



5. On the 9<sup>th</sup> May 2016 the Respondent conducted the initial interview and inspection of the business premises of the Appellant. This was an attempt to understand the business operations of the Appellant. In the minutes recorded at this meeting the Appellant was represented by its Manager Mr. Paul Ngeno.
6. The Respondent conducted a preliminary meeting on the 10<sup>th</sup> May 2016 to inform the Appellant of its preliminary findings. The Appellant was informed that there was no formal application requesting for amendment of the VAT returns. The amended returns were submitted to KRA without a formal application in support thereof. As such, it was explained to the taxpayer that the point of reference for VAT analysis are the VAT returns originally filed and captured in the system since the amended returns have not been captured in the system. The Appellant's director present at this meeting, Mr. Richard Langat responded that the Appellants tax agents who was handling this issue had died without giving them a copy.
7. A further interim meeting was held on the 13<sup>th</sup> May 2016 where the Appellant was required to respond to the variances in sales attributable to transport income. The Appellant acknowledged that there were under declarations of both sales and purchases in the original VAT return. The Appellant undertook to provide evidence in support of the transport income on the 16<sup>th</sup> May 2016.
8. A third interim interview was conduct at the Respondent's premises at Nakuru on the 26<sup>th</sup> May 2016. The Respondent lamented over the delay in providing the pending record and explanation to the audit issues. Mr. Langat, the Managing director of the Appellant noted the variances between the accounts and VAT returns and explained that the filing of amended returns was their attempt to remedy the situation. Additionally, the Appellant was questioned on the reason why some transactions were not posted to the ledger. The Appellant was unable to explain the reason why the sales captured in the ledger in the year 2014 were more than sales reported in the accounts. The Respondent informed the Appellant that it will treat the excess sales as unreported sales and charge both VAT and Corporation Tax.
9. In the meeting of the 2<sup>nd</sup> September 2016 at Nakuru, the Appellant sought to claim input vat on purchases. The Appellant was advised on the time limited of six (6) months within which a taxpayer must claim input vat. Further, the Appellant did not object to the proposal to charge both corporation tax and VAT on the understated sales. The Respondent allowed the Appellant a period of one (1) week provide the outstanding records.

10. The Appellant failed to provide records to support purchases that were not supported by purchase invoices. On this account, the Respondent proceeded to issue amended assessment vide the notice to issue amended assessment dated 19<sup>th</sup> September 2016.
11. The final interim interview was held on the 15<sup>th</sup> November. The Respondent informed the Appellant that it analyzed the statements for 2014 provided by the Appellant after the amended assessment was issued. Accordingly, the Respondent found that the values of the purchases as per the invoices totaled Kshs. 140,394,813.34 compared to the value of purchases claimed in accounts which was Kshs. 139,980,766. The purchases were therefore fully supported in the year 2014. Regardless, the Appellant could not still claim the input tax as it was time barred.
12. Vide a letter dated 20<sup>th</sup> December 2016 the Respondent disclosed to the Appellant its tax liability under the tax heads of accounts and VAT totaling Kshs. 99,349,054. Additionally, the Appellant was advised on its right to object to the assessment within 30 days in writing.
13. The Appellant on the 23<sup>rd</sup> December 2016 appointed C/O DAVIES AND ASSOCIATES, a registered tax agent to represent it. On the 28<sup>th</sup> December 2016 the Appellant's tax agents wrote to the Respondent objecting to the assessment on the following grounds:
  - a) Sales reported in accounts excluded zero rated sales that were not captured in the end year tax returns. The purchases for the zero rated items were not factored in the accounts for the period.
  - b) The Respondent's audit officers failed to capture all purchases to match with sales as an accounting convention for best practice to arrive at the proper tax position of the company.
  - c) That the KRA officers from the Kericho office did an audit for the same period and the taxpayer paid the assessed tax for the same period.
14. The Respondent acknowledged receipt of this objection on the 16<sup>th</sup> of January 2017. On the 10<sup>th</sup> February 2017 the Respondent requested the following documents to enable it resolve the issues raised in the objection;
  - a) Analysis of purchases of seeds and the supporting invoices.
  - b) Analysis of sale of seeds and the supporting cash sake receipts or sale invoices.
  - c) Bank payment slips for assessment raised by KRA Kericho office.
  - d) Analysis of VAT withholding certificates issued by transport service customers.

e) Original VAT withholding certificates.

