

# Tax Case Summaries

## Select Tax Appeal Tribunal Decisions

Issue No. 3/2024





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## Preface

In this issue of tax case summaries, we continue to provide succinct summaries on the decisions issued by the TAT.

Whether you are a seasoned tax professional seeking to stay abreast of recent developments, a student delving into the intricacies of tax law, or a curious individual with a penchant for understanding the legal framework that governs our fiscal responsibilities, these case summaries provide a valuable resource.

The “Index” section highlights the key issue(s) under consideration by the TAT and is not an indication that the issue(s) highlighted are the only issues raised by the parties.

For a detailed analysis on any case and how it would affect your tax affairs, please look out for our tax alerts, reach out to your usual contacts or the following PwC tax team members.

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# East Africa Community Customs Management Act

## Tarif classification

### TAT 788/2022:

### Highland Drinks Limited vs Commissioner of Investigation & Enforcement

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#### Background

Highland Drinks Limited, the appellant, is a company involved in the manufacture and sale of carbonated soft drinks, drinking water, and cordials. The respondent, the Commissioner of Investigation & Enforcement, is a principal officer appointed under the Kenya Revenue Authority Act. The appellant applied under the Voluntary Tax Disclosure Programme (VTDP) declaring unpaid Value Added Tax, variances arising out of revenue and VAT returns, adjustments to tax losses, and unpaid principal Excise duty. The respondent conducted an audit of the appellant's transactions and issued findings demanding Value Added Tax, Corporation Tax, and Excise Duty. The appellant objected to the assessment, leading to the current appeal.

#### Issues for Determination

Whether the respondent lawfully reclassified the cordial drinks manufactured by the appellant. Whether the assessments in respect of VAT, Corporation tax, and Excise duty were excessive.

#### Appellant's Argument

The appellant argued that the respondent erred in using the appellant's sales volumes in charging Excise duty payable, failing to take into consideration the appellant's correctly declared dispatched volumes, and ignoring the actual sales volume and price. The appellant also claimed that the respondent erred in classifying the appellant's products, cordials as fruit juice under Chapter 20 of HS Code, and in failing to provide the appellant the sample laboratory test results and the tariff reclassification.

#### Respondent's Argument

The respondent maintained that it relied on the production volumes provided by the appellant to determine the Excise duty charged. It also argued that the appellant did not provide alternative workings and analysis or explanations to counter its computation on the variance noted between sales for purposes of domestic excise duty and sales for purpose of VAT and Corporation tax. The respondent

further argued that it lawfully reclassified the cordial drinks manufactured by the appellant based on laboratory findings.

#### Tribunal Findings

The tribunal found that the respondent lawfully reclassified the cordial drinks manufactured by the appellant. It also found that the assessment in respect of VAT, Corporation tax, and Excise duty was not excessive. The tribunal noted that the appellant was unable to adduce evidence during the Appeal to enable the tribunal ascertain whether the confirmed assessment of Kshs. 403,185,880.52 is excessive.

#### Tribunal's Decision

The appeal was dismissed, and the respondent's objection decision was upheld. Each party was ordered to bear its own costs.



## TAT 1274/2022:

### Kenya Biologics Limited vs Commissioner of Customs & Border Control

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#### Background

The case arose from a desk review conducted by the respondent, Commissioner of Customs & Border Control, on import entries of the appellant, Kenya Biologics Limited, for the period July 2016. The review revealed instances of use of wrong tariff classification on some of the appellant's imports particularly micronutrient preparations and Tutrack sticky papers. The appellant classified the micronutrient preparations and Tutrack sticky papers under Heading 31.05 and 38.08 instead of 38.24 and 39.19/48.1, respectively. The appellant objected to the findings and the respondent issued a review decision revising the assessment from Kshs. 16,119,665.00 to Kshs. 5,239,264.00. The appellant, aggrieved by the respondent's review decision, filed the appeal.

#### Issues for Determination

Whether the appellant's imports which it classified as fertilizers under Chapter 31 ought to have been declared under Chapter 38 as micronutrients - Whether the identity description and use is that of a fertilizer as declared by the appellant - Whether the imports are VAT exempt

#### Appellant's Argument

The appellant argued that the products in question are used and described as 'fertilizers' as demonstrated by the certificate of analysis from the manufacturer. The appellant maintained that the products contain nitrogen and amino acids as elements, which play a nutritional role in plants. The appellant disputed the respondent's decision to classify the products under Chapter 38 titled

'miscellaneous Chemical products', arguing that the products are organic fertilizers and therefore classifiable under Chapter 31. The appellant also argued that the respondent's imposition of high interest liability should be frowned upon.

#### Respondent's Argument

The respondent argued that the product by its description could not be categorized as fertilizer under Heading 31.05. The respondent submitted that the imports are not VAT exempt supplies as claimed by the appellant. The respondent did not support its position with either relevant provisions of the law or material to persuade the Tribunal that its reclassification of the product was justified.

#### Tribunal Findings

The Tribunal found that the respondent erred in classifying the appellant's imports under HS Code 38.24.99.90. The Tribunal held that based on the material provided by the appellant in support of classification of its import as fertilizer under Heading 31, specifically 31.02 and 31.05 and in the absence of compelling arguments to the contrary by the respondent, there is clearly no basis for reclassification of the imports under HS 38.24.

#### Tribunal's Decision

The Tribunal allowed the appeal, set aside the Commissioner's review decision dated 15th March 2022, and ordered each party to bear its own costs.

## TAT 184/2022:

# Solar Power Infrastructure Limited vs Commissioner of Customs and Border Control

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### Background

The appellant, Solar Power Infrastructure Limited, is a company that provides energy solutions through the supply of products and services, including solar energy products. The respondent, Commissioner of Customs and Border Control, conducted a review of customs entries of importers of solar water heating systems for November 2016 to October 2020. The respondent found that the solar water heaters were dual water heating systems classifiable under tariff 8516.10.00, which attracts an import duty of 25% and VAT, and not 8419.19.00. Consequently, the respondent issued a demand notice to the appellant for Kshs. 5,388,227.00. The appellant applied for a review, which resulted in the respondent confirming its position on the reclassification of the tariff. Dissatisfied with the review decision, the appellant filed the instant appeal.

### Issues for Determination

Whether the reclassification of the water solar water heaters infringed on the Appellant's right to legitimate expectation - Whether the solar water heaters are classifiable under Heading 84.19 or 85.16 - Whether the Respondent's Post Audit Department acted ultra vires

### Appellant's Argument

The appellant argued that the solar water heaters cannot be classifiable under Heading 85:16 but rather Heading 84:19. The appellant also claimed that the respondent failed to appreciate that in the event that the solar water heater with an electric backup could not be classified under both HSC 85:16 and HSC 84:19, the same could

only be classified under Rule 3 (b) of the W.C.O General Rules for Interpretation of the Harmonized System. The appellant further argued that the respondent infringed on its right of access to information provided under Article 35 of the Constitution of Kenya 2010 by not disclosing how the opinion of the World Customs Organization was arrived at.

### Respondent's Argument

The respondent maintained that the appellant's imported products have an electric component and are considered dual water heating systems which operate under both solar power and electricity and can operate solely on electricity or on solar energy. The respondent also stated that according to the GIR 1 to 6 and Explanatory Notes, the Appellants' imported solar water heating systems are classified under 8516.10.00.

### Tribunal Findings

The tribunal found that the solar water heaters imported by the appellant are most appropriately classifiable under Heading 8419. The tribunal held that the heaters are not electric water heating systems fitted with solar components, but solar systems fitted with electric accessories to enable them to function as electric heaters. The tribunal also found that the respondent's review decision dated 5th January 2022 should be set aside.

### Tribunal's Decision

The appeal was allowed, and the respondent's review decision dated 5th January 2022 was set aside. Each party was ordered to bear its own costs.



## TAT 342/2022:

### Positive Packaging Limited vs Commissioner of Customs & Border Control

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#### Background

The Appellant, Positive Packaging Limited, is a company incorporated in Kenya, primarily involved in the manufacturing of corrugated cartons. The dispute arose from a Post Clearance Audit (desk review) of the Appellant's imports covering the period July 2016 to August 2021. The Respondent, Commissioner of Customs & Border Control, claimed that the audit revealed a short levy of taxes due to the application of a duty rate of 10% instead of 25%. The Respondent demanded the short-levied taxes from the Appellant, whose liability was said to be Kshs. 4,570,500.00. The Appellant objected to the demand notice and applied for a review of the decision.

#### Issues for Determination

Whether the Respondent erred in reclassifying the Appellant's product. Whether the rate of duty for the imports under H.S Codes 4804.19.90 is 25% or 10%.

#### Appellant's Argument

The Appellant argued that there was no law imposing a duty rate of 25% on paper and paperboard products in the period between July 2016 and 31st August 2021. They claimed that the Respondent's actions violated their rights to fair administrative action, property, access to justice, and protection of the law. The Appellant also argued that the Respondent's decision to initiate a post-clearance

audit and issue the demand notice was actuated by malice, bad faith, and improper motive.

#### Respondent's Argument

The Respondent argued that the law adjusting the import duty rate from 10% to 25% was operational at the time the Appellant was importing its products. They claimed that the Kenyan tax regime is based on self-declaration and thus the Respondent carries out post clearance to verify the accuracy of declarations in the entries for imported goods. The Respondent also argued that the demand was valid and issued within the statutory timelines specified in Section 135(3) of the EACCMA.

#### Tribunal Findings

The Tribunal found that the Respondent erred in reclassifying the Appellant's product under review from HS code 4804.19.90 to HS Code 4805.91.00 and 4805.92.00. The Tribunal also found that there was no valid Gazette Notice between 2014 and 2021 that adjusted the duty rate from 10% to 25% on paper and paper related products.

#### Tribunal's Decision

The Appeal was allowed, and the Respondent's review decision dated 29th October 2021 was set aside. Each party was ordered to bear its own costs.



## **TAT 183/2022:**

### **Energood East Africa Limited vs. Commissioner of Customs & Border Control**

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#### **Background**

The case arose from a desk review conducted by the Respondent's Customs Post Clearance Audit on the Appellant's customs entries for solar water heating systems imported between November 2016 and October 2020. The Respondent concluded that the solar water heating systems imported by the Appellant had an electric component, making them dual water heating systems classifiable under tariff code 8516.10.00. As a result, the Respondent demanded a sum of Kshs. 5,070,044.00 from the Appellant. The Appellant, however, disagreed with the classification and applied for a review, which was denied by the Respondent, leading to the appeal.

#### **Issues for Determination**

Whether the Respondent erred in classifying the Appellant's imported solar water heating system under tariff HS code 8516:10:00 instead of tariff HS code 8419:19:00.

#### **Appellant's Argument**

The Appellant argued that its imported solar water heater should be classified under tariff HS code 8419.19.00, as it is a thermal solar system for heating domestic water with the electric heater being used as a backup when solar energy is inadequate. The Appellant contended that the heater is not a dual system as claimed by the Respondent and therefore not classifiable under HS code 8516. The Appellant also argued that the Respondent had acted outside its mandate by attempting to use the Post Clearance Audit process to change the HS code, thereby usurping the powers of the HS Committee.

#### **Respondent's Argument**

The Respondent maintained that the Appellant's solar system is a dual water heating system and should be classified under tariff HS code 8516.10.10. The Respondent argued that the heating system in dispute is for use by both solar and electricity and was classified accordingly under tariff code 8516.10.00 according to EAC CET. The Respondent also contended that the Appellant did not produce any material evidence to support the argument that the products under the audit were classifiable under EAC CET Heading 8419.

#### **Tribunal Findings**

The Tribunal found that the water heaters imported by the Appellant have the characteristics of a solar water heating system and are not an electric water heating system fitted with solar components. The Tribunal noted that the heaters mainly function as solar water heaters and resort to electricity only when there is inadequate solar energy. The Tribunal also noted that the Respondent did not offer satisfactory justification for departure from the code that it has used over the years and that continues to be used by other countries in the East Africa Union. Therefore, the Tribunal held that the Appellant's imported water heaters are classifiable under tariff HS Code 8419.19.00 applicable for solar water heaters.

#### **Tribunal's Decision**

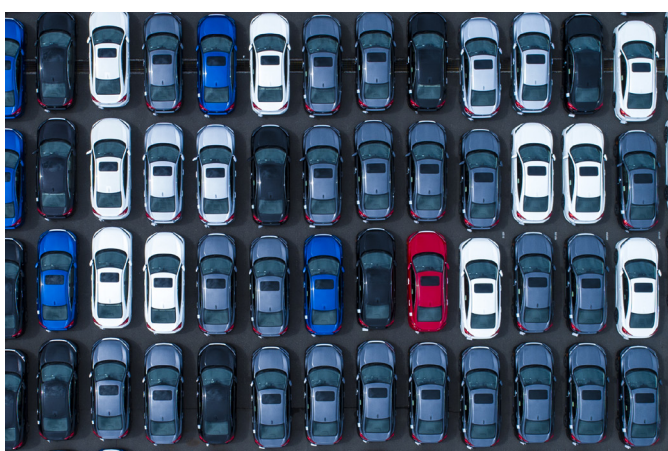
The Appeal was allowed, and the Respondent's review decision dated 5th January 2022 was set aside. Each party was ordered to bear its own costs.

# Customs Valuation – Motor vehicle valuation

## TAT 691/2022:

### George Njenga Kariuki vs Commissioner of Customs & Border Control

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#### Background

The appellant, a Kenyan resident in the UK, imported a Mercedes CLS 400 V6 Engine Petrol WDD2183612A157869 into Kenya for private use. The appellant paid taxes amounting to Kshs. 2,320,446.00 based on the Current Retail Selling Price (CRSP) list used by the respondent. The respondent later advised the appellant to pay an uplift amount of Kshs. 1,592,698.00, making the total tax due of Kshs. 3,891,726.00 based on a CRSP value of Kshs. 22,641,678.00. The appellant lodged an appeal with the respondent against this decision.

