

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO 485 OF 2019

TETU BEVERAGE COMPANY..... APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is registered under the Registration of business names Act, Cap 489 of the Laws of Kenya. The business name was registered on 11th August 1995 with Silvester Wangombe Nderi and Alexander Nderi Wangombe as the owners T/A Tetu Beverage Company.
2. The Respondent is a principal officer of the Kenya Revenue Authority, a public body, duly established under the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya whose primary duty is the collection and accounting for Government Revenue.
3. The Respondent issued a demand notice dated 4th October 2018 indicating that the Appellant had made sales in the FY 2014, 2015, 2016 and 2017 as VAT amounting to Kshs 317,784,564.18. The letter indicated that a total of Kshs 118,020,982.00 had been assessed inclusive of interest as income tax from under declared income. The assessments for the same were dated 4th October 2018.

4. The Appellant objected to the assessments and which objection was acknowledged by the Respondent on 19th February 2019. Subsequently, the Respondent confirmed the assessments on 26th September 2019.
5. Aggrieved by the Respondent's confirmed assessments, the Appellant filed this Appeal on 4th November 2019.

THE APPEAL

6. The Appellant raised this Appeal against the decision and supported by an affidavit by Alexander Nderi Wangombe based on the grounds that:-
 - i. The additional incomes and taxes as shown on table 9 are unfair, illegal, exaggerated and unreasonable, and requests for an amendment to nil or have them vacated.
 - ii. That annexed to the Appeal is a copy of the certificate of registration which they had furnished the Commissioner to prove that the company was initially registered as Partnership between the late S. W. Nderi and the current Proprietor Alexander Nderi Wangombe.
 - iii. It is not fair for the Commissioner to infer a legal form which cannot be authenticated by a formal registration.
 - iv. That the taxpayer has filed and paid his taxes to date.
 - v. That the estimated Corporation taxes have been derived from the VAT returns focusing only on output and totally ignoring the input. This shows an aspect of incompetence or it was designed to serve some other purposes.

vi. That the additional assessments for the year 2014, 2015, 2016 and 2017 as detailed in the hereunder table. Columns one and two show the exaggerated additional incomes based on return on sales for VAT which is extremely unfair to the Appellant, while columns three and four show the returned incomes and taxes.

Year	Additional Assessment Kshs.	Tax Kshs.	Returned Income Kshs.	Self-Assessed Tax Kshs.
2014	35,859,584	10,757,875.20	597,183.97	106,344
2015	89,082,561.40	26,724,768.42	1,114,479.05	261,533
2016	97,354,249.78	29,206,274.93	583,739.02	102,308
2017	95,488,169	28,646,450.70	(121,769.07)	nil

- vii. That it is therefore clear that if it were not for the Commissioner's inference Mr. Alex Nderi Wang'ombe would have no additional tax to pay, because Tetu Beverage Company is a business name.
- viii. That the additional assessments are illegal because the inferred legal entity does not exist.
- ix. That the objections raised by the Taxpayer's Agent against the Commissioner's additional assessments had stated the reasons for the objections,
- x. That there were no reasons advanced for the rejections of the Taxpayer's objections.

- xi. That the Appellant cannot read positive intentions for the Commissioner's Officers from Nyeri motivated by ill intention and malice all geared towards collection. This is so because despite its spirited effort to convince them to abandon or vacate the assessments they chose to ignore the Appellant's explanations.

THE APPELLANT'S CASE

7. The Appellant made the following submissions in support of its case:-
8. It was the Appellant's submission that the business name Tetu Beverage Company was registered as a partnership between Alexander Nderi Wangombe and the late S. W. Nderi in 1995 until 2001 when the later opted out of the partnership and left the former to run the business as a sole proprietor. The Appellant continued to do so under the partnership name and the entire income was taxable to him alone.
9. According to the Appellant, sometime in 2008, the Partnership PIN which he used to file VAT had a problem which made payment of tax impossible. The banks were unable to accept payment made through the old partnership PIN thus prompting him to seek help from the Commissioner's office to facilitate payment of VAT. The matter was resolved through issuance of the new PIN given by the Respondent.
10. The Appellant submitted that the payment of VAT problem was solved through creation of a new PIN and hence the current PIN number P051318231Y which the taxpayer continues to use. The Appellant stated that he did not realize that the

new PIN had changed the legal form of the partnership business and hence the genesis of his problems.

