

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 232 OF 2018

KEN IRON AND STEEL LIMITED APPELLANT

-VERSUS-

**COMMISSIONER OF INVESTIGATIONS &
ENFORCEMENT RESPONDENT**

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company duly registered under the Laws of Kenya. Its principal activity is the sale of different construction materials within the construction industry.
2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and is charged with the mandate to administer and enforce all provisions of the written laws for purposes of assessing, collecting, accounting and general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent reviewed the Appellant's tax affairs and discovered that the Appellant sourced construction material from two suppliers namely Darwine Wholesalers Ltd and Fahari Hardware & Building Wholesalers. These two suppliers had been profiled by the Respondent as being

responsible for printing and selling ETR invoices without making actual supplies for purposes of reducing the purchaser's tax liability.

4. The Respondent therefore issued VAT Assessment Orders dated 3rd and 4th May, 2018 totalling Kshs.13,562,515/- for the period covering January 2016 to January 2018. A further Assessment Order dated 9th May, 2018 was issued to the Appellant with regard to Corporation Tax amounting to Kshs. 25,429,716/- for the same period.
5. Following a series of correspondence and engagements, the Appellant lodged its formal Notice of Objection dated 13th June 2018 with the Respondent formally objecting to the Assessments in totality.
6. The Respondent thereafter rendered two Objection Decisions dated 3rd August 2018 and 6th August 2018 confirming the VAT Assessments of Kshs.13,562,515/- and Corporation Tax Assessments of Kshs.25,429,716/- respectively.
7. Aggrieved by the Respondent's Objection Decisions, the Appellant lodged this instant appeal vide a Notice of Appeal dated 24th August, 2018 and filed on even date.

THE APPEAL

8. The Appellant instituted the Appeal vide a Memorandum of Appeal dated 7th September 2018 filed on even date. The Appeal is premised on the following grounds as set out in the Memorandum of Appeal; -

- i. That the Respondent erred in law by raising additional Value Added Tax assessment on an approach that contravenes the applicable Sections of the Valued Added Tax Act and applicable Kenyan jurisprudence.
 - ii. That the Respondent erred in law and fact by disallowing expenses incurred wholly and exclusively in generation of business income of the Appellant, contrary to Section 15(1) of the Income Tax Act and supporting Sections.
 - iii. That the Respondent erred in fact and law by disallowing input VAT incurred in the making of taxable supplies, contrary to the Stipulations of Section 17 of the Value Added Tax Act.
9. Based on the foregoing, the Appellant urges the Honourable Tribunal to find that:-
 - i. The confirmed assessments are in violation of the provisions of the Income Tax Act and the Value Added Tax Act and that the entire assessment amounting to Kshs.38,992,231/- be set aside;
 - ii. That the costs of this cause be awarded to the Appellant.
10. In response to the Appeal, the Respondent filed its Statement of Facts dated 4th October 2018 on 5th October, 2018.

11. The Respondent averred that the Appellant's assessed tax was as a result of invoices from suppliers who had been profiled by the Respondent as being responsible for printing and selling ETR invoices without actual supplies. These suppliers, namely, Darwine Wholesalers Ltd and Fahari Hardware & Building Wholesalers were the Appellant's main suppliers among other steel companies.
12. The Respondent further averred that Darwine Wholesalers Ltd and Fahari Hardware & Building Wholesalers' VAT inputs were mainly imports on which they claim input tax as per their VAT returns. Further analysis revealed that the imports claimed were not addressed to them; neither did the goods relate to construction materials. As such, the Respondent averred that Darwine Wholesalers Ltd and Fahari Hardware & Building Wholesalers could not sell to the Appellant goods which they did not have.
13. The Respondent thus computed the claimed inputs from the above suppliers for the period 2016 to 2018 and charged VAT and Corporation Tax of Kshs.13,562,515/- and Kshs.25,429,716/-, respectively.
14. The Respondent prayed that this Tribunal considers the case and finds that;-
 - a) The confirmed assessments were proper in law.
 - b) That the Appeal herein be dismissed with costs to the Respondent.

