REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.73 OF 2016

THOMAS AND PIRON GRANDS LACS LIMITED.....APPELLANT

-VERSUS-

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

## JUDGEMENT

### INTRODUCTION

1. The Appellant Thomas and Piron Grands Lacs Limited (TPGL Limited) is a private limited company incorporated under the Companies Act (Cap 486) Laws of Kenya in 2011. Its principal business is construction of residential and commercial development projects. It is certified by the National Construction Authority as Class A Contractor.
2. The Respondent is a Statutory Corporation duly established under the provisions of the Kenya Revenue Authority Act Cap 469 of the Laws of Kenya as the sole Agent of the Government of Kenya for the assessment and collection of all taxes by administering the various tax laws of the country.

### BACKGROUND

3. The Respondent vide its letter of 1st September 2015, requested the Appellant to produce books, records and documents including copies of Audited Accounts for the years 2012 to 2014 and Income Tax Returns. The Appellant submitted the requested documents to the Respondent through its letter dated 9th September 2015.
4. The Respondent issued a Notice of Intention to Audit the Appellant for the years 2013 to 2015 pursuant to Section 56 of the Income Tax Act (ITA) and Section 48 of the Value Added Tax Act, Cap 476 (VAT), Repealed, and the Value Added Tax Act, 2013 (VAT) in its letter dated 29th September 2015 which required the Appellant to avail 26 documents for Audit purposes.

5. In its letter dated 4th October 2015, the Appellant requested for additional time up to 20th November 2015 to collate the requisite documentation which the Respondent granted taking cognisance of the volumes of documents required.

6. Subsequently, meeting was held between the parties on 3rd December 2015 wherein the Appellant explained its operations and also provided the information requested by the Respondent.

7. The Respondent, after perusing the documents, issued a Notice of Additional Assessment to the Appellant in its letter dated 1st April 2016, citing the issue of self-supply services which required VAT to be charged. The Appellant objected to the Additional Assessment in its letter dated 1st May 2016.

8. The Respondent acknowledged the letter of Objection as a valid Notice of Objection in its letter dated 5th May 2016. In the same letter, the Respondent informed the Appellant that the taxes had been stood over pending settlement of the Objection.

9. The Respondent in its letter to the Appellant dated 17th May 2016 confirmed the VAT Assessment of Kshs.21,175,415/=. In its letter to the Respondent dated 17th June 2016, the Appellant objected to the confirmed assessment and issued a Notice of Intent to Appeal against the same.

## THE APPEAL

10. The Appellant in its Memorandum of Appeal raised three issues in respect of VAT on Residential Development, self-supply to the Appellant's construction and an Order to set aside the VAT assessment of Kshs.21,175,415/=

11. The Appellant who undertakes construction of residential and commercial development argues that it did not claim VAT as input tax nor was any VAT paid or charged on sale of units. This treatment was adopted in compliance with the First Schedule of the VAT Act, Part 2 Chapter 8 which exempts such services. The Appellant developed its first project of residential houses for purposes of sale at Athi River.

12. The Appellant alleged that the Respondent had taken the view that TPGL Limited being an accredited contractor is supplying to itself construction services hence such supply being treated as taxable supplies to the Appellant.

13. The Appellant argued that the Respondent relied on the definition of "Supply" as contained in Repealed VAT Act Cap 476 Section 2 under definition of "Supply" (F) prior to September 2013 and the VAT Act 2013 Section 2, under definition of "Supply of Services"(C). The above referenced VAT Act 2013 Section 2 (C) defines supply of services as "anything done that is not a supply of goods or money including the making available of any facility or advantage"

14. The Appellant contends that the services it provided do not fit the above definition on the following grounds:

    i. The contracting services that it provides cannot be deemed to be a facility or an advantage.

    ii. The Respondent has selectively picked Section 2 Part C of the VAT Act 2013, as their point of reference without reading part A of the same Act which states that "Supply of services includes the performance of service for another person". In the case of the subject project, the services were not to another person but to itself, hence nontaxable.

    iii. The Appellant stated that the bulk of the services performed on the project were subcontracted and not performed directly by it. Consequently, no input VAT was claimed on such services and therefore it is unlawful for the Respondent to charge VAT without looking at the totality of the business transaction and the relevant Act.

    iv. The Appellant contends that the Respondent made reference to the Repealed VAT Act prior to September 2013, Cap 476 Section 2, part F which defines the supply of services to include;

        **(a)** "The provision of taxable services by a contractor to himself in constructing a building and related civil engineering works for his own use, sale or renting to other persons", part A defines the supply to include "the sale, supply or delivery of taxable services to another person".

