Neramo Limited v Commissioner of Domestic Taxes (Income Tax Appeal E149 of 2024) [2025] KEHC 16927 (KLR) (Commercial and Tax) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16927 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E149 OF 2024

CM KARIUKI, J

NOVEMBER 14, 2025

BETWEEN

NERAMO LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

1. This is a second-stage appeal from the Judgment of the Tax Appeals Tribunal ("the Tribunal") delivered on 17th May 2024 in TAT No. E133 of 2023. The dispute originates from a compliance check and subsequent additional tax assessments issued by the Respondent against the Appellant, a company in the information technology sector, for the years 2016 to 2020.

2. Following the Respondent's initial assessment, the Appellant lodged an objection. The Respondent subsequently issued an objection decision which partially allowed the objection but confirmed a substantial tax liability. Being aggrieved, the Appellant appealed to the Tribunal.

3. The Tribunal, in its impugned Judgment, delivered a split decision. It set aside assessments for certain taxes for time-barred periods but upheld the Respondent's confirmed assessments for Corporation Tax, Value Added Tax, and Pay-As-You-Earn for periods subsequent to November 2017, and for Withholding Tax for periods subsequent to 7th November 2019.

4. The Appellant, still dissatisfied, has invoked the appellate jurisdiction of this Honourable Court, contending that the Tribunal erred in law and fact in confirming the said assessments.

Issues for Determination

5. Based on the whopping grounds of Appeal and all the material presented before me, I isolate the following issues for determination by this Court.

a. Whether the Tribunal erred in law in its application of the burden of proof by concluding that the Appellant failed to discharge the statutory burden placed upon it by Sections 30 of the *Tax Appeals Tribunal Act* and 56 of the *Tax Procedures Act* to prove the Respondent's assessments were incorrect.

b. Whether the Tribunal erred in law by failing to find that the Respondent's conduct, in requesting further documentation and then issuing its objection decision, violated the Appellant's right to legitimate expectation and principles of procedural fairness.

c. Whether the Tribunal erred in law in confirming the disallowance of certain business expenses, notably rental costs, based on a finding that the Appellant's explanation of document destruction by fire and the production of a fire report was an insufficient discharge of its evidentiary burden.

d. Whether the Tribunal misdirected itself in law by upholding the assessment for Value Added Tax on imported services without due consideration of the Appellant's claim to a full input tax credit under Section 17 of the *Value Added Tax Act* and its explanation for missing documentation.

e. Whether the Tribunal's confirmation of the Respondent's assessments for Withholding Tax for the period subsequent to 7th November 2019 was based on a proper evaluation of the evidence and a correct application of the relevant legal provisions.

f. Whether the Tribunal erred in law and fact in upholding the Corporation Tax assessment which was predicated on a recomputation of sales derived from Withholding VAT data.

A. Whether the Tribunal erred in law in its application of the burden of proof by concluding that the Appellant failed to discharge the statutory burden placed upon it by Sections 30 of the *Tax Appeals Tribunal Act* and 56 of the *Tax Procedures Act* to prove the Respondent's assessments were incorrect.

6. The foundational principle in tax appeals is codified in Section 56(1) of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act*, which unequivocally place the burden of proof upon the taxpayer to demonstrate that a tax decision is incorrect or excessive.

7. This Court, and the Tribunal, are bound by the High Court's reasoning in Ushindi Limited v Commissioner of Investigation & Enforcement, as cited in PVH Kenya Limited v Commissioner of Domestic Taxes [2024] KETAT 163 (KLR) which held that:

> "the burden was on the appellant to raise the specific items and/or aspects of the tax assessment that were manifest errors, wrongfully imposed or not liable to be paid as tax."

8. The Tribunal correctly found that the Appellant failed to discharge this burden. While the Appellant provided a fire report to explain the absence of some records, this did not absolve it of the duty to prove its claims through alternative, verifiable means. The burden only shifts to the Respondent after the taxpayer first adduces sufficient evidence. The Appellant's generalized assertions and unsupported reconciliations fell short of this standard. Consequently, the Tribunal was correct in upholding the assessments based on the Appellant's failure to prove they were incorrect.

B. Whether the Tribunal erred in law by failing to find that the Respondent's conduct, in requesting further documentation and then issuing its objection decision, violated the Appellant's right to legitimate expectation and principles of procedural fairness.

9. The Appellant contended that the Respondent's conduct requesting additional documentation and thereafter issuing its objection decision offended Article 47 of *the Constitution* and the doctrine of legitimate expectation. Procedural fairness under Article 47 and Section 4 of the *Fair Administrative Action Act* requires that a taxpayer be accorded an opportunity to be heard and that a decision be reached rationally and fairly. The record shows that the Respondent invited the Appellant to supply records, and upon non-compliance, proceeded to issue an objection decision. The Tribunal considered this sequence and found that the Appellant was not denied an opportunity to present its case; rather, it chose not to fully cooperate.

