REPUBLIC OF KENYA

IN THE TAX APPEALS TRIBUNAL

AT NAIROBI

TAX APPEAL NO. E019 OF 2023

CAPITAL HILL MOTORS LIMITED……APPELLANT

-VERSUS-

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT…… RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company registered in Kenya. Its main activity is importation and resale of used motor vehicles.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, 1995. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue.
3. The Respondent commenced investigations against the Appellant for the period 2015 to 2019 to confirm tax compliance.
4. Vide a letter dated 9th June 2021, the Respondent informed the Appellant of additional assessment of Kshs. 93,921,239.00 comprising VAT and Corporation income tax for the period 2015 to 2019.
5. Vide a letter dated 29th June 2021, the Appellant sought and was granted additional time to respond to the investigation findings and additional assessment.
6. The Appellant, vide a letter dated 14th July 2021, responded to the investigation findings and additional assessment.
7. The Respondent, vide a letter dated 7th June 2022, issued the Appellant with a notice of assessment and tax demand of Kshs. 89,445,720.00 for the

period 2015 to 2019.

8. Vide a letter dated 5th July 2022, the Appellant objected to the demand and additional assessment on the grounds that the Respondent had disregarded its explanations on the nature of its business.
9. The Appellant vide letters dated 13th August 2022 and 11th November 2022, subject to request of the Respondent, availed further documents in support of its objection.
10. On 30th November 2022, the Respondent issued its objection decision confirming its assessment and demanding principal tax of Kshs. 8,053,297.00.
11. Aggrieved by the Objection decision, the Appellant lodged the instant Appeal vide Notice of Appeal dated 28th December 2022, and filed on the same date.

THE APPEAL

12. The Appeal is premised on the Memorandum of Appeal dated 5th January, 2023 and filed on 11th January, 2023, stating the following grounds: -
    a) That the Respondent erred in law and facts by deeming an arbitrary profit margin of Kshs. 100,000.00 per vehicle processed by the Appellant without substantiating the same.
    b) That the assessment is based on erroneous grounds that is out of assumption that the Appellant had under-declared revenues thus resulting to unreasonable estimates by deeming a margin of Kshs. 100,000.00 per vehicle processed.
    c) That the Appellant dutifully accounted for commission income earned and declared resulting in VAT and income tax pursuant to provisions of the VAT Act of 2013, Income Tax (Cap 470) and Tax Procedures Act of 2015.

d) That the basis relied upon to charge tax i.e. deeming margins arbitrary is not only unconstitutional but also illegal as Article 210 of the Constitution provides that "no tax or licensing fees may be imposed, waived or varied except as provided by legislation."

e) That the Appellant duly declared all income earned in the period in question as provided for by the Income Tax Act (cap 476), a fact that was demonstrated by provisions of income tax self-assessment returns for the years in question.

f) That the income tax was charged out of assumed income against provisions of Section 3 of the Income Tax Act.

g) That the Appellant fully declared business income earned in the period in question and alleged under-declared income does not fall under any of the above envisioned sources of income reproduced above.

h) That VAT can only be charged as provided in the VAT Act of 2013.

i) That the alleged undeclared amount subjected to VAT does not amount to supply as provided for in the charging section, and the Appellant did not claim any input VAT associated with the alleged undeclared supplies.

j) That the Appellant discharged its role of giving adequate explanation and the Respondent upheld the allegation without tabling any evidence to disprove the Appellant's position.

k) That the Appellant indeed established a prima facie case and the Appellant has not proved otherwise thus the appeal should be allowed.

THE APPELLANT'S CASE

13. The Appellant's case is premised on the following documents filed before the Tribunal: -

a) The Appellant's Statement of Facts dated 5th January 2023 and filed on 11th January 2023.

b) Appellant's Written Submissions dated 30th July 2023 and filed on 1st August 2023.

