REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAT NO. 54 OF 2017

LASER SUPPLIES LIMITED ..................................................APPELLANT

VERSUS

THE COMMISSIONER INCOME TAXES DEPARTMENT.........RESPONDENT

JUDGEMENT

A. INTRODUCTION


2. The Respondent is established under Section 3 of the Kenya Revenue Authority Act and empowered to by section 5 of the same Act with the mandate of assessing and collecting revenue for the Government and to administer various tax laws in Kenya.

B. BACKGROUND

3. After analyzing the tax returns filed by the Appellant, the Respondent resolved to carry out an audit on the operations of the Appellant for the years 2014 and 2015. Accordingly, the Appellant was served with a Notice of Intention to audit on the 19th September 2016 as provided for under Section 59 of the Tax Procedures Act. The said audit was to focus on verification of the income tax declared in the self-assessment and ascertainment of VAT. Thus the Appellant was required to avail for examination their records, books of accounts and other documents on or before the 19th October 2016.
4. On 19th October 2016 the Respondent carried out an initial interview of the Appellant with the aim of starting the audit exercise. The officers of the Respondent conducted the audit after which an assessment of Kshs. 146,357,439 was assessed as payable.

5. Vide a letter dated 30th November 2016 the Appellant was served with a notice of additional assessment. This additional assessment was premised on KRA’s right to re-audit where new information becomes available.

6. The Appellant aggrieved by the additional assessment raised an objection vide letters dated 2nd December 2016 in respect of Assessment Number KRA201609234547 and KRA201609234734.

7. On the 3rd of February 2017 the Respondent confirmed the assessment in its objection decision to the Appellant. In particular the Respondent stipulated that after the adjustments, the total tax payable was Kshs. 107,541,639.

8. Dissatisfied with the Respondent’s Objection decision dated 3rd February 2017, the Appellant was prompted to file a notice of Appeal dated 13th March 2017.

C. THE APPEAL

9. The grounds of Appeal presented in the Memorandum of Appeal dated 27th March 2017 are as follows;
   a) The Respondent erred in its demand as the said demand was excessive and estimated as it is not based on any material facts thus it is erroneous.
   b) The Respondent in confirming the amended assessment failed to consider reasons of objecting to the assessment in part as per the tax laws.
   c) The Respondent erred in tax law in failing to consider the provisions of the Value Added Tax Act 2013 on export sales.
d) The Respondent’s demand is full of errors and inaccuracies evidenced by double charging of Value Added Tax on sales that had been declared in the VAT return.

e) The Respondent erred in tax law by failing to acknowledge the provisions of the Income Tax Act before charging to tax expenses that were wholly and exclusively business related.

10. The Appellant thus prays that:
   a) The Respondent’s notice of assessment for the years 2014 and 2015 be vacated in its entirety.
   b) Any other remedies that the Honorable Tribunal deems just and reasonable.

11. In response the Respondent prayed that it’s decision be upheld on the grounds that:

   a) Value Added Tax

   i. During the audit period the Appellant was uncooperative and was not willing to provide the required documents to prove that there was a declaration of output tax in the year 2014.

   ii. This led to the confirmation of the assessment based on the available documents and demanding of taxes amounting to Kshs. 107,541,639.

   iii. Upon filing this appeal the Appellant provided the required documents and the Respondent confirmed that indeed there was a declaration made in the year 2014, amounting to Kshs. 67,772,750.

   iv. From the said declaration, VAT amounting to Kshs. 498,862 was paid by the Appellant.

   v. The exported sales in the year 2014 have since been factored in as the Respondent now has had a chance to look at them upon inclusion of the documents during the filing of the Appeal.

   vi. In the year 2015, the Appellant and the Respondent are in agreement that a sale of Kshs. 101,772,903 was made. The same was not declared for VAT purposes.

   vii. The Appellant has insisted on its right to amend returns as provided for under section 46 (2) of the Value Added Tax Act, 2013.
viii. The Respondent recognizes this right but the same right should be exercised without delay, as the Appellant is denying the Commissioner his rightful tax as upon admission of the undeclared sale the Commissioner’s assessment for the year was validated.

b) Corporation Tax
   i. The Respondent had issued an assessment on corporation tax based on the available documents during the audit period.
   ii. The Appellant was uncooperative and he was not willing to provide supporting documents leading to the assessment issued on the Appellant.
   iii. The Appellant has since agreed that there was additional sales of Kshs. 81,772,900 that were not declared in the 2015 returns.
   iv. The Appellant seeks to declare the income in his 2016 audited accounts. The Appellant concedes that it has declared these sales of Kshs. 81,772,900 in the unaudited financial statement for the financial year 2016 when the sales were made. This would validate the Respondent’s tax assessment.

