



Commissioner of Domestic Taxes v Automobile Association of Kenya (Income Tax Appeal E076 of 2024) [2025] KEHC 10779 (KLR) (Commercial and Tax) (21 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E076 OF 2024**

**PJO OTIENO, J
JULY 21, 2025**

BETWEEN

THE COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

AUTOMOBILE ASSOCIATION OF KENYA RESPONDENT

*(Being an appeal from the judgement of the tax appeals tribunal delivered
on 2nd February 2024 republic of Kenya in the tat no e1263 of 2022;
Automobile Association of Kenya-Versus-The Commissioner of Domestic Taxes)*

JUDGMENT

Background

1. The Appellant is a principal officer appointed under and in accordance with Section 13 of the [Kenya Revenue Authority Act](#), Cap 469 of the laws of Kenya. The Kenya Revenue Authority, KRA, is charged with the responsibility of among others, assessment, collection, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
2. The Respondent was founded in 1919 and registered in Kenya as an association in 1993 with the object of promoting and safeguarding the interests of its members, who are mostly motorists. The Respondent also provides valuation services, maintenance and repair of vehicles, road mapping, technical training to its members, towing services, rescue services, driving classes among other services to its members.
3. The present appeal arises from a dispute concerning the corporate income tax liability of the Respondent for the financial years 2016 to 2020. The Appellant conducted a verification exercise on



the Respondent's operations covering the financial years 2016 to 2020 which resulted in the Appellant issuing Corporate Income Tax (CIT) assessment amounting to Kshs. 27,165,407.00.

4. Additional assessment was issued to the Respondent on 24th June, 2022 on the basis that it did not qualify to be a members' club under Section 21 (1) of the *Income Tax Act* because more than 50% of its gross income was derived from driving school learners who did not qualify to be members as provided for under Section 21 (3) of the *Income Tax Act*.
5. The Respondent objected to the Appellant's assessment vide a letter dated 22nd July 2022 but the Appellant confirmed the assessment through its objection decision dated 16th September 2022 on the basis that a section of the Respondent's members i.e. learners do not qualify to be members as defined under Section 21 (3) of the *Income Tax Act*. In confirming the assessment, the Appellant maintained that the driving school learners did not qualify as members as defined under then Act.
6. The consequence of the Appellant's finding that the Respondent did not qualify as a 'members' club was the disallowance of specific expenses. The disallowance then resulted to the additional tax liability which included provisions for leave of Kshs 7,979,412.00 in 2018, provision for staff terminal dues of Kshs 4,451,094.00 in 2018, impairment of subsidiary of Kshs 15,500,000.00 in 2019 and provision for bad debts of Kshs 5,893,843.00. The Appellant stated that these expenses did not meet the conditions for deduction under Sections 15(1) and 16 of the Act.
7. Dissatisfied with the Appellant's objection decision, the Respondent filed an Appeal at the Tax Appeals Tribunal on 13th October 2022. The proceedings before the Tribunal proceeded by way of written submissions by the parties. The Tax Appeals Tribunal delivered its judgment on 2nd February, 2024 where it upheld the Respondent's Appeal. The Tribunal found that the Respondent maintained different classes of members, namely honorary, life and ordinary members and that the driving school learners were classified as ordinary members of the association.

The Appeal

8. Dissatisfied and aggrieved by the entire decision of the Tax Appeals Tribunal rendered on 2nd February 2024, the lodged the current Appeal against that whole decision. The grounds upon which the Appeal is premised are found in the Appellant's Memorandum of Appeal dated 2nd April 2024 and are couched to be that; -
 - a. The Honourable Tribunal erred in law and in fact in holding that the Respondent's driving school learners meet the threshold of a "member" as defined under section 21 (3) of the ITA;
 - b. The Honourable Tribunal erred in law and in fact in holding that the assessments were justified;
 - c. The Honourable Tribunal erred in law and fact by failing to consider the parties' pleadings and submissions and make a determination merit.
 - d. The Honourable Tribunal erred in law and in fact by arriving at the conclusion that the Appellant's Assessment and Objection Decision were not justified.
9. Based on such grounds, the Appellant urges that this Honourable Court be pleased to sets aside the decision of the Tax Appeal Tribunal dated 2nd February 2024, upholds its objection decision and also be awarded costs of the Appeal.



