



**Roniam Construction Limited v Commissioner of Legal Services and Board Coordination
(Tax Appeal E019 of 2024) [2024] KETAT 1669 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KETAT 1669 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
TAX APPEAL E019 OF 2024
CA MUGA, CHAIR, BK TERER, EN NJERU, E NG'ANG'A & SS OLOLCHIKE, MEMBERS
NOVEMBER 21, 2024**

BETWEEN

RONIAM CONSTRUCTION LIMITED APPELLANT

AND

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

JUDGMENT

Background

1. The Appellant is a limited company in Kenya registered under the [Companies Act](#), whose core business is in the provision of general insurance business.
2. The Respondent is a principal officer appointed under Section 13 of the [Kenya Revenue Authority Act](#), CAP 469 of Kenya's Laws (hereinafter "the Act"). Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Respondent issued the Appellant with income tax and VAT additional assessments for the periods 2018, 2019, 2020, 2021, December 2018, November 2019, December 2020, & December 2021 through a letter dated 16th August 2023 demanding Kshs. 15,678,398.80.
4. Upon obtaining leave from the Respondent to file objection out of time, the Appellant filed notices of objection against the assessments on 27th September 2023.



5. The Respondent reviewed the objection applications and issued an Objection Decision confirming the additional assessments vide a letter dated 22nd November 2023.
6. Aggrieved by the Respondent's objection decision, the Appellant lodged this appeal via a Notice of Appeal dated 22nd December 2023.

The Appeal

7. The Appeal is predicated on the following grounds of appeal as outlined in the Memorandum of Appeal dated 5th January 2024 and filed on 8th January 2024:
 - a. That the Respondent erred in law and fact by overstating the Appellant's revenues for the periods in question based on erroneous summation of bank credits.
 - b. That the Respondent erred in law and fact by charging income tax on bank credits that were not revenue in nature but rather loans and capital injections.
 - c. That the Respondent erred in law and fact by disallowing deductible expenses claimed by the Appellant.
 - d. The Respondent erred in law and fact by disregarding the reconciliations, explanations and documentation provided by the Appellant including financial statements and tax returns, and proceeded to confirm the erroneous tax assessments.

Appellant's Case

8. In support of its appeal, the Appellant relied on its Statement of Facts dated 5th January 2024 and filed on 8th January 2024. The Appellant filed its written submissions dated 22nd July 2024 on 25th July 2024 and the same were adopted by the Tribunal during the hearing on 11th September, 2024.
9. The Appellant's case was that it was issued with additional assessments raised on i-Tax on 16th August 2023 for the periods 2018, 2019, 2020, and 2021 in respect to income tax and VAT of Kshs. 15,678,398.80 based on variances derived from the Appellant's bankings.
10. The Appellant averred that the Respondent erred in law and fact by overstating its revenues for the periods in question based on erroneous summation of bank credits. It argued that the Respondent disregarded the actual turnover realized by it in its financial statements and tax returns by arbitrary subjecting it to a bank analysis process that unfairly increased the Appellant's turnover for the periods under review.
11. The Appellant also averred that it received a request from the Respondent for provision of documents and that it availed the requested information for verification. In particular, the Appellant alleged that it availed copies of its bank statements, financial statements, sales and purchases ledgers. The Appellant stated that despite compliance in provision of requested documents, the Respondent subjected the bank credits to tax on the assumption that all bank deposits were income on the part of the Appellant.
12. According to the Appellant, having deliberately disregarded the information, explanations and documents submitted, the Respondent without any basis or justification adjusted the turnover of the Appellant upwards for the periods under review by subjecting the Appellant's bank accounts to scrutiny on Assumption that all bank credits were income.



