

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 158 OF 2018

AMRITLAL KACHRA SAVLA.....APPELLANT

- VERSUS-

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a sole proprietor trading as Universal Gift Centre and whose principal activity is supplying broadcast and Pro-video equipment.
2. The Respondent is a principal officer of the Kenya Revenue Authority and which Authority is established under Section 3 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and its core mandate is to assess, collect and account for all Government revenue in accordance with identified laws.
3. The Respondent issued a tax demand on 16th April 2018 and thereafter a notice of assessment on 16th May 2018 for Kshs 5,704,658.00 being Value Added Tax (VAT) for the period September 2014 to December 2017.

4. The Appellant objected to the tax assessment in its letter dated 14th May 2018. Thereafter the Respondent wrote via email to the Appellant asking for more documents on 11th June 2018 and 27th June 2018.
5. The Respondent issued the Objection Decision on 10th July 2018 confirming the additional assessment.
6. Being dissatisfied with the Respondent's decision the Appellant filed a Notice of Appeal on 10th August 2018.

GROUND OF APPEAL

7. The Appeal was premised on the following grounds:
 - (i) That The Respondent has disallowed input VAT contrary to Section 17 of the VAT Act 2013.
 - (ii) That the facts and circumstances giving rise to this Appeal points to abuse of office and power by the Respondent and the Honourable Tribunal should not sanction such abuse of power.

APPELLANT'S CASE

8. The Appellant averred that the Respondent disallowed input VAT on the grounds that its investigations established a grand missing trader scheme where the suppliers from whom the Appellant made purchases do not sell or deliver goods at all. This, the Appellant argued, does not apply to it because the

Appellant indeed purchased goods as indicated in the invoices, the goods were delivered as indicated in the delivery notes and payments were made as can be confirmed from the company bank accounts and payment records.

9. The Appellant argued that the unsupported suggestions or presumptions that the goods were not bought and delivered is therefore inaccurate and untenable.
10. According to the Appellant, the Respondent is trying to attribute non-compliance of the listed suppliers to the Appellant which cannot be a basis for disallowing input VAT as provided for under the VAT Act or any other law of Kenya.
11. To buttress its position, the Appellant cited Section 17 of the VAT Act which states that:

“(1) Subject to the provisions of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies.

(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.

(3) The documentation for the purposes of subsection (2) shall be—

(a) an original tax invoice issued for the supply or a certified copy;

(b) a customs entry duly certified by the proper officer and a receipt for the payment of tax;

(c) a customs receipt and a certificate signed by the proper officer stating the amount of tax paid, in the case of goods purchased from a customs auction;

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

(e) a debit note in the case of input tax deducted under section 16(5).”

12. The Appellant submitted that it met the threshold set out for VAT input claims required under Section 17 of the VAT Act and regulations and failure by the Respondent to allow the same is arbitrary, illegal and a violation of the Appellant’s right to a fair administrative action protected under Article 47(1) of the Constitution of Kenya, 2010.

13. The Appellant maintained that the Respondent's investigation findings are not only inaccurate and unreasonable but also unfair to the Appellant since the Appellant has to the best of his knowledge provided sufficient proof to show that he indeed purchased the goods in question.
14. The Appellant argued that the evidence by documents provided by the Appellant to the Respondent including invoices, delivery notes and evidence of payments made to the suppliers which can be confirmed from the Appellant's bank account statements and payment records.
15. The Appellant argued that by insisting that his suppliers did not supply the goods and completely disregarding the documents it provided, the Respondent was introducing grounds that are not provided for in law to deny the Appellant legitimate input VAT claims.
16. The Appellant submitted that the findings by the Respondent connecting him to missing traders' scheme were not only inaccurate and unreasonable but also unfair to him since he had, to the best of his knowledge, provided sufficient proof to show that he indeed purchased the goods in question.
17. The Appellant contended that having followed the law, he had a legitimate expectation that the Respondent would allow his input VAT claims. The Appellant further averred that the facts and circumstances giving rise to this Appeal clearly points to abuse of office and power by the Respondent and that such abuse of power should not be sanctioned by the Tribunal.

18. To support his case, the Appellant cited **De Smith, Woolf & Jowell**, in “**Judicial Review of Administrative Action**” 6th Edn. Sweet & Maxwell page 609 where the authors state:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

19. The Appellant averred that a legitimate expectation may arise from express stipulations of the law as appreciated in **Keroche Industries Limited –Vs- Kenya Revenue Authority & 5 others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** where the court held that:

“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration....”

