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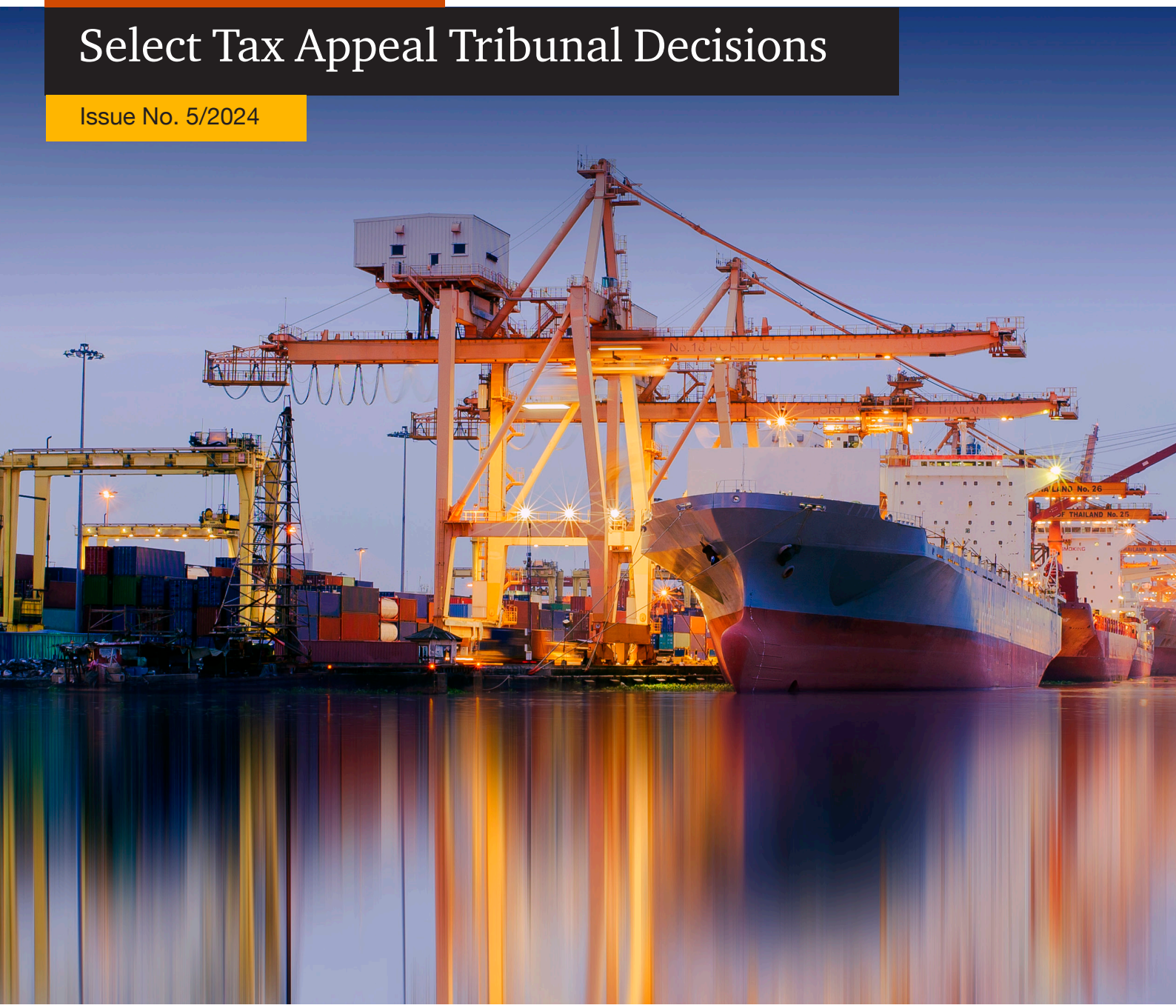
Tax Case Summaries

Select Tax Appeal Tribunal Decisions

Issue No. 5/2024



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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 – Tariff classification.

TAT 244/2021:
Harleys Limited vs The Commissioner of Customs & Border Control

Background

Harleys Limited, a pharmaceutical and surgical distributor, imported a product called Tres Orix Forte and classified it under Harmonised Commodity Description and Coding System Code (HS Code) 3004.90.00. The Commissioner of Customs & Border Control reclassified the product under HS Code 2106.90.900 and issued a demand for payment of extra taxes due to the reclassification. Harleys Limited objected to this demand, leading to the appeal.

Issues for Determination

Whether the Respondent's tariff ruling re-classifying Tres Orix Forte under HS Code 2106.90.00 is just and proper in law.

Appellant's Argument

Harleys Limited argued that Tres Orix Forte is a prescription only medicine, fully registered with the Pharmacy and Poisons Board of the Ministry of Health as a medicine under the Pharmacy & Poisons Act, and therefore should be classified under HS Code 3004.90.00 in accordance with EACCET. They also claimed that they never received the objection decision letter from the Respondent, hence their objection was deemed allowed by operation of law.

Respondent's Argument

The Commissioner of Customs & Border Control argued that Tres Orix Forte is a dietary appetite stimulant supplement, not a medicament, and therefore should be classified under HS Code 2106.90.90. They also claimed that they responded to Harleys Limited's objection within the required timelines and that the appellant knew about the decision.

Tribunal Findings

The Tribunal found that Tres Orix Forte is recognized as a medicine under the Pharmacy and Poisons Act, Cap 244 of the laws of Kenya, and therefore should be classified under HS Code 3004.90.00. They also found that the Respondent's tariff ruling on the re-classification of Tres Orix Forte to HS Code 2106.90.00 was not justified.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the Respondent's objection decision dated 27th November 2020, and ordered each party to bear its own costs.

TAT 1289/2022:
Redavia Kenya Asset Limited vs Commissioner of Customs & Border Control.

Background

The Appellant, Redavia Kenya Asset Limited, is a company that provides off-grid and on-grid solar solutions. The Respondent, Commissioner of Customs & Border Control, issued the Appellant with preliminary Post Clearance Audit (PCA) findings on the misclassification of solar aluminium mountings under tariff code 7610.90.00 instead of tariff code 7616.99.00. The Respondent justified its decision based on a tariff ruling of reference number KRA/C&BC/BIA/THQ/GEN/008/01/2022. The Appellant disputed the misclassification, and the Respondent issued a demand letter for the short levied duty and VAT, amounting to Kshs. 7,058,290.00 inclusive of penalty. The Appellant made an application to the Respondent to review its decision. Dissatisfied with the Respondent's review decision, the Appellant lodged a Notice of Appeal.

Issues for Determination

Whether the Respondent erred in law and in fact in reclassifying the Appellant's aluminium solar mounting unit from tariff code 7610.90.00 to tariff code 7616.99.00.

Appellant's Argument

The Appellant argued that the classification of the aluminium solar mounting unit should be determined according to the terms of the headings and any relative Section or Chapter Notes, as provided by the General Interpretative Rule 1 (GIR). The Appellant contended that the aluminium parts are artificially joined together to create a structure that is then riveted to either the ground or roofs to provide a supporting platform where the solar panels are to be mounted. The Appellant also argued that the Respondent had created a legitimate expectation through the publication of a tariff ruling reference on its website, and by clearing the Appellant's goods over time under Tariff 7610.90.

