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Tax Case Summaries

# Select Tax Appeal Tribunal Decisions

Issue No. 4/2024

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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.

## Classification of goods presented together – Tarif classification.

**TAT 887/2022:**
Asif Abdulla Kadernami vs Commissioner of Customs and Border Control

### Background

The Appellant, Asif Abdulla Kadernami, is a Kenyan citizen whose principal business activity is sales, installation, and maintenance of solar energy products. The Respondent, Commissioner of Customs and Border Control, is a principal officer appointed under the Kenya Revenue Authority Act. The Appellant received an enforcement notice from the Respondent, which stated that a desk audit had found that solar water heaters imported by the Appellant had been wrongly classified under tariff code 8419:19.00 instead of 8516:10.00. The Appellant objected to this demand, but the Respondent upheld its demand amounting to Kshs. 4,062,551.69. Dissatisfied with the review decision, the Appellant filed a Notice of Appeal.

### Issues for Determination

Whether the Respondent erred in law and in fact in reclassifying the Appellant's solar water heaters from tariff code 8419.19.00 to tariff code 8516:10.00

### Appellant's Argument

The Appellant argued that the solar water heaters imported by them are not classifiable under Heading 85:16 but rather 84:19. They also contended that the Respondent failed to appreciate that the Appellant has a right of access to information provided under Article 35 of the Constitution of Kenya 2010. The Appellant further argued that the Respondent erred in law by purporting to retrospectively apply the opinion of the WCO dated 3rd November 2021 to imports that took place many years before the same opinion was delivered.

### Respondent's Argument

The Respondent contended that the Appellant's imported dual solar water heating systems have an electric component and are therefore dual water heating systems classifiable under Chapter 85 of EAC CET. The Respondent also argued that the WCO advisory opinion dated 3rd November, 2021 was an opinion and did not in any way alter the East African Community Common Market Tariff (EAC CET) which governs the classification of goods in Kenya.

### Tribunal Findings

The Tribunal found that the Respondent erred in reclassifying the Appellant's solar water heaters from tariff code 8419.19.00 to tariff code 8516:10.00. The Tribunal noted that the East African Solar Taxation Handbook describes solar water heaters as machinery, plant for conversion of sunlight into heat for water heating using a solar thermal collector. The Handbook indicates that the HS code used for solar water heaters in the East African countries is 8419.19.00. The Tribunal also noted that the Respondent did not offer a satisfactory justification for departure from the code that it has used over the years and that continues to be used by the other countries in the East African Customs Union.

### Tribunal's Decision

The Tribunal allowed the Appeal and set aside the Respondent's objection decision dated 15th July 2022. Each party was ordered to bear its own costs.

## Duty Remission – Importation of goods past the specified duty remission timelines.

### TAT 1240/2022:
Nestle Kenya Ltd Vs Commissioner of Customs And Border Control

### Background

The dispute arose from the Respondent's decision to classify the Appellant's imported Coffee Mate Coffee Creamer under tariff code 2106.90.99 instead of the Appellant's declared tariff of 2106.90.20. The Appellant applied for a review of the Respondent's classification decision, which was revoked and reclassified under tariff code 2106.90.99. Dissatisfied with the decision, the Appellant lodged an appeal.

### Issues for Determination

Whether the Respondent was justified in reclassifying the Appellant's imported product under HS code 2106.90.99 instead of HS code 2106.90.20.

### Appellant's Argument

The Appellant argued that the correct tariff classification for its product is 2106.90.20, not 2106.90.99 as contended by the Respondent.

The Appellant relied on the General Rules for the Interpretation of the Harmonized System (GIRs) and the product's attributes to determine the tariff classification. The Appellant also argued that the Respondent's tariff decisions were arbitrary and unreasonable, thus contrary to the Appellant's right to fair administrative action.

### Respondent's Argument

The Respondent argued that it subjected a sample of the product to laboratory analysis and confirmed it to be a food preparation containing various ingredients and that it did not contain any caffeine. The Respondent also argued that the product was ready to use without any value addition. Based on this, the Respondent concluded that the product was a non-dairy creamer incorporated in coffee beverages classifiable under HS Code 2106.90.99.

### Tribunal Findings

The Tribunal found that the Appellant's product, Coffee Mate Coffee Creamer, is imported for use as a raw material in the manufacture of beverages, fitting the description under Subheading 2106.90.20 - 'preparations of a kind used in manufacturing of beverages and food'. The Tribunal also found that Subheading 2106.90.99 is a residual tariff used for goods not described elsewhere in the heading and would not be appropriate for the subject product. Therefore, the Tribunal found that the appropriate classification for the Appellant's imported non-dairy coffee creamer should be EAC/CET HS Code 2106.90.20.

### Tribunal's Decision

The Tribunal allowed the appeal, set aside the Respondent's review decision issued on 9th September 2022, and ordered each party to bear its own costs.

## TAT 1376/2022:
## Hygrotech East Africa Limited vs Commissioner of Customs and Border Control

### Background

The case arose from a customs post-clearance audit of Hygrotech East Africa Limited's imports for the period 2017 to 2022. The Commissioner of Customs and Border Control issued a demand notice to Hygrotech, claiming VAT in the sum of Kshs. 4,367,057.88. The Commissioner argued that Hygrotech had wrongly classified its DK-20 organic fertilizer imports under HS Tariff Code 3101.00.00, which does not attract VAT, instead of the Commissioner's proposed HS Tariff Code 3808.93.90, which does attract VAT. Hygrotech lodged an application for review, objecting to the reclassification and assessment. The Commissioner amended the applicable HS Code from 3808.93.90 to 3824.99.90 and confirmed its VAT assessment and demand. Dissatisfied with the Commissioner's review decision, Hygrotech lodged an appeal with the Tax Appeals Tribunal.

### Issues for Determination

Whether the Appellant's right to legitimate expectation was breached by the Respondent in the reclassification of its imported product DK-20. - Whether the Respondent was justified in reclassifying the Appellant's imported product DK-20 from Tariff Code 3101.00.00 to Tariff Code 3824.99.90.

### Appellant's Argument

Hygrotech argued that it had a legitimate expectation stemming from the Commissioner's practice of classifying DK-20 under HS Code 3101.00.00. It contended that it had been importing DK-20 organic biofertilizer under this code since 2017 and had always availed all relevant documents to the Commissioner for clearing the product. Hygrotech also argued that the Commissioner's reclassification of the product was unjustified. It asserted that DK-20 is an organic fertilizer and does not fall within Tariff Code 3824.99.90 as it is an organic biofertilizer that does not have any chemicals or mixture of chemicals with natural products. Hygrotech further contended that the Commissioner erred by failing to consider or ignoring the analysis and categorization by KEPHIS of DK-20 as an organic fertilizer while undertaking its customs tariff classification.