14. The Appellant averred that via a letter dated 9th June 2021, the Respondent informed it that it was carrying out investigations against it and communicated its findings.
15. That the Respondent's findings relied upon vehicle imports processed using the Appellant and its director's KRA PIN, and the Respondent relied on the banking method to charge VAT and income taxes amounting to Kshs. 73,787,207.00 and Kshs. 20,134,032.00, respectively.
16. That via a letter dated 29th June 2021, the Respondent requested for extension of time to allow it to respond to the said investigation findings, which the Appellant did on 14th July 2021, giving a comprehensive response and explaining to the Respondent the issues raised on banking and imports.
17. The Appellant further averred that it explained to the Respondent its business model, that is importing motor vehicle on behalf of clients and handing the same in good condition. The Appellant in return charges a fee (commission) for facilitating the importations.
18. The Appellant indicated that imports of cars processed using its KRA PIN belonged to respective clients and not its own inventory for resale as alleged by the Respondent.
19. That the bank deposits relied upon by the Appellant to charge VAT and income taxes did not constitute income chargeable, but rather clients' funds made for procurement of vehicles abroad together with the cost of clearing.
20. That the Appellant provided self-assessment returns both for VAT and Corporation taxes for periods in question indicating income earned in form of commission, which was duly accounted for VAT and income taxes declared accordingly.
21. That the Respondent on 7th June, 2022 issued an assessment notice for both VAT and Corporation taxes based on the banking method amounting to

Kshs. 69,840,442.00 and Kshs. 19,605,278.00.

22. That the Appellant on 25th July 2022, objected in total to the said assessment on the ground that the Respondent had disregarded its explanations about the nature of its business, as the bank deposits relied upon to charge taxes was not revenue but rather clients' deposits. Accordingly, the Appellant reiterated its initial position that it had duly accounted for its income earned in form of commission and made self-assessment declarations.
23. The Appellant further averred that on 24th August 2022 and 11th November 2022, it availed further documentation in support of its objection pursuant to request by the Respondent
24. That the Respondent, nonetheless, proceeded to issue an objection decision on 30th November 2022 confirming taxes of Kshs. 8,053,297.00, based on the assumption that the Appellant made profit margin of Kshs. 100,000.00 on each single unit imported. AN

Appellant's prayers.

25. The Appellant prayed to the Tribunal for the following orders: -
    a) The instant Appeal be allowed with costs.
    b) The decision of the Commissioner of 30th November 2022 be set aside.
    c) The Commissioner be restrained from undertaking any enforcement measures against the Appellant with a view of collecting Kshs.8,053,297.00 and any penalties and interests.
    d) The Tribunal grants such other orders as it deems fit.

THE RESPONDENT'S CASE

26. The Respondent's case is premised on the following documents filed before the Tribunal: -

a) The Respondent's Statement of Facts dated 8th February, 2023 and filed on same date.
b) The Respondent's Written Submissions dated 15th August, 2023, and filed on the same date.

27. The Respondent averred that it commenced investigation against the Appellant that covered the period between 2015 to 2019, with a view to confirm tax compliance status of the Appellant for the period under review.
28. That the investigations carried out sought to establish the following:
    a) Whether the Appellant declared all taxable income earned for the period under review;
    b) Whether the Appellant accounted for all taxes due the period for the period under review;
    c) Whether the Appellant and the directors deliberately committed and offence that warrants prosecution under the prevailing laws; and
    d) Assess, demand, and collect taxes established from the investigations.
29. That the Respondent sought and considered information and documents including the Appellant's bank deposits.
30. That from analysing the Appellant's banking vis a vis declaration, the Appellant was assessed for additional income tax of Kshs. 19,605,278.00.
31. That the Respondent further assessed the Appellant for VAT of Kshs. 69,840,442.00.
32. That upon completion of the investigations and computations, the Respondent, on 7th June 2022, issued the Appellant with a notice of tax assessment requiring it to pay cumulative tax of Kshs. 89,445,720.00, to which the Appellant filed a notice of objection on 5th July 2022.
33. The Respondent averred that it informed the Appellant that its objection dated 5th July 2022 was not in compliance with provisions of Section 51(3)(c) of the TPA, and the Appellant availed supporting documents on 24th August 2022 and 11th November 2022 to validate its objection.

