



REPUBLIC OF KENYA



**Seo and Sons Limited v Commissioner of Domestic Taxes (Income Tax Appeal E120 of 2021)
[2024] KEHC 918 (KLR) (Commercial and Tax) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E120 OF 2021**

**A MABEYA, J
JANUARY 30, 2024**

BETWEEN

SEO AND SONS LIMITED APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

1. The respondent investigated the appellant for the period of January, 2016 to December, 2017 for the high VAT credit demonstrated in its monthly filings. On 8/5/2017, the appellant was served with a notice to verify the tax declarations and the respondent issued his assessment on 9/2/2018 for Kshs. 37,732,976/- comprising of the principal tax and interest.
2. The appellant with leave filed the late objection on 19/4/2018 and an objection decision was issued by the respondent on 18/6/2018. Dissatisfied with that decision, the appellant lodged an appeal at the Tax Appeals Tribunal (“the Tribunal”) and on 18/8/2021 the Tribunal dismissed the appeal.
3. Being aggrieved by the said judgment, the appellant has filed the present appeal *vide* a memorandum of appeal dated 8/7/2021. The grounds of appeal can be summarized as follows: -
 - a. That the Tribunal erred in failing to consider all the documents presented to it and gave an assessment that was not reasonable or fair.
 - b. That the Tribunal erred in fact and in law in failing to consider all the information and supporting documents.
4. The respondent opposed the appeal *vide* the statement of facts dated 20/2/2023. He contended that the assessment was based on an estimation since the appellant failed to respond to the verification



notices. That the appellant's objection did not meet the threshold under section 51(3) of the [Tax Procedures Act](#).

5. That the documents having been availed on the 60th day, the respondent's time to issue an objection decision had lapsed. With respect to the documents availed by the appellant, the respondent averred that the VAT claims were not supported by invoices and some claim were after six months of supply.
6. That the appellant had claimed some inputs twice. That the input VAT claims by the appellant were not supported by proper documentations and others were time barred.
7. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that the respondent did not consider all the documents presented to him and had the effect of making the Tribunal reach a different outcome. That the issue of documents being barred was raised at the submission stage and not when the objection decision was made. It was submitted that the Tribunal failed to consider the supporting documents contrary to section 31 of the [Tax Procedures Act](#).
8. That the respondent had time to consider the supporting documents and if the Tribunal had addressed itself on the pleadings, it would have arrived at a different outcome. That the respondent had not contended the documents were not availed but rather that he was not willing to go through the documents. Finally, that the appellant maintained proper records of every transaction as required by law.
9. The respondent submitted that the appellant's objection did not meet the requirements under section 51(3) of the [Tax Procedures Act](#) as the appellant only availed further documentation in support of the objection on the 60th day. That according to section 17 of the [VAT Act](#), the appellant could not claim input VAT without providing documentation as proof. That the appellant did not discharge the burden of proof by not supporting the input VAT claims.
10. I have considered the record, the response and the written submissions. The dispute between the parties stems from section 17 of the [VAT Act](#) with regard to input VAT. The appellant faulted the Tribunal for not considering all the documentation provided with respect to input VAT. According to the appellant, had the Tribunal considered the said evidence the outcome would have been different.
11. On his part, the respondent contended that the objection was not valid as it was not supported by evidence and the documents were only availed on the 60th day when the respondent was mandated to issue an objection decision.
12. Section 17 of the [VAT Act](#) provides for credit for input tax. It provides 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.”

13. In view of the foregoing, for a tax payer to claim input VAT there must be evidence to show that the supplies actually took place. The burden of proof in matters tax lies with the tax payer. Section 56 of the [Tax Procedures Act](#) provides: -

“In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is wrong”.

14. Further, section 30 of the [Tax Appeal Tribunal Act](#) provides: -

“In a proceeding before the Tribunal, the appellant has the burden of proving where an appeal relates to an assessment, that the assessment is excessive.”

15. I have looked at the record, in its impugned decision, the Tribunal held that the documents attached to the appeal did not have a schedule to demonstrate how the invoices supported the claims. Further, it made a finding that the appellant did not make the documents available to the Tribunal for determination.

16. From the record, the assessment was confirmed on 9/2/2018 for failure to produce records as requested. Further, the reasons advanced for confirming the assessment in the objection decision were that some of the input tax were not supported, copies of the invoices were not properly arranged and that the claimed input tax was not separated with the unclaimed input tax.

17. With respect to the objection decision, the court does not find any error on the part of the respondent. Section 51(11) of the [Tax Procedures Act](#) makes it mandatory for the respondent to issue an objection decision within 60 days of the objection failure of which the objection is allowed. The appellant was under an obligation to lodge the notice of objection together with the supporting documents. By purporting to supply the same on the 60th day, there was no intention that the respondent was to act on them. That was mischievous to say the list.

18. Section 59 (1) of the [TPA](#) provides that a tax payer shall produce records when required to do so by the Commissioner as follows: -

“(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to—

- (a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
- (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice;
- (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.”



19. The Tribunal is wrongly faulted that it did not consider the documents supplied yet from the judgment, it is demonstrated otherwise.
20. For the reasons set out above, the Court finds no merit in the appeal and the same is dismissed with costs. The judgment of the Tax Appeals Tribunal delivered on 18/6/2021 is hereby upheld.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

