REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL NO. E001 OF 2019

USHINDI LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF INVESTIGATION AND

ENFORCEMENT KENYA REVENUE AUTHORITY.....RESPONDENT

(Being an appeal against the Decision/Judgment of the Tax Appeal Tribunal at Nairobi delivered on the 8th day of December 2016)

IN THE TAX APPEAL TRIBUNAL

APPEAL NO. 7 OF 2015

BETWEEN

USHINDI EXPORTS LIMITED.....APPELLANT

-VERSUS-

THE COMMISSIONER OF INVESTIGATION AND

ENFORCEMENT KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

APPEAL

The Appellant (herein referred to as **"Ushindi Exports Limited")** being dissatisfied with the Judgment/Decision of the Tax Appeals Tribunal (herein referred to as **"the Tribunal)** filed a Memorandum of Appeal dated 21st March 2019, against the said Judgment/Decision on grounds;

1. The Tribunal erred in law in dismissing the instructions given by Commissioner of Mining through his letter dated 6th January 2012 which waived the requirement to keep records of identity of suppliers. The Tribunal failed in law to appreciate the wide discretionary powers given to the Commissioner of Mines vide **section 9, 10 and 11 of the Mining Act Cap 306** Laws of Kenya;

2. The Tribunal erred in law and in fact in relying on an extraneous issue to arrive at its decision and in allowing itself to be bullied by the Kenya National Assembly thereby losing its independence in discharging its obligations to the Appellant and further lost its objectivity and legitimacy by calling the Appellant **"smugglers of Gold".**

3. The Tribunal gravely erred in upholding the tax demanded by the Respondent without taking into account the costs of purchasing the Gold and other costs.

4. The Tribunal erred in law and in fact in holding that the Appellant did not discharge its statutory duty of demonstrating that the Respondent assessment was erroneous in view of the principle of *"Res – ipsa loquitor"* and the manifest errors in the assessment.

5. The Tribunal erred in law and in fact in misapplying the legal maxim of *"ex tupi causa non oritur action"* and in holding that it(the Tribunal) was being used as an instrument of enforcing illegal obligations;

6. The Tribunal erred in holding that the Appellant was guilty of non -disclosure of material evidence in view of the Government Policy on the issue of Artisanal miners and the guidelines existing from the Commissioner of Mines at the time.

7. The Tribunal erred in its interpretation and application of the ruling by Nyamu J in ***Republic –vs- Commissioner of Lands (exparte) & Smoken Petroleum Company Limited*** and failed to consider the said ruling in the context of the existing business environment and guidelines created by the letters dated 3rd April 1997; 29th June 2005 and 6th June 2012.

RESPONDENT'S STATEMENT OF FACTS DATED 22ND AUGUST 2014

The Respondent analysed the documents and established that the Appellant made exports of gold worth Ksh 2,595,838,877/- and Ksh 2,940,001,820/- in the years 2010 and 2011 respectively. It was also established that the Appellant claimed cost of sales amounting to Ksh 2,588,274,982 and Ksh2, 927,880,360 in the years 2010 and 2011 respectively therefore declaring gross profits margins of 0.3% in 2010 and 0.4% in 2011.

The Respondent also established that all the transactions of the Appellant were done in cash. During the export of the gold, the Appellant exchanged huge amounts of cash in dollars with the importer at the Jomo Kenyatta International Airport. All the Purchase Invoices claimed in the accounts are also allegedly done in cash.

The Respondent therefore requested the Appellant to provide supporting documents for the costs of sales for further analysis.

The Appellant objected to the assessments through their Consultants PKF Accountants & Business Advisers; vide a letter dated 22nd July 2013 stating that the Appellant was not in a position to provide the requested supporting documents for the cost of sales since they were buying Gold from artisan miners who normally declined to give their personal details and/or tax invoices. The Appellant further argued that they maintained records in accordance with **Trading in Unwrought Precious Metals Act Cap 309** which only indicated the date of transaction, nature and weight of the precious metal and the price (if any) without indicating the names or identities of the sellers.

The Appellant also attached a letter dated 6th January 2012 and reference CN.M/2781/1/VOLX/(38) allegedly from the Ministry of Environment and Mineral Resources, signed by Acting Commissioner of Mines, Mr. Moses Masibo waiving the requirement for all licensed Gold dealers from demanding the identities of the suppliers/sellers of Gold.