20. The Appellant submits that the arbitrary decision by the Respondent with respect to his input VAT claims amounted to the thwarting of the Appellant's legitimate expectations that the said claims would be allowed.
21. Further the Respondent allowed itself to consider irrelevant factors in arriving at the Objection Decision. The Respondent in arriving at the Objection Decision alleged that the input tax claimed could not be allowed because the suppliers of the Appellant did not supply goods nor deliver them.
22. The Appellant alleges that the Respondent gave itself wide latitude in interpreting tax statute and ended up making irrelevant considerations in reaching the impugned decision. To support his case, the Appellant cited **Fleur Investments Limited –vs-Commissioner of Domestic Taxes & another [2018] eKLR** where the court held that:

*“This case falls squarely on all fours with the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra), because clearly, the respondents failed to consider the very relevant facts that their request for an audit meeting had already been met, all documents requested for had been availed and examined, and yet the assessment was premised on the erroneous premise that the appellant had failed to comply with the said requests. The need to take into account relevant considerations and ignore irrelevant facts in the decision making has close nexus with the need to act reasonably.”*

23. The Appellant averred that the Respondent is under a duty to direct itself properly in law. According to the Appellant, the Respondent ought to have paid attention to matters which it is bound to consider such as the provisions of Section 17 of the VAT Act and Section 15(1) of the Income Tax Act in arriving at the tax assessments.
24. The Appellant argued that the Respondent was bound to exclude from its consideration matters which are irrelevant, (such as requiring the Appellant, a legitimate trader, to give identities of his suppliers). As such, the Appellant submits that the Respondent acted unreasonably, and the resultant assessments cannot stand.

THE APPELLANT'S PRAYERS

25. In view of the foregoing, the Appellant prays that the Honourable Tribunal finds that:
- a. The Respondent failed to carry out proper and credible investigations and issue proper assessments as provided in law.
 - b. The additional assessments established by the Respondent for the period under review, 2015- 2017 for Kshs. 5,704,658.68.00 for VAT together with penalties and interest were unlawful and improperly assessed and as such the same should be set aside.
 - c. The Appeal herein be allowed with costs in favour of the Appellant.

THE RESPONDENT'S CASE

26. The Respondent in its response submitted that the Appellant was identified as being among the beneficiaries of the suspect invoices referred to as missing trader scheme where the suppliers only manufactured invoices without actual delivery of goods and sold the invoices to the Appellant for a commission. The Appellant claimed input VAT from September 2014 to December 2017 using the said invoices.
27. The Respondent submitted that it disallowed the said purchases on the basis that the purchases from the suppliers were not supported by actual delivery of goods.
28. The Respondent avers that it had conducted investigations over a period and identified a tax evasion scheme by a number of traders who were involved in production and sale of invoices.
29. The Respondent further submitted that the fact that the invoices from all suppliers in question had all the requirements of a tax invoice as required under the VAT Act 2013 and had ETR receipts attached thereon is not sufficient proof that the goods were actually delivered.
30. According to the Respondent, the issue of suppliers being compliant or non-compliant is secondary to the issue at hand as the Respondent seeks to collect tax that was fraudulently claimed by the Appellant by utilizing purchase invoices for deliveries not made.

31. According to the Respondent it had not raised any such requirement that failure of tax compliance by supplier lead to a tax liability on the part of the buyer in this case the Appellant. It further submitted that it had used Section 46(4) of the VAT Act 2013 to demand the taxes in the assessment raised.
32. The Respondent submitted that the Appellant filed his VAT returns under the self-assessments regime while the onus of the Respondent is to determine if the input claimed in the VAT return meets the requirement as set out in the VAT Act 2013. This does not stop it from making further enquiries regarding the veracity of the invoices claimed. Moreover, the Appellant had made purchases from other suppliers apart from the seven (7) specific suppliers whose input VAT has been disallowed.
33. The Respondent claimed that the Appellant had not yet availed records of payments made to each of the suppliers, seeing as this is how the tax evasion scheme was designed and effected, whereby, payments were made to the suppliers through Commercial Banks and the money would find its way back to the purchaser in this case the Appellant.
34. Regarding records, the Respondent avers that it received from the Appellant copies of invoices and delivery notes from the suppliers, copies of the purchase ledger indicating payments made to various suppliers. The Respondent further submitted that it requested additional records, but no further information/documentation was availed.