#### Issues for Determination

Whether the respondent erred in the assessment of the appellant's motor vehicle.

#### Appellant's Argument

The appellant argued that the respondent acted in bad faith and in breach of all expected norms by discriminating

against the appellant through issuance of an unjustified, unrealistic customs value without logic. The appellant also argued that the respondent failed to act in a fair, transparent and accountable manner by selectively furnishing information and refraining to offer guidance and provide information as needed.

#### Respondent's Argument

The respondent maintained that it contacted a motor vehicle dealer and was guided that the Current Retail Selling Price (CRSP) of the motor vehicle was EURO 180,000, which equates to Kshs. 22,641,678.00. The respondent also averred that the earlier request of release of motor vehicle by undertaking bank guarantee was declined because there was a system failure on customs declaration migration to NTSA system which has been resolved.

#### Tribunal Findings

The tribunal found that the respondent erred in uplifting a further tax against the appellant without a proper and clear basis on the same. The tribunal noted that the appellant based his tabulation on the valuation of the motor vehicle, CLS 350, which was on the CRSP list and according to the appellant, the description was identical to his vehicle. The respondent has not argued that the two vehicles compared by the appellant in determining his vehicle's valuation are not identical as per the applicable CRSP description.

#### Tribunal's Decision

The appeal was allowed and the respondent's review decision dated 30th May 2022 was set aside. Each party was to bear its own costs.

### TAT 1561/2022:

### Equator Bottlers Ltd vs Commissioner of Domestic Taxes

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#### Background

Equator Bottlers Ltd, a Kenyan company, withheld and remitted taxes amounting to Kshs 7,087,772.00 to the Commissioner of Domestic Taxes from payments made to Coca-Cola Sabco (Pty) Ltd, a South African company, for technical and computer services. The appellant claimed that these amounts were erroneously withheld and remitted due to a Double Taxation Agreement (DTA) between Kenya and South Africa, which provides a 0% withholding tax rate. The respondent rejected the appellant's refund application, arguing that the transaction fell under Section 41 (5) of the Income Tax Act, which exempts certain payments from the benefits of the DTA.

#### Issues for Determination

Whether the appellant is entitled to relief from double taxation under Section 41 of the Income Tax Act. - Whether limiting the application of the DTA would constitute a Treaty Override. Whether the appellant is entitled to the withholding tax refund.

#### Appellant's Argument

The appellant argued that the DTA between Kenya and South Africa applies to the technical fees and computer charges paid to Coca-Cola Sabco (Pty) Ltd. They contended that the underlying ownership of Coca-Cola Sabco (Pty) Ltd is the Coca-Cola Company, which does not qualify as a natural person as the company is mainly held by institutional investors. The appellant also argued that the amendment to Section 41(6) of the ITA effected through the Finance Act 2021 had the effect of clarifying the word individual which was replaced by person which include individuals, companies and other entities. They asserted that they are entitled to relief from double

taxation under Section 41 of the ITA since limitation of benefit clause does not apply in its case as there is no individual or individuals who own more than 50% of the company in South Africa.

#### Respondent's Argument

The respondent argued that the term 'individual' as used under Section 41 (5) of the ITA includes both natural and legal persons. They contended that the amendment of Section 41(5) of ITA through the Finance Act 2021 was not a substantive change in law but rather a clarification and a restatement of what Section 41 (5) of ITA had always been. The respondent also argued that the appellant merely withheld and remitted payments which belonged to another and as such cannot claim refund as it was not the payee. It is Coca-Cola Sabco (Pty) that should claim that part of its profits that was wrongly withheld and remitted.

#### Tribunal Findings

The Tribunal found that the appellant is not entitled to the refund and the respondent was justified in rejecting the appellant's refund application. The Tribunal concurred with the respondent that the right to a claim for a refund of the withheld funds is exercisable by the party that offered the services, in this case, Coca-Cola Sabco (Pty) Limited. In the absence of any claim by the South African entity, the appellant would be unjustly enriched from the refund of taxes paid to the respondent.

#### Tribunal's Decision

The Appeal was dismissed and the Respondent's objection decision dated 10th November 2022 was upheld. Each party was ordered to bear its own costs.

# Tax on income not derived in Kenya

## TAT 910/2022:

### Kenya Ports Authority vs Commissioner of Domestic Taxes

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#### Background

The Kenya Ports Authority (Appellant) was assessed by the Commissioner of Domestic Taxes (Respondent) for withholding income tax amounting to Kshs 1,993,582,700.00 inclusive of penalties and interest. This was following an audit on some procurements of the Appellant of various port equipment. The Appellant objected to the assessment, leading to the Respondent confirming the assessments. The Appellant then filed an appeal.

#### Issues for Determination

Whether the Respondent erred by charging Withholding tax on the subject contracts undertaken by the Appellant.

#### Appellant's Argument

The Appellant argued that the equipment (gantry cranes and a salvage tugboat) was manufactured in their respective countries of origin and delivered to the Appellant in Kenya, fully built. This was done by the respective suppliers in their ordinary conduct of business of selling the equipment off-the-shelf, to any of their potential customers. The Appellant contended that it procured port equipment and not services which would otherwise have attracted payment of fees. The Appellant also argued that the income tax cannot be charged as the income was not accrued or derived from Kenya.

#### Respondent's Argument

The Respondent contended that the contracts that the Appellant entered into were all lump sum contracts and contained specific requirements for the design and construction works. The Respondent stated that the Appellant engaged various contractors to undertake the contracts to design, manufacture, supply, install, test and commission the operation of a tugboat, a multipurpose boat and cranes at the port of Mombasa. These works fall under the scope of building, civil and engineering works hence subject to withholding tax.

#### Tribunal Findings

The Tribunal found that since the equipment was imported complete by the Appellant it is clear that income tax cannot be charged as the income was not accrued or derived from Kenya. The Tribunal also found that the contracts were for equipment, and therefore no Withholding tax was chargeable. In light of this, the Tribunal found that the Respondent erred by charging withholding tax to the subject contracts.

#### Tribunal's Decision

The Appeal was allowed, and the Respondent's objection decision dated 7th July 2022 was set aside. Each party was to bear its own costs.

# Tax Appeals Tribunal Act

## Appeals out of time

### TAT 911/2022:

### Buildventure Enterprises Limited vs Commissioner of Domestic Taxes

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#### Background

The Respondent conducted an audit on the Appellant, a civil engineering, construction and water projects company. The audit findings, issued on 14th April 2022, assessed additional Corporation income tax of Kshs. 26,377,212.00 and VAT of Kshs. 36,238,186.00. The Appellant objected to these findings via a letter dated 11th May 2022. The Respondent issued its decision on 12th July 2022, reviewing the Corporation income tax assessment to nil but confirming VAT assessment of Kshs. 27,331,747.00. The Appellant appealed this decision on 29th August 2022.

#### Issues for Determination

Whether the appeal is valid.

#### Appellant's Argument

The Appellant argued that the Respondent erred in computing VAT by way of gross banking method without adjusting for non-revenue bank deposits. They also claimed that the Respondent erred in computing VAT by way of grossing up withholding VAT credits while relying on erroneous figures of the said credits. The Appellant further argued that the Respondent erred in forming an opinion that the Appellant had filed an application for extension of time to file a late objection notice while indeed the objection had been filed on time.

#### Respondent's Argument

The Respondent refuted all allegations by the Appellant. They argued that there were variances between sales declared by the Appellant, sales derived from the withholding VAT certificates and sales derived from banking records. The Respondent also argued that the Appellant failed to provide documentation to support its grounds for objection as required under Section 51(3)(c) of Tax Procedures Act. The Respondent further argued

that the Appellant failed to prove or explain the source and nature of the amounts of cash received in its bank account during the period under review.

#### Tribunal Findings

The Tribunal found that the Appellant failed to comply with the timelines for appealing the Commissioner's decisions as set out in the law. The Appellant received the Respondent's decision on 12th July 2022, but filed its Notice of Appeal on 29th August 2022, which was after the stipulated thirty days subsequent to receiving the Respondent's decision. The Appellant also failed to apply for leave to file its Notice of Appeal out of time as required in Section 13 (3) of the TAT Act.

#### Tribunal's Decision

The Appeal was struck out and each party was ordered to bear its own costs.



## **TAT 976/2022:**

### **Caleb Africa Ltd vs Commissioner of Domestic Taxes**

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#### **Background**

The Respondent conducted tax investigations into the business affairs of the Appellant for the tax period month of December 2016. The Respondent noted a variance between the sales declared in the VAT and income tax returns for the tax period year 2016. The Respondent issued the Appellant with a pre-assessment notice and later raised additional VAT assessments. The Appellant failed to object to the additional VAT assessments and the Respondent issued distress orders to collect the taxes due. The Appellant consequently objected through a late objection, which the Respondent deemed invalid.

#### **Issues for Determination**

Whether there is a valid appeal before the Tribunal.  
Whether the Respondent's assessment was valid and justifiable.

#### **Appellant's Argument**

The Appellant argued that the Respondent should be barred from collecting different amounts of tax demands without explanation on the diverse variances of figures. They also contended that the Respondent erred in making an assessment out of the stipulated five years period.

#### **Respondent's Argument**

The Respondent argued that they are not bound by the information provided by the taxpayer and can assess the tax liability based on any other available information. They also contended that the additional VAT assessments were based on the variances in the sales declared in the VAT returns and the turnover declared in the income tax returns for the tax period year 2016. The Respondent also stated that the variations in the amounts demanded is due to the accruing interest.

#### **Tribunal Findings**

The Tribunal found that there was no valid appeal before it as the Appellant failed to comply with the statutory timelines for appealing the Commissioner's decisions. The Tribunal did not delve into the second issue for determination as it had been rendered moot.

#### **Tribunal's Decision**

The Appeal was struck out and each party was ordered to bear its own costs.

## TAT 1204/2022:

### Shabuvilla Enterprises Ltd vs. Commissioner of Domestic Taxes

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#### Background

The Respondent discovered a variance between the income tax turnover and sales declared in the Appellant's VAT declaration for the period 2020 and proceeded to issue the Appellant with a pre-assessment demand notice. The Appellant failed to respond to the demand notice and the Respondent consequently raised an additional assessment before issuing the Appellant with an Assessment Order. The Appellant objected to the additional assessment and was requested to provide documents to support its objection. The Respondent issued the Appellant with an objection decision, which the Appellant appealed.

#### Issues for Determination

Whether there is a valid appeal before the Tribunal.  
Whether the Respondent's assessment was valid and justifiable.

#### Appellant's Argument

The Appellant argued that the assessment was based on the previous returns reflection of gross sales and that the returns and accounts for the year of income 2020 had already been submitted to the department. The Appellant also stated that the operations of the business had already ceased.

#### Respondent's Argument

The Respondent raised a Preliminary Objection on a point of law on the ground that the purported Appeal is fatally defective for being filed out of time without leave and for being premised on an invalid Notice of Appeal. The Respondent also averred that the basis of the assessment was turnover variance where the VAT turnover was higher than the income tax turnover. The Respondent argued that it raised the additional assessment based on the information provided by the Appellant and that the Appellant failed to illustrate if and how the Respondent's computation was erroneous.

#### Tribunal Findings

The Tribunal found that there is no valid appeal before it as the Appellant failed to comply with the timelines for appealing the Commissioner's decisions as set out in the law. The Tribunal did not delve into the second issue for determination as it had been rendered moot.

#### Tribunal's Decision

The Appeal was struck out and each party was ordered to bear its own costs.







## TAT 604/2022:

### Lamsy Investments Limited vs Commissioner of Domestic Taxes

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#### Background

The Respondent carried out a returns review of the Appellant and analyzed purchases claimed by purchasers and sales declared by suppliers on the iTax system for the month of December 2017, and raised additional assessments of Kshs. 429,651.08 on 24th March 2021. The Appellant lodged a late objection application to the additional assessment on 28th March 2022, which was rejected by the Respondent on grounds that it did not comply with the threshold set under Section 51(7) of the Tax Procedures Act 2015.

#### Issues for Determination

Whether the Instant Appeal is Valid - Whether the Respondent's Additional Assessment of the Appellant is Justified and Proper in Law.

#### Appellant's Argument

The Appellant argued that the variance under assessment was due to declaration of income tax return (ITC2) based on gross sales rather than amount exclusive VAT for the period as per VAT analysis tabulation form - provided then, and therefore resulting into variance of Kshs. 1,918,093.00, which is equivalent to VAT for the period. The Appellant also claimed that the Respondent's decision was arbitrary, capricious, unreasonable, unfair and contrary to administration of justice.

#### Respondent's Argument

The Respondent argued that the assessments were correctly issued and conform to VAT Act as the Appellant did not provide any evidence that would have altered the assessment. The Respondent also claimed that the Appellant was uncooperative in providing relevant records and failed to respond to requests for documents or records. As a result, the additional assessment was made based on available information and best judgement of the Respondent.

#### Tribunal Findings

The Tribunal found that the Appellant lodged its Notice of Appeal on 10th June 2022, which is well over 40 days after the Respondent's decision. There is nothing on the record to show that the Appellant applied and obtained leave to file its Appeal out of time. Accordingly, the Appellant filed its Notice of Appeal out of time. Therefore, the Tribunal held that having been filed out of time and without leave of the Tribunal, the instant Appeal is invalid.

