

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MILIMANI LAW COURTS
INCOME TAX APPEAL NO. E191 OF 2024

FORESIGHT INFRASTRUCTURE INC.....
APPELLANT

VERSUS

**COMMISSIONER OF LEGAL SERVICES &
BOARD COORDINATION.....**
RESPONDENT

JUDGMENT

1. This is an appeal against the Tax Appeals Tribunal’s judgment dated 7th June 2024 in **Tax Appeal No. E159 of 2023; Foresight Infrastructure Inc v Commissioner of Legal Services & Board Coordination.**
2. Dissatisfied, the appellant lodged this appeal through a memorandum of appeal dated 2nd August 2024, on the following grounds:-
 - (1) **The Tribunal erred in law by placing reliance on the Respondent’s Statement of Facts notwithstanding that the Respondent’s Statement of Facts had not been filed in accordance with the provisions of Section 15 of the Tax Appeals Tribunal Act, 2013 and had not**

been served on the Appellant.

(2) The Tribunal erred in law in making reference to the Respondent's Statement of Facts purportedly filed on 7th June 2023, notwithstanding that the proceedings before the Tribunal carried on without the Respondent's Statement of Facts being filed or served on the Appellant.

(3) The Tribunal erred in law in finding that the Appellant failed to discharge its burden of proof under Section 56 (1) of the Tax Procedures Act, 2015 (TPA) notwithstanding that the appropriate documentation in support of the claim had already been supplied to the Respondent during prior audit checks and were in the Respondent's knowledge and possession.

(4) The Tribunal erred in law in disregarding the evidence adduced by the Appellant in support of its commercial building allowance claim without any legal justification.

- (5) **The Tribunal erred in law in failing to find that the Appellant was entitled to claim the remainder of its commercial building allowance, being 25%, having successfully claimed 75% of the commercial building allowance in the years 2013, 2014 and 2015 all of which had been allowed by the Respondent.**
- (6) **The Tribunal erred in law in finding that the Appellant ought to resupply supporting documents in respect to the commercial building allowance claim for the year 2016 notwithstanding that the commercial building allowance claim was a rolling over claim that had successfully been allowed by the Respondent for prior years (2013, 2014 and 2015) pegged on the same supporting documents, as the entire claim for 2016 was predicated on the same investment.**
- (7) **The Tribunal erred in law in failing to find that the Respondent had no basis in law for challenging the commercial building allowance**

which was simply a carry forward balance for the year 2016 predicated on successful claims already having been allowed for 2013, 2014 and 2015.

(8) The Tribunal erred in law by disregarding the principle of legitimate expectation which dictated that having accepted the Appellant's commercial building allowance claim for the years 2013, 2014 and 2015, the Respondent was estopped from disallowing the Appellant's commercial building allowance claim for the year 2016.

(9) The Tribunal erred in law in failing to find that the Appellant had already adduced supporting documents to the Respondent through the Respondent's Medium Taxpayer's Office and during previous audits which the Respondent was estopped from disavowing.

(10) The Tribunal erred in law in failing to consider the explanations provided by the Appellant in respect to the foreign exchange

variances which arose due to the Appellant's invoicing model which was based on United States Dollars as opposed to the Respondent's tax accounting regime which was premised in Kenya Shillings.

Background

3. The appellant is a Kenyan branch of **Foresight Infrastructure Inc.** based in Mauritius. Its principal business activity is letting out commercial property from which it earns rental income. It owns the Delta Tower B composed of 18 floors, parking lot and other social infrastructure. It and its related company, Skylinetowers Investment Inc commissioned Delta Corporation East Africa Limited to construct the building and purchased it while it was being constructed. The purchase was completed in December 2012, and the building was commissioned in 2013 for use by tenants.

4. The appellant stated that it incurred an investment of KES.958,012,587/- in the year 2013, capitalised in its books. In **2014** and 2015, it incurred further costs KES.6,082,615 and KES.1,650,637 respectively, on the

building, bringing the total investment in the building KES. 965,745,839.