35. The Respondent submitted that it evaluated the records availed by the Appellant vis-à-vis the findings of the investigations carried out and found that there was no sufficient proof that the goods were indeed received by the Appellant, which formed the basis of the Respondents' Objection Decision.
36. The Respondent avers that it deals with each taxpayer's matter independently and based on available information and at no time required the Appellant to follow through the supply chain to demand from the suppliers the origin of their goods.
37. The Respondent stressed that it has embraced the self-assessment regime through trust and facilitation and only verifies information when in doubt of the declarations made in the tax returns. The assessments were therefore correctly issued and conform to Section 46(4) of the VAT Act 2013.
38. According to the Respondent, the Stock movement register provided by the Appellant is an afterthought since the investigations carried out by the Respondent revealed that no goods were received by the Appellant.

RESPONDENT'S PRAYER

39. The Respondent prays that the Tribunal may be pleased to uphold the Respondent's Objection Decision.

ISSUE FOR DETERMINATION

40. Having carefully studied the parties' pleadings, submissions and all documentation provided, the Tribunal is of the respectful view that the only issue for determination was whether the Respondent's decision to disallow the input VAT claimed by the Appellant was proper as per the provisions of the VAT Act.

TRIBUNAL'S ANALYSIS AND FINDINGS

Whether the Respondent's decision to disallow the input VAT claimed by the Appellant was proper as per the provisions of the VAT Act?

41. In determining whether the Respondent's decision to disallow the input VAT claimed by the Appellant was proper as per the provisions of the VAT Act, 2013, the Tribunal set for itself the following tests:

- a. Whether the Appellant furnished sufficient proof of purchase?
- b. Whether the Appellant's right to claim VAT was affected by the presence of fraud in the supply chain?
- c. Whether the Appellant knew or should have known that there was fraud?

a. Whether the Appellant furnished proof of purchase?

42. The right to claim input VAT is premised on the assumption that the taxpayer had paid VAT during the purchase of his supplies. This is provided for in Section 17(1) of the VAT Act which states that:

“Subject to the provisions of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies.”

43. Thus, as averred by the Respondent, it is not enough for the taxpayer to hold the documentation listed in Section 17 of the VAT Act. The documentation must be representative of an underlying transaction that took place. The taxpayer must have bought the goods, had them delivered and used them in making taxable supplies. The taxpayer must prove that it purchased taxable supplies.
44. Section 30 of the Tax Appeals Tribunal Act places the burden of proof on the taxpayer to prove that it made a purchase to which it is entitled to deduct input VAT. The same position was held by the South African Supreme Court in **Metcash Trading Limited –vs Commissioner for the South African Revenue Service and Another Case CCT 3/2000**, where Justice Kriegler stated thus:

“But the burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self-

assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand."

45. Once the taxpayer adduces evidence that discharges his burden, the burden shifts to the Commissioner who must demolish such evidence. This view was held in Supreme Court of Canada's decision in **Hickman Motors Ltd. v. Canada**, [1997] 2 S.C.R. 336 the Court stated that:

"The taxpayer's initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least prima facie case... Where the Minister's assumptions have been "demolished by the appellant, "the onus.... shifts to the Minister to rebut the prima case"

made out by the appellant and to prove the assumptions...The law is settled that unchallenged and uncontradicted evidence “demolishes” the Minister’s assumptions; ...Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed; and even if the evidence contained “gaps in logic, chronology, and substance”, the taxpayer’s appeal will be allowed if the Minister fails to present any evidence as to the source of income.”

46. Although the current tax laws provide that the onus of proof lies with the Appellant to prove that tax was paid or that the Respondent’s assessment was wrong, it cannot have been the intention of the legislature to put the taxpayer in a position where he would be required to produce any document that the taxman may require. In demanding the production of documents that are not prescribed by legislation, the tax authority should be guided by reasonableness, the nature and circumstances of the trade otherwise it would, as it occasionally does, demand information ad nauseum.
47. The Tribunal noted that the Appellant furnished the Respondent with the documents detailing the transactions as provided by Section 17 of the VAT Act. The Appellant further provided ETR invoices, delivery notes and payment records. This evidence established prima facie that it indeed purchased the said goods.

48. The Respondent on its part averred it conducted investigations and unearthed a tax evasion scheme where traders engaged in production and sale of invoices. The Respondent submitted that it evaluated the records availed by the Appellant vis-à-vis the findings of the investigations carried out and found that there was no sufficient proof that the goods were indeed received by the Appellant. The Respondent further averred that once the Appellant made payments to the suppliers, the money found its way back to the Appellant.
49. The findings of these investigations were, however, not placed before the Tribunal. As such, all we have are the Respondent's averments as to the findings of the investigations. Ali-Aroni, J in **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** said:

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations... Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence"

50. The Tribunal found that these averments were not sufficient to prove the Respondent's case. The Respondent should have furnished information/evidence to prove that the invoices submitted by the Appellant to support its claim were fictitious. It was not enough to just allege that the documents presented were fictitious.

