



**Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020) [2021] KEHC 25 (KLR) (Commercial and Tax) (23 August 2021) (Judgment)**

*Equity Group Holdings Limited v Commissioner of Domestic Taxes [2021] eKLR*

Neutral citation: [2021] KEHC 25 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E069 & E025 OF 2020**

**JM MATIVO, J  
AUGUST 23, 2021**

**BETWEEN**

**EQUITY GROUP HOLDINGS LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*((Appeals against the judgement of the Tax Appeals Tribunal in TAT No. 27 of 2017, Equity Group Limited v Commissioner of domestic Taxes dated 26th February 2020).)*

**The duty of the courts to administer justice without undue regard to procedural technicalities also applies when interpreting substantive provisions of the law.**

Reported by Ribia John

**Banking Law** – transfer of assets and liabilities – role of the Registrar of Companies and the Registrar of Titles – duty to endorse change of records - whether the Registrar of Companies/Registrar of Titles role in amalgamations and transfer of assets and liabilities was limited to carrying out an endorsement of change of record and was not an indicator of when the transfer took place - Banking Act, (Cap 488), section 9(8).

**Law of Taxation** – objection to a tax decision (tax assessment)– decision on an objection by a taxpayer against a tax assessment and demand for taxes– where a decision on an objection by a taxpayer was issued later than the statutory period of sixty days – where the Tax Appeals Tribunal allowed such a decision despite the delay - whether the Tax Appeals Tribunal had the discretion to extend the time for the Commissioner of Domestic Taxes to issue a decision on an objection by a taxpayer – whether an objection by a taxpayer stood allowed as a matter of law the moment the Commissioner of Domestic Taxes failed to render his decision within the statutory period of 60 days - Tax Procedures Act, Act No. 29 of 2015, section 51(11).

**Statutes** – interpretation of statutes –rules applicable in the interpretation of statutes – substantive law vis-à-vis procedural law - what was the difference between procedural and substantive law – whether the duty of the courts



*to administer justice without undue regard to procedural technicalities also applied to courts when interpreting substantive provisions of law - whether section 51(11) of the Tax Procedures Act whose effect was that an objection to a tax decision would be deemed successful where the Commissioner of Domestic Taxes failed to render a decision on the objection within 60 days, was a procedural technicality that the court could fail to pay regard to in favour of doing substantive justice - Constitution of Kenya, 2010, article 159(2)(d); Tax Procedures Act, Act No. 29 of 2015, section 51(11).*

### **Brief facts**

On January 2013, the Banking Act was amended to recognize non-operating holding companies and banking groups. Pursuant to the said amendments, particularly sections 9 and 13 of the said Act, Equity Bank Limited, the appellant in the 1<sup>st</sup> appeal opted to set up a non-operating holding company. After completion of the restructuring exercise, the Commissioner of Domestic Taxes conducted a review of the appellant's business re-organization transaction falling within the period 2014 — 2015 and determined that Capital Gains Tax (CGT) arose from the transaction. It subsequently issued a tax demand to the appellant for payment of CGT relating to the transfer of net banking assets from EBL to EBKL amounting to Kshs. 330,858,696/= inclusive of penalties and interest. A meeting held on November 2, 2016 between the parties failed to resolve the matter. On November 9, 2016, the appellant filed a notice of objection with the respondent objecting to the entire assessment of Kshs. 330,858,696. The respondent reviewed the objection and adjusted the tax demand to Kshs. 820,406,196 which was confirmed *vide* the respondent's letter dated January 9, 2017 being the objection decision. Aggrieved by the objection decision, the appellant appealed to the Tax Appeals Tribunal (TAT) on grounds that the objection decision was invalid. The respondent urged the TAT to find that the respondent's objection decision in January 9, 2017 met the provisions of Section 51 of the Tax Procedures Act (TPA). The TAT allowed the appeal and set aside the respondent's Capital Gains Tax Assessment amounting to Kshs. 820,406,196 inclusive of penalties and interests.

Aggrieved, the appellant in the 1<sup>st</sup> appeal, Equity Holdings Group, sought for the decision of the TAT to be set aside on grounds that the TAT erred in law by admitting the respondent's objection decision even though the decision on the tax objection was issued outside the statutory period of 6 months; that the decision of the TAT was wrong in law and a misinterpretation of section 51 of the Tax Procedures Act (TPA). Also aggrieved, the appellant in the 2<sup>nd</sup> appeal, Commissioner of Domestic Taxes, sought for the decision of the TAT to be set aside on grounds that the TAT erred in law and misdirected itself in finding that the Registrar's role, under Section 9 (8) of the Banking Act was simply limited to carry out endorsement thus failing to establish when a transfer took place and in finding that there was no gain accrued on the transfer of property whereas the formula provided by the respondent to the appellant showed a gain of Kshs. 34,590,905,615. They sought for the Capital Gains Tax assessment of Kshs.820,406,196 by the Commissioner of Domestic Taxes be upheld.

### **Issues**

- i. When did the need for interpretation of statute arise?
- ii. What rules were applicable in interpreting a taxing statute?
- iii. What was the difference between procedural and substantive law?
- iv. Whether the duty of the courts to administer justice without undue regard to procedural technicalities also applied to courts when interpreting substantive provisions of law.
- v. Whether the Registrar of Companies/Registrar of Titles role in amalgamations and transfer of assets and liabilities was limited to carrying out an endorsement of change of record and was not an indicator of when the transfer took place.
- vi. Whether the Tax Appeals Tribunal had the discretion to extend the time for the Commissioner of Domestic Taxes to issue a decision on an objection by a taxpayer against a taxing decision.
- vii. Whether an objection by a taxpayer against a taxing decision stood allowed as a matter of law the moment the Commissioner of Domestic Taxes failed to render his decision within the statutory period of 60 days.



## Relevant provisions of the Law

### Tax Procedures Act, Act No. 29 of 2015

#### Section 51 - Objection to tax decision

(11) *The Commissioner shall make the objection decision within sixty days from the date of receipt of—*

