



**Digital Divide Data Kenya Limited v Commissioner of Legal Services and Board Cordination (Income Tax Appeal E117 of 2024)  
[2025] KEHC 7936 (KLR) (Commercial and Tax) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7936 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E117 OF 2024**

**AB MWAMUYE, J**

**MAY 29, 2025**

**BETWEEN**

**DIGITAL DIVIDE DATA KENYA LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF LEGAL SERVICES AND BOARD  
CORDINATION ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Tax Appeals Tribunal  
at Nairobi delivered on 5th April, 2024 in TAT No. 1349 of 2022)*

**JUDGMENT**

**Introduction And Background**

1. The Appellant, Digital Divide Data Kenya Limited, is a limited liability company duly incorporated in Kenya, whose core activity is bridging the divide between economically and socially marginalized youth and sustainable employment opportunities through technology and digital skills. The Respondent, is an officer of the Kenya revenue authority, a public body, duly established under the [Kenya Revenue Authority Act](#), CAP 469, of the Laws of Kenya whose primary mandate is the assessment and collection of revenue on behalf of the Government.
2. This appeal arises from the judgment of the Tax Appeals Tribunal (TAT) in Tax Appeals Tribunal case No. 1349 of 2022, delivered on 5<sup>th</sup> April, 2024. The TAT dismissed the Appellant's appeal on the ground that it was invalid for failure to comply with section 52 of the [Tax Procedures Act](#) (TPA). Aggrieved by the TAT's decision, the Appellant has lodged this appeal, citing the grounds set out in the Memorandum of Appeal dated 9<sup>th</sup> May 2024.



3. The facts leading to this dispute are that the Appellant sought a Value Added Tax (VAT) refund regarding zero-rated services through an application dated 25<sup>th</sup> March 2022. In the course of auditing and verifying that refund claim, the Respondent issued an assessment notice dated 10<sup>th</sup> June 2022, which inter alia:
  - i. Reduced losses carried forward as at June 2020 by KES 357,597,476;
  - ii. Reduced VAT credit by KES 15,353,855;
  - iii. Approved a VAT refund of KES 4,013,476; and
  - iv. Assessed PAYE of KES 2,335,277 as due and payable.
4. The Appellant objected to parts of the assessment by letter dated 25<sup>th</sup> July 2022, specifically contesting the reduction of the carried-forward losses but conceding to the disallowed VAT input amount albeit as a reduction of credits rather than a payable sum and to the PAYE amount assessed. The Appellant requested the Respondent to offset the conceded PAYE of Kshs.2,335,277/= against the approved VAT refund of Kshs.4,013,476/=. Ultimately, the Respondent confirmed its original assessment through an Objection Decision dated 26<sup>th</sup> September 2022.
5. Dissatisfied, the Appellant lodged an appeal at the Tax Appeals Tribunal. The TAT, however, dismissed that appeal without going into the merits, holding that it was invalid as the Appellant had allegedly not settled the undisputed tax prior to lodging the appeal, in contravention of section 52(2) of the [Tax Procedures Act](#). It is against that dismissal that the present appeal has been brought before this Court.
6. The Appellant prays that this Court allows the appeal, sets aside the TAT judgment, and directs that the matter be heard on its merits by the TAT.
7. The Appeal was canvassed by way of written submissions. In compliance, both parties filed and served their submissions.

### **The Appellant's Submissions.**

8. The Appellant, through its counsel filed its written submissions dated 27<sup>th</sup> September, 2024 together with its Supplementary Submissions dated 10<sup>th</sup> October, 2024. The Appellant's counsel submitted on behalf of the Appellant that the Appellant, a limited liability company whose core mission is to empower marginalized youth through digital skills, lodged a refund claim for VAT on zero-rated services, prompting the Respondent's audit. The audit culminated in a Notice of Assessment dated 10<sup>th</sup> June 2022 that reduced the Appellant's carried-forward tax losses by Kshs.357,597,476/=, reduced its VAT credit by Kshs.15,353,855/=, approved a VAT refund of Kshs.4,013,476/=:, and declared PAYE of Kshs.2,335,277/= as due.
9. It was submitted that the Appellant objected only to the reduction of its carried-forward losses, conceding to both the PAYE assessment and the reduction of VAT credit. Crucially, the Appellant requested an offset of the PAYE liability against the approved VAT refund, arguing that this was sufficient to discharge any actual tax payable. However, the Tax Appeals Tribunal dismissed the appeal under Section 52 of the TPA on the basis that the Appellant had not first settled the undisputed tax before appealing.
10. The Appellant further contends that the TAT erroneously treated the disallowed VAT credit of Kshs.15,353,855/= as a cash sum that needed to be paid, rather than a mere reduction in the Appellant's existing VAT credit. The only actual undisputed payable amount was PAYE of Kshs.2,335,277/=, which was amply offset by the approved refund of Kshs.4,013,476/= and that no



portion of the tax was therefore left unpaid by the Appellant prior to lodging the appeal. As a result, section 52(2) TPA was fully complied with.

