REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 353 OF 2018

RUMISH LIMITED .......................................................... APPELLANT

VERSUS

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

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company registered in Kenya and its main business being in hardware business and based in Nakuru.

2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. The Respondent is duly authorized by law to be responsible for the control, collection and accounting for Tax.

3. The Respondent carried out tax investigation on the Appellant and subsequently issued Value Added Tax assessment on 23rd July 2018.

4. The Appellant through its tax agent objected vide a letter dated 13th August 2018 and an online objection Application dated 14th August 2018. The Respondent via a letter dated 22nd September 2018 wrote to the Appellant requesting for additional documents.

5. Subsequently the Respondent issued its objection decision on 12th October 2018 confirming VAT assessment as follows:
<table>
<thead>
<tr>
<th>Assessment Reference no.</th>
<th>Tax Head</th>
<th>Tax Amount objectd</th>
</tr>
</thead>
<tbody>
<tr>
<td>KRA201812132885</td>
<td>VAT</td>
<td>748,678.62</td>
</tr>
<tr>
<td>KRA201812145593</td>
<td>VAT</td>
<td>1,045,660.35</td>
</tr>
<tr>
<td>KRA201812143200</td>
<td>VAT</td>
<td>463,001.16</td>
</tr>
<tr>
<td>KRA201812148357</td>
<td>VAT</td>
<td>278,025.61</td>
</tr>
</tbody>
</table>

6. The Appellant requested for ADR but the process collapsed and the matter referred to the Tribunal for determination. The Appellant filed the Appeal with the Tribunal on 9th November 2018.

THE APPEAL

7. The Appeal is premised on the hereunder filed documents and proceedings before the Tribunal:

   a) The Appellant’s Memorandum of Appeal and Statement of Facts d filed on the 9th November, 2018 together with the documents attached thereto.

   b) The Appellant’s written submissions filed on 16th September, 2019.

8. The Appellant in its Memorandum of Appeal cited the following grounds for Appeal.

   i. That the Respondent never took into account the sales reports and ledgers when arriving at sales for VAT purpose. The Appellant submitted the table below which it avers were from its system;
### SALES ANALYSIS

<table>
<thead>
<tr>
<th>Month</th>
<th>Summary Report (Ksh)</th>
<th>Exclusive Sales A (Ksh)</th>
<th>VAT B (Ksh)</th>
<th>Exempts Sales C (Ksh)</th>
<th>Total Sales From VAT Return (A+B+C) Ksh</th>
</tr>
</thead>
<tbody>
<tr>
<td>July-16</td>
<td>11,512,537</td>
<td>9,918,652.75</td>
<td>1,586,984.44</td>
<td>6,900.00</td>
<td>11,512,537.19</td>
</tr>
<tr>
<td>Aug-16</td>
<td>15,893,071</td>
<td>13,676,225.03</td>
<td>2,188,196.00</td>
<td>28,650.00</td>
<td>15,893,071.03</td>
</tr>
<tr>
<td>Sept-16</td>
<td>13,247,989</td>
<td>11,413,309.49</td>
<td>1,326,129.52</td>
<td>8,550.00</td>
<td>13,247,989.01</td>
</tr>
<tr>
<td>Oct-16</td>
<td>12,068,494.80</td>
<td>10,387,581.74</td>
<td>1,562,013.08</td>
<td>18,900.00</td>
<td>12,068,494.82</td>
</tr>
<tr>
<td>Nov-16</td>
<td>13,701,922</td>
<td>11,804,631.03</td>
<td>1,388,740.96</td>
<td>8550.00</td>
<td>13,701,921.99</td>
</tr>
<tr>
<td>Dec-16</td>
<td>12,889,011</td>
<td>11,109,792.24</td>
<td>1,777,566.76</td>
<td>1,650.00</td>
<td>12,889,009.00</td>
</tr>
</tbody>
</table>

The Appellant stated that the Commissioner never took into account the sales reports and ledgers when arriving at the sales for VAT purposes. As a result, the Appellant avers the Respondent did assessment from sales not consistent with its sales summaries.

ii. The Appellant submitted that the sales used for the assessments were as shown in the table below:

