Commissioner of Investigations & Enforcement v Mohamed & another (Tax Appeal E029 of 2022) [2023] KEHC 21494 (KLR) (Commercial and Tax) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21494 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E029 OF 2022

DAS MAJANJA, J

JULY 28, 2023

BETWEEN

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ..... APPELLANT

AND

BARE MOHAMUD MOHAMED ..... 1ST RESPONDENT

MOHAMED ISMAIL HARET ..... 2ND RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 28th January 2022 in Tax Appeal No.225 of 2021)

JUDGMENT

Introduction and Background

1. The Respondents operate a business known as Barwaqo Shop within Garissa County. It deals in wholesale and retail sale of food commodities. They are also registered taxpayers under the *Income Tax Act* (Chapter 470 Laws of Kenya) ("the *ITA*") bearing respective PIN numbers issued by the Appellant ("the Commissioner").

2. On the basis of intelligence reports that the Respondents had deposited huge sums of money into their business bank account at Gulf African Bank ("the Bank") on diverse dates, the Commissioner commenced investigations against the Respondents for the period 2014 to 2019 for Income Tax and Value Added Tax (VAT) obligations. The Commissioner sought and obtained the Respondents' bank statements and also interrogated its *ITA*x system to ascertain the Respondents' tax compliance status.

3. Having concluded its preliminary investigations, the Commissioner communicated its preliminary findings to the Respondents by the letter dated May 12, 2020 which also served as a notice to them that they were under investigations for failure to declare income for tax purposes. From its analysis of the

Bank account, the Commissioner found that there was evidence of business activities as the statements showed several payments to suppliers for purchases of trading goods and 'credits' received indicating deposits on sales made. The Commissioner therefore concluded that computation of taxes payable was to be based on the income received into the Bank account and that the deposits were to be taken as business income.

4. The Commissioner also stated that it appeared that the Respondents dealt in both vatable and non-vatable supplies since they bought supplies from some named Wholesalers and Maize Millers among others who deal in both vatable and non-vatable supplies. In this regard, the Commissioner stated that the total bank deposits were to be apportioned on a ratio of 60:40 for vatable to non-vatable supplies consistent with similar taxpayers in the retail/ wholesale sector. The Commissioner further found that the Respondents were filing nil-returns and also not filing their income tax and VAT obligations.

5. As a result, the Commissioner stated that no input VAT had been allowed due to the six-month restriction and given that they had never filed VAT returns, VAT was computed at Kshs 316,962,718.00. On income tax, the Commissioner held that since the Respondents had not filed any returns and there were no financial statements available for comparison, the income tax payable was to be estimated based on their turnover. The Commissioner therefore required the Respondents to provide the audited accounts for the period under review for analysis before any taxes were computed. That failure to provide the same would lead to estimation of taxes payable based on industry averages. The Commissioner also pointed out that the Respondent's omissions constituted tax offences for which the Commissioner could initiate criminal proceedings.

6. The Commissioner communicated its final findings by the letter dated December 17, 2020. It reiterated its earlier findings on the income analysis based on the banking deposits and the Respondents' filing of nil returns and non-filing altogether. On the analysis it had done on the financial statements provided by the Respondents and the supporting records, the Commissioner noted that not all the purchases claimed were supported from the records provided and in its summarized tabulation, the Commissioner stated that from the purchases of the subject period amounting to Kshs 2,454,268,170.00, the Respondents was only able to support purchases worth Kshs 614,943,399.00 leaving unsupported purchases amounting to Kshs 1,839,324,771.00.

7. The Commissioner further noted that from the Bank statement, the Respondents made several cash withdrawals which they claimed were payments for the expenses incurred by the business, however on comparison to the drawings made and the business expense claimed, variances were noted amounting to Kshs 121,424,405.00. On the vatable and non-vatable supplies, the Commissioner stated that from the information availed, its analysis placed the average ratio at 52:48 and that VAT payable was to be computed apportioning the sales declared in the financial statements on this ratio but that no input tax will be allowed due to the time lim*ITA*tions on the claim of input tax. Based on the sales declared and the ratios identified, the Commissioner computed and tabulated the VAT payable for the said period. On income tax, it stated that the tax payable was computer based on the variances identified on unsupported purchases being disallowed and it similarly calculated and tabulated the income tax payable for the said period. The drawings from the Bank account identified above were also apportioned between the Respondents and subjected to Pay As You Earn(PAYE) of Kshs 8,816,880.00. For these reasons, the Commissioner raised assessments in respect of the aforementioned findings.

