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Tax Case Summaries

Select Tax Appeal Tribunal Decisions

Issue No. 6/2024

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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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VAT Act

VAT Refunds

TAT 1389/2022:
Tp Kenya Limited Vs The Commissioner of Legal Services And Board Coordination

Background

TP Kenya Limited, a company dealing with the supply of labels for drinks, lodged a VAT refund application for Kshs 22,036,291.00, claiming it had accumulated excess input tax from making zero-rated supplies due to exported goods. The Commissioner of Legal Services and Board Coordination rejected the application, citing non-compliance with return filing. TP Kenya Limited objected to the decision, arguing that the rejection was unjustified and that the Commissioner had failed to provide sufficient reasons for the decision.

Issues for Determination

Whether the Commissioner's notice of refusal of TP Kenya Limited's application complied with the law - Whether the Commissioner's rejection of TP Kenya Limited's application for VAT refund was justified

Appellant's Argument

TP Kenya Limited argued that the Commissioner erred in law by rejecting the VAT refund application and issuing credit adjustment vouchers. They claimed that the Commissioner insinuated that corporate income tax returns filing is a pre-requisite to allowing a VAT refund application, which they argued is not a requirement under the VAT Act.

They also argued that the Commissioner failed to provide sufficient reasons for its decision, which they claimed contravened the provisions of the Tax Procedures Act, the Constitution of Kenya, and the Fair Administrative Actions Act.

Respondent's Argument

The Commissioner argued that they had requested TP Kenya Limited to provide requisite documents to validate the VAT refund, but the documents provided were not sufficient to reconcile the variances noted. They relied on Section 59 (1) of the Tax Procedures Act, which requires the taxpayer to provide records to enable the Commissioner determine its tax liability. The Commissioner claimed that TP Kenya Limited failed to avail its records, leading to the rejection of the VAT refund application.

Tribunal Findings

The Tribunal found that the Commissioner provided clear reasons for the rejection of the VAT refund application, in compliance with the provisions of Section 49 of the Tax Procedures Act. However, the Tribunal also found that compliance with return filing is not a pre-condition for the grant of VAT refunds. Therefore, the Commissioner erred by rejecting TP Kenya Limited's application for VAT refund on this ground. The Tribunal also found that TP Kenya Limited had provided all the documents requested by the Commissioner in compliance with the provisions of Section 59 of the Tax Procedures Act, thus discharging its burden of proof.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the Commissioner's Objection decision, and annulled the Commissioner's decision disallowing the refund claim. The Commissioner was ordered to process TP Kenya Limited's refund claim within ninety days from the date of delivery of the judgment. Each party was to bear its own costs.

TAT 1349/2022:
Digital Divide Data Kenya Limited vs. Commissioner of Legal Services and Board Coordination

Background

The Respondent issued the Appellant with a demand letter and assessment notices for the period 2017 to 2020 demanding total tax due from the Appellant of Kshs. 2,335,277.00 for PAYE and a reduction of income tax losses and input VAT of Kshs. 357,597,476.00 and Kshs. 15,353,855.00, respectively. The Appellant objected to the Respondent's tax demand and assessment notices. The Respondent issued its objection decision, which the Appellant appealed against.

Issues for Determination

Whether there is a valid Appeal before the Tribunal - Whether the assessments by the Respondent were justified.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by reducing the Appellant's income tax losses resulting from an erroneous transfer pricing adjustment. The Appellant also argued that the Respondent erred in law and fact by disallowing input VAT incurred in the making of taxable supplies contrary to Section 17 of the VAT Act, 2013. The Appellant further argued that the Respondent erred in law and in fact by assessing PAYE on salaries and wages related to Tanzania staff which are not subjected to tax in Kenya.

Respondent's Argument

The Respondent argued that the Appellant failed to meet the burden of proof in proving that the Respondent's tax decision is incorrect as per the provisions of Section 56(1) of the Tax Procedures Act. The Respondent also argued that the Appellant's application for input VAT was disallowed as the application had not met the mandatory provisions of Section 17 of the VAT Act. The Respondent further argued that the Appellant claimed that wages and salaries related to Tanzania staff are not subjected to tax in Kenya which is contrary to statutory provisions.

Tribunal Findings

The Tribunal found that the Appeal is incompetent and unsustainable in law. The Tribunal found that the Appellant conceded to disallowed input VAT amounting to Kshs. 15,353,855.00 and PAYE amounting to Kshs. 2,335,277.00. The Tribunal also found that the Appellant requested for these conceded amounts to be offset against its VAT refunds payable. The Tribunal further found that the only refund amount that the Respondent had approved as recoverable amounted to Kshs. 4,109,560.00. The Tribunal concluded that even if the Respondent opted to offset the conceded amounts against the approved VAT refund, the refund amount would not be sufficient to offset the tax not in dispute in line with Section 52 of the Tax Appeals Tribunal Act.

Tribunal's Decision

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

TAT E64/3:
Kenya General Industries Limited vs Commissioner of Domestic Taxes

Background

The appellant, Kenya General Industries Limited, applied for a Withholding VAT (WHVAT) refund. Before the validation exercise was completed, the respondent, Commissioner of Domestic Taxes, issued the appellant with credit adjustment vouchers, putting the appellant in a continuous credit position. The appellant lodged an appeal seeking the tribunal's intervention, arguing that the respondent misinterpreted and misapplied Section 17(5) of the VAT Act, 2013, by utilizing WHVAT credits to offset VAT payable instead of utilizing accrued input tax credits carried forward.

Issues for Determination

Whether the respondent breached the appellant's right to fair administration action. - Whether the respondent correctly interpreted the provisions of Section 17(5) of the VAT Act, 2013. - Whether the appellant's claim is unfounded on the basis that it did not appeal against the Credit Adjustments Vouchers issued by ITAX. - Whether there is uncertainty and ambiguity in the interpretation of Section 17(5) of the VAT Act, 2013.

Appellant's Argument

The appellant argued that the respondent misinterpreted and misapplied Section 17(5) of the VAT Act, 2013, by utilizing WHVAT credits to offset VAT payable instead of utilizing accrued input tax credits carried forward. The appellant also argued that the respondent's actions constituted a breach of the appellant's right to fair administrative action as enshrined under Article 47 of the Constitution of Kenya 2010.

Respondent's Argument

The respondent argued that the appellant's appeal was premature because it had not issued a refund decision. The respondent also argued that Section 17(5) of the VAT Act does not specify the priority of utilizing credits when a taxpayer has both WHVAT credits and credits brought forward from previous months. The respondent further argued that once utilized, the WHVAT credits become unavailable for refund application.

Tribunal Findings

The tribunal found that the respondent's decision to proceed with enforcement decision by offsetting the appellant's WHVAT credits against its VAT liabilities amounted to a decision of the Commissioner from which an appeal could be filed before the Tribunal. The tribunal also found that the respondent acted in error when it opted to utilise the appellant's WHVAT credit before processing the appellant's refund as commanded by Section 47(3) of the TPA.

Tribunal's Decision

The tribunal allowed the appeal and directed the respondent to reverse all the credit adjustments for the specified periods within 90 days from the date of delivery of the judgment. The respondent was also directed to process and pay the appellant's WHVAT refunds within 90 days from the date of delivery of the judgment. Each party was to bear its own costs.

Classification of zero-rated supplies

TAT 314/2023:
Mancuchar Kenya Limited vs Commissioner of Domestic Taxes

Background

The case arose from the Respondent's additional assessments for VAT for the month of August 2022, issued on the 15th November 2022. The Appellant objected to this on the 9th December 2022.

The Respondent issued its Objection decision on 6th February 2023 rejecting the Appellant's objection and confirmed its additional assessment on VAT in the sum of Kshs. 6,278,009.00 for the principal tax, penalty and interest. The Appellant lodged its Notice of Appeal electronically on 3rd March 2023.

Issues for Determination

Whether the Appellant was justified to classify the sales as Zero-rated in relation to VAT. - Whether the Respondent's Objection Decision issued on 6th February 2023 was justified.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by reclassifying the subject fertilizer supplies as exempt instead of zero-rated as had been declared by the Appellant in its VAT returns for the month of August 2022.

The Appellant also contended that the Respondent's decision was manifestly incorrect by basing the same on a false premise that effective 1st July 2022 the Finance Act reclassified fertilizers under Chapter 31 of the East African Community Common External Tariff from the Second Schedule of the VAT Act to the First Schedule of the VAT Act.

Respondent's Argument

The Respondent contended that effective 1st July 2022, the Finance Act 2022 reclassified fertilizers under Chapter 31 of the CET from the Second Schedule to the First Schedule to the VAT Act 2013.

The Respondent also asserted that the Appellant misapplied the provisions of the VAT Act by relying on the Second Schedule rather than the First Schedule thereto, in line with the amendments contained in the Finance Act 2022, the result whereof was that the Appellant misclassified its products as zero-rated rather than exempt.

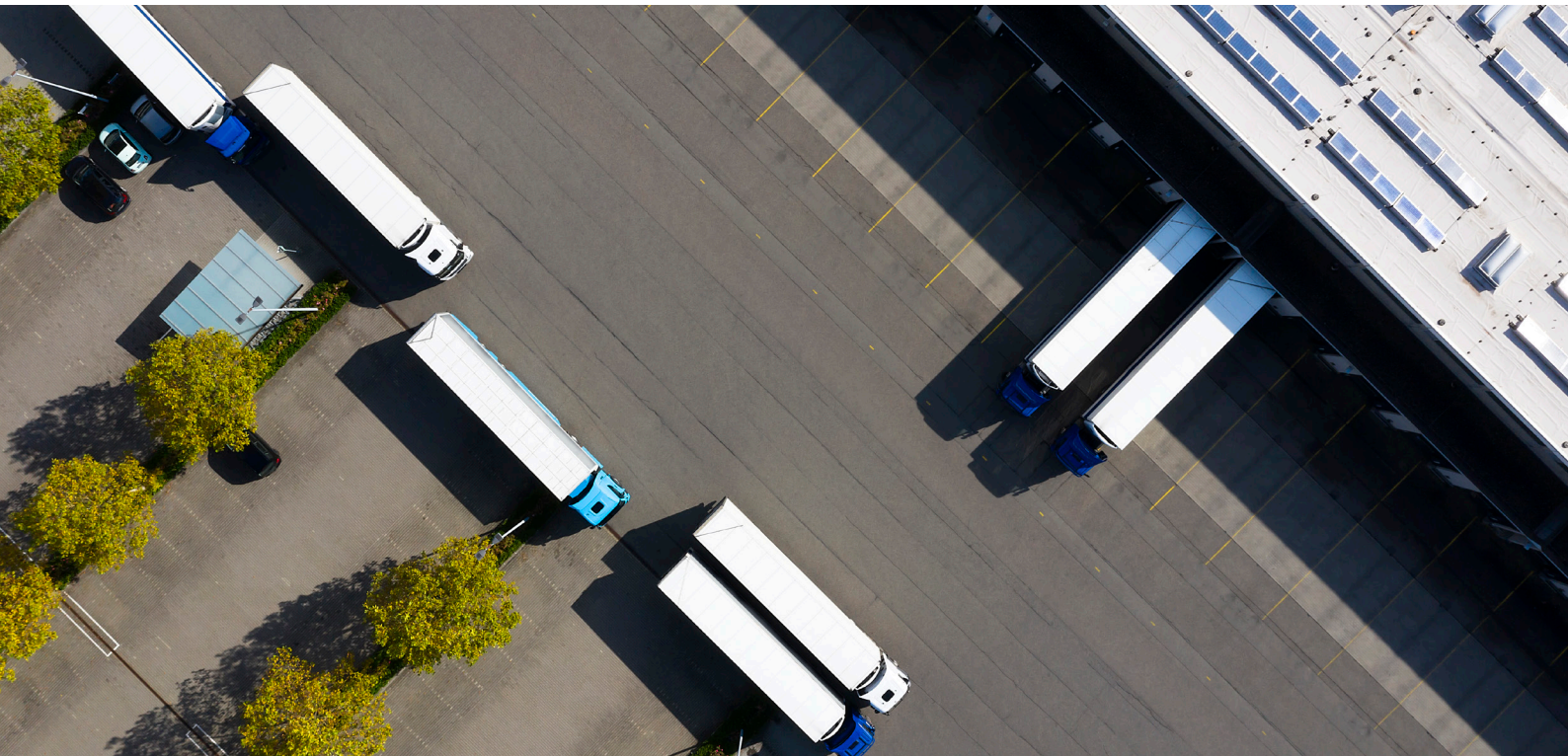
Tribunal Findings

The Tribunal found that the Respondent's assessment was premised on the misapplication of Section 31 of the Finance Act 2022. The Tribunal also found that the Appellant did not misread or misdirect itself in classifying the fertilizers under Chapter 31 of East African Community Common External Tariff as zero-rated rather than exempt products.

The Appellant, therefore was justified in classifying the fertilizers under Chapter 31 of East African Community Common External Tariff to be covered under the Second Schedule to the VAT Act as zero-rated supplies.

Tribunal's Decision

The Appeal was allowed. The Respondent's Objection decision issued on 6th February 2023 was set aside. The Respondent was ordered to reverse the Debit Adjustment Voucher Number 2018180694 dated 15th November 2022, in the sum of Kshs. 5,707,281.20 relating the VAT in the period of 1st August 2022 to 31st August 2022. Each party was to bear its own costs.



Compliance with the documentary requirement under Section 17

TAT 961/2022:
J & K Investments Limited vs Commissioner of Investigation and Enforcement

Background

The Appellant, J & K Investments Limited, was served with an additional assessment for VAT and Corporation tax following an audit investigation by the Respondent, Commissioner of Investigation and Enforcement. The Appellant lodged a notice of objection to the additional assessment, which the Respondent subsequently invalidated. The Appellant then lodged an appeal with the Tribunal.

Issues for Determination

Whether the Appellant's Notice of Objection was validly lodged.

Appellant's Argument

The Appellant argued that the Respondent misdirected itself in law and facts by failing to take into account the Appellant's explanations and submissions. The Appellant claimed that the purchases disallowed by the Respondent were allowable, legitimate, and claimed timely as per the VAT Act and ITA. The Appellant also argued that the Respondent erred in law by disallowing the purchases claims on the basis that the taxpayer failed to provide proof of payments for purchases.

Respondent's Argument

The Respondent argued that the Appellant did not qualify for the input VAT as it failed to provide documenTATion in support of the same as provided for under Section 17(2)(a) of the VAT Act. The Respondent also contended that it used available information to come to the tax liability of the Appellant.

The Respondent further argued that it is permitted to amend an assessment outside the five-year period in certain circumstances.

Tribunal Findings

The Tribunal found that the Appellant failed to provide documents to support its objection despite the Respondent's request, thereby necessitating the Respondent's invalidation decision. The Tribunal also found that the onus of providing documents to support the objection lay with the Appellant. However, the Appellant failed to do so.

Tribunal's Decision

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

TAT 1453/2022:
Joleek Investments Limited vs Commissioner of Domestic Taxes

Background

The Appellant, Joleek Investments Limited, was issued with a Value Added Tax (VAT) assessment order by the Respondent, Commissioner of Domestic Taxes, for the period January 2018 to May 2018.

The order disallowed VAT input claim amounting to Ksh 913,774.32 based on invoices claimed without corresponding sales declaration by the suppliers.

The Appellant objected to the assessment order, which was invalidated by the Respondent, confirming the VAT assessment of Ksh 913,774.32. Aggrieved by the Respondent's decision, the Appellant filed an appeal.

Issues for Determination

Whether the Respondent's objection decision dated 25th January, 2022 was valid.

Appellant's Argument

The Appellant argued that its VAT input claim was legitimate and conformed to Section 17(3) of the VAT Act.

The Appellant claimed that despite providing purchase invoices and bank Statements as proof of purchase during the objection review process, the Respondent proceeded to disallow the claims.

The Appellant asserted that the Respondent's decision was improper, unfair, and unjust.

Respondent's Argument

The Respondent argued that the Appellant failed to provide proper documentation to establish that transactions took place and to prove that the said suppliers were genuine.

The Respondent claimed that the Appellant failed to provide invoices mapped to prove payments that demonstrate they incurred the expense that would have enabled the Respondent to follow up on the purported suppliers.

The Respondent maintained that the Appellant was informed of the basis for which the assessment was issued and how the Respondent arrived at its decision.

Tribunal Findings

The Tribunal found that the Appellant failed to discharge its burden of proof and thus the Respondent's invalidation decision dated 25th January, 2022 and assessments therein were valid.

The Tribunal noted that the Appellant's pleadings did not have any attachments in support of its grounds opposing the assessment or the decision of the Respondent.

Tribunal's Decision

The Appeal was dismissed. The Respondent's invalidation decision dated 25th January 2022 was upheld. Each party was ordered to bear its own costs.

TAT 1580/2022:
Little Cribs Limited vs Commissioner of Domestic Taxes

Background

The Respondent issued an additional VAT assessment to the Appellant for the period of July 2022 amounting to Kshs. 161,467.40.

The Appellant lodged an objection to the assessment, which the Respondent reviewed and confirmed. Dissatisfied with the Respondent's decision, the Appellant lodged a Notice of Appeal.

Issues for Determination

Whether the Respondent's objection decision dated 4th November, 2022 was justified.

Appellant's Argument

The Appellant argued that it had been filing all relevant tax returns on time and all liabilities there from paid in full.

The Appellant also claimed that it had provided all necessary documents to support its purchases invoices, including original copies of the invoice for verification, ETR from suppliers, proof of payment to suppliers (bank statements), and statements from suppliers to support purchases.

Respondent's Argument

The Respondent maintained that the Appellant failed to support the input VAT claimed and did not meet the set criteria for deduction of input tax as provided for under the provisions of Section 17 of the Value Added Tax Act No. 35 of 2013. The Respondent also argued that the Appellant failed to provide the requested purchase invoices, delivery notes, proof of payment and suppliers' statement.

Tribunal Findings

The Tribunal found that the Appellant did not provide any of the documents listed under Section 17(3) of the VAT Act, which was a breach of Rule 5 of the Tax Appeals Tribunal (Procedure) Rules, 2015. The Tribunal also found that the Appellant failed to discharge its burden of proof and failed to establish that the Respondent erred in confirming the additional assessments.

Tribunal's Decision

The Appeal was dismissed, the objection decision dated 4th November, 2022 was upheld, and each party was ordered to bear its own costs.

TAT 184/2023:
Gobin Limited vs Commissioner of Domestic Taxes

Background

The Respondent issued an additional assessment on VAT returns for the months September 2018, December 2018 and January 2019. The Appellant filed an objection to these additional assessments. The Respondent considered the Appellant's objection and issued a decision confirming the assessment of Kshs. 497,407.36. Dissatisfied with the Respondent's decision, the Appellant lodged a Notice of Appeal.

Issues for Determination

Whether the Appellant's claim for input VAT is statutorily time barred.

Appellant's Argument

The Appellant argued that the Respondent erred in law and in fact by rejecting its objections lodged on the basis that they were time barred. The Appellant also stated that all the invoices claimed fall within the law to claimed input tax as per Section 17(2) of the VAT Act. The Appellant further argued that the Respondent disregarded the invoices which had been claimed in the return.