### Respondent's Argument

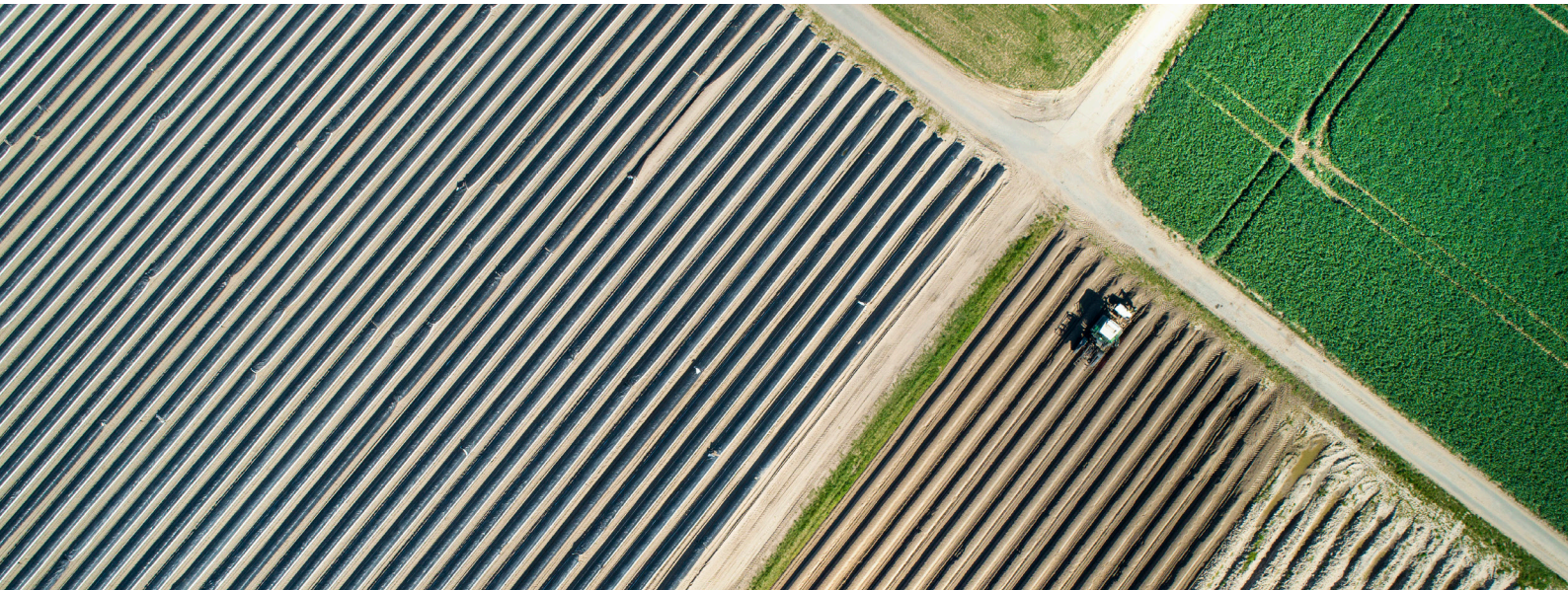
The Commissioner contended that it did not err by disregarding Hygrotech's practice of classifying its product DK-20 under Tariff Code HS 3101.00.00, as this did not give rise to legitimate expectation. The Commissioner submitted that its mandate to conduct post clearance audit is anchored in Sections 235 and 236 of EACCMA, 2004, which allows the Commissioner to be satisfied beyond reasonable doubt of the compliance with all customs laws and regulations for imports and exports. The Commissioner also contended that Hygrotech's product DK-20 is not a fertilizer but rather it was a plant growth stimulator (bio stimulant) that acts a physiological trigger for plant growth and development in roses, rice and other crops.

### Tribunal Findings

The Tribunal found that the Commissioner was within its right to conduct the post clearance audit within the five years period provided for under the law, and as such there cannot be a legitimate expectation against the clear provisions of the law. The Tribunal also found that the Appellant's product DK-20 is an organic fertilizer and is not constituted with any chemicals or mixture of chemicals and is therefore free of any chemicals, and therefore cannot appropriately be classified under Tariff Heading 3824.99.90. The Tribunal concluded that the most appropriate classification for the Appellant's product DK-20 is under Tariff HS Code 3101,00.00.

### Tribunal's Decision

The Tribunal allowed the appeal, set aside the Commissioner's review decision issued on 26th September 2022, and ordered each party to bear its own costs.



## TAT 1390/2022:
Pesapal Limited vs Commissioner of Customs and Border Control

**Background**

The Respondent conducted a Post Clearance Audit on the Appellant's imported Mobile Point of Sale devices (MPOS) and reclassified the same from tariff HS code 8471.41.00 to HS code 8470.50.00 contending that the same had been misclassified, and consequently issued a demand notice dated 22nd July 2022 for additional tax in the sum of Kshs. 2,837,476.00 thus giving rise to the dispute herein.

**Issues for Determination**

Whether the Respondent in reclassifying the Appellant's imported goods was in breach of the appellant's legitimate expectation.
- Whether the Respondent was justified in classifying the Appellant 's imported MPOS devices under tariff HS code 8470.50.00 instead of HS code 8471.41,00.

**Appellant's Argument**

The Appellant contended that its MPOS devices were properly classified under tariff HS code 8471.41.00 and stated that this applies to; 'Automatic data processing machines comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined.' The Appellant also stated that HS Heading 84.71 broadly defines automatic processing machines as; 'Automatic data processing machines and units thereof; magnetic or optical readers; machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.'

**Respondent's Argument**

The Respondent stated that the Appellant erred in classifying its MPOS devices under tariff code HS code 8471.41.00 which is reserved for automatic data processing machines as opposed to HS code 8470.50.00 which is reserved for cash registers. The Respondent also stated that the classification of goods in the nomenclature is guided by General Interpretation Rules (GIRs) as set out in the EAC CET, 2017 version.

**Tribunal Findings**

The Tribunal found that the MPOS devices cannot be correctly described within the term cash registers and came to the inescapable conclusion that the said devices are more appropriately describable under automatic data processing machines as opposed to cash registers. The Tribunal also found that the Appellant's imported MPOS devices were correctly classifiable under the Tariff HS Code 8471.41.00.

**Tribunal's Decision**

The Appellant's appeal was allowed. The Respondent's review decision dated 21st September 2022 was set aside. Each party was to bear its own costs.

# Excise Duty Act

## Classification of Excisable goods

### TAT 1179/2022:
Mawingu Networks Limited vs Commissioner of Domestic Taxes

**Background**

The Respondent conducted a compliance review of the Appellant's returns and found a variance between the Appellant's business turnover and its declared turnover for Excise duty for the period October 2018 to October 2021. The Respondent subsequently raised assessments for Excise tax manually on 15th December 2021 followed by an online assessment via iTax on 20th April 2022. The Appellant raised an Objection to the assessment on 4th July 2022 which was acknowledged by the Respondent on 15th July 2022 and upon further communication and deliberation between the parties, the Appellant provided documents to the Respondent. The Objection was fully rejected by the Respondent in its objection decision of 29th August 2022.

**Issues for Determination**

Whether the Appellant's infrastructure used in the provision of internet data services is subject to Excise Duty.

**Appellant's Argument**

The Appellant argued that its infrastructure fee charged to its client is separate from the internet data fee as the term 'Telephone and internet data service' provided under Paragraph 1 Part II of the Second Schedule to the Excise Duty Act is not clearly defined to include infrastructure used to facilitate the provision of such services to the client such as fibre optic cables and towers. The Appellant further submitted an analogy that likened the Respondent's act of charging its infrastructure to that of charging excise duty the telephones (hardware) used to provide telephone services to people which is wrong.

**Respondent's Argument**

The Respondent was of the submission that the Appellant's action of separately charging the infrastructure fee from the data service fee in its invoices to its clients is a blatant act of trying to evade tax in the form of Excise duty and that the infrastructure used to facilitate the provision of data services to the Appellant's clients are so intertwined that it is impossible to separate one from the other thus both are chargeable to excise duty.

**Tribunal Findings**

The Tribunal found that the infrastructure as provided by the Appellant in its invoices are not subject to excise duty. The Tribunal therefore finds that the Appellant's has satisfactorily proven that its charge for infrastructure is distinct and separate from the provision of internet data service.

