



Darwine Wholesalers Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E051 of 2021) [2023] KEHC 23537 (KLR) (Commercial and Tax) (13 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E051 OF 2021
FG MUGAMBI, J
OCTOBER 13, 2023**

BETWEEN

DARWINE WHOLESALERS LIMITED APPELLANT

AND

THE COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT RESPONDENT

JUDGMENT

Brief Facts

1. The appellant is a local textile company incorporated in Kenya. Its principal business involves purchasing of various types of clothing which are then sold to customers. The respondent investigated the appellant across various months in the first quarter of 2018 and issued a tax demand amounting to Kshs.157,924,332/= in respect of VAT and corporation tax, to which the appellant issued a notice of objection.
2. This ultimately led to a confirmation of the assessment through an objection decision dated 10th August 2018. The appellant was aggrieved by the said decision, and filed an appeal before the Tax Appeals Tribunal (the Tribunal). The Tribunal delivered its Judgment dated 23rd April, 2021 dismissing the appeal and upheld the respondent's assessment and objection decision for the sum of Kshs.105,340,298/=. This is what led to the appeal now before the Court.
3. The appellant takes issue with the failure of the respondent to address the grounds of the appellant's notice of objection and provide the legal and factual basis of its assessments and objection decision. This, the appellant notes, was in contravention to section 49 and 51(9) of the *Tax Procedures Act* (TPA), article 47 of the *Constitution* and section 4(3)(d) of the *Fair Administration Action Act*.



4. The appellant further opines that under section 17(3) of the *VAT Act*, to be entitled to claim input VAT, the appellant was merely required to produce the tax invoices and the corresponding ETR receipts which were furnished to the respondent together with proof of payments, delivery notes and store records for all of the appellant's purchases. The appellant's referred to the Tribunal's decision in *Ukwala Supermarkets v Commissioner of Domestic Taxes* TAT 187 of 2018 in support of this assertion. Needless to say, the Tribunal is bound by the decisions of this court and cannot therefore be bound by its own finding where the court has pronounced itself in a contrary manner.
5. It was the appellant's case that the law did not oblige it to produce records and proof of purchase from suppliers or proof that the exporter had itself purchased the goods. There was no requirement for the appellant to produce all other records further back in the supply chain. The appellant's case is that the respondent did not demonstrate that the that the evidence adduced by the appellant was insufficient. The respondent also failed to prove the alleged fraud as against the appellant, when it contended that the respondent was involved in the fraudulent missing trader scheme.
6. Finally, the appellant took issue with the decision of the Tribunal for failing to consider the documentary evidence placed before it and before the respondent to prove specific purchases under section 15(1) of the *Income Tax Act*, (the ITA).
7. The respondent opposed the appeal on grounds that the appellant sought to abuse the VAT tax regime by claiming input VAT from a list of companies that were actually missing traders. This term meant that the companies that the appellant claimed to have been trading with existed only on paper and were using wrong identities to register phony companies and supplying non-existent (missing) products. Most of the traders that the respondent claimed inputs from were not registered persons as required under Section 42(2) (b) of the *VAT Act*.

Analysis

8. I have carefully considered the pleadings, evidence and submissions of the rival parties as well as the impugned judgment delivered by the Honourable Tribunal on 23rd April 2021. The first issue that arises for determination is the validity of the Commissioner's objection decision. The appellant contends that the same was defective.
9. The appellant cited the *Constitution* and the *Fair Administration Act* to support its argument that the decision by the respondent failed to address the grounds of the appellant's notice of objection and provide the legal and factual basis of its assessments and objection decision. The real bone of contention here is whether the appellant was given sufficient reasons for the objection decision and whether the decision addressed the issues raised by the appellant.
10. I concur with the South African court's view of what constitutes adequate reasons for an assessment or decision. This was described in *CSARS V Sprigg Investment 117 CC T/A Global Investment* [2010] JOL 26547 (SCA). The court quoted with approval from the dictum of the Supreme Court of Appeal in *Minister of Environmental Affairs & Tourism & others V Phambili Fisheries (Pty) Ltd & Another*, [2003] 2 All SA 616 (SCA) to the extent that:

“[T]he decision maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect:

“Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.”



