

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 241 OF 2023

KAPKIMOLWA QUARRY LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a company incorporated in Kenya under the Companies Act and a registered taxpayer.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the laws of Kenya. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Respondent conducted a returns review by performing an analysis of income tax, PAYE, and VAT returns for the period running from 26th September 2019 to 13th July 2021 as a result of which the Appellant was issued with a preassessment demand notice of VAT amounting to Ksh. 2,280,523.03 on 19th May 2021.

4. On 16th July 2021, the Appellant was issued with additional assessments for Ksh 1,066,841.66 comprising principal tax, interest and penalties. The Appellant objected to the assessment on iTax on 19th July 2021.
5. On 20th September 2021, the Respondent issued its objection decision confirming an assessment of principal VAT amount of Ksh 895,024.81. The Appellant was also issued with confirmation assessment notice fully rejecting the Appellant's objection on 14th October 2022.
6. Aggrieved by the objection decision, the Appellant filed its Notice of Appeal dated 17th February 2023 on 21st March 2023 at the Tribunal. This was after the Appellant was granted leave to file Appeal out of time vide **Miscellaneous Application No 25 of 2023** dated 3rd March 2023.

THE APPEAL

7. The Appeal was premised on the following grounds as laid-out in the Memorandum of Appeal dated 17th March 2023 and filed on 21st March 2023;
 - (a) That the Respondent erred in law and in fact by arbitrarily increasing the sales figures in the Appellant's VAT returns and erroneously assessing additional VAT.
 - (b) That the Respondent erred in law and in fact by disregarding the VAT returns filed by the Appellant and all explanations and documentation provided by the Appellant in support of their objection and proceeding to confirm the VAT assessments.
 - (c) The Respondent erred in law and in facts 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.

- (d) The Respondent erred in law and in 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 disallowing invoices.
- (e) The Respondent erred in law and in fact by disregarding all the explanations and documentation provided by the Appellant and proceeding to disallow input VAT borne and claimed by the Appellant.
- (f) The Respondent erred in law and in fact by disregarding the express provisions of Section 17 of the Value Added Tax Act No. 35 of 2013 (hereinafter 'VAT Act') and Paragraph 9 to the VAT Regulations, 2017 and disallowing the Appellant's input VAT.

APPELLANT'S CASE

- 8. The Appellant stated as follows in its Statement of Facts dated 17th March 2023 and filed on 21st March 2023:
- 9. The Appellant averred that it filed and paid all its VAT due for the period under assessment yet the Respondent amended the Appellant's VAT return without conducting an audit or review of books for the months under review and disallowed some input VAT incurred and claimed by the Appellant while at the same time increasing the sales value for the period.
- 10. It was the Appellant's assertion that the Respondent's assessment was based on arbitrary figures which appeared to have been plucked from the air and not the actual sales or supplies made by the Appellant during the period under review. Additionally, that the Respondent disregarded all the facts in

the financial statements and source documents and erroneously made additional assessments by overstating sales for the period.

11. The Appellant asserted that it claimed valid input VAT within six (6) months supported by valid tax invoices in compliance with provisions of the VAT Act and VAT Regulations in force at the time. That it submitted these invoices as well as supporting documentation but the Respondent proceeded to disallow the input VAT when confirming the assessment. Moreover, that in disallowing input VAT and recovering the tax therefrom unfairly imposed a financial burden on the Appellant's operations.
12. The Appellant stated that VAT Act was well aligned with tax canon of equity whose basic premise is that tax collection should be equitable across taxpayers on different levels and that taxpayers should bear no more tax than what other taxpayers in the same bracket bear. Additionally, that VAT heavily drew impetus on the input-output principle and that any distortion on the formulae would lead to unfair and heavy pecuniary burden upon the taxpayer.
13. The Appellant averred that VAT being a consumption tax whose burden is borne by the final consumer of supplies, it would be prejudicial if the pecuniary burden was borne by intermediaries in the chain of supplies bearing in mind the input-output VAT principle.
14. The Appellant asserted that the difference between deemed income declared and the income reported during the period under review could be explained by reconciliations and that assessing additional taxes on the deemed variances was erroneous.

Appellant's Prayers

15. The Appellant's prayers to the Tribunal were that:

(a) It allows this Appeal with costs; and

(b) It annuls and sets aside the Respondents' objection decision dated 14th September 2022.

