



**Commissioner of Domestic Taxes v Gokals Limited (Tax Appeal E144 of 2020)
[2021] KEHC 400 (KLR) (Commercial and Tax) (10 December 2021) (Judgment)**

Neutral citation: [2021] KEHC 400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E144 OF 2020
MW MUIGAI, J
DECEMBER 10, 2021**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

GOKALS LIMITED RESPONDENT

*(Being an Appeal from the Judgement of the Tax Appeals Tribunal
at Nairobi delivered by Honourable Tribunal on 25th September
2020 in Tax Appeals Tribunal Appeal Number 126 of 2018.)*

JUDGMENT

MEMORANDUM OF APPEAL

1. The Appellant filed a Memorandum of Appeal dated 20th November 2020 and appealed against the whole of the said decision and the consequential Orders on the following grounds:
 1. The Tribunal erred in fact and in law in shifting the burden of proof to the Appellant contrary to Section 30 of the [Tax Appeals Tribunal Act](#), 2013.
 2. The Tribunal erred in law in reading Section 17 of the [Value Added Tax Act](#), 2013 in isolation while ignoring the other relevant tax provisions.
 3. The Tribunal erred in law and in fact in failing to find that the Appellant has the powers to raise additional assessments based on the available information.
 4. The Tribunal erred in law and in fact in failing to find that the Respondent had failed to avail the documentation to dispute the additional Value Added Tax assessments.



5. The Tribunal erred in law and fact by ignoring the glaring discrepancies that existed in the Respondents supplier's documents.
 6. The Tribunal erred in law and fact in failing to consider the evidence and submissions tendered by the Appellant.
 7. The Tribunal misapplied the law and facts and therefore arrived at the wrong decision.
2. REASONS WHEREFORE the Appellant prays for orders that:
- a) The objection decisions dated 28th June 2018 be hereby upheld.
 - b) The Respondent be hereby ordered to pay Kshs.5, 298, 608.44 being VAT arrears owed to the Appellant.

3. RESPONSE TO THE MEMORANDUM OF APPEAL

The Respondent filed a Response to the Memorandum of Appeal dated 2nd February 2021 and stated;

1. The Tribunal was right and well within its jurisdiction to interpret the [Tax Appeals Tribunal Act](#) and the [Evidence Act](#), together with binding case law to ultimately and correctly place the burden of proof, with regards to allegations of fraud, upon the Appellant, and as far as it relates to an objection decision. (At page 42-45 of the Record of Appeal, paragraphs 75-89 of its Judgement and Page 262-265 of the Record of Appeal Respondents Submissions).
 2. Tribunal correctly exercised its jurisdiction in interpreting section 17 of the [Value Added Tax Act](#), 2013, as at paragraph 90-93 of the Judgment by finding inter alia, that Input VAT is rightly deductible by a supplier and that the Appellant herein failed to identify the traders who they claimed the Respondent transacted with and were not registered. The Tribunal further finding that the VAT law does not place a burden on a trader to confirm the tax liability status of another trader. (At page 45-46 of the Record of Appeal).
 3. The Tribunal properly directed itself in law and in fact in finding that the Appellant herein, has the power to demand documentation but found that the Appellant failed to identify what documents they had asked for and the same had not been supplied to them. In addition, it was not an issue in contention whether the Respondent has the powers to raise additional assessments. (At page 45 of the Record of Appeal at paragraph 87-89 of the Judgment).
 4. The Tribunal further correctly applied itself to the law and the facts by finding that the tax payer made available and supplied all documents it was required to keep as a registered Value Added Tax taxpayer for the Appellants perusal. (At page 43-44 of the Record of Appeal at paragraph 81-83 of the Judgment).
 5. The Tribunal properly considered all evidence brought before it by the Respondent. Further to this the Appellant had at no point in its submissions indicated any discrepancies in the Respondent's documents.
 6. The Tribunal duly considered all available evidence and all the parties' submission including various case law submitted in arriving at its decision.
 7. The Tribunal duly interpreted all tax laws directly in relation to the case before it to judiciously arrive at the decisions that it did.
4. REASONS WHEREFORE the Respondent prays that:



- a. That the Appeal herein be dismissed.
- b. That the Tribunals Judgement dated 25th September 2020 be upheld.

APPELLANT'S SUBMISSIONS

5. The Appellant submitted that Tribunal erred in law in shifting the burden of proof to the Appellant which finding is bad in law as the law places the burden of proof upon the Respondent. Following the submission of documents by the Appellant to prove that it had made actual purchases of taxable supplies, it was the onus of the Respondent to prove that there was actual supply of taxable supplies and that the supplies existed only in paper.
6. In *Metcash Trading Limited versus Commissioner for the South African Revenue Service and Another (CCT3/00) [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (24 November 2000)*

