



REPUBLIC OF KENYA



HP Gauff Ingenieure GmbH & Company KG v Commissioner of Domestic Taxes (Income Tax Appeal E078 of 2024) [2025] KEHC 14866 (KLR) (Commercial and Tax) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14866 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E078 OF 2024**

H NAMISI, J

OCTOBER 23, 2025

BETWEEN

HP GAUFF INGENIEURE GMBH & COMPANY KG APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal from the Judgement of the Tax Appeals Tribunal delivered at Nairobi on 2 February 2024 in Tax Appeal Tribunal Appeal No. TAT 442 of 2020)

JUDGMENT

1. The Appellant is a German multinational with over 25 representations worldwide that helps to carry out projects in the disciplines of water and sewerage, transport, roads and rail, mobility and IT solutions, environment and energy, urban planning and architecture. It was registered in August 1986 in Kenya under a certificate of compliance as a branch of H.P Gauff. The principal activity of the Kenya branch is the provision of consultancy and engineering services mainly in the infrastructure sector. The Kenyan branch is headed by Director, East and southern Africa and is responsible for overseeing projects in Kenya, Ethiopia, Tanzania, Uganda and Zambia. The four main projects which are subject of the audit include: Kisumu Kakamega Road (A1), Merille-Marsabit road, MRTS Jogoo corridor & Nakuru Loruk-Marich road.
2. The Respondent is a principal officer appointed under section 13 of the *Kenya Revenue Authority Act*, Cap 469 and the Kenya Revenue Authority, mandated to collect and receive all Government revenue in accordance with the various tax statutes.
3. On 12 February 2019, the Respondent issued the Appellant a notice of intention to audit. Parties held a meeting on 13 August 2019 to review the preliminary audit findings. Upon conclusion of the



review, the Respondent issued the Appellant with a preliminary letter of findings dated 16 January 2020. Parties thereafter engaged on the audit findings via correspondence. The Appellant responded to the audit findings vide a letter dated 14 February 2020. The Respondent considered the presentations by the Appellant and issued a formal notice of assessment on 25th March 2020 for Corporation Tax at Kshs 1,240,424,979, P.A.Y.E at Kshs 189,339,257 and VAT at Kshs 526,022,967, all totalling Kshs 1,955,787,203.

4. The Respondent raised Corporation Tax assessments on the basis that the income from the project was not tax exempt, the Appellant under declared revenue for the projects undertaken and failed to report the incomes for various contracts. The VAT assessments were based on the fact that the Appellant failed to prove that the projects were exempt from VAT. The Respondent raised PAYE assessments on the basis that the remuneration of expatriates was relatively low compared to the local employees.
5. The Appellant being dissatisfied with the objection decision lodged an appeal at the Tax Appeals Tribunal dated 21 August 2020. After considering the pleadings, documents and submissions, the Tribunal rendered its judgement on 2 February 2024. The Tribunal found the appeal to be without merit, dismissed it and upheld the Respondent's Objection decision. The Tribunal's central finding was that the Appellant had failed to obtain and provide tax exemption certificates for the Official Aid Funded Programs (OAFPs) despite being granted sufficient time to do so in a prior ruling, and consequently, the Respondent was justified in issuing the assessment.
6. Aggrieved by the judgement and order of the Tribunal, the Appellant lodged this appeal on the following grounds:
 - i. That the Honourable Tribunal failed to apply the decision in the judgment in HCCCOMMITA/E057/2020 on the application of tax exemptions granted to Official Aid Funded Projects;
 - ii. That the Honourable Tribunal erred in holding that the VAT assessments were justified by reason of the Appellant failing to obtain tax exemption certificates, when the taxpayer discharged all its duties in the administrative process of obtaining the same;
 - iii. That the Honourable Tribunal erred in holding that the VAT assessments were justified by reason of the Appellant failing to obtain the exemption certificates when the Respondent refused to issue the same and was unable to present any legal reason therefor;
 - iv. That the Honourable Tribunal erred in upholding the Income Tax and Pay as You Earn assessments by reason of the Appellant failing to obtain VAT tax exemption certificates;
 - v. That the Honourable Tribunal erred in failing to make any findings on the issue of the Income Tax and Pay as You Earn tax assessments
7. The appeal was canvassed by way of written submissions.
8. The Appellant contends that the Tribunal committed a grave error of law by failing to apply the binding decision set by the Court in the case of Commissioner of Domestic Taxes v H. P. Gauff Ingenieure GMBH Company Limited KEHC 206 (KLR) (Tax Appeal E057 of 2020), which involved the same parties and the same subject matter. In that matter, the Court authoritatively determined that the production of exemption certificate was not a statutory precondition for the remission of VAT on OAFPs under the applicable law. The Appellant argues that the Tribunal was bound by the doctrine of stare decisis to follow this decision and that its failure to do so renders its judgement on the VAT component perverse.