12. Therefore, the Respondent prays that:
   a) The Appeal be dismissed and the Assessment be upheld.

D. PARTIES SUBMISSIONS

I. THE APPELLANT’S CASE

13. The Appellant avers that this appeal was prompted by the Respondent’s assessment of Kshs. 107,541,639. However, both parties are in agreement that there was no VAT owing for the year 2014. Further, the parties are in agreement that there is no corporation tax owing for the year 2014 and 2015. So out of the Kshs. 107,541,639.00 assessment, what is in contention is the amount of Kshs.17, 260,683.00 being VAT for the year 2015.

14. Therefore, the bone of contention according to the Appellant is on the interpretation of section 17 (2) of the Value Added Tax Act, 2013. The Appellant’s key issue is whether it can claim input VAT after the six (6) months period has lapsed. Mr. Gilbert Musau for the Appellant contends that Section 17 (2) of the VAT Act of 2013 cannot be read in isolation without taking into
consideration the Tax Procedures Act, Section 31 (2) when it comes to
amendment of Vat returns. In this regard, the Appellant objects to the
Respondent’s allegations that the Appellant went ahead to utilize some input
Vat that was not supposed to be utilized for a tax period for a time that had
already elapsed.

15. The Appellant clarified that tax period for this issue was November 2015
although the amendment happened on 19th July 2017. That Section 17 (2) of
the Vat Act relating to amendment of Vat returns cannot be read in isolation
of Section 31 (2) as the TPA Act empowers a tax payer to amend the return
as long as it lies within the five years. As such, it is the Appellant’s humble
submission that the Appellant be allowed to claim the inputs that have already
been utilized in amending the November 2015 return by the Appellant.

16. The Appellant further avers that the list of authorities relied on by the
Respondent have no bearing on the issue for determination by the Tribunal.
The Respondent relied on the following authorities, Smith vs Clain, Elizabeth
Waceke and 62 Others vs Airtel Kenya Ltd, Ericson Kenya Ltd vs The Attorney
General and three others, Republic vs KRA ex parte LAB International Kenya
Ltd. and Tata Chemicals Magadi Ltd vs Commissioner of Domestic Taxes. It is
the Appellant’s position that the Tribunal should disregard the afore-
mentioned authorities as they are irrelevant in the case before the Tribunal.

II. THE RESPONDENT’S CASE

17. The Respondent equally agrees that there was no VAT owing for the year
2014. Neither is there corporation tax owing for the years 2014 and 2015.
Further, both parties are in agreement that the Appellant made sales of
Kshs.101, 772,903.00 in the month of November 2015. The Respondent avers
that the Appellant failed to declare these sales when making its returns, and
the same was brought to the Appellant’s attention. This necessitated the
Appellant to amend its returns on the 17th June 2017.

18. That when the Appellant made these amendments, they also claimed input
VAT of Kshs.76, 528,976.00. Therefore what is in issue here is whether the
Appellant can claim input VAT after the six (6) months period.
Respondent relied wholly on Section 17 (2) of the VAT Act claiming that the section is in mandatory terms. In particular the Respondent contends that the Appellant was claiming input VAT for the month of November 2015 in July 2017. As such, it is contrary to the precepts of section 17 (2) to claim input VAT after a duration of more than 18 months from when the supply was made.

19. On the question of the relevance of the authorities the Respondent relied on, it is the Respondent’s submission that it relied on the obiter dictum in the case laws and not the findings.

E. ISSUES FOR DETERMINATION

20. Having carefully considered the grounds of appeal, the submissions of the parties, the authorities cited in support thereof, it is clear to the Tribunal that only one issue falls for determination. We hereby restate this single issue as being:

    a) Whether the Appellant can claim input VAT after the lapse of six (6) months?

F. ANALYSIS

21. The Appellant contends that for the purpose of ascertaining its entitlement to an input VAT refund and interpreting the applicable law, section 17 (2) of the VAT Act cannot be read in isolation without taking into consideration the provisions of the section 31 (2) of the Tax Procedures Act, 2015.

22. On the other hand, the sheet anchor of the Respondent’s argument is pitched on section 17 (2) of the VAT Act. In resisting the Appellant’s position the Respondent submitted that it rejected the Appellant’s claim for refund on account of non-compliance with the statutory timeline under section 17 (2).
23. The Tribunal after a careful and close reading of the impugned provisions of the VAT Act, 2013 and Tax Procedures Act, 2015 finds that the law on whether input VAT refund/credit avails to an individual is governed by section 17 (2) of the VAT Act, 2013. The section stipulates as follows:

17 (1) ............

17(2) If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in subsection (3), 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.

24. Section 17 (2) elaborately and in mandatory terms sets down criteria to be followed by a tax payer in seeking a refund of input VAT namely; that the taxpayer must hold the documentation referred to in section 17 (3) of the VAT Act; and secondly, input VAT shall be allowable for a deduction within six months after the end of the tax period [Emphasis added] in which the supply or importation occurred.

