Alliance One Tobacco Kenya Limited v Commissioner of Legal Services & Board Coordination (Tax Appeal E298 of 2024) [2025] KEHC 12523 (KLR) (Commercial and Tax) (10 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12523 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E298 OF 2024

FR OLEL, J

SEPTEMBER 10, 2025

BETWEEN

ALLIANCE ONE TOBACCO KENYA LIMITED ..... APPELLANT

AND

COMMISSIONER OF LEGAL SERVICES & BOARD COORDINATION ..... RESPONDENT

JUDGMENT

A. Introduction

1. The Appeal before this court for determination arises from the judgement of the Tax Appeals Tribunal sitting at Nairobi dated 20th September 2024, issued in Tax Appeal No 42 of 2023, where they partially allowed the Appeal and varied the respondent's objection decision issued on 7th December 2022 in the following terms;

    a. The Tax assessment in relation to corporation income Tax prior to June 2016 and in relation to VAT prior to September 2017 were expunged from the objection decision.

    b. The assessment in relation to corporation income tax from June 2016 and in relation to VAT from September 2017 to March 2021 were upheld.

    c. The Respondent was directed to recompute the taxes, taking into account Order b(i) and(ii) herein above and considering the rates under the *Excise Duty Act* as regards Order b(ii) herein above.

    d. Each party was directed to bear their own costs.

B. Background Facts

2. The Appellant is a limited liability company incorporated in Kenya involved in the business of buying raw tobacco leaves from local farmers, which they would then steam and thresh for sale to licenced tobacco manufacturers. The genesis of this dispute arose when the respondent, vide its pre-assessment letter dated 9th June 2022, alleged a variance between the Appellants' Tax records and ITax filings for the period between January 2016 to December 2021, which variance was caused by taxes not declared on certain transactions.

3. As per the said demand, the amounts declared as outstanding on additional Corporate Income Tax (CIT), Withholding Tax (WHT), and Value-added Tax (VAT) for the said period between January 2016 to December 2021, was assessed at Ksh 25,802,232,395/= excluding penalties and Interest. In response, the Appellant, through their appointed Tax agent, Ernest & Young LLP (EY) provided detailed reconciled accounts and other supporting documents to prove the respondents wrong. But despite robust exchange of correspondence and several meeting being held, the respondent issued a new assessment notice dated 12th September 2022 confirming their demand of additional taxes to the tune of Kshs 39,804,972,831/=, (including penalties and interest).

4. On receipt of the notice of assessment, the Appellant did formally object to the said notice vide its notice of objection dated 11th October 2022, which was considered by the respondent, who subsequently issued its objection decision dated 7th December 2022, where it partially upheld the addition tax assessment contained in the notice of assessment for the period April 2016 to March 2021 and reduced the tax demanded to Kshs 23,746,847,800/=inclusive of penalties and interest. Still being dissatisfied with the objection decision, the Appellant filed their substantive Appeal before the tax tribunal, culminating in the decision dated 20th September 2024, the subject of this Appeal.

C. Pleadings

(i) The Appellants' case.

5. The Appellant filed their notice of Appeal, supported by relevant documents attached thereto, giving a detailed overview of their operations and explanation as to why the respondent had wrongly calculated their tax liability. The appellant company (hereinafter referred to as AOTKL) initially operated in Kenya and Uganda, where they would primarily purchase raw tobacco/green leaf from farmers, process the same to the level of pre-manufactured tobacco, and then sell it to its primary customer, which was a related entity, Alliance One International GmbH (AOI). They in turn would sell the said leaves to tobacco manufacturing companies including; British American Tobacco (BAT), Mastermind Tobacco Limited and Estobac Kenya Limited.

6. The Appellant described its activities to be limited to stemming, threshing, and re-drying of the tobacco leaves; which process basically involved sorting out the leaves received from farmers to remove non tobacco materials, sort together all similar grades from different farmers, remove stems from the tobacco leaf and then repackage the pre manufactured tobacco for easy storage, long shelf life and subsequent transportation to other players in the supply chain, who engage in the actual process of manufacturing of cigarettes, cigars smokeless tobacco, loose smoking tobacco (used in pipe or roll-you-own cigarette tobacco) and reconstituted (sheet) tobacco.

7. Regarding the astronomical taxes demanded by the respondent, the appellant pointed out that the term "manufacture" as defined under the *Excise Duty Act*, 2015 (EDA) connotes the process employed in the production of excisable goods. Their product was pre-manufactured tobacco, which was not

ready for consumption and was therefore not an excisable good, thus classified as, "unmanufactured tobacco" for excise duty purposes.

