REPUBLIC OF KENYA
TAX APPEALS TRIBUNAL
APPEAL NO. 140 OF 2018

UNIQUE ENTERPRISES LIMITED……APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES……RESPONDENT

JUDGMENT

BACKROUND

1. The Appellant is a private limited liability company duly incorporated in Kenya under Cap 486 Laws of Kenya (Now Repealed) and carrying on its business within the Republic of Kenya. Its principle activity is general trading.

2. The Respondent is appointed under Section 13 of the Kenya Revenue Authority Act. Under Section 5(1) of the Act. The Kenya Revenue Authority (the Authority) is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) with respect to the performance of its function under subSection (1) the Authority is mandated administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule to the Act for purposes of assessing, collecting and accounting for all revenue in accordance with those laws.

3. The Respondent conducted investigations into the Appellant's business for the years 2015 to 2017 with a view of ensuring due compliance with tax.

4. Pursuant to the findings of the investigations, the Respondent issued a tax demand to the Appellant dated 13th April, 2018 of Kshs. 25,569,731.00 being Input VAT of Kshs. 8,893,819.00 and Corporation Tax of Kshs. 16,675,911.00.

5. On 21st April 2018, the Appellant wrote to the Respondent acknowledging receipt of the tax demand notice and requesting for more time to respond citing illness and committed to visit the Respondent's offices on 2nd May 2018.

6. On 7th May 2018 the Respondent raised assessment orders for payment of underpaid VAT totalling Kshs. 25,569,731.00 for years 2015-2017.

7. The Appellant objected to the additional assessments in its letter dated 20th May 2018, providing explanations and documents to support its objection as is required under Section 51 of the Tax Procedures Act, 2015.

8. The Respondent rendered its Objection Decision on 4th July 2018, confirming the principal VAT amount of Kshs. 8,893,819.00 together with the resultant penalties and interest.

9. The Appellant being dissatisfied with the Respondent's decision filed its notice of Appeal to the Tax Appeals Tribunal in their letter dated 3rd August 2018.

GROUNDS FOR APPEAL

10. The Appeal is based on the following grounds:

a. That the Respondent erred in fact and law by disallowing input VAT contrary to the provisions of the VAT Act 2013.
b. That the Respondent erred in fact and law by disallowing input VAT based on investigation of non-compliance of tax by the Appellant suppliers.

THE APPELLANT'S CASE

11. In its Statement of Facts and written submissions, the Appellant made the following arguments to support its Appeal.

12. The Appellant avers that it filed its Notice of Objection on 20th May 2018 but the Respondent rendered its decision on 23rd October 2018 which was way out of the 60 day period prescribed by Section 51(8) of the Tax Procedures Act. Thus, according to the Appellant, the Respondent cannot demand taxes from the Appellant on the basis of an

13. The Appellant further submitted that the Respondent in processing any input claims for VAT ought to be guided by the provisions of Section 17 of the VAT Act. The Appellant argued that the Respondent disallowed input VAT contrary to Section 17 of the VAT Act. The Section provides that:

> *"17 (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 custom auction.

(d) a credit notes in the case of input tax deducted under Section 16(2); or (e) a debit notes in the case of input tax deducted under Section 16(5)."

14. The Appellant contended that a claim for input VAT should be based on the documents listed under Section 17(3) of the VAT Act as listed below:

    i. An original invoice issued for the supply or a certified copy
    ii. Customs entry duly certified and receipt for tax payment;
    iii. Customs receipt and certificate stating the amount of tax paid;
    iv. Credit note and debit note.

15. The Appellant argued that based on Section 17 of the VAT Act, the considerations that the Respondent should have taken into account in processing the VAT claims are:

    a) The taxpayer is registered for VAT.
    b) The purchase was for the purposes of making taxable suppliers.
    c) The input tax does not relate to the excluded purchases as set out in Section 17(4) of the VAT Act or exempt supplies.
    d) The input tax is claimed within six months of receiving the supply; and
    e) The claim for the input tax should be based on the documentation required under Section 17 of the VAT Act and Regulations.