### SALES ADDITIONAL ASSESSMENT

<table>
<thead>
<tr>
<th>Month</th>
<th>Exclusive (in Kshs)</th>
<th>VAT (in Kshs)</th>
<th>Inclusive (in Kshs)</th>
<th>Exempt (in Kshs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jul-16</td>
<td>12,812,410.00</td>
<td>2,49,985.60</td>
<td>14,862,395.60</td>
<td>6,900.00</td>
</tr>
<tr>
<td>Aug-16</td>
<td>20,076,288.25</td>
<td>3,212,206.12</td>
<td>23,288,494.37</td>
<td>12,000.00</td>
</tr>
<tr>
<td>Sept-16</td>
<td>9,532,306.00</td>
<td>1,525,168.96</td>
<td>11,057,474.96</td>
<td>8,550.00</td>
</tr>
<tr>
<td>Oct-16</td>
<td>11,333,644.22</td>
<td>1,813,383.08</td>
<td>13,147,027.30</td>
<td>18,900.00</td>
</tr>
<tr>
<td>Nov-16</td>
<td>11,583,338.00</td>
<td>1,853,334.08</td>
<td>13,436,672.08</td>
<td>8,550.00</td>
</tr>
<tr>
<td>Dec-16</td>
<td>11,990,425.00</td>
<td>1,918,468.00</td>
<td>13,908,893.00</td>
<td>1,650.00</td>
</tr>
</tbody>
</table>
iii. The Appellant avers that this led to the difference as tabulated in the table below:

<table>
<thead>
<tr>
<th>MONTH</th>
<th>Exclusive (Kshs)</th>
<th>VAT (Kshs)</th>
<th>Inclusive (Kshs)</th>
<th>Exempt (Kshs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jul-16</td>
<td>2,893,957.25</td>
<td>463,001.16</td>
<td>3,356,758.41</td>
<td>-</td>
</tr>
<tr>
<td>Aug-16</td>
<td>6,400,063.22</td>
<td>1,024,010.12</td>
<td>7,424,073.34</td>
<td>16,650.00</td>
</tr>
<tr>
<td>Sept-16</td>
<td>1,881,003.49</td>
<td>300,960.56</td>
<td>2,181,964.05</td>
<td>-</td>
</tr>
<tr>
<td>Oct-16</td>
<td>946,062.48</td>
<td>151,370.00</td>
<td>1,097,432.48</td>
<td>-</td>
</tr>
<tr>
<td>Nov-16</td>
<td>221,293.03</td>
<td>35,406.88</td>
<td>256,699.91</td>
<td>-</td>
</tr>
<tr>
<td>Dec-16</td>
<td>880,632.76</td>
<td>140,901.24</td>
<td>1,021,534.00</td>
<td>-</td>
</tr>
</tbody>
</table>

From the tabulations, the Appellant stated that the additional assessment was done upward except for the month of September 2016 and November 2016 where the Respondent understated its sales other than what was in its records.

iv. On sales the Appellant submitted that it disputed with the additional assessment since it resulted to overstated sales other than what its records for the months of July 2016, August 2016, October 2016 and December 2016 depict. According to the Appellant, in the Months and September 2016 and November 2016, the additional assessment resulted in understated sales other than what was in its sales. The Appellant insisted that as per its sales (Schedule I and VI), the sales have been shown in the record of sales or output sales and the same match with its original return. The Appellant explained that it also uses an accounting system with a connected ESD machine where all its sales documents are generated through the device.
Regarding purchases, the Appellant submitted that some suppliers issue it with trade discounts. The Appellant avers that the Respondent disallowed that with the assertion that this was duplication of invoices while it was merely attempting to disclose the discounts issued. The Appellant also listed the invoices disallowed whose summary it gave as follows:

A. In August 2016 the original assessment showed input VAT of Kshs. 1,310,989.86. on the other hand, the additional assessment showed input VAT of Kshs. 1,289,339.63 giving a difference of Kshs. 21,650.23. The Appellant submitted that a close analysis of the same showed the list of invoices were omitted. The Appellant disputes this since it claims that the invoices used are in its possession and will be provided if required.

B. In September 2016 the original assessment showed input VAT of Kshs. 1,547,492.35 while the additional assessment showed input VAT of Kshs. 1,274,013.40. The difference was Kshs. 273,478.96. The Appellant avers that a close analysis of the same showed the list of invoices were omitted. The Appellant disputes this as it claims that the invoices used are in its possession and will be provided if they are required.

C. In October 2016 the original assessment showed input VAT of Kshs. 1,851,986.52 while the additional assessment showed input VAT of Kshs. 1,285,980.47. According to the Appellant there was a difference of Kshs. 566,006.05. The Appellant stated that an analysis of the same the list of invoices (showed in Appendix III) were omitted. The Appellant disputes this as it claims that the
invoices used are in its possession and will be provided if they are required.