15. Vide a letter dated 3<sup>rd</sup> March 2017 the Respondent communicated its objection decision as follows;

- a) There was no ground advanced to support objection to additional tax assessment on corporation tax of Kshs. 6,845,434. This objection is therefore disallowed in total.
- b) Additional assessment in VAT arose from sales reported in audit accounts but which were not declared in VAT returns. The corresponding purchases which were also not claimed could not be allowed for input tax claims against the adjusted tax since they were time barred. Provisions of the VAT law provide strict timelines within which input tax is to be claimed. VAT Act 2013 provides for input tax to be claimed within six (6) months while the VAT Act (Cap 476) (Now Repealed) allowed for input tax to be claimed within twelve (12) months. The invoices referred to in this case are way out of time.
- c) Sand and ballast are taxable at the general rate of 16% since they are not listed either as exempt or zero rated supplies in the Repealed VAT Act (Cap 476) or in the VAT Act 2013.
- d) Schools and NGO are not listed among public bodies, privileged persons and institutions in either the Repealed VAT Act (Cap 476) or VAT Act 2013. Supply of taxable goods or services to schools and/or NGOs do not accord them zero rated status.
- e) Seeds are listed among exempt items in both the Repealed VAT Act (Cap 476) and the VAT Act 2013. Supply of seeds is therefore exempt from VAT. Schedules showing sales of seeds in the respective years under review were not provided to enable us ascertain the value of exempt sales in those years despite our written request for the same. We have analyzed the value of exempt sales arising from sale of seeds from copies of cash sale receipts provided as per attached analysis. Exempt sales amounted to Kshs. 747,060 and Kshs. 4,700 in the years 2014 and 2015 respectively. Values of taxable supplies have been adjusted downwards by these values of exempt sales as all sales were initially taken to be taxable.
- f) Evidence of payment of additional tax raised by KRA Kerch office was not provided despite our written request for the same. Request to grant credit for this payment is declined.
- g) Schedule and copies of withholding vat certificates were not provided. Request to grant credit for the certificates is declined.
- h) Additional assessment on VAT is amended to adjust for exempt sales. The amended additional assessment on VAT now stands at Kshs. 92,310,290 down from Kshs. 92,502,620.

In the same letter, the Appellant was advised on its right to appeal the Respondent decision within the stipulated time.

16. On the 3<sup>rd</sup> March 2017, the Appellant responded to the objection decision claiming that the responses given do not accord the taxpayer the correct tax explanations as the whole process was flawed, not source documents based and the decision is appealed accordingly.
17. In response the Respondent wrote back to the Appellant notifying it that the said appeal is invalid as it has not been made in accordance with the provisions of the Tax Appeals Tribunal Act, 2013. Accordingly, the Appellant was advised to pay the taxes in arrears immediately to avoid action being taken to enforce collection.
18. The Appellant acknowledged receipt above correspondence on the 20<sup>th</sup> March 2017. In the same letter the Appellant requested to be furnished with the necessary information to facilitate the appeal process of the taxpayer.
19. There being no formal appeal to the Tribunal, the Respondent on 18<sup>th</sup> August 2017 issued an immediate demand notice for taxes due of Kshs. 99,155,724. The Appellant was cautioned that if the entire amount is not settled within the next fourteen (14) days, recovery measures will commence without further reference.
20. On the 13<sup>th</sup> September the Appellant served the Respondent with an appeal notice. By the same correspondence the Appellant undertook to furnish further details in due course after filling the memorandum of appeal and statement of facts. The Appellant filed its memorandum of Appeal and statement of facts with the Tribunal on the 25<sup>th</sup> September 2017.

## **C. PARTIES SUBMISSIONS**

### **I. APPELLANT**

21. The Appellant contends that there were acts of omission during the audit exercise. The Respondent's officers who did the audit exercise used a selective approach. The audit officers mainly depended and used a bank reconciliation approach. They never scrutinized all the documents and therefore the assessment was based on incomplete records.

22. Secondly, it is the Appellant's contention that it supplied sand stones to various institutions and told the Respondent that sand is zero rated. To this end the Appellant objects to the Respondent's reliance on the Tax Regulations 2015 and the position that so long as an item is not in the schedule for zero rated supplies, then it is subject to vat.
23. The Appellant further avers that the assessment process lacked inclusivity. In particular that one officer is signing on behalf of the whole station. That there is no tax agent involved. Neither are senior managers at the station involved. As such, decision of such a magnitude of taxing close Kshs. 91 million, there has to be a sitting agreed upon and proper scrutiny is arrived at.
24. Finally, the Appellant claims that when it comes to amendment of returns as per the tax regulations, the tax payer has a period to amend his tax returns. The Appellant amended its returns for several periods for vat. Indeed the same amendment was received by the Commissioner and they were stamped as received and he started paying some taxes on those amended returns. The Respondent cannot 2-3 years after the claim that the returns were not done properly. As per the tax regulations it is very clear if after 60 days the Commissioner does not respond it means he has acknowledged.