34. That the Respondent reviewed the documents availed by the Appellant, and noted from the sale agreements provided that indeed the Appellant imported vehicles on behalf of clients in its name pending clearance and registration of the respective units and payment of purchase price.
35. That the same was evidenced by logbooks presented by the Appellant showing initial registration in the Appellant's name and subsequent transfer of logbooks upon payment of the purchase price by the respective customers.
36. That in addition to importing vehicles on behalf of customers, the Appellant also sold locally used motor vehicles on behalf of clients and earned commissions therefrom.
37. That further analysis of the importation documents established that the Appellant imported a total of 272 units, whereby 202 units were imported by the company and 70 units were imported by the Director.
38. That from analysis of imports and documents presented, the Respondent noted that the Appellant made an average margin of Kshs. 100,000.00 per unit for the imported vehicles, which was applied to determine income earned from the sale of the vehicles of Kshs. 27,200,000.00.
39. That from the analysis of the sale agreements and commission vouchers presented regarding commission for locally used cars, it was determined that the Appellant earned a commission of Kshs. 2,165,000.00.
40. The Respondent averred that in view of the above findings, it recomputed the Appellant's income based on the commissions earned during the period under review instead of banking, which the Respondent noted did not reflect the Appellant's business model.
41. That the Respondent proceeded to compute corporation tax based on the total income earned which reflected gains/profit the Appellant made from sale of vehicles as per Section 3 of the Income Tax Act, as opposed to levying taxes on the total receipts in bank accounts, and demanded Kshs. 8,053,297.00.

42. That in view of the above findings, the Respondent considered the grounds raised in the notice of objection, the documentations and further information provided in support, and issued Objection decision confirming principal taxes of Kshs. 8,053,297.00 on 30th November, 2022.

Respondent's prayers.

43. The Respondent prayed to the Tribunal for the following orders: -
    a) The Respondent's Objection Decision dated 30th November 2022 be upheld as proper and in conformity with provisions of the law.
    b) The Appeal be dismissed with costs to the Respondent as the same is devoid of any merit.

ISSUE FOR DETERMINATION

44. The Tribunal, having carefully reviewed the pleadings and filings made by the parties and the supporting documentation is of the view that the following single issue falls for its determination: -

    Whether the Respondent's Assessment of the Appellant of Kshs. 8,053,297.00 is Justified.

ANALYSIS AND FINDINGS

45. The Tribunal noted that the gist of the instant dispute between the Appellant and the Respondent emanated from the objection decision dated 30th November 2022, where the Respondent confirmed the principal tax payable by the Appellant at Kshs. 8,053,297.

46. The Respondent submitted that it issued the Objection decision after according to the Appellant sufficient opportunity to lodge its objection and provide additional information and documents.

47. The Respondent further submitted that after reviewing the information and documents provided by the Appellant in relation to imported and locally used motor vehicles sold by the Appellant, it vacated some of the income initially assessed and revised the assessment appropriately.
48. On its part, the Appellant submitted that it had provided sufficient information and records to the Respondent, and that the objection decision is unfair.
49. The Appellant submitted that the tax demanded by the Respondent is neither due nor payable as the Appellant had regularly paid all taxes due from it.
50. The VAT and Corporate income tax in the instant dispute relate to assessments for the period 2015 to 2019, as confirmed vide objection decision dated 30th November 2022.
51. The law is very clear that the tax authorities can only issue assessment(s) before the expiry of five years from the date of filing the self-assessment by the taxpayer. This is as per the provisions of Section 31 (4) of the TPA which provides as follows:

> *" The Commissioner may amend an assessment—*
>
> *(a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or*
>
> *(b) in any other case, within five years of—*
>
> *(i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or*
>
> *(ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment.*

52. The exception applicable where the Respondent may issue an assessment beyond the five years is only where the Respondent can prove gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer. This must be

substantively proven in a proper forum and after according the Appellant's due process. The Respondent did not allege or prove fraud in the present matter.

53. The Tribunal reiterates its holding in a similar matter **TAT Appeal number 411 of 2021, City Gas East Africa v Commissioner of Investigations & Enforcement** where Tribunal held that the Respondent erred in assessing the Appellant for a period longer than five years when there was no evidence of wilful neglect or fraud.

54. Consequently, the Tribunal finds that the Respondent's assessment of VAT was illegal for the periods up to May 2017, and the same was unjustified.