8. They also pointed out that when importing "green leaf tobacco" from their sister company in Uganda into Kenya, no excise duty was levied as the same was classified under HS Code 2401 of the common External tariff (CET), which fact was not disputed by the respondent. The said tariff HS Code 2401 was for "unmanufactured tobacco; tobacco refuse, and the list of tobacco products under the said heading included;

    a. "Tobacco, not stemmed/stripped"

    b. "Tobacco partially or wholly stemmed/stripped"

    c. "Tobacco refuse"

9. It was clear that the respondent was contradicting itself by allowing the importing of pre-manufactured tobacco under HS Code 2401, and proceeding to demand excise duty tax of stemmed and stripped tobacco, which was item/goods was expressly exempted by the said HS code.

10. On corporate tax variance, and VAT liability, the appellant averred that the respondent gravely erred in their assessment, as the variance between the sales as per VAT returns and sales as per corporation income tax (CIT) returns were fully reconciled during the audit stage and the objection stage, but unfortunately the respondent had proceeded to disregard their explanation and reconciliations provided. To this end, the appellant demonstrated at length where the errors were made in the said assessments, and reiterated that no loss of revenue had occurred as propagated by the respondent.

11. Flowing from the above, it was the appellant's contention that the attached reconciliation which summarized all the income declared in the CIT return as sales together with other income (as per the audited financial statement) and excluding from this sum the export sales, the resultant figure would be the taxable sales to be declare on the VAT returns. This sum compared with the taxable sales that were actually declared in the VAT returns of the years 2017 to 2020, shows very minimal differences, demonstrating that there were no tax leakages arising from the turnover differences.

12. The appellant did therefore urge the tribunal to uphold their Appeal and strike out the objection decision dated 7th December 2022.

(ii) The Respondents' case.

13. The respondent relied on their replying affidavit and statement of facts to oppose the appeal filed before the tax tribunal. During normal review/ audit process of the appellant's accounts, they had noticed variances between sales per corporation income tax returns and Value added tax returns declared in the accounting period between January 2016 to December 2021, and proceeded informed the appellant of the same vide their letter dated 9th June 2022. Subsequent meetings were held and correspondence exchanged to resolve the financial gaps noticed, but the parties herein were unable to reconcile the accounts previewed.

14. Accordingly, they issued the appellant with their assessment letter dated 12.09. 2022, leading to the appellant filing its objection dated 11.10.2022. The same was considered and rejected vide their letter dated 07.12.2022, hence the appeal filed before the Tax tribunal. The respondent reiterated their contention that, though the appellant had submitted tax returns in the approved forms and prescribed manner, they had noticed variances which, upon demand, were not satisfactorily explained by the appellant hence, the findings communicated to the appellant as per its objection decision dated 07.12.2022.

15. Further they averred that their investigations had established that the appellant processed tobacco through the leased machinery at BAT, and the resultant product attracted excise duty tax as defined by Section 2(b) as read with Section 5 of the *Excise Duty Act*,2015. They also noted that Part 1 of the first schedule of the *Excise Duty Act* did not list Tobacco or cigarettes using HS codes; therefore, the classification being advanced by the appellant had no legal locus on the chargeability of excise duty.

16. On withholding tax, the respondent faulted the appellant for using percentages of their invoice value to justify disbursements such as air ticket, accommodations, tax, and meals catered for the service providers, which, disbursement's in any event, could not be classified as "profession fee" as defined by Section 35(3),(f) of the *Income Tax Act*. They were therefore justified in subjecting full payments made to the Appellant to withholding Tax (WHT) without breaking the invoices into different categories as proposed by the appellant.

17. Finally, the respondent also confirmed that all assessments made beyond five (5) year period, had been dropped at the objection stage and the appellant had been notified of the same. Their assessment was thus presumptively assumed to be correct until the appellant produced competent and relevant documents to support their position, which burden they had failed to satisfactorily discharge. They thus urged the tribunal to uphold the assessment made as proper and be pleased to dismiss the appeal filed.

18. During the pendency of the Appeal before the tax tribunal, the parties did attempt to resolve the tax dispute but were unsuccessful. The Appeal was eventually heard on merit and vide its judgment dated 20th September 2024, the tribunal did find and hold that;

    a. The Appeal be and is hereby partially allowed.

    b. The respondent's objection decision issued on 7th December 2022, be and is hereby varied in the following terms;

        i. The tax assessment in relation to Corporation income tax prior to June 2016 and in relation to VAT prior to September 2017 be and are hereby expunged from the objection decision.

        ii. The assessment in relation to corporation income tax from June 2016 and in relation to VAT from September 2017 to March 2021 be and are hereby upheld.

        iii. The respondent to recompute the taxes taking into account order b(i) and(ii) herein above and considering the rates under the *Excise duty Act* as regards order b(ii) herein above; and

    (c) Each party to bear its own Costs.