#### Tribunal's Decision

The Appeal was struck out and each party was ordered to bear its own costs.

## Validity of an appeal

### TAT 748/2022:

## Mbiwa Construction Company Limited vs Commissioner of Domestic Taxes

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### Background

The Respondent amended the Appellant's self-assessment returns for various months in 2019 on 16th and 17th July 2020. The Respondent issued an Agency Notice to the Appellant's bank demanding VAT amounting to Kshs 10,762,946.00 and Income tax of Kshs 16,625.43. The Appellant lodged its Notice of Appeal on 18th July 2022, arguing that the assessment was not compliant with the VAT Act and that the Respondent had disregarded the conventional way of computing VAT.

### Issues for Determination

Whether there is a valid Appeal before the Tribunal. Whether the Respondent erred in its assessment of tax on the Appellant.

### Appellant's Argument

The Appellant argued that the Respondent's assessment was not compliant with the VAT Act, which allows any taxpayer to utilize the VAT credits realized in the month to the full amount. The Appellant also claimed that the Respondent disregarded the conventional way of computing VAT, leading to the Appellant's credit claim being ignored and resulting in a tax demand of Ksh.10,779,571.

### Respondent's Argument

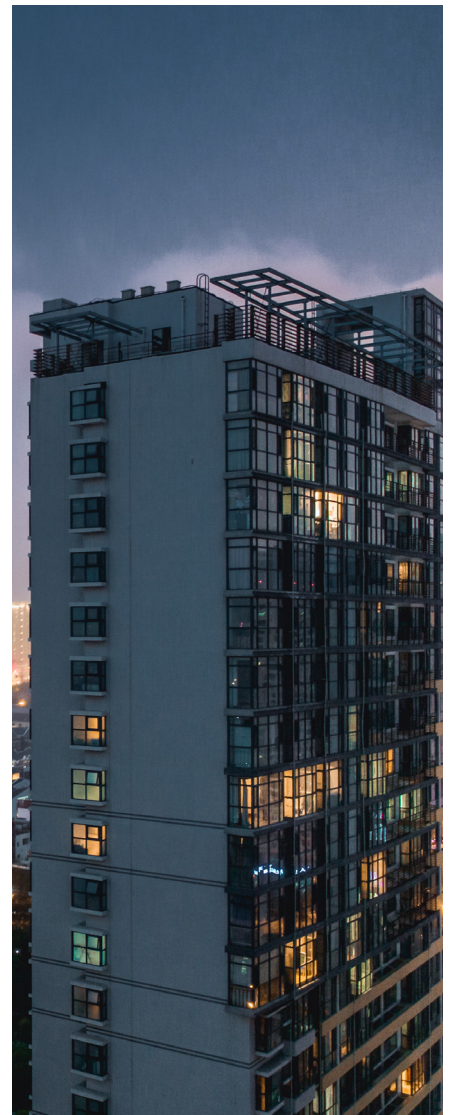
The Respondent argued that the Appellant filed original VAT assessments that were later amended to reflect the Appellant's true tax position. The amendments reflected an output tax increase that consequently reduced the Appellant's credit position, leading to a tax deficit and a tax liability of Kshs.10,773,571.00.

### Tribunal Findings

The Tribunal found that the Appellant failed to follow the procedure as provided by law. The Appellant ought to have first objected to the Respondent's amended assessments of 16th and 17th July 2020 and allow the Respondent to issue an objection decision prior to approaching the Tribunal with an appeal. As such, the Tribunal found that the Appeal was not valid.

### Tribunal's Decision

The Appeal was struck out, with each party to bear its own costs.



## **TAT 844/2021:**

### **The Hotel Eagles Limited vs Commissioner of Domestic Taxes**

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#### **Background**

The Hotel Eagles Limited (Appellant) operates a hotel business in Kenya. The Commissioner of Domestic Taxes (Respondent) audited the Appellant's tax declarations of income tax for the years 2017 and 2018 and issued additional income tax assessments. The Appellant filed an objection to these assessments, which the Respondent rejected as it was lodged out of time and the Appellant failed to submit necessary documents. The Appellant consequently filed an appeal.

#### **Issues for Determination**

Whether the Tribunal has the jurisdiction to determine the Appeal. Whether the Respondent was justified in issuing the late objection rejection.

#### **Appellant's Argument**

The Appellant argued that the Respondent failed to ascertain the basic definition of corporate deductions as defined under Section 16 of the Income Tax Act (ITA). They claimed that the Respondent made an error in law and action by disallowing the expenses declared by the Appellant in its income tax returns for the periods January 2017 to December 2017 and January 2018 to December 2018. The Appellant also argued that the Respondent erred in law and in fact when it refused to recognise wholly incurred expenses deducted by the Appellant to generate income of the period of time under review.

#### **Respondent's Argument**

The Respondent opposed the Appellant's Appeal, arguing that the Appeal is incompetent, legally unsuitable and amounts to forum shopping, and as such, an abuse of the court process as there is no appealable decision before the Tribunal. The Respondent also argued that the Tribunal lacks jurisdiction to hear the Appeal as the Appeal as filed is premature and ought to be dismissed at first instance. The Respondent further stated that the Appellant failed to discharge its burden of proof in averring that the Respondent's decision was incorrect.

#### **Tribunal Findings**

The Tribunal found that a late objection rejection decision is an appealable decision, therefore, the Appellant was justified in appealing the decision under Section 52 of the TPA in accordance with the TAT Act. The Tribunal also found that the Respondent correctly rejected the Appellant's application for extension of time to lodge notices of objection in its rejection decision dated 10th November, 2021.

#### **Tribunal's Decision**

The Appeal was dismissed and the Late Objection Rejection Notice dated 10th November 2021 was upheld. Each party was ordered to bear its own costs.

## TAT 1384/2022:

### Edkan Enterprises Limited vs. Commissioner of Domestic Taxes

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#### Background

EDKAN Enterprises Limited, a telecommunication company, was issued with additional tax assessments for the period 2018 and 2019 for withholding tax on the basis of withholding income tax credits without corresponding declaration of income. The company lodged a late objection to the additional taxes, which was allowed by the Commissioner of Domestic Taxes. However, the Commissioner later rejected the objection, leading to the appeal.

#### Issues for Determination

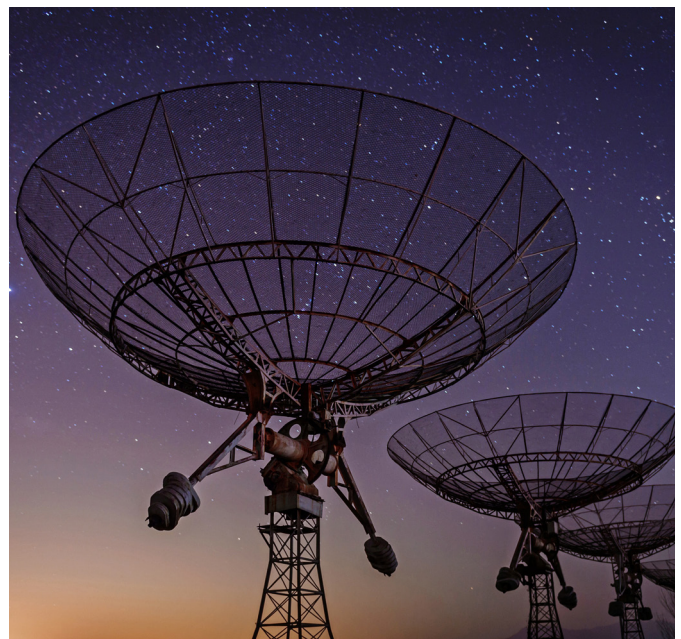
Whether the appeal was lodged within the stipulated time - Whether the Commissioner erred in law and fact by failing to consider supporting documentation provided by the appellant - Whether the Commissioner erred in law and in fact by assessing and confirming income tax without taking into consideration the expenses that were incurred in the accounting period

#### Appellant's Argument

EDKAN Enterprises Limited argued that the Commissioner erred in law and fact by failing to consider supporting documentation provided by the company. The company also contended that the Commissioner erred by assessing and confirming income tax without taking into consideration the expenses that were incurred in the accounting period. The company sought for the objection decision of the Commissioner to be annulled and set aside in its entirety.

#### Respondent's Argument

The Commissioner of Domestic Taxes argued that the appeal was lodged out of time without first seeking leave of the Tribunal and that there was no Notice of Appeal, hence the entire Appeal was invalid. The Commissioner also contended that the Appellant failed to support its objection with relevant documents despite email reminders. The Commissioner maintained that the



Appellant having not provided documents or explanations capable of making the assessment vacated or amended, the Commissioner correctly confirmed the assessment and rejected the objection.

#### Tribunal Findings

The Tribunal found that the Appeal was fatally defective and therefore incompetent and untenable in law. The Tribunal noted that there was no Notice of Appeal on record, which is a mandatory document envisaged in law for an appeal to be considered as competently presented before the Tribunal. Therefore, the Appeal was not validly and properly before the Tribunal.

#### Tribunal's Decision

The Appeal was struck out and each party was ordered to bear its own costs.

### TAT 1161/2022:

### Mugoiri Investment Company Limited vs Commissioner of Domestic Taxes

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#### Background

The appellant, Mugoiri Investment Company Limited, is a private limited liability company involved in manufacturing food products. The respondent, Commissioner of Domestic Taxes, noted from available IFMIS data that the appellant had supplied goods worth Kshs. 25,471,000.00 and Kshs. 4,367,000.00 in the years 2020 and 2021 respectively to the State Department of Correctional Services and unclaimed Withholding VAT and Income tax credits in the Appellant's ledgers. The respondent consequently issued the appellant with withholding assessments on 30th May 2022, to which the appellant lodged an objection.

#### Issues for Determination

Whether the appellant has discharged its burden of proving that Respondent's Objection Decision dated 26th August 2022 confirming the Additional Assessments was unjustified.

#### Appellant's Argument

The appellant contended that it could not provide all the documents within time including a letter expected from the Permanent Secretary in charge of the State Department of Correctional Services explaining that it supplies exempt supplies and withholding tax deducted was erroneous and that the process of canceling the same was underway.

#### Respondent's Argument

The respondent maintained that the appellant has failed to prove that the respondent's tax decision was in any way inconsistent based on extraneous factors, excessive or incorrect and the respondent has demonstrated to the Tribunal what was considered in arriving at the assessment and subsequently the objection decision which are within the law with reasons for its findings thus its assessment was hinged on the letter of the law.

#### Tribunal Findings

The Tribunal found that the appellant has satisfactorily discharged its burden that the tax decision should have been made differently had the respondent had the opportunity to take the letter from the Principal Secretary into account while making its decision.

#### Tribunal's Decision

The Appeal was allowed. The Respondent's objection decision dated 26th August 2022 was set aside. The Respondent was given liberty to review the Appellant's tax affairs taking into account the letter from the Principal Secretary to the State Department of Corrections dated 31st August 2022 and issue the appropriate decision with sixty (60) days of the date of delivery of this Judgment. Each party was to bear its own costs.

# Failure to discharge documentary burden of proof

## TAT 1043/2022:

### Stanley Wamui Mwaniki vs Commissioner of Domestic Taxes

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#### Background

The appellant, Stanley Wamui Mwaniki, a sole trader in Kenya, was assessed by the respondent, Commissioner of Domestic Taxes, for income tax resident returns for the years 2015, 2016, 2017, 2019, and 2020. The respondent conducted an additional assessment on 16th December 2021, which resulted in an incremental principal tax liability of Kshs 167,531,887.50 plus penalty and interest. The appellant objected to the additional assessment, but the respondent rejected the objection and confirmed the assessment of Kshs 205,867,969.00 together with resultant penalties and inter-ests.

#### Issues for Determination

Whether the respondent's additional assessments were proper in law - Whether the respondent considered the appellant's nature of business - Whether the respondent took into consideration all additional information availed before making the decision.

#### Appellant's Argument

The appellant argued that the respondent erred in fact and law in the assessment. The appellant maintained that it submitted all documents to the respondent on 18th January 2022 to support his objection. The appellant requested the tribunal to allow the appeal, discharge and set aside the decision of the respondent, and assess the tax payable by the appellant to be commensurate with the actual transactions and the evidence tendered.

#### Respondent's Argument

The respondent argued that the appellant did not submit the necessary documents. The respondent stated that the Tax Procedures Act No 29 of 2015 places the onus of proof in tax objections to the taxpayer who in this case failed to avail evidence that would support a contrary assessment or that would have guided the respondent at arriving to a different finding. The respondent also argued that the appellant was required to register for VAT since his business had met the threshold stated under Section 34 of the VAT ACT.

#### Tribunal Findings

The tribunal found that the appellant did not submit any supporting documentation to show that the assessment by the respondent was wrong. It merely filed an objection with no grounds adduced, no explanation on the assessment. The tribunal noted that the appellant did not support its case at all. The tribunal found that the burden of proof did not shift, and the confirmation of assessment dated 19th August 2022 is valid in law as no evidence has been adduced to challenge its legal basis.

#### Tribunal's Decision

The tribunal dismissed the appeal and upheld the objection decision dated 19th August 2022.

## JTAT 1104/2022:

### Aviat Networks (Kenya) Limited vs Commissioner of Domestic Taxes

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#### Background

The Appellant, Aviat Networks (Kenya) Limited, is a company that supplies microwave routers, switches, and other internet support equipment to mobile telecommunication companies in Kenya. It also offers sales representative services, including marketing and promotion of Aviat products on behalf of Aviat Network Singapore. The Respondent, Commissioner of Domestic Taxes, issued a VAT credit verification notice to the Appellant and subsequently raised additional assessments on both income tax and VAT. The Appellant objected to these assessments, leading to the current appeal.

