



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INCOME TAX APPEAL NUMBER E341 OF 2024

TRINA KENYA LIMITED -----

APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES

RESPONDENT

JUDGMENT

1. On 11/10/2024, the Tax Appeals Tribunal delivered judgment in TAT E004/2024 it made the following orders.

a) The appeal be and is hereby partially allowed.

b) The respondent's objection decision dated 23rd November 2023 be and is hereby varied in the following terms:

i) The corporation tax assessment for the year 2020 and 2021 be and are hereby upheld.

- ii) The VAT assessment for the year 2019 be and is hereby referred back to the Respondent to exclude from the assessment the principal VAT and to recalculate the late payment interest in accordance with section 38 of the Tax Procedures Act.*
- iii) The Vat assessment for the years 2021 and 2022 be and are hereby upheld.*
- iv) The WHT assessment on professional fees and subcontractor's fees for the years 2019, 2020 and 2021 be and are hereby upheld.*
- v) The WHT assessment ion deemed interest be and is hereby referred back to the Respondent to recalculate the assessment using the correct deemed interest rates for the periods 2020, 2021 and 2022.*
- vi) The Respondent is hereby directed to recompute the tax assessment based on the tribunals findings under orders b) (i)-(v) above within Thirty (30) days of the date of delivery of this judgment.*
- c) Each party to bear its own costs.*

2. The gist of the matter was that - the appellant Trina Kenya Ltd, was formerly Ndave Kenya, a limited liability company registered in Kenya under the Companies Act and tax resident in Kenya.
3. The respondent - a principal officer appointed under Section 12 of the KRA Act Cap 469 Laws of Kenya. Under section 5(1) KRA is an agency of the Government for the collection and receipt of all revenue. It is mandated to administer and enforce all the provisions of the written laws as set out in parts I and II of the first schedule to the KRA Act , to assess, collect and account for all revenues under those laws.
4. The respondent had conducted a tax verification exercise covering the period January, 2019 to December, 2022. On 29/6/2023 it issued the appellant with a notice of intention to issue assessment of corporation tax, value added tax, withholding tax and pay as you earn (PAYE).
5. On **31/8/2023**, the respondent issued the appellant with a notice of assessment, assessing the appellant corporation

tax, VAT, WHT amounting to principal tax of Kshs. 53,717,344 plus interest and penalties.

6. On **27/9/2023**, the appellant objected to the assessments in their entirety.
7. On **23/11/2023** the respondent issued an objection decision partially by reducing the WHT assessment, and confirming the corporation tax & VAT assessment as initially assessed.
8. The appellant was dissatisfied with the objection decision and lodged its notice of appeal dated 19/12/2023 and a *memorandum of appeal dated 3rd January 2024* on the following grounds:-

a) *That the Respondent erred in law and fact by assessing corporation tax based on alleged variances obtained from grossing up withholding taxes based on the withholding tax certificate amounts deducted by the Appellant's customers.*

b) *That the Respondent erred by failing to take into consideration, for corporation tax purposes, sales variances for the year 2019.*

- c) *That the Respondent erred in law and fact by assessing VAT on withholding tax certificate amounts deducted by the Appellant's customers.*
- d) *That the Respondent erred in law and fact by treating reimbursements of site expenses as professional fees and payment for supply of goods as subcontractor's fees and thereafter subjecting them to withholding tax contrary to provisions of section 35 of the Income Tax Act.*
- e) *That the Respondent erred in concluding that the Appellant had conceded to withholding tax for the periods 2020 and 2021 and yet this was not conceded by the Appellant at any one time either verbally or in writing.*
- f) *That the Respondent erred in law and fact in concluding that the mere running suppliers' balances showing payables for invoices from the suppliers and payments to subcontractors, that is, Leza Limited and Liroma Limited were loans and hence deeming interest thereto.*

g) That the Respondent erred in law and fact by deeming interest and charging deemed interest at an incorrect rate 8% contrary to the legal provision existing at the time.

h) That given the foregoing, the Appellant is apprehensive that the decision of the Respondent lacks in merit, is unlawful and manifestly unjust and that unless the orders sought are granted, the Appellant risks being unjustly compelled to pay for the alleged taxes to the prejudice of the Appellant.