Respondent's Argument

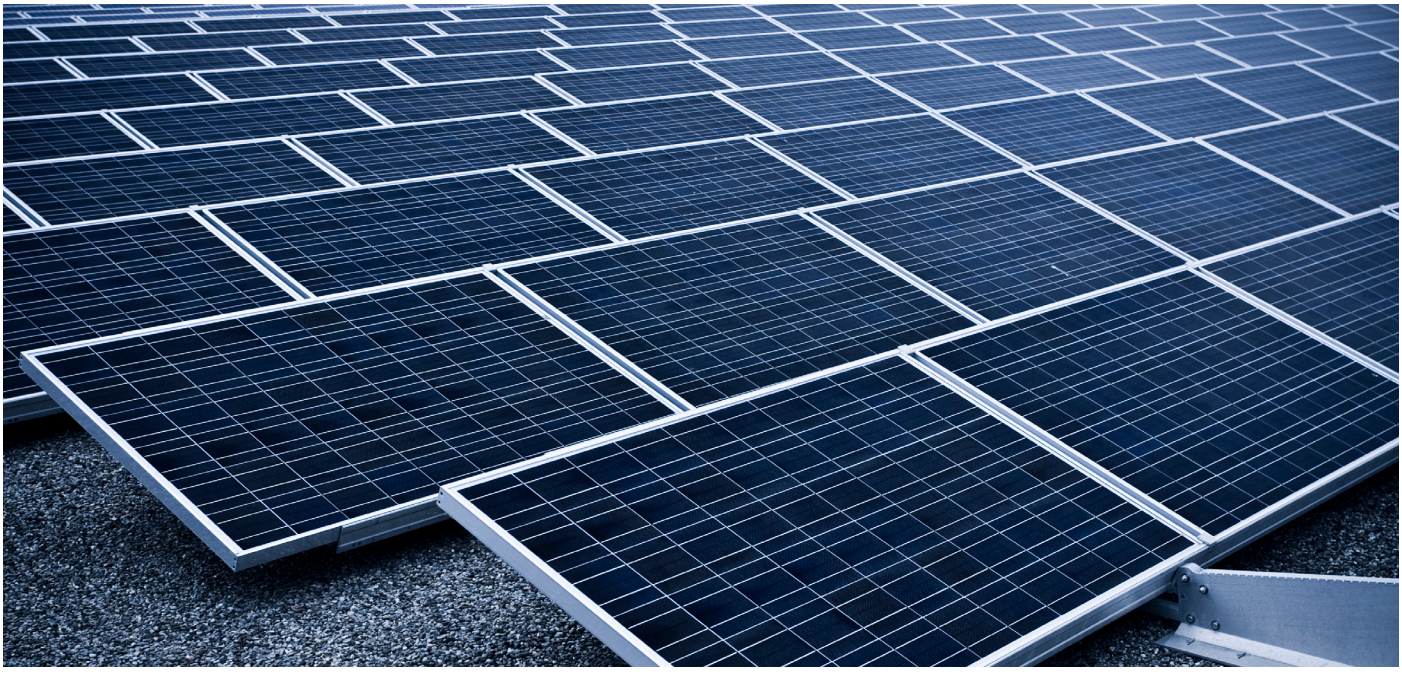
The Respondent argued that Heading 7610 covers classification of aluminium parts used in structures or prepared for use in structures and that the solar mounting Kits are not articles prepared for use in structures but intended for mounting solar panels on roofs. The Respondent also contended that the Appellant cannot claim legitimate expectation on the face of illegality. The Respondent maintained that the applicable HS Code to the Appellant's imported solar mounting units is 76.16.99.00 since the proposed HS code rightly applies to aluminium solar mounting kits.

Tribunal Findings

The Tribunal found that the Appellant's solar mounting kits for installation of solar panels are classifiable under heading 7610.90.00 and not heading 7616.90.00 as indicated by the Respondent. The Tribunal also found that the Respondent had created a legitimate expectation through the publication of a tariff ruling reference on its website, and by clearing the Appellant's goods over time under Tariff 7610.90, only to turn back, reclassify the product and demand short-levied taxes.

Tribunal's Decision

The Appeal was allowed. The Respondent's review decision dated 19th September 2022 was set aside. Each party was to bear its own costs.



TAT 1485/2022:
Ombra Limited. vs Republic of Kenya in The Tax Appeals Tribunal at The Nairobi Registry

Background

The Appellant, Ombra Limited, a registered taxpayer in Kenya, sought an opinion from the Respondent, Commissioner of Customs & Border Control, on the proper classification of composite manhole covers. The Respondent issued a tariff classification advising the Appellant that the applicable tariff was 3922.90.90 of the East African Community External Tariff 2017. The Appellant disagreed with this classification and made an application for review. The Respondent issued a new tariff ruling stating that the correct and applicable tariff code is 3926.90.90. Dissatisfied with the Respondent's review decision, the Appellant lodged an appeal at the Tribunal.

Issues for Determination

Whether the Respondent erred in classifying manhole covers under Tariff 3926.90.90.

Appellant's Argument

The Appellant argued that the Respondent erred in fact and in law by applying multiple usage tests in unlawfully classifying manhole covers under Tariff line 3926.90.90. The Appellant submitted that the Respondent failed to appreciate Explanatory notes III on GIR. 4 that the test for kinship can depend on many factors such as descriptions, character, purpose and that the Respondent cannot exclude tariff line 7325.10.00 simply because the composite manhole cover is not made of iron or steel. The Appellant proposed that the Heading 73.25 Other cast articles of iron or steel, specifically 7325.10.00 based on other goods which include drain covers which manhole covers is most akin to.

Respondent's Argument

The Respondent argued that the Appellant made a request for review of tariff classification of Composite manhole covers through submission presented to the Respondent's Departmental Technical Committee. The Respondent stated that from the sample provided by the Appellant, the Tariff line 7325.10.00 warrants consideration on the principal of application of General Interpretation Rule 4, that states goods that cannot be classified in accordance with the above rule shall be classified under the heading appropriate to the goods to which they are most akin. The Respondent submitted that it rescinded and revoked its initial decision where it classified the product under EAC/CET Tariff No. 3922.90.90 this being a decision that was based on the material information and submissions presented by the Appellant.

Tribunal Findings

The Tribunal found that the Respondent erred in classifying the Appellant's imports under Tariff 3926.90.90 on the basis of a laboratory result that was alien to the consignment that was subject of classification in this instance. The Tribunal also found that the Respondent's permission granted to the Appellant vide letter CUS/V&T/TARI/GEN/175/2019 dated 1st November 2019 to apply HS Code 7019.90.90 be and is hereby extended until a joint laboratory test is conducted to inform proper classification of the product.

Tribunal's Decision

The Appeal was partially allowed. The Respondent's review decision of 26th October 2022 was set aside. The Respondent's permission granted to the Appellant vide letter CUS/V&T/TARI/GEN/175/2019 dated 1st November 2019 to apply HS Code 7019.90.90 was extended until a joint laboratory test is conducted to inform proper classification of the product. Each party was to bear its own costs.

TAT 984/2022:
Premier Solar Solutions Limited vs The Commissioner of Customs & Border Control

Background

Premier Solar Solutions Limited, the appellant, is a company incorporated in Kenya that distributes solar PV solutions. The respondent, Commissioner of Customs & Border Control, is a principal officer appointed under the Kenya Revenue Authority Act. The respondent issued the appellant with desk audit findings based on a desk audit of importations covering the period January 2017 to April 2022. The respondent claimed that the appellant had misclassified its imports under the wrong Harmonized System (HS) Code 7610.90.00, leading to a demand notice for the sum of Kshs. 7,810,358.00 being import duty and VAT due. The appellant objected to the demand notice, but the respondent upheld it. The appellant then applied for a review of the respondent's decision, which was rendered on 10th August 2022. Aggrieved by 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 aluminium articles from HS code 7610.90.00 to HS code 7616.99.00

Appellant's Argument

The appellant argued that it correctly declared its importations under HS Code 7610.90.00, which attracts an import duty at 0% for the period under assessment. The appellant claimed that the respondent's decision was arbitrary and devoid of legal or factual basis. The appellant also argued that the respondent erred in law by purporting to impose additional taxes without justification and in breach of the appellant's legitimate expectation. The appellant further argued that the respondent's decision violated its constitutional right to transparency, accountability, legitimate expectation and right to fair administrative action in tax administration.

