

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL AT NAIROBI**  
**TAX APPEAL NUMBER E142 OF 2023**

CYMA LIMITED..... APPELLANT

~VERSUS~

COMMISSIONER OF LEGAL SERVICES &  
BOARD CO-ORDINATION ..... RESPONDENT

## JUDGMENT

### BACKGROUND

1. The Appellant is a private limited company incorporated in Kenya under the companies Act Cap 486 the Laws of Kenya and is registered taxpayer.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, the Authority 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 issued the Appellant with additional assessments for VAT and Income tax for the periods 2018 to 2021. The Appellant lodged its notice of objection dated 15<sup>th</sup> August 2022 in response to the additional assessments relating to VAT for the period January 2021.
4. Upon review of the Objection lodged on 15<sup>th</sup> August 2022, the Respondent having granted the Appellant extension of time to file the Objection out of time, issued the Objection decision dated 13<sup>th</sup> October 2022.
5. Dissatisfied with the Respondent's Objection decision, the Appellant filed the Appeal with leave of the Tribunal by lodging a Notice of Appeal filed on 15<sup>th</sup> May 2023, Memorandum of Appeal and Statement of Facts on the same date.

### THE APPEAL

6. The Appellant based its Appeal on the grounds in the Memorandum of Appeal dated 6<sup>th</sup> April 2023 and filed on the 15<sup>th</sup> May 2023 as follows, that:

#### **Income Tax**

- a) The Respondent erred in law and fact by disregarding the actual turnover realized and reported by the Appellant in its financial statements and tax returns and arbitrarily increased the Appellant's turnover thereafter assessing additional income tax, penalties and interest.
- b) The Respondent erred in law and fact by disregarding all the reconciliations, explanations and documentation provided by the Appellant including the financial statements and tax returns, and proceeded to confirm the erroneous Income tax assessments.
- c) The Respondent erred in law and fact by disallowing expenses incurred by the Appellant in the production of the taxable income during the period under review, thereby assessing additional taxes on account of the disallowed expenses.
- d) The Respondent erred in law and fact by disregarding the express provisions of Sections 15 and 16 of the Income Tax Act which provide that all expenses incurred wholly and exclusively in the generation of income are tax deductible.
- e) The Respondent erred in law and fact by purporting to charge Income tax on all the banking deposits without allowing for the necessary adjustments for non-revenue items such as inter-account and inter-bank transfers, related party transfers, loans, reversals and contra entries and inter-company transfers.

#### **Value Added Tax**

- f) The Respondent erred in law and fact by arbitrarily increasing the sales figures in the Appellant's VAT returns and erroneously assessing additional VAT.

- g) The Respondent erred in law and fact by disregarding the VAT returns filed by the Appellant and all explanations and documentation provided by the Appellant in support of its Objection and proceeding to confirm the VAT assessments.
- h) The Respondent erred in law and fact by assessing additional VAT on the Appellant based on arbitrary and unreasonable estimates while disregarding the actual sales and purchases made and declared in the VAT returns filed by the Appellant.
- i) The Respondent erred in law and fact by disallowing the input VAT incurred and claimed by the Appellant in making of taxable supplies, thereby assessing additional VAT on the Appellant based on erroneously disallowed invoices.
- j) The Respondent erred in law and fact by disregarding all the explanations and documentation provided by the Appellant and proceeding to disallow input VAT borne and claimed by the Appellant.
- k) The Respondent erred in law and fact by disregarding the express provisions Section 17 of the VAT Act, 2013 and Paragraph 9 to the VAT Regulations, 2017 and disallowing the Appellant's input VAT.

## **THE APPELLANT'S CASE**

- 7. The Appellant based its case on its;
  - i. Statement of Facts dated 6<sup>th</sup> April 2023 and filed on the 15<sup>th</sup> May 2023 together with the documents annexed thereto; and
  - ii. Written submissions dated and filed on 24<sup>th</sup> October 2023.
- 8. The Appellant averred that, the Respondent without carrying out an audit on the books and financial statements of the Appellant issued additional assessment for Value Added Tax and Income tax through its iTax platform for the year of incomes 2018 -2021.