(a) *the notice of objection; or*

(b) *any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.*

#### Held

1. The need for interpretation only arose when the words used in the statute were on their own terms ambivalent and did not manifest the intention of legislature. Similarly, rules of interpretation came into play only if there was doubt with regard to the express language used. The overriding purpose of the construction of any statutory provision was to ascertain the intention of the legislature and the primary role was to determine the same by reference to the language used.
2. The dominant purpose in construing a statute was to ascertain the intention of the legislature as expressed in the statute, by considering it as a whole and in its context so that the intention, and therefore, the meaning of the statute, was primarily to be sought in the words used in the statute itself, which had to, if they were plain and unambiguous be applied as they stood. The object of all interpretations was to discover the intention of Parliament, but the intention of Parliament had to be deduced from the language used.
3. A statute was an edict of the Legislature and the conventional way of interpreting or construing a statute was to seek the intention of its maker. A statute was to be construed according to the intent of them that made it and the duty of judicature was to act upon the true intention of the legislature. If a statutory provision was open to more than one interpretation the court had to choose the interpretation which represented the true intention of the legislature, the legal meaning of the statutory provision. The intention of the legislature assimilated two aspects: -
  - a. in one aspect it carried the concept of meaning, being, what the words meant.
  - b. in another aspect, it conveyed the concept of purpose and object or the reason and spirit pervading through the statute.
4. The intention of Parliament could not prevail if the language of the statute did not support that view. The object of the statute had to be gathered from language and not on what one believed or thought.
5. The art of correct interpretation would depend on the ability to read what was stated in plain language, read between the lines, read through the provision, examining the intent of the legislature and called upon case laws and other aids to interpretation. However, rules of interpretation were applied only to resolve the ambiguities. The object and purpose of interpretation was to ascertain the intention of the law, as evinced in the statute. The key to the opening of every law was the reason and spirit of law. To be literal in meaning was to see the body and miss the soul. The judicial key to interpretation was the composite perception of the body and the soul of the provision.
6. Wherever it was possible to do so, the provision in question had to be harmoniously construed by avoiding a conflict. A construction which reduced the statute to futility had to be avoided. A statute or any enabling provision therein had to be so construed as to make it effective and operative. A liberal construction should be put upon written instruments, so as to uphold them, if possible and carry into effect the intention of the statute. The provisions of two enactments had to be read harmoniously so as not to subject them to any strained construction giving rise to an artificial inconsistency or repugnance. Every clause of a statute should be construed with reference to the context and other clauses of the statute so as, as far as possible, to make a consistent enactment of the whole statute.
7. Parliament in its wisdom deployed the word “shall” twice in section 51(11) of the Tax Procedures Act. The classification of statutes as mandatory and directory was useful in analyzing and solving the



- problem of the effect to be given to their directions. There was a distinction between a case where the directions of the Legislature were imperative and a case where they were directory. The real question in all such cases was whether, a thing, had been ordered by the Legislature to be done, and what the consequence was, if it was not done. The general rule was that an absolute enactment had to be obeyed, or, fulfilled substantially. Some rules were vital and went to the root of the matter, they could not be broken; others were only directory and a breach could be overlooked provided there was substantial compliance.
8. It was the duty of courts of justice to try to get to the real intention in legislation by carefully attending to the whole scope of the statute. The question as to whether a statute was mandatory or directory depended upon the intent of the legislature and not upon the language in which the intent was clothed. The meaning and intention of the Legislature had to govern, and that was to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.
  9. The word shall when used in a statutory provision imported a form of command or mandate. It was not permissive, it was mandatory. The word shall in its ordinary meaning was a word of command which was normally given a compulsory meaning as it was intended to denote obligation. Shall was used to express a command or exhortation or what was legally mandatory.
  10. Section 51(11) of the Tax Procedures Act (TPA) was couched in mandatory terms. In a taxing statute one had to look merely at what was clearly said. There was no room for any intendment. There was no equity about a tax. There was no presumption as to a tax. Nothing was to be read in, nothing was to be implied. One could only look fairly at the language used. Where, however, the provisions were couched in language which was not free from ambiguity and admitted two interpretations, a view which was favourable to the subject should be adopted. The fact that such an interpretation was also in consonance with ordinary notions of equity and fairness would further fortify the court in adopting such a course.
  11. In construing fiscal statutes and in determining the liability of a subject to tax one had to have regard to the strict letter of the law. If the revenue satisfied the court that the case fell strictly within the provisions of the law, the subject could be taxed. If, on the other hand, the case was not covered within the four corners of the provisions of the taxing statute, no tax could be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter.
  12. The TAT rightly computed time and pronounced that the objection decision was rendered out of time. The objection decision was deemed to have been allowed. If the Commissioner did not render a decision within the stipulated period, the objection was deemed as allowed by operation of the law. The statute required that where the Commissioner had not made an objection decision within 60 days from the date the taxpayer lodged the notice of objection, the objection was to be allowed. That meant that the issues that the taxpayer had raised in the notice of objection would be accepted. In case of a tax assessment, it would be vacated.
  13. Section 51 (11) of the TPA was couched in peremptory terms. The decision was made after the expiry of 60 days, the TAT had no legal basis to proceed as it did and to invoke article 159(2) (d). There was no decision at all. The decision had ceased to exist by operation of the law. The provisions of section 51 (11) (b) had kicked in. The objection had by dint of the said provision been deemed as allowed. The TAT had no discretion to either extend time or to entertain the matter further. Discretion followed the law and a tribunal could not purport to exercise discretion in clear breach of the law.
  14. The TAT premised its decision on the provisions of article 159 (2) (d) of the Constitution which required courts to determine matters without undue regard to technicalities of procedure. On the face of a clear statutory dictate, the TAT could not term the express statutory edict as a matter of procedural technicality. That was a gross misapprehension of the law. Article 159 (2) (d) of the Constitution



- was not meant to oust express statutory provisions and to open a window for disregard of statutory requirements.
15. The TAT fell into grave error when it failed to appreciate the difference between procedural law and substantive law. Procedural law also called adjective law was the law governing the machinery of the courts and the methods by which rights were enforced. Procedural law prescribed the means of enforcing rights or providing redress of wrongs. It comprised rules about jurisdiction, pleadings, and practice, evidence, appeal, execution of judgments, representation in court, costs, and other matters. Procedural law was commonly contrasted with substantive law, which constituted the great body of law and defined and regulated legal rights and duties. Thus, whereas substantive law would describe how two people could enter into a contract, procedural law would explain how someone alleging a breach of contract could seek the courts' help in enforcing the agreement.
  16. Substantive law was a statutory law that dealt with the legal relationship between people or the people and the State. Therefore, substantive law defined the rights and duties of the people, but procedural law lay down the rules with the help of which they were enforced. The TAT manifestly erred in law by confusing substantive law with procedural law. Article 159(2) (d) of the Constitution talked about procedural technicalities. A statutory edict was not a procedural technicality. It was a law which had to be complied with. Parliament in its wisdom expressly and in mandatory terms provided the consequences of failing to render a decision within 60 days. The objection was deemed to be allowed. The appellant's objection stood allowed as a matter of law the moment the Commissioner of Domestic Taxes failed to render his decision within 60 days.