**Tribunal's Decision**

The Appeal was allowed. The Respondent's Objection decision dated 29th August 2022 was set aside. Any monies paid to the Respondent in respect to the Respondent's decision were ordered to be refunded to Appellant forthwith. No orders as to costs.

# Income Tax Act

## Liability to pay tax in Kenya

### TAT 734/2022:
Palladium Development and Consultancy Limited vs. Commissioner of Domestic Taxes

**Background**

Palladium Development and Consultancy Limited (the Appellant) is a Kenyan company involved in sustainable development projects. The company's income is primarily from grants from its UK-based holding company, Palladium Group Holdings Ltd. The Commissioner of Domestic Taxes (the Respondent) conducted a review of the Appellant's tax payments and self-assessed returns, leading to a dispute over the classification of certain payments and the application of withholding tax. The Appellant objected to the assessment, leading to an appeal at the Tax Appeals Tribunal.

**Issues for Determination**

Whether the Appellant is liable to pay taxes in Kenya - Whether the reconciliation discrepancies between income tax returns and PAYE returns on iTax should be subjected to further assessments - Whether the consultants should be classified as employees thus subjecting their income to PAYE as opposed to withholding tax - Whether reimbursement of project related costs to consultants qualify as consultancy fees subjected to withholding tax or not - Whether the withholding tax on deemed interest should apply on grants/loans received from Palladium International LLC.

**Appellant's Argument**

The Appellant argued that it operates on a not-for-profit basis and is exempt from tax under a Memorandum of Understanding between the Kenyan Government and the United States and United Kingdom. It disputed the Respondent's classification of certain payments as subject to withholding tax, arguing that these were reimbursements for project-related costs, not consultancy fees. The Appellant also contended that certain individuals were independent consultants, not employees, and thus their income should not be subject to PAYE. Finally, the Appellant argued that it did not receive loans from its holding company, but grants, and thus withholding tax on deemed interest should not apply.

**Respondent's Argument**

The Respondent maintained that the Appellant is liable to pay taxes in Kenya. It argued that the Appellant had not provided sufficient evidence to support its claims of tax exemption or to justify its classification of certain payments. The Respondent contended that the individuals in question were employees, not independent consultants, and thus their income was subject to PAYE. It also argued that the Appellant had received loans from its holding company, not grants, and thus withholding tax on deemed interest should apply.

**Tribunal Findings**

The Tribunal found that the Appellant is liable to pay taxes in Kenya, as it had not provided sufficient evidence to support its claims of tax exemption. It also found that the Appellant had not provided sufficient evidence to justify its classification of certain payments as reimbursements for project-related costs, rather than consultancy fees. The Tribunal agreed with the Respondent that the individuals in question were employees, not independent consultants, and thus their income was subject to PAYE. Finally, it found that the Appellant had received loans from its holding company, not grants, and thus withholding tax on deemed interest should apply.

**Tribunal's Decision**

The Tribunal dismissed the appeal, upheld the Respondent's assessment and ordered each party to bear its own costs.

## Classification as a member's club under Section 21 (1) of the Income Tax Act.

### TAT 1263/2022:
Automobile Association of Kenya vs Commissioner of Domestic Taxes

**Background**

The Automobile Association of Kenya (Appellant) was assessed by the Commissioner of Domestic Taxes (Respondent) for Corporate Income Tax (CIT) amounting to Kshs. 27,165,407.00 for the financial years 2016 to 2020. The assessment was based on the Respondent's assertion that the Appellant did not qualify as a members' club under Section 21 (1) of the Income Tax Act because more than 50% of its gross income was derived from driving school learners who did not qualify to be members as provided for under Section 21 (3) of the Income Tax Act. The Appellant objected to the assessment, but the Respondent confirmed the assessment. Dissatisfied with the Respondent's decision, the Appellant appealed to the Tax Appeals Tribunal.

**Issues for Determination**

Whether the Appellant's driving school learners meet the threshold of a 'member' as defined under Section 21 (3) of the Income Tax Act - Whether the Respondent was justified in confirming its assessment

**Appellant's Argument**

The Appellant argued that the driving school learners were indeed members of the association, as they were registered as ordinary members upon payment of a membership access fee. The Appellant contended that the word 'entitled' as used in Section 21 (3) of the Income Tax Act is not defined, and therefore any right, material or immaterial, significant or insignificant, where granted to its members on properties is reasonable and falls in the purview of 'entitlement' under Section 21 of the Income Tax Act. The Appellant further argued that the Respondent's actions to 'reclassify' members to be 'non-members' is usurpation of judicial authority to establish and determine who has rights, adjustment to those rights and extent of those rights.

**Respondent's Argument**

The Respondent contended that the Appellant's learners are given temporary 'access' to the driving school facilities for a limited period of time only and did not entitle them to other services offered by the Appellant. The Respondent argued that the learners' real motive when engaging the Appellant was to obtain training services and not membership to a member's club. The Respondent further argued that the Appellant does not qualify to be a member's club under Section 21 (1) of the Income Tax Act because more than 50% of its gross income is derived from the driving school learners who do not qualify to be members as provided under Section 21 (3) of the Income Tax Act.

**Tribunal Findings**

The Tribunal found that the Appellant's driving school learners were indeed members of the association as per the constitution of the Association. However, Section 21 (3) of the ITA only recognizes members if those members are entitled to a share of the assets of the association upon liquidation. The Appellant's constitution outlines the rules on dissolution of the association but does not mention the interest of members in the assets of the association in the event of liquidation. Wherefore, such entitlement would only be determined by a court of competent jurisdiction as stipulated under the provisions of the Insolvency Act. Having thus concluded, and in the absence of a determination under the Insolvency Act alienating the Ordinary Members from entitlements to assets of the Association upon liquation, the Tribunal held that the Ordinary Members be treated as members as per Section 21 (3) of the ITA.

**Tribunal's Decision**

The Tribunal allowed the Appeal, set aside the Respondent's Objection decision dated 16th September 2022, and ordered each party to bear its own cost.

## Transfer Pricing and application of the arm's length principal.

### TAT 1181/2022:
Checkpoint Technologies Kenya Limited Vs. Commissioner of Domestic Taxes

**Background**

The case arose from a review of Checkpoint Technologies Kenya Limited's tax records for the periods 2017-2020 by the Commissioner of Domestic Taxes. The review covered Corporation tax, PAYE and Withholding tax. Following the review, the Commissioner issued a notice of assessment, which the company objected to. The Commissioner rejected the company's objection, leading to the appeal. The main issue in dispute was the company's transfer pricing policy and the rate applied in its dealings with related parties.

**Issues for Determination**

Whether the income reported by the company from its dealings with related parties was sufficient and appropriate in line with the company's transfer pricing policy and the requirements of the Income Tax Act. - Whether the company was required to adopt the median position in an interquartile range. - Whether the reimbursement of the expenses to employees constitutes a professional service subject to Withholding tax. - Whether the accrual of staff costs and incentives constitute an employment benefit subject to PAYE. - Whether the claimed medical benefit is a taxable employment benefit.

**Appellant's Argument**

Checkpoint Technologies Kenya Limited argued that the income it reported from its dealings with related parties was in line with its transfer pricing policy and the requirements of the Income Tax Act. The company contended that it was not required to adopt the median position in an interquartile range, and that the reimbursement of expenses to employees did not constitute a professional service subject to Withholding tax. The company also argued that the accrual of staff costs and incentives did not constitute an employment benefit subject to PAYE, and that the claimed medical benefit was not a taxable employment benefit.