9. The Appellant stated that it objected to the assessment on 15<sup>th</sup> August 2022 and the Respondent on 13<sup>th</sup> October 2022 made its Objection decision confirming the entire assessment and did not serve it on the Appellant with the same.
10. The Appellant stated that being aggrieved by the Objection decision of the Respondent, it filed an application for leave to file an appeal out of time as well as the Notice of Appeal, which leave was granted on 28<sup>th</sup> April 2023.
11. The Appellant stated that the Respondent asserted that the Appellant had underdeclared its sales and overclaimed its expenses during the period under review. As a result, thereof, the Respondent increased the gross sales, reduced the expenses and charged VAT tax on the recomputed profits.
12. The Appellant avowed that the Respondent disallowed some of the invoices claimed as input VAT thereby assessing additional VAT from the disallowed invoices as well as the adjusted sales of the Appellant.
13. The Appellant averred that it duly filed its returns and paid all Income tax due during the period under review, that the Respondent without any basis or justification adjusted the turnover of the Appellant upwards for the period under review and thereafter erroneously assessed additional taxes on the difference between the adjusted turnover and what the Appellant had declared.
14. The Appellant asserted that the Respondent also disallowed some of the expenses which had been incurred by the Appellant in the generation of the taxable income.
15. The Appellant averred that during the period under review, it kept proper books of accounts and reconciliations, which it relied on in filing of its income tax returns. That inspite of the Appellant providing all the information, explanations and documentation, the Respondent disregarded the information, explanations and documents and issued the impugned

assessments and proceeded to erroneously confirm them in total disregard of the information provided.

16. The Appellant averred that the Respondent arbitrarily and without any justification adjusted its revenue upwards, thereby assessing more income tax, notwithstanding being provided with all the necessary documentation including financial statements and other source documents which would provide a fair view of the Appellant's transactions.
17. The Appellant further averred that the Respondent failed to acknowledge the expenses incurred in the running of the business contrary to the provisions of the Income Tax Act which provide that all expenses incurred in the generation of income are tax allowable. It is imperative to note that while it is impossible to run a business without incurring expenses, the Respondent did not allow any expenses claimed by the Appellant in its statement of income.
18. The Appellant averred that it filed all its VAT returns and paid the VAT due for the period under assessment. That the Respondent without any basis or justification adjusted the turnover of the Appellant upwards for the period under review and thereafter erroneously assessed additional taxes on the difference between the adjusted turnover and what the Appellant had declared and partly disallowed some of the input VAT incurred and claimed by the Appellant during that period.
19. The Appellant asserted that the assessment issued by the Respondent was based on arbitrary figures which appear to have been plucked from the air and not the actual sales or supplies made by the Appellant during the period under review.
20. The Appellant averred that it had claimed valid input VAT supported by valid tax invoices in compliance with the provisions of the VAT Act and the VAT Regulations in force at the time. The input tax claimed was fully supported by valid tax invoices and copies of the tax invoices as well as other supporting documentation provided to the Respondent.

21. The Appellant stated that it had correctly claimed the input VAT as per the provisions of the VAT Act, 2013 since all the invoices claimed are proper invoices containing all the mandatory features of valid tax invoices prescribed in law and having been claimed within 6 months from the date of issuance. Further, all the invoices (with ETR Receipts) as well as supporting documentation such as evidence of payment were submitted, however, the Respondent disregarded the explanations and documentation and disallowed the input VAT and confirm the assessment.