## **II. THE RESPONDENT**

25. It is the Respondent's case that the Appellant has misapprehended the procedure for assessing a tax payer for taxes due. The Respondent contends that this procedure is provided for under the Tax Procedures Act, 2015. The regime provides for self-assessment in terms of filing returns as per section 28 of the Tax Procedures Act. The only time the Commissioner comes in is where a tax payer fails to submit a return. So it is a system of self-assessment and that is why if you look at the Tax Procedures Act you have various sections that have the tax.
26. In response to the Appellant's claim of incomplete records, the Respondent avers that it is the tax payer's duty to keep proper records for purposes of ascertaining tax liability. The tax payer was indulged in so many meetings, in more than five meetings. He was given notice of an audit was to be carried out, followed up with a telephone conversation and then several meetings where he was encouraged to produce documents which he failed to do.
27. With regards to zero rated items, the Respondent submitted that it was guided by the law and the VAT Act, 2013 which gives various categories of items, some items will be exempt and some items will be zero rated.

Therefore, if an item does not fall in the Schedule under a particular tax, let's say it is either supposed to be exempt or zero rates, the Act is very clear. One cannot read into a tax law what is not there. There is no intendment, there is no equity in tax and this has been the essence of the **Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64**.

28. The Respondent submits that amending of returns is not a tax decision made by the Commissioner. That I as per section 31 of the Tax Procedures Act, a taxpayer who wishes to amend returns will make a request to the Commissioner. The Commissioner may amend the self-assessment or refuse. It is within the province of the Commissioner to amend the returns, it is not within the province of the tax payer to amend the returns themselves.

#### **D. ISSUES FOR DETERMINATION**

29. In determining this matter therefore, this Tribunal is called upon to consider and make findings on the following issues;
- a) Whether the Respondent relied on incomplete records during the audit exercise
  - b) Whether river sand, sand stone are zero rated items
  - c) Whether the Appellant complied with the procedure for making amendment to its returns.

#### **E. ANALYSIS**

- a) Whether the Respondent relied on incomplete records during the audit exercise
30. It is the Appellant's contention that the Respondent relied on incomplete records in reaching the assessment in question. In opposition the Respondent avers that it is the duty of the taxpayer to keep proper records in order to ascertain the taxpayer's tax liability. This Honorable Tribunal is called upon to determine whether the Respondent relied on incomplete records in conducting an audit of the Appellant.

31. The Tribunal finds that it is the duty of the tax payer to keep and maintain proper records. Section 23 of the Tax Procedures Act, 2015 provides as follows;

*23. A person shall-*

*a) Maintain any document required under a tax law, in either of the official languages.*

*b) Maintain any document required under a tax law so as to enable a person's tax liability to be readily ascertained; and*

*c) Subject to subsection 3, retain the document for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.*

Further, this is complemented by section 43 and 54A of the Value Added Tax Act, 2013 and the Income Tax Act respectively which stipulate;

*43. (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.*

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

.....

*54A. A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax*

32. This Tribunal agrees with the Counsel for the Respondent that the Appellant is duty bound to keep and maintain proper records for purposes of computation of tax. From the onset of the audit process the Respondent frequently request for records in order to ascertain and assess the taxpayer's liability.

33. The documents annexed to the Respondent's Statement of Facts indicate clearly that there were extensive correspondence and meetings between the Appellant and the Respondent on the matter of the Appellant's tax affairs. The Respondent right from the notice of intention to audit dated 8<sup>th</sup> April 2016 was required the Appellant to avail all its records and books of account for the period under review. The Respondent's repeated request for records of the Appellant are evident from the letters dated 9<sup>th</sup> May 2016, 10<sup>th</sup> May 2016, 13<sup>th</sup> May 2016, 26<sup>th</sup> July 2016 and 2<sup>nd</sup> September 2016 entitle 'Note of Interview'. All the while the Appellant was non-compliant.

