REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

INCOME TAX APPEAL NO. E097 OF 2020

COMMISSIONER OF DOMESTIC SERVICES .....APPELLANT

-VERSUS-

COMPUTECH LIMITED.....RESPONDENT

(Being an appeal from the Judgment of the Tax Appeals Tribunal dated 30/8/2020 in Tax Appeals Tribunal Appeal Number 148 consolidate with 344 of 2018 between Computech Ltd vs Commissioner of Domestic Taxes)

J U D G M E N T

1. Vide a letter dated 16/4/2018, the appellant issued a tax demand to the respondent following a review of the respondent's tax declarations in accordance with the provisions of ***section 5 (2) of the Kenya Revenue Authority, CAP 469 of the Laws of Kenya.***

2. In its review, the appellant had found that the respondent had used for the period of June 2016 to July 2016, invoices from suppliers to account for input VAT. The same invoices were used to account for expenses in the financial statements thereby reducing the respondent's income tax liability. A tax assessment of Ksh.37,079,093.00 was raised against the respondent.

3. The respondent was aggrieved by the tax assessment and appealed against the decision to the Tax Appeals Tribunal. The Tribunal delivered its judgment on 30/8/2020 allowing the appeal.

4. Being dissatisfied with the said judgment, the appellant appealed against the said decision and consequential order vacating the assessments of VAT of Ksh.12,897,228/- and Corporation Tax of Ksh.24,897,228/- on the following grounds:-

> ***"a) THAT the Honourable Tribunal erred in fact and in law in failing to appreciate that the dispute before it was based on Section 59 of the Tax Procedures Act 2015 which expressly gives power to the respondent to request the production of records and additional information which can fully satisfy the respondent where he is of the view that the information given is insufficient.***
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> ***b) THAT the Honourable Tribunal failed to appreciate and/or give due regard to the provisions of Section 43 of the VAT Act 2013, Section 54A of the Income Tax Act Cap 470 Laws of Kenya applicable to the dispute which requires the taxpayer to keep transactional records for a period of five years.***
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> ***c) THAT the Honourable Tribunal erred in both law and fact in failing to take into account and/ or disregarding evidence of fraud adduced by the Appellant in particular that the Appellant claimed local purchases in the sum of Kshs 80,607,679.00 and the supplier statements, invoices, delivery notes, payment vouchers and ETR Receipts for the claimed purchases were not availed to the Appellant.***
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> ***d) THAT the Tribunal erred in law in shifting the burden of proof to the Appellant contrary to the express provisions of Section 30 of the Tax Appeals Tribunal Act.***
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> ***e) THAT the Tribunal considered irrelevant factors and failed to consider relevant material evidence placed before it and thus it arrived at a wrong conclusion.***
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> ***f) THAT the Tribunal erred when it framed the wrong issues for determination thus asked itself the wrong questions and in so doing arrived at a wrong conclusion.***
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> ***g) THAT the Tribunal erred in fact by failing to appreciate that in this case there was revenue loss because there was no exchange of goods or services in respect of which VAT input was claimed by the Respondent.***

h) The Tribunal erred in fact and in law in failing to appreciate and distinguish the present case where there was no supply of any commodity, no economic activity and no transaction between the Appellant and the 2 "missing traders" with the case of Optigen (Taxation) [2006] EUECJ where there was actual trade in goods namely Central Processing Units (CPUs).

i) The Tribunal erred both in law and fact in ignoring all material placed before it and based its judgment on a biased approach without due regard to the balance of the scales of justice.

j) The Tribunal erred in law by making pronouncements on a criminal process which was not before it and which is outside the jurisdiction."

5. On the foregoing grounds the appellant prayed that the appeal be allowed and the judgment of the Tax Appeals Tribunal set aside.

6. In opposition to the appeal, the respondent filed a statement of facts dated 2/11/2020. The respondent contended that the Tribunal had considered all the relevant material placed before it and correctly held that the evidence before it supported the respondent's purchases and sales, the respondent's entitlement to a credit refund and that the respondent was not involved in any fraudulent VAT scheme.

7. It further asserted that it had discharged its burden of proof under the law as it had produced the relevant documentary evidence in support of its claim which the Tribunal appreciated. That on the other hand, the appellant had not provided any evidence to support its allegation of fraud by the respondent.

8. Both parties filed submissions which the court has carefully considered. The grounds of appeal may be collapsed into three as follows: -

a) Whether the Tribunal had misconstrued the provisions of sections 59 of the Tax Procedures Act?

b) Whether there was exchange of goods in respect of which the respondent was entitled to claim input VAT.

c) Whether the Tribunal erred in shifting the burden of prove contrary to section 30 of the Tax Appeals Tribunal Act?

