



Nairobi Bottlers Limited v Commissioner of Domestic Taxes (Income Tax Appeal E079 of 2024) [2025] KEHC 9540 (KLR) (Commercial and Tax) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E079 OF 2024**

BK NJOROGE, J

JULY 3, 2025

BETWEEN

NAIROBI BOTTLERS LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

1. This is an Appeal arising from the decision of the Tax Appeals Tribunal delivered on 8th March, 2025 in Tax Appeals Tribunal Tax Appeal No. 1559 of 2022 Nairobi Bottlers Limited Vs Commissioner Of Domestic Taxes.

Background Facts.

2. The Appellant applied for a tax refund on 22nd May 2019 under Section 90(1) of the *Income Tax Act, 1993*, for income tax paid in error in December 2018 on technical fees and computer charges. The Respondent rejected the application on 13th October 2021. A late objection filed on 16th November 2021 was also rejected on 11th January 2022 due to being outside statutory timelines.
3. Thereafter, the Appellant appealed to the Tax Appeals Tribunal on 4th February 2022 and was later allowed to file the objection out of time, which they did on 15th September 2022. However, the Respondent again disallowed the application. The Appellant then appealed the objection decision. The Tribunal dismissed the appeal, upholding the Respondent's decision.
4. The Appellant being dissatisfied by the decision of the Tax Appeals Tribunal dated 8th March 2024, dismissing its appeal against the objection decision of the Commissioner of Domestic Taxes (hereinafter referred to as the "Respondent") dated 11th November, 2022 ("the Objection Decision")



rejecting its Notice of Objection to and confirming its refund decision dated 13th October, 2022, appeals to the High Court against the whole of the said decision on the following grounds;

- a. The Honourable Tax Appeals Tribunal (hereinafter referred to as the "Tribunal") erred in law and fact in finding that the Respondent was justified in rejecting the Appellant's Application for Refund of an amount totaling Kshs.41,711,350 and Kshs.17,106,753 being withholding tax erroneously paid on technical fees and computer charges to Coca-Cola Sabco (Pty) Limited respectively.
- b. The Honourable Tribunal fundamentally misapprehended the law when at Paragraph 73 of its Judgement, it determined that management and professional fees do not amount to business profits under Article 7 of the Kenya- South Africa Double Tax Treaty (hereinafter referred to as the 'DTA'). Even though the same was not contested by the Respondent at any particular time or at all.
- c. The Honourable Tribunal at Paragraph 66 of its judgment stated that; '...Both parties agree that these services fall under the management and professional fees...' It erred in finding that the Appellant does not benefit from the withholding tax exclusion set out in the DTA as it '...fails the ownership test...'
- d. More specifically, the Honourable Tribunal erred in failing to appreciate and consider the following.
 - i. Section 41(5) of the [Income Tax Act](#) provided that;
'(5) Subject to subsection (6), where an arrangement made under this section provides that income derived from Kenya is exempt or excluded from tax, or the application of the arrangement results in a reduction in the rate of Kenyan tax, the benefit of that exemption, exclusion, or reduction shall not be available to a person who, for the purposes of the arrangement, is a resident of the other contracting state if fifty per cent or more of the underlying ownership of that person is held by an individual or individuals who are not residents of that other contracting state for the purposes of the agreement...'
 - ii. Section 41(6) of the [Income Tax Act](#) further provided that;...
(6) Subsection (5) shall not apply if the resident of the other contracting state is a company listed in a stock exchange in that other contracting state...'
- e. The Honourable Tribunal fundamentally misinterpreted and misapprehended the above stated provisions of Section 41(5) and (6) of the [Income Tax Act](#) in stating at Paragraph 69 of its Judgment that the '...ITA envisioned a situation where the benefits of exclusions of the Kenya-South Africa DTA would be enjoyed only where...a) A company is listed in the South Africa stock exchange.... (b) A company holding 50% or more of the underlying ownership of that person is owned by individual or individuals who are residents of South Africa...'
- f. To the contrary, a strict and literal interpretation of the said Section 41(5) and (6) of the [Income Tax Act](#) effectively means that a company which is resident in South-Africa and is owned by a company with more than 50% of its shareholding being held by an individual who is not resident in South Africa, shall not be entitled to the benefits of the Kenya- South Africa DTA. As such, the Tribunal fundamentally erred in failing to find that Coca-Cola Sabco (Pty) Limited met the 'ownership-test' as set out in Section 41(5) of the [Income Tax Act](#) and therefore it was indeed entitled to the treaty benefits.