CERTIFICATE OF URGENCY

The Appellant through its Advocate filed a Certificate of Urgency application dated 21st March 2019, urging the Court to hear the matter at the earliest possible opportunity for reasons;

a) That the Appellant herein sought a copy of the Judgment and typed proceedings from Tax Appeals Tribunal on 10th January 2017 to enable it prepare a record of appeal;

b) That the Tax Appeals Tribunal forwarded the judgment to the Appellant on 23rd February 2018 but failed to provide copies of the typed proceedings until February 2019.

c) That as a result the Appellant herein was not able to file this appeal within the statutory thirty days timeline set by **Tax Procedure Act and the Tax Appeals Tribunal Act**.

d) That as a result the Appellant seeking extension of time within which to file the appeal and/or record of appeal filed herein be deemed to have been filed within time.

e) That the Respondent has started to enforce the Tax claimed against the Appellant by issuing a Departure Prohibition Order (D. P. O) against the Appellants so they cannot travel out of the country.

By a Notice of Motion Application dated 21st March 2019 the Appellant sought orders:

a) That this Court be pleased to grant an extension of time for filing the memorandum of Appeal

b) That the record of appeal filed herein be deemed to have been filed within time.

The Application was based on grounds;

1. That the Appellant filed and served its Notice of Appeal on 22nd December 2016.

2. That the Appellant herein sought a copy of the Judgment and typed proceedings from the Tax Appeals Tribunal on 10th January 2017 and followed this up on 25th January 2017, 7th March 2017 to enable it prepare a record of Appeal.

3. That the Secretary to the Tax Appeals by a letter dated 30th March 2017 informed the Appellant herein that the judgment was not ready and that the Tribunal does not provide copies of proceedings. The said judgment and proceedings were eventually issued to the Appellant last month (February 2019)

4. That this Court has the powers to grant an extension of time being sought by the Applicant herein under the provisions of the Tax Appeals Tribunal (Appeal to the High Court rule, 2015) and **sections 3 and 3A of the Civil Procedure Act.**

STATEMENT OF FACTS DATED 12TH JUNE 2019

The Respondent through its Advocate filed a statement of facts dated 12th June 2019 as hereunder;

1. The Tribunal fully appreciated the discretionary powers given to the Commissioner of Mines vide **Section 9, 10, and 11 of the Mining Act Cap 306** laws of Kenya.

2. The Tribunal in dismissing the appeal, duly appreciated the facts and applied the law in finding that the Appellant did not discharge its statutory mandate of demonstrating that the Respondent's assessment was erroneous.

3. The Tribunal fully appreciated the Government Policy on the issue of Artisanal Mines and the guidelines existing at the time from the Commissioner of Mines in arriving at its determination.

4. The Tribunal duly applied the ruling by Nyamu J in ***Republic –vs- Commissioner of Lands (exparte) & Smoken Petroleum Company Limited;*** in the context of the existing business environment and guidelines created by the letters dated 3rd April 1997, 29th June 2005 and 6th June 2012.

APPELLANT'S SUBMISSIONS

The Appellant submitted that **Section 11** of the **Mining Act** gives the Commissioner of Mines immunity from prosecution for anything done in good faith.

That **Section 12(2) of the Mining Act** vests the power to regulate exports of minerals to the Commissioner. The Commissioner is the only person licensed to issue a dealer's license.

The Appellant contended that **Section 12 (4)** of the **Mining Act** provides;

> ***"A person who has been issued with a mineral dealers license shall maintain a proper register of the kind, quantity and quality of minerals dealt in, bought, sold, bartered, exported, cut or polished, the manner by which it was obtained or disposed of and the dealer shall make the register available for inspection by the commissioner or any person authorised by him"***

The Appellant asserts that over the years, it had been inspected and licensed by the Commissioner who had never found any anomalies in its books of account and/or records.

That there is no provision in the Income Tax Act which states that the said Act shall override all other laws that regulate trade. Consequently, the **Trading in Unwrought Precious Metals Act Cap 309**, the **Mining Act and Income Tax** must be interpreted in tandem with each other.