*1st appeal allowed; 2nd appeal dismissed.*

#### **Orders**

- i. *1st appeal (HCC ITA No. 069 of 2020) was allowed with costs to the appellant.*
- ii. *Tax Appeals Tribunal decision dated February 26, 2020 was set aside in its entirety.*
- iii. *The respondent's objection dated January 9, 2017 was set aside.*
- iv. *The appellant's notice of objection dated November 9, 2016 was allowed in accordance with section 51(11) (b) of the Tax Procedures Act.*
- v. *2nd appeal (HCC ITA No. 025 of 2020) was dismissed with no order as to costs.*

#### **Citations**

##### **Cases**

1. Anacleto Kalia Musau (suing on behalf of the estate of Vincent Mangalo Kalia (Deceased) v Attorney General & 2 others
2. Anacleto Kalia Musau (suing on behalf of the estate of Vincent Mangalo Kalia (deceased) v Attorney General & 2 others
3. APA Insurance Company v Vincent Nthuka
4. Attorney General v Torino Enterprises Limited
5. Dakianga Distributors (K) Ltd v Kenya Seed Company Limited
6. David Njenga Ngugi v Attorney General
7. Independent Electoral and Boundaries Commission & Anor. v Stephen Mutinda Mule & others
8. Kaaya L. Enterprises Ltd v Commissioner of Customs and Excise & 3 Other, Attorney General v Torino Enterprises Limited
9. Kenya Ports Authority v Kenya Power & Lighting Co. Ltd
10. Kenya Ports Authority v Kenya Power & Lighting Co. Ltd
11. Louis Dreyfus Company (K) Ltd v Kenya Revenue Authority
12. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others
13. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others
14. Republic v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited
15. R v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited



16. State of Punjab and Another v Shamlal Murari & Anr
17. Utalii Transport Company Limited 3 others v Nic Bank Limited another
18. Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another
19. Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another
20. D v. Sileshkumar R. Mehta (1990) 181 ITR 10

#### **Statutes**

1. Banking Act — section 9 — Interpreted
2. Constitution of Kenya — article 159, 47, 159(2)(b), 159 (2) (d)
3. Income Tax Act — section 13(1) — Interpreted
4. Tax Procedures Act; — section 51 — Interpreted

#### **Advocates**

None mentioned

## **JUDGMENT**

1. This judgment determines two consolidated appeals, namely; ITA No. 069 of 2020 (herein after referred to as the 1<sup>st</sup> appeal) and ITA No. E025 of 2020 (herein after referred to as the 2<sup>nd</sup> appeal). The common thread between the two appeals is that they both challenge the same decision rendered by the Tax Appeals Tribunal (the TAT) in ITA No. 27 of 2017. Specifically, the both appeals seek to set aside the same decision but for different reasons. The appellant in the 1<sup>st</sup> appeal was the appellant before the TAT. The respondent before the TAT is the appellant in the 2<sup>nd</sup> appeal. The two appeals were consolidated on May 6, 2021 and the court ordered that the records remain in ITA No. 069 of 2020.
2. In order to fully appreciate the diametrically opposed arguments presented by the parties in support of their respective appeals and also in opposition to other party's appeal, it is necessary to highlight, albeit briefly, the factual background which triggered the appeal before the TAT, the party's arguments before the TAT and the TAT's decision. In this regard, a reading of the pleadings before the TAT and also in the two appeals now before me leave no doubt that the factual matrix is essentially common ground or uncontroverted. However, there are key areas of contestation as shall be evident shortly.
3. For starters, in January 2013, the Banking Act[1] was amended to recognize non-operating holding companies and banking groups. Pursuant to the said amendments, particularly sections 9 and 13 of the said Act, Equity Bank Limited, the appellant in the 1<sup>st</sup> Appeal opted to set up a non-operating holding company.
4. Equity Bank Limited, as it then was, wrote to the Central Bank of Kenya, the Capital Markets Authority, and the Competition Authority of Kenya seeking approvals on its proposal(s) to undertake internal restructuring with a view to creating a non-operating holding company. This involved incorporating a wholly-owned subsidiary company and transferring its Kenyan banking business and certain assets and liabilities to the Subsidiary pursuant to Section 9 of the Banking Act. In this regard, Equity Bank Limited wrote to the above authorities on November 14, 2014, October 8, 2014 and



November 14, 2014 respectively and on November 24, 2014, it held a shareholder's meeting which resolved: -

- a) Equity Bank (Kenya) Limited ("EBKL"), be incorporated as a wholly-owned subsidiary of Equity Bank Limited and that the EBL be authorized to acquire additional 29,999,900 shares in the share capital of EBKL.
- b) Equity Bank Limited be authorized to transfer the banking business, assets and liabilities (excluding the excluded assets and liabilities) to EBKL subject to obtaining all required regulatory and tax approvals and/or exemptions in terms acceptable to the Directors.
- c) The Memorandum and Articles of Association of Equity Bank Limited be amended to read:
  - i "To carry on the business of a non-operating holding company as defined under the Banking Act (Cap, 488, Laws of Kenya)
  - ii "To co-ordinate the administration of and to provide advisory, administrative, management and other
  - iii services in connection with the activities of any companies which are for the time being subsidiaries of the Company'
- d) Subject to Completion of transfer of the banking business, assets and liabilities (excluding the excluded assets and liabilities) from Equity Bank Limited to EBKL, the change of name of the Company from "Equity Bank Limited" to "Equity Group Holdings Limited" be approved and confirmed to take effect from the date of Completion.

5. Equity Bank Limited and EBKL executed a Business Transfer Agreement on November 24, 2014 in which Equity Bank Limited agreed to transfer its banking business as a going concern to the EBKL pursuant to section 9 of the Banking Act in order to achieve greater operational efficiency for the Equity Bank Limited Group. The agreement defined the completion date to "mean the effective date of the transfer of the banking business as published by CBK pursuant to section 9(5) of the Banking Act. The consideration for the sale of banking business pursuant to the Agreement was the Consideration Shares which were to be issued and allotted to EBL on the completion date. The salient conditions precedent to the completion of the transfer of banking business enumerated under Schedule 2 of the Agreement are:-

- i . Approval of the CBK and the Cabinet Secretary of the National Treasury of Kenya of the transfer of the Banking Business to the Transferee (EBKL) in terms of and pursuant to section 9 of the Banking Act;
- ii. the approval of EBL as a non-operating holding company by the Central Bank of Kenya in terms of and pursuant to section 13 of the Banking Act;
- iii . the issuance of a letter of no objection by the CAK in respect of transactions contemplated under the Agreement;
- iv . approval of the transactions contemplated under the terms of the Agreement by EBL to the Transferee by the shareholders of EBL in a general meeting;