THE APPELLANT'S CASE

15. The Appellant set out its case in support of its Grounds of Appeal in its Statement of Facts dated 7th September, 2018, the Witness Statement of

Mayur Malde sworn on 3rd March 2021, and its Written Submissions dated 23rd March, 2021.

16. The Appellant avers that vide the letter dated 16th April, 2018, the Respondent notified it that it had reviewed its tax declarations in accordance with Section 5(2)(a) of the Kenya Revenue Authority Act and Section 4 of the Tax Procedures Act ('TPA') and had established that the Appellant had used invoices from suppliers such as Darwine Wholesalers Ltd and Fahari Hardware & Build Wholesalers for which no deliveries had been received by the Appellant, to account for input VAT.
17. The Respondent therefore, made the decision to disallow the wrongly claimed input VAT of Kshs.13,562,515/- and charge Corporation Tax of Kshs.25,429,716/- for the same invoices which were used to account for expenses in the Financial Statements and demanded the immediate payment of both sums.
18. The Appellant avers that upon receipt of the Respondent's letter, the Appellant protested the Respondent's assertions, stating that no audit was done vide a letter dated 16th April, 2018. The Respondent thereafter replied to the Appellant vide a letter dated 18th April, 2018 advising that its findings were as a result of reviewing the Appellant's tax declarations on iTax. Further, the Respondent provided the Appellant with workings and a summary of invoices from the alleged invalid suppliers.
19. The Appellant avers that in subsequent communication, the Respondent requested for documents including copies of invoices with ETRs, Delivery

Notes, Stock Records and evidence of payments which were duly provided by the Appellant.

20. Nonetheless, the Respondent issued the VAT assessment orders totalling Kshs. 13,562,515/- on 3rd and 4th May, 2018 and a further Assessment Order on account of Corporation Tax totalling Kshs.25,429,716/- dated 9th May, 2018.
21. The Appellant averred that vide a letter dated 31st May, 2018, it notified the Respondent that it had provided all the documents requested and was promised to receive feedback regarding the authenticity of such documents, which feedback was not forthcoming. Following the above events, the Appellant averred that it lodged a Notice of Objection on 13th June, 2018 contesting the whole of the Respondent's assessments and provided the Respondent with further documentation. This was followed by the Respondent's Objection Decisions dated 3rd August 2018 and 6th August 2018 confirming the VAT and Corporation Tax assessments.
22. The Appellant submitted that it provided the Respondent with all the documents requested and that at no particular time did the Respondent contest their validity and/or authenticity. The Appellant maintained that the Respondent, while raising its assessment, should have reviewed the documents and provided its reason(s) if any for rejecting the same in both its Assessments and Objection Decision.
23. The Appellant avers that it only received Assessments on its iTax, adding that the reasons now proffered being that the goods did not appear on the seller's Import Declaration Forms were not communicated to it. The Appellant submitted that it only learnt about such reasons from the

Respondent's Statement of Facts adding that there was no mention or even a hint of them in the Assessments or the Objection Decisions.

24. The Appellant added that the Respondent's failure to reveal the information relied upon in the issuance of the Assessments and on whose basis the same had been confirmed, was contrary to proper tax administration as addressed by Justice Majanja in the High Court case of **Pz Cussons East Africa Limited v Kenya Revenue Authority [2013] eKLR(Petition no. 309 of 2012)**, where the court pointed out that KRA should not charge tax based on information in its sole possession, especially where the details of the information and verification of the validity have not been addressed.
25. The Appellant further submits that the Assessments did not give a statement of reasons for disallowing the input VAT contrary to Section 49 of the Tax Procedures Act. To the Appellant, the claim for input VAT was an application under Section 17 of the VAT Act. On this basis, the Appellant states that the actions violated the due process requirements and violated its administrative rights guaranteed under Article 47 of the Constitution and the Fair Administrative Actions Act, 2015.
26. The Appellant proceeds to state that since the Objection Decisions uphold the Assessments which they state are null and void for failure to contain a statement of reasons; they too are null and void and are of no legal effect.
27. The Appellant proceeded to submit that it had met the requirements for a claim of input VAT as set out in Section 17 of the Value Added Tax Act as read together with Regulation 7 of the Value Added Tax Regulations, 2017. The said provisions state 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.”