Appellant's Case

10. The Appellant's appeal is founded on the assertion that the Respondent does not qualify as a members' club under Section 21(1) of the *Income Tax Act* (ITA) because more than 50% of its gross income is derived from driving school learners who do not meet the definition of members under Section 21(3) ITA. The Appellant contends that driving school learners are not members because they receive only temporary access, their membership cards are for specific services (not asset entitlement), their motive is training (not club membership), they lack vetting/long-term commitment, that the Respondent is not expressly registered as a members' club, and that there is no provision for surplus distribution to them. The Appellant presents financial data showing driving school revenue consistently exceeding 50% of total revenue for the years 2016-2020.
11. The Appellant advocates for a strict interpretation of tax statutes by the court so that no room is left for any intendment or implication. It contends that its assessment and disallowance of expenses were proper, as deductible expenses must be wholly and exclusively incurred in income production and allowed under Section 16 ITA. The Appellant highlights that it is not bound by a taxpayer's returns under Section 24(2) *Tax Procedures Act* 2015.
12. It is further submitted that the Respondent bears the obligation to prove a tax assessment is incorrect as coded under Section 56(1) *Tax Procedures Act* 2015 but failed to do so, arguing that merely demonstrating an error in the assessment is insufficient to discharge this burden. The Appellant prays for the appeal to be allowed and the objection decision be upheld. The appellant quoted various decisions on the need to; apply tax statutes on their plain words without inviting intendment of inference, on the duty upon the tax payer to prove that the tax demanded is not due and when the exemption under section 21 ITA applies. It was in particular stressed that mere demonstration of an error in the assessment does not suffice to discharge the taxpayer's burden of proof.

Respondent's Case

13. It is the Respondent case that it does qualify as a members' club and its driving school learners are members under Section 21(3) ITA, thus its income is exempt under Section 21(1) ITA. The Respondent argues that entitled means to give a right or title and this entitlement to assets upon liquidation is prospective and conditional, crystallizing only at liquidation. Any right, however small, constitutes entitlement.
14. It is the Respondent's case that the determination of who has rights to assets upon liquidation and the adjustment and extent of those rights, is a prerogative and function of the association's contributories and creditors, under the instruction of a competent court, as clearly stipulated under Sections 454 and 455 of the *Insolvency Act*, 2015. It further asserts that the Appellant's actions to reclassify members to non-members was reckless constituted a usurpation of the authority of the respondent under its constitution and also the authority of the judicial under the *Insolvency Act*.
15. The Respondent emphasizes that learners are registered as ordinary members, pay membership subscription fees, receive membership cards, access facilities, attend AGMs, and have voting rights as per its Constitution, and are not excluded from asset entitlement upon liquidation. It pointed that its Constitution classifies members into Honorary, Life, and Ordinary members, and no member can be registered outside these categories or granted temporary membership. The Respondent asserts that the Appellant's lack of guidelines for Section 21 ITA creates ambiguity that should be resolved in favor of the taxpayer.



16. The Respondent further avers that while the initial burden of proof is with the taxpayer, it shifts to the tax authority once the taxpayer provides sufficient evidence. It asserts to have discharged the burden, and the Appellant failed to disprove their claims. The Respondent claims a legitimate expectation that Section 21 ITA would be applied for exemption, given that over 75% of its revenue was from members.
17. Finally, the Respondent states that the learners, like other members, are eligible to shift their membership grade and renew subscriptions annually, demonstrating consistent treatment. The Respondent argued that the Appellant had not issued any Guidelines, Regulations, or Public Notices to aid taxpayers in complying with the provisions of Section 21 of the *Income Tax Act*.
18. In support of its case, the respondent also cited to court the decisions on how to construe the tax legislations while stressing that even though the burden of proof rests upon the tax payer, there is the incidence of the evidential burden which shifts one a prima facie position is established by the burden bearer.