THE RESPONDENT'S CASE

16. The Respondent replied to the Appeal through its Statement of Facts dated and filed on 10th March 2023.
17. The Respondent averred that the Appellant was identified as part of continuous sector monitoring activities and identification of inconsistencies in taxpayer filed returns.
18. The Respondent stated that its returns review established that there were variances between the Appellant's income tax turnover and VAT sales turnover declarations for the year 2019 which pointed to under declaration of sales in VAT returns. Additionally, that the Appellant understated its gross profit by introducing opening stock in its initial year of operations and also double claimed some invoices in its purchase declarations for the October 2019 and March 2021 period.
19. The Respondent asserted that the assessments were correctly issued and conformed to the VAT Act as the Appellant did not provide any evidence that would have altered the assessment pursuant to Section 56(1) of the Tax Procedures Act (TPA). Moreover, the Respondent averred that the Appellant's notice of objection was invalidly lodged as it did not have grounds of objection and that the Respondent informed the Appellant regarding the same as provided for under Section 51(2),(3)(a)(b) of the TPA.
20. The Respondent averred that the Appellant was uncooperative in the provision of relevant records and failed to respond to the request for

documents; as a result, assessment was made based only on available information based on the best judgement by the Respondent. The Respondent cited Section 59 (1)(a) of the TPA which provides as follows; “.

“59(1). For the purpose of obtaining full information in respect of the income of a person or class of persons, the Commissioner may, by notice in writing, require, in the case of the income of a person, that person or any other person, and in the case of a class of persons, any person-

To produce for examination by the Commissioner at the time and place specified in the notice, any accounts, books of account, and other documents which the Commissioner may consider necessary; and the Commissioner may inspect such accounts, books of accounts or other documents and may take copies of any entries therein”

21. It was the Respondent’s assertion that the Appellant failed to provide relevant supporting documents of records and invoices to support their objection, the VAT was therefore estimated as this was the only reasonable basis of assessing VAT tax and issuance of objection decision. Further, that contrary to Appellant’s assertions, the objection decision provided precise and clear reasons for raising the assessment and the Respondent disallowed some invoices/input claims in VAT returns that were not supported by documentation.
22. The Respondent stated that it disallowed input VAT where necessary documents were not provided as couched under Section 17 (1)(2) & (5) of the VAT Act. Further, that Section 31 (1)(a)(b)(c) of the TPA empowered the Respondent to make alterations or additions to original assessment from available information for a reporting period based on the best judgement. In

buffering this position, the Respondent relied on Section 24 and 29 of the TPA which provides 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 “default assessment”).”

Respondent’s Prayer

23. The Respondent prayed;

- (a) That the Tribunal upholds the objection decision and finds the outstanding tax arrears of Ksh 895,024.81 due and payable by the Appellant.
- (b) That the Tribunal confirms the assessment dated 14th October 2022 as proper in law
- (c) That the Tribunal dismiss the Appeal herein with costs

PARTIES WRITTEN SUBMISSIONS

24. The Appellant's written submissions were dated 17th October 2023. The Appellant submitted on two issues which it analysed as outlined hereunder:

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

25. The Appellant submitted that it filed its VAT returns and paid the VAT due for the period under assessment yet 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 yet input VAT was supported with valid tax invoices and copies of other documents as stipulated under Section 17(1)(2)&(3)(a) of the VAT Act. The Appellant relied on the case of **Commissioner of Domestic Taxes v Trical and Hard Limited (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR) (Commercial and Tax)** where Majanja J held as follows:

“The burden of proof in tax matters is not stationary but is like a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer. The uniqueness of our tax system in placing the evidential burden of proof on the tax payer is neither a mistake nor is it unconstitutional. The evidential burden of proof rests with the taxpayer to disprove the Commissioner and that once competent and relevant evidence is produced, then this burden now shifts to the Commissioner. I have emphasized and underlined ‘competence’ and ‘relevance’ because it is only evidence that meets these two tests that demolishes presumption of correctness and swings the burden to the Commissioner.”

26. The Appellant claimed that it availed competent and relevant evidence in form of invoices, ETR receipts and supporting documentation indicative of

payments yet the Respondent disregarded these explanations and documentation and proceeded to disallow input VAT and confirm the assessment. The Appellant stated that the evidence adduced was enough proof to allow for input tax because disallowing the same and recovering the tax therefrom would unfairly impose unfair financial burden on the Appellant's operations yet the Respondent did not have any evidence to the contrary.