28. Regulation 7 of the VAT Regulations of 2017 is to the effect that;

“...(1) A person shall be entitled to a deduction of input tax incurred for trading stock on hand at the date that the person becomes registered.

(2) A deduction of Input Tax shall not be allowed unless-

(a) the input tax to which the deduction relates is deductible under Section 17 of the Act;

(b) the registered person has provided the Commissioner with satisfactory evidence-

(i) that input tax was paid on acquisition of the goods;

(ii) of the quantities, descriptions, and values of the goods on hand at the time of registration...”

29. The Appellant avers that, not only did it incur the input VAT for purposes of making taxable supplies, but it was also issued with tax invoices and ETRs which it furnished the Respondent as evidence of the supply.
30. The Appellant contends that having been furnished with all the documents requested, the Respondent then resorted to introduction of the imports data of Darwine Wholesalers and Fahari Hardware & Build Wholesalers at Appeal stage and stated that they could not sell goods that they did not have.
31. The Appellant maintains that it purchased the goods from Darwine Wholesalers and Fahari Hardware & Build Wholesalers and avers that it was absurd for the Respondent to expect the Appellant, “before purchasing goods on which they would be entitled to claim or include as part of the cost of generating income, they must turn themselves into revenue amateur sleuths and demand to view the suppliers’ import data”.
32. The Appellant relied on the Honourable Tribunal’s decision in **Shreeji Enterprises Limited -vs- Commissioner of Investigations and Enforcement, TAT No. 58 and 126 of 2019** where it was determined that:-
- “... Although the current tax law provides that the onus of proof lies with the Appellant to prove that tax was paid or that the Respondent’s assessment was wrong...In demanding the production of documents which are not prescribed by legislation, the tax authority should be guided by reasonableness, the nature and circumstances of the trader otherwise it would, as it occasionally does, demand information which the trader cannot produce because he does not have...”*

33. The Appellant further relied on the case of **Karshan Limited -vs- Commissioner of Domestic Taxes, TAT No.123 of 2018**, where the Honourable Tribunal found that:-

“...While the list is not exhaustive on the documents that must be furnished as proof of purchase, the Tribunal was of the view that the Respondent should have furnished information to prove that the invoices submitted by the Appellant to support its claims were fictitious. It was not enough to just allege that the documents presented were not sufficient to prove purchase and delivery of the goods. The Tribunal was therefore of the view that the Appellant furnished sufficient proof of purchase...”

34. To that end, the Appellant submits that having discharged its burden of proving the purchase, it should not be penalized for the indolence and malice on the part of the Respondent. It is the Respondent's duty to demonstrate that the evidence adduced was insufficient to prove the contrary.

35. The Appellant further submits that there is no requirement in law for it to bear the tax compliance obligations of any of its suppliers. To expound on the assertion, the Appellant relied on Justice Nyamu's analysis in **Keroche Industries vs. the Kenya Revenue Authority and 5 Others, Miscellenous Civil Application No. 743 of 2006** as follows;

“I accept the Applicant's counsel's powerful argument that taxation can only be done on clear words and that taxation cannot be on intendment... where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination (or the

court) should be against a construction or interpretation of a burden, tax, or duty on the subject (taxpayer)”.

