

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**TAX APPEAL NO. 146 OF 2017**

**SCANIA EAST AFRICA LIMITED.....APPELLANT**  
**VERSUS**  
**COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. The Appellant is a private limited liability company incorporated under the companies Act, Cap 486 of the Laws of Kenya and a tax resident in Kenya registered under the Personal Identification Number P051426902Z. Its principal activity is to distribute heavy trucks, buses, spare parts industrial and marine engines, all of which are imported from Scania Sweden.
2. The Respondent is established under the Kenya Revenue Authority Act, Cap 469, of the Laws of Kenya, charged with the mandate to administer the Tax regime on behalf of the Government of Kenya.
3. The Respondent conducted a Value Added Tax verification exercise on the Appellant's operations covering the period January 2014 to August 2016 culminating in an assessment via the Respondent's letter dated 30 June 2017. The VAT assessment amounted to Kshs. 19,351,663 consisting of Kshs. 18,460,926 principal tax and Kshs. 890,737 interest.
4. The Appellant objected to part of the assessment and conceded to the balance vide a letter dated 27 July 2017. It conceded to the Principal VAT assessed on restaurant services amounting to Kshs. 729,204.
5. The Appellant objected to the principal VAT assessed on unsupported invoices amounting to Kshs. 463,125 and subsequently furnished the Respondent with the supporting documents. The Appellant further objected to Kshs. 17, 268,597 principal VAT assessed by the Respondent on the basis that the Respondent relied on customer statements to charge VAT and disregarded the tax invoices issued by the Appellant.
6. The Respondent amended the original assessment and communicated the decision vide a letter dated 31 August 2017. The Respondent allowed part of the objection relating to Kshs 463,125 in light of the availed

invoices and disallowed the Appellant's Objection amounting to Kshs 17,268,597, whereupon the Appellant rendered its Objection Decision on 31 August 2017.

7. The Appellant filed its notice of intention to appeal on 29 September 2017 and served it to the Respondent on the same day.
8. The Appellant filed its notice of intention to appeal on 29 September 2017 and proceeded to lodge its Memorandum of Appeal and Statement of Facts on 12<sup>th</sup> October 2017.
9. Upon service and in response thereto, the Respondent filed its Statement of Facts on 9th November 2017.

## **THE APPEAL**

10. The Appeal is premised on the following grounds;
  - a) The Appellant is a distributor of Scania products and services in East Africa and has entered into contracts with its clients for sale of buses or trucks based on the client's specifications.
  - b) Scania's sales policy stipulate that upon placing an order, a client must pay a deposit before the bus or truck is fabricated in accordance with the set specifications.
  - c) Upon completion of the fabrication works, the Appellant issues a sales invoice for the full amount, the client settles the outstanding balance and the bus or truck is transferred to the client.
  - d) The Appellant accounts for and remits Value Added Tax (VAT) due on the supply upon transfer of the bus or truck to the client. The VAT remitted by the Appellant is on the full value of the supply and not on the deposit received.
  - e) The Respondent assessed VAT on the amounts specified in the customer statements instead of the amounts specified in the sales invoices issued to the clients by the Appellant.
  - f) The Respondent did not take into account the VAT remitted hence the Respondent's actions resulted in double taxation since VAT due was accounted for in accordance with the provisions of the VAT Act.
  - g) The Respondent erred in law by misinterpreting the facts and assessing Value Added Tax on previously declared sales.

## THE RESPONSE

11. The Respondent vide its Statement of Facts filed contends that:-

- a. The Appellant has admitted to remitting VAT late. In Paragraph 10 of the Memorandum of Appeal, the Appellant acknowledges that it paid VAT late and is therefore estopped from claiming otherwise by the doctrine of estoppel.
- b. To wit, paragraph 10 of the Appellant's Memorandum of Appeal states that, *"Whether the Appellant having paid the entire Value added Tax on its taxable supplies, albeit late, should be compelled to make double payments as assessed by the Respondent."*
- c. Section 12 (1) of the VAT Act 2013 clearly states that where part payment is made, VAT shall be due as the part payment is considered as the time of supply.
- d. The tax period for accounting for VAT is one (1) calendar month as provided for in section 2 of the VAT Act 2013. Section 2 of the VAT Act 2013 has described the same as: *"tax period" means one calendar month or such other period as may be prescribed in the regulations.*
- e. The Appellant in some supplies accounted for VAT in periods or months which were different from when the tax was due thus surpassing the one-month tax period as prescribed in law. Instances of such occurrences are:
  - i. The Appellant received a deposit of Kshs 5,000,000 from Litein Secondary School for a bus valued at Kshs 13,999,999 in July 2016 but accounted for the supply in December 2016.
  - ii. Between July and November 2016, the Appellant received deposits amounting to Kshs 5,994,000 from Liban Bus Services for a bus valued Kshs 10,165,544 but accounted for this supply in December 2016.
  - iii. The Appellant received a deposit of Kshs 500,000 from Koilel High School for a bus valued at Kshs 13,999,990 in July 2016 but accounted for this supply in December 2016.
- e. The failure to account for VAT in the period when it was due, that is, when the payment was received, leaves the Appellant in contravention of Section 12 of the VAT Act. (Annexed and marked CDT-5 is the Appellant's customer statements, sales invoices and VAT output analysis)