“ But the burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self- assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal.”
7. The Respondent submitted that the Tribunal under paragraph 80 of the judgement stated that the Respondent had furnished the Appellant with the documents detailing the goods. The list under Section 17 of the [Value Added Tax Act, 2013](#) is not exhaustive; the Appellant further submitted that the Tribunal only looked at Section 17 of the [Value Added Tax Act, 2013](#) while ignoring other relevant provisions on documentation. Section 43 of the [Value Added Tax Act, 2013](#) provides a requirement for a taxpayer to keep a full and true record of every transaction made for five years and the said record be made available for inspection by the Appellant.
8. It was the Appellant's submission that despite having demonstrated a vivid picture that no supplies were made by the Respondents suppliers to thereafter sell to the Respondent. The Tribunal held that the Appellant had not placed any evidence before it that the Respondent was involved in the fraud. The Respondent did not demonstrate to the Appellant how the goods he alleged to have purchased were ordered, recorded and sold if its source had no goods to sell in the first place. In paragraph 24 of its judgment the Tribunal acknowledged that the Appellant had established that the Respondents supplier Rahima Traders was not an importer of mobile phones and accessories and therefore could not have supplied the Respondent with these goods. In the case on the TAT 159 OF 2018 of Osho Drapers. vs Kenya Revenue Authority it was held;

“ For one to claim input VAT, there must be a purchase of taxable supply. It is not enough to have documentation listed in Section 17 of the VAT Act. The Documentation must be supported by an underlying transaction and the Taxpayer must furnish proof that there was an actual purchase.”
9. Section 17(1) of the [Value Added Tax Act, 2013](#) allows a registered person to deduct Input VAT from Output VAT. A taxable supply has to be made to a registered person to allow him/her to deduct the Input VAT from the output VAT on the supply he/she is making. A supply is defined under Section 2 of the [Value Added Tax Act, 2013](#) as: -

“ supply of goods” means- (a) a sale, exchange, or other transfer of the right to dispose of the goods as owner; or”



10. A taxable supply is defined under Section 2 of the [Value Added Tax Act](#), 2013 as: -

“Taxable supply” means a supply, other than an exempt supply, made in Kenya by a person in the course or furtherance of a business carried on by the person, including a supply made in connection with the commencement or termination of a business.

11. The Appeal is merited and the same should be allowed.

RESPONDENT’S SUBMISSIONS

12. The Respondent submitted that that the Court can only determine matters of law as provided under Section 56 of the Tax Procedure Act. The Appellants Grounds 3-7 of their Memorandum of Appeal aver to matters of fact, which grounds should thus not be relied upon by the Court. The Supreme Court of Kenya, in the Case of *Gatirau Peter Munya versus Dickson Mwenda Kithinji & 3 others* [2014] eKLR observed as follows:

“[75]The Supreme Court of the Philippines has had occasion to distinguish between "a question of fact" and "a question of law" in the case of Republic v. Malabanan, G.R. No. 169067, October 632 SCRA 338, 345. Citing another case, Leoncio v. De Vera, G.R. No. 176842, 546 SCRA 180, 184 the Court thus remarked: "A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact."

13. It was the Respondent’s submission that the gist of the Appeal at the Tax Appeal’s Tribunal was whether indeed the Respondent was a party to a fraudulent scheme known as the ‘missing Trader’ where some VAT registered persons would manufacture invoices without any supply of goods or services and all calculated to reduce tax liability, and whether the Respondent could rightly claim and deduct input VAT as it did. The Appellant herein had accused the Respondent of being a party to this fraudulent scheme in its demand for taxes. The law allows the burden to shift where a party alleges an issue that it ought to prove. The Supreme Court of India in *Anil Rishi vs Gurbaksh Singh Appeal* (civil) 2413 of 2006 confronted with this issue stated as follows: -

“When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation.”

14. The onus of proving whether or not the Respondent herein was involved in any fraud or not was squarely on the Appellant and which it failed to discharge.

15. On whether the Tribunal ignored relevant tax provisions of the law in finding that the Respondent was entitled to deduct input tax, the Tribunal rightly found that Section 17 of the [Value Added Tax Act](#), 2013 provides for Input Tax. The Tribunal noted that Input VAT that has been incurred in a transaction in respect of which VAT is deductible, is deductible by the Taxpayer as of right and can only



- be denied where the Taxpayer was involved in fraud, had knowledge or should have had knowledge that there was fraud or had failed to prove that he had paid input VAT by furnishing proof of purchase.
16. Further, on whether the Respondent was entitled to Input Tax Deductions, the Tribunal rightly reached the conclusion that the Respondent herein was entitled to VAT deductions and which the Appellant had purported to deny the Respondent. The Applicant did not dispute the validity of the invoice provided, or that they did not conform to the requirements of Section 42. All that the tax payer is required to present is a valid document as stipulated under Section 42 of the Act.
 17. The Respondent urged the court to find that the Tribunal was right in setting aside the Appellant's decision to disallow and demand input VAT.