15. The Appellant disagreed with the Respondent's argument that the services it provides fall under Part F and further stated that the same services are also subject to Part A in which case such services would not be deemed as taxable supplies.

**THE RESPONSE**

16. After the initial Audit which was carried out through perusing the documentation and interviews with the Appellant, it was established that the Appellant had developed 40 residential units for sale in Kitengela Area of Machakos County, hereinafter called Graceland Project with financing from both the directors' capital injection and a loan from Eco-Bank Limited drawn between the years 2013-2014. The Appellant started by building 20 units of the Graceland project between 2012 and 2013.

17. The Respondent in the course of the Audit and interviews established that neither output tax was charged nor was any input tax claimed on costs directly related to the Graceland project.

18. The Respondent averred that the Appellant was a receiver of construction service from itself from the development of the Graceland project. The project was developed to make available an advantage or an asset and selling the same to potential investors.

19. The Respondent further observed that the Appellant made supply to itself which amounted to self-supply and the same was found to be taxable. The said decision was based on the definition of "Supply of services" under the VAT Act, 2013 and the definition of "supply" under the VAT Act, Cap 476, repealed.

20. The Respondent after critically examining the documents and explanations availed by the Appellant, issued a Notice of Additional VAT Assessment on 1st April, 2016 and demanded a sum of Kshs.21,175,415/=,(inclusive of interest) made up of KShs.4,919,379/= (prior to VAT Act 2013) and Kshs.16,256,036 (after VAT Act 2013)

21. The Respondent used the Appellant's general ledgers and treated all expenses before 1st September, 2013 to be supply under the First Schedule of the Value Added Tax Act, Part 2 Paragraph 8, and also observed that since the Appellant

was an accredited contractor, the construction services provided in the Graceland project was a taxable supply to self (self-supply).

22. The Respondent further affirmed that the Appellant in its Objection acknowledged that it had self-supplied itself but averred that the same was for residential premises which were exempt from VAT and referred to the Appellant's letter dated 1st May 2016, in which it stated as follows;

"Should the company be supplying itself such services, the nature of such a supply would still be residential which is exempt."

**ISSUE FOR DETERMINATION.**

23, The Tribunal has carefully considered the parties pleadings, documentation and arguments of the parties and is of the considered view that the issue for its determination is as hereunder:

- Whether the Respondent was correct in assessing VAT for supply of service for the construction service that the Appellant supplied itself under Value Added Tax, 2013.

24. In order to determine the issue herein, the Tribunal will consider the following salient issues simultaneously;

i. Whether there was a taxable supply

ii. Whether it is relevant that there was an issue of creation of a facility or an advantage,

iii. The nature of the amendment in the VAT Act, 2013 in the definition of supply

25. In its Submissions, the Respondent contended that VAT is a line tax and that the assessment on the Appellant was on the construction services supplied in the making available of the facility or advantage that is Graceland project and not the sale, hiring, letting or leasing of the individual unit or facility. It contended further that its demand is for VAT for the supply of construction services, in the creation of the units.

26. On its part, in respect of self-supply, the Appellant averred that the VAT Act 2013 amended the concept of self-supply. This Act unlike the Repealed Act Cap 476 does not provide for self-supply. The repealed Act expressly charged VAT on

construction services provided by a developer to self. The VAT Act limits the definition of taxable supply of goods and services to supplies made between unrelated parties and to separate related entities. The Appellant argued that if the framers of the VAT Act 2013, had intended to retain the provision, nothing would have stopped them from doing so.

27. The Appellant argued that the self-supply does not fall within the letter and spirit of the VAT Act. The VAT Act does not define the terms 'facility" or "advantage", but the Respondent relied on the Essential Law Dictionary which defines a facility as a building, a space, or the equipment used to provide some service or perform some function.

28. It is the Appellant's assertion that the Respondent has no mandate to interpret the statute. The Respondent can only exercise such powers as are conferred on it under the KRA Act. It could only enforce the provisions of the VAT Act as enacted. Therefore, any purported clothing of itself with any other function, such as interpretation of the tax statute, is ultra vires and of no consequence. The Appellant, to buttress its argument on the interpretation of statute, cited the following cases: ***Keroche Industries Limited v Kenya Revenue Authority and 5 others [2007] eKLR; Inland Revenue v Scottish Central Electricity Company 1931 SLT 405 and Commissioner of Income Tax v Westmont Power (K) Limited [2006] eKLR.*** *In addition, it relied on the case of* **Re *Hebatulla Properties Ltd [1979] eKLR.*** In this case Justice A.H.Simpson while delivering judgment stated as follows;