36. To cement its position, the Appellant added that the Respondent is equipped with the legal, financial, technical, resources, and other capabilities to enforce compliance with tax laws. Therefore, imposing other taxpayers’ burden on the Appellant is illegal and unmerited.
37. The Appellant also submitted that its dealings with the suppliers did not constitute a tax-avoidance scheme as envisioned in the provisions of Section 66 of the VAT Act and Section 23 of the Income Tax Act. The Appellant avers that it did not obtain any form of tax reduction or postponement of payment of tax. Instead, the full invoice value with VAT sales was settled and the total costs incurred. As such, the failure by the suppliers to remit the tax or file returns on the declared transactions did not in any way confer a tax benefit to the Appellant. The Appellant thus accused the Respondent of being influenced by alleged “internal guidelines” positing that whoever trades with tax non-compliant suppliers is also cited for non-compliance.
38. On the Corporation Tax Assessment, the Appellant relied on the provisions of Section 15 (1) of the Income Tax Act which states as follows;-

“For the purpose of ascertaining the total income of any person for a year of income there shall, subject to Section 16 of this Act, be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that

income, and where under Section 27 of this Act any income of an accounting period ending on some day other than the last day of such year of income is, for the purpose of ascertaining total income for any year of income, taken to be income for any year of income, then such expenditure incurred during such period shall be treated as having been incurred during such year of income.”

39. The Appellant averred that the specific purchases made by it met the requirement for allowability as they directly related to the taxable income of the Appellant.
40. The Appellant therefore concluded that the Respondent's actions of assessing tax on the Appellant on the basis of open factual error and tax obligations of other alleged tax non-compliant suppliers, was not only unfair but also unreasonable.
41. The Appellant therefore urged this Tribunal to hold as follows:-
- a) That the Appellant fulfilled the requirements for claim of the input VAT in line with Section 17 of the VAT Act;
 - b) The Appellant fulfilled the requirements for deduction of expenses in line with Section 15 of the Income Tax Act;
 - c) There is no basis for the assessment as the conditions for Section 23 of the Income Tax Act and Section 66 of the VAT Act have not been met;
 - d) That the Respondent cannot enjoin the Appellant in the tax compliance obligations of other taxpayers;

- e) The tax assessment amounting to Kshs.38,992,231/- is set aside with costs to the Appellant.

THE RESPONDENT'S CASE

42. The Respondent set out its case in its Statement of Facts dated 4th October, 2018 and its Written Submissions dated 10th March, 2021.
43. The Respondent submitted that the Appellant's tax as assessed was as a result of invoices in support of claims for VAT from two suppliers, Darwine Wholesalers Ltd and Fahari Hardware & Building Wholesalers, where there were no actual supplies made, thus reducing tax liability.
44. The Respondent noted that sales to the Appellant from Darwine Wholesalers Ltd for the period January 2016 to March 2017 were not reflected in their returns but were reflected in the VAT returns for the other months under review. Likewise, sales from Fahari Hardware & Building Wholesalers for the period May 2017 were not reflected in their returns but were reflected for all other months under review.
45. The Respondent averred that Darwine Wholesalers and Fahari Hardware & Building Wholesalers' VAT inputs were mainly imports on which they claimed input tax as per their VAT returns. Upon further analysis of the imports data, the Respondent noted that the said imports were not addressed to Darwine Wholesalers and Fahari Hardware & Building Wholesalers, neither did the imported goods relate to construction materials.
46. As such, the Respondent concluded that the purchases claimed by the Appellant from Darwine Wholesalers and Fahari Hardware & Building

Wholesalers were fictitious as they could not sell goods which they did not have.

47. The Respondent further stated that it encountered instances of teeming and lading on the Appellant's part, whereby Darwine Wholesalers Limited declared sales to the Appellant in their VAT returns and also claimed purchases from the Appellant.
48. The Respondent submitted that the Appellant failed to demonstrate that there were actual purchases where the goods were supplied. Reliance was placed on Tax Appeals Tribunal Appeal No. 159 of 2018, Osho Drappers Ltd Vs. Commissioner for Domestic taxes, where the Tribunal expressed itself at Paragraphs 57 and 58 as follows;

"The Tribunal therefore agrees with the Respondent that for one to claim input VAT, there must be a purchase of a taxable supply. It is not enough to have the documentation listed in Section 17 of the VAT Act. The documentation must be supported by an underlying transaction and the taxpayer must furnish proof that there was an actual purchase.