D. November 2016: The original assessment showed input VAT of Kshs. 1,109,962.58. on the other hand, the additional assessment showed input VAT of Kshs. 796,530.09. The difference was Kshs. 313,432.49. The Appellant claims that a close analysis of the same the list of invoices (showed in Appendix IV) were omitted. This the Appellant disputes as it avers the invoices used are in its possession and will be provided if they are required.

E. December 2016: The original assessment showed input VAT of Kshs. 3,012,748.79. on the other hand, the additional assessment showed input VAT of Kshs. 2,404,971.41. The difference was Kshs. 607,777.38. The Appellant claims that a close analysis of the same showed that the list of invoices (shown in Appendix V) were omitted. The Appellant disputes this as it claims that the invoices used are in its possession and will be provided if they are required. In addition The Appellant stated that there were some invoices that had been omitted in its original return but incorporated in the additional assessment amounting to input VAT of Kshs 34,360.00. (Appendix VI).

**Appellant’s Prayers**

The Appellant prays that;

a) That in the Commissioner’s computation of the input VAT, refers to the sales summary to arrive at the correct sales for VAT purpose. The Commissioner was
in error in arriving at the gross sales unlike the submitted sales register contrary to Section 42(1), (2)(a) of the VAT Act No.35 of 2013.

b) In computing the output VAT, the Commissioner rejected some invoices to arrive at the VAT payable. The invoices recognized the credit from the discount as per the invoices were valid as per Section 42(3) of VAT Act 470 No.35 of 2013.

THE RESPONDENT’S CASE

9. The Respondent’s case is premised on the hereunder filed documents and proceedings before the Tribunal: -

c) The Respondent’s Statement of Facts dated 7th February 2019 and filed on the 8th February, 2019 together with the documents attached thereto.

d) The Respondent’s written submissions dated and filed on 9th October, 2019.

10. The Respondent submitted that through its data driven compliance initiative it established that the Appellant had mismatches on its sales and purchases. The Respondent avers that the Appellant had lumped sales and never recognised registered VAT claims as it is supposed to be done.

11. The Respondent averred that further investigations established that the Appellant combined purchase invoice numbers with credit notes issued hence creating confusion on legality of claims.

12. The Respondent averred that the additional assessments were confirmed on all non-declared sales as per the mismatches identified and the duplicated purchase invoices as given in the table below:
<table>
<thead>
<tr>
<th>PIN No</th>
<th>Month</th>
<th>VAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>July</td>
<td>463,001.25</td>
</tr>
<tr>
<td>2</td>
<td>August</td>
<td>1,596,857.03</td>
</tr>
<tr>
<td>3</td>
<td>September</td>
<td>1,525,169.80</td>
</tr>
<tr>
<td>4</td>
<td>October</td>
<td>151,370.77</td>
</tr>
<tr>
<td>5</td>
<td>November</td>
<td>281,266.80</td>
</tr>
<tr>
<td>6</td>
<td>December</td>
<td>414,166.53</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>4,431,832.18</strong></td>
</tr>
</tbody>
</table>

13. The Respondent averred that its analysis of the mismatch data together with purchases claims in VAT3 which were duplicated revealed the following as summarised:

Table A

<table>
<thead>
<tr>
<th>PERIOD</th>
<th>NON-DECLARED SALES(From Mismatch data)</th>
<th>VAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec-16</td>
<td>880,632.50</td>
<td>140,901.20</td>
</tr>
<tr>
<td>Oct-16</td>
<td>946,062.50</td>
<td>151,370.00</td>
</tr>
<tr>
<td>Aug-16</td>
<td>6,400,063.25</td>
<td>1,024,010.12</td>
</tr>
<tr>
<td>Jul-16</td>
<td>2,893,757.25</td>
<td>463,001.16</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>11,120,515.50</strong></td>
<td><strong>1,779,282.48</strong></td>
</tr>
</tbody>
</table>

14. The Respondent stated that its analysis of the overstated sales from duplicated invoices were as summarised below;
<table>
<thead>
<tr>
<th>Period</th>
<th>Overstated Sales (Duplicated Invoices)</th>
<th>VAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec-16</td>
<td>3,798,608.75</td>
<td>607,777.40</td>
</tr>
<tr>
<td>Oct-16</td>
<td>3,537,537.81</td>
<td>566,006.05</td>
</tr>
<tr>
<td>Aug-16</td>
<td>135,313.75</td>
<td>21,650.20</td>
</tr>
<tr>
<td>Sept-16</td>
<td>1,709,243.13</td>
<td>273,478.90</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>9,180,703.44</strong></td>
<td><strong>1,468,912.55</strong></td>
</tr>
</tbody>
</table>