11. The Appellant averred that sometime in October 2018, the Respondent reviewed the partnership PIN and identified Tetu Beverages Company PIN as a non-filer for Income tax purposes.
12. It was the Appellant's case that the PIN had been issued to a wrong legal person. He argues that this was despite the fact that he furnished the Respondent with all the necessary documents for the business including the Certificate of Registration and the VAT certificate. Despite this, the Respondent continued to issue additional assessments based on a limited liability company without ascertaining its existence.
13. The Appellant submitted that he raised an objection to the additional assessments made based on a non-existence company which was consequently rejected by the Respondent and hence the Appeal herein.
14. It was the Appellant's submission that if a partnership is not converted into another legal form through registration and one of the partners opts out either naturally or through resignation, it automatically ceases being a partnership and becomes a sole proprietorship.
15. According to the Appellant, the Respondent's witness, Winnie, did not understand that it is not possible to infer a legal person without the necessary registration documents.

16. The Appellant averred that the Respondent's witness statement alleged that the Appellant had not furnished the team with the documents. However, the Appellant stated that it had furnished all the documents requested which included some selected accounts such as motor running costs, repairs and maintenance etc.
17. It was the Appellant's assertion that to avoid future confusion in the matter, it would be reasonable to delete the Partnership PIN in favour of the individual PIN, then assign all his tax obligations to his individual PIN.
18. The Appellant stated the following additional assessments were assessed on a non-existent corporate body:-
 - YEAR 2017 Assessment Notices No. KRA201913676430
 - YEAR 2016 Assessment Notices No. KRA201913676390
 - YEAR 2015 Assessment Notices No. KRA201913676358
 - YEAR 2015 Assessment Notices No. KRA201913676332
19. The Appellant stated that all the assessments were raised for other legal form and not the taxpayer.
20. Further the Appellant urged the Tribunal to vacate the same and uphold the Appellant's returns already paid for under the PIN A002325774Y:-

Year	Additional Assessment Kshs.	Tax Kshs.	Returned Income Kshs.	Self-Assessed Tax Kshs.
2014	35,859, 584	10,757,875.20	597,183.97	106,344
2015	89,082,561. 40	26,724,768.42	1,114,479.05	261,533
2016	97,354,249.78	29,206,274.93	583,739.02	102,308
2017	95,488,169	28,646,450.70	(121,769.07)	nil

21. The Appellant submitted the table below to demonstrate that figures assessed by the Respondent were the same as figures filed by it:-

<i>Year</i>	<i>2017</i>	<i>2016</i>	<i>2015</i>	<i>2014</i>
	<i>Kshs.</i>	<i>Kshs.</i>	<i>Kshs.</i>	<i>Kshs.</i>
<i>sales as per accounts</i>	101,756,520	97,397,284	89,080,181	67,378,403
<i>cost of Goods Sold</i>	<u>98,055,677</u>	<u>94,295,281</u>	<u>86,096,775</u>	<u>64,114,661</u>
<i>Gross Profit</i>	3,700,843	3,102,003	2,988,406	3,263,742
<i>Matatu Income</i>	3,825,445	5,934,316	6,950,262	4,571,600
<i>Dividend & Interest Inc</i>	<u>325,320</u>	<u>362,793</u>	<u>125</u>	<u>2,200</u>
<i>Net Income before expenses</i>	7,851,608	9,399,112	9,938,793	7,837,542
<i>Total expenses</i>	<u>7,648,186</u>	<u>8,453,003</u>	<u>8,791,115</u>	<u>7,238,595</u>
<i>Net Profit (income)</i>	<u>203,186</u>	<u>946,109</u>	<u>1,147,678</u>	<u>598,946</u>