Section 30 of the Tax Appeals Tribunal Act places the burden of proof on the taxpayer to submit all the necessary documentation in support of its case. The same position was held by the court in Metcash Trading Limited – vs- Commissioner for the South African Revenue Service & another Case CCT3/2000, where it was held that; "the burden of proving the Commissioner wrong then rests on the vendor under Section 17. Because VAT is inherently a system of self-assessment based on the 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 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."

49. In support of the foregoing, the Respondent maintained that most of the documents provided by the Appellant were not legible hence the Appellant's Objection was found to be invalid. The Respondent avers that this information was communicated to the Appellant who was requested to submit original documentation to support the Objection vide an email dated 21st June 2018.
50. The Respondent further submitted that Section 17(2) of the VAT Act 2013 provides that input tax is only deductible when a registered person is in possession of a valid document. It is the Respondent's assertion that the documents used to claim input VAT by the Appellant were not valid.
51. Further, while placing reliance on Section 66(1) of the VAT Act 2013 and Section 23 (1) of the Income Tax Act, the Respondent submitted that the Respondent is empowered to determine the tax liability of an individual who obtained a tax benefit and hence the assessments were justified.

52. The Respondent also submitted that the Appellant did not appeal the Objection Decision dated 3rd August 2018 confirming VAT assessments at Kshs. 13,562,515/-. Instead, the Appellant only filed a Notice of Appeal in respect of the Objection Decision confirming Corporation Tax at Kshs. 25,429,716/- dated 6th August, 2018. As such, the Respondent argues that the Objection Decision dated 3rd August 2018 is uncontested for failure to file a Notice of Appeal and the VAT is therefore due.
53. The Respondent urged the Tribunal to dismiss the Appellant's case as it lacked merit.

ISSUES FOR DETERMINATION

54. Having carefully considered the pleadings, documentations, and submissions from both sides, the Tribunal is of the view that the issues for determination are as follows: -

- i) Whether the Appellant's Appeal contested the VAT and Corporation Tax assessments confirmed in the 3rd August, 2018 and 6th August, 2018 Objection Decisions, respectively.*
- ii) Whether the Respondent's Decision to charge Corporation Tax on the disallowed expenses on purchases by the Appellant was justified.*

ANALYSIS AND FINDINGS

- i) Whether the Appellant's Appeal contested the VAT and Corporation Tax assessments confirmed in the 3rd August, 2018 and 6th August, 2018 Objection Decisions, respectively.**

55. The Respondent argued that the Appellant did not appeal against the Objection Decision dated 3rd August 2018 confirming VAT assessments at Kshs.13,562,515/-. Instead, the Appellant only filed a Notice of Appeal in respect of the Objection Decision confirming Corporation Tax at Kshs. 25,429,716/- dated 6th August, 2018. This formed the background of the argument that the Appellant did not contest the VAT assessment in this Appeal.
56. The Tribunal has had the benefit of looking at the documentation and correspondence between the Appellant and the Respondent, which were not brought about clearly in their respective pleadings in relation to this issue of uncontested VAT and wishes to revisit them herein below.
57. The Respondent issued a “Demand for Underpaid Taxes” on 16th April, 2018 stating that it had commenced a review of the Appellant’s tax declarations, with preliminary investigations revealing that it used invoices from suppliers (listed below) where no supplies were made to account for input VAT. The Respondent demanded that the Appellant make a payment of Kshs.38,992,231/- on account of underpaid taxes.
58. The Appellant responded on the same day (16th April, 2018) requesting for an explanation on how the figures were arrived at, pointing out that there was no audit done by ‘KRA’. The Respondent vide a letter dated 18th April, 2018 confirmed the receipt of the letter dated 16th April 2018 and further informed the Appellant that the demand was as a result of the review of tax declarations in the iTax system. The Respondent attached detailed workings/summary of invoices from the alleged invalid suppliers.

