Auditel Kenya Limited v Commissioner Domestic Taxes (Tax Appeal 1242 of 2022) [2024] KETAT 47 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KETAT 47 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

TAX APPEAL 1242 OF 2022

E.N WAFULA, CHAIR, E NG'ANG'A, RO OLUOCH, CYNTHIA B. MAYAKA, AK KIPROTICH & B GITARI, MEMBERS

JANUARY 26, 2024

BETWEEN

AUDITEL KENYA LIMITED .... APPELLANT

AND

COMMISSIONER DOMESTIC TAXES .... RESPONDENT

JUDGMENT

1. The Appellant, Auditel Kenya, is a branch of Auditel Ingeniera Y Servicios SI (Auditel Spain), a company incorporated in Spain. It is duly registered in Kenya under the *Companies Act* 2015 and is a tax resident in Kenya.
2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, 1995. 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.
3. On 22nd June 2022, the Respondent issued a demand notice in respect of VAT and Corporation tax against the Appellant for the period of 2017. In the assessment, the Respondent demanded settlement of the resulting principal taxes, late payment penalties and interest totaling to a tax liability of Kshs. 270,359,587.00.
4. The Appellant lodged its objection on 18th July 2022 objecting to the said assessment of Kshs 270,359,587.00 in its entirety and seeking the withdrawal of the said assessments by the Respondent together with the alleged accrued interest and penalties.
5. On 8th September 2022, the Respondent issued its decision in respect of the objection lodged by the Appellant confirming the entire tax assessment of the Corporation tax and VAT.
6. Being aggrieved by the Respondent's decision, the Appellant subsequently filed this Appeal.

The Appeal

7. The Appeal is premised on the following grounds as stated in the Appellant's Memorandum of Appeal dated 21st October and filed on 26th October 2022:-

   a. That the Respondent erred in law and fact in rejecting the Appellant's objection to the erroneous attribution of income to the Appellant by the Respondent and subsequently confirming its assessment of Corporation tax inspite of the services being performed by Spain and relevant payments being remitted to Auditel Spain and not the Appellant.

   b. That the Respondent erred in law and in fact in failing to predicate its decision in respect of the Appellant's objection on material facts and relevant provisions of law in confirming its assessment of Corporation tax of Kshs. 199,815,891.00 on income which had not accrued in Kenya or been derived therefrom by the Appellant contrary to the provisions of *Income Tax Act*.

   c. That the Respondent errered in law and in fact in upholding its assessment of VAT of Kshs, 85,254,781.00 on imported services as being due from the Appellant contrary to the provisions of the *Value Added Tax Act* yet the obligation to pay VAT on imported services lies with the importer hence the taxes were only due from the recipient of the imported services and not from the Appellant.

   d. That the Respondent erred in law and in fact in failing to consider the functional profile of the Appellant vis-à-vis the functions of Auditel Spain in respect of the agreement for the provision of the services under consideration which were provided by Auditel Spain and not the Appellant.

   e. That the Respondent erred in law and in fact in rejecting the objection lodged by the Appellant on the basis that the Appellant had failed to avail the requisite documents yet the Appellant was not the importer of the services in question nor the recipient of the services hence the Appellant could not reasonably be expected to produce the documents not within its custody.

   f. That in view of the foregoing, the Appellant is apprehensive that the actions of the Respondent lack in merit, are unlawful and manifestly unjust and that unless the orders sought are granted, the Appellant risks being unjustly compelled to pay for the alleged taxes to the prejudice of the Appellant.

Appellant's Case

8. The Appellant's case is supported by the following documents:

   a. Appellant's Statement of Facts dated 21st October 2022 and filed on 26th October 2022 together with the documents attached thereto.

   b. The Appellant's written submissions dated 31st May 2023 and filed on 5th June 2023 and authorities attached hereto.

9. That on 22nd June 2022, the Respondent issued a demand notice in respect of VAT and Corporation tax against the Appellant for the period of 2017. In the assessment, the Respondent demanded settlement of the resulting principal taxes, late payment penalties and interest totaling to a tax liability of Kshs. 270,359,587.00.