11. The Appellant contends that this dismissal is erroneous because the reduction of VAT credits is not itself a payable tax, and thus no additional amounts beyond the PAYE which was covered by the approved VAT refund remained outstanding.
12. It was also submitted that the TAT denied the Appellant an adequate opportunity to address the preliminary objection, thus breaching the natural justice requirement of “audi alteram partem.” The Appellant maintains that the TAT’s interpretation violates clear legal principles, including the constitutional requirement to afford parties a fair hearing, and placed reliance on several authorities that taxation must rest on the unambiguous imposition of liability. Accordingly, it urges the Court to overturn the TAT’s decision and direct it to hear the substantive appeal on its merits.

### **Respondent’s Submissions**

13. The Respondent filed its written submissions dated 30<sup>th</sup> September, 2024. In its written submissions, the Respondent maintains that the TAT correctly dismissed the Appellant’s appeal for non-compliance with Section 52(2) of the *Tax Procedures Act*, which mandates that any uncontested tax must be paid or arranged for prior to lodging an appeal.
14. According to the Respondent’s audit findings, the Appellant conceded to disallowed VAT inputs of Kshs.15,353,855/= and PAYE of Kshs.2,335,277/= as payable. Of the overall VAT refund claim, only Kshs.4,013,476/= was approved, which the Respondent argues is insufficient to offset the combined conceded amounts. Thus, in the Respondent’s view, there was still an unpaid portion of uncontested tax, and the Appellant’s appeal was rightly dismissed. The Respondent relied on the case of *Hewlett Packard East Africa Ltd v Commissioner of Domestic Taxes* [2019] indicating that an appeal is invalid if undisputed taxes remain outstanding, emphasizing that the Appellant bore the burden of proving that it had no outstanding liability prior to appealing, something the Respondent asserts the Appellant failed to do.
15. Consequently, the Respondent asks this Court to uphold the TAT’s decision and dismiss the Appellant’s appeal with costs.

### **Analysis And Issues For Determination**

16. Having carefully considered the Memorandum of Appeal, the Record of Appeal, the parties’ submissions, and the authorities cited, this Court finds that the following broad issues arise for determination:
  - I. Whether the TAT properly dismissed the Appellant’s appeal as invalid under section 52(2) of the *Tax Procedures Act*.
  - II. Whether the TAT violated the Appellant’s right to be heard,
  - III. If the TAT erred, what is the appropriate relief or order to be made by this Court?



