



**Silpack Industries Limited v Commissioner of Domestic Taxes (Tax Appeal 1587 of 2022) [2024] KETAT 282 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KETAT 282 (KLR)

**REPUBLIC OF KENYA  
IN THE TAX APPEAL TRIBUNAL  
TAX APPEAL 1587 OF 2022  
GRACE MUKUHA, CHAIR, E KOMOLO, JEPHTHAH  
NJAGI, W ONGETI & G OGAGA, MEMBERS  
FEBRUARY 23, 2024**

**BETWEEN**

**SILPACK INDUSTRIES LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant is a private limited liability company incorporated in Kenya under the [Companies Act](#), and whose principal activity is manufacture of packaging products.
2. The Respondent is an officer appointed under Section 13 of the [Kenya Revenue Authority Act](#), 1995. Under Section 5 (1) of the [Act](#), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue.
3. On 10<sup>th</sup> August 2022, the Respondent assessed the Appellant for additional VAT of Kshs. 4,441,682.64 on account of disallowed purchases (input taxes) and sales (output taxes). This was done upon audit of the Appellant's application for VAT refunds arising from excess withholding tax credits and supply of zero-rated good.
4. On 19<sup>th</sup> September 2022, the Appellant, being dissatisfied, objected to the Respondent's additional assessment.
5. On 23<sup>rd</sup> September 2022, the Respondent requested the Appellant for additional information in support of its objection.
6. The Respondent subsequently issued an objection decision on 17<sup>th</sup> October 2022, and confirmed the additional assessment of Kshs. 4,441,682.64



7. Aggrieved, the Appellant filed the instant Appeal vide a Notice of Appeal dated 15<sup>th</sup> December, 2022 and filed on the same date.
8. The parties subsequently filed a Partial Consent dated 15<sup>th</sup> November 2023, in which the issue in dispute and for the Tribunal's determination was narrowed down to additional VAT assessment of Kshs. 1,904,087.00 in respect to unsupported zero-rated sales.

### **The Appeal**

9. The Appeal is premised on the Memorandum of Appeal dated 23<sup>rd</sup> December 2022 and filed on 29<sup>th</sup> December 2022 stating the following grounds: -
  - a. That the Respondent erred in law and fact in disallowing input tax in relation for purchase of commercial vehicle/truck by the Appellant.
  - b. That the Respondent erred in law and fact in finding that incomes were undeclared for the year 2019, yet the Appellant had declared the same in the subsequent month of July 2019 as its accounting period ended in June 2019.
  - c. That the Respondent erred in fact in finding that the Appellant's exports of value of Kshs. 19,980,395.00 are unsupported, and subsequently charging the Appellant VAT of Kshs. 3,196,863.00, the Appellant has all documentation to support its exports.

### **The Appellant's Case**

10. The Appellant's case is premised on the following documents filed before the Tribunal: -
  - a. The Appellant's Statement of Facts dated 23<sup>rd</sup> December, 2022 and filed on 29<sup>th</sup> December, 2022.
11. The Appellant averred that it applied for refund of VAT due to withholding taxes of Kshs. 23,273,841.00 and excess input tax arising from zero rated supplies amounting to Kshs. 29,688,221.00.
12. That the Appellant's refund application was referred by the Respondent for audit during which period the Respondent requested various documents and information. The Appellant contended that it supplied the requested information and documents.
13. That vide an email of 31<sup>st</sup> October, 2022, the Appellant requested the Respondent for the final audit report.
14. That the Respondent responded to the Appellant attaching the final audit report, however this was not supported by appendices and other information that was highlighted in the said report. This prompted the Appellant to request for the appendices, which were finally availed via email of 8<sup>th</sup> November 2022.
15. That the Respondent issued additional assessments vide iTax on 5<sup>th</sup> September 2022 before the final report of its audit findings, which prompted the Appellant to file its objection on 19<sup>th</sup> September 2022 requesting the Respondent to reverse/vacate its assessment in its entirety.
16. That the Respondent issued an objection decision without reverting/responding to the Appellant, thus failed to provide the Appellant with ample time to provide necessary information to support its objection application.
17. That in its decision, the Respondent claimed that the Appellant did not respond to the issues raised during the audit since the matter was not new based on various correspondences held with the assessing team.



18. That the Appellant could not adequately respond to the queries since it was waiting for feedback from the Respondent as stated in its email of 25<sup>th</sup> October 2022. Thus, the Respondent's argument that the issues raised were not responded to fully are without merit.
19. That the Respondent issued the Objection decision on 17<sup>th</sup> November 2022, which was 9 days after issuing the final audit report and additional supporting documentation. Therefore, the Appellant was not accorded reasonable time to respond to queries, which is in contravention of Article 47 of the Constitution, 2010, which guarantees the Appellant's right to fair administrative action that is reasonable and procedurally fair.
20. That although the information was ready and being compiled, the action by the Respondent to issue the objection decision therefore meant that the only recourse would be to appeal to this Honourable Tribunal.

### **Appellant's Prayers**

21. The Appellant prayed to the Tribunal for the following orders: -
  - a. The instant Appeal be allowed.
  - b. The Respondent be directed to amend the Appellant's June 2020 and December 2021 additional assessments to nil.

