



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**INCOME TAX APPEAL NUMBER E334 OF 2024**

**COMMISSIONER OF DOMESTIC TAXES -----**

**APPELLANT**

***VERSUS***

**ELISHA JACK ORARO -----**

**RESPONDENT**

**JUDGMENT**

1. The appellant /respondent *is a principal officer appointed under section 13 of the Kenya Revenue Authority Act, Cap 469 Laws of Kenya (KRA Act). Under Section 5(1) of the Act, KRA is an agency of the Government for the collection and receipt of all revenue. Under Section 5(2) of the Act with respect to the performance of its function under Subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Parts 1 and II of the First Schedule to*

*the KRA Act for the purpose of assessing, collecting and accounting for all revenues in accordance with those laws.*

2. The respondent/appellant Elisha Jack Oraro is a registered Tax Payer.
3. On 16/9/2022, the respondent was issued with additional assessment for VAT amounting to principal tax of Kshs. 754,180/25 for May, 2017, January, 2019, March, 2019, and December 2019.
4. This arose out of the respondent's failure to provide the documentary evidence to show that the input tax claimed in that period came within section 17 of the VAT Act, 2013.
5. The respondent lodged a late objection on 7/2/2023.
6. The appellant acknowledged it the same day. The objection was approved on 9/2/2023, and the respondent invited to validate his objection by filing supporting documents by 16/2/2023.
7. The respondent having failed to provide the same, the appellant wrote follow up letters requesting for the documents, vide a letter dated 3/3/2023, to provide the same by 10/3/2023.
8. Further letters were written via email - on 13<sup>th</sup>, on 24<sup>th</sup> March 2023- without any response. The appellant proceeded to issue objection decision on 28/3/2023 confirming the VAT assessment.

9. The respondent filed appeal at the Tax Appeals Tribunal on the grounds:-

- a) *That the respondent erred in both law and fact in not recognizing and complying with duly filed VAT returns of May, 2017, January, 2019, March, 2019 and December 2019.*
- b) *That the respondent erred in both law and fact in not acting on VAT input original documents submitted as requested and instead kept on asking for the appellant's submission later after having received them.*
- c) *That the respondent erred in both law and fact in insisting on reconstructing VAT input documents which documents originated from suppliers of the appellant and therefore not possible.*
- d) *That the respondent violated the appellant's right to fair administrative action and laws of natural justice by summarily and arbitrarily issuing additional assessments without affording him any reasonable opportunity to be heard on the assessments.*
- e) *That the respondent erred in fact and law by openly manifesting biasness, unfairness and unfair action of*

*misplacing VAT input evidence documents submitted and imaginarily confirming arbitrarily determined VAT additional assessment.*

f) *That the respondent erred in law by denying the appellant his right to be subjected to administrative action from a public body, Kenya Revenue Authority, which is expeditious, efficient, lawful, reasonable and procedurally fair as provided under Article 47 of the Constitution of Kenya.*

10. After hearing the appeal – the TAT set out one issue for determination :*whether the appellant’s assessment on VAT was justified.*

11. By its judgment dated 25/10/2024, the TAT allowed the appeal setting aside the objection decision of 28/3/2023, and referring the matter back to the respondent for review of the respondent’s documents within 60 days thereof.

12. The appellant was aggrieved, and filed this appeal, through amended the memorandum of appeal amended on 7/4/2025. The grounds of appeal are:-

- 1) *That the honourable tribunal erred in law and in fact in setting aside the appellant's objection decision dated 28<sup>th</sup> March, 2023.*
- 2) *That the honourable tribunal erred in law and in fact in holding that the respondent had established a prima facie case that they supplied documents to the appellant.*
- 3) *That the honourable tribunal erred in law and in fact in holding that the respondent discharged its burden of proof.*
- 4) *That the honourable tribunal erred in law and in fact by failing to consider the evidence tendered by the appellant herein thereby arriving at an erroneous decision.*
- 5) *That the honourable tribunal misapplied the law and facts and therefore arrived at the wrong decision.*

The appellant seeks that the appeal be allowed the judgment of the tribunal be set aside.