Respondent's Argument

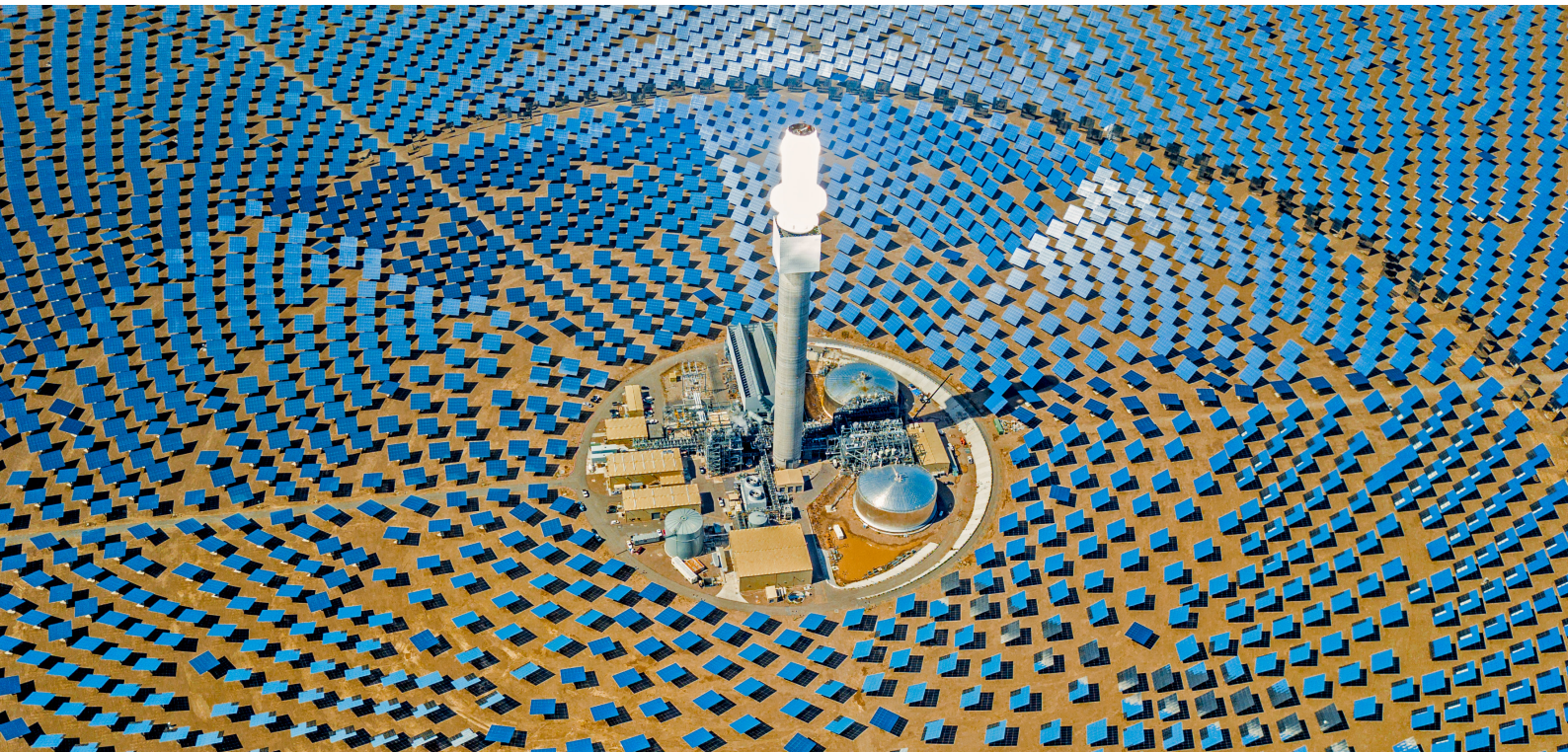
The respondent argued that the appellant's aluminium articles were not structures or parts of structures, and therefore could not be classified under Heading 76.10. The respondent maintained that the decision to classify the aluminium articles under Heading 76.16 was the correct one. The respondent also argued that it acted within its power under Sections 235(1) and 236 of EACCMA, 2004 which empowers the respondent to conduct a post clearance audit within 5 years and seek for documents to verify the correctness of the taxes declared and paid.

Tribunal Findings

The Tribunal found that the respondent erred in law and in fact in reclassifying the appellant's aluminium articles from HS code 7610.90.00 to HS code 7616.99.00. The Tribunal noted that both parties agreed that classification of goods imported into Kenya is governed by the East African Community External Tariff (EAC CET) 2017. After analyzing the submissions, the General Rules of Interpretation and the items classified under the Headings indicated above the Tribunal found that the appellant's aluminium structures, parts of structures and accessories for installation of solar panels are classifiable under Heading 7610.90.00 and not Heading 7616.99.00 as indicated by the respondent.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the respondent's review decision dated 10th August 2022, and ordered each party to bear its own costs.



TAT E034/2023:
Harley's Limited vs Commissioner of Customs & Border Control

Background

The dispute arose when the Respondent conducted a desk audit on the Appellant for the period starting November 2017 to September 2022. The examination revealed that the Appellant had been misclassifying food supplements and medical equipment under incorrect headings. As a result, a demand for uncollected taxes of Kshs. 174,835,029.00 was sent to the Appellant. The Appellant applied for a Commissioner's review, which upheld the amount as demanded, leading to the filing of the Appeal.

Issues for Determination

Whether the Respondent was justified in reclassifying the Appellant's imports.

Appellant's Argument

The Appellant argued that the Respondent erred in failing to appreciate that the impugned decision disclaims its own tariff rulings issued to the Appellant for its products. The Appellant also argued that the Respondent acted arbitrarily and illegally by failing to take into account proper considerations on tariff classification and reclassification of HS Codes of the food supplements and other products under review.

Respondent's Argument

The Respondent averred that the reclassification of the products imported by the Appellant was legal as per the General Rules for the Interpretation of the Harmonized System as contained in the East African Community Common External Tariff. The Respondent also argued that the period of 5 years going backwards was its mandate for short, levied taxes.

Tribunal Findings

The Tribunal found that the Respondent had departed from the tariff rulings unprocedurally and concluded that the reclassification of the Appellant's imports was unjustified. The Tribunal also held that the Respondent's actions were in contravention to the Appellant's right to fair administrative action and legitimate expectation.

Tribunal's Decision

The Appeal was allowed, and the review decision made by the Respondent was set aside. Each party was ordered to bear its own costs.

Notice of enforcement subject to an application for review not appeal.

TAT 776/2022:
Ripple Pharmaceuticals Limited vs Commissioner of Customs & Border Control

Background

Ripple Pharmaceuticals Limited (the Appellant) was issued a demand notice by the Commissioner of Customs & Border Control (the Respondent) following a post-clearance audit that revealed a short levy of Excise Duty on the Appellant's importation of electronic cigarettes and cartridges for the period 2017-2022. The Appellant did not object to the demand notice within the stipulated period, leading to the issuance of a notice of enforcement by the Respondent. The Appellant then objected to the enforcement, leading to the current appeal.

Issues for Determination

Whether the Appeal before the Tribunal is valid - Whether the Respondent's assessment of the Appellant's imports on Excise Duty were justified.

Appellant's Argument

The Appellant argued that the Respondent's demand was illegal and arbitrary, as they had paid all taxes due as per the duty rate computed by the Respondent's Tradex System. They also claimed that the Respondent had imposed additional taxes without justification, acted ultra vires its mandate, and violated the Appellant's Constitutional rights to transparency, accountability, legitimate expectation, and fair administrative action in tax administration.

Respondent's Argument

The Respondent argued that the desk audit was neither arbitrary nor erroneous, as it revealed a short levy of Excise Duty. They also stated that they had a legal duty to ensure collection and administration of revenue according to the relevant laws. The Respondent further argued that the Appellant failed to object to the demand notice within the stipulated period without any justifiable cause, and thus there was no decision to be challenged at the Tribunal.

Tribunal Findings

The Tribunal found that the Appellant failed to adhere to the provisions of Section 229 (1) of the East Africa Community Management Act (EACCMA), which requires a person directly affected by the decision or omission of the Commissioner to lodge an application for review of the decision or omission within thirty days. The Tribunal also found that the notice of enforcement issued by the Respondent was not a tax decision as per Section 3 of the Tax Procedures Act (TPA) capable of being objected to and being appealed against.

Tribunal's Decision

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

Excise Duty Act

Excise duty refund application

TAT 1164/2022:
Synresins Limited vs Commissioner Of Domestic Taxes

Background

Synresins Limited, a manufacturer of resins, appealed against the rejection of its refund applications for Excise Duty and Anti-adulteration Levy paid on illuminating kerosene, a raw material used in its manufacturing process. The Commissioner of Domestic Taxes rejected the refund applications on the basis that the claim was based on a supply that is exempt as per the Excise Duty Act 2015, 2nd Schedule, Part A, Item 13. The appellant argued that the respondent erred in law and fact by retrospectively applying the 2021 Finance Act to deny the appellant refunds that it was rightfully entitled to by the provisions of Section 29 of the Excise Duty Act, which were in force at the time.

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.

Tax Procedures Act

Documentary burden of proof.

TAT 1296/2022:
James Finlay (Kenya) Limited vs Commissioner Legal Services & Board Coordination

Background

The appellant, James Finlay (Kenya) Limited, a branch of a UK-based company, was issued a notice of partial assessment by the respondent, Commissioner Legal Services & Board Coordination, for the period 2016. The respondent disallowed a management fee charge incurred by the appellant amounting to Kshs 81,905,760.00 and assessed for Corporate income tax amounting to Kshs 52,522,069.00. The appellant lodged a notice of objection against the assessments, which was later confirmed by the respondent. Aggrieved by the decision, the appellant filed a Notice of Appeal.

Issues for Determination

Whether the respondent was justified in disallowing management expenses offered to the appellant by JFL-UK.

Appellant's Argument

The appellant argued that the management support services provided by JFL-UK enhanced its business position and were not a duplication of services since no activity performed by JFL-UK was also performed by the appellant's employee. The appellant also contended that the respondent erred in law by alleging that JFL did not have employees and could therefore not have capability to provide management support services to the appellant. The appellant further submitted that the respondent erred in fact and law by alleging that the financial statements did not demonstrate that a service was rendered to the appellant and that there lacks proof of payment made to JFL of Kshs 81,905,760.00 by the appellant.

