



Far East Connections Limited v Commissioner of Investigations and Enforcement (Tax Appeal E613 of 2024) [2025] KETAT 171 (KLR) (Commercial and Tax) (21 March 2025) (Judgment)

Neutral citation: [2025] KETAT 171 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
COMMERCIAL AND TAX
TAX APPEAL E613 OF 2024
CA MUGA, CHAIR, BK TERER, EN NJERU, E NG'ANG'A & SS OLOLCHIKE, MEMBERS
MARCH 21, 2025**

BETWEEN

FAR EAST CONNECTIONS LIMITED APPELLANT

AND

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

JUDGMENT

1. The Appellant is a limited liability company and is a registered taxpayer runs an auto care centre.
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 carried out investigations against the Appellant for the period 2020 and 2022 for income tax and VAT. Consequently, the Respondent issued the Appellant with a notice of tax assessments dated 9th February 2024 for the period 2020 to 2022 seeking to recover Kshs 48,988,514.00 The Appellant lodged an objection to the assessments vide a letter dated 8th March 2024.
4. The Respondent considered the Appellant's objection and confirmed taxes of Kshs 41,810,605.00 vide an objection decision dated 7th May 2024. The Appellant being aggrieved with the objection decision lodged the Appeal herein vide a Notice of Appeal dated 16th May 2024 and filed on 6th June 2024.



The Appeal

5. The Appellant filed the memorandum of appeal dated 11th May 2024 on 6th June 2024 wherein the Appellant raised the following grounds of appeal:
 - a. That the Respondent erred in fact and in law by failing to consider the objection filed in its totality and supporting documentation thereon.
 - b. That the Respondent erred in fact and in law by disallowing the Taxpayer's expenses which were incurred wholly and exclusively incurred in the production/generation of income as provided in section 15 of the Income Tax Act Cap. 470 of the Laws of Kenya (hereinafter "ITA").
 - c. That the Respondent erred in fact and in law by failing in charging tax on the gross income as per the withholding certificates.
 - d. That the Respondent decision to overlook the taxpayer's contentions violates its right to a fair administrative action as provided for in Section 4 (3) (g) of the Fair Administrative Action Act, CAP 7L of the Laws of Kenya (hereinafter "FAAA") and Article 47 of the Constitution of Kenya, 2010 (hereinafter "the Constitution").

Appellant's Case

6. The Appellant relied on its statement of facts dated 11th May 2024 and filed on 6th June 2024. The Appellant did not file written submissions even though it was directed to do so by the Tribunal on or before 22nd January 2025.
7. The Appellant stated that it received a notice of tax assessment from the Respondent dated 9th February 2024 demanding payment of Income tax and VAT from the period 2020 to 2022 amounting to Kshs 48,988,514 to which the Appellant objected on 8th March 2024.
8. The Appellant stated that the Respondent issued objection decision without taking into account the facts laid down by the Appellant and confirmed the assessments.
9. The Appellant asserted that it can provide documentary evidence to demonstrate the following:
 - a. That the expenses were wholly and exclusively incurred in production/generation of income.
 - b. That the Commissioner charged tax on gross income as opposed to net of VAT.
 - c. That the Commissioner failed to consider the income recognition period.
10. The Appellant prayed for the Tribunal to find that the additional assessments are erroneous and award the costs to the Appellant.

Respondent's Case

11. In response to the appeal, the Respondent relied on its Statement of facts dated 11th June 2024 and filed on even date. The Respondent also filed written submissions dated 14th January 2025 on even date.
12. The Respondent stated that it carried out the investigations against the Appellant and considered information and documents including the information obtained from the Respondent's internal databases including i-Tax and Jaspersoft; and the Appellant's bank statements.



