Ennus Company Limited v Commissioner of Domestic Taxes (Income Tax Appeal E208 of 2023) [2025] KEHC 7271 (KLR) (Commercial and Tax) (26 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7271 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E208 OF 2023

AA VISRAM, J

MAY 26, 2025

BETWEEN

ENNUS COMPANY LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 10th November, 2023 in Tax Appeal No. 1014 of 2022)

JUDGMENT

Introduction and Background.

1. The Appellant is a company whose principal business is the operation of a public service vehicle (matatu) sacco. The Respondent ("the Commissioner") conducted a compliance verification exercise on the Appellant's VAT declarations for the year 2018. By a pre-assessment demand notice dated 25th August, 2020, the Commissioner informed the Appellant that there were variances in its declared sales of its VAT and income tax returns and audited accounts for the year 2017 and that the variance observed was Kshs.11,564,325.00/-. The Commissioner also noted a similar variance for the year 2018 amounting to Kshs. 12,034,526.00/- and as such, it charged VAT of Kshs. 1,925,524.16/- on this variance.

2. The Appellant lodged a late objection on this assessment which was considered together with the furnished documents and the Commissioner issued an Objection Decision on 1st April, 2022, where the objection was partly allowed and the VAT assessment was reviewed downwards by Kshs. 199,424.00/- bringing the assessed tax liability to Kshs. 1,726,100.99/-. Dissatisfied with the Objection Decision, the Appellant lodged an appeal with the Tax Appeals Tribunal ("the Tribunal") which

rendered a decision on 10th November, 2023, dismissing the appeal and upholding the Objection Decision [Ennus Company Limited v Commissioner of Domestic Taxes [2023] KETAT 959 (KLR)].

3. This decision by the Tribunal has precipitated the filing of the present appeal by the Appellant which is grounded on the Memorandum of Appeal dated 11th December, 2023, as follows:-

    1. THAT the tribunal erred in law and the analysis of burden of proof in finding that the Appellant had failed to discharge its burden of proof in demonstrating that not all collection from its members was subject to payment of VAT.

    2. THAT the tribunal erred in law by conflating the burden of proof and incidence of proof. In particular, the tribunal erred in law in the following respect:-

        a. The tribunal failed to find that the Appellant had presented sufficient material to discharge its burden of demonstrating that not all the collections from its members were subject to VAT.

        b. Having presented the said materials, the incidence of proof shifted to the Respondent to rebut the evidence presented by the Appellant.

    3. THAT the tribunal erred in law and in fact in finding that all the collection by the Appellant from its members constituted management fees when there was evidence to the contrary.

    4. THAT the tribunal erred in law and in fact in failing to consider all the issues which were presented before it.

    5. THAT the tribunal erred in law and in fact in finding that the Appellant had offered services which were beyond five million threshold and that the provisions of section 34(7) of the VAT Act applied.

    6. THAT the tribunal erred in law in arriving at a finding which was against the weight of the evidence.

4. Thus, the Appellant prays that the appeal be allowed and judgment be entered against the Respondent on the following terms:-

    a. THAT the amount collected by the Appellant from management services and which was subject to VAT was Kshs. 525,700/=.

    b. THAT the amount collected by the Appellant from management services fell below the Kshs. 5,000,000/= threshold and the provisions of section 34(7) of the VAT Act does not apply to the Appellant.

    c. THAT the assessment of tax liability in the sum of Kshs. 1,726,100/= be set aside.

    d. THAT costs of this appeal be borne by the Respondent.

5. The Commissioner has responded to the appeal through the Statement of Facts dated 13th March, 2024, and the appeal has been disposed by way of written submissions which I will briefly highlight below.

