



**AEE Power Limited v Commissioner of Domestic Taxes (Income Tax Appeal E165 of 2023)
[2024] KEHC 15987 (KLR) (Commercial and Tax) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E165 OF 2023
FG MUGAMBI, J
DECEMBER 20, 2024**

BETWEEN

AEE POWER LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(An appeal from the Tax Appeal's Tribunal's Judgment
dated 13th October 2023 in Tax Appeal No. 709 of 2022)*

JUDGMENT

Background and introduction

1. The Appellant, AEE Power Limited, is a limited liability company duly incorporated under the Laws of Kenya. It is engaged in construction business specialising in design, supply, and installation in various facilities. The Kenya Power and Lighting Company (KPLC) awarded contract KP1/12A-2/PT/2/15/A40 – LOT 2 Last Mile Connectivity Kisumu, Siaya, Vihiga, Busia, Bungoma and Kakamega counties and KP1/12A-2/PT/2/15/A40 – LOT 4 in Narok, Nakuru, Samburu and Nyandarua counties to AEE Power Spain. The Appellant claimed that it was assigned the onshore component of the contracts for the procurement of plant, design, supply and installation of facilities in various projects.
2. The Respondent, through a demand letter dated 10th December 2021, requested the Appellant for information concerning transactions done with non-resident persons in the period 2017- 2020 and its transfer pricing policy for the related transactions between January 2016 and December 2020. The Respondent contends that there was no response from the Appellant, prompting a reminder dated 3rd February 2022.



3. When the Appellant failed to respond or provide the requested documents the Respondent then conducted a comprehensive audit on the Appellant for 2017 to 2020, pursuant to Section 29 of the [Tax Procedures Act](#) (TPA). The Respondent established a tax liability of Kshs. 1,155,754,914.00/- in respect of corporation tax and VAT. The Respondent also issued a subsequent assessment for Kshs. 1,442,723,166 following a set off of Kshs. 113,031,748 withheld at source by KPLC.
4. The Appellant objected to the assessment through a letter dated 19th May 2022. The Respondent allowed the objection in part and amended the assessment to Kshs. 859,632,528.00/-, exclusive of interest and penalties.
5. Dissatisfied with the assessment decision the Appellant appealed to the Tax Appeals Tribunal (the Tribunal). The main grounds of appeal were that the Respondent did not consider the fact that the Appellant was issued with withholding certificates for the offshore portions of the contract after KPLC wrongly withheld amounts paid to AEE Power Spain using the Appellant's KRA PIN.
6. The Appellant contends that the withholding tax schedules did not therefore reflect its sales volumes and it was erroneous for the Respondent to use them to calculate the VAT allegedly payable by the Appellant. The Appellant further contends that the reason for not filing its income tax returns for 2017 to 2020 was due to the erroneous withholding tax certificate confirmation prompts on the iTax system. The Appellant takes issue with the Respondent for ignoring the complaints which highlighted this error.
7. Against this background the Appellant argued that the assessment notice dated 20th April 2022 and the subsequent objection decision dated 13th June 2022 for the demand of corporate tax and VAT are without basis, illegal and an overstatement of total sales for 2017 to 2020.
8. Through the judgment dated 13th October 2023, the Tribunal upheld the Respondent's objection decision dated 13th June 2022 upholding the assessment of Kshs. 859,632,528.00/-.
9. Aggrieved, the Appellant filed a Memorandum of Appeal dated 16th October 2023 on the following grounds:
 - i. That the Honourable Tribunal erred in Law and in contravention to the provisions of Section 24 as read with Sections 94(1) of the Tax Procedure Act in failing to consider the reasons that led to the Appellant herein failing to file its income tax returns for the period 2017 to 2020 being that once it tried to file its Income Tax returns on the iTax System, the iTax system prompted it to confirm that the Withholding Tax Certificates on the system related to its transactions and yet the said Certificates had been wrongly issued under the Appellant's PIN.
 - ii. That the Honourable Tribunal erred in Law and in contravention to the provisions of the [Evidence Act](#) in failing to consider the Assignment Agreements at Appendix 8 and 9 of its bundles of documents at the Tribunal Stage together with the invoices showing separate billings and payments as submitted by the Appellant indicating that its billing related to the assigned portions of work under contracts the subject of Appeal.
 - iii. That the Honourable Tribunal erred in Law and in contravention of Section 4(1) of the Income Tax (Withholding Tax) Rules 2001, in concluding that the Withholding Taxes withheld by the Kenya Power and Lighting Company (KPLC) using the Appellant's KRA PIN were in respect of sales made by the Appellant owing to the fact that the Appellant had failed to file its tax returns for the period 2017 to 2020 and yet the Appellant had on several occasions informed the Respondent that the Withholding Tax had been wrongly withheld on the Appellant's PIN and did not in any way relate to its sales.



