Fahd Commodities Group Limited v Commissioner of Domestic Taxes (Income Tax Appeal E132 of 2024) [2025] KEHC 9346 (KLR) (Commercial and Tax) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9346 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E132 OF 2024

F GIKONYO, J

JUNE 30, 2025

BETWEEN

FAHD COMMODITIES GROUP LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

Additional assessment

1. This is an appeal against the judgment dated 5th April 2024, by the Tax Appeals Tribunal ("Tribunal") in TAT Appeal No. 276 of 2023.

Background

2. The appellant is a private limited liability company that imports and trades commodities, including wheat bran, maize and sugar.

3. The Commissioner conducted a return review of VAT credit, imports and income tax for September 2017 to August 2022.

4. On 8th November 2022, the Commissioner issued the appellant with a notice of intention to issue additional assessments for the inconsistent variances. On 21st December 2022, the Commissioner requested further information and documents. The appellant submitted physical documents through letters dated 27th December 2022, 4th January 2023, 6th January 2023 and 14th January 2023.

5. On 20th February 2023, the Commissioner issued its objection decision confirming VAT and Corporation tax totalling Kshs. 113,448,822.00 comprising principal tax, penalties and interest.

6. Dissatisfied, the appellant filed an appeal on 20th March 2023 before the Tribunal through its notice of appeal dated 18th March 2023.

7. The Tribunal dismissed the appellant's appeal and upheld the Commissioner's objection decision dated 20th February 2023.

8. Aggrieved, the appellant instituted this appeal through the memorandum of appeal dated 29th May 2024, on the following grounds:-

    1. That the Tax Appeals Tribunal erred in law and fact by upholding the Respondent's Objection Decision dated 20th February 2023.

    2. That, on the issue of income tax on wheat brand for the year 2021, the Tax Appeals Tribunal erred in law and fact by failing to recognize the Principal Agency relationship between the Appellant and ABS Trading LLC which appointed the Appellant as an agent for purposes of importation on behalf of ABS Trading LLC

    3. That the Tax Appeals Tribunal erred in law and fact by failing to appreciate that as a result of the Agency relationship, the Appellant only recognized the Management Fees received from ABS Trading LLC as taxable income.

    4. That the Tax Appeals Tribunal erred in law and fact by finding that the Appellant had not discharged its burden of proof on the issue of establishment of an Agency relationship with ABS Trading LLC despite having furnished the Tribunal with all the necessary supporting documentation.

    5. That on the issue of Income Tax and VAT on import of sugar for the year 2017 and 2018, the Tax Appeals Tribunal erred in law and fact by failing to recognize that imported sugar in 2017 and 2018 was not all sold in the Financial year 2017 and some were sold, and subsequently recognized in the Appellants financial year 2018.

    6. That the Tax Appeals Tribunal erred in law and fact by failing to appreciate that the sugar sold in both 2017 and 2018 to Mariam Shariff and Highrise Commodities Limited was an arms-length transaction. The Appellant adequately demonstrated that the sugar was indeed sold at market value.

    7. That the Tax Appeals Tribunal erred in law and fact by upholding the 10% markup imposed by the Respondent on the sugar sold to Mariam Shariff and Highrise Commodities Limited despite the fact that the Transaction was between unrelated parties, accordingly the transaction was at an arms-length and the goods sold for market value.

    8. That the Tax Appeals Tribunal erred in law and fact by upholding the Respondent's erroneous assessment which had previously been vacated on 4th March 2019. The Respondent had previously assessed the Appellant's sugar sales for the period 2017 and later vacated the same. Despite having vacated that assessment, the Respondent in 2022 again assessed the same sugar sale for the period December 2017 despite them having earlier vacated the same.

    9. That on the issue of income tax on maize for the year 2017, the Tax Appeals Tribunal erred in law and fact failing to appreciate the importation costs incurred by the Appellant which placed it in a loss position. The Tribunal further erroneously upheld the Respondent's markup of 10% on the value of the maize imports and disregarded the cost paid by the Appellant which included storage handling costs.

10. That the Tax Appeals Tribunal erred in law and fact by disregarding the Appellant's Bank Statements which demonstrated that the Appellant suffered losses in the purchase, importation and supply of maize for the year 2017 placing it in a loss position.

