



**Commissioner of Domestic Taxes v Shop & Deliver Limited (Income Tax Appeal E178 of 2023) [2024] KEHC 4052 (KLR) (Commercial and Tax) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4052 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E178 OF 2023**

**A. ONG'INJO, J**

**APRIL 25, 2024**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**SHOP & DELIVER LIMITED ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 8th September 2023 in Tax Appeal No. 129 of 2022)*

**JUDGMENT**

1. Vide judgment delivered on 8<sup>th</sup> September 2023, the Tax Appeals Tribunal allowed the Respondent's appeal and set aside the Appellant's objection decision dated 24<sup>th</sup> December 2021. The Tribunal determined that winnings as stipulated in *Income Tax Act* refers to payouts by the licensee but does not include amounts staked by the bettor. The Tribunal relied on the Judgment of Majanja, J. delivered on 13<sup>th</sup> March 2022 in Commissioner of Domestic Taxes v Pevans East Africa Limited & 6 others [2022] KEHC 10392 (KLR) where it was held: -

“This buttresses the point that had Parliament intended to define “winnings” to include both the wager and the profit, nothing would have been easier than for it so state just like they did in the Tax Laws (Amendment) Act, 2018 and the *Excise Duty Act*, 2015.

It is clear that strictest interpretation that favours the taxpayer, in this case the Respondents in respect of the definition of “winnings” in that it is the payment made to the punter less the amount staked. It is this amount that is subject to tax and what the respondents are obligated to deduct and remit to the commissioner. I am therefore in agreement with the Tribunal's conclusion on its definition of “winnings”.



2. The Tribunal concluded that authoritative definition of the term taxable winnings under the under the [Income Tax Act](#) only relates to payments made to the Punter less the amounts staked. It concluded that the Appellant erred when it defined and applied the term winnings to include the amounts staked in assessing the Respondent's withholding tax liability in amounts including the Punter's stake.
3. The Appellant was aggrieved by the decision of the Tribunal and they lodged the appeal herein vide the Memorandum of Appeal dated 3<sup>rd</sup> November 2023 on the following grounds: -
  1. That the Honourable Tribunal erred in fact and in law in failing to give the definition of the term 'winnings' under the [Income Tax Act](#) Cap 470 of the Laws of Kenya as strict interpretation as is required for tax statutes.
  2. That the Honourable Tribunal erred in law in holding that the definition of 'winning' under the [Income Tax Act](#) Cap 470 of the Laws of Kenya only relates to the payments made to the punter less the mount staked.
  3. That the Honourable Tribunal erred in law and fact in failing to find and hold that the appeal before the Tribunal is untenable and the same should be dismissed because the Respondent had violated Section 51(3)(b) of the [Tax Procedures Act](#) by failing to pay tax not in dispute before filing appeal at the Tax Appeals Tribunal.
  4. That the Honourable Tribunal erred in fact and in law in failing to consider the evidence and submissions tendered by the Appellant.
  5. That the Honourable Tribunal misapplied the law and facts and by ignoring all material facts placed before it and placed its judgment on a biased approach without due regard to the balance of the scales of justice.
4. The Appellant prayed for orders: -
  - a. That the objection decision dated 24<sup>th</sup> December 2021 be upheld
  - b. That the Respondent be ordered to pay Kshs. 3,152,420,469 withholding taxes on winnings owed to the Appellant
  - c. That costs of the Appeal be awarded to the Appellant.
5. The brief background of the matter herein is that the Respondent is licensed as a bookmaker and public gaming operator in Kenya under the Betting, Gaming and Lotteries Act (Chapter 131 of the Laws of Kenya) and offers various betting and gaming products, including sports betting, jackpot games and casino games.
6. The Appellant, the Commissioner, is an officer and agent of the Kenya Revenue Authority that is responsible for collection and administration of revenue taxes on behalf of the Government of Kenya, conducted an audit of the Respondent's tax affairs for the period 2017 - 2020 in relation to various tax heads including withholding tax (WHT).
7. Following the audit, the Commissioner raised additional assessments through its letter of 21.10.2021 where it demanded inter alia Kshs. 3,152,420,469.00 in respect of WHT on winnings paid to punters by the Respondent. The Commissioner's position was that the Respondent ought to have paid WHT on the gross amount paid out to punters and not on the difference between the staked amount and the gross payout.



