



Kenya Tea Development Agency Staff Provident Fund v Commissioner of Domestic Taxes (Income Tax Appeal E180 of 2023) [2024] KEHC 11175 (KLR) (Commercial and Tax) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E180 OF 2023
JWW MONG'ARE, J
SEPTEMBER 19, 2024**

BETWEEN

**KENYA TEA DEVELOPMENT AGENCY STAFF PROVIDENT
FUND APPELLANT**

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an Appeal from part of the decision of the Tax Appeals Tribunal dated 8/9/2023 in Tax Appeal No. 1187 of 2022)

JUDGMENT

1. On 14/06/2022 the Respondent issued to the Appellant a Notice of Additional Assessment for the July 2016 – June 2022 tax period for the sum of Kshs. 73,042,306/=. According to the Respondent, the withholding tax deducted from the lump sum commuted from the Appellant members who belonged to SPF and SRBS for 2016- 2021 was understated. The Respondent's view is that pensioners cannot receive an exemption from two schemes under the same employer.
2. In its assessment the Respondent opined that the investment income earned by KTDA staff provident fund and the KTDA Staff Retirement Benefits Scheme are partially exempt from income tax, thus the income earned from amounts contributed by an employee above the tax allowable limit provided by Section 22A of the *Income Tax Act* is deemed to be from an unregistered fund and therefore is chargeable as per Section 8(5)(f) of the *Income Tax Act*.
3. By a letter dated 6th July 2022 the Appellant objected to the Assessment. The Appellant's position was both the SPF and SRBS schemes were registered with the Retirement Benefits Authority and with the Commissioner and were exempt from tax.



4. Upon considering the objection, the Respondent upheld its decision on 30th August 2022. Aggrieved by the Respondent's decision the Appellant filed an Appeal in the Tax Appeal Tribunal which rendered its decision on 8th September, 2023. The Tribunal dismissed the Appeal and upheld the Respondent's assessment.
5. The Appellant was aggrieved by the Tribunal's decision and Appealed to this court vide the Amended memorandum of Appeal dated 22nd January 2024 raising the following grounds:
 - i. The Tribunal erred in its appreciation and application of when the burden and standard of proof shifts from the Appellant to the Respondent under Section 56 of the *Tax Procedures Act* when read together with Section 30 of the Tax Appeals Tribunal Act,
 - ii. The Honourable Tribunal erred in its interpretation of the burden of proof under Section 22A of the *Income Tax Act* paragraphs 12, 14 and 15 of the First Schedule to the *Income Tax Act*
 - iii. the Honourable Tribunal erred in holding that the Appellant had not discharged the burden of proof in the Appeal to demonstrate the Respondent had erred in its objection decisions.
 - iv. The Honourable Tribunal erred in fact and in law by failing to find that the deductions applied by the Appellants were uncontroverted and uncontested by the parties hence requiring no provisions of proof by the Appellant
 - v. The Honourable Tribunal erred in fact and in law by presuming that the deductions applied by the Appellant had exceeded the statutory limit despite the apparent finding by the Respondent in their objection decisions that such deductions had not exceeded the statutory limit if the Pension Schemes were treated as separate and distinct entities.
6. The Appellant urged the Court to allow the Appeal and subsequently set aside the judgment and orders of the Tax Appeal Tribunal.
7. The Appeal was heard through written submissions and oral highlights by counsels. The parties adopted two issues for determination as follows;(1) whether the assessment was justified; and (2) whether the Appellant discharged the burden of proof and if so whether the burden of proof shifted to the Respondent.
8. The Appellant argues the Tribunal erred in paragraphs 94 and 96 by holding the Appellant had the duty to demonstrate that the Respondent's position as alluded was incorrect, by adducing documentary evidence or information that there were no inconsistencies on the income or that the Statutory limit has been surpassed, and proceeded to find the Appellant failed to discharge its burden of proof.
9. The Appellant argues that upon the finding by the Tribunal that the tax income was erroneous, the entire assessment ought to have been vacated and no additional evidence ought to have been sought or adduced.
10. In arguing the Appeal, the Appellant submits the assessment by the Respondent was a nullity as it was anchored on a wrong interpretation of the law. That the Respondent misinterpreted the provisions of sections 8 (5), 13 and 22 of the Income Act. That the Respondent misconstrued the law in holding that the Appellant could not maintain two distinct schemes and subsequently proceeded to treat the second scheme as unregistered and therefore not tax-exempt and finally that the Respondent failed to appreciate it had issued two tax-exempt certificates and a legitimate expectation was created.