11. That on the issue of corporation tax on maize import for the year 2017, the Tax Appeals Tribunal erred in law and fact by disregarding the Appellant's sample invoice date of 1,381,670 kgs which was used to determine the selling price per kilogram to local millers and instead chose to uphold the Respondent mark up of 10% which was arbitrary, excessive and unjustified.

12. That the Tax Appeals Tribunal disregarded that the Appellant had entered into an import contract with a Zambian supplier and consequently suffered losses on the maize importation after the Kenyan market prices declined below the import cost.

13. That the Tax Appeals Tribunal erred in law and fact by upholding the Respondent's decision to disallow import costs which are allowable pursuant to section 15 of the *Income Tax Act*.

14. That the Tax Appeals Tribunal erred in law and fact by upholding the Respondent's Objection Decision despite the Respondent not having made any efforts to understand the Appellant's nature of business nor verify any of the evidences and documents shared by the Appellant.

Directions of the court

9. The appeal was canvassed through written submissions. The appellant and the Commissioner filed written submissions dated 20th March 2025 and 7th May 2025 respectively.

Appellant's submissions

10. The appellant submitted that the respondent's tax assessments were erroneous, arbitrary, and unsupported by law or fact. It asserted that it demonstrated that it acted as an agent for ABS Trading LLC, and as such, taxation should have been limited to the management fee earned rather than the entire transaction value.

11. In addition, the appellant submitted that the Commissioner's imposition of a 10% mark-up on sugar sales was unjustified, as it provided sufficient evidence showing that the transactions were conducted at arm's length. It argued that reassessment of sugar imports for 2017 and 2018 was equally flawed, as the initial assessment had been vacated, making the subsequent reassessment legally untenable.

12. The appellant further submitted that the respondent erred in its assessment of maize imports for 2017 by disregarding evidence of financial losses and arbitrarily imposing a mark-up. The disallowance of import costs under section 15 of the *Income Tax Act* was also unjustified, as these were legitimate business expenses wholly and exclusively incurred in the production of income. Finally, the respondent failed to conduct a proper review of the appellant's financial records and business operations before making its assessments, leading to an inaccurate and unfair tax liability.

13. The appellant argued that the Commissioner failed to adhere to the principle of fair administrative action in violation of the *Constitution* and the *Fair Administrative Action Act*. It contended that the overall approach to the assessment process was flawed, as it failed to properly review the appellant's financial records and business model before making its determinations. It faulted the Commissioner for relying on arbitrary estimations and ignored the financial realities of the appellant's operations. It relied on *Judicial Service Comission v Mbalu Mutava & another* [2015] eKLR

14. In conclusion, the appellant urged the court to allow the appeal; to set aside the Tribunal's judgment dated 5th April 2024 in its entirety and to set aside the Commissioner's objection decision dated 20th February 2023.

Response

15. The Commissioner submitted that the appeal as filed is incompetent and ought to be struck out as the judgment annexed in the record of appeal is unsigned. It also argued that the appellant has not tendered any explanation why it did not file the signed and certified judgment. It submitted that the appeal was not based on a question of law only as required.

16. The Commissioner asserted that the appellant did not provide sufficient evidence to discharge its burden to prove that the assessments were wrong. It argued that the Tribunal was correct on the findings of fact.

17. The Commissioner relied on:-

    1. *Mwambega Allan Mwajimbo v Republic* [2016] eKLR
    2. *Hewlett Packard East Africa Ltd v Commissioner of Domestic Taxes* [2019] eKLR
    3. *Digital Box Limited vs Commissioner of Investigation & Enforcement*-TAT Appeal No. 115 of 2017
    4. *Tile and Carpet Centre Limited v Commissioner of Domestic Taxes* [2020] eKLR
    5. *Ushindi Exporters Limited v Commissioner Of Investigations And Enforcement* (TAT Appeal no. 7 of 2015)

18. In closing, the Commissioner urged the court to dismiss the appeal with costs.

Analysis and Determination

Duty of court

19. The court's duty in an appeal emanating from a decision of the Tribunal is circumscribed to a question of law only. This is as per Section 56 of the *Tax Procedures Act*, which provides that:-

> " 56.
>
> (1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
>
> 1. An appeal to the High Court or to the Court of Appeal shall be on a question of law only.
> 2. 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 on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds."

