REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 581 OF 2020

TRIBUS TSG SECURITY LIMITED.....APPELLANT

- VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is an internationally accredited company and is the security arm of the Centum Investment Group. It is a subsidiary of the Centum Investment group.

2. The Respondent is a principal officer of Kenya Revenue Authority (KRA). KRA is established under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and is charged with the mandate of administration, assessment and collection of revenue as an agent of the Government of Kenya.

3. On 15th November, 2019, the Respondent raised an assessment on VAT for the months of January to April 2018 amounting to Ksh.3, 233, 244.00.

4. On 3rd February, 2020 the Appellant made a late objection claiming that it was not its duty to confirm when and how the supplier declared the sales.

5. The parties engaged in discussions and reviewed the documents provided.

6. The Respondent considered the Objection and the supporting documents and issued its objection Decision on 17th November, 2020 where the assessment was reduced to Kshs.999,000.00.

7. Being dissatisfied with the Respondent's Objection Decision, the Appellant appealed to this Tribunal by filing a Memorandum of Appeal and Statement of Facts on 10th December, 2020.

THE APPEAL

8. The Appeal was premised on the following grounds:

   a) That The Respondent erred in disallowing genuine input VAT claimed by the Appellant.
   b) That in rendering its decision, the Respondent failed and / or neglected to take into account the provisions of Sections 12 and 17 of the VAT Act, 2013.
   c) That the Respondent's decision lacks basis in law.

THE APPELLANT'S CASE

9. The Appellant stated that the Respondent issued it with Value Added Tax Automated Assessments (VAA) for the months of January and April 2018 amounting to Kshs.3, 233,244.00.

10. In accordance with Section 51 of the Tax Procedures Act, 2015 (TPA), the Appellant objected to the assessment on 3rd February, 2020.

11. The Respondent reviewed the objection lodged by the Appellant and disallowed input VAT amounting to Kshs. 999,000.00.

12. The Appellant averred that Securex Agencies Limited issued it with an invoice dated 8th February, 2018 for security services it provided in the month of December, 2017. The Appellant accordingly claimed the invoice IN391019 in the month of January 2018.

13. That in disallowing the input tax claimed by the Appellant, the Respondent did not put into consideration the provisions of Section 12 of the VAT Act which provides as follows;

"subject to subsection (3), the time of supply, including a supply of services, shall be the earlier of;

a. The date on which goods are delivered or services performed,

b. The date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity,

c. The date on which the invoice of supply is issued, or

d. The date on which payment for the supply is received in whole or in part."

14. The Appellant maintained that the supply of the security services referenced in the said invoice is a genuine supply where the services were performed in the month of December, 2017. This is evident from the description of the service as indicated in the invoice.

15. The service provider confirmed to the Respondent that the services were indeed offered and that the invoice was genuine. Further, the service provider duly accounted for VAT on this specific invoice and accordingly declared the same under its VAT returns and as such, there was no loss of revenue to KRA.

16. The Appellant further submitted that input VAT incurred herein was to generate taxable supplies which are the security services offered by the Appellant. Further, according to the Appellant, the Respondent did not raise any reasonable grounds under the law for which the input VAT was disallowed.

17. The Appellant averred that Xtranet Communications Limited supplied it (the Appellant) with computer equipment in the month of November 2017 and issued a tax invoice 14050 for the same as required under Section 17 of the VAT Act.

18. According to the Appellant, the invoice in the month of April 2018 was in accordance with Section 17 of the VAT Act and is in compliance with the requirements under Article 9 of the VAT Regulations, 2017.

19. The Appellant submitted that in disallowing the input VAT claimed, on the invoice number 14050, the Respondent did not put into consideration the provisions of Section 17(1) of the VAT Act which provides that:

"Subject to the provision 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."

20. The Appellant maintains that this is a genuine supply of goods as it fully paid for the goods sold on the 5th April, 2018 and the service provider confirmed that indeed the goods were sold and delivered to the Appellant's premises.

21. Further, the service provider has duly accounted for VAT on the said supply and accordingly declared the same in its VAT returns for the month of November, 2017 and so there was no loss of revenue to KRA.

22. The Appellant insists that the VAT it incurred in this supply was to generate taxable supplies which were the security services offered by the Appellant. Further, the Respondent did not raise any reasonable grounds under the law for which the input VAT was disallowed.

23. In view of the foregoing, the Appellant prays that the Honourable Tribunal finds that:

    a. The assessment of Kshs.999,000.00 by the Respondent be vacated in its entirety,
    b. The Respondent be estopped from demanding or taking further steps to enforce recovery of principal tax, penalties and interest as stipulated, and
    c. The Honourable Tribunal be at liberty to make any such orders as it deems necessary in the circumstances.