Respondent's Argument

The Respondent stated that the Appellant claimed VAT from different suppliers that did not meet the requirements for deduction of input VAT and therefore disallowed and brought to charge. The Respondent also stated that the Appellant was informed of the anomalies observed in its return through the letter dated 21st October 2021. The Respondent asserted that due process of the law was followed, and the assessments were confirmed after due consideration of the information and explanations provided by the Appellant.

Tribunal Findings

The Tribunal found that the Appellant has not claimed that it filed returns late. That is not the case. The Respondent in its objection decision rejected the Appellant's objection because the invoices were time barred pursuant to the provisions of Section 17(2) of the VAT Act. The Tribunal is of the view that the Appellant ought to have spent most of its time demonstrating that the invoices were filed within 6 months yet it did not. Accordingly, the Appellant failed to discharge its burden of proof under Section 56(1) of the TPA.

Tribunal's Decision

The Appeal was dismissed and the Respondent's objection decision dated 23rd December 2022 was upheld. Each party was to bear its own costs.

VAT Threshold

TAT 217/2023:
Lenin Manga Ngondi vs Commissioner of Domestic Taxes

Background

The appellant, Lenin Manga Ngondi, is a sole proprietor in the construction sector. He won a tender with the Kenya Rural Roads Authority (KERRA) valued at Kshs. 4,101,701.79. Upon completion of the contract, KERRA withheld VAT besides withholding tax on income tax. The appellant registered for VAT obligation on 15th October 2020. The respondent, Commissioner of Domestic Taxes, issued an additional VAT assessment dated 2nd November 2020 for the period from 15th October 2020 to 31st October 2020. The appellant objected partially to the assessments. The respondent rejected the notice of objection, leading to the appeal.

Issues for Determination

Whether the appellant was eligible for registration for VAT under Section 34 of the VAT Act - Whether the VAT assessed and confirmed assessment was due and payable.

Appellant's Argument

The appellant argued that he was not registered for VAT at the onset, during the course, and even at the point of completing the contract. He also argued that the respondent erred in law and in fact by levying VAT on him. The appellant further argued that the respondent erred in law and in fact by implying that the whole output VAT is payable to the respondent and failing to appreciate that the appellant contractual works were actually executed and costs with VAT element incurred and consequently affecting the output VAT.

Respondent's Argument

The respondent argued that the appellant had met the threshold for VAT registration but failed to apply for registration as required by Section 34 of the VAT Act. The respondent also argued that the burden lies with the appellant to prove that the assessments and objection decision are wrong pursuant to Section 56 of the Tax Procedures Act No. 29 of 2015.

Tribunal Findings

The tribunal found that the respondent cannot register a taxpayer for VAT obligation under Section 34 of the VAT Act if the taxable supply is less than Kshs. 5 million shillings in any period of twelve months. The respondent has not demonstrated that the appellant made 5 million shillings or more in any period of twelve months. Consequently, the respondent's actions are therefore, illegal, null and void ab initio. The tribunal also found that the VAT assessed and confirmed is neither due nor payable.

Tribunal's Decision

The appeal was allowed and the respondent's objection decision dated 6th February 2023 was set aside. Each party was ordered to bear its own costs.

Failure to obtain tax exemption certificate as required

TAT 36/2022:
Antomacks Company Limited vs Commissioner of Domestic Taxes

Background

The respondent conducted an audit of the appellant's tax affairs for the 2017 tax period and noted that appellant had declared sales worth Kshs. 10,791,267.00 in its 2017 tax returns yet its VAT returns were nil. The respondent issued additional assessments amounting to Kshs. 1,726,603.00 being principal tax.

The appellant lodged its objection to the assessments on the iTax platform and the respondent requested additional documents which the appellant provided. Nonetheless the respondent rejected the appellant's letter of objection and issued an objection decision.

Issues for Determination

Whether the Objection Decision was justified..

Appellant's Argument

The appellant argued that the respondent erred in law and in fact in making the decision to charge VAT on the project, Ethiopia-Kenya Power System Interconnection HVDC Transmission line (the Project) part of which was undertaken by the appellant and was exempt from custom duties and VAT.

The appellant also argued that the respondent erred in law and in fact in disregarding the letter from the National Treasury exempting the said project from customs duties and VAT.

Respondent's Argument

The respondent argued that the appellant was sub-contracted by a company known as Larsen & Toubro Limited to erect HVDC overhead line from KEN-AP 9 near Loglogo to EN-AP 16 near Kinamba. Larsen & Toubro Limited communicated officially to the respondent on 24th

September 2019 on the appellant's VAT exemption.

There was no feedback from the respondent on the appellant's VAT exemption status. The appellant relied on the exemption certificate provided by National Treasury to Larsen & Toubro Limited not to charge VAT despite the appellant being a registered person and having failed to obtain a remission letter from the respondent.

Tribunal Findings

The tribunal found that the appellant believes that its services were exempt from VAT. However, protocol was established through those letters on how such applications would be individually approved on a piece meal basis. In other words, for each transaction, for example in respect of exemption from Customs duties, there was a requirement for certain documentation to be provided in order for exemption to be granted.

In respect to application for VAT exemption, there was established protocol on how such applications would be made.

The appellant, in the view of the tribunal appeared to be unaware of the established protocol and even during the oral hearing, it attempted to pass the blame to Larsen & Tubro Limited.

However, since the appellant was sub- contracted by Larsen & Tubro Limited, it is a business that is independent and separate from Larsen & Tubro Limited.

Tribunal's Decision

The appeal was allowed and the respondent's objection decision dated 6th February 2023 was set aside. Each party was ordered to bear its own costs.

Chargeability of transport services facilitated by a digital platform

TAT e167/2023:
Sendy Limited vs Commisioner of Domestic Taxes

Background

The case revolves around Sendy Limited, a company that provides a digital platform connecting transporters to third parties requiring transportation/delivery services.

The Kenya Revenue Authority (KRA) conducted an analysis of Sendy's records for the period January 2016 to December 2020 and assessed Sendy for VAT and CIT amounting to Kshs.167,170,057.00.

Sendy objected to the entire assessment, arguing that KRA had mischaracterized its business model and wrongly held it responsible for VAT on transportation services rendered by third parties. KRA accepted Sendy's objection regarding the CIT but confirmed the VAT assessments.

Issues for Determination

Whether Sendy Limited offered transport services chargeable to VAT.

Appellant's Argument

Sendy argued that it merely provides a digital platform connecting transporters to customers and does not offer transport services itself.

It contended that the transporters, not Sendy, should be responsible for VAT on the transportation services.

Sendy also claimed that KRA disregarded a private ruling it had issued, which clarified the VAT treatment of Sendy's business model. Sendy sought to have the VAT assessment vacated in its entirety.

Respondent's Argument

KRA argued that Sendy was the main player and in complete control of the transactions, hence responsible for VAT. KRA treated the variances between banking receipts and VAT returns as undeclared sales and issued additional assessments. KRA also contended that Sendy's private ruling could not be applied retrospectively and did not specify the taxable value of Sendy's supplies.

Tribunal Findings

The Tribunal found that Sendy did not provide transport services that are chargeable to VAT. It observed that Sendy only provided a digital platform connecting drivers and customers and collected payments on behalf of the transporters. The Tribunal held that the transporters, who provided the transport services, should have issued a taxable invoice as per the VAT Act. The Tribunal also noted that Sendy only retained a percentage of the total amount as a commission, which is chargeable to VAT.

Tribunal's Decision

The Tribunal allowed the appeal, set aside KRA's objection decision, and ordered each party to bear its own costs.

Tax Refunds on Bad Debts

TAT 152/6:
Hotpoint Appliances Limited vs Commissioner of Domestic Taxes

Background

Hotpoint Appliances Limited (the Appellant) applied for a refund of VAT amounting to Kshs 61,855,285.86 for the period January 2016 to July 2017. This was in regard to bad debts owed to Nakumatt Holdings Limited. The Commissioner of Domestic Taxes (the Respondent) partially approved the claim of Kshs 6,958,881.00 and rejected Kshs 54,896,504.00. The Appellant objected to the Respondent's decision, leading to the appeal.

Issues for Determination

Whether the Respondent erred in disallowing the Appellant's refund application.

Appellant's Argument

The Appellant argued that it met the threshold of Section 31(1) of the VAT Act in that Nakumatt Holdings Limited had been declared insolvent and that it made its refund application one year after the declaration of insolvency. The Appellant also contended that the Respondent violated legitimate expectation it had created by disallowing the refund claim.

Respondent's Argument

The Respondent argued that Nakumatt Holdings Limited had not been declared insolvent and that the matter was still pending in court. Further, the Respondent contended that the Appellant failed to satisfy the Respondent that it exhausted all available avenues in pursuit of its debt with Nakumatt Holdings Limited.

Tribunal Findings

The Tribunal found that the matter of insolvency of Nakumatt Holdings Limited has been proven beyond reasonable doubt and that on this limb alone, the Appellant satisfies the threshold of Section 31 (1) of the VAT Act. The Tribunal also found that the Respondent has fronted extraneous reasons to justify its rejection of the Appellant's application.

However, the law is very clear on the conditions to be fulfilled for one to claim a tax refund on bad debts and that the taxpayer would be required to fulfil either of the conditions as set out under Section 31(1) of the VAT Act which in this case the Appellant has done so.

Tribunal's Decision

The Appeal was allowed and the Respondent's decision dated 2nd November 2022 was set aside. Each party was to bear its own costs.

Conflict between Statute and subsidiary legislation

TAT 39/0:
Majorel Kenya Ltd Vs Commissioner Of Legal Services & Board Coordination

Background

Majorel Kenya Ltd, a business process outsourcing company, lodged a claim of relief of Value Added Tax (VAT) incurred for making exempt supplies which became taxable, amounting to a tax of Kshs. 14,717,713.19 for the period January 2022 to June 2022 in line with Section 18(1)(a) of the VAT Act 2013. The Commissioner of Legal Services & Board Coordination rejected the claim, stating that the input tax incurred is not trading stock and does not qualify for inventory relief as per Regulation 7(1) of the VAT Regulations, 2017. Majorel Kenya Ltd objected to the decision and subsequently filed an appeal.

Issues for Determination

Whether the Respondent's Objection Decision dated 7th December 2023 is justified and Proper in Law.

Appellant's Argument

Majorel Kenya Ltd argued that the Commissioner's interpretation of both Section 18 of the VAT Act and Regulation 7 of VAT Regulations 2017 had created a non-existent limitation and restriction to the application of laws. They contended that Section 18 (1) (a) of the VAT Act expressly and clearly permit claim of relief for input tax on supplies, and not trading stock only, that had already been incurred before the date when exempt supplies made by a registered person became taxable. They also argued that the Commissioner's reliance on Section 17(1) of VAT Act is prejudicial and totally irrelevant in guiding approval

of a claim for relief under Section 18(1) of the VAT Act.

Respondent's Argument

The Commissioner of Legal Services & Board Coordination maintained that the interpretation of Section 18 of the VAT Act envisaged no express limitation in the application the entitled relief from VAT incurred and that input incurred prior to the change of the VAT treatment of exported services. They also argued that the input tax so claimed by Majorel Kenya Ltd cannot be subject to the relief provided by Section 18 of the VAT Act as the input relief sought by the Appellant does not relate to a taxable supply.

Tribunal Findings

The Tribunal found that in situations where there are real or potential contradiction or conflict between a statute and a subsidiary legislation that flows from the statute, then the statute takes precedence. In this case, provisions of the VAT Act 2013 take precedence, and in particular Sections 17 and 18, in determining the Appellant's claim of relief of VAT on input tax incurred for making exempt supplies which became taxable. However, the Tribunal also found that Majorel Kenya Ltd did not discharge its burden of proof to demonstrate that the Commissioner's Objection decision dated 7th December, 2023, was incorrect as required under Section 56 (1) of the Tax Procedures Act, 2015, and failed to prove that the tax decision should not have been made or should have been made differently as required under Section 30 (b) of the Tax Appeals Tribunal Act.

Tribunal's Decision

The Appeal was allowed and the Commissioner's Objection decision dated 7th December 2022 was set aside. Each party was ordered to bear its own costs.

Applicable test for exported services

TAT E36/5:
AARO East Africa Limited Vs Commissioner Of Legal Services And Board Coordination

Background

The Appellant, AARO East Africa Limited, a subsidiary of AARO Sweden, is involved in software implementation and maintenance. The Respondent, Commissioner of Legal Services and Board Coordination, issued assessment orders seeking to recover Kshs. 8,286,381.28. The Appellant objected to the additional assessment, leading to the Respondent's objection decision. The Appellant, dissatisfied with the decision, lodged an appeal before the Tribunal.

Issues for Determination

Whether the Appellant's services were exported services that are zero-rated.

Appellant's Argument

The Appellant argued that its principal activity is the implementation and maintenance of software owned and sold by AARO Sweden to various clients globally. The Appellant claimed that it outsourced the implementation and maintenance departments, handling the implementation and maintenance aspects of the software integration and invoicing AARO systems. The Appellant argued that the Respondent erred in holding that the majority of the income received by the Appellant was from Kenyan companies and would therefore not qualify as exported services relating to business process outsourcing. The Appellant also argued that the term 'business process outsourcing' was ambiguous and should be interpreted in favor of the taxpayer.

Respondent's Argument

The Respondent argued that the Appellant's services were consumed locally and therefore do not qualify as exported services. The Respondent stated that outsourcing occurs when a third-party or non-related party is contracted to offer services. The Respondent also argued that the Appellant's services should have been charged VAT at a rate of 16%.

Tribunal Findings

The Tribunal found that the applicable test is the location of the recipient of the services. The Tribunal also found that the identity of the customer who receives exported services from Kenya should be legally connected to the service provider such as through a business agreement. The Tribunal found that the Appellant did not provide any Agreement to identify the concerned parties and services to be provided. Therefore, the Tribunal concluded that the Appellant did not supply exported services which were zero-rated.

Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Respondent's Objection decision dated 22nd May 2023. Each party was ordered to bear its own cost.bear its own costs.

Income Tax Act

Expenses “wholly and exclusively” incurred

TAT 1558/2022:
Esther Njeri Kiritu vs The Commissioner of Domestic Tax

Background

The appellant, Esther Njeri Kiritu, a registered taxpayer involved in the business of soda distribution, was issued with an additional income tax and VAT assessment by the respondent, the Commissioner of Domestic Tax, following a compliance audit. The appellant objected to the additional assessment, arguing that the respondent confirmed the assessments without due regard to all records/documents, explanations, and information provided. The appellant also claimed that the respondent overstated her sales amount and erred in disallowing the incurred input tax.

Issues for Determination

Whether the respondent’s additional tax assessment on the appellant was correct and proper in law.

Appellant’s Argument

The appellant argued that the respondent’s additional tax assessment was excessive and did not reflect the true state of her business. She contended that she had complied with tax laws by declaring input and output taxes as required by the law. The appellant also claimed that the respondent failed to consider all the information and documents provided, giving reasons contrary to facts that the documents provided were inadequate.

Respondent’s Argument

The respondent argued that it had the power to amend tax assessments as per Section 31 of the Tax Procedures Act. It claimed that the appellant had claimed full purchases despite receiving rebates from Nairobi Bottlers Ltd, and therefore it disallowed the deductions at the full purchase price pursuant to Section 16 (1) of the Income Tax Act.

Tribunal Findings

The tribunal found that the appellant had not demonstrated that the purchases claimed in her input tax and income tax computation were wholly and exclusively incurred for the generation of income for the years under review. It held that the appellant’s purchases were not wholly and exclusively incurred in the generation of income as provided for under Section 16 (1) of the ITA.

Tribunal’s Decision

The tribunal dismissed the appeal, upheld the respondent’s objection decision, and ordered each party to bear its own costs.

TAT E10/1:
Prime Capital And Credit Limited Vs Commissioner For Legal Services And Board Coordination

Background

The appellant, Prime Capital and Credit Limited, is a company involved in lending money and investing in shares, government bonds, dividends from related parties, and foreign bonds. The respondent, Commissioner for Legal Services and Board Coordination, issued an assessment to the appellant, disallowing portions of expenses claimed by the appellant and recomputing the appellant's annual tax computations. The appellant objected to this assessment, leading to the respondent partially amending the assessment but still confirming a tax loss reduction. Dissatisfied with the respondent's decision, the appellant lodged a Notice of Appeal.

Issues for Determination

Whether the respondent was justified in disallowing expenditure used in the generation of taxable income, which are allowable for tax purposes. - Whether the respondent was justified in apportioning all general expenses of the company without analysing the basis on which the expenses were incurred. - Whether the respondent was justified in disallowing the donations made by the appellant.

Appellant's Argument

The appellant argued that the respondent erred in law and in fact by disallowing expenditure used in the generation of taxable income, which are allowable for tax purposes. The appellant also argued that the respondent erred by deeming allowable expenditure incurred by the appellant as common expenses incurred in relation to both taxable and exempt income and further disallowing the apportioned expenses in relation to the exempt income for corporation tax purposes. The appellant relied on several legal precedents to support their position.

Respondent's Argument

The respondent argued that the expenses were disallowed as they did not meet the criteria set out in Section 15(1) of the Income Tax Act. The respondent also argued that the appellant failed to provide any evidence to demonstrate that the employees were only involved in the lending business. The respondent further argued that the appellant failed to discharge its evidential burden of proof under Section 107 of the Evidence Act in demonstrating that the assessment by the respondent was in any reasonable manner excessive or incorrect.

Tribunal Findings

The tribunal found that the general expenses that the company incurred were not incurred in the generation of the appellant's exempt income and therefore were utilised in its taxable business and should therefore not be apportioned. The tribunal also found that the donations by the appellant to the Social Service League and Shree Jalaram Satsang Mandal were backed by valid tax exemption certificates in compliance with Section 15(2)(w) of the ITA and Paragraph 10 of the First Schedule to the ITA. However, the tribunal found that the appellant did not produce any documentation to support its averments on unrealised exchange loss and overstated unrealized exchange gain.

Tribunal's Decision

The tribunal partially allowed the appeal. The tribunal set aside the confirmed assessment arrived at by the apportionment of general expenses incurred by the business and the disallowance of donations to the Social Service League and Shree Jalaram Satsang Mandal. However, the tribunal upheld the confirmed assessment relating to unrealised exchange loss and overstated unrealized exchange gain. The respondent was directed to recompute the tax assessment based on the tribunal's findings within thirty days of the date of delivery of the judgment.

Exemption of taxes based on double tax agreements.

TAT 1559/2022:
Nairobi Bottlers Ltd vs Commissioner of Domestic Taxes

Background

Nairobi Bottlers Ltd, an affiliate of the Coca-Cola group of Companies, made an application for refund of taxes paid in error for the period December 2018. The taxes constituted of Withholding tax in respect of technical fees and computer charges amounting to Kshs 41,711,350.00 and Kshs 17,106,753.00, respectively. The Respondent rejected the refund application. The Appellant objected to the Respondent's decision albeit late. This was rejected by the Respondent. The Appellant filed an appeal with the Tribunal.

Issues for Determination

Whether the Respondent was justified in rejecting the Appellant's tax refund application.