51. The Tribunal was of the view that the Appellant having discharged its burden, furnished sufficient proof of purchase.

b. Whether the Appellant's right to claim VAT was affected by the presence of fraud in the supply chain?

52. The Respondent in arriving at the Objection Decision alleged that the input tax claimed could not be allowed because the Appellant's suppliers did not supply goods nor deliver them. It claimed that the Appellant participated in a *Missing Trader Fraud* scheme. The Respondent submitted that the Appellant contravened Section 66 of the VAT Act, 2013 by knowingly engaging in a tax avoidance scheme and cannot therefore be entitled to deduct input VAT under Section 17 of the VAT Act.

53. The said Section of the law provides that if a trader has incurred properly allowable input tax, he is entitled to set it off against its output tax liability or to receive a refund if the input tax credit due to him exceeds that liability. Evidence is required in support of the claim for repayment.

54. The Appellant argued that it supplied all the documents required under Section 17 of the VAT Act to the Respondent as proof that it indeed purchased goods from the listed suppliers which it sold to various customers. The Appellant further argued that it also made payments for all the purchases as can be confirmed from the documents attached to the Appellant's bundle of documents. The said documents include invoices, delivery notes and payment records.
55. The Tribunal observes that it is a common Principle that a taxable person who makes transactions in respect of which VAT is deductible may deduct the VAT in respect of the goods or services acquired by him, provided that such goods or services have a direct and immediate link with the output transactions in respect of which VAT is deductible. In the Kenyan VAT system, this principle is found in Section 17(1) of the VAT Act.
56. The right to claim input VAT is an integral part of the VAT scheme and in principle may not be limited. The European Court of Justice held that this system should apply whether or not there is a missing trader somewhere in the value chain unless the trader had knowledge of the fraudulent actions in the value chain. This was the holding in **Optigen Ltd, Fulcrum Electronics Ltd and Bond House Systems Ltd v Commissioners of Customs & Excise** where it was held that:

“Under the common system of VAT...the entitlement of a trader to credit for payment in respect of VAT under a transaction should be judged by reference to the particular transaction to which the trader was a party. Transactions of which he has no knowledge and the fraudulent acts or intentions of other persons in the chain of supply of whose involvement he is unaware do not affect his entitlement.”

57. The European Court of Justice in the **Axel Kittel v État belge and État belge v Recolta Recycling SPRL [2006] ECR I-06161** (hereinafter referred to as **Kittel**), stated that the doctrine of Optigen and others is also applicable to fraudulent transactions where the recipient of the supplies knows nothing or could know nothing. So if a supplier is fraudulent, but the recipient knows nothing or could not know of his intention, the recipient's right to deduct input VAT, connected with that transaction, stays intact.
58. The Respondent averred that there was fraud in the transactions that resulted in the input VAT claimed by the Appellant. It did not however prove this fraud. The mere fact that his suppliers were suspected to have engaged in fraud does not extinguish the Appellant's right to claim input VAT. This right can only be extinguished if the Appellant knew or ought to have known that the transaction was part of a fraudulent scheme.

59. Further, as stated by the court in **Kittel**, the mere fact that the VAT charged by the Appellant's suppliers was not submitted to the Respondent is irrelevant to its exercise of claiming input tax that it incurred.
60. Consequently, the Tribunal finds that the Appellant's right to claim VAT was not affected by the presence of fraud in the supply chain unless he had knowledge of fraudulent acts of his suppliers.

c. Whether the Appellant knew or should have known that there was a fraud?

61. The Respondent averred that the Appellant's claim to input tax was denied since the transactions for which he was claiming the disallowed input VAT were part of the missing traders' scheme. According to the Respondent, the Appellant's suppliers did not actually supply any goods and only sold invoices at a commission. The Appellant on his part argued that he purchased goods and therefore was entitled to claim the VAT therein.
62. Having established that the Appellant proved it indeed made purchases that were subject to VAT, the Tribunal then turned to the issue of whether the Respondent had established that the Appellant knew or ought to have known that his transactions were part of a VAT fraud.
63. **Kittel** supplied the legal basis for denial of the right to deduct in certain circumstances. It stated:

"Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums"

retroactively...In the same way a taxable person who knew or ought to have known that, by his purchases, he was taking part in a transaction connected with fraudulent evasion of VAT must... be regarded as a participant in that fraud. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice... Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of ‘supply of goods effected by a taxable person acting as such’ and ‘economic activity’.”