10. The Appellant lodged its objection on 18th July 2022 objecting to the said assessment of Kshs.270,359,587.00 in its entirety and seeking the withdrawal of the said assessments by the Respondent together with the alleged accrued interest and penalties.

11. That on 8th September 2022, the Respondent issued its decision in respect of the objection lodged by the Appellant confirming the entire tax assessment of the Corporation tax and VAT.

12. That as per the said objection decision, the alleged principal tax payable in respect of VAT and Corporation tax for the period of the year 2017 was tabulated as follows -

Tax Head	Ta Period(s)	Principal	Penalty	Interest	Total
VAT	Dec 2017	52,953,280.00	2,647,664	26,653,837	85,254,781
Corporation Tax	Jan 2017 Dec 2017	124,109,248.88	6,205,462	69,501,179	199,815,891
Total					285,070,671

13. The Appellant being dissatisfied with the decision of the Respondent, filed its Notice of Appeal with the Tax Appeals Tribunal on 7th October 2022.

14. The Appellant's first ground of appeal is that the Respondent erred in law and fact in rejecting the Appellant's objection to the erroneous attribution of income to the Appellant by the Respondent and in confirming its assessment of Corporation tax inspite of the services being performed by Auditel Spain and relevant payments being remitted to Auditel Spain and not the Appellant.

15. It is the Appellant's assertion that the Respondent failed to consider the contractual arrangement between the parties and the appertaining obligations thereto. The Appellant sets out the facts of the engagement as below-

    i. Auditel Spain entered into a contract with the Ministry of Sports, Culture and Arts (MOSCA) for the design, supply, testing, commissioning and supervision of security, lighting, communication, audiovisual and access control systems for five stadiums in Kenya;

    ii. The contract comprised two components - the offshore component -which involved the feasibility study and pre-planning of the project which was carried out by the head office-Auditel Spain and; the onshore component which involved the actual implementation of projects by Auditel Kenya.

    iii. The contract provided for an advance payment of 20% of the contract amount which is equivalent to Kshs. 330,537,997 to cater for the offshore component of the project which was the preliminary portion of the project prior to implementation by Auditel Kenya.

    iv. Auditel Spain performed the services agreed upon and was paid Kshs.330,537,997.00 by MOSCA as agreed upon in the contract.

16. That in light of the facts above, the Appellant submitted that the Respondent misdirected itself in concluding that the tax liability in respect of Corporation tax and VAT on the advance payment of Kshs. 330,537,997.00 is due and owing from the Appellant yet the services were not performed by the Appellant and the payment proceeds were made to Auditel Spain and not the Appellant.

17. It is the Appellant's assertion that there is no basis for the alleged taxes and resultant penalties and interest in the amount of KShs. 285,070,671.00 imposed by the Respondent as owed by the Appellant and the same should be set aside

18. The Appellant's second ground of appeal is that the Respondent erred in law and in fact in failing to predicate its decision in respect of the Appellant's objection on material facts and relevant provisions of law in confirming its assessment of Corporation tax of Kshs. 199,815,891.00 on income which had not accrued in Kenya or been derived therefrom by the Appellant contrary to the provisions of *Income Tax Act*.

19. The Appellant submitted that the Respondent misdirected itself in rendering its decision contrary to section 3(1) of the *Income Tax Act* which provides for the charge to tax and the income chargeable to tax as below;

> " 3 Charge of Tax
>
> (1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya."

20. The Appellant submitted that there was no income which accrued in or was derived from Kenya by the Appellant by virtue of the advance payment of Kshs. 330,537,997 to Auditel Spain therefore no tax may be recovered from the Appellant on income which does not fall within the ambit of this charging section as there were no gains or profits derived by the Appellant from Kenya.