20. The implication of the foregoing is that the court will limit its interaction with the fact for background and context. The court is also entitled to consider "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." *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* NRB CA EPA NO. 5 OF 2018 [2018] eKLR

21. The substantive issues for determination in this appeal are:-

    1. Whether the Tribunal erred in finding that there was no principal-agency relationship between the appellant and ABC Trading Limited.

    2. Whether the Tribunal erred in upholding the income tax assessments on the import of sugar for the period 2017 and 2018 and

    3. Whether the Tribunal erred in upholding income tax assessments on the import of maize for the period 2017.

22. The following two preliminary issues were raised by the Commissioner.

Incompetence of the appeal

23. The Commissioner argued that the appeal as filed is incompetent and ought to be struck out as the judgment annexed in the record of appeal is unsigned. It also argued that the appellant has not tendered any explanation why it did not file the signed and certified judgment.

24. In *Mwambega Allan Mwajimbo v Republic* [2016] eKLR cited by the Commissioner, the judgment upon which the appeal before the court was based was unsigned. The Court of Appeal noted that it was common ground that the unsigned judgment was a nullity and no appeal can be founded on it. It also noted that it was a mistake of the court.

25. The circumstances in the case are distinguishable in that the irregularity was brought to the court's attention when the court was about to embark on the hearing of the appeal, leading to an order that the matter be remitted to another bench of the High Court for re-hearing.

26. In this matter, I note that the judgment in the record is unsigned. However, the court registry staff uploaded signed judgment on the Judiciary's Case Tracking System (CTS) on 29th May 2025. The CTS filing form part of the court record.

27. Therefore, the Commissioner's objection that the appeal is incompetent and should be struck out because the judgment was unsigned, fails.

Whether the appeal is based on issues of law

28. The Commissioner submits that the appellant is urging the court to overturn the Tribunal's finding based on factual matters which is contrary to section 56(2) of the *Tax Procedures Act*.

29. As stated in *Oceanfreight (E.A) Limited v Commissioner of Domestic Taxes* [2018] eKLR "issues of fact may turn out to give rise to a question of law."

30. Put differently, "a conclusion although based on primary factual evidence that is erroneous becomes a point of law." *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 Others* [2013] eKLR

31. As earlier noted elsewhere above, an appeal from the Tribunal ought to be on questions of law. However, questions whether the Tribunal's findings are based on evidence and the law are questions of law. There also instances where a question of law consists in a mixed question of law and fact. Therefore, 'only on a question of law' must be understood in its complete sense established in case law.

32. In *Commissioner of Domestic Taxes v Better Globe Forestry Limited* (Tax Appeal E003 of 2022) [2023] KEHC 3645 (KLR) (Commercial and Tax) (28 April 2023) (Judgment), the Court observed that:-

> "Whether the amount received by the local entity is a loan that attracts interest or deemed interest is a question of fact. Given the jurisdiction of the court, the duty of this court is to examine the record and satisfy itself that the determination of the Tribunal comports with the evidence."

Whether the Tribunal erred by finding that there was no principal-agency relationship between the appellant and ABC Trading Limited.

33. The appellant's case is that in 2021, it facilitated the importation of wheat bran on behalf of ABS Trading LLC under an agency agreement, earning only a management fee. It faulted the Commissioner for disregarding the principal-agency relationship and assessed tax on the full transaction value instead of only the management fee.

34. The Commissioner argued that the invoice issued to ABC Trading LLC for service fee had glaring discrepancies where the amounts in figures were completely different from the amount in words for all the invoices provided for review. The appellant failed to provide an explanation on the discrepancies.

35. There were discrepancies in the total number of metric tonnes exported by the appellant in 2021 as per the custom data. The appellant alleged to have exported 3,066 metric tonnes as compared to 58,319.97 metric tonnes as per the custom data.