9. In his submissions, the appellant did not address the first ground. The contention was that the Tribunal had failed to appreciate that under ***section 59 of the Tax Procedures Act, 2015,*** the appellant had the power to request for the production of records to satisfy himself on the accuracy of the information supplied.

10. I have considered the entire record and I have not seen anywhere where the Tribunal failed to appreciate that fact. To the contrary, there was no issue before the Tribunal about insufficiency of records. The only record missing was the so called stock movement record. However, the Tribunal found as a matter of fact that all the records required by the appellant for the assessment of tax had been produced to him as well as the Tribunal by the respondent. That ground fails.

11. On the second ground, the appellant submitted that the investigations he carried out revealed that the respondent's input VAT claim was based on purchases of goods that were not delivered.

12. On the other hand, the respondent submitted that for every invoice filed relating to its suppliers (Zulma Trading Limited and Halinto General Distributors), for the period in question, it received the goods from the suppliers, received correct invoices with corresponding ETR Receipts from the suppliers and made payments to the suppliers. That the goods purchased were then sold and delivered to its customers who were issued with invoices and ETR receipts.

13. On this issue, in paragraph 30 of its judgment the Tribunal observed: -

"The evidence placed before us and before the respondent during the audit fully supports the appellant's purchases and sales. It also sufficiently supports this Appeal on the Appellant's entitlement to a credit refund as per section 17 of the VAT Act, 2013. As such, the tribunal finds that the right to deduct input tax is an integral part of the VAT scheme and in principle may not be limited."

14. Further, in paragraph 33 thereof, the Tribunal found that the respondent had put forth a prima facie case for its entitlement to deduct input tax. That the respondent had discharged its burden of proof as provided for under ***section 56(1) of the Tax Procedures Act.***

15. I note that the appellant did not fault the documents relied on by the respondent to prove its case. To the extent that the Tribunal found the documents relied on by the respondent as sufficient, it cannot be faulted. The appellant did not, either before the Tribunal or before this Court, show what sort of documents that were lacking or that failed to back the respondent's claim for the Tribunal to be held to have erred in its finding.

16. The Court has considered the evidence produced by the respondent. The respondent provided the tribunal with evidence of: purchase orders, invoices, delivery notes, withholding VAT certificates, payments made to the suppliers for the goods delivered, agreements, delivery notes and invoices made to the respondent's customers for the goods delivered by the suppliers and sold to the respondent's customers. This documentary evidence is found at pages 32 to 35 and pages 69 to 184 of the record of appeal and was not impeached.

17. The Court finds no fault with the Tribunal on its finding on the said evidence. Having produced the said documents which were prima facie evidence of trading, the evidentiary burden of proof shifted to the appellant. The appellant did not impeach any of the said documents. Neither did he challenge them. That being the case, the respondent had discharged its burden of proof and the Tribunal's decision thereon

cannot be faulted. The respondent had discharged its burden under ***section 56(1) of the Tax Procedures Act.***

18. All that the appellant alleged was that the alleged 2 suppliers did not supply the alleged goods and that the monies paid to them by the respondent found its way back to the respondent. The appellant did not offer any evidence to prove that allegation. It should have, for example pointed out in the bank statement of the respondent the alleged back payments by the said suppliers. This it did not.

19. The next ground is whether the Tribunal erred in law in shifting the burden of proof to the appellant contrary to ***section 30 of the Tax Appeals Tribunals Act.*** The Tribunal noted in paragraph 33 of the judgment that the burden of proof had shifted to the appellant as it had raised allegations of fraudulent evasion of Value Added Tax.

20. The Court is guided by Section 107 of the Evidence Act The said Section provides that the party who alleges the existence of a fact must prove the same. As I have already found, the respondent had established a case, through documents, that it had purchased goods from the two 'missing traders'. Upon discharging that burden, the evidentiary burden then shifted to the appellant to justify his assessment.

21. In attempting to justify his assessment, the appellant alleged that the respondent had been involved in fraud. That was an allegation by the appellant himself and not the respondent. It is that allegation that the Tribunal required the appellant to prove.

22. Can that be said to have shifted the burden of prove to the appellant contrary to the law? I do not think so. The allegation of fraud was made by the appellant in answer to the respondent's case. It was for the appellant to prove that allegation and the Tribunal did not err when it held that it was upon the appellant to prove that allegation.

23. In **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] Eklr**, it was held: -

> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts".***

24. I fully adopt the foregoing. The appellant having alleged fraud on the part of the respondent, he bore the burden of proving that allegation. He failed to provide the specifics of the same as well as evidence to support the same. The Tribunal cannot be faulted on that ground also. The ground also fails.

25. All in all, the Court finds the tribunal's judgment to be sound. The appeal is without merit and is dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2021.

A. MABEYA, FCI Arb

JUDGE