- g. The Honourable Tribunal erred in disregarding the fact that Coca-Cola Sabco (Pty) Limited is a company resident in South-Africa, and it is owned by Coca-Cola Beverages Africa (Pty) Limited which is in turn owned by Coca-Cola Company USA - 67.5% of its total shares, as accurately set out at Paragraph 28 of its judgment.
 - h. More specifically, the Honourable Tribunal fundamentally erred in failing to take cognizance of the fact that Coca-Cola Sabco (Pty) Limited passes the ownership-test, as Coca-Cola Company USA which holds more than 50% of the shareholding in Coca-Cola Beverages Africa (Pty) Limited is a legal person and not an 'individual' for purposes of the *Income Tax Act*. In particular, Section 2 of the *Income Tax Act* expressly defines an individual as a '... natural person...'
 - i. In any event, the Honourable Tribunal erred in disregarding the supremacy of the DTA as a source of law in Kenya. In particular, the Tribunal by rendering its judgment, undermined the legal concept of treaty override which seeks to uphold the provisions of a DTA in the event that there is a conflict with a provision in a statute.
 - j. At Paragraph 71 of its judgment, the Honourable Tribunal, despite acknowledging that the Appellant '...may have wrongly remitted withheld amounts...' to the Respondent, was unjustified in stating that the Appellant would be unjustly enriched from the refund of the taxes paid.
5. The Appellant prayed that the court grant the following orders:
- a. The Appeal herein be allowed with costs.
 - b. The Judgment of the Tax Appeals Tribunal dated and delivered on 8th March 2024 be set aside and substituted with Orders setting aside: -
 - i. The Refund Decision dated 13th October,2022
 - ii. The Objection Decision dated 11th November,2022
 - c. Such other and/or further orders as the Court may deem fit to grant.
6. In response to the Appeal, the Respondent filed a Statement of Facts dated 29th May 2024 stating that the taxes were correctly withheld and the refund decision aligns with the law. The Respondent referenced Section 56(1) of the *Tax Procedures Act*, which places the burden on the taxpayer to prove that a tax decision is incorrect. The Respondent asserted that they did not err in law or fact, having carefully examined the available information before issuing the objection decision

Issues for Determination

7. The parties disposed of the Appeal by way of written submissions which the Court has carefully considered. The Court frames the following issues for determination;
- a. Whether Coca cola Sabco (Pty) Limited met the ownership test set out under section 41(5) and (6) of the *Income Tax Act* in order to enjoy the Treaty benefits.
 - b. Whether the Appellant is entitled to the withholding tax exclusion set out in the DTA

Analysis

8. It is trite law that an Appeal to the High Court from the decision of the Tax Appeals Tribunal shall be on a question of law only. This Court is not permitted to substitute the Tribunal's decision with its



own based on its own analysis and appreciation of facts. This is unless the Tribunal's decision cannot be supported by any evidence.

Whether Coca Cola Sabco (Pty) Limited met the ownership test set out under section 41(5) and (6) of the Income Tax Act in order to enjoy the Treaty benefits.

9. It was the Appellant's argument that the Income Tax Act distinguishes between an individual and a company. Subject to Section 2 of the Act, an individual is a natural person. Therefore, Coca Cola Company USA being a company, is not a non-resident individual for purposes of Section 41(5)(6) of the Income Tax Act. The Appellant is therefore entitled to the benefits under the Kenya-South Africa DTA.
10. On the other hand, the Respondent maintained that the standard test is provided by Section 41(5) & 41(6) of the Income Tax Act. This section provides for various conditions for a company to enjoy the benefits of exclusion of the Kenya-South Africa DTA. Therefore, Coca-Cola Sabco (pty), having not been listed in the South African Stock Exchange and not having a 50% underlying ownership consists of the individual(s) who are residents of South Africa was excluded. That the Tribunal was correct in holding that the Coca-Cola Sabco (pty) limited fails the ownership test in that although Coca-Cola Sabco (pty) limited is domiciled in South Africa, it is not listed in the South African Stock Exchange. It is also owned by Coca-Cola Company USA at 67.5% shareholding and Gutshe Family Investment at 33.5% shareholding.
11. Section 41(5)(6) of the Income Tax Appeal (2019) provides;
 - (5) Subject to subsection (6), where an arrangement made under this section provides that income derived from Kenya is exempt or excluded from tax, or the application of the arrangement results in a reduction in the rate of Kenyan tax, the benefit of that exemption, exclusion, or reduction shall not be available to a person who, for the purposes of the arrangement, is a resident of the other contracting state if fifty per cent or more of the underlying ownership of that person is held by an individual or individuals who are not residents of that other contracting state for the purposes of the agreement.
 - (6) Subsection (5) shall not apply if the resident of the other contracting state is a company listed in a stock exchange in that other contracting state.
 - (7) In this section, the terms "person" and "underlying ownership" have the meaning assigned to them in the Ninth Schedule.
12. While the Appellant holds the view that an individual is a natural person, the ninth schedule of the same Act provides the interpretation as follows;