15. The Respondent based on the above additional assessments and computations of VAT due done as below;

<table>
<thead>
<tr>
<th></th>
<th>Total Table A</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>11,120,515.50</td>
<td>1,179,282.48</td>
</tr>
<tr>
<td>Total Table B</td>
<td></td>
<td>9,180,703.44</td>
</tr>
<tr>
<td><strong>Total Tax</strong></td>
<td></td>
<td>20,301,218.94</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1,468,912.55</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3,248,195.03</td>
</tr>
</tbody>
</table>

16. The Respondent submitted that the Appellant objected to the assessments and claimed to have declared all the sales correctly and input tax without exaggeration as the Respondent had established.

17. The Respondent contended that the mismatch had arisen as a result of lumping of sales in VAT3 returns and duplicate purchase invoices arose as a result of using the same invoices on purchases in accounting for discounts received for the year 2016.

18. The Respondent stated that the Appellant did not respond to the Demand letter dated 23rd July 2018. It further avers that the Appellant failed to submit supporting documents for both income tax and VAT to prove that indeed all sales were declared and the purchases claimed could be supported by invoices and payments made.
19. The Respondent further averred that the Appellant emailed purchase analysis without supporting documents and therefore the assessments could not be amended.

20. In response to the Appellant's grounds of appeal the Respondent argued as follows:

a) That the Appellant did not support its objection as required by submitting the required documents to wit purchase ledgers, VAT control account ledger, supplier certified statements and bank statement proving payment of the supplies. According to the Respondent therefore, there wasn't sufficient material evidence to vacate the assessment.

b) The Respondent stated that the assessment was based on the known transactions of the Appellant and was in conformity with Section 51(8) of the TPA with respect to inquiry by an authorised officer and therefore the confirmation notice was issued with strict conformity to Section 51 of the TPA.

c) That the Appellant in lodging its objection had a duty to provide supporting evidence which was never provided. In addition, the Appellant was contacted through emails and phone contacts as appears on the iTax registration details but there was no response. The contention that the Respondent failed to consider evidence is erroneous as no evidence was provided during the objection process.

d) The Respondent maintained that the principal taxes, interest and penalties were due and payable by the Appellant as was communicated to the Appellant in the objection decision.
21. The Respondent contended that the burden of proving payment of taxes is on the Appellant as provided for under Section 56(1)(4) of the TPA.

22. The Respondent relies on Section 73 of the Income Tax Act which provides that;

Assessments

“(1)...

(2) Where a person has delivered a return of income, the Commissioner may-

a. (i) accept the return and deem the amount that person has declared as his self-assessment in which case no further notification need be given; or

(ii).....

b. If he has reasonable cause to believe that such return is not true and correct, determine, according to the best of his judgement, the amount of the income of that person and assess him accordingly.

(3) Where a person has not delivered a return of income for any year of income, whether or not he has been required by the Commissioner so to do, and the Commissioner considers that the person has income chargeable to tax for that year, he may, according to the best of his judgement determine the amount of the income of that person and assess him accordingly; but such assessment shall not affect any liability otherwise incurred by such person under this act in consequence of his failure to deliver the return.”

23. According to the Respondent, Section 29(1) of the TPA allows it to use such information as may be available to him and to the best of his judgement to issue a tax assessment to a taxpayer who has failed to submit a tax return. The Section provides thus:

“29(1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of
his or her judgement, make an assessment ("referred to as a default assessment").

24. The Respondent averred that Section 52B(1)b of the Income Tax Act requires a person to file a return of income and assess how such tax is payable by him/her from all the sources of income. The Section states that:

"every person, other than an individual chargeable to tax under the act shall for any accounting period commencing on or after 1st January, 1992 furnish to the Commissioner a return of income, including a self-assessment of his tax on such income, not later than the last day of the sixth month following the end of his accounting period"

25. The Respondent submitted that in absence of evidence/records to prove otherwise, the Respondent for all intent and purposes of tax law; he acted within its mandate and within the law and the same was properly assessed.

26. The Respondent averred that he served the assessment notice explaining the reasons for the assessment and invited the Appellant to provide records in support of their objection. The Respondent added that he accorded the Appellant sufficient time to avail the relevant records that would enable it to determine its tax liability.

