

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 13 OF 2018

KATSRAN MOTORS LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in the Republic of Kenya. It is an appointed dealer of Tata Africa Holdings (K) Ltd (TAHL) and sells Tata branded trucks from Mumbai, India.
2. The Respondent is a principal officer of Kenya Revenue Authority (KRA). KRA is established under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and is charged with the mandate of administration, assessment and collection of revenue as an agent of the Government of Kenya.
3. The Respondent conducted a tax audit on the Appellant for the period January 2016 to June 2017. The audit established that the Appellant supplied five trucks to Dittman in July 2016 and the supply was not declared in the VAT return prompting the Respondent to demand output VAT on the under-declared supply of the five trucks. In this regard, the Respondent vide the letter dated 13th October, 2017 assessed

VAT on the Appellant for Kshs. 4,918,114.00 being principal tax and late payment interest.

4. The Appellant objected to the assessment vide the letter dated 7th November, 2017.
5. The Respondent issued its Objection Decision vide the letter dated 13th December, 2017 confirming the assessment of Kshs.4,918,114.
6. The Appellant replied to the Objection Decision vide a letter dated 15th December, 2017 and vide an email dated 19th December, 2017 the Respondent advised the Appellant that the matter could only be dealt with at the Tax Appeals Tribunal.
7. The Appellant filed a Notice of Appeal on 11th January, 2018. Thereafter, it filed the respective Memorandum of Appeal and Statement of Facts on 26th January, 2018 and both documents were served on the Respondent.
8. Upon service, the Respondent filed its Statement of Facts on 23rd February, 2018.

THE APPEAL

9. The appeal is premised on the grounds that: -
 - a) The Respondent erred in assessing VAT liability on a transaction which was declared for VAT purposes, albeit belatedly;
 - b) The Respondent erred by not distinguishing between the principal tax payable and late payment interest;

- c) The Respondent erred by not recognising that it is possible for a dealer to sell trucks before taking possession from the principal;
 - d) The Respondent erred in assessing the VAT liability as unpaid principal and interest; and
 - e) The Respondent erred by ignoring the VAT declared on the transaction in the October 2017 return.
10. The Appellant entered into a contract with Dittman for the sale of five trucks in July 2016. As per the Appellant, Dittman claimed input VAT related to the purchase of the trucks. However, the Appellant did not declare the sale of the trucks to Dittman on the grounds that it had not received the respective accounting documents from its principal as a result of a mix-up of the parties to the transactions. The mix-up was finally resolved and the respective accounting documents received by the Appellant from TAHL in October 2017 and output VAT declared in the same month
11. The Appellant avers that it does not import nor manufacture any Tata trucks. It receives commissions after submitting the proceeds of respective sales to the principal, TAHL.
12. TAHL is a multinational company with foot prints in all continents where dealers and sub-dealers are contracted to market, sell and service products on its behalf. It provides support to all the dealers and pays commissions after every quarter at pre-arranged rates per each transaction at an average of 3%.

13. The Appellant admits that there was a sale of five trucks to Dittman in July, 2016 and that it ought to have declared the sale in its VAT return in August 2016 as per Section 5(3) of the Value Added Tax Act, 2013 (VAT Act, 2013). Instead of declaring the output VAT in August 2016, it was declared in July 2017 after the reversal of the related output VAT by TAHL, the Appellant's principal. The principal had initially allocated the transaction to another of its dealers, Yansam Motors EA Ltd (YML) by error. The error was however corrected albeit belatedly for VAT purposes. As the VAT was subsequently accounted for by the parties, the Appellant argues that there was no loss of VAT.
14. The Appellant further argues that by dint of Article 159(2)(b) of the Constitution of Kenya, the Respondent should not have allowed the technicalities of the VAT Act to issue a demand notice on the transaction. The Respondent should have instead followed through the alleged VAT lost to satisfy itself that indeed the taxes were never lost by inviting all the mentioned parties to the transactions in a round table, with the iTax platform in tow, to ensure the taxes are traceable from importation to the eventual sale.
15. In the foregoing, as per the Appellant, the Respondent failed to exercise the provisions of Article 47 of the Constitution of Kenya and Section 4(1) of the Fair Administrative Act of 2015. The Appellant maintains that it had the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
16. The Appellant avers that by ignoring the principal, TAHL, the Respondent assumed that it manufactures or imports trucks which was

a fatal error. The Respondent's assessment, as per the Appellant, is therefore nugatory and ought to fail.