#### Issues for Determination

Whether the Appellant's technical fees are exported services - Whether the additional VAT and Income Tax Assessments were justified

#### Appellant's Argument

The Appellant argued that the services it offers in terms of technical fees are exported services, as they are provided to Aviat Network Singapore. It also contended that there was no under-declaration of equipment sales in 2021, and that the variances between the sales as per VAT and that of the income tax for the year ended June 2021 were due to unearned income (work in progress) which was not added as part of the income for the year as it was yet to be earned.

#### Respondent's Argument

The Respondent argued that the Appellant's services were not exported services, as they were provided to Safaricom and Airtel, both based in Kenya. The Respondent also contended that the additional VAT and Income Tax

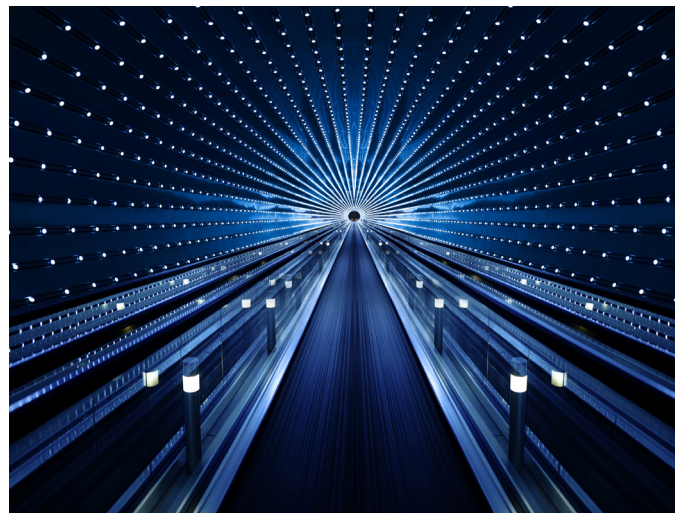
Assessments were justified, as the Appellant failed to provide adequate supporting documentation for the variances in sales in the accounts and in the VAT returns for the 2018-2019 years of income.

#### Tribunal Findings

The Tribunal found that the Appellant's technical fees were not exported services, as they were performed and consumed in Kenya. It also found that the additional VAT and Income Tax Assessments were justified, as the Appellant did not provide evidence to support the variances in sales in the accounts and in the VAT returns for the 2018-2019 years of income.

#### Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Respondent's objection decision dated 29th August, 2022.



## **TAT 1147/2022:**

### **Gulf Stream Investments Limited vs Commissioner Domestic Taxes**

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#### **Background**

The Respondent conducted an audit on the Appellant's operations for the financial years January 2016 to December 2020. The audit resulted in the Respondent issuing a notice of assessment amounting to a tax liability of Kshs. 145,443,424.00 inclusive of penalties and interest. The assessed tax included Corporate income tax (CIT), VAT and WHT. The Appellant lodged a valid notice of objection to part of the Respondent's assessment. The Respondent issued the Appellant with its objection decision allowing part of the objection and confirmed a tax assessment amounting to Kshs. 82,253,273.00 inclusive of penalties and interests. The Appellant subsequently filed a Notice of Appeal.

#### **Issues for Determination**

Whether the Respondent's assessment was justified.

#### **Appellant's Argument**

The Appellant argued that the Respondent erred in law and in fact by disallowing the Appellant's legitimate business expenses related to insurance costs, assessing Corporate income tax (CIT) on the variance arising from the Appellant's revision to its billing model, assessing CIT on non-trade creditors written off, and assessing WHT on reimbursed costs paid to outsourced labor service providers. The Appellant also argued that the Respondent failed to take into consideration documents provided by the Appellant in support of insurance expenses at the objection review stage.

#### **Respondent's Argument**

The Respondent argued that the Appellant failed to provide sufficient support for the insurance costs, failed to provide sufficient explanation for non-trade creditors written off, and failed to withhold tax as required by law. The Respondent also argued that the Appellant falsified the records to not reflect the true position of the business dealings contrary to Section 97 of the Tax Procedures Act 2015.

#### **Tribunal Findings**

The Tribunal found that the Appellant failed to provide evidence to prove that it was advanced any loans, failed to provide the said documents or provide any form of evidence to support its assertion on insurance costs, and failed to demonstrate and or provide evidence on how Corporation tax was charged on tax that had already been conceded and paid. The Tribunal also found that the management fees from the Appellant's contract with Cyka Manpower Services Limited, which is 18% of the total cost falls under management fees which attracts withholding tax at 5% as stipulated by Section 35(3)(f) of the Income Tax and Paragraph 5 (f) of the Third Schedule of the Income Tax Act.

#### **Tribunal's Decision**

The Tribunal dismissed the Appeal and upheld the Objection decision dated 29th August 2022.



## TAT 1176/2022:

### Chromawave Enterprises Limited vs Commissioner of Domestic Taxes

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#### Background

The Respondent issued an assessment on 9th March 2022 and a further demand letter on 18th March 2022. The Appellant submitted an application to file a late objection on 4th July 2022, citing sickness as the reason for the delay. The Respondent informed the Appellant that the objection did not meet the statutory requirements on 15th July 2022 and requested for documentary evidence to support the Appellant's late objection. The Appellant appealed the Respondent's decision dated 18th March 2022 by filing a Notice of Appeal to the Tribunal dated 7th October 2022.

#### Issues for Determination

Whether the Appeal is valid.

#### Appellant's Argument

The Appellant argued that the Respondent erred in law by disallowing direct expenses incurred in the production of taxable income contrary to section 15 of the Income Tax Act, while computing income tax for periods 2017 to 2020. The Appellant also argued that the Respondent erred in disallowing input VAT thus arriving at an erroneous assessment. The Appellant further argued that the Respondent erred in issuing erroneous, irrational and unreasonable assessments given the circumstances.

#### Respondent's Argument

The Respondent argued that the Appellant's returns were up to date however, the Respondent noted that the Appellant overstated its expenses to reduce its tax liability. The Respondent further argued that the Appellant did not object within the statutory 30 days but objected on 4th July 2022 stating the reason for lateness as sickness. The Respondent also argued that the Appellant when attaching evidence attached blank excel documents.

#### Tribunal Findings

The Tribunal found that the Appellant did not provide any evidence, either during the objection review process or before this Tribunal to satisfy the requirement for late objection as per Section 51(7) of the Tax Procedures Act. The Tribunal also found that the communication by the Respondent to which the Appellant lodged its Appeal at the Tribunal was a demand letter and not an appealable decision as defined under Section 2 of the TPA. The Tribunal further found that the Appellant failed to follow due process as it appealed a demand letter by the Respondent in response to which it should have lodged a valid objection.

#### Tribunal's Decision

The Tribunal found that the Appeal lacks merit and accordingly made the following Orders: The Appeal be and is hereby struck out.



## TAT 1227/2022:

### Sanpet Filling Station Vs Commissioner of Domestic Taxes

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#### Background

The Respondent issued the Appellant with a tax assessment order based on sales variance data between the Appellant's income tax returns and VAT returns. The Appellant lodged a late objection application, contending that it was unable to object on time due to sickness. The Respondent rejected the Appellant's late objection application and confirmed its assessment. The Appellant then lodged an appeal against the Respondent's decision.

#### Issues for Determination

Whether the Respondent erred in rejecting the Appellant's application to file an objection late.

#### Appellant's Argument

The Appellant argued that the assessing officer erred in confirming additional assessment against objections of the Appellant. The Appellant also contended that the assessing officer erred in law and fact by not considering the size of the enterprise and even industry index in arriving at the huge profit margin. The Appellant further argued that it had not received an objection decision, and that it only became aware of the Respondent's decision after agency notice had been effected.

#### Respondent's Argument

The Respondent submitted that it undertook additional assessment of the Appellant based on sales variance data provided on SABS between the Appellant's income tax returns and VAT returns for the year 2019 and issued additional assessment order. The Respondent also contended that the Appellant lodged an objection late, wherein it contended that it was unable to object on time on grounds of 'other reasonable cause', but neither was any evidence provided nor other objection grounds addressed.

#### Tribunal Findings

The Tribunal found that the Appellant failed to provide any evidence to support his application for late objection, especially coming over 160 days from the date the assessment order was issued. The Tribunal also found that the Appellant has not sufficiently discharged its burden of proof that would have triggered the Respondent to allow its late objection application as required by Section 30 of the Tax Appeals Tribunal Act.

#### Tribunal's Decision

The Appeal was dismissed and the Respondent's additional assessment of the Appellant was up-held.

## **TAT 1242/2022:**

### **Auditel Kenya Limited vs Commissioner Domestic Taxes**

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#### **Background**

Auditel Kenya Limited (Appellant), a branch of Auditel Ingeniera Y Servicios SI (Auditel Spain), was issued a demand notice by the Commissioner Domestic Taxes (Respondent) for VAT and Corporation tax for the period of 2017. 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. The Appellant objected to the assessment, arguing that the services were performed by Auditel Spain and payments were remitted to Auditel Spain, not the Appellant. The Respondent rejected the Appellant's objection and confirmed the entire tax assessment, leading to this appeal.

#### **Issues for Determination**

Whether the Respondent's assessment was justified.

#### **Appellant's Argument**

The Appellant argued that the Respondent erred in attributing income to the Appellant and confirming its assessment of Corporation tax despite the services being performed by Auditel Spain and payments being remitted to Auditel Spain. The Appellant also argued that the Respondent erred in upholding its assessment of VAT on imported services as due from the Appellant, contrary to the provisions of the Value Added Tax Act. The Appellant further argued that the Respondent erred 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.

#### **Respondent's Argument**

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, audiovisual and pitch lighting systems for five stadiums in Kenya. The Respondent asserted that the Appellant failed to provide the requisite documents to support its case, leading to the rejection of the Appellant's objection.

#### **Tribunal Findings**

The Tribunal found 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 Tribunal also noted 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.

#### **Tribunal's Decision**

The Tribunal found the Appeal to be unmeritorious and upheld the Respondent's Objection decision dated 8th September 2022. Each party was ordered to bear its own cost.

## TAT 1378/2022:

### Lasting Solutions Limited vs Commissioner of Domestic Taxes

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#### Background

The Respondent conducted an audit on the Appellant for the period 2017 - 2020 regarding income tax and VAT and issued additional assessments of Kshs. 40,578,192 inclusive of interests and penalties. The Appellant objected to the additional assessments, which was reviewed and the Respondent issued an objection decision revising its assessments to Kshs. 24, 986, 314 as inclusive of penalties and interests. The Appellant lodged an appeal against this decision.

#### Issues for Determination

Whether the Respondent's Additional Assessment of the Appellant is Justified and Proper in Law.

#### Appellant's Argument

The Appellant argued that the Respondent erroneously omitted legitimate expenses and included amounts claimed by a failed taxpayer for amount not invoiced by the Appellant. The Appellant also contended that the Respondent erroneously declared VAT derived from withholding VAT certificates and did not consider that some products sold were VAT exempt. The Appellant further argued that the Respondent did not consider the impact of the collapse of its main clients on its tax position.

#### Respondent's Argument

The Respondent argued that it carried out an audit and issued additional assessments based on the information available and the best judgment of the Commissioner. The



Respondent contended that the Appellant had failed to provide sufficient proof to support its claims and that the burden of proof lies with the Appellant.

#### Tribunal Findings

The Tribunal found that the Appellant did not provide sufficient evidence to show that the additional assessments by the Respondent were excessive or erroneous. The Tribunal held that the Appellant had not sufficiently discharged its burden of proof.

#### Tribunal's Decision

The Appeal was dismissed and the Respondent's objection decision was upheld. Each party was ordered to bear its own costs.

## **TAT 1433/2022:**

### **Cable Car Corporation vs Commissioner of Domestic Taxes**

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#### **Background**

The Respondent issued assessment orders against the Appellant on 13th May 2021 and 26th May 2021 for total tax amounting to Kshs 8,257,536.00 for VAT and Income tax inclusive of penalties and interest. The Appellant objected to the assessments on 17th June 2021. The Respondent issued its decision on 14th June 2022 rejecting the Appellant's objection and demanding the taxes. The Respondent further demanded tax arrears amounting to Kshs 9,604,896.87 on 9th November 2022. The Appellant lodged the Appeal on 25th November 2022.

#### **Issues for Determination**

Whether the Appellant's notice of objection was allowed by operations of the law. Whether the Respondent erred in its assessment of tax on the Appellant.

#### **Appellant's Argument**

The Appellant argued that the Respondent issued the objection decision outside of the mandatory provisions of Section 51(11) of the Tax Procedures Act. The Appellant sought orders that the tax demanded of Kshs 9,604,896.87 be quashed and set aside.

#### **Respondent's Argument**

The Respondent argued that an objection decision can only be issued if the taxpayer filed a valid objection. The Respondent contended that the Appellant's objection

did not meet the mandatory requirement of a valid objection under Section 51 (3) (c) of the TPA due to lack of supporting documents to the objection filed. The Respondent prayed that the Tribunal upholds the Respondent's confirmed assessment and dismisses the Appeal.

#### **Tribunal Findings**

The Tribunal found that the Respondent ought to have issued the objection decision on or before 16th August 2021 if it did not ask for any additional documents or information from the taxpayer prior to the lapse of sixty days. The Tribunal found that the Respondent did not make any communication to the Appellant regarding validity of the objection as provided for under Section 51(4) of the TPA and therefore the 60-day period provided under Section 51(11) started counting on 17th June 2021. The Tribunal found that the Appellant's notice of objection dated 17th June 2021 was allowed by operation of the law.

