



**Sea-Tech Limited v Commissioner of Domestic Taxes (Income Tax Appeal E134 of 2023)  
[2024] KEHC 7343 (KLR) (Commercial and Tax) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7343 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E134 OF 2023  
FG MUGAMBI, J  
JUNE 14, 2024**

**BETWEEN**

**SEA-TECH LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(Being an appeal from the Judgment & decree of the Tax Appeals  
Tribunal delivered on 29th June 2023 in Tax Appeal No. 636 of 2022)*

**JUDGMENT**

**Background**

1. The appellant, Sea-Tech Limited is a limited liability company incorporated in Kenya engaged in the principle business of importation and sale of sugar in the local market. In 2020, the respondent, the Commissioner of Domestic Taxes (the Commissioner) audited and reviewed the appellant's tax returns.
2. The Commissioner's findings revealed that in 2018, the appellant's opening and closing stock figures were the same, being Kshs. 257,634,234/= and that in 2019, the appellant claimed opening stock of Kshs. 18,123,875/= suggesting that stock worth Kshs. 239,510,359/= was sold in 2018 but was not declared in the income tax returns.
3. Through a letter dated 22<sup>nd</sup> September 2020, the Commissioner notified the appellant of its intention to treat the discrepancy in stocks as undeclared sales and charged income tax on the same. The Commissioner also advised the appellant to provide supporting records or an explanation for the discrepancy within 14 days.



4. The appellant issued a response dated 1<sup>st</sup> October 2020 and provided the 2018 audit report amongst other documents. The parties held meetings on 6<sup>th</sup> October 2020 and 18<sup>th</sup> February 2021. Upon review of the documents, the Commissioner issued a tax assessment of Kshs. 77,608,800/= on 16<sup>th</sup> March 2021.
5. On 30<sup>th</sup> March 2021, the appellant objected to the assessments. Thereafter, the Commissioner issued an objection decision on 18<sup>th</sup> May 2022 confirming the assessment of Kshs. 77,608,800/=.
6. Dissatisfied, the appellant preferred an appeal before the Tax Appeals Tribunal (the Tribunal). The appeal was dismissed and the Tribunal upheld the Commissioner's objection decision. Still dissatisfied, the appellant instituted this appeal through a Memorandum of Appeal dated 28<sup>th</sup> August 2023, on the following grounds:
  - i. The Tribunal erred in facts and in law in arriving at a finding that the appellant had failed to rebut the respondent's contention that it failed to support its grounds of objection, and further erred in law by imputing the absence of support documents to the statement of facts as fatal in discharging its burden of proof.
  - ii. The Tribunal erred in law and principle in finding that the appellant's evidence in respect of a fire incident produced by way of a Police Abstract OB as inadmissible.
  - iii. The Tribunal erred in law and principle in finding against the weight of evidence that the appellant failed to demonstrate with evidence in the appeal that it provided evidence to demonstrate the reasons for the variance, and failed to fully account for its sales.
  - iv. The respondent erred in law and fact failing to find that the respondent charged corporation tax on undeclared gross sales contrary to the provisions of section 3(1) of the *Income Tax Act*, which directs income tax be based on gains or profits.
7. The appellant prayed that its appeal be allowed with costs and that the Tribunal's judgment dated 29<sup>th</sup> June 2023 be set aside. The appellant also filed written submissions dated 16<sup>th</sup> February 2024. In opposing the appeal, the respondent filed a statement of facts dated 22<sup>nd</sup> January, 2024 and written submissions dated 30<sup>th</sup> January 2024.

### **Analysis and Determination**

8. This Court has carefully considered the record of appeal, statement of facts, parties' respective submissions and authorities as well as the impugned judgment.
9. The pleadings raise a preliminary issue to be determined as to whether this Court has jurisdiction to entertain this appeal. The Commissioner submitted that this Court lacks jurisdiction since the appeal was filed outside the statutory timelines without leave for extension of time. It was noted that the appellant filed the Notice of Appeal on 31<sup>st</sup> July 2023, whereas the impugned judgment was delivered on 29<sup>th</sup> June 2023 and the appeal ought to have been filed within 30 days, by 30<sup>th</sup> July 2023. The appellant did not make any submissions on this issue.
10. Section 32 of the *Tax Appeals Tribunal Act* (TATA), provides as follows with respect to the timelines for preferring an appeal:

“ 32(1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the



High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

(2) The High Court shall hear appeal made under this section in accordance with the rules set out by the Chief Justice.”

11. Further, rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, provides that:

“The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the Registrar and service a copy on the respondent.”