27. The Appellant asserted that the explanations provided by the Respondent for the rejection of the input VAT were invalid and unreasonable since the Appellant had provided proper invoices. Further, that it is trite law that tax system should be fair and no citizen ought to bear an unfair and an unequal tax burden. To buttress this position, the Appellant relied on the case of **Keroche Industries Limited V Kenya Revenue Authority & 5 Others [2007] Eklr** where the court held that;

“It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due... Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must

disallow it to among other things to uphold both the law the integrity of the rule of law.”

28. The Appellant averred that VAT heavily drew impetus upon the input-output principle, and if the formulae was to be distorted, the taxpayer ought to unfairly suffer a heavy pecuniary burden. Similarly, that VAT being a consumption tax, its burden should be borne by the final consumer of the supplies as this was the basis of the input-output principle, which allows for intermediaries in the supply chain to pass on the VAT burden to the final consumers and that it would be prejudicial if the pecuniary burden was borne by the intermediaries in the chain of supply. In buffering its position further, the Appellant relied on the case of **Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR**, where the learned judge held that;

“The shifting of the burden of proof in tax disputes flows from the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency.[10] The commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption created by the above provisions is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position.[11] If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer.

The Supreme Court of Canada in Johnston v Minister of National Revenue [18] decided that the onus is on the taxpayer to “demolish the basic fact on which the taxation rested.” Also, the Supreme Court of Canada provided guidance on this issue in Hickman Motors Ltd. v Canada [19] that the onus is met when a Taxpayer makes out at least a prima facie case. Prima facie is another legal term that

literally means “on its face.” To prove a case “on its face” you must provide evidence that, unless rebutted, would prove your position. According to the said decision, a prima facie case is made when the taxpayer can produce unchallenged and uncontradicted evidence. Once the taxpayer has made out a prima facie case to prove the facts, the onus then shifts to the Revenue Authority to rebut the prima facie case. If the Revenue Authority cannot provide any evidence to prove their position, the taxpayer will succeed.”

29. The Appellant submitted that it discharged the burden of proof by providing the various invoices and documents required to claim input VAT in accordance to Section 17 of the VAT Act, financial statements and evidence of the filed VAT returns for the period under review all of which were unchallenged and uncontradicted evidence to proof its case and further relied on the case of **George v Federal Commissioner of Taxation, {1952} HCA 21** where it was held that;

“the burden lies upon the taxpayer of establishing affirmatively that the amount of taxable income for which he has been assessed exceeds the actual taxable income which he has derived during the year of income” and that “...in order to carry that burden he must necessarily exclude by his proof all sources of income except those which he admits. His case must be that he did not derive from any source taxable income to the amount of the assessment.”

30. The Appellant claimed that the Respondent who was aptly equipped and mandated to collect and assess taxes was committing an illegality by imposing unfair, excessive and unjust taxes to a committed and diligent taxpayer who had been at the forefront in submitting tax returns. The

Appellant relied on the case of **Kilburn v Bedford (H.M. Inspector of Taxes) 1955 Chancery Division, 36, p.262.** where it was held that;

“...as regards the extra tax imposed upon those figures it was for the appellant to show that there was some reason why on the agreed figures tax should not be paid...”

(b) Whether the Respondent erred in disregarding the Appellant’s information and documentation provided.

31. The Appellant submitted that despite filing all its VAT for the period, 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 during that period. The Appellant relied on Section 108 and 109 of the Evidence Act, CAP 80 of Kenya’s Laws (hereinafter ‘Evidence Act’) stating that it discharged its burden of proof. Additionally, the Appellant averred that it kept all records in the course of business and produced them during the audit carried out by the Respondent as provided for under Section 43 of the VAT Act as read together with Section 20 of the TPA.

32. The Appellant submitted that the differences between deemed income declared and income reported under review was explained by reconciliations yet the Respondent went ahead to assess additional taxes on these deemed variances which was erroneous. The Appellant sought reliance on the case of **Republic v Commissioner of Domestic Taxes Large Tax Payer's Office Ex Parte Barclays Bank of Kenya Ltd[2012] eKLR** where the court held that;

“for the proposition that the decision to tax must have a legal basis and that section 56(1) does not empower the appellant to make speculative assessments (citing Johnson v Scott (Inspector of Taxes) nor was it the intention of the legislature to put the taxpayer in a position where he would be required to produce any documents that the taxman requires...”