21. The Appellant therefore submitted that the Respondent erred in treating the payment made to Auditel Spain as income which accrued in or was derived from Kenya by the Appellant as it is clear that Auditel Kenya did not earn any income for services rendered but rather Auditel Spain did.

22. The Appellant further submitted that the Respondent erred in confirming the assessment of Corporation tax despite the explanation provided by the Appellant that the income was not recognized in the books of the Appellant in accordance with the International Financial Reporting Standards on Revenue Recognition (IFRS 15).

23. The Appellant noted that IFRS 15 stipulated that an entity should recognize revenue in a manner that depicts the pattern of transfer of goods and services to customers and that the amount recognized should reflect the amount to which the entity expects to be entitled in exchange for those goods and services.

24. Therefore, the Appellant asserts that there was no performance of services or supply of goods by the Appellant to MOSCA but rather the services were provided by Auditel Spain to MOSCA. The advance payment made to Auditel Spain was consideration for services rendered by Auditel Spain and was therefore not recognizable as revenue by the Appellant hence the Appellant is not liable to account for the Corporation tax assessed by the Respondent.

25. The Appellant further submitted that the Respondent misdirected itself in determining that the payment was made to the Appellant in relation to services performed by the Appellant despite the explanations provided by the Appellant referencing the contractual arrangement between Auditel Spain and the Ministry of Sports, Culture and Arts. Furthermore, the Appellant did not receive the payment from MOSCA therefore no tax is due from the Appellant in respect of this transaction.

26. The Appellant's third ground of appeal is that the Respondent erred in law and in fact in upholding its assessment of VAT on imported services as due from the Appellant resulting in the tax demand of Kshs. 85,254,781.00 yet the obligation to pay VAT on imported services lied with the importer and therefore the amounts were due from the recipient of the imported services in respect of Value Added Tax yet the Appellant had demonstrated that the obligation to pay VAT on imported taxable services lies with the importer.

27. The Appellant submitted that the Respondent failed to consider the role of the parties in the contract for provision of services and therefore erroneously determined that the Appellant was obligated to pay VAT on the services provided by Auditel Spain to the Ministry of Sports, Culture and Arts (MOSCA) yet MOSCA was the importer of the services and not the Appellant.

28. The Appellant noted that while imported taxable services are subject to VAT, the Respondent misdirected itself on the party obligated to remit VAT on these services. Section 5 of the VAT Act provides that –

> "(1) A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on-
>
> (a) a taxable supply made by a registered person in Kenya;
>
> (b) the importation of taxable goods; and
>
> (c) a supply of imported taxable services"

29. The Appellant relied on Section 2 of the *Value Added Tax Act* which provides that-

> "supply of imported services" means a supply of services that satisfies the following conditions-
>
> (a) the supply is made by a person who is not a registered person to any person;
>
> (b) the supply would have been a taxable supply if it had been made in Kenya;and
>
> (c) in the case of a registered person, the person would not have been entitled to a full amount of input tax payable if the services had been acquired by that person in a taxable supply;

30. The Appellant therefore noted that the Respondent erred in disregarding the provisions of the *Value Added Tax Act* which provides that the importer of taxable services is liable to pay VAT on this supply specifically Section 5(6) of the *Value Added Tax Act* stipulates that:-

> "Tax on the supply of imported taxable services shall be liability of any person receiving the supply and subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply."

31. The Appellant submitted that there is no lawful basis for the assessment of VAT by the Respondent on the Appellant in respect of the imported services. The obligation to account for and pay VAT on the imported services lies with MOSCA and not the Appellant.

32. That in light of these facts, the Appellant submitted that the Respondent erred in disregarding the provisions of the *Value Added Tax Act* and determining that the Appellant was obligated to pay VAT in the amount of Kshs. 85,254,781.00.

33. The Appellant's fourth ground of appeal is that the Respondent erred in law and in fact in failing to consider the functional profile of the Appellant vis-à-vis the functional profile of the parent company of the Appellant in respect of the provision of the taxable services which were provided by Audite1 Spain and not the Appellant.

