

REPUBLIC OF KENYA  
IN THE TAX APPEALS TRIBUNAL  
AT THE NAIROBI REGISTRY  
TAX APPEAL NO. E080 OF 2023

CHINA COMMUNICATION CONSTRUCTION

COMPANY LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

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## JUDGMENT

### BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya whose business activity is that of construction services.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority (KRA) Act, and KRA is charged with the responsibility of among others, assessment, collection, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent raised VAT assessment orders and debit adjustment vouchers on iTax on 3rd November, 2023 where it disallowed Input VAT amounting to Kshs. 103,351,052.00.
4. The Appellant objected to the VAT assessments on iTax on both 2<sup>nd</sup> December, 2022 and on 29<sup>th</sup> November 2022.
5. The Respondent issued the Appellant with an objection decision confirming the tax assessments raised on the Appellant on 27<sup>th</sup> January, 2023.
6. Following its dissatisfaction with the Respondent's decision, the Appellant appealed by filing a Notice of Appeal to the Tribunal dated 24<sup>th</sup> February, 2023.

## THE APPEAL

7. The Appeal is premised on the following grounds as stated in the Appellant's Memorandum of Appeal dated and filed on 10<sup>th</sup> March, 2023:-
- i. The Respondent erred in both law and fact in finding that input VAT claimed by the Appellant was not in line with the requirements of the VAT Act, 2013 and the VAT Regulations.
  - ii. The Respondent erred in fact by failing to acknowledge that the impugned input VAT was actually declared as output VAT in the hands of the suppliers.

## APPELLANT'S CASE

8. The Appellant's case is premised on the hereunder listed documents:
- i. Its Statement of Facts dated 9<sup>th</sup> March, 2023 and filed on 10<sup>th</sup> March, 2023 together with the documents attached thereto and proceedings before the Tribunal.
  - ii. Its written submissions dated 20<sup>th</sup> November, 2023 and filed on 22<sup>nd</sup> November, 2023 together with the authorities adduced thereto.
9. That the Appellant's principal activity is infrastructure construction, that is, the construction of roads, bridges, tunnels, and dredging of berths among other infrastructure construction projects and it engages in the above contracts after participating in competitive bidding conducted by various Government agencies.
10. That the Appellant has been involved in the construction of various key projects in Kenya such as the Nairobi-Naivasha Standard Gauge Railway, the construction of berths at the Lamu Port, construction of the Naivasha Inland Container Depot among other projects.

11. That upon successful bidding, the Appellant sources materials and equipment that may be required in the execution of the contracts either locally or through importation. The disputes in this case relates to the disallowing of input VAT claimed for the months of November 2021, December 2021, March 2022, May 2022, June 2022, August 2022 and September 2022 on local purchases.
12. That that the input tax disallowed was validly claimed as provided for under Section 17 of the VAT Act, 2013 and the VAT Regulations. That Section 17 (1) of the VAT Act stipulates that a taxpayer may deduct input tax from the tax payable for a month if it was incurred in making taxable supplies subject to the exceptions provided under Section 17. That taxable supplies include zero-rated supplies and supplies liable to VAT at 8% and 16%.
13. The Appellant averred that the disallowed input VAT that it claimed meets the criteria for deduction under Section 17 of the VAT Act as further examined below.
14. That under Section 17(2), the VAT Act stipulates that a taxpayer can only claim input VAT when in possession of the following documents:
  - i. an original tax invoice issued for the supply or a certified copy;
  - ii. a customs entry duly certified by the proper officer and a receipt for the payment of tax;
  - iii. 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;
  - iv. a credit note in the case of input tax deducted under section 16(2); or
  - v. a debit note in the case of Input tax deducted under section 16(5).
15. That further, the VAT Regulations under Paragraphs 9(1) and 9(2) specify the requisite details that should be contained in a valid tax invoice for the accompanying VAT to be claimable. That these include:
  - i. the words "TAX INVOICE" In a prominent place;

- ii. the name, address, and PIN of the supplier;
- iii. the name, address, and PIN, if any, of the recipient;
- iv. the individualized serial number of the tax invoice;
- v. the date on which the tax invoice is issued and the date on which the supply was made, if different from the date of issue of the tax invoice;
- vi. the description of the goods supplied including quantity or volume or services provided;
- vii. the details of any discount allowed at the time of supply; and
- viii. the consideration for the supply and the amount of tax charged.

16. The Appellant reiterated that it deducted input VAT in line with the above stipulated provisions of the VAT law as its input tax claim was supported by valid documents that the Appellant had in its possession at the time of filing the VAT returns. That the said documentation included original tax invoices that met the requirements enumerated above, evidence of remittance of tax and proof of payment to the suppliers. That it attached the same to its pleadings.