Appellant's Argument

The Appellant contended that the payments in respect of technical fees and computer charges it made were to Coca-Cola Sabco (Pty) Ltd, a company resident in South Africa and were erroneously subjected to Withholding tax. It stated that the Respondent rejected the application for the refund of taxes despite the provisions for exemption of taxes based on double tax agreements. The Appellant argued that Coca-Cola does not qualify as a natural person and that there is no non-resident individual or individuals who holds more than 50% of the shares in Coca-Cola Sabco (Pty) Ltd, hence the Kenya-South Africa DTA is applicable to the Appellant as it satisfies the conditions set out by Section 41(5) and 41(6) of the ITA.

Respondent's Argument

The Respondent argued that Section 41(5) of the ITA provides for relief from double taxation between Kenya and South Africa with regard to taxation of Income tax due to the existence of the Kenya-South Africa DTA which was ratified in 2016. The Respondent emphasized on the superiority of the Income Tax Act as appertains any DTA in reference to Section 41(1) of the ITA and averred that the withheld taxes on payment made to Coca-Cola Sabco (Pty) Ltd were correctly done since they were payment made to a non-resident and Kenya South Africa DTA is therefore not applicable.

Tribunal Findings

The Tribunal found that the Respondent was justified in rejecting the Appellant's tax refund application. The Tribunal noted that the Appellant had not provided evidence of a claim by Coca-Cola Sabco (Pty) Ltd claiming the withheld funds, who in this case would be the rightful owner as it is the party that offered the services and was paid for the same. The Tribunal also found that the Appellant's argument based on Article 7 does not apply as if the party to benefit from the tax exception has 50% or more of its underlying ownership held by a non-resident, then Section 41(5) of ITA negates the relief that such a party would otherwise be enlisted under the provisions of the DTA including Article 7.

Tribunal's Decision

The Appeal was dismissed and the Respondent's Objection decision dated 13th January, 2022 was upheld. Each party was to bear its own costs.

Allowability of Bad Debts for Digital Money Lenders

TAT 1237/2022:
M-KOPA Limited vs Commissioner Of Domestic Taxes

Background

M-KOPA Limited, a company that retails solar powered home lighting solutions, mobile phones and other related products on a pay-as-you-go basis, was issued with a tax assessment by the Commissioner of Domestic Taxes. The assessment adjusted the corporation tax loss position for the financial year 2016 downwards to Kshs 1,789,514,499.45. The adjustment was due to the disallowance of bad debts amounting to Kshs 193,736,915.00. M-KOPA Limited objected to the assessment, arguing that it had taken all reasonable steps to recover the debts and that the cost of further pursuing the debts would exceed the amount likely to be recovered.

Issues for Determination

Whether the Respondent erred in disallowing the Appellant's bad debts of Kshs 193,736,915.00 for the year of income 2016.

Appellant's Argument

M-KOPA Limited argued that it had taken all reasonable steps to recover the debts, including monitoring credit advanced to customers, following up with customers, and offering incentives for customers to return their devices. It also argued that the cost of pursuing the debts using third party agents would exceed the cost of recovering the debts. The company further contended that it did not have the legal mandate to repossess its products under hire purchase or similar financing or leasing regimes, since it sells its products on credit sales basis.

Respondent's Argument

The Commissioner of Domestic Taxes argued that M-KOPA Limited did not demonstrate that all reasonable steps were taken to collect the debts. The Commissioner contended that the company did not take all the necessary steps in recovery of bad debts as the loaned devices were not repossessed, and additional costs in tracing the location of the customers to collect the debts or devices were not demonstrated. The Commissioner also argued that the company did not meet any of the conditions set out in Legal Notice No.37/2011 to warrant allowance of bad debts.

Tribunal Findings

The Tribunal found that M-KOPA Limited had reasonably demonstrated that all reasonable steps were taken to collect the debts during the subject year of income 2016, and confirmed the same uncollectable. It also found that the company had demonstrated and proved that the cost of further pursuing the said debts through other means including third party agents, would far outweigh and exceed the amount of doubtful debts likely to be collected through such an additional venture. The Tribunal was satisfied that the company satisfied the conditions set out under the Legal Notice No, 37 of 2011 and was justified in treating its unrecoverable debts as bad and doubtful and consequently writing them off.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the Respondent's Objection decision dated 8th September 2022, and ordered each party to bear its own costs.

Methods/formulas for transfer pricing

TAT 1174/2022:
Gold Crown Foods (Epz) Limited Vs Commissioner Of Domestic Taxes

Background

Gold Crown Foods (EPZ) Limited (the Appellant) is a limited liability company incorporated in Kenya whose principal activity is the blending and packaging of tea. The Commissioner of Domestic Taxes (the Respondent) conducted tax audits on the Appellant's operations, particularly on the transfer pricing issues, based on the commercial transactions between the Appellant and its non-resident related parties. The Respondent issued iTax assessment orders for the period 2015 to 2018 where the total assessed amount was Kshs. 297,763,595.97.00. The Appellant filed a notice of objection to the notice of assessment. The Respondent issued an objection decision to the objection application. Aggrieved by Respondent's objection decision, the Appellant filed its Notice of Appeal.

Issues for Determination

Whether the Respondent's notice of objection decision was issued out of time. - Whether the Respondent erroneously and unlawfully adjusted the Appellant's income. - Whether the Respondent had grounds to apply the Transaction Net Margin Method (TNMM) since the Respondent did not provide any evidence to support the fact as to how the deficiencies in the Cost-Plus Method were not rectified or rectifiable. - Whether the Respondent erroneously applied Transfer Pricing Rules to transactions with third parties. - Whether the Respondent erred in rejecting the Cost-Plus method and applying the Transactional Net Margin Method. - Whether the Respondent has erroneously disallowed the costs of leasing equipment for income tax purposes instead of applying a lower value based on a customs entry value as the arm's length price. - Whether the Respondent has erroneously applied withholding tax on lease payments made by the Appellant after the end of the ten-year EPZ tax exemption period. - Whether the Respondent has erroneously disallowed and adjusted the bill discounting costs of the Appellant. - Whether the Respondent erroneously assessed the Appellant for the financial year 2015 despite the Appellant having a tax exemption.

Appellant's Argument

The Appellant argued that the Respondent's notice of objection decision was issued out of time. The Appellant also contended that the Respondent erroneously and unlawfully adjusted the Appellant's income. The Appellant further argued that the Respondent had no grounds to apply the Transaction Net Margin Method (TNMM) since the Respondent did not provide any evidence to support the fact as to how the deficiencies in the Cost-Plus Method were not rectified or rectifiable. The Appellant also claimed that the Respondent erroneously applied Transfer Pricing Rules to transactions with third parties. The Appellant further contended that the Respondent erred in rejecting the Cost-Plus method and applying the Transactional Net Margin Method. The Appellant also argued that the Respondent has erroneously disallowed the costs of leasing equipment for income tax purposes instead of applying a lower value based on a customs entry value as the arm's length price. The Appellant further contended that the Respondent has erroneously applied withholding tax on lease payments made by the Appellant after the end of the ten-year EPZ tax exemption period. The Appellant also claimed that the Respondent has erroneously disallowed and adjusted the bill discounting costs of the Appellant. Finally, the Appellant argued that the Respondent erroneously assessed the Appellant for the financial year 2015 despite the Appellant having a tax exemption.

Respondent's Argument

The Respondent argued that the objection decision was issued within the sTATutory timelines. The Respondent also contended that it identified deficiencies in the cost base used under the transfer pricing method adopted by the Appellant which orchestrated a drastic reduction in the profits realized vis-□-vis what would be expected if the Appellant did not have such relationship. The Respondent further argued that it applied the TNMM on the Appellant's transactions as it found this as the most appropriate method. The Respondent also contended that the lease rental payments ought to be treated as a financial transaction between the related parties. These were not captured in the TNMM by the Respondent and were in fact computed separately. The Respondent further argued that withholding tax was chargeable on any payments made to a non-resident outside the ten-year period therefore correctly issuing withholding tax assessments in the years 2017 and 2018. Finally, the Respondent contended that the assessment for the year 2015 was adjusted for the period which the tax exemption was still in place.

Tribunal Findings

The Tribunal found that the Respondent's objection decision was rendered on time as per the then applicable law. The Tribunal also found that the Respondent had grounds for applying the TNMM and rejecting the Cost-Plus method applied by the Appellant. The Tribunal further found that the Respondent correctly adopted the import declaration value of the equipment in question as this was a self-declared value made by the importer. The Tribunal also found that the Respondent correctly assessed the Appellant in respect to the 2015 year of income and more particularly, in respect of the period in that year when the Appellant was exempt. The Tribunal also found that the Respondent correctly disallowed the adjusted bill discounting costs of the Appellant. However, the Tribunal found that the Respondent erroneously applied withholding tax on lease payments made by the Appellant after the ten-year EPZ tax exemption period.

Tribunal's Decision

The Appeal was partially allowed. The Respondent's Objection decision dated 29th August, 2022 was varied to the extent that the assessment in relation to withholding tax was set aside. Each party was to bear its own costs.

Application of the Withholding Tax Point

TAT E016/2023:
Agrochemicals and Food Company Limited vs Commissioner Of Domestic Taxes

Background

The appellant, Agrochemicals and Food Company Limited, is a manufacturing company in Kenya. The respondent, Commissioner of Domestic Taxes, conducted an audit covering the period January 2017 to December 2021 on the appellant's VAT, excise duty, PAYE and WHT obligations.

The respondent issued a notice of assessment demanding taxes amounting to Kshs. 1,268,054,221.00 and reducing Corporate tax losses by Kshs. 356,002,279.00. The appellant objected to the assessments, leading to a partial allowance of the objection and confirmation of additional assessments amounting to Kshs. 1,243,986,739.00.

Dissatisfied with the respondent's decision, the appellant filed an appeal.

Issues for Determination

Whether the respondent was justified in issuing a WHT assessment on interest. - Whether the respondent was justified in finding a positive variance in ENA production, issuing additional excise duty and VAT assessments, and reducing the appellant's corporate tax losses.

Appellant's Argument

The respondent argued that the loan agreements did not expressly grant an exemption from tax. They also stated that the High Court ruling cited by the appellant was specific to Fintel Limited and thus inapplicable in this matter.

The respondent further argued that the interest on the appellant's loan does not qualify as exempt from tax.

They also stated that the appellant did not provide evidence that the interest on its government-guaranteed loan is exempt from tax.

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 respondent erred in including the WHT of Kshs. 634,644,435.00 in the summary of taxes in its objection decision. The tribunal also found that the respondent erred in law by assessing WHT for the periods ending June 2016 and June 2017.

However, the tribunal found that the respondent was justified in issuing the WHT additional assessments for June 2018, June 2019 and June 2020.

The tribunal also found that the respondent was not justified in finding that the appellant had cumulatively under-declared ENA production quantities.

Tribunal's Decision

The appeal was partially allowed. The tribunal ordered that the WHT assessment of Kshs. 634,644,435.00 relating to the assessment referred to in the notice of assessment dated 27th November 2008 be set aside. The WHT assessment of principal taxes, plus interest and penalties for June 2016 and June 2017 were also set aside. The WHT assessment of principal tax plus interest and penalty for June 2020 was upheld. The additional Excise duty and VAT assessments, and the reduction of the deficit carried forward under the Income Tax Act (Corporate tax losses) of the appellant were set aside. Each party was to bear its own costs.

Transfer Pricing and the Application of the Arms-length Principle

TAT 1318/2022:
James Finlay Mombasa Limited vs Commissioner of Domestic Taxes

Background

The Respondent, Commissioner of Domestic Taxes, conducted an audit on the Appellant's, James Finlay Mombasa Limited, operations for the periods 2016 to 2020. The Respondent issued a preliminary assessment of Kshs. 1,279,544,751.00 inclusive of principal tax, penalty and interest relating to Corporation tax, Withholding tax and Value Added Tax. The Respondent issued a notice of assessment of Kshs. 4,534,226.00 in additional income tax on 29th June 2022 for the year ended 31st December 2016, which the Appellant objected to in its entirety via an objection letter dated 28th July 2022. The Respondent issued an objection decision on 23rd September 2022, confirming the income tax additional assessment of Kshs. 4,534,226.00 inclusive of principal tax, penalties and interest, which the Appellant appealed vide a Notice of Appeal to the Tax Appeals Tribunal on 21st October 2022.

Issues for Determination

Whether the documents attached to the Appellant's written submissions are admissible. - Whether the Respondent's objection decision dated 23rd September 2022 is proper in law.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by asserting that the Appellant subscribed to an unsuitable transfer pricing policy for its profit and cost-sharing formula in 2016, the year under assessment. The Appellant further argued that the Respondent erred in law and fact by attempting to infer and introduce a non-existent profit-sharing arrangement between the Appellant and its related party, James Finlay (ME) DMCC ("JFME"), for the period under assessment. The Appellant also contended that the Respondent erred in law and fact by seeking to enforce the demand despite the fact that the Appellant and JFME did not have any shared clients for the period under assessment and therefore no profit- sharing arrangement could be applied.

Respondent's Argument

The Respondent argued that the Appellant did not provide sufficient evidence to substantiate the profit and cost-sharing formula despite being requested. The Respondent further averred that the Appellant was established to be an active entity within the Kenyan space and therefore it was inferred that it should by default get the greater share of the profits. The Respondent also contended that the Appellant did not discharge its burden of proving that the additional assessments were erroneous since the Appellant did not fully adduce the required documentation.

Tribunal Findings

The Tribunal found that the additional evidence introduced by the Appellant with its submissions is not admissible. The Tribunal also found that the Appellant failed to discharge its burden of proving that the Respondent's assessment was wrong, by demonstrating that the transfer prices it charged to JFME in 2016 were at arm's length in accordance with Section 18(3) of the Income Tax Act and the Income Tax (Transfer Pricing) Rules, 2006 L.N. 67/2006, and as guided by the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Respondent's objection decision dated 23rd September 2022. Each party was ordered to bear its own costs.

Tax Exemption of Individuals in Relation to the Privileges Act

TAT 88/9:
Francis Edward Omondi Opiyo vs Commissioner of Domestic Taxes

Background

The Appellant, Francis Edward Omondi Opiyo, was issued with an income tax additional assessment for Kshs 15,116,587.60 on 15th March, 2022 for the years of income 2016 to 2019. The Appellant objected to the assessment, claiming that he was exempt from taxation due to his sTATus as an official of the United Nations under the World Food Programme. The Respondent, Commissioner of Domestic Taxes, issued an objection decision confirming the assessment.

Issues for Determination

Whether the Appellant qualifies for tax exemption - Whether the demanded tax is due and payable.

Appellant's Argument

The Appellant argued that he was exempt from taxation due to his sTATus as a United Nations official. He claimed that he was entitled to privileges and immunities, including exemption from taxation, under the Convention on Privileges and Immunities of the United Nations and the Basic Agreement between the Government of Kenya and World Food Programme. The Appellant also argued that the Respondent erred in its assessment and failed to consider all records and information provided by him.

Respondent's Argument

The Respondent maintained that the Appellant failed to provide sufficient evidence to prove his exemption from taxation. The Respondent argued that the Appellant was a resident person in Kenya and therefore not exempt from taxation under the Income Tax Act and the Privileges Act. The Respondent also asserted that it used the available information, including the Appellant's bank sTATements and employment contract, to assess the Appellant on the undeclared income.

Tribunal Findings

The Tribunal found that the Appellant did not qualify for tax exemption as he was unable to prove that he met the conditions set out in the Privileges Act and the Income Tax Act. The Tribunal also found that the tax demanded by the Respondent was due and payable as the Appellant benefited from funds he was not entitled to.

Tribunal's Decision

The Appeal was dismissed and the Respondent's objection decision dated 13th May, 2022 was upheld. Each party was ordered to bear its own costs.

Chargeability of PAYE to Contracts of Service

TAT 114/6:
Kenya Hospital Association vs Commissioner of Domestic Taxes

Background

The Kenya Hospital Association (Appellant) operates Nairobi Hospital, which provides a range of medical services. The Commissioner of Domestic Taxes (Respondent) conducted an audit on the tax returns of the Appellant and issued additional assessments for Withholding tax, VAT and PAYE for the periods 2015 to 2020 totaling to Kshs. 862,732,072.00. The Appellant objected to the additional assessment, but the Respondent partially allowed the objection, confirming Kshs. 748,649,162.00. Dissatisfied with the decision, the Appellant filed an appeal with the Tribunal.

Issues for Determination

Whether the additional PAYE, VAT and Withholding Tax liability for the years of income 2017 to 2020 relating to PAYE Locum and WHT on doctors payments was justified.

Appellant's Argument

The Appellant argued that the Respondent erred in its calculations of taxes, including oversTATing penalties and interest on the taxes allegedly owed. The Appellant also contended that the Respondent incorrectly classified certain engagements as contracts of service, subjecting them to PAYE, when they were in fact contracts for service. The Appellant further argued that the Respondent incorrectly subjected certain payments to VAT and Withholding Tax, including payments for software acquisition, purchase of equipment, and payments to various healthcare service providers. The Appellant requested that the Tribunal set aside the tax demand issued by the Respondent.

Respondent's Argument

The Respondent argued that it correctly assessed PAYE on remunerations to the Clerks of Works and locum doctors, which it found to be contracts of service. The Respondent also contended that it correctly assessed VAT and Withholding Tax on various payments made by the Appellant. The Respondent argued that it was not bound by the tax returns filed by the Appellant and could assess a taxpayer's tax liability using any information available. The Respondent requested that the Tribunal dismiss the Appeal and uphold the objection decision.

Tribunal Findings

The Tribunal found that the locum doctors were independent contractors and not employees, and therefore not subject to payment of PAYE. The Tribunal also found that the Respondent had incorrectly calculated taxes, including oversTATing penalties and interest on the taxes allegedly owed by the Appellant. The Tribunal also found that the Respondent incorrectly subjected certain payments to VAT and Withholding Tax.

Tribunal's Decision

The Tribunal set aside the assessment in relation to PAYE on locums and WHT tax on doctors payments covering the years 2017 to 2020. Each Party was ordered to bear its own costs.

Tax exemption on income of Japanese entities derived from Kenya

TAT 07/6:
Japan Port Consultants Limited vs The Commissioner of Domestic Tax

Background

The case arose when the Commissioner of Domestic Tax carried out a compliance audit on Japan Port Consultants Limited's tax affairs, resulting in an additional assessment. The assessment included income tax assessed for January to December 2019, Withholding income tax for January to December 2017, and PAYE for January to December 2017. The appellant filed its objection for PAYE and income tax, but the respondent confirmed the additional assessment. Dissatisfied with the decision, the appellant filed a Notice of Appeal.

Issues for Determination

Whether the exemptions issued by the Cabinet Secretary under Section 13(2) of the Income Tax Act apply only from the date of gazettement or as clearly specified by the CS in the gazette notice. - Whether the international treaty signed between the Government of the Republic of Kenya and the Republic of Japan was binding upon the parties. - Whether the income earned in Kenya by a non-resident company out of consulting activities carried out outside Kenya is subject to Kenyan taxation. - Whether PAYE was due and payable from payments made to the employees and consultants of JPC. - Whether transfer pricing methods are used to determine the arm's length price of a branch based on its activities in Kenya.