Respondent's Argument

The respondent averred that the appellant did not provide any documentation to demonstrate the persons who provided the services as required by law under Section 59(1) of Tax Procedures Act. The respondent further stated that the appellant failed to provide proof that a service was rendered in the year 2016. The respondent also contended that the appellant's allegations were false as the respondent did not deny it any refund.

Tribunal Findings

The Tribunal found that the appellant failed to address the specific documents mentioned by the respondent in the objection decision and therefore failed to discharge the burden of proof. Consequently, the Tribunal found that the respondent was justified in disallowing management expenses offered to the appellant by JFL-UK.

Tribunal's Decision

The Appeal was dismissed, and the respondent's Objection decision dated 21st September 2022 was upheld. Each Party was ordered to bear its own costs.

TAT 866/2022:
Beta Healthcare International Limited vs Commissioner of Legal Services & Board Coordination

Background

The Appellant, Beta Healthcare International Limited, a subsidiary of Aspen Pharmacare Holdings Limited, is a company incorporated and tax resident in Kenya. The Respondent, Commissioner of Legal Services and Board Coordination, is a principal officer appointed under the Kenya Revenue Authority Act. The Respondent issued a notice of assessment dated 25th November, 2021 of Kshs. 480,175,287.00. The Appellant objected to the notice of assessment, leading to a series of meetings and exchanges of correspondence between December 2021 and May 2022. The Respondent issued an objection decision rejecting the objection and upholding the assessment. The Appellant, dissatisfied with the objection decision, filed a Notice of Appeal.

Issues for Determination

Whether the change of Transfer Pricing method by the Respondent was justified.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by comparing elements of the uncontrolled transactions with controlled transactions to determine the arm's length price in relation to the transactions that the Appellant has entered with its related parties. The Appellant also argued that the Respondent erred in law and fact by failing to perform comparability analysis, taking into account economically relevant characteristics or comparability factors, to accurately determine the transactions of the Appellant. The Appellant further argued that the Respondent has erred in law and fact by misapplying the Comparable Uncontrolled Price (CUP) method and by failing to consider material differences and adjustments between sales made to related parties vis-a-vis sales made to third parties in determining the appropriate method to arrive at the arm's length price.

Respondent's Argument

The Respondent argued that the Appellant was trading with both its subsidiaries and third parties. However, the sales to the related enterprises were noted to have been concluded at significantly lower prices as compared to the pricing of similar products sold to third party distributors. The Respondent contended that the Comparable Uncontrolled Price (CUP) method would be the most appropriate method to test the transaction between the Appellant and its related parties. This is because, according to the Respondent, the transaction in question is the sale of goods which is similar in nature in both the controlled and uncontrolled transactions.

Tribunal Findings

The Tribunal found that the Appellant did not provide all the documentation requested by the Respondent prior to the issuance of the objection decision. The Tribunal also found that the Appellant did not provide evidence to show that it provided the disputed information on 8th March 2022 as averred by it. The Tribunal further found that the Appellant did not exhaust its burden of proof under Section 56(1) of the Tax Procedures Act. The Tribunal concluded that the Respondent was justified in changing the Transfer Pricing method.

Tribunal's Decision

The Appeal was dismissed and the Respondent's Objection decision dated 5th July, 2022 was upheld. Each Party was ordered to bear its own costs.

TAT 1299/2022:
Live Ad Limited vs Commissioner of Investigations & Enforcement

Background

The Respondent initiated an investigation into the Appellant's tax affairs for the period 2015 to 2020. The Respondent issued a preliminary investigation finding indicating that the Appellant owed Kshs. 29,667,620.00 being income tax amounting to Kshs. 12,106,991.00 for 2016 and 2018 and VAT amounting to Kshs. 17,560,629.00 for 2016 to 2020. The Appellant objected to the Respondent's assessment. After a meeting and further correspondence, the Respondent issued its objection decision confirming an income tax and VAT assessment of Kshs. 3,914,108.00 and Kshs. 606.00, respectively, relating to the period 2018. The Appellant, dissatisfied with the Respondent's decision, filed an appeal.

Issues for Determination

Whether the Respondent's income tax demand was valid - Whether the Respondent's objection decision was valid.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by issuing an erroneous assessment of the Appellant's taxable income for the year 2018 without taking into consideration the supporting documents submitted by the Appellant. The Appellant also argued that the Respondent erred in fact by issuing its objection decision based on unfair and unreasonable calculations made using incorrect figures from the Appellant's income tax return. The Appellant further argued that the Respondent's demand for income tax did not take into account valid tax credits claimed on iTax under Section 42 that comprised tax overpayments from the previous year carried forward.

Respondent's Argument

The Respondent argued that it conducted its investigations based on suspicions that the Appellant overclaimed purchases in its tax returns and used double claimed invoices in the VAT returns. The Respondent also argued that it had considered all the information provided by the Appellant in its objection, and allowed previously disallowed purchases that were proved by the Appellant. The Respondent further argued that it was the duty of the Appellant to prove the existence of the alleged credits and to prove that the Respondent's assessment is erroneous.

Tribunal Findings

The Tribunal found that the Respondent was justified in issuing its objection decision confirming the assessment because the Appellant has not discharged the burden of proof that the Respondent's tax demand amounting to Kshs. 3,914,108.00 for year 2018 was not valid. The Tribunal also found that the Appellant failed to prove the existence of the alleged credits and therefore could not be ascertained by the Respondent.

Tribunal's Decision

The Tribunal dismissed the appeal, finding it without merit. Each party was ordered to bear its own costs.

TAT 411/2022:
Kenya Sweets Limited vs Commissioner of Customs & Border Control

Background

Kenya Sweets Limited, the appellant, is a company that imports eucalyptus oil into Kenya. The respondent, Commissioner of Customs and Border Control, conducted a desk audit on the appellant's custom entries for eucalyptus oil for the period December 2016 to December 2021. The respondent reclassified the appellant's products under tariff Heading 3302, which attracts import duty of 10 per cent, instead of Heading 3301, which is zero rated. The appellant appealed this reclassification, providing additional documents to support its case. The respondent rejected the appellant's appeal and upheld its tariff ruling, leading to the appellant lodging the instant appeal.

Issues for Determination

Whether the respondent's review decision dated 17th March 2022 is proper and justified.

Appellant's Argument

The appellant argued that it imports pure eucalyptus oil which should be classified under tariff Heading 3301, which is zero rated for import duty. The appellant provided additional documents to support its case, including laboratory results from South Africa. The appellant also argued that the respondent's reclassification of its products was unfair and infringed on its right to fair administrative action.

Respondent's Argument

The respondent maintained that it conducted a test on the appellant's product, eucalyptus oil 80/85, which is an essential oil with basis 58.58% vv diluent intended for use in food and drink industry, and classifiable under HS 3302.10. The respondent did not attach its laboratory chemical test results but did annex a letter to the appellant communicating the results of the test and the basis for reclassification.

Tribunal Findings

The tribunal found that the appellant had sufficiently discharged its burden of proof in terms of Section 30 of the TAT Act. The tribunal noted that the appellant took additional steps to supply the respondent documents supporting its classification under tariff code 3301.19 including lab test results. The respondent, on the other hand, did not attach the laboratory test results. Pleadings alone without relevant annexures cannot constitute sufficient evidence to discharge burden of proof one way or the other.

Tribunal's Decision

The appeal was allowed, and the respondent's review decision dated 17th March 2022 was set aside. Each party was to bear its own costs.

TAT 848/2022:
KCSSA East Africa Limited vs Commissioner of Customs & Boarder Control

Background

The Appellant, KCSSA East Africa Limited, a company involved in the production and distribution of baby care and fem care products, was issued a demand notice by the Respondent, Commissioner of Customs and Boarder Control, following a desk review of the Appellant's imports for the period May 2017 to March 2022. The Respondent claimed that the Appellant's consignment contained items that were misclassified, leading to an underpayment of taxes. The Appellant disputed this claim, arguing that the consignment only contained sanitary towels, which attract both VAT and Import duty at the rate of 0% under Tariff Code 9619.00.10, and not panty liners and napkin diapers, which attract import duty of 25% and VAT of 16% under Tariff Code 9619.00.90.

Issues for Determination

Whether the Respondent's Review Decision dated 13th July 2022 is Proper and Justified.

Appellant's Argument

The Appellant argued that the Respondent's assessment was erroneous, as the consignment in question only contained sanitary towels, which are classified under tariff code 9619.00.10 and subject to both VAT and Import duty at the rate of 0%. The Appellant provided additional evidence, including a Free Sale Certificate from the Economic Chamber of the Czech Republic and China, a commercial invoice, packing list, certificate of conformity and bill of lading, to support its claim.

