



REPUBLIC OF KENYA



**Nyota Clothing Limited v Commissioner of Legal Services and Board Coordination (Tax Appeal E230 of 2024) [2025] KETAT 184 (KLR) (Commercial and Tax) (14 March 2025) (Judgment)**

Neutral citation: [2025] KETAT 184 (KLR)

**REPUBLIC OF KENYA  
IN THE TAX APPEAL TRIBUNAL  
COMMERCIAL AND TAX  
TAX APPEAL E230 OF 2024  
E.N WAFULA, CHAIR, RO OLUOCH, CYNTHIA B.  
MAYAKA, AK KIPROTICH & G OGAGA, MEMBERS  
MARCH 14, 2025**

**BETWEEN**

**NYOTA CLOTHING LIMITED ..... APPELLANT**

**AND**

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

**JUDGMENT**

1. The Appellant is a private company incorporated in Kenya carrying on the business of supply of second hand clothes.
2. The Respondent is a principal officer of the Kenya Revenue Authority, appointed under Section 13 of the KRA Act, and the Authority is charged with the responsibility of assessing, collecting, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent conducted an audit on the Appellant's tax affairs and issued tax assessments on 30<sup>th</sup> October 2023.
4. The Appellant lodged its Objection on 27<sup>th</sup> December 2023 challenging the Respondent's assessments.
5. The Respondent subsequently issued an Objection decision on 23<sup>rd</sup> January 2024.
6. Dissatisfied with the Respondent's objection decision, the Appellant filed a Notice of Appeal dated 19<sup>th</sup> February 2024.



## **The Appeal**

7. The Tribunal discerned the grounds of Appeal from the Memorandum of Appeal dated 19<sup>th</sup> February, 2024 and filed on the 22<sup>nd</sup> February, 2024 to be as follows;
  - i. The grounds for objection was that the accounts entries and invoices provided to the Commissioner were correct and there was no loss of revenue to the Commissioner.
  - ii. The Commissioner erred by using arbitrary prices to project sales based on what it termed as intelligence and market research while it had access to all the accounting sales records.
  - iii. The Commissioner created a table and assumed sales should be generated based on arbitral margins and markup which it could not support with records. The Commissioner didn't not produce any other record to dispute the records provided by the taxpayer except prorating a table of assumed sales and demanding tax on the projected sales.
  - iv. The Commissioner had access to all the sales invoices, import and direct cost records including other auxiliary cost records and ledgers for verification.
  - v. The taxpayer had declared all sales through i-tax portal and tax due on Vat and Corporation tax settled.
  - vi. The Corporation tax and Vat tax demanded by the Commissioner was as a result of the projected sales.
  - vii. That tax cannot accrue where there were no transactions between a willing buyer and a willing seller. Tax only accrue after a transaction has been initiated. If there is no transaction, tax cannot accrue.
  - viii. The Company motor vehicles were purely used for business. The Director and other members of staff never use the vehicles for personal purposes.

## **Appellant's Case**

8. The Appellant's case is premised on the following documents filed before the Tribunal;
  - i. The Appellant's Statement of Facts dated 19<sup>th</sup> February 2024 and filed on 22<sup>nd</sup> February 2024 together with the documents attached thereto.
  - ii. The Appellant's written submissions dated 14<sup>th</sup> October, 2024 and filed on 15<sup>th</sup> October 2024.
9. The Appellant averred that the case commenced on 23<sup>rd</sup> January 2023 when the Respondent sent an email attaching audit commencement letter on tax affairs covering years 2017, 2018, 2019, 2020 and 2021.
10. That on 18<sup>th</sup> May 2023 the Respondent emailed preliminary findings for reconciliation covering the years 2017,2018, 2019, 2020 and 2021.
11. It stated that it reconciled the bankings and sales which it shared with the Respondent. That the Respondent confirmed receipt of reconciled bankings, sales and cost of sales and a meeting was also scheduled at the Appellant's place of business on 7<sup>th</sup> September 2023
12. That on 21<sup>st</sup> September 2023 the Respondent raised a second preliminary audit findings. That it responded to Respondent's preliminary audit findings of 21<sup>st</sup> September 2023.



