



**Laikipia Comfort Hotel Ltd v Commissioner of Domestic Taxes (Income Tax Appeal E094 of 2022) [2024] KEHC 3453 (KLR) (Commercial and Tax) (26 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3453 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E094 OF 2022**

**A MABEYA, J**

**MARCH 26, 2024**

**BETWEEN**

**LAIKIPIA COMFORT HOTEL LTD ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

**JUDGMENT**

1. The respondent conducted an audit of the affairs of the appellant for the years 2015 and 2016 and raised an assessment of additional taxes. This amounted to Kshs. 37,729,192/- made of VAT Kshs. 17,129,646/-, PAYE of Kshs. 382,136/36 and Corporation Tax of Kshs. 20,217,410.30. The appellant objected to the additional assessment via a notice of objection dated 7/8/2018.
2. On 17/9/2018, the respondent issued his objection decision confirming the assessment. Dissatisfied with the respondent's decision, the appellant lodged an appeal at the Tax Appeals Tribunal (hereinafter "the Tribunal") which rendered its judgment on 30/10/2020 dismissing the appeal.
3. Aggrieved by the said decision, the appellant lodged this appeal vide a Memorandum of Appeal dated 2/12/2022. The grounds of appeal can be collapsed into two as follows: -
  - a. The Tribunal erred in dismissing the appellant's appeal and confirming the respondent's objection decision dated 17/9/2018.
  - b. The respondent did not file its statement of facts.
4. The parties canvassed the appeal by way of written submissions which I have duly considered. The appellant submitted that the respondent had failed to adhere to section 59 of the *Tax Procedures Act* by not requesting additional information before making the additional assessment. That the appellant was



not given an opportunity to counter the respondent's assessment bearing in mind that it had produced satisfactory evidence. That the respondent was not justified in raising the assessment.

5. On the part of the respondent, it was submitted that upon investigation of the appellant's affairs, it was noted that there were variances between the sales declared as per the returns and the sales obtained from the daily summaries. With respect to VAT, the respondent submitted that the assessment was arrived at as a result of an under declaration of sales which meant less payment of VAT.
6. That for any service of goods to be zero rated, the same had to be exempt from a VAT charge. That the appellant made zero rated acquisitions but failed to provide sufficient documentation.
7. I have considered the record of appeal and the written submissions by both parties. The main issue for determination is whether the Tribunal erred in dismissing the appeal lodged by the appellant.
8. The appellant's appeal was predicated on the grounds that the Tribunal had erred in dismissing the appeal for reasons that it did not consider that the zero-rated adjustments had not been verified by the respondent and that there was no consideration of the daily sales summaries for the audit years.
9. From the record, the disputed tax is with respect to the assessment made on VAT, PAYE and Corporation Tax. The decision of the Tribunal was based on the ground that the information supplied by the appellant was not substantiated by evidence.
10. The burden of proof in taxation lies with the tax payer. This is supported by section 56 of the [Tax Procedures Act](#) and section 30 of the [Tax Appeals Tribunal Act](#) which provide as follows: -

“56. In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is wrong”.

And: -

“30. In a proceeding before the Tribunal, the appellant has the burden of proving where an appeal relates to an assessment, that the assessment is excessive.”

11. On the issue of VAT, the respondent's position was that the VAT Act, 2013 did not exempt hotel services from the charge of VAT. Further, that the appellant did not provide sufficient documentation to prove that it had made zero rated acquisitions.
12. Section 29 of the [Tax Procedures Act](#) permits the Commissioner to make an assessment where a tax payer fails to submit a return for the reporting period. The same provides that: -
  - (1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgment, make an assessment (referred to as a "default assessment") of—
    - (a) the amount of the deficit in the case of a deficit carried forward under the [Income Tax Act](#) (Cap. 470) for the period;
    - (b) the amount of the excess in the case of an excess of input tax carried forward under the [Value Added Tax Act](#), 2013 (No. 35 of 2013), for the period; or
    - (c) the tax (including a nil amount) payable by the taxpayer for the period in any other case.
  - (2) The Commissioner shall notify in writing a taxpayer assessed under subsection (1) of the assessment and the Commissioner shall specify—



- (a) the amount assessed as tax or the amount of a deficit or excess of input tax carried forward, as the case may be;
  - (b) the amount assessed as late submission penalty and any late payment penalty payable in respect of the tax, deficit or excess input tax assessed;
  - (c) the amount of any late payment interest payable in respect of the tax assessed;
  - (d) the reporting period to which the assessment relates;
  - (e) the due date for payment of the tax, penalty, and interest being a date that is not less than 30 days from the date of service of the notice; and
  - (f) the manner of objecting to the assessment.
- (3) A written notification by the Commissioner of an assessment under this section shall not alter the due date (referred to as the "original due date") for payment of the tax payable under the assessment as determined under the tax law imposing the tax, and any late payment penalty or late payment interest shall remain payable based on the original due date.
- .....”

13. In the present case, once the additional assessment was made by the respondent, it became incumbent upon the appellant to provide the requisite documentation to prove that the assessment was wrong. All that the appellant did was to fault the respondent of making the assessments without providing any proof of any wrong doing on the part of the respondent.

14. Section 54A (1) of the *Income Tax Act* mandates a taxpayer to keep the records of its business dealings. It provides: -

“(1) A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax.”

15. The appellant was the custodian of the records. It failed to adduce evidence before the Tribunal to demonstrate that the VAT, PAYE and Corporation Tax assessed was wrong. By failing to provide the required information and/or documentation, the appellant failed to discharge its burden of proof and cannot therefore fault the Tribunal. It cannot therefore be said that the additional assessment was punitive or excessive as alleged by the appellant.

16. In view of the foregoing, I find no merit in the appeal and the same is dismissed with costs.

It is so decreed.

**DATED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF MARCH, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