Respondent's Argument

The Respondent maintained that the Appellant had misclassified its consignment, leading to an underpayment of taxes. The Respondent argued that the burden of proof lies with the Appellant and that the Appellant had not discharged its burden of proof. The Respondent did not contest the additional evidence presented by the Appellant but argued that it was not submitted at the objection stage.

Tribunal Findings

The Tribunal found that the Appellant had sufficiently discharged its burden of proof by providing additional documentary evidence showing the chronology of the consignment and the actual goods in the consignment. The Tribunal noted that the Respondent did not contest the authenticity of these documents. Therefore, the Tribunal held that the burden of proof had logically shifted to the Respondent.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the Respondent's review decision dated 13th July 2022, and vacated the Respondent's assessment of additional duties of customs amounting to Ksh. 2,618,607.00 in its entirety. Each party was ordered to bear its own costs.

Validity of Objections, Objection Decisions and Appeals

TAT 967/2022:
Titus Otieno Koceyo vs Commissioner of Domestic Taxes

Background

The appellant, Titus Otieno Koceyo, is an individual taxpayer running various small-scale businesses in Nairobi, including a sole proprietorship law firm and a real estate commission and agency brokerage. On 23rd August 2021, he received a notice from the respondent, the Commissioner of Domestic Taxes, to assess undisclosed business income and undeclared Value Added Tax. The appellant responded to the notice, but subsequently received a notice of assessment based on variances between sales declared in his VAT and Income-tax returns for the period 2018-2020. The additional tax due was Kshs. 44,742,361.00. The appellant lodged an objection, but the respondent issued an objection decision ordering immediate payment of the assessed amount. Dissatisfied, the appellant lodged a Notice of Appeal to the Tribunal.

Issues for Determination

Whether the respondent's objection decision dated 29th August 2022 was proper in law - Whether the respondent's assessments for additional Income Tax and VAT of Kshs. 44,742,361.00 were justified.

Appellant's Argument

The appellant argued that the objection decision was invalid because it was not made and communicated within 60 days of a valid objection, contrary to Section 51 (11) of the Tax Procedures Act. The appellant also argued that the respondent erred in fact and in law in failing to find that the objection having been allowed by operation of the law, the respondent had no further jurisdiction to entertain the objection.

The appellant further argued that the respondent's decision violated his constitutional and statutory rights to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Respondent's Argument

The respondent argued that the decision to arrive at the confirmed assessments was justified and was in conformity with law under the Income Tax Act, VAT Act and the Tax Procedures Act. The respondent also argued that the appellant did not provide the requisite documents to support the objection, which could adequately be reviewed by the respondent. The respondent further argued that the appellant provided documents in piecemeal, with documents being provided on various dates from 9th February 2022 with the last document being received on 8th August 2022.

Tribunal Findings

The Tribunal found that the respondent did not comply with the specific requirements as set out in The Tax Procedure Act No 29 as amended on 7th November 2019 (Finance Act 2019) and was in effect up to and including to 30th June 2022, and in particular Section 51 (2), (3)(4) and (11) of the Tax Procedures Act 2015 regarding the process of assessment, notices of objection and objection decisions. The Tribunal therefore found that the Respondent's assessment of tax dated 5th October 2021 was proper in law. However, the Respondent failed to validate or invalidate the same tax Assessment in writing and within the stipulated timelines of 60 days after receipt of the notice of objection submitted by the Appellant on 15th December 2021. Therefore, it failed to proof that there was a valid objection decision in law.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the respondent's objection decision to Income Tax individual and VAT for the period January 2018 to December 2020 of Kshs 44,742,361.00 dated 29th August 2022, and ordered each party to bear its own costs.

TAT 845/2022:
PVH Kenya Limited. vs Republic of Kenya

Background

The Appellant, PVH Kenya Limited, lodged a VAT refund claim amounting to Kshs. 4,069,388.00 for the periods of August 2019 to July 2020 with the Respondent, Commissioner of Domestic Taxes. The Respondent rejected the entire refund claim on the grounds that the Appellant failed to provide supporting documents. The Appellant objected to the refund decision, but the Respondent issued an objection decision advising the Appellant to escalate its grievance to the Tribunal, stating that the Independent Review of Objections lacks the jurisdiction to review the objection. The Appellant then filed an appeal against the Respondent's decision.

Issues for Determination

Whether the Respondent's objection decision dated 29th July 2022 is proper in law. - Whether the Respondent's refund decision dated 30th June 2022 rejecting the entire refund claim was justified.

Appellant's Argument

The Appellant argued that it had submitted the required information within the stipulated timeline and that the Respondent's rejection of the VAT refund claim was based on inaccurate facts. The Appellant also contended that the Respondent had created a legitimate expectation by way of conduct that it would acknowledge receipt of the Appellant's emails and revert to the Appellant. The Appellant further argued that the services it provides are for use and consumption by its non-resident parent, PVHFEL, outside Kenya, and are therefore subject to VAT at the zero rate (0%) as provided by the VAT Act.

Respondent's Argument

The Respondent argued that the Appellant failed to provide the relevant supporting documents at the objection stage, despite several requests. The Respondent also contended that it was correct, in the absence of any documents to warrant a review of the Appellant's refund application, to use the available information to invalidate the objection. The Respondent further argued that the burden is on the Appellant to prove that the assessment made by the Respondent is incorrect and/or that the documents and/or information relied upon by the Respondent in making the assessment was wrong.

Tribunal Findings

The Tribunal found that the Appellant lodged a valid notice of objection to the refund decision, a tax decision, within time and holds that the Respondent's failure to review the Appellant's objection to the refund decision dated 30th June 2022 on its merits was in contravention with the dispute resolution process provided in peremptory terms under Section 51 of the TPA. Consequently, the Tribunal found that the Respondent erred in issuing the objection decision dated 29th July 2022 where it claimed that it lacked the jurisdiction to determine the matter.

Tribunal's Decision

The Tribunal allowed the Appeal and ordered that the Respondent's objection decision dated 29th July 2022 be varied to the extent that the notice of objection to the Respondent's rejection of refund claim of Kshs. 4,069,388.00 for the periods of August 2019 to July 2020 is hereby returned to the Respondent to review the objection on its merits and make a decision on it within Sixty (60) days of the date of delivery of this Judgment. Each party was ordered to bear its own costs.

TAT 952/2022:
Evamar Enterprises Limited vs Commissioner of Domestic Taxes

Background

The Respondent carried out a compliance review on the Appellant for the period January 2017 to December 2019 and issued its findings. The Appellant objected to the additional assessment. The Respondent invalidated the objection application citing non-compliance with Section 51 of the Tax Procedures Act. The Appellant, dissatisfied with the decision, issued a Notice of Intention to Appeal to the Tribunal.

Issues for Determination

Whether the Respondent's Preliminary Objection should be upheld

Appellant's Argument

The Appellant argued that the Respondent used expected sales to compute the tax liability as opposed to the actual sales. The Appellant also argued that the Respondent taxed items which do not constitute income, failed to consider the prior year tax losses incurred by the Appellant in its tax assessment, and disallowed expenses relating to professional fees charged by the Appellant in its financial statements for the years 2017-2019 on the basis that the inherent withholding tax was not remitted.