- v. approval of the transactions contemplated under the terms of the Agreement by the board of EBL;
  - vi. approval of the transactions contemplated under the terms of this Agreement by the shareholders and the board of the Transferee;
  - vii. if the Completion is to take place after December 31, 2014, an exemption granted by the Cabinet Secretary to the Treasury under the provisions of section 13(1) of the Eighth Schedule to the *Income Tax Act* (Cap 470), Laws of Kenya in relation to any payment of Capital/ Gains Tax
6. EBKL averred that the above conditions were subsequently effectuated between the months of October, 2014 and December, 2014 in the following timelines;
- a. EBL obtained approval from CMA to incorporate EBKL on October 15, 2014;
  - b. EBKL, the new subsidiary company was incorporated on November 18, 2014;
  - c. The appellants shareholders approved the Transaction on November 24, 2014;
  - d. The approval by CAK, of the transaction, was received on November 28, 2014;
  - e. The CBK approvals were as follows;
    - i the CBK issued a letter on December 29, 2014, and published a notice in the Kenya Gazette on December 30, 2014(Gazette Notice No 9292 Of 2014) confirming the issuance of a new banking licence to EBKL, which was effective from December 23, 2014;
    - ii the CBK in a letter dated December 30, 2014 approved for EBL to form a non-operating holding company; and
    - iii the CBK published a notice in the Kenya Gazette on December 30, 2014 (Gazette Notice No 9294 Of 2014) notifying the public of the Restructuring Transaction which in part stated "...the transfer and acquisition is to take effect on December 31, 2014 at 2359 hours."
7. Its common ground that after completion of the restructuring exercise, the Commissioner of Domestic Taxes conducted a review of the appellant's business re-organization transaction falling within the period 2014 — 2015 and determined that Capital Gains Tax ("CGT") arose from the transaction. It subsequently issued a tax demand to the appellant vide its letter dated October 10, 2016 for payment of CGT relating to the transfer of net banking assets from EBL to EBKL amounting to Kshs 330,858,696/= inclusive of penalties and interest. A meeting held on November 2, 2016 between the failed to resolve the matter.
8. On November 9, 2016, the appellant filed a notice of objection with the respondent objecting to the entire assessment of Kshs 330,858,696/=. The respondent reviewed the objection and adjusted the tax demand to Kshs 820,406,196/ = which was confirmed vide the respondent's letter dated January 9,



2017 being the Objection Decision. Aggrieved by the Objection decision, the appellant appealed to the TAT citing the following grounds: -

- a. That the Objection Decision is invalid because it was not made and communicated within 60 days of a valid objection having been lodged by the appellant contrary to section 51 of the [Tax Procedures Act](#);
  - b. That the effect of failing to respond to the Objection lodged by the appellant within 60 days, resulted in the Objection being allowed pursuant to section 51 of the [Tax Procedures Act](#);
  - c. That the respondent erred both in fact and in law, in failing to find that the appellant transferred the Banking Net Assets to Equity Bank (Kenya) Limited on December 31, 2014;
  - d. That the respondent erred in finding that the appellant realized a gain from the transfer of Banking Net Assets to EBKL and that the appellant is liable to pay Capital Gains Tax;
  - e. That the respondent erred by failing to appreciate the distinction between what constitutes a transfer of property under the applicable laws and administrative procedures of effecting payment for the transfer;
  - f. That the respondent failed to appreciate the distinction between post completion procedures of the reorganization transaction and the transfer of assets transaction undertaken by the appellant;
  - g. That the respondent erred by misreading and misapprehending a clause in the appellant's annual report on the basis of which it arrived at an absurd conclusion;
  - h. That the respondent erred by failing to take into account all information, documents and explanations provided by the appellant in order to appreciate the relevant considerations in determining the applicability of Capital Gains Tax to the transaction and thereby arrived at an assessment that had no basis and was otherwise ill-conceived, vexatious, unreasonable, flawed and biased; and
  - i. That the respondent erred in law by failing to fairly and objectively consider the Objection raised by the appellant and predisposed his mind to a position in favour of a finding that the appellant owed the amount demanded in the Assessment.
9. The appellant in the 1<sup>st</sup> appeal prayed that the TAT allows its appeal; that it allows its Objection and set aside/annuls the Objection Decision. It also prayed for the costs of the appeal and a prayer that the TAT to make such other orders it may deem appropriate.
10. In its response, the respondent prayed that its Objection decision be upheld on the following grounds that: -
- a. That the objection decision was communicated vide its letter dated January 9, 2017 which was delivered and date stamped at the appellant's offices and a



copy served to Ernest & Young, the tax consultant's offices on January 9, 2017, in the premises, the objection decision was not time barred.

- b. That the Transfer of Banking Net Assets did not occur on 31<sup>st</sup> December 2014 as stated by the appellant but rather took place on January 14, 2015 when the Statement of Nominal capital was duly registered at the Registrar of Companies.
  - c. That the appellant realized a gain in the sale of its banking net assets and that since the Transfer of Banking Net Assets was completed on January 14, 2015, the said gain is then subject to CGT under the provisions of section 3(2)(f) of the *Income tax Act*.
  - d. That the respondent's calculation of CGT due on the re-organization transaction was guided by the formulas contained in the Business Transfer Agreement which prescribed how to calculate the Book value of the Banking Net Assets transferred to EBKL at Completion.
  - e. That its decision was based on the facts and documentary evidence presented by the appellant during audit and the law and consequently, there was no bias in the decision.
11. The respondent urged the TAT to find that respondent's objection decision of January 9, 2017 meets the provisions of section 51 of the *Tax Procedures Act* [2] (the TPA); that the respondent's decision to charge tax amounting to Kshs 820,406,196/= inclusive of interest under Section 38 of the TPA is valid; and that the appeal be dismissed with costs.

### **The TAT's Verdict**

12. The TAT identified three issues, namely; (a) Whether the respondent's Objection Decision was made within the time prescribed by section 51(11) of the TPA;; (b) When was the transfer of Banking Net Assets from EBL to FBKL completed? (c) Whether the appellant's reorganization transaction attracted capita/ gains tax.
13. In resolving the 1<sup>st</sup> issue, the TAT noted that the Objection decision was received by the appellant three (3) days after the statutory period. It noted that the 60<sup>th</sup> day was 8<sup>th</sup> January, 2017 which fell on a Sunday, so, the respondent's Objection decision should have been issued and delivered latest Friday January 6, 2017. Further, the TAT held that "though the wording in sections 51 (11) and 77 of the TPA are framed in mandatory terms, the Tribunal invoked the provisions of article 159 of the Constitution in order not to shut out the respondent on this technical ground and admits the Objection decision. The TAT concluded that the delay was not inordinate nor had the appellant suffered prejudice. It also found that the short delay was not a serious affront of the appellant's right to fair administrative action protected by article 47 of the Constitution. (Citing *Utalii Transport Company Limited 3 others v National Industrial Credit Bank Limited another*[3]).
14. Regarding the 2<sup>nd</sup> issue, the TAT concluded: -
- "The provisions of section 9(8) of the Banking Act relied upon by the respondent, in the Tribunal's view, only serve to state that the Registrar of Companies being satisfied that the appellant has been granted the necessary approvals by the Cabinet Secretary in charge of National Treasury is obliged to carry out the endorsement of change of records in the register. The Registrar's role is simply limited to that alone, carry out the endorsement.



The Tribunal was not shown any written approval by the Cabinet Secretary if one was issued in order to determine the date of the transfer.