16. The Appellant contends that despite having met the threshold set out for VAT input claims, the Respondent disallowed its claim allegedly on the grounds that its investigation established that the suppliers from whom the Appellant purchased the goods were non-existent, do not sell nor deliver goods.

17. These findings, the Appellant argued, are not only inaccurate and unreasonable but also unfair to the Appellant since it has to the best of its knowledge provided sufficient proof to show that it indeed purchased the goods in question. This, the Appellant submitted, is evidenced by the documents it provided which include but are not limited to invoices, delivery notes and evidence of payments made to the suppliers as indicated in the Appellant's bank account statements and payment records.

18. The Appellant argued that having met the requirements as set out under Section 17 of the VAT Act, it had a legitimate expectation that the Respondent would allow its input VAT claims. To buttress its case, the

Appellant cited the case of **Keroche Industries Limited v Kenya Revenue Authority & 5 Others Nairobi HCMA No 743 of 2006 [2007] KLR 240** where it was 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. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.

An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised….

In order to ascertain whether or not the Respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the quantum of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power."

19. The Appellant contends that by insisting that the Appellant's suppliers did not supply the goods and completely disregarding the documents provided the Appellant, the Respondent was introducing grounds that are not provided for in law to deny the Appellant legitimate input VAT claims.

PRAYERS SOUGHT

20. The Appellant prays the Tribunal to find that:-

    i. The Respondent failed to carry out proper and credible investigations and issue proper assessments as provided in law. The same should be set aside.
    ii. The additional assessments established by the Respondent for the period 2015 to 2017 for Kshs. 8,893,819 for VAT and Kshs. 16,675,911 for Corporation Tax together with penalties and interest were unlawful and improperly assessed and as such should be set aside.
    iii. The Appeal herein be allowed with costs in favour of the Appellant.
    iv. Any other remedy that this Honourable Tribunal deems just and reasonable.

THE RESPONDENT'S CASE

21. In opposing the Appeal, the Respondent advanced the following arguments.

22. The Respondent submitted that it unearthed a VAT tax evasion scheme referred to as 'missing trader'. The scheme, according to the Respondent, is orchestrated by a chain of businessmen to avoid payment of VAT and

in the case at hand, through fictitious invoicing and fraudulent purchase claims.

23. The Respondent averred that the Appellant used invoices from companies implicated in missing traders' scheme namely: Vispis wholesale ltd, Kiyan Trading, Katco Kenya Trading, Royalking Kenya Trading and Zache Trading to claim input tax for which no actual supply and/or deliveries were made.

24. The Respondent argued that it is empowered under Sections 58 and 59 of the Tax Procedures Act to require the production of documents and information to enable the Respondent ascertain tax liability of a person.

25. The Respondent averred that it analyzed the documents presented by the Appellant and found that there was no evidence of purchase and delivery of the goods invoiced.

26. The Respondent submitted that Section 17 (1) of the VAT Act, 2013 provides for the credit for input VAT against output VAT on a taxable supply by a registered person if acquired to make taxable supplies.

27. The Respondent argued that the Appellant cannot claim input tax on supplies that were never made merely because it holds tax invoices and/or ETR receipts which were never accompanied by actual supplies and were only fictitious to allow the Appellant claim input VAT to reduce its VAT liability.

28. The Respondent argued that for a registered person to claim a credit on input VAT there must be a supply of goods. Section 2 of the Value Added

Tax Regulations Act, 2017 defines a supplier as a person making a supply and a recipient as the person to whom the supply is made.

