



**Frontier Enterprises Limited v Commissioner of Legal Services
and Board Coordination (Income Tax Appeal E187 of 2024)
[2025] KEHC 11284 (KLR) (Commercial and Tax) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E187 OF 2024
JK NG'ARNG'AR, J
JULY 30, 2025**

BETWEEN

FRONTIER ENTERPRISES LIMITED APPELLANT

AND

**COMMISSIONER OF LEGAL SERVICES AND BOARD
COORDINATION RESPONDENT**

*(Being an appeal from the judgement of the Tax Appeals
Tribunal No. E385 of 2023 delivered at Nairobi on 28 June 2024)*

JUDGMENT

1. The appellant herein Frontier Enterprises Limited being aggrieved by the decision of the Tax Appeals Tribunal dated 28 June 2024, preferred an appeal to this court vide a memorandum of appeal dated 20 August 2024 raising the following grounds;
 - i. That contrary to facts and applicable law, the Honourable Tribunal erroneously found that Zumandu Limited qualifies as a tax representative of the Appellant.
 - ii. That the Honourable Tribunal erred in finding that the place of effective management of the Appellant was in Kenya and nothing was provided by the Appellant to prove this fact, yet, the Appellant provided registration and other documents proving that none of the directors/management were present or working in Kenya during the period under assessment.
 - iii. That the Honourable Tribunal arrived at an erroneous conclusion that the Appellant is tax resident contrary to jurisprudence from the same Tribunal on the similar matters affecting taxpayers.



- iv. That the Honourable Tribunal erred in law and fact by upholding assessment by the Commissioner based on erroneous figures and consolidating group entity figures.
 - v. That the Honourable Tribunal erred in law and fact by upholding assessment on bad debts which was explained and reasonably supported.
 - vi. That the Honourable Tribunal erred in law and fact by upholding withholding tax assessment.
 - vii. That the Honourable Tribunal erred in law and fact by upholding PAYE tax assessment even where none of the employees were present in Kenya during the period under assessment.
 - viii. That the Honourable Tribunal erred in law and facts and therefore arrived at the wrong decision.
2. The appellant sought for the following Orders;
 - a. The Appeal be allowed with costs to the Appellant.
 - b. Any other costs that the Honourable Court deems fit.
 3. In response to the grounds of appeal, the Respondent prays that this court affirms the judgment delivered by the Tribunal on 28 June 2024 and dismiss the appeal with costs to the Respondent.
 4. This appeal was canvassed by way of written submission. The respondent filed its written submissions dated 17 June 2025. There are no submissions on record for the appellant.

Respondent's submissions

5. The respondent citing Section 3 of the *Tax Procedures Act* submitted that the argument by the appellant that Zumandu is not eligible to be appointed does not hold water. On the basis of the definition of a person under Section 3 as read with Section 15 (1)(b) and (j) on appointment of tax representative, the Respondent reiterates that the actions of the Respondent in deeming Zumandu Limited as the tax agents of the appellant is within the ambits of the law as these provisions empower the Respondent to do so.
6. On the second issue, whether the appellant was tax resident in Kenya, the Respondent cited Section 2 of the *Income Tax Act* and submitted that the definition of resident is multifaceted and a company can be incorporated outside Kenya but can have its management and control within Kenya. A company can be resident in Kenya if management and control of its affairs was exercised in Kenya without it having being incorporated under the Laws of Kenya.
7. The respondent submitted that the residency test is factual and the relevant circumstances relevant to identifying the location of a company's management and control include, but not limited to where the company's meetings, including its directors' meetings are held and where the key decisions of the company are made, the residency of the company's directors and the residency of the company's shareholders. The respondent established that the appellant is incorporated in Mauritius and the respondent noted the following on the management and control of the appellant.
8. According to the records obtained, the Respondent showed that Mr. Udayesing Bheergoonath, Mr. Ashvin Duljeet, Mr. Victor William Chandler, Mr. Michael Gary Carlton and Mr. Jason Neil Gibson are the directors of the appellant and only two are residents in Mauritius. The employment contract of Mr. Jason Neil Gibson and Mr. Dean Delaney show that their place of work is Nairobi.
9. It was contended by the Respondent that the management and control of the affairs of appellant was exercised in Kenya through the active role of the directors, hence the appellant qualifies as a tax