8. The Respondent challenged and objected to this assessment through its letter of 22.11.2021. It disputed the method of computing the WHT as propounded by the Commissioner and stated that the same had already been challenged in the Tax Appeals Tribunal (the Tribunal) in Tax Appeal No. 304 of 2019 consolidated with Tax Appeal Nos. 141, 175, 198, 200, 265, 302 & 305 of 2019 and a judgment delivered on 06.11.2019 where the Tribunal found that the term ‘winnings’ as stipulated in the *Income Tax Act* (Chapter 470 of the Laws of Kenya) (the ITA) refers to payouts less the amount staked by the bettor. The Respondent thus urged the Commissioner to vacate the assessment based on this decision of the Tribunal.
9. After considering the Respondent’s objection, the Commissioner rendered its objection decision on 24.12.2021 (the Objection Decision). The Commissioner, while acknowledging the decision of the Tribunal, however stated that the same was pending an appeal before this court and as such, the assessment as issued earlier remains.
10. The appeal has been canvassed by way of written submissions dated 13<sup>th</sup> March 2024 and 20<sup>th</sup> March 2024 for the Appellant and the Respondent respectively.

### **Analysis and Determination**

11. Section 56(2) of the *Tax Procedures Act*, 2015 provides that: -  
An appeal to the High Court or to the Court of Appeal shall be on questions of law only.
12. The Court of Appeal in *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR summarised what amounts to ‘matters of law’ as follows: -  

“(38) [T]he interpretation or construction of *the Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, 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. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.”
13. Similarly, the appellate court in *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* [2013] eKLR, NYR CA Civil Appeal Mo. 48 of 2013, stated that when a court that is limited to dealing with matters of law has a concern regarding the issues that dealt on facts, then the court will also be limited to re-evaluation of the lower court’s conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law.
14. The issue that lies for determination is whether the interpretation of winnings under the ITA includes the amount staked by the bettor.
15. Section 2 (1) of the *Income Tax Act* defines winnings as follows: -  

“winnings” includes winnings of any kind and a reference to the amount or the payment of winnings shall be construed accordingly;



16. In *Commissioner of Domestic Taxes v Pevans East Africa Limited & 6 others* (Tax Appeal E003 of 2019) [2022] KEHC 10392 (KLR) (Commercial and Tax) (13 May 2022) (Judgment) Majanja, J. stated: -

“...According to The Concise Oxford English Dictionary (12th Ed.), “winnings” is defined as, “money won especially by gambling.” Thus the ordinary meaning does not tell us whether the winning include the stake. In order to reach the conclusion that the “winnings” includes the stake, the Tribunal and this court would have to imply something in the ordinary language that does not exist.

On the legal aspects of the matter, I hold that when the definition of winnings was first amended on July 18, 2018, it was clear and specific that “winnings” meant the amount gained by the punter over and above the amount staked. However, the September 21, 2018 amendment limited and generalized this definition leaving it open to interpretation by the Commissioner or taxpayer as to the amount payable. I have no doubt that the current definition of “winnings” under section 2 of the ITA is ambiguous. By stating that, “winnings of any kind and a reference to the amount or the payment of winnings shall be construed accordingly”. The “amount or payment of winnings” does not state or clarify whether that amount includes the stake. Further by stating that the reference shall be construed accordingly does not make any sense as it is not clear what the point of reference is. I am therefore in agreement with the Respondents that it does not state or set out what constitutes winnings and how to compute the “winnings”.

In the case of such ambiguity, then interpretation and resolution must be in the taxpayer’s favour. This position was fortified by the Court of Appeal in *Commissioner of Domestic Taxes (Large Taxpayers Officers) v Barclays Bank of Kenya Ltd* NRB CA Civil Appeal No. 195 of 2017 [2020] eKLR when it held that:

There is no doubt in our minds that the decisions in *Adamson v Attorney General* [1933] AC 247, *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1920] 1 KB 64, *T. M. Bell v. Commissioner of Income Tax* [1960] EA 224, *Republic v. Commissioner of Income Tax ex parte SDV Transami* [2005] eKLR and the first judgment represent a correct statement of the law, namely strict construction of tax legislation, so that the tax demand must fall within the terms of the statute without ambiguity. If there’s any ambiguity in the legislation, it is not to be rectified by considerations of intendment, but by amending the legislation. However, determination of whether there is clarity or ambiguity in the legislation or whether a tax demand is precise and within the terms of the legislation, is not an abstract or pedantic exercise. It must be based on the evidence and the circumstances of each case. We agree with the majority of this Court in *Stanbic Bank Ltd v. Kenya Revenue Authority* [2009] eKLR that meaning of words should not be strained so as to find ambiguity.

