



Commissioner of Investigations & Enforcement v Doshi Enterprises Limited (Income Tax Appeal E112 of 2024) [2025] KEHC 4501 (KLR) (Commercial and Tax) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E112 OF 2024**

BM MUSYOKI, J

APRIL 8, 2025

BETWEEN

**THE COMMISSIONER OF INVESTIGATIONS &
ENFORCEMENT APPELLANT**

AND

DOSHI ENTERPRISES LIMITED RESPONDENT

(Being an appeal against part of judgment of the Tax Appeals Tribunal in its appeal number 1316 of 2022 dated 22-03-2024)

JUDGMENT

1. The appellant commenced investigations on the respondent's declared income for period between April 2015 and March 2020 upon which it issued the respondent with a notice of assessment demanding corporation tax of Kshs 59,120,592.00 and Value Added Tax of Kshs 28,600,371.00. The appellant objected to the assessment through a letter dated 26-07-2023 following which the appellant made an objection decision dated 23-09-2023 in which it confirmed corporate tax and VAT totaling to Kshs 87,720,963.00. The respondent reacted by filing appeal before the tax appeals tribunal and in its judgment dated 22-03-2024, the tribunal allowed the appeal and set aside the appellant's objection decision.
2. The above judgment sparked this appeal in which the appellant has raised the following grounds;
 1. The Honourable Tribunal erred in law in finding that the respondent discharged its burden of proof in accordance with section 56(1) of the [Tax Procedures Act](#) in total disregard of the appellant's submissions which rebutted the respondent's assertions.



2. The Honourable Tribunal erred in law in finding that the respondent discharged its burden of proof in accordance with Section 56(1) of the *Tax Procedures Act* yet the respondent only provided ledgers as opposed to bank statements which was the basis of the assessment.
 3. The Honourable Tribunal erred in law in finding that the respondent had discharged its burden of proof in accordance with Section 56(1) of the *Tax Procedures Act* with regard to alleged loans received from Manav foundation yet no single documentation was provided in support of the alleged loan.
 4. The Honourable Tribunal erred in law in finding that the respondent had discharged its burden of proof in accordance with Section 56(1) of the *Tax Procedures Act* in total disregard of the fact that the respondent did not produce any evidence in support of assertion that exchange losses were incurred wholly and exclusively in the production of income.
 5. The Honourable Tribunal erred in law in finding that the respondent had discharged its burden of proof in accordance with Section 56(1) of the *Tax Procedures Act* yet the respondent did not provide any evidence to demonstrate that some of the funds received were from the sale of dollars to its related entity Doshi Hardware.
 6. The Honourable Tribunal erred in law in failing to find that the burden of proof was on the respondent to explain all the income in their bank statement.
 7. The Honourable Tribunal erred in law in failing to consider the evidence and appellant's submissions placed before it and violated the appellant's right to fair hearing granted under Article 50(1) and 50(2) of *the Constitution* of Kenya.
 8. The Honourable Tribunal erred by finding that the appellant did not request for further documents from the appellant after receipt of the notice of objection contrary to section 56(1) of the TPA which places the burden of proof on the respondent.
 9. The Honourable Tribunal erred in law and fact in failing to exercise its powers to refer the matter back to the appellant for consideration in the event the respondent provided documents before the tribunal which had not been availed to the appellant contrary to section 29(2)(3) (c)(ii) of the *Tax Procedures Act*.
 10. The Honourable Tribunal erred in law and fact in misapplying section 51(11) to mean it has the same connotation with section 51(4) of the *Tax Procedures Act*.
3. The appeal was disposed of by way of written submissions, the appellant having filed its submissions dated 31-10-2024 while the respondent filed its submissions dated 25-11-2024. The appellant had asked for leave to file supplementary submissions which was granted on 25-11-2024 but it did not file any. The respondent has raised preliminary issue of law based on the argument that the appeal herein offends section 56(2) of the *Tax Procedures Act* which restricts appeals to this court from the tribunal to questions of law only. The Section provides that;

‘An appeal to the High Court or to the Court of Appeal shall be on a question of law only.’

