



Aee Power Limited & another v Commissioner of Domestic Taxes & another (Income Tax Appeal E160 & E201 of 2023 (Consolidated)) [2025] KEHC 828 (KLR) (Commercial and Tax) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E160 & E201 OF 2023 (CONSOLIDATED)**

**BM MUSYOKI, J
JANUARY 31, 2025**

BETWEEN

AEE POWER LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

**AS CONSOLIDATED WITH
INCOME TAX APPEAL E201 OF 2023**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

AEE POWER LIMITED RESPONDENT

JUDGMENT

1. These appeals were consolidated on 18-03-2024 for hearing and disposal on 18-03-2024. For purposes of this consolidated judgment, I will be referring to AEE Power Limited as the appellant and the Commissioner of Domestic Taxes as the respondent. Both appeals arise from the judgment of the Tax Appeals Tribunal dated 6-10-2022 in its appeal number 259 of 2022. In the said appeal, the tribunal upheld part of the respondent’s decision on objection raised by the appellant and set aside the other.
2. The respondent had subjected the appellant to tax assessment for the period between 2016 and 2019 which came up with additional tax liability assessment of Kshs 55,895,107.00 for income tax, Kshs



12,190,438.00 for Value Added Tax, Kshs 66,020,641.00 for withholding tax and Kshs 16,662,807 for Pay As You Earn all totaling to Kshs 150,768,993.00. The respondent's decision on the objection was communicated through a letter dated 27th January 2022 which prompted the appeal before the tribunal. Upon hearing the parties, the tribunal held as follows;

- a. The assessment on income tax be and is hereby upheld.
 - b. The assessment on VAT be and is hereby upheld.
 - c. The assessment on WHT be and is hereby set aside.
 - d. The assessment on PAYE be and is hereby upheld.
3. Both parties were not satisfied with the part of the judgment of the tribunal which did not favour them hence these appeals. The appellant has in its appeal number E160 of 2023 raised the following grounds;
1. The honourable tribunal erred in law in failing to consider how the appellant generated its income for tax and accounting purposes by concluding that the appellant made supplies to AEE Power Spain with construction services which would be billed at 15 per cent mark up on all expenses incurred by the appellant and yet constructions services detailed in the appellant's VAT returns and withholding tax certificates clearly captured the Kenya Power and Lighting Company (KPLC) as the appellant's main client and not AEE Power Spain as purported by the respondent.
 2. The honourable tribunal erred in law in confirming the respondent's assertion that the mark up 15 per cent on the appellant's expenses as used by the respondent to determine the company's revenues without providing any basis for determining that the income generated by the appellant was based at a mark up of per cent or that a cost-plus methodology was applicable to the appellant.
 3. The honourable tribunal erred in law in confirming the mark up of per cent despite the respondent herein having failed to provide the appellant with its transfer pricing analysis nor undertaken any benchmarking analysis for its workings so as to arrive at the alleged tax arrears in respect of income tax.
 4. The honourable tribunal erred in law in confirming that the appellant had underdeclared its VAT by Kshs 12,190,438 for the year 2016 and 2019 in its VAT returns and yet the reasons and evidence for the said variances had been duly presented to the tribunal and the respondent.
 5. The honourable tribunal erred in law in confirming that the respondent's assessment in terms of PAYE despite the respondent having extracted the incorrect information related to the payroll filed as per the P10 returns and yet the expense subject to PAYE as per ledgers as selected by the respondent were less than the amounts taxed under payroll as per P9.
4. On its part, the respondent filed a memorandum of appeal in appeal number 201 of 2012 setting only one ground viz;
1. The tax appeal tribunal erred in law by shifting the burden of proof to the appellant contrary to section 56(1) of the *Tax Procedures Act* by sparing the respondent the onus of proving that some amounts subjected to withholding tax had been incurred in purchase of equipment and machinery and therefore not subject to withholding tax.
5. The appeal was heard by way of written submissions. The appellant is substantially owned by AEE Power S.A. which is based in Spain. The appellant's parent company was granted a contract by



the Kenya Power and Lighting Company (hereinafter referred to as 'KPLC') to construct power infrastructure in several counties in Kenya notably Kisumu, Siaya, Vihiga, Busia, Bungoma and Kakamega. This contract had two components; offshore and onshore. The appellant was to carry out the onshore works while its parent company was to carry out the offshore component of the works. In this judgment, I will look at each category of tax separately.

a. Income tax

6. The respondent assessed and demanded income tax of Kshs 55,895,107.00 which included interest and penalties. It is apparent that the default assessment was determined on account of a markup of 15 per cent on the profit margins based on the revenue received by the appellant. This would mostly happen where the respondent has not been provided with documentation in proof of the costs of production of the taxable income. The respondent avers that it applied the markup percentage based on what other companies providing similar services reported as per their record. The appellant argues that the application of the markup was not scientific or based on any benchmarking results. According to the appellant, the respondent should have provided results of a research or a benchmarking exercise in proof that the 15 per cent markup was justified.
7. It should be noted that matters of tax are considered on strict liability basis. Upon assessment like the one in this case, the burden of proving that the taxpayer is not liable is on the taxpayer. That is the purport of Section 56(1) of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act*. The justification on this is that our taxation system is based on self-assessment and the only person who is in control and custody of documents and primary information in relation to the generation of the taxable income is the taxpayer. There is always a rebuttable assumption of the correctness of assessment by the tax authority and the only way to rebut this assumption is by providing enough information and documents to prove that the taxes were not payable or the assessment was wrong. The respondent relies on third parties' information such as financial statements and returns to carry out an assessment whenever the need arises.
8. It is indisputable that the income that was subjected to assessment by the respondent was for works the appellant had done on assignment from AEE Power Spain. The tribunal in its judgment noted that the appellant did not supply the documents and transfer pricing policy which was specific between the appellant and its parent company. I have gone through the documents filed by the appellant and I do not see any reason to fault the tribunal for reaching this finding. Failure by the appellant to supply the documents justified the respondent's decision to use the mark up of 15 per cent and in doing that, it did not need to conduct any research or benchmarking exercise.
9. The appellant has put up an argument that the respondent treated AEE Power Spain as its customer instead of KPLC. I do not see the relevance of this argument in this matter. Whether the customer was KPLC or AEE Power Spain, the fact remains that the income was generated and received by the appellant and as such taxable. I therefore find as the tribunal did that the respondent was right in assessment of the appellant's income tax liability as it did.