D. The Appeal

19. Dissatisfied with the judgement/ decree issued by the tax Appeals tribunal, the Appellant filed their Memorandum of Appeal and raised nine (9) grounds of Appeal, namely that;

    i. The tribunal erred in law by finding that the Appellant did not discharge its evidential burden, thereby confirming additional tax on variances between sales corporate income Tax (CIT) returns and value-added Tax (VAT) returns that had been fully supported by the Appellant.

    ii. The tribunal erred in law by upholding the Respondents' disallowance of a provision in the 2019 year of income, which provision had been accorded the correct tax treatment.

iii. The tribunal erred in law by finding that the respondents' VAT assessment was proper on export sales, which are zero-rated, on the erroneous conclusion that the Appellants' goods were manufactured in Kenya.

iv. The tribunal erred in law by upholding the respondents' withholding tax (WHT) assessment and by failing to appreciate the Appellants' submission that it could not defend itself against the respondents' arbitrary WHT assessment without sufficient information provided by the respondent.

v. The tribunal erred in law and in fact in its determination on the WHT assessment by finding that the Appellant had failed to provide its version of the facts on this issue and by erroneously demanding documentary evidence on the same, which finding was based on a false understanding of the issues in dispute.

vi. The tribunal erred in law by upholding the respondents' Application of WHT on disbursements which are mere reimbursements contrary to the provisions of Section 10 as read with Section 35 of the *Income Tax Act*, (Cap 470). Laws of Kenya.

vii. The tribunal erred in law and in fact by returning an erroneous finding without legal basis by agreeing with the respondent that the Appellant's product should be categorized as "other manufactured tobacco and tobacco substitutes" when in fact the products are raw materials used in the production of tobacco products.

viii. The tribunal erred in law from and excise duty perspective, in finding that the Appellant's activities dealt with intermediate goods and therefore the Appellant engaged in the "manufacture of excisable goods under the *Excise Duty Act*, 2015.

ix. The tribunal erred in law by failing to adhere to the principle of stare decisis when making a determination on the applicability of excise duty on the Appellants' activities.

20. The Appellant thus prayed that the judgment/ decree of the tribunal be set aside in its entirety and that they be awarded the costs of this Appeal.

E. Parties Submissions

(i) Appellants' Submissions.

21. The Appellant filed submissions dated 9th May 2025 and supplementary submissions dated 11th June 2025, which they wholly relied on. They pointed out that the crux of this dispute lay on the fact as to whether their products constituted "manufactured tobacco" and if so, were excisable under the provisions of the *Excise Duty Act*, 2015 or not. Notable the respondent in their objection decision, had categorized their product's under, "Other manufactured tobacco" and "Manufactured Tobacco substitutes, "homogenous" and "reconstituted tobacco", tobacco extracts and essences" which products were subject to excise duty under the First schedule to the *Excise Duty Act*, an interpretation they had disagreed with, but was upheld by the Tribunal.

22. The Appellant reiterated that its principal activity was to supply raw materials (unmanufactured tobacco) used to manufacture tobacco by licensed tobacco manufacturers. Put simply, they engaged in the supply of stemmed and re-dried leaf tobacco, which was not ready for consumption, and, despite placing contractual evidence of the same before the tribunal, they had erred by assigning them a role (manufacturing) not provided for under the said contract. Reliance was placed on the case of

National Bank of Kenya Ltd Versus Pipeline Samkolit (K) Ltd & Another (2001) KLR 112, where it was emphasized that courts should not rewrite contracts for parties.

23. Secondly, it was submitted that all East African partner states were contracting parties to the International Convention on the Harmonised Commodity Description and Coding System (the HS Convention), which provided a standard coding framework for internationally traded goods. In implementing this code, the East African partner states had customized their customs systems through the East African Community common external Tariff (EAC-CET), which the *Excise Duty Act*,2015 under its First schedule, had derived all of its tariff classification.

24. Given this similarity, the tribunal had erred in failing to find that the goods subject to excise duty under the *Excise Duty Act* mirrored the nomenclature and classifications of goods provided for under EAC-CET. Thus, the said Acts were intended to be read in conjunction, particularly with respect to the tariff for classification of Goods. The Appellant also further noted that the *Excise Duty Act* imposed excise duty on goods and services on an exclusionary basis, which meant that if an item was not listed under its first schedule as excisable, the same should then not be subjected to excise duty.

25. The Appellant also relied on World Customs Organisation (WCO) guidance on the nomenclature and classification of goods through "explanatory notes", which in turn provided the scope of each heading, giving a list of the main products included and excluded, together with technical description of the goods concern (their appearance, properties, method of production and uses) and practical guidelines for their identification. Explanatory notes on heading 2401 covered "unmanufactured goods", (such as the appellants' products), while Code 2403 related to finished products (beyond the primary manufacturing stage), ready for smoking.