Appellant's Argument

The appellant argued that it was exempted from tax under clause 8 of the Treaty Exchange Notes and the Legal Notice No. 15 of 2021. It also argued that the income earned by its head office, which is based in Japan, was not subject to tax in Kenya. The appellant further argued that PAYE only applies to employment services discharged in Kenya or by individuals who exercise their employment activities for an aggregate duration longer than six months in Kenya.

Respondent's Argument

The respondent argued that the exemption was only applicable from the date of gazettement and could not be applied retrospectively. It also argued that the Legal Notice No. 15 of 2021 was declared unconstitutional and thus not applicable. The respondent further argued that the income earned by the appellant's head office was taxable in Kenya and that PAYE was due and payable from payments made to the employees and consultants of JPC.

Tribunal Findings

The tribunal found that the Legal Notice No. 15 of 2021 did not exempt the appellant from payment of tax. It also found that the respondent was justified in issuing additional income tax assessment and PAYE for the period 2017 to 2019. However, the tribunal found that the respondent erred in assessing WHT for the period January 2017 to 6th November 2019 when the law which allowed the Commissioner to demand taxes not withheld from the person who should have withheld the same had been deleted.

Tribunal's Decision

The appeal was partially allowed. The tribunal upheld the respondent's confirmed assessments regarding PAYE and income tax but vacated the WHT for the period from January 2017 to 6th November 2019. Each party was to bear its own costs.

Tax point for Capital Gains Tax

TAT E51/7:
Kumar Haria Asvin vs Commissioner of Domestic Taxes

Background

On 30th December 2022, three shareholders of Harleys Limited transferred their shares to Westlands Heights Limited and filed Capital Gains Tax (CGT) returns and made payment on the same day at a rate of 5%. However, the acquisition of the shares in Westlands Heights took place on 1st February 2023, when the CGT had changed to 15%. The Respondent issued the Appellant with an assessment order of Kshs. 247,217,628.00 for CGT. The Appellant objected to the assessment, but the Respondent confirmed the assessment. The Appellant, being dissatisfied with the Respondent's decision, filed an appeal at the Tribunal.

Issues for Determination

When is the tax point for Capital Gains Tax - Whether the Respondent was justified in confirming the Capital Gains Tax assessed on the Appellant.

Appellant's Argument

The Appellant argued that the transfer was not undertaken in the year 2023 but rather in the year 2022 when the rate of CGT applicable was 5% and not 15% as alleged in the impugned assessment. The Appellant also argued that the tax is payable at the point of a self-assessment and declaration by a tax payer, not upon registration of the transfer instrument in favour of the transferee.

Respondent's Argument

The Respondent argued that the transfer deed was franked by Collector of stamp duties on 4th January 2023, and the deed can be dated any day but will be considered effected when franking takes place. The Respondent also argued that the tax-point/ due date in relation to CGT is upon registration of the transfer instrument in favor of the transferee.

Tribunal Findings

The Tribunal found that the tax point for CGT is upon registration of the transfer instrument in favour of the transferee. The Tribunal also found that the transfer of ownership took place in 2023 when the effective rate for CGT was 15%, therefore the Respondent was justified in confirming the CGT assessment upon the Appellant.

Tribunal's Decision

The Appeal was dismissed and the Respondent's Objection decision issued on the 27th July 2023 was upheld. Each party was ordered to bear its own costs.

Chargeability of WHT on reimbursements for employee-related costs

TAT 1/5:
Bharti Airtel International (Netherlands) B.v. Kenya Branch vs The Commissioner Of Domestic Taxes

Background

The Appellant, Bharti Airtel International (Netherlands) B.V. Kenya Branch, objected to a tax assessment issued by the Respondent, The Commissioner of Domestic Taxes, following a VAT refund audit. The Respondent disallowed a refund claim of Kshs. 117,798,089.00 and demanded Withholding Tax (WHT) in the sum of Kshs. 12,358,329.10. The Appellant objected to the assessment, but the Respondent upheld its demand, leading to the appeal..

Issues for Determination

Whether the Appellant's appeal was validly lodged. - Whether the Respondent had any legal basis for assessing and demanding WHT for the period 1st June 2016 to 7th November 2019. - Whether the reimbursement of costs is subject to WHT.

Appellant's Argument

The Appellant argued that the Respondent had no legal basis to demand WHT for the period between 1st June 2016 to 7th November 2019 due to the deletion of Section 35 (6) of the Income Tax Act. The Appellant also contended that the Respondent erred in demanding WHT on reimbursement of costs, which are not listed as items qualifying for WHT under Sections 10 and 35 of the Income Tax Act. The Appellant further argued that the Respondent disregarded the terms of the contract between the Appellant and Sheer Logic Management Ltd and the invoicing arrangements thereunder.

Respondent's Argument

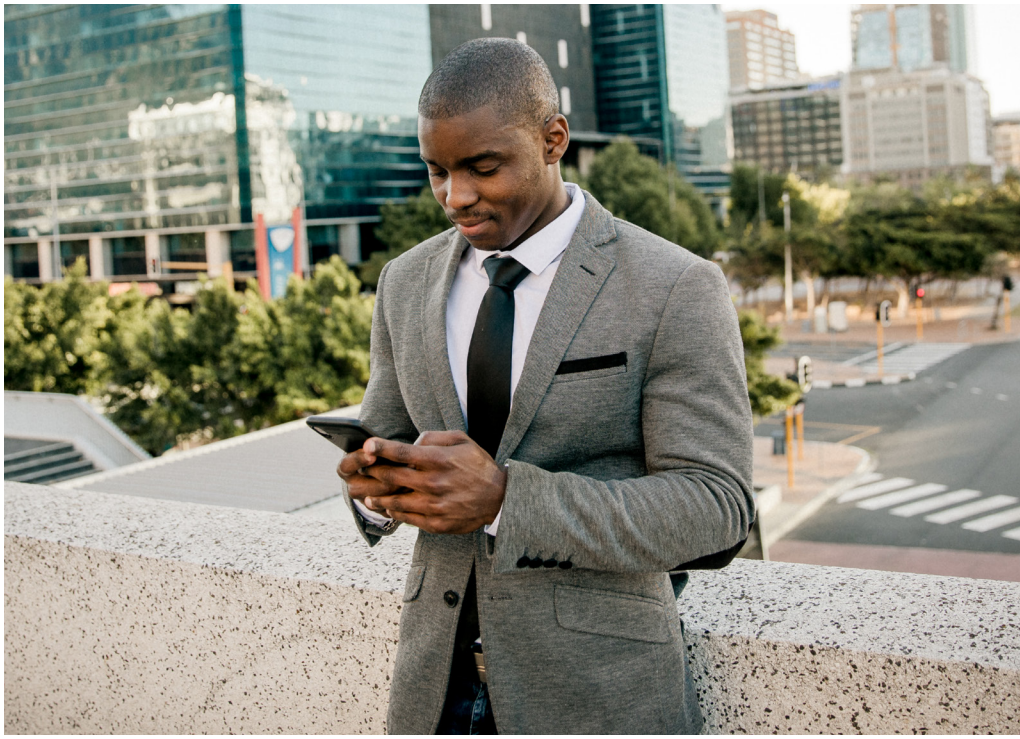
The Respondent argued that the Appellant's appeal was invalid as the Appellant had not paid the undisputed tax nor filed an application for extension of time to pay the same. The Respondent also contended that it had the legal basis under Section 35(3) (f) of the TPA to demand WHT from the Appellant. The Respondent further submitted that the relationship between the Appellant and its contractor was that of a consultancy and the entire amount payable to the contractor was professional/management fees and was subject to WHT.

Tribunal Findings

The Tribunal found that the Appellant's appeal was validly lodged and is competently before the Tribunal. The Tribunal also found that the Respondent did not have powers to collect the WHT for the period 2017 to 2019 from the Appellant, and that what the Respondent ought to have done was to assess and demand from the contractors directly. The Tribunal further found that the contractor's reimbursement for costs of its employees seconded to the Appellant should not have been subjected to WHT by the Respondent

Tribunal's Decision

The Tribunal allowed the appeal, set aside the Respondent's Objection decision dated 17th November 2022, and ordered each party to bear its own costs.



Deductions with respect to capital expenditure

TAT 134/5:
Mwea Medical Centre Limited vs Commissioner of Domestic Taxes

Background

The Respondent issued the Appellant with a pre-assessment notice demanding for taxes for the period of January 2018 to December 2019.

The Appellant filed a notice of objection, which was dismissed by the Respondent. The Appellant then lodged a Notice of Appeal, dissatisfied with the decision.

Issues for Determination

Whether the Respondent erred in disallowing claimed industrial building deductions.

Appellant's Argument

The Appellant argued that the Respondent erred by failing to consider and apply Second Schedule Part 1 of the ITA on capital deduction on the lessee.

The Appellant also argued that the Respondent's demand has amounted to a gross violation of Article 47 of the Constitution which guarantees it a right to fair administrative action that is reasonable and procedurally fine.

Respondent's Argument

The Respondent averred that the Appellant claimed industrial building deduction in the year ending 2019 which was not provided for in the then Second Schedule of the ITA. The Respondent also averred that the Appellant did not provide relevant facts therefore the allegations are strange to the Respondent.

Tribunal Findings

The Tribunal found that the Respondent erred in law and fact in finding that the Appellant's claimed industrial building deduction in the year ending 2019 was not provided for in the then Second Schedule of the ITA. The Tribunal found that the Respondent ought to have applied the provisions of Section 15(1) and 15(2)(b) of the ITA as read together with the Second Schedule thereto as that was before Tax Laws (Amendment) Act 2020.

Tribunal's Decision

The Appeal was allowed. The Respondent's objection decision dated 10th June, 2022 was set aside. Each party to bear its own costs.

TAT 22/1:
Petrocity Enterprises Limited Vs Commissioner For Domestic Taxes

Background

Petrocity Enterprises Limited (the Appellant) is a company dealing in fuel products and logistics. The Commissioner for Domestic Taxes (the Respondent) conducted a verification exercise on the Appellant's capital expenditure and disallowed the Appellant's claim for commercial building allowance at a rate of 25% on a straight line amounting to Kshs 405,577,842.00 for the years 2015 to 2019.

The Respondent later issued further communication sTATing that the rate applicable for commercial buildings in 2020 was 10% of the residential value and not 25% on a straight-line basis that applied in the previous period of 2015 to 2019. The Appellant objected to the Respondent's finding and filed an appeal..

Issues for Determination

Whether a tax claim can be filed or claimed from a repealed STATute.
- Whether the Respondent was justified to reject the Appellant's amended assessment.

Appellant's Argument

The Appellant argued that the Respondent misapprehended the changes made by the Tax Laws (Amendment) Act No. 2 of 2020 to the Second Schedule of the Income Tax Act. The Appellant claimed that the law provides for investment allowance to be computed at the rate of 10% of the qualifying capital expenditure as from the 25th April 2020 and not 10% of the residential value of a commercial building. The Appellant also argued that the changes made to the Second Schedule of the Income Tax by the Tax Laws (Amendment) Act No. 2 of 2020 cannot apply retrospectively to take away the rights acquired by the Appellants under the previous law.

Respondent's Argument

The Respondent defended the Appeal sTATing that the Appellant did not file a claim for the Commercial Building Allowance (CBA) in the years 2015 to 2019 upon completion and use of the petrol sTATions. The Respondent sTATed that the claim for CBA under the repealed law was to be claimed in the year 2020. The Respondent was of the view that any claim CBA made after the Tax Laws (Amendment) Act, 2020 was enacted would be considered under the new law which was now applicable.

Tribunal Findings

The Tribunal found that the rights obtained by the Appellant to claim for CBA at the rate of 25% on a straight line under Paragraph 6A of the Second Schedule of the Income Tax Act (repealed) are still in existence. The Tribunal also found that the Respondent erred in its decision to apply a capital allowance rate of 10% on PEL capital expenditure for the period 2017 to 2019 when the law entitled it to a capital allowance of 25% on a straight-line method under Paragraph 6A of the Second Schedule of the Income Tax Act (repealed). The Tribunal also found that the Appellant lodged its applications for amendment of its 2015 to 2019 assessments within the prescribed sTATutory limit period and that the law applicable to these assessments was Paragraph 6A of the repealed Second Schedule of the ITA.

Tribunal's Decision

The Tribunal allowed the Appeal and ordered that the Appellant is entitled to Commercial Business Allowance at the rate of 25% of capital expenditure incurred in the years 2015 to 2019. The Respondent was directed to consider the Appellant's application for amendment of its returns for the years 2015 to 2019 in line with the order. The Respondent was to comply with the directive within 45 days from the date of the judgment. Each Party was to bear its own costs.

Trading Activities

TAT 97/4:
Itochu Corporation, Kenya Branch vs. Commissioner Of Investigation And Enforcement

Background

The case arose when the Respondent conducted an audit on the operations of the Appellant for the period 2016-2019 and issued an assessment of Kshs 2,388,258,918.00 on Corporate income and Pay As You Earn(PAYE) taxes on 30th September 2021. The Appellant lodged its objection to the said assessments on 29th October 2021. The objection was partially allowed but the assessments on transfer pricing adjustments were confirmed on 14th April 2022 for tax liability of Kshs 2,559,875,622.00 inclusive of penalties and interests. The Appellant was dissatisfied with this decision and it lodged its Appeal to the Tribunal on 13th May 2021.

Issues for Determination

Whether the income of Itochu Japan earned from the exporTATion of goods from Japan is accrued or derived from Kenya. - Whether the activities of the Appellant are trading activities. - Whether the profit split method was the correct Transfer Pricing (TP) method for the services provided by the Appellant and Itochu Japan. - If determined that the Respondent applied the wrong Transfer Pricing (TP) method, whether they indeed lacked sufficient documenTATion to assess the correct volumes at the time of rendering the Objection Decision, and whether the Respondent was provided with requisite documenTATion to arrive at a correct assessment.

Appellant's Argument

The Appellant argued that it is a liaison office of Itochu Japan and undertakes liaison activities such as market research, contact and communication with local clients and partners for Itochu Japan and acts as a communication and transmission channel for business

inquiries. It contended that the Respondent erred in law and fact by allocating profits of Itochu Japan to the Appellant and by finding that the activities of the Appellant's General Manager, Head of Business Segments and other staff's work permit applications indicate that the Appellant was involved in trading activities. The Appellant also argued that the Respondent erred in law and fact by finding that the Appellant's staff are appraised based on numeric targets set by Itochu Japan and not the qualiTATive aspects of their liaison activities.

Respondent's Argument

The Respondent argued that the Appellant was performing more functions than just a liaison office. It contended that the Appellant was actively engaged in business development such as the incubation of next-generation businesses for motor vehicles, appointment of new dealers, vehicle specification and price discussion with dealers. The Respondent also argued that the Appellant was always on copy on email with respect to all orders made by Isuzu EA and CMC Motors to Itochu-Japan. The Respondent further contended that the Appellant was also actively involved in seeking orders from suppliers in East Africa and was the link between Itochu-Japan and food suppliers in all correspondences.

Tribunal Findings

The Tribunal found that the Appellant performed and offered services like procurement, scouting for new businesses with set minimum targets and sales and marketing which went beyond basic liaison services. The Tribunal also found that the skills and qualifications that was required of its top managers also depicted a picture of an entity that was steeped in employing persons whose qualification who were more trade oriented as opposed to being concentrated on the listed liaison activities of market research, communication and inquiry. The Tribunal further found that the functions performed by the Appellant especially in its sales operations and the target appraisal contracts of its senior employees integrated it with Itochu Japan and also made it assume the risks of the main office..

Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Respondent's Objection decision dated 14th April 2022. Each party was ordered to bear its own costs.

Issuing a CIT assessment when an income variance relates to VAT

TAT E01/8:
Booking.com Limited vs Commissioner of Domestic Taxes

Background

The Respondent issued additional assessments of Corporate income tax on 20th September 2022 for the period of the year 2016 amounting to Kshs. 6,160,648.00 via iTax. The Appellant lodged a notice objection to the additional assessment. Following a series of engagements and correspondences, the Respondent issued an objection decision confirming the income tax assessment, penalties, and interest that added up to Kshs. 10,657,922.00. The Appellant filed a Notice of Appeal on 6th January 2023.

Issues for Determination

Whether the Respondent was justified in assessing the Appellant for CIT.

Appellant's Argument

The Appellant argued that the Kshs. 20,535,497.00 was a cost-plus revenue adjustment that was included in the accounts and income tax return for 2016 to account for the conversion of the accounts from US GAAP to IFRS. That this amount was not included in the 2016 VAT returns, hence the lower turnover reported for VAT purposes in January 2016 to December 2016. The Appellant submitted that it corrected this under-declaration of turnover in its VAT declarations in the year 2020 where it raised an intercompany invoice to reconcile turnovers in the VAT returns and income tax returns. The Appellant further submitted that the Respondent has no basis in law to assess the Appellant for additional income tax when in fact the variance of Kshs. 20,535,497.00 only related to under-declared turnover in the VAT returns of 2016.

Respondent's Argument

The Respondent argued that whereas it was justified and

reasonable to request for further information (being copies of the invoices) based on the agreed position by parties in a meeting dated 8th December 2022, the Appellant had not demonstrated that it provided the information requested. That instead, rather than adducing the copies of the invoices agreed upon by parties to be the only way of explaining away the variances, the Appellant had produced certain documents which were not invoices requested and agreed upon by parties.

Tribunal Findings

The Tribunal reviewed the pleadings and evidence adduced by both parties and observes that the income on which the Respondent issued the disputed income tax assessment was a turnover variance of Kshs. 20,535,497.00 already accounted for in the Appellant's 2016 income tax return, but not declared by the Appellant in the VAT returns for January 2016 to December 2016. The Tribunal observes that legally, under-declared turnover in a VAT return would not give rise to an additional income tax assessment when the income has already been declared and accounted for in an income tax return covering the same period. It is the Tribunal's considered view that the Respondent's income tax assessment lacks reason and sound basis. Further, the Tribunal notes that the Appellant sufficiently discharged its burden to prove that the Respondent's income tax assessment was wrong.

Tribunal's Decision

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

Chargeability of PAYE on gratuity

TAT E05/1:
County Government of Kakamega vs Commissioner of Legal Services and Board Coordination

Background

The Respondent, Commissioner of Legal Services and Board Coordination, informed the Appellant, County Government of Kakamega, of a reconciliation of disbursements against expenditure for the financial year 2020/2021, resulting in a total tax liability of Ksh 95,017,305.69.

The Appellant objected to the tax demand, leading to an objection decision by the Respondent. Aggrieved by the decision, the Appellant filed an appeal.

Issues for Determination

Whether the Respondent erred in its decision to confirm the assessments on PAYE on gratuity. - Whether the Respondent erred in its decision to confirm the assessments for WHVAT and WH Rental Income.

Appellant's Argument

The Appellant argued that the Respondent failed to consider all the payments made by the Appellant in respect to Withholding taxes for the financial year under review in its assessment of the Appellant's purported tax liability.

The Appellant also contended that the Respondent erred by factoring gratuity and remittances to pension schemes and funds in its tax demand.

The Appellant further argued that the Respondent erred by assessing and determining that taxes were payable for car benefit without laying a legal and factual basis for such assessment.