## I. Whether the TAT Properly Dismissed the Appellant's Appeal as Invalid

17. Section 52(2) of the *Tax Procedures Act* (TPA) provides that:

“ A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”
18. The purpose of this requirement is self-evident: taxpayers should not litigate issues that they have conceded as payable without first settling or making concrete arrangements to settle that portion. This statutory duty prevents unnecessary delay in collecting revenue not in dispute.
19. The TAT dismissed the appeal because it found that the undisputed amount was Kshs.17,689,132/= consisting of disallowed input VAT amounting of Kshs.15,353,855/= and PAYE of kshs.2,335,277/= which dwarfed the approved refund of Kshs.4,109,560/=. Consequently, the TAT concluded that a shortfall inevitably remained, meaning the Appellant had not paid the entire conceded amount before lodging the appeal.
20. The Appellant argues, however, that the Kshs.15,353,855/= is not a payable sum but a reduction of a pre-existing credit. The Appellant thus focuses on the actual payable item, the Kshs.2,335,277/= in PAYE, which it claims was to be fully offset by the Kshs.4,013,476/= refund, leaving no unpaid undisputed liability.
21. The crucial distinction is whether the disallowed VAT credit automatically became a “cash liability” or whether it remained an accounting adjustment that diminished the Appellant’s overall credit balance without leaving a net debit.
22. Indeed, many VAT positions involve credit accumulations especially for businesses with zero-rated or export supplies that do not necessarily translate into a payable tax if disallowances only reduce the credit. If, after a reduction, the taxpayer still retains some credit or refund capacity, there is no net tax due.
23. In the present case, the Appellant contends it had significant VAT credits, even after deducting the disallowed sum, and also had a pending or approved refund large enough to offset the PAYE.
24. Upon closer scrutiny of the record, it emerges that the figure of Kshs.15,353,855/= relates to a reduction of a VAT credit, not to an actual outstanding tax liability. The TAT’s conclusion that the total of Kshs.17,689,132/= was not in dispute and thus unpaid was premised on an assumption that every disallowed item is necessarily a sum payable in cash. Yet the evidence suggests otherwise, especially when dealing with offset or reduction of the Appellant’s credits, as opposed to positive obligations to pay additional tax. Indeed, the Appellant never acknowledged that Kshs.15,353,855/= was a payable sum, but rather recognized it as a credit reduction.
25. In short, the uncontested monetary assessment at stake was the PAYE of Kshs.2,335,277/= which the Appellant sought to offset against the approved refund of Kshs.4,013,476/=. That offset evidently leaves a surplus, not a shortfall. On these facts, the Court finds force in the Appellant’s position that no undisputed tax liability remained outstanding.



26. In *Kaluworks Limited v Commissioner of Domestic Taxes (Income Tax Appeal E044 of 2021)* [2023] KEHC 3991 (KLR), the High Court observed:

“The import and intention of section 52(2) of the TPA is to ensure that a taxpayer pays what is undisputed before he can challenge the assessments made by the Commissioner in the appeal process....”

27. Where no actual payable sum remains undisputed, there is no bar to filing an appeal. Indeed, the offset mechanism is valid under the tax statutes when, for instance, a taxpayer has a confirmed refund that is sufficient or partially sufficient to cover the liability. This principle is equally reflected in *Rana Auto Selection Ltd & 2 Others v Kenya Revenue Authority & Another* [2021] eKLR, where the Court clarified that amounts still under dispute or simply credited or discredited do not automatically translate to a “due and payable” sum for the taxpayer to remit in cash.

28. Even if the TAT concluded that some portion of the disallowed VAT was a net liability which the Appellant denies, section 52(2) of the TPA also permits an arrangement with the Commissioner to pay the undisputed tax. Here, the Appellant requested an offset. If the Respondent had agreed to that arrangement, that alone could suffice under section 52(2) of the TPA. The TAT’s decision does not fully address whether the offset request was accepted or rejected by the Commissioner before the Notice of Appeal was lodged.

29. On the evidence presented, it appears the TAT merged the disallowed VAT credit and the PAYE sums into one total of Kshs.17,689,132/=, treating everything as a direct “cash liability.” The record strongly suggests that the Kshs.15,353,855/= was a downward adjustment of the Appellant’s VAT credit, not an outright demand for payment.

30. The undisputed or positive liability was the PAYE of Kshs.2,335,277/=, which the Appellant sought to offset against the Kshs.4,013,476/= VAT refund. On that basis, it would seem that the undisputed liability, PAYE, was covered, leaving no net outstanding sum that must be settled before lodging the appeal.

31. Therefore, this Court finds that the TAT’s conclusion that the appeal was invalid under section 52 of the TPA was based on an erroneous assumption that the disallowed VAT credit automatically resulted in a net outstanding tax. The TAT should have distinguished between a “reduction of credit” and an actual “payable sum.”

32. Consequently, the TAT erred in law and fact by striking out the appeal for non-compliance with section 52 of the TPA when, on a correct interpretation of the evidence, there was no undisputed payable sum left unsettled.

### **Whether the TAT Violated the Appellant’s Right to Be Heard**

33. The Appellant further contends that it was never given a fair opportunity to address the Preliminary Objection on which the TAT ultimately relied. The Respondent had raised a note in its Statement of Facts that it would rely on a preliminary objection but, the Appellant says, never actually argued it as a separate application or motion. The TAT nonetheless used it as the basis for dismissing the appeal.

34. Article 50 of *the Constitution* of Kenya, 2010 enshrines the right to a fair hearing. One core pillar of a fair hearing is the principle of audi alteram partem, “hear the other side.”