#### **Tribunal's Decision**

The Appeal was allowed, the Respondent's decision dated 16th June, 2022 was set aside, and each Party was to bear its own costs.

## TAT 585/2022:

### Shayonam Uniform Limited vs Commissioner of Domestic Taxes

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#### Background

The appellant, Shayonam Uniform Limited, was issued with a pre-assessment notice and subsequent VAT additional assessments by the respondent, Commissioner of Domestic Taxes, for the period of 2018. The appellant objected to the assessment, but the respondent confirmed the assessments. The appellant then filed an appeal, arguing that the respondent erred in raising the VAT assessment for 2018, as the appellant was not registered for VAT during the period in question.

#### Issues for Determination

Whether the respondent erred in law and fact by issuing VAT additional assessment amounting to Kshs. 970,369.60 for the period 2018. Whether the appellant was liable for VAT registration and remittance for the period 2018 as assessed.

#### Appellant's Argument

The appellant argued that the respondent erred in raising the VAT assessment for 2018, as the appellant was not registered for VAT during the period in question. The appellant contended that it reached the threshold for VAT registration in March 2022 and that is when it requested for registration. The appellant also argued that the respondent did not take into consideration the explanation given by the appellant for the income earned before the appellant was registered for VAT.

#### Respondent's Argument

The respondent argued that it reviewed the appellant's bank statements after it was registered for VAT and found that the appellant had already reached the threshold in January 2022. The respondent also argued that the appellant failed to provide the documents requested by the respondent, which led to the issuance of the assessments. The respondent further argued that the appellant ought to have registered for VAT earlier than March 2018 and file regular and accurate VAT returns.

#### Tribunal Findings

The tribunal found that the appellant did not provide the documents requested by the respondent and did not support its averments with supporting documents. The tribunal also found that the appellant did not discharge its burden of proof that the respondent erred in raising the VAT assessment for year 2018. The tribunal relied on the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency.

#### Tribunal's Decision

The tribunal dismissed the appeal, finding it lacked merit. Each party was ordered to bear its own costs.

## **TAT 714/2022:**

### **Intime Stone Age Limited vs Commissioner of Domestic Taxes**

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#### **Background**

The Respondent carried out a returns review on the Appellant as part of compliance monitoring process, which established under declaration of sales for VAT for the periods August 2017 and August, 2018. As a result, the Respondent issued the Appellant with a preassessment notice to review its returns and provide explanations/reconciliation for the variances. The Respondent issued the Appellant with VAT additional assessments for the said periods. The Appellant lodged objections to the entire assessments, which were rejected by the Respondent. The Appellant, dissatisfied with the Respondent's objection decision, lodged its Appeal at the Tribunal.

#### **Issues for Determination**

Whether the Respondent's tax assessment was justified.

#### **Appellant's Argument**

The Appellant argued that the Respondent erred in fact and law by failing to consider all the documents that the Appellant supplied in support of its objection before issuing the objection decision. The Appellant prayed for orders that the Respondent's objection decision be struck out in its entirety.

#### **Respondent's Argument**

The Respondent argued that it arrived at the additional assessments by comparing the Appellant's VAT sales compared to the Income tax sales declared as per the income tax returns for the same period. The Respondent further submitted that it requested the Appellant to provide sales invoices and the bank statements for the assessment period, which the Appellant failed to provide. The Respondent averred that the duty of proving that a tax decision is wrong lies with the Appellant and not the Respondent.

#### **Tribunal Findings**

The Tribunal found that the Appellant failed to provide the requested documents, thus failing to discharge its burden of proof. The Tribunal found that the burden was on the Appellant to prove that the assessed tax was not correct. The Tribunal found that the Appellant did not provide evidence to prove that the Respondent's assessment was wrong. In the circumstances, the Tribunal found that the Respondent did not err in making its assessment on the basis of documents that were in its possession.

#### **Tribunal's Decision**

The Appeal was dismissed and the Respondent's Objection decision was upheld. Each party was ordered to bear its own costs.

## TAT 991/2022:

### Keitt Exporters Limited vs Commissioner of Domestic Taxes

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#### Background

The Appellant, Keitt Exporters Limited, is a company involved in the export of fruits and vegetables. The Respondent, Commissioner of Domestic Taxes, issued the Appellant with Income tax and VAT assessments for the period 2016 to 2020 amounting to Kshs. 50,832,051.46. The Appellant objected to this assessment. The Respondent issued its objection decision, which the Appellant was dissatisfied with, leading to the appeal. The parties reached an ADR agreement on some issues but could not resolve the matter of a tax assessment of Kshs. 6,108,948.00 relating to Withholding income tax on labour subcontracting arrangements, which is the subject of the appeal.

#### Issues for Determination

Whether the Respondent is justified and is within the tax laws to raise a withholding tax assessment on reimbursements that do not constitute income to the recipient. Whether the Respondent is justified to disregard the structure of a binding contract as long as it is legally made.

#### Appellant's Argument

The Appellant argued that the objection decision was rendered out of time and that the Respondent erred in law and fact in arriving at the VAT, PAYE, and additional assessments on bad debts. The Appellant also contended that the Respondent erred by assessing direct labour costs paid to casual workers as subcontracted labour to a service provider, Volt Management Services Ltd. The Appellant argued that the contract between them and the service provider was clear on the split between

reimbursement costs and management fees, and that reimbursement costs are not subject to withholding tax since they are not income or revenues of the recipient but a third party payment.

#### Respondent's Argument

The Respondent argued that the Appellant's decision to only withhold income tax on a specific element of the total amount paid to Volt Management Services Limited and classify the other portion of the payment as reimbursement is a private arrangement that is inconsistent with the provision of the Third Schedule of the Income Tax Act. The Respondent also argued that the Appellant did not demonstrate that it has extinguished all debt recovery efforts as provided for by Legal Notice No. 37 of 2011, and that the Appellant did not demonstrate that the exchange losses claimed were actually incurred and not merely a provision.

#### Tribunal Findings

The Tribunal found that the Appellant did not adduce any documentation to support its averments relating to the labour subcontracting arrangement. The Tribunal held that the burden to prove that a tax assessment is erroneous lies on the Appellant and that the Appellant therefore should have adduced documentary evidence to support its averments in the instant case.

#### Tribunal's Decision

The Tribunal partially allowed the Appeal, upholding the Respondent's Objection decision dated 19th August 2022, save for the Consent dated and filed on 13th March, 2023. Each Party was ordered to bear its own costs.



## **TAT 762/2022:**

### **Cool Rivers Pure Water Limited vs Commissioner of Domestic Taxes**

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#### **Background**

The Respondent conducted a returns review of the Appellant and noticed inconsistencies between Excise duty returns filed by the Appellant for VAT sales. The Respondent carried out investigations and established a difference of Kshs. 6,541,376.00, which had not been accounted for. Based on the inconsistencies, the Respondent raised additional assessments for VAT for the year 2021 totalling to Kshs. 1,046,620.16 including penalty and interest. The Appellant lodged an objection to the additional assessments, which was rejected by the Respondent. Aggrieved by the objection decision, the Appellant filed its Notice of Appeal.

#### **Issues for Determination**

Whether the Respondent's Objection Decision dated 20th June 2022 was justified.

#### **Appellant's Argument**

The Appellant argued that it maintained and has ETR receipts in support of all sales made by the company. It further argued that sales ledger are held based on sales invoices issued to customers, and that price lists are also maintained. The Appellant disputed the additional confirmed assessment of Kshs. 1,046,620.00, arguing that it is punitive, unreasonable, and incorrect.

#### **Respondent's Argument**

The Respondent argued that the additional assessments were correctly issued and conform to VAT Act as the Appellant did not provide any evidence that would have altered the assessment. The Respondent further argued that the Appellant was uncooperative in providing documents requested for by the Respondent, thus no documents were provided to support the objection by the Appellant. The Respondent also argued that the Appellant has not paid all its taxes due and owes Kshs. 1,046,620.16.

#### **Tribunal Findings**

The Tribunal found that the Appellant has not discharged its burden of proof to disprove the Respondent's assessment as incorrect as envisaged in Section 56(1) of the TPA and Section 30 of the Tax Appeals Tribunal Act. The Tribunal therefore found that the Appeal is without merit and therefore fails.

#### **Tribunal's Decision**

The Appeal was dismissed and the Respondent's objection decision dated 20th June 2022 was up-held. Each party was ordered to bear its own costs.

## **TAT 1395/2022:**

### **Napro Industries Limited vs Commissioner, Legal Services and Coordination Board**

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#### **Background**

Napro Industries Limited (the Appellant) was selected for audit by the Commissioner, Legal Services and Coordination Board (the Respondent) on allegations of under-declared income based on variances between incomes declared in the VAT returns against the income in the income tax returns. The Respondent issued an objection decision, which the Appellant appealed against, arguing that the Respondent failed to verify the Appellant's production analysis reconciliations relating to stock and wastage, and erred in not including the imported steel wool rolls in their analysis.

#### **Issues for Determination**

Whether the variances identified by the Respondent in their production analysis had been sufficiently supported by the Appellant's reconciliation and supporting documents - Whether the amount of Kshs. 7,895,740.00 claimed under Investment Deduction on Plant and Machinery (roofing) for the period 2019 ought to be allowed as an expense in the 2019 Income Tax return.

#### **Appellant's Argument**

The Appellant argued that the Respondent's assessment arose from its inability to acknowledge the Appellant's formal production analysis reconciliations relating to stock and wastage. The Appellant maintained that despite being the source of the faulty reconciliation, there was no under-declaration of sales and its returns were made in accordance with the law. The Appellant also argued that the Respondent erred by not fully addressing the Appellant's assertion that the amount of Kshs. 7,895,740.00 claimed under Investment Deduction on

Plant and Machinery (roofing) for the period 2019 ought to be allowed as an expense in the year.

#### **Respondent's Argument**

The Respondent contended that the Appellant had failed to reconcile material banking variances, which was also confirmed by its inability to reconcile the production analysis. Thus, the production analysis adjusted was based on the documents provided by the Appellant as well as the Respondent's best judgement. The Respondent also contended that the Appellant had failed to provide supporting documents for the construction of the roof, and thus the cost related to the roofing was not an extension of the building and not entitled to claim investment deduction.

#### **Tribunal Findings**

The Tribunal found that the Appellant failed to sufficiently support the stock variances identified by the Respondent. However, the Tribunal also found that the amount of Kshs. 7,895,740.00 claimed under Investment Deduction on Plant and Machinery (roofing) ought to be claimed as an expense.

#### **Tribunal's Decision**

The Appeal succeeded in part. The Tribunal upheld the Respondent's Objection Decision confirming the assessment relating to the production material variances. However, the Tribunal allowed the amount of Kshs. 7,895,740.00 previously claimed under investment deduction to be allowed as an expense for the year 2019. Each party was ordered to bear its own cost.

# Validity of the Objection decision

## TAT 1205/2022:

### Santram Traders Limited vs Commissioner of Domestic Taxes

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#### Background

The Respondent conducted an audit of the Appellant's financial records from 1st January 2019 to 31st August 2021. Following the audit, the Respondent issued assessment orders for 2019 and 2020 years of income in relation to Corporation tax, PAYE and VAT totaling to Ksh 139,117,342.45. The Appellant objected to the assessment, but the Respondent confirmed the assessment in its objection decision. The Appellant then lodged an appeal at the Tribunal.

#### Issues for Determination

Whether the objection decision dated 30th September 2022 was valid.

#### Appellant's Argument

The Appellant argued that the Respondent's use of direct method was misplaced as they maintained proper books and ledgers. They also claimed that the Respondent failed to adjust all transactions correctly in the bank statements and that the stock estimation was biased. The Appellant further argued that the Respondent's actions were contrary to their legitimate expectation and the Respondent's demand for taxes was unreasonable and unfair.

#### Respondent's Argument

The Respondent maintained that they acted within the law when they applied the banking test and stock analysis methods. They argued that the Appellant failed to properly lodge its notice of objection and did not provide sufficient documents to dislodge the assessment. The Respondent also asserted that they granted the Appellant fair administrative action that was reasonable and procedurally fair.

#### Tribunal Findings

The Tribunal found that the Respondent communicated its intention to conduct an audit and issued preliminary audit findings and an assessment that was confirmed through the contested objection decision. The Tribunal noted that the Appellant did not fully discharge the assessment and did not indicate why the Respondent's assessment was not warranted. The Tribunal also found that the Respondent acted fairly by informing the Appellant of its audit intentions, the documentation required, and communicating its findings in time.

#### Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Respondent's objection decision dated 30th September 2022. Each party was ordered to bear its own costs.

## TAT 1288/2022:

### Moto Commodities Limited vs Commissioner of Domestic Taxes

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#### Background

The appellant, Moto Commodities Limited, is a company involved in the importation and sale of rice products. The respondent, Commissioner of Domestic Taxes, assessed additional VAT for the years 2018, 2019 and 2020 amounting to Kshs 383,938,195.00 for the company and Kshs 23,704,920.00 for the directors. The appellant objected to this assessment, leading to the current appeal.

#### Issues for Determination

Whether the appeal is valid - Whether the respondent was justified in demanding additional tax from the appellant.

#### Appellant's Argument

The appellant argued that the respondent's assessments were unfair and excessive, based solely on banking activities rather than actual business activities. They also claimed that the respondent failed to consider their books of accounts and ledgers when making the assessment. The appellant further argued that the respondent's objection decision did not meet the legal requirements of Section 51(9), (10), and (11) of the Tax Procedures Act.

#### Respondent's Argument

The respondent argued that the appeal was incompetent as the appellant had not issued a valid objection to the assessment. They claimed that the appellant failed to provide supporting documentation as required by Section 51 (3) of the Tax Procedures Act (TPA). The respondent also defended their use of banking analysis as a valid method of computing income.