13. That on 30<sup>th</sup> October 2023 the Respondent arrived at a tax decision which was shared the same day. It averred that the demanded tax inclusive of penalties and interest were broken down as follows:-

Corporation tax Kshs.56,825,036

VAT Kshs.26,799,153

PAYE Kshs.765,450

Total Kshs.84,389,640

14. That further the Respondent raised assessments orders on the same taxheads. That on 27<sup>th</sup> November 2023, it objected to the assessment orders.

15. The Appellant submitted that after it objected the assessments, the Respondent requested for supply of the relevant documents relating to the objection for verification which it acknowledged receipt. That in support of the objection it attached copies of the following records:-

- i. Sales Ledgers for years 2017,2018, 2019, 2020 and 2021.
- ii. Import/purchase cost and other direct cost ledgers for years 2017,2018,2019,2020 and 2021.
- iii. Cash books for years 2017, 2018,2019,2020 and 2021.
- iv. Vehicle logs for deliveries.

16. That on 23<sup>rd</sup> January 2024 the Respondent issued through an email the objection decision.

17. It was the Appellant's view that the issues for determination in this dispute were as follows;

- a. Whether the Commissioner was justified in raising additional taxes based on simulated percentage margins and markup collected through intelligence and market research.
- b. Whether the Commissioner was justified in assuming an estimated percentage turnover at 140% of cost of sales and charging additional tax on the difference between actual sales and estimated sales. The additional tax in this category was Corporation tax and VAT.
- c. Whether the commissioner was justified to raise additional tax where the use of company cars was purely for business.

18. The Appellant further pleaded on each tax head as hereunder;

### **Corporation Tax**

19. The Appellant averred that Corporation tax assessed by the Respondent of Kshs. 56,825,036.00 inclusive of penalties and interest was because the Respondent projected sales by using margins and markup as shown in the table below:-



Details	2017	2018	2019	2020	2021
Projected Under declared sales	27,828,603	37,915,173	40,857,939	16,333,381	19,891,002
IT Vs VAT	7	0	15	3	746,132
Under Declared turnover	27,828,610	37,915,173	40,857,954	16,333,384	20,637,134
Loss b/f	1,276,144	-	-	-	
Loss for the year	9,011,238	-	-	-	639,069
Total Loss	10,287,382	-	-	-	639,069
Net Taxable Profit	17,541,228	37,915,173	40,857,954	16,333,384	19,998,065
Corp Tax @30%	5,262,368	11,374,552	12,257,386	4,083,346	5,999,420
Penalty @5%	263,118	568,728	612,869	204,167	299,971
Interest@1%	3,315,292	5,801,022	4,780,381	1,102,503	899,913
Total	8,840,779	17,744,301	17,650,636	5,390,017	7,199,303

20. The Appellant submitted that the Respondent never took into consideration that by simulating margins and markup, it would generate revenues that cannot be supported. That by using a percentage, the Respondent tabulated a table and generated more revenue than what it declared in its annual returns which was not the case.
21. That the actual breakdown of sales generated by the company for twelve months ending December 2017, 2018, 2019, 2020 and 2021 were as shown in the table below:-

Year	2017	2018	2019	2020	2021
Turnover Exclusive of Vat	62,516,068	122,436,375	144,566,943	89,878,626	82,272,886



22. That this is confirmed by the sales ledgers it provided to the Respondent. That for it to achieve the revenue tabulated above its cost of sale were as shown in the table below:-

Year	2017	2018	2019	2020	2021
Opening Stock	14,072,020	7,820,035	6,280,668	14,983,888	84,380
Add	36,924,015	75,737,353	94,080,946	37,794,967	54,127,374
Other	21,355,908	37,260,101	47,068,618	23,171,244	27,562,263
Less	7,820,035	6,280,668	14,983,888	84,380	8,799,811
Cost of sales	64,531,908	114,536,820	132,446,344	75,865,719	72,974,206

