



REPUBLIC OF KENYA



Spread Marketing Consultancy Ltd v Commissioner of Domestic Taxes (Income Tax Appeal E270 of 2024) [2025] KEHC 11487 (KLR) (Commercial and Tax) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E270 OF 2024**

FG MUGAMBI, J

JULY 31, 2025

BETWEEN

SPREAD MARKETING CONSULTANCY LTD APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGMENT

Background and Introduction

1. The respondent, (that is the Commissioner), assessed the appellant and issued a notice of assessment dated 13th December 2022, demanding Income Tax, PAYE, and VAT amounting to Kshs. 28,707,705/=. In response, the appellant filed a notice of objection dated 23rd January 2023. The Commissioner subsequently issued an objection decision on 20th March 2023, confirming the assessment. Dissatisfied with the decision, the appellant lodged an appeal before the Tax Appeals Tribunal (the Tribunal), which delivered its judgment on 13th September 2024, dismissing the appeal.
2. Aggrieved by the Tribunal's decision, the appellant filed the present appeal through a memorandum of appeal dated 15th October 2024. The appellant submits that the Tribunal erred in law and fact by failing to consider key documentary evidence such as bank statements, invoices, and reimbursement schedules that was allegedly submitted and reviewed at the objection stage. It submits that this led to a misapplication of the burden of proof under Section 30 of the *Tax Appeals Tribunal Act* (TATA), as the Tribunal erroneously concluded that the documents had not been provided, despite both parties acknowledging their submission.
3. The appellant contends that this refusal to consider relevant material violated its right to a fair hearing under Article 50(1) of the *Constitution* and amounted to procedural unfairness. Furthermore, it is alleged that the Tribunal's decision was biased and unreasonable, as it disregarded material facts, acted



contrary to the evidence on record, and favored the Commissioner's position without justification. The appellant therefore urges the Court to set aside the Tribunal's decision and allow the appeal.

4. The Commissioner opposed the appeal through a statement of facts dated 25th November 2024. It contends that the appellant failed to declare invoices amounting to Kshs. 2,859,802.00 in its VAT returns, despite those invoices having been claimed by clients. The appellant also failed to provide key contracts, namely, the GSK 2018 and AstraZeneca 2018 and 2019 agreements, which were necessary to support its assertion that certain amounts received were merely reimbursements. The Commissioner observed inconsistencies in the appellant's reporting of income from these contracts, particularly in classifying part of the income as VAT-exempt reimbursements.
5. With respect to PAYE, the Commissioner argues that the appellant failed to substantiate its claim that director drawings constituted loan repayments. The Commissioner further asserts that it acted within the scope of the law by relying on available records to raise the assessments, pursuant to Sections 24(2), 29, and 31 of the *Tax Procedures Act* (TPA). Additionally, the Commissioner maintains that the appellant did not discharge its burden of proof as required under Section 30 of the TATA. Instead, the appellant sought to introduce new documents at the appeal stage, which had not been availed during the objection process.

Analysis and Determination

6. The parties filed their respective submissions, which I have carefully considered alongside the record of appeal and the response thereto.
7. The appellant contends that the Tribunal failed to consider the documents submitted as evidence, erroneously stating that the documents had not been provided at the objection stage. The appellant maintains that the documents in question were, in fact, submitted during the objection process.
8. Conversely, the Commissioner argues that although the appellant may have referenced certain documents such as invoices, bank statements, and reimbursement schedules, it failed to properly submit or present them at the objection stage, as required under the *TPA*.
9. I have reviewed the Tribunal's decision and particularly paragraph 60 thereof where the Tribunal made a finding of fact that:

“The Tribunal further notes that the appellant attached the following documents to its pleadings, which documents were not provided at the objection stage. ... The above documents were thus not sighted by the respondent in making its objection decision. The Tribunal is thus enjoined from considering these documents that were never sighted by the respondent.”

10. It is trite law that in a second appeal, the jurisdiction of this Court is confined to questions of law. This principle is firmly anchored in Section 56(2) of the *TPA*, which provides that:

“An appeal to the High Court or to the Court of Appeal shall be on a question of law only.”

11. In *Commissioner of Investigation and Enforcement V Doshi Enterprises Limited*, [2025] KEHC 4501 (KLR) this Court further held that:

“Despite the grounds of appeal stating that the tribunal erred in law, the court has a duty to interrogate the complaints raised in the grounds and satisfy itself that the matters raised are of law and if it finds that they are actually matters of fact, it must avoid going into them



no matter how tempting the arguments therein may be lest it would be acting without jurisdiction.”

12. The Court cited from the decision in *Romageco Kenya Limited V Commissioner of Customs Services*, (2024) KECA 1416 (KLR) where the Court again emphasized that:

“This is a second appeal. Our mandate in such an appeal has been enunciated in a long line of cases decided by the Court. See for instance, *Maina V Mugiria* [1983] KLR 78, and *Stanley N. Muriithi & Another V Bernard Munene Ithiga* [2016] eKLR, for the propositions, inter alia, that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse”.

13. In the present case, the Tribunal’s finding that the documents relied upon by the appellant at the appeal stage were not provided at the objection stage is a finding of fact, made upon consideration of the evidentiary record. There is no evidence that this finding was made per incuriam or without evidentiary basis. As such, and in the absence of any demonstrated error of law arising from this finding, this Court is bound by it and lacks jurisdiction to interrogate or reverse it.