Respondent's Argument

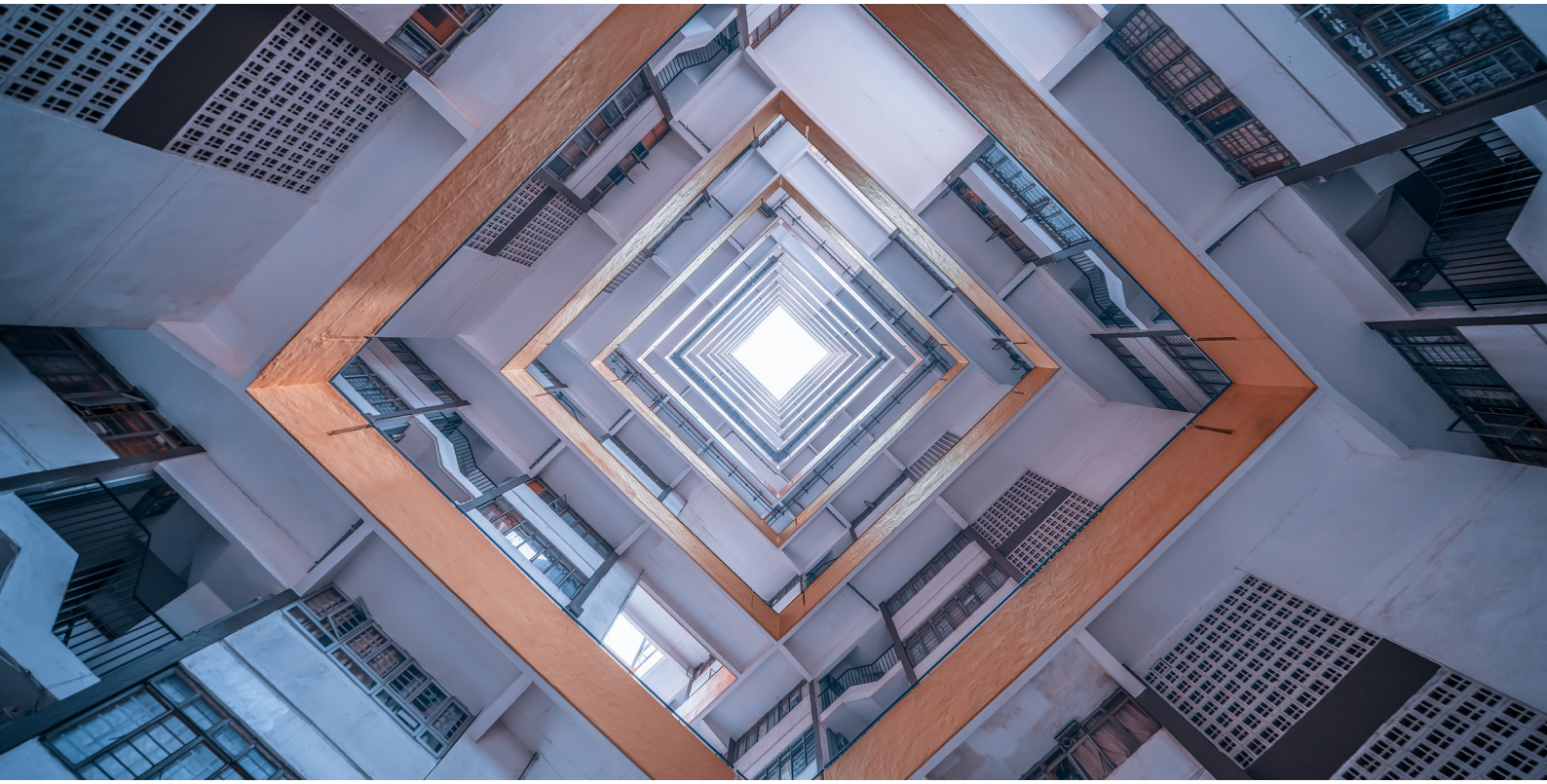
The Respondent refuted each and every one of the allegations by the Appellant and argued that the Notice of Appeal and subsequent Appeal are defective as the Appellant's undisputed taxes had not been paid in full and/or any arrangement entered into for settlement of the same. The Respondent also argued that the assessment was done according to the law and that the Appellant failed to provide reconciliation for the noted variances in the bank analysis in the year of income 2019.

Tribunal Findings

The Tribunal found that the Appellant did not fail to pay taxes not in dispute as it paid the Capital Gains tax in full on 15th July 2022 and part of the unspecified withholding tax on 22nd July 2022 and requested the Respondent to assist it to pay the rest of the unspecified withholding taxes by generating PRNs to enable payment of taxes for the professionals for whom the Appellant did not have PIN certificates.

Tribunal's Decision

The Appeal was allowed. The Respondent's invalidation notice dated 20th July 2022 was set aside. The matter was referred back to the Respondent to make an objection decision within Sixty (60) days of the date of delivery of the Judgment. Each party was to bear its own costs.



TAT 1282/2022:
Stephenson Karuri Mbari vs Commissioner of Domestic Taxes

Background

The Appellant, Stephenson Karuri Mbari, is an individual engaged in several businesses in real estate, owning residential and commercial rental properties. The Respondent, Commissioner of Domestic Taxes, carried out investigations on the Appellant's tax affairs and found that the Appellant owned several properties for which rental income was not properly declared for tax purposes. The Respondent issued the Appellant with an assessment for Income tax for the period 2014 to 2019 amounting to Kshs. 31,415,550.00. The Appellant filed a notice of objection, which the Respondent invalidated. The Appellant then filed a Notice of Appeal.

Issues for Determination

Whether the Notice of objection was validly lodged under Section 51 (3) (c) of the Tax Procedures Act - Whether the 2014 assessments are time barred.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by assessing taxes and demanding the production of documents in contravention of Section 23 (1) (c) of the Tax Procedures Act No. 29 of 2015. The Appellant also claimed that the Respondent relied on hearsay in estimating alleged rental income, without providing actual evidentiary proof of such fact. The Appellant further argued that the Respondent erred in fact by considering electricity meters application as ownership of the houses for purposes of imposing tax. The Appellant maintained that all documents provided under the above stated matter, gave an insight on who owned the properties and the court made a determination on the same.

Respondent's Argument

The Respondent argued that it correctly invalidated the objection for non-compliance to Section 51 (3) of the Tax Procedures Act. The Respondent maintained that it is empowered to use best judgement based on the available information in making its decision. The Respondent used the electric meter information to determine the Appellant as the owner of the houses and estimated the rental rates since the Appellant refused to provide records requested by the Respondent.

Tribunal Findings

The Tribunal found that the Appellant failed to discharge its mandate under Section 51 (3) (c) of the Tax Procedures Act. Consequently, the Tribunal found and held that the Appellant's notice of objection was not validated by the Appellant in accordance with Section 51 (3) (c) of the Tax Procedures Act. The Tribunal did not delve into the issue of whether the 2014 assessments are time barred due to the invalidity of the notice of objection.

Tribunal's Decision

The Appeal was dismissed and the Respondent's decision invalidating the Appellant's notice of objection issued on 17th December 2020 was upheld. Each party was ordered to bear its own costs.

Objection decision past the statutory timelines.

TAT 1425/2022:
Suma Health Products (K) Limited vs Commissioner of Investigation & Enforcement

Background

The Appellant, Suma Health Products (K) Limited, a company involved in multi-level marketing of healthcare and beauty products, was issued assessments for Corporation tax and VAT by the Respondent, Commissioner of Investigation and Enforcement, on 28th June, 2022 amounting to Kshs. 57,923,710.00 and Kshs. 24,245,722.00 respectively. The Appellant objected to these assessments on 5th September, 2022. The Respondent issued its objection decision on 18th October, 2022. Dissatisfied with the Respondent's decision, the Appellant filed a Notice of Appeal to the Tribunal on 10th November, 2022.

Issues for Determination

Whether the Respondent erred in law and in fact by issuing assessments for the period outside the statutory timelines provided by the law. - Whether the Respondent's assessments were justified.

Appellant's Argument

The Appellant argued that the Respondent erred in fact and law by conducting a default assessment which exceeded the timeframe provided under Section 29 of the Tax Procedures Act. The Appellant also contended that the Respondent failed to appreciate and understand the Appellant's nature of business, particularly that it is not in the export business. The Appellant further claimed that the Respondent erred in fact and law by stating that its analysis of the Appellant's employees' salaries subjected to PAYE, when compared to the company expenses claimed by the Appellant, showed a discrepancy which was disallowed for Corporation tax. The Appellant also argued that the Respondent erred in law and fact by breaching the Appellant's right to legitimate expectation and fair administrative action in issuing the Agency notice.

Respondent's Argument

The Respondent argued that it started investigations after receiving intelligence to the effect that the Appellant was under declaring its income for tax purposes. The Respondent further submitted that it analysed the Appellant's IT2C account which indicated that the Appellant had claimed a total of Kshs. 80,935,042.00 as employment expense, yet the Appellant had filed Kshs. 11,799,380.00 as per its PAYE return. The Respondent treated the variance as over claimed employment expense and the same was disallowed for Corporate tax. The Respondent also argued that the Appellant provided various explanations and schedules to support its grounds but did not adduce documentary evidence to support the same.

Tribunal Findings

The Tribunal found that the Respondent erred in law and in fact by issuing assessments for the period outside the statutory timelines. The Tribunal also found 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. The Tribunal found that the Appellant provided various schedules for expenses incurred for business purposes but did not attach any documentation to support the same for Corporation tax purposes. Further, the Appellant did not provide any support documents as per Section 17 of the VAT Act to support its input tax claim for expenditure incurred in its business.

Tribunal's Decision

The Appeal was partially allowed. The objection decision dated 18th October, 2022 was varied. The assessment relating to VAT for any period prior to 29th June, 2017 and the assessment relating to Corporation tax for any period prior to January 2017 were set aside. The Respondent was ordered to re-compute VAT and Corporation tax taking in account the above variations within Ninety (90) days of the date of delivery of this judgement. Each party was to bear its own costs.