29. The Respondent averred that no supply was made to the Appellant for it to claim input VAT deductions as provided for under Section 17 (1) of the VAT Act, 2015.
30. The Respondent averred that the Appellant knowingly engaged in a tax evasion scheme as envisaged in Section 66 of the VAT Act and obtained a tax benefit of having its VAT liability reduced by using the fictitious tax invoices to claim input VAT. The Section provides that:

> *"(1)Notwithstanding anything in this Act, if the Commissioner is satisfied that—*
> *(a) a scheme has been entered into or carried out;*
> *(b) a person has obtained a tax benefit in connection with the scheme; and*
> *(c) having regard to the substance of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme did so for the sole or dominant purpose of enabling the person referred to in paragraph (b) to obtain a tax benefit,*
> *the Commissioner may determine the tax liability of the person who obtained the tax benefit as if the scheme had not been entered into or carried out.*
> *(2) If a determination is made under subSection (1), the Commissioner shall issue an assessment giving effect to the determination.*

(3) A determination under subSection (1) shall be made within five years from the last day of the tax period to which the determination relates."

31. The Respondent averred that the Appellant's contention that the input VAT had been disallowed based on investigation of non-compliance of tax by Appellant's suppliers was erroneous and misguided in law as the Appellant wilfully participated in a tax avoidance scheme and independent investigations on it proved so.

32. In response to the Appellant's assertion that it has a legitimate expectation, the Respondent averred that legitimate expectation cannot arise where there is a blatant disregard for the provisions of the law. To support its case, the Respondent cited the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** where the court set out the following principles that must be met for legitimate expectation to be invoked:

"there must be an express, clear and unambiguous promise given by a public authority;
the expectation itself must be reasonable;
the representation must be one which it was competent and lawful for the decision-maker to make; and
(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution."

RESPONDENT'S PRAYERS

33. The Respondent prays that this Honourable Tribunal finds:

    i. That the objection decision dated 4th July 2018 confirming the assessment of Kshs. 8,893,819 being the Principal VAT together with the resultant penalty and interest thereof be upheld.
    ii. That this Appeal be dismissed with costs to the Respondent as the same is without merit.

ISSUES FOR DETERMINATION

34. Having carefully studied the parties' pleadings, submissions and all documentation, the Tribunal is of the respectful view that the issues for determination are as hereunder:

    i. Whether the Respondent's Objection Decision dated 4th July 2018 was proper in law?
    ii. Whether the Respondent's decision to disallow the input VAT as claimed by the Appellant was proper as per the provisions of the VAT Act, 2013?

TRIBUNAL'S ANALYSIS AND FINDINGS

(i) Whether the Respondent's Objection Decision dated 4th July 2018 was proper in law?

35. In its submissions, the Appellant averred that it filed its Notice of Objection on 20th May 2020 and the Respondent issued its Objection Decision on 23rd October 2018. Consequently, the Appellant argued that the Objection Decision was time barred.

36. A review of the documents filed before the Tribunal indicates that the Objection Decision against which the Appellant lodged an Appeal was dated 4th July 2018. It is unclear to the Tribunal which Objection Decision the Appellant is disputing as none dated 23rd October 2018 was placed before the Tribunal.

37. The Tribunal therefore finds that the Objection Decision on file is valid as it was issued within the 60-day period allowed under the Tax Procedures Act.

(ii) Whether the Respondent's decision to disallow the input VAT as claimed by the Appellant was proper as per the provisions of the VAT Act, 2013?

38. In its analysis of the issue above, the Tribunal seeks to answer the following questions:

    a) Whether the Appellant had 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 a fraud?

(iii)(a) Whether there was proof of purchase

39. The Appellant contends that it met the threshold set out for VAT input claims as provided under Section 17 of the VAT Act. It submitted that it was registered for VAT and made taxable supplies charging VAT thereof, claimed input VAT from its suppliers within the stipulated time and was in possession of original tax invoices issued for the supply. According to the Appellant, it was therefore entitled to claim the input VAT.

40. It argues that despite meeting the requirements for claiming input VAT, the Respondent disallowed its claim allegedly on the grounds that its investigation established that the suppliers from whom the Appellant purchased the goods were non-existent, do not sell nor deliver goods. The Appellant avers that it indeed bought goods and incurred input tax on the purchase. It argues that the purchase is evidenced by the sales invoices and sales ledgers and other documents it supplied the Respondent.