- f. The law is clear on the fact that VAT should be remitted either on part or full payments and therefore the Appellant's issue of when or at what point to remit VAT is an already answered question and cannot be argued.
  - g. The Respondent denies the Appellant's allegation that it assessed VAT based only on the amount specified in sales invoices issued to the client by the Appellant.
  - h. The Respondent verified customer's statements, sale invoices, VAT output analysis and VAT returns to confirm when the supply was due and also when it was declared by the Appellant.
  - i. The law is clear on the provision of when VAT is to be remitted and regardless of the fact that the Appellant declared sales later on, it failed it comply with Section 12 of the VAT Act 2013.
  - j. The non-compliance with the regulations of the VAT Act 2013 resulted in incorrect computation of VAT by the Appellant thus leading to the belief that there was double taxation which is wrong.
  - l. The Respondent charged tax only at the point when it was expected or at the time of supply as required by law. This led to a difference in the tabulation and the belief that there was double taxation where there was none.
12. In conclusion, the Respondent submitted that its decision to confirm the tax assessment of Kshs 17,268,597 is correct and ought to be upheld as it was premised on the assumption that the Appellant did not observe the time of supply upon receipt of deposits as stipulated under Section 12 of the VAT Act 2013.

## **ISSUES FOR DETERMINATION**

13. The Tribunal having carefully and respectfully studied the pleadings, together with the submissions of both parties herein, is of the view that the issues for its determination is as hereunder: -
- a) Whether VAT remitted is on the full value of the supply and not the deposit received.**
  - b) Whether VAT on restaurant services has been double charged.**

## ANALYSIS AND FINDINGS

- a) Whether VAT remitted is on the full value of the supply and not the deposit received.

14. It is not in contention that the transaction is a taxable supply and tax is due and payable as per Section 19 of the Vat Act, at the time of supply. The case at hand involves a determination of when VAT is due and payable. The Tribunal will turn to the relevant statute, to wit, Section 12 of the VAT Act which defines the time of supply. The same provides as hereunder:

*“Time of supply of goods and services*

*1) Subject to subsection (3), the time of supply, including a supply of imported services shall be the earlier of-*

- (a) The date on which the goods are delivered or services performed;*
- (b) The date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity*
- (c) The date on which the invoice for the supply is issued; or*
- (d) The date on which payment for the supply is received, in whole or in part...*

*...(3) If (b) goods or services are made by metered supplies, or under an agreement or law that provides for periodic payments, the goods or services shall be treated as successively supplied for successive parts of the period of the lease or agreement, or as determined by law, and the time of each successive supply shall be the earlier of the date on which payment for the successive supply is due or received”.*

15. Furthermore Section 19 of the VAT Act states as follows;

*“When tax is due*

*(1) Tax shall be due and payable at the time of supply*

*(2) Notwithstanding the provision of subsection (1), a registered person may defer payment of tax due to a date not later than the twentieth day of the month succeeding that in which the tax became due”.*

16. The Appellant submitted that Scania buses are costly, up to about Kshs. 18 Million each. It averred that it imports the chassis and the customers then give specification on how each bus is going to be fabricated, which fabrication takes about six months. In view of the same, the Appellant argued that the exact cost of the bus is not known from the onset, which is at the time of receipt of the deposit.

17. The Tribunal is of the view that though the Appellant did not avail the Sale Agreements in its appeal documentation, as that would have served as evidence for the provision of periodic payments, it nonetheless produced tax invoices coupled with other documents which supported its claims that VAT was paid in full, albeit upon physical supply.
18. Consequently the Tribunal finds that the Appellant accounted for and remitted VAT upon transfer of the bus or truck to the customer /client. The VAT remitted was on the full value of the supply.
19. The Appellant has conceded that some payments were not accounted for within the stipulated timelines. Furthermore, the Appellant, through its tax agent, PKF taxation services limited, vide its letter dated 27<sup>th</sup> July 2017, attached in their Memorandum of Appeal page 14, has conceded that they did not account for VAT on customer deposits in the respective months that the deposits were received.
20. It is the finding of the Tribunal that the receipt of individual deposits were tax points which the Appellant failed to pay VAT on. Consequently VAT was chargeable, not on the full invoice value but on the deposits when received. The non-compliance of the same therefore attracted penalties which penalties ought to be in respect to deposits only.

**b) Whether VAT on restaurant services has been double charged.**

21. Restaurant services, in this Appeal, refer to input VAT being disallowed by the Respondent, rather than a supply by the Appellant.
22. It is worth noting that having perused the Appellant's documentation, the Appellant, through its tax agent, Messrs. PKF Taxation Services Limited objected to part of the assessment and conceded to the balance vide a letter dated 27 July 2017. It conceded to the Principal VAT assessed on restaurant services amounting to Kshs. 729,204. Consequently, the tribunal will not delve into this matter as it is spent.
23. The upshot of the above is that the Appeal partially succeeds and the Tribunal makes the following Orders;
  - a) The Respondent's Tax Assessment vide the letter dated 31st August 2017 for Kshs. 19,135,209 is hereby upheld **subject** to the same being varied as follows;
    - i. VAT to be charged on the deposits amounts when received by the Appellant and not on the full sale value.
    - ii. Any Penalties thereto to be in respect to the amount of deposits only and not on the full sale value.
  - b) Each party to bear its own costs.



**DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of March, 2020**



.....  
**JOSEPHINE K. MAANGI**  
**CHAIRPERSON**



.....  
**DELILAH K. NGALA**  
**MEMBER**



.....  
**GEOFFREY KARUU**  
**MEMBER**



.....  
**TANVIR ALI**  
**MEMBER**