Respondent's Argument

The Respondent argued that it acted in accordance with Section 31(1) of the Tax Procedures Act (TPA). The Respondent sTATed that the Appellant had alleged that the County activities were tax exempt and requested for the provision of documents that showed the vatable county activities including leased/rentals of assets, Bukura ATC, hire fees and advertisements. The Respondent also sTATed that the Appellant failed to provide a breakdown of what these Vatable services constituted.

Tribunal Findings

The Tribunal found that the Respondent did not err in its decision to confirm assessment of PAYE on gratuity. The Tribunal also found that the Respondent did not err in its decision to confirm the assessments for WHVAT and WH rental income.

The Tribunal held that the Appellant had the responsibility of deducting and forwarding tax due from the excess segment to the Respondent.

Tribunal's Decision

The Appeal was partially allowed in terms of the Consent filed on 2nd November 2023. The Respondent's confirmed assessments for WHVAT and WH rental income were upheld.

The Respondent's confirmed assessment for PAYE on gratuity was also upheld. Each party was to bear its own costs.

EAC Customs Management Act

Lack of an Appealable decision

TAT 1417/2022:

Rohivra Limited & Kiranbhai Hirimanbhai Patel vs Commissioner Customs and Border Control

Background

Rohivra Limited, a private limited liability company incorporated in Kenya, is engaged in the importation of tobacco. The Commissioner Customs and Border Control conducted a post clearance desk audit pursuant to the provisions of Sections 235 and 236 of EACCMA, 2004.

A review of the taxpayers declarations was conducted and upon application of the recommended tariff of 2403.19.00 extra taxes comprising of Import duty, Excise duty, VAT, IHDF, RDL, Interest and penalties were assessed.

On 17th January 2020, the Commissioner issued a demand for additional duties, tax and interest of Kshs. 180,649,148.00. Rohivra Limited objected to the demand on 14th February, 2020.

On 10th March, 2020 the Commissioner requested for additional information without which the demand for additional duties, taxes and interest would stand.

Dissatisfied with the Commissioner's decisions, Rohivra Limited lodged its Notice of Appeal on 24th November 2022.

Issues for Determination

Whether there is a proper Appeal before the Tribunal.

Appellant's Argument

Rohivra Limited argued that the Commissioner's decision to reclassify their imported tobacco under a different tariff code was illegal and void.

They claimed that the Commissioner failed to rely on the tariff classification ruling that was issued by the KRA laboratory after testing a sample from their consignment. They also argued that the Commissioner acted in breach of various sections of the Tax Procedures Act and the Constitution of Kenya by failing to provide a written explanation for the reclassification, acting in a non-transparent manner, and issuing an agency notice without a court order.

They further contended that the Commissioner's decision violated their legitimate expecTATion to the proper administration of the tax law.

Respondent's Argument

The Commissioner argued that the tariff ruling referred to by Rohivra Limited was only in reference to a sample from one customs entry and that tariff rulings are based on the sample tested and material facts presented during laboratory analysis. They maintained that Rohivra Limited failed to respond to their request for supporting documents for review, making the additional taxes due and payable.

They also contended that the appeal was premature as the decision contemplated in EACCMA 229 had not been made by the Commissioner so as to warrant Rohivra Limited to appeal to the Tribunal in accordance with Section 230 of EACCMA.

Tribunal Findings

The Tribunal found that the appeal was invalid due to lack of an appealable decision. They held that the appeal was premature as the decision contemplated in EACCMA 229 had not been made by the Commissioner so as to warrant Rohivra Limited to appeal to the Tribunal in accordance with Section 230 of EACCMA.

The Tribunal held that the Appellant had the responsibility of deducting and forwarding tax due from the excess segment to the Respondent.

Tribunal's Decision

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

Tariff Classification

TAT 1551/2022:

Modern Ways Limited vs Commisioner of Customs and Border Control

Background

Modern Ways Limited, a company involved in the manufacture and distribution of mineral supplements for livestock, appealed against the Commissioner of Customs and Border Control's decision to reclassify their product, Vitalblock, under a different Harmonized System (HS) Code.

The reclassification resulted in a higher import duty and VAT, leading to a demand for additional taxes amounting to Kshs 21,750,376.00. The appellant objected to this reclassification, arguing that the product was correctly classified under its original HS Code.

Issues for Determination

Whether the Respondent erred in law and in fact in classifying the Vitalblock, licking blocks for animals imported by the Appellant as Salt under HS Code 2501.00.90 of the Harmonised Commodity Description and Coding System (Common External Tariff). - Whether the Respondent erred in law and in fact in disregarding Note 1 to Chapter 25 of the Harmonised Commodity Description and Coding System (Common External Tariff) 2022 which specifically exclude products obtained by mixing from classification under Chapter 25. - Whether the Respondent erred in law an in fact in assessing and demanding for additional taxes on import duty applied to HS Code 2501.00.90..

Appellant's Argument

The appellant argued that the product, Vitalblock, was correctly classified under HS Code 2309.90.90, as it is a product used in animal feeding, obtained by processing salt and premixes to an extent that the salt loses the essential characteristics of the original composition.

They contended that Vitalblock cannot be classified under HS Code 2501.00.90, as Note 1 to Chapter 25 of the EAC CET specifically excludes products obtained by mixing.

The appellant also argued that the respondent's demand for additional taxes was improper and not lawfully due.

Respondent's Argument

The respondent contended that Vitalblocks are for use as salt licks for animals, and should be classified in EACCET,2022 HS Code 2501.00.90 as salt.

They argued that Heading 25.01 covers classification of salt including table salt and denatured salt and pure sodium chloride, whether in aqueous solution or containing additional anticaking or free agents; sea water.

The respondent also argued that the appellant's products are generally compressed blocks containing predominantly sodium chloride (salt) and compounds of other minerals, and therefore HS Code 2309.90.90 was an incorrect classification of the appellant's product

Tribunal Findings

The Tribunal found that the product, Vitalblock, leans more towards classification as provided under Note 1 of Chapter 23 which states that the Chapter includes products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material.

The Tribunal also found that the list in Chapter 23 is not exhaustive and this means it may include other products that are obtained from materials other than vegetables and animal materials. As such, the Tribunal found that Tariff Code 2309.90.90 would be the appropriate HS Code.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the respondent's review decision, and each party was ordered to bear its own costs.

TAT 1127/2022:
Kaish Mering Plastic Company Limited Vs. Commissioner Customs And Border Control

Background

The Appellant, Kaish Mering Plastic Company Limited, is a company that imports and distributes plastic films from China to manufacturers in Kenya. The Respondent, Commissioner Customs and Border Control, conducted a post clearance audit review on the Appellant's custom entries for the period 2016 to April 2021.

The audit was on duty paid on PVC heat shrink films imported by the Appellant. The Respondent issued the Appellant with a demand dated 16th June 2021 for the amount of Kshs. 7,132,942.00. The Appellant objected to the demand notice on 19th August 2021. The Respondent tested samples of an identical product from a random shipment of the Appellant.

The Respondent issued the Appellant with a review decision on 21st September 2021 upholding the demand. The Appellant responded to the Respondent's review decision vide a letter dated 7th November 2021..

Issues for Determination

Whether the Respondent's decision to re-classify the Appellant's imported PVC heat shrink under HS Code 3920.49.00 attracting import duty of 25% was justified.

Appellant's Argument

The Appellant argued that the Respondent erred in fact and in law in finding that the Appellant had declared a wrong tariff and underpaid import taxes despite all the verification reports being done and submitted.

In addition, the Appellant claimed that the Respondent erred in facts and in law by relying on an imaginary report in arriving at his decision to impose an additional 15% duty on the products imported by the

Appellant. The laboratory report, if at all exists, had never been served upon the Appellant.

The Appellant also contended that the Respondent acted unreasonably, capriciously and motivated by malice and extraneous considerations in issuing the tax demands

Respondent's Argument

The Respondent argued that it was within its mandate to perform the post clearance audit and classify the PVC heat shrink consignment wrongly classified under tariff code 3919.90.10 to tariff 3920.49.00 under the East Africa Community Common External Tariff.

The Respondent asserted that the classification of goods in the nomenclature is guided by the General InterpreTATion Rules (GIR) as cited in the EACCET, which are read together with the Explanatory Notes to the Harmonized System

The Respondent averred that the Appellant misdeclared the PVC heat shrink film consignment resulting in short levy of taxes and interest thereof hence why the demand was upheld

Tribunal Findings

The Tribunal found that the Respondent had a right to carry out the PCA as it was acting within its statutory mandate under Sections 235 and 236 of the EACCMA,2004. However, the Tribunal also found that the Respondent's decision to re-classify the Appellant's imported PVC heat shrink film under HS Code 3920.49.00 attracting import duty of 25% was not justified.

The Tribunal noted that the Respondent did not provide its detailed laboratory analysis report as ordered by the Tribunal, it lost the opportunity to rebut the evidence adduced by the Appellant to the effect that the plasticiser content in the said product is more than 6% as per the SGS laboratory analysis report.

Tribunal's Decision

The Tribunal allowed the appeal and set aside the Respondent's review decision dated the 21st September, 2021. Each party was ordered to bear its own costs

TAT E21/9:
Automatic (K) Ltd vs Commissioner Of Customs And Border Control

Background

The Appellant, Automatic (K) Ltd, imported copper busbars under the declared tariff classification under H.S Code 7407.10.00 (of refined copper & copper alloys).

The Respondent, Commissioner of Customs and Border Control, reclassified the copper busbars under Heading 85.36, subheading 8536.90.00 which covers the classification of electrical apparatus for switching or protecting electrical circuits.

The Appellant appealed against this reclassification decision.

Issues for Determination

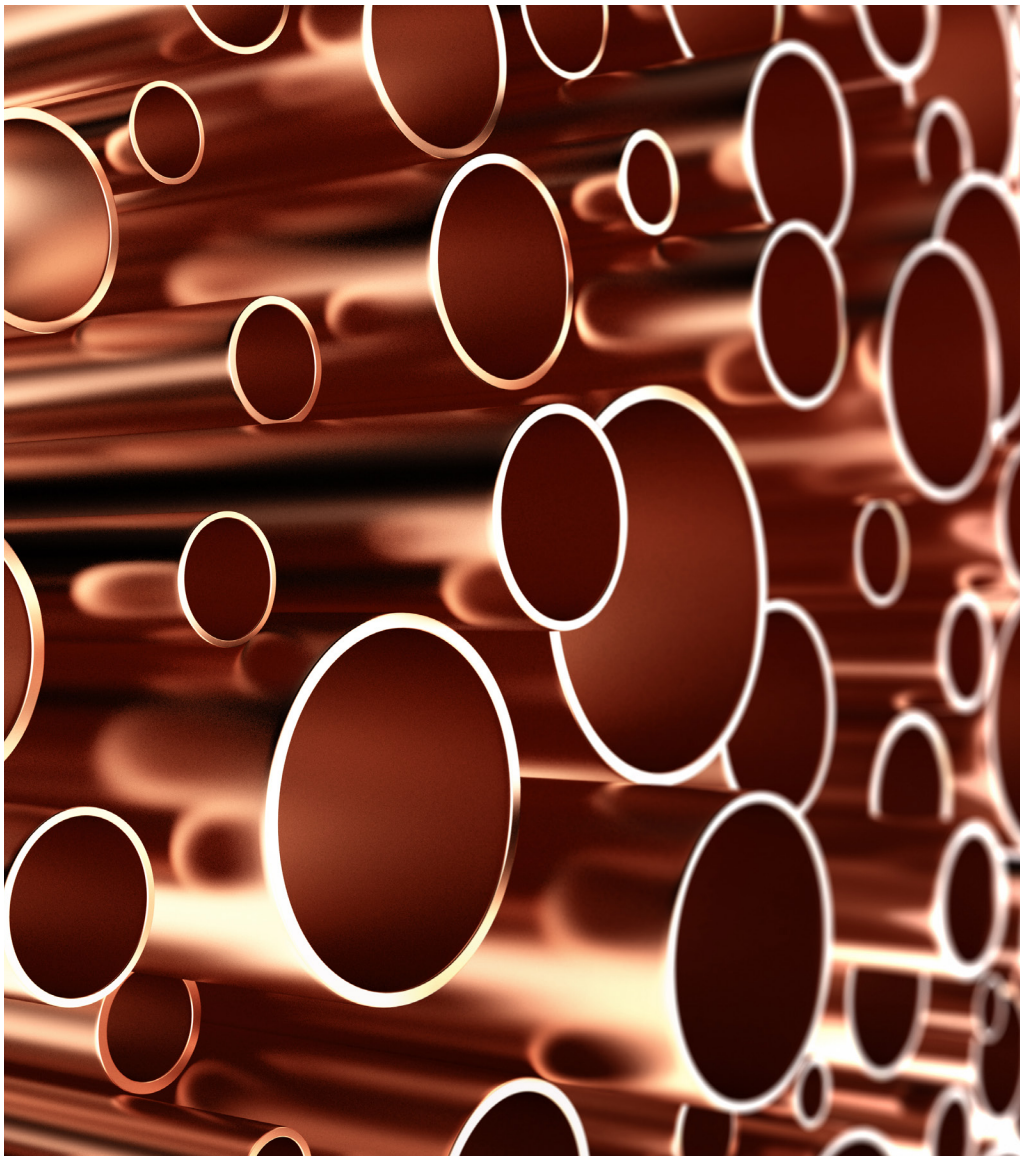
Whether the Respondent's decision to reclassify the Appellant's imported cooper busbars under HS Code 8536.90.00, instead of HS Code 7407.10.00 was proper in law.

Appellant's Argument

The Appellant argued that the copper busbars should be classified under H.S Code 7407.10.00 as they were imported in that sTATe and needed to be further modified and combined with other materials to be used as an electrical apparatus. The Appellant contended that the Respondent's reclassification was influenced by the ultimate use of the copper busbar and not its imported sTATe, which was in violation of the General Rules of InterpreTATion (GIR).

Respondent's Argument

The Respondent maintained that the copper busbars were correctly classified under HS Code 8536.90.00, arguing that the busbars are electrical apparatus for connecting electricity. The Respondent contended that the classification was based on the ultimate use of the product and was in accordance with the Harmonized Commodity Description and Coding



system explanatory notes and the additional notes.

Tribunal Findings

The Tribunal found that the Appellant's product is a raw material, to be used by modifying and combining with other materials to make or constitute the ultimate electrical panels to be used in electrical apparatus.

Since the product cannot be used in its original imported form, the Tribunal found that the same properly fits under Chapter 74 of copper and articles thereof, and Heading 7407 covering copper bars, rods and profiles, as opposed to Heading 85.36 covering electrical apparatus.

Therefore, the Tribunal found that the Respondent erred in reclassifying the Appellant's imported copper busbars under HS code 8536.90.00 instead of the declared HS code 7407.10.00.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the Respondent's review decision dated 4th April 2023, and ordered each party to bear its own costs.

TAT E29/3:
Nairobi Enterprises Limited vs Commissioner of Customs & Border Control

Background

Nairobi Enterprises Limited (the Appellant) imported a consignment of Surgical Operating Theatre LED Lights and declared them under HS Code 9018.90.00, attracting 0% import duty and VAT.

The Commissioner of Customs & Border Control (the Respondent) disputed this classification and reclassified the items under HS Code 8539.52.00, attracting 25% import duty and 16% VAT.

The Appellant disputed this reclassification, leading to the appeal.

Issues for Determination

Whether the Respondent erred in reclassifying the Appellant's imports under tariff heading 8539.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by classifying the theatre lights as ordinary lights under HS Code 8539.52.00 rather than HS Code 9018.90.00, which is the HS Code for medical devices including theatre lights.

The Appellant contended that the lights are medical devices designed to illuminate the patient's body during surgical operations, diagnostic or treatment in the theatre room, and thus should be classified under HS Code 9018.90.00.

Respondent's Argument

The Respondent maintained that the LED lights imported by the Appellant, although designed for use in medical theatres, are considered to be light-emitting diode (LED) lights, and thus should be classified under HS Code 8539.52.00.

The Respondent argued that this classification was based on the material information presented and was not contrary to the law.

Tribunal Findings

The Tribunal found that the LED surgical lights imported by the Appellant are specialized and have specific characteristics that aid in surgical procedures.

By the application of General Interpretative Rule 1, their classification should fall under Heading 9018, which specifically provides for instruments and appliances used in medical, surgical, dental or veterinary sciences.

The Tribunal concluded that the Respondent erred in re-classifying the Appellant's imports under Heading 8539.

Tribunal's Decision

The Tribunal upheld the Appeal, set aside the Respondent's tariff ruling dated 28th April, 2023, and ordered each Party to bear its own costs.

Filing a Premature Appeal

TAT e372/2023:
Ronald Odhiambo Juma vs Commissioner of Customs & Border Control

Background

The Appellant, Ronald Odhiambo Juma, received donated goods from the United Kingdom. The Respondent, Commissioner of Customs & Border Control, targeted the Appellant's consignment for low values.

The Respondent requested documentary proof to support declared values, which the Appellant could not provide as the goods were not for sale and no funds transfer was involved. The Respondent conducted a verification and found discrepancies in the declared values.

The Respondent then uplifted the value of the goods, leading to an increase in the customs duty payable. The Appellant was dissatisfied with the uplifted values and paid the additional taxes under protest.

The Appellant lodged an appeal against the demurrage charges and the value uplift.

Issues for Determination

Whether the Tax Appeals Tribunal has jurisdiction to determine the matter.

Appellant's Argument

The Appellant argued that the Respondent erred in law by uplifting duty through comparing with goods from different countries instead of the United Kingdom where the goods came from. The Appellant also argued that the Respondent erred in law and in fact by refusing to allow for destination verification, causing the Appellant to incur extra storage charges. The Appellant further argued that the Respondent erred in law and in fact by giving an uplift value but failing to provide the basis for the same contrary to Section 122(1) of EACCMA 2004.

Respondent's Argument

The Respondent argued that the Appeal was prematurely filed and hence bad in law for failure to comply with the provisions of Sections 229 and 230 of the East African Community Customs Management Act.

