



Algarve Distillers Limited v Commissioner for Investigations & Enforcement (Income Tax Appeal E163 of 2024) [2025] KEHC 12631 (KLR) (Commercial and Tax) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 12631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E163 OF 2024**

**F GIKONYO, J
JULY 24, 2025**

BETWEEN

ALGARVE DISTILLERS LIMITED APPELLANT

AND

**COMMISSIONER FOR INVESTIGATIONS &
ENFORCEMENT RESPONDENT**

JUDGMENT

Whether appeal in the Tribunal was filed within time

1. This is an appeal against the Tax Appeals Tribunal's judgment dated 7th June 2024 in Tax Appeal No.203 of 2023; Algarve Distillers Limited v Commissioner For Investigations & Enforcement.
2. Aggrieved, the appellant instituted this appeal through a memorandum of appeal dated 4th July 2024, on the following 6 grounds:-
 1. The Tribunal erred in fact and in law in upholding the Respondent's Notice of Assessment dated 12th November 2020 as the operative notice, the subject of the Appellant's Notice of Objection dated 22nd April 2022, while turning a blind eye to the fact that enforcement action had been executed against the said notice of assessment, with the Respondent issuing a fresh Notice of Assessment dated 24th March 2022, which was the subject of the Appellants objection dated 22nd April 2022. The Tribunal's error in fact and law has occasioned the erroneous finding that the Appellant's referenced Notice of Objection had been filed out of statutory timelines, the result of which was the striking out of the appeal.
 2. The Tribunal erred in fact and in law in failing to find that the Objection Decision by the Respondent was issued beyond the statutory period of sixty (60) days provided under



Section 51 of the [Tax Procedures Act](#) which automatically resulted in the Appellants Notice of Objection dated 22nd April, 2022 being allowed by operation of law.

3. The Tribunal erred in fact and in law in determining an issue that was not raised before it, i.e. whether the Appellants notice of objection dated 22nd April 2022 was filed within time. No such ground was raised by the Respondent in its Memorandum of Response and/or Statement of Facts and no evidence was provided in support of this contention, calling for a rebuttal by the Appellant. Further, no submissions were made on this point by the Respondent.
4. The Tribunal erred in fact and in law in dismissing the Appellant’s appeal on account of statutory time limitation under section 51(2) of the Tax Proceedings Act yet its objection to the Respondent’s assessment was done well within the provided timelines. Specifically.
 - a. The Respondent issued a notice of assessment dated 24th March 2022, which was based on a notice of findings dated 27th October 2021.
 - b. The Appellant objected to the Assessment through a Notice of Objection dated 22nd April 2022 which was received by the Respondent the same day as evidenced by a received stamp on the said letter. The Notice of Objection was therefore received within the statutory timeline of 30 days provided under the [Tax Procedures Act](#).
 - c. An Objection Decision was issued by the Respondent vide a letter dated 27th February 2023, more than ten months after receipt of the Notice of Objection on 22nd April 2022. The Objection Decision was therefore outside the 60-day Statutory Timeline set out at Section 51 of the [Tax Procedures Act](#).
 - d. The Appellant’s Notice of Objection was therefore automatically allowed by operation of law following the lapse of the 60 days statutory period provided for in the [Tax Procedures Act](#).
 - e. The Appellant lodged an appeal to the Tax Appeals Tribunal vide a Notice of Appeal dated 20th April 2023 and raised as its first ground, the fact that the Objection Decision dated 27th February 2023 was issued well outside the 60 days period provided for in law.
 - f. The Respondent’s response to the Memorandum of Appeal dated 12th June 2023 did not raise any ground to the effect that the Appellants Notice of Objection dated 22nd April 2022 had been filed out of time. The issue was therefore raised and determined by the Tribunal suo moto.
 - g. The Respondent in its Memorandum of Response did not raise any rebuttal to the averment in the Appeal that it had issued its Objection Decision outside the 60 days period. The Respondent only sought to explain this delay in its Statement of Facts dated 12th June 2023 by alleging without evidence that it had been in communication with the Appellant in the intervening period. The Tribunal therefore erred in fact and in law by failing to acknowledge that the averment by the Appellant that the Objection Decision dated 27th February 2023 was out of time was unrebutted.
 - h. The Respondent’s response to the Memorandum of Appeal dated 12th June 2023 did not address the fact that the Objection Decision had been filed ten months after the Notice of Objection. Further, the Respondents Bundle of Documents did not include any documentary evidence to the effect that there had been correspondence between



the Appellant and the Respondent between 22nd April 2022 and 27th February 2023 as indicated in the Tribunals judgment delivered on 7th June 2024

