Commissioner of Investigation & Enforcement v Asea Brown Boverthe Court (Abb) Limited (Income Tax Appeal E073 of 2023) [2025] KEHC 2798 (KLR) (Commercial and Tax) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2798 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E073 OF 2023

PJO OTIENO, J

MARCH 7, 2025

BETWEEN

COMMISSIONER OF INVESTIGATION & ENFORCEMENT ..... APPELLANT

AND

ASEA BROWN BOVERTHE COURT (ABB) LIMITED ..... RESPONDENT

(Being an appeal from the Judgment of the Honourable Tribunal delivered on 17th March 2023 in TAT No.854 of 2021)

JUDGMENT

Background Facts of the Appeal

1. The Appellant, Commissioner of Investigation & Enforcement is described as a principal officer appointed under section 13 of the *Kenya Revenue Authority Act* cap 496 of the laws of Kenya. Under section 5(1) of the Act, the Kenya Revenue Authority, is an agency of the Government for the collection and receipt of all tax revenue. Section 5(2) of the Act vests upon the Authority the mandated to administer and enforce all provisions of the written laws, set out in Parts 1 and 2 of the First Schedule, relating to the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

2. The Respondent on the other hand, Asea Brown Boverthe court (ABB) Limited, is a limited liability company incorporated in Kenya and whose principal activity is the sale and servicing of electric products and contractual support services to its affiliates in relation to large contracts within Kenya.

3. The dispute culminating into this Appeal was birthed out of Kenya Power and Lighting Company (KPLC's) case where it was suspected that the huge inputs claimed by KPLC from the Respondent

may not have been reported as output by the Respondent. On the 25th of November 2020, the appellant served the Respondent with demand for Kshs 596, 647, 841.00 being an aggregate of Corporate Tax and Value Added Tax [VAT] for the years of income 2014 to 2019 founded on the variance between sales recomputed from the banking and sales reported in the Corporation Tax returns and VAT Returns.

4. The Respondent disputed the computation and provided reconciliation schedules and additional records to the Appellant. The Appellant then varied its assessments on 9th July 2021 by which it claimed that the Respondent had a total incremental liability of Kshs 264,294,054 and Kshs 78,146,896 arising from sales not declared for Corporation tax and VAT respectively. The Respondent objected to the assessment through its Notice of Objection dated 6th August 2021. The Appellant then heard and the dispute and rendered an Objection Decision dated 15th November 2021 confirming the default assessments issued in respect of 2018 and 2019 in which it confirmed part of its assessment of Kshs 3,196,617.00 and Kshs 63,273,417.00 for Corporation Tax and VAT respectively. The Appellant proceeded to issue Agency Notices against the Respondent's bank, on 7th July 2021, for Corporate Income Tax amounting to Kshs 496,331,766.00 and succeeded in collecting the indicated amount from the Respondent's account.

5. Being dissatisfied and aggrieved with the Objection Decision, the respondent, lodged an appeal at the Tax Appeal Tribunal vide its Amended Memorandum of Appeal and Amended Statement of Facts dated 29th December 2021. The Tribunal heard the appeal and delivered a judgment on 17th March 2023. The Tribunal Appeal while setting aside the Objection decision, vacated the Agency Notices issued holding that that the Appellant had failed to discharge the burden of proving that the Respondent willfully neglected to declare accurate sales thus erred in making a claim for the period 2014-2015 which were time barred for having been made after the lapse of 5 years.

6. The Tribunal further held that the Appellant erred in cherry-picking on apparent variances between estimated turnovers derived from bank deposits and the actual turn-overs hence failed to recognize that the variances arising from a comparison of the turnover per the VAT Returns and the sales over banking deposits which were because of a difference in the accounting treatment on different items of reconciliation. The tribunal ordered that the sum amounts of Kshs 496,331,766.00 collected from the enforcement of the Agency Notices be refunded to the Respondent.

7. It was then the Appellant's turn to be dissatisfied and aggrieved by the Judgement and Orders of the Tribunal hence it lodged the instant appeal against that entire decision.

The Appeal

8. The memorandum of appeal dated 21st March 2024 sets out three grounds of appeal to be: -

    a. That the Honourable Tribunal erred in law and fact by holding that the Appellant erred in in assessing Taxes for the years of income 2014-2015 being outside the five-year limitation period ignoring the fact that the Notice of Tax findings and intention to vary assessments was issued on 25th November 2020.

    b. That the Honourable Tribunal erred in law and fact by finding that the assessments for the years 2018-2019 were erroneous for failure by the Appellant to take into account negative variances for the years 2016-2017 without explanation contrary to the express accounting principle that the Appellant is allowed to carry forward losses explaining the negative variance and taxes only accrue on positive variances.

c. That the Honourable Tribunal misdirected itself on both facts and law, and thereby arrived at wrong, erroneous and absurd findings decision.

9. The Appellant's case is premised on its Statement of Facts dated and filed at the Tribunal on 27th January 2022. The Appellant contends that there was sufficient proof of willful neglect on the part of the Respondent to accurately declare full income received in 2014 in its returns after the appellants analysis and investigations established that the Respondent had total sales of Kshs. 716.824,440.00 but declared only Kshs. 706,259,051.00.

10. The Appellant relied on and cited to court the provisions of Section 31(4)(a) of the *tax Procedures Act* to bring to charge the variance established of Kshs. 10,565,389.00 which has a resultant Corporation tax liability of Kshs. 3,169,617.00 and stated that in view of the reconciliations carried out on the banking records, there was no dispute on the sales as per bank records for the period under review hence, the item on the VAT charged on the variance between the sales declared in the VAT return and the recomputed sales as per banking records was Kshs. 46,427,199.00 and Kshs. 95,574,358.00.

11. The Appellant asserted that Section 31 of the *Tax Procedures Act* allows it to amend original tax assessments for a reporting period based on the available information and to the best of its judgement, it considered all the documentation and information provided by the Respondent and noted that there were unexplained and unaccounted variances between declared sales on corporate tax returns and VAT returns as compared with the banking deposits for 2014 and 2015. The Appellant argued that even though the Respondent submitted to it the documentation, it did not explain the variance noted between the sales declared in the returns and sales as per the banking records stating that the default assessment by it was lawful.

12. The Appellant thus prays that the appeal be allowed, the judgement of the Tribunal dated 17th March 2023, be set aside, the objection decision dated 15th November 2021 be upheld and reinstated, and the appellant be awarded the costs of the Appeal and those of the proceedings at the Tax Appeals Tribunal.

Respondent's Case

13. The Respondent's case is pleaded in its Statement of Facts dated 12th April 2024. Against ground one in the Memorandum of Appeal on whether the Tribunal erred in its finding that the assessment for the years of income 2014 – 2015 was outside the five-year limitation period, the Respondent submits that the 2014 and 2015 reporting period, for both Corporation tax and VAT, were indeed issued outside the statutory period of five years stipulated under the *Tax Procedures Act*, 2015 (TPA).

14. The Respondent reiterates that sections 29(5) and 31(4) of the IPA bars the Commissioner from amending an assessment after the expiry of 5 years from the date of a self-assessment unless there is demonstrated evidence that exemption under the sections have exist.

15. It is then pointed out that the Appellant in varying the assessments on 9th July 2021 alleged there having been willful neglect on the part of the Respondent when it failed to accurately declare full income received. It was thus the Respondent's case that the Appellant did not substantiate how the variance was a result of willful neglect on the its part. Specifically, the Respondent avers that the Appellant did not rebut its arguments that the variances arising from re-computation of the sales amount using the banking method were mainly due to reconcilable items given that the sales declared in the returns were based on the revenue recognized in the audited financial statements.

16. It was further submitted that in considering the time lapse of the period in question and the fact that there had been changes in its staff, most of the reconciliation data had to be retrieved from an

independent archivist hence the variance which was in any event too immaterial when compared to the aggregate sales declared

17. The Appellant's contention that the Notice of Tax findings was issued on 25th November 2020 does not hold water for the reason that the assessments in issue were already statutory barred. The Respondent states that in any event, the Notice of Tax Findings of 25th November 2020 cannot be relied on for the reasons that these were then varied and confirmed assessment issued on 9th July 2021. The Respondent further states that the preliminary audit findings of the Appellant were only temporary, pending reconciliation on justification by the Respondent, thus negating the position taken by the Appellant that the Respondent was grossly and willfully negligent in its returns so as to warrant the Notice of findings and its intention to vary assessments.

18. In its response to ground 2 of the Appeal, whether the assessments for the years 2018-2019 were erroneous for failure by the Appellant to take into account negative variances for the years 2016 2017 without explanation, the Respondent states that the tribunal correctly held that the Appellant's Objection Decision was unjustifiable and unlawful in purporting to charge for tax on positive variances in years of income 2014, 2015, 2018 and 2019, and ignoring the significant negative variances in years of income 2016 and 2017.

19. The Respondent avers that had the Appellant had considered the entire period of the audit i.e. years of income from 2014 to 2019, the Appellant would have correctly found that the aggregate turnover declared by the Respondent in the VAT returns was Kshs 5,443,469,365 and higher than turnover derived by the Appellant in the same period of Kshs 5,429,383,220.

20. The Respondent stresses that the accounting principle that the Appellant sought to rely on to allow it carry forward only positive variance is an afterthought, was never before the tribunal and an argument designed to justify the selective choice of only instances with positive variances in its favour while completely ignoring the negative variances in favour of the respondent.

21. The Respondent thus faults the Appellant for completely failing to consider the reconciliation provided by it and instead before issuing the Objection Decision in blatant disregard to the Respondent's views and as such its actions contravened the Respondent's right to fair administrative action as provided for under Article 47 of *the Constitution* of Kenya, Section 4(1) of the *Fair Administrative Action Act* of 2015 and Section 29(2)(f) of the TPA.

22. On the Appellant's third ground on the Memorandum of Appeal as to whether the Tribunal misdirected itself by arriving at wrong, erroneous and absurd findings/decision, the Respondent reiterates that the Appellant's assessments for the years of income 2014 and 2015 fell outside the statutory time limit and therefore time bared. Further, that the 2018 and 2019 assessments and the subsequent Agency Notices were fatally defective and had no proper and justifiable basis, as the Appellant's method in charging taxes on the variances was haphazard and irrational.

Appellant's Submissions

23. The Appellant grounds its arguments in support of the appeal on three fronts he shapes as the issues for determination by the court. The three issues are set out to be: -

    i. Whether the Appellant was wrong for assessing taxes for years of income 2014-2015 outside the 5 years limitation period.

    ii. Whether the Appellant was wrong in the 2018-2019 assessments for failing to take into account negative variances for the year 2016-2017.

iii. Whether the Appeal should succeed as prayed.

24. On Whether the Appellant was wrong for assessing taxes for years of income 2014-2015 outside the 5 years limitation period, the Appellant submits that the Kenyan tax system operates on a self-assessment regime whereby the tax payer assesses self and declares what he considers to be taxable income on which he then pays tax to the authorities and as such the tax laws are coached in manner that gives the tax authorities wide powers and discretion in ascertaining ex-post facto and that the taxpayers are therefore required to keep records that allow the tax authorities to establish ex-post facto what is the correct taxable income, what taxable income is citing the decision in Commissioner of Domestic Services v Galaxy Tools Limited [2021] eKLR.

25. It is the Appellant's position that the retrospective application of assessments and tax audits raises a number of concerns i.e. issue of certainty and determinacy on how long these records may be kept stating that the time limits have been codified in statute i.e. five year statutory period in which the taxpayer must keep records and the bar on the Commissioner not to make assessments beyond a period of five years from the date of assessments unless in cases of willful neglect, evasion or fraud by the taxpayer.

26. The Appellant submits that the Commissioner notified the Respondent of the tax findings on 25th November, 2020 and made a demand of Kshs. 596,647,841/- for Corporation tax and VAT for the years 2014 to 2019 hence the assessment Act crystallized being the taxpayer was given sufficient details and documentation as well as notice necessary for business certainty on the intention to vary the assessment subject to according the Tax-payer a hearing. In applying the five-year rule from the date to the letter of tax findings i.e. 25th November, 2022, the commissioner was allowed to audit the taxpayer up to the year 2015.

27. The Appellant submits that in view of the Commissioner's notification that the investigation would go beyond the five years period (for the year 2014) it was therefore not correct for the Tribunal to make a finding that the variances were not material enough to warrant the incorporation of the year of income 2014. As such, the Appellant posits that the Tribunal wrong proceeded in finding that the five years period could be counted from the date of assessment i.e on 9th July, 2021 ignoring the long-held practice and principle that certainty is one of the hallmarks of a good tax administration or policy. One such important tenet of tax policy certainty is limitation of tine which allows a taxpayer to know the timeframe in which he can be held responsible for previous non-compliance citing the UK case of Maciejewskthe court vs Revenue & Customs (Income Tax/Corporation TaX: Penalty) 20181 UKFTT54 (C) (19th December 2018), Trustco Mortgage Co. vs Canada.

28. The Appellant further submits that the question of time limitation being administrative rather than substantive in nature, should not be interpreted strictly but rather purposively. Relying on the English House of Lords case of Inland Revenue Commissioners vs Duke of Westminster, the Appellant presents that tax statutes must be interpreted strictly and literally, is slowly being overturned by a more recent and modern purposive approach to interpretation of tax statutes. The Applicant posits that the purposive approach is globally gaining traction as evidenced by Canadian case of Stubart Investments Ltd vs The Queen the Supreme Court of Canada began to deviate from the strict interpretation approach towards a more broad and purposive approach to the interpretation of tax statutes and that in the above cited case the court held that: "The words of an Act are to be read in their entire context and in their ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

29. Locally, the Appellant seeks reliance on the Supreme Court decision on the subject of purposive interpretation of the law in the case of Gatiurau Peter Munya vs Dickson Mwenda Kithinjthe court & 2 Others, Supreme Court Petition No. 26 of 2014 [2014] eKLR, where the court held that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The Appellant submits that the court in the above case set the grounds for the adoption of a purposive approach to tax interpretation and the Canadian jurisprudence offers the much - needed foresight. The Commissioner reiterates that the purpose of the five-year limitation is to give the taxpayer certainty in tax administration and thus, in this case, the taxpayer was given notice of tax findings on 25th November, 2020 fulfilling the purpose of statute i.e. being notified with certainty on the tax audit and the timeframe in question.

30. On Whether or not the Appellant in the 2018 – 2019 assessments failed to take into account negative variances for the year 2016 – 2017, it is the Appellant's submission that while comparing the banking analysis and the returns filed by the Respondent, it emerged from the investigations that the returns filed i.e. the turnover, was higher than that established through banking deposits for the years 2016 and 2017. This is what the Appellant and the Tribunal refers to as the negative variances.

31. The Appellant submits that there was a positive variance for the years 2014, 2015, 2018 and 2019 i.e. the expected turnover established from the banking deposits was greater than the turnover declared by the taxpayer in the tax returns. In terms of subjecting these variances to income, the Commissioner subjected to tax only the positive variances and not the negative variances since income is charged on a gain or profit and not the losses represented by the negative variances.

32. The Appellant submits that tribunal in finding that the Commissioner fell in error by not taking into account the negative variances, the Tribunal failed to take into account that the Appellant had filed returns for the years in which there were negative variances and was allowed to claim the cumulative losses in the previous years of income.

33. The Appellant submits that the accounting principle that allows Respondent to claim the losses and offset them from the subsequent years of income, takes case of the negative variances as they are deemed to have been allowed before the profit for the year is taxed and the resultant variance is profit that ought to be subjected to tax. Accordingly, the Appellant submits that the Respondent failed to prove before the Commissioner and the Tribunal that there was an error in employing the banking analysis method or that the Commissioner failed to employ best judgement citing the decision in Digital Box Limited Commissioner of Domestic Taxes TAT Appeal No. 16 of 2017, paragraphs 100-101.

Respondent's Submissions

34. The Respondent filed its submissions on 12th of April 2024 and in which addresses three (3) main issues for determination being:

    i. Whether the Appellant erred in assessing taxes for the years of income 2014-2015 outside the five-year limitation period (Ground 1 of the Memorandum of Appeal):

    ii. Whether the assessments for the years 2018 2019 were erroneous tor failure by the Appellant to take into account negative variances for the years 2016 2017 without explanation (Ground 2 of the Memorandum of Appeal);

    iii. Whether the Respondent is entitled to the reliefs granted by the Tribunal (Ground 3 of the Memorandum of Appeal).

35. The Respondent in its submission cites a plethora of Authorities in support of its case including Tax Appeals Tribunals *Act, No 40 of 2013*; Commissioner of Investigations and Enforcement vs Ahmed [2021] KEHC 10 eKLR; Commissioner of Domestic Taxes vs Africa Oil BV [2020] eKLR; Commissioner of Income Taxes vs Local Productions (K) Limited [2021] eKLR; Commissioner of Income Taxes vs Local Productions (K) Limited [2021] eKLR; MUgo vs Wanjiru [1970] EA 481, 483; Commissioner of Income Taxes v Local Productions (K) Limited [2021] eKLR; Nicolas Kiptoo Arap Korir Salat vs I.E.B.C & others [2014] eKLR; Abdul Aziz Ngoma vs Mungathe court Mathayo [l976] Kenya LR 61,62; SAMVIR Trustee Limited vs Guardian Bank Limited [2007] eKLR.

36. On Issue 1 in response to Ground 1 of the Memorandum of Appeal as to whether the Appellant erred in assessing taxes for the years of income 2014 – 2015 outside the five-year limitation period, the Respondent submits that by the provisions of Section 31 of the *Tax Procedures Act*, 2015 (TPA), the Appellant can only amend an assessment of a taxpayer, within five years of the date the self-assessment was filed save for the case of fraud or willful neglect by or on behalf of the taxpayer. The Respondent submits that for the Appellant to depart from the application of section 31(4)(b), in effect invoking the provisions of section 31(4)(a), the Appellant must meet the strict requirements of this provision citing the cases of Agricultural Training Board vs Aylesbury Mushrooms Ltd [1972] Al ER 280 and the TAT decision in the Tax Appeal Number 207 of 2015 Paragon Electronics Limited vs Commissioner of Domestic Taxes.

37. The Respondent submits that the Appellant is statutorily obligated to undertake an assessment within a specific timeframe, and where the applicable legislation expressly provides for a consequence for the failure to do so, the same must be strictly adhered to. The Respondent states that it is the Appellant argument in an attempt to justify its late tax assessment for the years of income 2014- 2015 that the Respondent being guilty of fraud and willful gross negligence in allegedly failing to declare full income received in that the Respondent had total sales of Kshs 716,824,440 but only declared Kshs 706,259,051 citing the case Shreejthe court Enterprises *Limited v Commissioner of Investigations and Enforcement TAT 58 & 196 of 2019* whereby the Tribunal opined that although the burden of proof rests on the taxpayer to prove the payment of tax or that an assessment is wrong, the burden shifts to the Commissioner at the point where issues of VAT fraud are raised. It is the Respondent's position that the Appellant did not provide evidence of fraud in support of its allegation of fraud and willful neglect at paragraph 8 of the Appellant's submissions. The Respondent therefore prays that the Honourable Court disregards this allegation in the absence of any proof to support the same.

38. On the definition of the term "willful neglect", the Respondent submits that the court in Internal Revenue Service of the Federal Government of the United States of America defined the tem as "failure to exercise the care that a reasonable person would observe under the circumstances to see that the standards were observed, despite knowledge of the standards or rules in question" the Respondent further states the English case of R vs Turbill & Anor [2013] EWCA Crim 1422 where the Court of Appeal defined the term "willfully" to mean 'deliberately refraining from acting or refraining from acting because of not caring whether action was required or not.'

39. It is the Respondent's case that the Appellant failed to substantiate his allegation of willful neglect at the Tribunal and has merely reiterated the same position on its submissions to this appeal. Relying to 'TAT' decision in Tax Appeal No. 16 of 2019 Gitere Kahura Investments Ltd vs Commissioner of investigations and Enforcements, the Respondent avers that he who alleges pointing the decision in must prove and that the burden lay on the Appellant at all times to establish how the Respondent was negligent, and willfully so. The Respondent indicates that despite this burden, no evidence was submitted by the Appellant to justify its departure from the statutory time limitation of 5-year tax assessments.

40. The Respondent submits to have explained and provided records to show that the variances arising from re-computation of the sales amount using the banking method were mainly due to reconcilable items given that the sales declared in the returns were based on the revenue recognized in the audited financial statements. Further, the Respondent submit that in considering the time lapse of the period in question and the fact that there have been changes in staff at the Respondent's business and most of the reconciliation data had to be retrieved by an independent archivist, the variance was too immaterial relative to the sales declared, that it cannot be construed to be out of gross negligence pointing the High Court decision in National Social Security Fund Board of Trustees vs Commissioner of Domestic Taxes, Kenya Revenue Authority where it was stated that "where it was held that if there is no evidence to support the allegations or assertions of willful neglect then there is no basis upon which the period for the assessment of tax could have been extended."

41. The Respondent submits that the Appellant's allegations of "willful neglect" does not meet the test established under Section 107 to Section 109 of the *Evidence Act* and that the tribunal was right in its finding that the Appellant erred in assessing taxes for the years of income 2014 – 2015 outside the five-year limitation period. Further, that the Appellant's position that the Notice of Tax findings was issued on 25th November 2020 does not hold for the reason that the assessment in issue were already statutory bared and that in any event, the Notice of Tax Findings of 25th November 2020 cannot be relied on for the reasons that these were then varied and confirmed assessment issued on 19th July.

42. On issue 2 of Ground 2 of the Memorandum of Appeal on whether the assessments for the years 2018-2019 were erroneous for failure by the Appellant to take into account negative variances for the years 2016 2017 without explanation, it is the Respondent's case that the Appellant is seeking to charge VAT on the variance established from comparing the sales declared in the VAT returns to the recomputed sales as per banking records for the years of income 2018 and 2019.

43. The Respondent submits that the additional vatable sales arising from this comparison is Kshs 46, 427, 199 and Kshs 95, 574, 358 for the years of income 2018 and 2019 respectively and as such the variance was sufficiently reconciled as per the records it submitted to the Appellant which the Appellant has not disputed. The Respondent submits that the variances arising from a comparison of the turnover per the VAT returns and the sales per the banking records are largely because of the difference in the accounting treatment accorded to the various reconciling items. There is therefore no loss of revenue to the Appellant.

44. It is the Respondent's case that the Appellant cherry-picked only those instances where the apparent variance favored its case in total disregard of the full facts and that had it considered the entire period of the audit i.e. years of income from 2014 to 2019, it would have found that the aggregate turnover declared by the Respondent in the VAT returns was Kshs 5, 443, 469, 365 and not Kshs 5, 429, 383, 220 derived by the Appellant. As such, the Respondent submits that it declared a higher turnover by Kshs 14, 086, 145; was an uncontroverted fact which the Appellant ignored while issuing the Objection Decision.

45. In Response to Ground 3 of the Memorandum of Appeal on whether the Respondent is entitled to the reliefs granted by the Tribunal, the Respondent submits that the Appellant has completely failed to establish and demonstrate how the Tribunal's Judgment in allowing its Appeal was erroneous and has merely regurgitated its submission and arguments before the Tribunal. The Respondent presents that it would only be fair and just that the Objection Decision be vacated and the Appellant refunds to the Respondent the amounts collected from the enforcement of the unlawful Agency Notices for the sum of Kshs 496,331,756.00, as was held by the Tribunal. The Respondent prays that the Tribunal's Judgment be upheld and the Appeal dismissed with costs to it.

Analysis and Determination

46. The court has considered the grounds of appeal in the Memorandum of Appeal, the Appellant's case as presented before the Tribunal by Statement of Facts dated 27th January 2022 visa a vis Respondent's Statement of Facts dated 12th April 2024 in response to the Appeal as well as the parties' respective submissions, the notes that both parties have presented on common issues for determination as aligned with the grounds of appeal in the Memorandum of Appeal. The court has in its own appreciation of the dispute, with due regard to the positions taken by the parties, concurred with the parties and settled on the following issues for its determination: -

    a. Whether the Appellant erred in assessing taxes for the years of income 2014-2015 outside the five-year limitation period?

    b. Whether the assessments for the years 2018/2019 were erroneous tor failure by the Appellant to take into account negative variances for the years 2016/2017 without explanation?

    c. Whether the Respondent was entitled to the reliefs granted by the Tribunal?

47. The court's jurisdiction on appellate against the decision of the Tax Appeal Tribunal is vested by section 56(2) of the *Tax Procedures Act* 2015 and limited to the question of law only. Accordingly, this court in determining this Appeal is required to give due deference to the findings of fact by the Tax Tribunal and only depart from them if, the findings appear to be perverse and not founded on the evidence or if there be a clear and obvious misapprehension of the fact as applied to the law.

48. In the case of Mercy Kirito Mutethe vs Beatrice Nkatha Nyaga & 2 Others (2013) eKLR the Court of Appeal in discussing what constitutes a matter of law as opposed to matter of facts held and said:

> " Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law."

49. That position on what amounts to questions of law and fact, was reiterated by the court in Tile and Carpet Centre Limited vs Commissioner of Domestic Taxes (2020) eKLR when it further guided as follows:

> " These decisions do not suggest that the appellate court should not consider the evidence on record at all. Where the issue is misapprehension of evidence, leading to a perverse decision or ignoring material evidence or basing a decision on extraneous evidence amount to points of law that may be taken up on appeal."

50. In the instant case, the Appellant has challenged the decision of the Tax Appeals Tribunal dated 17th March 2023 in favour of the Respondent on two grounds. The first issue is whether the Appellant was in error in assessing Taxes for the years of income 2014-2015 outside the five-year limitation period considering that the Notice of Tax findings and intention to vary assessments was issued on 25th November 2020. The second issue is the question, if the Honourable Tribunal erred by finding that the assessments for the years 2018-2019 were erroneous for failure by the Appellant to take into account negative variances for the years 2016 – 2017 without explanation and contrary to the express accounting principle that the Appellant is allowed to carry forward losses explaining the negative variance and taxes only accrue on positive variances.

51. The question of statutory timelines goes to jurisdiction and must thus take precedence. The Appellant does not dispute the fact that the assessment was outside the five-year limitation period but asserts that the Commissioner notified the Respondent of the tax findings on 25th November, 2020 and made a demand of Kshs. 596,647,841/- for Corporation tax and VAT for the years 2014 to 2019. It contends that the Respondent was given sufficient details and documentation as well as notice necessary for business certainty on the intention to vary the assessment subject to the Tax-payer being accorded a hearing.

52. It is the Appellant's submission that the Commissioner notified the respondent that because of the variations in the returns filed, the investigation would go beyond the five-year period, and therefore, it was incorrect for the Tribunal to make a finding that the variances were not material enough to warrant the incorporation of the year of income 2014.

53. The dictates of the law under Section 29(5) of the *Tax procedures Act* are clear and unambiguous that it limits the Appellant not to conduct tax assessment for periods beyond five years from the last reporting period, subject only to instances where the tax payer has employed wilful neglect, evasion or fraud against the commission. The court interprets the provision to set time limit to five years.

54. In this matter, the notice of assessment herein having been issued by the Appellant on 25th November 2020 to cover the period beginning 2014, the same was prima facie in respect of a tax period beyond five years and it require proof that the respondent had been wilfully negligent or evasive on tax obligations. The duty to prove wilful neglect or evasion was upon the appellant. Whether or not there was wilful neglect was and remains a matter of fact and within the mandate of the tribunal, as the first appellate court with a duty to proceed by way of rehearing, to determine. It did give to the question the due consideration and determined, as a matter of fact, that in the whole process of investigations and assessments, the Appellant tendered no evidence in support of its argument that there was wilful neglect, evasion or fraud by the Respondent.

55. This court, upon perusal of the materials presented before the tribunal finds that no evidence was led to prove wilful neglect and therefore there would not have been a basis to find that the respondent had been in wilful neglect of his assessment obligations. By dictates of sections 107 and 108 of the *Evidence Act*, it was always incumbent upon the Appellant to demonstrate sufficiently that the variance, both positive and negative, arising from the sales records as compared to banking records, as submitted by the Respondent were not genuine accounting variations but a wilful neglect on the part Respondent to avoid tax obligations. On that duty, the appellant failed and it cannot be the tribunal that failed on its duty to determine the appeal in accordance with the law, but the appellant who failed to discharge its legal duty in proving what the law expected of it.

56. In coming to the foregoing conclusions, the court proceeds from the appreciation that tax statutes must be construed strictly on the true and natural meaning of the words used by the legislature. The court is, like the tribunal was, bound to strictly enforce the provisions of tax statutes. That obligation is drawn from the words of the court in Partington vs. AG [1869] LR 4 HL where the court rendered itself and said: -

> " If the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction,

certainly such a construction is not admissible in a taxing statute, where you simply adhere to the words of the statute." (emphasis added)

57. Flowing from foregoing, the Tribunal's finding that any tax assessment prior up to 26th November 2015, the 2014-2015 reporting period, by the Appellant was in contravention of the law cannot be faulted because the *Tax procedures Act* must be given strict interpretation when it sets limitation of time. This limb of the Appeal is adjudged meritless and is thus dismissed.

58. On the next question whether the assessments in the years 2018 – 2019 were erroneous for failure by the Appellant to take into account negative variances for the year 2016 – 2017, the Appellant's position that the investigations established that the returns filed show the turnover on sales was higher than that established through banking records for the years 2016 and 2017 was not controverted. It was equally uncontroverted that the appellant failed to reconcile such negative variations against the positive ones upon which the appellant computed the tax payable.

59. In its determination, the tribunal held: -

> " In the absence of any further explanation by the respondent as to why the negative amounts were not taken into consideration in arriving at it variance between the reported sales and banking, the tribunal agreed with the appellant that the respondent erred in cherry-picking on apparent variance between estimated turnover derived from bank deposits and the actual turnover"

60. That was equally a factual finding which the tribunal remained the master for purposes of determination on a first appeal. It requires a very strong case to countermand the determination by the tribunal on the issue. The court finds no error on that finding to merit its intervention by way of reversal. Effectively, therefore, the court resolves the two substantive issues in the negative with the consequence that even the consequential third issue is determined that the appellant not entitled to the remedies and orders sought in this appeal.

61. In conclusion the court holds that the Appellant has failed to demonstrate a question of law meriting its intervention by interfering with the decision arrived at. The entire Appeal is adjudged unmerited and is hereby dismissed with costs. Let the tribunal's judgment be given its full effects

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF MARCH, 2025.

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PATRICK J O OTIENO

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JUDGE