12. It is clear that under section 32(1) of the TATA, a party that wishes to appeal from a decision of the Tribunal is required to serve a notice of appeal on the other party within thirty days of the notification of the decision. Thereafter, the appellant is required to file and serve a memorandum of appeal within thirty days after the date of service of the notice of appeal.

13. A cursory look at the record confirms that the impugned judgment was issued on 29<sup>th</sup> June 2023. The appellant ought to have served the notice of appeal on or before 30<sup>th</sup> July 2023 but the same was filed on 31<sup>st</sup> July 2023. The respondent argues that this was outside of the timelines provided by law.

14. In determining whether this is indeed correct, I turn to the provisions of section 57 of the *Interpretation and General Provisions Act*, which provides that:

“In computing time for the purposes of a written law, unless the contrary intention appears –

- a. a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
- b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
- c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day...”

15. The last day that the appellant was required to serve the notice of appeal was Sunday 30<sup>th</sup> July 2023. By virtue of section 57 (b) (above), the following day, being 31<sup>st</sup> July 2023, should be included in computing the time period for serving the notice of appeal. Accordingly, I find that the notice of appeal was served in time and the contention that the Court lacks jurisdiction to hear the appeal fails.

16. I now move to consider the substantive issue for determination in this appeal which is whether the appellant provided sufficient evidence to show that the assessments arrived at by the respondent were erroneous. Indeed, whether the Tribunal erred in its finding in confirming the assessments.

17. At this stage, it is important to underscore this Court’s duty in an appeal from the Tribunal, laid out under Section 56 of the *Tax Procedures Act* (TPA). This Court has emphasised time and again that such an appeal is limited to matters of law. Matters of fact are only of concern for purposes of background or context and in determining whether the conclusions made by the Tribunal were evidence-based or so perverse that no Tribunal would have arrived at them. (See *John Munuve Mati V Returning Officer*



Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu, [2018] eKLR).

18. The appeal before this Court is premised on a question of burden of proof. It is the appellant's case that it supplied the Commissioner with the information that was within its reach at the objection stage and before the Tribunal. The appellant noted that given the 5-year period that had lapsed before the audit, it was possible that some transactional documents might not have been available.
19. The appellant relied on this Court's decision in *Commissioner Investigations and Enforcement V Kidero (Income Tax Appeal E028 of 2020)*, [2022] KEHC 52 (KLR) where it was held that the question whether the taxpayer has provided sufficient evidence is dependent on the nature of the subject or transaction and the circumstances of the case bearing in mind the duty placed on the taxpayer to keep records.
20. The appellant faulted the Tribunal for failing to make a finding on its contention that the Commissioner had charged corporation tax on undeclared gross sales. It reiterated that contrary to the Commissioner's assertions that the variance in stocks meant stocks sold but undeclared, the variance in stocks was explained as having arisen due to loss/ damage of stocks during a fire incident at its storage facility.
21. It highlighted that the fire incident was reported to the authorities and an OB number was produced in support at the objection hearing. It therefore argued that the Tribunal erred by failing to consider that as per section 3(2)(a)(i) of the *Income Tax Act* (ITA), income tax can only be charged in respect of gains or profits from a business.
22. According to the appellant, the Tribunal was wrong to have deemed the alleged lack of documents as a basis to assume that the variance in stock was chargeable for tax purposes. It argued that the Commissioner ought to have supported its assessment with verifiable proof that it was correct by showing that the tax administered was supported by verified payments.
23. On its part, the Commissioner pointed out that the appellant did not mention that there was a fire incident that gutted down its storage facilities in its notice of objection. It therefore faulted the appellant for introducing a new issue of fact at the appeal without seeking leave as required under Section 13 (6) of the TAT Act.
24. It asserted that the Tribunal did not have the jurisdiction to consider the issue. In any case, the respondent urged this Court to find that the Tribunal was right to find that the evidence in the form of Exhibit STL-6 being a Police Abstract was inadmissible and that the purported evidence of fire was not relevant to the appeal.
25. This is because the abstract was dated 10<sup>th</sup> April 2019 while the period of assessment or review was in 2018 and further that there was no direct link between the fire incident and the missing documents as the affected storage facility belonged to Highrise Commodities Ltd and not the appellant.
26. The Commissioner denied that it charged corporation tax on undeclared gross sales, clarifying that the audit disclosed that in its 2018 income tax returns, the appellant claimed and accounted for the cost of sales amounting to Kshs. 284,060,821/=. Thus, it concluded that the appellant had already claimed what was deductible and whatever remained as undeclared sales were net sales for the purpose of raising additional assessment.
27. This position is supported by the fact that the appellant was unable to show that corporation tax was charged on undeclared gross sales.