41. In rebuttal, the Respondent averred for a registered person to claim a credit on input VAT there must be a supply of goods. The Respondent argued that the Appellant was involved in a missing trader fraud scheme and thus its suppliers neither supplied goods nor delivered. Thus, it disallowed the input tax claimed.

42. Section 17(1) of the VAT Act provides as follows:

"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. According to the above provision, the right to claim input tax is hinged upon the transaction meeting the requirements set out. According to Section 17(1) of the VAT Act, input tax is deductible where it is incurred on purchases made in making taxable supplies. This means that for a taxpayer to deduct input tax, it must have actually made a purchase. It is not merely enough to possess documentation. The documentation must be supported by an

underlying transaction and the taxpayer must furnish proof that there was an actual purchase.

44. Section 30 of the Tax Appeals Tribunal Act places the burden of proof on the taxpayer to submit all the necessary documentation to support its case. The same position was held by the court in **Metcash Trading Limited –vs Commissioner for the South African Revenue Service and Another Case CCT 3/2000**, where it was held that:

> *"But the burden of proving the Commissioner wrong then rests on the vendor... 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. The Appellant furnished the Respondent with a bundle of documents as proof that it indeed purchased goods from the listed suppliers. The bundle of documents included purchase ledger, invoices, account statements and

evidence of payment. This evidence established prima facie that it indeed purchased the said goods.

46. Following the submission of documents by the Appellant to prove that it had made actual purchases of taxable supplies, it was the onus of the Respondent to prove that there was no actual supply of taxable supplies and that the supplies existed only in paper. A similar view was held in **Supreme Court of Canada's** decision In **Hickman Motors Ltd. V. Canada, 1997 Canlii 357 (SCC), [1997] 2 S.C.R. 336 at paragraphs 92 to 94; HOUSE V. CANADA, 2011 FCA 234 (CanLII), 2011 FCA 234, 422 N.R. 144 where** at paragraph 30 states inter alia that:

> *"This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a prima facie case… Where the Minister's assumptions have been "demolished" by the appellant, "the onus . . . shifts to the Minister to rebut the prima facie 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….even if the evidence contained "gaps in logic, chronology, and substance", the taxpayer's Appeal was allowed as the Minister failed to present any evidence as to the source of income."*

47. The Tribunal notes that the Appellant furnished the Respondent with the documents detailing the transactions as provided by Section 17 of the VAT

Act. This evidence established prima facie that it indeed purchased the said goods. The Respondent on its part did not demolish this evidence.

48. While this list is not exhaustive on the documents that must be furnished as proof of purchase, the Tribunal is of the view that the Respondent should have furnished information 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.

49. The Tribunal was therefore of the view that the Appellant furnished sufficient proof of purchase.

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

50. The Respondent averred that it has unearthed a missing trader scheme which it claimed the Appellant was a part of. It argued that the Appellant used invoices from companies implicated in missing traders' scheme namely: Vispis wholesale ltd, Kiyan Trading, Katco Kenya Trading, Royalking Kenya Trading and Zache Trading to claim input tax for which no actual supply and/or deliveries were made.

51. The Appellant on the other hand argued that it was not participating in any missing trader scheme and had in fact provided substantial documentation to the Respondent to prove that it had made purchases. The Respondent however argues that the Appellant did not provide sufficient evidence of purchase.

52. It is an established principle in VAT that a taxable person who makes transactions in respect of which VAT is chargeable 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. To maintain the efficacy of the system, the principle of neutrality is key. Meaning that this system should apply whether or not there is a missing trader somewhere in the value chain. This was the finding in **Optigen Ltd, Fulcrum Electronics Ltd and Bond House Systems Ltd v Commissioners of Customs & Excise [2006] EUECJ C-354/03.**

53. The court in makings its determination stated 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."*

54. The court held that a taxable person cannot be denied the right to deduct input VAT only because he was, without knowing or having any means of knowing, participating in a carousel fraud. The court further held that in the exercise of the right to claim input tax, it was irrelevant whether the VAT on the earlier or later sale of the goods concerned to the end-user has or has not been paid to the public purse.