36. The Tribunal looked at the appellant's documentation alluding to direct payments made to the Kenyan wheat millers implying that it was not involved in the payments but was indeed a facilitator. The Tribunal noted that the appellant failed to dislodge the Commissioner's assertion that it received Kshs. 112,484,077.00 in its NCBA bank account as no explanations were availed to explain or account for the funds. It thus applied section 107 of the *Evidence Act* and *Miller v Minister of Pensions* [1947] ALL ER 372.

37. Section 30 of the *Tax Appeals Tribunal Act* and Section 56(1) of the *Tax Procedures Act*, the burden of proving that an assessment is wrong is on the tax payer.

38. From my perusal of the record, there is no evidence to support the purported agency relationship between it and ABC Trading LLC. There was no reasonable explanation proffered by the appellant regarding the discrepancies uncovered by the Commissioner in the invoice issued to ABC Trading LLC for service fee or the receipt of the funds into its NCBA bank account.

39. As such, I find that the Tribunal cannot be faulted here.

10% mark-up

40. As highlighted by the Commissioner, under the terms of the agreement on service fee, the service fee was to be based on the total cost incurred by service provider i.e. direct and indirect cost, 10% mark-up, total sales support, general and administration cost. Therefore, in the absence of proper documentation, the Commissioner was allowed to use the Free on Board (FOB) value and 10% mark-up to arrive at service fee payable for the year under review.

41. I therefore, find no fault in the Tribunal's upholding of the Commissioner's application of the 10% mark-up on was justified.

42. Grounds 2, 3 and 4 fail.

Whether the Tribunal erred by upholding the income tax assessments on the import of sugar for the period 2017 and 2018

Failure to consider the 2018 sales

43. The appellant contended that for the years 2017 and 2018, it imported sugar, part of which was sold in 2017, and the remainder in 2018. It faulted the Tribunal for failing to appreciate that the sugar sold to Miriam Shariff and Highrise Commodities Limited was an arms-length transaction and that the appellant had demonstrated that the sugar was sold at market value.

44. The Tribunal found that the appellant failed to adduce invoices to support the sale of sugar to Miriam Shariff and Highrise Commodities Limited.

45. At para. 66 of the judgment, the Tribunal found:-

> "....a variance of Kshs. 18,137,722 between what was declared and sold was not reconciled or explained and was treated as underdeclared VAT on sugar sale for the 2017 period. Further, opening stock for 2018 of Kshs 28,339,750.00 was different from closing stock of 30,539,750 which was not reconciled or explained even the difference of unsold of 6 bags was not explained....."

46. From a review of the record, there was no explanation or reconcilement of the noted discrepancies by the appellant. The appellant failed to provide the invoices issued to Mariam Shariff and Highrise Limited. The appellant failed to discharge the burden to prove that the assessment was wrong. Thus, I find no merit in the appellant's claim that the Tribunal failed to consider that the sugar was sold partly in 2017 and 2018.

10% mark-up

47. The appellant submitted that the Tribunal erred in upholding the 10% mark-up on the sugar sales. According to the Commissioner, due to the discrepancies, the appellant ought to have declared sales amounting to Kshs. 31,173,725 having applied a mark-up of 10% on the custom value of Kshs.28,339,750. It explained that a 10% mark-up was applied on the custom values for the year 2017 and 2019 and the variances between sales declared and expected sales were charged to taxes as undeclared income.

48. Due to the appellant's failure to discharge its burden to prove that the assessments were wrong or to explain the discrepancies, the Tribunal cannot be faulted for upholding the 10% mark-up.

49. Grounds 5, 6 and 7 fail.

Amendment of assessment

50. The appellant contended that the Tribunal erred by upholding the Commissioner's erroneous assessment, which had been previously vacated on 4th March 2019. It faulted the Commissioner for assessing the same sugar sale in 2022 for the period December 2017, even though it had earlier vacated it.

51. The Commissioner submitted that the VAT additional assessment issued in February, 2018 was in relation to input VAT claimed by the appellant in the same period and not related to under-declared sugar sales under review.