b. VAT

10. On VAT, it was the respondent's position that the appellant had received a sum of Kshs 287,604,399.00 but the advance recovered in returns was Kshs 211,41,158.00 thus giving a variance of Kshs 76,190,341.00. On this basis, the respondent assessed VAT for the unrecovered sum at 12 per cent giving Kshs 12,190,438.00 as the tax due from the respondent. The appellant did not deny receiving



this sum but it failed to produce documents to disprove the assessment by the respondent. Section 62 of the *Value Added Tax Act* provides that;

‘In any civil proceedings under this Act, the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax.’

11. Other than stating in its submissions and pleadings that the amount the respondent was demanding in its assessment had already been accounted for and paid, the appellant did not produce before the tribunal any evidence to prove payment of the VAT on the variance of Kshs 76,190,341.00. In its submissions, the appellant has simply stated in general that documents were provided. It has not pointed to me any single document which would have affected the results of the assessment but was ignored by the respondent and the tribunal.
12. The duty was on the appellant to make reference and direct the court to specific documents or information or even come up with its own calculation and assessment to enable the court make an informed decision. Throwing a myriad of documents at the court and leave it to make the analysis and sense out of them does not help a party’s case. The court should not be turned into an accounting or auditing entity where it is expected to sieve thorough all manner of documents some of which are irrelevant. A party who files documents which the court find difficult to appreciate should blame itself if its case is not captured well by the court or the tribunal. I therefore agree with tribunal that the appellant did not discharge its duty of proof as per section 62 of the VAT Act.

c. PAYE

13. This assessment followed extraction, evaluation and examination of the salaries and wages of the appellant’s employees against the staff costs declared in returns for PAYE. It was averred by the respondent that upon the exercise, it unearthed variances as the appellant had not brought all the emoluments to the PAYE charge which was contrary to Section 37 of the *Income Tax Act*. The respondent avers and submits that the returns were at variance with what the appellant showed in its payroll. Again, the principle of strict liability on matters of taxation comes into play.
14. The appellant had a duty to prove that the assessment by the respondent was erroneous or should not have been undertaken. While the appellant argued in its pleadings and submissions that the respondent extracted the wrong information, it did not produce the necessary documents to support its case. I have gone through the documents the appellant claims to be its evidence in this matter but I am not convinced that the same are enough to rebut the assumption of correctness of the respondent’s assessment.
15. It appears from the proceedings of the tribunal for 22-08-2022 which appear at pages 1079 to 1080 of the record of appeal that the appellant was not willing to provide witnesses before the tribunal. Specifically in the proceedings of 22-08-2022 which appear at page 1080 of the record of appeal, it is shown that the appellant was ordered to file witness statement with a warning that it will be forced to rely on its submissions. There is no indication whether the appellant produced witness statement or anyone testified on its behalf. This ground of appeal is also unfounded and I proceed to dismiss it and hold that the tribunal was right.

d. Withholding tax

16. The tax assessed under this category was said to have been based on amount paid out as interest on loan and some other expenses which were subject to the withholding tax. In making its decision on



this point, the Tribunal held that Section 35(6) of the *Income Tax Act* which made it the duty of the person liable to withhold tax but failed to do so personally liable for the same as if it were tax payable by the said person was repealed by the Finance Act 2016 and as such the same was not applicable until its reintroduction in 2019 with effect from 7th November of that year.

17. The facts of this matter are clear that the tax in dispute was for the period between 2016 and 2019 with no mention of the specific months or dates. During this period, the appellant was not responsible for withholding tax as the section putting such responsibility on it and other persons for such as held by the tribunal had been repealed. The respondent has not addressed this court on that point. Instead, it has concentrated on argument of categorizing of the taxes which to me is irrelevant owing to the fact that the law was not existing as at then. The respondent claims that the tribunal shifted the burden of proof to it thereby violating Section 56(1) which puts the burden on the taxpayer. I have not seen anything in the judgement of the tribunal which suggests that it shifted the burden of proof to the respondent.
18. Taxes cannot be imposed as a matter of assumption or intendment. For the respondent to demand tax from a taxpayer, there must be clear and unequivocal direct legislation imposing that tax on the taxpayer or allowing the respondent to collect such taxes. In absence of any enabling provision, the respondent had no authority to assess or demand such taxes from the appellant. Consequently, the respondent's appeal in this court's income tax appeal number E201 of 2023 is hereby dismissed.

Conclusion

19. The final decision which commends itself to me is that both appeals lack merits and I do make the following specific orders;
 1. This court's income tax appeal number E160 of 2023 is dismissed in its entirety.
 2. This court's income tax appeal number E201 of 2023 is also dismissed in its entirety.
 3. Each party shall bear their own costs of the appeals.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in absence of the appellant and presence of Mr. Kinyua for the appellant.