9. Flowing from that ground, the Appellant submits that the Tribunal erred by failing to correctly apply the doctrine of legitimate expectation. Having discharged all its procedural obligations in applying for the tax remissions, the Appellant argues that it had legitimate expectation that the exemption would be granted. The Appellant posits that it cannot be punished for the administrative failure or refusal of the Respondent and other Government agencies to issue the certificates. It is contended that this inaction by a public body should not be visited upon a taxpayer, a principle rooted in the right to fair administrative action under Article 47 of *The Constitution*. In support, the Appellant cites the Court of Appeal decision in Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR.
10. The Appellants assails the Tribunal's judgement for its complete failure to make any findings or provide any reasons for upholding the Income Tax and PAYE assessments. The Appellant points out that the Tribunal's entire analysis and conclusion were predicated on the failure to obtain VAT exemption certificate, a consideration that is wholly irrelevant to the distinct legal and factual issues underpinning the Income Tax and PAYE disputes. These issues included the taxability of income from foreign projects (Yei Water Supply), transfer pricing for regional office services and the benchmarking of expatriate salaries. The Appellant argues that by failing to adjudicate these grounds, the Tribunal abdicated its statutory duty under Section 29(3) of the *Tax Appeals Tribunal Act*, 2013, to provide a reasoned judgement. The Appellant relies on the decision in Hashi v Commissioner of Domestic Taxes KEHC 12793 (KLR), to support this point.
11. On its part, the Respondent argues that despite the High Court decision in Tax Appeal No. E057 of 2020, the operative fact remains that the Appellant has, for over four years, failed to produce the requisite exemption certificates from the National Treasury. The Respondent maintains that the administrative procedure for obtaining tax exemptions for OAFPs as outlined in the National Treasury Circular Ref DFN 425/232/011, is mandatory. In the absence of the explicit authority from the National Treasury in the form of exemption certificates, the supplies in question were correctly treated as standard-rated and subject to VAT at 16%.
12. Regarding the Corporation Tax assessment, the Respondent justifies its decision by asserting that the income from the various projects was derived from or accrued in Kenya, as the supervision services were performed within the country by personnel employed by the Appellant's Kenyan branch. This income is chargeable under section 3 of the *Income Tax Act* and does not qualify for exemption under section 13 of the Act.
13. In defence of the PAYE assessment, the Respondent contends that it was justified in benchmarking the salaries of expatriate employees because their declared remuneration was comparatively low and because the Appellant failed to provide their employment contracts for verification. Furthermore, the Respondent argues that the Appellant did not meet the statutory criteria under section 15(2)(r) of the *Income Tax Act* to qualify as a regional office, and, therefore, the disallowance of the one-third exclusion on the emoluments of its regional directors and expatriates was correct in law.
14. Underpinning the entirety of the Respondent's case is the principle of burden of proof. The Respondent strongly relies on section 56(1) of the *Tax Procedures Act* and section 30 of the *Tax Appeals Tribunal Act*, which place the onus on the taxpayer to prove that a tax decision is incorrect. The Respondent's position is that the Appellant to discharge this burden with concrete evidence, relying instead on legal arguments that do not negate the factual basis of the assessments.