27. The Respondent claimed that the Appellant failed to produce sufficient records to support any of the claims contended in their Memorandum of Appeal. He stated that the Appellant was accorded sufficient time and notices to avail all the relevant records for considerations but failed to do so.

28. The Respondent further stated that the Appellant raised facts in its objection but did not offer evidence in support. The Evidence Act (Cap 80) Laws of Kenya, is clear on the issue of facts that he who alleges any fact or claim, it is upon them to prove it.
29. The Respondent submitted that Section 56(1) of the TPA, 2015 as regards objection and appeals provides that:

"56(1) In any proceedings under this part the burden shall be on the tax payer to prove that a tax decision is incorrect"

30. In its written submissions of 9th October 2020 the Respondent stated that the Appeal is incompetent for failing to abide by Rules 4 and 5 of the Tax Appeals Tribunal (Procedure) Rules 2015 and therefore not properly before the Tribunal

31. The Respondent cited Rules 4 and 5 which provide as follows;

"4. Memorandum of appeal

"(1) A Memorandum of Appeal referred in rule 3(2) shall-

(a) Be signed by the Appellant

(b) Set out concisely under distinct heads, numbered consecutively, the grounds of appeal without argument or narrative:

(c) Contain an index of all documents in the appeal with number of pages at which they appear; and

(d) Be accompanied by a copy of the

i. Tax decision; and

ii. Notice of appeal"

5. Statement of Facts of appellant

(1) Statement of fact signed by the appellant shall set out precisely all the facts on which the appeal is based and shall refer specifically to documentary evidence or other evidence which it is proposed to adduce at the hearing of the appeal."
32. The Respondent stated that it had painstakingly perused the Appeal filed countless times but could not find any grounds of appeal nor the Appellants or its agents signature. The Respondent urges the Tribunal to find that there is no Appeal before it capable of being adjudicated upon as the law is couched in mandatory terms.

33. The Respondent averred that the Appellant is praying for no reliefs/prayers and as such the purported Memorandum of Appeal is only liable for dismissal. The Respondent quoted the case of *Caltex oil (Kenya) LTD v Rono Limited*[2006] eKLR Civil Appeal 97 of 2008 which the Court of Appeal held that;

"This Appeal raises two important issues. The first relates to the jurisdiction of this court as to whether the court has powers to grant an order not specifically pleaded in the plaint, pleadings are a shield and a sword for both sides. They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

34. The Respondent therefore avers that by virtue of the absence of any prayer, it is its submission that the Tribunal has no jurisdiction.

35. The Respondent also addressed the issue of whether it exercised its statutory power diligently and within the law, and if the objection decision was proper in law. The Respondent stated that it is crystal clear that the Respondent carried out invoice verification and after the exercise requested for additional documents
from the Appellant to enable it conclude the invoice validation exercise. The Respondent avers that belatedly, that which ought to have been done during verification is being done through submissions filed on 16th September 2019. He stated that indeed, during verification that was still the case.

36. The Respondent stated that the Appellant and its agents despite being given ample time, failed to avail the documents requested in support of its transactions. This they stated was captured in the decision as contained in the letter dated 12th October 2018. The Respondent asserted that Section 43 of the Value Added Tax Act provides duty to keep for records. The Section provides that;

"Keeping Records
(1) Every registered person shall, for the purposes of this act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein.
(2) The records to be kept under subsection (1) shall include-

a) Copies of all tax invoices and simplified tax invoices issued in serial number order;

b) Copies of all credit and debit notes issued, in chronological order;

c) Purchase invoices, copies of customs entries, receipts for the payment of customs duty or tax, and credit and debit notes received, to be filed chronologically either by date or receipt or under each supplier’s name;

d) Details of the amounts of tax charged on each supply made or received and in relation to all services to which section 10 applies, sufficient written evidence to identify the supplier and the recipient, and to show the nature and quantity of services supplied,
the time of supply, the place of supply, the consideration for the supply, and the extent to which the supply has been used by the recipient for a particular purpose;

e) Tax account showing the totals of the output tax and the input tax in each period and a net total of the tax payable or the excess tax carried forward, as the case may be, at the end of each period;
f) Copies of stock records kept periodically as the commissioner may determine;
g) Details of each supply of goods and services from the business premises, unless such details are available at the time of supply on invoices issued at, or before, that time; and
h) Such other accounts or records as may be specified, in writing by the Commissioner.

(3) Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorised officer for inspection and shall give the officer every facility necessary to inspect the records

(4) For purposes of this section, the Commissioner may, in accordance with the regulations, require any person to use an electronic tax register, of such type and description as may be prescribed, for purpose of accessing information regarding any matter or transaction which may affect the tax liability of the person.