33. The Appellant claimed that even though the argument of failing to produce all required documents sounded attractive, the Appellant stated that it dutifully produced all the records as required and the reconciliation of accounts should have been done accordingly by the Respondent which would not have resulted in the erroneous assessment. The Appellant asserted that the Respondent disregarded the Appellant’s supporting documentation and made excessive assessment and the tax decision should have been made differently. The Appellant was convinced that it discharged its burden of proof in great detail as shown contrary to the Respondent’s objection decision which was erroneous.
34. The Respondent’s written submissions dated 26th September 2023 were filed on 27th September 2023. The Respondent submitted on three issues as stated hereunder;
- a) **Whether the Respondent took into consideration all additional information availed before making the decision.**
 - b) **Whether the Respondent erred by raising the VAT assessment for 2019 period.**
 - c) **Whether the assessments issued were excessive.**
35. The Respondent was categorical that the assessments were correctly issued and conformed to the ITA and Section 56(1) of the TPA. Moreover, the Respondent stated that it duly informed the Appellant that its notice of

objection was invalidly lodged pursuant to Section 51(3)(a)(b) and (4) of the TPA. Further, the Respondent claimed that all the Appellant's submissions in interviews, review meetings, site inspections, document verifications meetings and documentations provided were taken into consideration before issuance of objection decision.

36. The Respondent submitted that the Appellant underdeclared and did not disclose all income earned even though it filed all necessary returns and paid what they had assessed themselves to be payable. The Respondent asserted that the Appellant was derelict in its responsibility to maintain records of all transactions as couched under Section 54 A(1) and 55(2) of the ITA as read with Section 42(1), 43(1) and 93(1) of the TPA. The Respondent claimed that the Appellant offended Section 97 of the TPA by providing false or misleading information during the tax period under review.
37. Further, the Respondent averred that the Appellant was uncooperative in provision of relevant records as provided for under Section 59(1)(a) of the TPA and failed to respond to request of documents as a result assessment was made based on available information and the Respondent was empowered to make alterations or additions to original assessments from available information as provided under Section 24 of the TPA as read together with Section 29 and Section 31 (1)(a),(b)&(c) of the TPA.
38. The Respondent submitted that the Appellant supplied insufficient documents that failed to meet the threshold espoused under Section 15(1) and 16 of the ITA alleging further that the Appellant knowingly and recklessly offended Section 94 & 95 of TPA both of which provide as follows;

“94 Failure to submit tax return or other document

A person commits an offence if the person without reasonable cause fails to submit a tax return or other document required under a tax law by due date.

95 Failure to pay tax

A person commits an offence is that person fails to pay tax by due date.”

39. The Respondent asserted that the Appellant’s objection was devoid of substance as it failed to include supportive records to validate Appellant’s claims as required under Section 51 of the TPA. The Respondent relied on the following cases to buttress its position;

- a) Monaco Engineering Limited v Commissioner Domestic Taxes [TAT Appeal No 67 of 2017]
- b) Osho Drappers Limited v Commissioner of Domestic Taxes [TAT No 159 of 2018]
- c) Miao Yi v Commissioner of Investigations & Enforcement [TAT No 441 of 2019]
- d) Ritz Enterprises Limited v Commissioner of Investigations & Enforcement [TAT No. 227 of 2018]
- e) Kenya Revenue Authority v Man Diesel & Turbo SE, Kenya[2021]eKLR
- f) Janet Kephipe Ouma and another v Marie Stopes International (Kenya), HCC No. 68 of 2017
- g) Dyer & Dyer Limited v Commissioner of Domestic Taxes [TAT No 139 of 2020]
- h) Commissioner of Domestic Taxes v Metoxide Limited [2021]

- i) KenIron and Steel Limited v Commissioner Investigations and Enforcement [2021]
- j) Commissioner of Domestic Taxes v Galaxy Tools Limited [2021]eKLR

ISSUES FOR DETERMINATION

40. The Tribunal having carefully considered the parties' pleadings, documentation and submissions notes that a singular issue calls for its determination as follows;

