



CM ADVOCATES LLP



THE COURT OF APPEAL STOPS THE PENDULUM IN TAX DISPUTES: DEMYSTIFYING THE “MISSING TRADER” NARRATIVE

In a majority decision of the **Court of Appeal of Kenya** delivered on **15th May 2026** in [*Pearl Industries Limited vs. Commissioner of Investigations and Enforcement, Civil Appeal No. E0101 of 2022*](#), the Court delivered a landmark Judgment set to influence tax procedure and practice for years to come.

The appeal arose from the High Court’s decision in [*Commissioner of Investigations and Enforcement v Pearl Industries Limited \[2022\] KEHC 51 \(KLR\)*](#), where the Justice D.A.S. Manjanja considered questions regarding the evidentiary burden placed on Taxpayers and the extent of the Commissioner’s investigative powers under Kenya’s tax law framework. In summary the High Court held that it was incumbent upon a Taxpayer to substantiate the legitimacy of transactions forming basis of an application for refund. The Court also discussed the “shifting of the burden of proof” in tax matters, the court held as follows;

“...In this case, the pendulum of proof swung three times; the first was upon the Respondent (Pearl Industries Ltd), which it did by providing the documents requested by the Commissioner; the second shifted to the Commissioner, who after reviewing the documents challenged their authenticity and validity. This meant that the burden of proof finally swung back to the Respondent to prove that the Commissioner was wrong in its position and overall findings,”

The Court of Appeal’s Judgment of 15th May 2026 is particularly significant as it delineates the scope of the Commissioner’s powers to demand documentation and clarifies the evidentiary responsibilities that arise once such documentation has been provided and challenged.

Lately, Kenya Revenue Authority (KRA) appears to treat the absence or untraceability of a Taxpayer’s suppliers as “Missing Trader” as the basis for questioning the legitimacy of transactions by a Taxpayer. Section 15 of the Income Tax Act and Section 17 of the Value Added Tax (VAT) Act allows a Taxpayer to deduct expenditure incurred in the production of income. “Missing Trader” can be defined as a scheme by a Taxpayer involving invoicing without actual supply of goods.

Over the years, several cases have been filed before the Tax Appeals Tribunal, the High Court and the Court of Appeal touching on the concept of “Missing Trader”. From a Taxpayer’s perspective, the “Missing Trader” concept is neither define nor recognized under the Income Tax Act or the Tax Procedures Act and in the absence of statutory recognition, such a classification by KRA, cannot, of itself, form a lawful basis for disallowing deductible business expenditure.

On the other part, KRA has consistently held the position that in an application for a VAT refund, a registered supplier of VATable goods is expected,



CM ADVOCATES LLP

under Kenya's tax laws, to provide original ETR receipts, signed delivery notes and payment documents to enable the Commissioner establish whether the purchases took place in the first instance. The Commissioner once presented with these documents (if any) can uphold its decision to disallow the application if it suspects the VAT refund to be fictitious. That at this point, the burden of proof swings back to the Respondent to prove that the Commissioner was wrong in its findings.

The Court of Appeal has now clarified that where a Taxpayer complies with the provisions of Section 15 of the Income Tax Act and Section 17 of the Value Added Tax (VAT) Act by producing documentary evidence demonstrating that the expenditure was wholly and exclusively incurred in the production of income, the evidential burden does not remain static.

Once that evidence is placed before the Commissioner, the burden shifts to the Commissioner to demonstrate that the documents produced are not genuine, are unreliable, or are otherwise tainted by fraud or misrepresentation. Mere suspicion, inference drawn from the inability to trace suppliers, or reliance on the so-called "missing trader" concept, is insufficient to displace properly adduced documentary evidence.

In this regard, the Court of Appeal reaffirmed that tax assessments and disallowances must be anchored on evidence and statutory authority, and not on presumptions that effectively reverse the burden of proof onto a Taxpayer without legal basis. The decision therefore reinforces the principle that the pendulum of proof stops with Respondent once a Taxpayer complies with the provisions of Section 15 of the Income Tax Act and Section 17 of the Value Added Tax (VAT).

Ultimately, the Judgment signals a more disciplined approach to burden shifting in tax disputes: a Taxpayer must first establish a credible evidential foundation when called upon, after which the Commissioner bears the burden of rebuttal based on evidence rather than inference.

It will be interesting to see the steps the Commissioner of Investigations and Enforcement will take in response to this decision, particularly in light of its implications on ongoing and future tax disputes premised on the "Missing Trader" narrative. We anticipate that this matter may ultimately find its way to the Supreme Court. However, for the time being, the law as pronounced by the Court of Appeal remains settled and binding, and will continue to guide the Tax Appeals Tribunal and the High Court in similar disputes.

What we can do for you

At CM Advocates LLP, we advise and represent clients in complex tax disputes involving tax assessments, refunds, and investigations by the Kenya Revenue Authority (KRA). We assist clients in structuring their documentary evidence, responding to tax audits and objections, and challenging unlawful or unsupported assessments before the Tax Appeals Tribunal and superior courts. We also support clients in proactive tax risk management, ensuring that commercial transactions are properly documented and capable of withstanding regulatory scrutiny at every stage of review and litigation.

This write-up is for informational purposes only and should not be construed as a legal opinion or advise. If you have any queries or need clarifications, please do not hesitate to contact **Kelvin Mwaniki, Senior Associate** (kmwaniki@cmadvocates.com), or your usual contact at our firm, for legal advice.

Head Office Nairobi

I&M Bank House, 7th Floor, 2nd Ngong Avenue
T: +254 20 2210978 or +254 716 209673
P.O. Box 22588 – 00505, Nairobi Kenya
E: law@cmadvocates.com

Mombasa Office

Links Plaza, 4th Floor, Links Road, Nyali
T: +254 041 447 0758 / +254 41 447 0548
P.O. Box 90056 – 80100, Mombasa Kenya
E: mombasaoffice@cmadvocates.com

Regional Presence

Uganda | Tanzania | Rwanda | Zambia | Ethiopia | South Sudan

www.cmadvocates.com

Disclaimer: This publication is for informational purposes only and does not constitute legal advice. For tailored legal support, please consult our team.