The fact of ambiguity is not idle as other tax statutes have sought to resolve it. The *Excise Duty Act, 2015* imposes excise tax on betting services and when they were brought to charge through the Finance Act, 2019, the amendment therein was very explicit that “Excise duty on betting shall be twenty percent of the amount wagered or staked.” This buttresses the point that had Parliament intended to define “winnings” to include both the wager and the profit, nothing would have been easier than for it to state just like they did in the Tax Laws (Amendment) Act, 2018 and the *Excise Duty Act, 2015*.

It is clear that strictest interpretation that favours the taxpayer, in this case the Respondents in respect of the definition of “winnings” in that it is the payment made to the punter less the amount staked. It is this amount that is subject to tax and what the respondents are obligated to deduct and remit



to the commissioner. I am therefore in agreement with the Tribunal’s conclusion on its definition of “winnings” ...”

17. The position of the Appellant is that the Respondent calculated withholding tax on winnings based on the difference between the gross payouts and stakes placed by the punter instead of gross payouts to the punter. It is not explained by the Appellant how winnings of any kind and reference to amount of payments to the winnings if construed accordingly would include gross payout to the punter. Interpreting Section 2 of the Income Tax to include stakes would mean that the court is reading into the statute what was not intended or provided for by the statute.
18. The Appellant’s interpretation that Section 2 does not exclude stake is therefore wrong as it is prejudicial to read into statutes what is not expressly provided for. I am bound by the Court of Appeal decision in Commissioner of Domestic Taxes (Large Taxpayers Officers) v Barclays Bank of Kenya Ltd, NRB CA Civil Appeal No. 195 of 2017 [2020] eKLR and persuaded by the decision in Commissioner of Domestic Taxes v Pevans East Africa Limited & 6 others (Tax Appeal E003 of 2019) [2022] KEHC 10392 (KLR) (Commercial and Tax) (13 May 2022) (Judgment) that where there is an ambiguity in a statute, interpretation should not be prejudicial to the tax payer. In any case, the ordinary or plain meaning of winnings does not indicate that the same should include the stake placed by the punter. It would not serve any purpose to place stake only for it to be taxed.
19. In Commissioner of Domestic Taxes v Bank of Africa Kenya Limited (Tax Appeal E004 of 2023) [2023] KEHC 18719 (KLR) (Commercial and Tax) (12 June 2023) (Judgment) Majanja, J. stated as follows:

“I would be remiss not to comment on a statement made by the Commissioner in the Objection Decision that since it has appealed against certain decisions to this court to the Court of Appeal hence none of the said decisions can be executed or applied against it. This position is without precedent and suggests that the Commissioner is entitled to ignore binding decisions of the High Court merely on the grounds that it has expressed its intention to appeal or that the its appeal on similar issues has not been determined. I reject this contention. A decision of the High Court on a point of law is binding on the parties and remain valid, is to be complied with until it is set aside by the higher court.”

20. Ms. Gitau Advocate for the Appellant argued that the issue as to the definition of winning has not been settled and therefore the judgment in Commissioner of Domestic Taxes v Bank of Africa Kenya Limited (Tax Appeal E004 of 2023) [2023] KEHC 18719 (KLR) is not binding and that this court should relook into the case and issue an independent judgment. She said that the Appellant had filed a Notice of Appeal and it is yet to be heard. The above decision was made by court of competent jurisdiction and may not be binding but persuasive and I find that I have no reason to deviate from the sound reasoned decision of my brother judge where this court has not been satisfied that there can be no other definition assigned to the word winnings apart from that in the Concise Oxford English Dictionary (12th Ed.).
21. In conclusion, this court finds that the appeal herein lacks merit and the same is dismissed. The decision of the Tribunal dated 8<sup>th</sup> September 2023 is upheld. Costs of the appeal to be borne by the Appellant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS  
25<sup>TH</sup> DAY OF APRIL 2024**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**



**In the presence of: -**

Esther - Court Assistant

Ms. Gitau Advocate for the Appellant

Ms. Khamala Advocate for the Respondent

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