10. Kenyan courts have consistently held that the right to be heard does not oblige an authority to accept a party's position. Fairness is satisfied when the taxpayer is given a reasonable chance to respond, not necessarily when the authority agrees with the taxpayer. The Appellant did not demonstrate any clear representation by the Respondent creating a legitimate expectation that the assessment would be withdrawn or delayed pending receipt of documents. The Respondent merely exercised its statutory power under Section 59 TPA to call for further evidence. Consequently, I find no violation of legitimate expectation or procedural fairness, and the Tribunal committed no error of law in declining to so hold.

C. Whether the Tribunal erred in law by confirming the disallowance of certain business expenses, notably rental costs, based on a finding that the Appellant's explanation of document destruction by fire and the production of a fire report was an insufficient discharge of its evidentiary burden.

11. The Appellant argued that it had furnished a fire report to explain the loss of records supporting its rental expenses and that the Tribunal erred in rejecting this explanation. Section 15 of the *Income Tax Act* allows deduction of expenses wholly and exclusively incurred in the production of income, but the burden of substantiating such expenses remains with the taxpayer. As affirmed in Commissioner of Domestic Taxes v Kenya Maltings Limited, the onus is on the taxpayer to prove this." A mere explanation for loss of documents, without substitute verification, does not shift the statutory burden.

12. While the Tribunal accepted that a fire had occurred, it found that the Appellant produced no alternative proof of the rental payments or corresponding accounting entries. The Tribunal's finding is one of mixed fact and law; it cannot be disturbed unless shown to be perverse. There is no indication of legal misdirection the Tribunal correctly applied the principle that deductions must be evidenced. I therefore hold that the Tribunal did not err in law in confirming the disallowance of the impugned expenses.

D. Whether the Tribunal misdirected itself in law by upholding the assessment for Value Added Tax on imported services without due consideration of the Appellant's claim to a full input tax credit under Section 17 of the *Value Added Tax Act* and its explanation for missing documentation.

13. The Appellant contended that, as it provided taxable IT services, it was entitled to a full input tax credit on imported services under Section 17 of the VAT Act, and that the Tribunal failed to appreciate this entitlement. The principle of self-accounting for VAT on imported services is contained in Section 10(3) of the VAT Act, which requires the recipient to account for output VAT on imported services

and allows corresponding input credit if the service is used to make taxable supplies. However, the entitlement to input tax credit depends on the taxpayer's ability to produce supporting invoices and documentary proof.

14. The Tribunal found that the Appellant had failed to substantiate its input claim. Under Section 17(2) of the VAT Act, input tax may be deducted only if "supported by a valid tax invoice or other evidence prescribed by the Commissioner." Absent that proof, no legal entitlement arises.

15. Given that the Tribunal's finding was anchored on missing documentation rather than an erroneous view of the law, there is no misdirection. The Tribunal correctly applied Section 17 by holding that entitlement to input tax is conditional upon proof. This ground, too, fails.

E. Whether the Tribunal's confirmation of the Respondent's assessments for Withholding Tax for the period subsequent to 7th November 2019 was based on a proper evaluation of the evidence and a correct application of the relevant legal provisions.

16. The critical date of 7 November 2019 marks the commencement of Section 39A of the TPA, which re-introduced liability on a payer who fails to deduct and remit withholding tax. The Tribunal, relying on this amendment, held that WHT assessments could only be sustained for the post-amendment period. The Appellant has not shown that the Tribunal misapplied the law. Prior to that amendment, the Commissioner had no authority to collect unpaid WHT from a payer. After that date, the statute clearly empowered recovery "as if the tax were due from the person."

17. The Tribunal's decision to confirm WHT assessments for periods after 7 November 2019 was therefore firmly grounded in statute. Its evaluation of evidence, that the Appellant had not shown those payments were exempt or that WHT was otherwise remitted, is factual and not perverse. I find the Tribunal correctly applied the law to the post-2019 WHT assessments.

F. Whether the Tribunal erred in law and fact in upholding the Corporation Tax assessment which was predicated on a recomputation of sales derived from Withholding VAT data.

18. The Appellant contended that the Tribunal should have rejected the Respondent's recomputation of turnover based on Withholding VAT (WHVAT) data. Section 31(4) of the TPA empowers the Commissioner to amend an assessment "using available information" where the Commissioner has reason to believe that the self-assessment is incorrect.

19. The Tribunal found that the Respondent's use of WHVAT data was a permissible method of estimation, particularly where the taxpayer failed to furnish verifiable sales records.The Tribunal's approach was consistent with both Section 31(4) TPA and case law affirming the Commissioner's right to rely on secondary data when the taxpayer fails to produce primary evidence. Since the Appellant did not demonstrate any legal error or perverse factual inference, the Tribunal's confirmation of the corporation tax assessment was lawful and proper.

Conclusion

20. Each of the issues turns on either statutory interpretation or evidentiary sufficiency. In all, the Tribunal applied the correct legal principles under the TPA, the VAT Act, and the *Income Tax Act*, and its factual findings were neither perverse nor unsupported.

21. Accordingly, the Court finds no error of law in the Tribunal's decision. The appeal is dismissed in its entirety.

Orders:

i. The appeal is dismissed.

ii. The decision of the Tax Appeals Tribunal in Tax Appeal No. E133 of 2023 is upheld.

iii. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 14TH NOVEMBER,2025

.....

CHARLES KARIUKI

JUDGE