



**Atlas International Limited v Commissioner of Domestic Taxes (Income Tax Appeal E085 of 2021) [2023] KEHC 17268 (KLR) (Commercial and Tax) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17268 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E085 OF 2021**

**FG MUGAMBI, J**

**MAY 12, 2023**

**BETWEEN**

**ATLAS INTERNATIONAL LIMITED ..... APPELLANT**

**AND**

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

*(Being an appeal from the decision of the Tax Appeals Tribunal delivered on 21st May 2021 in Tax Appeal No. 551 of 2019)*

**JUDGMENT**

**Introduction And Background**

1. The respondent *vide* a letter dated October 18, 2018 raised estimated tax assessments of the affairs of the appellant, a business registered and carrying out the business of sale of business magazines in Kenya. The appellant objected to the assessment *vide* a notice of objection dated August 20, 2019. Through a letter dated September 5, 2019 applied to lodge its objection out of time. The objection was allowed and accepted by the respondent. The respondent requested for more documents which in a letter dated September 25, 2019 were provided by the appellant. The respondent issued an objection decision on November 22, 2019. The appellant lodged an appeal at the Tax Appeals Tribunal (hereinafter ‘the tribunal’) against the decision of the respondent.
2. The tribunal in its judgment dated May 21, 2021 dismissed the appeal and upheld the respondent’s objection decision dated November 22, 2019 which confirmed the tax assessment in the sum of Kshs 13,632,533.00. Dissatisfied with the judgment of the tribunal, the appellant lodged this appeal through a memorandum of appeal dated July 21, 2021 setting out the following grounds of appeal:



- i. The honourable tribunal erred in law by entertaining the respondent's argument on insufficiency of documentation contrary to section 51(3) of the [Tax Procedures Act](#) which requires the respondent to only issue objection decisions where it is satisfied that all documents have been provided and consequently that the objection is well lodged.
  - ii. The honorable tribunal erred in law by failing to analyze the evidence and making the finding that the appellant had not provided all the documents contrary to the statement of facts and pleadings filed before it.
  - iii. The honourable tribunal erred in law by finding against the appellant for not providing documents that were not material for the ascertainment of its taxes as required by section 23 of the [Tax Procedures Act](#).
  - iv. The honorable tribunal erred in law by allowing the respondent to make estimated assessments notwithstanding that the appellant had provided the respondent with books of accounts and supporting documents demonstrating its revenues.
  - v. The honourable tribunal erred in law by allowing the respondent to ignore the appellant's books of accounts and proceed to make estimated assessments without giving any reasons for its decision contrary to the Fair Administrative Actions Act.
  - vi. The honourable tribunal erred in law by misapplying section 59 of the [Tax Procedures Act](#) and upholding the decision of the respondent without specifying the relevance of the documents that the appellant had not provided and their significance in the assessment of the appellant's taxes
  - vii. The honourable tribunal erred in law in finding that the appellant had failed to keep the required documents as per section 23 of the [Tax Procedures Act](#) consequently disregarding the many records and books of accounts released to the respondent.
3. It was the appellant's submissions that the request for more documents by the respondent in a letter dated September 23, 2019 was met by the appellant when they supplied the documents *vide* an email dated September 25, 2019. The respondent further informed the appellant that there were purchases made in 2018 and sales ledgers for the year 2017 that were still missing and made a request for loan agreements which were supplied on November 22, 2019 by the appellant.
  4. Based on the correspondences, the appellant's submissions were that all the documents requested for by the respondent were availed and therefore the honourable tribunal erred in holding that documents were not availed. With respect to withholding tax, the appellant submitted that the appellant was at no time requested to produce the same by the respondent. The appellant's contention was that despite the documents being provided by the appellant, the respondent still relied on the estimated assessments.
  5. The respondent filed its response to the appeal through the statement of facts dated November 16, 2021. It was the respondent's case that the respondent considered the appellant's objection as validly lodged on September 25, 2022 when the documents in support of the objection were received. It was the respondent's contention that the appellant failed to provide the relevant documentation and as a result the respondent was unable to review the objection. According to the respondent the information regarding the number of magazines was not provided, the business model and service agreement records on sharing of revenue was absent and finally the evidence of financial support for the accumulated losses and loan agreements were not availed.
  6. In its submissions the respondent observed that the objection decision was issued within the 60-day statutory period thus satisfying the mandatory provisions of section 51(3) of the [Tax Procedures Act](#)



(hereinafter the ‘TPA’). Counsel submitted that the burden of proof was on the appellant to provide the relevant documents which would in turn answer the questions raised in the assessment. It was submitted that the appellant was given sufficient time to produce the documents but it failed to fully comply with the respondent’s request.

7. It was the respondent’s further submissions that the assessment was grounded on section 29 of the TPA and the respondent, with respect to section 24(2) of the said Act was at liberty to assess the tax payer without being bound by the information produced by it.