resident in Kenya and is liable to pay taxes under the provision of *Income Tax Act*. The appellant had gains and profits from business hence taxable under Section 3(2)(a)(i) of the *Income Tax Act*. The tax liability of business gains was Kshs. 127,592,864. The appellant as tax resident in Kenya failed to withhold income taxes on payments made in the nature of management, professional or technical fees which attract withholding tax in line with Section 35 of the *Income Tax Act* giving rise to tax liability of Kshs. 24,814,261 inclusive of penalties and interest. The respondent cited the case of De Beers Consolidated Mines Ltd vs Howe 5TC 198 (De Beers Case), Malayan Shipping Company Ltd vs Federal Commissioner of Taxation (1946) 3 AITR 258 and The Bywater Investments Ltd & ors vs Commissioner of Taxation: Hua wang Bank Berhad vs Commissioner of Taxation (2016) HCA 45 (By water).

10. On the of tax assessments, the Respondent submitted that services were rendered and, on its tax, assessment gave a detailed breakdown of all the taxes. On withholding tax on deemed interest expense, Section 16 (1) (a) (i) of the *Tax procedures Act* interest shall apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company where the person is controlled by a non-resident person alone or together with not more than four other persons and where the company is not a bank or a financial institution licensed under the *Banking Act*. The appellant received interest free loans from its non-resident and charge withholding tax on demand interest in accordance with Section 35(1) (e) of the *Income Tax Act*. The tax liability was Kshs. 20,671,994.00 inclusive of penalties and interest.
11. On PAYE, the respondent submitted that from the reconciliation of employee emoluments as declared in the financial accounts of the appellant vis a vis the amounts declared by Zumandu Limited show that there were benefits paid by the appellant or its affiliates employees. The bank statements of the appellant in Mauritius show monthly salary payment to various employees who reside in Kenya. The appellant did not file any PAYE returns in Kenya for the period and therefore did not declare any payroll expense. The Respondent further submitted that where PAYE has been accounted for in a different jurisdiction the company should still declare and claim credit in line with Section 42 of the *Income Tax Act*.
12. In regards to disallowed costs, the respondent submitted that the appellant claimed costs in relation to operating expenses but did not provide any documentations to support the costs in line with Section 15 of the *Income Tax Act*. The appellant failed to provide financial accounts, trial balances, ledgers and source documents to support the expense claimed.
13. On bad debt expenses disallowed, it was contended by the Respondent that the appellant has not proven or met the conditions set out in *Legal Notice 37 of 2011* to the satisfaction of the Respondent to warrant allowance of bad debts.
14. On penalty and interest, the respondent submitted that the penalty and interests were charged accordingly under the law and the appellant has not demonstrated how the same was irregular or contra statute.

Analysis and Determination

15. I have considered the appeal, the written submissions on record together with the cited authorities. I have also had the opportunity to peruse the proceedings of the Tax Appeals Tribunal and the judgment. I find the following issues arising for determination;
 - i. Whether the appointment of Zumandu Limited as a Tax representative was lawful?
 - ii. Whether the appellant was a tax resident in Kenya for the year of income in dispute?