4. The respondent has submitted that the main issue in the appeal is whether or not the respondent discharged its burden of proof as required under Section 56(1) of the *Tax Procedures Act*. According to the respondent, this is an issue of fact. It is trite that where an appeal has been restricted to matters of law only, the appellate court has no jurisdiction in delving into matters of facts. Determination of whether the appeal is on matters of law or fact is not a matter of plain reading of how the memorandum of appeal has been couched. Despite the grounds of appeal stating that the tribunal erred in law, the



court has a duty to interrogate the complaints raised in the grounds and satisfy itself that the matters raised are of law and if it finds that they are actually matters of fact, it must avoid going into them no matter how tempting the arguments therein may be lest it would be acting without jurisdiction. In *Romageco Kenya Limited v Commissioner of Customs Services (2024) KECA 1416 (KLR)* which has been cited by the respondents, the court held that;

‘This is a second appeal. Our mandate in such an appeal has been enunciated in a long line of cases decided by the Court. See for instance, *Maina vs. Mugiria [1983] KLR 78*, and *Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR*, for the propositions, inter alia, that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. See also the English case of *Martin vs. Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511*, wherein it was reiterated that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.’

5. I have carefully gone through the grounds of appeal and it is my position that grounds 1, 2, 3, 4 and 5 raise matters of facts. They indulge the court in analysing the weight of the evidence adduced by the parties before the tribunal. Although they make reference to section 56(1) of the *Tax Procedures Act*, they clearly revolve around the tribunal’s decision on proof of the truth of the pleaded facts which is obviously an issue of fact. An issue of fact is that which goes or seeks to prove the truth of the stated facts while an issue of law is concerned with interpretation and application of the law to the facts and evidence. I will therefore not consider the said grounds.
6. In its submissions, the appellant has drawn three issues calling for determination which in my opinion cover the twelve grounds of appeal. The issues identified by the appellant are as follows;
 - i. Whether the honourable tribunal erred in law and in fact in failing to consider that the foreign exchange losses had not been realised and therefore were not allowable as per the provisions of Section 4A of the *Income Tax Act*, Cap 40 Laws of Kenya.
 - ii. Whether the honourable tribunal erred in law and in fact in finding that the respondent discharged its burden of proof in accordance with section 56(1) of the *Tax Procedures Act* in total disregard of the appellant’s submissions, which rebutted the respondent’s assertion.
 - iii. Whether the honourable tribunal erred in law and in fact by shifting the burden of determining which documentation are sufficient to support the respondent’s contention while the law places the burden squarely on the respondent.
7. In my view, issues ‘i’ and ‘ii’ above cover the grounds I have already held are on matters of facts and as such I will not consider submissions made in respect of the said issues. That leaves me with issue ‘iii’ which basically blames the tribunal of shifting burden of proof to the appellant. In its submissions, the appellant complains that the burden of proof that the assessment was incorrect and that the assessed tax was not due was on the respondent. That is the correct position in law as tax matters are of strict liability which is captured in section 56(1) of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act*.



8. The appellant submits that the tribunal erred by making a finding that stated that the appellant did not call for more documents when it received the objection from the respondent. I take position that once a taxpayer is faced with assessment which they wish to object to, they have a duty to provide all the documents in support of their objection. That is the purport of Section 51(4)(b) of the *Tax Procedures Act* which provides that;

‘A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if all the relevant documents relating to the objection have been submitted’

9. I note from my reading of the judgment of the tribunal that it noted that the appellant did not call for more documents after receiving the objection. Since the taxpayer is the custodian of the records relating to taxable income, the identification of the relevant documents is always within their knowledge. The Commissioner can only call for information or record which appears relevant depending on the grounds of objection. The tribunal went further to observe that the appellant’s objection decision did not explain why the documents submitted by the respondent (cashbook extract and nominal ledger) were not adequate to substantiate the objection. I am of the opinion that this statement was tantamount to shifting the burden of proof to the appellant which went against the provisions of Sections 56(1) of the *Tax Procedures Act* and 30 of the *Tax Appeals Tribunal Act*.