In further determining the date of the transfer of the Banking Net Assets, the respondent correctly pointed out that the Business Transfer Agreement dated 24<sup>th</sup> November, 2014 at Clause 2.1 provides as follows:

"Subject to the terms and conditions of this Agreement, EBL shall as of the Completion Date sell, convey, assign, transfer and deliver to the Transferee and the Transferee shall, with a view to carrying on the Banking Business as going concern, purchase, acquire and accept the right, title and interest of BBL in the Banking Business as at and with effect from the Completion Date taking the benefit of the statutory rights and subject to the statutory rights and subject to the statutory obligations under Section 9 of the Banking Act..."

By dint of this clause, the Appellant bound itself to a completion date which was subject to section 9 of the Banking Act.

After all is said and done, if the Cabinet Secretary did not issue any written approval or a statutory exemption obtained the registration effected on January 14, 2015 would be rendered null and void *ab initio*."

15. Regarding the third issue, the TAT held that "It is therefore not possible that in this transaction, where no 3<sup>rd</sup> party is involved, that an increase in Liabilities of EBKL would at the same time result in a gain in Net Worth of EBKL, this change would be reflected in shareholders' wealth, in this case the Share Premium account."
16. Consequently, the TAT allowed the appeal and set aside the Respondent's Capital Gains Tax Assessment amounting to Kshs. 820,406,196 inclusive of penalties and interests. It awarded the appellant the costs of the appeal to the appellant

### **The 1<sup>st</sup> Appeal**

17. The appellant seeks to disturb the above decision on the following grounds: -
  - a) That the TAT erred in law in wrongly construing and interpreting the provisions of section 51 (11) of the TPA and expanding the time for issuance of an objection decision by the Respondent.
  - b) That the TAT erred in law in failing to find that the appellant's notice of objection filed on November 9, 2016 was deemed to have been allowed by operation of the law by virtue of the provisions of section 51 (11) of the TPA.
  - c) That the TAT erred in law in admitting the respondent's objection decision dated January 9, 2017, despite having found that the objection decision was filed outside the mandatory statutory timelines, which was contra statute.
  - d) That the TAT wrongly interpreted the provisions of article 159 of the Constitution as vesting upon the TAT power to excuse the respondent's non-compliance with statutory timelines and classifying the said non-compliance as a technicality curable by the said provision of the Constitution.
  - e) That the decision is wrong in law and unjust in effect and therefore ought to be set aside.



18. As a consequence of the foregoing, the appellant prays that the appeal be allowed and the decision of the TAT admitting the Respondent's objection decision dated January 9, 2017 be set aside; and, that the costs of this appeal be provided for.

### **The 2<sup>nd</sup> Appeal**

19. The Commissioner of Domestic Taxes, the respondent in the 1<sup>st</sup> appeal is the appellant in the 2<sup>nd</sup> appeal. It seeks to overturn the decision citing the following grounds: -
- a) That the TAT erred in law and misdirected itself in finding that the Registrar's role, under section 9 (8) of the Banking Act, is simply limited to carry out endorsement thus failing to establish when a transfer takes place.
  - b) That the TAT erred in law and misdirected itself in finding that there was no gain accrued on the transfer of property whereas the formula provided by the respondent to appellant clearly showed a gain of Kshs. 34,590,905,615/=.
20. The Commissioner of Domestic Taxes prays that the TAT's Ruling in TAT No. 27 of 2017 be set aside, that the Capital Gains Tax assessment of Kshs. 820,406,196/= by the Commissioner of Domestic Taxes be upheld. Lastly, it prays that it be awarded the costs of the appeal.

### **Submissions on the 1<sup>st</sup> Appeal**

#### **The appellant's advocates submissions**

21. The appellant's counsel submitted that the respondent issued his Objection Decision on January 10, 2017, 2 days after the 60 days' timeline stipulated in section 51(11) of the TPA. He also argued that the respondent purported to confirm an assessment of Kshs. 820,406,196.50, more than twice double the assessment objected to. He submitted that section 51(11) of the TPA provide that where the Commissioner has not made an objection decision within 60 days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.
22. Counsel submitted that a reading the said section shows that the respondent was required to issue an objection decision 60 days from the date when the appellant lodged its objection. He argued that the effect of the failure to issue an objection decision within the stipulated timeline was that the objection filed by the appellant was allowed by operation of law. He submitted that the TAT had no discretion to extend the time. He submitted that the appellant lodged its objection on November 9, 2016 and the respondent was required to communicate its objection decision on or before Sunday, January 8, 2017, but considering that January 8, 2017 fell on a Sunday, pursuant to section 77 of the TPA, the respondent ought to have issued his objection decision on or before Friday, January 6, 2017 as provided under section 77 of the TPA.
23. Counsel submitted that the TAT in its judgment correctly found that the 60<sup>th</sup> day fell on January 8, 2017 which was Friday 6<sup>th</sup> January 2017. He submitted that the Objection decision received on 10<sup>th</sup> January was issued 3 days outside the statutory timelines. He submitted that despite so finding, the TAT wrongly admitted the objection decision, which amounted to a clear error. Counsel submitted that section 51(11) of the TPA is couched in mandatory terms. In addition, counsel submitted that the said section provides that the effect of failure to issue an objection decision within the prescribed timelines is that the objection is allowed. As a consequence, counsel submitted that there was nothing capable of being admitted by the Tribunal out of time as the Assessment/demand had already ceased to exist.



24. Additionally, counsel submitted that the effect of 51(11) of the TPA is that the objection automatically takes effect by operation of the law if no objection decision is issued within 60 days of lodging the objection. He submitted that in absence of a statutory provision in the TPA granting the TAT power to extend time, the TAT had no discretion and lacked jurisdiction to admit the respondent's objection decision out of time. He submitted that the TAT should not have purported to carry out an analysis on whether the delay was inordinate or excusable. He argued that upon finding that the objection decision was issued out of time, it ought to quash it. Further, the appellant's counsel submitted that by purporting to admit the objection decision out of time, the TAT deprived the appellant of the opportunity to appeal against the decision. He cited *Republic v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited*[4] in which the court held that if the objection decision is not made within 60 days, the objection is deemed to have been allowed. He also cited *Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another*[5] for a similar holding.
25. Counsel faulted the TAT for failing to appreciate that the timelines under section 51(11) of the TPA were mandatory and could not be waived and that the appellant's objection was allowed by operation of law. He also faulted the TAT for purporting to exercise a discretion it did not have. In addition, counsel submitted that the TAT wrongly invoked the provisions of article 159 of the Constitution. He faulted the TAT for proceeding on the erroneous basis that the failure by the respondent to issue an objection decision within the timelines prescribed in section 51(11) of the TPA was a procedural technicality which could be cured by article 159(2)(b) of the Constitution. He submitted that compliance with statutory timelines is a matter of substantive law that gave rise to a substantive legal right capable of protection and as such was not a procedural technicality. He cited *Anaclet Kalia Musau (suing on behalf of the estate of Vincent Mangalo Kalia (Deceased) v Attorney General & 2 others*[6] which held as follows: -
- “...statutory provisions limiting time within which a substantive cause of action should be brought cannot be equated to procedural technicalities envisaged under article 159 (2) (d) of the Constitution. They are not procedural lapses that do not go to the root or substance of the matter in consideration”
26. Counsel also relied on *Kenya Ports Authority v Kenya Power & Lighting Co. Ltd*[7] in which the Court defined procedural technicalities as follows: -
- “...Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”
27. Counsel submitted that the respondent's failure to issue an objection decision within the statutory timelines cannot be considered as a procedural technicality as it affected the appellant's substantive rights in relation to the respondent's tax claim which was extinguished by operation of law. He also submitted that article 159(2)(d) does not oust the obligation of litigants to comply with procedural



imperatives as they seek justice from courts of law. He relied on *APA Insurance Company v Vincent Nthuka*[8] which held: -