9. Following the determination of the Tribunal and being aggrieved, the appellant filed this appeal on the grounds inter alia :

i. That the Honourable Tribunal erred in law and fact by upholding the Respondent corporation tax assessment for the years 2020 and 2021 which were based on alleged variances from grossing up withholding tax based on the withholding tax certificate amounts deducted by the Appellant's customers. The Tribunal failed to take into consideration the fact that the

Appellant is engaged in projects that are (Engineering procurement, ad construction) EPC in nature which the Appellant was paid advance payments, which are not recognized as income until work is completed. In these payments, the customers remitted withholding tax, creating withholding credits and leading to the respondents incorrect cli that the Appellant failed to declare this income.

- ii. That the Honourable Tribunal erred in law and fact by upholding the Respondent's VAT assessments for the years 2020 and 2022 which were based on variances obtained from grossing up withholding taxes based on the withholding tax certificate amounts deducted by the Appellant's customers. The Tribunal failed to take into consideration the differences that arose due to foreign exchange and the fact that some of the sales variances arose from a timing difference in VAT and Withholding tax declaration and further the lack of consideration of the sales on the Appellant's amended return.*

- iii. *That the Honourable Tribunal erred in law and fact by upholding the Respondent's VAT assessments on professional fees and subcontractors' fees for the years 2019,2020 and 2021. In this regard, the Tribunal failed to appreciate the fact that the Appellant operates in the EPC sector dealing in among other activities designing, manufacturing, supplying, installing, and commissioning different equipment, under the scope of the subcontracting contracts not all supplies were subject to withholding tax. The Appellant withheld the appropriate services and accounted for the same on all the qualifying payments.*
- iv. *That the Honourable Tribunal erred in law and fact in failing to consider the evidence and submissions tendered by the Appellant.*
- v. *That the Honourable Tribunal misapplied the law and facts by ignoring all material facts placed before it and based its judgment on a biased approach without due regard to the balance of the scales of justice.*

10. The appellant seeks that the judgment of the TAT dated 11/10/2024 be set aside with costs to the appellant.

11. Parties filed written submission through their respective counsel.

12. In its submissions the appellant identified 5 issues for determination:-

- i. Whether the respondent's failure to comply with the binding orders of the TAT amounts to an abuse of legal process, prolonged litigation, and violation of the appellant's constitutional rights warranting judicial intervention and punitive measures against the respondent.
- ii. Whether the TAT erred in law and fact by upholding the respondent's corporation tax assessment for 2020 and 2021
- iii. Whether the TAT erred in law and fact by upholding the respondents VAT assessment for 2020 and 2022
- iv. Whether the TAT erred in law and fact by upholding the respondents WHT tax assessment on professional fees and subcontractors' fees for 2019, 2020 and 2021

v. Whether the TAT misapplied the law and ignored material facts thereby rendering a biased judgment.

13. On the first issue, the appellant reiterates the orders of the TAT of 11/10/24- regarding VAT assessment for 2019, the WHT and the time frame set down by the Tribunal, the appellant contends that though the Tribunal orders were clear, binding and time bound, the respondent failed/refused/neglected to comply - and in so doing - subverted the appellant's right to fair and expeditious resolution tax dispute. It is argued that by so doing the respondent has undermined the finality of this dispute and subjected the appellant to unjustified pro-longed litigation. This court is urged to protect the integrity of the judicial process and ensure compliance with adjudicative directives.

14. It is further submitted that this is in violation of the appellant's rights under Article 47 & 50 of the Constitution. This court is urged to find the respondent to be in contempt of the orders of the TAT.