#### Tribunal Findings

The tribunal found that the respondent had not issued an objection decision under Section 51(8) of the TPA, but rather an invalidation notice under Section 51(3) of the TPA. The tribunal also found that the respondent's invalidation was within the prescribed timelines and hence lawful. As such, the tribunal ruled that the appellant did not have a valid objection on record and the respondent's assessment stood confirmed.

#### Tribunal's Decision

The tribunal ruled that the appeal was incompetent and struck it out, upholding the respondent's invalidation decision. Each party was ordered to bear its own cost.



## **TAT 42/2016:**

### **Fast Generation Ltd vs Commissioner of Domestic Taxes**

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#### **Background**

Fast Generation Ltd, a private company registered in Kenya, was issued with an objection decision by the Commissioner of Domestic Taxes confirming Corporation tax and Withholding tax of Kshs 15,519,333.00 and Kshs 2,700,776.00, respectively. Dissatisfied with the decision, Fast Generation Ltd filed an appeal. The Tribunal upheld the appeal, but the High Court set aside the Tribunal's judgment and remitted the matter back to the Tribunal for determination on merit.

#### **Issues for Determination**

Whether the Appellant's Objection Decision was valid under Section 51(10) of the TPA. Whether the Respondent erred in arriving at its tax assessment for the Corporation tax and Withholding tax of Kshs 15,519,333 and Kshs 2,700,776 respectively was justified.

#### **Appellant's Argument**

Fast Generation Ltd argued that the Respondent's objection decision lacked a statement of findings on material facts and reasons for the decision, making it a nullity in law. They also claimed that the Respondent erred in determining the income received by the Appellant, in adding back and overstating the under-declared income,

and in finding that there was a withholding tax liability arising out of unpaid financiers' interest.

#### **Respondent's Argument**

The Commissioner of Domestic Taxes argued that the objection decision was accompanied by assessment in respect of withholding tax schedule of additional assessment, case schedule of additional income and further tax forms which explained how it arrived at its conclusion on the Corporate tax and Withholding tax due. The Respondent also claimed that it did not err in arriving at the tax liability because its audit revealed discrepancies in the Appellant's financial statements.

#### **Tribunal Findings**

The Tribunal found that the Respondent's objection decision lacked reasons for the decision, making it invalid under Section 51(10) of the TPA. As a result, the Tribunal did not need to consider the second ground regarding the assessment of Corporation tax and Withholding tax.

#### **Tribunal's Decision**

The Tribunal upheld the appeal, set aside the Respondent's Objection decision dated 18th March 2016, and ordered each party to bear its own costs.

## Invalid Agency Notice

### TAT 1382/2022:

## Apex Refrigeration and Air Conditioning Limited vs Commissioner For Domestic Taxes

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### Background

The Respondent issued a demand notice for tax arrears on 22nd February 2022. On 28th June 2022, the Respondent issued the Appellant with a letter requesting it to settle its arrears of Kshs. 240,961.00 then issued an agency notice on the same date to the Appellant's banker, Cooperative Bank of Kenya Ltd for the taxes due. The Appellant filed an appeal on 16th November 2022.

### Issues for Determination

Whether the Respondent's Agency Notice dated 28th June 2022 is proper.

### Appellant's Argument

The Appellant argued that the Respondent erred in fact and law in demanding for taxes amounting to Kshs. 240,961.00 which taxes were unfounded, excessive and not based on any material facts that have been provided by the Respondent. The Appellant also argued that the Respondent erred in fact and law by issuing agency notices to the Appellant's bank without first issuing the Appellant with a demand and/or an assessment.

### Respondent's Argument

The Respondent argued that it was exercising the powers conferred to it under the Tax Procedures Act in assessing the tax payable and issuing the tax assessments and Section 24 (2) of the Tax Procedures Act allows it to assess a taxpayer's liability using any information available to it. The Respondent added that it has operated within the confines of the law by using the data availed and thus cannot be faulted since the Appellant did not object to the notices.

### Tribunal Findings

The Tribunal found that the Respondent's action of issuing the agency notice to the Appellant's banker was proper in law. The Tribunal observed that the Appellant did not lodge an objection to the notice of demand issued in February 2022, and thus there was another letter issued on 28th June 2022 demanding the same taxes from the Appellant which seemingly went unanswered.

### Tribunal's Decision

The Appeal was dismissed. The agency notice dated 28th June 2022 was upheld. Each party was ordered to bear its own costs.

# Statutory timelines for the Objection decision

## TAT 1060/2022:

### Joel Maina Kairu Vs Commissioner of Domestic Taxes

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#### Background

The appellant, Joel Maina Kairu, was appointed as a project manager by Egerton University in 2013. He was paid an allowance for every visit and a mileage allowance. In 2014, he completed the assignment and invoiced the University for Kshs. 3,796,506.48. The University paid Kshs. 2,272,850.00 and deducted Kshs. 163,643.00 as withholding tax. In 2018, the respondent, Commissioner of Domestic Taxes, issued a VAT Assessment Order for Kshs. 578,426.47 inclusive of interest. The appellant objected to the assessment, but the respondent confirmed the assessment in 2022.

#### Issues for Determination

Whether the Appellant's objection was allowed by the operation of the law. Whether the Respondent erred in fact and in law in confirming the VAT assessments of the Appellant.

#### Appellant's Argument

The appellant argued that the respondent erred in its decision to issue him with additional tax assessment. He claimed that the monies he received from Egerton University were reimbursements for the amounts he had used for the oversight of the project, and should not be subject to VAT. He also claimed that the withholding tax made for VAT was made in error by Egerton University.

#### Respondent's Argument

The respondent argued that it raised an assessment based on undeclared withholding certificate. It claimed that the appellant was a nil filer for the period 2016 despite having chargeable sales. The respondent also argued that the payment made to the appellant did not fall within the definition of the term reimbursement. It further argued that the appellant did not provide any evidence that would have altered the assessment.

#### Tribunal Findings

The tribunal found that the valid decision made by the respondent is the confirmation of assessment notice issued on the iTax system by the respondent on 22nd September 2022 as there is no evidence of the objection decision dated 12th September 2018 having been served on the appellant. The tribunal also found that the objection made by the appellant on 18th July 2018 was allowed by operation of the law and the respondent's decision conveyed via iTax on 22nd September 2022 is not valid as it was made outside the statutory timelines.

#### Tribunal's Decision

The tribunal allowed the appeal, set aside the respondent's decision communicated to the appellant on 22nd September 2022, and ordered each party to bear its own costs.

## **TAT 1075/2022:**

### **Sandalwood Hotels & Resort Limited vs Commissioner of Domestic Taxes**

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#### **Background**

The respondent, Commissioner of Domestic Taxes, issued additional income tax and VAT assessments for the period January 2017 to December 2021 amounting to Kshs. 10,617,388.00 on 11th February 2022 and 13th May 2022. The appellant, Sandalwood Hotels & Resort Limited, lodged an objection to the additional assessments on 27th May 2022. The respondent issued an objection decision on 30th August 2022 confirming the additional assessments on VAT and income tax for Kshs. 11,018,030.00. The appellant, aggrieved by the decision of the respondent, filed this appeal.

#### **Issues for Determination**

Whether the appellant's objection was allowed by the operation of the law. Whether the respondent erred in fact and in law in confirming the Income Tax and VAT assessments of the appellant.

#### **Appellant's Argument**

The appellant argued that the respondent arbitrarily arrived at the conclusion that the assessments raised on the appellant were proper and consistent without considering the appellant's documents. The appellant also claimed that their right to a fair hearing was curtailed and that the respondent's objection decision was deficient of the mandatory qualities of an objection decision as prescribed in Section 51(10) of the Tax Procedures Act. The appellant further argued that they had effectively discharged their

onus of proof as imposed on them by Section 56(1) of the Tax Procedures Act.

#### **Respondent's Argument**

The respondent maintained that during the objection process, it requested for various documents from the appellant to support the grounds of objection. The respondent argued that the documents provided by the appellant did not address the appellant's grounds of objection leading to the respondent to confirm the assessments. The respondent also argued that the appellant was granted fair hearing during the objection process and that the objection decision was limited to the documents that the appellant provided to support its objection.

#### **Tribunal Findings**

The tribunal found that the respondent issued its objection decision beyond the sixty days allowed by Section 51(11) of the Tax Procedures Act. Therefore, the tribunal found that the objection made by the appellant on 27th May 2022 was allowed by operation of the law and the respondent's objection decision conveyed in the letter dated 30th August 2022 is therefore not valid.

#### **Tribunal's Decision**

The appeal was allowed. The respondent's objection decision dated 30th August 2022 was set aside. Each party was to bear its own costs.



## **TAT 1245/2022:**

### **Seven Seas Technologies Ltd vs Commissioner of Domestic Taxes**

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#### **Background**

The appellant, Seven Seas Technologies Ltd, is a provider of integrated business and technology solutions in Sub-Saharan Africa. The respondent, Commissioner of Domestic Taxes, issued a tax demand of Ksh. 900,443,330.00 for the period 2015 to 2019 in respect to Value Added Tax, PAYE and Withholding tax. The appellant objected to the demand, leading to various correspondences between the parties. The respondent issued its objection decision confirming the tax liability, which the appellant appealed.

#### **Issues for Determination**

Whether the respondent's objection decision was issued out of the stipulated timelines. Whether the demanded tax is due and payable.

#### **Appellant's Argument**

The appellant argued that the respondent's objection decision was issued outside the statutory timelines. They also contended that the respondent erred in demanding payment of Withholding taxes in respect of certain payments, and yet the Withholding taxes in respect of the said payments had already been deducted and remitted accordingly to the respondent. The appellant further argued that the respondent erred in demanding payment of Withholding tax in respect of supply of goods contrary to the provisions of Sections 10 and 35 of the Income Tax Act.

#### **Respondent's Argument**

The respondent argued that the appellant's objection was deemed valid and allowed. They also asserted that the appellant had not been withholding tax as required by Section 35 of the ITA. The respondent contended that the appellant made payments for services performed by three of its related parties, however, the Withholding tax was not charged on payments made in relation to these services in the years 2014 and 2015 contrary to the provisions of Section 35 of the ITA.

#### **Tribunal Findings**

The tribunal found that the respondent's objection decision was validly issued within the statutory timelines. It also found that the appellant failed to provide relevant documentation to support its assertions, thus failing to discharge its burden of proof. The tribunal therefore found that the respondent's tax demand is due and payable.

#### **Tribunal's Decision**

The appeal was dismissed, and the respondent's objection decision was upheld. Each party was ordered to bear its own costs.

## **TAT 1264/2022:**

### **Elgon Tea and Coffee Limited vs Commissioner of Domestic Taxes**

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#### **Background**

The Appellant, Elgon Tea and Coffee Limited, is a Kenyan company involved in tea processing for export. The Respondent, Commissioner of Domestic Taxes, is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act. The Appellant was issued with a pre-assessment notice on 28th January, 2022 in respect of the periods 2015 - 2020, requesting reconciliations and explanations within 14 days. The Appellant did not provide all the requisite documentation, leading the Respondent to issue a notice of assessment on 20th June, 2022, calculating additional adjustments and taxes as Kshs. 444,943,190.00. The Appellant, aggrieved by the review decision of the Respondent, filed its Notice of Appeal on 12th October, 2022.

#### **Issues for Determination**

Whether the Appellant was entitled to Capital Investment Deduction - Whether the Respondent carried out proper assessment of the sums claimed in a letter dated 22nd November, 2018 - Whether the Respondent provide reasons for its decision in the tax assessment notices issued - Whether the decision by the Respondent issue through the letter dated 12th September, 2022 should be upheld - Whether the Respondent's Statement of Facts dated 25th November, 2022 should be considered

#### **Appellant's Argument**

The Appellant argued that it had provided all necessary documentation to support its claim for investment deduction and that the Respondent's disallowance of the claim was in bad faith. The Appellant also contended

that the Respondent failed to provide reasons for its decision in the tax assessment notices, violating the Appellant's constitutional right to fair administrative action. The Appellant further argued that the Respondent failed to consider supporting documentation and introduced additional requirements in its objection decision.

#### **Respondent's Argument**

The Respondent argued that the Appellant failed to provide all the relevant information and documentation required for the assessment, leading to the additional adjustments. The Respondent also contended that it had the power to seek any information in relation to the ascertainment of the correct tax liability of an Appellant, and that the burden of proof lies with the Appellant. The Respondent further argued that it had provided reasons for its decision in the tax assessment notices.

#### **Tribunal Findings**

The Tribunal found that the Appellant failed to discharge the burden of proving that the tax decision was incorrect by failing to produce documents to support its objection to the Respondent's decision. The Tribunal also found that the Appellant did not provide new information to support its averments in its pleadings. The Tribunal therefore held that the adjustment in respect of corporate taxes was justified.

#### **Tribunal's Decision**

The Appeal was dismissed, and the Respondent's objection decision dated 12th September, 2022 was upheld. Each party was ordered to bear its own costs.

## **TAT 326/2022:**

### **My Way Bar & Restaurant Limited vs Commissioner of Domestic Taxes**

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#### **Background**

The Respondent conducted VAT returns review on the Appellant for the periods January 2016, January 2017, January 2018 and January 2020, and company income tax review for years 2016, 2017, 2018 and 2020. The Respondent noted that the Appellant had undervalued sales for the tax period and issued additional assessments. The Appellant, being dissatisfied with the additional assessment orders, lodged late notice of objection, which was allowed by the Respondent. The Respondent issued its objection decision, and confirmed the assessment orders, with which the Appellant disagreed, leading to the appeal.

