REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL NO. 555 OF 2020

ASL PACKAGING LIMITED........................................APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES..........................RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant, a registered taxpayer, is a limited liability company incorporated in Kenya. It is engaged in designing and manufacturing of wrappers and flexible packaging materials. Its operations are principally in Kenya.

2. The Respondent is a principal officer of the Kenya Revenue Authority (KRA). KRA is established under the Kenya Revenue Authority Act (Cap 469) and is charged with the mandate of administration, assessment and collection of revenue as an agent of the Government of Kenya.

3. The Appellant was auto assessed for VAT inconsistencies arising from input taxes claimed in VAT returns filed for the months of January 2018 to May 2018.

5. The Appellant objected online to the 5 VAA assessments of Kshs. 13,642,157.76 on 28th November 2019 on the ground that all the invoices were correctly declared and claimed.

6. On various dates the Appellant was engaged to provide more evidence to support its objections.

7. On 16th October 2020 the Respondent partly confirmed its VAT assessment of Kshs. 808,553.41 through its Objection Decision.

8. The Appellant being dissatisfied with the Respondent's Objection Decision filed a Notice of Appeal on 13th November 2020 and its Memorandum of Appeal and Statement of Facts were both filed on the 27th November 2020.


THE APPEAL

10. The Appeal is premised on the grounds that:

   a. The Respondent erred in law and in fact in its wrongful interpretation of Section 17 of the VAT Act 2013 and that the Appellant has discharged its duty in claiming input VAT against a taxable supply acquired by itself.

   b. The Respondent erred in fact by stating that input VAT was improperly deducted in the VAT returns for the months of January
2018 to May 2018 and in fact the Appellant provided all documents in relation to the input VAT claimed.

c. The Respondent fell in error in that the Appellant did not deduct input VAT in relation to Section 17(4) of the VAT Act 2013. In fact, the Appellant believes that the Respondent failed in its assessment to apply a purposive approach to statutory interpretation and there is a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purpose and objects of the Kenyan tax laws.

d. The Respondent erred in law by disallowing amounts of input VAT not claimed by the Appellant thereby breaching its mandate to fairly impose tax on an Appellant as the law must not be interpreted in a form and manner that is highly prejudicial towards an Appellant and against public policy.

11. In its January 2018 to May 2018 returns, the Appellant avers that it claimed input VAT amounting to Kshs. 800,344.40 relating to Kenya Power Lighting Company (KPLC) invoices billed under the name Associated Steel Limited "ASL Limited" and Kshs NIL relating to other three invoices from other suppliers namely, Gulf Badr, Auto Express Limited and Cyber Trace, VAT amounting to Kshs. 3,852.41 was not claimed as the supplies provided by Auto Express Limited and Cyber trace, relate to supplies under Section 17(4). Furthermore, the VAT amount of Kshs. 4,356.60 was not claimed by the Appellant in relation to supplies provided by its clearing agent. However, the Appellant should have claimed this amount as it relates to the provision of its taxable supplies.
12. A summary of the input VAT in which the Appellant claimed is as per below:

<table>
<thead>
<tr>
<th>Invoice date</th>
<th>Name of Supplier</th>
<th>Month input VAT was claimed</th>
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<td>179,766.61</td>
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<td>195,160.30</td>
</tr>
<tr>
<td>01/05/2018</td>
<td>KPLC</td>
<td>May-18</td>
<td>1,276,423.07</td>
<td>204,227.69</td>
</tr>
<tr>
<td>07/04/2018</td>
<td>Auto Express</td>
<td>Apr-18</td>
<td>22,327.56</td>
<td>3,572.41</td>
</tr>
<tr>
<td>07/04/2018</td>
<td>Cyber Trace</td>
<td>Apr-18</td>
<td>1,750.00</td>
<td>280.00</td>
</tr>
<tr>
<td>06/04/2020</td>
<td>Gulf Badr</td>
<td></td>
<td>27,228.75</td>
<td>4,356.60</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>5,053,459.10</strong></td>
<td><strong>808,553.46</strong></td>
</tr>
</tbody>
</table>

13. The Respondent conducted an audit for the period January 2018 to May 2018 in which it disallowed invoices for the tax period January 2018 to May 2018 relating to the suppliers stating that the input VAT was improperly deducted in the VAT returns.