### **Analysis And Determination**

8. This court has considered the record of appeal, the response together with the written submissions and the authorities relied upon by parties. Having done so, the main issue that arises from the appeal is with respect to provision of additional documents and this court is called upon to ascertain whether the tribunal made an error in fact and in law in holding that the appellant failed to avail the relevant documents within time and therefore whether the objection decision issued by the respondent was valid and could stand. As this issue will rotate around the interpretation of tax legislation, it is important to point out at the onset that this court has settled the manner and style in which tax legislation should be interpreted.
9. In the case of *Republic v Commissioner of Domestic Taxes Large Tax Payer’s Office ex-parte Barclays Bank of Kenya Ltd* [2012] eKLR the court held as follows:

The approach to this case is that stated in the oft cited case of *Cape Brandy Syndicate v Inland Revenue Commissioners* [1920] 1 KB 64 as applied in *T.M Bell v Commissioner of Income Tax* [1960] EALR 224 where Roland J. stated, “...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”

10. Similarly, the Court of Appeal in *Kenya Revenue Authority v Republic (ex-parte Fintel Ltd)* Nrb CA civil appeal No 311 of 2013 [2019] eKLR, cited with approval the dictum of Lord Atkinson in *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1 that;

“It is well established that one is bound, in construing revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of a statute must be adhered to, and that so-called equitable constructions of them are not permissible”.

11. Further in *Commissioner of Income Tax v Westmont Power (K) Ltd* Nairobi High Court Income Tax Appeal No 626 of 2002, the court while citing *Inland Revenue v Scottish Central Electricity Company* [1931] 15 TC 761 expressed itself as follows:

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for



ambiguity...any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”

12. Having laid this basis, the appellant relies on section 51(3) of the TPA in stating that the law requires the respondent to only issue objection decisions where it is satisfied that all documents have been provided and consequently that the objection is well lodged. Section 51(3) reads as follows: -

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- (3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—
- (a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;
  - (b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and
  - (c) all the relevant documents relating to the objection have been submitted.

13. I have reviewed the record before me and I note as observed by the tribunal that between the period of the assessment which was October 18, 2018 and the date of the objection decision which was November 22, 2019, there had been correspondence exchanges between parties most of which were on documents required. The tribunal noted that the respondent sought evidence of the financial support that the appellant had received from its Dubai office and for loan agreements amongst other documents that were never issued to the respondent. The respondent went ahead and issued an objection decision on November 22, 2019 stating that the appellant had not produced relevant documents with respect to the number of magazines registered, their ownership and publications for the period under review.
14. The respondent further stated in its objection decision that the business service level agreements as well as the transaction records on the revenue proceeds together with the expenses between the appellant and the sister company in Dubai were not availed. It was the respondent’s contention that there ought to have been evidence of financial support for the accumulated losses detailing how the funds were received and used for the review period but the loan agreements and withholding tax on interest had also not been provided. For the reasons stated, and from the record, I disagree with the assertion that the respondent did not explain the relevance of the documents sought to the appellant and if the appellant felt that the requests were unreasonable, there was all the time to raise the concern. In any case, the appellant has not led any evidence to show that the documents demanded by the respondent, which it is under obligation to demand by virtue of section 59 of the TPA were unreasonable.
15. The said provision that the appellant relies on must be read alongside other tax provisions so as to ensure that the interpretation intended in section 51(3) of the TPA is in tandem with the general spirit of tax legislation. The appellant appears to insinuate that a tax payer ought to have his time to decide when to put in all the documents that are relevant and only then does time begin to run. What does the ‘relevant documents’ in this section mean? To answer this question, I will refer to a few other provisions of the law, closely related.



16. The starting point is that the burden of proof in a tax dispute lies with the tax payer. Section 56 of the TPA provides that; -

In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is wrong”.

17. The tax payer according to section 59(1) is obligated by the commissioner to produce documents when called upon to do so. Section 59 (1) of the Act states as follows;

For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to—

- (a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
- (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or
- (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.

18. In the case of *Commissioner of Domestic Taxes v One Stop Trading Limited* (Income Tax Appeal E098 of 2020) the court observed that;

“Once the tax payer produces to the appellant the requested information and documentation, the tax payer then can be said to have discharged his burden and the evidentiary burden then shifts to the appellant to support his assessment. The basis for this is because, a tax payer is required to be a keen trader who should keep his documentation for all commercial transactions that he undertakes for tax purposes.”

19. Similarly in *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) the court held that:

“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. A presumption of correctness arises from the commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented”.



20. It is therefore always presumed that once the taxpayer has seen the assessment raised by the taxman and the issues at hand, the taxpayer ought to diligently provide documents that sufficiently support his position and these should meet a minimum threshold by discharging the burden placed on him to prove the incorrectness of the assessment. It is only then that the evidentiary burden would swing to the taxman. Even when asked for additional information, the respondent is under an obligation to provide the same to the best of his knowledge and ability without being seen to withhold information. This is my interpretation of ‘relevant documents’ within the meaning of section 51(3).
21. It is not the responsibility of the respondent to keep at a back and forth with a taxpayer who once he has knowledge of exactly what is required of him, must then either produce the same or provide an explanation to the respondent. That cannot have been intended in an otherwise time bound process. All through the process, the burden of proof to show the incorrectness of the assessment therefore remained on the appellant and was not discharged. The appellant had sufficient time from October 18, 2018 up to November 22, 2019 to discharge this burden but he did not and he ran out of time. He cannot therefore be heard to say that the law allows him time unlimited until when all ‘relevant’ documents have been filed.

### **Disposition And Orders**

22. For the reasons that I have stated, I find no reason to interfere with the tribunal’s finding. The court finds no merit in the appeal and the same is hereby dismissed with no orders to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2023**

**F. MUGAMBI**

**JUDGE**

**Court Assistant: Ms. Lucy Wandiri.**