#### **Issues for Determination**

Whether the Respondent's objection decision is proper and lawful - Whether the Respondent erred in Confirming Appellant's Additional Tax Assessments.

#### **Appellant's Argument**

The Appellant argued that the Respondent's additional assessments were issued without conducting due diligence or audit on the Appellant, and no additional information was shared with the Appellant to justify additional assessment. The Appellant also claimed that the Respondent's objection decision was rendered out of time, being more than 60 days from the date of filing its objection, and thus should be deemed to have been allowed by operation of the law.

#### **Respondent's Argument**

The Respondent argued that the assessment was raised on the basis of under declaration of sales for both VAT and income tax purposes. The Respondent also claimed that the Appellant failed to provide supporting documents to support its case, and that the Appellant failed to lodge a valid objection in terms of Section 51(3) of the TPA. The Respondent further averred that the additional con-firmed assessments are proper and should be upheld.

#### **Tribunal Findings**

The Tribunal found that the Respondent, having rendered its objection decision, more than 60 days from the date of Appellant's objection, was outside time and the Appellant's objection stood allowed by operation of the law. As a result, the Tribunal held that the second issue for determination was rendered moot.

#### **Tribunal's Decision**

The Appeal was allowed. The Respondent's objection decision dated 28th February 2022 was set aside. Each party was to bear its own costs.

## **TAT 792/2022:**

### **Waciama Company Limited vs Commissioner of Domestic Taxes**

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#### **Background**

The Respondent conducted a review on the Appellant's VAT returns and raised VAT assessments for May 2021 on 23rd June 2021 on the iTax profile. The Appellant objected to the additional assessments on 28th June 2021 and on 16th December 2021 and 13th January 2022, the Respondent issued Objection decisions invalidating the Appellant's notice of objection.

#### **Issues for Determination**

Whether the Respondent was right to issue the Objection decision of 16th December 2021, fully rejecting the Appellant's Objection - Whether the Objection decision was made as per the stipulated timelines - Whether sufficient documents were provided during the objection stage - Whether the Respondent made a correct computation in raising the confirmed assessments - Whether the Respondent filed a valid VAT returns inputs (cost of sales) - Whether communication was done before as-sessments were raised and the amended assessments done as per the Tax Procedures Act.

#### **Appellant's Argument**

The Appellant argued that the Respondent erred in law and fact by arbitrarily and retroactively imposing VAT on the variance found between the Income Tax and VAT

declared resulting in higher taxation. The Appellant also claimed that the Respondent violated its right to fair administrative action and natural justice by acting as investigator, judge and executioner.

#### **Respondent's Argument**

The Respondent argued that it requested the Appellant to validate its Objection and provide documents, but the Appellant failed to do so. The Respondent also claimed that the Appellant's notice of objection was invalid and the Respondent had no option but to confirm the assessment as issued.

#### **Tribunal Findings**

The Tribunal found that the Respondent acted in contravention of Section 51 (11) of the Tax Procedures Act, and in so doing, the late objection decision was time-barred.

#### **Tribunal's Decision**

The Appeal was allowed. The objection decision dated 13th January 2022 was set aside. Each party was ordered to bear its own costs.

## **TAT 1190/2022:**

# **Morgan Air and Seafreight Logistics Kenya Limited vs Commissioner of Domestic Taxes**

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### **Background**

The Appellant, Morgan Air and Seafreight Logistics Kenya Limited, is a private limited liability company incorporated in Kenya, primarily involved in handling cargo. The Respondent, Commissioner of Domestic Taxes, is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, 1995. The Appellant made applications for VAT refund claims totaling Kshs. 21,414,409.00 on various dates for a zero-rated supply of logistics customers based outside Kenya. The Respondent rejected the refund claims, arguing that the Appellant was precluded from payments made on behalf of the principal as an agent. The Appellant objected to this assessment, which was subsequently rejected by the Respondent. Dissatisfied with the objection decision, the Appellant filed a Notice of Appeal.

### **Issues for Determination**

Whether the Respondent's Objection dated 30th August 2022 was validly issued. Whether the Respondent's Objection dated 30th August 2022 was justified.

### **Appellant's Argument**

The Appellant argued that it provided the Respondent with the requisite information well before the objection decision was issued. It contended that it does not act as an agent to any of its customers per the contracts it entered into with said customers. The Appellant stated that the nature of the agreement with its customers is that of service orders/quotes for the services ordered after which it issues invoices to its customers depending on the terms and conditions of the service orders/ quotes based on the fee amount agreed. It cited Section 13 (1) of the VAT Act and asserted that the expenses it incurred are part of its costs of sales and it does not receive any reimbursement from its customers for any of the costs incurred but earns consideration for the services rendered.

### **Respondent's Argument**

The Respondent argued that the Appellant did not provide sufficient supporting evidence and the Appellant cannot dictate to the Respondent the documents that it will require to execute its mandate. The Respondent averred there was a request for documentation and various meetings were held where documents were requested but the same was never produced within the 60 days thus limiting the Respondent's ability to look into the objection. The Respondent maintained that the Appellant's principal business is offering logistics solutions to its customers that enable them to get block spaces for their goods as per Paragraph 16 of the Agreement, the Appellant ensures the goods of the customer are availed for transportation and is not a transporter or carrier but a transport manager.

### **Tribunal Findings**

The Tribunal found that the Respondent was required to render its objection decision on or before the 16th August 2022, unless where by that date time had been extended by the provision of further documents it had requested from the Appellant. The Tribunal observed that indeed the Respondent did request for further documents in the meeting of 22nd August 2022, which were provided on the 25th August 2022. However, by this time the Appellant's objection had already been deemed allowed by operation of the law pursuant to the provisions of Section 51 (11) (b) of the TPA (supra).

### **Tribunal's Decision**

The Appeal was allowed. The Respondent's objection decision issued 30th August 2022 was set aside. The Respondent was ordered to process the Appellant's refund applications within Ninety (90) days of the date of delivery of this Judgment. Each party was to bear its own costs.

## **TAT 1243/2022:**

### **George Arunga Sino vs Commissioner of Domestic Taxes**

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#### **Background**

The dispute arose when the Respondent carried out a verification of the Appellant's business operations to verify the source of financing for a purchased property of Kshs. 13,000,000.00 and raised additional assessments relating to income tax for the years 2016, 2018, 2019 and 2020 cumulatively in the amount of Kshs. 16,289,924.26. The Appellant disputed the additional assessments and lodged notices of objection. The Respondent issued an objection decision disallowing the Appellant's objection and confirmed the additional assessments. The Appellant, aggrieved by the decision, lodged this Appeal.

#### **Issues for Determination**

Whether the Objection Decision of 27th September 2022 was validly issued - Whether the Respondent's Objection Decision was justified.

#### **Appellant's Argument**

The Appellant argued that the Respondent erred in both law and fact in arbitrarily estimating incomes not known to the Appellant on which additional excessive assessments were based. The Appellant also argued that the Respondent erred in computing tax on gross incomes ignoring deducting all expenses wholly and exclusively incurred in the production of those incomes as provided by Section 15 of the Income Tax Act. The Appellant further argued that the Respondent violated the Appellant's right to fair administrative action by summarily and arbitrarily issuing additional assessments without affording him any reasonable opportunity to be heard on the assessments.

#### **Respondent's Argument**

The Respondent argued that it is not bound by the information provided by the Appellant whilst submitting the self-assessment returns, but can assess for additional taxes based on any other available information in accordance with Section 24 of the TPA. The Respondent further argued that the Appellant had a window of proving his correct tax liability provided under Section 31 of the Tax Procedures Act and provide the records required. The Respondent also argued that the Appellant has not provided proof for its purchases, but has merely made averments that the Respondent computed tax on gross incomes and failed to acknowledge the deductible expenses.

#### **Tribunal Findings**

The Tribunal found that the Respondent did not present evidence to demonstrate that it notified the Appellant that his notice of objection was not validly lodged, it therefore follows that the Respondent was obligated to issue its objection decision within sixty days of a validly lodged objection. The Tribunal also found that the Respondent's objection decision was issued beyond the statutory timelines, therefore the Appellant's objection was deemed as allowed by operation of the law.

#### **Tribunal's Decision**

The Appeal was allowed and the Respondent's objection decision issued on 27th September 2022 was set aside. Each party was to bear its own costs.

## **TAT 1050/2022:**

### **Patrick Njuguna Mwaura vs Commissioner of Domestic Taxes**

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#### **Background**

The appellant, Patrick Njuguna Mwaura, sold a piece of land and was subsequently assessed for Capital Gains Tax (CGT) by the respondent, Commissioner Domestic Taxes. The respondent issued additional assessments after disallowing the adjusted costs and incidental costs claimed by the appellant. The appellant lodged an objection, which was rejected by the respondent for being lodged out of time. The appellant then filed an appeal with the Tax Appeals Tribunal.

#### **Issues for Determination**

Whether the respondent's objection decision was valid pursuant to Section 51(7) of the Tax Procedures Act 2022 - Whether the respondent's assessment disallowing the appellant's claim for costs was justified.

#### **Appellant's Argument**

The appellant argued that the respondent erred in law and fact by calculating CGT on the entire purchase price without considering the net gain. The appellant claimed to have incurred incidental costs and adjusted costs, which should have been deducted from the purchase price before computing CGT. The appellant also argued that the respondent disregarded his documentary evidence of the transfer value and the costs of developing the property. The appellant relied on various sections of the Income Tax Act to support his arguments.

#### **Respondent's Argument**

The respondent maintained that the assessments were correctly issued and conformed to the Income Tax Act. The respondent argued that the appellant failed to provide any evidence that would have altered the assessment. The respondent also contended that the appellant was uncooperative in the provision of relevant records and failed to respond to request of documents, hence no relevant documents or records were provided to support the objection by the appellant.

#### **Tribunal Findings**

The tribunal found that the appellant failed to challenge the respondent's decision to reject the application to file a notice of objection out of time in his memorandum of appeal. Instead, the appellant challenged the merits of the respondent's assessment. The tribunal concluded that it could not evaluate whether the CGT assessments were correct or incorrect since the appellant's notice of objection was rejected for being statutory time barred and the appeal did not challenge that fact.

#### **Tribunal's Decision**

The appeal was dismissed, and the respondent's invalidation decision was upheld. Each party was ordered to bear its own cost.

# Value Added Tax Act

## VAT Refunds

### TAT 1202/2022:

### Kenya Cuttings Limited vs Commissioner of Domestic Taxes

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#### Background

Kenya Cuttings Limited, the appellant, is a company that produces ornamental plant cuttings for export to the Netherlands. The company had accumulated excess input tax due to making exported supplies taxable at the rate of zero per cent and lodged various VAT refund claims with the Commissioner of Domestic Taxes, the respondent, for the tax period of October 2017, November 2017, December 2017 and January 2020, February 2020 and March 2020 amounting to Kshs. 27,040,852.00. The respondent rejected the appellant's refund application, leading to the appeal.

#### Issues for Determination

Whether the Appeal is prematurely before the Tribunal -  
Whether the Respondent erred in rejecting the Appellant's application for VAT refunds.

#### Appellant's Argument

The appellant argued that it is not engaged in any way in research and development activities, contrary to the respondent's claim. The appellant's business is in producing and exporting rooted and unrooted cuttings. The appellant also argued that the respondent had every opportunity to request for documents prior to making the rejections and that the Tribunal should take note of the unprocedural means by which the respondent dealt with the appellant's refund claim.

#### Respondent's Argument

The respondent argued that the services offered by the appellant are those of propagation, research and development, which are performed in Kenya and are agricultural and exempt from VAT. The respondent also argued that the appeal is premature as the rejection of the input VAT claims by the respondent was a refund decision to which the appellant ought to have filed an objection.

#### Tribunal Findings

The Tribunal found that the appeal was properly filed and that the respondent erred in rejecting the appellant's application for the refund claims. The Tribunal noted that the respondent had the opportunity to request for documents prior to making the rejections and did not include the appeal period claim in the refund claim review process, which would have determined the present matter and saved judicial time.

#### Tribunal's Decision

The Tribunal allowed the appeal, set aside the orders of rejection issued on 1st September 2022, and sent the matter back to the respondent to review the Production and Sale agreement dated 1st January 2019 and make a decision on the refund claim for the periods of October to December 2017 and January to March 2020 within 60 days of the date of delivery of this Judgment. Each party was ordered to bear its own costs.



## **TAT 1135/2022:**

### **Unitron Limited vs Commissioner of Domestic Taxes**

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#### **Background**

The Respondent raised an additional VAT assessment on the Appellant for various months from 2015 to 2018 amounting to Ksh.12,846,789.00. The Appellant objected to this decision, which was validated by the Respondent. The Respondent issued an Objection decision, which the Appellant disputed, leading to this appeal.

#### **Issues for Determination**

Whether the Respondent erred in its decision to invalidate objection by the Appellant - Whether the Respondent's invalidation dated 10th November, 2021 is proper and in conformity with the law - Whether the Respondent was right to decline an ADR process after agreeing to do so in an ADR meeting without stating any compelling reasons.

#### **Appellant's Argument**

The Appellant argued that the Respondent issued an Objection decision on the grounds of insufficient documents despite providing all documents requested by the Respondent. The Appellant also argued that the Respondent failed to realize that the only lawful obligation the Appellant has is to check that it purchases goods from a VAT registered supplier and that the supplier has a registered ETR register.

#### **Respondent's Argument**

The Respondent argued that it raised automated VAT assessment after iTax detected inconsistencies between the invoices claimed by the Appellant and those declared by its suppliers. The Respondent also argued that the Appellant was unable to demonstrate to the satisfaction of the Respondent that indeed it had received the said supplies.