### **The Respondent's Case**

22. The Respondent's case is premised on the following documents filed before the Tribunal: -
  - a. The Respondent's Statement of Facts dated 28<sup>th</sup> January 2023 and filed on 30<sup>th</sup> January 2023.
  - b. The Respondent's Written Submissions dated 14<sup>th</sup> August 2023 and filed on 29<sup>th</sup> August 2023.
23. The Respondent averred that it conducted an audit on the Appellant's audited accounts, income and expense ledgers, asset registers, payroll information and income and expense invoices, after the Appellant made an application for VAT refunds in the sum of Kshs. 52,962,062.00.
24. That upon receiving the Appellant's objection, the Respondent requested the Appellant to avail documents in support of the explanations that the Appellant had tendered in its objection.
25. That the Appellant neither raised the grounds in its objection that it has now raised in the instant Appeal, nor provided any documentation or explanations to support the grounds of objection.
26. That the Appellant cannot raise new grounds in the Appeal that were not part of the objection as it contravenes Section 56(3) of TPA and Section 13(6) of TAT Act.
27. That it is the Appellant's burden to prove that the assessments are excessive or wrong, and the same cannot shift to the Respondent.
28. That the Appellant had obligation to provide competent documentation in support of the explanations it tendered, and since they were not provided at the objection stage, the Respondent had no opportunity to consider them.
29. That the Appellant does not deal with passenger cars or mini buses as taxable supply and therefore cannot deduct input under Section 17(4) of the VAT Act.
30. That the instant appeal is not meritorious on the basis that the Appellant has not discharged its burden of proof and therefore the objection decision is valid and duly anchored in law.



## Respondent's prayers

31. The Respondent prayed to the Tribunal for the following orders: -
  - a. The Objection decision be upheld.
  - b. The Appeal be dismissed with costs to the Respondent for lack of merit.

## Issues for Determination

32. The Tribunal, having carefully reviewed the pleadings and filings made by the parties and the supporting documentation is of the view that the following issue falls for its determination: -

Whether Additional VAT assessment of Kshs. 1,904,087.00 in respect of unsupported zero-rated sales is due and payable.

## Analysis and Findings

33. The Tribunal noted that the Appellant and the Respondent, after filing the instant Appeal, entered negotiations, and recorded partial consent on majority of issues in dispute.
34. The single pending issue for determination by the Tribunal is on additional VAT assessment of Kshs. 1,904,087.00 in respect of unsupported zero-rated sales by the Appellant.
35. The Appellant averred extensively that it supplied some documentation and information to the Respondent to support its objection.
36. The Appellant contemporaneously averred that Respondent issued its Objection decision nine (9) days after issuing the final audit report and additional supporting documentation/appendices.
37. It was the Appellant's contention that it was not accorded reasonable time to respond to queries, which is in contravention of Article 47 of the *Constitution*, 2010, which guarantees the Appellant's right to fair administrative action that is reasonable and procedurally fair.
38. From the outset, the Tribunal noted that these are conflicting positions, especially because both parties continued to negotiate during the pendency of the instant Appeal leading to the Partial Consent filed on 15<sup>th</sup> November, 2023.
39. On its part, the Respondent submitted on two main grounds. First, that the Appellant had introduced new grounds in the Appeal which were not the grounds the Appellant identified at objection stage, and which is contrary to Section 56(3) of *TPA* and Section 13(6) of the *TAT Act*. Second, that the Appellant had failed to provide the Respondent with relevant additional documents and information, and thus not discharged its burden of proof/obligation in terms of 56(1) of *TPA* and Section 30 of *TAT Act*.
40. To buttress its case, the Respondent relied on, amongst others, the authority in *Usbindi Limited v Commissioner of Investigations and Enforcement* (2020) eKLR where it was held thus;

“The burden of proof was on the Appellant to raise the specific items and/or aspects of the tax assessment that were manifest errors, wrongfully imposed or not liable to be paid as tax.”
41. The Tribunal noted that despite the contradictory positions advanced by the Appellant in terms of opportunity to provide additional documents and information, there is nothing on record before the Tribunal to show that the Appellant shared the said documents.



42. The Tribunal has previously addressed itself on the obligation of parties in tax matters. In *Digital Box Limited v Commissioner of Investigations and Enforcement* (2020) eKLR, with regard to the taxpayer’s obligation the Tribunal held as follows: -

“The question of burden of proof in taxation matters is provided for under the *Tax Procedures Act* as well as the *Tax Appeals Tribunal Act*. Section 56(1) of the *Tax Procedures Act* states that: ‘In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect’. Section 30 of the *Tax Appeals Tribunal Act* similarly provides that: 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.”

In this case, the Appellant is the one seized of the desire to prove that the Respondent used extraneous information in arriving as its assessment. Thus, according to the provisions of *Evidence Act*, the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*, the burden of proof falls upon the Appellant...the Tribunal is of the view that the Appellant did not discharge its burden proof in showing that the Respondent used extraneous considerations and documents other than those prescribed in the law. The averments made by the Appellant did not amount to evidence.”

43. In the instant case, the Tribunal is of the considered view that the Appellant has not discharged its obligation and proved that it provided the documents to the Respondent. Indeed, the Appellant did not even make effort to annex those relevant documents and information as part of the instant Appeal.

44. Accordingly, the Tribunal holds that the Appellant has, in the circumstances, failed to discharge its burden of proof. The Appeal must therefore fail.

**Final Decision**

45. The upshot of the foregoing is that the Appeal, save for the Partial Judgment entered on the 22<sup>nd</sup> November, 2023, lacks merit and the Tribunal accordingly proceeds to make the following Orders:-

- a. The Appeal be and is hereby dismissed.
- b. The Respondent’s confirmed additional VAT assessment of Kshs. 1,904,087.00 be and is hereby upheld.
- c. Each party to bear its own costs.

46. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024**

.....

**GRACE MUKUHA  
CHAIRPERSON**

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**DR. ERICK KOMOLO JEPHTAH NJAGI  
MEMBER**



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**DR. WALTER J. ONGETI GLORIA A. OGAGA**  
**MEMBER**