14. What remains for this Court to determine is whether the Tribunal erred in concluding that the appellant failed to discharge its burden of proof as required under Section 30 of the *TATA* and Section 56(1) of the *TPA*.

15. In tax disputes, it is a well-established principle that the burden of proof rests with the taxpayer. This position is expressly provided for under Section 30 of the *TATA* and Section 56(1) of the *TPA*, which set out the taxpayer’s obligation to demonstrate the inaccuracy or excessiveness of a tax decision or assessment.

16. Section 30 of the *TATA* provides that:

“In a proceeding before the Tribunal, the appellant has the burden of proving –

- (a) where an Appeal related to an assessment, that the assessment is excessive; or
- (b) in any other case, that the tax decision should not have been made or should have been made differently.”

17. While Section 56 of the *TPA* provides as follows:

“(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”

18. In *Republic V Kenya Revenue Authority; Proto Energy Limited, (Ex parte)* [2022] KEHC 5 (KLR), the Court articulated the rationale for placing the burden of proof on the taxpayer as follows:

“The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his



liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records.

The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold. A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented."

19. I have considered the submissions presented before the Tribunal. The Commissioner was emphatic that the appellant had not provided certain documentation including the proof of shilling-to-shilling reimbursement of staff cost as well as the AstraZeneca contracts for 2018 & 2019 that would enable the Commissioner to confirm its terms. The Commissioner further submitted that the appellant did not submit all the documents that were required to contrast the VAT, PAYE and corporation tax assessments.
20. The appellant contends that it submitted all the documents necessary to discharge its burden of proof. However, a careful review of the email correspondence at pages 64, 65, and 66 of the respondent's statement of facts, which were presented before the Tribunal, reveals that the disputed documents were never actually transmitted to the Commissioner, at least not within the available email trail.
21. The Tribunal therefore correctly found that the appellant was unable to demonstrate that the documents in question had been availed to the Commissioner at the objection stage. Based on the evidentiary record before the Tribunal, I am satisfied that the appellant failed to discharge the burden of proof placed upon it under Section 30 of the TATA. In the absence of the necessary documentation, the Commissioner was left with no alternative but to assess the taxes due based on the information available, a course of action that the Tribunal rightly endorsed.
22. What, then, was the appropriate course for the Tribunal in these circumstances? Section 29(2)(c) of the TATA empowers the Tribunal to remit a matter back to the Commissioner for reconsideration. This discretionary power may be exercised in appropriate cases, particularly where the taxpayer demonstrates good faith and provides a cogent explanation for any evidentiary omissions. However, this was not such a case.
23. The appellant failed to offer a satisfactory explanation for its failure to submit the relevant documents at the objection stage and instead persisted in its position without concession. In the absence of any sign of good faith or reasonable justification, the Tribunal cannot be faulted for declining to remit the matter for reassessment.
24. The case of Commissioner of Investigation and Enforcement V Doshi Enterprises Limited (*supra*) is particularly instructive. In that decision, the Court held:

"... These are documents which are said not to have been produced by the respondent during the objection stage. This court holds that in view of the legal position that the taxpayer has the burden of proving that the assessment is wrong, it is the duty of the taxpayer to provide to the Commissioner all the relevant documents in respect of the transactions in question. This should be done at the objection stage in the first instance. Producing the documents during the hearing before the tribunal attest to the fact that the respondent considered



them to be relevant to the objection but doing so in my view amounted to transferring the mandate of assessment of tax which belongs to the Commissioner to the tribunal.

The mandate of the tribunal is to analyse evidence, documents, information and material produced to the Commissioner and the law and assess the correctness of the assessment. This is not to say that the tribunal has no powers to receive evidence but it must be noted that core evidence and materials must first be produced before the Commissioner during the objection process. In that case, the appellant should have been provided with the documents before the appeal was initiated or heard. Section 51(4) does not relieve the taxpayer of the responsibility of providing all the relevant documents and information, otherwise the objection would be deemed invalid.”

25. In that case, the Court emphasized that the burden of proof in tax disputes lies squarely with the taxpayer, who must present all relevant documentation to the Commissioner during the objection stage. The Court cautioned that introducing documents for the first time before the Tribunal, though indicative of their relevance, amounts to shifting the statutory function of tax assessment from the Commissioner to the Tribunal.
26. This holding is directly relevant to the case at hand. As established by the record and confirmed by the Tribunal, the appellant failed to submit critical documents during the objection stage, only seeking to rely on them at the appellate stage. In line with *Doshi Enterprises*, the Tribunal was correct in declining to admit and rely on such evidence, and in upholding the Commissioner’s assessment based on the documentation that was actually before him at the time of making the objection decision and holding that the appellant had not succeeded in discharging the burden of proof to the required standard.

Disposition

27. Accordingly, this appeal is devoid of merit and is hereby dismissed. The decision of the Tax Appeals Tribunal upholding the Commissioner’s objection decision dated 20th March 2023 is affirmed. Each party shall bear its own costs of the appeal. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2025

F. MUGAMBI

JUDGE