5. The appellant claimed a commercial building allowance or (**CBA**) in its tax computations for the financial years ended 2013, 2014, 2015 and 2016 at the rate of 25% per annum, which was the investment allowance applicable at the time as a deduction to investors who incurred expenditure in relation to a commercial building and provided social amenities from the year 2013.
6. On 12th November 2021, the respondent issued the appellant a notice of intention to audit its corporate income tax, VAT and PAYE for the 2016 - 2020 years of income.
7. On 4th November 2022, the respondent issued preliminary findings raising a cumulative liability of Kshs. 74,512,306/=; corporate income tax (**CIT**), value added tax (**VAT**), and withholding tax (**WHT**) of KES 15,205,203, KES 33,563,517, and KES 29,743,585, respectively.
8. In response, on 21st November 2022, the appellant wrote to the respondent providing explanations and supporting documentation in respect of the preliminary findings.

9. On 23rd December 2022, the respondent issued assessments on VAT, withholding tax and separately disallowed a commercial building allowance of Kshs. 241,486,261/-.
10. The appellant lodged a notice of objection dated 20th January 2023, challenging the assessments wholly. It was received by the respondent on 23rd January 2023.
11. Through an email dated 9th March 2023, the respondent requested the appellant to provide additional documents for its examination and review. These were the sales ledger for 2016 - 2021, breakdown of commercial building allowance and the supporting documents; documents explaining the forex variance - analysis of the adjusting amounts (invoice, invoice date, payment and payment date) to support the exchange loss adjusted; Service charge - evidence that input tax on the service charge was not deducted if the output value of the service charge was not part of the supplies as per VAT returns. Forex Variance - Provide more details/explanations on how the exchange rate variation affected the supply value if an average rate was applied in each year. Double input deduction - Provide

documentation on the respective invoices in the posting mix. Detailed breakdown of the sales as per your reconciliation for 2016-2021.

12.The appellant gave further clarification through an email dated 14th March 2023.

13.The respondent issued its objection decision on 27th March 2023.

14.Aggrieved, the appellant filed an appeal before the Tax Appeals Tribunal on 8th May 2023, leading to the judgment that is the subject of this appeal.

Directions of the court

15.The appeal was canvassed through written submissions. The appellant and the respondent filed written submissions dated 16th May 2025 and 13th May 2025 respectively.

Appellant's submissions

16.The appellant urged the court to allow its appeal with costs. It also urged the court to set aside the Tribunal's judgment dated 7th June 2024 in its entirety; set aside the respondent's objection decision dated 27th March 2023 disallowing a commercial building allowance of **KES**

241,486,261 in its entirety, and order the respondent to process the appellant's commercial building allowance.

17. The appellant faulted the Tribunal for referring to the respondent's statement of facts, which had not been filed and served before the proceedings. It argued that this was in contravention of its right to a fair hearing under Article 50(1) of the Constitution.

18. The appellant argued that it was entitled to claim the remainder of its commercial building allowance, being 25%, having successfully claimed 75% of the commercial building allowance in the years 2013, 2014 and 2015, all of which had been allowed.

19. The appellant submitted that the appropriate documentation in support of the claim was in the respondent's knowledge and possession, as they had been supplied during prior audit checks. It thus faulted the Tribunal for disregarding the evidence adduced in support of its commercial building allowance claim without any legal justification.

20. The appellant again faulted the Tribunal for finding that it ought to resupply the supporting documents for the

commercial building allowance for 2016. It highlighted that the claim had successfully been allowed for 2013, 2014 and 2015, pegged on the same supporting documents and the same investment.

21. The appellant argued that based on the principle of legitimate expectation, the respondent was estopped from disallowing its commercial building allowance claim for 2016 since it had its claim for the years 2013, 2014 and 2015. It faulted the Tribunal for disregarding the principle of legitimate expectation.