8. The Respondents objected to the findings and assessments by the letter dated December 31, 2020. They stated that the profit margin of their business was very meagre and hence deposits were mainly goods offered on credit and that what the Commissioner treated as purchases were payment to creditors (providing goods on credit). The Respondent did not deny that the 1st Respondent, Bare Mohamud Mohamed is a non-filler of returns both for income tax and VAT but that records in the system reflect

that he filled returns in 2019 and paid a penalty of Kshs 12,000.00. They also did not deny that the 2nd Respondent, Mohamed Ismail, filed nil returns for both income tax and VAT and that this is granted by law as he did not do business transactions neither did he receive direct proceeds of payment from suppliers.

9. The Respondents averred that they had never been inducted or trained by the Commissioner's staff on tax issues especially income tax and VAT and this had contributed to ignorance of the law and illiteracy which was their current status of schooling. That while Covid-19 was an implication on every Kenyan tax payer, they were also affected by fire destroying the building due to post election violence and hence their shop continued to diminish until it reached a level where business closed down due to lack of cap*ITA*l and excessive debts owed to suppliers. They stated that some of the suppliers were intending to take legal action against them for not honoring payment due on demand for a long period of time. They contended that they had earlier presented a bill of quantities and a police abstract to verify to the Commissioner that they incurred huge expenses due to the fire incident but that the Commissioner decided not to accept the liability due to lack of evidence and since they had all the receipts, they had decided to provide evidence to the Commissioner and they urged that the building owner was not ready to accept liability and they had to bear the cost of reconstruction of the building and bearing in mind there was no salvage value as the building was condemned as inhab*ITA*ble for living.

10. The Respondents averred that while they treated the Commissioner's letter of December 17, 2020 as a formal notice of assessment under section 31 of the *TPA*, they urged the Commissioner to note that they were making efforts to persuade suppliers on request to give them receipts (invoices) or statements and that all purchases were treated without payment of VAT and payment was done to every transaction. The Respondents reiterated that the deposits treated as sales were the creditors to whom goods were supplied on credit and they strongly disagreed that the computation was on assumption of the credits as profit of sales and payment of debts as purchases.

11. The Respondents averred that it was difficult to fast track some of the suppliers as they were un-cooperative to give them invoices and that the Commissioner was not to treat this as laxity on the Respondents' side as they had no authority to reinforce law but they were law abiding citizens. They thus requested the Commissioner to acknowledge the invoices forwarded to Mugwanga associates and give them more time to continue persuading those who refuse to cooperate and give them the requirement needed.

12. Further to this letter, the Respondents, through their representative objected to the assessments by an email dated January 16, 2021. On VAT, they stated that they were still looking for more information to establish the correct proportions as most of the products sold were exempt from VAT. On income tax, they faulted the Commissioner's basis for computing the income tax payable for the period arguing that it was practically not possible to buy goods at Kshs 614,943,399.00 and sell the same at Kshs 2,510,595,610.00 as this amounts to gross profit rates of 76% and a markup of 308%. Thus, the Respondents stated that the Commissioner's computation was exaggerated and beyond any economies or accounting reasoning. On PAYE, they averred that it was not correct to charge tax on profits on a sole proprietor and then charge them PAYE on the drawings because the business and the owner are one and the same. The Respondents stated that they did not get details of how the Commissioner arrived at the drawings figures as the cash withdrawals as explained were used for purpose of business expenses.

13. The Respondents averred that the additional tax demanded was estimated and excessive and could not be recovered as they did not have such cash or assets. They reiterated that they are old and illiterate and that most of the necessary business records were either not maintained or have been lost or destroyed and it was only reasonable to approach the matter on this understanding as not doing so will result to the business closure.

