasons for the decision. In this case the respondent's findings were that the notice of objection was not properly lodged. That since it had not given any evidence to support its challenge on the assessment, the assessment was confirmed.
 14. It is clear that the letter not only made a finding on the objection decision, it also gave reasons for the said findings. I have on my part seen the objection letter dated 21/6/2018. It only contained bare assertions and the response by the respondent cannot be faulted. In the circumstances, I agree with the Tribunal that the objection decision was valid.
 15. The other ground of appeal is that the Tribunal erred in holding that the appellant failed to discharge its burden of proof. Section 56(1) 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 incorrect.”
 16. The appellant's case was that it was only entitled to produce tax invoices and corresponding ETRS in claiming input VAT and thus faulted the Tribunal for failing to consider that the appellant had duly issued the respondent with the copies of invoices and corresponding ETRs, RTGSs and store records.
 17. In its decision, the Tribunal observed that the burden on the appellant could have been discharged upon submitting documents such as the delivery notes, invoices, bank statements, receipts or records of the purchase day book to show that the VAT claims were based on actual stock.
 18. Section 17 of the [VAT Act 2013](#) provides: -

“ 17.

 - (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.”
 19. Further, section 43 of the [VAT Act 2013](#) and 59(1) of the [Tax Procedures Act](#) gives the respondent the mandate to request for more and additional information in order to assist in the assessment of tax.



20. From the foregoing, it is without a doubt that the appellant had the burden of producing the required documents. In support of its case, the appellant only produced copies of invoices and ETRs and RTGS. What is required of an applicant for VAT refund is to prove that a supply had been made. That is to be proved through a trail of documentation. An invoice and payment alone cannot be said to be sufficient.
21. In *Commissioner of Domestic Taxes v One Stop Trading Limited* (Income Tax Appeal E098 of 2020), the court observed that: -
- “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.”
22. In the circumstances of this case, from the onset the respondent informed the appellant that the tax authority was investigating a missing trader scheme that involved fraudulently tax evasion. The appellant was also informed that the companies that the appellant had traded with had been involved in the same fraud and thus the respondent was keen on examining whether the appellant had benefited from the scheme.
23. In this court’s view, a taxable supply can be proved by production of various documentation including, orders, purchase ledgers, copies of the stock records, delivery notes in addition to invoices and payment details. Without such documentation, it is difficult to exonerate a tax payer from having participated and/or benefited from a missing trader scheme.
24. In the present case, the appellant did not avail sufficient documentation. In the premises, the burden did not shift to the respondent but lied with the appellant. Having failed to produce sufficient evidence to show that there was taxable supply, the court agrees with the Tribunal that the appellant had not discharged its burden of proof.
25. The upshot of this is that the appeal lacks merit and is dismissed with costs. This court upholds the decision of the Tribunal dated 28/5/2021.

It is so decreed.

DATED AND DELIVERED THIS 10TH DAY OF MARCH, 2023.

A. MABEYA, FCI Arb

JUDGE