THE RESPONDENT'S CASE

24. The Respondent submitted that the iTax system noted inconsistencies in the VAT returns of the Appellant and its suppliers. On 15th November, 2019 the Respondent raised assessments for the months of January to April 2018 amounting to Kshs.3, 233, 244.00.

25. The Appellant lodged a late objection on 3rd February 2020 and the parties engaged in discussion and review of the documents.

26. The Respondent considered the objection and the supporting documents causing the assessment to be reduced to Kshs. 999,000.00.

27. The Respondent asserted that the law allows it to deny input VAT where the requirements are not met. It quoted Section 17(1) of the VAT Act (the same has been reproduced earlier in this judgment) and stated that

the law is not open ended to allow taxpayers to claim input whenever they so please and that the requirements of the law must be met.

28. It further quoted the provisions of Section 56(1) of the TPA which provides that in any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect. According to the Respondent, the Appellant failed to fully discharge this burden and this is proven by the fact that disallowed input VAT at the assessment stage and the objection stage changed significantly.

29. This, according to the Respondent, meant that the Appellant had the necessary evidence for the other invoices but failed to provide the necessary invoices in support of the Kshs.999,000.00 amount that remained disallowed. The Respondent maintains that it is the Appellant's onus to prove that the input VAT was genuine.

30. The invoices that were disallowed were as follows:
    a. Invoice from Xtranet Communications limited was disallowed because it had no ownership proof. The amount disallowed was Ksh.10,560.00.
    b. Invoice from Securex Agencies limited was disallowed because it was claimed prior to the date indicated as having been issued. Amount disallowed was Ksh.988, 440.00.

31. The Respondent further submitted that it is allowed under Regulation 9 of the VAT Regulations, 2017 to call for further information that would satisfy it of the veracity of the input VAT claimed.

32. Further, the Respondent stated that the Appellant cannot allege that it (the Respondent) acted in ultra vires of its power and failed to state the actions it (the Appellant) believes are in ultra vires.

33. The Respondent maintained that it acted within the law in discharging its mandate. It stated that it considered the provisions of Sections 12 and 17 of the VAT Act in making the Objection Decision.

34. The Respondent therefore prays that this Appeal be dismissed with costs.

ISSUE FOR DETERMINATION

35. Having carefully studied the parties' pleadings, submissions and all documentation provided, the Tribunal is of the view that the issue for determination is as hereunder: -

> **Whether the Respondent's decision to disallow the input VAT claimed by the Appellant was proper as per the provisions of the VAT Act, 2013.**

ANALYSIS AND FINDINGS

36. Section 2 of the VAT Act, 2013 provides that:

""input tax" means –

(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 purpose of his business."

37. From the evidence on record, it is not in dispute that the supplies in question qualify for input tax. The Appellant's contention is that the Respondent was wrong in disallowing input VAT on the same yet it complied with the provisions of Sections 12 and 17 of the VAT Act as far as the supplies in question are concerned.

38. The Respondent on the other hand holds the position that the law allows it to deny input VAT where the requirements are not met. The Respondent further stated that the law is not open ended to allow a taxpayer to claim input tax whenever it so pleases, the requirements of the law must be met.

39. The Respondent submitted that this invoice was disallowed because at the time the input tax was claimed, there was no invoice that had been issued.

40. Section 17 of the VAT Act provides that:

"(1)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 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.

(1) The documentation for purposes of section (2) shall be-

(a) An original 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 statin the amount of tax paid, in the case of goods purchased from a customs auction;

(d) A credit not 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)."

41. It is the Respondent's case that the Appellant did not have the necessary documentation and was not entitled to claim input VAT. Further, the Respondent submitted that the Appellant claiming an invoice before its existence puts itself in a credit position as opposed to a payment position thus deceiving the Respondent and abusing the tax system.

42. Section 12 of the VAT Act provides that:

"(1) subject to subsection (3), the time of supply, including an imported service, shall be the earlier of:

(a) the date to which the goods are delivered or services performed;

(b) the date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity;

(c) the date on which the invoice for the supply is issued; or

(d) the date on which payment for the supply is received, in whole or in part."

43. The Appellant on its part stated that Securex Agencies Limited (the service provider) issued the Appellant with an invoice dated 8th February, 2018 for security services it offered in the month of December, 2017. The Appellant claimed the invoice in the month of January, 2018. The Appellant maintains that this is a genuine supply of a service and the Appellant fully paid for the same and produced its bank statement to prove same. The payment was made on 29th December, 2017.

44. The question that arises then is when was the time of supply in this case.

Section 12 of the VAT Act gives a list of situations that are considered to be time of supply and clearly states "**whichever is earlier**", (a) is the date to which the goods are delivered or services performed and (c) is the date on which the invoice for the supply is issued.