23. It averred that there was no dispute on above incurred cost shown. That the Commissioner agreed with it on the cost structure.
24. That it's disagreement with the Respondent was in respect of sales. That even after the Respondent vouched the sales invoices and sales ledger it provided, the Respondent went ahead to tabulate sales using percentage margins and markup as shown in the table below;

Year	2017	2018	2019	2020	2021
Estimate Turnover at 140% of cost of sales	90,344,671	160,352,548	185,424,882	106,212,007	102,163,888

25. That by simulating a percentage, the Respondent came up with some projected undeclared sales as shown in the table below;

Year	2017	2018	2019	2020	2021
Commissioner Estimated	90,344,671	160,351,548	185,424,882	106,212,007	102,163,888
Less Actual	62,516,068	122,436,375	144,566,943	89,878,626	82,272,886
Projected undeclared sales	27,828,603	37,915,173	40,857,939	16,333,381	19,891,002



26. The Appellant submitted that it is from the projected undeclared sales that the Respondent charged Corporation tax and VAT. That this was erroneous because tax can only be charged from actual sales realized and not from expected projected sales. It averred that it is unfair to demand tax based on assumptions without taking into consideration actual trading practice.

### VAT

27. It was the Appellant's contention that the Respondent also raised assessments on VAT tax of Kshs. 26,799,153.00 by charging the projected sales as shown in the analysis as below;-

2018	2019	2020	2021	
Projected Undeclared Sales	37,915,173	40,857,939	16,333,381	19,891,002
Vat@16%	6,066,428	6,537,270	3,182,560	
Vat@14%	2,286,673			
Penalty @5%	303,321	326,864	114,334	159,128
Interest@1%	3,457,864	2,941,772	754,602	668,338
Total Projected Vat tax	9,827,613	9,805,905	3,155,609	4,010,026

28. It stated that from the above analysis the Respondent raised VAT from non-existent sales which had not been actualized nor realized.
29. That the Respondent failed to recognize the fact that one cannot generate VAT on non-existent projected sales. That this goes against a simple principle of charging tax. That tax cannot accrue where there are no transactions.

### Paye

30. It was the Appellant's contention that the Respondent also raised additional tax assessments on PAYE of Kshs.765,450.00 as shown in the analysis below;



Vehicle Model	Toyota Station	Toyota Station Wagon KCN803K	Totals
Cost	900,000	750,000	
Year	28.6.2019	30.10.2017	
Benefit per month	810,000	1,215,000	2,025,000
PAYE@30%	243,000	364,500	607,500
Penalties5%	12,150	18,225	30,375
Interest@1%	51,030	76,546	127,575
Total	306,180	459,270	765,450

31. It averred that the Appellant had three vehicles registered under the company, a lorry and two station wagons. That the Respondent went ahead and charged car benefit on Toyota Station Wagon (Fielder) KCU137Y and Station Wagon (Ractis)-KCN803K on the director's pin.
32. That the Respondent presumed that the cars were being used by the director for private purposes. That even after the Respondent was provided with documentary evidence that the cars were purely for business and not designated to any employee.
33. That the two station wagon cars were used to deliver goods to customers and were not used for any other purpose other than delivery. That the station wagons were used in delivering small quantities of bales while the lorry was used for bulk deliveries.
34. The Appellant stated that the vehicles were parked at its premises at Industrial area after the day's deliveries. That they are picked up the following day if there are deliveries to be made. That if there were no deliveries, they remain at the parking bay.
35. The Appellant stated that the Respondent was provided with work tickets signed during deliveries.
36. That the Respondent should therefore not have added back car benefit to the directors pin for tax purposes since the cars were purely used for business. That the cars usage was in the normal course of business basically assisting in generation of the Appellant's revenues.
37. The Appellant further asserted as follows;
  - a. That all the income it generated were declared and returns had been filed with the Respondent.
  - b. That all accounting documents had been provided in accordance with Section 59(1) of the TPA.
  - c. That a valid objection was lodged in accordance with Section 51 of the TPA.
  - d. That all taxes due had been paid in accordance with the relevant tax laws.