22. The Appellant in its written submissions identified three issues for determination;

*i. Whether the Respondent erred in the computation of the Income Tax assessments of the Appellant for the period under review by arbitrarily adjusting the turnover of the Appellant and disallowing expenses incurred by the Appellant in the generation of the taxable income.*

*ii. Whether the Respondent erred in its assessment of the Value Added Tax of the Appellant for the period under review.*

*iii. Whether the Respondent erred in disregarding the Appellant's information and documentation provided.*

**i. Whether the Respondent erred in the computation of the Income Tax assessments of the Appellant for the period under review by arbitrarily adjusting the turnover of the Appellant and disallowing expenses incurred by the Appellant in the generation of the taxable income.**

23. The Appellant submitted that despite numerous attempts to explain to the Respondent regarding the nature of the information relied on, the Respondent failed, refused and neglected the Appellant's explanations and documentation produced as proof and evidence, and refused to consider or disregarded the financial statements and other source documents which would provide a fair

view of the Appellant's transactions, thereby failing to adhere to the provisions of Section 54 of the Income Tax Act.

24. The Appellant submitted that it was not only unjust but also unfair for the Respondent to arbitrarily adjust the Appellant's turnover on the basis of erroneous and unsubstantiated data causing a duplicity in the assessment of Income tax and contrary to the documents provided by the Appellant, which were neither reviewed nor considered in the sudden adjustments. The failure by the Respondent to consider material facts produced by the Appellant greatly prejudiced the Appellant with the excessive and erroneous tax assessments. Further, the Respondent disregarded proper financial statements prepared by the Appellant and went ahead to adjust the Appellant's revenue upwards assessing more income tax which appeared to have been plucked from thin air to make the assessments herein.
25. The Appellant relied on Section 15 of the ITA and submitted that the Respondent failed to acknowledge the expenses incurred in the running of the Appellant's business contrary to the provisions of the Income Tax Act.
26. The Appellant submitted that the Respondent remained adamant to allege that the Appellant did not produce evidence of the said expenses yet the Appellant has shown it has kept proper records of the book of accounts and reconciliations as highlighted in the Appellant's Statement of Facts.

**ii. Whether the Respondent erred in its assessment of the Value Added Tax of the Appellant for the period under review**

27. The Appellant submitted that it filed its VAT returns and paid the VAT due for the period under assessment but the Respondent without conducting an audit or review of the Appellant's books amended the Appellant's VAT returns for the period under review by increasing sales value and partly disallowing some of the input VAT incurred and claimed by the Appellant during that period.

28. The Appellant submitted that it rightfully claimed input VAT supported with valid tax invoices and copies of other documents as stipulated in Section 17 (1), (2), (3) (a) of the VAT Act.
29. The Appellant submitted that it presented to the Respondent all the invoices with ETR receipts as well as supporting documentation such as evidence of the payment but the Respondent disregarded these explanations and documentation and proceeded to disallow the input VAT and confirm the assessment.
30. The Appellant submitted that it has produced competent and relevant evidence and the input tax ought to be allowed as the Respondent has not proven why the same should not be granted to the Appellant, that the explanations provided by the Respondent for the rejection of the input VAT are invalid and unreasonable and implores this Tribunal to review the invoices provided to confirm that they are proper invoices.
31. The Appellant further submitted that the action of the Respondent of disallowing the input VAT and recovering the tax therefrom would unfairly impose unfair financial burden on its operations. It is trite law that our tax system should be fair and no citizen ought to bear an unfair and an unequal tax burden.
32. The Appellant submitted, that VAT being a consumption tax, its burden should be borne by the final consumer of the supplies. This is the basis of the input-output principle, which allows for the intermediaries in the supply chain to pass on the VAT burden to the final consumers. It would be prejudicial if the pecuniary burden is borne by the intermediaries in the chain of supply.
33. The Appellant submitted that it is without a doubt that it incurred the Input VAT and the Respondent did not have any evidence to the contrary. The actual invoices (with ETR receipts) supporting the expenses incurred by the Appellant were furnished to the Respondent, which ought to be sufficient reason to prove that the Appellant did incur those expenses.

34. The Appellant submitted that it had discharged its burden of proof by providing the various invoices and documents required to claim input VAT in accordance to Section 17 of the VAT Act and financial statements of the period under review and evidence of the filed VAT returns for the period under review.
35. The Appellant further submitted that it had produced unchallenged and uncontradicted evidence to proof its case. The burden of proof ought to have shifted to the Respondent to proof its allegations.