26. Further, it was worth noting that the nomenclature of the EAC-CAT ran in sequential order of goods in the value chain based on the rawness and value addition to the products until the final product is produced. Specifically, Chapter 24 of the EAC-CET on Tobacco products provided that;

    a. Unmanufactured or raw/green tobacco falls under heading 2401;

    b. As value is added to the green leaf, the heading is elevated to 2402; and

    c. When actual value is added to more sophisticated products like filtered cigarettes, electronic cigarettes and nicotine products, headings 2403 and 2404 then are applied.

27. The same analogy applied to the excise duty rates applicable and as captured in the first schedule of the *Excise Duty Act* and acknowledged by the respondent, when they cleared the said steam leaf under HS code 2401, when imported from Uganda into Kenya. Refence was also made to similar HS coding applied by the sister East African states of Uganda and Tanzania and global best practise in taxation of tobacco products sampling USA, India and United Kingdom.

28. Finally, to buttress their submissions on the applicability of EAC-CET, the Appellant urged the court to take judicial notice of the fact that the Finance Bill 2025 had sought to amend the provisions of the *Excise Duty Act* to explicitly provide that excisable goods under the *Excise Duty Act* shall be classified by reference to the tariff codes set out in Annex 1 to the protocol on establishment of the East African Community Customs union (commonly referred to as EAC-CET). This fact corroborated their assertion, and urged the court to so find. Reliance was placed on the case of Commissioner of Customs and Border Control Vrs Jayraj Impex Limited, Income Tax Appeal No. E173 of 2021 & Commissioner of Customs and Border Control Vrs Adula (Tax Appeal E003 of 2021) {2022} KEHC 248 (KLR) and Suresh Tobacco Co Versus CGST & Central Excise Vadodara I, Excise Appeal No. 10189 of 2024, where the courts relied on explanatory notes in H.S 2401 to find that stemmed tobacco was unmanufactured tobacco and hence did not attract Excise Duty.

29. The third issues raised by the Appellant, was that the tribunal erred in law by relying on the provision of the *Tobacco Control Act*, Chapter 245A, to define the word "manufacturing", which Act primary objective was to provided regulations for production, manufacture, sale, labelling, advertising, promotion and sponsorship of Tobacco products as opposed to relying on the *Excise Duty Act*,2015 which provided the parameters of taxation of various tobacco products. This had been done in flagrant disregard of well-known principal of taxation, that no person would be subjected to taxation unless the terms of the taxing statute were clear and unambiguous on liability imposed. Reliance was placed on the case of Thika water & sewerage Company Limited Vrs Commissioner of Domestic Taxes (Tax Appeal No 8 of 2020), {2022}, where it was held that importation of a definition from a different statute other than the tax legislation was unacceptable.

30. The final issue raised by the Appellant was that the tribunal had erred in law by upholding an excessive tax demand contrary to the principles of taxation, and fair administrative Action. To put the issue into context, they sold the most expensive grade of stemmed/blended tobacco for approximately Kshs600 per kilogram, yet the respondent was purposing to levy excise duty at the rate of Kshs 7,000/= or Kshs 8,837 per Kilogram, which was ten times the actual cost of the product sold to its customers. The said duty proposed to be imposed on their product was therefore unfeasible by local and global standards, arbitrary and excessive thereby falling foul of the provisions of Article 47 (1) of *the Constitution* of Kenya 2010. Reliance was placed in the case of Judicial Service Commission Vesus Mbalu Mutava & Another (2015) eklr & Local Productions Kenya Limited Vrs Commissioner of Domestic Taxes (Tax Appeal No. 50 of 2017)

31. It was also their contention that the tribunal inexplicably ignored the principles of stare decisis, when making a determination on the applicability of excise duty on their products, which precedent especially relying on the high court case of Adula case (Supra), and Jayraj Impex case (Supra) provided clear parameters on classification of unmanufactured tobacco goods and ought to have been upheld by the tribunal. Reliance was placed in the case of Rai & 3 others Vrs Rai & 5 others (Petition No 4 of 2012), {2013} KESC 21 (KLR), which reconsider that it was important to uphold the principal of stare decisis for predictability, consistency, reliability, integrity and coherence.

32. The Appellant thus urged this court to find that this Appeal has merit and proceed to allow the same with costs.

(ii) Respondents' Submissions.

33. The respondent relied on their written submissions dated 3rd June 2025 and their supplementary Submissions dated 18th June 2025 to oppose this Appeal. They contended that the Appellant was involved in the primary manufacture of cigarettes, wherein raw tobacco leaf sourced from contracted farmers was sorted, graded, threshed, packed, scanned, and blended in the primary manufacture process to meet customer specifications for secondary manufacture in the process of making cigarettes.