34. From all the document produced by the Respondent and whose content and import the Tribunal has carefully studied, all of which have not been materially controverted by the Appellant, it is clear that the Appellant failed *ad nauseam* to comply with the Respondent's Request for records. It then follows that the Appellant cannot fault the Respondent for relying on the available records after several failed attempts to acquire all the necessary records.

b) Whether the items supplied by the Appellant are zero rated for VAT purposes

35. It was submitted on behalf of the Appellant that some of the items supplied by it such as sand stone, river sand and maize seeds are zero rated under the Vat Act. The Respondent agrees that only the seeds are zero rated item. Accordingly, in its objection decision dated 3<sup>rd</sup> March 2017, the Respondent factored in this and adjusted the taxable supply of the Appellant for the years 2013 and 2014.

36. What remains for consideration by this Tribunal is whether the river sand and stones are zero rated items under the VAT Act, 2013 as alleged by the Appellant. The Tribunal is guided by the Part A of the Second Schedule of the VAT Act, 2013, which enumerated the items that are zero rated for purposes of Vat. After a close reading of the Second Schedule of the VAT Act, 2013 the Tribunal finds that the items supplied by the Appellant are not among the zero rated items enlisted in the Act. As such, these items remain subject to the general 16% Vat prescribed in the VAT Act.

37. The Tribunal's approach to this case is that stated in the oft cited case of *Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64* as applied in *Panalpina Airflo Limited v Commissioner of Domestic Taxes [2019] eKLR* where it was stated;

*"...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."*

38. Additionally section 7 (2) of the VAT Act, 2013 provides that a supply or importation of goods or services shall be zero-rated under this section if the goods or services are of the description for the time being specified in the Second Schedule. A careful reading of section 7(2) of the Vat Act coupled with Part A of the Second Schedule of this Act indicates that the supply of taxable goods in this case did not qualify and fall within the parameter identified in the Part A of the Second Schedule.
39. This Tribunal is not entitled to attempt a discovery at the intention of the legislature but must restrict itself to the articulate list of items enumerated under Part A of the Second Schedule. Consequently, it is our finding that river sand and stones do not qualify for zero rating under the Act. The Tribunal finds that these items are therefore vatable at the rate of 16% given that they are neither zero rated nor exempt.
- c) **Whether the Appellant complied with the procedure for making amendments to returns**
40. It is the Appellant's case that it made amendments to its returns and the same amendments were received by the Commissioner. The Commissioner therefore cannot purport that the returns were not done properly. Reliance was placed on section 51 of the Tax Procedures Act.
41. On the other hand the Respondent contends that amending of returns is not a tax decision. That amending of returns is provided for under section 31 of the Tax Procedures and is distinct from a tax decision as provided for under section 51 of the Tax Procedures Act, 2015. Therefore, a taxpayer in order to make amendments to returns must first make a request to the Commissioner. The Appellant in this case did not make the said request for amending returns.
42. The question before this Tribunal is whether the Appellant in making amendments to its returns complied with the requisite procedure. In order to make an amendment to returns, section 31 (2) of the Tax Procedures Act provides as follows;

*A taxpayer who has made a self-assessment may apply to the Commissioner, within the period specified in subsection (4) (b) (i), to make an amendment to the taxpayer's self-assessment.*

43. The Tribunal is alive to the fact that the regime in Kenya in terms of tax compliance is one of self-assessment. In the present case, We find it is the sole province of the Appellant to request for an amendment as per the procedure laid down in section 31 (2) of the Tax Procedures Act, 2015. In the Tribunal's analysis of section 31 of the Tax Procedures Act, the first step in the amendment of returns is to make a request for the same to the Commissioner. Thereafter, it is the Commissioner's duty to effect those changes in the system. From the documents on record, the Appellant herein has failed to take this first step. It wants to enjoy the benefits that make with making the request without necessarily making a request for amendment. Therefore, given that there was not proper amendment to the returns, it is safe and proper to assume that the self-assessment of the Appellant is all that the Respondent could rely on in assessing the Appellant's tax liability.

#### F. DETERMINATION

44. From the foregoing analysis, the Tribunal finds the Appeal herein is not merited and makes the following orders;
- a) This appeal is hereby dismissed.
  - b) The Respondent's demand notices issued on 18<sup>th</sup> August and 15<sup>th</sup> September 2017 are valid.
  - c) Each party to bear its own cost.

DATED and DELIVERED at NAIROBI this 17<sup>th</sup> of day of December 2019.

In the presence of:-

Savies Mudambo.....for the Appellant

Raphaela Muruka.....for the Respondent

.....  
MOSES B. OBONYO  
CHAIRMAN

Mahat Somane  
.....  
MAHAT SOMANE  
MEMBER

Patricia Magiri - Anampiu  
.....  
PATRICIA MAGIRI - ANAMPIU  
MEMBER

.....  
TIMOTHY K. CHESIRE  
MEMBER