“...failure to apply within the time prescribed by the law cannot be ignored pursuant to the provisions of article 159 of the Constitution. It is my view article 159(2)(d) of the Constitution cannot be a panacea for all ills. It cannot be relied upon to revive a claim which is expressly extinguished by statute since the provision does not give rise to a cause of action. In my view it is not meant to destroy the law but to fulfil it. It is meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issue of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law.”

28. Counsel submitted that article 159(2)(d) could not oust the provisions of section 51(11) of the TPA which are framed in mandatory terms. He submitted that there is no remedy in law to cure an invalid objection decision, and the Tribunal ought to have so found.

### **The respondent's advocates submissions**

29. The respondent's counsel submitted that the appellant in its pleadings before the TAT averred that the Objection decision ought to have been communicated on January 9, 2017. He submitted the decision was served on January 10, 2017 since the last day was a Sunday. He argued that parties are bound by their pleadings and cited *Independent Electoral and Boundaries Commission & Ano v Stephen Mutinda Mule & others*[9] and *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited*. [10] He argued that the TAT ought to have restricted itself to the pleadings.
30. Counsel argued that the *East African Community Customs Management Act* (EACCMA), *Income Tax Act*, *Value Added Tax Act* and *Excise Duty Act* which are statutes of strict interpretation while the TPA is a Procedural Law that is amenable to a purposive interpretation. He cited *State of Punjab and Another v Shamlal Murari & Anr*[11] which held that procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. He also relied on *R v Kenya Revenue Authority ex parte M-Kopa Kenya Limited*[12] which held that the courts do not apply or enforce the words of statute or rules but their objects, purposes and spirit or core values and that the Rules remain subservient to the Constitution and statutes.
31. Counsel submitted that the mischief Section 51 (11) of the TPA sought to cure was the inordinate delay taxpayers experienced at the hands of the Commissioner before an objection decision was rendered. He argued that the Respondent never suffered prejudice. He distinguished *R v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited*[13] and *Attorney General v Torino Enterprises Limited*[14] cited by the appellant arguing that these were judicial review applications which challenged the procedural aspects of the decision-making process.
32. Regarding the TAT's reliance on article 159 of the Constitution, counsel cited *Attorney General v Torino Enterprises Limited*[15] which held that article 159 (2) (d) of the Constitution enjoins courts to administer justice without undue procedural technicalities. Lastly, counsel argued that *Aneclat Kalia Musau (suing on behalf of the estate of Vincent Mangalo Kalia (deceased) v Attorney General & 2 others*[16] and *Kenya Ports Authority v Kenya Power & Lighting Co. Ltd*[17] cited by the appellant dealt with substantive law as opposed to procedural laws which courts have been urged to apply them to further ends of justice.



### Appellant's further submissions

33. In his submissions in reply, the appellant's counsel reiterated that that the Objection decision ought to have been communicated by January 6, 2021 under section 51 (11) of the TPA. He dismissed the Respondent's submission that the TPA is a procedural statute and non-compliance can be cured by article 159 (2) (d). He urged the court to consider the effect of non-compliance and submitted that tax statutes must strictly be construed. To fortify his argument, counsel cited *Louis Dreyfus Company (K) Ltd v Kenya Revenue Authority*[18] which held that non-compliance with section 51 (11) renders the objection to be deemed as admitted.
34. Counsel distinguished the authorities cited by the respondent arguing that *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule* and *Dakianga (K) Distributors Limited v Kenya Seed Company Limited*[19] did not relate to tax matters. Regarding *State of Punjab & Anor v Shamlal Murari & Anor*, [20] counsel argued that section 51(11) is not a technicality or procedural matter but a matter of substantive law. Further, he argued that *State of Jharkhand & Others v Tata Cummins Ltd & Anor* and *Kaaya L. Enterprises Ltd v Commissioner of Customs and Excise & 3 others* are not relevant because they dealt with tax exemptions which is not the issue in dispute in this matter.
35. Lastly, counsel submitted that section 51 (11) of the TPA is couched in mandatory terms and relied on *David Njenga Ngugi v Attorney General*. [21] He distinguished *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others*[22] *Kaaya L. Enterprises Ltd v Commissioner of Customs and Excise & 3 Other, Attorney General v Torino Enterprises Limited*[23] on grounds that they dealt with totally different disputes.

### The 2<sup>nd</sup> Appeal - (ITA NO. 025 OF 2015)

#### The appellant's advocates submissions

36. Counsel for the Commissioner of Domestic Taxes (the appellant in the 2<sup>nd</sup> appeal) submitted that the TAT erred in holding that the date appearing on the written approval of the Cabinet Secretary is the date of transfer. He faulted the TAT for failing to appreciate section 9 (8) of the Banking Act which states:- "The Registrar of Companies and the Registrar of Titles, and every officer or person in charge of a deeds registry or any other relevant office, shall, if in his office or in any register under his control... make such endorsements thereon and erect such alterations in his registers as may be necessary to record the transfer of the relevant property or other right, share, stock, debenture, marketable security, letter or appointment or licence and of any rights thereunder to the resulting institutions or, as the case may be, to the receiving institution. "
37. Counsel submitted that the narrow interpretation adopted by the appellant on the provisions of section 9 (8) of the Banking Act renders it superfluous. He argued that the transfer of assets and liabilities evidences completion of the process. (Citing *Law Society of Kenya v Kenya Revenue Authority & Another*[24]). He submitted that the transfer would have to be completed upon filing of the instruments and registration of transferee as proprietor of the assets by the Registrar of Companies or Registrar of Titles. Counsel submitted that a reading of the documents shows that the whole restructuring process was not completed on December 31, 2014 as claimed by the appellant but in January 2015. He also referred to the definition of completion in the agreement between the parties which defined it as the date of transfer.
38. Regarding the CGT, counsel submitted that the Business Transfer Agreement dated November 24, 2014 provides for consideration at paragraph 3. He tabulated the formula he adopted to tabulate the



CGT and urged this court to set aside the TAT's decision and uphold the appellant's decision to charge the CGT and award the appellant costs of the appeal.