- iv. That the Honourable Tribunal erred in Law and in contravention of Section 4(1) of the Income Tax (Withholding Tax) Rules in confirming that the Respondent was right in using the sales as per the Withholding Tax Schedules to calculate the amount of alleged VAT payable by the Appellant and yet the KPLC in deducting the Withholding Taxes had wrongly used the Appellant's KRA PIN for which was duly notified to the Respondent herein
 - v. That the Honourable Tribunal erred in Law in agreeing with the Respondent to the effect that the request for cancellation of the withholding tax certificates could not be sustained on alleged grounds that the income had been correctly assessed on the Appellant and yet the Withholding Tax Certificates thereto related to amounts that had been paid directly to the AEE Spain and not the Appellant herein evidenced by the invoices and proof of payments submitted to the Honourable Tribunal.
10. The Appellant also filed written submissions dated 8th July 2024. It prays that the Court allows its appeal and vacates the demand confirmation issued by the Respondent on 13th June 2022 for Kshs. 859,632,528 and awards it the costs of the appeal.

Response

11. In opposing the appeal, the Respondent filed a statement of facts dated 13th December 2023 and written submissions dated 4th July 2024. It urged the Court to uphold the Tribunal's judgment. It is the Respondent's case that the reasons advanced by the Appellant for failure to file their returns for the period 2017 – 2020 are not cogent and that the failure did not extinguish their tax liability. The Respondent further submits that KPLC and AEE POWER Spain entered into turnkey contracts. This fact is not controverted as there were no valid assignment deeds with KPLC.
12. The Respondent further contends that since part of the business of AEE Spain is carried on by the Appellant herein and the Appellant issued invoices and received contract funds in Kenya, the Appellant is liable to pay taxes in Kenya with some profit attribution to Spain. In the absence of any returns filed by the Appellant, the Respondent submits that it was constrained to issue assessments by making the best judgment out of the information available to the Commissioner.

Analysis and Determination

13. I have carefully considered the record of appeal, the response, submissions and authorities cited by the parties. This Court's mandate is circumscribed to considering questions of law only, by dint of Section 56(2) of the TPA. The Court can only consider questions of fact where necessary to put matters into context or where the findings of fact were so perverse that no Tribunal could have reasonably arrived at them. See *Commissioner of Domestic Taxes V Ibangua Investments Co Ltd*, [2023] KEHC 26013.
14. I have distilled and consolidated the grounds of appeal into one main issue which is whether the Tribunal erred by finding that the Appellant had failed to discharge its burden to prove that the withholding tax assessments were attributable to AEE Power Spain.
15. Firstly, with respect to the Respondent's inquiries of 10th December 2021 and 3rd February 2022, I note that the copies of these letters are exhibited at pages 356, 357 and 359 of the record. They confirm the Respondent's submissions that indeed the Appellant was accorded an opportunity to present the Respondent's with the relevant records but it failed to do so. The Appellant's assertion that there was no evidence that it had been requested and failed to give evidence cannot therefore hold.
16. The Respondent proffered that due to the Appellant's non-response, it conducted an audit into the Appellant's tax affairs leading to the establishment of a tax liability of Kshs. 1, 155,754,914 comprised



of corporation tax and VAT and that it issued a subsequent assessment for Kshs. 1,442,723,166 issued after setting off Kshs. 113, 031,748 withheld at source by KPLC.

17. On this ground, the Tribunal found, and correctly so, that under Section 29 of the TPA, the Respondent was within its right to make such an assessment where a taxpayer failed to submit a tax return for a reporting period. Section 29(1) of the TPA provides:

“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 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") of...”

18. As regards the subsequent amended assessment, Section 31 of the TPA provides:

“(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the “original assessment”) by making alterations or additions, from the available information and to the best of the Commissioner’s judgement, to the original assessment of a taxpayer for a reporting period to ensure that—

- a. in the case of a deficit carried forward under the *Income Tax Act* (Cap. 470), the taxpayer is assessed in respect of the correct amount of the deficit carried forward for the reporting period;
- b. in the case of an excess amount of input tax under the *Value Added Tax Act* (Cap. 476), the taxpayer is assessed in respect of the correct amount of the excess input tax carried forward for the reporting period; or
- c. in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates.”

19. Based on the foregoing, I concur with the Tribunal’s finding that the Respondent acted in line with the statutory guidelines in dealing with the Appellant’s matter.