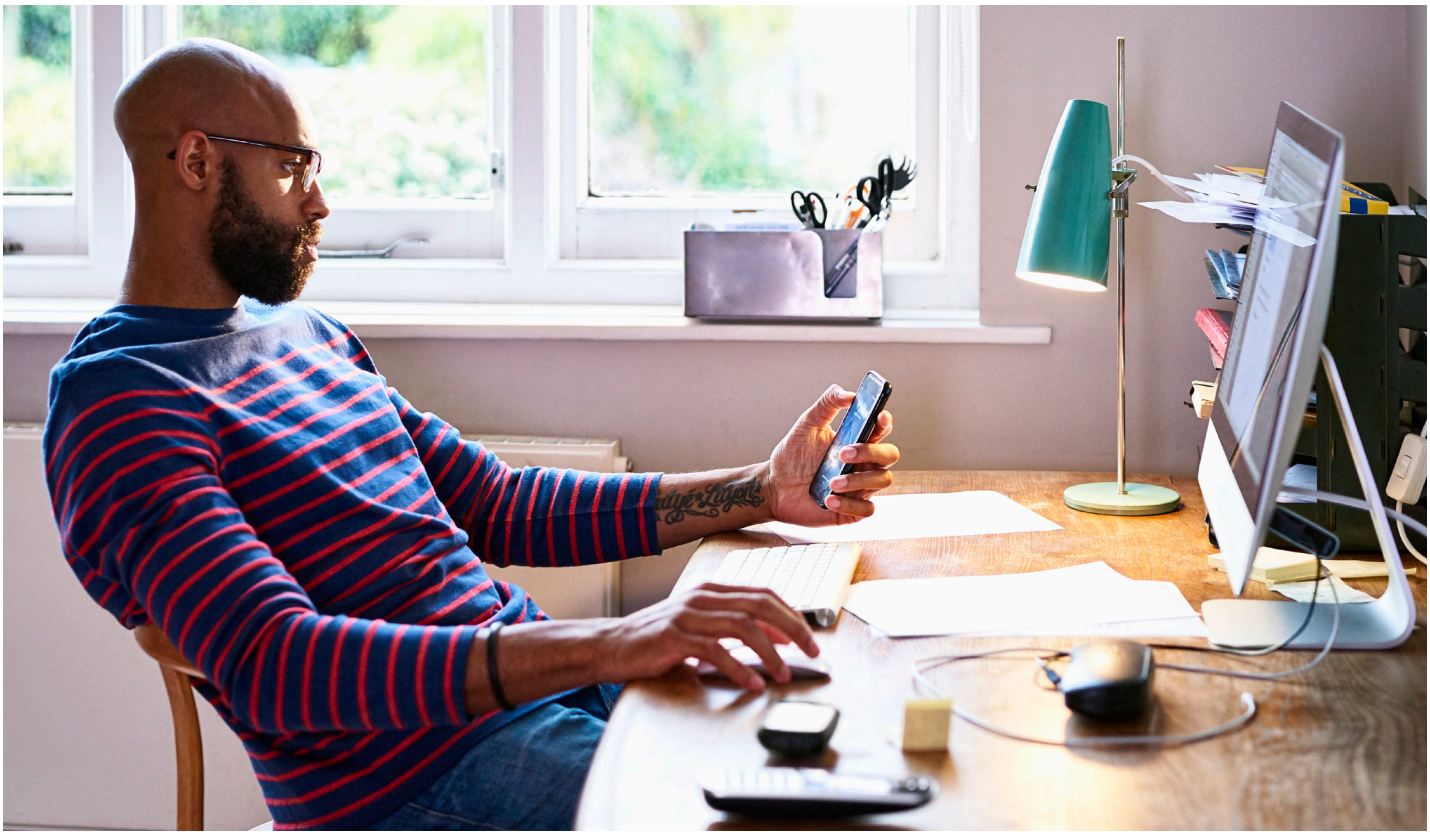
The Respondent also argued that it followed the law as provided for under Section 122 as read together with the Fourth Schedule of EACCMA, 2004 in uplifting the customs duty payable and as such therefore its decision should be upheld.

Tribunal Findings

The Tribunal found that the Appeal was filed prematurely and there is therefore no valid Appeal before the Tribunal, and the Tribunal lacks the jurisdiction to determine the matter. The Tribunal held that where specific procedures for redress have been set out the same have to be adhered to.

Tribunal's Decision

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



TAT E60/8:
Exome Life Sciences Kenya Limited Vs Commissioner Of Customs And Border Control

Background

Exome Life Sciences Kenya Limited (the Appellant) imported various products for application in agriculture, declaring them as fertilizers under HS Code 3101.00.00 of the EAC/CET, which are not chargeable for VAT.

The Commissioner of Customs and Border Control (the Respondent) disagreed with the classification and reclassified the products as 'miscellaneous chemical products' under Chapter 38 of the EAC/CET under HS Code 3824.99.90, charging VAT of Kshs. 5,177,517.00.

The Appellant disagreed with the reclassification and filed an appeal with the Tribunal.

Issues for Determination

Whether the Appellant's Appeal is properly before the Tribunal. - Whether the Respondent correctly classified the Appellant's products under HS Code 3824.99.90 instead of HS Code 3101.00.00.

Appellant's Argument

The Appellant argued that their products are fertilizers and should be classified under Chapter 31 of the EAC/CET under HS Code 3101.00.00.

They claimed that the Respondent's classification of the products as 'Miscellaneous Chemical Products' under Chapter 38 of the EAC/CET under HS Code 3824.99.90 is incorrect and wrongful.

The Appellant also argued that VAT is not chargeable on the products and that the products have been duly certified for use in Kenya as a fertilizer by the Kenya Plant Health Inspectorate Services (KEPHIS) of the Ministry of Agriculture.

Respondent's Argument

The Respondent argued that the Appellant's products are bio-stimulants and not fertilizers, and thus correctly classified under HS Code 3824.99.90.

They also argued that the Appellant did not follow the correct procedure for challenging the reclassification, as they did not seek a review of the tariff rulings by the Commissioner within 30 days of issuance, as required by Section 229 of EACCMA.

Tribunal Findings

The Tribunal found that the Appellant did not exhaust the internal remedies provided for under Section 229 of EACCMA, thus lodged its Appeal to the Tribunal prematurely.

Therefore, the Tribunal found that the Appellant's Appeal was defective and not properly before the Tribunal.

Tribunal's Decision

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

Use of mirror analysis for duty uplift

TAT 96/9:
Calbati Limited Vs Commissioner Of Investigations & Enforcement

Background

Calbati Limited, a Kenyan company involved in the importation of timber, was issued a tax assessment by the Commissioner of Investigations & Enforcement following a post-clearance audit. The assessment amounted to Kshs. 169,229,720.00, comprising of customs duties and corporation taxes for the years 2017 to 2020. The Commissioner alleged that Calbati had under-declared its timber imports, leading to the tax demand. Calbati objected to the assessment, leading to the appeal.

Issues for Determination

Whether the Commissioner erred in raising a duty uplift on the consignments imported by Calbati for the period 2017 to 2020. - Whether the Commissioner erred in using values from two independent systems, which use measurement methods which are fundamentally different to arrive at an unjustified duty uplift. - Whether the Commissioner's decision to issue a duty uplift five years after the fact and after a joint verification of the consignments is unreasonable and contrary to fair administrative action.

Appellant's Argument

Calbati argued that the Commissioner erred in raising a duty uplift based on a mirror analysis of the Uganda Revenue Authority Asycuda System. They claimed that the two systems used different measurement methods, leading to discrepancies in the declared values.

Calbati also argued that the Commissioner only flagged transactions where the declarations made in Uganda were higher than Kenya, disregarding the majority where the transactions declared in Kenya were higher. They further contended that the Commissioner's decision to issue a duty uplift five years after the fact was unreasonable and contrary to fair administrative action..

Respondent's Argument

The Commissioner defended the use of mirror analysis, sTATing that it was a complementary risk management tool for the detection of value under/over declaration, smuggling, fictitious exports, fraud, and for revision of existing valuation databases. They argued that the mirror analysis revealed a gross under-declaration and smuggling of timber at the Busia and Malaba boarders due to under-declaration of quantity. The Commissioner also stated that corporation tax was assessed based on the established undeclared timber purchases, which were subjected to a 25% markup.

Tribunal Findings

The Tribunal found that the Commissioner properly applied the mirror analysis and therefore its uplift of Calbati's consignment was justified and well within the law. The Tribunal also noted that Calbati failed to provide sufficient documenTATion to prove that the mark-up and additional assessments were arbitrary. Therefore, the Tribunal held that Calbati did not discharge its burden of proof as required under Section 56 (1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act.

Tribunal's Decision

The Tribunal dismissed the appeal, upheld the Commissioner's Objection decision dated 28th July 2022, and ordered each party to bear its own costs.

Excise Duty Act

Relief for raw materials

TAT 1026/2022:
London Distillers (K) Limited Vs Commissioner Of Legal Services And Board Coordination

Background

The dispute arose from the respondent disallowing the appellant's input deduction of Excise duty paid on bottles used in the manufacture of its alcoholic beverages. The respondent demanded Prepaid Excise duty claimed on purchases amounting to KShs 15,712,051.00 after conducting a desktop review.

The appellant objected to the tax demand and assessment, arguing that the bottles are essential inputs for the manufacturing process and formation of its final product, and that the respondent's definition of raw materials to exclude bottles used in the manufacture of the appellant's products is narrow, unreasonable and contrary to the internationally accepted standards.

Issues for Determination

Whether the Appellant was justified in claiming Excise Duty relief on imported bottles? - Whether the Appellant's assessment was based on an erroneous Excise Duty rate?

Appellant's Argument

The appellant argued that the bottles are essential inputs for the manufacturing process and formation of its final product.

They also argued that the respondent's definition of raw materials to exclude bottles used in the manufacture of the appellant's products is narrow, unreasonable and contrary to the internationally accepted standards. The appellant also contended that the applicable Excise duty rate applicable between 1st and 6th November 2019 was KShs 221.24 per litre.

Respondent's Argument

The respondent argued that the appellant's packaging materials are not raw materials used to manufacture excisable goods and therefore Excise duty paid thereon does not qualify for relief under Section 14(1) of the EDA. The respondent also asserted that the assessment solely relates to the claim of Excise duty on raw materials and that the appellant has not presented any evidence to demonstrate that the Excise duty rate it applied between 1st and 6th November 2019 was the prevailing rate relating to the tax point for determining the liability for Excise duty as per Section 6 of Excise Duty Act.

Tribunal Findings

The tribunal found that the ambiguities in the law meant that the provisions of Section 14(1) of the Excise Duty Act had to be interpreted in favour of the Appellant. Meaning that the Appellant was justified to offset the duty paid on its finished product from the Excise duty paid on the raw materials.

The tribunal also found that the increased Excise duty under dispute kicked in on the 7th of November 2019, and not a day earlier as asserted by the Respondent. Therefore, the Respondent's assessment of increased duty rates for the periods between 1st to 6th November 2019 was erroneous.

Tribunal's Decision

The appeal was allowed and the respondent's objection decision was set aside. Each party was ordered to bear its own cost.

Effective date of rate variances by legal notices

TAT 607/2022:
British American Tobacco Plc vs. The Commissioner of Legal Services and Board Co-Ordination

Background

The appellant, British American Tobacco PLC, is a company incorporated in Kenya, primarily involved in the manufacture and marketing of tobacco and related products.

The respondent, The Commissioner of Legal Services and Board Co-ordination, is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the laws of Kenya.

The dispute arose when the respondent issued a new adjustment of Excise duty rates on various commodities, including the appellant's products, through Legal Notice No. 217, intending to revoke the previous Legal Notice No. 194. The appellant continued to comply with the rate of Excise duty prescribed by Legal Notice No. 194, leading to a demand from the respondent for additional Excise duty amounting to Kshs. 124,031,240.00 for the period between December 2021 and February 2022.

The appellant objected to this demand, leading to the current appeal.

Issues for Determination

Whether the orders issued by the High Court in Nairobi in the Petitions stayed the implemenTATion of Legal Notice No. 217 of 2021. - Whether the Respondent's Claim for additional excise duty dated 28th April, 2022 was lawful.

Appellant's Argument

The appellant argued that the High Court had suspended the implementation of Legal Notice No. 217 of 2021, and therefore, the respondent's demand for additional amounts of Excise duty was unlawful. The appellant also contended that the respondent's actions were a violation of the Constitution, rule of law, democracy, and administration of justice.

Respondent's Argument

The respondent argued that Legal Notice No. 217 of 2021 was in effect as of 2nd November, 2021, and therefore, the additional tax assessment in respect of Excise duty was lawful and justified. The respondent also contended that the High Court orders did not amount to stay orders and that the appellant's reliance on the Petitions was misguided.

Tribunal Findings

The Tribunal found that the High Court had indeed ordered that the effective date of Legal Notice No. 217 of 2021 be 20th December, 2021. Therefore, the respondent should have applied the new rates from this date.

The Tribunal also found that the respondent's tax assessment for the entire month of December 2021 was incorrect, as it did not specify the dates to which the Legal Notice applied. The Tribunal ordered the respondent to apply the correct rates of Excise duty on a pro-rata basis for the month of December 2021.

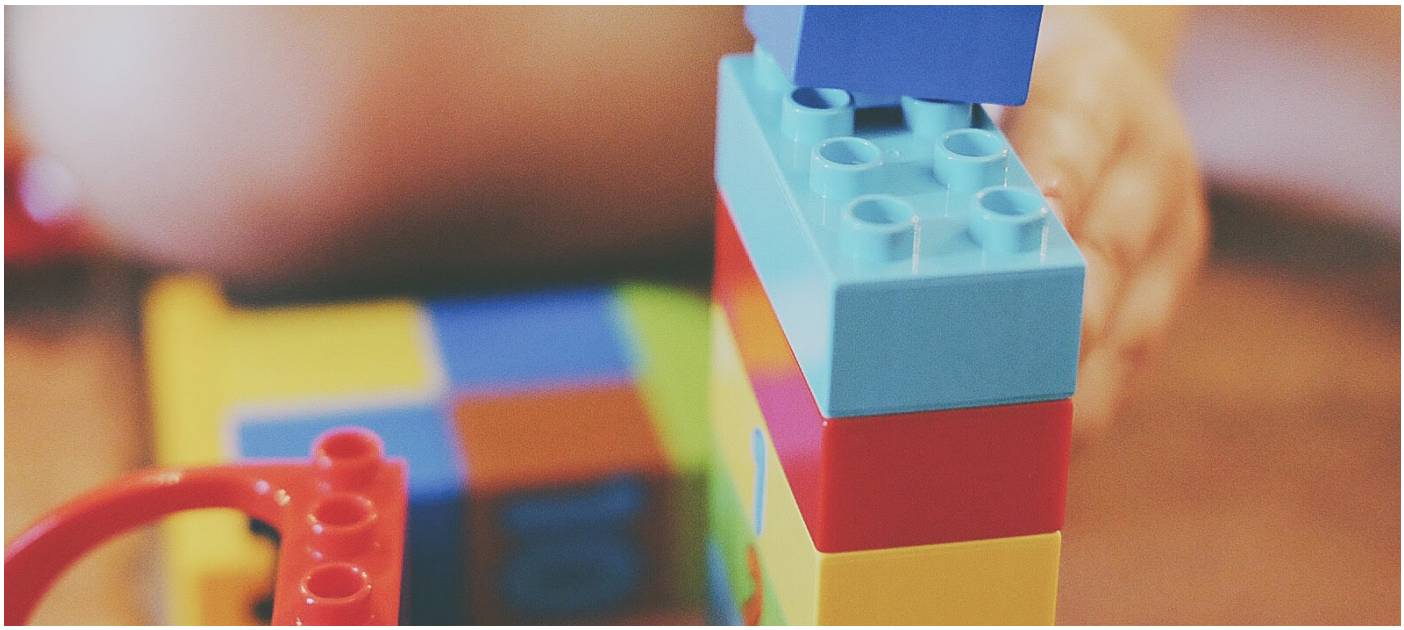
Tribunal's Decision

The appeal was partially allowed. The Tribunal upheld the respondent's objection decision dated 28th April, 2022, subject to a variation arising from the application of the rates outlined in both Legal Notice Number 194 of 2020 and Legal Notice 217 of 2021 on a pro-rata basis only in respect of the month of December, 2021.

The respondent was ordered to undertake a variation of the tax assessment to exclude the Excise duty for the days prior to 20th December, 2021 and to accordingly issue an appropriate decision within Thirty (30) days of the date of delivery of this Judgment. Each party was to bear its own costs.

Excise on Imported versus Domestic Plastic

TAT E377/2023:
Safepak Limited vs The Commissioner for Legal Services & Board Coordination



Background

Safepak Limited, a Kenyan company involved in the manufacture and sale of plastic products, stopped charging and remitting Excise duty on locally produced plastic articles of tariff HS Code 3923.30.00 following the amendment of the Finance Act 2022.

The Commissioner for Legal Services & Board Coordination demanded an Excise duty additional assessment in the sum of Kshs. 159,543,931.00 for the period September 2022 to January 2023 and issued an Agency notice to Safepak's bank agents. Safepak objected to the assessment, leading to the Commissioner issuing an Objection decision. Safepak then lodged an appeal against this decision.

Issues for Determination

Whether the Commissioner erred in law and fact by demanding excise duty on locally manufactured articles of plastic that are not excisable. -

Whether the Commissioner erred in law and fact by disregarding the National Assembly's Hansard Report dated 2nd June 2022, and correspondence between the National Assembly and the Attorney General's office dated 28th July 2022.

Appellant's Argument

Safepak argued that the amendment introduced by the Finance Act, 2022 to the Excise Duty Act, 2015 was clear that Excise duty was only applicable on imported articles of plastic of Tariff Heading 3923.30.00 and 3923.90.90 and not on locally manufactured Articles of plastics of the aforementioned tariff headings.

They contended that the Commissioner's assessment to impose Excise duty on locally manufactured plastic items oversteps the legislative authority granted to the National Assembly under Article 109 of the Constitution of Kenya, 2010.

Respondent's Argument

The Commissioner argued that the Finance Act 2022 sought to expand the scope of Excise duty on plastics under Tariff 3923.90.90 and that the word 'imported' mentioned in the current Act is not the current provision of the law, therefore Excise duty is applicable on all articles of plastics under Tariff Heading 3923.30.00 and 3923.90.90 whether locally manufactured or imported.

They contended that once a Bill is published in the Kenya Gazette it becomes law as is and, in the words, published in the Kenya Gazette and that there are only two ways that such a law can be amended; by Parliament or by the Attorney General through the revisionary powers bestowed upon it by law.

Tribunal Findings

The Tribunal found that the Finance Act 2022 provided that only imported articles of plastic that fell under Tariff Codes 3923.30.00 and 3923.90.90 were excisable at 10%.

The Tribunal held that the Commissioner was not justified in levying Excise duty on Safepak's goods since locally manufactured articles of plastic were left out of the goods chargeable to duty under the Finance Act 2022.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the Commissioner's Objection decision dated 30th May 2023, and ordered each party to bear its own cost.

TAT E31/5:
Nairobi Plastics Limited vs Commissioner Of Legal Services And Board Coordination

Background

The Appellant, Nairobi Plastics Limited, is a private limited company incorporated under the laws of Kenya, primarily engaged in plastics manufacturing. The Respondent, Commissioner of Legal Services and Board Coordination, is a principal officer appointed under the Kenya Revenue Authority Act, responsible for the assessment, collection, and administration of tax revenue on behalf of the Government of Kenya.

On 15th March 2023, the Respondent issued the Appellant with tax assessments in respect to Excise duty. The Appellant lodged an objection against the Commissioner's assessment on iTax and through a letter of the same date. The Respondent rejected the objection and upheld the assessments. Dissatisfied with the objection decision, the Appellant lodged a Notice of Appeal.

Issues for Determination

What was the applicable law at the time of assessment - Whether the Respondent's assessment was justified.

Appellant's Argument

The Appellant argued that the Excise duty should be levied solely on imported articles of plastics as per the Hansard and Order Paper dated 2nd June, 2022, and the letter from the Clerk of the National Assembly dated 28th July, 2022.