52. The Commissioner relied on sections 24(2) and 31(1) of the *Tax Procedures Act*, which provide as follows:-

> " 24 (2) The Commissioner shall not be bound by a tax return or information provided by, or on behalf of, a taxpayer and the Commissioner may assess a taxpayer's tax liability using any information available to the Commissioner."
>
> 31(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that—
>
> (a) .....;
>
> (b) in the case of an excess amount of input tax under the Value Added Tax Act, 2013 (No. 35 of 2013), the taxpayer is assessed in respect of the correct amount of the excess input tax carried forward for the reporting period; or
>
> (c) In any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates."

53. From the above, the Commissioner is not bound by the returns filed by a taxpayer and may assess a taxpayer's tax liability using any information available to the Commissioner and may amend an assessment.

54. The Tribunal noted that the basis of the additional assessments were variances between the sales declared as per income tax and VAT returns a vis-à-vis derived from import and customs data. The Tribunal also noted that under section 43(1) of the *ITA*, the requirement is that every registered person shall keep records for five years from the date of the last entry made.

55. Given the Commissioner's power to amend an original assessment, to issue an additional assessment to ensure that the taxpayer pays the correct amount of tax, I find that the Tribunal did not err in upholding the Commissioner's assessment for the sugar sale for December 2017 in 2022.

56. Accordingly, ground 8 is unfounded and fails.

Whether the Tribunal erred in upholding income tax assessments on the import of maize for the period 2017

Disregard of losses incurred

57. The appellant indicated that in 2017, it imported maize and incurred significant costs in transportation, storage and handling resulting in a loss. It argued that the costs were directly related to its business operations and were deductible under section 15 of the *Income Tax Act*.

58. The Commissioner indicated that the Audited Financial Statement for sale of maize in 2017 was Kshs. 14, 005,658 compared to total cost incurred in importation of maize, which was Kshs. 241,956,942 as presented by the appellant in its letter of objection. It asserted that there was no explanation or evidence adduced for the huge disparity between figures reported in Annual Financial Statement and those in

the objection. This was in contradiction of appellant's assertions that they generated loss from the sales of maize in 2017.

59. The Commissioner highlighted that the appellant's computation of purchase value per Kg was based on 478,400kg and yet they had imported 2,099,560 Kg of maize with a custom value of Kshs. 59,012,466.28 in 2019. It contended that this was an indication that the appellant did not factor in 1,621,160kg of maize in computation of the purchase price per Kg.

60. The Commissioner further submitted that the computation for selling price per Kg indicated that the appellant had sold 1,381,670 kg out of the total 2,099,560 of maize for Kshs. 47, 590,673. It noted that this suggested that the remaining 717,890 kg were unsold in 2019. The Commissioner argued that however, Audited Financial Statements in 2019 did not support this position as there was no closing stock for the year.

61. The appellant did not sufficiently support how revenue and cost were arrived at in 2017 and 2019. The computations were wrongly computed since they did not factor the correct amount of Maize imported in 2017 and 2019.

62. The appellant's bank account statement indicated that the appellant received Kshs. 19, 288,606 yet the income tax return showed revenue of Kshs. 11,949,831 for the year under review. There was no explanation or evidence adduced for the disparity in figures by the Appellant.

10% mark-up

63. The appellant faulted the respondent for imposing a 10% mark-up on the value of the maize imports without considering the costs, disregarding bank statements and financial records showing the losses.

64. According to the Commissioner, a mark-up of 10% was applied on the custom values for the year 2017 and 2019 and the variances between sales declared and expected sales were charged to taxes as undeclared income. This was based on Custom Data which indicated that the appellant imported maize from Zambia worth Kshs. 185, 214,270 but only Kshs. 66, 797,022 was declared as sales in 2017. iii. Similarly, maize import amounting to Kshs. 58, 879,704 was made in 2019 and only sales amounting to Kshs. 50,909,235 was declared.

65. The Tribunal found that the appellant did not explain the discrepancies or prove that the assessments were wrong. From a review of the record, there is no evidence by the appellant to explain the discrepancies. Thus, I find no fault in the Tribunals findings.

66. Grounds 1, 9, 10, 11, 12, 13 and 14 cannot hold.

Disposition

67. The upshot is that the appeal is dismissed for want of merit.

68. Given the analysis and outcome thereof, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 30TH DAY OF JUNE, 2025

F. GIKONYO M

JUDGE

In the presence of: -

1. Lemayan for KRA

2. CA Kinyua