17. That under Section 17(2)(b) of the VAT Act, a taxpayer is allowed to defer the deduction of the input VAT until the first period in which they hold the documentation required provided that it shall not be deferred for a period of more than six months after the end of the period in which the supply or importation occurred. That in some of the instances, the Appellant claimed input tax in the subsequent month since proper mechanisms had been put in place to ensure that the requisite documentation is provided by the supplier promptly.

18. The Appellant further noted that Section 17(6) of the VAT Act provides for the criteria of determining the input VAT claimable for taxpayers who provide

both exempt and taxable supplies. That the deductible input VAT should be determined as follows:

- a) full deduction of all the input tax attributable to taxable supplies;
  - b) no deduction of any input tax which is directly attributable to other use; and
  - c) deduction of input tax attributable to both taxable supplies and other uses calculated according to the restriction formula.
19. That the Appellant claimed a full deduction of all the input tax as it was all attributable to taxable supplies in accordance with the guidelines for determining the claimable input VAT mentioned above.
20. The Appellant noted that the above notwithstanding, it settled the input tax relating to the affected invoices as part of the consideration for the supply of the goods and services by the affected suppliers.
21. That the Appellant having duly paid the input tax on the affected invoices, subsequent demand of input tax on the same invoices from the Appellant will result in double taxation contrary to the provisions of the law.
22. That based on the foregoing, the Appellant averred that all prerequisite documentation was provided to the Respondent and all conditions required for claiming input VAT as provided by the VAT Act and VAT Regulations were met.
23. That the impugned input VAT was actually declared as output VAT in the hands of the suppliers.
24. The Appellant confirmed that to onboard any supplier, various background checks are done including carrying out a PIN checker on the Respondent's iTax platform which provides details of the tax obligations that a supplier is registered to.
25. The Appellant asserted that the PIN checker carried out on the Respondent's iTax platform affirmed that the aforementioned suppliers were registered for

VAT and as such all invoices raised were inclusive of VAT. That the suppliers were therefore mandated to declare the invoices in the VAT return in the period that they relate to and the Appellant was not in a position to further confirm the tax compliance status of all its many suppliers. The Appellant contended that it carried out its due diligence based on a best-effort basis by confirming that the suppliers were registered for VAT and that it issued them with proper tax invoices backed by ETRs/ESD.

26. That the Appellant, therefore, claimed the invoices based on the understanding that the suppliers had complied on their end in relation to the declaration of the sales invoices in their VAT returns. That from a further review, the Appellant noted that there was some inconsistency in the details declared in the suppliers' and the Appellant's VAT returns. That specifically, the inconsistencies of invoice details were due to inadvertent transposition errors such as the invoice number being declared as '6' as opposed to '006'. That in other instances, the date of the supply was also erroneous. That details of these have been provided to the Respondent for its consideration.

27. That to further support its position, the Appellant noted that it has taken the extra step to seek confirmations from the affected suppliers that they indeed supplied the Appellant with goods and services. That the Appellant has attached the confirmations received from its suppliers as well as proof of the email requests made for the required confirmations to its pleadings.

28. That in light of the above, the Appellant contended that it was entitled to claim the input VAT on all the impugned invoices and the Respondent should therefore not succeed in disallowing its legitimate claim of input VAT.

29. The Appellant submitted that there was a legitimate expectation that the information on the Respondent's iTax platform was reliable. To buttress its ground on legitimate expectation, it relied on the case of **Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others**.

30. The Appellant averred that there is no requirement in law for the Appellant to carry the tax compliance obligations of its suppliers and that the Respondent has the legal, financial, technical and other resources to undertake its duties in ensuring that each and every taxpayer is compliant.

31. The Appellant relied on the following list of authorities to support its case:-

- i. **Shreeji Enterprises (K) Limited vs Commissioner of Investigations & Enforcement TAT No. 58 and 189 of 2019**
- ii. **Hickman Motors Ltd. v. Canada, [1997] 2 S.C.R.336**
- iii. **Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR**
- iv. **Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others:**

### **Appellant's Prayers**

32. The Appellant made the following prayers:

- i. The Appeal be allowed with costs to the Appellant;
- ii. The decision of the Respondent contained in the letter dated 27<sup>th</sup> January 2023 demanding payment of VAT amounting to Kshs 99,254,357.00 be set aside; and
- iii. Any other orders that the Honourable Tribunal may deem fit.

### **RESPONDENT'S CASE**

33. The Respondent's case is premised on the hereunder filed documents:-

- i. The Respondent's Statement of Facts dated and filed on 28<sup>th</sup> March, 2023 together with the documents attached thereto.