The Appellant contended that the Respondent's actions constitute a breach of the Appellant's right to fair administrative action as laid out in Article 47 of the Constitution.

Respondent's Argument

The Respondent submitted that the First Schedule to the Excise Duty Act provided that articles of plastic of tariff heading 3923.30.00 and 3923.90.90 shall be charged Excise duty at 10%.

The Respondent argued that the Appellant is a manufacturer of plastics in Kenya and hence plastics are excisable goods under the Excise Duty Act and accordingly, the goods manufactured by the Appellant are subject to Excise duty.

Tribunal Findings

The Tribunal found that the law in place at the time of the assessment provided that imported articles of plastic that fell under tariff codes 3923.30.00 and 3923.90.90 were excisable at 10%.

Locally manufactured articles of plastic were left out of this descriptions under the Finance Act 2022. The Respondent therefore erred in its attempt to bring locally manufactured articles of plastic within tariff codes 3923.30.00 and 3923.90.90 to charge as this was not the applicable law on Excise duty chargeability for locally manufactured articles of plastic under the two codes

Tribunal's Decision

The Appeal was upheld and the Respondent's Objection decision dated 16th May, 2023 was set aside. Each Party was to bear its own costs.

TAT E005/2023:
Brooklyn Dairies Limited vs Commissioner of Domestic Taxes

Background

The Appellant, Brooklyn Dairies Limited, was issued with additional Excise and VAT assessments by the Respondent, Commissioner of Domestic Taxes, on 12th October 2022. The assessments were due to a variance established by the Respondent on both Excise and VAT, arising from 69,130 Excise stamps ordered by the Appellant and issued by the Respondent but which the Appellant failed to activate as required.

The Appellant objected to the assessments on 25th October 2022, and the Respondent issued its Objection decision on 7th December 2022 and confirmed the assessments. The Appellant, dissatisfied with the Respondent's Objection decision, filed the appeal on 6th January 2023.

Issues for Determination

Whether the Appellant sufficiently accounted for 69,130 excise stamps issued by the Respondent. - Whether the Respondent was justified in issuing the additional Excise Duty and VAT assessments against the Appellant.

Appellant's Argument

The Appellant argued that the subject stock of stamps was stolen and the matter was validly reported both to the Respondent and the Kenya Police Service. The Appellant contended that a stolen stamp cannot be treated as a sale where all the evidence is available on what transpired to the stamps. The Appellant also asserted that from the Respondent's responses it was clear that the assessments were based on the Appellant's failure to respond to its email, which approach the Appellant contended was not justified. The Appellant stated that the Respondent was wrong in assuming that the stamps were used in any way since they had already been earlier recalled thus rendering them unusable.

Respondent's Argument

The Respondent sTATed that it issued the Appellant with additional Excise tax and VAT assessments vide the Appellant's iTax account on 12th October 2022.

The assessments were done on variance established on both VAT and Excise tax upon request of stamps by the Appellant which order was issued but the Appellant failed to activate. The Respondent further stated that it issued the Appellant with a pre-assessment notice to charge the stamps affixed and not activated using the highest stock keeping unit (SKU) of 18.9 liters previously declared by the Appellant as per Section 14 (2) of the Excise Duty (Excisable Goods Management System) Regulations, 2013.

Tribunal Findings

The Tribunal found that the Appellant failed to sufficiently account for the 69,130 Excise stamps issued by the Respondent. The Tribunal also found that the Respondent was justified in issuing the additional assessments against the Appellant.

The Tribunal held that the Respondent relied on the relevant sTATutory provision and information provided by the Appellant, as well as its best judgement in assessing the Appellant for the additional assessments.

Tribunal's Decision

The Appeal was dismissed and the Respondent's Objection decision dated 7th December 2022 was upheld. Each party was ordered to bear its own costs.

Chargeability of excise on discounts provided to an insurance broker

TAT E03/3:
Minet Kenya Insurance Brokers Limited vs Commissioner of Domestic Taxes

Background

The Appellant, Minet Kenya Insurance Brokers Limited, is a private limited liability company incorporated in Kenya and licensed under the Insurance Act as an insurance broker and medical insurance provider. The Respondent, Commissioner of Domestic Taxes, is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act. The Respondent conducted an audit covering the period January 2017 to December 2021 on the Appellant's VAT, Excise duty, Pay as You Earn (PAYE) and Withholding tax (WHT) obligations.

Upon completion of the audit, the Respondent issued the Appellant with a notice of assessment, notifying the Appellant of additional assessments covering the years 2017, 2018, 2019, 2020 and 2021 amounting to principal tax of Kshs. 67,380,627.00 of Excise duty and Kshs. 73,200,583.00 of VAT, plus interest and penalties.

The Appellant objected to the entire assessment, and the Respondent issued its objection decision partially allowing the objection and confirming additional assessments covering the years 2017, 2018, 2019, 2020, and 2021 amounting to a principal tax of Kshs. 53,514,443.00 of Excise duty and Kshs. 50,461,383.00 of VAT, plus interest and penalties. Dissatisfied with the Respondent's objection decision, the Appellant lodged its Notice of Appeal.

Issues for Determination

Whether the Respondent erred by classifying 'hospital discounts' received by the Appellant as 'other fees' as defined by the Excise Duty Act. - Whether the Respondent erred by classifying 'hospital discounts' received by the Appellant as 'taxable supply' under the Value Added Tax Act. - Whether the Respondent erred in law and fact by failing to consider that it had already assessed Excise duty for 2014 to 2017 and erred in fact that the Appellant was paid administrative fees in the National Police Service and Kenya Prisons Service medical scheme. - Whether the Respondent erred in law and fact by failing to consider that it had already assessed VAT for 2014 to 2017 and erred in fact that the Appellant was paid administrative fees in the National Police Service and Kenya Prisons Service medical scheme. - Whether the Respondent erred in law by failing to consider the relevant documenTATion in support of variances in the VAT and excise duty returns.

Appellant's Argument

The Appellant argued that the 'hospital discounts' it received were not 'other fees' as defined by the Excise Duty Act and were not a 'taxable supply' under the VAT Act.

The Appellant contended that the Respondent had already assessed Excise duty and VAT for the period 2014 - 2017 and therefore, the

additional assessments for 2017 were erroneous.

The Appellant also disputed the Respondent's claim that it was paid administrative fees in the National Police Service and Kenya Prisons Service medical scheme.

The Appellant further argued that the Respondent failed to consider the relevant documentation provided by the Appellant, thereby erroneously confirming an Excise duty assessment and a VAT assessment arising from an alleged variance between Excise duty and VAT returns.

Respondent's Argument

The Respondent argued that the 'hospital discounts' received by the Appellant were 'other fees' as defined by the Excise Duty Act and were a 'taxable supply' under the VAT Act.

The Respondent contended that the additional assessments for 2017 were justified as they were based on undisclosed 'other fees' which were not assessed in the previous assessment. The Respondent also maintained that the Appellant was paid administrative fees in the National Police Service and Kenya Prisons Service medical scheme. The Respondent further argued that it had considered the relevant documentation provided by the Appellant and confirmed the Excise duty assessment and VAT assessment based on the variance between Excise duty and VAT returns.

Tribunal Findings

The Tribunal found that the Appellant's 'hospital discounts' did not conform to the definition of 'other fees' under the Excise Duty Act and therefore, the Respondent erred in assessing Excise duty on the 'hospital discounts'. The Tribunal also found that the Appellant supplied a service under the VAT Act and therefore, the Respondent did not err in assessing VAT on the 'hospital discounts'. However, the Tribunal found that the Respondent failed to exclude from its ascertainment of the taxable value of the supply the Excise duty that the Respondent incorrectly assessed on the 'hospital discounts'. The Tribunal also found that the Respondent was justified in issuing Excise duty and VAT assessments on variances arising from Excise duty and VAT return analysis.

Tribunal's Decision

The Tribunal partially allowed the Appeal. The Tribunal set aside the Excise duty and VAT assessments for September 2017. The Tribunal also set aside the Excise duty assessment on 'hospital discounts' for the periods 2018, 2019, 2020 and 2021. The Tribunal revised the VAT for the periods 2018, 2019, 2020 and 2021 charged on 'hospital discounts' to exclude the VAT charged on the Excise duty that the Respondent incorrectly assessed on the 'hospital discounts'. The Tribunal set aside and revised the Excise duty assessment for the periods 2018, 2019, 2020 and 2021 charged on variances in declared administration fees. The Tribunal set aside the VAT assessment for the periods 2019 and 2020 charged on variances in declared administration fees.

TAT Act

Lack of an appealable decision

TAT 1215/2022:
The Estate of The Late Sherbanu Hassanali Moledina vs. Commissioner of Domestic Taxes

Background

The late Sherbanu Hassanali Moledina, a Ugandan national, moved to Kenya around 1980 and acquired properties. The Commissioner of Domestic Taxes placed a caveat on one of her properties in 2001 to secure a tax owed amounting to KShs. 17,000,000.00. The administrators of her esTATe requested the caveat be lifted in 2022, arguing that there was no justification for it as the esTATe did not owe any tax. The Commissioner refused, leading to the appeal.

Issues for Determination

Whether the Tribunal has jurisdiction to determine this Appeal - Whether the Respondent correctly subjected and sustained a charge against the Appellant's property, for unpaid taxes.

Appellant's Argument

The Appellant argued that the late Sherbanu Hassanali Moledina did not accrue or derive any income from Kenya and that she substantially lived in Uganda. They claimed that she neither received any assessment from the Respondent nor raised a self-assessment under iTax. The Appellant also argued that the Respondent failed to provide an analysis of liability or any other acceptable documents as proof of the alleged tax.

Respondent's Argument

The Respondent argued that it had the right to place a charge on the property as security for unpaid taxes under Section 40 of the Tax Procedures Act. They sTATed that a tax payable by a person under a tax law is construed to be a debt due to the Government and shall be payable to the Respondent unless a taxpayer pays the outstanding taxes. The Respondent also argued that the burden of proof was on the Appellant to disprove its decision with evidence.

Tribunal Findings

The Tribunal found that the appeal was brought to purely lift the caveat arising from assessment of taxes and there was no appealable decision that can be subject to premise the appeal for determination. Therefore, the Tribunal lacked jurisdiction to entertain this Appeal. As such, the Tribunal did not delve into the second issue for determination as the same was rendered moot.

Tribunal Findings

Tribunal Findings

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

TAT E29/3:
Jihan Freighters Limited -Versus- Commissioner Of Domestic Taxes

Background

The Respondent undertook an investigation on the VAT purchase claims of the Appellant for the period between October 2020 and April 2021. The Respondent issued a demand notice for Kshs. 5,923,328.00 for the period under review. The Appellant, being dissatisfied with the assessment, lodged a notice of objection. The Respondent invalidated the objection and confirmed the assessment. Aggrieved by the confirmation of the assessment, the Appellant filed this Appeal.

Issues for Determination

Whether the Appellant lodged a valid late objection - Whether the Assessment is proper in law.

Appellant's Argument

The Appellant averred that the Respondent carried out an audit focusing on VAT. The Appellant issued a notice of objection and provided its analysis with supporting documents. The Appellant presented all the documents to support the objection which are still with the Respondent. The Appellant observed that the Respondent ignored the Appellant's documents and denied it 'fair hearing.' The Appellant's demand for VAT as per Respondent's objection decision has no basis in fact or in law and the entire assessment was arbitrary and unjust.

Respondent's Argument

The Respondent averred that it undertook an investigation on the purchase claims of the Appellant for the period between October 2020 and April 2021. The investigation was meant to establish the authenticity of duplicate invoice claims with a view to disallowing the double claims. The Respondent established that the Appellant had made double and in other cases multiple claims of purchase invoices relating to VAT during the period under review. The Respondent issued a demand notice for Kshs. 5,923,328.00 for the period under review. The Respondent issued an assessment to the Appellant on 8th December 2021. The Respondent submitted that the Appeal is incompetent as the Respondent did not render an objection decision under Section 51(8) of the Tax Procedures Act.

Tribunal Findings

The Tribunal notes that the procedure as prescribed in the TPA is that once the taxpayer has received the tax demand and disputes the facts, he or she ought to lodge a notice of objection within thirty days after receipt of the same. The Commissioner is then expected to review this objection and issue an objection decision within sixty days. It is upon receipt of this objection decision, and if still in dispute, can the taxpayer commence the process of lodging its appeal to the Tribunal. The Tribunal notes that in the instant Appeal, there was no tax decision made and that is why none was submitted as required by Section 3(2) of the TAT Act. The Tribunal notes that it is the letter advising the Appellant to apply for extension of time to file its notice of objection that the Appellant has decided to call the 'decision of the Respondent.'

Tribunal Findings

The Appeal is incompetent and is hereby struck out. Each party to bear its own costs.

TAT E29/8:
CPF Trust Fund Registered Trustees vs Commissioner for Domestic Taxes

Background

The Appellant, CPF Trust Fund Registered Trustees, applied for Income tax exemption under Paragraph 10 of the First Schedule of the Income Tax Act through the Respondent's iTax platform. The Respondent, Commissioner for Domestic Taxes, rejected the application, sTATing that the Appellant's activities and objectives were not aligned with the objectives outlined under Paragraph 10 of the First Schedule to the Income Tax Act. The Appellant, aggrieved by the decision, lodged an appeal at the Tribunal.

Issues for Determination

Whether the Appeal is valid.

Appellant's Argument

The Appellant argued that it is an irrevocable charitable trust as provided for under Sections 3A and 3B of the Trustees (Perpetual Succession) Act CAP (164) laws of Kenya. It contended that its activities are well in line with Paragraph 10 of the First Schedule of the Income Tax Act as it provides services that help the public in the relief of poverty or distress. The Appellant further argued that the Respondent's decision is an appealable decision under the provisions of the Tax Procedures Act.

Respondent's Argument

The Respondent argued that the decision it rendered on 15th March 2023 rejecting the Appellant's application for exemption does not constitute an 'appealable decision' as envisaged under Section 3 of the Tax Procedures Act. It further argued that all the requirements must be met before an exemption is granted and that the Appellant did not meet all the requirements under Paragraph 10 to the satisfaction of the Respondent.

Tribunal Findings

The Tribunal found that the communication by the Respondent to which the Appellant lodged its Appeal at the Tribunal was a tax decision by the Commissioner. The Tribunal concluded that the decision forming the basis of the Appellant's appeal to this Tribunal was not an appealable decision as defined under Section 2 of the TPA. Therefore, the Tribunal found that the Appeal was premature and there is therefore no valid appeal before the Tribunal.

Tribunal Decision

The Tribunal found the Appeal to be incompetent and unsustainable in law and accordingly struck out the Appeal. Each Party was ordered to bear its own costs.

TAT 137/1:
KELLICO Limited Vs Commissioner of Domestic Taxes

Background

The Appellant, KELLICO LIMITED, a registered taxpayer in Kenya, was issued with a tax assessment notice by the Respondent, COMMISSIONER Of DOMESTIC TAXES, on 14th June 2018 relating to Income tax, Value Added Tax, Withholding tax and Capital Gains Tax for the years of income 2014 to 2017. An amended notice of assessment was issued on 3rd April 2020, covering Withholding tax and Corporation tax for the years of income 2015 to 2018. The Respondent confirmed the amended notice on 20th April 2020 and subsequently issued agency notices to Classic Mouldings Limited, a tenant of the Appellant, and against the personal account of the Appellant's Director in Prime Bank Limited on 6th April 2021 demanding taxes in the sum of Kshs. 56,975,369.00. The Appellant disputed the Respondent's amended assessments and lodged a notice of objection dated 24th May 2021

Issues for Determination

Whether the Appellant's Appeal as lodged is valid - Whether the Respondent's Agency Notices dated 9th December 2020 and 6th April 2021 were properly issued? - Whether the notice of invalidation issued on 24th September 2020 was properly issued?

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by unlawfully and illegally denying the Appellant from claiming commercial building allowance of Kshs. 15,302,672.00 for the period 2015 - 2018. The Appellant also contended that the Respondent erred in law and fact by disallowing permitted tax deductions of the Appellant in relation to expenses incurred for repairs and maintenance costs on its buildings, interest on loans, wear and tear allowances in the aggregate sum of Kshs. 2,059,439.00 for the years 2015 - 2018. The Appellant further argued that the Respondent's action to issue agency notices on the personal bank account of the Appellant's director was arbitrary and illegal as the Appellant and its directors are separate in law and neither can bear the tax liability of the other.

Respondent's Argument

The Respondent argued that it issued the Appellant with an original tax assessment notice relating to Income tax; Value Added Tax; Withholding tax and Capital Gains Tax for the period 2014 to 2017 on 14th June 2018. Thereafter, on 3rd April 2020 pursuant to the provisions of Section 31 of the Tax Procedures Act, the Respondent amended its assessment of 14th June 2020, to which the Appellant objected to on 24th April 2020. The Respondent averred that it reviewed the Appellant's objection and deemed it invalid for failure to comply with the mandatory provisions of Section 51 (3) of the Tax Procedures Act, the Appellant's Objection was not accompanied by documenTATion in support, subsequently the Respondent issued a notice of invalidation of the Objection on 24th September 2020.

Tribunal Findings

The Tribunal found that the Appellant did not have a valid Appeal before it as relates to the decision made on 3rd April 2020. However, it found that the Respondent was justified in issuing the agency notices dated 9th December 2020 the Appellant's tenant. The Tribunal also found that the Respondent was justified to issue the agency notice dated 6th April 2021.

Tribunal Decision

The Appeal was dismissed. The Respondent's decision issued on 3rd April 2020 was upheld. The Respondent's agency notices dated 9th December 2020 and 6th April, 2021 were also upheld. Each party was to bear its own costs.

Filing further/ additional documents

TAT 1575/2022:
Heineken East Africa Import Company Limited vs Commissioner of Investigations and Enforcement

Background

The Respondent issued a notice of tax investigations to the Appellant and subsequently issued a notice of assessment. The Respondent's assessment was based on a banking analysis done on the Appellant's bank deposits, which considered numerous bank transactions done over the entire audit period of 2016 to 2020. The Appellant lodged a Notice of Appeal to the Respondent's objection decision. The Appellant sought leave to file an amended Memorandum of Appeal and Supplementary STATement of Facts to corroborate the earlier filed STATement of Facts and adduce new and relevant documentary evidence supporting its position.

Issues for Determination

Whether the Appellant should be granted leave to file an amended Memorandum of Appeal and Supplementary STATement of Facts - Whether the additional documents which the Appellant seeks to file are relevant and vital to the case - Whether the Respondent will suffer any prejudice from the grant of orders sought.

Appellant's Argument

The Appellant argued that the additional documents which it seeks to file are extremely relevant and vital to this matter and shall support the Appellant's case. The Appellant also argued that the Respondent shall not be prejudiced in any manner whatsoever if the orders are granted as the Tribunal may grant corresponding leave to the Respondent to file a Supplementary Statement of Facts in reply if need be.

Respondent's Argument

The Respondent opposed the application arguing that the application is an afterthought since the Appellant did not disclose its intention to amend its Memorandum of Appeal or file Supplementary STATement of Facts on 26th June 2023 when the matter came up for pre-trial. The Respondent also argued that any documents introduced at this stage will prejudice the Respondent as it will not have had the benefit of that information contained in the documents that the Appellant alleges to have been in the possession of the Respondent.