34. The Appellant noted that the Respondent failed to consider the fact that the taxable basis of the Corporation tax and VAT assessment was Kshs. 330,537,997.00 which was directly and wholly paid out to Auditel Spain and not the Appellant. The Appellant further noted that the Respondent disregarded the fact that the Appellant, Auditel Kenya, being the branch, undertook the onshore component of the contract whereas the head office being Auditel Spain undertook the offshore component being the feasibility study and pre-planning of the project.

35. That therefore, the Appellant submitted that the Respondent erred in overlooking the nature of the contract which apportions the performance of services between the Appellant and Auditel Spain and consequently, the amounts paid to Auditel Spain by MOSCA were paid with respect to services performed by Auditel Spain in the initial phase of the project.

36. That in light of these facts, it is clear that the Respondent misapprehended the role of the Appellant in the performance of the contractual obligations and arrived at the incorrect conclusion that the payment to Auditel Spain in the period of 2017 was made to the Appellant for services supplied by the Appellant, Auditel Kenya. As such, the taxes assessed by the Respondent are without legal justification and should be set aside.

37. The Appellant's fifth ground of appeal is that the Respondent erred in law and in fact in rejecting the objection lodged by the Appellant on the basis that the Appellant had failed to avail the requisite documents yet the Appellant was not the importer of the services in question nor the recipient of the services hence the Appellant could not reasonably be expected to produce the documents not within its custody.

38. The Appellant noted that the Respondent misconstrued the role of the Appellant and in the absence of any justifiable basis treated the Appellant as the importer of taxable services on account that no documents were supplied. The Appellant submitted that the Respondent erred in demanding documents in the hands of a third party from the Appellant as the taxpayer can only produce documents in its custody and relating to transactions undertaken by it.

39. That therefore, the Respondent erred in requiring the Appellant to produce documents in respect of offshore services undertaken by Auditel Spain and the resultant payments made by the Ministry of Sports, Culture and Arts yet the Appellant was not party to this transaction between Auditel Spain and MOSCA.

40. In light of the foregoing, the Appellant averred that the Respondent erred in issuing its decision confirming its assessment of Kshs. 285,070,671.00 in respect of Corporation tax and VAT on payment proceeds which were not paid to the Appellant therefore, no taxes are due in respect of these external transactions which did not include the Appellant.

41. It is therefore the Appellant's case that the issuance of the demand notice dated 22nd June 2022 and the subsequent objection decision dated 8th September 2022 in respect of the demand of payment of VAT and Corporation tax was without legal basis.

42. The Appellant therefore prays that this Honourable Tribunal finds in favour of the Appellant and vacates the tax demand issued by the Respondent on 8th September 2022 in the amount of Kshs. 285,070,671.00 with costs to the Appellant.

43. The Appellant submitted that there was no income which accrued or was derived from Kenya by itself by virtue of the advance payment of Kshs. 330,537,997.00 to Auditel Spain. Therefore, no tax liability can be imposed on the Appellant on income which does not fall within the ambit of this charging section as there were no gains or profits derived by the Appellant from Kenya.

44. The Appellant submitted that the Respondent erred in treating the payment made to Auditel Spain as the Appellant's income.

45. The Appellant further submitted that the Respondent erred in confirming the assessment of Corporation tax despite the explanation by the Appellant that the income was not recognized in the books of the Appellant in accordance with the International Financial Reporting Standards on Revenue Recognition (IFRS 15).

46. The Appellate submitted that IFRS (15) provides a single, principle-based five step model to be applied to all contracts with a customer:

    i. Identify the contract with a customer.

    ii. Identify the separate performance obligations in the contract.

    iii. Determine the transaction price.

    iv. Allocate the transaction price to the separate performance obligations.

    v. Recognise revenue when (or as) each performance obligation is satisfied.

47. The Appellant submitted that the IFRS (15) stipulates that an entity should recognize revenue in a manner that depicts the pattern of transfer of goods and services to customers and that the amount recognized should reflect the amount to which the entity expects to be entitled in exchange for those goods and services.