- i. The applicable Notice of Assessment was therefore the one dated 24th March 2022 which covered the period January 2018 to July 2021.
 - j. The Appellant in its Notice of Objection dated 22nd April 2022 did indicate that it had been subjected to a previous assessment (through the Notice of Assessment dated 12th November 2020) and confirmed that the same had been the subject of enforcement action and that the taxes had been partially settled. The said Assessment was therefore not applicable and did not oust the Notice of Assessment dated 24th March 2022, on the sole basis of which the Objection Decision dated 27th February 2023 was issued.
5. The Tribunal therefore erred in fact and in law by relying on the Notice of Assessment dated 12th November 2020 in making the wholly erroneous suo moto determination that the Appellants Notice of Objection dated 22nd April 2022 was based on this Assessment despite the said letter making clear reference to the Notice of Assessment issued by the Respondent on 24th March 2022.
 6. The Tribunal's judgment was therefore based on a misapprehension of the factual and legal position and is therefore wholly erroneous and ought to be set aside in its entirety.

Background

3. The appellant is a private limited company that engages in the manufacture and sale of compounded spirits and spirituous beverages.
4. In an analysis of the sector of manufacturers of spirits and spirituous beverages, the respondent carried out investigations into the appellant's tax affairs to establish credibility. The analysis of the filed returns indicated significant variances in the declared turnovers of the appellant for 2018 and 2019. The appellant had significant unaccounted excise stamps for that period.
5. The respondent sent a notice dated 12th February 2020 to the appellant to the effect that it was reviewing its affairs. In response, the appellant issued a letter dated 13th May 2020, stating that it owed Kshs. 11,801,318.00 in Excise Tax and VAT heads.
6. On 19th May 2020, the respondent acknowledged the appellant's proposal to settle the arrears but declined due to lack of basis for arriving at the said tax arrears, supporting information and documentation.
7. In response, the appellant issued a letter dated 27th May 2020 attaching a reconciliation.
8. Following the conclusion of the investigations, the respondent issued its findings for the period January 2018 to May 2020 to the appellant through a letter dated 2nd September 2020.
9. The appellant objected to the findings through a notice dated 22nd September 2020.
10. The respondent issued a notice of assessment dated 12th November 2020 for Kshs. 90,535,200.00 total taxes payable.
11. The respondent issued another notice of assessment dated 24th March 2022 for Kshs. 1,248,525,272.00/-.
12. The appellant lodged a notice of objection dated 22nd April 2022.



13. The respondent considered the objection and documents and issued its objection decision on 27th February 2023, confirming the principal tax liability of Kshs. 39,722,516.00/-.
14. Aggrieved, on 20th April 2023, the appellant appealed to the Tribunal, culminating in the impugned judgment.

Directions of the court

15. The appeal was admitted to hearing and directions issued to the parties to put in their written submissions.
16. The appellant and the respondent filed written submissions dated 11th November 2024 and 12th May 2025, respectively.

Appellant's submissions

17. The appellant submitted that the Tribunal erred by finding that its notice of objection was not filed in time and that the respondent's objection decision was filed in time.
18. The appellant urged the court to allow the appeal with costs, to set aside the Judgment of the Tribunal and to declare that its notice of objection dated 22nd April 2022 stands.
19. The appellant relied on:-
 1. I&M Bank Limited v Commissioner of Domestic Taxes (Income Tax Appeal E034 of 2020) [2023] KEHC 3522 (KLR) (Commercial and Tax) (28 April 2023) (Judgment)
 2. China Wu Yi Limited & another v Irene Leah Musau (2022) eKLR
 3. Civil Appeal No. 3 of 2020 Ndishu & Anor v Muriungi
 4. Rongai Tiles and Sanitary Limited v Commissioner of Domestic Taxes (2023) eKLR
 5. Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020) [2021] KEHC 25 (KLR) (Commercial and Tax) (23 August 2021)
 6. Eastleigh Mall Limited v Commissioner of Investigations & Enforcement (Income Tax Appeal E068 of 2020) [2023] KEHC 2000 (KLR)

