



Ingala Building & Construction Limited v Commissioner of Domestic Taxes (Income Tax Appeal E094 of 2023) [2024] KEHC 7675 (KLR) (Commercial and Tax) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E094 OF 2023**

PM MULWA, J

JUNE 27, 2024

BETWEEN

INGALA BUILDING & CONSTRUCTION LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal from the Judgment of the Tax Appeal Tribunal delivered on the 9/6/2023 in TAT No. 627 of 2022)

JUDGMENT

1. The appellant is a private limited company registered in Kenya and its principal business activity is the provision of construction services, mainly on civil engineering works and is domiciled in Meru County.
2. The respondent is appointed under section 13 of the [Kenya Revenue Authority Act](#) and is responsible for the administration and enforcement of various revenue laws among them the [Income Tax Act](#) and the [Value Added Tax Act](#).
3. The appellant was subjected to a returns review covering income tax and VAT declarations for the years 2017/2018, 2018/2019 and 2019/2020. The appellant was served with a returns review letter by the respondent on 10th November 2020 informing him of the inconsistencies and requesting for further documents.
4. Following several un-responded reminders, the respondent issued additional VAT assessments on 15th January 2021 and additional assessments in respect of income tax on 19th January 2021.



5. This led the appellant to lodge a notice of objection on 7th July 2021 against the aforementioned assessments. The respondent then sought for further documents on 16th July 2021 in support of the objection.
6. The respondent issued its manual objection decision on 6th August 2021 covering all the areas in dispute, amounting to; income tax Kshs.341,271.65 and VAT Kshs. 3,184,461.90.
7. The respondent issued another objection decision on iTax computing the principle tax, penalties and interest amounting to; income tax Kshs. 292,388, VAT Kshs. 4,223,279.26 and consequently issued the comprehensive objection decision on 13th May 2022.
8. The appellant, being dissatisfied with the objection decision, filed an appeal against it at the Tax Appeals Tribunal (hereinafter referred to as ‘the tribunal’).
9. The tribunal considered the appeal filed and rendered its judgement on 9th June 2023 whereby it found that the appellant had not discharged its burden of proof as required under section 56(1) of the [Tax Procedures Act](#) in order to prove that the respondent’s assessment was incorrect or excessive.
10. The tribunal dismissed the appeal and upheld the respondent’s objection decision dated 13th May 2022.
11. The appellant being dissatisfied with the whole of the judgement of the tribunal appealed to this court against it on the following grounds of appeal as set out in its memorandum of appeal dated 6th July 2023:

- “ 1. That the Tribunal erred in law by failing to recognize that the Respondent’s objection decision dated May 13, 2022, which disallowed the Appellant’s purchase invoices and input tax, constituted an erroneous tax assessment, as the Appellant had duly furnished the supporting documents to substantiate its claim.
2. That the Tribunal erred in law by upholding the Respondent’s decision to disallow the input tax attributed to the Appellant’s taxable supplies, despite the evident direct and immediate connection between such supplies and the deductible VAT on the corresponding output transaction, thus contravening Section I7 of the [Value Added Tax Act](#), 2013.
3. That the Tribunal erred in law by erroneously holding that the Appellant had failed to discharge its burden of proof as required by Section 30 of the [Tax Appeals Tribunal Act](#), despite the Appellant availing sufficient evidentiary documents which by the Tribunal’s own acknowledgment and admission stated that the supporting/evidentiary documents presented by the Appellant were sufficient to substantiate the Appellant’s claim.
4. That the Tribunal erred in law by wrongly determining that the Appellant had not adequately specified the particulars of the evidentiary documents despite the Appellant successfully discharging its burden of proof to justify the VAT claim therefore the burden of proof shifted to the Respondent but the Tribunal disregarding the legal principle that once the Appellant satisfies its burden of proof the burden shifts to the Respondent.
5. That the Tribunal erred in law by failing to acknowledge the shift of the burden of proof to the Respondent from the Appellant and by neglecting to



consider that the Respondent did not fulfil its burden of proof to contradict the sufficiency or accuracy of the documents provided by the Appellant in support of the purchases and expenses.