"Underlying ownership", in relation to a person, means an interest in the person held directly, or indirectly through an interposed person or persons, by an individual or by a person not ultimately owned by the individuals.

'Person' includes an individual, company, partnership, trust, government, or similar body or association."
13. The above-mentioned provision was very specific as to the interpretation of the words 'person' and underlying ownership' for purposes of application of this particular provision of the ITA (2019). It therefore did not leave any room for any other interpretation as intimated by the Appellant that 'individual as expressly defined under the act as a natural person'.



14. Thus, the standard test is provided by Section 41(5) & 41(6) of the *Income Tax Act* which provides for various conditions for a company to enjoy the benefits of the exclusion of the Kenya-South Africa DTA which are:
- i) A Company is listed in the South Africa stock exchange
 - ii) Fifty percent or more of the underlying ownership of the company is held by individual or individuals who are residents of South Africa
15. It is undisputed that Coca-Cola Sabco (pty) is not listed in the South Africa Stock exchange and neither does its 50% underlying ownership consist of the individual(s) who are residents of South Africa. Therefore, Coca-Cola Sabco (pty) limited fails the ownership test. This is in that although Coca-Cola Sabco (pty) limited is domiciled in South Africa, it is not listed in the South Africa Stock Exchange. It is also owned by Coca-Cola Company USA at 67.5% shareholding and the and Gutshe Family Investment at 33.5% shareholding.

Whether the Appellant is entitled to the withholding tax exclusion set out in the DTA

16. It is the considered view of this Court that the Appellant would NOT enjoy the benefits under Kenya – South Africa DTA if more than 50% of its underlying ownership is held by an individual who is not resident in South Africa (in this case Underlying Ownership is by Coca-Cola Company USA at 67.5% shareholding). On the other hand, Coca Cola Sabco (Pty) Limited is NOT listed in the South African Stock Exchange.
17. Further, the Court noted the Appellant’s argument that a subsequent general law cannot override a prior special law such as a Double Tax Treaty. Our Constitution envisages a system of taxation that is imposed and controlled by law as provided under Article 210 (1) which states that:
- “No tax or licensing fee may be imposed, waived or varied except as provided by legislation.”
18. The Supreme Court in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR) clarified that;
- “Where it has been used, as in the judicial pronouncements above, the expression “part of our law” means that domestic courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that the same are relevant, and not in conflict with *the Constitution*, statutes, or a final judicial pronouncement.
19. The import of the above is that the Double Tax Treaty ought not to be in conflict with *the Constitution*, statutes, or a final judicial pronouncement.
20. In light of the above, the Court agrees with the Tribunal’s holding that if the party to benefit from the tax exception has 50% or more of its underlying ownership held by a non-resident, then Section 41(5) of ITA negates the relief that such a party would otherwise be entitled under the provisions of the DTA including Article 7.
21. The Court is not persuaded that the Appeal has any merits.
22. As to costs, the same are awarded at the discretion of this Court. The fair order in the circumstances of the case is let each party bear its own costs of this Appeal.



Determination

23. The Appeal is hereby dismissed in its entirety as lacking in merits.

24. Each party is to bear its own costs of the Appeal.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 03RD DAY OF JULY, 2025

NJOROGE BENJAMIN K.

JUDGE

In the Presence of

Miss Onyango for the Appellant.

Mr. Lemaiyan holding brief for Miss Njuguna for the Respondent.

Court Assistant: Luyai