22. According to the Appellant, the above rearranged data demonstrate that the taxpayer had filed and paid its taxes.

23. The Appellant submitted that on cross examination it was confirmed that the Respondent witness was unable to authenticate the legal form they had assessed with a formal registration.
24. It was the Appellant's averment that the estimated Corporation Taxes had been derived from the VAT returns focusing only on output and totally ignoring the inputs and related expenses and hence the estimates are grossly overstated and meaningless.
25. It was the Appellant's submission that the additional assessments for the years 2014, 2015, 2016 and 2017 as per the table in Paragraph 19 on columns one and two shows the exaggerated additional incomes based on returned sales for VAT which the Appellant's submits were unfair to the taxpayer, whereas columns three and four shows the returned income and taxes paid.
26. The Appellant concluded by submitting that were it not for the Commissioner's inference, he had no additional tax to pay as Tetu Beverage Company is merely a business name. The Appellant added that the additional assessments are illegal as the inferred legal entity does not exist and that the PIN should be deleted.

THE APPELLANT'S PRAYERS

27. The Appellant's prays that:
 - a) The Tribunal rules in his favour and orders the Respondent to amend its records on the tax liability on "Tetu Beverage Company Limited" because it does not exist.

- b) The Tribunal uphold the tax returns filed under the A Pin for Alex Nderi Wang'ombe.
- c) Order the Commissioner to abandon or vacate the assessments.

THE RESPONDENT'S CASE

28. The Respondent opposed the Appeal relying on the Statements of Facts dated 4th December 2019, the filed list of documents dated 26th January 2021, the witness statement dated 26th January 2021, written submissions and the cited authorities.
29. The Respondent averred that the decision to arrive at the assessment was justified and had basis in law. It explained that according to the Income Tax Act, it is the responsibility of any person carrying on business to maintain records of all transactions. It further stated **that Income Tax Act Part II on Imposition of Income Tax** provides that:
- “3 (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.*
- (2) Subject to this Act, income upon which tax is chargeable under this act is income in respect of-*
- (A) gains or profit from-*
- (i) a business, for whatever period of time carried on;”*

30. According to the Respondent, the **Tax Procedures Act** further provides that it is the responsibility of a taxpayer to file returns as per Section 24 which provides as hereunder:

“(1)A person required to submit a tax return under a tax law shall submit the return in the approved form and in the manner prescribed by the Commissioner.

(2)The Commissioner shall not be bound by a tax return or information provided by, or on behalf of, a taxpayer and the Commissioner may assess a taxpayer’s tax liability”

31. The Respondent further avers that the burden of proof lies on the Appellant who failed to meet the provisions of **Section 56 (1)** of the **Tax Procedures Act 2015** which provides that:

“The burden shall be on the taxpayer to prove that a tax decision is incorrect.”

32. The Respondent avers that the Appellant’s grounds of Appeal are not sufficient as the Appellant failed to provide any evidence contrary to the basis of the Respondent’s assessment.

33. According to the Respondent, the Appellant made sales in the financial year 2014 to 2017 as VAT returns amounting to Kshs 317,784,564.18 in which assessment and subsequent demands were made.

34. It is the Respondents’ contention that the Appellant objected to the assessment but failed to support the objection with sufficient reasons and neither did they avail any documentation to support their objection. In opposing the Appeal, the

Respondent states that the decision to arrive at the assessment was justified and had a legal basis.

35. The Respondent submitted that there are 4 issues for determination listed as hereunder:

- a) Whether the Respondent was justified in raising the disputed assessment given the fact that the Appellant had not filed any returns.
- b) Whether the Appellant has proved that the accounts were filed based on erroneous accounts.
- c) Whether the Appellant's status affects his tax obligations under the law?
- d) Whether the Respondent's decision was justified and within the law?

a) **Whether the respondent was justified in raising the disputed assessment given the fact that the Appellant had not filed any returns.**

36. The Respondent submitted that it is undisputed that the Appellant failed to file his returns for the financial year 2014 to 2017 despite having declared VAT sales amounting to Kshs. 317,784,564.18.