6. That the Tribunal erred in law by neglecting to duly consider the Appellant's substantial supporting documents including bank statements, audited books of accounts, expense documents, purchase invoices, and medical records and by subsequently upholding the Respondent's decision to disallow the Appellant's input tax.
12. Based on the foregoing grounds, the appellant prayed to have its appeal allowed and the tribunal's judgement set aside.
13. The respondent opposed the appeal by filing its statement of facts dated 11th November 2023.
14. It was the respondent's case that it requested the appellant to provide certain documents to enable it to ascertain the correctness of its tax declarations however the appellant failed, refused and or neglected to proffer any document to it, despite being given sufficient time, compelling it to issue additional assessments and its objection decision.
15. The respondent averred that the burden was on the appellant to demonstrate that it had discharged a tax liability and that the appellant has not discharged the burden of proof as stipulated in Section 56(1) of the [Tax Procedures Act](#) 2015 thus the appeal herein is unmerited and should be dismissed with costs to the respondent.

Analysis and determination

16. The court has considered the memorandum and record of appeal, the grounds of opposition and the written submissions filed by the parties.
17. The court is of the view that the grounds of appeal stated in the memorandum of appeal may be condensed to the following issue for determination, that is; whether the tribunal erred in upholding the objection decision of the respondent dated 15th May 2022.
18. The respondent issued additional assessments on 15th January 2021 with respect to the appellant's VAT and income tax liabilities. The appellant filed a notice of objection to the assessments on 7th June 2021 whereby it listed its grounds of objection to the additional assessments but did not attach documents in support of the objection. The additional assessments and notice of objection are annexed on pages 24-28 of the respondent's supplementary record of appeal.
19. This led the respondent to write an email dated 16th June 2021 to the appellant requesting it to avail the necessary documentation to support its objection notice as required under Section 51 of the [Tax Procedures Act](#). The email is found on page 42 of the respondent's supplementary record of appeal.
20. Having considered the notice of objection, the respondent issued its objection decision on 13th May 2022 whereby it was stated:

“Kindly note that the Commissioner has partially accepted/rejected your income tax and VAT objection application for the aforementioned periods based on the availed records to support the application.

Income tax and VAT principle taxes amounting to Kshs. 292,388.00 and Kshs. 4,223,279.26 respectively for the additional assessment periods remain outstanding in your account.”



21. The record indicates that the appellant provided the documents requested by the respondent in the email dated 16th June 2021. However, the respondent submitted that the documents were not adequate to entirely support the figures stated in the audited books of accounts.
22. On the other hand, the appellant submitted that it provided sufficient documentation therefore it had discharged its burden of proof.
23. The burden of proof is upon a taxpayer to prove that a tax decision is erroneous, this is provided for under Section 56 of the [Tax Procedures Act](#) which states:

“In any proceedings under this part, the burden shall be on the taxpayer to prove that the tax decision was incorrect.”
24. In the case of *Kenya Revenue Authority v Maluki Kitili Mwendwa* [2021] eKLR, Mativo J (as he then was) held:

“The pertinent issue in this appeal as I see it is the question of the taxpayer’s burden of proof in tax cases. The party with the obligation of persuasion - what Wigmore termed the risk of non-persuasion - is said to bear the burden of proof. [14] The effect of non-persuasion on a party with the burden of proof is that the particular issue at stake in the litigation will be decided against the party. Generally, the taxpayer has the burden of proof in any tax controversy. The taxpayer must demonstrate that the commissioner’s assessment is incorrect. The taxpayer has a significantly higher burden. The taxpayer must prove the assessment is incorrect. This position enjoys statutory backing courtesy of section 56 (1) of the TPA which provides that in any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect. As if to underscore the import of the above provision, the legislature deployed the word “shall” in the said section meaning that the provision is couched in peremptory terms.”
25. In this case, I agree with the tribunal’s finding that although the appellant provided the relevant records as requested, it was incumbent upon it to prove through those documents that the respondent’s assessment was incorrect.
26. Although the appellant provided documents and the respondent reviewed them before partially accepting/rejecting the appellant’s objection notice, it did not specify the particulars of the said documents and issues omitted or not considered by the respondent so as to prove that the respondent was incorrect. Further, the appellant had the opportunity to prove this before the tribunal and also in this appeal but has failed to do so.
27. I find that the appellant has failed to discharge its burden of proof as stipulated under Section 56(1) of the [Tax Procedures Act](#).
28. Consequently, I find no merit in the instant appeal which I dismiss. The tribunal’s judgement delivered on 9th June 2023 is upheld.

JUDGMENT delivered virtually, dated and signed at NAIROBI

This 27th day of **June** 2024.

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P. MULWA

JUDGE



In the presence of:

Ms. Cheronno b/b for Mr. Murimi for Appellant

Mr. Gitau b/b for Mr. Kinyua for Respondent

Court Assistant: *Carlos*

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