17. In conclusion, the Appellant prays that the Tribunal: -

- a) Quashes the Respondent's demand decision dated 13th December, 2017;
- b) Upholds the Appellant's objection dated 15th December, 2017; and
- c) Awards costs of the appeal to the Appellant.

THE RESPONSE

18. The Appellant entered into a contract to supply five (5) tippers (TATA) to Dittman on 4th July, 2016 for a consideration of Kshs. 31,250,000.00 and on 6th July, 2016. Dittman paid a deposit of Kshs. 1,562,000.00 to the Appellant for the supply. On 1st August, 2016, Kenya Commercial Bank Ltd gave an undertaking to pay the balance of the consideration to the Appellant upon its delivery of the trucks. The bank thereafter paid the balance after the Appellant delivered the said trucks to Dittman and on 5th August, 2016 the Appellant paid Kshs. 29,687,500.00 to its principal, TAHL, for the five tipper trucks.
19. In August 2016, Dittman claimed input VAT on the trucks as per the ETR issued by Katsran Limited, the sister company of the Appellant. However, as per the Respondent, neither Katsran Limited (PIN: P051303380X) nor the Appellant (PIN: P05153730W) declared the output VAT. The inconsistency in the undeclared output tax was captured in the Respondent's iTax system and picked for verification.

The Respondent notes that both Katsran Limited and the Appellant have common directorship and shareholding.

20. In reply to specific grounds raised by the Appellant, the Respondent stated as follows: -

- a) In reply to the first, the Respondent assessed VAT on undeclared supply of five (5) tippers to Dittman in August 2016 but not declared in that month as required under Section 5(1) of the VAT Act, 2013.
- b) In reply to the second, the Respondent states that it distinguished between principal VAT and interest due in a notice that was received by the tax representative of the Appellant.
- c) In response of the third, the Respondent states that it took into consideration all facts and circumstances of the transaction including the fact that the Appellant is a dealer under TAHL.
- d) In response to the fourth, the Respondent states that the assessment was raised as per the provisions of Sections 2, 5 (1) and 12(1) of the VAT Act, 2013.
- e) In response to the fifth, the Respondent states that the declaration made by the Appellant in October 2017 could not be for the said transaction as the inputs declared could not be allowed under Section 17(2) of the VAT Act, 2013.

21. It is the Respondent's submission that Dittman rightly claimed input VAT from the purchase of the five vehicles from the Appellant. The Appellant failed to declare its supply to Dittman. The Respondent notes that TAHL supplied the vehicles to the Appellant who in turn supplied the same to Dittman. The transaction between TAHL and the Appellant (purchase

transaction) is distinct from the transaction between the Appellant and Dittman (sale transaction).

22. The Respondent reiterates that the Appellant declared supplies made in July 2016 in October 2017 contrary to the provisions of Section 12(3) of the VAT Act, 2013. The time of the supply was in July 2016 as asserted by the Respondent.
23. The Respondent further reiterates that the issue of the importation of the vehicles and the transactions between TAHL and the Appellant has no bearing with the supply made by the Appellant to Dittman. In addition, the Respondent submits that there was no mix-up in accounting for supply made by the Appellant to Dittman since the former entered into a contract to supply and issued the respective invoice, ETR receipts, and received a deposit for the vehicles and none of these were revised later. Indeed, Dittman rightly claimed the input VAT in August 2016 and did not have to revise the declaration. The documents which were revised related to purchases from TAHL. The Respondent avers that the output declared by the Appellant in October 2017 related to a supply made in July, 2016, a fact that the Appellant has not disputed.
24. In conclusion, the Respondent prays that the Tribunal:-
 - (a) Upholds its Objection Decision; and
 - (b) Dismisses the Appeal with costs to the Respondent.

ISSUES FOR DETERMINATION

25. The Tribunal has carefully studied the parties' pleadings, submissions and documentation and is of the respectful view that the sole issue for its determination is as herein below: -

Whether the Respondent erred in law and in fact by raising an additional VAT assessment on the Appellant in respect of the sale of the five tipper trucks to Dittman Construction Ltd in August 2016.

ANALYSIS AND FINDINGS

26. From the onset, the Tribunal notes that, the Appellant in its submissions, has referred to Article 159(2)(b) of the Constitution of Kenya which states as follows: -

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

- a) ...
- b) Justice shall not be delayed;”**

27. In addition, the Appellant has also referred to Article 47 of the Constitution of Kenya and Section 4(1) of Fair Administration Act of 2015, both of which deal with fair administrative action.