The Appellant submitted that the Commissioner of Mines and Geology wrote the letter dated 6th January 2012 where he stated on page 132 of the record;

> ***"As we work on the modalities of formalizing Artisanal miners therefore, we encourage you to continue buying all such Gold from Artisanal miners (and/or their brokers) even when they decline to give their personal details provided you keep a record of the quantities that you have bought and the date"***

That the Commissioner of Income Tax cannot over-rule the Commissioner of Mines as both are Government officers charged with functions created under their respective enabling Acts, that is the **Kenya Revenue Authority Act** and the **Mining Act**.

It was submitted that the letter issued by the Commissioner of Mines was never quashed and cannot therefore be unilaterally over-ruled by the Tax man as that would amount to insubordination of an officer of equivalent jurisdiction. Further **section 54 A** of the **Income Tax Act** provides;

> ***54A (1) A person carrying on a business shall keep records of all receipts and expenses of good purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax.***
>
> ***(2) any person who contravenes the provisions of subsection (1) shall be liable to such penalty, not exceeding twenty thousand shillings, as the Commissioner may deem fit to impose.***

It submitted that the penalty provided by the law for non-compliance with **section 54A of the ITA** and **section 11** of the T.I.U.M.A is a fine

and the Respondent cannot impose any other penalty not recognized by the law. Further, by dint of the provisions of **section 15** of the **Income Tax**, it is mandatory for the Respondent to factor in the cost of production of income. To the extent that the said assessment did not cover the cost of production, the said assessment is illegal and unenforceable. The said section is couched in mandatory terms.

The Appellant relied on ***Misc. Civil Application No. 743 of 2006, Keroche Industries Limited –vs- Kenya Revenue Authority & 5 Others [2007]eKLR***, where the Court held that;

> ***"it is also illegal ….the Authority must not use its power for an improper purpose i.e to single out the applicant to apply the tariff in order to block unpaid refund which they admit in their audit reports is rightly due and valid."***

RESPONDENT'S SUBMISSIONS

It was the Respondents submissions that the Tribunal rightly made a finding on fact and in law in holding that the Appellant had not complied with the provisions of **Section 54A of the Income Tax Act** and disallowed the cost of sales as outlined in paragraphs 16 – 24 of the judgment on pages 5-9 of the recorded of Appeal.

That the Tribunal observed at paragraph 20 of the judgment that the failure of the Appellant to comply with sections of the law is a serious breach of its obligations under **Income Tax Act** and the provisions of the **Trading in Unwrought Precious Metals Act**.

That the Tribunal then proceeded to make its determination at paragraph 23 of the judgment by stating that;

> ***"we have no hesitation in finding that the Appellant not only failed to keep the records required by the provisions of the Income Tax Act and the Trading in Unwrought Precious Metals Act, he also deliberately, wrongfully and mischievously generated its own self-serving document....***
>
> ***Paragraph 24***
>
> ***The literal or strict construction of section 54A clearly states that the Commissioner must be satisfied that the records produced are adequate for the purpose of computing tax. It is not the opinion of the Appellant therefore that carries the day and as we have seen, the Commissioner was not satisfied that the documents produced were adequate for the purpose of computing tax."***

The Respondent submitted that the tribunal was well within its right in setting the issues for determination, it relied on the case of ***Automobile Association of Kenya –vs- James Jaguga [2005]eKLR***, where the High Court in affirming the Magistrate's Court decision to pronounce itself on an issue that though not pleaded, was raised in evidence and also raised in written submissions by both Counsel for the parties, and being guided by Court of Appeal decisions, had this to say;

> ***"In this case of Odd Jobs –vs- Mubia [1970]EA 476 the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision. That decision was followed by the Court of appeal in the case of Vyas Industries –vs- Diocese of Meru [1982]KLR 114 in which the Court of Appeal cited with approval the decision in the case of Odd Jobs –vs- Mubia [1970] EA 476 in the following terms-***
>
> ***"the circumstances which an unpleaded issue can become an issue in a suit is a question which was considered in Odd Jobs –vs- Mubia [1970] EA 476 in which it was held that:***
>
> ***a) A court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue had been left to the court for decision.***
>
> ***b) On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."***
>
> ***As I have said earlier, in our present case, the issue of the vicarious liability of the appellant for the acts of its employee Silas was an issue that was raised in evidence. It was also raised in written submissions by both counsel for the parties. It was therefore an issue that was left to the learned magistrate to decide upon. I am therefore of the view that the learned magistrate was correct in deciding on the issue of vicarious liability, even though it was not pleaded in the plaint.***

On the third ground of appeal the Respondent submitted that the Tribunal was well with its mandate in dismissing the instructions given by the Commissioner of Geology and Mines through his letter dated 6th January 2012, waiving the requirements to keep records of identity of suppliers, based on the evidence adduced before it.

It further submitted that Mr. Ngigi testified at page 198 of the Record of Appeal at paragraph 7 that vide a letter dated 23rd November 2015, the then Cabinet Secretary for Mining Honourable Najib Balala wrote to the Director of Criminal Investigations that the law does not provide for waiver of the requirements that dealers must keep a register of transactions. That according to the letter, the Commissioner went beyond his powers to allow dealers to transact without keeping these register, as required by law.

In response to the Appellant's submission that the Commissioner of Income Tax cannot over rule the Commissioner of Mines whose letter in any event had never been quashed, the Respondent submitted that what it sought to do is to enforce its statutory obligation pursuant to **Section 54 (1) of the Income Tax Act** in requesting for documents which in his opinion are adequate for purposes of computing tax.

That the two offices have separate statutory mandates and statutes which govern the execution of that mandate. Each of those statutes have different requirements with regard to the Appellant and those requirements/dictates have to be complied with as prescribed. The Appellant cannot purport to be excused from complying with the requirements of the **Income Tax Act** based on a letter by the Commissioner of Mines who has completely different statutory mandate to be adhered to separately.

That the Tribunal fully appreciated the discretionary powers given to the Commissioner of Mines vide **Sections 9, 10 and 11** of the **Mining Act Cap 306 Laws of Kenya**.

The Respondent submitted that the Tribunal was well within its mandate in holding that the Appellant was guilty of non disclosure of material evidence. That non disclosure of facts was discussed in ***Brinks – Mat Ltd –vs- Elcombe (1988) 3 ALL ER 188***, the Court set out what it had to consider to be material non disclosure as follows;

> ***"In considering whether there has been relevant non disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following;***
>
> ***i) The duty of the applicant is to make a full and fair disclosure of the material facts.***
>
> ***ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.***
>
> ***iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries***
>
> ***iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including ;***
>
> ***a) The nature of the case which the applicant is making when he makes the application;***
>
> ***b) The order for which application is made and the probate effect of the order on the defendant, and***
>
> ***c) The degree of legitimate urgency and the time available for the making of inquiries.***
>
> ***v) If material non disclosure is established the court will be astute to ensure that a Plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty... see Bank Mellat –vs- Nikpour at (91) per Donaldson L.J, citing Warrington LJ in the Kensington Income Tax Corms Case***
>
> ***vi) Whether immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the importance of the fact to issues which were to be known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.***
>
> ***vii) Finally, it is not for every omission that the injunction will be automatically discharged.***
>
> ***A locas poenitenntiae (chance of repentance) may sometimes be afforded. The court has discretion, notwithstanding proof of material non disclosure which justifies or requires the immediate discharge of the exparte order, nevertheless to continue the order, or to make a new order on terms.***
>
> ***...when the whole of the facts including that of the original non disclosure, are before it, (the court) may well grant such a second injunction if the original non disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed."***

That the Tribunal fully appreciated the Government policy on the issue of Artisanal Miners and the guidelines existing at the time from the Commissioner of Mines in arriving at its determination.

That the Tribunal duly applied the ruling by Nyamu J in the case of ***Republic –vs- Commissioner of Lands (exparte) & Smoken Petroleum Company Limited*** in the context of the existing business environment and guidelines created by the letters dated 3rd April 1997, 29th June 2005 and 6th June 2012.

In response to the issue of legitimate expectation, the Respondent submitted that the Appellants have not satisfied the preconditions for legitimate expectation namely:

a) There must be an express, clear and unambiguous promise given by a public authority;

b) The expectation itself must be reasonable.

c) The representation must be one which it was competent and lawful for the decision maker to make; and

d) There cannot be a legitimate expectation against clear provisions of the law or the Constitution.

The Respondent submitted that it was not lawful for the Commissioner of Mines to issue the said letter as that would go against the clear provisions of the law and that the last two preconditions for legitimate expectation to be created were not met.

SUBMISSIONS IN REBUTTAL OF THE RESPONDENT'S SUBMISSIONS DATED 30TH JULY 2019

The Appellant in rebuttal of the Respondents submissions said that, it was in the interest of justice to bring to closure to this issue by inviting the court to read the final Judgment of the Chief Magistrate Court in ***Republic –vs- Moses Masibo CMRC Case No. 1256 of 2014*** which was recently delivered on 12th July 2019.

It submitted that in the said decision the Honourable P. M. Mugure Senior Resident Magistrate held as follows page 27 of her judgment;

"The accused by his letter dated 6th January 2012, P. Exhibit 1 asked that the law specifically Section 11 of Cap 309 (b) to be adhered to by the Licensed gold dealers but in addition, and speaking specifically to the then existing gap in the law which did not recognize or otherwise provide for artisanal gold miners who were, at the material time, the source of in excess of 95% of the gold mined in Kenya.

The said gap, as was testified to by prosecution witnesses, led to smuggling and the loss of revenue, critical data and a diminished monitoring capacity on the part of Government in the important gold sector.

The said administrative policy measures put in place by Government and overseen by the accused and his predecessors in office dating as far back as the mid- 1980s sought to help address the said problem, challenges and gap and resultant challenges as the Government, through the Department formulated legislative proposals and measures to factor in and grant legal sanction to the artisanal miners and which process culminated in the Mining Act of 2016 in which the artisanal miners are specifically provided and catered for by statute in terms mirroring the administrative measures and policies earlier previously put in place by the accused and his predecessors before him by way of the administrative measures and policies aforesaid .....

The administrative measures undertaken by the ministry have been in place since the mid-1980s and are what is essentially captured in DMFI 2 being the 3/4/1997 letter to Messrs Ushindi Export Limited Ref No. M/748/AA 170 (25) where then Commissioner C.Y. OWAYO makes reference to the existing Government policy being as follows;

"That the mineral resources of this country should not be subject to smuggling out of the country." And that to the said end the Department had licensed dealers whose part of their licenses, the right to buy, sell and export such minerals as may be willingly and freely offered to them anywhere within the borders of Kenya without insisting that the seller provides particulars if this may scare them and lead to smuggling. In this way, minerals may be legally purchased and channelled into the national economy"

The said government policy led to, among other things

a) Increased revenue to the country

b) Curtailment of smuggling and the channelling of proceeds of gold sales into the formal economy.

c) Capture of appropriate date and statistics as related to gold production and trade in the country.

d) Contributed to the safeguard and continued monitoring of the integrity of the statistical data collected and maintained by the country over the years.

e) The filing up of a huge gap in the prevailing legal regime even as the country worked out modalities to legally recognized and provide for artisanal miners.

f) Safeguard of the artisanal miners' constitutionally protect rights against discrimination and marginalization on the basis of social, economic and/or other basis.

DETERMINATION

After consideration of pleadings and submissions the issues for determination of the appeal are as follows**;**

a) Is there a competent appeal on record?

b) Did the Tax Appeals Tribunal err that the Appellant failed to comply with Section 54A of Income Tax Act in light of letter by Commissioner of Mining of 6th January 2012?

c) Did the Tax Appeals Tribunal err in upholding the assessment by the Respondent without taking into account costs of

purchasing the gold and considering manifest errors

d) Did the Tax Appeals Tribunal err in relying on extraneous matters

ANALYSIS

a) Is there a competent appeal on record?

Section 32 of Tax Appeals Tribunal Act provides for Appeals to the High Court on decisions of the Tribunal as follows;

> **(1)** ***A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.***

The Tax Appeals Tribunal delivered judgment on 8th December, 2016 and served notice to the Respondent on 22nd December 2016. The Appellant sought certified copy of the Judgment and proceedings on 10th January 2017. The Judgment was availed on 23rd February 2018. The pleadings and proceedings were certified and availed in March 2019.

The Record of Appeal was filed on 21st March 2019, clearly after the statutory period. The delay caused by the release of proceedings and pleadings by the Tax Appeal Tribunal was not controverted by facts to the contrary. It is also a factor that the Tax Appeal Tribunal was not constituted for a while and hence proceedings could not be certified to facilitate the appeal on time. The delay was not occasioned by the Appellant and since Section 32 of Tax Appeal Tribunal Act grants the Court discretion to extend the appeal period, in the instant case where circumstances were beyond the Appellant, the Court grants extension of time and there is a competent appeal.

b) Did the Tax Appeals Tribunal err that the Appellant failed to comply with Section 54Aof Income Tax Act in light of letter by Commissioner of Mining of 6th January 2012?

The brief facts surrounding the appeal, is that the dispute arose when the Respondent on 13th June 2013 issued notice to the Appellant under **Section 56 and 30 of Income Act and Value Added Tax** respectively to produce several documents relating to their business. The documents included;

a) Sales Invoices & Sales Registers

b) Purchases Invoices and Purchases Ledgers including custom entries if any

c) General Ledger

d) Cashbook, Bank statements and Pay in Slips

e) Petty Cash Books

f) Inventory Records

g) Export Documents

h) Financial Statements for the Years 2009 todate

On 18th June 2013, the Appellant submitted Ledgers for the years 2010/2011& 2012 and Financial statements for the years 2009, 2010 & 2011.

The Respondent contended that the documents produced, the Appellant failed to comply with **Section 54 A of Income Tax Act** which provides;

54A. Keeping of records of receipts, expenses, etc

(1) ***A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax.***

The Respondent submitted the Commissioner of Income Tax was not satisfied that the documents were sufficient for purposes of independent computation of tax on the ground the documents were internally generated and allegedly signed by Suppliers of gold and did not contain the identities of these suppliers. Secondly, these documents were not objective and could not be verified by other sources other than the Appellant who could not disclose source of the documents. Part of the documents comprised of internally generated Petty Cash Vouchers of Payments ranging from Ksh 1million to 20 million. In the absence of the identity of the Seller (s) of gold or of recipient of the money these vouchers did not constitute valid receipts as envisaged in the Income Tax Act. Of concern is the fact that all transactions of purchase and sale of gold were ALL in form of Cash; there were no cheques, money transfers etc.

The Appellant contended that vide the letter submitted that the **Commissioner of Mines and Geology wrote on 6th January 2012** signed by Acting Commissioner of Mines, Mr. Moses Masibo it waived the requirement for all licensed Gold dealers from demanding the identities of the suppliers of Gold as follows;

> ***"As we work on the modalities of formalizing Artisanal miners therefore, we encourage you to continue buying all such Gold from Artisanal miners (and/or their brokers) even when they decline to give their personal details provided you keep a record of the quantities that you have bought and the date"***

The Appellant submitted that in reliance on this letter it was exempted from obtaining details identities of the artisanal miners who sold the gold to the Appellant Company.

On the other hand the Tax Appeal Tribunal heard evidence from Mr. Collins Ngigi; Representative from Department of Geology and Mines. He testified and disowned the letter of 6th January 2012. He pointed out that the **Trading in Unwrought Precious Metals Act** did not donate powers to Commissioner of Geology and Mines to waive the requirement to keep records as provided by **Section 11 of the said Act**. It provides;

Dealers in precious metals to keep a Register of all gold dealings which must specifically state the following;

i) The date of transaction

ii) The names of parties of the transaction

iii) The nature and weight of the precious metal ;and

iv) The price if any received or paid

The Respondent submitted that vide a letter dated 23rd November 2015, the then Cabinet Secretary for Mining Honourable Najib Balala wrote to the Director of Criminal Investigations that the law does not provide for waiver of the requirements that dealers must keep a register of transactions. That accordingly, to the letter, the Commissioner went beyond his powers to allow dealers to transact without keeping these register, as required by law.

The Appellant submitted that the Commissioner of Income Tax could not overrule the Commissioner of Mines whose letter of 6th January 2012 in any event had never been quashed and was relied on by the Appellant.

The Respondent submitted that what it sought to do is to enforce its statutory obligation pursuant to **Section 54 (1) of the Income Tax Act** in requesting for documents which in his opinion are adequate for purposes of computing tax.

The Respondent contended that the two offices; Commissioner of Income Tax and Commissioner of Geology and Mines have separate statutory mandates and statutes which govern the execution of that mandate. Each of those statutes have different requirements with regard to the Appellant and those requirements/dictates have to be complied with as prescribed. The Appellant cannot purport to be excused from complying with the requirements of the **Income Tax Act** based on a letter by the Commissioner of Mines who has completely different statutory mandate to be adhered to separately.

The Appellant informed Court vide Rebuttal Submissions filed on 29th August 2019, the Appellant annexed the judgment of **Milimani Criminal Case1256 of 2014 Republic vs Moses Masibo;** where the Court held that the ingredients of the offence of abuse of office were not proved and the author of the impugned letter of 6th January 2012 was acquitted under **Section 215 CPC.**

This Court finds that the Tax Appeals Tribunal relied on the oral evidence of Mr. Collins Ngigi Representative from Department of Geology and Mines. The evidence was not controverted by evidence to the contrary; that provisions of **Section 11 of Trading in UnWrought Precious Metals Act** were/are mandatory and compliance could not be waived by the letter of 6th January 2012.The Act did not empower the Commissioner of Geology and Mines to waive compliance of the law. Whereas it is appreciated and recognized there was a problem; artisanal miners who did not want their identities disclosed and therefore refused to sell gold thus leading to loss of gold and revenue; the process of resolving the problem was not to authorise the gold dealers to circumvent the law. Although he was/is acquitted of the criminal offence, the acquittal does not sanitize non compliance of **Section 11 of Trading in UnWrought Precious Metals Act** and **Section 54A of Income Tax Act** by the Appellant.

Secondly, The Appellant was challenged to keep records, avail them to the Respondent to carry out comprehensive tax assessment. The Appellant's reliance on the Commissioner of Geology and Mines letter of 6th January 2012 would only absolve the Company from producing Purchase Invoices and Ledgers that contained identities of the Artisanal miners, as follows;

> ***The letter of 6th January 2012 addressed to All Licenced Gold Dealers which read as follows;***
>
> ***This is to remind you of the requirement for continuous registering of all your gold dealings as per the Dealing in Unwrought Precious Metal Act Cap 309. Section 11 as follows;***
>
> ***a) The date of transaction***

b) The names of parties of the transaction

c) The nature and weight of the precious metal; and

d) The price if any received or paid

It is noted, however, that a number of artisanal miners are not willing to disclose their personal details due to their fear of being apprehended since they are not licensed. It is nonetheless, important to ensure that all the gold that is mined in our country is captured through formal dealing and not smuggled out of the country.

As we work on modalities of formalizing the artisanal miners, therefore we encourage you to continue buying all such gold from the artisanal miners even when they decline to give their personal details, provided you keep a record of the quantities that you bought and the date.

The required documents sought by the Respondent vide letter13th July 2013, that the Appellant failed to produce are;

a) Sales Invoices & Sales Registers

b) Purchases Invoices and Purchases Ledgers including custom entries if any

c) Cashbook, Bank statements and Pay in Slips

d) Petty Cash Books

e) Inventory Records

f) Export Documents

All these documents were not exempted by the letter of Commissioner of Geology and Mines of 6th January 2012. The exemption if it at all related only to purchase of gold from the Artisanal Miners and not sale of gold and/or payment thereof. This means that despite the alleged exemption, keeping of records was compulsory under **Section 11 of Unwrought Precious Metal Act Cap 309.** The only consideration by the author of letter of 6th January 2012 sought was continued purchase and keeping of records in spite of artisanal miners non disclosure of identities.

The letter by Commissioner of Geology & Mines was/is of 6th January 2012 alluding to exemption of identities of the artisanal miners in keeping records. The Commissioner of Income Tax vide the letter of letter13th July 2013, sought from the Appellant, pursuant to **Section 54A of Income Tax Act**, records from the years **2009, 2010, 2011& 2012**. If the letter by the Commissioner of Geology and Mines was/is of 6th January 2012, it took effect on and after 6th January 2012 and thereafter and not before that date. The said letter could not be relied on before that date. So why did the Appellant not keep records, registers and identities of the artisanal miners before 6th January 2012? The Appellant is presumed to have complied with the law; to keep records, identities of sellers of gold and Purchasers of gold and amounts of gold involved and funds thereof before 6th January 2012, before the exemption of identities of Purchasers was allowed. The letter did not waive the Appellant's obligation to keep records and provide documents for tax assessment.

Thirdly, the impugned letter was addressed to ALL LICENCED GOLD DEALERS. How did other Gold Dealers comply with mandatory provision of **Section 54A Income Tax Act** despite the letter exempting non disclosure of identities of the artisanal miners who sold gold to Gold dealers?

I find the Tax Appeals Tribunal properly directed itself in light of the evidence on record and the relevant legal provisions. The Court concurs and upholds its finding that the Appellant did not comply with **Section 54A Income Tax Act.**

c) Did the Tax Appeals Tribunal err in upholding the assessment by the Respondent without taking into account costs of purchasing the gold and considering manifest errors?

The Appellant submitted that the Tribunal erred in upholding the tax demanded against the Appellant by the Respondent and did not factor the costs of purchasing gold and other costs. The proceedings annexed in the Record of Appeal do not depict any part of the proceedings where the Appellant raised, contested any item of the tax assessment save for the assessment conducted without factoring Purchase costs and other expenses. **Section 15 of Income Tax Act** could not be complied with in the absence of documents availed by Respondents for comprehensive tax assessment. The Respondent stated that it was not possible to do so in the absence of documents provided by the Appellant as requested in the letter of 13th June 2013. The **Tax Procedures Act** provides;

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.***

(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

(3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.

The burden of proof was on the Appellant to raise the specific items and/or aspects of the tax assessment that were manifest errors, wrongfully imposed or not liable to be paid as tax. It was not raised during the proceedings before the Tax Appeals Tribunal and cannot be heard and determined at this stage except raised only as a matter of law.

d) Did the Tax Appeals Tribunal err in relying on extraneous matters

The Appellant submitted that the Tribunal erred in law and in fact in relying on an extraneous issues to arrive at its decision and in allowing itself to be bullied by the Kenya National Assembly thereby losing its independence in discharging its obligations to the Appellant and further lost its objectivity and legitimacy by calling the Appellant **"smugglers of Gold".**

The Tax Appeals Tribunal clearly, stated in the Judgment at the outset that the matter was triggered by a Report from the Kenya National Assembly to the Respondent, to carry out an investigation into gold that had been allegedly smuggled into Kenya from DRC Congo.

The Tax Appeals Tribunal was not approached by anyone to investigate this matter but it was Kenya Revenue Authority. Throughout the proceedings before the Tribunal, it was not intimated that any documents, exhibits or statements were presented from the Kenya National Assembly, No witness testified from Kenya National Assembly. The record of Appeal has no evidence of interference by and from the Kenya National Assembly. Presumably, the Kenya National Assembly received a Complaint which was channelled to the relevant legal institution to investigate, since it related to tax; it was Kenya Revenue Authority.

On the allegation that the Appellant was referred to in the judgment as **"smugglers of gold;"** the relevant part of the judgment at page11 paragraph 32; reads as follows, Kenya Revenue Authority.

"There is no doubt in the mind of the Tribunal that the only reason why the Appellant did not disclose the identity of the unlicensed and unregistered artisanal miners was because as stated by the Respondent in the first paragraph of its written submissions;

"these are the smugglers of gold which Kenya Parliament was concerned about''

A clear reading of this part of the judgment, the Tribunal did not refer to any party to the proceedings particularly the Appellant as **"smuggler of gold;"** instead the Tribunal attributed the unlicensed and unregistered artisanal miners were possibly the smugglers of gold as their identities were undisclosed to and by the Appellant.

The court finds the Tax Apeals Tribunal directed its mind to the evidence and law before it and no extraneous matters were depicted either in the proceedings, pleadings and/or judgment.

DISPOSITION

1. From the totality of the issues considered above in terms of grounds of appeal, this Court finds the decision of the Tax Appeals Tribunal sound and based evidence before it and is upheld.

2. The appeal is dismissed with costs to the Respondent.

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH FEBRUARY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF

MIRIU H/B FOR KINGARA FOR THE APPELLANT

CHABALA FOR THE RESPONDENT

COURT ASSISTANT – MR. TUPET