The Appellant's submissions

6. The Appellant submitted that the appeal turns largely on the burden of proof and the incidence of proof. It relied on Section 107 of the *Evidence Act* which submitted that the burden of proof lies in the person who desires the court or tribunal to enter judgment in his favour, and that this burden does

not shift and remains constant during the entire trial. In contrast, that the incidence of proof, that is, Section 107(2), relates to proof of specific facts, and in that regard, the incidence of proof rests on that person. It further submitted that proof in civil case is on a preponderance of evidence, and it is a matter of the quantum and the probative value of the evidence presented and that where a party presents sufficient evidence to prove his case on a preponderance of evidence, the burden shifts to the opposite party to rebut the evidence on similar standards.

7. The Appellant submitted that at the time when the Commissioner was invited to consider the amount for which VAT was payable, the Appellant had submitted its audited accounts and financial accounts which clearly demonstrated that the income from office service fee was Kshs. 527,700.00/-. That at the point of the consideration of the objection, the Commissioner did not give a justification for taking all the income made by the Appellant as taxable instead of considering only a sum of Kshs. 525,700.00/- and that this was the matter which was referred to the Tribunal. The Tribunal found that the Appellant offered management services to its members and that the management services were subject to VAT and based on this finding, the Tribunal dismissed the appeal.

8. The Appellant submitted that the Tribunal erred in this finding and that the issue which was before the Tribunal was not whether management services are subject to VAT, the question was how much the fees was from management services. That this question could only be answered based on the empirical data provided by the Appellant, which it did, when it furnished the audited accounts to the Commissioner and the same was available to the Tribunal. That the probative value of the audited accounts was not challenged by the Commissioner, and the accounts demonstrated that the income from office management was Kshs. 525,700.00/-. Thus, the Appellant submitted that this was the amount which ought to have been the subject matter of VAT.

The Commissioner's submissions

9. The Commissioner submitted that the appeal raises 3 issues for determination: namely, whether the Appellant is eligible for VAT; whether the management services offered by the Appellant are an exempt supply under the VAT Act and; whether the Appellant discharged its burden of proof before the Tribunal. The Commissioner submitted that the Appellant has at all material times been eligible for VAT tax liability and that in cases where a taxpayer in a given period makes taxable supplies whose value is Kshs. 5,000,000.00/- or more, but is registered later by itself or the Commissioner, the subsequent registration operates retrospectively to make the taxpayer liable for VAT in respect of amounts received before registration.

10. The Commissioner relied on Section 34(7) of the VAT Act to submit that although the Appellant was not registered for VAT, subsequent registration would render the Appellant liable for VAT for the period it had not been registered, with an exception of when the tax registration certificate indicates the specific date from which VAT obligation would be effective. That the Appellant's tax registration certificate specified the time from which the VAT obligation would be effective, and the date indicated was 5th March, 2019, and it also states the Appellant's contention that it was dormant until 31st December, 2019. The Commissioner submitted that the dormant status was not absolute and was bound to change if taxable supplies were made and that the Appellant did offer taxable management services and attempted to illegally shield itself using the dormant VAT status and yet its VAT tax status changed when it began offering vatable services, despite its declarations that its status was dormant.

11. The Commissioner submitted that when the Appellant applied to have its VAT status as dormant, it essentially informed the Commissioner that it was not making taxable supplies, which was clearly a misrepresentation. The Commissioner adds that it is not bound by the information declared by the Appellant, as it is allowed to make its own independent assessments based on new information

at its disposal, pursuant to Section 24(2) of the *Tax Procedures Act* (Chapter 469B of the Laws of Kenya) ("the TPA"). The Commissioner relied on the authority of Mohamed Ali t/a Top Model Apparels & 44 others v Kenya Revenue Authority [2020] KEHC 9210 (KLR) to assert its position. The Commissioner submitted that the Appellant filed its returns and did not file returns for VAT tax despite having provided vatable services. The Commissioner realised that the Appellant was providing vatable management services to the owners of the vehicles operating under its Sacco, despite declaring a dormant status in its tax registration certificate, which led to the assessment of the Appellant for VAT liability.