22. The appellant relied on:-

- (1) **Judicial Service Commission v Gladys Boss Shollei & Another CACA No. 50 of 2014 [2014] eKLR**
- (2) **Judicial Service Commission v Mbalu Mutava & Another CACA No. 52 of 2014 [2015] eKLR**
- (3) **Guaca Stationers Limited v Commissioner of Domestic Taxes [2020] eKLR**
- (4) **Kenya Revenue Authority v Man Diesel and Turbo SE Kenya (2021) eKLR**

- (5) **Hickman Motors Ltd. v Canada [1997] 2 SCR 33.6**
- (6) **Shreeji Enterprises (K) Limited v Commissioner of Investigation Tax Appeal No 58 and 186 of 2019**
- (7) **Commissioner of Domestic Taxes & Another v Chase Bank Kenya Ltd (In Receivership) & Another [2021] KEHC 28 (KLR)**
- (8) **Stanbic Bank Kenya Limited v Kenya Revenue Authority [2009] eKLR**
- (9) **Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)**
- (10) **Geothermal Development Company Limited vs Attorney General & 3 Others (2013) eKLR**
- (11) **Richard Bonham Safaris Limited v Commissioner of Income Tax (2006) eKLR**

Respondent's submissions

23. The respondent urged the court to dismiss the instant appeal and to uphold the judgment. It asserted that the Tribunal properly referred to its statement of facts as it had been duly filed and served in accordance with the law.

It contended that the issue was of fact and beyond this court's mandate.

24. The respondent submitted that the appellant did not discharge its burden of proof. It asserted that the appellant did not provide it with the requisite documentation to support its claim. It added that the documents submitted in 2021 were for a compliance check while the documents required were for validation of its notice of objection. It relied on section 23 of the Tax Procedures Act, 2015 and section 54A (1) of the Income Tax Act to submit that it was the appellant's responsibility to provide the expansive documentation required to support its claim.

25. The respondent submitted that the doctrine of legitimate expectation is inapplicable. That the appellant has the burden to prove the capital expenditure incurred to the tune of Kshs. 241,486,261/- so that such deduction would be allowed by the respondent for the year 2016. That the appellant had already proved capital expenditure for 2013, 2014 & 2015 but the criteria/consideration employed for 2016 was different.

26.As regards the forex issue, the respondent argued that the appellant did not adduce all the invoices required in support of the reconciliation, and neither did they avail their account statements for the shilling and dollar accounts as requested.

27.The respondent relied on:-

(1) **Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] KEHC 13347 (KLR)**

(2) **Mulheim v Commissioner of taxation (2013) FCAFC 115**

Analysis and Determination

Duty of court

28.**Section 56(2) of the Tax Procedures Act** provides that ***“An appeal to the High Court or to the Court of Appeal shall be on a question of law only.”***

29.While the court’s mandate is limited to questions of law, it will also consider ***“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.”*** John Munuve

***Mati v Returning Officer Mwingi North Constituency
& 2 others NRB CA EPA NO. 5 OF 2018 [2018] eKLR***

30. The issues before the court are:-

- (1) Whether the Tribunal erred by considering the respondent's statement of facts;**
- (2) Whether the Tribunal erred by disregarding the evidence in support of the commercial building claim for the year 2016 and its legitimate expectation; and**
- (3) Whether the Tribunal erred by failing to consider the appellant's explanations for the foreign exchange variances due to its invoicing model.**

Whether the Tribunal erred by considering the respondent's statement of facts (Grounds 1 and 2)

31. The appellant faulted the Tribunal for referring to the respondent's statement of facts, which had not been filed and served before the proceedings.

32. The respondent submitted that they had filed their statement of facts at the Tribunal on 7th June 2023 and that it was served upon the respondent on 8th June 2023. It

asserted that the Tribunal properly referred to its statement of facts as it had been duly filed and served.