55. Further, the Tribunal, finds that the Respondent's assessment of Corporation income tax for the year of income 2015 was illegal and unjustified.

56. The Tribunal noted that outside the averments, the Appellant did not annex any documents or records confirming payments of the assessed taxes as alleged.

57. The Tribunal further noted that the duty to make full and accurate disclosures in tax matters vests with the Appellant and this is now settled law. The Tribunal relies on the authority in ***Commissioner of Investigations and Enforcement vs Kidero (Income Tax Appeal E028 of 2020 eKLR,*** where it was held that:

> *"…the duty imposed on the taxpayer to keep records and the provisions on the burden of proof all go to support the Kenyan tax collection regime which is centered on a system of self-assessment. This system relies on the taxpayer making full and good faith disclosures in their tax declaration and affairs and hence empower the Commissioner to demand documents from time to time when investigating the affairs of a taxpayer…"*

58. The Tribunal noted that the Respondent's contention that the Appellant did not provide sufficient information and documents to vacate its additional assessment and that led to objection decision dated 30th November 2022 is largely unrebutted.

59. Section 54A (1) of the Income Tax Act which provides as follows: -

"A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax."

60. In addition, Section 23 of the TPA provides as follows: -

"(1) A person shall—

(a) maintain any document required under a tax law, in either of the official languages;

(b) maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained;"

61. Section 43 of the VAT Act Section 43 of the VAT Act, 2013 envisions that a person carrying on a business must keep certain records and documents which should be provided to the Commissioner for inspection.

62. These provisions of the law envision that a person carrying on a business must keep certain records and documents which in the opinion of the Commissioner are adequate for computing tax. There is nothing on the record before the Tribunal to conclude that the Appellant provided any source documents or transactional records for the Tribunal's review. Logically, this raises the question of when the burden of proof shifts in tax matters.

63. This Tribunal has previously addressed itself on the obligation of parties in tax matters and the shifting of burden of proof. In ***Digital Box Limited vs Commissioner of Investigations and Enforcement (2020) eKLR***, with regard to obligation this Tribunal observed held us follows: -

"The question of burden of proof in taxation matters is provided for under the Tax Procedures Act as well as the Tax Appeals Tribunal Act. Section 56(1) of the Tax Procedures Act stats tha: 'In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect'. Section 30 of the Tax Appeals Tribunal Act similarly

provides that: 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."

In this case, the Appellant is the one seized of the desire to prove that the Respondent used extraneous information in arriving as its assessment. Thus, according to the provisions of Evidence Act, the Tax Procedures Act and the Tax Appeals Tribunal Act, the burden of proof falls upon the Appellant…the Tribunal is of the view that the Appellant did not discharge its burden proof in showing that the Respondent used extraneous considerations and documents other than those prescribed in the law. The averments made by the Appellant did not amount to evidence."

64. In the instant case, the Tribunal is of the considered view that the Appellant has not discharged its obligation and proved that it provided the information and documents to the Respondent. Indeed, the Appellant did not even make effort to annex those relevant documents and information as part of the instant Appeal.

65. Accordingly, the Tribunal holds that the Appellant has, in the circumstances, failed to discharge its burden of proof.

FINAL DECISION

66. The upshot of the foregoing is that the Appeal partially succeeds and the Tribunal proceeds to make the following orders: -

a) The Appeal be and is hereby partially allowed.

b) The Respondent's Objection decision dated 30th November 2022 be and is hereby varied in the following terms:

i. The VAT assessments for the periods in 2015, 2016 and up to May 2017 be and are hereby vacated.

ii. The Corporate income tax assessment for the year 2015 is hereby set aside.

iii. The VAT assessments for the periods from June 2017 to 2019 be and are hereby upheld.

iv. The income tax assessments for the years 2016, 2017, 2018 and 2019 be and are hereby upheld.

c) Each party to bear its own costs.

74. It is so ordered.

DATED and DELIVERED at **NAIROBI** this **22nd** day of **March, 2024**

GRACE MUKUHA
CHAIRPERSON

DR. ERICK KOMOLO
MEMBER

JEPHTHAH NJAGI
MEMBER

DR. WALTER J. ONGETI
MEMBER

GLORIA OGAGA
MEMBER