28. The Tribunal is quick to note that the matters raised in the above paragraph were not pleaded by the Appellant in its Memorandum of Appeal nor raised in its Statement of Facts. Consequently, the Tribunal will not delve with the same further and will therefore proceed to analyse the sole issue which calls for its determination as hereunder.

29. The facts of this case are fairly straightforward and as admitted by the Appellant in paragraphs 30 and 31 of its submissions, it sold five (5) trucks to Dittman in August 2016. The sale was not declared in its VAT return for the month as provided for under Section 5(3) of the VAT Act, 2013. Instead, the sale was declared by the Appellant in October 2017 and as explained by the Appellant this was **"after the same output was reversed by the Appellant's principal who had initially allocated the transaction to another of its dealers (YML) erroneously and who had to reverse back to the Appellant's principal to eventually land on the Appellant legal realm for declaration"**.

30. Section 5(3) of the VAT Act, 2013 deals with chargeability to tax and it states: -

"Tax on a taxable supply shall be a liability of the registered person making the supply and, subject to provisions of this Act relating to accounting or payment, shall become due at the time of supply."
(Emphasis supplied).

31. The sale of the tipper trucks was a taxable supply as provided for under Section 5(1) (a) of the VAT Act, 2013. The incidence of tax is not contested by the parties in this respect.

32. Section 12(1) of the VAT Act 2015 deals with the time of the supply of goods and services and it states: -

"(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.

(2) ...

(3) If -

- (a) goods are supplied under a rental agreement; or
 - (b) goods or services are made by metered supplies, or under 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."
- (Emphasis supplied).

33. The five tipper trucks were contracted for in July 2016, the same were delivered and paid for in August 2016, the facts of which are admitted by the Appellant. The time of supply of the trucks was therefore August 2016 and the Appellant should have accounted for the output VAT in the same month.

34. The Respondent conducted a tax audit on the Appellant for the period January 2016 to June 2017. In the course of the exercise, it established that the Appellant supplied the five trucks to Dittman in August and the respective sale was not declared in the VAT return of that month. Consequently, the Respondent issued the impugned assessment bringing into tax charge the undeclared supply of the trucks. The assessment was issued in accordance with Section 31(4) of the Tax Procedures Act, 2015 which states as follows: -

"The commissioner may amend an assessment -

- (a) in the case of gross or wilful neglect, evasion or fraud by, or on behalf of the taxpayer; or**
- (b) in any other case within five years of -**
 - (i) for a self-assessment the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or**
 - (ii) for any other assessment, the date the commissioner notified the taxpayer of the assessment"**

35. The Appellant in paragraph (48) of its submissions asserted as follows:

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" That the Respondent could have taken time to summon the TAHL and follow the trail of alleged missing VAT and how it was reversed to the Appellant, they would have definitely concluded without doubt that no VAT was lost or missing or under-declared."(sic)

36. The Appellant however has not made reference to the legislative backing of the assertion. We also note that the parties to the mix-up to the transaction, as claimed by the Appellant, are separate legal entities and taxpayers who ought to account for tax individually.
37. The Tribunal is of the view that the accounting for the sale of the five tippers which occurred in August 2016 ought to have been done within the same month, following which the respective VAT was payable by the 20th day of the following month, that is, 20th September 2016. However, the fact that the relevant accounting for the sale of the said five tippers was in October 2017 was therefore accounted for in the wrong month. The same applies to the related VAT payable. In view of this, the appropriate remedy would be for the Appellant to amend the self-assessment for October 2017.
38. Consequently, the Tribunal finds that the Respondent did not err in law and in fact by raising an additional VAT assessment on the Appellant in respect of the sale of the five tipper trucks to Dittman Construction Ltd in August 2016.

FINAL DECISION

39. The upshot of the foregoing is that the Appeal is not merited. Consequently, the Tribunal makes the following **ORDERS**: -
- i) The Appeal is hereby dismissed.
 - ii) The Respondent's Objection Decision dated 15th December, 2017 and the respective assessment in the sum of Kshs.4,918,114.00 is hereby upheld.

iii) Each party to bear its own costs.

40. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May, 2021.


.....
JOSEPHINE K. MAANGI
CHAIRPERSON


.....
PATRICIA M. ANAMPIU
MEMBER


.....
TANVIR ALI
MEMBER


.....
GEOFFREY KARUU
MEMBER


.....
DELILAH K. NGALA
MEMBER