37. The Respondent further submitted that it requested the Appellant to furnish it with records in support of its objection which included audited accounts, bank statements, loan statements, purchases ledger, sales ledger, expenses ledger and supporting invoices and VAT ledger accounts. According to the Respondent, the Appellant failed to supply the documents requested and hence the objection decision to confirm the assessment.

38. The Respondent averred that it is the responsibility of any person carrying on business to maintain records of all transactions. The Respondent relied on the provisions of The **Income Tax Act Part II on imposition of income tax** that provides as follows:-

“3(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 which all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya

(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of-

(a) gains or profits from-

(i) a business, for whatever period of time carried on;”

39. The Respondent further cited **Section 24** of the **Tax Procedures Act** that also provides as follows:-

“(1)A person required to submit a tax return under a tax law shall submit the return in the approved form and in the manner prescribed by the Commissioner.

(2)The Commissioner shall not be bound by tax return or information provided by, or on behalf of, a taxpayer and the Commissioner may assess a taxpayer’s tax liability using any information available to the Commissioner.”

40. The Respondent avers that **Section 29 (1)** of the **Tax Procedures Act, 2015** provides for default assessment as hereunder:

“Where a taxpayer has failed to submit a tax return for reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his judgment, make an assessment...”

41. The Respondent asserted that its actions were justified since the Appellant did not file its returns for the period in dispute.
 42. According to the Respondent, since the Appellant failed to discharge its burden of proof required under **Section 56 (1)** of the **Tax Procedures Act**, the Respondent was constrained to confirm the taxes as per the demand as due and payable from the Appellant.
 43. The Respondent averred that the Appellant is required by law to pay taxes when they are due according to Section 19(1) of the VAT Act 2013 and that the law places the responsibility on a taxpayer to submit the return under tax law in the approved form and in the manner prescribed by law. It is therefore the responsibility of the Appellant to ensure the returns are not only filled in the prescribed form but are also accurately declared and filed according to the law.
- b. Whether the Appellant has proved that the accounts were filed based on erroneous accounts.***
44. It was the Respondent’s assertion that the Appellant’s testimony during the hearing that he has several PIN certificates, one as an individual and another as the ‘partnership’ ‘company’ and has therefore the responsibility of filing returns for both PINs as required by law.

45. It is also the Respondent's submissions that the Appellant knowingly filed his VAT returns under the 'P' PIN but failed to file income tax returns and instead purported to use the 'A' PIN where he had other incomes like the matatu business and dividends.
46. Further the Respondent also submitted that the Appellant admitted during the hearing that the profits and loss accounts for the years in question, 2014 to 2017, did not reflect the true position. The Respondent referred to the year 2017 when the Appellant made a gross profit of Kshs. 98,055,677.00 but the Appellant indicated that he had made losses.
47. The Respondent argued that Appellant failed to demonstrate how he filed returns on the 'A' PIN to the tune of the amount declared under the VAT head. Thus, it argued, the failure by the Appellant to avail evidence of properly filing his returns only leads to the conclusion that the tax demand by the Respondent is valid and was issued within the law given the circumstances.
48. The Respondent relied on the following provisions of law:

Section 54 of the **Income Tax Act** which provides as follows in relation to the documents to be included in return of income:-

“(1)Where any person who carries on any business makes a return of income for any year of income and accounts for his business for any accounting period relating to such year of income have been prepared or examined by another person in a professional capacity he shall furnish with such return of income:-

(a) A copy of such accounts signed by himself and such other person together with a certificate signed by such other person-

(i) Where such accounts were prepared of the books of accounts and documents from which the accounts were so prepared and

(ii) Stating whether and subject to what reservations, if any, he considers that such accounts present a true and fair view of the gains or profits from such business for accounting period;”

Section 59 of the **Tax Procedures Act 2015** states the following on production of records:

“59. (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 authorized 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 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.”

c. Whether the Appellant's status affects his tax obligations under the law?

