



**Branso Distributors Ltd v Commissioner of Investigations and Enforcement (Income Tax Appeal E041 of 2021) [2023] KEHC 23224 (KLR) (Commercial and Tax) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23224 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E041 OF 2021  
FG MUGAMBI, J  
OCTOBER 6, 2023**

**BETWEEN**

**BRANSO DISTRIBUTORS LTD ..... APPELLANT**

**AND**

**COMMISSIONER OF INVESTIGATIONS AND  
ENFORCEMENT ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal against the decision of the Tax Appeals Tribunal (hereinafter ‘the Tribunal’) delivered on 11<sup>th</sup> May 2021. The respondent investigated the affairs of the appellant and issued an assessment on 24<sup>th</sup> May 2018 for Kshs. 85,621,269.75 being VAT of Kshs. 29,781,311.22 and Kshs. 55,839,958.53 as Corporation Tax.
2. The appellant objected to the assessment vide a notice of assessment dated 21<sup>st</sup> June 2018 which the respondent reviewed and subsequently issued an objection decision dated 26<sup>th</sup> July 2018. Dissatisfied with the decision of the respondent, the appellant lodged an appeal at the Tribunal culminating to the judgment delivered on 11<sup>th</sup> May 2018, dismissing the appeal.
3. Being aggrieved by the judgement of the Tribunal, the appellant has since lodged this appeal vide a Memorandum of Appeal dated 11<sup>th</sup> May 2021 setting out 19 grounds of appeal which I would summarize as follows:
  - i. The Honourable Tribunal erred in failing to hold that the assessment was invalid and contra statute;
  - ii. The Honourable Tribunal erred in failing to find the objection decision invalid;



- iii. The Honourable Tribunal misconstrued the provision of section 51(10) of the [Tax Procedures Act](#);
- iv. The Honourable Tribunal erred in holding that the respondent had failed to provide sufficient proof to rebut the respondent's assessment;
- v. The Honourable Tribunal erred in failing to find that the appellant had a right to deduct the cost of purchases under section 15 of the [Income Tax Act](#).

## Analysis

4. The Court has carefully considered the pleadings, evidence and submissions of the rival parties as well as the impugned judgment. I have taken note of the ground challenging the objection decision and having perused the same, I agree with the Tribunal that the decision satisfied the threshold under section 51(10) of the [Tax Procedures Act](#) (hereinafter 'the TPA'). In any case, the grounds of appeal presently before Court are as a result of the reasons given by the respondent in its objection decision.
5. Other than that, it appears to me that the main bone of contention is the interpretation and findings of the Tribunal on the question of production of additional information and duty to discharge the burden of proof. These fall particularly under sections 17 and 43 of the [VAT Act](#), section 59 of the [TPA](#) and section 15 of the [Income Tax Act](#) (hereinafter the 'ITA').
6. The argument by the appellant is that it submitted all the documents sought by the respondent under section 17 of the [VAT Act](#) and the respondent had not questioned the authenticity of the invoices and ETRs. The appellant further noted that under that provision, it was only required to produce tax invoices and corresponding ETRs as proof of the supplies, to be entitled to claim input VAT.
7. Although the appellant acknowledged that the respondent was empowered to ask for more documents, this power was required to be exercised fairly and reasonably. The appellant felt that it was wrong for the respondent to base its objection decision on the appellant's alleged failure to provide further documents, having provided the documents required by law.  
  
Further, the appellant took issue with being asked to produce documents that were not in its possession and which it was not privy to, such as import records of its suppliers.
8. The appellant claimed that it had discharged its burden of proof when it produced the requested documents to the respondent. The onus had then shifted to the respondent to rebut the prima facie case and to prove the allegation of fraud and involvement of the appellant in the missing trader tax fraud scheme.
9. The respondent on his part maintained that the Companies which the appellant claimed to have dealt with, were missing traders. The Commissioner disclosed that the respondent was unable to trace the appellant's suppliers' premises and offices. Either the contact details given to the respondent did not go through, or the directors were unwilling to cooperate or denied owning the businesses claimed by the appellant.
10. The respondent further revealed that the source of goods allegedly supplied by the Companies to the appellant were untraceable. The alleged imports were fictitious and had entry numbers which did not belong to the alleged suppliers. On the other side, the customers of the appellant had declared purchases which meant that the appellant had actually made sales but failed to disclose all its sales to the respondent.