TAT 1383/2022:
Jayantilal Ramniklal Bhat vs Commissioner of Domestic Taxes

Background

The appellant, a sole proprietor selling potato crisps, was assessed for VAT of Kshs. 412,044.00 inclusive of penalties and interest for the period February 2017 to June 2017. The appellant objected to the assessments, arguing that his turnover was below the registrable threshold and did not charge nor claim VAT. The respondent issued its objection decision rejecting the appellant's objection on the ground that no documents were provided.

Issues for Determination

Whether the Respondent's Objection Decision dated 21st October 2022 is proper and lawful. - Whether the Respondent erred in issuing the Appellant with VAT Assessment.

Appellant's Argument

The appellant argued that the demand notice is erroneous as the Commissioner did not take into consideration that the Appellant's turnover was below the registrable threshold and did not charge nor claim VAT. The appellant also claimed that the Respondent erred in fact and in law by registering the Appellant for VAT whereas his turnover was below the registrable threshold.

Respondent's Argument

The respondent argued that the appellant registered for VAT on 22nd February 2017, which thereafter attracted VAT obligation. The respondent also claimed that the appellant failed to avail the documents in support of his objection despite constant email reminders.

Tribunal Findings

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

Tribunal's Decision

The tribunal allowed the appeal, set aside the Respondent's objection decision dated 21st October 2022, and ordered each party to bear its own costs.

Value Added Tax Act.

VAT Refunds

TAT 1000/2022:
Kenya Cuttings Limited vs Commissioner of Domestic Taxes

Background

The Appellant, Kenya Cuttings Limited, is a company that produces ornamental plant cuttings for export to the Netherlands. The Respondent, Commissioner of Domestic Taxes, is a principal officer appointed under the Kenya Revenue Authority Act. The Appellant filed an appeal for a VAT refund claim for March 2021. The Respondent admitted in a letter dated 15th February 2023 that the amount being claimed in the Appeal was refundable.

Issues for Determination

Whether the VAT refund claim made by the Appellant for March 2021 is valid and should be refunded by the Respondent.

Appellant's Argument

The Appellant argued that the VAT refund claim for March 2021 is valid and should be refunded by the Respondent. They pointed out that part of the refund claims allowed by the Respondent in a letter dated 15th February 2023 related to VAT refund claims made between January 2021 and June 2021, which includes the claim for March 2021.

Respondent's Argument

The Respondent admitted in a letter dated 15th February 2023 that the amount being claimed in the Appeal was refundable. However, they later submitted a denial of liability for the claim.

Tribunal Findings

The Tribunal found that the VAT refund claim made by the Appellant for March 2021 is valid and should be refunded by the Respondent. This decision was based on the Respondent's admission in their letter dated 15th February 2023.

Tribunal's Decision

The Tribunal allowed the Appeal as per the Respondent's admission letter dated 15th February 2023. The orders of rejection of refund claim issued on 31st July 2022 were set aside. Each party was ordered to bear its own costs.

TAT 1363/2022:
Samasource Kenya EPZ Limited vs Commissioner of Domestic Taxes

Background

Samasource Kenya EPZ Limited (the Appellant) lodged a Value Added Tax (VAT) refund claim of Kshs. 2,445,538.59 for the period of December 2020 with the Commissioner of Domestic Taxes (the Respondent). The Respondent reviewed the claim and disallowed Kshs. 2,183,752.00 of the refund claim, subsequently issuing a VAT assessment of the same amount. The Appellant, dissatisfied with the refund decision, filed an appeal.

Issues for Determination

Whether the Respondent's decision to reject the Appellant's refund claim of Kshs. 2,183,752.00 was proper in law. - Whether the Respondent was justified in issuing a VAT assessment of Kshs. 2,183,752.00.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by rejecting the Appellant's application for refund of Kshs. 2,183,752.00 validly lodged under provisions of Section 17 (5) (d) of the Value Added Tax Act, 2013 (VAT Act) by deeming the Appellant's input VAT to be attributable to exempt supplies. The Appellant also argued that the Respondent erred in law and fact by disallowing the Appellant's input tax amounting to Kshs. 2,183,752.00 that was incurred within the requirements envisaged in Section 17 (1) of the VAT Act. The Appellant further argued that the Respondent failed to update the Appellant's tax status as an Export Processing Zone (EPZ) on the Appellant's iTax page as soon as the Appellant obtained the EPZ license on 14th October 2020.

Respondent's Argument

The Respondent argued that it did not err in law or fact as it carefully examined the information available to it before issuing the assessment. The Respondent stated that it was guided by Section 56 (1) of the Tax Procedures Act, 2015 (TPA) that in any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect. The Respondent further argued that the Appellant had an alternative process to claim the alleged tax paid in error, and that the dispute resolution mechanism should have been invoked and or exhausted before the Appellant approached the court.

Tribunal Findings

The Tribunal found that the Appellant failed to sufficiently support its refund claim that arose from input tax it incurred before and after 14th October 2020 when it was licensed to operate as an EPZ business. Consequently, the Tribunal found that the Respondent's decision to disallow the VAT refund claim of Kshs. 2,183,752.00 for the period of December 2020 is proper in law. The Tribunal also found that there is no appealable decision regarding the VAT assessment that the Respondent issued to the Appellant. Without an appealable decision, the Tribunal lacks the jurisdiction to determine the matter of the VAT assessment.

Tribunal's Decision

The Appeal was dismissed, and the Respondent's refund decision dated 29th September 2022 was upheld. Each party was ordered to bear its own costs.

TAT E002/2022:
Morgan Air and Seafreight Logistics Kenya Limited vs Commissioner of Domestic Taxes

Background

The appellant, Morgan Air and Seafreight Logistics Kenya Limited, lodged a VAT refund claim for excess input tax resulting from zero-rated supplies for the months of March to June 2022. The respondent, Commissioner of Domestic Taxes, rejected the refund claim on the basis that the appellant did not have zero-rated sales as per Section 17(5) of the VAT Act 2013. The respondent also issued a Credit Adjustment Voucher for an equal amount, implying that the rejected VAT refund claims could be reinstated as excess input tax to be carried forward and utilized to offset against any future liabilities. The appellant lodged a notice of objection, which was fully rejected by the respondent. The appellant then lodged 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 had accumulated excess input tax having made zero-rated supplies of logistics services to its customers who are based outside Kenya. The appellant disputed the respondent's claim that there was a principal-agent relationship and argued that it was offering transportation services, despite not owning any aircraft or vessel. The appellant also argued that the respondent was bound by previous authorities from the Tribunal and the High Court unless those judgments were overturned or a stay order granted.

Respondent's Argument

The respondent argued that the appellant failed to provide an analysis of input incurred related to services offered to mainly non-resident companies where output VAT was not charged. The respondent also argued that the appellant was claiming input VAT on supplies made to the principal and subsequently proceeded to disallow the same on account that the appellant in furtherance of its business did not incur the expenses and input VAT. The respondent further argued that the appellant was not a transporter since it did not own any aircraft or vessel.

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. The tribunal also found that there was no principal-agent relationship between the appellant and its customers. The tribunal held that the appellant is entitled to an input tax refund in accordance with Section 17(5)(a) of the VAT Act.

Tribunal's Decision

The tribunal allowed the appeal, set aside the respondent's refund rejection decision, and ordered the respondent to process the refund of excess input VAT within sixty days of the date of delivery of the judgment. Each party was ordered to bear its own costs.

TAT E004/2023:
Morgan Air & Sea Freight Logistics Kenya Limited vs Commissioner of Domestic Taxes

Background

The Appellant, Morgan Air & Sea Freight Logistics Kenya Limited, is a logistics solutions provider with customers based in Europe, the United Kingdom, and other parts of Africa. The Appellant had accumulated excess input tax from making zero-rated supplies of logistics services to its customers who are based outside Kenya. The Appellant lodged a VAT refund claim for the periods November 2017 and September 2020 amounting to Kshs 1,417,285.00. The Respondent, Commissioner of Domestic Taxes, rejected the Appellant's VAT refund applications 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 carried forward and utilized to offset against any future VAT liabilities. The Appellant objected to the rejected claims, but the Respondent upheld its decision. Aggrieved by the objection decision, the Appellant filed this 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 any of its customers and that there was no agency relationship at all between it and its customers. The Appellant's business model clearly shows that the Appellant is not an agent of any of its customers. The Appellant deals with the transportation of goods originating from Kenya. The Appellant clarified that as part of the transportation services offered to its customers, Morgan Air guarantees its suppliers of filling up space with contracted airlines. The Appellant is therefore the sole 'owner' of the airfreight capacity, and this is then subsequently sold to customers at market related rates. The Appellant submitted that the Tribunal rightfully reiterated its position as expressed in the case of Local Production Kenya Limited v Commissioner of Domestic Taxes where it held that in the absence of the ability of a party (acting as an agent) to bind the principal in relation to third party contracting, an agency relationship cannot be inferred..