13. The Respondent noted that the Appellant traded with various government agencies and had received a total of Kshs 149,816,330.00 from the Ministry of Petroleum, IEBC, State Department of Petroleum and World Safari Rally project.
14. The Respondent averred that it analysed the Appellant's bank statements domiciled at Credit and Sidian Bank and it was noted that the Appellant received a net banking of Kshs 194,041,176.00 for the period under review. It then made adjustments for debtors and input VAT to arrive at the expected income of Kshs 163,259,176.00.
15. The Respondent noted that the withholding test and the banking test analysis revealed no huge variance and as such, the withholding test in raising the additional assessments for both Income tax and VAT. Consequently, on 9th February 2024, the Respondent issued the Appellant with a notice of tax assessments for the period 2020 to 2022 seeking to recover Kshs 48,988,514.00.
16. The Appellant lodged an objection to the assessments vide a letter dated 9th March 2024. According to the Respondent, it notified the Appellant vide a letter dated 13th March 2024 that the objection was invalid under section 51(3) of the *Tax Procedures Act*, CAP 469B of the Laws of Kenya (hereinafter "TPA"). Therefore, it partially considered the Appellant's objection and confirmed taxes of Kshs 41,810,605.00 therefore the Appellant filed this appeal.
17. Whereas the Appellant contended that the Respondent failed to consider all the information provided and subsequently proceeded to issue the objection decision, the Respondent that at the objection stage, the Appellant failed to provide all the necessary supporting documents.
18. The Respondent that through an electronic mail of 2nd April 2024, it requested the Appellant to avail all the necessary documents to support expenses claimed. It asserted that it requested the following records: Audited financial statements for the period under review; Purchase ledgers for the period under review; Import entries for all imports done during the period; and Copies of F147s used to pay any import taxes.
19. The Respondent stated that the Appellant provided documentation for the years 2021 vide an electronic mail dated 24th April 2024 which were considered by the Respondent and an amount of Kshs 23,926,362.00 was allowed. It stated that the Appellant failed to provide invoices or proof of payment for import purchases for the year 2020 and 2021 hence the expenses for the said period were disallowed.
20. Whereas the Appellant contended that the Respondent erred by charging tax on the gross income as per the withholding certificates, the Respondent stated that the Respondent compared the income received as per the withholding certificates to the income declared by the Appellant in its returns to establish a variance.
21. Whereas the Appellant contended that the Respondent's decision violates the Appellant's right to a fair administrative action as provided for in Section 4(3)(g) of the FAAA, the Respondent stated that its objection decision echoed the right to fair administrative action enshrined under Article 47 of *the Constitution* and that it accorded the Appellant an opportunity to defend its position however, the Appellant failed to satisfactorily prove its claims during the objection and the review stage therefore, Appellant cannot blame the Respondent.
22. The Respondent further stated that the Appellant failed to avail detailed supporting documentation and records to counter the assertions of the Respondent in the various engagements at assessment stages as well as objection stage contrary to Section 59 (1) of the TPA. It maintained that the Appellant did not provide any evidence to show or demonstrate that the assessment is erroneous or excessive despite being given several opportunities to support its position.



23. It asserted that the Appellant at the objection stage failed to avail the detailed support documentation to support its various objection grounds as per the requirements of Section 51(3) of the TPA. The Respondent asserted that every opportunity was extended to the Appellant to present its case and the support for its objection but the Appellant failed.
24. It asserted that it has mandate under Section 24(2) of the TPA to assess a taxpayer's tax liability using information available. The Respondent further that its actions are in line with Section 51(3) and 51(4) of the TPA given that the Appellant's grounds of objection, although invalid, were considered and consequently invalidated.
25. The Respondent relied on Section 56(1) of the TPA which provides that the burden of proving that the tax assessment is wrong lies with the taxpayer and the Appellant herein failed to prove to the satisfaction of the Commissioner that the assessment was wrong.
26. The Respondent also filed written submissions wherein it submitted that the Appellant failed to avail documents as requested. It relied on the case of Kotile General Contractors Company Limited v Commissioner of Domestic Taxes [2020] eKLR where the Tribunal held that the Appellant has to comply with the provisions set out in Section 51(3) of the TPA.
27. The Respondent maintained that the additional assessments were legally justified. It relied on section 3 of the ITA which sets out the items upon which income tax is payable and submitted that it charged taxes on those items. The Respondent relied on the case of The London County Council & Others v The Attorney General [1901]ACC 26] to support the position that Income tax is a tax on income. It also submitted that its assessments meet the test set in Digital Box Limited v Commissioner of Investigations and Enforcement (TAT 115 Of 2017) in that the assessment is objective, the calculations are arithmetically sound: and, finally that sampling technique used was free from bias.
28. The Respondent also cited the case of Atronix Limited v *Commissioner Domestic Taxes TAT no 551 Of 2021* to support the position that upon the Appellant failing to provide sufficient documents to prove its objection it gives the Respondent the leeway to invoke and take into consideration and rightly so the provisions of Section 24(2) of the TPA.
29. Finally, the Respondent submitted that the Appellant failed to provide documents therefore, it failed to discharge the burden of proof.