55. The Respondent in this case adduced evidence that there was fraud on the part of the Appellant's suppliers. It submitted that some of the Appellant's suppliers were not registered for VAT and did not submit the VAT they

charged. This, at the very least implies that there was some fraud on the part of the suppliers.

56. Be that as it may, the Appellant's right to claim VAT cannot be affected by the presence of fraud in the supply chain unless it shown that it had knowledge of fraudulent acts of its suppliers. The mere fact that its suppliers were 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.

57. Further, as stated by the court, 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.

(iii)(c) *Whether the Appellant knew or should have known that there was a fraud?*

58. As already discussed, the right to claim input tax may be limited where it is shown that the taxpayer knew or ought to have known that the transaction was fraudulent.

59. The court in **Axel Kittel v Belgian State (C-439/04) and Belgian State v Recolta Recycling SPRL (C-440/04)** provided the legal basis for denial of the right to deduct in certain circumstances. The Court was confronted by two questions. First, whether the doctrine of Optigen and others is also valid in transactions where the supplier commits a fraud in relation to the recipient - a taxable person - who did not know and could not have known anything about the fraud. The second question was whether a taxable person who is a recipient of the supply of goods who knew or should have known that he was participating in a transaction involving the fraudulent evasion of VAT

loses his right to deduct input VAT connected with those transactions. The Court held that:

"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'."

60. Thus, for the Appellant's right to deduct input of 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.

61. 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."

62. Guided by the decision of the court in **Calltell** 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 Telecom Ltd v HMRC [2007] UKVAT V202666**, the standard is not beyond reasonable doubt. Rather 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.

63. Accordingly, it was upon the Respondent to establish a case that the Appellant knew or ought to have known that the transaction of which it was a part was fraudulent.

64. The Tribunal analysed the evidence adduced before it as well as the submissions of both parties. The Respondent pleaded fraud and adduced evidence indicating that there may indeed be a Missing Trader Fraud scheme. However, that is not enough. The court in **Calltell Telecom Ltd v HMRC [2009] EWHC 1081 (Ch)** held that:

> "*The mere fact that a transaction forms part of a chain in which fraud occurred is not enough to justify the refusal of repayment of income tax. To justify such a refusal the tax authorities must prove that the taxpayer was himself being fraudulent or knew or had the means of knowledge of fraud by others."*

65. 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. However, it failed to adduce evidence to support its averments. Madan J in his judgment in **CMC Aviation Ltd V Cruisair Ltd (1) [1978] KLR 103** observed that:

> *"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for*

investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."

66. The Appellant on its part produced documents indicating that there was indeed a purchase. The Respondent failed to counter the evidence adduced.

67. Thus, the Tribunal found that the Respondent did not discharge its burden of proof by establishing knowledge of the fraud on the part of the Appellant.

68. Given the foregoing, the Tribunal found that the Respondent erred in disallowing the input tax claim.

DECISION OF THE TRIBUNAL

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

    i. The Appeal Succeeds.

    ii. That the Objection Decision dated 4th July 2018 confirming assessment of Kshs. Kshs 8,893,819 together with the resultant interest and penalties is hereby vacated.

    iii. Each party to bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this **28th** day of **August, 2020.**

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CATHERINE N. MUTAVA
CHAIRPERSON

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WILFRED N. GICHUKI
MEMBER

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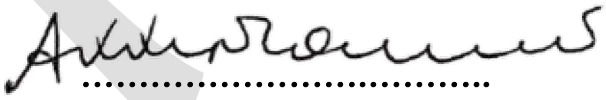
GABRIEL M. KITENGA
MEMBER



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ABRAHAM K. KIPROTICH
MEMBER