13. In this appeal - the appellant identified these issues for determination;

*a. That the Hon. Tribunal erred in law and facts - by holding that the respondent had established a prima facie case; that they supplied documents to the appellant, ;by failing to appreciate that the burden of proof in tax matters lies on the tax payer, and in exercising its discretion wrongly by issuing a judgment in express contravention of the law.*

14. Parties filed written submissions.

15. It is submitted for the appellant that the respondent's late objection was received on 9/2/2023 and he was invited to produce supporting documents - as required by section 17 of the VAT Act -

- *Purchase invoices and ETR/ESD receipts against purchase invoices*
- *Delivery notes*
- *Supplier's confirmation*
- *Supplier's statements*
- *Proof of payment i.e bank statements, cheques payments slips and*
- *Any contractual agreements with suppliers.*

16. It is submitted that the respondent failed to avail any records to support the objection as required by Section 51(3) of the Tax Procedures Act ;

*“A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if;*

*a) The notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments.*

*b) In relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and*

*c) All the relevant documents relating to the objection have been submitted.”*

**17.** It is also submitted that there was no valid objection because the respondent did not comply with section 51(3) (c) of the Tax Procedures Act: the appellant relies on **Kotile General Contractors Company Ltd Vs Commissioner of Domestic Taxes [2020]eKLR** where the TAT held that

there was no valid objection because the applicant had failed to comply with the provisions of section 51(3) of the Tax Procedure Act. It was further submitted that the respondent failed to support his objection, and that the burden of proof was on him as provided for under section 56(1) of the Tax Procedure Act where it states that;

*“In any proceedings under this part the burden shall be on the applicant to prove that a tax decision is incorrect”*

18. Further that the appellant failed to prove, as is required by section 30 of the TAT Act - in an appeal relating to an assessment , that the assessment was excessive or the tax decision should have been made differently or not at all. The appellant relied on section 107 of Evidence Act on the burden of proof and relied on **Sheria Sacco Society Limited vs Commissioner of Tax [2019] eKLR** among other cases to reinforce the position that the respondent had not discharged the burden of proof.

19. It is sought that the appeal be allowed and the orders of the TAT be set aside.

20. For the respondent; it is in the statement of facts that ;

- 1) *The respondent is a resident registered individual tax payer with a personal identification Number A004420242B.*
- 2) *The appellant initiated tax investigations on the respondent as provided for in Section 59 of the Tax Procedures Act. In the process of the investigations, relevant records were asked for by the appellant which were duly provided by the respondent in full.*
- 3) *The investigation resulted into a demand notice by the appellant to the respondent dated 30<sup>th</sup> March,2023 for Kenya Shillings 11,766,100.95 composed of income tax of Kenya shillings 10,651,783.20 and VAT of Kenya shillings 1,114,317.75 both interests and penalties inclusive.*
- 4) *The additional assessment notices for these amounts did not come to the attention of the respondent before the demand notice.*
- 5) *The respondent had the additional assessment notices availed to him by the appellant and after the perusal,*

*he raised late objection as per section 51(1) of the Tax Procedure Act which was approved by the respondent.*

21. The Respondent explains the basis for the objection as the following grounds:-

- a) That the appellant erred in both law and fact in not recognizing and complying with duly filed VAT returns on May, 2017, January 2019, March, 2019 and December, 2019.*
- b) That the appellant erred in both law and fact in not acting on VAT input original documents which documents submitted as requested and instead asking for their submission later after having received them.*
- c) That the appellant erred in both law and fact in insisting on reconstructing VAT input documents which documents originated from suppliers of the respondent and therefore not possible.*
- d) That the appellant violated the respondent's right to fair administrative action and laws of Natural Justice by summarily and arbitrarily issuing additional*