15. On the second issue regarding the corporation tax assessment for the years 2020 and 2021, it is submitted

that the error by the TAT was in upholding assessments based on alleged variances derived from grossing up WHT using WHT certificate amounts deducted by the appellant's customers - that it failed to properly evaluate the nature of the appellant's and operations - across the EPC sector where advance payments are standard procedure and do not constitute taxable income until the contractual obligations are fulfilled.

16. Here the appellant placed emphasis on the argument that the TAT failed to appreciate that advance payments do not constitute taxable income - that upon making advance payments, the appellant's deducted and remitted withholding tax resulting in WHT credits in the appellant's ledger - that these were balance sheet items that only become income when the contractual obligations are fulfilled.

17. The appellant cited; ***The International Accounting Standards***:- (IAS11 & 1AS 18) which govern construction contracts and submitted as follows :

Since the advance payments received by the Appellant did not meet the conditions under the IAS 11 and IAS 18, they could not be recognized as taxable income. The Tribunal's failure to apply these accounting standards resulted in an erroneous decision that unjustly upheld the Respondent's tax assessments... the Tribunal has previously ruled that the Respondent erred in assessing deferred revenue in Stefanutti Stocks Kenya Limited-versus- Commissioner of Domestic Taxes (TAT No. 18 of 2020), by holding that:

The Respondent erred in bringing to charge the Appellant's deferred revenue, which had already been accounted for by the time it made its assessment.

18. The appellant submits that since its contracts were fixed price contracts - its clients were not liable to pay more than the contracted amounts - the failure by the TAT to appreciate this position led it to endorse an assessment that resulted in double taxation.
19. On the third issue on VAT assessments for years 2020 & 2022. Here the emphasis was on the fact that the TAT

failed to consider amended VAT returns reflecting the accurate taxable incomes – by failing to recognize that WHT deductions do not necessarily align with VAT reporting periods – particularly in context of advance payments and EPC contracts. Further, that the TAT had wrongfully upheld VAT assessments on tax exempt supplies; The court is urged to invalidate the respondent's erroneous VAT assessment for 2020 & 2022.

20. Whether the tribunal erred in law and fact by upholding WHT assessments on professional fees and sub-contractors' fees for years 2019, 2020 and 2021. The argument here is that the TAT failed to consider the evidence that not all payments made under subcontracting agreements are subject to WHT. That it did this by failing to distinguish between payments for services (subject to WHT) and payments for supply of goods and services (not taxable under WHT provisions); failing to apply section 35(1) (a) and section 35(3) (f) of the Income Tax Act.
21. There was also the issue of differentiating between reimbursement of site expenses and professional fees –

classifying the former as subject to WHT led to unjustified tax liability

22. On the 5th issue whether the Tribunal misapplied the law and ignored material facts rendering a biased judgment

The appellant submitted that the Honourable Tribunal failed to fully and objectively evaluate all the evidence that was provided, which evidence demonstrated compliance with tax laws and refuted the Respondent's assessments. That this led to an , an erroneous determination that unjustly upheld the Respondent's tax assessments.

23. In its submissions the respondent reiterated the brief background of the case and set out 2 issues for determination

a. Whether the assessments were correctly raised and should be upheld.

b. Whether the Respondent correctly charged deeming interest

24. On the issue of alleged assessing corporation tax based on variance from grossing WHT based on WHT certificates - deducted by customers and the filed returns - the

respondent resorted to section 31(1) (b) and section 29 of the TPA - which empowers it to amend the assessment based on the information available and to the best of its judgment- it is submitted that the appellant failed to provide all the requested documents to support their objection - justifying the additional assessment; further that the respondent was not bound by the information provided by the tax payer and could assess additional taxes from any other available information. The respondent relied on ***Commissioner of Domestic Taxes Vs Aitech Stream (EA) Ltd [2021] eKLR*** on the powers of the commissioner to make assessment on any other additional information.