34. Section 2 of the *Excise Duty Act* defined manufacture to include the production of excisable goods and/or any intermediate or uncomplete process in the production of excisable goods. The production process undertaken by the Appellant, as explained above (stemming, Re-drying, pressing), clearly amounted to a manufacturing process as the form of the tobacco changed from the time it was received by the Appellant to the point of sale.

35. Having established that the Appellant was engaged in a manufacturing process of tobacco, which was an excisable good, it was axiomatic that the Excise duty demanded was justified under Section 5 of the said *Excise Duty Act*,2015. It was also to be noted that the Appellant had in the year 2020, sought a private ruling as to whether the process they undertook amounted to a manufacturing process, and

the respondent had been categorical in their letter dated 28th August 2020, that the process undertaken involved the manufacture of tobacco and a such the appellant was liable to pay Tax. Reliance was placed in the case of Cape Brandy Syndicate Vrs I.R. Commissioners (1921) 1KB, Mount Kenya Bottlers Ltd & 3 others Vrs Attorney General & 3 Others (2019) Eklr, Majengo Limited Vrs Commissioner of Domestic Taxes CA No 85 of 2014 & Commissioner of Income Taxes Vrs Kneya Seed Company limited to buttress this point.

36. The respondent further submitted that the *Excise Duty Act*, under the 1st schedule, did not list Tobacco or Cigarettes using their HS Code, and therefore the classification being advanced by the Appellant, placing reliance on Common External Tariff and EACCMA, was inapplicable to the dispute at hand.

37. The respondent also supported the tribunal's finding that the "*Tobacco Control Act*" applied to the Appellant's activities. The said Act of Parliament aimed to provide a framework for the control, production, manufacture, sale, labeling, advertisement, promotion, sponsorship, and use of Tobacco products. They reiterated that the Appellant was engaged in a production process of tobacco leaves, which they turned into a marketable product and sold for commercial gain, and were thus liable to pay excise duty imposed on local manufacture, importation, or local supply of certain commodities and services.

38. As to whether the VAT assessment was valid, the respondent submitted that the same was charged where the taxpayer dealt with a Vatable good or Vatable Supply within the country. It was not disputed that the Appellant sold their processed green leaf tobacco to local companies, including BAT, Mastermind Tobacco Kenya, and Eastobac Kenya, all of whom were resident in Kenya. The Appellant had also not provided evidence to support exported sales, and thus, they were justified in demanding VAT due on local sales, calculated by using the formula: (Vatable Value = Costs plus Excise Duty Paid).

39. Finally, on the issue of stare decisis, the respondent faulted the Appellants' contention that the tribunal had failed to follow the said well-known legal principle, while adjudicating over this matter, and referred to the citations of Kenya Seed Company case and Majengo Lts cases (Supra) which were relevant to the issue at hand. The tribunal had also acted within the confines of their statute, and thus, no bad/ill motive could be attributed to their decsion. Reliance was placed in the citation of Republic v Commissioner of Customs & Excise Duty; Ex parte Abdi Gulet Olus (2014) Eklr.

40. The respondent therefore urged the court to find that, without doubt, they had adequately proved that the Appellant was engaged in a tobacco manufacturing process and had failed to pay Excise duty and VAT as demanded under the law. Excise duty calculated at Kshs 21,546,538,312 /=, and Vatable sales occasioned by underpaid excise duty, also calculated at Kshs 3,449,354.366/= were rightly due. They thus urged this court to dismiss this Appeal and uphold the Tax assessment made.

(F) Consent

41. While this Appeal was pending for determination, the parties did engage in an ADR process, the outcome of which resulted in the parties signing and filing a partial consent dated 28th May 2025. The same was adopted as an order of this court on 16th June 2025, and its terms were that;

G. Partial Consent

i. Pursuant to the Alternative Dispute Resolution Agreement dated 4th April, 2025, this appeal is hereby marked as partially settled under the following terms: -

i. That the Income Tax Assessment totalling to Kshs. 770,846,466 has been amended to Kshs. 13,299,016 comprising of principal tax of Kshs. 7,741,897, a late penalty of Kshs. 387,095 and an interest of Kshs. 5,170,024.

ii. That the VAT Assessments of Kshs. 3,202,230,122 is settled as follows: -

   a. VAT Amounting to Kshs. 3,159,251,044.28 arising from Exercise Duty adjustments is referred back to the High Court for hearing and determination.

   b. VAT Assessments from income Variances established between sales as per income Tax returns and VAT returns for the year 2018 of Kshs. 42,979,068.42 comprising of principal VAT of Kshs. 22,740,247.84, a late payment penalty of Kshs. 1,137,012.39 and an interest of Kshs. 19,101,808.19 is due and payable.

iii. That the Withholding Tax Assessments totalling Kshs. 1,696,269 have been revised to Kshs. 1.417,484 comprising of Principal tax of Kshs. 794,660, a late payment penalty of Kshs. 39,733 and interest of Kshs. 583,091.