#### **Tribunal Findings**

The Tribunal found that the Respondent was not justified in disallowing the Appellant's input VAT refund claim amounting to Ksh 12,789,870.54. The Tribunal also found that the Respondent's objection decision dated 10th November, 2021 was unjustified.

#### **Tribunal's Decision**

The Appeal was allowed. The Respondent's objection decision dated 10th November, 2021 was set aside. Each party was to bear its own costs.

## **TAT 741/2022:**

### **Inchcape Shipping Services Kenya Limited vs Commissioner of Legal Services & Board Coordination**

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#### **Background**

Inchcape Shipping Services Kenya Limited (the Appellant) applied for VAT refunds amounting to Kshs 172,152,008.00 for the period 2015 to 2019, claiming its services were zero-rated. The Commissioner of Legal Services & Board Coordination (the Respondent) issued credit adjustment vouchers instead of refunds. The Appellant objected to this decision, leading to the appeal.

#### **Issues for Determination**

Whether the Appellant's Objection Applications amounting to Kshs 65,824,858 were time barred. Whether the Respondent was justified in rejecting the Appellant's refund claims amounting to Kshs 106,327,150.

#### **Appellant's Argument**

The Appellant argued that its services were zero-rated under the VAT Act, as they were provided to international sea or air carriers on international voyage or flight. The Appellant also contended that the Respondent's reliance on a Tribunal decision that had been overturned by the High Court was erroneous. The Appellant further argued that the credit adjustment vouchers did not meet the legal threshold of a refund decision.

#### **Respondent's Argument**

The Respondent maintained that the services provided by the Appellant were not zero-rated and hence not eligible for a VAT refund. The Respondent also argued that some of the Appellant's objections were lodged late, without providing reasons for the delay, and were therefore time-barred.

#### **Tribunal Findings**

The Tribunal found that the objections amounting to Kshs 65,824,858.00 were indeed time-barred. However, it also found that the Respondent was not justified in rejecting the Appellant's refund claims amounting to Kshs 106,327,150.00, as the High Court had previously overturned a Tribunal decision that these services were subject to VAT.

#### **Tribunal's Decision**

The Appeal was partially allowed. The Tribunal upheld the Respondent's decision relating to refund applications amounting to Kshs 65,824,858.00, but set aside the decision relating to refund applications amounting to Kshs 106,327,150.00. The Respondent was ordered to process the Appellant's refund applications for the sum of Kshs.106,327,150.00 within Ninety (90) days of the date of delivery of the Judgment. Each party was to bear its own costs.

## TAT 1497/2022:

### Ennsvalley Bakery Limited vs Commissioner of Domestic Taxes

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#### Background

Ennsvalley Bakery Limited (the Appellant) applied for a VAT refund for the period January, March, April, and May 2017, which was rejected by the Commissioner of Domestic Taxes (the Respondent). The dispute arose when the Respondent rejected the Appellant's claim for refund on 27th October 2022. The Appellant argued that the Respondent was misguided in fact and law in rejecting the application for refund on the grounds that the refund claim application related to the period October 2022.

#### Issues for Determination

Whether there is a proper Appeal before the Tribunal -  
Whether the Respondent's Refund Rejection Decision of 27th October 2022 was proper in law and justified.

#### Appellant's Argument

The Appellant argued that the Respondent was misguided in fact and law in rejecting the application for refund on the grounds that the refund claim application related to

the period October 2022. The Appellant also contended that the Respondent breached the Appellant's legitimate expectation by reneging from its representations made on 20th June 2022, 27th July 2022 and 4th October 2022 that it would consider the information furnished by the Appellant in arriving at its refund decision.

#### Respondent's Argument

The Respondent argued that the Appellant's application was rejected because it did not meet the requirements of Section 31 (1) of the VAT Act. Further, that the Appellant did not provide the requisite documents and that it did not demonstrate the efforts of recovery of debt and how much it received from the Administrator of Nakumatt Holdings.

#### Tribunal Findings

The Tribunal found that the Appellant's application for refund dated and filed on 23rd November 2020, satisfies all the requirements for refund of the VAT in accordance with Section 31 (1) of the VAT Act. Therefore, the Tribunal found that the Respondent's refund rejection decision is invariably flawed and the Appellant's Appeal is merited.

#### Tribunal's Decision

The Appeal was allowed. The Respondent's refund rejection decision issued on 27th October 2020 was set aside. The Respondent was ordered to process the Appellant's refund application within Ninety (90) days of the date delivery of this Judgment. Each party was to bear its own costs.

## **TAT 003/2023:**

# **Morgan Air & Sea Freight Logistics Kenya Limited vs Commissioner of Domestic Taxes**

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### **Background**

The Appellant, Morgan Air & Sea Freight Logistics Kenya Limited, a logistics solutions provider, lodged VAT refund claims for excess input tax for various periods amounting to Kshs. 11,390,241.38. The Respondent, Commissioner of Domestic Taxes, rejected these claims and issued credit adjustment vouchers for the same amount, implying that the rejected VAT refund claims could be reinstated as excess input tax to be offset against future VAT liabilities. The Appellant objected to the rejected claims, leading to the Respondent issuing an objection decision. Dissatisfied with the Respondent's decision, the Appellant filed an appeal.

### **Issues for Determination**

Whether the Respondent erred in finding that the services offered by the Appellant were not exported services -  
Whether the Appellant is entitled to an input tax refund

### **Appellant's Argument**

The Appellant argued that it did not act as an agent to its customers and that the services it provided were for use or consumption outside Kenya, qualifying as exported services under Section 2 of the VAT Act, 2013. The Appellant also contended that it was immaterial whether it owned a vessel/aircraft to qualify as a provider of transportation and logistics services. The Appellant further argued that the Respondent was bound by previous case law unless a stay order had been issued by a superior court.

### **Respondent's Argument**

The Respondent maintained that the Appellant acted as an agent for its customers and did not provide transportation services as it did not own any aircraft or vessel. The Respondent also argued that it was not bound by previous case law as it had appealed cases with similar business models as the Appellant's. The Respondent further contended that the Appellant failed to provide documentation to support its claims, contrary to the provisions of Section 59 of the TPA.

### **Tribunal Findings**

The Tribunal found that the services offered by the Appellant were indeed export services within the definition of Section 2 of the VAT Act. It also found that there was no principal-agent relationship between the Appellant and its customers. The Tribunal held that the issue of whether the Appellant is a transporter or not is of no consequence as the test of importance in this instance is whether the services provided by the Appellant are exported services. The Tribunal also held that the Respondent's actions in issuing credit adjustment vouchers indicated its admission that the Appellant indeed qualified for a refund as applied for.

### **Tribunal's Decision**

The Tribunal allowed the appeal, set aside the Respondent's objection decision, and ordered the Respondent to process a refund of the excess input VAT within sixty (60) days of the date of delivery of the judgment. Each party was to bear its own costs.

## **TAT 1153/2022:**

### **Orbit Products Africa Limited vs Commissioner Domestic Taxes**

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#### **Background**

Orbit Products Africa Limited (the Appellant) was issued with a VAT Automated assessment by the Commissioner Domestic Taxes (the Respondent) based on VAT inconsistencies that arose from the input taxes claimed by the Appellant in VAT returns filed for the months of January, February, March, April and May 2018. The Appellant lodged an online objection to the assessment. The Respondent issued the Appellant with an objection decision rejecting the Appellant's input VAT of Kshs. 44,883,677.30 adjusted under the VAT Automated Assessment (VAA) for the period February 2018 to May 2018. The Appellant, being aggrieved and dissatisfied with the decision of the Respondent's decision to reject its input VAT adjustment for the period February 2018 to May 2018, subsequently filed this Appeal.

#### **Issues for Determination**

Whether the Respondent's objection decision was justified in disallowing the input VAT claimed by the Appellant.

#### **Appellant's Argument**

The Appellant argued that the Respondent erred in law and fact in disallowing input VAT validly claimed by the Appellant pursuant to Section 17 (3) of the Value Added Tax Act. The Appellant also claimed that the Respondent failed to take into account the supporting documents provided by the Appellant. The Appellant further argued that it had provided all the supporting documentation required under Section 17(3) of the Value Added Tax Act

and that the Respondent failed to take into account the supporting documents provided by the Appellant.

#### **Respondent's Argument**

The Respondent asserted that it issued the Appellant with VAT Automated Assessments based on VAT inconsistencies that arose from input taxes claimed by the Appellant in VAT returns filed for the months of January, February, March, April and May 2018. The Respondent further stated that the Appellant partly failed to avail such documents/records for examination compelling the Respondent to reject the amount of Ksh. 44,833,677.30.

#### **Tribunal Findings**

The Tribunal found that the Appellant did not furnish the necessary documentation to fully support its objection as required by Section 17(2) & (3) of the VAT Act. In the circumstances, the Respondent's objection decision in disallowing the input VAT claimed was justified. The Tribunal also found that the fact that the Appellant dealt with a related party does not in any way exempt it from the provisions of Section 17(2) and (3) of the VAT Act. The offsetting mechanism assumed by the Appellant, in the absence of the requisite documents stipulated under statute cannot form a basis for claim of input VAT.

#### **Tribunal's Decision**

The Appeal was dismissed and the Objection decision dated 18th August 2022 was upheld. Each party was ordered to bear its own costs.

## Compliance - Under-declaration of sales

### TAT 1196/2022:

### Jennt Africa Limited vs Commissioner Domestic Taxes

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#### Background

The Appellant, Jennt Africa Limited, operates a fuel station and is a Rubis brand dealer. The Respondent, Commissioner Domestic Taxes, is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, 1995. The Respondent issued the Appellant with preliminary audit findings advising the Appellant to amend the VTDP application to increase the principal tax de-clared from Kshs. 617,902.00 to Kshs. 15,699,764.00 for the period between September 2018 and December 2018 as well as for the period between January 2020 and June 2020. The Respondent revised the principal tax from Kshs. 377,249.00 to Kshs. 9,128,249.00 to account for the undeclared fuel sales for the period July 2020 to December 2020. The Appellant filed an iTax objection on 5th July 2022. The Respondent issued its objection decision dated 1st September 2022 for both the VTDP period as well as the subsequent period between July 2020 and December 2020 confirming the VAT assessment of Kshs. 29,068,139.

#### Issues for Determination

Whether the Respondent was right in disallowing input VAT with respect to the period September 2018-December, 2020 - Whether the Respondent was right in finding that the Appellant had undeclared its sales for the period July 2020-December 2020.

#### Appellant's Argument

The Appellant argued that the Respondent erred in law and in fact by failing to recognize that petroleum products are subject to price controls and the gross margins and Value Added Tax (VAT) paya-ble are predetermined by law

by the Energy and Petroleum Regulatory Authority. The Appellant also argued that the Respondent erred in law and fact by assessing VAT amount that was higher than the gross margin realized from the Appellant's business. The Appellant further argued that the Respondent erred in law by failing to appreciate that the filing of monthly VAT returns is not a prerequisite for claiming input VAT.

#### Respondent's Argument

The Respondent contended that the assessment was justified and based on the Appellant's actual turnover and business turnover and business circumstances. The Respondent further contended that the less-than GP margin is a one-off scenario and was arrived at because of an adjustment that has been occasioned by applicability of law, specifically on allowability of input taxes. The Respondent also contended that claiming of input VAT must be in accordance with Section 17 of the VAT Act. The Appellant did not claim input VAT within the statutory six months nor did it file returns. These are prerequisites which must be present for the allowing of input VAT.

#### Tribunal Findings

The Tribunal found that the Appellant used a different and incorrect sales margin which resulted to underdeclared VAT and that was the basis of the assessment. The Tribunal therefore found that the Respondent assessment was justified.

#### Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Objection decision dated 1st September 2022. Each Party was ordered to bear its own costs.

# Amendment of VAT returns

## TAT 1258/2022:

### Transafrica Motors Limited vs Commissioner Domestic Taxes

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#### Background

Transafrica Motors Limited, the appellant, noticed that it had inadvertently omitted in its VAT returns for the months of January 2021 and February 2021, input tax on supplies purchased/imported in the same month totaling Kshs. 29,183,396.40 and sought to amend the error in the VAT returns of May 2021. The respondent, Commissioner Domestic Taxes, rejected the amendment on the basis that the inputs sought to be claimed were imported/purchased more than 6 months from the date of the amendment contrary to Section 17(2) of the VAT Act 2013.

#### Issues for Determination

Whether the Respondent was justified in its refusal to allow the Appellant amend the VAT returns.

#### Appellant's Argument

The appellant argued that it had the right to amend its VAT returns within a period of five years as per Section 31 (2) of the Tax Procedures Act. It further argued that the 6 months period allowable by law for claiming input VAT began to run when the supply or importation occurred and not necessarily when the return was filed.

#### Respondent's Argument

The respondent maintained that the input tax sought to be claimed is valid and had not been previously claimed in any returns relating to the month in which supplies/importation occurred or any of the subsequent six months. The respondent further argued that the inputs should have been claimed on or before regardless of the month the taxpayer wanted to amend its return.

#### Tribunal Findings

The Tribunal found that the appellant was within time to amend the May return as per Section 31 (2) of the Tax Procedures Act. It also found that the amendment in May would not result in the input VAT claim being time barred as per Section 17 (2) of the VAT Act. Therefore, the Tribunal held that the respondent was not justified in its refusal to allow the appellant's application for amendment of the May return.

#### Tribunal's Decision

The Tribunal allowed the appeal, set aside the Objection Decision dated 23rd September 2022, and ordered the respondent to allow the appellant to amend the VAT returns for the month of May 2021 and to claim the input VAT arising therefrom.



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