25. It is further submitted that as per section 56 of the TPA 2015 the burden of proof in tax cases is on the tax payer. The respondent relies on ***Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes [2020] eKLR*** where the court held that:

Under section 56(1) of the Tax Procedures Act, 2015, the Company bears the burden of demonstrating that

Commissioner's decision in reaching the assessments complained of was incorrect.

26. The respondent also relies on section 3 of the Income Tax Act which provides that all incomes are subject to tax, that:

1) *"Subject to, and in accordance with this Act, a tax known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or derived from Kenya."*

2) *Subject to this Act, income upon which tax is chargeable under this Act is income in respect of*

(a) Gains of profits from-

i) Any business, for whatever period of time carried on.....

27. It is submitted that the Appellant contravened section 3 of the income tax act by filling nil returns even after earning income. Hence there was no wrongdoing in the Respondent raising the additional assessments herein.

28. It is further submitted that despite a meeting held on 21st November 2023 whose outcome was that the appellant

was to provide evidence the following day to support the claims on the WHT assessment the appellant failed to provide the said evidence. It was submitted that Appellant did not discharge this burden of providing the full documentation and that the burden could only shift once further proof was provided to show the Respondent's decision was incorrect. That the Appellant failed to show how the two withholding tax certificates were related to the income for the year 2019.

29. On the second issue the respondent submits that under Income Tax Act – deemed interest is defined, and the law provides for tax deductions. Citing on section 107 (1) of the Evidence Act & section 109 of the same Act the respondent submits that the appellant did not establish the facts alleged

30. The respondent relies on **CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR** where the Court of Appeal faulted the reliance on averments as evidence in arriving at a decision. It stated as follows:

The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy, for example, the following definition of "evidence" in Cassell's English Dictionary, p 394:

Anything that makes clear or obvious; ground for knowledge. indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.

The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.

31. It is further submitted, that the appellant instead of providing evidence to support its claims has been making averments and the court is urged not to consider the same without the requisite supporting documentation/information. It is further submitted that interest was computed on foreign loans for the years 2020 to 2021 and the appellant was requested to avail the supporting documents in the form of loan agreements, proof of payment of the loans, interest schedule of any interest paid on the loans, and proof of payment of the interest. Consequently, the Respondent was unable to recompute the deemed interest pursuant to the Appellant's grounds of objection.

32. Reliance was made on S. 56(1) of the Tax Procedures Act which states: *In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.*

33. The respondent also relies on **Leah Njeri Njiru V Commissioner of Investigations and Enforcement Kenya Revenue Authority & another [2021] eKLR** where the Tribunal upheld the position that the Taxpayer has the legal burden to show that an assessment is incorrect.

34. It is submitted that from the foregoing the Appellant has failed to discharge the legal burden to provide the requisite supporting documents /information to demonstrate that the assessment was incorrect.

35. I have carefully considered the record of appeal, and the rival submissions. The issue is whether this appeal has merit based on the issues raised by the appellant in its submissions. Section 53 of the Tax Procedures Act provides for Appeals to High Court .S. 56 (2) limits the Jurisdiction of the High Court regarding the appeals: It states;

(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

*(3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, **the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.***

36. In this appeal the court is limited to dealing with questions of law.

37. I am well guided by the Court of Appeal in **Madison Insurance Kenya Limited v Commissioner of Domestic Taxes [2025] KECA 4 (KLR)** pointed out this limited jurisdiction stating

We have carefully considered the appeal before us, which is a second appeal. Our remit in this appeal is clearly defined by Section 56(2) of the Tax Procedures Act, which provides that an appeal to the High Court or to the Court of Appeal shall be on a question of law only. As to what constitutes matters of law, this Court in

John Munuve Mati vs. Returning Officer Mwingi North Constituency & 2 others [2018] eKLR, stated as follows:

*“(38)The interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to **background and context** and to satisfy ourselves, when the issue is raised, 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. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.”*

38. It is also limited to the grounds in the objection as filed by the appellant.

39. The appellant's take off is that it operates in a specialized areas - EPC (Engineering, Procurement & Construction) while bears certain peculiarities bear upon the taxation regime - the appellant speaks about advance payments, site reimbursement costs and professional & subcontractor's fees with respect to WHT, VAT and corporation tax. It had the responsibility to lay the facts of its case clearly to the Tribunal

40. I have read through the judgment of the TAT and I note that the TAT meticulously analyzed the evidence on record and arrived at a determination vis a vis the law applicable to the appellant's issues. I point out at the outset that one of the shortcomings on the part of the appellant was the failure to support a lot of the averments it made with requisite documents.