**Respondent's Argument**

The Commissioner of Domestic Taxes argued that the income reported by the company from its dealings with related parties was neither sufficient nor appropriate in line with the company's transfer pricing policy and the requirements of the Income Tax Act. The Commissioner contended that the company was required to adopt the median position in an interquartile range. The Commissioner also argued that the reimbursement of expenses to employees constituted a professional service subject to Withholding tax, and that the accrual of staff costs and incentives constituted an employment benefit subject to PAYE. The Commissioner further contended that the claimed medical benefit was a taxable employment benefit.

**Tribunal Findings**

The Tribunal found that the revenue reported by the company in its income statement was within the arm's length range of between 4.9% and 7.3%, and there was no justification for the Commissioner to adjust the company's income as reported in its financial statements. The Tribunal also found that the company's transfer pricing policy was in line with the requirements of the OECD Guidelines, and that the company was not required to adopt the median position in an interquartile range. The Tribunal further found that the Commissioner's decision to assess the company's Corporation tax using a method that is not known to law was not justified.

**Tribunal's Decision**

The Tribunal set aside the assessment in relation to Corporation tax covering the years 2017-2020. Each party was ordered to bear its own costs.

# Tax Appeal Tribunal Act

## Appeals out of time.

**TAT 1138/2022:**
Majesty Construction Limited vs Commissioner of Legal Services & Board Coordination

**Background**

The dispute arose when the Respondent carried out an analysis of the Appellant and raised additional assessments relating to income tax for the years 2019 and 2020, and for VAT for the period March 2020 and January 2021. The Appellant disputed the additional assessments and lodged its notices of objection. The Respondent issued the 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 there is a proper Appeal before the Tribunal - Whether the Objection Decision of 29th August 2022 was validly issued - Whether the Respondent's assessments on VAT and Income Tax were justified

**Appellant's Argument**

The Appellant argued that the Respondent erred in law and fact by contravening the provisions of Section 51 (11) of the Tax Procedures Act, 2015 while issuing its objection decisions. The Appellant also contended that the Respondent's assessments on income tax for the periods 2019 and 2020 were unfair and lacked due consideration of the material facts in establishing the correct tax position of the Appellant.

**Respondent's Argument**

The Respondent argued that the Appellant filed on iTax its returns relating to income tax and VAT for the periods 2019 and 2020, which did not accurately capture its tax positions, necessitating the Respondent to undertake a review on the Appellant's tax affairs. The Respondent further contended that since the Appellant failed to properly declare income, the Respondent was without choice but to issue an assessment based on available documents and best judgement.

**Tribunal Findings**

The Tribunal found that the Appellant ought to have lodged its Appeal on or before the 28th September 2022, but failed to do so. The Tribunal also found that there exist provisions of law that offer remedy to an Appellant who intends to lodge an Appeal beyond the statutory timelines, under Section 13 (3) of the TAT Act, which makes such provisions and such an Appellant could seek leave of the Tribunal to regularize such lateness, the Appellant has however failed to do so.

**Tribunal's Decision**

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

# Tax Procedures Act.

## Failure to discharge documentary burden of proof.

### TAT 1149/2022:
Preferred Personnel Limited Vs Commissioner of Domestic Taxes

**Background**

The Respondent issued an assessment demanding an additional tax amounting to Kshs. 157,824,499.00 which comprised of Kshs. 111,931,320.00 in principal tax and a total penalty and interest of Kshs. 45,893,179.00. The taxes assessed comprised Corporation tax, Withholding tax (WHT) and Value-Added Tax (VAT). The Appellant partly objected to Kshs 111,931,320.00 (in principal tax) of the additional assessment and conceded to Kshs 2,809,052.00 (in principal tax). The Respondent issued and delivered its objection decision dated 12th September, 2022, amending the additional assessment to Kshs. 153,803,747.00 which comprised of Kshs. 109,115,724.00 in principal tax and a total penalty and interest of Kshs. 44,688,023.00.

**Issues for Determination**

Whether the Respondent's assessment for Corporation tax was justified - Whether the Respondent's assessment for Withholding tax was justified - Whether the Respondent's assessment for Value Added Tax was justified.

**Appellant's Argument**

The Appellant argued that it provides HR solutions to its clients and it gets reimbursements of employment costs and earns a margin for the service. The Appellant claimed that the Respondent may have willfully and capriciously ignored most of the information and documents presented as evidence in explaining the issues that gave rise to the assessed Corporate tax. The Appellant also claimed that the Respondent's demand of Kshs 153,803,747.00 is excessive, punitive and beyond the ability of the Appellant to pay contrary to generally accepted cannons of taxation.

**Respondent's Argument**

The Respondent argued that all payments made by the Appellant's clients should be subjected to VAT. The Respondent claimed that the Appellant did not provide documentation while the Appellant averred that the Respondent relied on documentation it provided to accept its concession to part of the Withholding tax assessment. The Respondent also contended that it was improper for the Appellant to claim an overpayment of tax as an allowable deduction. The Respondent averred that its findings were that the engagement between the Appellant and its clients are similar to labour outsourcing contracts thus the consideration of the service provided includes both the cost of labour as well as the mark-up on the cost.

**Tribunal Findings**

The Tribunal found that the payments made to the Appellant for reimbursement of employee-related costs are not vatable as they constitute reimbursements of employee salaries and emoluments and therefore not chargeable to VAT. The Tribunal also found that the Appellant did not provide the invoices requested by the Respondent to conclusively support its averment, hence it did not exhaust its burden of proof in demonstrating that the residual Withholding tax assessment was not justified. The Tribunal also found that the Appellant did not follow the provisions of Section 47 of the TPA and the Respondent was justified in disallowing the tax credits claimed as a deductible expense.

**Tribunal's Decision**

The Appeal was partially allowed. The Respondent's objection decision dated 28th June, 2022 was varied in the following terms: The Corporation tax assessment was upheld. The Withholding tax assessment was upheld. The VAT assessment was set aside. Each party was to bear its own costs.

## TAT 1514/2022:
Cellnet Limited Vs Commissioner of Domestic Taxes

### Background

The Appellant, Cellnet Limited, is a private limited liability company incorporated under the Companies Act, CAP. 486 (Repealed) of the laws of Kenya and is a tax resident in Kenya registered with the Kenya Revenue Authority. The Appellant's principal business activity involves the sale of airtime, connector packs, mobile phones and accessories, computer equipment and networking accessories. The Respondent, Commissioner of Domestic Taxes, is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, Cap 469. The Respondent conducted investigations on the Appellant for the period July 2015 to June 2020 and upon conclusion issued an assessment of Kshs. 245,825,276.00 on 28th June 2022. The Appellant lodged an objection against the Respondent's assessment on 6th July 2022 on iTax and a detailed objection on 2nd September 2022.

### Issues for Determination

Whether the Respondent's assessment was validly issued - Whether the Respondent was justified in confirming the VAT assessment on adjusted vatable sales.

### Appellant's Argument

The Appellant argued that the Respondent had assessed and confirmed VAT assessment for Kshs. 12,982,500.00 being Kshs. 7,892,779.00 and Kshs. 5,089,721.00 relating to years 2016 and 2019 respectively. The Appellant submitted that it earned a commission from its dealership agreement with Safaricom based on the volumes of sales made from various commodities retailed/ owned by Safaricom. These sales commissions would be broken down into three main categories namely; commissions from M-Pesa, commissions from sale of airtime to both prepaid and post-paid customers, and sale of peripheral devices. The Appellant submitted that the commissions earned from the operations of M-pesa and the sale of airtime to prepaid and post-paid customers are exempt from VAT. The Appellant submitted that this is in fulfilment to the provisions of Paragraphs 16 and Paragraph 1 (b) of the First Schedule to the VAT Act.