(5) A person who contravenes any of the provisions of this section commits an offence.”

37. The Respondent stated that by failing to abide by Section 43(1), 43(2)b and 43(3) the Appellant left the Respondent with no alternative but to disallow input VAT as claimed in the duplicated and mismatched invoices. It is the Respondent’s submission that contrary to what the Appellant would want this Honourable
Tribunal to believe, the good and valid reason was to be proffered to the Respondent during verification, which the Appellant failed to do.

38. In addition, the Respondent cited Section 59 of the Tax Procedures Act which provides as follows;

"59. Production of records

(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing to-

(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person’s custody or under the person’s control relating to the tax liability of any person.

(b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or

(c) Attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person."

39. The Respondent contended that as contained in the decision dated 12th October 2018, the Appellant failed to avail documents as provided at Section 51(3)c of the Tax Procedures Act and as such its objection was rejected
Respondent's Prayers

40. The Respondent prayed that the Tribunal considers the same and finds that: -
   a) The confirmed assessments were proper in law.
   b) That the Appeal be dismissed with costs to the Respondent.

ISSUES FOR DETERMINATION

41. Having considered the rival submissions of the parties, the Tribunal determined
    that the only issue for determination was whether the Respondent erred in its
    assessment of tax on the Appellant

ANALYSIS AND FINDINGS

Whether the Respondent erred in its assessment of tax on the Appellant.

42. To determine this the Tribunal perused through the documentation to establish
    whether the Appellant provided sufficient documentation to support its case.

43. The Respondent in arriving at its Objection Decision asserted that the Appellant
    failed to submit supporting documents for both income tax and VAT to prove
    that indeed all sales were declared and the purchases claimed could be supported
    by invoices and payments made.

44. Respondent submitted that further investigations established that the Appellant
    combined purchase invoice numbers with credit notes issued hence creating
    confusion on legality of claims.

45. The Appellant on its part submitted that some suppliers issue it with trade
    discounts. The Appellant stated that the Respondent disallowed that with the
    assertion that this was duplication of invoices. The Appellant added that
Respondent never took into account the sales reports and ledgers when arriving at sales for VAT purpose.

46. The Tribunal notes that the Appellant in its list of documents attached to the Appeal included only the sales analysis and copies of some receipts. The Appellant had attempted to attach some documents with the submissions of 16th September 2019 without leave from the Tribunal and therefore the said documents were not considered in this analysis for being irregularly filed and for failure to accord the Respondent an appropriate opportunity to consider the same.

47. The Tribunal further noted that the Respondent had earlier on 22nd September 2016 requested for documents including Income Tax return for the period 2015 and accounts, creditors ledger of all the Appellant’s suppliers for 2015/2016 and contacts, Monthly/Annual supplier’s statements, bank statements, payment receipts for the suppliers and copy of the offer letter for all the loans. The Tribunal noted the averments by the Respondent to the effect that the Appellant did not provide any of the documents requested.

48. It was the Tribunal’s view that the Appellant ought to have provided at least documentation that it keeps to support its objection to the assessment and this Appeal as prescribed under Section 17(3) of the Value Added Tax Act. Section 17(3) of the VAT Act provides as thus:

"17(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)."

49. Further, the Respondent’s request for documentation is covered under Section 59 of the Tax Procedures Act, 2015 which provides that;

“(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to—

(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person; (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or

(c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.”

50. The Tribunal observed that even after the Respondent requested in writing for documentation, the Appellant failed to provide the same or even reply to the Respondent. The Appellant also failed to attach to its Appeal the documentation that it keeps as provided by the VAT Act.

51. Additionally, 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 under section 37. 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."

52. Based on the submissions of the parties, the law and case law cited above, the Tribunal finds that the Respondent did not err in its assessment of tax on the Appellant.

FINAL DECISION

53. The upshot of the foregoing is that the Appeal lacks merit and the Tribunal accordingly makes the following Orders:

   i. The Appeal is hereby dismissed

   ii. The Respondent’s confirmed assessment dated 12th October 2018 is hereby upheld.

   iii. Each party to bear its own costs.

54. It is so ordered.
DATED and DELIVERED at NAIROBI on this 23\textsuperscript{rd} day of July, 2021.

ERIC N. WAFULA
CHAIRMAN

CATHERINE N. MUTAVA
MEMBER

GABRIEL M. KITENGA
MEMBER

ABRAHAM K. KIPROTICH
MEMBER