20. On whether the assessments were attributable to AEE Power Spain, the Appellant faulted the TAT for concluding that it had not provided documents before the demand and that it did not discharge its burden of proof, yet the documents were provided at the objection stage.

21. I have reviewed the record of appeal and particularly the contract between KPLC and AEE Power Spain dated 10th December 2015. Clause 1.7 found at page 77 of the record provides that:

“1. Assignment

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1. 7.1 Neither Party shall assign the whole or any part of the Contract or any benefit or interest in or under the Contract. However, either Party:
 - (s) may assign the whole or any part with the prior agreement of the other Party, at the sole discretion of such other Party, and



- (t) may, as security in favour of a bank or financial institution, assign its right to any monies due, or to become due under the Contract.”

22. The Appellant produced two assignment agreements in relation to the two subject contracts. They are found at pages 220 to 222 of the record. The agreements are between the Appellant and AEE Power Spain. The Appellant did not provide any proof of consent from KPLC as required under Clause 1.7 of the contract. Since the Appellant alleged that KPLC wrongly withheld the amounts paid to AEE Power Spain using its KRA PIN, it would have been fundamental for the Appellant to prove such consent, which it failed to do. This negates the submission by the Appellant that it was only responsible for the onshore part of the contract while AEE Spain took up the offshore part of the contract.
23. This point was emphasized by the Tribunal in its further finding that Appellant did not offer evidence that KPLC allowed AEE Spain to assign onshore works to AEE Power Limited or even whether there were elements of onshore and offshore works in the contracts dated 10th December 2015. The Tribunal thus found that the assignments were internal arrangements. I further take the view that the invoices produced to show that the billings were done separately, without the support of KPLC’s consent to the assignment of the contract, are insufficient.
24. The burden of proving that a tax decision is wrong or excessive under Section 56 (1) of the TPA as well as under Section 30 of the TAT Act, lies on an appellant and a taxpayer. Section 30 of the TAT Act provides;

“In a proceeding before the Tribunal, the appellant has the burden of proving—

- a. where an appeal relates to an assessment, that the assessment is excessive; or
- b. in any other case, that the tax decision should not have been made or should have been made differently.”

Additionally, Section 56(1) of the TPA provides;

“In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”

25. Courts have held the justification for this approach as being the fact that the Kenyan tax system is based on self-assessment. As such, the evidence to support transactions for purposes of tax is in the taxpayer’s possession and knowledge. (See Kenya Revenue Authority V Maluki Kitili Mwendwa, [2021] eKLR).
26. My assessment is that the Tribunal considered the reason given by the Appellant for failure to file income tax returns for 2017 to 2020 but found that the averments were unsupported by evidence. It is also clear that the Tribunal considered the documents furnished by the Appellant during the objection stage including the contract and the assignment agreements. On the whole, therefore, the Tribunal cannot be faulted for finding that the Appellant failed to discharge its burden of proof.
27. As submitted by the Respondent, the absence of the assignment agreement meant that the Appellant was considered a permanent establishment of AEE Power Spain. The Appellant submitted that under Article 7(2) of the OECD Model Tax Convention, the Respondent ought to have limited the profits attributable to it upon analysis of the functions performed, assets used and risk assumed (FARS) and not include income/revenue attributable to AEE Power Spain.



28. I however note that this issue was not raised in its notice of objection. The Appellant is not permitted to raise new grounds at this point, as per Section 56(3) of the TPA which provides:

“In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.”

29. Finally, the Appellant submitted that by considering WHT Certificates in respect of periods that were not under audit, that is from 2015 and 2019, had the effect of overstating the total sales and alleged tax due from the Appellant for the periods 2017 and 2020. The Respondent refuted this claim by submitting that it computed the Appellant’s total sales as per the withholding schedules, which led to an amount of Kshs. 3,034,404,231. Further, that it undertook a verification of the withholding tax certificates and insists that no figures for the years 2015 and 2016 were considered.

30. As earlier observed, there is evidence that the Appellant had been requested and failed to give evidence and information but failed to do so. It also neither filed income tax returns for 2017 – 2020 nor paid WHT based on the purported withholding sales of Kshs. 1, 343, 223, 419 which it claims is the correct amount due. Section 52 (2) of the TPA provides that:

“A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”

31. Ground 5 of the appeal therefore fails for non-compliance with Section 52(2) of the TPA.

Disposition

32. In conclusion, the Court finds no merit in the appeal and the same is dismissed albeit with no orders as to costs. The Tribunal’s judgment dated 13th October 2023 is upheld.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE

