

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 499 OF 2021

CHARLEY AUTOMOBILE LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

Background

1. The Appellant is a limited liability company incorporated in Kenya and is registered with taxpayer
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act and is responsible for the control and management of the Domestic Taxes Department and accounting for tax under the Income tax and Value Added Tax Acts.
3. The Respondent issued VAT Automated Assessments (VAA Assessments) for the months of February 2018, April 2018 and May 2018 on the 15th November 2020.
4. The Appellant objected online to the three VAA assessments on 13th December 2019 and the Respondent via iTax requested for documents on the same date to support the objections.
5. The Appellant provided documents and the Respondent reviewed the Objection and requested additional evidence vide a letter dated 18th May 2021.

relied on as the applicable sub-section relevant in support of the input VAT deductions in the months of February 2018, April 2018, and May 2018.

- d) That Section 17(1) of the VAT Act provides that subject to the *provisions of this sub-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* but only to the extent that the supply or importation was acquired to make taxable supplies. The documentation provided under sub-section (3)(a) is;- an original tax invoice issued for the supply or a certified copy.
- e) That the Appellant complied with provisions of paragraph 4 above herein and hereby attaches the original tax invoices and bank statements copies of which were submitted to the Respondent containing cheque numbers of the cheques by which payments for the supplies were made by the Appellant.
- f) That the Appellant complied with the law under Section 17(3)(a) of the VAT Act, 2013.

APPELLANT'S CASE

9. The Appellant's case is premised on its Statement of Facts dated 9th August, 2021 and filed on 17th August, 2021 together with the documents attached thereto.
10. The Appellant averred that the input tax deducted by the Appellant in the VAT returns for the said months were properly deducted save for input tax

- a) That the Respondent's decision be set aside and that the input tax deducted by the Appellant partially totalling Kshs 1,354,004.61 be allowed as properly deducted in the VAT returns for the months February 2018, April 2018 and May 2018.
- b) That partially deducted input tax in the VAT returns for in the said months totalling Kshs 106,444.00 which were not supported and were not disputed by the Appellant are paid by the Appellant to the Respondent.

RESPONDENT'S CASE

17. The Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal;
 - i. The Respondent's Statement of Facts dated 14th October, 2021 and filed on 15th October, 2021 together with the documents attached thereto.
 - ii. The Respondent's written submissions dated 23rd August, 2022 and filed on the same date together with the legal authorities filed therewith.
18. The Respondent stated that the assessment was based on inconsistencies arising from the Appellant's input taxes claimed in VAT returns filed for the months of February, April and May 2018.
19. The Respondent averred that it correctly applied Section 17 of the VAT Act, 2013 in allowing the correct input tax fully supported and disallowing input VAT.
20. It submitted that following the review of the documents submitted by the Appellant, the Respondent partially accepted the Appellant's objection by

27. While citing Section 17(1) of the VAT Act, the Respondent submitted that the right to claim VAT is premised on the assumption that the taxpayer paid VAT during the purchase of his supplies.
28. That Section 17(1) of the VAT Act 2013 was categorical that a taxpayer, in this case the Appellant is only allowed to claim input VAT only to the extent that the supply or importation acquired was used to make a taxable supply. It averred that the documents required for one to be entitled to claim a refund are provided for under Section 17(3) of the VAT Act. That however, where they are doubtful, they are entitled to ask for additional information to satisfy itself as to the self-assessment made by a taxpayer
29. The Respondent further stated that Section 24(1) & (2) of the TPA allows a taxpayer to file returns but further provides that the Commissioner was not bound by information provided therein and can assess the tax liability based on any other information.
30. It added that in this context, the claim for input VAT was not fully supported by valid documentation and as such, it was defective. The Respondent submitted that it correctly applied Section 17 of the VAT Act in partially accepting the Appellant's objection by allowing input tax fully supported while disallowing input VAT that was not fully supported.
31. It was the Respondent's contention that the Appellant did not meet the threshold of a proper invoice as the particulars of the invoices provided by it differed from those issued by the suppliers. That the invoices and the other relevant records submitted were examined and the main source of inconsistencies was their suppliers declaring lump sum sales in their VAT returns and the invoice number and date mismatch in the Appellant's VAT returns and the supplier VAT Returns.

- c) That the Respondent be awarded the costs of the Appeal.

ISSUE FOR DETERMINATION

35. Having carefully studied the parties' pleadings, submissions and all documentation provided, the Tribunal is of the respectful view that the only issue falling for its determination is:

Whether the Respondent's decision to disallow the input VAT by the Appellant was proper as per the provisions of the VAT Act?

ANALYSIS AND FINDINGS

Whether the Respondent's decision to disallow the input VAT by the Appellant was proper as per the provisions of the VAT Act?

36. It was the Respondent's contention that the Objection Decision issued was based on facts and documents submitted and thus it was correct. It averred that the Appellant complied with the request for documents by the Respondent but failed to produce invoices and proof of payment. It averred that in disallowing the objection, it noted the invoices for input VAT of Kshs 1,460,447.74 were improperly deducted in the VAT returns of February, April and May 2018.
37. The Appellant on its part averred that the input tax totalling Kshs 1,354,003.61 was properly deducted and the deductions supported by original invoices issued by the suppliers to the Appellant under provisions of Section 17(3)(a) of the VAT Act 2013.
38. It added that copies of the original invoices against which the input tax was deducted in the VAT returns were paid for by cheques indicating the amounts paid to the suppliers against each invoice.

entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently, the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand."

43. Furthermore, the Respondent must demolish any evidence furnished by the Appellant. This view was held in **Supreme Court of Canada's** decision in **(Hickman Motors Ltd- vs- Canada, 1997 CanLII 357 (SCC), [1997] 2 S.C.R. 336 at paragraphs 92 to 94; House –vs- Canada, 2011 FCA 234 (CanLII), 2011 FCA 234, 422 N.R.144** where at paragraph 30 states, *inter alia*, that:

"The taxpayer's initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least prima facie case... Where the Minister's assumptions have been "demolished by the appellant, "the onus.... shifts to the Minister to rebut the prima case" made out by the appellant and to prove the assumptions...The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions; ...Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed; and even if the evidence contained "gaps in logic, chronology, and substance", the taxpayer's appeal will be allowed if the Minister fails to present any evidence as to the source of income."

44. The Tribunal noted that the Appellant furnished the Respondent with the documents detailing the transactions as provided by Section 17 of the VAT Act. The Appellant further provided copies of tax invoices from its suppliers such as Salsabila General Trading Limited, Riaz Auto Spares and Kenvibro Enterprises, proof of delivery via Roy Parcel services and payment records in

48. Given the foregoing, the Tribunal found that the Respondent erred in disallowing input VAT claimed by the Appellant for purchases from registered VAT agents.


FINAL DECISION

49. The upshot of the foregoing analysis is that the Appeal is merited, and the Tribunal accordingly proceeds to make the following orders:

- i) The Appeal be and is hereby allowed
- ii) That the Objection Decision dated 7th July 2021 confirming the Assessment of Kshs. **1,460,477.74** for Value Added Tax (VAT) be and is hereby set aside
- iii) Each party to bear its own costs

DATED and DELIVERED at NAIROBI on this 9th day of September, 2022.


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ERIC N. WAFULA
CHAIRMAN


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ABRAHAM K. KIPROTICH
MEMBER


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GRACE MUKUHA
MEMBER


.....
JEPHTHAH NJAGI
MEMBER


.....
CYNTHIA B. MAYAKA
MEMBER