



Auditel Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E050 of 2024) [2025] KEHC 8377 (KLR) (Commercial and Tax) (13 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E050 OF 2024**

RC RUTTO, J

JUNE 13, 2025

BETWEEN

AUDITEL KENYA LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an Appeal against the Judgment delivered on 26th January 2024 at the Tax Appeals Tribunal in Tax Appeals Tribunal Case No. 1242 of 2022)

JUDGMENT

1. This appeal challenges the decision of the Tax Appeal Tribunal that upheld the respondent's Objection Decision dated 8th September 2022 on assessment of income tax and VAT of Kshs.270,359,587 for the year 2017, in respect of VAT and Corporation Tax, together with penalties and interest.
2. The Appellant, being aggrieved with the Tribunal's judgment, lodged this appeal setting out the following grounds of appeal; that the Tribunal erred in law by erroneously misinterpreting the provision of Section 30 of the *Tax Appeals Tribunal Act* as read together with Section 59 (1) (a) of the Tax Procedure Act 2015; by misinterpreting the contractual arrangements between the Appellant and Auditel Spain in the determination of the tax liability resulting in an undue burden on the Appellant; failed to consider the unique nature of the payments made by the Ministry of Sports, Culture and Arts (MOSCA) which were for the offshore component of the project for services that were performed exclusively by Auditel Spain and the Appellant was to perform the onshore component of the project. Lastly, that the Honourable Tribunal erred in law and fact by failing to consider other forms of evidence which were in the custody of the Appellant, was provided by the Appellant and could be used to substantiate the Appellant's case thereby denying the Appellant a fair hearing.



3. The Appellant prayed that the appeal be allowed, the judgment of the Tax Appeals Tribunal dated 26th January 2024 be set aside in its entirety, and that the costs of the appeal be awarded to the Appellant by this Honourable Court in any event.
4. In response to the appeal, the Respondent filed a Statement of Facts dated 18th November 2024. The Respondent stated that it had requested the Appellant to provide the tender documents and contract, bank statements for the years 2017 and 2018, and audited accounts for the 2017 year of income. However, these documents were not availed, yet they would have clarified who was awarded the tender and who received the proceeds of the advance payment. The Respondent further stated that, due to the Appellant's failure to produce the requested records, it was compelled to reject the Appellant's objection application. The Respondent contended that the burden of proof lay with the Appellant to demonstrate that it had discharged its tax liability. Consequently, the Respondent prayed that the Court upholds its decision as proper and dismisses the appeal with costs.
5. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 1st October 2024 while the Respondent's submissions are dated 18th November 2024.

Appellant's Submissions

6. The Appellant identified two issues for determination. First, whether the Tribunal erred in law by failing to apply Section 30 of the [Tax Appeals Tribunal Act](#) and Section 59(1) of the [Tax Procedures Act](#), and by failing to consider other forms of evidence that could have substantiated the Appellant's case, thereby resulting in a miscarriage of justice. Second, whether the Tribunal erred in law by misinterpreting the contractual arrangements between the Appellant and Auditel Spain, and by failing to consider the unique nature of the payments made by the Ministry of Sports, Culture and Arts (MOSCA) to Auditel Spain, thereby leading to a flawed conclusion.
7. Regarding the first issue, the Appellant submitted that the Tribunal erred in law by failing to apply Section 30 of the [Tax Appeals Tribunal Act](#) and Section 59(1) of the [Tax Procedures Act](#), thereby leading to an unjust outcome. It further contended that the failure to apply these statutory provisions undermined the principles of fairness and justice, as the Appellant was deprived of the opportunity to have its case evaluated within the comprehensive legal framework established by the applicable statutes. The Appellant argued that, by neglecting to consider the full scope of the [Tax Procedures Act](#), the Tribunal failed to safeguard the Appellant's rights. It further asserted that the Tribunal failed to consider crucial evidence that could have substantiated its claim.
8. The Appellant submitted that it had provided the contract details, bank statements, and audited accounts, which clearly demonstrated that the advance payment was made to Auditel Spain and not to the Appellant. It therefore contended that the Respondent's assertion that the necessary documents were not provided was unfounded. The Appellant further argued that the Tribunal's duty extended beyond merely acknowledging the existence of evidence; it was required to actively engage with and evaluate all relevant submissions. The Appellant maintained that it had included all materials that could potentially influence the outcome of the case.
9. On the second issue, the Appellant submitted that the Tribunal's interpretation of the contract between the Appellant and Auditel Spain was fundamentally flawed. It contended that the contract with the Ministry of Sports, Culture and Arts (MOSCA) was divided into two distinct components: the offshore component, handled by Auditel Spain and involving feasibility studies and pre-planning; and the onshore component, executed by the Appellant and involving actual implementation of the project. The Appellant argued that the Tribunal failed to recognize this contractual division and