Tribunal Findings

The Tribunal found that the delay in filing the additional documents was reasonable and excusable. The Tribunal also found that the additional documents did not introduce any new cause of action in the Appeal. The Tribunal further found that no prejudice will be suffered by the Respondent as it shall have an opportunity to peruse the documents well in time for the hearing of the Appeal and will be accorded an opportunity to respond to the Supplementary STATement of Facts and additional documents.

Tribunal's Decision

The Tribunal granted the Appellant leave to amend its Memorandum of Appeal and to file a Supplementary STATement of Facts and additional documents. The Appellant was ordered to file and serve the Amended Memorandum of Appeal, Supplementary STATement of Facts and additional documents within Fifteen (15) days of the date of delivery of this Ruling. The Respondent was also granted a corresponding leave to file a Supplementary STATement of Facts and additional documents within Fifteen (15) days of being served by the Appellant.

TAT E31/3:
African Research Collaboration for Health Limited vs Commissioner of Domestic Taxes

Background

The appellant, African Research Collaboration for Health Limited, filed an appeal against the respondent, Commissioner of Domestic Taxes, after being dissatisfied with the respondent's decision. The appellant sought to file a further bundle of documents, which they claim were produced to the respondent during deliberations. The respondent challenged the application, arguing that the appellant failed to provide these documents during the objection stage and that the documents being introduced at this stage would prejudice the respondent.

Issues for Determination

Whether the appellant should be granted leave to file a further bundle of documents - Whether the respondent would suffer any prejudice if the appellant's application is allowed.

Appellant's Argument

The appellant argued that the documents they seek to file are relevant to the appeal and were provided to the respondent during their various engagements. They also argued that the delay in bringing the application was not inordinate and that the respondent would not suffer any prejudice if the orders sought are granted.

Respondent's Argument

The respondent argued that the appellant seeks to add additional documents that should have been in their possession and that there is no new evidence being brought before the tribunal. They also argued that the appellant took almost 6 months to realize that they had not filed the documents despite engagements at ADR and that the delay is inordinate.

Tribunal Findings

The tribunal found that the appellant's application meets the legal threshold for allowing such orders sought in the application and is merited. They found that the further/additional documents shall aid the tribunal to have a clear picture of the issues and will also afford the parties a fair trial as well as shade more light to the issues in controversy.

Tribunal's Decision

The tribunal granted the appellant leave to file further additional bundle of documents, limited to the documents annexed and marked as MM1 to the application. The appellant was ordered to file and serve the further additional bundle of documents within seven days of the date of delivery of the ruling. The respondent was granted a corresponding leave to file and serve a bundle of further additional documents and/or a Supplementary STATement of Facts within fifteen days of being served by the appellant.

TAT E33/2:
Katebes Enterprises Limited vs Commissioner of Domestic Taxes

Background

The Respondent, Commissioner of Domestic Taxes, filed an application seeking orders to extend leave for the Respondent's Statement of Facts to be deemed as duly filed. The Respondent claimed that the Statement of Facts was filed and served online on 8th August, 2023, but was missing from the Tribunal documents. The Respondent argued that without the STATement of Facts on record, they would lose the opportunity to effectively respond to the appeal.

Issues for Determination

Whether the Respondent's STATement of Facts was duly filed and served - Whether the Tribunal should extend leave for the Respondent's STATement of Facts to be deemed as duly filed.

Appellant's Argument

The Appellant did not file any response in opposition to the Respondent's application. The Appellant's counsel could not confirm when the Appellant was served with the Respondent's STATement of Facts.

Respondent's Argument

The Respondent claimed that the STATement of Facts was filed and served online on 8th August, 2023, but was missing from the Tribunal documents. The Respondent argued that without the STATement of Facts on record, they would lose the opportunity to effectively respond to the appeal. The Respondent sought for the Tribunal to extend leave for the Respondent's STATement of Facts to be deemed as duly filed.

Tribunal Findings

The Tribunal found that the Respondent failed to provide evidence of filing and service of the STATement of Facts.

The Tribunal noted that the Respondent had a sTATutory obligation to file and effect service of the STATement of Facts within specified sTATutory timelines.

The Tribunal found that the Respondent had not advanced any reasonable cause to warrant the issuance of the orders sought in the application.

Tribunal's Decision

The Tribunal dismissed the application and referred the matter to Panel 3 to render its Judgment. No orders as to costs were made.

Incompetent pleadings

TAT 1529/2022:
Jarika County Lodge Limited vs. Commissioner of Domestic Taxes

Background

The Appellant, Jarika County Lodge Limited, is a registered taxpayer operating a hotel business. The Respondent, Commissioner of Domestic Taxes, conducted a compliance review of the Appellant's VAT declarations for the period January 2021 to May 2022 and noted that the Appellant had been filing NIL VAT returns. The Respondent issued estimated VAT additional assessments resulting in a total principal tax liability of Kshs. 2,880,000.00. The Appellant objected to the assessments, arguing that it was not in operation and therefore had no income. The Respondent dismissed the objection, leading to the Appellant's appeal.

Issues for Determination

Whether the Appellant's Pleadings complied with Rules 4(1) (a) and 5(1) of the Tax Appeals Tribunals (Procedure) Rules, 2015 - Whether the Respondent charged Value Added Tax (VAT) on non-existent income contrary to section 5 of the Value Added Tax Act - Whether the Respondent confirmed the assessments without due regard to all records/documents and explanations and information provided.

Appellant's Argument

The Appellant argued that the Respondent erred in fact and in law by charging VAT on non-existent income contrary to Section 5 of the VAT Act. The Appellant also claimed that the Respondent confirmed the assessments without due regard to all records/documents, explanations and information provided, thereby failing to appreciate all issues presented and raised by the Appellant before confirming the assessment.

Respondent's Argument

The Respondent maintained that it conducted a compliance review of the Appellant's VAT declarations and noted that the Appellant was engaged in active business that generates income, but filed Nil VAT returns. The Respondent argued that the Appellant failed to honour the Respondent's request for documents, forcing the Respondent to issue assessments. The Respondent also argued that the Appellant's explanations were mere sTATements at best and thus no probative value can be attached to them in the absence of corroborating evidence.

Tribunal Findings

The Tribunal found that the Appellant's pleadings were incompetent as they did not comply with Rules 4(1) (a) and 5(1) of the Tax Appeals Tribunals (Procedure) Rules, 2015. Consequently, the Tribunal found and held that the Appellant's pleading are incompetent and are available for striking out. The Tribunal did not proceed to analyse the remaining issues due to the incompetence of the Appellant's pleadings.

Tribunal's Decision

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

Orders for Issuance of a Tax Compliance Certificate

MISC E13/9:
Jojen Butchery Vs. Commissioner Of Domestic Taxes

Background

The applicant, Jojen Butchery, received additional VAT assessment orders from the respondent, Commissioner of Domestic Taxes, demanding a total incremental tax of Kshs. 77,135,023.60 plus interest of Kshs. 25,589,306.80

The applicant objected to the additional assessment and requested the respondent to vacate the assessments. However, the respondent did not issue an objection decision as required by Section 51(11) of the Tax Procedures Act.

The respondent also denied the applicant a Tax Compliance Certificate, which affected the applicant's trading activities. The respondent continued to charge interest on the liability, which as at 9th September, 2023 was Kshs. 60,921,786.70.

Issues for Determination

Whether the respondent should issue a Tax Compliance Certificate to the applicant - Whether the respondent should stop charging further interest on the additional tax assessments.

Appellant's Argument

The applicant argued that the respondent has not issued an objection decision as required by law, despite the applicant having objected to the additional assessments. The applicant also argued that the respondent has continued to charge interest on the liability and has denied the applicant a Tax Compliance Certificate, causing distress to the applicant's trading activities.

Respondent's Argument

The respondent did not file any response or submissions in opposition to the application.

Tribunal Findings

The Tribunal found that the respondent did not put up a defense against the application and there was no proof of any objection decision having been issued by the respondent.

The Tribunal also found that the issuance of a Tax Compliance Certificate is an administrative function of the respondent, but the Tribunal can order the issuance of the same if it deems fit.

Tribunal's Decision

The Tribunal allowed the application and directed the respondent to issue a Tax Compliance Certificate to the applicant within 30 days of the delivery of the ruling. The respondent was also restrained from instituting any recovery proceedings for the collection of any taxes, inclusive of penalties and interest in relation to the Assessment Order of 19th November, 2019.

Reinstatement of Appeals

TAT 83/7:
Paramount Assessors Limited vs Commissioner of Domestic Taxes

Background

The Appellant, Paramount Assessors Limited, had initially filed an appeal against the Respondent, Commissioner of Domestic Taxes, challenging a tax decision. However, the Appellant withdrew the appeal based on advice from the Respondent's officers and an ongoing engagement with the Respondent for settlement of the tax dispute. The Appellant later filed an application to reinsTATe the appeal, citing confusion over differing figures of the principal tax liability provided by the Respondent.

Issues for Determination

Whether the Tribunal has the jurisdiction to reinsTATe an appeal that has been voluntarily withdrawn by the Appellant.

Appellant's Argument

The Appellant argued that the Respondent had changed the principal tax liability at the time of drawing a payment plan, which amounted to an amendment of the tax decision that should have been communicated to the Appellant. The Appellant relied on Section 51 of the Tax Procedures Act and a previous decision in Eastleigh Mall Limited vs. Commissioner of Investigations & Enforcement Appeal to support their position.

Respondent's Argument

The Respondent did not file any response or challenge to the application.

Tribunal Findings

The Tribunal found that it only has the jurisdiction to reinsTATe appeals that have been dismissed by the Tribunal or an appeal upheld under certain subsections of the Tax Appeals Tribunal Act. There is no provision to reinsTATe an appeal that has been voluntarily withdrawn by a party. Therefore, once an appeal is withdrawn and adopted as an order of the Tribunal, it cannot be reinsTATed unless provided by law.

Tribunal's Decision

The Tribunal dismissed the application for reinsTATement of the appeal, finding it unmeritorious. No orders as to costs were made.

Jurisdiction to grant orders staying the implementation of a decision under review

TAT E55/5:
Bluejay Limited vs Commissioner of Legal Services and Board Co-Ordination

Background

The Respondent issued the Appellant with a notice of intention to conduct a system audit and requested for full and unlimited access the Appellant's business operation systems for the period 2017 to 2021.

The Respondent issued the Appellant with a letter of assessment relating to Corporate income tax, Withholding tax on winnings, Excise tax and betting and gaming tax amounting to Kshs. 5,272,752,325.00, to which the Appellant lodged an Appeal.

Issues for Determination

Whether the prayers by the Respondent can be sustained under Section 18 of the Tax Appeals Tribunal Act, 2013 - Whether the application as lodged before the Tribunal is appropriate as the taxes are yet due on the Appellant - Whether the Respondent is required to substantiate the tax evasion claims.

Appellant's Argument

The Appellant argued that the purposes of Section 18 is to offer reprieve to taxpayers who lodge Appeals at the Tribunal to prevent any enforcement action pending the hearing and determination of the matter, and can only be invoked by the Appellant to stay the implementation of the Objection decision. The Appellant also argued that the taxes requested by the Respondent are yet to be determined and are yet to crystalize as due and payable by the taxpayer.

Respondent's Argument

The Respondent sought for the orders, as; 'That the Honourable Tribunal do issue security for the taxes amounting to Kshs. 5,272,752,325.00 pending the hearing and determination of this instant Appeal'. The Respondent also argued that the Appellant is a foreign entity with a branch in Kenya and in the process of winding up its operations and has moved out of its registered offices.

Tribunal Findings

The Tribunal found that the application is premised on Section 18 of the Tax Appeals Tribunal Act, which Section provides that the Tribunal may make an order staying or otherwise affecting the operation or implemenTATion of the decision under review as it considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the appeal. However, the Tribunal found that the jurisdiction to deal with application and to grant such orders is the preserve of the High Court and not the Tribunal.

Tribunal's Decision

The Tribunal dismissed the application and ordered that the matter to be fixed for hearing within Thirty (30) days of the date of delivery of this Ruling. Each party to bear its own costs.

Filing a supplementary statement of facts and related documents due to errors in previous pleadings

TAT 51/8:
Nishil Asvin Haria vs Commissioner of Domestic Taxes

Background

The appellant, Nishil Asvin Haria, filed an appeal against the Commissioner of Domestic Taxes.

During the filing of the appeal documents, the appellant's counsel erroneously annexed documents related to a different case (TAT 517) to the current case (TAT 518). The error was discovered during the preparation of the final submissions.

The appellant then filed a motion application seeking to correct the error and extend the time for filing of documents and submissions.

Issues for Determination

Whether the Tribunal should allow the appellant to correct the error in the pleadings and extend the time for filing of documents and submissions.

Appellant's Argument

The appellant argued that the error was due to the similarity in the names of the appellants in the two cases. They claimed that the respondent would not suffer any prejudice if the application was allowed as they did not wish to raise any new issues but only to correct the court record. They relied on Section 13(2) and (3) of the Tax Appeals Tribunal Act which allows for extension of time for filing of documents in certain circumstances..

Respondent's Argument

The respondent did not file any response to the application.

Tribunal Findings

The Tribunal found that the grounds advanced by the appellant were reasonable and the error was excusable. It also found that the respondent would not be prejudiced by the granting of the orders sought by the appellant. The Tribunal therefore allowed the appellant to file the appropriate STATement of Facts and related documents.

Tribunal's Decision

The Tribunal granted the appellant's application. It ordered the appellant to file and serve a Supplementary STATement of Facts and related documents within seven days. The respondent was granted leave to file and serve a Supplementary STATement of Facts within fifteen days of being served with the appellant's documents. The appellant was also granted leave to file and serve its written submissions to the Appeal within seven days of being served with the respondent's documents.

Filing a supplementary statement of facts without leave of the Tribunal

TAT 28/1:
Schon Noorani vs. Commissioner of Domestic Taxes

Background

The appellant, Schon Noorani, was assessed by the Commissioner of Domestic Taxes for the period 2014 to 2018. The assessment was based on investigations into the appellant's business, which included money lending and real estate.

The respondent reviewed bank statements and iTax database information, determining that the appellant had made taxable supplies exceeding five million shillings but failed to register for VAT obligation.

The respondent also found that the appellant received rental income and invested in real estate properties using proceeds from the money lending business.

The appellant was served with the investigation findings and issued assessments on 30th November 2022 for Kshs. 33,115,895.00. The appellant filed an objection, but the respondent issued a demand after the appellant failed to provide all supporting documents for his objection.

Issues for Determination

Whether the Supplementary Statement of Facts filed by the respondent should be expunged from the record. - Whether the assessment or dispute arose after the five-year statutory timeline.

Appellant's Argument

The appellant argued that the Supplementary Statement of Facts was filed without leave of the Tribunal or with the concurrence of the parties and is therefore unprocedural. The appellant also claimed that his fundamental right to a fair hearing was violated as he was assessed after the time limit for the respondent to assess a taxpayer had passed. The appellant further argued that his right to privacy of information was compromised by the respondent in an attempt to source information from him without declaring the purpose for which the information is sought.

Respondent's Argument

The respondent argued that the Supplementary Statement of Facts was filed based on further instructions received from its clients after the initial Statement of Facts was filed. The respondent also claimed that the appellant had an opportunity to file any further responses as they may deem fit. The respondent further argued that it would suffer gross prejudice, injustice, and irreparable loss if the prayer sought by the appellant was granted.

Tribunal Findings

The Tribunal found that the Supplementary Statement of Facts was filed without leave of the Tribunal and no attempt was made to secure its being on record, deeming it unprocedurally on record. The Tribunal also found that the question of whether the assessment or dispute arose after the five-year statutory timeline is a matter to be litigated in the substantive Appeal and not in an application.

Tribunal's Decision

The Tribunal allowed the application, expunged the Respondent's Supplementary sTATement of Facts from the record, and made no orders as to costs.

Lack of jurisdiction due to 'res judicata'

TAT 147/0:
Minet Kenya Insurance Brokers Limited Vs. Commissioner Of Domestic Taxes

Background

Minet Kenya Insurance Brokers Limited (the Appellant) is a private limited liability company incorporated in Kenya, whose principal activity is insurance brokerage.

The Commissioner of Domestic Taxes (the Respondent) is a principal officer appointed under the Kenya Revenue Authority Act. The Finance Act 2020 introduced the Voluntary Tax Disclosure Program (VTDP), which allowed taxpayers to voluntarily disclose their tax liabilities to the Respondent in order to receive a remission of interest and penalties on the disclosed principal tax liability.

The Appellant undertook a review of its financial records to determine whether there were any tax liabilities that it wished to disclose under the VTDP. The Appellant applied through VTDP and disclosed an underpayment of Kshs. 152,390,683.00 being Withholding Tax (WHT) and Value Added Tax (VAT) for the period 2018, 2019 and 2020. The Appellant made payment of the principal tax of Kshs. 152,390,683.00 in December 2021.

On 12th August 2022, the Appellant applied for a refund of part of the taxes paid under VTDP amounting to Kshs. 102,869,228.00 being an overpayment of the taxes disclosed and paid as at 31st December 2021.

The Respondent received the application on 18th August 2022 and requested for relevant executed records in order to validate the application.

Upon review of the documents submitted by the Appellant, the Respondent issued a letter dated 19th October 2022 stating that it was unable to grant refund of the taxes disclosed and paid under the VTDP as at 31st December 2021.

Issues for Determination

Whether the Appeal is competent before the Tribunal - Whether the Appellant is entitled to refund.

Appellant's Argument

The Appellant argued that it had a right to apply for taxes paid in error under Section 47 A as read with Section 47 of the TPA and it on this basis that it applied for refund of taxes paid in error. The Appellant further argued that the Respondent failed to correctly apply the rules of statutory interpretation, thereby arriving at the erroneous conclusion that the Appellant's refund application was barred by the provisions of Section 37 D (6) of the Tax Procedures Act.

The Appellant also argued that the Respondent misdirected itself and erred in law by erroneously finding that a refund application constituted an appeal or that the Appellant was barred from appealing, contrary to Sections 37 D (9) and 47 A (13) of the TPA.

The Appellant further argued that the Respondent's decision to reject the refund application amounts to double taxation which is contrary to the law.

Respondent's Argument

The Respondent argued that the Appeal is not competent before the Tribunal as the Appellant did not object to the letter dated 19th October 2022 and subsequently there is no 'objection decision' to be challenged.

The Respondent further argued that the Appellant has grounded the Appeal on Section 47 A of the TPA yet the background of the refund application, which is the subject of the Appeal, is a tax disclosure on VTDP as provided under Section 37 D of the TPA.

The Respondent further argued that the Appellant is not entitled to a refund as the application for refund was premised on Section 37 D (6) which does not allow refunds and Appeals.

Tribunal Findings

The Tribunal found that the Appeal is incompetent and unsustainable in law. The Tribunal found that the letter dated 19th October 2022 is an appealable decision before the Tribunal. However, the Tribunal has no jurisdiction to determine the issue of the refund of the overpaid tax as the same has already been decided under Section 37D (9) of the TPA VTDP as was amended by the Finance Act of 2020.

Tribunal's Decision

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