13. The Appellant relied on the case of *Afya X-Ray Centre LTD v The Commissioner of Domestic Taxes* (Appeal No 70 of 2017) to argue that the Respondent relying solely on its bank statements was likely to cause prejudice of untold measures to all taxpayers.
14. The Appellant also asserted that the Respondent erred in law and fact by charging income tax on bank credits that were not revenue in nature but rather loans and capital injections. It also alleged that the Respondent wrongfully charged tax on the variance between the declared turnover and the recomputed turnover as indicated by its bankings.
15. The Appellant averred that the Respondent's mandate to ensure impartiality when conducting its audit should also include ensuring that there is no overzealous rush to put a taxpayer in a payable tax position for the sake of collection of higher taxes.
16. The Appellant stated that the documents provided by it demonstrated that the deposits in its bank accounts included loans, contra entries, bounced cheques and capital injections, which could not constitute taxable income within the confines of Section 3(2) of the *Income Tax Act*, CAP 470 of the Laws of Kenya (hereinafter "ITA").
17. The Appellant averred that Section 3(2) of the ITA provides for the type of income upon which tax is chargeable but the Respondent chose to contravene the same by subjecting non-taxable bank credits to tax based on assumptions.
18. The Appellant averred that the Respondent ignored its documents and failed to appreciate the fact that variances arising from the re-computation of turnover using the banking method are mainly due to reconcilable items given that the turnover declared in returns were based on revenue recognised by the Appellant. Therefore, the Appellant averred that the Respondent's assessments were unsubstantiated and speculative.
19. The Appellant stated that, the banking assessment was done in bad faith and with the foregoing explanations in mind, the Appellant requested the Tribunal to vacate the assessments in its entirety with attendant penalties and interests.
20. The Appellant further stated that the Respondent erred in law and fact by disallowing deductible expenses claimed by the Appellant. It stated that the Respondent arbitrarily disallowed some expenses which had been incurred by the Appellant in generation of the taxable income. Whereas the Respondent disallowed some of the expenses claimed by the Appellant citing lack of supporting documentation, the Appellant averred that it availed copies of the respective invoices and requisite receipts in support of the expenses claimed but the same were disregarded by Respondent.
21. The Appellant further averred that it provided evidence in support of the expenses claimed, the Appellant asserted that it submitted to the Respondent all the invoices with ETR Receipts as well as supporting documentation such as evidence of payment but the Respondent disregarded these explanations and documentation and proceeded to disregard the input VAT and confirm the assessment.
22. The Appellant averred that it had claimed valid input VAT supported by valid tax invoices in compliance with the provisions of the *Value Added Tax Act*, CAP 476 of the Laws of Kenya (hereinafter "VAT Act") and the VAT Regulations in force at the time. The Appellant stated that had the Respondent appreciated all explanations, documents and information provided by the Appellant it would not have made the impugned decision.



23. The Appellant also stated that the Respondent erred in law and fact by disregarding all the reconciliations, explanations and documentation provided by the Appellant including financial statements and tax returns, and proceeded to confirm the erroneous tax assessments.
24. The Appellant stated that the Respondent failed to rely on the Appellant's physical documents in carrying out its assessment which resulted to an erroneous tax liability. It stated that the Respondent without any basis or justification adjusted the turnover of the Appellant upwards for the period under review and thereafter erroneously assessed additional taxes on the difference between the adjusted turnover and what the Appellant had declared.
25. The Appellant averred that during the period under review, it kept proper books of accounts and reconciliations, which it relied on in filing its returns. It argued that despite providing all the information, explanations and documentation, the Respondent went ahead to disregard the information, explanations and documents and issued the impugned assessments and proceeded to erroneously confirm them in total disregard of the information provided.
26. It contended that the Respondent failed to review the underlying documentation and unfairly rushed in providing its findings. The Appellant submitted that it would have been prudent, within reasonable judgment and information available for the Respondent to take into consideration all the records and information provided by the Appellant in making its decision.
27. In its written submissions the Appellant identified two issues for determination. First, whether the Respondent erred in law and fact by raising additional assessments for the Appellant by solely relying on bank analysis and a Standard Gross Profit Margin; and second, whether the Respondent erred in law and fact by disallowing deductible expenses claimed by the Appellant.
28. On the first issue, the Appellant submitted that it supplied the Respondent with all relevant documentary evidence for review and in support of the Appellant's position and that the Respondent ought not to have solely used bank credits to assess taxes.
29. The Appellant relied on the case of *Minazini Enterprises Limited v Commissioner of Domestic Taxes* to buttress its position that the Respondent ought to make a rational decision and not to pluck figures from the air.
30. The Appellant submitted that having provided the Respondent with material and factual evidence challenging the impugned and exaggerated Gross Profit Margin, the Appellant's view was that the Respondent then had the burden to challenge the evidence provided. To support its view, the Appellant cited the case of *Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya* [2021] eKLR, where it the court held as follows:

“Once the taxpayer has made out a prima facie case to prove the facts, the onus then shifts to the Revenue Authority to rebut the prima facie case. If the Revenue Authority cannot provide any evidence to prove their position, the taxpayer will succeed.”
31. With regard to the second issue, the Appellant submitted that the documentary evidence provided were sufficient to demonstrate the expenditure incurred for the periods in question and ought to have been allowed as legitimate business expenses to be factored in the calculation of taxable income.
32. The Appellant relied on the case of *Afya X-ray Centre Limited v the Commissioner of Domestic Taxes* to support the position that the Respondent was required to undertake the assessment using all the records provided.