11. In my view, the threshold of information required by a tax payer is such reasons as would be sufficient to put the tax payer on notice and facilitate an application for an appeal or review. I have considered the law and in particular sections 49, 51(8), (9) and (10) of the *Tax Procedures Act* ('the TPA'). The law requires that an objection decision should contain a statement of findings on the material facts and the reasons for the decision. In my view, there is no obligation for the Commissioner to deal with each and every one of the grounds separately, so long as the decision presents the statement of findings, addresses the material facts and provides the reasons for the decision.
12. I concur with the Tribunal that the Commissioner gave sufficient reasons for the objection decision to put the appellant on notice. The decision was very clear that the respondent had considered the grounds of objection and that the records supporting the averments by the appellant had not been provided. In any case, it is this reason that has led to the present appeal. I find that the objection decision was therefore valid.
13. The next issue is whether the appellant had proved that the Commissioner was wrong in the tax assessment delivered vide the objection decision of 10th August 2018. Section 17(3) of the *VAT Act* provides for the following documentation that is required for purposes of the credit on input tax:
 - “(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 Commissioner. It was incumbent on the Commissioner to prove that its decision was right. The Commissioner instead 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. I have particularly taken note of a letter from the respondent sent to the appellant dated 25th January 2018 requesting the respondent to provide additional documents to support their case. The respondent responded to the letter on 25th January 2018 promising to submit the requested information. There is no evidence from the appellant that the requested information was ever forwarded to the respondent.
16. This Court has consistently pronounced itself on this matter. Once the Commissioner presented its case as aforesaid, the evidentiary burden of proof shifted back to the appellant to prove the purchases so as to make a claim for expenses and to prove that the alleged suppliers did exist, that the alleged commercial transactions for VAT input were genuine and that its documentation was legitimate.
17. In *Commissioner of Domestic Taxes v Trical and Hard Limited* (Tax Appeal E146 of 2020), [2022] KEHC 9927 (KLR), the Court 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”.



18. The pendulum in this case had stalled at and lay with the appellant as no further evidence was provided in rebuttal. 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.
19. Under section 59 of the TPA and section 43 of the VAT Act the Commissioner is expressly empowered to ask for additional information to ascertain the tax chargeable. This legal position is in consonance with section 107 and 112 of the Evidence in that the balance of proof lies with the party with the knowledge of facts. Further section 30 of the Tax Appeals Tribunal Act (TATA) and section 56 of the TPA imposes the burden of proof on the tax payer to prove that an assessment was wrong or that it was excessive.
20. In the case of Commissioner of Domestic Services V Galaxy Tools Limited, [2021] eKLR, the court laid out a roadmap on balance of proof and how it should be applicable in tax matters. The court stated:
- “Further, the tax Laws reverse the well-known principle of evidence of “he who alleges must proof”. 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.”
21. Additionally, this Court concurs with the decision in Republic v Kenya Revenue Authority Proto Energy Limited, (JR Appln. No. E023 of 2021), [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) where the Court explained the unique position relating to the burden of proof in tax matters in the following words:
- “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 tax payers’ 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.”
22. From these judicial pronouncements, I would therefore disagree with the submission by the appellant that in order to claim input VAT, it was only required to produce tax invoices and corresponding ETRs. In any case, section 59 of the TPA and section 43 of the VAT Act imposes a duty on tax payers to keep tax related documents for a period of up to five (5) years. As stated earlier, I have looked at the letter



from the respondent to the appellant requesting for additional information. I certainly agree that the further documents requested 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.

23. The documents that the respondent requested were in my view, documents that a diligent and prudent trader who is genuinely undertaking honest business, would be expected to keep so as to demonstrate how goods purchased were ordered, recorded and sold. The appellant ought to have at the very least, requested for letters from the alleged suppliers confirming the supplies, or invited the suppliers to testify in support of the appellant's case in addition to or as an alternative to the documents requested by the Commissioner.

Determination

24. This appeal is therefore devoid of merit and the same is dismissed. The decision of the Tribunal dated 23rd April, 2021 upholding the objection decision of 10th August 2018 issued by the Commissioner, is upheld. There shall be no orders to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF OCTOBER 2023.

F. MUGAMBI

JUDGE