48. The Appellant further submitted that the Respondent erred by failing to predicate its decision on material facts and relevant provisions of the law in assessment of Corporation tax on income accrued outside Kenya.

49. That to this end, the Appellant submitted that the Respondent's attempt to expand the meaning of income beyond the limits of the statute is unlawful, this Honourable Tribunal should be guided by the court's decision in Keroche Industries Limited -versus- Kenya Revenue Authority & 5 Others (2007) eKLR in which the Court cited with approval the dictum of Lord Simonds in Russell -versus- Scott (1948) which states:

> "........ there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him"

50. The Appellant further submitted that the Respondent erred in law and in fact by failing to apply the doctrine of strict interpretation of taxing statutes in assessing the Appellant's tax liability. The rule of the thumb for interpretation of tax statutes is that they must be strictly construed.

51. That to this end the Appellant relied on the Court's holding in Republic V Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd (2012) eKLR where the court cited

with approval the case of Cape Brandy Syndicate -versus- Inland Revenue Commissioners (1921) in which it was held that:-

> " In a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no reason for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in,nothing to be implied. One can only look fairly on the language used."

52. That to this end, the Appellant submitted that the Respondent erred in disregarding the provisions of the *Value Added Tax Act* and in determining that the Appellant was obligated to pay VAT in the amount of Kshs. 85,254,781.00.

53. The Appellant submitted that the Respondent erred in overlooking the nature of the contract which apportions the performance of services between the Appellant and Auditel Spain and consequently, the amounts paid to Auditel Spain by the Ministry were paid in respect of services performed by Auditel Spain in the initial phase of the project.

54. The Appellant relied on this Tribunal's holding in the case of Man Diesel and Turbo SE Kenya-vs-Commissioner of Domestic Taxes (Judgment Appeal No. 26 of 2017) where the Tribunal in dismissing the assessment by the Respondent made a distinction between the onshore and offshore work in attribution of income to the Appellant. The Tribunal quoted the decision made in the case of Ishikawajima Harima Heavy Industries Ltd.-vs-DIT (2007)(288 ITR 408) (SC) as follows :-

> " The contract involved : (i) offshore supply, (ii) off-shore services (iii) on-shore supply (iv) on-shore services and (v) construction and erection. At issue was whether the amounts received/receivable by the applicant from Petronet LNG for offshore supply of equipment, materials etc. are liable to tax in India
>
> It was held that:
>
>> "What is to be taxed is profit of the enterprise in India, but only so much of them as is directly or indirectly attributable to that permanent establishment. All income arising out of the turnkey project would not therefore be assessable in India. It is stated that the term "directly or indirectly attributable" indicates the income that shall be regarded on the basis of the extent appropriate to the part played by the permanent establishment in those transactions. The permanent establishment here has had no role to play in the transaction that is sought to be taxed, since the transaction took place abroad."

55. That based on the case cited above, the Appellant further submitted that the Respondent misapprehended the role of the Appellant in the performance of the contractual obligations and arrived at the incorrect conclusion that the payment made to Auditel Spain in the period of 2017 was made to the Appellant.

56. The Appellant submitted that the Respondent erred in demanding from the Appellant documents which were in the hands of a third party, as a taxpayer can only produce documents in its custody and relating to transactions undertaken by it.

57. The Appellant further submitted that the Respondent erred in requiring the Appellant to produce documents in respect of offshore services undertaken by Auditel Spain and the resultant payments made by the Ministry yet the Appellant was not party to this transaction.

Appellant's Prayers

58. The Appellant prayed for orders, that:

    a. The Respondent's Objection decision dated 8th September 2022 be hereby set aside;

    b. The tax demand issued by the Respondent in respect of Value Added Tax and Corporation tax in the total amount of Kshs. 285,070,671.00 and the accrued penalties and interest thereon is without legal basis and is hereby vacated; and

    c) Costs of this Appeal be awarded to the Appellant.