33. The Appellant maintained that, had the Respondent appreciated all explanations, documents and information provided by the Appellant it would not have made the impugned decision.

Appellant's Prayers

34. The Appellant made the following prayers to the Tribunal:
- a. That the Appeal be allowed;
 - b. That the Respondent's decision dated 22nd November 2023 be set aside and reversed;
 - c. That the costs of and incidental to this Appeal be awarded to the Appellant; and
 - d. Any other orders the Tribunal may deem fit.

Respondent's Case

35. The Respondent's case was based on its Statement of facts dated and filed on 1st February 2024 and filed on 2nd February 2024. The Respondent filed its written submissions dated 29th July 2024 on even date and the same were adopted by the Tribunal on 11th September, 2024.
36. The Respondent's case was that the dispute arose from Income Tax - Company and VAT additional assessments raised on i-Tax on 16th August 2023 for the periods 2018, 2019, 2020, 2021, December 2018, November 2019, December 2020 and December 2021. On 16th August 2023 the Respondent issued the Appellant with additional assessments for the periods 2018, 2019, 2020, 2021, December 2018, November 2019, December 2020 & December 2021 after a tax audit.
37. The Respondent stated that the Income Tax additional assessments for the years 2018, 2019, 2020 and 2021 were issued based on additional incomes assessed on noted income under declarations after established variances in return declarations and established incomes as per banking's analysis and audited accounts.
38. The Respondent, stated that with regard to VAT additional assessments for the periods December 2018, November 2019, December 2020 & December 2021 were issued based on noted sales under declarations from established variances in return declarations and established Incomes as per the banking's analysis and audited accounts.
39. The Respondent stated that whereas the Appellant made a late application, it granted leave for the the Appellant to be allowed to file its objection out of time vide letter dated 6th October 2023 and that the Appellant was advised on what constitutes a valid notice of objection as per the provisions of Section 51(3) of the *Tax Procedures Act*, CAP 469B of the Laws of Kenya (hereinafter "TPA") and was requested to provide the relevant supporting documents to enable the Respondent review the matter.
40. The Respondent stated that the Appellant communicated vide electronic mails on 15th and 16th November 2022 and forwarded supporting documents comprising of audited Financial statements, tax computations for Years 2018 to 2021, Bank statements from KCB Bank Kenya Limited for the period January 2018 to 23 March 2022, bank statements for Access Bank Limited for the period 25th March 2022 to 31st December 2022 and an analysis of its sales. Upon review of the objection applications, the Respondent issued its objection decision confirming the additional assessments vide letter dated 22nd November 2023.



41. In response to ground (a) of the Appeal, the Respondent stated that it is allowed by Section 24(2) of the TPA to assess a taxpayer's liability using any information available to it and it is not bound by the Appellant's self-assessment returns.
42. The Respondent stated that Section 31 (1)(c) of the TPA allows it to amend an assessment by making alterations or additions from the available information and to the best of its knowledge and that the taxpayer is liable for the correct amount of tax payable in respect to the reporting period to which the original assessment relates. The Respondent further stated that the Appellant failed to provide requested documents necessary to disprove the basis of the assessment and therefore did not discharge its burden of proof as required by law.
43. In response to the ground (b) of the Appeal, the Respondent stated that section 15 of the ITA provides for allowable expenses. It added that it is the Commissioner's as well as general accounting principle that expenditures must be supported with evidence to ensure they are verifiable. The Respondent added that the Appellant in this case did not provide sufficient documentary evidence to support the contention made.
44. The Respondent averred that it disallowed purchases expenses claimed by the Appellant as they were unsupported. It is also noted that the Appellant's failure to provide sufficient documents requested by the Respondent goes against the provision of Section 51(3) and 56 of the TPA.
45. The Respondent further stated that the Appellant only provided partial records and that no ledgers or breakdown of the cost of sales and other expenses, invoices, contracts and other primary documents were submitted in support of the cost of sales and expenses indicated in the Appellant's financial statements and tax Computation for the period for review and verification to enable determination of allowability of the same.
46. In response to grounds (c) and (e) the Respondent stated that the Appellant failed to discharge the burden of proof to support the grounds thereof. The Respondent also stated that no positive evidence was provided to disprove the of the Respondent's assessments or the Respondent's misapplication of the banking methodology in issuance of the assessment.
47. It was the Respondent's case that the Appellant's failure to discharge it its burden of proof as per the provisions of Section 56 (1) of the TPA, left the Respondent with no option but to uphold the assessment since there was no evidence produced by the Appellant to disprove the assessment.
48. The Respondent in its written submissions identified a single issue for its determination namely; whether the Appellant has satisfied the burden of proof that the assessment is erroneous or in any way excessive.
49. The Respondent submitted that the Appellant did not adduce any single document in this appeal to demonstrate that the its objection decision was erroneous. It relied on the case of Desert Star Transporters Ltd v *Commissioner of Investigations & Enforcement TAT No. 304 of 2020* to support the position that the taxpayer has a duty to provide documents to demonstrate that the Respondent's decision was erroneous.
50. The Respondent submitted that it was justified in relying on the banking analysis method. It relied on the case of Digital Box Limited v Commissioner of Investigations and Enforcement TAT No. 115 of 2017 to support the position that the banking analysis test also known as bank deposit analysis is an acceptable method of arriving at an assessment.
51. The Respondent submitted that the Appellant has a duty to prove that the its decision is incorrect. In this regard, the Respondent relied on a number of case laws including the following: National