Whether the objection decision dated 20th September, 2021 was justified

ANALYSIS AND DETERMINATION

- 41. The Tribunal will proceed to analyse this issue for determination as hereunder.
- 42. The dispute herein arose when the Appellant was singled out due to inconsistencies between the Appellant's income tax turnover and VAT sales turnover declarations for the year 2019.
- 43. Whereas the Appellant stated that it paid all its VAT due for the period under assessment, the Respondent contested this stating that even though the Appellant filed all necessary returns and paid what they had assessed themselves to be payable, the Appellant was derelict in its responsibility to maintain records of all transactions. The Tribunal notes that Section 42 (1) & 43(1) as read with Section 93 of the TPA provides as follows;

“Section 42 Tax Invoice

(1) Subject to subsection (2), a registered person who makes a taxable supply shall, at the time of the supply furnish the

purchaser with the tax invoice containing the prescribed details for the supply.

Section 43 Keeping records

(1) Every registered person shall, for the purposes of this ACT, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made herein.

Section 93 Failure to maintain documents

A person commits an offense if the person fails to keep, retain or maintain a document that may be required to be kept, retained or maintained in accordance- with a tax law without reasonable excuse during a reporting period.”

44. The Appellant claimed that the Respondent’s assessment was based on arbitrary figures plucked from the air whereas the amended VAT returns were done without conducting an audit or review of books for the months under review yet the Appellant claimed valid input VAT within six(6) months which were supported by valid tax invoices in compliance with provisions of the VAT Act. This was contested by the Respondent who insisted that the assessments were correctly issued and conformed to the VAT Act and it was the Appellant who was uncooperative in the provision of relevant records and failed to respond to the request for documents.
45. The Respondent asserted that the Appellant introduced opening stock in the initial year of operation the effect of which was understating of gross profit, this averments by the Respondent have not been controverted by the Appellant. Further, the Respondent claimed that the Appellant double claimed some invoices in its purchase declarations for the periods between

October 2019 and March 2021, claims that were uncontested by the Appellant. The Tribunal is well aware that Section 56(1) of the TPA and Section 30 of the TAT Act place the burden of proof upon the Appellant to prove that a tax decision is incorrect. The Tribunal is guided by the holding in the case of **Alfred Kioko Muteti vs. Timothy Miheso & Another [2015] eKLR** where the court held that a party can only discharge its burden of proof upon adducing evidence. Merely making pleadings is not enough.

46. The Tribunal notes the Respondent's position that the Appellant failed to provide all the relevant supporting documents or records and invoices for the period under audit in support of their objection has neither been disputed by the Appellant through evidentiary record of submissions made to support their iTax notice of objection nor attached in their pleadings herein. The Tribunal reiterates the court decision in the case of **Commissioner of Domestic Taxes -vs- Structural International Kenya Ltd ITA E089 of 2020 (2021) KEHC 152 (KLR)**, where the High Court stated;

“For the avoidance of doubt, the Tribunal is reminded that in matters where the supply of goods, be it for VAT purposes or Corporation Tax, the burden is always on the trader / taxpayer to show that, the documentation set out in the statute and in which he relies on arose out of a commercial transaction. Period. If additional documents, which would reasonably expected to be in his possession is requested for to verify the alleged transactions, he should produce the same to the Commissioner. That is what is expected of a keen and diligent trader.”

47. From the foregoing analysis is that the Tribunal is convinced that the Appellant was derelict in its duty of discharging the burden of proof and

failed to show why and how the Respondent ought to have arrived at a different decision.

48. The Tribunal therefore finds that the objection decision dated 20th September, 2021 is justified.

FINAL DECISION

49. The upshot of the foregoing is that the Appeal lacks merit and the Tribunal accordingly proceeds to make the following Orders:

- (a) The Appeal be and is hereby dismissed.
- (b) The Respondent's objection decision dated 20th September 2021 be and is hereby upheld.
- (c) Each party to bear its own costs.

50. It is so ordered.

DATED and DELIVERED at NAIROBI this 5th Day of April, 2024

**CHRISTINE A. MUGA
CHAIRPERSON**

**BONIFACE K. TERER
MEMBER**

**DELILAH K. NGALA
MEMBER**

**GEORGE KASHINDI
MEMBER**

**SPENCER S. OLOLCHIKE
MEMBER**