iv. That the Exercise Duty assessments totaling Kshs. 19,772,074,953 has been referred back to the High Court for hearing and determination.

v. That in summary:

   a. The VAT Amounting to Kshs. 3,159,251,044.28 arising from Exercise Duty adjustments and the Exercise Duty Assessments totaling Kshs. 19,772,074,953, detailed in paragraphs 2(a) and 4 above respectively, are referred back to the High Court for hearing and determination.

   b. The Income Tax Assessment, VAT Assessments from income Variances, and the Withholding Tax Assessments as detailed in paragraphs 1, 2 (b), and 3 above, respectively, have been settled on the terms hereunder.

vi. That the parties are cognizant of the fact that the interest amount may vary upon amendment of the assessments in the iTax system and are agreeable to such variation.

vii. That the Appellant shall pay the agreed total principal Tax liability of Kshs. 31,276,805 by 25th April, 2025 (now past) being full and final settlement as set out hereinabove.

viii. That subject to payment of principal tax by the Appellant, the Respondent shall update the Appellant's ledger to reflect the updated and correct tax position as per the terms of the ADR Agreement.

ix. That notwithstanding the payments indicated in paragraph 7 herein above, the Appellant may apply for remission of penalty and interest immediately upon payment in full of the total outstanding principal tax liability herein, as provided for in Section 37E of the *Tax Procedures Act* 2015. The Respondent shall then undertake to grant the remission upon timely application by the Appellant.

x. That should the Appellant fail to make its Application for remission of penalty and interest as indicated hereinabove, the entire amount of penalty and accrued interest shall be due and payable immediately.

xi. That where a party to this agreement fails to fulfill part of its obligation, the other party shall be at liberty to enforce the performance of the agreement.

xii. That the Agreement having been concluded and consent adopted is binding on the parties in HCCOMMITA/E298 of 2024 and upon full compliance with the terms of the ADR Agreement, the Respondent shall not raise any further assessments or claims against the Appellant in relation to the subject matter of this dispute covering Corporate tax, WHT and VAT for the 2016 – 2020 tax period.

xiii. That each party shall bear its costs, if any.

G. Analysis & Detrmination

42. In determining this Appeal, this court exercising Appellate jurisdiction that is circumscribed by Section 56(2) of the Tax Procedure Act, which provides that, "An appeal to the High Court or to the court of Appeal shall be on a question of law only". An appeal limited to matters of law does not permit the appellate court to substitute the tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. In John Munuve Mati Vr The returning officer, Mwingi North Constitency & 2 others (2018) eKLR, what amounts to "matters of law" was described as;

> (38) The interpretation or construction of *the constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context, and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into consideration of the credibility of witnesses or which witnesses are more believable than others; by law, that is the province of the trial court.

43. I have considered the entire record of appeal, the parties' respective submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. During the pendency of this Appeal, the parties did file a partial consent resolving some of the issues in contention, especially concerning Income Tax Assessment, VAT assessment from income variance, and withholding tax assessment as detailed under paragraphs 1,2, (b), and 3 of the said partial consent that was adopted as an order of this court on 16th June 2025.

44. What then remains for determination is whether the respondent is entitled to demand payment of Excise Duty assessment totaling Kshs19,772,074,953/= and VAT amounting to Kshs 3,159,251,044,122/= from the Appellant.

45. The Appellant before the tribunal made out a strong case to prove that it was a supplier of raw materials (unmanufactured tobacco to licensed tobacco manufacturer). In summary, the process they undertook involved stemming, re-drying, and pressing the tobacco leaves to remove non-tobacco materials, sorting together all similar grades tobacco from different farmers, removing stems from the tobacco leaf, and then re-packaging the pre-manufactured tobacco for easy storage, long shelf life, and subsequent transportation to the licensed manufacturer.

46. Their product was thus pre-manufactured tobacco, which was used as raw material in the manufacture of the final tobacco products like cigarettes, cigars, smokeless tobacco, i.e, chewed, plug/twisted, and snuff tobacco.

47. They further pressed the tribunal to note that the green leaf imported from Uganda to Kenya did not attract excise duty as it was categorized under HS Code 2401 of the Common External Tariff (CET), which fact that the respondent did not dispute. The said HS Code 2401 dealt with "unmanufactured tobacco; tobacco refuse," and the list of tobacco products under the said heading included;

a. "Tobacco, not stemmed/stripped"

b. "Tobacco, partly or wholly stemmed/stripped"

c. "Tobacco refuse"

48. Flowing from the above, it was not in doubt that the provisions of EAC-CET applied to their product classification and urged the said tribunal to find that the process they undertook did not amount to manufacturing as defined under the *Excise Duty Act*, 2015 and therefore should not attract excise duty as demanded by the respondent.