12. The Commissioner cites the case of Commissioner of Domestic Services v Galaxy Tools Limited [2021] KEHC 5530 (KLR) to submit that it was proper for it to assess the Appellant for tax liability, having been offered the opportunity to declare its sales in its self-returns, but did not declare its VAT liability. The Commissioner therefore submitted that the Appellant's dormant status changed once the Appellant began offering vatable services, hence it became liable for VAT the moment it started offering vatable services. Thus, the Commissioner presents that it acted lawfully in issuing the income assessments against the Appellant.

13. The Commissioner further submitted that the income earned by the Appellant, to the extent that it was earned from management services to the owners of PSV motor vehicles is not exempt from VAT, as the Appellant alleges and that the management services offered by the Appellant to the owners of the PSVs operating under its Sacco are taxable supplies which are not exempt from VAT. Further, that it was upon the Appellant to clearly demonstrate income received was entirely from the supply of exempt goods or services. It relied on Section 56(1) of the *Tax Procedures Act* to state that the burden of proof is on the Appellant to prove that the assessment issued by the Commissioner is wrong. That the Appellant failed to prove that the entire of its income was derived from supply of exempt services, and also failed to show precisely what amounts were attributed to the vatable supplies and that it merely alleges that only Kshs. 525,700.00/- emanates from vatable supplies.

14. The Commissioner submitted that it was carrying out its proper mandate when it issued an additional assessment upon the Appellant, and requested for documents from the Appellant ascertain its tax liability. That it was very specific in its request for documents from the Appellant, who provided financial statements showing different sources of income, with a note showing that it received Kshs. 525,700.00/- in 2018 for official fees. That the note to the financial statements was not supported by invoices, receipts, agreements, bank statements or any other proof that indeed this was the exact amount that the Appellant received in management fees. That the Appellant has a duty to keep the full and accurate accounts of every transaction that it engaged in, as provided under Section 43(1) of the VAT Act and that Section 54A(1) of the *Income Tax Act*(Chapter 470 of the Laws of Kenya) also places an obligation on any Taxpayer to ensure any and all tax documents required for scrutiny be readily available for the Commissioner to review. The Commissioner also relied on Section 23(1) of the *Tax Procedures Act* which requires the Appellant to maintain documents that would enable their tax liability to be easily assessed. The Commissioner submitted that the Appellant ought to have produced these records which it is legally expected to maintain, to prove that the vatable supplies it engaged in were exempt from VAT, to what extent that it was exempt, and to dispute the Commissioner's assessment but it failed in its duty of maintaining and providing such documentation to dispense its burden of proof.

15. The Commissioner also relied on Section 30 of the *Tax Appeals Tribunal Act*, which provides that the burden of proving that an assessment is erroneous falls on the Appellant and further, Section 62 of VAT Act which provides that:

In any civil proceedings before this act, the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax.

16. As such, the Commissioner submitted that the Appellant's failure to provide proper supporting documents to ascertain its tax liability and to prove to what extent its services were tax exempt directly meant that they were unable to discharge the burden of proving that the Commissioner's assessment was erroneous. The Commissioner urges the Court to take note that its assessment did take into full consideration all the documents produced by the Appellant, and as a result, the Appellant's tax liability was adjusted and reduced from Kshs. 1,925,524.16/- to Kshs. 1,726,100.16/-. That the adjustment was as a result of the Appellant providing documents during the review that showed that some income was derived purely from supply of exempt transport services using some of the motor vehicles used by the Appellant. The Respondent submitted that the Appellant bore the burden to prove that the services it offered were not vatable under the VAT Act, and that the Commissioner's assessment was erroneous and it failed to discharge the said burden. In conclusion, it submitted that the Appellant's appeal lacks merit and the same should be dismissed.

Analysis and Determination

17. I have considered the grounds set out in the Memorandum of Appeal, and reviewed the contents of the record; and considered the rival submissions of the parties.