- ii. The Respondent's written submissions dated 23<sup>rd</sup> November, 2023 and filed on 24<sup>th</sup> November, 2023 together with the legal authorities filed therewith.

34. The Respondent averred that the assessments were correctly issued and conform to the Value Added Tax Act. That the Appellant lodged its objection to the assessments for the period under review on 29<sup>th</sup> November, 2022 and 2<sup>nd</sup> December 2022, on iTax. That the same was invalidated by the Respondent for lack of supporting documents pursuant to Section 51 (3) (c) of the Tax Procedures Act.

35. The Respondent averred that the Appellant did not provide all the documents requested for such as purchase ledger, delivery notes, supplier statements and supplier confirmations. That the Appellant only provided invoices, proof of payments and few supplier confirmations that were contained in the original file.

36. That Section 17(3) stipulates that:

*“That 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; and*

*(d) a credit note in the case of input tax deducted under section 16(2);*

*(e) a debit note in the case of input tax deducted under section 16(5); or*

*(f) in the case of a participant in the Open Tender System for the importation of petroleum products that have been cleared through a non-bonded facility, the custom entry showing the name and PIN of the winner*

*of the tender and the name of the other oil marketing company participating in the tender.”*

37. The Respondent further asserted that the Appellant failed to provide the supporting documents requested. That as a result, the Respondent made the assessment based on the only available information and the best judgement. That the Tax Procedure Act empowers the Respondent to require production of such documents vide issuance of notice as deemed necessary in determination of tax liability. The relevant Sections provide as follows:-

*“24 (1) A person required to submit a tax return under a tax law shall submit the return in the approved form and in the manner prescribed by the Commissioner.*

*(2) The Commissioner shall not be bound by a tax return or information provided by, or on behalf of, a taxpayer and the Commissioner may assess a taxpayer's tax liability using any information available to the Commissioner.*

*...*

*29 (1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment (referred to as a “default assessment”).”*

38. The Respondent averred that the reason some of the Appellant's inputs were rejected is because of;

- i. Failure by some of the suppliers to declare their sales.
- ii. Failure by some of the suppliers to file their returns.
- iii. Suppliers filing nil returns.
- iv. Suppliers lumping up sales making it impossible for the Respondent to decipher which sales belong to the Appellant.
- v. Some of the suppliers had their VAT obligations deactivated.

39. That Section 17(2)(b) unequivocally stipulates that input tax cannot be deducted where a registered supplier has not declared the sales invoices in a return. The Section specifically provides as follows:

*“17. Credit for input tax against output tax*

*(2) If, at the time when a deduction for input tax would otherwise be allowable under subsection (1)-*

*(a) the person does not hold the documentation referred to in subsection (3), or*

*(b) the registered supplier has not declared the sales invoice in a return, 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.”*

40. The Respondent averred that some of the invoices used to claim input VAT fall under Section 17(4)(b) of the VAT Act and therefore cannot be claimed.

41. The Respondent stated that an in-depth examination of the records established that there were inconsistencies in the returns filed by suppliers and the invoices claimed by the Appellant and this indicated a variance as per the VAT returns filed. That further to that, the Appellant provided no explanations requested on the variance hence the same was disallowed and additional assessments carried out.

42. That the Tax Procedure Act places the burden of proof in tax matters on the Appellant who in this case failed to avail evidence that would support its objection. The Section provides as follows:-

*“Section 56 (1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”*

43. That further, Section 107 of the Evidence Act stipulates that:

*“Burden of proof.*

*(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist.*

*(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

44.The Respondent averred that the Appellant failed to produce any further documents in support of its objection. That the Tax Procedure Act empowers the Respondent to make alterations or additions to original assessments from available information for a reporting period based on the best judgment. That the relevant Section provides as follows; -

*“31. Amendment of assessments*

*Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement...”*

45.The Respondent averred that the Appellant is undeserving of the prayers sought due to the aforestated reasons.

46.The Respondent relied on the following cases to buttress its position:

- i. **TAT No. 70 of 2017 Afya X-Ray Centre vs. Commissioner of Domestic Taxes**
- ii. **Commissioner of Domestic Taxes vs. Galaxy Tools Limited [2021] eKLR**

## **Respondent’s Prayers**

47.The Respondent prayed that the Tribunal finds that:

- i. The objection decision dated 27<sup>th</sup> January, 2023 was proper in law and the same be upheld.
- ii. The outstanding tax arrears of Kshs. 99,254,357.00 are due and payable by the Appellant.
- iii. That the Appeal herein be dismissed with costs to the Respondent.