Respondent's submissions

20. The respondent asserted that the objection decision was proper in law. It took the view that the Tribunal was right in upholding its assessment.
21. The respondent submitted that the appellant did not discharge its burden to prove that the assessment was wrong.
22. The respondent relied on:-
 1. Mulherin vs Commissioner of Taxation [2013] FCAFC 115
 2. Commissioner of Domestic Services v Galaxy Tools Limited [2021] eKLR
 3. Digital Box Ltd V Commissioner Investigations and Enforcement (TAT Act 115 of 2017)
 4. In re Estate of JKM (Deceased) [2020] eKLR



23. The respondent urged the court to uphold the Tribunal’s judgment dated 7th June 2024 and to dismiss the appeal with costs.

Analysis and Determination

Duty of court

24. In an appeal from the Tax Appeals Tribunal, this court has to consider only points of law. Section 56(2) of the *Tax Procedures Act*.
25. However, a question of fact can become a question of law if it is based on no evidence. Thus, the court may examine the issues of fact to ascertain that they are in conformity with the evidence and the law. *Oceanfreight (E.A) Limited v Commissioner of Domestic Taxes [2018] eKLR*
26. The issue before the court is whether the Tribunal erred in finding that the notice of objection was lodged outside the prescribed time, and that the objection decision was void.
27. The Tribunal’s findings on the issue are reproduced below:-

“ 52. The Tribunal noted that the Respondent issued its assessment vide a letter dated 12th November 2020. However, the Appellant filed its notice of objection on 22nd April 2022, two years after the assessment was issued.

...

53. The Tribunal has not been made aware of what transpired between 12th November 2020 to 22nd April 2022 that would explain the delay in the Appellant filing its notice of objection. The Tribunal would have expected the Appellant to file its notice of objection by 12th December 2020. The Tribunal would also have expected that the Appellant obtained leave from the Respondent to lodge its notice of objection out of time. Such an application, was not provided to the Tribunal for review. The Tribunal further notes the Respondent’s reserve in raising the fact that the notice of objection was lodged long after the statutory period of Thirty (30) days, in its pleadings.

54. In a letter dated 22nd April 2022, the Appellant stated as follows:-

“we did bring to the Respondent’s attention the fact that they did not have access to our office premises from 21st August 2021 when the said premises were taken over by officers from KRA and placed under armed guard. We did not receive any response to our aforementioned letters.”

50. The Tribunal notes that even if the Appellant did not have access to its office premises from 21st August 2021, it ought to have already made its objection on or before 12th August 2021. The Tribunal is of the further view that pursuant to section 21(2) the Appellant ‘may’ [emphasis ours] lodge an objection. Another way in which this section can be expressed is that the Appellant has the liberty of not lodging an objection to the assessment. The use of the word ‘May’ in statute implies that the obligation is discretionary and not mandatory. The Tribunal has also noted that the Respondent is responsible for determining whether or not an objection has been validly lodge. It is apparent



that the Respondent was not bothered by the delay in the objection and did not invalidate the objection which it ought to have done immediately pursuant to section 51(4) of the TPA...

56. ...A late objection would have required that the Appellant request, from the Respondent the necessary extensions or allowances. The view of the Tribunal is that the Respondent was neither capable nor had the mandate to issue an objection decision against the objection dated 22nd April 2022. The purported objection by the Appellant dated 22nd April 2022 was null and void. The Respondent acted 'ultra vires' in issuing its objection decision.

...

58. Accordingly, the finding of the Tribunal is that the objection by the Appellant was invalidly lodged pursuant to section 51(2) of the TPA and the Assessment therefore stands. The Assessment order is not an appealable decision. This appeal is therefore improperly before the Tribunal. All other issues the Tribunal identified for determination have been rendered moot by this finding and the Tribunal will not therefore proceed to probe them.”