Issues For Determination

30. The Tribunal having considered the pleadings, puts forth the following issues for determination:
 - a. Whether the Respondent acted unfairly in carrying out its administrative duty.
 - b. Whether the Appellant discharged its burden of proving that the objection decision dated 7th May, 2024 was incorrect.

Analysis And Findings

31. The Tribunal will proceed to analyse the issues as hereinunder:
 - a. Whether the Respondent was unfair in carrying out its administrative duty.
32. The Appellant stated that the Respondent erred by disallowing its expenses which were incurred wholly and exclusively in the generation of income as provided in section 15 of the ITA. The Appellant also averred that the Respondent erred by charging tax on the gross income as indicated in the withholding certificates.



33. The Tribunal notes the Appellant’s averment that the Respondent’s decision to overlook its contentions violated its right to a fair administrative action as provided for in Section 4 (3) (g) of the FAANA and Article 47 of *the Constitution*. The said section provides as follows:
- “ 4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
- Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
- Information, materials and evidence to be relied upon in making the decision or taking the administrative action.”
34. The Tribunal notes that the Respondent gave the Appellant an opportunity to avail documents to support its notice of objection but the Appellant failed to do so save for partial documents it presented.
35. The Tribunal notes that on the other hand, the Respondent asserted that it requested the Appellant to produce the following documents:audited financial statements;purchase ledgers;import entries for all imports done during the period;copies of F147s used to pay any import taxes.
36. The Respondent stated that the Appellant provided some documentation for the year 2021 therefore, an amount of Kshs 23,926,362.00 was allowed. Further, the Respondent stated that the Appellant failed to provide invoices or proof of payment for import purchases for the year 2020 and 2021 hence the expenses for the said period were disallowed.
37. The Tribunal noted that the Respondent vide a letter date 13th March 2024, notified the Appellant that its objection was invalid and requested it to validate its objection as pursuant to the provisions of Section 51(3) of the TPA. The Tribunal noted that the Respondent complied with the provisions of section 51(4) and (4A) of the TPA which provides as follows:
- “(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall within a period of fourteen days notify the taxpayer in writing that the objection has not been validly lodged and request the taxpayer to submit the information specified in the notice within seven days after the date of the notice.
- (4A) Despite subsection (3), where a taxpayer fails to provide the information required under subsection (4) or fails to provide the information within the specified period, the Commissioner may make an objection decision within sixty days after the date on which the notice of objection was lodged.”
38. The Tribunal notes that the Respondent gave the Appellant opportunity to avail documents to support notice of objection but the Appellant failed to do so save for some documents which it presented and out of which the Respondent allowed an amount of Kshs 23,926,362.00. The Tribunal also noted that Respondent requested the following specific documents:audited financial statements.purchase ledgers.import entries for all imports done during the period.copies of F147s used to pay any import taxes.
39. The Tribunal notes however that the the Appellant did not produce audited financial statements which affected its ability to discharge its burden of proving that the objection decision was incorrect. In the case of *Katebes Enterprises Limited v Commissioner of Domestic Taxes (Tax Appeal E332 of 2023)* [2024] KETAT 1293 (KLR), the Tribunal emphasised that the taxpayer must produce documentary evidence to support notice of objection and to discharge burden of proof.