41. In this appeal, it is my mandate is to examine each of the issues raised by the appellant in light of the provisions of s. 56(2) of the Tax Procedures Act.

42. On the 1st issue on the alleged noncompliance by the respondent with the orders of the Tribunal- nothing was

placed before me to show that the respondent has failed to comply with the orders of the TAT and was now demanding for the payment of the tax before re assessment. In any event should there be noncompliance the avenue for contempt proceedings would be before the Tribunal itself and not before the appeal court. This ground must fail

43. On the 2nd issue regarding the corporate tax, the same was upheld on the evidence that was availed. It has not been demonstrated Tribunal did ignored the supporting documents.

44. On the 3rd and 4th issues on VAT and WHT, the TAT upon considering the available evidence referred the matter back to the respondent for re assessment.

45. On these the appellant was asked to provide certain specific documents by the respondent. It has not demonstrated that it complied to enable the respondent arrive at a different assessment.

46. The judgment of the Tribunal was delivered on 11th October 2024. The memorandum of Appeal is dated 30th December 2024. The Respondent had been directed to comply with

the re assessment order within 30 days of the Judgment. It would appear that by the time of filing this appeal , based on the 1st ground of appeal, the respondent had not complied. But as I have stated herein above the matter and effect of noncompliance would have to be determined by the TAT. What I can say here is that failing to comply with the orders of the tribunal for re assessment did not erase the orders. The time for compliance simply expired.

47. I noted that running through the judgment of the TAT was the request to the appellant to supply documentary evidence to support the averments made in the objection to the assessment.

48. I have read the record of appeal - I note that the same submissions that were made before the Tribunal are the same submissions placed before me in this appeal. The point is taken because the grounds of appeal ought to be the same as those raised in the objection. However, upon the Tribunal making its decision it would be expected that the appellant would narrow down the specific questions of

law to be determined by this court in view of this court's limited jurisdiction.

49. With respect, it appears to me that the appellant's complaints were mainly on issues of fact, and the TAT offered the appellant the avenue of supporting the averments with evidence.

50. On what it means for the court's power to be limited to matters of law, I would like to borrow from the Court of Appeal¹ though in a criminal matter on the limitation of the powers of a court whose jurisdiction is on points of law

*It is trite law that a second appeal such as this one, can only be based on a matter of law and not on a matter fact... Where the right of appeal is confined to a point of law the **Court has loyalty to accept findings of fact of the lower court(s)** and has to resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and should not interfere with such findings unless it is satisfied that no reasonable tribunal could have, on the evidence, reached such a conclusion ...(emphasis mine)*

¹ [Simon Morara Onchonke v Republic \[2011\] KECA 209 \(KLR\)](#)

51. On the 5th issue to the effect that the TAT misapplied the law, ignored material facts, the appellant's submissions did not as to what law was misapplied and how. Just stating it is not enough as it was the duty of the appellant to demonstrate the same.

52. From the foregoing I have to re-assert the position that it was the appellant's burden to prove the averments it made before the respondent in the objection. Having not done so, I find no reason to interfere with the Tribunal's decision as it was reached at on the evidence placed before it

53. The appeal is not merited and is dismissed.

54. The decision of the Tribunal be and is hereby upheld.

55. Orders accordingly

Dated, signed and delivered via CTS on this 9th

January 2026

**Mumbua T Matheka
Judge**