49. In response, the respondent stated that a tax verification process was undertaken on the Appellant's activities, and it revealed variances in both Income Tax and Value Added Tax returns. After due process, the said assessment was upheld, resulting in the proceedings before the Tax Tribunal. They insisted that the Appellants' activities of stemming, re-drying, and pressing the tobacco leaves was a manufacturing process as defined by Section 2(b) of the *Excise Duty Act*, 2015 and thus liable to excise tax as defined under Section 5 of the said *Excise Duty Act*.2015.

50. For avoidance of doubt, the *Excise Duty Act*, 2015, under Part 1 of its 1st schedule did not list Tobacco or cigarettes using their HS Codes, and therefore the classification being advanced by the appellant had no legal locus on the chargeability of excise duty. By extension, the provisions of EACCMA or EAC-CET did not apply. The Appellant had thus failed to meet the burden of proof contrary to section 56(1) of the *Tax Procedures Act* to prove that the tax decision made was incorrect and urged the tribunal to uphold their objection decision made vide their letter dated 7th December 2022.

51. Having heard both parties, the tribunal specifically held that, " to its mind it was rather obvious that the Appellant adds value to raw material/green leaf for sale. In other words, the appellant deals with intermediate goods, which process fell within the definition of manufacturing within the meaning of section 2(1), (b) of the *Excise Duty Act*, 2015.

52. Further, the said tribunal did hold that it was also necessary to take cognizance of the fact that tobacco and tobacco-related products were controlled products under the *Tobacco Control Act*, Cap 245A which Act under section 2 thereof defined manufacturing as: "the processing of Tobacco product and includes the packaging, labelling, distribution or importation of a tobacco product for sale in Kenya. Having established that the Appellant dealt with the manufacturing of intermediate goods, the tribunal held that the Appellant was liable to pay excise duty.

53. The crux of this Appeal, as stated above, lies in determining the following conjoined issues;

i. whether the Appellants' process of stemming, re-drying, and pressing amounts to manufacturing as defined under Section 2 as read with Section 5 of the *Excise Duty Act*, 2015, and/or Section 2 of the *Tobacco Control Act*, Cap 245A.

ii. Whether classification under the HS code applies to the Appellant's products

iii. Whether the tribunal was right in upholding the respondents' finding that the appellants' products are classified under the goods, "other manufactured tobacco and manufactured tobacco substitutes; "homogenous" and "reconstituted tobacco", tobacco extracts and essences, as provided for under part 1 of the first schedule of the *Excise Duty Act*, 2015

iv. Whether the tribunal erred in law by upholding an excessive tax demand contrary to the principles of Taxation and fair administrative Action.

v. Whether the tribunal erred in law by failing to adhere to the principles of stare decisis.

vi. Who should bear the costs of this Appeal?

i. whether the Appellants' process of stemming, re-drying, and pressing amounts to manufacturing as defined under Section 2 as read with Section 5 of the *Excise Duty Act*, 2015, and/or Section 2 of the *Tobacco Control Act*, Cap 245A

54. First and foremost, it is rather obvious that the tribunal erred in relying on the provisions of the *Tobacco Control Act*, Cap 245A, which is not a Taxing Act, to find that the process undertaken by the Appellant amounted to a manufacturing process. A similar issue arose in Thika Water & Sewerage Company Limited Vrs Commissioner of Domestic Taxes (Tax Appeal No. 8 of 2020), {2022} where the taxpayer sought to classify its income as zero-rated for VAT purposes, based on definitions provided under the "*Water Act*", and it was held that;

> "I agree with the commissioner's submissions that the court cannot second-guess or imply into the provisions of tax statutes. The court cannot begin to draw a conclusion into what the intendment of the legislature was when it Zero-rated the supply of water. It cannot thus import a definition from a different statute.... The VAT Act, 2013, and other tax legislation ought to be read without leaving any room for implication or intendment. If parliament intended to Zero-rate sewerage services or include its meaning into the supply of natural water, nothing could have been easier than for them to say so."

55. Be that as it may, Section 2(1) of the *Excise Duty Act* defines "manufacture" to include;

a. The product of excisable good;

b. Any intermediate or uncomplete process in the production of excisable goods; or

c. The distilling, rectifying, compounding, or denaturing of spirits."

56. It is not disputed that the Appellant engages in a process where they buy green leaf/raw tobacco from local farmers and engage in the primary processing stage, which involves sorting undesired tobacco leaves not suitable for processing in terms of leaf grade, dry the same through loose leaf butting and threshing, before re-drying the same to suitable moisture content, which then allows for their packaging. The tipped and threshed tobacco is then sold to licensed tobacco manufacturers for further processing.