59. The Respondent thereafter, issued VAT Assessment Orders totalling Kshs.13,562,515/- dated 3rd and 4th May, 2018 via iTax. On 9th May, 2018, a further Assessment Order on account of Corporation Tax totalling Kshs.15,898,232.61/- was issued to the Appellant via iTax for the period covering January 2016 to December 2016. No other electronically generated Assessments on Corporation Tax have been presented before this Tribunal.
60. Vide an email dated 9th May, 2018, the Respondent then advised the Appellant that it had raised the Assessments on iTax and advised the Appellant to Object to the assessments if it was dissatisfied with the same.
61. The Appellant responded vide a letter dated 31st May, 2018 confirming receipt of the Assessment Orders and seeking to know how the Respondent had come up with the figures in the Assessments without an audit. In the said letter, the Appellant alluded to a meeting between it and the Respondent on 25th April, 2018 where the Appellant delivered its supporting documents and the Respondent promised to forward them to another department for verification of their authenticity after which, a response would be communicated to the Appellant in due course. The response was yet to be issued as at that date. The Appellant thus objected to the assessments on the ground that they had been raised without a verification audit.
62. Upon receipt of the Appellant's letter, the Respondent replied to the said letter of 31st May, 2018 by a letter dated 5th June, 2018, reiterating what constitutes a valid objection and further advising the Appellant to raise a valid objection if it wished to do so.

63. On 14th June, 2018, the Appellant lodged its Notice of Objection, which the Respondent confirmed to have received on 21st June, 2018.
64. The Respondent subsequently issued its Objection Decisions as follows:
- i) On 3rd August 2018 confirming the VAT assessments at Kshs.13,562,515/- ; and'
 - ii) On 6th August 2018 and Corporation Tax assessments at Kshs.25,429,716/- .
65. The Appellant lodged an Appeal vide a Notice of Appeal dated 24th August, 2018 and filed on even date that stated,
- “TAKE NOTICE that Ken Iron and Steel Ltd (PIN – P 051 566 501 C), being dissatisfied with the decision of the Commissioner given at Nairobi on the 6th day of August 2018 (attached) intends to appeal to the Tribunal against the whole of the said decision”.***
66. The Tribunal has followed the chronology of events as documented through the various communications between the parties and established that the Respondent’s Assessments as made in iTax, split the VAT and Corporation Tax Assessments and the objections made thereto were similarly split. Further, when the Respondent made its Objection Decisions, the same were made separately, The Respondent issued a decision dated 3rd August, 2018 on VAT and another dated 6th August, 2018 on Corporation tax. When the Appellant filed a Notice of Appeal, the same was apparently limited to the objection decision dated 6th August, 2018 on Corporation tax.

67. The Tribunal agrees with the Respondent that this Appeal must only be limited to its objection decision dated 6th August, 2018 on Corporation tax and that this Appeal cannot apply to the objection decision dated 3rd August, 2018 on VAT in the absence of a Notice of Appeal filed against it.

ii) Whether the Respondent's Decision to charge Corporation Tax on the disallowed expenses on purchases by the Appellant was justified.

68. Section 15(1) of the Income Tax Act provides that a taxpayer is allowed to deduct any expenditure which is incurred wholly and exclusively in the production of income in ascertainment of its taxable income. The said provision states as follows:-

“For the purpose of ascertaining the total income of any person for a year of income there shall, subject to Section 16 of this Act, be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that income, and where under Section 27 of this Act any income of an accounting period ending on some day other than the last day of such year of income is, for the purpose of ascertaining total income for any year of income, taken to be income for any year of income, then such expenditure incurred during such period shall be treated as having been incurred during such year of income.”