10. The tribunal also noted that the appellant produced before it evidence to demonstrate the loan by NIC to Doshi Hardware including bank advice showing the loan amount leaving Doshi Hardware’s account and reaching the respondent’s Barclays bank account. It is no doubt these documents influenced the decision of the tribunal as the tribunal went on to state that;

‘In the tribunal’s view, provision of these documents was sufficient proof to support the appellant’s contention that the bank credit of Kshs 65,887,500.00 in year 2016 was a debt repayment by its related entry Doshi Hardware.’

11. The same goes for documents in explanation of some Kshs 7,962,750.00 and Kshs 46,000,000.00 said to have been proof of intra-accounts transfers, invoices and corresponding bank statements showing cash flows. These are documents which are said not to have been produced by the respondent during the objection stage. This court holds that in view of the legal position that the taxpayer has the burden of proving that the assessment is wrong, it is the duty of the taxpayer to provide to the Commissioner all the relevant documents in respect of the transactions in question. This should be done at the objection stage in the first instance. Producing the documents during the hearing before the tribunal attest to the fact that the respondent considered them to be relevant to the objection but doing so in my view amounted to transferring the mandate of assessment of tax which belongs to the Commissioner to the tribunal.

12. The mandate of the tribunal is to analyse evidence, documents, information and material produced to the Commissioner and the law and assess the correctness of the assessment. This is not to say that the tribunal has no powers to receive evidence but it must be noted that core evidence and materials must first be produced before the Commissioner during the objection process. In that case, the appellant should have been provided with the documents before the appeal was initiated or heard. Section 51(4) does not relieve the taxpayer of the responsibility of providing all the relevant documents and information, otherwise the objection would be deemed invalid.

13. In its submissions, the respondent denies that the aforesaid documents were produced for the first time during the hearing before the tribunal and refers the court to the statement of facts filed by the appellant at the tribunal. According to the respondent, the appellant admitted having reviewed



documents like bank statements, invoices, ledgers and transfers. However, a look paragraphs 18 and 19 of the statement of facts, it is stated that;

‘Save for cash book extract and nominal ledger, no other evidence was provided to support this debt repayment. In view of this, it was the respondent’s position that the appellant had not substantiated its assertion that the credits relate to intercompany debt repayment to warrant adjustment in the bank reconciliations. The appellant ought to have provided invoices, contracts, bank statements from the paying and receiving banks and documented repayment plan to demonstrate that indeed the credits in the account related to payment of stocks from a related entity.’

14. Same goes for paragraph 23 of the said statement where it is stated that inter-divisional transfers support documents were not provided to the respondent. These are the documents which appear to have been supplied to the tribunal during the hearing. The record of appeal does not have the proceedings which would enable me to ascertain the position but, it is apparent from the submissions of the parties and the judgement of the tribunal that the documents were produced at the hearing.
15. The tribunal should resist attempts of seeking documents which were not provided to the Commissioner during objection proceedings as in doing so, it will not be acting as an appellate tribunal but a trial one. The drafters of the *Tax Appeals Tribunal Act* must have foreseen situations where loopholes like the one in this matter may happen and that is in my view, the reason the law gave powers to the tribunal to refer matters back to the Commissioner for reconsideration. In view if this, I agree with the appellant that the correct decision would have been exercise of the tribunal’s powers under Section 29(2)(c) of the *Tax Appeals Tribunal Act* although the appellant cited a nonexistent section 29(2)(c)(ii) of the *Tax Procedures Act*.
16. In conclusion and based on the above analysis, this appeal is allowed in the following terms;
 - a. Part of the judgement of the tax appeals tribunal dated March 22, 2024 in its appeal number 1316 of 2022 allowing the entire appeal is hereby set aside.
 - b. Part of the judgment of the tax appeals tribunal dated 22-03-2024 in its appeal number 1316 of 2022 setting aside the appellant’s objection decision dated September 23, 2022 is upheld to the extent that the matter shall be referred back to the Commissioner for reconsideration taking into account all relevant documents produced by before the tribunal.
 - c. The appellant shall make and supply the respondent with a fresh objection decision in compliance with order 2 above within sixty (60) days from the date of this judgment.
 - d. Each party shall bear their own costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Otieno for the appellant and Mr. Ruto for the respondent.