### Respondent's Argument

The Respondent submitted that the Appellant's Appeal was not supported by documentary proof showing why the Respondent's assessment and objection decision is erroneous and the same is without merit and thus ripe for dismissal. The Respondent submitted that the Appellant's commissions from sales of Safaricom airtime are VAT exempt by relying on a directive issued by the Kenya Revenue Authority Domestic Taxes Department (KRA DTD) to Safaricom Limited and Celtel Limited on 16th March 2005. On the other hand, the Respondent submitted that the said advisory is obsolete and that the said Ruling was withdrawn under Section 64 (2) of the Tax Procedures Act, 2015 and upon repeal of the Value Added Tax, Cap 476.

### Tribunal Findings

The Tribunal found that the Respondent had erred in assess for the year 2016 as the same was time barred, it remains for the Tribunal to determine on the assessment relating to the year 2019. The Tribunal found that the Appellant has provided documents including bank statements showing monies received from its customers, however there is nothing provided identifying the various amounts of commissions earned from Safaricom in respect of Mpesa transactions fees and dealer commissions that it sought to be exempted in arriving at the Vatable amount that the Respondent was bringing to charge in the year 2019. The Tribunal found that the Appellant having failed to prove its case the Respondent was justified in confirming the VAT assessment on adjusted vatable sales.

### Tribunal's Decision

The Appeal is hereby partially allowed. The Respondent's Objection decision issued on 1st November 2022 is varied in the following terms; The assessment on VAT in the sum of Kshs. 7,892,779.00 relating to year 2016 be and is hereby set aside. The assessment on VAT in the sum of Kshs. 5,089,721.00 relating to the year 2019 be and is hereby upheld. Each party to bear its own costs.

## Assessment outside the 5-year statutory timeline

### TAT 548/2022:
Sidoman Investment Limited vs Commissioner of Investigations & Enforcement

**Background**

The Respondent, Commissioner of Investigations & Enforcement, carried out investigations on the Appellant's, Sidoman Investment Limited, tax affairs and subsequently issued a tax assessment for total taxes amounting to Kshs 607,805,388.00. The Appellant, a clearing and forwarding services company, objected to this assessment, arguing that it was based on the erroneous assumption that the Appellant was in the trade of importation and resale of goods. The Appellant maintained that it only cleared consolidated imports belonging to third parties and had duly declared all income earned in the period in question. The Respondent confirmed the assessments, leading to the Appellant filing this appeal.

**Issues for Determination**

Whether the Respondent was justified in assessing the Appellant beyond the five years. - Whether the Respondent was justified in its decision to confirm the assessment of taxes.

**Appellant's Argument**

The Appellant argued that the assessment was based on erroneous grounds, that it was a clearing and forwarding agent and only cleared consolidated imports belonging to third parties. The Appellant maintained that it had duly declared all income earned in the period in question as provided for by the Income Tax Act Cap 476 laws of Kenya. The Appellant also contended that it did not keep information in the format requested by the Respondent for the individual owners of the consolidated consignment as there was no legal requirement to do so.

**Respondent's Argument**

The Respondent contended that the Appellant was declaring business expenses incurred in the course of trade and input VAT claimed without declaring the income earned as a result of consolidation. The Respondent argued that the Appellant neither provided particulars of the clients on whose behalf the Appellant was acting for nor evidence to prove the commission paid to the Appellant for the services rendered. Therefore, there was nothing to demonstrate that the credits in the Appellant's accounts were not the company's taxable income.

**Tribunal Findings**

The Tribunal found that the Respondent was not justified in assessing the Appellant beyond the five years as provided by law, unless issues of wilful neglect, evasion or fraud is proven. Given that the notice of assessment was issued on 31st August, 2021, the law allowed the Respondent to assess the Appellant only up to 1st September, 2016. The Tribunal also found that the Appellant did not provide the necessary documents in support of the transactions in its bank account including any agreements with the clients stating the terms of their engagements which would have explained the transactions in its bank account. Therefore, the Tribunal found that the Respondent, save for the assessments beyond five years, did not err in confirming the assessments.

**Tribunal's Decision**

The Appeal was partially allowed. The objection decision dated 15th April, 2022 was varied. The Income tax assessments for the years 2014 and 2015 were set aside. The VAT assessment for the period prior to September 2016 was set aside. The Respondent was directed to re-compute income tax and VAT as per the variations within Thirty (30) days of the date of delivery of this Judgement. Each party was to bear its own costs.

## TAT 1443/2022:
Africa Reit Limited vs Commissioner Of Domestic Taxes

### Background

The Respondent, Commissioner of Domestic Taxes, carried out investigations on the Appellant, Africa REIT Limited, for the period between January 2014 and December 2017 for Corporation Income tax, PAYE and VAT. The Respondent issued the Appellant a notice of assessment dated 24th June 2015. The Appellant objected to the assessments and provided necessary documentation in support of the objection. The Respondent considered the documents and issued an objection dated 17th October 2022, adjusting the assessments and giving a revised figure of Kshs. 20,493,132.00 as the taxes due. The Appellant, aggrieved by the confirmation of assessments, filed a Notice of Appeal before the Tribunal.

### Issues for Determination

Whether the Respondent's assessments were justified
- Whether the Respondent breached the Appellant's legitimate expectations

### Appellant's Argument

The Appellant argued that the Respondent's assessments were done beyond the five years legal limit for documents in custody by the Appellant and Respondent's failure to demonstrate that there was any evidence of gross or wilful neglect to warrant extension of the period, contrary to Section 29 (5) & (6) of the Tax Procedures Act. The Appellant also contended that the Respondent erred in law by demanding VAT on a transaction that happened before the VAT Act was amended hence acting retrospectively. The Appellant further argued that the Respondent's actions were contrary to legitimate expectations on the operations of the taxpayer.

### Respondent's Argument

The Respondent maintained that the assessments were made in the year 2012 when the payment of the consideration was made since the Respondent based its assessments on the banking analysis method. The Respondent also argued that the Appellant has not shown or pleaded the kind of representation or past practice that it places reliance on for the doctrine of legitimate expectation.

### Tribunal Findings

The Tribunal found that the Respondent did not file and serve any Statement of Facts in opposing the Appeal, and the Tribunal subsequently issued an Order that the Appeal proceeds unopposed. The Tribunal also found that the Respondent has not led or presented any evidence either under Section 29 (6) or Section 31 (4) (a) of the Tax Procedures Act to justify assessment of taxes beyond the five-year rule. The Tribunal therefore held that the tax assessments dated 24th June 2022 are statutory time barred.

### Tribunal's Decision

The Appeal was allowed and the Respondent's Objection decision dated 17th October 2022 was set aside. Each party was to bear its own costs.

## Failure to obtain a tax exemption certificate as required.

### TAT 442/2020:
H.P. Gauff Ingenieure GMBH & Co KG vs Commissioner of Domestic Taxes

**Background**

The Appellant, H.P. Gauff Ingenieure GMBH & CO KG, a German multinational with a branch in Kenya, was issued a notice of intention to audit its tax declarations for the period 2012 to 2019 by the Respondent, Commissioner of Domestic Taxes. Following the audit, the Respondent issued a notice of assessment demanding an additional tax amounting to KShs 1,955,787,204.00, which comprised of KShs 1,360,591,271.00 in principal tax and a total penalty and interest of KShs 595,195,932. The taxes assessed included Corporation tax, PAYE, and VAT. The Appellant objected to the entire assessment, leading to the current appeal.