Analysis & Determination

15. Having keenly read the Record of Appeal, Supplementary Record of Appeal and the respective submissions, the following are the issues for determination:



- i. Whether the Tribunal erred in law by upholding the VAT assessments based solely on the Appellant’s failure to produce tax exemption certificates thereby failing to follow the binding precedent set in Tax Appeal No. E057 of 2020;
 - ii. Whether the Tribunal erred in law by failing to conduct a substantive analysis and provide reasoned findings concerning Corporation Tax and PAYE assessment, in violation of section 29(3) of the *Tax Appeals Tribunal Act*.
16. On the first issue, the Appellant’s primary grievance is that the Tribunal disregarded a binding High Court precedent that was directly on point. The doctrine of stare decisis is a foundational pillar of our legal system. It requires that courts and tribunals follow the legal principles laid down by superior courts in previous cases with similar facts in order to promote certainty, predictability and consistency. The Tax Appeals Tribunal, being a statutory tribunal, is subordinate to the High Court and is, therefore, bound to follow the decisions of the High Court.
17. In the impugned Judgement, the Tribunal acknowledged existence of its own prior decision in TAT Case No. 165 of 2017 and its affirmation by the High Court in Tax Appeal No. E057 of 2020. However, it proceeded to reason as follows:

“Accordingly, seeing that the Appellant has failed to obtain the tax exemption certificate despite being allowed sufficient time to do so, it follows that the Respondent was justified in issuing an assessment against the Appellant.”
18. In Tax Appeal No. E057 of 2020, Value Added Tax (Remission) (Official Aid Funded Projects) Order 2003, held as follows:

Commissioner of Domestic Taxes v H. P. Gauff Ingenieure GMBH Company Limited [2021] KEHC 206 (KLR), the Court, upon strict construction of the applicable law, particularly the

“From the provisions I have cited above, more so Paragraphs 3 and 4 of the Value Added Tax (Remission) (Official Aid Funded Projects) Order, 2003 of the VAT Act (Repealed), I do not find any provision or condition that required the Respondent to satisfy the Commissioner through exemption certificates that the project qualifies for remission. Acceding to the Commissioner’s position that exemption certificates were necessary, would amount to amending the clear language of the statute particularly where there is clear evidence that the tax payer has met the conditions imposed by the statute and regulations to entitle it to remission of tax. It is not disputed that the subject projects were Official Aid Funded Projects and if at all there was any doubt, the letter dated 4th October 2012 from the Ministry of Finance to the Commissioner was a clear confirmation.”
19. The learned Hon. Majanja, J went on to affirm the Tribunal’s finding that the Appellant had discharged its duty by applying for remission and therefore, had a legitimate expectation that it would be granted. The Court’s order directing the Appellant to complete the process of obtaining the certificate was framed as a facilitative administrative step, not as a condition precedent to the tax exemption itself.
20. The Tribunal, in the instant appeal, appears to have made a finding that the assessment was justified purely because the certificate remained unobtained. This is a clear misdirection in law. Once a superior court has addressed the interpretation of a statute and the procedural requirements thereunder – specifically ruling that the lack of a document due to administrative failure does not vitiate an otherwise compliant claim for exemption- the Tribunal is bound by that precedent.



21. The Respondent's submissions reiterate that the necessary procedures involving the National Treasury writing to the Kenya Revenue Authority to confirm zero-rating were not done. This confirms that the failure lay in the administrative process between the government agencies, not in the Appellant's initial duty to apply. The principle of law regarding burden of proof, as stipulated under section 56(1) of the *Tax Procedures Act* and section 30 of the Tax Appeals Tribunals Act, requires the Appellant to prove that the assessment is excessive or incorrect. However, this burden is discharged when the taxpayer provides positive evidence demonstrating eligibility for an exemption that the relevant statute provides, even if the final administrative certification is pending due to official inaction. This position is supported by the general rule of interpretation of taxing statutes in Kenyan jurisprudence. While it is trite law that exemptions must be strictly construed and claimed unequivocally, as confirmed in the cases such as *Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others* [2019] KECA 500 (KLR), where the procedural failure rests with the executive arm of the state after the taxpayer has fulfilled their preparatory duties, the taxpayer cannot be penalised. The exemption, derived from the terms of the official aid agreement and confirmed by the relevant Treasury circular, exists ab initio, independent of the issuance of the certificate itself.
22. As was held in *Republic v Kenya Revenue Authority Ex- Parte Aberdare Freight Services Ltd & 2 others* [2004] KEHC 1238 (KLR), a public body is not to be a master of its own making; it is a servant of the law. The Respondent cannot create a hurdle through its own inaction and then penalise the taxpayer for failing to overcome it.
23. It is my finding that the Tribunal erred in allowing the administrative failure of the relevant Ministries and the Respondent to prejudice the Appellant's established right to remission, effectively punishing the Appellant for the Government's failure to finalise internal procedures.
24. On the second issue, section 29(3) of the *Tax Appeals Tribunal Act* provides:

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.
25. The duty to give reasons is not a mere procedural formality; it is a fundamental aspect of the right to a fair hearing. It ensures that the decision is not arbitrary, allows the parties to understand the outcome, and provides a basis for any subsequent appeal. A decision devoid of reasons on the issues contested is no decision at all.
26. I have meticulously reviewed the impugned judgement. The entire analysis is exclusively focused on the issue of OAFPs and the failure to obtain exemption certificates. The Tribunal restates the parties' positions on this singular issue and concludes, as noted earlier, that the failure to produce the certificates justified the Respondent's assessment. Conspicuously absent is any analysis, finding or reasoning whatsoever on the specific and distinct grounds of appeal raised by the Appellant concerning the Income tax and PAYE assessments. The Appellant had challenged, for instance, the Respondent's decision to tax income from the Yei Water Supply project, a project located in South Sudan, arguing that it was contrary to section 4 of the *Income Tax Act*. It had also contested the benchmarking of expatriate salaries and the disallowance of tax-free subsistence allowances under German law, which are matters of both fact and law under the *Income Tax Act*.
27. The Tribunal made no findings on these material questions. It did not refer to the evidence presented, such as the Shared Services Agreement or the Transfer Pricing Policy. It did not interpret the relevant sections of the *Income Tax Act*. Instead, it upheld the entirety of the Kshs 1.9 billion assessment based



on a rationale that could, at best, only apply to the VAT portion of the dispute. This is a manifest error of law.

28. In a similar situation in *Hashi v Commissioner of Domestic Taxes KEHC 12793 (KLR)*, the Court found that the Tribunal's judgement, which consisted of a few paragraphs of observations without capturing the issues for determination or the reasons for its findings, fell short of a proper judgement as envisaged by the law. The Court observed:

“I note that the Tribunal did not make any findings on all the substantial and pertinent issues that it was required to determine... 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.”

29. The reasoning in the *Hashi* case (*supra*) is applicable in this instance. The Tribunal's failure to address the merits of the Income Tax and PAYE appeal is a procedural impropriety of such a magnitude that it vitiates that part of its decision. The Appellant was entitled to have its arguments heard and determined. By failing to do so, the Tribunal denied the Appellant a fair hearing. The only appropriate remedy for such a failure is to set aside the decision and remit the matter for a proper and reasoned determination on its merits.

30. For the foregoing reasons, this Court finds that the appeal is merited. The same is allowed and I make the following orders:

- i. The Appeal is hereby allowed.
- ii. The judgement and decree of the Tax Appeals Tribunal delivered on 2 February 2024 in Tax Appeal No. 442 of 2020 is hereby set aside.
- iii. In substitution thereof, this Court makes the following orders:
 - a. The Respondent's Objection Decision dated 22 July 2020, in so far as it upholds the Value Added Tax assessment of Kshs 526,022,967/= is hereby set aside.
 - b. The decision of the Tribunal upholding the corporation tax and PAYE assessments is hereby set aside.
 - c. The matter is remitted back to the Tax Appeals Tribunal for fresh hearing and determination on merits before a differently constituted panel.

31. Since the success of this appeal is divided and the matter involves important points of public tax law and administration, each party shall bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF OCTOBER 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Appellant: Ms. Githire

For the Respondent: Ms. Mwongera

Court Assistant: Lucy Mwangi

