

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.132 OF 2015

RABAI OPERATIONS & MAINTENANCE LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXESRESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company that was incorporated in Kenya in June 2008 but started its operations in September 2009. The Appellant's main activity is to operate and maintain the 90 MW Power Plant owned by Rabai Power Limited in accordance with the operations and maintenance agreement between the two companies, for which it collects revenue and incurs costs.
2. The Respondent is an agency of the Government of Kenya established under Section 5 of the Kenya Revenue Authority Act, Cap 469 Laws of Kenya and charged with the duty of assessing and collecting taxes on behalf of the Government.
3. On 19th November 2010, the Respondent issued a notice of intention to carry out a compliance tax audit against the Appellant for the period 2008-2010 and requested for the Appellant's financial data in support of the transactions in its books of accounts for the said period. The Appellant supplied the requested documents.
4. The Respondent carried out a compliance audit and had initially issued a notice of assessment dated 7th June 2012 for Kshs.20,211,475/=. In response to the Appellant's objection and in consideration of further documents and evidence availed by the Appellant, the assessment was revised vide a Value Added Tax assessment number 0220120000402 dated 10th October 2012 to Kshs.17,965,918/=.
5. The Appellant further objected to the revised assessment vide their letter dated 31st October 2012 and in accordance with Sections 32 and 33 of the VAT Act Cap 476, Laws of Kenya, now repealed.

6. The Notice of Assessment was confirmed by the Respondent on 8th November, 2012.
7. The period in respect of which the Respondent disallowed the Appellant's deduction of input VAT relates to August 2009 to August 2010. The Appellant was only able to file its returns after it was set up on Integrated Tax Management System (ITMS) in August 2011.
8. The Appellant filed the Notice of Appeal, Memorandum of Appeal together with the Statement of Facts on 20th December 2012 while the Respondent filed its Response on 12 February 2016, which was duly admitted out of time by consent of the parties on 7th of April 2016.

APPELLANT'S ARGUMENTS

9. The Appellant summarized the issues for determination as follows:
 - I. Does the Appellant have the statutory right to deduct the input VAT pertaining to the period when the Appellant was not registered for VAT under Section 11 of VAT (Cap 476) (now repealed)?
 - II. Was the right to deduct input VAT under section 11 of the VAT Act subject to the filing of returns and was there any reference to returns in the said section?
 - III. Was the late filing of the returns in any event caused by the failure in the Respondent's own ITMS?
 - IV. If the late filing of the return was caused by the Respondent's system failure, is it lawful, reasonable and procedurally fair under Article 47(1) of the Constitution of Kenya 2010, to require the Appellant to pay the tax twice?
10. The Appellant was registered for online Personal Identification Number (PIN) during August 2009. Then the Appellant deducted input VAT from output VAT charged by the Appellant, in accordance with Section 11 of Value Added Tax Act and remitted the balance amount to the Respondent each month, by using a PIN Number as VAT registration number was no longer necessary in accordance with Legal Notice number 95 of 2009 dated 11th June 2009.
11. The Appellant claimed that its attempts for online VAT registration under ITMS failed and in support, the computer generated messages were enclosed and hence could not file online VAT Returns. The

Appellant also stated that it tried to submit Manual VAT Returns but the same were not accepted for lack of VAT registration.

12. Subsequently, when the Appellant succeeded with the online VAT registration during August 2011, the VAT Returns for the period August 2009 to September 2010 were filed late by paying late filing fee.
13. The Appellant argued that pursuant to Section 11 of the VAT Act ,Cap 476, now repealed, the input tax can be deducted from the output tax as long as it was not deducted after the time period set out in Section 11(1)(a). It was argued that the time period provided within Section 11(1)(a) was 12 months after the input tax became due and payable and in this case, 12 months after the supplier's invoice. The Appellant contended that it had all the relevant invoices and maintained all records under paragraph 1 of the Seventh Schedule, and therefore could not be barred from deducting input tax.
14. On the right to deduct input VAT under Section 11 of the VAT Act and whether it was subject to filing of returns, the Appellant argued that there was no reference whatsoever to the word 'return' in Section 11 of the VAT Act. The Appellant argued that tax Laws must be interpreted by applying the plain and clear meaning of the wording of the statute and relied on the case of *T.M. Bell -v- The Commissioner of Income Tax (1960) EALR 224 which was applied in the case of R -vs- Commissioner of Domestic Taxes ex Parte Barclays Bank of Kenya Limited (Misc. Application no. 1223 of 2007.*
15. The Appellant submitted that its statutory right to deduct input VAT was not subject to filing of VAT returns and that the late filing of Returns was caused by the failure of the Respondent's own online system, ITMS.
16. The Appellant contended that Article 47 (1) of the Constitution of Kenya 2010 gave the Appellant its statutory right to deduct input tax and that the Respondent's action is in contravention of the Appellant's right under the said statute.
17. Moreover, the Appellant argued that the Respondent conveniently accepted Real Time Gross Settlement (RTGS) remittance of net VAT amount without insisting on the VAT registration.
18. The Appellant further contended that the Respondent accepted the payment of net VAT, which was remitted by the Appellant each month by RTGS and hence the Respondent's action of refusing input

tax, amounts to double taxation, which is an infringement of the Appellant's Constitutional right.