Respondent's Case

59. The Respondent's case is premised on its Statement of Facts dated and filed on 22nd November 2022.

60. The Respondent contended that the Appellant was awarded a contract by the Ministry of Sports Culture and Arts (MOSCA) in September 2017 for the design, supply, testing, commissioning and supervision of security, access control, communications, audio-visual and pitch lighting systems for five stadiums in Kenya.

61. The Respondent averred that the tender was worth Kshs 1,609,037,145.00 and it provided for a 20% advance payment equivalent to Kshs 330,537,997.00 for commencement of the project.

62. That consequently, the Respondent carried out an audit of the VAT and Income tax returns of the Appellant for the period January to December 2017, and it was established that the Appellant had filed nil returns.

63. That on 22nd June, 2022 the Respondent issued the Appellant with additional assessment for VAT and Income tax for the undeclared sales of the advance payment.

64. That on 21st July, 2022 the Appellant filed an objection opposing the whole assessment.

65. The Respondent requested the Appellant vide emails dated 22nd August, 2022 and 5th September, 2022 to provide evidence and explanations of the various issues raised in its objection. That however, the Appellant failed to provide the requisite documents.

66. The Respondent thus on 8th September, 2022 issued the Appellant with its objection decision rejecting the Appellant's objection in toto.

67. The Respondent asserted that it requested the Appellant to provide the following documents but it did not avail:

    i. Tender document and contract

    ii. Bank Statements for 2017 and 2018

    iii. Audited accounts for 2017 year of income

68. The Respondent asserted that the Appellant was reticent notwithstanding the fact that the information contained in the above documents, would have ascertained who was awarded the tender and further, clarified on who was in receipt of the proceeds of the advance payment.

69. The Respondent therefore relied on Section 59 (1) of the Tax Procedure Act 2015 which required the Appellant to provide records to enable the Respondent determine its tax liability. The Respondent was subsequently compelled to reject the Appellant's Objection Application because of the failure of the Appellant to avail its records.

70. The Respondent stated that pursuant to Section 56 of the TPA and Section 30 of the *Tax Appeals Tribunal Act*, the burden of proof lies on the Appellant to demonstrate that it had discharged its tax liability. The Respondent stated that this burden was never discharged as no documentary evidence was availed to the Respondent for the year 2017 to enable it render a meritorious decision in the circumstances.

71. The Respondent therefore stated that the Income and VAT assessments were proper and should be upheld by this Honourable Tribunal.

Respondent's Prayers

72. The Respondent's prayed to this Tribunal for orders:

    a. That it upholds the Respondent's 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 of merit

Issues for Determination

73. The Tribunal having evaluated the pleadings and submissions of the parties is of the view that there is only one issue that calls for its determination; Whether the Respondent assessment was justified.

Analysis and Findings

74. The Tribunal having determined the issue falling for its determination proceeds to analyse it as hereunder.

75. The crux of this dispute is based on whether the Appellant was able to prove that income was indeed not paid to it by the Ministry of Sports, Culture and Arts (MOSCA) but to Auditel Spain. The Appellant averred that the Respondent had failed to consider its contractual arrangement between itself and Auditel Spain whom which relevant payments were remitted to.

76. The Tribunal notes that its the Appellant's entire case that the Respondent failed to consider its contractual arrangement between Auditel Spain and itself and their appertaining obligations thereto. The Appellant submitted the facts of their engagement to be as follows:

    a. That Auditel Spain entered into a contract with the Ministry of Sports, Culture and Arts (MOSCA) for the design, supply, testing, commissioning and supervision of security, lighting, communication, audiovisual and access control systems for five stadiums in Kenya;

    b. That the contract comprised two components - the offshore component -which involved the feasibility study and pre-planning of the project which was carried out by the head office-Auditel Spain and; the onshore component which involved the actual implementation of projects by Auditel Kenya.

    c. That contract provided for an advance payment of 20% of the contract amount which is equivalent to Kshs. 330,537,997.00 to cater for the offshore component of the project which was the preliminary portion of the project prior to implementation by Auditel Kenya.

d. That Auditel Spain performed the services agreed upon and was paid Kshs.330,537,997.00 by MOSCA as agreed upon in the contract.