Social Security Fund board of Trustees v Commissioner of Domestic Taxes. Kenya Revenue Authority 2016 eKLR. Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR. Mulheim v Commissioner of taxation (2013) FCAFC 115. Gashi v Respondent of Taxation [2012] FCA 638.

Respondent's prayers

52. The Respondent prayed that the Tribunal be pleased to dismiss the Appeal with costs.

Issues For Determination

53. The Tribunal having considered the parties' pleadings, documentation and written submissions puts forth the following single issue for determination which will dispense the entire Appeal:

Whether the Appellant discharged its burden of proof pursuant to Section 56(1) of the TPA.

Analysis And Findings

54. The Tribunal wishes to analyse the issue as hereunder:

Whether the Appellant discharged its burden of proof pursuant to Section 56(1) of the TPA.

55. The Tribunal notes the Appellant's submissions that the documents provided by the Appellant demonstrated that the deposits in its bank accounts included loans, contra entries, bounced cheques and capital injections, which could not constitute taxable income within the confines of Section 3(2) of the ITA. On the other hand, the Respondent averred that the Appellant failed to provide requested documents necessary to disprove the basis of the assessment and therefore did not discharge its burden of proof as required by law.

56. Section 13(2) (b) of the *Tax Appeals Tribunal Act*, CAP 469A of the Laws of Kenya (hereinafter "TATA") requires an Appellant to file a statement of facts. There is no doubt that the statement of facts should support and expound the contents of the memorandum of appeal. The statement of facts should explain why and how the Respondent's decision is incorrect. Rule 5 of the Tax Appeals Tribunal (Procedure) Rules, 2015 (hereinafter referred to as the "Rules") speaks to this fact. Rule 5 of the Rules provides as hereunder:

"(1) Statement of fact signed by the appellant shall set out precisely all the facts on which the appeal is based and shall refer specifically to documentary evidence or other evidence which it is proposed to adduce at the hearing of the appeal. [emphasis ours].

(2) The documentary evidence referred to in paragraph (1) shall be annexed to the statement of fact. [emphasis ours]"

57. Section 56(1) of the TPA provides as follows:

"In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect."

58. Further, Section 30 of the TATA provides as follows:

"Burden of proof

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.”

59. The Tribunal relies on the high court holding in the case of Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes [2020] eKLR that the taxpayer has the burden of proving that the tax decision is wrong. Similarly, this Tribunal in the case of Digital Box Limited v Commissioner of domestic investigations and Enforcement [2020] affirmed that that the burden of proving that the Commissioner’s decision is wrong falls on the taxpayer.
60. The Tribunal notes that the Appellant did not file documentary evidence for the Tribunal to examine whether the Appellant actually incurred the expenses or whether the Respondent erred in examining the expenses. Therefore, the Appellant has failed to discharge its burden of proving that the decision of the Respondent is incorrect.
61. Consequently, the Tribunal finds and holds that Appellant failed to discharge its burden of proof pursuant to Section 56(1) of the TPA.

Final Decision

62. The upshot to the Tribunal’s findings is that the Appeal lacks merit and consequently the Tribunal makes the following Orders:
- a. The Appeal be and is hereby dismissed.
 - b. The objection decision dated 22nd November 2023 be and is hereby upheld.
 - c. Each party to bear its own cost.
63. It is so Ordered.

DATED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF NOVEMBER, 2024.

.....
CHRISTINE A. MUGA

CHAIRPERSON

.....

BONIFACE K. TERER

MEMBER

.....

ELISHAH N. NJERU

MEMBER

EUNICE N. NG’ANG’A

MEMBER

OLOLCHIKE S. SPENCER

MEMBER