> ***"As correctly pointed out by Mr. Khanna, the Tribunal is a creature of Statute. It derives its power from the statute that creates it. Its jurisdiction being limited by statute it can do only those things which the statute has empowered it to do. Its powers are expressed and cannot be implied".***

29. The Appellant proceeded further and submitted as follows;

a) The VAT Act repealed the provisions on self supply present under the repealed Act.

b) The repeal of the provision of self supply was informed by government policy to address the acute housing shortage facing the country.

c) the Respondent has not brought the Appellant within the letter or spirit of the VAT Act,

d) Without prejudice to the foregoing, any ambiguity arising out of the interpretation of Section 2 of the VAT Act should be resolved in favour of the Appellant.

30. According to the Respondent the issue to be decided relates to the VAT Act, 2013. The VAT liability demanded by the Respondent after the ADR discussions is Kshs.13,769,325/= being the recomputed tax charge for the period September 2013 to December 2014. It averred that the Appellant had agreed to the factual computation but objected to the tax liability on a basis of law.

31. The Respondent submits that Section 2 of VAT, 2013 defines "supply of services" as provided, thus;

"supply of services" means anything done that is not a supply of goods or money", including_

(a) The performance of services for another person;

(b) The grant, assignment, or surrender of any rights;

(c) The making available of any facility or advantage; or

(d) The toleration of any situation or the refraining from the doing of any act;

32. It is the Respondent's contention that construction service is not an exempt supply within Part II of the First Schedule nor is it zero rated within the Second Schedule to the VAT Act, 2013 as such it attracts the 16% VAT rate as provided under Section 5(2)(b) which states as follows:-

"The rate of tax shall be-

(a) In the case of a zero-rated supply, zero percent; or

(b) In any other case, sixteen percent of the taxable value of the taxable supply, the value of imported taxable goods or the value of a supply of imported taxable services."

33. On the issue as to whether there was a "supply of service" the Respondent submits that having the word "including" is an expansionary word in nature and intended to bring other things which in normal circumstances would not be considered to be "supply of service". To buttress it's position, it stated that this

was so held by the Court of Appeal in **Mjengo Limited v Commissioner of Domestic Taxes; Civil Appeal No. 85 of 2014**; and also the case **Dilworth v Commissioner of Stamps [1899] A.C.99**, at page 105 Lord Watson of the House of Lords.

34. The Respondent further argued that the issue of whether a facility or an advantage was created or not does not arise as the definition of supply of service properly fits the construction service. Further the action of the Appellant in the Graceland project was both making available a facility and an advantage to the Appellant and the same is a supply of service as defined under Section 2(c) of the VAT Act, 2013.

35. On the question of "supply" the Respondent submits that Section 2 of the VAT Act (Cap 476) provides that "supply" includes:

(f) the provision of taxable services by a contractor to himself in constructing a building and related civil engineering works for his own use, sale or renting to other persons.(take it to analysis)

The Respondent submits that Section 2 of the VAT Act, 2013 defines "supply of services" as provided:

"supply of services" means anything done that is not a supply of goods or money".

36. In response to the Appellant's definition of "Business" under the VAT Act 2013, Section 2 thereof to the effect that for there to be business there must be consideration, the Respondent stated that the Appellant is misguided in view of the fact that this provision states as follows:

"business" means

(a) Trade, commerce or manufacture, profession, vocation or occupation;

(b) Any other activity in the nature of trade, commerce or manufacture, profession, vocation or occupation;

(c) Any activity carried on by a person continuously or regularly, whether or not for gain or profit and which involves, in part or in whole, the supply of goods or services for consideration; or

(d) A supply of property by way of lease, license, or similar arrangement.

37. The Respondent submits that Section 15 of the said Act clearly provides that "for use outside his business shall be taxable supply made by the person". Therefore the issue that there must be business for there to be consideration does not arise as it is outside the business.

38. The Respondent concludes its submissions that the Appellant could not be allowed by law to claim the input tax because it had been time barred by Section 17(2) of the VAT Act, 2013.The Additional Assessment was issued on 1st April, 2016 which was more than 16 months after the project. The Respondent submits that the Appellant's right to claim for input tax could have been allowed if it had been made within time.