18. The starting point I found at Section 56(2) of the TPA, which states that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". (Emphasis mine). This means that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts [See John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission & Paul Musyimi Nzengu [2018] KEHC 8738 (KLR)]

19. In the Tribunal's judgment, it determined whether the Commissioner was justified in assessing the Appellant for amounts received from the matatu operators as a non-exempt supply under the VAT Act. The Court is therefore required to determine whether the Tribunal's conclusion was reflective of the law and the evidence on record. The Tribunal noted that the Appellant did not own all the vehicles that were used in its transportation business, and did not collect income from transportation service. It simply managed the fleet of vehicles owned by others and operated in the company at designated routes, then the PSV owners paid the Appellant a daily fee. The Tribunal thus concluded that the Appellant offered management services to PSV owners of motor vehicles in the Sacco. That having carefully considered the structure of the Appellant's business model, the Tribunal arrived at the conclusion that the income earned by it, to the extent that it was earned from management services to the owners of PSV motor vehicles managed by the Appellant, is not exempt from VAT as the Appellant contended.

20. The Tribunal was thus satisfied that the management services offered by the Appellant to the owners of PSVS operating under its Sacco are taxable supplies which are not exempt from VAT under the Act, therefore, the Commissioner was justified in assessing the Appellant for management services as a non-exempt supply under the Act. The Appellant faulted this finding and submitted that the issue which was before the Tribunal was not whether management services are subject to VAT but how much was the fees from management services. That this question could only be answered based on the empirical data provided by the Appellant which the Appellant states it did, by way of audited accounts to the Commissioner and the same was available to the Tribunal. That the probative value of the audited accounts was not challenged by the Commissioner and demonstrated that the income

from office management was Kshs. 525,700.00/-. As such, the Appellant submitted that this is the amount that ought to have been subject to VAT.

21. In response, the Commissioner submitted that the Appellant failed to prove that the entire income was derived from supply of exempt services and also failed to show precisely what amounts were attributable to VAT supplies and that the sum of Kshs. 525,700.00/- was not supported by invoices, receipts, agreements, bank statements or any other proof that indeed this was the exact amount that the Appellant received in management fees.

22. From the above submissions, the parties agree that management fees are subject to VAT and the Appellant's grievance appears to be whether he was able to demonstrate that only Kshs. 525,700.00/- was subject to VAT as per the audited accounts and not the sum of Kshs.10,788,126.00/- as concluded by the Commissioner. Thus, whereas the Appellant raised six issues in its Memorandum of Appeal, I find that the same have been condensed to this sole issue to which I now turn to. I am in agreement with the Commissioner's submission that in tax matters, the taxpayer bears the burden of proving that a tax decision is incorrect or excessive. This reverses the well-known principle of evidence of "he who alleges must proof". In this regard, the tax authorities would assess what it considers to be the tax due from a taxpayer and the tax laws would burden the tax payer to disprove that the assessment or tax demanded is wrong or incorrect. This is borne by the fact that the assessment and demand is ordinarily made way after the tax payer has assessed himself and made a declaration of what according to him is the tax payable and has already paid such tax. The burden is therefore shifted to the tax payer because, the tax authority has to rummage through the documents of the tax payer years after the tax payer assessed himself and paid what he considered to be his tax liability [see Commissioner of Domestic Services v Galaxy Tools Limited(supra)].

23. The aforementioned position is in line with Section 30 of the *Tax Appeals Tribunal Act* and Section 56(1) of the TPA which provide as follows:-

30. Burden of proof

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

where an appeal relates to an assessment, that the assessment is excessive; or

in any other case, that the tax decision should not have been made or should have been made differently.

56. General provisions relating to objections and appeals

(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect. (Emphasis mine)

24. In Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) [2022] KEHC 5 (KLR), Mativo J.,(as he was then) expounded on this principle by stating as follows:-

> 48. 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.