**Issues for Determination**

Whether the Respondent considered all information and explanations provided by the Appellant before arriving at the objection decision - Whether the Respondent overlooked the decision in the judgment of TAT Case No. 165 of 2017 on the application of tax exemptions granted to Official Aid Funded Projects (OAFP) - Whether the Respondent wrongfully assessed income tax on a project whose income arose from outside Kenya contrary to Section 4 of the Income Tax Act - Whether the Respondent wrongfully charged Value Added Tax (VAT) on the Merille - Marsabit Road project income contrary to the decision in the judgment of TAT Case No. 165 of 2017 relating to the same project - Whether the Respondent's assessment of Kshs 1,955,787,204.00 is excessive, punitive and beyond the ability of the appellant to pay contrary to generally accepted canons of taxation.

**Appellant's Argument**

The Appellant argued that the Respondent failed to consider all information and explanations provided, including the Shared Service agreement, Transfer Pricing policy, and additional invoices. The Appellant also claimed that the Respondent overlooked the decision in TAT Case No. 165 of 2017 on the application of tax exemptions granted to Official Aid Funded Projects (OAFP). The Appellant further contended that the Respondent wrongfully assessed income tax on a project whose income arose from outside Kenya, contrary to Section 4 of the Income Tax Act, and wrongfully charged VAT on the Merille - Marsabit Road project income. The Appellant also argued that the Respondent's demand of Kshs 1,955,787,204.00 is excessive, punitive and beyond the Appellant's ability to pay.

**Respondent's Argument**

The Respondent maintained that it considered all information and explanations provided by the Appellant. The Respondent also argued that the Appellant did not meet the threshold of Section 13 of the Income Tax Act for tax exemption and therefore the incomes did not qualify as exempt incomes. The Respondent further contended that the provision of services by the Appellant outside of the normal working hours constitutes a service provided in the course of its business hence the services are taxable. The Respondent also stated that the Appellant has not availed the necessary exemption certificates despite being given sufficient time to do so.

**Tribunal Findings**

The Tribunal found that the Appellant failed to obtain the necessary tax exemption certificate despite being given sufficient time to do so. Therefore, the Tribunal found that the Respondent was justified in issuing an assessment against the Appellant. The Tribunal also found that the Respondent considered all information and explanations provided by the Appellant and that the provision of services by the Appellant outside of the normal working hours constitutes a service provided in the course of its business hence the services are taxable.

**Tribunal's Decision**

The Tribunal dismissed the Appeal and upheld the Respondent's Objection decision dated 22nd July 2022. Each party was ordered to bear its own costs.

## Failure to lodge a notice of objection in respect of an assessment.

### TAT 996/2022:
Adabla General Construction and Company Limited vs. Commissioner Domestic Taxes

**Background**

The Respondent issued the Appellant with an Income tax assessment dated 21st December, 2021 for Kshs 19,157,706.00. The Appellant lodged an objection to the assessment through iTax on 21st January, 2022. The Respondent rejected the Appellant's Objection on 11th April, 2022 on the ground that the objection was not validly lodged.

**Issues for Determination**

Whether the notice of objection was validly lodged. - Whether the Appellant discharged the burden of proof as provided by law.

**Appellant's Argument**

The Appellant argued that the Respondent erred in law and in fact by failing to consider supporting documentation provided by the Appellant. The Appellant also argued that the Respondent erred in fact and in law by assessing and confirming income tax without taking into consideration the expenses that were incurred in the accounting period.

**Respondent's Argument**

The Respondent argued that the Appellant did not lodge notices of objection with respect to the assessments for the assessment period 1st June, 2017 - 31st May, 2018 amounting to Kshs. 14,594,688.90 which consists of a principal tax of Kshs.9,729,792.90 and an interest of 4,864,896.00. The Respondent further averred that the Appellant herein did not apply for an extension of time to pay the tax not in dispute.

**Tribunal Findings**

The Tribunal found that the Appellant did not lodge notices of objection with respect to the assessment for the periods 1st June, 2017- 31st May, 2018 amounting to Kshs 14,594,688.90 which consisted of principal tax of Kshs 9,729,7292.90 and an interest of Kshs. 4,8864,896.00. The Tribunal also found that the Appellant neither paid the undisputed amount nor entered into any arrangement with the Respondent to pay the taxes not in dispute as provided for by Section 52(2) of the Tax Procedures Act.

**Tribunal's Decision**

The Tribunal found the appeal to be incompetent and struck it out, with each party to bear its own costs.

# Value Added Tax Act.

## VAT Refunds

### TAT 1084/2022:
Samasource Kenya EPZ Limited vs Commissioner of Domestic Taxes

**Background**

Samasource Kenya EPZ Limited (the Appellant) lodged Value Added Tax (VAT) refund claims with the Commissioner of Domestic Taxes (the Respondent) on three occasions, amounting to Kshs. 52,378,397.00. The Respondent reviewed the refund claims and rejected Kshs. 12,164,136.00 of the refund claims for various reasons. The Appellant objected to the refund decision, and upon receiving an objection decision from the Respondent, filed a Notice of Appeal.

**Issues for Determination**

Whether the Respondent erred in law and fact by rejecting the Appellant's application for refund of Kshs. 11,556,711.00 - Whether the Respondent erred in law and fact by disallowing the Appellant's input tax amounting to Kshs. 12,164,136.00 - Whether the Respondent erred in law and fact by failing to provide reasons for rejecting the Appellant's refund claim of Kshs. 502,572.00.

**Appellant's Argument**

The Appellant argued that the Respondent erred in rejecting the refund claims, stating that the claims were validly lodged under the provisions of the VAT Act. The Appellant also argued that the Respondent failed to provide reasons for rejecting the refund claim as required by the Tax Procedures Act 2015. The Appellant further argued that the Respondent should have deducted the additional assessment from the refundable amount and refunded the balance to the Appellant.

**Respondent's Argument**

The Respondent maintained that the Appellant had claimed input tax that is not allowable as per the VAT Act. The Respondent also stated that the system prompted it to disallow input tax claimed from suppliers with inactive PINs. The Respondent further argued that the Appellant failed to provide evidence to discredit the assessments by the Respondent and thus the assessments ought to be deemed correct and proper in law.

**Tribunal Findings**

The Tribunal found that the Respondent was justified in disallowing the input tax and corresponding refund claims for the periods of May 2016 to March 2017 and January 2019 to May 2019. However, the Tribunal found that the Respondent erred in rejecting the VAT refund claim for the period of April 2020 without due consideration of the merits of the refund claim.

**Tribunal's Decision**

The Appeal was partially allowed. The Tribunal upheld the disallowed input tax and corresponding refund claim for the periods of May 2016 to March 2017 and January 2019 to May 2019. However, the Tribunal ordered the Respondent to review the refund claim for the period of April 2020 on its merits and make a decision on it within sixty days of the date of delivery of the judgment.

## TAT 1278/2022:
## Kenya Nut Company Limited vs. Commissioner of Domestic Taxes

### Background

The appellant, Kenya Nut Company Limited, lodged a refund claim of excess input tax of Kshs. 15,240,681.00 resulting from dealing in zero-rated supplies for January to April 2020. The respondent, Commissioner of Domestic Taxes, approved Kshs. 9,9968,722.00 and denied the rest based on a Private Ruling it issued on 6th December 2013 in which various products were classified as exempt. The appellant lodged a notice of objection on the VAT refund claim for the period January to April 2020. The respondent issued its refund rejection decision to the appellant vide a letter dated 27th September 2022. Aggrieved by the decision, the appellant filed the instant appeal with the tribunal.