14. The Appellant states that it had acquired assets which included the plot and electricity connection from the Associated Steel Limited in the year 2014. However, KPLC took long to effect the change of meter numbers and account names to the Appellant's and KPLC continued to raise its invoices under the name of the previous owner.
15. The invoices from the KPLC that were billed under the name Associated Steel Limited (herein referred to as "ASL") to the Appellant in January 2018 to May 2018 and included in the VAT returns are as produced in the Appellant's bundle of documents.

16. The invoices from the Auto Express Ltd, Gulf Badr and Cyber Trace Limited billed to the Appellant in the period January 2018 to May 2018 where no input VAT was claimed were included in the VAT returns under zero rated purchases as produced on page 151 to page 171 of the Appellant's bundle of documents. All VAT relating to these amounts was remitted on time and the Appellant has stated that it will amend the returns to reflect the supplies correctly under general rate purchases in the returns.

17. The Appellant contends that the Respondent was mistaken in stating that the input VAT claimed was improperly deducted.

18. The Appellant further contends the rejection of the input VAT amounting to Kshs. 808,553.41 for the period January 2018 to May 2018 on the grounds set out hereunder:

   a) On input VAT, the Appellant states that it was claimed against taxable supplies.

   i) The Appellant avers that Section 17 states: -

   "(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 hint in the 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.”

The provisions of the law are clear and the Appellant guided by Section
17 (1) and (2) above, states that it can claim input VAT on a taxable
supply at the end of the tax period in which the Appellant received such
supply.

ii) A taxable supply under Section 2 of the VAT Act means: -
“Supply of goods” means - (a) a sale, exchange, or other transfer of the
right to dispose of the goods as owner; or (b) the provision of electrical
or thermal energy, gas or water;

“Supply of services” means anything done that is not a supply of goods
or money, including - (a) the performance of services for another
person; (b) the grant, assignment, or surrender of any right; (c) the
making available of any facility or advantage; or (d) the toleration of
any situation or the refraining from the doing of any act”.

iii) The Appellant avers that under Sections 2 and 17 as above, the
Appellant correctly claimed input VAT against the KPLC invoices. The
issue herein arose due to the fact that the Appellant acquired the assets
ASL Limited, and KPLC failed to change the account name to that of the
Appellant. This delay in changing of the account name however is not a justifiable reason in disallowing the input claimed by the Appellant as it was claimed in line with the Appellant's taxable supplies.

iv) The spirit of the law under Section 17 of the VAT Act is to ensure that Appellant does not claim input VAT against taxable supplies not received by it and supplies received that were not acquired by it for furtherance of its own taxable supplies.

v) This law was not intended however to purposely penalize the Appellant who has no power to compel a government parastatal "KPLC" to effect the change of meter numbers account names from ASL to ASL Packaging Limited.

b) Further the Appellant states that the Respondent disallowed input VAT not claimed by the Appellant.

   i. The Respondent has incorrectly disallowed input VAT not claimed by the Appellant. The Appellant under Section 17(4) correctly did not deduct input VAT relating to the supplies by Auto Express Ltd and Cyber Trace.

   ii. Moreover, for the supplies relating to Gulf Badr, it too did not claim input VAT however it was entitled to as these were supplies relating to clearing agent fees.

   iii. The Respondent's decision to disallow input VAT not claimed by the Appellant is not only absurd, but done in bad faith. In the case of Scott v Russel (Inspector of Taxes), Lord Simonds observed, "that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him." This means that a tax payer should pay taxes imposed by the law and nothing
more. Legislation should not be skewed by the taxman to generate higher revenues.

iv. The law must not be interpreted in a form and manner that is highly prejudicial and against public policy. The Respondent must be reasonable in its assessments. In *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948]* the court set out the standard of unreasonableness of public-body decisions, that if unreasonable, would make (the decision) liable to be quashed.

v. The Appellant therefore contends that the input VAT was claimed in relation to its taxable supplies and amounts not claimed should not be taxed on them.

