



**Hashi v Commissioner of Domestic Taxes (Tax Appeal 30 of 2017)
[2024] KEHC 12793 (KLR) (Commercial & Admiralty) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12793 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
TAX APPEAL 30 OF 2017
WA OKWANY, J
OCTOBER 3, 2024**

BETWEEN

AWALE ALI HASHI APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(An Appeal from the judgment of the Tax Appeals tribunal at Nairobi delivered on the 22nd May 2017 in the Tax Appeals Tribunal Tax Appeal No. TAT/2 of 2015)

JUDGMENT

Introduction

1. The Appellant is a sole proprietor operating a petroleum transportation business registered as A. H. Awale Company.
2. On or about 12th October 2011, the Respondent wrote to the
3. Appellant to submit its books of accounts and other additional documents for the period covering its inception to 2011 in line with the provisions of Section 56 of the
4. Income Tax Act (Cap 470) and Section 30 of the Value Added Tax Act (Cap 476).
5. The Respondent then audited the Appellant's books of accounts for the period 2004-2010 which audit revealed huge variations between the sales declared in the VAT Returns and the Income Returns.
6. Following the Audit the Respondent demanded Kshs.125,663,746 being additional taxes, penalties and interest.



7. The Appellant objected to the additional taxes, penalties and interest and subsequently filed an appeal in the Local Committee which Appeal was subsequently transited to the Tax Appeals Tribunal.
8. The Respondent proceeded to issue assessments of Ksh. 75,060,579 to the Appellant which assessment was later varied to Ksh. 125,663,756. The Respondent however subsequently adjusted its demands and arrived at the conclusion that the Appellant owed Tax in the sum of Kshs. 539,927, Kshs. 5,408,572 and Kshs. 1,840,965/- for the years 2008, 2009, 2010 respectively amounting to a total of Kshs. 7,789,464/-.
9. The Appellant referred the dispute to the Tax Appeals Tribunal and in its judgment rendered on the 22nd May 2017, the Tribunal upheld the Respondent's assessment of Ksh. 7,789,464 against the Appellant thereby precipitating the filing of the instant appeal.

The Appeal

10. The Appellant was dissatisfied with the Tribunal's findings and instituted the instant appeal and enumerated the following grounds of appeal in the Memorandum of Appeal: -
 - i. The said decision was made in contravention of the principles of natural justice as the Appellant's submissions titled Appellant's Final Position were not considered at all.
 - ii. The decision failed to give a concise statement of the case, the points for determination and reason for the decision as is required under Section 29(4) of the *Tax Appeals Tribunal Act*.
 - iii. The Tribunal's decision failed to interrogate the tabulation of assessment by the Respondent which had glaring irregularities.
 - iv. That the Tribunal erred in law and in fact when it determined the Appellant Appeal as Valued Added Tax dispute instead of Income Tax Dispute.
 - v. That the Tribunal erred in Law and in Fact in finding the Appellant had serious lapses in filing the self-assessment returns when no such issue arose for determination by the Tribunal.
 - vi. That the Tribunal erred in Law and in Fact when it failed to find that the Respondent had declined to adjust all disputed transactions in the bank statements which had been justified by the Appellant.
 - vii. That the Tribunal erred in law and in fact when it found that a global sum of Kshs. 7,789,464/= is payable without factoring the Appellant's evidence which disputed the amount.
 - viii. That the Tribunal erred in law and in fact when it allowed the Respondent to unlawfully and irregularly introduce a figure of Kshs.(-2,935,246) in the Respondent's submissions and which figure was not in the Statement of Facts/response to appeal filed by the Respondent.
 - ix. The Tribunal erred in law and in fact when it failed to notice a negative figure of Kshs. (-2,935,246) in the Respondent's tabulation which was added instead of subtraction from the amount claimed.
 - x. That the Tribunal erred in Law and in Fact when it failed to record the actual arguments that were raised by the Appellant and Respondent and it instead relied on arguments that were not raised by the Appellant or the Respondent.
 - xi. That the Tribunal erred in law and in fact when it failed to notice that the Respondent compounded assessments for several years to a sum of Kshs. 7,789,464/= instead of providing assessments against the individual years of income including the year 2008,2009 and 2010.