erroneously attributed the entire contract and the resultant tax liability to Auditel Kenya Limited, the Appellant herein.

10. The Appellant further submitted that it and Auditel Spain had separate financial obligations, and that the Tribunal failed to assess the distinct functional profiles of the two entities. It maintained that the services under consideration were rendered solely by Auditel Spain and that the payments were made directly to it. As such, the attribution of the entire income and corresponding tax liability to the Appellant was, in its view, unjust and contrary to Section 3(2)(a)(i) of the *Income Tax Act*. The Appellant also argued that the Tribunal's interpretation disregarded established legal precedent which underscores the importance of considering the intentions of the contracting parties and the actual performance of contractual obligations. It asserted that the payments made by MOSCA to Auditel Spain were specifically for the offshore component of the project and should therefore have been treated differently from domestic transactions. In support of this position, the Appellant invoked international taxation principles, submitting that offshore payments are subject to different tax treatments.
11. In conclusion, the Appellant urged the Court to set aside the judgment of the Tribunal and to order a reassessment of the tax liabilities in accordance with the correct legal and factual framework.

Respondent's Submissions

12. This appeal was strenuously opposed by the Respondent. The Respondent began by outlining the background of the case, stating that the Appellant had alleged it was awarded a contract by MOSCA in September 2017 for the design, supply, testing, commissioning, and supervision of security, access control, communications, audio-visual, and pitch lighting systems for five stadiums in Kenya. The total value of the contract was Kshs.1,609,037,145/=, which included a 20% advance payment equivalent to Kshs.330,537,997/= for commencement of the project. The Respondent averred that it subsequently conducted an audit of the Appellant's VAT and Income Tax returns for the period January to December 2017, during which it was established that the Appellant had filed nil returns.
13. In reference to Section 56 of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act*, the Respondent submitted that the obligation to file tax returns rests with the taxpayer and is not excused merely because the Commissioner has the power to issue a default assessment. The Respondent relied on the case of *Saima Khalid v The Commissioner for Her Majesty's Revenue & Customs*, Appeal No. TC/2017/02292, to support its position that the burden of proof was never discharged, as no documentary evidence was availed by the Appellant for the year 2017 to enable the Respondent to render a meritorious decision.
14. The Respondent further relied on Section 31(1) of the *Tax Procedures Act*, the case of *Digital Box Limited v Commissioner of Investigations & Enforcement*, TAT No. 115 of 2017, and *Van Boeckel v C & E* [1981] STC 290, submitting that it required some material to form the basis of its assessment under the best judgment principle. Accordingly, the Respondent argued that the Income Tax and VAT assessments were properly issued and ought to be upheld by the Court.

Analysis and Determination

15. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the *Tax Procedures Act* (the TPA) which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". The Respondent has rightly cited the decision of the Court of Appeal in *John Munuve Mati v Returning*



Officer Mwingi North Constituency & 2 others [2018] eKLR where the court summarised what amounts to “matters of law” as follows:

“The interpretation or construction of *the Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.”