- e. That the Appellant had been co-operative by providing all the required accounting documents as demanded by the Commissioner. That it had also responded to all the correspondences and provided all the requested documents and explanations.
38. The Appellant stated that it relied on the following statutes;
- a. [Tax Procedures Act](#) 2015
  - b. [Income Tax Act](#)
  - c. Vat Act 2013

### **Appellant's Prayers**

39. The Appellant prayed that;
- i. The Tribunal directs the Respondent to amend the additional assessments to agree with the returns that were validly filed and taxes paid by the Appellant.
  - ii. The Tribunal directs the Respondent to take into account all the records that were provided by the Appellant.

### **Respondents Case**

40. The Respondent's case is premised on its Statement of Facts dated the 5<sup>th</sup> April, 2024 and filed on 4<sup>th</sup> May, 2024 together with the documents attached thereto and its written submissions dated and filed on 4<sup>th</sup> November 2024
41. The Respondent submitted that it conducted a review of the Appellant's tax compliance. That upon conclusion of the review, the following were established:
- i. That as per the import data records, the Appellant registered imports worth Kshs 405,185,828.00 for the years 2017-2021. This is shown in the table below:

Year	CIF (a)	Import Duty (b)	CIF+ Import (c)	Import VAT Paid (d)
2017	33,469,265.00	14,825,551.00	48,294,816.00	7,727,170.00
2018	74,340,117.00	26,019,032.00	100,359,149.00	16,057,460.00
2019	92,680,645.00	32,438,228.00	125,118,873.00	20,019,020.00
2020	42,723,747.00	14,953,365.00	57,677,112.00	8,847,549.00
2021	54,597,614.00	19,138,264.00	73,735,878.00	11,797,746.00
Totals	297,811,388.00	107,374,440.00	405,185,828.00	64,448,945.00

- ii. That the Appellant's average margin declared was 9%. That however, this was suppressed and insufficient to cover direct costs as well as overheads. That the table below shows the Appellant's mark up analysis;



Year	Declared sales	Declared Cost of	Mark Up
2017	62,516,068.00	64,531,908.00	-3%
2018	122,436,375.00	114,536,821.00	7%
2019	144,566,943.00	132,446,345.00	9%
2020	89,878,626.00	75,865,720.00	18%
2021	82,272,886.00	72,974,206.00	13%
Total	501,272,886.00	460,355,000.00	
Average Mark Up	9%		

- iii. The Respondent stated that the intelligence and market research based on the used clothing imported established that the sales price for one bale of used garments averages Ksh 10,000. That analysis of the Appellant's import entries revealed that the sales price is on average at a 75% mark up on its imports. That however, a mark up of 40 % was applied in the Appellant's case. That the Respondent used market research information and established that one bale of used garments range from 8,000 to 30,000. It averred that it then proceeded and used a conservative selling price of 9,650 applied on the purchase cost leading to a 40% industry mark up.
- iv. That based on the Respondent's intelligence and market surveillance, it was established that the correct mark up for the Appellant's business activities was 40%. That an online and a random physical market research was done by the Respondent. That some of the traders who have an online prices have published a catalogue of the prices on their sites. That Some of the sites url are as below:
- a. <https://teddmakmitumbabales.com/>
  - b. <https://kutusbales.co.ke/mitumba-bales-prices-in-gikomba/>
  - c. <https://maria-mitumba-bales-wholesalers.business.site/>
- v. It averred that in the entire period under review the Appellant under declared its income turnovers amounting to kshs. 253,368,572.00 through application of wrong markup/margins. That the estimated income tax liability arising from the under declared income is Ksh 29,520,861.00. That a mark-up of 40% on the CIF plus import duty was used to arrive at the estimate of the Appellant's sales. It added that a net profit margin of 40% was applied on the under declared turnover to allow for expenses before charging additional tax, as per the Mitumba Industry margin.
- vi. It stated that in the entire period under review, the Appellant under declared its VAT turnovers amounting to kshs. 502,417,055.00 through application of wrong markup/margins. That this was based on a compassion of the estimated sales and declared VAT turnover. That the estimated VAT tax liability arising from the under declared income is Ksh 39,536,219.00. It added that the VAT liability was analyzed by utilization of the Appellant's generated sales as



per the import data records. That a mark up of 40% on the CIF plus import duty was used to arrive at the Appellant's sales for the years 2016- 2020.