### Issues for Determination

Whether the respondent was justified in rejecting the appellant's refund application for VAT.

### Appellant's Argument

The appellant argued that the respondent, having attempted to recant its previous position, is estopped, by the provisions of Section 120 of the Evidence Act, from resiling from its rulings dated 5th August 2003, 1st August 2006 and 6th December 2013 upon which the appellant had placed reliance for numerous years. The appellant averred that by retrospectively revoking the Private Ruling dated 6th December 2013, the respondent violated the provisions of Article 47 of the Constitution of Kenya, 2010 as the administrative action taken was leisurely, inefficient, unlawful, unreasonable, and procedurally unfair.

### Respondent's Argument

The respondent contended that the appellant had misclassified honey-coated macadamia nuts and honey-coated cashew nuts as exempt which were taxable at the time of filing as per the VAT Act 2013 since they fall under HS Code 2008.19.00. The respondent reiterated that honey-coated macadamia nuts and honey- coated cashew nuts are not part of those listed in the First Schedule, Part 1, Section A, Paragraph 24 of the VAT Act 2013. The respondent stated that it explained that the letter dated 6th December 2013 cannot be binding as it would amount to an illegality and went ahead to revoke the same.

### Tribunal Findings

The tribunal found that the respondent became aware of its mistake which it allowed to take effect for 9 years before the same was corrected. It cannot therefore punish the appellant for the actions the appellant took in reliance on the same mistake. The tribunal found that the respondent can revoke its private ruling, which it has the right and mandate to do and did, inform the taxpayer of the revocation, which in the instant case it did, then effect the revocation of the ruling on transactions that take place after the said revocation and notification. To that extent, it is the tribunal's finding that had the revocation been effected on imports made after 4th May 2021, then the taxes accruing therein would be considered just and fair to the taxpayer. Any tax accruing for similar imports made before 4th May 2021 seeking to effect the respondent's revocation of the same is unfair to the appellant. The appellant's refund claims on the said goods accruing from the period before 4th May 2021 are thus justified and owed to it.

### Tribunal's Decision

The appeal was allowed. The respondent's refund rejection decision dated 27th September 2022 was set aside. The respondent was ordered to process the disallowed VAT refund claim within Ninety (90) days of the date of delivery of this Judgement. Each party was to bear its own costs.

## Failure to lodge a notice of objection in respect of an assessment.

### TAT 1410/2022:
BAC/GKA JV Company Limited vs. Commissioner of Domestic Taxes

**Background**

The Appellant, BAC/GKA JV Company Limited, a resident company incorporated in Kenya, was involved in a project with the Kenya Ports Authority (KPA). The Respondent, Commissioner of Domestic Taxes, raised additional assessments for Value Added Tax, Income tax and Withholding income tax amounting to Kshs 249,778,912.00. The Appellant objected to the pre-assessment notice, but the Respondent invalidated the objection and issued an objection decision rejecting the objection in full. Dissatisfied with the objection decision, the Appellant lodged a Notice of Appeal.

**Issues for Determination**

Whether the services offered by the Appellant were exempt from VAT - Whether the Respondent's Objection Decision dated 2nd September 2022 was proper.

**Appellant's Argument**

The Appellant argued that their notice of objection was valid and that the Respondent erred in charging VAT on exempt supplies, as the project was exempt. They also claimed that the Respondent erred in charging the variances between bankings versus income as per audited accounts, and in subjecting to Income tax the 2020 accrued bonus, which had already been subjected to tax and payment made. The Appellant further argued that the Respondent did not appreciate the true nature and status of the Appellant, as well as the true nature and structure of the subject project. They claimed that the demand of additional Value Added Tax was ultra vires, arbitrary, and erroneous.

**Respondent's Argument**

The Respondent argued that it carried out an audit exercise for the period 2016 to 2020 on the Appellant's Corporation tax, VAT, PAYE & Withholding tax declarations. They stated that the Appellant declared all supplies made in the period under review as local/ exempt supplies but the same were not supported by exemption/ remission letters. The Respondent further argued that the Appellant failed to reconcile the variances between turnovers as per bankings and Income tax returns, and that the Appellant's accrued bonus was a provision and not incurred. The Respondent maintained that the Appellant has not provided any additional evidence to show that the Respondent's confirmed assessment was wrong.

**Tribunal Findings**

The Tribunal found that the Appellant's services were not exempt from VAT as the exemption provided in Legal Notice No. 15 of 2021 did not apply to the Appellant, a Kenyan company. The Tribunal also found that the Appellant did not provide sufficient evidence to show that the Respondent's assessment was erroneous. The Tribunal therefore found that the Respondent's objection decision was proper.

**Tribunal's Decision**

The Appeal was dismissed and the Respondent's Objection decision dated 2nd September 2022 was upheld. Each party was ordered to bear its own costs.

## TAT 073/2022:
Prime Bank Limited vs. Commissioner of Domestic Taxes

### Background

The Respondent conducted a review of the tax declarations and Voluntary Tax Disclosure Programme (VTDP) applications made by the Appellant on 8th March 2021 relating to the tax periods in 2017 to 2019 and issued a notice of assessment demanding a total tax of Kshs. 17,361,157.00 comprising principal tax, penalties and interest on additional Value Added Tax (VAT) on merchant purchase and interchange commission for the tax periods in January 2017 to December 2019. The Appellant objected to the additional assessments. The Respondent issued an objection decision where the Respondent upheld the additional assessments of VAT on merchant fees and interchange fees for the tax periods December 2017, December 2018 and December 2019. The Appellant, dissatisfied with the objection decision, filed its Notice of Appeal.

### Issues for Determination

Whether the objection decision dated 9th December 2022 is proper in law.

### Appellant's Argument

The Appellant argued that the services that give rise to interchange fees and merchant fees are financial services that are exempted from VAT under Paragraph 1 of Part II of the First Schedule to the VAT Act 2013. The Appellant further contended that it was unfair to levy VAT on card services, because other money transfer modes such as EFT, RTGS and mobile money transfer services offered by telecommunication companies are not subject to VAT. The Appellant further relied on several cases where the Tribunal held that interchange fees received by issuing banks are exempt from VAT.

### Respondent's Argument

The Respondent contended that the Appellant issued credit cards to its customers. That as an issuer, the Appellant earned interchanger fees for providing services to acquirers which included fees for facilitating a medium of communication between the issuers, acquirers and merchants and for confirmation of the creditworthiness of the cardholders. The Respondent submitted that it relied on the definition of management or professional fees as stated in Section 2 of the Income Tax Act and that the Appellant was paid interchange fees as consideration for managerial, technical, agency contractual, professional or consultancy services rendered to the acquiring banks.

### Tribunal Findings

The Tribunal found that the services that give rise to interchange fees and merchant fees, also known as acquirer processing fees, are financial services that fall under the exempted supplies under Paragraph 1 of Part II of the First Schedule to the VAT Act 2013. The Tribunal further found that the Respondent's reliance on the judgment by the Court of Appeal in Civil Appeal No. 195 of 2017 Commissioner of Domestic Taxes (Large Tax Payer Office) v Barclays Bank of Kenya Ltd [2020] as the anchor case law to support the additional VAT assessment in this Appeal is misplaced and a misinterpretation of the facts in this Appeal and the applicable law. The Tribunal finally reprises that the supply of the financial services that give rise to interchange fees and merchant fees is a supply that is exempted from VAT under Paragraph 1 of Part II of the First Schedule to the VAT Act 2013.