- iii. Whether the Tribunal erred in upholding the assessment?
16. On the issue of appointment of a tax representative, this Court is guided by the provisions of Section 3 of the *Tax Procedures Act* which provides as follows;
 3. Tax representative in relation to a taxpayer means a person who is the tax representative of the tax payer under Section 15.
 17. Further, Section 15 provides that;
 15.
 - (1) A person is the tax representative of another person for the purposes of this Act or a tax law, in the case of—
 - a.
 - b. A company within paragraph (a) of the definition in section 3, if that person is the chief executive officer, managing director, company secretary, treasurer, trustee or a resident director or similar officer of the company acting or purporting to act in such a position;
 - c.
 - d.
 - e.
 - f.
 - g. A company within paragraph (b) of the definition in section 3, a foreign government, political subdivision of a foreign government, or international organization, if that person is responsible for accounting for the receipt or payment of moneys or funds in Kenya on behalf of the company, foreign government, political subdivision of the foreign government, or international organization;
 - h.
 - i.
 - j. Any person (including a person referred to in paragraphs (a) to (j), if that person is the agent or representative of the person as provided for under a tax law or specified by the Commissioner, by notice in writing to the agent or representative.
 18. Therefore, from the wording of the aforementioned Section, the Act empowers the Commissioner to appoint a tax representative where the taxpayer is not fulfilling tax obligations adequately or where necessary for enforcement.
 19. The appellant did not file any submissions or evidence to challenge the authority of the Commissioner to appoint Zumandu Limited. This Court agrees with the reasoning by the Tribunal which made a finding that the appointment was lawful and within the Commissioner’s powers under Section 15 of the *Tax Procedures Act*.



20. The aforementioned Act authorizes the Commissioner to appoint a tax representative to safeguard tax collection and in the absence of any evidence to the contrary by the appellant, it reinforces the correctness of the appointment.
21. As to whether the appellant was a tax resident in Kenya for the year of income in dispute, the appellant faults the finding by the Tribunal that it is a tax resident in Kenya.
22. Section 1 of the *Income Tax Act* defines a ‘resident’ as follows:
- “resident”, when applied in relation—
- b. to a body of persons, means –
- i. that the body is a company incorporated under a law of Kenya; or
- ii. that the management and control of the affairs of the body was exercised in Kenya in a particular year of income under consideration; ...”
23. The definition encompasses place of incorporation and place where management and control of the affairs of the entity are exercised.
24. The provisions of Article 4, paragraph 3 of the Articles of the Model Convention with respect to Taxes on Income and on Capital (as they read on 21 November 2017) defines a resident as follows:
- “Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors.”
25. The appellant urged that none of its directors or management were present or working in Kenya during the period under assessment. It provided evidence to show that it was incorporated and managed outside Kenya. On this issue, the respondent submitted that Section 2 of the *Income Tax Act* contends that tax residency depends not only on incorporation but also on management and control. For instance, a company incorporated outside Kenya may still be resident if its management and control are exercised in Kenya. The respondent argued that there is evidence that some directors including Mr. Jason Neil Gibson and Mr. Dean Delaney had their place of work in Nairobi. The employment contracts and bank records indicate management activities were carried out in Kenya. This supports the position that the appellant’s effective management and control was exercised in Kenya.
26. In my humble view, the appellant did not provide sufficient evidence to rebut the respondent’s position. The incorporation in Mauritius does not exempt it from Kenya tax residency if management and control is in Kenya.
27. In the case of *De Beers Consolidated Mines Ltd vs Howe* (1906) AC, 455, the court held that;
- “a company resides...where its real business is carried on and the real business is carried on where the central management and control actually abides.”