69. The Respondent submitted that the disallowed purchases from the two suppliers, Darwine Wholesalers Ltd and Fahari Hardware & Build Wholesalers was as a result of their being profiled through the

Respondent's investigations for printing and selling ETR invoices without actual supplies to the Appellant thus reducing its tax liability. The Appellant was therefore considered a beneficiary of the "missing trader" scheme which revealed many beneficiaries of fictitious invoicing including the Appellant. Based on the above, the Respondent argued the Appellant did not actually purchase anything, and thus the documents it held were not valid.

70. The Appellant on its part submitted that it indeed purchased goods as indicated in the invoices, the goods were delivered as indicated in the delivery notes and payment was made as can be confirmed from the company's Bank Accounts and payment records.
71. The Appellant avers that the documents requested by the Respondent to prove that actual purchase and delivery of goods, were provided. The Respondent acknowledged the receipt of the said supporting documents including, *inter alia*, invoices, ETR Receipts, delivery notes and bank payments vide an email correspondence of 21st June, 2018.
72. The explanation by the Respondent was that Darwine Wholesalers Ltd and Fahari Hardware & Building Wholesalers' claimed that they traded mainly on imports as per their VAT returns. The Respondent further averred that these imports were not addressed to Darwine Wholesalers Ltd and Fahari Hardware & Building Wholesalers' and the goods imported did not relate to construction materials. As such, the Respondent concluded that they could not sell to the Appellant goods which they did not have.

73. The Respondent further pointed out in the aforementioned letter dated 21st August, 2018 that some of the documents were illegible and thus requested for the original documents. The Tribunal has not been presented with evidence to show that these originals were made available to the Respondent.
74. The Tribunal appreciates the spirit of Section 56(1) of the Tax Procedures Act, 2015 and Section 30 of the Tax Appeals Tribunal Act to the effect that the burden of proof is on the taxpayer to submit all the necessary documentation to support its case and fault the assessments made by the Respondent.
75. However, this burden placed upon the taxpayer is to the extent that the necessary documentation in support of the purchase is presented to the Respondent, upon which a legitimate expectation for the expense to be allowed arises unless the credibility of the documents provided is impeached.
76. Therefore, once the taxpayer adduces evidence that discharges his burden by providing the documents required, the onus shifts to the Respondent to impeach the credibility of the documents for the assessment to stand. Such a position is clearly captured in the Supreme Court of Canada's decision in Hickman Motors Ltd. v. Canada, [1997] 2 S.C.R. 336, where the Court expressed itself 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.”

77. The question is, did the Appellant do enough to shift the burden of proof to the Respondent? Based on the evidence placed before the Tribunal, the Appellant provided illegible documents to the Respondent who then requested for original copies of the same documents. The Appellant has not shown the Tribunal that these original documents were provided to the Respondent and therefore, the Appellant by failing to provide the original copies, did not do enough to transfer the burden of proof to the Respondent.
78. The Appellant would have done itself well to file its Appeal together with copies of some, if not all the documents, for the Tribunal’s consideration and possible tilting of the scales in its favour if found to be tax deductible expenses.

FINAL DECISION


79. In view of the foregoing, the Tribunal makes the following final Orders;
- i. The Appeal be and is hereby dismissed.
 - ii. The Respondent’s objection decisions dated 3rd August, 2018 and 6th August, 2018 confirming VAT assessment of Kshs.

13,562,515.00 and Corporation tax assessment of Kshs. 25,429,716.00, respectively, are hereby upheld.

iii. Each party shall bear its costs.

80. It is so ordered.

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



PATRICK LUTTA
CHAIRPERSON



HELEN BILA
MEMBER



MWAI MBUTHIA
MEMBER



ELISHAH NJERU
MEMBER



HABON FARAH
MEMBER