### **The respondent's advocates submissions**

39. The respondent's counsel submitted that the TAT correctly held that the Registrar's role in the transaction under section 9 (8) (b) of the Banking Act is limited to endorsement of change of records in his register and is not an indicator of the date which the transfer took place. He submitted that from the material before the court, the transfer of the Banking Net Assets was done on December 31, 2014 at 23:59 hours as announced by the industry regulator, the CBK. He argued that the respondent produced Gazette Notice No. 9294, published by the CBK which confirmed that the Cabinet Secretary had approved the transfer. Further, he submitted that there is no requirement either in the Banking Act, or any other law, that the written approval of the Cabinet Secretary must be availed when a Gazette notice has been published and that the Gazette Notice is sufficient.
40. Counsel submitted that the date the purchaser registers the transfer has no relevancy to the respondent, and that under the law, property passes when the parties to the transaction intend it to pass, hence, time for payment is not relevant. He submitted that *Law Society of Kenya v Kenya Revenue Authority*[25] cited by the appellant is irrelevant because it dealt with registration of instruments under the *Land Registration Act*.
41. Regarding the CGT, counsel faulted the appellant's computation and submitted that the TAT correctly concluded that an increase in Liability would of necessity result in an increase in Asset resulting into a nil effect, hence, there was no gain which would attract CGT. He submitted that the assessment was correctly set aside.

### **The appellant's submissions in reply**

42. The appellant's counsel reiterated his earlier submissions on section 9 (8) of the Banking Act and argued that the endorsements by the Registrar of Companies in his registers is what effects the transfer of the relevant property, bond, or other right, share, stock, debenture or any such instrument. He argued that the TAT failed to appreciate this concept and arrived at a wrong conclusion that this court should correct and set the record straight. Counsel also relied on section 3 (2) (f) of the *Income Tax Act* and the Eighth Schedule thereof in asserting that the Registrar's role is quite significant as it determines that point at which the taxes accrue.

### **Determination**

43. At the heart of the 1<sup>st</sup> appeal lies the interpretation of section 51 (11) of the TPA and the consequences of the respondent's failure to render an Objection decision under the said provision within the time frame prescribed under the said provision. The contestation is whether the TAT erred in correctly finding that the Objection decision was rendered outside the statutory period of 60 days, but despite so finding, it proceeded to hold that the omission was a procedural technicality capable of being cured by article 159 (2) (d) of the *Constitution*.
44. Resolving the issue(s) at hand requires interpreting the provisions of section 51 (11) of the TPA which provides: -
  - 1) The Commissioner shall make the objection decision within sixty days from the date of receipt of—
    - a) the notice of objection; or



- b) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.

45. The preamble to the TPA provides that it is an Act of Parliament to harmonize and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected purposes. Section 2 of the Act provides for the Object and purpose of the Act. It provides: -

#### 2. Object and purpose of the Act

- (1) The object and purpose of this Act is to provide uniform procedures for—
  - (a) consistency and efficiency in the administration of tax laws;
  - (b) facilitation of tax compliance by taxpayers; and
  - (c) effective and efficient collection of tax.
- (2) Unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under this Act shall apply.
- (3) This Act shall be interpreted to promote the object of the Act.

46. The need of interpretation arises only when the words used in the statute are on their own term, ambivalent and do not manifest the intention of legislature. Similarly, rules of interpretation come into play only if there is doubt with regard to the express language used. The overriding purpose of construction of any statutory provision is to ascertain the intention of the legislature and the primary role is to determine the same by reference to the language used.

47. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, by considering it as a whole and in its context that intention, and therefore, the meaning of the statute, is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous be applied as they stand. The object of all interpretation is to discover the intention of Parliament, but the intention of Parliament must be deduced from the language used.

48. A statute is an edict of the legislature and the conventional way of interpreting or construing a statute is to seek the intention of its maker. A statute is to be construed according "to the intent of them that make it" and "the duty of judicature is to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation the court has to choose that interpretation which represents the true intention of the legislature, which is also referred to as the "legal meaning" of the statutory provision. The intention of the legislature assimilates two aspects: - (a) in one aspect it carries the concept of "meaning," i.e., what the words mean. (b) in another aspect, it conveys the concept of "purpose and object" or the "reason and spirit" pervading through the statute.

49. Therefore, what one may believe or think to be the intention of Parliament cannot prevail if the language of the statute does not support that view. The object of the statute has to be gathered from language and not on what one believes or thinks. As Lord Denning in *Seaford Court Estates v Asher*[26] stated:

“A Judge must not alter the material of which the Act is woven but he can and should iron out the creases. When a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of the



Parliament and then he must supplement the written words so as to give force and life to the intention of the Legislature.”

50. The art of correct interpretation would depend on the ability to read what is stated in plain language, read between the lines, read ‘through’ the provision, examining the intent of the Legislature and call upon case laws and other aids to interpretation. However, rules of interpretation are applied only to resolve the ambiguities. The object and purpose of interpretation is to ascertain the intention of the law, as evinced in the statute. The key to the opening of every law is the reason and spirit of law. To be literal in meaning is to see the body and miss the soul. The judicial key to interpretation is the composite perception of the body and the Soul of the provision.[27]
51. Wherever it is possible to do so, the provision must be harmoniously constructed by avoiding a conflict. A construction which reduces the statute to a futility has to be avoided. A statute or any enabling provision therein must be so construed as to make it effective and operative. A liberal construction should be put upon written instruments, so as to uphold them, if possible and carry in to effect the intention of the statute. The provisions of two enactments must be read harmoniously so as not to subject them to any strained construction giving rise to an artificial inconsistency or repugnance. Every clause of a statute should be construed with reference to the context and other clauses of the statute so as, as far as possible, to make a consistent enactment of the whole statute.
52. Parliament in its wisdom deployed the word “shall” twice in section 51(11). The provision reads “The Commissioner shall make the objection decision within sixty days from the date of receipt of— (b) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.
53. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of the effect to be given to their directions.<sup>[28]</sup> There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.<sup>[29]</sup> The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.
54. It is the duty of courts of justice to try to get at the real intention of the legislation by carefully attending to the whole scope of the statute. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.
55. The word “shall” when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.<sup>[30]</sup> The *Longman Dictionary of the English Language* states that “shall” is used to express a command or exhortation or what is legally mandatory.<sup>[31]</sup>
56. By now it is beyond argument that the above provisions are couched in mandatory terms. It is an established position of law that in a taxing statute one has to look merely at what is clearly said.[32] There is no room for any intendment. There is no equity about a tax. There is no presumption as to



a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. [33] Where, however, the provisions are couched in language which is not free from ambiguity and admits of two interpretations a view which is favourable to the subject should be adopted. The fact that such an interpretation is also in consonance with ordinary notions of equity and fairness would further fortify the court in adopting such a course.[34]