14. On February 3, 2021, the Commissioner informed the Respondents that under section 51(3)(a) of the *TPA*, their response does not state precisely the grounds of objection, the amendments required to be made to correct the decision and the reasons for the amendment. That to enable the Commissioner objectively given a decision on the matter, the Respondents were requested to provide computations and their supporting documents by February 17, 2021. The Respondents provided further information through the letter dated February 11, 2021 and after considering it with the objections contained in the letter of December 31, 2020 and the email of January 16, 2021, the Commissioner made its objection decision on April 7, 2021 ("the Objection Decision").

15. The Commissioner stated that the additional information did not change in any material fact the taxes assessed and further, that the objection and subsequent correspondences did not meet the requirements for a valid objection under section 51 of the *TPA*. In view of this and lack of any alternative tax computation, the Commissioner stated that it was left with no option but to confirm the tax assessments as previously issued.

16. The Respondents lodged an appeal against the Objection Decision with the Tax Appeals Tribunal ("the Tribunal") on May 5, 2021. The Tribunal rendered a decision on January 28, 2022. In the judgment, the Tribunal determined inter alia, whether the Commissioner erred in issuing the additional assessments in respect of income tax, PAYE and VAT.

17. On income tax, the Tribunal stated that the shop was operated by the Respondents as a "general partnership" as construed from their supplementary list of documents and that the income of a partnership is chargeable to tax under section 3 of the *ITA* and as expounded under section 4 but that from the Commissioner's computations, the same was not based on aforementioned provisions and the graduated tax rates specified in the Third Schedule of the *ITA*. Thus the Tribunal found that the Commissioner erred in its assessment of the Respondents' income tax.

18. On PAYE, the Tribunal considered two questions; whether the Respondents were employees of Barwaqo Shop and whether the drawings were business emoluments and to these, it answered in the negative. The Tribunal noted that drawings from a partnership were an appropriation, not a charge, in the financial statements of the partnership and in essence, the withdrawals by the Respondents could not be assumed to constitute emoluments as defined under the *ITA*. The Tribunal took note of the fact that the partners were not employees of the partnership and that PAYE therefore does not apply under the circumstances and that in effect, the Commissioner still had the opportunity to tax the partners at a personal income level. As such, the Tribunal held that the Commissioner erred in issuing the additional PAYE assessment.

19. On the VAT assessment, the Tribunal noted that the shop dealt with vatable and non-vatable supplies but that the partnership was not registered for VAT either voluntarily or by the Commissioner during the subject period. The Tribunal relied on its decision in TAT No. 441 of 2019; *Miao Yi v Commissioner of Investigations & Enforcement* to hold that since there was no voluntary registration or registration by the Commissioner, then Commissioner could not bring to charge the Respondents' supplies. Thus, the Tribunal held that the Commissioner erred in raising an additional assessment on the Respondents in respect of VAT.

20. For the above reasons, the Tribunal allowed the Respondents' appeal and set aside the Objection Decision. The Commissioner appeals against this decision on the grounds set out in the Memorandum of Appeal dated March 28, 2022. The Respondent responded to the appeal through its Statement of Facts dated November 10, 2022. The parties have also filed written submissions which basically reiterate the arguments I have summarized above. I will not rehash them but make relevant references in my analysis and determination below.

Analysis and Determination

21. In determining this appeal, the court is guided by section 56(2) of the *TPA* which provides that

> "An appeal to the High Court or to the Court of Appeal shall be on a question of law only".

This means that this court ought pay due fealty to the findings of fact by the Tribunal and intervene only if it satisfied that it Tribunal made an error of law or that the conclusion reached cannot be reasonably supported by the facts (see *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR).