28. It is well established that the burden of proving a tax decision to be wrong or excessive lies with the taxpayer. This principle is supported by statute, as outlined in Section 56(1) of the TPA mentioned above, and in Section 30 of the TAT Act, which states as follows:

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

- (a) where an appeal relates to an assessment, that the assessment is excessive; or
- (b) in any other case, that the tax decision should not have been made or should have been made differently.”

29. The rationale for this principle is that the Kenyan tax system is based on self-assessment and the evidence to support transactions for purposes of tax is usually in the taxpayer’s possession. In *Kenya Revenue Authority v Maluki Kitili Mwendwa*, (Civil Appeal No. ITA E078 of 2020) [2021] eKLR the Court observed that:

“Regarding the presumption of correctness, 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.”

30. Similar observations have been made in other decisions including *Republic V Kenya Revenue Authority ex-parte Proto Energy Limited, (JR Appn E023 of 2021)* [2022] KEHC 5 (KLR) and *Rabisi Cash and Carry Traders Ltd V Commissioner of Investigations and Enforcement, (Income Tax Appeal E053 of 2021)* [2023] KEHC 24261 (KLR) (Commercial and Tax) (27 October 2023) (Judgment).

31. The Court notes that although the appellant challenges the decision by the Commissioner on the undeclared sales emanating from the stock variance, the appellant has not disputed the stock variance between its 2018 closing stock of Kshs. 257,634,234/= and its 2019 opening stock of Kshs. 18,123,875/= upon which the additional assessment was based.

32. The appellant had notice that it had not discharged the burden of proof. Through a letter dated 28<sup>th</sup> June 2021, the Commissioner notified the appellant that pursuant to section 51(4) of the TPA, the appellant had not submitted the requisite supporting documents including invoices and stock movement records to enable the Commissioner determine the correct tax payable. This led to the confirmation of the assessments by the Commissioner through the objection decision of 18<sup>th</sup> May 2022.

33. The claim by the appellant that not all the documents were available due to effluxion of time does not offer the appellant a way out of the stringent requirement for meeting the burden of proof. In any case I note that the period under review was 2018 and the investigations and objection periods were in 2020 and 2021 which was within the 5-year period that the appellant was required by law to keep records.



34. I therefore align with the finding of the Tribunal at paragraph 66 of its judgment that:
- “Though the Appellant has stated in its Statement of Facts that it provided the requested documentation. it has not stated the nature or listed the documents provided nor attached the same in its Statement of Facts. Thus has not satisfactorily rebutted the Respondent's contention that it failed to support its grounds of objection ... by failing to provide the requested documents the appellant in the instant case failed to discharge its burden of proof.”
35. The appellant additionally claimed that it provided the Commissioner with the police abstract and a report from the County Government of Mombasa in regard to the fire that gutted down its storage facilities with the stock that was unaccounted for. I do note in agreement with the respondent that this seems to have been an afterthought as the same was not raised in the appellant's notice of objection. Such a material fact ought to have been raised in the first instance.
36. The appellant produced exhibit “STL-6” being a Police Abstract OB as evidence before the Tribunal. The Tribunal discredited the evidence as a credible rebuttal against the issue of the stock variances. The Tribunal in any case held that the evidence was inadmissible.
37. Section 56(3) of the TPA, quoted above, stipulates that in an appeal, a taxpayer must rely on the grounds stated in the objection to which the decision relates, unless the Tribunal or Court permits the addition of new grounds.
38. The rationale behind this principle is rooted in the purpose of an appeal, which is to evaluate a matter based on the case presented and argued by the parties before the original forum. An appeal is not an opportunity to argue a different case. This principle is exemplified in the case of Ocean Freight (E.A) Limited V Commissioner of Domestic Taxes, (Income Tax Appeal 13 of 2017) [2020] eKLR.
39. Furthermore, it is essential that the Commissioner thoroughly evaluates the evidence at first instance. The initial evaluation ensures that all relevant facts and arguments are considered and addressed before any decision is made.
40. This thorough examination by the Commissioner serves as the foundation for any subsequent appeal, ensuring that the appellate body can review the matter based on a comprehensive and well-documented record. Without such diligent initial evaluation, the appeal process could be undermined, as the appellate body might not have access to all pertinent information initially presented by the taxpayer.
41. I therefore concur with the Tribunal's finding that the evidence was inadmissible.

### **Disposition**

42. On the whole therefore, the Court finds no merit in the appeal and the same is dismissed with costs. The Tribunal's judgment dated 29<sup>th</sup> June 2023 is upheld.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2024.**

**F. MUGAMBI**

**JUDGE**