49. The Respondent submitted that the Appellant admitted during the hearing that he has several PINs and a requirement he ought to file returns as required in law.
50. It is undisputed, the Respondent argued, that taxes were due from the Appellant notwithstanding his status, whether it is an individual, partnership or company, and the same have not been remitted to the Respondent.
51. According to the Respondent, it was the Appellant's testimony that he has been running a business alone since the father left the business and admitted not to have ever brought the same to the attention of the Respondent but continued doing business.
52. The Respondent avers that Income Tax was due from the Appellant and the same ought to have been declared and paid by Tetu Beverages the same way VAT was declared and paid. In the absence of the returns the Respondent was obliged to raise the assessments as it did.
53. The Respondent concluded by submitting that notwithstanding the Appellant's status it still has a tax obligation which has not been disputed by the Appellant and hence the Tribunal should not interfere with the Respondent's assessment.

d. Whether the Respondent's decision was justified and within the law?

54. It was the Respondent's assertion that the burden to prove that the tax assessment is wrong lay with the Appellant and he has evidently failed to prove to the

satisfaction of the Respondent that he was not under declaring his income in his annual returns and the monthly turnovers.

55. The Respondent referred to the case of **Mecash Trading Limited –VS- The Commission we for the South African Revenue Services and another, Constitutional Court of South Africa Case CCT 3/2000** where **Kriegler J** observed that the burden of proving that as assessment of VAT by the tax collector was wrong belonged to the merchant, stating as follows in Paragraph 22 of his Judgment:-

“Manifestly Section 31 constitutes a valuable weapon in the hands of the Commissioner. The prospect of having the commissioner independently assess both the underlying amount and the VAT that is to be paid thereon must in itself be a powerful disincentive for recalcitrant, dishonest or otherwise remiss vendors. But the compulsive force of this mechanism of the Act goes a good deal further. The dissatisfied vendor can, by lodging an objection under Section 32 of the Act and, that failing, by noting an Appeal Section 33 or 33A, both compel the Commissioner to reconsider afresh by an independent tribunal. 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 records it is obvious that the outcome of an objection of 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 on adverse credibility finding by the Commissioner; and by like token such 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 is precipitating credibility finding can be shown to be wrong, the consequential assessment must stand".

(Republic –VS- Kenya Revenue Authority & Another Ex-parte Pwani Oil Products Limited [2016] eKLR)

56. The Respondent further cited **Kasango J. in Sheria Sacco Limited –VS- Commissioner Domestic Taxes (2019) eKLR** who held that:

*"The SACCO however needs to appreciate that what the Tribunal was dealing with was an Appeal against the Commissioner's confirming notice that SACCO had taxes to pay. When one appreciates that the burden of proof lay on the SACCO. This is what is provided under **Section 30(b)** of the **Tax Appeals Tribunal Act**. The Section provides that:*

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."*

57. The Respondent stated that what comes out clearly is that the Sections allow the Appellant to provide documents to support his own allegation and verify the facts in his own assessment. It enables him to discharge the burden of proof, which anyone applying the rules of natural justice principle will uphold. However, the Appellant has failed to discharge the burden of proof placed upon it by law.
58. It was the Respondent's submissions the Appellant filed his profit and loss accounts but the same failed to prove his case. It also avers that the Appellant admitted to having failed to avail the necessary documents requested by the Respondent before confirmation of assessment.
59. The Respondent insisted that the Appellant did not avail the documents requested by the Respondent on numerous occasions. In line with its mandate, the Respondent collected the relevant information from third parties which formed the basis of its tax assessment.
60. The Respondent stated that **Section 24** of the **Tax Procedures Act** provides that it is the Responsibility of a taxpayer to file returns. The Section provides as follows:
*“(1) A person required to submit a tax return under a tax law shall submit the return in the approved form and in the manner prescribed by the Commissioner.
(2) The Commissioner shall not be bound by a tax return or information provided by, or on behalf of, a taxpayer and the commissioner may assess a taxpayer's tax liability using any information available to the Commissioner.”*