42. The Respondent submitted that a review was also extended to the Appellant's PAYE compliance which revealed PAYE under declaration. That the Appellant had not declared motor vehicle benefit used by its directors and there was no evidence that the motor vehicles were used for business purposes.
43. That consequently, on 30<sup>th</sup> October 2023, the assessments were issued to the Appellant for the periods under review. That the Appellant lodged its Objection on 27<sup>th</sup> December 2023 challenging the Respondent's assessments.
44. It posited that vide various correspondences, the Appellant was requested to provide various information/documents in order to validate its objection. That consequently, upon review of the objection, an objection decision was issued on 23<sup>rd</sup> January 2024.
45. The the Respondent's position was that the figures it used in the assessment were not arbitrary figures but rather figures obtained through market research and intelligence conducted by the Respondent. That the Appellant failed to disapprove its figures. That the Appellant provided the same documents it had filed in its tax return.
46. The Respondent stated that a reading of Section 24(2) of the TPA allowed the Respondent to use any information available to it to assess a taxpayer. That in this case, the Respondent used market research information leading to a 40% industry mark up. It stated that it carried out tests to establish the under declared sales by relying on market research that established similar used clothing importers sold a bale of clothing at Ksh 8,000 to 30,000.
47. That moreover, it observed that the cost price per bale in 2017 was higher than the selling price per bale in the same year, which means the taxpayer was selling at a loss in that year. That based on this the assessments for Income tax and VAT were confirmed.
48. The Respondent submitted that for the PAYE assessment, the Appellant stated that the vehicles were purely used for business. It averred that the two vehicles were private motor vehicles-Toyota station wagon (Fielder)-KCU137Y and Toyota station wagon (ractis). That the Appellant did not provide a work ticket showing the movement of the cars.
49. It averred that the work ticket would have assisted it in verifying if the two cars were purely used to deliver the goods to the clients and the vehicles were parked at the company's premises after the day's deliveries. That the Respondent was therefore correct to charge as benefit to the directors as per Section 4 of the *Income Tax Act*.
50. The Respondent contended that Section 56 of the Tax Procedure Act places the onus of proof on the Appellant who in this case failed to avail evidence that would support a contrary position to the assessment or that would have guided the Respondent at arriving to a different objection decision.
51. The Respondent further contended that it is not bound by the Appellant's returns, information or self-assessment and it is empowered to vary the assessments using any available information in Respondent's possession as provided for under Section 24(2) of the TPA.
52. That therefore when the Appellant was assessed this was within the Respondent's mandate as provided for under the *Tax Procedures Act*. That the law mandates the Respondent to assess the Appellant using whatever information is available to it.
53. The Respondent insisted that the grounds lack merit and the Appellant had not demonstrated any error made by the Respondent arising from the invalidation decision



## **Respondent's Prayers**

54. The Respondent prayed that the Tribunal;
- a. Upholds the Respondent's objection decision as proper and in conformity with the provisions of the law
  - b. That this Appeal be dismissed with costs to the Respondent as the same is devoid any merit.