45. In this case, the service was performed in December 2017 while the invoice was issued on 8th February, 2018. The payment was made on 29th December, 2017 and input was claimed in January, 2018.

46. It is our opinion that the time of supply in this case was in December 2017 when the security service was provided which is earlier than when the invoice was issued on 8th February, 2018. The Appellant was therefore right to claim input tax because it had already paid the supplier. Further, the supplier provided a copy of supplier confirmation

and its VAT returns for the month of February 2018 which further proves that the service was provided and duly paid for.

47. Section 17 of the VAT Act provides that:

" (1) Subject to the provision 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, 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 be allowable under sub-section (1), the person does not hold the documentation referred to in sub-section (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)."

48. From the provisions of Section 17, the Appellant had six months after the end of the tax period to claim input tax.

49. Section 2 of the VAT Act provides that **"tax period"** means one calendar month. The supply of service was in December 2017, that means that the tax period would be in January 2018. The Appellant had six months from January 2018 to claim input tax, which means that it had until July 2018 to claim input tax. The Appellant was entitled to claim input VAT as it had the necessary documentation, which was the invoice dated 8th February, 2018.

50. The Respondent's assertion is that by claiming an invoice before its existence, the Appellant puts itself in a credit position as opposed to a payment position is misleading. An invoice does not necessarily insinuate proof of payment. In this case, the Appellant had already paid the service provider as evidenced by the bank statement on record. We therefore find that the Respondent was wrong to disallow input VAT herein.

51. The Respondent submitted that it did not allow input VAT as the invoice of Xtranet Communications Limited as it had no proof of ownership and so it could not establish who had issued it.

52. The Respondent further submitted that the invoice provided by the Appellant did not meet the standards provided under Regulation 9 of the VAT Regulations as the invoice did not have details of the supplier and as such, it would be impossible to state who issued the invoice as it could be from any person and so the same should not be treated as valid.

53. The Appellant on its part submitted that Xtranet Communications limited supplied it with computer equipment in the month of November 2017 and issued it with a tax invoice for the same, which was produced as evidence.

54. The Appellant claimed input VAT for the same in April, 2018. The Appellant maintains that the invoice was genuine and meets the requirements of Regulation 9 of the VAT Regulations, 2017. The Appellant further produced as evidence supplier confirmation from Xtranet Communications Limited.

55. From the submissions by both parties, it is our opinion that the issue herein is whether or not the invoice herein has met the requirements under Regulation 9 of the VAT Regulations, 2017, specifically the requirement that the same invoice should contain the name, address and PIN of the supplier.

56. Upon examination of the invoice provided, the Tribunal notes that the same contains all the details as required; it has the name of the supplier as Xtranet, the address as 6th floor Citadel, P.O Box 27346 -00100 and the PIN is P051244515P.

57. The Respondent's assertion that the invoice provided by the Appellant did not meet the standards provided under Regulation 9 of the VAT Regulations, 2017 as the invoice did not have details of the supplier and so it would be impossible to state who issued the invoice is not true.

58. We therefore find that the invoice in question is valid as it meets all the requirements under Regulation 9 of the VAT Regulations, 2017 contrary to the allegations of the Respondent.

59. In the case **of EDGESKILL LIMITED-VS- THE COMMISSIONER FOR HER MAJESTY'S REVENUE AND CUSTOMS (SUPRA)** where the **Hon. Mr. Justice Hildyard** reiterates the test applied by the FTT (which is a specialist tax tribunal) when considering whether the Commissioners were justified in refusing a claim of input tax. The test, as set out in paragraph 37 of the Decision, is:

    a. Was there a VAT loss?
    b. If so, was it occasioned by fraud?
    c. If so, were the Appellant's transactions connected with such a fraudulent loss of VAT loss?

d. If so, did the Appellant know, or should it have known, of such a connection?

60. In applying the above test, we find that the first question has been answered in the negative and so the case has failed the test.

61. Consequently, the Tribunal finds that the Respondent's decision to disallow the input VAT claimed by the Appellant was not proper as per the provisions of the VAT Act.

FINAL DECISION

62. The upshot of the foregoing is that the Appeal is merited and succeeds. Consequently, the Tribunal makes the following ORDERS: -

a. The Respondent's Objection Decision dated 17th November 2020 disallowing the Appellant's input VAT claim of Kshs. 999,000.00 is hereby set aside.

b. Each party to bear its own costs.

63. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **11th** day of **June, 2021.**

.....
JOSEPHINE K. MAANGI
CHAIRPERSON

.....
PATRICIA M. ANAMPIU
MEMBER

.....
TANVIR ALI
MEMBER

.....
GEOFFREY KARUU
MEMBER

.....
DELILAH K. NGALA
MEMBER