16. 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 unless the decision of the Tribunal cannot be supported by any evidence.
17. From the record and submission of parties, the main issue arising for determination is almost similar to what the Tribunal dealt with, which is Whether the Appellant discharged the legal and evidential burden of proof before the Tax Appeals Tribunal as required under Section 56(1) of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act*, 2013.
18. Section 56 (1) of the *Tax Procedures Act* provides that;
 - “ 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.”
19. From the record and the Tribunal’s findings which this court is bound to review only on points of law, it is not in dispute that the Appellant was assessed for VAT and income tax liabilities amounting to Kshs.270,359,587/= for the year 2017. It is also undisputed that the Respondent requested for documents including the tender document and contract between the Appellant and MOSCA, Bank statements for 2017 and 2018 and audited accounts for the year of income 2017.
20. The Appellant failed to provide any of the required documents when filing its objection or at any stage before the Tribunal, despite claiming otherwise in its submissions. Upon reviewing the Record of Appeal and the documents presented before the Tribunal, there is no evidence to confirm that the appellant submitted the necessary documents. In addition, the Appellant has not offered any explanation for its failure to provide the documents requested by the Respondent to substantiate its objection. The Tribunal assessed this omission and concluded that the Appellant had not met the burden of proof as required under Section 56(1) of the Tax Procedure Act. As such, and based on the record, this court finds no reason to fault the Tribunal’s determination that the Appellant failed to provide evidence to show that the required documents were ever supplied to the Respondent.
21. The failure of a taxpayer to submit supporting documents to support its objection renders the Notice of Objection invalid. Courts have consistently held that a Notice of Objection that had not been supported by necessary documents is invalid. In *Builders Junction Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E073 of 2021)* [2023] KEHC 24805 (KLR) (Commercial and Tax), the court held as follows;

“In the present appeal, it was Builders Junction’s duty to provide documents when objecting to the assessment to enable the Commissioner review, reconsider, amend or allow the



objection. In the absence of evidence that documents were provided at the time of the objection which the Commissioner ignored and the TAT failed to appreciate such anomaly, this court is unable to fault the finding of fact by the TAT, that Builders Junction did not provide documents to support its objection.”

22. Similarly, in the case of Family Fashion Clothing Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E050 of 2021) [2023] KEHC 17608 (KLR) (Commercial and Tax), the Court observed as follows;

“29. I concur with the finding above. Once the Respondent found that the documents adduced by the Appellant were insufficient the burden lay squarely on the Appellant to disprove this. Further, the law allowed the Respondent could ask for additional documents/evidence if it found that the documents provided were not sufficient, which it did, and the Appellant was under an obligation to satisfy the said demand, in order to sustain its claim and discharge its burden as set by the law above.

30. I note further that in this appeal and the one before the Tribunal, the Appellant did not adduce the documents that it claimed it had provided to the Respondent to prove purchases from its suppliers. Therefore, this court, just like the Tribunal, cannot analyse the said documents in order to determine whether the Appellant acquired stock from the suppliers in question.

31. The upshot of the above findings is that the Appellant has not discharged its burden of proof despite having the opportunity to furnish sufficient proof. The appeal as filed is dismissed and the decision of the Tribunal upheld in its entirety.”

23. The Appellant has made reference to the contract between Auditel Spain with MOSCA the same does not form part of the Record, let alone having been availed to the Respondent for assessment as submitted. While the respondent maintains that it requested the appellant to provide the tender document and contract; bank statements for the year 2017 and 2018 as well as the audited accounts for 2017 year of income, the documents were not availed. Thus, the Respondent’s Objection Decision was based entirely on of the absence of documentation.

24. Having reviewed the Tribunal’s reasoning and the record of appeal, I find that the Tribunal correctly applied the law by holding that burden of proof lay squarely with the Appellant to disprove the tax assessments.

25. Based on the above, I find that the Appellant failed to discharge the burden of proof required under Section 56(1) of the Tax Procedures Act. The Tribunal did not err in law in dismissing the appeal for want of evidentiary support.

26. The appeal is dismissed. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 13TH DAY OF JUNE, 2025

RHODA RUTTO

JUDGE

In the presence of;



.....Appellant

.....Respondent

Sam Court Assistant