- xii. That the Tribunal erred in law and in fact when it failed to find that the amount of Kshs.7,789,464 is not specific to any year of income and the assessment fails to take into account reliefs and credits applicable in each year of income.
 - xiii. That the Tribunal erred in Law and Fact in not examining all the material and evidence presented to it.
11. The Respondent opposed the appeal through its Statement of Facts filed on 10th August 2017 wherein it reiterated the genesis of the case and the Tribunal's findings.
 12. The appeal was canvassed by way of written submissions which I have considered.

Appellant's Submissions

13. The Appellant faulted the Tribunal for failing to consider its final submissions and simply adopting the Respondent's submission as the judgment thereby contravening the principles of natural justice. The Appellant argued that by only adopting the Respondent's submissions as the judgment, the Tribunal did not give a concise statement of the case, the points for determination and reason for the decision as is required under Section 29(4) of the *Tax Appeals Tribunal Act*.
14. The Appellant contended that the Tribunal's did not interrogate the tabulation of assessment by the Respondent which had glaring irregularities thus arriving at an unfair decision.
15. The Appellant observed that even though the dispute commenced as a VAT assessment, it transitioned into an Income Tax matter after which parties presented a case founded on Income Tax only for the Tribunal to render a verdict that the Appellant had failed to declare zero rated sales in the Vat returns and failed to keep records contrary to VAT regulations. It was submitted that the judgment is therefore erroneous as the VAT tax regime and Income Tax regime operate on different rules and tax rates.
16. It was submitted that the Tribunal erred in finding the Appellant had serious lapses in filing the self-assessment returns when no such issue arose for determination by the Tribunal.
17. The Appellant argued that the Tribunal erred when it failed to find that the Respondent had declined to adjust all disputed transactions in the bank statements which had been justified by the Appellant. In this regard, the Appellant noted that the Respondent had failed to appreciate that the Appellant had expenses totaling to Kshs. 20,239,610 and further expenses of Kshs. 23,174,856/. The Appellant faulted the Tribunal for failing to call for the original documents that the Appellant had submitted to the Respondent to support the computation and instead merely adopted the Respondent's unsupported computations contained in their written submissions.
18. It was further submitted that the Tribunal erred when it found that a global sum of Kshs. 7,789,464/ = is payable without factoring the Appellant's evidence that the taxable amount tabulated by the Respondent for the year 2008 had deliberately omitted allowable expenses of Kshs. 23,174,856/- which the Respondent did not factor in the tabulation.
19. Instead the Respondent had only taken note of the expense of Kshs. 20,239,610/- but claimed Kshs. 23,174,856/- was a double claim of expenses when they were separate set of expenses.
20. At Page 62 of the Record of Appeal, the Appellant applied that the Tribunal should require the Respondent to avail all the original documents submitted by the Appellant for purposes of addressing the two expenses of Kshs. 23,174,856 and Kshs. 20,239,610.
21. Instead of the Tribunal calling for the original documents in possession of the Respondent, it took a short cut route of adopting the unsupported computation by the Respondent in its submissions.



22. In the end the dispute was determined by the Tribunal without adjustment
23. of all the disputed transactions notwithstanding the Appellant's prayers.
24. It was submitted that the Tribunal erred when it allowed the Respondent to unlawfully and irregularly introduce a figure of Kshs. (-2,935,246) in the Respondent's submissions which figure was not in the Statement of Facts/response to appeal filed by the Respondent. In this regard, the Appellant contended that instead of the Business expenses resulting in the reduction of the Taxable Income, the negative element introduced by the Respondent led to the expense being treated as an income.
25. It was submitted that there was therefore need for the matter to be submitted back to the Tribunal to enable both parties make submissions on the item of -2,935,246/-
26. The Appellant faulted the Tribunal for not noticing that the Respondent compounded assessments for several years to a sum of Kshs. 7,789,464/= instead of providing assessments against the individual years of income including the year 2008,2009 and 2010.
27. It was the Appellant's case that the amount of Kshs. 7,789,464 is not specific to any year of income and that the assessment fails to take into account reliefs and credits applicable in each year of income.