28. The appellant submitted that the notice of objection dated 22nd April 2022 was filed within the 30-day statutory window after the respondent issued a notice of assessment dated 24th March 2022.
29. The appellant submitted that the notice of objection was valid since there was no communication by the respondent to the effect that it was invalid. Therefore, it faulted the Tribunal for pronouncing itself on the issue suo moto. It argued that the Tribunal erred by deciding on an issue not raised by the parties in their pleadings. It complained that it had no prior notice of the issue.
30. The appellant submitted that through its notice of objection dated 22nd April 2022, it indicated that it had been issued with the notice of assessment dated 12th November 2020. It argued that the same had been the subject of enforcement action and that taxes had partially been settled. It thus argued that the previous assessment was not applicable and did not oust the fresh notice of assessment dated 24th March 2022.
31. The appellant highlighted that the objection decision was issued by the respondent through a letter dated 27th February 2023. It contended that the decision was issued over ten months after the notice of objection. This was outside the 60-day statutory window. It therefore argued that its notice of objection was automatically allowed.
32. The appellant pointed out that it raised the issue of validity of the objection decision in its memorandum of appeal before the Tribunal. It submitted that the respondent did not offer a rebuttal. The respondent sought to explain the delay by alleging, without evidence that it had been in communication with the appellant in the intervening period.
33. According to the respondent, after the appellant issued its notice of objection of 22nd April 2022, it subsequently furnished supporting documents on 17th August 2022, 25th October 2022, 23rd December 2022 and 2nd February 2023. Thus, it argued that the 60 days contemplated under Section 51(11) of the TPA, started running on 2nd February 2023, when the appellant sent its last batch of documents supporting its objection.
34. The appellant retorted that the respondent did not produce evidence to show that there had been correspondence between the parties on the dates mentioned.



35. I have perused the record. The following matters are evident. The respondent issued a notice of assessment dated 12th November 2020. The respondent also issued notice of assessment dated 24th March 2022 appearing at pages 8-12 of the Record of Appeal. The respondent could issue a fresh assessment under section 31 of the *Tax Procedures Act*.
36. In the notice of objection dated 14th April 2022, the appellant was writing in response to the notice of findings dated 27th October 2021 and the notice of assessment dated 24th March 2022. It clarified that it had responded to the letter of findings through letters dated 4th November 2021 and 22nd November 2021, received by the respondent on 4th November 2021 and 26th November 2021.
37. The appellant indicated that through both letters, it brought to the Commissioner's attention the fact that they had not had access to their offices for the past nine months therefore has no access to the documents necessary to enable them to prepare a response. That they had been granted access to the factory as at 2PM on Wednesday 20th April 2022.
38. The letter dated 4th November 2021 is on record and confirms that the appellant did respond to the notice of findings dated 27th October 2021.
39. In its analysis, the Tribunal did not consider the fresh assessment notice of assessment dated 24th March 2022 issued by the respondent.
40. Section 51(2) of the *Tax Procedures Act* provides that:-
- “(2) A taxpayer who disputed a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.”
41. The notice of objection to the assessment of 24th March 2022 was issued within the 30-day statutory window. Thus, I find that the Tribunal fell into error by finding that the appellant's notice of objection issued on 22nd April 2022 was filed outside the statutory timeline.
42. Before I close on this point, it is important to note that, whereas the tribunal may deal with certain matters suo moto, but where the appeal solely turns on the point so take, care should be taken to offer the parties an opportunity to address the point.
43. The finding that the notice of objection was invalid was the basis for the finding that the objection decision was valid. However, the issue of validity of the objection decision is relevant and cardinal point of appeal.
44. I do not, however, wish to delve into this issue for the order I will make is re-hearing of the appeal before the tribunal which will evaluate the evidence and the law on all issues before it as the appeal has been found to be competent.
45. In the upshot, I set aside the decision by the tribunal and remit the matter back to the tribunal for hearing of the appeal presented before it- other than the panel which heard it. Each party shall bear own costs of the appeal before me.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH TEAMS ONLINE
APPLICATION THIS 24TH DAY OF JULY, 2025**

F. GIKONYO M



JUDGE

In the presence of: -

1. Ms. Odhiambo for appellant
2. Ms. Ngovi for Respondent
3. CA Kinyua

