



Commissioner Investigation & Enforcement v Marylebone Properties Limited (Income Tax Appeal E204 of 2023) [2025] KEHC 3314 (KLR) (Commercial and Tax) (18 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E204 OF 2023**

BK NJOROGE, J

MARCH 18, 2025

BETWEEN

COMMISSIONER INVESTIGATION & ENFORCEMENT APPELLANT

AND

MARYLEBONE PROPERTIES LIMITED RESPONDENT

JUDGMENT

1. The background leading to the Appeal before the Tribunal is that a dispute arose when the Appellant notified the Respondent on 15th May 2020 of an investigation into alleged tax non-remittance. Despite multiple requests from the Respondent for a swift resolution, the Appellant continued its inquiry, summoning the Respondent's directors on 13th August 2020 and inspecting its rental property on 2nd September 2020. On 11th May 2021, the Appellant issued preliminary audit findings, alleging tax fraud and computing a liability of Kshs.311,244,334. This the Respondent disputed on 2nd June 2021 by providing supporting documents. Expecting the matter to be resolved, the Respondent made further requests for a final report. However, on 24th March 2022, the Appellant issued a tax assessment demanding Kshs.272,575,531 for corporate income tax (CIT) and stamp duty. The Respondent objected again on 19th April 2022, justifying its tax treatment for the 2015-2019 period. The Appellant upheld part of the assessment, confirming a CIT liability of Kshs.140,532,089 on 17th June 2022. Aggrieved, the Respondent appealed to the Tax Appeals Tribunal, which ruled in its favor on 6th October 2023, setting aside the Appellant's objection decision.
2. The Appellant being dissatisfied with the whole of the Judgment of the Tax Appeals Tribunal issued at Nairobi in Appeal No. 773 of 2022 and the Resulting Order appealed to the High Court. This is against the whole of the said decision and consequential order vacating the Assessments of corporation tax and stamp duty Kshs.208, 532,089 /-. This is on the grounds:



- a. The Tribunal erred in fact and in law in failing to appreciate that the dispute before it had a general accounting principle that expenditures must be supported with evidence to ensure they are verifiable contrary to provision of section 54A(1) of the [Income Tax Act](#) that requires the Respondent to keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds and contracts and vouchers which in the opinion of the Commissioner are adequate for the purpose of computing tax.
 - b. The Tribunal failed to appreciate and/or give due regard to the provisions of Tax Procedure Act section 56(1) which places the onus of proof in tax objections on the Respondent who in this case failed to avail evidence that would support a contrary assessment or that would have guided the Appellant at arriving to a different objection decision.
 - c. The Tribunal erred in both law and fact in failing to take into account and/ or disregarding evidence provided by the Appellant in its statement of fact and submissions as the nature of business carried out by the Respondent the guiding principles.
 - d. The Tribunal erred in law in misapplying the provisions of [Income Tax Act](#) that sections 3 (2) (a) (i) & (iii), section 6 as read together Section 15 of the [Income Tax Act](#) which provides for allowable expenses. It is a general accounting principle that expenditures must be supported with evidence to ensure they are verifiable, which the Respondent failed to do.
 - e. The Tribunal erred in misapplying the facts and law and arrived at a misguided conclusion that there was double taxation on the Respondent and that expenditure on the motor vehicle were allowable for taxable purposes.
 - f. The decision is unjust, capricious, and an abrogation of the Appellant's right to be heard as enshrined in [the Constitution](#) 2010.
 - g. The Tribunal contradicted its own rules of procedure, directions, and rules of natural justice by failing to consider the principles of taxation, specifically under the construction of tax statutes.
 - h. The Tribunal erred in law by failing to give strict interpretation of the [Tax Procedures Act](#) and [Income Tax Act](#) thereby violation Article 209 of [the Constitution](#).
 - i. The Tribunal erred in law and fact by deciding the case based on extraneous matters and not the evidence before it.
3. The Appellant sought the following orders:
 - a. The Appeal be allowed.
 - b. The Judgement of the Tax Appeals Tribunal dated 6th October 2023 be set aside in its entirety.
 - c. Costs be awarded to the Appellant herein.
 4. The Respondent responded to the Appeal by filing a Statement of Facts dated 8th March 2024. In summary, it stated that it had supported its rental income tax declarations and that the Appellant did not discharge its burden of rebutting the supporting documents availed by the Respondent.
 5. Moreover, the Appellant consistently impugned the documents availed by the Respondent. This is without providing any specific details on how the documents provided, fell short of basic documentary standards.