RESPONDENT'S ARGUMENTS

19. According to the Respondent there are only two issues for determination of the appeal as hereunder;
 - i) Whether input tax claimed by a registered person through VAT 3 form filed more than 12 months late should be considered time barred pursuant to Section 11 (1) (a) of the Value Added Tax Cap 476 of the Laws of Kenya.
 - ii) Whether late filing penalties should be charged on VAT 3 Returns filed late pursuant to the Seventh Schedule Paragraph 9 (2), which was paid by the Appellant.
20. The issue relating to claiming the input VAT arose when the registered taxpayer claimed input VAT of Kshs.9,417,648/= on VAT 3 returns that were filed more than 12 months late for the period August 2009 to August 2010. The Respondent argued that the same was beyond the permissible period allowed under Section 11(1)(a) of the Value Added Tax Cap 476 of the Laws of Kenya.
21. After the Appellant managed to register online for VAT, it filed VAT Returns for the period August 2009 to September 2010 late and hence the late filing of the VAT 3 Returns attracted a penalty, which was paid by the Appellant,
22. The Respondent claimed that during the period when ITMS was malfunctioning, there was a provision to register for VAT and file VAT Returns manually.
23. The Respondent further submitted that Input VAT is deductible from Output VAT in accordance with the provisions of Section 11(1)(a). They stated that the said Section is explicit on the deduction of input tax, that no input tax will be deducted more than twelve months after that input tax becomes due and payable and further that the section prohibits input tax that is more than twelve months, being claimed. They contended that a registered person can only talk of claiming input tax by filing the VAT 3 Form and the Respondent has given clear details on how to proceed in respect of the issue in its Regulations.

ANALYSIS AND FINDINGS

24. The Tribunal will address the issues of both the Appellant and the Respondent simultaneously as hereunder.
25. While agreeing with the Appellant that the word 'return' does not appear in Section 11(1) of VAT Act Cap 476 Laws of Kenya, it is clear that the said Section should be construed in reference to other related provisions of the Act and not in isolation.
26. The Tribunal notes that the only way one can claim deduction of input VAT is by filing the VAT Returns. Hence, the Tribunal finds that it does not agree with the argument of the Appellant that there can be any other way to claim input VAT except by way of declaring the same in the VAT Returns.
27. Section 11 (1) 1A provides that "*No input tax or tax withheld shall be deducted under subsection (1) unless a registered person (emphasis of the Tribunal) is in possession of a tax invoice issued under paragraph (1) of the Seventh Schedule*". The Section is express on the deduction of input tax, that no tax may be deducted more than twelve months after that input tax becomes due and payable. Therefore the Section prohibits input tax that is more than twelve months. This therefore distinguishes the Appellant's authority that tax statutes must be clearly interpreted in the plain meaning as the same is irrelevant on the issue herein.
28. The Appellant argued that Article 47(1) of the Constitution of Kenya 2010 gave it the Constitutional Right to deduct input VAT, and failure by the Respondent in allowing the input VAT is in contravention of its constitutional right as enshrined in the Constitution. However, the Tribunal notes that the Appellant did not provide any persuasive evidence to reach the required threshold to satisfy its eligibility to deduct input VAT. In the circumstances the Tribunal finds that the Respondent was not in breach of Article 47(1) of the Constitution of Kenya.
29. It is worth noting that if a business is not registered for VAT, it can neither charge VAT to its customers nor claim any input VAT. Indeed non-registration by the Appellant for VAT disadvantages the Appellant's customers, who cannot claim input VAT.
30. By dint of legislation, the Tribunal finds that to be able to claim input VAT, one must satisfy the following requirements;

- I. Claimant must be registered for VAT;*
 - II. The goods or services must have been supplied to the claimant or the goods have been imported by the claimant directly;*
 - III. The goods or services are used or will be used for the purpose of claimant's business;*
 - IV. Local purchases must be supported by valid tax invoices addressed to the claimant,*
 - V. Imports must be supported by import permits which show the claimant as the importer of the goods;*
 - VI. The input tax is directly attributable to taxable supplies (i.e. standard-rated supplies and/or zero-rated supplies).*
31. The Tribunal notes that although the VAT Registration was dispensed with by using PIN for all tax purposes, the online VAT registration was mandatory and not dispensed with.
 32. During the period when ITMS was malfunctioning, there was a provision to register for VAT and file VAT Returns, manually. The Appellant reiterated that its efforts to file manual Returns were futile as the Respondent refused to accept the manual Returns filed by them. However, the Appellant did not provide any satisfactory evidence in support of its claim in this regard. The computer generated messages to prove the Appellant's claim that their efforts to register for VAT were futile due to the malfunctioning of ITMS cannot be considered as any satisfactory evidence as those messages did not bear any particulars to prove their claim.
 33. In view of the foregoing, the Tribunal is satisfied that the Appellant did not register for VAT either electronically or manually and failed to file VAT Returns within the stipulated period.
 34. In the circumstances the Tribunal finds that this Appeal lacks merit and is hereby dismissed and the Respondent's Notice of Assessment is hereby upheld.
 35. As the Respondent gained benefit from the remittance of net VAT through RTGS from the Appellant, the Tribunal makes no orders as regards costs.
 36. Orders accordingly.

DATED and DELIVERED at NAIROBI this 9th Day of December, 2016.

In the presence of:-

OSBORNE WANYOIKE
MARK KOBAGA
ZABLON OKWOKWO for the Appellant

GEORGE KARANJA for the Respondent


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A. G. N. KAMAU
CHAIRPERSON


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PONANGIP ALLI V. R. RAO
MEMBER


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JOSEPHINE K. MAANGI
MEMBER


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WILFRED N. GICHUKI
MEMBER