## ISSUES FOR DETERMINATION

48. The Tribunal upon due consideration of the pleadings and the written submissions of the parties was of the considered view that the Appeal raises the following single issue for its determination:

*Whether the Respondent was justified in confirming its assessment*

## ANALYSIS AND DETERMINATION

49. The Tribunal having ascertained the issue for determination as set out above proceeds to deal with the same as hereunder.

50. This dispute arose from the Respondent's action of disallowing input VAT claimed by the Appellant.

51. The Respondent submitted that the Appellant did not properly support its input VAT claims while the Appellant stated that it fully supported its claims as well as inconsistencies picked by the Respondent.

52. The Tribunal gleaned through the parties' pleadings and notes that the Appellant objected on iTax on 29<sup>th</sup> November 2022 and 2<sup>nd</sup> December, 2022. Notably, these objections were not accompanied by any supporting documents.

53. The Tribunal further notes that subsequent to the said objections, the Respondent proceeded to issue its objection decision on 27<sup>th</sup> January, 2023 stating, *inter alia*, as follows:

*“We also note that the objection application did not fully comply with section 51(3)(c) of the Tax Procedures Act which expressly states;*

*(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; and*

*(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,*

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

54. From the Appellant’s pleadings, the Tribunal notes that the Appellant stated that it supplied the Respondent with copies of tax invoices, ETR receipts and evidence of remittance of tax at the time of filing its VAT returns. The Appellant has however failed to demonstrate that the same were ever delivered or forwarded to the Respondent for review during the objection process or even before the objection decision was issued.

55. The Tribunal further notes that the Appellant attached the following documents to its pleadings:

- i. Purchases ledgers
- ii. Invoices from suppliers
- iii. Payments to suppliers supported by ETR receipts

The Tribunal however notes that there was no indication in the Appellant’s pleadings that these documents were submitted to the Respondent previously.

56. In regard to the fact that the Appellant objected on iTax with no supporting documents, and the subsequent submission of documents to the Tribunal that had not been presented to the Commissioner for review with the objection, the Tribunal is guided by Section 56(3) of the TPA which states as follows:

*“In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the*

*grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.”*

57. It is apparent therefore that based on the above provision, the Tribunal cannot consider new information or grounds introduced at Appeal stage unless the party has sought leave of the Tribunal which in this case the Appellant did not. In this regard, Section 13(3) and 13(6) provide as follows:-

*“ (3) The Tribunal may, upon application in writing or through electronic means, extend the time for filing the notice of appeal and for submitting the documents referred to in subsection (2).*

*(6) The appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the appeal or documents to which the decision relates.”*

58. In regard to the non-provision of documents to support the Appellant’s averments, Section 56(1) of the Tax Procedures Act provides as follows regarding the burden of proof in tax disputes:-

*“(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”*

59. Additionally, provision of documents as evidence is well stated under Section 30 of the Tax Appeals Tribunal Act which provides as thus:

*“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.”*

60. That averments in pleadings are not evidence was appreciated in **Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989** where it was held that the court cannot be guided by pleadings since pleadings are not evidence nor can

they be a substitute therefor. Before that the then East African Court of Appeal held in **Mohammed & Another vs. Haidara (1972) E.A 166** where that the contents of a plaint are only allegations, not evidence. According to Edward Muriga Through **Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In **CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) (19781 KLR 103; (1976-80) 1 KLR 835**, Madan, J (as he then was) expressed himself as hereunder:

*“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”*

61. The Tribunal in the circumstances finds that the Appellant did not discharge the burden of proof placed upon it under Section 56(1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunals Act. Further, the Appellant did not follow due process laid down in Section 56(3) of the Tax Procedures Act and Section 13(3) and (6) of the Tax Appeals Tribunal Act when it introduced new documents after the Respondent had issued its objection decision.

62. As a result of the foregoing, the Tribunal finds that the Respondent was justified in confirming its assessment.

## **FINAL DECISION**

63. In view of the foregoing, the Tribunal finds that the Appeal is not merited and accordingly makes the following Orders: -

- a) The Appeal be and is hereby dismissed.
- b) The Respondent's Objection decision dated 27<sup>th</sup> January, 2023 be and is hereby upheld.
- c) Each Party to bear its own costs.

64. It is so ordered.

**DATED and DELIVERED at NAIROBI this 17<sup>th</sup> day of May, 2024**

**ERIC NYONGESA WAFULA  
CHAIRMAN**

**CYNTHIA B. MAYAKA  
MEMBER**

**DR. RODNEY O. OLUOCH  
MEMBER**

**TIMOTHY B. VIKIRU  
MEMBER**

**ABRAHAM K. KIPROTICH  
MEMBER**