61. The Respondent cited the case of **Tudor and Onions –VS- Ducker (H.M. Inspector for Taxes) 1924 Kings Bench Division, 8. 591** in which **Rowlatt J.** held:-

“I need not trouble you Mr. Attorney. This case can really be disposed of very shortly. The Appellants are said to have contended that the returns as made by the accountant on their behalf should be accepted and the additional assessment discharged, but they produced no evidence either in support of their return of against the additional assessments, and admitted that their books of account for the years in question were not in existence in June of the year 1917. The Commissioners state: the question for the opinion of the Court is whether, in the absence of evidence in support of the Appeal, the Commissioners were right in confirming the additional assessments. Now I take it that they are simply repeating THE POINT THAT HERE IS AN ADDITIONAL assessment, and these people have only attacked it by producing a certificate of a discredited accountant, saying it ought to be taken in spite of what had happened, and the Commissioner said: “No, we want evidence,” and they did not get it, and therefore they confirmed the assessments. I think they were right”.

62. The Respondent reiterated that the law demands that the Appellant keeps records of account and should furnish the Commissioner when called upon to do so. It stated that the Respondent has consistently called upon the Appellant to produce the supporting documents the Commissioner requested to authenticate the same, but the Appellant has failed to do so.

63. The Respondent also referred to **Kilburn – VS- Bedford (H.M. Inspector of Taxes) 1995 Chancery Division, 36, p. 262**, the **Hon. Harman J** held:

“... As regards the extra tax imposed upon those figures it was for the Appellant to show that there was some reason why on the agreed figures tax should not be paid... the Commissioners merely had his statement. Other statements made by him and by his accountant showed that statements of his were quite unreliable, in the circumstances the Commissioners seem to have had enough and to have said: you have not discharged this burden, and therefore the assessment must stand. They were under no duty, in my judgment to take any other course.”

64. The Respondent concluded by submitting that its actions were justified and within the law and the Appellant has not suffered any injustice.

65. The Respondent urged the Tribunal to be guided by the above provisions of law and the findings of the Courts in the cited authorities to arrive at a conclusion that the Appellant did not discharge his burden of proof by failing to furnish the Respondent with the requisite documents and therefore the assessment by the Respondent was lawfully levied.

THE RESPONDENT’S PRAYERS

66. The Respondent made the following prayers:

- a. That the Tribunal upholds the Objection Decision as proper in law and in conformity with the provisions of the law.

- b. That the Appeal be dismissed with costs to the Respondent as the same is devoid any merit.

ISSUES FOR DETERMINATION

67. Having analysed the pleadings of the parties including the statement of facts, the Appeal, as well as the statements of the witnesses and any other evidence tabled before us, the Tribunal was of the view that the issues arising for determination from the Appellant's and the Respondent's cases are as follows:-

- i) What is the legal persona of the Appellant?*
- ii) Whether the Appellant had met his tax obligation.*

ANALYSIS AND DETERMINATION

i) What is the legal persona of the Appellant?

68. Tetu Beverage was registered in 1995 as per the availed certificate of registration of business name in the names of Alexander Nderi Wang'ombe and S. W Nderi as a partnership. The Appellant avers that in 2001, prior to his demise, the late S. W. Nderi left the partnership and Alexander Nderi Wang'ombe continued to run the business as a sole proprietor under the Partnership business name and the whole income was taxable to him as an individual.

