



Commissioner Of Domestic Taxes v Bookingcom (Kenya) Limited (Income Tax Appeal E159 of 2024) [2025] KEHC 1130 (KLR) (Commercial and Tax) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E159 OF 2024
BM MUSYOKI, J
FEBRUARY 28, 2025**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

BOOKINGCOM (KENYA) LIMITED RESPONDENT

(Being an appeal from the whole of judgment of the Tax Appeals Tribunal delivered on the 9th May 2024 in its Tax appeal number E018 of 2023)

JUDGMENT

1. This appeal arises from the judgment of the Tax Appeals Tribunal dated 9th May 2024 in its appeal number E018 of 2024. In the said judgment, the tribunal set aside the appellant's objection decision dated 9th December 2022. The decision was in respect of the respondent's objection dated 14th October 2022 in which the respondent had objected to assessment of corporate income tax of Kshs 6,160,648.00 which with interest and penalties added up to Kshs 10,657,922.00. In the judgment, the tribunal held that the respondent erred in issuing an income tax assessment on income already declared and accounted for in the appellant's income tax returns.

The appellant has raised 7 grounds of appeal viz;

- a. Honourable tribunal erred in law in setting aside the appellant's objection dated 9th December 2022 despite the respondent having failed to discharge its burden of proof that the assessment was erroneous or excessive.
- b. The honorable tribunal erred in law in setting aside the appellant's objection decision dated 9th December 2022 despite the appellant having explained basis of the income tax variance for the year 2016 giving rise to the assessment.



- c. The honourable tribunal erred in law and fact by failing to find that there was an unexplained income tax variance for the respondent's year of income 2016.
 - d. The honourable tribunal erred in law and fact in concluding that the respondent had accounted for variance in its income tax returns for the year 2016 when no tax returns was produced by the respondent to discharge that burden.
 - e. The honourable tribunal erred in law and fact in concluding that there was no tax variance for the year 2016 when the respondent had itself acknowledged and admitted existence of the variance.
 - f. The honourable tribunal erred in law and fact in failing to consider the appellant's submissions and responses in its finding.
 - g. The honourable tribunal misapplied the law and fact and therefore arrived at the wrong decision.
2. The appellant filed submissions dated 12th November 2024 while the respondent decided to stay away from the appeal. Although the above grounds of appeal are couched in a way to show that the same are on matters of law and facts, I in my analysis and opinion think that the only semblance of a matters of law is in grounds 5 and 7. Ground 5 because it claims that there was an admission of variance for the year 2016. The position of the law is that where there is an admission in any pleading or suit, the court or tribunal is obligated in law to give effect to the admission unless the same is against the law or public policy. In such circumstances, there will be no need for proof of the facts or the existence of the pleaded state of affairs. That is definitely a matter of law as it calls into action Section 61 of the [*Evidence Act*](#) which states that;
- ‘No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
- Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.’
3. Ground 6 raises an issue of law as it claims that the tribunal misapplied the law thereby arriving at the wrong decision. Where there is a claim that the law was misapplied, the appellate court is called upon to interrogate the law claimed to have been misapplied in relation to the facts of the case and come to its own conclusion.
4. I have mentioned the above because the jurisdiction of this court in matters of tax emanating from the tax appeals tribunal is restricted to matters of law only. Section 56(2) of the [*Tax Procedures Act*](#) states that;
- ‘An appeal to the High Court or to the Court of Appeal shall be on a question of law only.’
5. The above being the position in law, this court will not consider the issue raised in the other grounds of appeal. The question that the decision of the tribunal on whether or not the relevant tax had been paid or nonpayment thereof justified and sufficiently explained is correct or not is matter of fact. In its submissions, the appellant has identified the following as issues for determination in the appeal;
- a. Whether there was an income tax variance for the year of income 2016 and whether the same is in dispute.



- b. Whether the income tax variance for the year 2016 was explained away by the respondent/ whether the respondent discharged its burden of proof to disprove of the assessment.
6. The appellant's submission covers the two issues identified above. In my view, only the first issue has element of a matter of law since it mentions dispute on the variance which it is claimed to have been admitted.
7. I have not been able to see in the appellant's submissions, any specific reference to the law which the tribunal is said to have misapplied. In its analysis, the tribunal made very little reference to any law if any as it was dealing with issues of fact. As expected of a specialized tribunal, it interrogated documentary evidence placed before it by the parties to ascertain the truth of the facts surrounding the appellant's assessment and the respondent's objection. The finding from such analysis is always a matter of fact unless the same is laced with application of law which must be specified by the complaining party. The appellant has not specified what application of law was wrong and how the same influenced the decision of the tribunal. I find no merit in this ground.
8. The appellant has claimed that the appellant had admitted that there was a variance of 20,535,497.00 for the year of income in 2016. To start with, ground 5 of the memorandum of appeal which faults the tribunal of concluding that there was no income tax variance is a misrepresentation of the finding of the tribunal. The tribunal did not conclude that there was no variance. It acknowledged the admission of the variance but found that the same had been explained as having been caused by under declaration in VAT returns which the respondent had corrected and as such, there was no basis for assessment.
9. The admission of the variance and explanation of its cause was discussed in paragraphs 70 to 77 of the tribunal's judgment. Admission of variance does not translate to tax liability since there could be genuine and acceptable explanation for the same which explanation is a process of establishing the truth of a fact. At paragraph 77, the tribunal held that;
- 'The tribunal has reviewed the pleadings and evidence adduced by both parties and observes that the income on which the respondent issued the disputed income tax assessment was a turnover variance of Kshs 20,535,497.00 already accounted for in the appellant's 2016 income tax returns but not declared by the appellant in VAT returns for January 2016 to December 2016. The tribunal observes that legally, under-declared turnover in a VAT return would not give rise to an additional income tax assessment when the income has already been declared and accounted for in an income tax return covering the same period.'
10. I find the above holding sound and sufficiently and correctly dealing with the issue of the admitted variance and I see no reason for disturbing it. The Tax Appeals Tribunal is a special tribunal which is meant to deal with technical areas of taxation and it is better placed like other specialised quasi-judicial entities to analyse and process technical facts and issues which the ordinary courts may not have the expertise to handle. That is the main reason that most appeals from the tribunals and quasi-judicial entities are restricted to matters of law only. I do believe that the intrinsic issues of taxation would require scrutiny of facts, documents and returns by tax practitioners and experts to assist the tribunal in analysing issues of fact but within the law and where there is no issue of law raised in the tribunal's judgement, the High Court should not interfere with the factual decision.
11. In view of the above, I find no merits in this appeal and the same is hereby dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025.

B.M. MUSYOKI



JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Muhoro holding brief for Mr. Nyapara for the appellant and in absence of the respondent.