11. In the end, it was the respondent’s case that the appellant had failed to show that the invoices provided related to actual supplies and that no proof was provided to explain the undisclosed sales. It is for this reason that the respondent stated in his objection decision, that the Companies had supplied non-existent products.
12. In any case, it was submitted that if indeed these suppliers existed, when the respondent questioned the authenticity of the information produced by the appellant, the appellant would have provided whatever further evidence it had to rebut this assertion. This would have included evidence to demonstrate how the purchased goods were ordered, recorded and sold. Counsel submitted that the appellant had an option of providing letters from the suppliers showing that the goods were actually supplied.
13. 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 in part as follows:

“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);
  - (e) a debit note in the case of input tax deducted under section 16(5).”
14. Once the appellant provided the documents set out in section 17(3) of the Act as it did, this amounted to prima facie evidence of purchase. The evidentiary burden of proof then shifted to the respondent. It was incumbent on the respondent to prove that his decision was right. The respondent challenged the veracity of the evidence produced by the appellant and asked for more documents to prove that there had indeed been purchases and supplies made by the appellant from the alleged suppliers and that the companies making the supplies actually existed.
15. Based on the now consistent judicial pronouncements by this Court on the matter, once the respondent presented its case as aforesaid, the evidentiary burden of proof shifted back to the appellant to prove that the alleged suppliers did exist and that the alleged commercial transactions for VAT input were genuine and that its documentation was legitimate.
16. This explains why the Court in *Commissioner of Domestic Taxes V Trical and Hard Limited*, (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR), described the burden of proof in tax matters as a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer.
17. The pendulum in this case stalled with the appellant as no further evidence was provided in rebuttal of the respondent’s assertion. The law recognizes that evidence required in support of transactions for tax purposes is ordinarily in the possession of the taxpayer and that the Commissioner cannot sustain the burden.



18. The justification for this unique position that appears to depart from the general principle that he who alleges must prove was expounded by the Court in the case of *Commissioner of Domestic Services V Galaxy Tools Limited [2021]* eKLR. The Court explained that:

“This country operates under a self-assessment tax regime. Under this regime, the tax payer assesses self and declares what he considers to be taxable income on which he then pays tax to the authorities. For this reason, the tax laws are coached in a manner that gives the tax authorities wide powers and discretion in ascertaining ex-post facto, what taxable income is.

Further, the tax laws reverse the well-known principle of evidence of “he who alleges must prove”. In this regard, the tax authorities would assess what it considers to be the tax due from a taxpayer and the tax laws would burden the tax payer to disprove that the assessment or tax demanded is wrong or incorrect. This is borne by the fact that the assessment and demand is ordinarily made way after the tax payer has assessed himself and made a declaration of what according to him is the tax payable and has already paid such tax. The burden is therefore shifted to the tax payer because, the tax authority has to rummage through the documents of the tax payer years after the tax payer assessed himself and paid what he considered to be his tax liability.”

19. This position is in tandem with section 112 of the *Evidence Act* which in turn provides that:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

20. In fact, section 30 of the *Tax Appeals Tribunal Act* (hereinafter ‘the TATA’) and section 56 of the *TPA* both impose the burden of proof on the tax payer to prove that an assessment is excessive or that a tax decision is incorrect.
21. Moreover, section 59 of the *TPA* and section 43 of the *VAT Act* empowers the respondent to request for more and additional information to satisfy himself on the taxable income declared. The additional information and documents must of course be those which are reasonably expected to be in the hands of the tax payer as a business entity carrying out the business that it does. Section 59 of the *TPA* and section 43 of the *VAT Act* create an obligation for keeping of tax records for a period of up to five (5) years. These records must be produced when required by the tax authorities.
22. The power for request of additional documents was confirmed by the Court in *Commissioner of Domestic Taxes V Priyguru Company Limited (Income Tax Appeal E085 of 2020) [2021] KEHC 132 (KLR)*. In this case the Court disagreed with a similar submission as that put forward by the appellant, that section 17 of the VAT Act only required a taxpayer to produce certain documents. These, the Court held, were only a bare minimum.
23. In the present case the appellant ought to have produced letters from its suppliers to confirm supplies, supplier invoices, payment vouchers, delivery notes, stock records and import records. These, in my view, are documents that a diligent and prudent trader who is genuinely undertaking honest business, would be expected to keep.

## Determination

24. For all the foregoing reasons, the appellant cannot be said to have discharged its burden of proving that the assessment by the respondent was wrong. This appeal is therefore devoid of merit and the same is



dismissed. The decision of the Tribunal dated 16<sup>th</sup> April 2021 upholding the objection decision of 24<sup>th</sup> July 2018 issued by the respondent, is upheld. There shall be no orders to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI**

**THIS TH DAY OF OCTOBER 2023.**

**F. MUGAMBI**

**JUDGE**