DETERMINATION

18. The Court has considered the pleadings, the submissions filed the parties as well as the impugned judgment and the issues for determination are;
 - a) Whether Tribunal erred in law in shifting the burden of proof to the Appellant contrary to Section 30 of the *Tax Appeals Tribunal Act*, 2013?
 - b) Whether the Tribunal erred in law in reading Section 17 of the *Value Added Tax Act*, 2013 in isolation while ignoring the other relevant tax provisions?
1. Whether Tribunal erred in law in shifting the burden of proof to the Appellant contrary to Section 30 of the *Tax Appeals Tribunal Act*, 2013?
19. Section 30 of the *Tax Appeals Tribunal Act* provides;

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.
20. The Appellant argued that the Tribunal under paragraph 83 of the judgment held as follows “based on the judgment the Tribunal is of the view that the Appellant has not discharged the burden of proof.”
21. Paragraph 83 of the decision of the Tribunal stated as follows;

“Based on the facts and evidence before it, the Tribunal is of the view that the Respondent has not discharged the burden of proving that the Appellant was directly or indirectly involved in the VAT fraud.”
22. The Appellant having alleged fraud on the part of the Respondent, it was upon the Appellant herein to prove that allegation. The Appellant failed to provide the specifics of the same as well as evidence to support the same. The Respondent on its part had produced the necessary documentation to support the transactions between it and Rahima Traders. The Tribunal cannot be faulted on that ground.
23. In *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR*, the court stated;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It



is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

24. The TAT judgment at paragraph 80 indicates that the Appellant in its letter dated 23rd April 2018, had informed the Respondent that it had relevant documents required to support the transaction including purchase invoices. Stock records showing goods received and sold, sales records and record of payment made to Rahima Traders via bank transfers and invited the Respondent to inspect them.
25. At paragraph 81 of TAT judgment, the Respondent by letter of 28th June 2018, communicated its objection confirming the assessment without explaining why they did not inspect the documents as invited to do, or if they did what was the result/finding and if the documents were rejected the reasons and basis for such rejection.
26. The Respondent identified the Appellant to be one of the beneficiaries of VAT Fraud Scheme (Missing Trader Scheme) and established that Rahima Traders was not an importer of mobile phones and accessories and could not have supplied the Appellant with the goods. The Respondent did not however place before the Tribunal any information about its investigations or any evidence material to show the Appellant was involved in alleged missing trader Fraud.
27. Section 30 of TAT Act prescribes burden of proof on assessment but in this case the Appellant made an allegation of fraud to Respondent the burden of proof under Section 107 *Evidence Act* is that ‘he who alleges must prove’. There was no evidence that was produced to link the Respondent to the alleged fraud. In this regard, the Court finds that there is nothing on record to suggest that the Tribunal misdirected itself on the burden of proof.

2. Whether the Tribunal erred in law in reading Section 17 of the *Value Added Tax Act*, 2013 in isolation while ignoring the other relevant tax provisions?

28. Section 17 of the VAT Act provides for input tax as follows;

- (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.

- (3) 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).

29. Section 2 of the VAT Act defines “input tax” as;
- (a) tax paid or payable on the supply to a registered person of any goods or services to be used by him for the purpose of his business; and
 - (b) tax paid by a registered person on the importation of goods or services to be used by him for the purposes of his business;
30. It was the Appellant’s contention that the Tribunal only looked at Section 17 of the *Value Added Tax Act* while ignoring other relevant provisions on documentation. The Tribunal at paragraph 88 of its judgment stated that the Appellant herein did not specify which documents or information were not provided by the Respondent as this was required to prove that input VAT was paid to a person who was registered as an agent of the Appellant.
31. Section 43(2) of the VAT Act specifically lists the records to be kept by a taxpayer. It is not in dispute that the Respondent provided the Appellant with documents but what is contended is the fact that the Appellant did not specify which documents or information was not provided. Both Section 17 (3) and Section 43(2) of the VAT Act list the specific documents to be provided by the taxpayer. The Respondent by providing the Appellant with the documents to support its transactions had discharged its burden of proof as provided for under Section 56(1) of the Tax Procedures Act;
56. General provisions relating to objections and appeals (1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
32. The Appellant contended that the Tribunal erred in law in reading Section 17 of the *Value Added Tax Act*, 2013 in isolation while ignoring the other relevant tax provisions. There are other provisions that relate to record keeping and/or production of certain documents; Sections 42 & 43 of VAT Act. The Tribunal held that most of the traders that the Appellant claimed input from were not registered persons and agreed that the input tax ought to have been disallowed under Section 42(2) (b) of the Act and stated that the Respondent failed to name the traders and to provide evidence that they were not registered. The Court finds the burden to prove who the traders were and that they were not registered would be an uphill task for the Appellant. Surely, it is the Respondent who interacted with them and ought to prove by documents that they transacted in the first place before registration is confirmed.
33. The Appellant asserted that the Tribunal erred in law and in fact in failing to find that the Appellant has the powers to raise additional assessments based on the available information. The Appellant is entitled to reassess or raise additional assessments as provided by law but the current assessment and demand is vitiated by the fact that the Respondent’s availability and presentation of documents for inspection was not taken up by the Appellant and if so no reasons were advanced for rejection.

DISPOSITION

34. In the instant case, the Appellant did not, either before the Tribunal or before this Court, name the documents that were lacking or that these documents failed to back the Respondent’s claim for the Tribunal to be held to have erred in its finding.**
35. In the upshot of the above I find that the Appeal lacks in merit and is dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 10TH DECEMBER, 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI



JUDGE