57. In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. [35]
58. The appellant's counsel argued that as the law stands, if an objection decision is not rendered within 60 days, the Objection stands allowed by operation of the law, and that, this being a peremptory statutory dictate, the TAT had no discretion to purport to extend the period. More so, he argued, by operation of the law, there was no decision to extend in the first place. He argued that the issue at hand is a statutory prescription as opposed to a procedural technicality. He submitted the TAT manifestly erred by invoking article 159 (2) (d) of the Constitution.
59. The TAT rightly computed time and pronounced that the Objection decision was rendered out of time. This being the position, then by dint of the above provision, the objection decision is deemed to have been allowed. This position has been upheld in a catena of superior court decisions in this country, among them those cited by the appellant's counsel. In *Republic v Commissioner of Customs Services Ex-Parte Unilever Kenya Limited*<sup>[36]</sup> the court stated that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law. The act requires that where the Commissioner has not made an objection decision within 60 days from the date the tax payer lodged the notice of objection, the objection shall be allowed. This means that the issues that the tax payer had raised in the notice of objection will be accepted. In case of a tax assessment, it will be vacated.
60. Section 51 (11) of the TPA is couched in peremptory terms. Having correctly found that the decision was made after the expiry of 60 days, the TAT had no legal basis to proceed as it did and to invoke article 159(2) (d). First, there was no decision at all. The decision had ceased to exist by operation of the law. Second, the provisions of section 51 (11) (b) had kicked in. The Objection had by dint of the said provision been deemed as allowed. Third, the TAT had no discretion to either extend time or to entertain the matter further. Fourth, discretion follows the law and a tribunal cannot purport to exercise discretion in clear breach of the law.
61. The TAT premised its decision on the provisions of Article 159 (2) (d) of the Constitution which requires courts to determine matters without undue regard to technicalities of procedure. On the face of a clear statutory dictate, I do not see how the TAT could term the express statutory edict as a matter of procedural technicality. This was a gross misapprehension of the law. Article 159 (2) (d) of the Constitution was not meant to oust express statutory provisions and to open a window for disregard of statutory requirements.
62. The TAT clearly fell into a grave error when it failed to appreciate the difference between a procedural law and substantive law. Procedural law, also called adjective law is the law governing the machinery of the courts and the methods by which rights are enforced. Procedural law prescribes the means of enforcing rights or providing redress of wrongs. It comprises rules about jurisdiction, pleadings, and practice, evidence, appeal, execution of judgments, representation in court, costs, and other matters.



Procedural law is commonly contrasted with substantive law, which constitutes the great body of law and defines and regulates legal rights and duties. Thus, whereas substantive law would describe how two people might enter into a contract, procedural law would explain how someone alleging a breach of contract might seek the courts' help in enforcing the agreement.

63. Substantive law is a statutory law that deals with the legal relationship between people or the people and the state. Therefore, substantive law defines the rights and duties of the people, but procedural law lays down the rules with the help of which they are enforced. The TAT manifestly erred in law by confusing substantive law with procedural law. Article 159(2) (d) of the Constitution in clear terms talks about procedural technicalities. A statutory edict is not procedural technicality. It's a law which must be complied with. Parliament in its wisdom expressly and in mandatory terms provided the consequences of failing to render a decision within 60 days. The Objection is deemed to be allowed. That being the law, the appellant's Objection stood allowed as a matter of law the moment the Commissioner of Domestic Taxes failed to render his decision within the 60 days. This being the correct legal position, it is my finding that the 1<sup>st</sup> appeal succeeds.
64. The above finding determines the 2<sup>nd</sup> appeal. It collapses on account of this finding because its life depended on whether or not there was an objection decision. This being the position, I find and hold that it will serve no utilitarian value to determine 2<sup>nd</sup> appeal because the ground upon which it stood has sunk. It cannot stand at all. The same stands dismissed.

## Conclusion

65. Flowing from my discussion, analysis of the law and the conclusions arrived at herein above, I find that the 1<sup>st</sup> appeal, ie HCC ITA No 069 of 2020 is totally merited. With regard to the 2<sup>nd</sup> Appeal, ie ITA No 025 of 2020, it is my finding that the 1<sup>st</sup> appeal having succeeded, the 2<sup>nd</sup> appeal cannot stand. Accordingly, I make the following orders: -
- a) That HCC ITA No 069 of 2020 be and is hereby allowed with costs to the appellant.
  - b) That the Tax Appeals Tribunal decision dated February 26, 2020 is hereby set aside in its entirety.
  - c) That the respondent's objection decision dated January 9, 2017 be and is hereby set aside.
  - d) That the appellant's notice of objection dated November 9, 2016 be and is hereby deemed as allowed in accordance with section 51(11) (b) of the Tax Procedures Act.
  - e) That HCC ITA No 025 of 2020 is hereby dismissed with no orders as to costs.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 23<sup>RD</sup> DAY OF AUGUST 2021**

**John M. Mativo**

**Judge**

[1] Cap 488, Laws of Kenya.

[2] Act No. 29 of 2015.

[3] {2014} e KLR.

[4]{2018} e KLR.



- [5] {2020} e KLR,
- [6] {2015} e KLR.
- [7] {2012} e KLR.
- [8] {2018} e KLR.
- [9] {2017} e KLR.
- [10] {2015} e KLR.
- [11] {1976} AIR 1177, 1976 SCR (2) 821.
- [12] {2013} e KLR.
- [13] {2018} e KLR.
- [14] {2020} e KLR.
- [15] {2020} e KLR.
- [16] {2015} e KLR.
- [17] {2012} e KLR.
- [18] {2021} e KLR.
- [19] {2015} e KLR.
- [20] {1976} AIR 1177, 1976 SCR (2)(82)]
- [21] {2016} e KLR
- [22] {2013} e KLR.
- [23] {2020} e KLR.
- [24] {2017} e KLR.
- [25] {2017} e KLR.
- [26] {1949} 2 All ER 155.
- [27] See *Nasiruddin v Sita Ram Agarwal* – [(2003) 2 SCC 577].
- [28] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).*
- [29] Ibid.
- [30] See *Dr Arthur Nwankwo and Anor vs Albaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .
- [31] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.
- [32] *CIT v Madho Prasad Jatia* (1976) 105 ITR 179 (SC).
- [33] *CIT v Ajax Products Ltd.* (1965) 55 ITR 741 (SC)] [*CED v. Silesbkumar R. Mehta* (1990) 181 ITR 10 (Mad) (FB).
- [34] *CIT v Madho Prasad Jatia* (1976) 105 ITR 179 (SC).



[35] A.V. Fernandez v State of Kerala, {AIR 1957 SC 657}.

[36] {2012} e KLR.