77. The Appellant argued that there was no income which accrued or was derived from Kenya by it since by virtue of the advance payment to Auditel Spain, no tax liability can be imposed on the Appellant on income which does not fall within the ambit of its charging Section since no gains or profits were derived by the Appellant from Kenya.

78. The Respondent submitted that it requested for the following documents from the Appellant and the Tribunal finds that there is no proof that the same was provided by the Appellant.

a. Tender document and contract

b. Bank Statements for 2017 and 2018

c. Audited accounts for 2017 year of income

79. The Tribunal notes that the Appellant failed to produce its contract with Auditel Spain and as such, the Respondent was not able to ascertain its contractual arrangements and obligations between the two parties. The Appellant averred that the contract had two components, the offshore and onshore component with each party carrying out different roles. However, the Appellant was not able to support these assertions with the absence of said contract. It followed that the Respondent was not able to ascertain the level of performance of Auditel Kenya as far as the contract is concern.

80. The Tribunal also notes that the Appellant neither provided its bank statements for 2017 nor 2018 for the Respondent to indeed confirm that it did not receive the advance payment or part of it. In the absence of such demonstration the Tribunal finds that the Appellant acted contrary to Section 56 of the TPA and Section 30 of the *Tax Appeals Tribunal Act*.

81. The Tribunal is also guided by Section 59 (1) of the Tax Procedure Act 2015 which required the Appellant to provide records to enable the Respondent determine its tax liability. The Section states as follows:-

> " 1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law,
>
> The Commissioner or an authorised officer may require any person,by notice in writing,to-
>
> (a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
>
> (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice;or
>
> (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person."

82. The Tribunal is guided by the holding in the case of Alfred Kioko Muteti vs. Timothy Miheso & another [2015] eKLR where the court held that:-

> " a party can only discharge its burden upon adducing evidence. Merely making pleadings is not enough". In reaching its findings, the Court stated that: "Thus, the burden of proof lies on the party who would fail if no evidence at all were given by either party.... Pleadings are not evidence...."

83. In Tax Appeal Number 353 of 2018 Rumish Limited vs. Commissioner of Domestic Taxes at paragraph 51, the Tribunal stated that:-

> " Additionally, Section 30 of the *Tax Appeals Tribunal Act* places the burden of proof on the taxpayer to submit all the necessary documentation to support its case. The same position was held by the court in Metcash Trading Limited-vs Commissioner for the South African Revenue Service and Another Case CCT 3/2000, where it was held that:
>
> > 'But the burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently, the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand'"

84. The issue of burden of proof under Section 30 of the TAT Act was clarified by the High Court in Primarosa Flowers Ltd -vs Commissioner of Domestic Taxes (2019)eKLR, where it was held that:-

> " In tax disputes, the taxpayer must satisfy the burden of proof to successfully challenge the income tax assessment. The onus is on the taxpayer in proving that the assessment excessive by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied."

85. The Tribunal is therefore persuaded that the Appellant failed to discharge the burden of proof placed upon it and therefore demonstrating that the Respondent's assessment was justified.

Final Decision

86. In view of the foregoing, the Tribunal finds that the Appeal is unmeritorious and accordingly proceeds to make the following Orders:-

    a. That the Appeal be and is hereby disallowed.

    b. That the Objection decision dated 8th September 2022 be and is hereby upheld.

    b) Each party to bear its own cost.

87. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2024

ERIC NYONGESA WAFULA - CHAIRMAN

EUNICE NG'ANG'A - MEMBER

DR RODNEY O. OLUOCH - MEMBER

CYNTHIA B. MAYAKA - MEMBER

ABRAHAM K. KIPROTICH - MEMBER

BERNADDETTE GITARI - MEMBER