25. A tax period is defined in section 2 (1) of the Value Added Tax Act, 2013 as;

‘One calendar month or such other period as may be prescribed in the Regulations.’

The Appellant made its returns in November of 2015. Therefore, a claim for input tax refund could only be sustained if made within six months after the date on which the return was filed. The law strictly allows a taxpayer a duration of six months after a tax period in order to make an input tax refund claim. Further, the VAT Act does not allow for enlargement of this duration.
26. In holding this view, this Honorable Tribunal is alive to the fact that in interpretation of tax laws, it is duty bound to look at what the law states. The law at hand, section 17 (2) of the VAT Act, does not admit any other interpretation except that a claim for a refund cannot be beyond the time prescribed. Accordingly, there is not room for intendment. In support of this position, reliance is placed on the decision of Cape Brandy Syndicate vs Inland Revenue Commissioner (1921) 1 KB 64, where the Court held that:

"In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used"

27. To further buttress this position, the Tribunal is persuaded by the decision of the Indian High Court at Madras in US Agencies vs The Commercial Tax Officer, 2013 in which the Court grappled with the interpretation of section 19 (11) of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter TN VAT Act ) for the purpose of input tax credit. Section 19 (11) of the stipulates as follows:

In case any registered dealers fails to claim input tax credit in respect of any transaction of taxable purchase in any month, he shall make the claim before the end of the financial year or before ninety days from the date of the purchase, whichever is later.

28. The Madras High Court was faced with the question whether a dealer could claim input tax credit contrary to the modalities and time frame prescribed by section 19 (11) of the TN VAT Act. The court held as follows:

27. As per Section 19(11) of TN VAT Act, _.... in case any registered dealer fails to claim Input Tax Credit in respect of any transaction of taxable purchase in any month, he shall make the claim before the end of the financial year or before ninety days from the date of purchase, whichever is later_. Sub-section (1) of Section 19 contemplates allowing Input Tax Credit of the amount of tax paid or payable to the extent of the amount of Input Tax Credit accrued on purchases. Section 19(11) prescribes the modalities and time frame as regards availment or enjoyment of the said concession.
By Section 19(11) Legislature wanted to set up a time-frame for availment of Input Tax Credit accrued on purchases before the end of the financial year or ninety days from the date of purchase, whichever is later.

........

39. The availment of Input Tax Credit is creature of Statute. The concession of Input Tax Credit is granted by the State Government so that the beneficiaries of the concession are not required to pay the tax or duty which they are otherwise liable to pay under TN VAT Act. While so extending the concession, it is open to the Legislature to impose conditions. Section 19(11) is one such condition imposed making it mandatory for the registered dealer to claim Input Tax Credit before the end of the financial year or before ninety days from the date of purchase, whichever is later. The entitlement to claim Input Tax Credit is created by TN VAT Act and the terms on which Input Tax Credit can be claimed must be strictly observed.

40. The modalities and the time frame in Section 19(11) as regards availment or enjoyment of Input Tax Credit is a pre-condition and not merely procedural. As far as Section 19(11) of TN VAT Act is concerned, the Legislature clearly intended to prescribe a time frame for availment of Input Tax Credit and the contravention of Section 19(11) means forfeiture of Input Tax Credit. Section 19(11) is a pre-condition for availing Input Tax Credit.

29. Save for the foregoing, the Appellant sought to take protection under section 31 (2) of the Tax Procedures Act, 2015 in order to sustain its refund claim. That section 17 (2) of the VAT Act cannot be read without considering section 31 (2) of the Tax Procedures Act. Nothing could be further from the truth. To contradistinguish the two sections, section 17 (2) of the VAT Act, 2013 deals with credit for input tax. On the other hand section 31 (2) traverses issues of amendment to assessment dating back to five (5) years. In the eyes of the Tribunal the two sections are independent of each other, distinct and capable of standing on their own. This Honorable Tribunal is not persuaded by the proposition advanced by the Learned Counsel on record for the Appellant, that the two sections are interdependent.
G. DETERMINATION

30. These conclusions lead us to the following orders:
   a) In line with the foregoing analysis the Appeal herein fails and is hereby dismissed.
   b) Consequently, the Confirmed Assessment dated 3rd February 2017 is hereby upheld.
   c) Each party shall bear its own cost.

DATED and DELIVERED at NAIROBI this 17th day of December 2019.

In the presence of:-

Mr. Magire ...................... for the Appellant

Ibrahim Said Mutua ............... for the Respondent

MOSES B. OBONYO
CHAIRMAN

MAHAT SOMANE
MEMBER

PATRICIA MAGIRI - ANAMPIU
MEMBER

TIMOTHY K. CHESIRE
MEMBER