## **Issue For Determination**

55. The Tribunal frames the issue for determination to be:

### **Whether the Respondent's objection decision is justified.**

## **Analysis And Findings**

56. The Tribunal having appropriately ascertained the issue that falls for its determination shall proceed to make analysis of the same as hereunder.
57. The genesis of this dispute is the Respondent's assessments for VAT, Corporation tax and PAYE raised in the assessment dated 30<sup>th</sup> October 2023 and confirmed in the Objection decision of 23<sup>rd</sup> January 2024.
58. The Appellant averred that Corporation tax assessed by the Respondent of Kshs. 56,825,036.00 inclusive of penalties and interest was because the Respondent projected sales by using margins and markup.
59. That the Respondent never took into consideration that by simulating margins and markup, it would generate revenues that cannot be supported. That by using a percentage, the Respondent tabulated a table and generated more revenue than what it declared in its annual returns which was not the case.
60. On VAT the Appellant contended that the Respondent also raised assessments by charging the projected sales. That the Respondent raised VAT from non-existent sales which had not been actualized nor realized
61. The Respondent on its part submitted that in this case, it used market research information leading to a 40% industry mark up. It stated that it carried out tests to establish the under declared sales by relying on market research that established similar used clothing importers sold a bale of clothing at Ksh 8,000 to 30,000.
62. That moreover, it observed that the cost price per bale in 2017 was higher than the selling price per bale in the same year, which meant that the taxpayer was selling at a loss in that year. That based on this the assessments for Income tax and VAT were confirmed.
63. The Tribunal has perused through the documents presented by the Appellant and notes that apart from the correspondences with the Respondent during objection process, it provided sales ledgers, import/purchase ledgers, its cash book and record of journeys for its motor vehicles which it averred that it had provided to the Respondent during objection process.
64. The Tribunal further notes regarding PAYE that although the Appellant has attached to its pleadings copies of work tickets to demonstrate that the two motor vehicles were solely used for business, it did



not provide any evidence that it supplied the same to the Respondent during objection process. The Respondent in fact stated in part in the objection decision as follows;

“ ...

The two vehicles are private motor vehicles- Toyota station wagon (Fielder) – KCU137Y and Toyota station wagon (ractis). You did not provide a work ticket showing the movement of the cars. The work ticket would have assisted us in verifying if the 2 cars are purely used to deliver the goods to the clients and the vehicles are parked at the company’s premises after the day’s deliveries.

...”

65. The Appellant did not directly address this assertion by the Respondent in the Objection decision in its pleadings. A perusal of the Appellant’s objection dated 27<sup>th</sup> November 2023 and other subsequent correspondences on email, the Tribunal notes that the work tickets were not among the documents provided to the Respondent.

66. Section 23 of the [Tax Procedures Act](#) provides as follows regarding record keeping;

“ A person shall—

- (a) maintain any document required under a tax law, in either of the official languages;
- (b) maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and

...”

67. It is the view of the Tribunal that the Appellant ought to have provided the documents that it is required to keep under the VAT Act and [Income Tax Act](#) to fully support its objection to disprove the assumptions made by the Respondent during the assessments failure to which means its arguments remain mere averments.

68. The provision of documents as evidence is well stated under Section 30 of the [Tax Appeals Tribunal Act](#) which provides thus:

“ 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.”

69. The Tribunal is of the view that the Appellant failed to meet the obligation placed on it under Section 30 of the [Tax Appeals Tribunal Act](#) to discharge its burden of proof by providing supporting documents.



70. The Tribunal reiterates the Court finding in the case of Primarosa Flowers Limited vs. Commissioner of Domestic Taxes (2019) eKLR, whilst making reference to the Australian case of Mulherin vs Commissioner of Taxation [2013] FCAFC 115 the Court held that: -

“..... The onus is on the taxpayer in proving that assessment was excessive by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied....”

71. Consequently, the Tribunal finds that the Appellant failed to discharge the burden of proof placed upon it in demonstrating that the Respondent erred in confirming the assessments and therefore the Objection decision was justified.

### **Final Decision**

72. The Tribunal on the basis of the foregoing analysis finds that the Appeal lacks merit and accordingly proceeds to make the following final Orders:-

- i. The Appeal be and is hereby dismissed.
- ii. The Respondent’s Objection decision dated 23<sup>rd</sup> January, 2024 be and is hereby upheld.
- iii. Each party to bear its own costs.

73. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2025**

**ERIC NYONGESA WAFULA**

**CHAIRMAN**

Dr. Rodney O. Oluoch Cynthia B. Mayaka

Member Member

Abraham K. Kiprotich Gloria A. Ogaga

Member Member