33. The respondent faulted the appellant for not raising the issue before the Tribunal before delivery of the impugned judgment, despite service. It also pointed out that the appellant had the opportunity to but failed to inquire whether it had filed its response.

34. The respondent further contended that the issue of filing and service of the statement of facts is a question that requires factual determination and should not be entertained by this court.

35. I agree that the issue of service of the respondent's statement of facts is a question of fact.

36. However, in **Oceanfreight (E.A) Limited v Commissioner of Domestic Taxes [2018] eKLR**, the court noted that ***"issues of fact may turn out to give rise to a question of law."***

37. In this case, the court will consider whether the respondent's assertion that its statement of facts was filed and served is supported by the evidence on record.

38. The appellant highlighted that the Tribunal consistently confirmed that the respondent's statement of facts was not on record. It stated that on 12th July 2023, the appellant's counsel informed the Tribunal that the respondent had not filed and served its statement of facts. It also stated that the Tribunal could not confirm whether the same was on record as it was out of Nairobi on official duties.

39. I have studied the proceedings. There is nothing to show that the Tribunal could not confirm whether the same was on record as it was out of Nairobi on official duties on 12th July 2023.

40. However, on 14th August 2023, during a mention of the matter for directions on hearing, the Tribunal noted that the respondent defaulted in filing the statement of facts.

41. On 19th December 2023, the Tribunal directed the parties to file and serve their written submissions.

42. The record contains a copy of the respondent's statement of facts dated 6th June 2023. At para. 32 of the judgment, the Tribunal referred to the respondent's statement of facts dated 6th June 2023 and filed on 7th June 2023. The

Tribunal noted that it was filed on 7th June 2023, however, during the mention of 14th August 2023, the Tribunal had noted that the respondent defaulted in filing the statement of facts.

43. The appellant contended that the Tribunal's referral to the respondent's statement of fact in the circumstances was an affront to its right to a fair hearing. It was submitted that it is a cardinal principle of natural justice that one should not be condemned unheard.

44. With these claims of fair hearing, the issue becomes one of law.

45. Section 15 of the Tax Appeals Tribunal Act, 2013 requires the commissioner to file its documents within 30 days of service of an appeal and to serve them upon the appellant within two days of filing.

46. The respondent's statement of facts dated 6th June 2023. It bears a faint stamp showing that it was filed on 7th June 2023. If it was filed on that date, this was 29 days after the filing of the appellant's statement of facts on 8th May 2023. This was also before the commencement of the proceedings before the Tribunal on 12th July 2023

47. The Tribunal's statement of 14th August 2023 raises doubt as to whether the statement of facts was either on record or served upon the appellant by that date to allow the appellant to address it in its submissions. There is no other proof of service.

48. I am inclined to agree with the appellant that it is entitled to the right to be heard, in this instance, an opportunity to be served with and respond to the respondent's statement of facts.

49. I am also inclined to agree that the appellant is entitled to a consideration of its response to the respondent's statement of facts through its submissions. I find that the Tribunal erred in this respect.

50. Therefore, the court finds that grounds 1 and 2 of the appeal are merited. Without proof of service, the Tribunal erred.

51. Having found merit in grounds 1 and 2 of the appeal, I do not wish to delve into the other issues for the order I will make is re-hearing of the appeal before the tribunal which will evaluate the evidence and the law on all issues before it.

Conclusion

52. In conclusion, I set aside the decision by the tribunal and remit the matter back to the tribunal for hearing of the appeal presented before it- other than the panel which heard it. Each party shall bear own costs of the appeal before me.

Dated, signed and delivered through Microsoft Teams online application this 25th day of September, 2025

F. Gikonyo M
Judge

In the presence of: -

- 1. Ms. Ouma for Appellant**
- 2. Ms. Otieno for Respondent**
- 3. CA Kinyua**