### Tribunal's Decision

The Appeal was allowed and the Respondent's objection decision dated 9th December 2022 was set aside. Each party was ordered to bear its own costs.

## Compliance with documentary requirement under section 17. /Missing Trader Scheme

### TAT 1033/2022:
Arcon Works Limited vs. Commissioner Domestic Taxes.

**Background**

The Appellant, Arcon Works Limited, a construction company, was issued with an Assessment order for various months (March 2018, April 2018 & May 2018) for an amount of Kshs. 37,666,450.56. The dispute arose from inconsistencies detected between the invoices declared by the Appellant and those declared by its suppliers when the Appellant made an application through the iTax platform claiming input VAT for the said period. The Appellant lodged notices of objection to the entire assessment on 9th December 2019. Dissatisfied with the decision made by the Respondent on 24th May 2022, the Appellant filed a Notice of Appeal.

**Issues for Determination**

Whether the Respondent was justified in disallowing the Appellant's input tax.

**Appellant's Argument**

The Appellant argued that the Respondent erred in law by failing to allow some of the claimable purchases as stipulated under Section 17 of the VAT Act 2013. The Appellant also argued that the Respondent erred in demanding tax on the claimed input tax credits under Section 17 of the VAT Act 2013. The Appellant claimed that its input VAT claims were legitimate and conformed to Section 17 (3) of the VAT Act. The Appellant also argued that the Respondent disallowed some input VAT claims despite being provided with the purchase invoices and bank statements as proof of purchase during the objection review process.

**Respondent's Argument**

The Respondent argued that the Appellant failed to provide the requisite documents to support the objection and sufficient proof to authenticate the input tax claimed. The Respondent also argued that the Appellant failed to meet the prerequisites of Section 17 of the VAT Act. The Respondent further argued that the Appellant failed to provide its suppliers statements or written confirmation to ascertain that the supplies took place. The Respondent also argued that the Appellant failed to prove that the supplies took place by not providing adequate proof of payment, supplier statements and confirmation from some suppliers despite an intention to disallow and several reminders done through email.

**Tribunal Findings**

The Tribunal found that the Appellant failed to produce original tax invoices as required by Section 17(2)(3) of the Value Added Tax Act. Proof of payment was not provided and neither was satisfactory explanation given for the identified inconsistencies. The Tribunal also found that the Appellant did not discharge its burden of proof as provided by law. The Tribunal noted that the Appellant only provided a document titled 'objection review analysis' which is not one of the documents decreed under Section 17 (3) of the VAT Act.

**Tribunal's Decision**

The Tribunal dismissed the Appeal and upheld the Objection decision dated 24th May 2022. Each Party was ordered to bear its own costs.

## TAT 1441/2022:
Chryso Eastern Africa Limited vs Commissioner of Domestic Taxes

### Background

The dispute arose when the Commissioner of Domestic Taxes issued a tax demand notice to Chryso Eastern Africa Limited, following a desk returns review for the period January 2017 to December 2019. The notice indicated variances between sales as per the ledgers and sales declared on iT2C, purchases as per VAT 3 against purchases as per iT2C, and disallowed expenses amounting to Ksh. 88,488,042.00. It also subjected VAT on 'expected sales' amounting to Ksh. 6,259,633.00 and withholding tax on foreign loans, consultancy and professional fees amounting to Kshs 2,493, 329.00. The Appellant filed a notice of objection to the assessment, providing all the supporting documents and also paid taxes not in dispute. However, the Respondent issued an invalidation notice and later confirmed the assessment of Kshs 97,241,004.00 for the period January 2016 to December 2020.

### Issues for Determination

Whether the Respondent erred in law and fact in charging VAT and corporate tax on variances between purchases on the ledger and purchases declared for VAT. - Whether the Respondent erred in law by charging Corporate tax on 'expected sales' in an approach that contravenes the applicable sections of the Income Tax Act. - Whether the Respondent erred in law and fact by disallowing expenses contrary to the provisions of Section 15 of the Income Tax Act.

### Appellant's Argument

The Appellant argued that the Respondent erred in law by imposing income tax and VAT on an approach that contravenes the applicable Sections of the Income Tax Act and VAT Act 2013. The Appellant provided detailed explanations and supporting documents for the variances in sales and purchases, the 'expected sales', and the disallowed expenses. The Appellant also argued that the expenses were wholly and exclusively incurred in furtherance of its business and thus should not have been disallowed. The Appellant further argued that it had provided all the necessary documents and information to the Respondent during the objection stage, as required by the VAT Act 2013.

### Respondent's Argument

The Respondent maintained that the variances remained unreconciled and that the explanations given by the Appellant were unsatisfactory. The Respondent argued that the Appellant did not provide sufficient evidence to support its claims and that the documents provided were general ledger extracts and tabulations not backed by any invoices and proof of payment. The Respondent also argued that the Appellant did not meet the burden of proof as required by Section 56(1) of the Tax Procedure Act.

### Tribunal Findings

The Tribunal found that the Appellant had made out a prima facie case as it submitted all the necessary documentations and provided explanations in form of tabulations and ledger extracts. The Tribunal also found that the Respondent failed to properly consider the documentation provided by the Appellant and to understand the information. The Tribunal therefore found that the Respondent failed in its duty and the taxpayer succeeds.

### Tribunal's Decision

The Tribunal allowed the Appeal and set aside the objection decision dated 13th October, 2022. Each party was ordered to bear its own costs.

## VAT on income that was earned but not received.

### TAT 058/2023:
Jared O. Magolo T/A J.O Magolo & Company Advocates vs. Commissioner of Domestic Taxes

**Background**

The appellant, a legal practitioner, was assessed for VAT and Income tax by the respondent based on information from the Integrated Financial Management System (IFMIS). The appellant objected to these assessments, arguing that he had not received the payments upon which the taxes were based. The respondent rejected the appellant's objections and confirmed its assessments. Dissatisfied with the respondent's decisions, the appellant lodged appeals.

**Issues for Determination**

Whether the respondent's objection decision issued on 16th August 2022 relating to VAT assessment was justified. - Whether the respondent's objection decision issued on 27th January 2023 relating to Income Tax assessment was justified.

**Appellant's Argument**

The appellant argued that he had not received the payments upon which the taxes were based, and therefore the taxes were not due. He contended that he had only issued a fee note, not an invoice, and that the respondent had misconstrued the facts. The appellant also argued that the respondent's process in arriving at the amount demanded was flawed as it did not take into consideration the Advocates Act with regards to interest and penalties.

**Respondent's Argument**

The respondent maintained that the appellant had made taxable supplies and was liable to declare the vatable supplies at the time of supply. The respondent also contended that the appellant had rendered professional services to Nairobi City County, which income was undeclared by the appellant, thus the respondent subjected the same to Income tax. The respondent argued that the alleged fraud or mistake does not negate the fact that a supply took place.

**Tribunal Findings**

The tribunal found that the appellant had indeed issued an invoice for VAT purposes, and therefore VAT was due. However, the tribunal also found that the respondent was not justified in its assessment and demand for VAT, as the figure on VAT was determined and inclusive of the invoiced amount and distinct of the non-vatable items. Regarding the Income Tax assessment, the tribunal found that the respondent was unjustified in assessing and demanding taxes on income which was earned, but not received for the purposes of taxation by the appellant.

**Tribunal's Decision**

The tribunal allowed the appellant's appeals, set aside the respondent's objection decisions, and ordered the respondent to recompute its assessment on VAT in consideration of the invoiced amounts and excluding the non-vatable item within sixty days of the date of delivery of the judgement. Each party was ordered to bear its own costs.