Respondent's Argument

The Respondent refuted each and every allegation by the Appellant. The Respondent stated that it conducted an audit with the main objective of confirming the authenticity and correctness of the amount claimed by the Appellant. The audit revealed that the Appellant failed to provide an analysis of the input incurred related to services offered to mainly non-resident companies where output VAT was not charged. The Respondent averred that the Appellant was claiming input Value Added Tax (VAT) on supplies made to the principal and subsequently proceeded to disallow the same on the account that the Appellant in the furtherance of its business thereon, did not incur the expenses and input VAT.

Tribunal Findings

The Tribunal found that the services provided by the Appellant were exported services within the definition of Section 2 of the VAT Act. The Tribunal also found that there is no principal agent relationship between the Appellant and its customers. The Tribunal held that the Appellant is entitled to an input tax refund in accordance with Section 17(5) (a) of the VAT Act.

Tribunal's Decision

The Appeal was allowed. The Respondent's objection decision dated 25th November 2022 was set aside. The Respondent was ordered to process the VAT refund claims for the periods November 2017 and September 2020 within Sixty (60) days of the date of delivery of the Judgment. Each party was to bear its own costs.

Zero rated supplies

TAT 1432/2022:
Jars Transporters Limited vs Commissioner of Domestic Taxes

Background

The Appellant, JARS Transporters Limited, is a company involved in the transportation of coffee and gurney bags. The Respondent, Commissioner of Domestic Taxes, issued the Appellant with a VAT credit verification notice and subsequently a VAT credit verification findings letter. The Appellant objected to this, leading to the Respondent issuing an objection decision. Dissatisfied with the decision, the Appellant appealed to the Tax Appeals Tribunal.

Issues for Determination

Whether the Value Added Tax assessments was justified.

Appellant's Argument

The Appellant argued that the service of transportation of coffee to coffee auctions for export is zero-rated. They contended that the transportation services are ancillary or essential to ensuring that the coffee for export is in situ at the auction centers in readiness for export. The Appellant also argued that the transport services qualify to be services exported out of Kenya.

Respondent's Argument

The Respondent argued that the transportation services rendered by the Appellant are neither zero rated nor exempt but taxable at applicable standard rates. They contended that the Second Schedule to the VAT Act does not list 'transport of coffee to auction centres' as a zero-rated supply. The Respondent also argued that the services were not exported as the contracts were all with local entities and none was with a non-resident/ foreign client.

Tribunal Findings

The Tribunal found that the transportation of coffee to coffee auction centres was not zero rated under the Second Schedule to the VAT Act. It was determined that the end consumer of the transport services and the person that bears the ultimate cost of the service, is the farmer. The Tribunal concluded that the services were not exported as the place of consumption of the said services was in Kenya and the location of the business/ persons receiving the services was in Kenya.

Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Respondent's Objection decision dated 17th October, 2022. Each Party was ordered to bear its own costs.

Input VAT Claim

TAT 1320/2022:
Impact North SEZ(KE) vs Commissioner of Legal Services & Board Coordination

Background

The Appellant, Impact North SEZ(KE), constructed an Industrial Park in Kiambu County, Kenya. The construction of such parks was exempt from VAT under certain conditions, subject to approval by the Cabinet Secretary National Treasury upon recommendation by the Cabinet Secretary responsible for Industrialization. The Appellant sought this approval but did not receive it before commencing construction. The Appellant was later declared a Special Economic Zone (SEZ) and received an Enterprise License. The Respondent, Commissioner of Legal Services and Board Coordination, disallowed the Appellant's claimed input VAT of Kshs. 339,896,231.00 and Kshs.36,011,163.00 and demanded output VAT of Kshs. 29,570,682.00.

Issues for Determination

Whether the Appellant was entitled to claim input VAT of Kshs. 339,896,231.00 incurred in the construction of the Industrial Park. - Whether the Appellant was entitled to claim input VAT of Kshs. 36,011,163.00 incurred after it was licensed as a SEZ enterprise. - Whether the Respondent is entitled to demand output VAT of Kshs. 29,570,682.00.

Appellant's Argument

The Appellant argued that it was entitled to claim the input VAT incurred during the construction phase of the industrial park pursuant to the provisions of Section 17(1) of the VAT Act. The Appellant also contended that it was entitled to claim the input VAT incurred after it was licensed as a SEZ enterprise, as its supplies were zero-rated under the law. The Appellant further contended that the Respondent's demand for output VAT was moot, given the significant amount of input VAT incurred.

Respondent's Argument

The Respondent argued that the Appellant was not entitled to claim the input VAT incurred during the construction of the industrial park as it did not secure approval before incurring the expenses inclusive of VAT. The Respondent also contended that the Appellant incurred the VAT wrongly but voluntarily after it was licensed as a SEZ enterprise and that as a purchaser it ought to have asked its suppliers not to charge VAT. The Respondent further claimed that output VAT is due since the Appellant was not entitled to claim the input VAT.

Tribunal Findings

The Tribunal found that the Appellant was not entitled to claim input VAT of Kshs. 339,896,231.00 on the basis that it did not secure approval before incurring the expenses inclusive of VAT. The Tribunal also found that the Appellant was not entitled to claim input VAT of Kshs. 36,011,163.00 after it was licensed as a SEZ enterprise, as it did not have approval from the National Treasury at the time of incurring the expenses. The Tribunal further found that the Respondent is entitled to demand output VAT of Kshs. 29,570,682.00, as the Appellant was not entitled to claim the input VAT.

Tribunal's Decision

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

Compliance with documentary requirement under section 17 of the VAT Act

TAT 1425/2022:
Suma Health Products (K) Limited vs Commissioner of Investigation & Enforcement

Background

The Appellant, Suma Health Products (K) Limited, a company involved in multi-level marketing of healthcare and beauty products, was issued assessments for Corporation tax and VAT by the Respondent, Commissioner of Investigation and Enforcement, on 28th June, 2022 amounting to Kshs. 57,923,710.00 and Kshs. 24,245,722.00 respectively. The Appellant objected to these assessments on 5th September, 2022. The Respondent issued its objection decision on 18th October, 2022. Dissatisfied with the Respondent's decision, the Appellant filed a Notice of Appeal to the Tribunal on 10th November, 2022.

Issues for Determination

Whether the Respondent erred in law and in fact by issuing assessments for the period outside the statutory timelines provided by the law. - Whether the Respondent's assessments were justified.

Appellant's Argument

The Appellant argued that the Respondent erred in fact and law by conducting a default assessment which exceeded the timeframe provided under Section 29 of the Tax Procedures Act. The Appellant also contended that the Respondent failed to appreciate and understand the Appellant's nature of business, particularly that it is not in the export business. The Appellant further claimed that the Respondent erred in fact and law by stating that its analysis of the Appellant's employees' salaries subjected to PAYE, when compared to the company expenses claimed by the Appellant, showed a discrepancy which was disallowed for Corporation tax. The Appellant also argued that the Respondent erred in law and fact by breaching the Appellant's right to legitimate expectation and fair administrative action in issuing the Agency notice.

Respondent's Argument

The Respondent argued that it started investigations after receiving intelligence to the effect that the Appellant was under declaring its income for tax purposes. The Respondent further submitted that it analysed the Appellant's IT2C account which indicated that the Appellant had claimed a total of Kshs. 80,935,042.00 as employment expense, yet the Appellant had filed Kshs. 11,799,380.00 as per its PAYE return. The Respondent treated the variance as over claimed employment expense and the same was disallowed for Corporate tax. The Respondent also argued that the Appellant provided various explanations and schedules to support its grounds but did not adduce documentary evidence to support the same.

Tribunal Findings

The Tribunal found that the Respondent erred in law and in fact by issuing assessments for the period outside the statutory timelines. The Tribunal also found 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. The Tribunal found that the Appellant provided various schedules for expenses incurred for business purposes but did not attach any documentation to support the same for Corporation tax purposes. Further, the Appellant did not provide any support documents as per Section 17 of the VAT Act to support its input tax claim for expenditure incurred in its business.

Tribunal's Decision

The Appeal was partially allowed. The objection decision dated 18th October, 2022 was varied. The assessment relating to VAT for any period prior to 29th June, 2017 and the assessment relating to Corporation tax for any period prior to January 2017 were set aside. The Respondent was ordered to re-compute VAT and Corporation tax taking in account the above variations within Ninety (90) days of the date of delivery of this judgement. Each party was to bear its own costs.