22. The Commissioner raises 11 grounds in its Memorandum of Appeal which it has condensed to the following issues for determination in its submissions:

i. Whether the Tribunal erred in law and fact in shifting the burden of proof that a tax decision is incorrect from the Respondents to the Appellant contrary to Section 56 (1) of the *Tax Procedures Act* and Section 43 of the *Value Added Tax Act*;

ii. Whether the Tribunal erred in law and fact by failing to recognize that the Appellant can issue default assessment or an amended assessment based on the information available to it under Sections 29(1) and 31 of the *Tax Procedures Act*.

iii. Whether the Tribunal erred in law and fact by excusing the Respondents non-compliance with the mandatory provisions of Section 43 of the *VAT Act* and Section 23 of the *Tax Procedures Act* which require that proper records be kept for every transaction undertaken;

iv. Whether the Tribunal erred in law and fact by finding that the Appellant is to blame for the Respondents business failure to register for VAT obligations contrary to the provisions of Section 34(1) as read with Section 37(1)(a) of the *VAT Act*;

v. Whether the Tribunal erred in fact and law by finding that the Appellant employed a corporate tax rate in issuing the assessments to the Respondents whereas income tax was computed at the individual Respondent's graduated tax rates;

vi. Whether the Tribunal erred in fact and law by finding that a single business permit procured by the Respondents consisted a general partnership without wholly considering the factors that determine the existence of a partnership or otherwise;

vii. Whether the Honourable Tribunal erred in fact and law by finding that no VAT liability attaches to the Appellants despite the 2nd Appellant having registered for VAT obligations, which finding is contrary to Section 7 &8 of the Partnership Act;

viii. Whether the Tribunal erred in fact by faulting the assessments made by the Appellant using the now established method of bank deposit analysis;

ix. Whether the Tribunal erred in fact and law in setting aside the PAYE assessments without any evidence and/or legal basis;

x. Whether the Tribunal erred in fact and law in misapplying the principle of allowable and disallowable expenses under the *Income Tax Act*.

23. Rather than dealing with the aforementioned issues individually, I propose to collectively deal with them by determining whether the Tribunal erred in finding that the Commissioner erred in raising the additional assessments.

24. The parties do not dispute that in tax matters, the taxpayer bears the burden of proving that a tax decision is incorrect or excessive. This position is in line with section 30 of the *Tax Appeals Tribunal Act, 2013* and section 56(1) of the *TPA* which provide as follows:

> 30. Burden of proof
> In a proceeding before the Tribunal, the appellant has the burden of proving—
>
> a. where an appeal relates to an assessment, that the assessment is excessive; or
>
> b. in any other case, that the tax decision should not have been made or should have been made differently.
>
> 56. General provisions relating to objections and appeals
>
> (1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

25. In *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment), the court expounded on this principle by stating as follows:

> 48. The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold.
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> 49. A presumption of correctness arises from the Commissioner's determination/ assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.

26. The onus of proof may shift based on the stage of the proceedings and the actions taken by the parties. In *Commissioner of Investigations and Enforcement v Pearl Industries Limited* (Tax Appeal E086 of 2020) [2022] KEHC 51 (KLR) (Commercial and Tax) (31 January 2022) (Judgment) and *Commissioner of Domestic Taxes v Trical and Hard Limited* (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR) (Commercial and Tax) (8 July 2022) (Judgment) the court described it like a pendulum swinging between the taxpayer and taxman at different points but more times than not swinging towards the taxpayer. This "pendulum of proof" swings at least twice and at most thrice; the first is when the Commissioner asserts its position and the tax payer is expected to disprove this position. Once the taxpayer states its position, the pendulum swings to the Commissioner who then reviews the position taken by the taxpayer. If it is determined that the position taken by the taxpayer is devoid of evidence or that the evidence is insufficient, incompetent and irrelevant, then the pendulum swings back to the taxpayer to prove that the Commissioner was wrong in its position and overall findings.

27. I therefore agree with the Commissioner's submission that in discharging this burden, the Respondents were required to provide such evidence as is required by law to prove that the assessments as issued by the Commissioner were incorrect or excessive. This is because the law requires the taxpayer to maintain records which it may be called upon by the Commissioner to produced. Section 43 of the *VAT Act, 2013* provides as follows:

> 43. Keeping of records
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> (1) A person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein.
>
> (2) The records to be kept under subsection (1) shall include—
>
> (a) copies of all tax invoices and simplified tax invoices issued in serial number order;
>
> (b) copies of all credit and debit notes issued, in chronological order;
>
> (c) purchase invoices, copies of customs entries, receipts for the payment of customs duty or tax, and credit and debit notes received, to be filed chronologically either by date of receipt or under each supplier's name;
>
> (d) details of the amounts of tax charged on each supply made or received and in relation to all services to which section 10 applies, sufficient written evidence to identify the supplier and the recipient, and to show the nature and quantity of services supplied, the time of supply, the place of supply, the consideration for the supply, and the extent to which the supply has been used by the recipient for a particular purpose;
>
> (e) tax account showing the totals of the output tax and the input tax in each period and a net total of the tax payable or the excess tax carried forward, as the case may be, at the end of each period;
>
> (f) copies of stock records kept periodically as the Commissioner may determine;

(g) details of each supply of goods and services from the business premises, unless such details are available at the time of supply on invoices issued at, or before, that time; and

(h) such other accounts or records as may be specified, in writing, by the Commissioner.

(3) Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorised officer for inspection and shall give the officer every facility necessary to inspect the records.

(4) For the purposes of this section, the Commissioner may, in accordance with the regulations, require any person to use an electronic tax register, of such type and description as may be prescribed, for the purpose of accessing information regarding any matter or transaction which may affect the tax liability of the person.

(5) A person who contravenes any of the provisions of this section commits an offence.

28. Section 59 (1) of the *TPA* also provides that a tax payer shall produce records when required to do so by the Commissioner as follows:

59. Production of records

(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—

(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;

(b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or

(c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.

29. In addition to the above, section 54A of the *ITA* requires a person carrying on a business to keep records adequate for the purpose of computing tax.

30. As I have highlighted in the introductory part, the Respondents, in their responses to the Commissioner and even in the appeal before the Tribunal admitted that they did not maintain or have in their possession complete and adequate records of their business. I note that in its decision, the Tribunal either ignored or overlooked this very critical aspect of the Respondents' case and went on to determine that the Commissioner erred in not finding that the Respondents were in a partnership

hence they ought to have taxed them as such. Partnership or not, every taxpayer has a duty and obligation to keep records as has been stated above and further augmented by section 23(1)(B) of the *TPA* which also imposes a duty on the taxpayer to keep records required under any law so as to enable their tax liability to be readily ascertained. In *Commissioner Investigations and Enforcement v Kidero* (Income Tax Appeal E028 of 2020) [2022] KEHC 52 (KLR) (Commercial and Tax) (4 February 2022) (Judgment) the court held as follows:

> 27. The duty imposed on the taxpayer to keep records and the provisions on the burden of proof all go to support the Kenyan tax collection regime which is centered on a system of self- assessment. This system relies on the taxpayer making full and good faith disclosures in their tax declaration and affairs and hence empower the Commissioner to demand documents from time to time when investigating the affairs of a taxpayer. Whether the taxpayer has provided sufficient evidence to meet the threshold of proof required to discharge its burden must of course depend on the nature of the subject or transaction and the circumstances of the case bearing in mind the aforesaid duty placed on the taxpayer to keep records.

31. The Respondents, having been requested for records and documents by the Commissioner and having failed to produce the same meant that they did not discharge the burden of proof placed on them and thus they failed to prove that the Commissioner was wrong in its decision or that its assessments were excessive. The Commissioner could not thus be faulted for coming to the conclusion that the deposits in the Respondents' bank accounts were income and that together with the unsupported expenses, the same was chargeable to tax, that is income tax, PAYE and VAT.

32. Whereas the Respondents found it impossible as per the Commissioner's computation that their business could have a gross profit rate of 76% and a mark-up of 308%, it was also equally baffling that they neither had supporting documents nor maintained records for a business that was having a turnover of averagely Kshs 300 million every year. Without supporting evidence, the Commissioner could not be expected to presume the Respondents' expenses and lower their chargeable income (See *Leah Njeri Njiru v Commissioner of Investigations and Enforcement Kenya Revenue Authority & another* ML Tax Appeal No. E002 of 2020 [2021] eKLR).