64. The Court went on to add that taxable persons who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud must be able to rely on the legality of those transactions without the risk of losing their right to deduct input VAT.
65. Moses LJ in his Judgment in **Mobilx Ltd v HMRC [2010] EWCA Civ 517** analysed the **Kittel** case stating that:

“Kittel...extended the category of participants who fall out with the objective criteria to those who knew or should have known of the

connection between their purchase and fraudulent evasion. **Kittel** did represent a development of the law because it enlarged the category of participants to those who themselves had no intention of committing fraud but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct...”

66. The court went on to explain that:

“The test in **Kittel** is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus, it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in **Kittel**. The true principle to be derived from **Kittel** does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction

was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.”

67. Thus, for the Appellant’s right to deduct input VAT to be curtailed, the Appellant must have known or ought to have known that it was part of a fraudulent transaction. In this case, the Respondent avers that the Appellant was part of the *Missing Trader Fraud* scheme and thus knew or ought to have known that it was part of a fraudulent transaction.

68. The Tribunal in **Calltell Telecom Ltd v HMRC [2007] UKVAT V202666** considered the question of burden of proof in cases where the question of knowledge of the taxpayer in *Missing Trader Fraud* scheme arose. The Tribunal stated thus:

“For those reasons we think it is incumbent on the Commissioners to raise a case, not necessarily amounting to proof but sufficient to demand an answer, that there were facts or circumstances which support, or at least are consistent with, the conclusion that the appellant knew, or should have known, of fraud in the chain. The mere fact that there was fraud will not be enough; there must be some reason which might lead the tribunal to conclude that the trader knew or could have known of it, or

that he should have taken precautions. Although, as we have already pointed out, the Court of Justice, at paragraph 51 of its judgment in Kittel, referred to traders "who take every precaution" as those who are not liable to forfeit their right to deduct, it should be borne in mind that most traders do not, and do not need to, carry out extensive enquiries into the honesty and creditworthiness of their suppliers and customers. But if the Commissioners are able to mount a case which demands some explanation, the burden shifts to the appellant to show that he took the precautions which could reasonably have been required of him and that, despite his having done so, he did not know, and could not have known, of the fraudulent purpose of others."

69. Under Kenyan law, **Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya** provides that:

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

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

70. Guided by the decision in **Calltell** and the provisions of the Evidence Act, the Tribunal finds that the burden of proof was upon the Respondent to establish

that there was fraud and that the Appellant knew or ought to have known. As stated in **Calltell**, the standard is not beyond reasonable doubt. It is enough for the Respondent to establish a case that demands answers from the Appellant. Once it establishes its case, then the burden shifts to the Appellant.

71. Thus in the case at hand, it was upon the Respondent to establish not only that there was fraud but also that the Appellant knew or ought to have known that the transaction of which it was a part was fraudulent.
72. Upon analysing the evidence adduced before it as well as the submissions of both parties, the Tribunal finds that the Respondent fell short of establishing a case that the Appellant knew or ought to have known about the fraud. It pleaded that some of the Appellant's suppliers had been noted as being part of the *Missing Trader Fraud* scheme. It averred that the Appellant merely purchased invoices without the attendant goods. It averred that payments made by the Appellant to his suppliers eventually found its way back to the Appellant. However, it failed to adduce evidence to support its averments. The Appellant on his part produced documents indicating that there was indeed a purchase. The Respondent failed to counter the evidence adduced. Thus, the Tribunal found that the Respondent did not discharge its burden of proof by establishing knowledge of fraud on the part of the Appellant.
73. Given the foregoing, the Tribunal found that the Respondent erred in disallowing input VAT claimed by the Appellant.

Orders

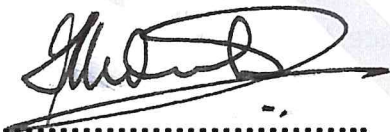
74. The Tribunal having considered the relevant statutory provisions and case laws available to it and submissions by both parties was of respectful view that the Appeal is merited. It therefore makes the following Orders:-

- i. The Appeal succeeds.
- ii. That the Objection Decision dated 10th July 2018 confirming the Assessment for Value Added Tax (VAT) is hereby vacated.
- iii. Each Party to bear its costs.

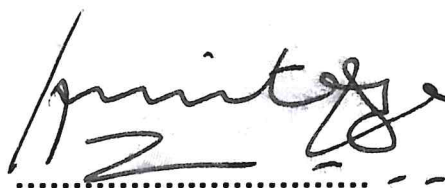
DATED and DELIVERED at NAIROBI this 18th day of September, 2020.



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CATHERINE N. MUTAVA
CHAIRPERSON



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WILFRED N. GICHUKI
MEMBER



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GABRIEL M. KITENGA
MEMBER



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ABRAHAM K. KIPROTICH
MEMBER