vi. The Appellant further submits that the Respondent should be fair and not punitive in imposing tax on the Appellant. The Appellant urges the Tribunal to look at the spirit of the law under Section 17 as input VAT claimed was not done so mischievously and that the Appellant did not wrongfully gain by doing so. The Respondent too did not unfairly lose out on this input claimed.

vii. As held in *R v Inland Revenue Commissioner, ex-parte Uniliver p/c [1996]*, "the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations... This is contrary to the scope and powers of the revenue authority which is to administer the collection of taxes and not to severely undermine the law in efforts to increase their revenues..."
19. In conclusion, the Appellant prays that the Tax Appeals Tribunal: -
   a. Allows this appeal;
   b. Annuls the Respondent's confirmed assessment based on the grounds above, as well as the information contained in the Statement of Facts attached; and
   c. Awards costs of this appeal to the Appellant.

THE RESPONSE

20. The Respondent submits that upon review of the Appellant's objections and supporting documents, it was established that the invoices in question included invoices under different names prohibited claims under Section 17 (4) of the VAT Act 2013.

21. Further, the Respondent relied on Section 17(4) of the VAT Act which provides:

   "(4) A registered person shall not deduct input tax under this Act if the tax relates to the acquisition of-
   (a) passenger cars or mini buses, and the repair and maintenance thereof including spare parts, unless the passenger cars or mini buses are acquired by the registered person exclusively for the purpose of making a taxable supply of that automobile in the ordinary course of a continuous and regular business of selling or dealing in or hiring of passenger cars or mini buses; or
   (b) entertainment, restaurant and accommodation services unless—"
(i) the services are provided in the ordinary course of the business carried on by the person to provide the services and the services are not supplied to an associate or employee; or
(ii) the services are provided while the recipient is away from home for the purposes of the business of the recipient or the recipient's employer:

Provided that no tax shall be charged on the supply where no input tax deduction was allowed on that supply under this subsection.”

22. The Respondent also relies on Section 42 of the VAT Act 2013 as read with Regulation 9 of the VAT Regulations 2017. Section 42 of the - VAT Act provides as follows on “Tax invoice”:

“(1) Subject to subsection (2), a registered person who makes a taxable supply shall, at the time of the supply furnish the purchaser with the tax invoice containing the prescribed details for the supply; or
(2) No invoice showing an amount which purports to be tax shall be issued on any supply—
(a) which is not a taxable supply; or
(b) by a person who is not registered.
(3) Any person who issues an invoice in contravention of this subsection commits an offence and any tax shown thereon shall become due and payable to the Commissioner within seven days of the date of the invoice.
(4) A registered person shall issue only one original tax invoice for a taxable supply, or one original credit note or debit note, but a copy
clearly marked as such may be provided to a registered person who claims to have lost the original”.

23. That the Appellant claimed taxable invoices under different names and prohibited claims under Section 17(4) of the VAT Act 2013 which could not be allowed.

24. The Respondent therefore prays that this Appeal be dismissed with costs.

ISSUES FOR DETERMINATION

25. Before delving into the issues for determination, the Tribunal would like to point out that we were informed, vide the Appellant’s Submissions filed on 8th September 2021, that the parties reached a mutual partial agreement on the issues in dispute. As a result, thereof, the assessment was marked as partially settled and reviewed downwards to Kshs 804,701.05 as per the below.

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<td><strong>5,029,381.54</strong></td>
<td><strong>804,701.05</strong></td>
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26. Having carefully and respectfully studied the pleadings and submissions from the parties, the Tribunal is of the view that the sole issue for its determination is as hereunder:

**Whether the Respondent erred in fact and in law in disallowing the input VAT amounting to Kshs. 804,701.05 for the period January 2018 to May 2018.**

**ANALYSIS AND FINDINGS**

27. The Tribunal, having considered the above issue wishes to analyze the same as hereunder.

28. The Appellant avers that the Respondent erred in law and fact in its wrongful interpretation of Section 17 of the VAT Act 2013 and that the Appellant has discharged its duty in claiming input VAT against taxable supplies acquired by itself. Further, the Appellant avers that the Respondent failed in its assessment to apply a purposive approach to statutory interpretation and there is a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purpose and objects of the Kenyan tax laws.