33. In this case, the Respondents received substantial cash deposits in their Bank account. They did not dispute the fact that the amounts were from their business and when called upon to provide responses to the Commissioners queries, they failed to produce documents which by statute they were required to maintain. In the circumstances, the Commissioner was entitled to resort to its best judgment to come up with the Respondents' tax liability. In *Bemarc Limited v Commissioner of Domestic Taxes* ML COMM *ITA* No. E136 of 2020 (UR) the court stated as follows regarding best judgment:

> (29) Once the Appellant failed to provide the required documents, the Commissioner was entitled to use its best judgment to come up with the Appellant's tax liability on the basis of all the available documents from other sources available to the Commissioner. This is provided for under section 29 of the *TPA* which provides that the Commissioner may make a default assessment based on such information as may be available and to be in the best of his or her judgment. Counsel for the Commissioner referred the court to Van Boeckel v Customs and Excise Commissioners [1981] STC 290 where

Woolf J., considered the meaning and application of 'best judgment', he stated as follows:

> [T]he very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them ...
>
> Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.
>
> Thirdly, it should be recognised, particularly bearing in mind the primary obligation of the taxpayer, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain the information without carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them. [Emphasis mine]

34. The Commissioner used its best judgment in the circumstances and it has not been demonstrated that the process was arbitrary or unreasonable. It is for these reasons that I find that the Tribunal totally misapprehended the facts and evidence before it and came to a conclusion that was unsupported. It failed to acknowledge that the Respondents did not have sufficient and relevant documents to ascertain their tax liability and thus failed to disprove the Commissioner's assessments. I also agree with the Commissioner that the conclusion that the Respondents were in a partnership was never argued by the Respondents from the outset. Under section 51(3) of the *TPA* an appeal in relation to an appealable decision is restricted to the grounds on which the objection was made therefore the Tribunal could only deal with issues and grounds that were raised by the Respondents in their objection and dealt with by the Commissioner in the Objection Decision (see *Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes* ML Tax Appeal No. 3 of 2020 [2020] eKLR)

35. I hold that it was erroneous for the Tribunal to lay blame on the Commissioner for not registering the Respondents for VAT when the Respondents themselves did not register for VAT as required by law. The responsibility of the registration cannot be imposed on the Commissioner particularly where the Respondents admitted that they dealt in vatable supplies in which case they had a positive obligation to register for VAT and remit the same to the Commissioner. In *Commissioner of Investigations and Enforcement v Mwangi* (Tax Appeal E059 of 2020) [2022] KEHC 3176 (KLR) (Commercial and Tax) (13 May 2021) (Judgment) it was held that it is only the taxpayer who knows his business position as he is the person making taxable supplies hence the obligation to register is imposed on him.

36. Once it became apparent from the investigation and audit that the Respondents were charging VAT without declaring the same, the Commissioner was entitled to demand payment of VAT which the taxpayer had been collecting from the public. I therefore reject that the Tribunal's holding that non-registration means that no VAT is due. It was as the stage of investigation and audit that the Commissioner would exercise the power to register a taxpayer.

37. On PAYE, I agree with the Tribunal that under section 3(2)(a)(ii) and section 5(1) of the *ITA*, PAYE can only be charged on the income of individuals in gainful employment and that it is only the employer in an employer-employee relationship that has the statutory obligation to deduct and remit PAYE in accordance with the *ITA* (see *China Road & Bridge Corporation v Commissioner of Domestic Taxes* ML HC *ITA* No. E003 of 2020 [2021] eKLR).The Respondent correctly points out that section 8(2) of the *Partnerships Act*, 2012 states that, "A partnership shall not employ a partner as an employee of the firm" hence the Respondents were not employees of the business and as such, PAYE could not be charged on them. Thus any drawing made by the partners could only be considered as part of their income and not subject to PAYE. This assessment is thus set aside.

Conclusion and Disposition

38. In conclusion, I hold that save for the issue of PAYE, the Tribunal erred in its interpretation and application of the law and facts and arrived at the wrong decision in this matter. It misapprehended the evidence and facts on record and arrived at a decision that was perverse and warrants the intervention of this court.

39. The appeal is allowed only to the extent that the assessment in respect of PAYE is set aside. Save for this aspect, the Commissioner's Objection Decision dated February 3, 2021 is upheld.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango.

Ms Ng'anga instructed by Kenya Revenue Authority for the appellant.

Mr Hassan instructed by HMS Advocates LLP for the respondent.