The Respondent's Submissions

28. The Respondent isolated the main issues for determination to be:
 - i. Whether the Tribunal's decision contravened the principles of natural justice
 - ii. Who bears the burden of proof in taxation matters
 - iii. Whether the Honourable Tribunal's decision to allow Ksh. 7,789,464 as tax due was proper.
29. On the Appellant's claim that the Tribunal did not adhere to the rules of natural justice when it failed to consider the Appellant's submissions titled Appellant's Final Position contrary to the weight of the Appellant's evidence, the Respondent submitted that the decision was arrived at in strict observance to the rules of natural justice as the Appellant was given an opportunity to be heard and present their evidence at the Tribunal. submissions persuasive not binding
30. It was the Respondent's case that since parties had agreed on all issues except issue number 8, the Tribunal did not err when it proceeded to render its verdict based on the issue that had not been agreed to by the parties.
31. Regarding the Appellant's claim that the Tribunal failed to give concise statement of the case, the points for determination and reasons for the decision as required by the *Tax Appeals Tribunal Act* and that the Tribunal simply adopted the Respondent's submissions as its decision, the Respondent submitted that since its final submissions stated that the only issue that was in contention was number 8 the Tribunal was well within its powers to arrive at issue number 8 as the only issue for determination. The Respondent noted that the Appellant did not controvert the fact that only one issue fell for the Tribunal's determination.
32. On the Appellant's claim that the Tribunal made no effort to probe the Respondent's tabulation of assessment and simply adopted the tabulation as a wholesome truth, the Respondent discounted this argument and contended that it addressed the issue in its submissions and that the Tribunal was guided by the same in its decision. For this argument, the Respondent cited the decision in *Tumaini Distributors Company (K) Limited vs. Commissioner of Domestic Taxes [2020] eKLR* where the court dealt with the issue of burden of proof in taxation matters and held that the taxpayer has the



burden to prove that a tax decision is wrong. How could the appellant prove it if its submissions were not considered.

33. The Appellant submitted under paragraph 33 that the Tribunal failed to adjust the disputed transactions as per their submissions. This cannot be true because the only issue to be determined by the Tribunal was issue number 8 which had not been agreed upon by the parties and that was the basis of the Tribunal's decision.
34. The Respondent maintained that the Tribunal considered all evidence presented before it and that the decision arrived at was the correct decision as the Appellant failed to exhaust the burden of proof placed upon by him under the law to show that the decision by the Respondent was incorrect. Reference was made to the decision in *Primarosa v Commissioner of Domestic Taxes* [2019] eKLR where Makau J. relied on *Mulherein v Commissioner of Taxation* [2013] FC AFC 115 and opined as follows

“The Federal Court of Australia held that in tax disputes, the taxpayer must satisfy the burden of proof to successfully challenge income tax assessment. The onus is on the taxpayer in proving that assessment was excessive by adducing positive evidence which demonstrates the taxable income on what tax ought to have been levied”
35. On the Appellant's submission that the Tribunal erred in law when it determined the Appellant's Appeal as a Value Added Tax dispute instead of Income Tax Dispute, the Respondent's submitted that the Tribunal duly determined the Appeal before it pursuant to the law applicable being the *Income Tax Act*. The Respondent added that it had indicated that there were variances between the VAT returns and the Income returns and that after the audit it was decided that the Appellant was due to pay the undeclared income tax.
36. The Respondent conceded that even though the VAT tax regime and Income Tax regime operate on different rules and tax rates, where there is a variance between the said returns on both regimes, it is upon the Taxpayer/Appellant to prove the variances to the Respondent's.
37. It was submitted that the Tribunal was well within its mandate when it pointed out that there were serious lapses in filing of the self-assessment returns by the Appellant.
38. On the Appellant's claim that the Tribunal's decision to allow Kshs. 7,789,464 as the tax due was erroneous for failing to specify the relevant year(s) of income thus denying the Appellant the benefit from reliefs and credits, the Respondent argued that the only income which was considered was income from 2008, 2009 and 2010 which was well captured by both the Appellant and the Respondents in their submissions. It was submitted that the Tribunal only pointed the total amount payable by the appellant on the basis of the computation by the respondent which reflected the availed supporting documents and that issues to do with reliefs and credits can be dealt with at a later stage.
39. Regarding the Appellant's claim that the Tribunal did not consider the figure of (- 2,935,246) and instead treated the same as an expense, the Respondent stated that the Tribunal was alive to the fact that the figure of Kshs. (-2,935,246) constituted an add back since what was claimed in the accounts was more than what was supported for by expenses. According to the Respondent, the Tribunal duly noted the negative figure of Kshs. (-2,935,246) and appreciated the basis of the addition in light of the Respondent's explanation substantiating the same.

Analysis and Determination

40. I have carefully considered the Record of Appeal and the parties' respective submissions together with the authorities that they cited. I find that the main issue for determination is whether the Appellant



has made out a case for the setting aside of the judgment by the Tribunal and for the granting of an order directing the Respondent to conduct a fresh assessment of the amount due separately for the years 2008, 2009 and 2010 with a view to factoring in the tax credits and reliefs.