69. The Appellant further argues that if a partnership is not converted into another form of business through registration upon the exit of a partner either naturally or through resignation it automatically ceases and becomes a sole proprietorship.
70. The Appellant produced a certificate of registration of a business. Further it is also the Appellant's evidence that the same certificate of registration is what they furnished the Respondent which it issued to register the new PIN in the year 2008.
71. The Respondent on its part seems to have issued the Appellant with a company PIN when he applied for a new one. This is despite the fact that there is no evidence of the business having been converted into a company. Further, the Respondent did not inform the Appellant that it had issued it a PIN that changed his legal persona and thus affected his compliance obligations.
72. Section 3(3) of the Income Tax Act provides that:
- “For the purposes of this Section –*
- (a) "person" does not include a partnership;”*
73. Based on the above, partnerships in Kenya are considered to be transparent entities. They do not exist as far as tax is concerned. It is the partners who account for taxes. Any taxes or returns filed by a partnership are purely for administrative purposes as they are not persons under the law. Companies on the other hand are persons who are deemed separate entities under tax law. Thus, they are required to account for their taxes separate from the shareholders. In this case, there is no evidence that the Appellant converted his business into a company. The evidence adduced indicates that he was of the view that having not incorporated his

business, he was still operating as a partnership or sole proprietor. Since he had not incorporated the business into a company, the additional tax obligations could not be placed upon merely because the Respondent without any authority had opted to give him a company PIN.

74. In conclusion, the Tribunal finds that the Appellant is not a corporate body and thus, a non-existent body could not have tax obligations or be assessed. Under the circumstances, the Tribunal finds that the Respondent erred in assessing the Appellant under the P051318231Y PIN.

ii) Whether the Appellant had met his tax obligation

73. Having established that there is no company registered by Alexander Nderu Wang'ombe, the Tribunal dealt with the question of whether the Appellant's had met his tax obligations.

74. It was Alexander Nderu Wang'ombe's evidence that he has been filing returns under his personal PIN **A002325774Y**. He avers that in doing so, he accounted for all taxes that were due. The Respondent on the other hand contends that the Appellant has been conducting business and filing NIL income tax returns under the PIN **P051318231Y** which was issued to the Appellant.

75. Having established that the Appellant was not a corporate body required to pay taxes, the question is if the Appellant had properly accounted for and paid his taxes under his personal PIN. The evidence tabled before the Tribunal indicates that the Appellant had indeed filed and accounted for his taxes. The Appellant produced

returns as well as financial statements that indicated that he had met his tax obligations. In so doing, we are of the view that the Appellant discharged his burden of proof. Once the taxpayer adduces evidence that discharges his burden, the burden shifts to the Respondent who must demolish such evidence. This view was held in Supreme Court of Canada's decision in **Hickman Motors Ltd. v. Canada**, [1997] 2 S.C.R. 336 the Court stated that:

“The taxpayer’s initial onus of “demolishing” the Minister’s exact assumptions is met where the appellant makes out at least prima facie case... Where the Minister’s assumptions have been “demolished by the appellant, “the onus.... shifts to the Minister to rebut the prima case” made out by the appellant and to prove the assumptions...The law is settled that unchallenged and uncontradicted evidence “demolishes” the Minister’s assumptions; ...Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed; and even if the evidence contained “gaps in logic, chronology, and substance”, the taxpayer’s Appeal will be allowed if the Minister fails to present any evidence as to the source of income.”

76. Attempts by the Respondent to rebut the evidence produced by the Appellant were weak at best with some of the arguments clearly based on what we can only assume was a deliberate misreading of the financial statements filed by the Appellant.
77. From the foregoing and in absence of a rebuttal to the above returns, Tribunal accounted for the taxes due under his personal PIN.

78. The Tribunal having established that there was no other entity that could be assessed in this case apart from the Appellant in his personal PIN No. A002325774Y hereby finds that the Appellant had met his tax obligations by filing Returns in his personal PIN and paying the resultant taxes.

FINAL DECISION

79. Accordingly, we find that the Appeal succeeds and make the following Orders:-

- a) The Respondent's confirmed assessments dated 26th September 2019 are hereby set aside.
- b) Each Party to bear its own costs.

80. It is so ordered.

DATED and DELIVERED at NAIROBI this 21st day of May, 2021.



ERIC N. WAFULA
CHAIRMAN



CATHERINE N. MUTAVA
MEMBER



ABRAHAM K. KIPROTICH
MEMBER



GABRIEL M. KITENGA
MEMBER