35. The Supreme Court of Uganda in *The Management Committee of Makondo Primary School & Another v Uganda National Examination Board* (HC Misc. Appln No. 18 of 2010) stated it in emphatic terms:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase ‘audi alteram partem’ literally translates into ‘hear the parties in turn’, and has been appropriately paraphrased as ‘do not condemn anyone unheard’. This means a person against whom there is a complaint must be given a just and fair hearing.”

36. Similarly, in *Geothermal Development Company Ltd v Attorney General & 3 Others* (2013)eKLR, the Court stated as follows;

“The right to hearing are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of *the constitution* must be implied in every Act especially the right to due process and it cannot be taken away.”

37. I agree with the learned judges. In the instant case, on the facts of it, it is not disputed that the alleged Preliminary Objection was not separately ventilated at trial. The TAT’s own judgment indicates it proceeded on the validity point without giving the Appellant notice or a fair chance to address whether Kshs.15,353,855 /= is actually a payable. The record reflects that the TAT effectively raised the matter *Suo motu* by reading from the Respondent’s Statement of Facts without a corresponding hearing on that specific issue of the shortfall.

38. The Appellant insists it never had a chance to present its offset argument with the same clarity it now does before this Court, because the TAT did not invite or require submissions on the validity question as a discrete preliminary matter.

39. This Court is of the view that the TAT should have clearly directed the parties to file or present arguments on the preliminary objection if it intended to dispose of the appeal on that ground. The record suggests the TAT did not do so. Consequently, the Appellant’s key contention that Kshs.15,353,855/= was not payable but a reduction of credit was not addressed thoroughly.

40. This mode of proceeding inherently undermined the Appellant’s right to respond fully to an issue that would dispose of the entire case. By adopting a final position without affording a robust platform for the Appellant to clarify the matter, the TAT deprived the Appellant of its right to be heard on a fundamental question of jurisdiction or competency.

41. This Court finds that the TAT, in the circumstances, ought to have invited submissions on the matter or directed the parties to argue the validity question before concluding that the appeal was a nullity. Denying the Appellant the chance to dispel the mischaracterization of the disallowed VAT credit as a payable sum contravened the fundamental rules of natural justice.

### **Appropriate Relief**

42. Having determined that the TAT erred in holding that the appeal was invalid under Section 52(2) of the TPA because it mischaracterized the disallowed VAT credit as an outstanding liability and that the TAT failed to accord the Appellant a fair and proper hearing on the preliminary objection, the next question is the relief to be granted.



43. As a general rule, where a lower court or tribunal dismisses a matter on a flawed threshold finding, the standard recourse is to set aside that decision and remit the dispute for determination on its merits, unless the appellate court can itself finally determine the issues. Here, the TAT did not delve into the merits of the underlying assessments, such as the correctness of the transfer pricing adjustments or the rationale for the reduction of carried-forward losses. Those factual and legal questions require the specialized inquiry of the TAT in the first instance, as mandated by the *[Tax Appeals Tribunal Act](#)*.
44. Accordingly, the just order would be to set aside the TAT judgment dated 5<sup>th</sup> April 2024 and remit the matter to the TAT for a substantive hearing and determination of all remaining issues on their merits. This approach best preserves the statutory architecture that places initial jurisdiction for tax disputes in the TAT, while ensuring the Appellant is not denied the constitutionally guaranteed right to a fair hearing.
45. In light of the above analysis, this Court is of the view that the TAT erred in law and in fact by merging the disallowed VAT credit with the undisputed PAYE to conclude there was a net outstanding liability. Properly understood, the VAT credit reduction did not create a positive amount of tax payable, and the only actual liability (PAYE) was fully offset by the approved VAT refund.
46. Consequently, the TAT's decision striking out the appeal for invalidity cannot stand. The appropriate remedy is to set it aside and remit the matter to the TAT for a full hearing on the merit.
47. In light of the above analysis, this court therefore makes the following orders:
  - a. The appeal is hereby allowed.
  - b. The Judgment of the Tax Appeals Tribunal in Tax Appeal No. 1349 of 2022, delivered on 5<sup>th</sup> April 2024, is set aside in its entirety.
  - c. The appeal in Tax Appeals Tribunal case No. 1349 of 2022 is remitted back to the Tax Appeals Tribunal for a full hearing and determination on its merits.
  - d. Costs of this appeal are awarded to the Appellant.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF MAY 2025.**

**BAHATI MWAMUYE**

**JUDGE**