*assessments without affording him any reasonable opportunity to be heard on the assessment.*

*e) That the appellant erred in fact and law by openly manifesting biasness, unfairness and unfair administrative action of misplacing VAT Input evidence documents submitted and imaginarily confirming arbitrarily determined VAT additional assessments.*

*f) That the appellant erred in law by denying the respondent his right to be subjected to administrative action from a public body, the appellant which is expeditious, efficient, lawful, reasonable and procedurally fair as provided under Article 47 of the Constitution of Kenya 2010.*

22. From the foregoing the respondent is saying that he had duly filed VAT returns in May 2017, January 2019, March 2019, and December, 2019.

- That the original VAT documents had been submitted.

- That the suppliers had already filed the VAT documents and that the appellant had insisted on reconstructing these VAT documents.
- That he had been denied a fair hearing

23. He states further that the fact that **a net taxable income was agreed on between the appellant and respondent** - means that all the requested documents had been availed.

24. The respondent submitted that the documents asked for were availed to the appellant and the appellant proceeded to make the decision without considering them.

25. I have carefully considered the statements of facts, written submissions and relevant provisions of the law.

26. It is trite that this is a 2<sup>nd</sup> appeal - where this court is only bound to consider matters of law. The question is , did the appellant comply with the law?

27. The TAT in its judgment made the following findings :

*1) In determining whether the Respondent's decision to disallow the input VAT by the appellant was proper as per the provisions of the VAT Act, 2013 the Tribunal*

*set to establish whether the appellant had furnished sufficient proof of purchase.*

*2) The right to claim input VAT is premised on the assumption that the taxpayer had paid VAT during the purchase of its supplies. In this regard, the taxpayer is required to prove that it purchased taxable supplies. The proof is in transaction documents and it is for the taxpayer to discharge this burden.*

***3) The issue as to whether the appellant supplied support documents for its refund claims application is the gist of the matter.*** *Although the appellant stated that it did supply the same, the respondent vehemently refutes the claim. ( Emphasis mine)*

***4) The appellant and the respondent have annexed to their statement of facts three emails dated 14<sup>th</sup> March, 2013 in which the appellant claims that he had given the respondent its supporting documents***

*and **the respondent's officers admit to have the same. (Emphasis mine)***

*5) The tribunal noted that **the respondent did not dispute the provision of the documents by the appellant but continued demanding for the documents in support of the appellant's claim after the date of 14<sup>th</sup> March, 2023 its admission of having the same as per the emails afore stated notwithstanding. (Emphasis mine)***

*6) The tribunal observes that it is a common principle that a taxable person who makes transactions in respect of which VAT is deductible may deduct the VAT in respect of the goods or services acquired by him, provided that such goods or services have direct and immediate link with the output transaction in respect of which VAT is deductible. In the Kenyan VAT system, this principle is found in Section 17(1) of the VAT Act.*

*7) The tribunal is of the view that **the only obligation upon the appellant was to furnish sufficient***

***proof of purchase. That the evidence provided by the appellant through the emails established prima facie that he indeed supplied documents to the respondent. (Emphasis added)***

8) *Despite the foregoing, the tribunal notes that the appellant did not attach the documents in issue or copies of the same and in the circumstances could not peruse the same and make a conclusive determination.*

28. I have perused the record of appeal and I have seen the emails exchanged between the tax payer and officers of the appellant.

29. There is admission by the officers of the appellant of receiving the documents from the respondent, a confirmation that the documents sought had already been submitted and it was upon the respondent to consider them.

30. It is upon this finding that I uphold the decision of the Tribunal delivered on 25<sup>th</sup> October 2024.

31. The appeal is dismissed with a direction that the appellant complies with the orders of the tribunal.

32. Orders accordingly.

**Dated, signed and delivered via CTS on 9<sup>th</sup> January**

**2026**

**Mumbua T Matheka  
Judge**