Issues for Determination

19. The appeal was directed to be heard by way of written submissions. Both sides filed respective submissions and the court has had the benefit of reading both and derived valuable benefit therefrom.
20. From the reading of the memorandum of appeal, the statement of facts by the respondent, the judgment of the Tribunal and the rival submissions filed, the court identifies only one issue as pertinent for its determination. That issue is whether the Tribunal erred in law in its holding that the Respondent's driving school learners meet the threshold of a "member" as defined under Section 21(3) of the *Income Tax Act*. It remains the sole issue because if the learners be determined members the threshold for being deemed not to have derived an income is met and whether or not that income is subject to taxation becomes a foregone conclusion.
21. When that issue is answered either way, it resolves the concomitant issue whether the decision to charge tax based on whether or not the learners were members, was accurate and lawful.
22. In arriving at the isolated issues, the court appreciates its mandate as a second appeal to be narrow and constricted to the questions of law only. It is thus outside the mandate of the court to seek to delve into and to interrogate, with a view to coming to own conclusions, on matters of fact. The grounds of appeal as fashioned, (the tribunal erred in law and fact), clearly invites the court to act beyond its mandate. That invitation is politely declined.
23. This decision, in terms of and in deference to section 56(2) *Tax Procedures Act*, must be confined to inquiry whether there has been demonstrated an erroneous apprehension, exposition, interpretation or indeed a conclusion on a matter of law.

Analysis and Determination

Whether the Tribunal erred in law in holding that the Respondent's driving school learners meet the threshold of a "member" as defined under Section 21(3) of the *Income Tax Act*.

24. This issue, in the court's view, lies at the very heart of the appeal. The status and character of membership of the respondent, and indeed any other association or entity, is a matter of fact to be proved by factual evidence. Now, that is the jurisdiction of the trier of facts. The trier of fact in this matter was the Tribunal. It would take a very strong case for an appellate court to countermand or reverse the trier of facts on its determination based on evaluation of the evidence.



25. It is however not a blind deference to the trier of fact. Being an exercise of judicial authority, that analysis must be rational and coherent with the evidence led. Where the finding glosses over the evidence or where it is irreconcilable with the evidence led, the finding must be seen to be perverse in which event it becomes a matter of law because a judicial determination must be grounded upon facts disclosed in the evidence adduced by parties.
26. The restraint transcends the boundaries between civil and criminal litigation. Where an appeal lies on questions of law only, the appellate court should not interfere with the decision of the trial court or that of the first appellate court unless it is glaring that, on the evidence, no reasonable tribunal could have reached the same conclusion¹.
27. In situation where the conclusion is not supported by the evidence it ought to have flowed from, the decision is said to be bad in law for being an affront to the norm of justice and fairness that judicial decision be based on evidence supporting the pleaded position of the successful party.
28. Before the tribunal, evidence was led by way of the constitution of the Respondent and its membership application and membership cards. Based on such documents, the parties offered submissions on such facts as applicable to the law under Income Tax Act. Having executed its mandate, the tribunal delivered itself as follows: -

” The appellant further argued that in any case where the interpretation of members under section 21(3) resulted in two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes burden, tax or duty on the subject relying on the case of Keroche Industries Ltd vs Kenya Revenue authority & 5 Others to buttress this position.

The Tribunal has analysed the appellants constitution, registration documents, sample membership card the appellant adduced one sample membership access card, sample membership application form and sample invoice and established that the appellant maintained different classes of members; honorary members, life members and ordinary members and that the learners were classified as ordinary members...

Having thus concluded, and in the absence of a determination under the insolvency Act alienating the Ordinary Members from entitlement to assets of the association upon liquidation, the tribunal holds that the ordinary members be treated as members as per section 21(3) of the ITA”

29. The court finds that reasoning and conclusion to have been arrived at upon the evaluation of the factual evidence adduced. It was for the trier of facts to determine whether on not the driving school learners having paid membership fees became members. That question was answered by the tribunal in the affirmative. The court finds nothing erroneous, as to be perverse, with the decision and finds that being called upon to re-evaluate the evidence afresh on a second appeal is beyond its jurisdiction. The court may only add that, the imposition of tax having been solely based on the position that a category of respondent’s member were not such members, the same has no basis to ground the assessment and the consequent objection decision.
30. The court finds no error in the conclusions by the Tribunal to merit its intervention with the consequence that the appeal lacks merit and is dismissed with costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JULY, 2025.

¹ M’Irungu vs Republic (2013) KLR 455, Phillip Kiptoo Chemwolo vs Augustine Kubende(1986) KECA 87 (KLR)



PATRICK J O OTIENO
JUDGE