40. The Tribunal is of the view that the duty of the Respondent is to issue an objection decision either allowing the objection fully or partially. In this regard, section 51 (8) of the TPA provides as follows:
- “(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner’s decision shall be referred to as an “objection decision”.
41. The Tribunal finds that the Respondent complied with the provisions of Section 51(8) of the TPA in discharging its administrative duty and consequent upon this finding and the analysis in the preceding paragraphs, the Tribunal finds and holds that the Respondent acted fairly in carrying out its administrative duty.
- b. Whether the Appellant discharged its burden of proving that the objection decision dated 7th May, 2024 was incorrect.
42. The Tribunal notes that to begin with analysing this issue for determination, with, Section 30 of the *Tax Appeals Tribunal Act*, CAP 469A of the Laws of Kenya (hereinafter “TATA”) provides as follows:
- “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.”
43. 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.”
44. The Tribunal notes that the Appellant herein averred that the Respondent erred in disallowing its expenses. It averred further that the Respondent erred in charging tax on the gross income as per the withholding certificates. In its defence, the Respondent asserted that the Appellant failed to adduce documents to support the objection.
45. In support of its case, the Appellant relied on the following provisions of Section 15(1) of the ITA in making its case that the expense incurred by it ought to have been deducted but that the Respondent had failed to do so:
- “15. Deductions allowed
1. For the purpose of ascertaining the total income of any person for a year of income there shall, subject to section 16 of this Act, be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that income...”
46. In order for the Appellant to assert its rights pursuant to the provisions of to Section 15(1) of ITA, it must produce documents supporting incurred expenses at the objection stage as provided for under section 51(3) of the TPA which mandates a taxpayer to adduce documents in support of the notice of objection. Where a taxpayer is dissatisfied with an objection decision that has been issued, it should then file the same documents in support of the appeal. The Appellant must comply with the provisions of Section 13(2)(d) of the TATA which requires it to provide such other documents as may be necessary to enable the Tribunal make a decision.



47. The Tribunal notes that whereas the Appellant averred that the Respondent erred by disallowing its expenses which it had incurred wholly and exclusively in the generation of income, the Appellant's statement of facts did not comply with Rule 5(1) of the TAT Rules which provides that the taxpayer must file statement of facts which 'shall refer specifically to documentary evidence.' In instant Appeal, the Appellant filed its statement of facts and adduced in evidence, documents without specifically making reference to the documentary evidence. In any case, the Respondent averred that it considered documents in relation to the year 2021 and allowed an amount of Kshs 23,926,362.00.
48. The Tribunal is of the view that if the Respondent allowed part of the 2021 assessment, then, the issue about the year 2021 assessments ought not to arise but if it does arise, the Appellant should provide documentary evidence to support its case with regard to the claim that was disallowed. The Appellant proceeded to file documents in respect to the period 2021 and the Tribunal observes that the entire assessment for the year 2021 was still in issue. However, if the Tribunal was to consider the 2021 invoices there is a risk that the Tribunal may consider and allow the claim that the Respondent had already allowed.
49. The Tribunal noted that the Appellant's documents were made up of documents in respect of the 2023 year of income yet the assessments were in respect to the period between 2020 and 2022. Accordingly, the documents in respect of the 2023 year of income were inadmissible.
50. The Tribunal further noted that the Appellant did not file its notice of objection which would have enabled the Tribunal determine whether or not the Respondent was provided with the documents attached to the instant Appeal. There was no evidence from the Appellant to indicate that the Appellant availed the documents to the Respondent during the objection review stage.
51. The view of the Tribunal is that the Appellant must adduce documents to demonstrate the that Respondent's decision is inaccurate or incorrect. The court in the case *Commissioner of Domestic Taxes v Trical and Hard Limited, (Tax Appeal E146 of 2020)*, [2022] KEHC 9927 (KLR) described the burden of proof in tax matters as a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer. Further, in *Sambimba Distributors Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E052 of 2021)* [2023] KEHC 24209 (KLR) (Commercial and Tax) (27 October 2023) (Judgment) the court affirmed that Section 56 of the TPA and section 30 of the TATA both impose the burden of proving that the Respondent's objection decision is incorrect on a taxpayer.
52. The Tribunal finds that the Appellant failed to discharged its burden of proving that the objection decision dated 7th May, 2024 was incorrect.

Final Decision

53. The upshot to the foregoing is that the Tribunal finds and holds that the Appeal lacks merit and proceeds to make the following Orders:
 - a. The Appeal be and is hereby dismissed.
 - b. The Respondent's objection decision dated 7th May 2024 be and is hereby upheld.
 - c. Each party to bear its own cost.
54. It is so Ordered.

DATED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF MARCH, 2025.

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CHRISTINE A. MUGA
CHAIRPERSON

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BONIFACE K. TERER ELISHAH N. NJERU
MEMBER MEMBER

.....
EUNICE N. NG'ANG'A OLOLCHIKE S. SPENCER
MEMBER MEMBER