49. 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. (Emphasis mine)

25. In *Commissioner of Investigations and Enforcement v Pearl Industries Limited (Tax Appeal E086 of 2020)* [2022] KEHC 51 (KLR) and Commissioner of Domestic Taxes v Trical and Hard Limited (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR), the late Majanja J., added that the onus of proof may shift based on the stage of the proceedings and the actions taken by the parties, swinging like pendulum between the parties but more times than not, swinging towards the taxpayer. I am in further agreement with the Commissioner that as per Section 43 of the VAT Act, a tax payer is required to maintain records and that the Commissioner has the power to request for the production of such records and Section 59(1) of the TPA also states that a taxpayer shall produce records when required to do so by the Commissioner.

26. The Commissioner does not dispute that it requested the Appellant for a number of documents including the NTSA registration certificate and list of its fleet of motor vehicles showing the registration numbers and owners, audited accounts for the period 2017-2018, minutes of the Appellant's monthly meetings and bank statements for the said period. The Commissioner admits that the Appellant furnished all these documents requested for by the Appellant including the audited accounts which indicated that the office service fee received for the subject period was Kshs. 527,700.00/-. Whereas the Commissioner states that the audited accounts were not backed by primary documents such as invoices, agreements, receipts or such other proof, I note that the Commissioner never requested these supporting documents and I am in agreement with the Appellant's submission that the Commissioner never impeached the veracity, credibility and/ or competence of the audited accounts presented. Up to this point, I find that the Appellant met the minimum threshold of competent and relevant information and documentation necessary to support its position. It should not be lost that what the Appellant was required by law to establish was a prima facie case and that the Commissioner ought to have measured this evidence on a preponderance of probabilities [see Kenya Revenue Authority v Maluki Kitili Mwendwa [2021] KEHC 4148 (KLR)].

27. I find that the Commissioner erred in finding that the management fees received by the Appellant for the subject period of income was Kshs. 10,788,126.00/- and not Kshs. 527,700.00/- as evidenced by the Appellant's audited accounts. The Tribunal also erred in agreeing with this conclusion by the Commissioner as this was a clear misapprehension of the facts and evidence on record that warrants the court's intervention.

28. In Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2014] KECA 697 (KLR) It was held that:-

> " We are nonetheless conscious that our jurisdiction is only limited to determination of points of law and thus, our concern regarding the issues that dealt on facts will be limited to our duty of re- evaluation of the Judge's conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law. As it was held in the case of Mwangi v Wambugu, [1984] KLR 453:

> "A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."(Emphasis mine)

29. In my view, the above authority is a case in point. The Appellant sufficiently discharged its burden of proof by providing all documents requested for by the Commissioner and this evidence was not challenged by the Commissioner. There was no indication that the same was insufficient, and in the event that this was the case, nothing would have been easier than to request the Appellant to furnish further information. The Commissioner did not make any such request, and therefore, the presumption was that the Appellant had satisfied its request based on the documents and information provided.

Conclusion and Disposition

30. It is for the above reasons that I find that the Appellant's appeal has merit. The Tribunal erred in its interpretation and application of the law and facts and arrived at the wrong conclusion in this matter. It misapprehended the evidence and facts on record and arrived at a decision that in my view warrants the intervention of this Court. Consequently, the appeal is allowed with costs.

31. I hereby set aside the judgment of the Tribunal dated 10th November, 2023, and the Commissioner's Objection Decision dated 1st April, 2022, and substitute it with the following orders, upon which judgment is entered:-

    a. The amount collected by the Appellant from management services and which was subject to VAT is the sum of Kshs. 525, 700.00/-.

    b. That the above amount collected by the Appellant from management services falls below the provision of Section 34 (7) of the VAT Act and the said provision is therefore inapplicable to the Appellant in the present circumstances.

    c. Costs shall be borne by the Respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 26TH DAY OF MAY, 2025

ALEEM VISRAM, FCIARB

JUDGE

In the presence of;

Court Assistant: Sakina

for Appellant

for Respondent

HCCOMMITA. NO. E208 OF 2023