6. The Appeal was canvassed by way of written submissions. The Court has also carefully considered the Appeal, the Statement of Facts, the Record of Appeal, and the written submissions filed with the Court. The Court frames a single main issue for determination in this appeal.
- a) Whether the Tribunal erred in setting aside the Objection Decision.

Analysis

7. The jurisdiction of this Court while hearing an Appeal from the Tribunal is circumscribed by Section 56 of the TPA, which provides as follows:

- “(1) In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
- (2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.
- (3) 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.”

8. The import of the above provision is that it is for the taxpayer in any proceeding to prove that the tax decision is incorrect or the assessment is excessive. On this issue the law is clear that once the Respondent makes an assessment, the burden of proof is on the taxpayer to show that the tax decision is erroneous, excessive, or should have been made differently.
9. It was the Appellant’s case that the Respondent did not provide adequate documents to support its expenditures to the satisfaction of the Commissioner. This is pursuant to Section 54A of the *Income Tax Act*. It was upon the Respondent to justify the costs of the expenditures and provide all records of accounts and receipts to justify the same. This section provides;

Keeping of records of receipts, expenses, etc.

1. 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.
10. On the other hand, the Respondent submitted that it honoured the Appellant’s information requests. That the Appellant admitted to receiving the information from the Respondent. The burden of proof articulated under Section 56(1) of the *Tax Procedures Act* is not permanently fixated upon the taxpayer. Upon the production of the requisite supporting documents by a taxpayer, the Burden of proof shifts. It shifts to the Appellant to demolish with precision the evidence availed.
11. According to the Tribunal, once the taxpayer adduces evidence by providing documents, relevant facts, and agreeing to site inspections, site visits, and interviews, the burden must shift. It shifts to the Commissioner to controvert the proof put forward by the Appellant.
12. Having heard the parties, the Tribunal had the benefit of assessing the evidence and the documents before it, it weighed the credibility of the evidence. The evidence met the threshold of discharging the burden placed upon the Respondent by the law.



13. It followed, therefore, that the Tribunal made the finding. This finding was to the effect that the Appellant herein did not provide evidence that the documents that were provided by the Respondent herein or the results of other information which the Appellant obtained by itself or relayed to it by the Appellant were not authentic.
14. Based on the above, it is the Court's view that the burden of proof in tax matters is not stationary but it is like a pendulum swinging between the Taxpayer and Taxman at different points. In *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment)*, the Court stated thus-

“The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold.

A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.”
15. In this case, as rightly pointed out by the Tribunal, the Respondent had provided sufficient evidence in the form of documentation to support its averment that the tax decision was wrong. Therefore, the Respondent had satisfied the provisions of Section 56(1) of the TPA.
16. The Respondent provided the Appellant with all the documentation in its custody in relation to the importation of the machinery in question. This is documentation which the Appellant does not dispute receipt thereof.
17. For the reasons given here before, it is this Court's finding that the Tribunal did not err in its interpretation and application of the provisions of Sections 56 of the *Tax Procedures Act*.
18. Accordingly, the Court is not persuaded that the Tribunal erred. To that extent the Appeal fails.
19. As to Costs, the same are awarded at the discretion of this Court. The Court notes that the Tribunal directed that each party bears its own costs. The Relationship between the Taxman and the Taxpayer is not a fleeting one. The Taxpayer remains in need of the services of the Taxman. The Taxman remains in need to collect revenue. Taking into consideration the circumstances of this case, the Court orders that let each party bears its own costs.

Determination

20. The Appeal fails in its entirety and the same is dismissed.
21. Each party to bear its own costs of this Appeal.
22. It is so ordered.



SIGNED, DATED, AND DELIVERED IN VIRTUAL COURT THIS 18TH DAY OF MARCH 2025

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent

Mr. Luyai- Court Assistant