**iii. Whether the Respondent was wrong in disregarding the Appellant's information and documentation provided**

36. The Appellant relied on Sections 108 and 109 in asserting that it had discharged its burden of proof.
37. Further the Appellant submitted that it adhered to the provisions of Section 43 of the VAT Act and Section 23 of the TPA by keeping proper records and that it furnished the said documents to the Respondent.
38. The Appellant submitted that the Respondent's argument of failing to produce all the required documents by the Appellant sounds attractive but it invited the Tribunal to objectively analyse the documents attached herein in the Appeal and establish that the Appellant dutifully produced all the records as required and the reconciliation of accounts should have been done accordingly by the Respondent and not proceed to erroneously assess the Appellant with the glaring evidence provided.
39. The Appellant in buttressing its case relied on the following authorities;
- i. **Nizaba International Trading Company Limited vs. Kenya Revenue Authority [2000] eKLR.**
  - ii. **Silver Chain Ltd vs. Commissioner Income Tax & 3 Others [2016] eKLR.**
  - iii. **Hancock v General Reversionary and Investment Company [1919] KB 5,**

**37.**

- iv. Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] eKLR.
- v. Kenya Revenue Authority vs. Man Diesel & Turbo Se, Kenya [2021] eKLR.
- vi. George vs. Federal Commissioner of Taxation, {1952} HCA 21.
- vii. Kilburn vs. Bedford (H.M. Inspector of Taxes) 1955 Chancery Division, 36.
- viii. Republic vs. Commissioner Domestic Taxes Large Tax Payer's Office Ex Parte Barclays Bank of Kenya Ltd [2012] eKLR.

### **Appellant's Prayers**

40. The Appellant prayed for the following reliefs, that the Tribunal:
- a) Allows the Appeal;
  - b) Annuls the Respondent's confirmed assessment based on the ground above, as well as the information contained in the Statement of Facts attached; and
  - c) Awards costs of this Appeal to the Appellant.

### **THE RESPONDENT'S CASE**

41. The Respondent's case is premised on its;
- i. Statement of Facts dated and filed on 7<sup>th</sup> June 2023 together with the documents annexed thereto; and
  - ii. Written submissions dated 16<sup>th</sup> October 2023 and filed on 17<sup>th</sup> October 2023.
42. The Respondent stated that it carried out investigations into the business of the Appellant for the period year 2021 with a view of confirming its tax compliance under income tax obligations. The information from the iTax data base on non-filers showed that the Appellant failed to declare the business income for year 2021.
43. The Respondent averred that during the aforesaid investigations, it was noted that the Appellant had overstated expenses while others were unsupported

and their income was underdeclared, respectively. Further, it was discovered that there were inconsistencies between the returns filed by the Appellant's suppliers and invoices claimed by the company for the period years 2018, 2019 and 2020.

44. Further to the above, the Respondent avowed that the Appellant was informed on the inconsistency of the VAT3 returns invoices for it to resolve the same, however, the Appellant failed to resolve the said inconsistencies within the stipulated timeframe.
45. In the view of the above, the Respondent contended that the adjustments were brought to charge for income tax together with unsupported expenses and under declared income by issuing additional assessments for year 2021 on 6<sup>th</sup> October 2022 for the sum of Kshs. 469,623.77 including penalties and interests.
46. The Respondent stated that as a result it issued additional assessments on 5<sup>th</sup> October 2022 for the period years 2018, 201, 2020 and 2021 for VAT totalling to Kshs. 3,416, 454.28 including interest and penalty, to which the Appellant filed a late Objection on 15<sup>th</sup> December 2022 requesting extension of time which was duly acknowledged by the Respondent. However, the Appellant failed to provide supporting documents for their Objection as requested within stipulated timelines.
47. The Respondent stated that it issued a demand for documents vide email in line with Objection lodged through email for delivery notes, purchase invoices, delivery notes, supplier statements and bank statements.
48. The Respondent averred that the Appellant, however, failed to provide all the relevant supporting documents of for year 2021 in support of its Objection. The Appellant's VAT and income was therefore estimated, as this was the only reasonable basis of assessing the VAT and income tax and objection decision issued on 7<sup>th</sup> February 2023.

49. That the Appellant filed a Notice of Appeal on 15<sup>th</sup> May 2023 against the decision of the Respondent confirming the assessment for income tax and VAT for Kshs. 2,923,745.29.
50. The Respondent averred that the assessments were correctly issued and conform to the Value added Tax Act and income tax, the Appellant did not provide any evidence that would have altered the assessment.
51. The Respondent contended that the Tax Procedure Act places the onus of proof in tax objections on the taxpayer who in this case failed to avail evidence that would support a contrary assessment or that would have guided the Respondent at arriving to a different Objection decision.
52. Further, the Respondent asserted that the Appellant lodged the Objection on iTax, which was received and acknowledged, however, the same was treated as invalidly lodged as it did not have grounds of objection. The Appellant was notified that the Objection lodged was invalid and requested to provide documents. However, the Appellant failed to provide documents as requested.
53. The Respondent insisted that the Appellant filed all necessary returns and paid the taxes deemed to be payable under the self-assessment method. The Respondent averred that the Appellant was uncooperative in the provision of relevant records and failed to respond to request for documents hence no relevant documents or records were provided to support its Objection by the Appellant. As a result, the assessments were made based on the only available information based on the best judgement by the Respondent.
54. The Respondent averred that the Tax Procedure Act empowers the Respondent or requires the production of such documents vide issuance of notice as deemed necessary in determination of tax liability
55. The Respondent averred that the examination of the Appellant's records, audited accounts and income tax returns established that the Appellant failed declare business income and all its income for the year of income 2021.

56. The Respondent averred that the tax was reached at, based on the information available and which was provided by the Appellant.
57. The Respondent contended that the Appellant, despite declaring some income knowingly continued to declare nil returns for the period under review contrary to the provisions of the Income Tax Act.
58. The Respondent averred that according to the Income Tax Act it is the responsibility of any person carrying on business to maintain records of all transactions.
59. The Respondent averred that it is empowered by Section 31 of the Tax Procedures Act 2015 to carry out amendments on assessments where adjustments are due to bring to charge the correct amounts.
60. The Respondent avowed that the Appellant did not file income tax returns for the accounting period 2018 - 2020 in contravention of the requirements of the Tax Procedures Act and that the estimated assessments were correct.
61. The Respondent reiterated that the Appellant failed to provide signed financial statements and books of account to support their allegations. The Tax Procedure Act empowers the Respondent to carry out assessment based on the information available. The Respondent averred that the assessment was issue based on the information provided.
62. The Respondent asserted that the examination of the Appellant's records established that it earned income from business in the period under audit, however, those incomes were not declared for tax purposes for the year earned.
63. The Respondent further asserted that the Appellant carried on business in contravention of the Tax Procedure Act which requires such documents to be maintained and for purposes of taxation.
64. The Respondent denied that the Appellant had paid all its tax dues and reiterated that because of its under-declaration, the Appellant is in debt of Kshs. 2,923,745.29.

65. The Respondent averred that the Appellant is undeserving of the prayers sought due to the aforesaid reasons.
66. The Respondent submitted that the Tribunal should be guided by the following considerations;
- i. Were any documents provided to justify the Appellant's Objection;
  - ii. Were annual taxation returns of income as done the Appellant from time to time correct and complete; and
  - iii. Were any transactions been omitted from or incorrectly recorded in the Appellant's books of accounts/banking's.
67. The Respondent submitted that it did not err in invalidating the Appellant's Objection and issuing the decision as the Appellant failed to discharge its burden of proof and challenge the Respondent's assessment with unchallenged and contradicted evidence to prove the incorrectness of the tax assessments.
68. The Respondent in fortifying its legal position relied on the following authorities;
- i. **Commissioner of Domestic Taxes vs. Metoxide limited [2021].**
  - ii. **Monaco Engineering Limited vs. Commissioner Domestic Taxes TAT Appeal No. 67/2017.**
  - iii. **John Githua Njogu vs. Commissioner Investigations & Enforcement TAT 101/2018.**
  - iv. **Osho Drappers Ltd vs. Commissioner Domestic Taxes, TAT No. 159 of 2018.**
  - v. **Miao Yi vs. Commissioner Investigations & Enforcement TAT No. 441 of 2019.**
  - vi. **Ritz Enterprises Limited vs. Commissioner of Investigations & Enforcement TAT No. 227 of 2018.**

### **Respondent's Prayers**

69. The Respondent prayed that this Tribunal considers the case and finds that:
- a) That the Respondent's Objection decision be upheld.

- b) The outstanding tax arrears of Kshs. 2,923,745.29 are due and payable by the Appellant.
- c) The confirmed assessments dated 5<sup>th</sup> and 6<sup>th</sup> October 2022 were proper in law.
- d) That the Appeal herein be dismissed with cost to the Respondent.

## ISSUES FOR DETERMINATION

70. The Tribunal having considered the parties pleadings and submissions, puts forth a singular issue for its determination:

**Whether the Respondent's Objection Decision of 13<sup>th</sup> October 2022 was justified**

## ANALYSIS AND FINDINGS

71. The Tribunal wishes to analyse the issue as hereunder;

72. The dispute subject of the instant Appeal as brought forth by the Appellant in its Notice of Appeal arises from the Respondent's Objection decision issued on 13<sup>th</sup> October 2022 relating to VAT for the period January 2021 in the sum of Kshs. 1,111,111.14. It was the Appellant's submission that it lodged its Objection to the assessments on 15<sup>th</sup> August 2022 and an Objection decision made on 13<sup>th</sup> October 2022.

73. The Tribunal having perused the record notes that, whereas the Respondent filed its Statement of Facts on 7<sup>th</sup> June 2023 and written submissions on 17<sup>th</sup> October 2023 and advanced an elaborate response and submissions, the responses as indicated and reiterated by the Respondent in paragraphs 7 to 17 of its Statement of Facts, relates to a different decision (*of 7<sup>th</sup> February 2023*) other than the Objection decision appealed against by the Appellant.

74. That in the body of the Respondent's Statement of Facts the Respondent addressed itself to and submitted on the assessments made on 5<sup>th</sup> and 6<sup>th</sup> October 2022 resulting in the Objection decision of 7<sup>th</sup> February 2023. Further

the said Objection decision of 7<sup>th</sup> February 2023 relates to both income tax and VAT for the period of income January to December 2021, December 2018, December 2019 and December 2020 in the cumulative sum of Kshs. 2,923,745.29 inclusive of both penalties and interest.

75. The Tribunal however, observes that the Appellant's Appeal is premised on the Objection decision issued on 13<sup>th</sup> October 2022 relating to VAT for the period January 2021 in the sum of Kshs. 1,111,111.14.

76. The Tribunal upon perusal of the Respondent's Objection decisions of 13<sup>th</sup> October 2022 and 7<sup>th</sup> February 2023, notes that the two Objection decisions are glaringly distinct and relate to different tax heads, different periods under review and different assessments and tax amounts.

77. The Tribunal has perused the Appellant's Notice of Appeal, Memorandum of Appeal and Statement of Facts and has noted that the Objection decision appealed against is the one made on 13<sup>th</sup> October 2022 and not the one made on 7<sup>th</sup> February 2023.

78. Consequently, it is the Tribunal's position that the Respondent has filed a response in relation to the Objection decision made on 7<sup>th</sup> February 2023 and which Objection decision does not form the substratum of the Appeal before the Tribunal. To that extent the Appeal before the Tribunal is deemed unopposed.

79. The Appellant retains the burden to prove its case even under the circumstances where the Appeal is otherwise deemed unopposed as provided for under Section 56 (1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act in relation to burden of proof.

80. *Section 56 (1) of the TPA provides as follows;*

*"In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect"*

81. Additionally, Section 30 of the TAT Act provides as follows with regard to the discharge of burden of proof:

*“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.”*

82. From the documents presented by the parties to the Appeal, there is no dispute that the Appellant furnished the Respondent with documentations in support of its expenses in line with Section 17 of the VAT Act, the Respondent in disallowing the input VAT, stated in the Objection decision as follows; -

*“You were required to avail evidence in support of the allowability of the disallowed inputs including but not limited to; evidence of purchase & confirmation of the transactions, purchases schedule and audited financial statements for 2021 year of income.*

*Vide email dated 21<sup>st</sup> September 2022, you provided copies of cash sales receipts numbers 1966, 1985, 1231, 1981 & 1936 and a letter of confirmation of supply from Minuteplus Holdings Limited. The aforementioned letter indicated that Minuteplus Holdings Limited had lumped their sales as they did not have your PIN hence the inconsistency. Evidence of delivery & payment, purchases schedule and audited financial statements were not provided despite being requested for.*

*Nonetheless, upon re-confirmation with Minute Holdings Limited on the authenticity of the documents availed by yourselves, they indicated that they had not transacted with you and that the said documents did not originate from them.*

*We have therefore arrived at the conclusion that you claimed the said inputs contrary to section 17 of the Value Added Tax Act, 2013 and that the Commissioner was right to issue the assessment by disallowing the unsupported input claim.”*

83. Whereas the Appellant provided cash sales receipts numbers 1966, 1985, 1231, 1981 & 1936 and a letter of confirmation of supply from Minuteplus Holdings Limited, the Respondent upon reconfirmation with Minute Holding Limited on the authenticity of the documents availed by the Appellant, stated that the entity indicated that it had not transacted with the Appellant and the said documentation did not originate from it.
84. The Tribunal notes that despite being provided with a letter of confirmation of supply from Minuteplus Holdings Limited, the Respondent took issue with the documents received, premised on the allegation that the said entity did not transact with the Appellant and the documents did not originate from the Appellant's supplier.
85. It is the Tribunal's view that the Respondent under the circumstances had a duty to provide the Appellant with details relating to the aforesaid assertion by Minuteplus Holdings Limited, correspondences or any investigation report(s) would have gone a long way in its support of its allegations.
86. The Tribunal is of the view that the duty of the Appellant during the objection review stage was to provide documents which were provided to the Respondent and whose action of disallowing the same was not anchored on the failure to provide documents.
87. The Tribunal notes that the Objection decision from the Respondent seemed to suggest that there were no transactions between the Appellant and Minuteplus Holdings Limited and to that extent puts into issue the authenticity of the documents relating to the transactions between the Appellant and Minuteplus Holdings Limited. At the instance that the Respondent challenged the authenticity of the documents and the occurrence between the parties to the transactions, the burden of proof shifted to the Respondent to prove any possible fraud or impropriety relating to the documents and or in relation to the transactions.

88. The Tribunal reiterates its finding in the case of **Shreeji Chemicals Limited vs. Commissioner of Investigation and Enforcement TAT Appeal No. 339 of 2018**, where it held as thus:-

*“it is settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from facts”*

89. Consequently, the Tribunal finds that the Respondent’s Objection decision made on 13<sup>th</sup> October 2022 was not justified.

### **FINAL DECISION**

90. In view of the foregoing the Tribunal finds that the Appeal is meritorious and accordingly proceeds to make the following Orders; -

- i. The Appeal be and is hereby allowed.
- ii. The Respondent’s Objection decision made on 13<sup>th</sup> October 2022 be and hereby set aside.
- iii. Each party to bear its own costs.

91. It is so ordered.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of April, 2024**

**ERIC NYONGESA WAFULA  
CHAIRMAN**

**EUNICE N. NG’ANG’A  
MEMBER**

**ELISHAH N. NJERU  
MEMBER**

**MUTISO MAKAU  
MEMBER**

**ABRAHAM K. KIPROTICH  
MEMBER**