**ANALYSIS AND FINDINGS**

39. In the course of the proceedings, the Tribunal, with the concurrence of the parties ordered the Appellant's Notice of Motion dated 16th September 2016 and filed on 21st September 2016 together with the Respondent's Notice of Preliminary Objection dated 28th October 2016, and filed on the same date, be withdrawn by consent of the parties. In the same breath, the Tribunal having been advised by the parties that they were discussing part settlement herein directed the parties on 3rd May 2017 to file their consent. In obedience to the same the parties filed a written consent on 7th June 2017 on the assessment under the repealed VAT Act Cap 476, which provided as follows:

**BY CONSENT,**

a. The Additional VAT Assessment for the period between January 2013 and August 2013 under Value Added Tax Act, Cap476 (now repealed) amounting to Kshs.4,919,379 inclusive of interest is hereby vacated;

b. The VAT liability for the period between September 2013 to December2014 under the VAT Act, 2013 is reviewed to Kshs.13,769,325/= inclusive of interest but the issue of whether it is payable under the law be determined by the Tax Appeals Tribunal; and

c. The parties to proceed for hearing of the Appeal in respect of the assessment on the VAT Act, 2013, on a point of law.

40. The Tribunal notes that in view of the foregoing consent of the parties, the effect is that there was a partial consent between the parties and the main issue left for its determination was the VAT assessment of Kshs.13,769,325/= charged under the VAT Act 2013.

41. The Tribunal, having considered the submissions of the parties and considering the two definitions of supply of service, it is evident that what the VAT Act, 2013 did was to expand the meaning of services which could be brought within the meaning of supply of service and did not exclude construction service. The new definition brought to charge services by other professions including doctors, lawyers and engineers who initially were not covered by the definition and not just those in the construction industry.

42. Moreover, it is not in dispute that the Appellant is a registered person in Kenya for the purposes of VAT. The Tribunal makes a finding that the Appellant provided to itself the construction services which is subject to tax. Consequently, on the issue of taxable supply the Tribunal finds that the Appellant provided to itself the construction services which is subject to tax under Section 15 of the VAT Act, 2013.

43. As to whether the Appellant created a facility or advantage, the Tribunal finds that the Appellant provided a facility or advantage by building Graceland project. The Respondent's demand for VAT is for the supply of construction services it provided in the creation of the units and not the sale, hiring, letting or leasing of the individual units or facility. The construction service is not an exempt supply within Part II of the First Schedule. It is not zero rated within Second Schedule of the VAT Act 2013. It attracts sixteen percent (16%) VAT as provided under Section 5(2)(b).

44. The Tribunal has carefully considered the case law cited by the Appellant and regret to note that the same do not lend credence to the issues of taxable supply or creation of facility or advantage. The cases merely relate to the eligibility of the Respondent to interpret the law, which was not an issue in this case. Indeed the Tribunal notes that these authorities were of no probative value.

45. The Tribunal finds that pursuant to the VAT Act, supply of services means anything done that is not a supply of goods or money, including:

(a) The performance of services for another person;

(b) The grant, assignment, or surrender of any rights;

(c) The making available of any facility or advantage; or

(d) The toleration of any situation or the refraining from the doing of any act;

(e) It is worth noting that the word **"including"** brought to charge other professions including doctors, lawyers and engineers who were not initially covered by the definition without leaving out people in the construction industry. The Respondent's reference to the Court of Appeal case in **Mjengo Limited -v- Commissioner of Domestic Taxes; Civil Appeal No. 85 of 2014; and Dilworth -v- commissioner of Stamps [1899] A.C. 99** at page 105 by Lord Watson of the House of Lords, is relevant as the two cases cited upheld the definition of supply of service and the word including.

46. On the issue raised by the Respondent that the Appellant could not be allowed by law to claim the input tax because it had been time barred by Section 17(2) of the VAT Act, 2013, the Tribunal makes a finding that it will not delve into the same as this was not an issue by the Appellant in its Appeal save that it was being sneaked in by the Respondent in the course of the parties discussions before the Appeal was filed and during the proceedings. It therefore does not lend much probative value to the outcome herein.

47. In view of the foregoing, the Tribunal finds that the Appeal has no merit and accordingly proceeds to dismiss it. The Tribunal upholds the Respondent's VAT assessment in the sum of Kshs.13,769,325/=

48. Each party shall bear its costs.

DATED and DELIVERED at NAIROBI this 13th day of December 2017.

In the presence of:

.....Starling Muchiri.....For the Appellant

.....Kemunto Ochako.....For the Respondent

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JOSEPHINE K. MAANGI
CHAIRPERSON

.....

WILFRED GICHUKI
MEMBER

.....

JOSEPH M. WACHIURI
MEMBER

.....

OMAR J. MOHAMMED
MEMBER

.....

GEOFFREY K.C .KATSOLEH
MEMBER