41. As can be noted from the above overview of the parties' respective submissions, the Appellant raised dissatisfaction with the decision by the Tribunal on several fronts. Almost all the grounds of appeal speak to the failure, by the Tribunal, to properly analyze all the facts presented before it or at all.
42. The Appellant's first concern was that the Tribunal did not pay homage to the principles of natural justice as it did not consider the Appellant's submissions titled Final Position, and further, that the Tribunal did not give a concise statement of the case, identify the issues for determination and the reasons for its findings as required under Section 29 (4) of the [Tax Appeals Tribunal Act](#). Section 29 (1) – (4) of the said Act stipulates as follows: -

Decisions of the Tribunal

1. The decision of the Tribunal shall be by majority vote of the members present, and in the case of equality of votes, the Chairperson shall have a casting vote in addition to his deliberative vote.
 2. The Tribunal shall make a decision in writing or through electronic means—
 - (a) affirming the decision under review;
 - (b) varying the decision under review; or
 - (c) setting aside the decision under review and either—
 - (i) making a decision in substitution for the decision so set aside; or
 - (ii) referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal.
 3. The Tribunal shall give reasons in writing or through electronic means for its decision, including its findings on material questions of fact and reference to the evidence or other material on which those findings were based.
 4. The Tribunal shall cause a copy of its decision, including the reasons for the decision, to be served on each party to the proceeding. [Emphasis added].
43. A perusal of the impugned judgment, by the Tribunal, reveals that after highlighting the background of the case and the parties' respective arguments, the Tribunal rendered itself as follows: -

“Tribunal's Observations

37. The Tribunal is of the opinion that there are serious lapses on the part of the Appellant in filing the self-assessment returns.
38. In the final submissions, the Respondent also adjusted all earlier disputed transactions in the bank statements, whichever could be justified by the Appellant to the satisfaction of the Respondent.
39. The Respondent considered and allowed substantial expenditure and the final assessment of the additional tax was reduced substantially to Kshs. 7,789,646, for the period covering 2008 to 2010 in the absence of satisfactory explanations and production of supporting documents by the Appellant."



Findings

40. The Tribunal finds that the adjusted amount of Kshs. 7,789,646, and any interest and penalty thereon is payable by the Appellant.

The Appeal is dismissed and there shall be no orders as to costs.”

44. I note that the Tribunal’s decision basically consisted of 3 paragraphs of its own observations and a one sentence finding which did not capture the issues for determination, the reasons for the findings or refer to the evidence on which the decision was founded as envisaged under Section 29 (3) and (4) of the *Tax Appeals Tribunal Act*. For example, at paragraph 37 of the impugned judgment, the Tribunal observed that there were serious lapses on the part of the Appellant in filing the self-assessment returns without showing the evidence that informed such an observation. Indeed, none of the Tribunal’s observations were backed by any evidence or submissions by the parties.

45. With all due respect to the Tribunal that heard the instant appeal, this court is of the humble view that the judgment fell short a proper judgment as envisaged by the law. I note that the Tribunal did not make any findings on all the substantial and pertinent issues that it was required to determine such as; interrogating the tabulation of the Respondent’s assessment, the adjustment of disputed transactions in the bank statements and the introduction of a negative figure of Kshs. (-2,935,246) by the Respondent during submissions. In my considered view, this failure, by the Tribunal, to address the critical issues, resulted in a judgment that does not meet the threshold of a proper judgment.

46. It is also noteworthy that nowhere in the Tribunal’s observations and findings did it make any reference to the Appellant’s position as stated in his evidence or submissions as the Tribunal only referred to the position presented by the Respondent thus lending credence to the Appellant’s argument that the Tribunal did not adhere to the principles of natural justice as the decision was one-sided.

47. My above findings on the shortfalls of the impugned judgment are sufficient to dispose of this appeal and consequently, I find that the appeal is merited and I therefore allow it in the following terms: -

- a. The impugned judgment by the Tax Appeals Tribunal is hereby set aside with a rider that the appeal is remitted back to the Tribunal so that it can determine all the issues raised by the parties in a fair and just manner.
- b. Each party shall bear its own costs of the appeal.

48. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS
THIS 3RD DAY OF OCTOBER 2024.**

W. A. OKWANY

JUDGE