28. It is thus clear from the definition of a resident for tax purposes under the Act and the cited authority that the appellant was a tax resident. This Court finds no fault with the finding by the Tribunal in making a finding that the appellant is a tax resident in Kenya.
29. On the issue of whether the Tribunal erred in upholding the assessment, the appellant asserts that the assessment were based on erroneous figures. The respondent on the other hand provided a detailed breakdown of assessments, including gains of Kshs. 127,592,864 and withholding tax liabilities. The assessments by the respondent were supported by bank statements, employee records and contracts. The appellant failed to adduce evidence of financial accounts, ledgers in support of its claimed expenses and costs.
30. According to Section 30 of the *Tax Appeals Tribunal Act*, the appellant bears the burden of proof that the assessment is excessive or the tax decision should not have been made. The Section states that;
- “In a proceeding before the Tribunal, the appellant has the burden of proving—
- a. where an appeal relates 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.”
31. Additionally, Section 56(1) of the *Tax Procedures Act* places similar burden on the taxpayer. It provides thus;
- “In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”
32. In the case of *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* [2022] KEHC 5 (KLR) Mativo J, observed that;
- “Placing the burden of proof in tax cases on the tax payer reflects the unique nature of the tax system. This is evident from the three-fold justifications for placing the burden on the tax payer. These are:- (a) the presumption of correctness; (b) the government’s need for revenue’ and, (c) the taxpayer’s possession of evidence.
- 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.”
33. It is trite law that the burden of proof rests on the appellant to demonstrate errors in the assessments. In my view the assessments were validly issued and based on proper application of the law and the facts.
34. In regards to PAYE and withholding Tax assessments, the appellant challenges these assessments give that some employees were not present in Kenya. In response, the respondent submitted that the appellant failed to withhold tax on management, professional or technical fees paid contrary to Section



- 35 of the *Income Tax Act*. The withholding tax assessment was assessed at Kshs. 24,814,261 inclusive of penalties.
35. On PAYE, the respondent proved that salaries were paid to employees residing in Kenya but no PAYE returns were filed. The law obligates the appellant to declare such payments or claim foreign tax credits. I thus find that the withholding tax and PAYE are due where payments are made to residents or where duties are performed in Kenya, irrespective of the employee's physical location during the period under assessment. Therefore, the finding by the Tribunal on withholding tax and PAYE assessments is upheld.
36. On disallowed costs and bad debts, the appellant alleged operating expenses and bad debts, which were disallowed by the Commissioner a decision subsequently upheld by the Tribunal. The respondent submitted that the appellant did not provide any documentation such as trial balances, ledgers, or any supporting documents to substantiate disallowed costs.
37. It is important to note that certain conditions require to be proved for allowance on disallowed costs and debts. These conditions are provided under the *Legal Notice No. 37 of 2011* which provides for guidelines on allowability of debts. It provides;
1. A debt shall be considered to have become bad if it is proved to the satisfaction of the Commissioner to have become uncollectable after all reasonable steps have been taken to collect it.
 2. A debt shall be deemed to have become uncollectable under paragraph (1) where-
 - a. the creditor loses the contractual right that comprises the debt through a court order;
 - b. no form of security or collateral is realisable whether partially or in full;
 - c. the securities or collateral have been realized but the proceeds fail to cover the entire debt;
 - d. the debtor is adjudged insolvent or bankrupt by a court of law;
 - e. the costs of recovering the debt exceeds the debt itself; or (1) efforts to collect the debt are abandoned for another reasonable cause.
 3. A bad debt shall be a deductible expense only if it is wholly and exclusively incurred in the normal course of business.
 4. For the purposes of these guidelines, a bad debt which is of a capital nature shall not be an allowable expense
38. In the circumstances of this appeal the appellant has not provided any evidence warranting the Commissioner to declare bad debts. In short the appellant has fallen short of the conditions set out above.
39. This court cannot fault the Tribunal's finding as the appellant did not discharge the evidential burden to warrant allowance of the expenses.
40. In end, this Court concludes that, the Honourable Tribunal correctly evaluated the evidence and applied the law appropriately. The appellant failed to discharge its burden of proof as required under the tax laws.
41. For the aforesaid reasons, the appeal lacks merits and it is hereby dismissed. I however, make no orders as to costs.



It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY, 2025. IN THE PRESENCE OF:-

N/A for the Appellant

Naeku for the Respondent

CA: Peter/Siele

JULIUS K. NG'ARNG'AR

JUDGE