11. The Appellant further argued that in discharging its burden of proof it adduced the exemption certificate issued to the two different schemes which were in force, and which rendered the lumpsum payment tax-exempt. Therefore, the Appellant took the position that the burden of proof had thus shifted to the Respondent to adduce evidence that the decision was anchored in law, and the tax exemption certificate was withdrawn or varied, and that despite the error of the law the same would have been arrived at differently.
12. In conclusion the Appellant averred that the Tribunal having concurred with the Appellant that the Respondent erred in interpreting the law, it ought to have found that the objection was a nullity and no further burden of proof could lie and therefore erred in calling for more evidence.
13. The Respondent submitted that the Appellant could not maintain two pension schemes under the law, if two schemes were maintained by default one scheme ought to be treated as non-tax exempt and taxes could be levied.
14. The Respondent's position was that subject to Section 22A of the *Income Tax Act*, income from a registered pension scheme, pension fund or provident fund is exempt from tax, which is subject to Statutory limit, any amount that exceeds the statutory limit is subject to tax.
15. The Respondent submitted the Appellant had both registered and unregistered contributions. In the absence of proof of payment in the unregistered segment, the Respondent issued an assessment which was based on the best judgment and the available information availed to it by the Appellant. Furthermore, the Respondent argued that the Tribunal was proper in holding the Appellant earned income from the unregistered segments or non-tax allowable contributions.
16. The Respondent further submitted that subject to the provision of Section 56(1) of the Tax Procedure Act the burden is on the Taxpayer to prove that a decision is incorrect. Whereas Section 30 of the Tax Appeals Tribunal the burden of proof is vested on the Appellant to prove that the assessment is excessive or that the tax decision should not have been made or ought to have been made differently. To buttress this point the Respondent relied on the case of Commissioner of Investigation and Enforcement vs Pearl Industries Limited (2022) eKLR.
17. The Respondent argued that furthermore, the evidential burden rests with the Appellant to disprove the Commissioner and only after competent and relevant evidence is produced, does the burden shift to the Respondent. The Respondent took the position that the Tribunal did not err in appreciating the law and in finding that the Tribunal was correct in the application of the burden and standard of proof and urged the court to uphold the Tribunal's decision.
18. The Respondent further submitted the Appellant's submissions concerning paragraph 98 of the Tribunal's judgment are misleading and invited the court to interrogate the Tribunal's judgment. The Respondent averred as per paragraph 8 part II of the Appellant's trust deed provided the contribution limit was as provided in the *Income Tax Act* and Income Tax (Retirement Benefit) Rules, thus any taxation or otherwise of the fund is subject to limitations if any under the *Income Tax Act* and Income Tax (Retirement Benefits) Rules.
19. The mere production of exemption certificates without the production of any other further document does not discharge the burden of proof placed on the Appellant. The Respondent correctly interpreted the provisions of Sections 8(5), 13 and 22 of the Income Act and the assessment was justified. The Respondent urged the court to dismiss the Appeal and uphold the Tribunal's decision of 8th September 2023.



Analysis and determination

20. I have carefully considered the Appeal, the Statement of Facts, and the rival submissions in support of the party's respective arguments as well as the oral highlights by counsel. The main issue for consideration involves the interpretation of the law. In determining this Appeal this court's jurisdiction is vested under Section 56(2) of the Tax Procedure Act which provides an Appeal from the High Court and the Court of Appeal from the Tax Appeal Tribunal will be on a question of law only.
21. The court of Appeal in *John Munuve Mati vs Returning Officer Mwingi North Constituency & 2 other* (2018) eKLR summarized matters of law as follows:
- “[T]he 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.”
22. I do agree with the Respondent that the Tax Procedure Act Section 56 (1) and Section 30 of the TAT places the burden of proof in tax cases on the taxpayer. Section 56 (1) provides:
- “
- “1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.’
- Whereas Section 30 of the Tax Appeal Act provides:
- 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.
23. The import of the above provision is that the taxpayer must demonstrate that the assessment by the Commissioner is incorrect. The Taxpayer is prima facie required to adduce evidence to challenge the decision of the Commissioner.
24. In *George vs Federal Commissioner of Taxation* (1952) HCA 21 the court held:
- “the burden lies upon the taxpayer of establishing affirmatively that the amount of taxable income for which he has been assessed exceeds the actual taxable income which he has derived during the year of income” and that “...in order to carry that burden he must necessarily exclude by his proof all sources of income except those which he admits. His case must be that he did not derive from any source taxable income to the amount of the assessment.” However, how a taxpayer can discharge the burden varies with circumstances.
25. The Respondent averred that despite the exemption of the two pension schemes they were limited by section 22A of the ITA and the Appellant was required to pay tax for income acquired under the unregistered pension which it failed to.



26. In determining tax cases the court will look at the language used without making any presumptions. In *Keroche Industries Limited Vs Kenya Revenue Authority & Others Misc. Civil Application No. 743 Of 2006*, Nyamu J. Quoted With Approval, The Following Words From *Cape Brandy Syndicate Vs Inland Revenue Commissioners [1921] KB 64*.

“...in a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity in a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used.

27. The Commissioner’s assessments of a tax deficiency are treated as correct and the presumption is only discharged when the Taxpayer discharges the burden of proof and adduced relevant evidence to the contrary. It has been held that the burden of proof in tax cases may not shift to either party as per the provision of the *Evidence Act* and in instances where the Taxpayer adduces the relevant evidence the court will decide the matter on the strength of the evidence adduced and will not in turn shift the burden of proof to the Commissioner.

28. In the instant case, I am persuaded that it was not enough for the Appellant to adduce a copy of the tax-exempt certificate, it was supposed to prove that indeed there was no interest received and what was paid to the employees was not more than the required limit.

29. In tax matters the burden of proof is placed on the taxpayer based on the justifications for the correctness of the assessment, the need for revenue by the government and the fact that the taxpayer holds the documents needed.

30. I have perused the impugned ruling and I note that in determining the issue of the burden of proof the Tribunal held that the Appellant’s duty or obligation was to demonstrate that the Respondent’s position as alluded to was incorrect by adducing documentary evidence that there were no inconsistencies on the income earned or that the statutory limits had not been surpassed.

31. I further note that the Tribunal went ahead to cite the provisions of Section 30 of Tax Appeals Tribunal and Section 56 of the *Tax Procedures Act* in holding that the burden of proof lay on the taxpayer in this instant case, the Appellant.

32. Courts have consistently held that the tax law operates uniquely in that placing the burden of proof on the taxpayer is not contrary to *the Constitution*. Based on the above reasoning I am not persuaded that the Tribunal erred in holding that the burden of proof lay on the taxpayer. The upshot of the above finding is that the Appellant’s Appeal fails. The Appeal is hereby dismissed with costs to the Respondent.

33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Mr. Nkaricha for the Appellant.

Ms. Chelangat holding brief for Ms. Nganga for the Respondent.