29. The Respondent, in its rebuttal maintains that the Appellant included invoices under different names which is prohibited under Section 17 (4) of the VAT Act 2013. The crux of this particular issue is that when the Appellant acquired ASL Limited, KPLC allegedly failed to timeously change the account name to ASL Packaging Limited. This delay in changing of the account name resulted in the Appellant
claiming input VAT in the original name which was then declined for that very reason by the Respondent.

30. We have perused the purchase agreement from pages 18 to 47 of the Appellant’s bundle of documents in its Memorandum of Appeal, which demonstrates that the business and the assets of ASL were indeed purchased by the Appellant. This fact is not in contention by both parties. Notwithstanding this fact, another key fact herein remains that ASL Packaging Limited was requesting input VAT from KPLC invoices addressed to a distinct and separate legal entity with a different KRA PIN.

31. The Appellant submits that having purchased the business as a going concern the acquisition also included property, assets, interests, rights, privileges, liabilities and obligations. Further, it submits that the change of name is only a formality and that the same principle applies when converting a partnership into a Limited Liability Partnership.

32. From a recapitulation of the above, and from the proceedings which took place on 8th September 2021, it is not in doubt that the KPLC invoices in question have been addressed to an entity that formerly owned the building, ASL Limited.

33. The Tribunal will now proceed to reproduce the Section 17(1) to 17(4) of the VAT Act in order to put this matter to rest.

"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 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).
(4) A registered person shall not deduct input tax under this Act if
the tax relates to the acquisition of-
(a) passenger cars or mini buses, and the repair and maintenance
thereof including spare parts, unless the passenger cars or mini buses
are acquired by the registered person exclusively for the purpose of
making a taxable supply of that automobile in the ordinary course of a continuous and regular business of selling or dealing in or hiring of passenger cars or mini buses; or
(b) entertainment, restaurant and accommodation services unless—
(i) the services are provided in the ordinary course of the business carried on by the person to provide the services and the services are not supplied to an associate or employee; or
(ii) the services are provided while the recipient is away from home for the purposes of the business of the recipient or the recipient’s employer.
Provided that no tax shall be charged on the supply where no input tax deduction was allowed on that supply under this subsection”.
(Emphasis added).

34. In our opinion, a vital criterion to be met when claiming input tax is that the supply was acquired to make taxable supplies. On that aspect, the Tribunal notes that the Appellant’s VAT monthly returns indicate the same taxpayer address as the KPLC invoices in question, over a similar period; that address being Plot 209/12091, Westlands, purchased by the Appellant in 2014. It therefore stands to reason that there is an associated VAT output from the identical address over the same period.

35. The spirit of the law under Section 17 of the VAT Act is to ensure that taxpayers do not claim input VAT against taxable supplies not made by them.
36. The concept of business transition, where there is a change in ownership of the business, is one that is not uncommon to the business world. It is therefore understandable that billing to a previous owner can occur during this transition phase from one company to another.

37. In *Sirikwa Eldoret Hotel Limited Vs Commissioner of Domestic Taxes TAT Appeal No 408 of 2019* the Tribunal held that “On the basis of the High Court Ruling in JR No 8 of 2018 there had been a transfer of tax liability, and the fact that the taxes had been admitted to by the taxpayer and therefore not in dispute, the Tribunal finds that the Respondent did not act unlawfully or misdirect itself...”. The Tribunal associates itself with the concept of the transfer of tax liabilities in the course of business transition.

38. Consequently, the Tribunal finds that the Respondent erred in fact and in law in disallowing the input VAT amounting to Kshs. 804,701.05 for the period January 2018 to May 2018.

**FINAL DECISION**

39. The upshot of the foregoing is that the Appeal is merited and succeeds. Consequently, the Tribunal makes the following **ORDERS**:

a) The Appeal is hereby upheld.

b) The Respondent’s Objection Decision disallowing the Appellant’s claim for input VAT dated 16th October 2020 is hereby set aside.

c) Each party to bear its own costs.
40. ORDERS accordingly.

DATED and DELIVERED at NAIROBI this 15th day of December, 2021.

JOSEPHINE K. MAANGI
CHAIRPERSON

PATRICIA M. ANAMPIU
MEMBER

TANVIR ALI
MEMBER

GEOFFREY KARUU
MEMBER

WAMBUI NAMU
MEMBER