57. Accordingly, the Appellant insisted that their process consisted of supplying raw pre-manufactured tobacco to licensed tobacco manufacturers, who engage in the actual manufacturing process of tobacco products ready for consumption by users such as cigarettes, cigars, smokeless tobacco (i.e. chewing, plug/twist and snuff tobacco) or loose smoking tobacco (i.e pipe and roll-your-own cigarette tobacco, and reconstituted (sheet) tobacco.

58. Section 2(1) of the *Excise Duty Act*, 2015 defines "manufacture" to include "any intermediate or uncomplete process in the production of excisable goods. From the definition proffered, excisable goods need not to have concluded the whole process of production, for it to attract excise duty, as intermediate and incomplete process is deemed to be part of the manufacturing process, under the said Act.

59. To my mind, therefore, the activities undertaken by the appellant to; stem the leaves, to remove undesirable leaf not suitable for blending in terms of leaf grade; loose leaf butting, where the leaf ends and thick stems are removed from the leaf; threshing which involves mechanically stripping off the leaf, or hand stripping the same or manually remove the stems; then re-dry the same to suitable moisture

content (13% or to the moisture level that are specified by the customer), and finally packaging the tipped and threshed tobacco without doubt comprises an intermediate (manufacturing) process, which brings the appellants activities within the ambit of Section 2(1) of the *Excise Duty Act*, 2015, and would, without doubt, attract excise duty as provided under section 5(1) of the *Excise Duty Act*,2015 as read together with Part 1 of the first schedule to the said *Excise Duty Act*, 2015.

ii. Whether classification under the HS code applies to the Appellant's products

60. East African states are contracting parties to the International convention on the Harmonized commodity description and coding system, (the HS convention) and accordingly apply the Harmonized system (the HS) as the standard coding framework for internationally traded goods. The East African partner states have adopted this HS system which provides for standardized numerical method for categorizing traded goods and codified the same under The East African Community-common External Tariff (EAC -CET) for interpretive purposes.

61. The appellant faulted the tribunals finding to the effect that, Excise duty payable, could only be determined based on reference made to relevant provision of *Excise Duty Act* 2015, and that reliance ought not be placed on the East African Community Customs Management Act (EACCMA) or the East African Community Common External Tariff (EAC-CET) for interpretive purposes. They reasoned and submitted the tribunals finding was illogical since *Excise Duty Act*, tariff classification mirrored the nomenclature and classifications as stated in EAC-CAT and thus the said Act, were to be read and applied conjunctly as relevant interpretive tools for determining which goods would subject to excise duty levy.

62. I do agree with the appellant, that the classification of goods and tariff under *Excise Duty Act*,2015 mirror the nomenclature and classification of goods and tariffs as provided for under EAC-CAT and that both Act of parliament ought to be read conjointly. Be that as it may, I must clarify this would only apply in situations, where goods and tariff classification is sought, where goods are being imported into the country and a determination on duty to be paid arises.

63. Based on the facts pleaded herein especially the appellants witness statement, that of Geoffrey Ndanjiwa Banda, he did aver that "prior to shutting down its operations in Kenya, AOTK'S principal business activity was buying raw tobacco/green leaf from local farmers stemming and threshing it and exporting the resulting stemmed and threshed tobacco leaf and by products (referred to in this statement as pre-manufactured tobacco). The said witness further confirmed that AOTKL would conduct its activities (what they termed as pre-manufacturing) at Green Leaf Threshing Plant (the BAT GLT Plant), which is situated within Thika town.

64. Given this background facts as pleaded herein, the provisions of the EAC-CAT for the reasons advanced above, then became inapplicable and the tribunal cannot be faulted for so finding.

iii. Whether the tribunal was right in upholding the respondents' finding that the appellants' products are classified under the goods, "other manufactured tobacco and manufactured tobacco substitutes; "homogenous" and "reconstituted tobacco", tobacco extracts and essences, as provided for under part 1 of the first schedule of the *Excise Duty Act*, 2015

65. The principles guiding tax legislation were restated in Republicvs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR, where Majanja, J held:

> " The approach to this case is that stated in the oft-cited case of Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64 as applied in T.M. Bell v Commissioner of Income Tax [1960] EALR 224, where Roland J. stated, " ...in a taxing Act, one has to

> look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used... If a 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."

As this case concerns the interpretation of the *Income Tax Act*, I am also guided by the dictum of Lord Simonds in Russell v Scott [1948] 2 ALL ER 5, where he stated, "My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him" ..... Also adopted in Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR per Nyamu JA

Any tax imposed on a subject is dictated by the terms of legislation, and the taxing authority must satisfy itself that the transaction fits within the definition of the statute. In Adamson v Attorney General (1933) AC 257 at p 275 it was held that, "The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect-if it be in view of the Crown a defect can only be remedied by legislation."

66. In Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

67. Having determined that the Appellant is engaged in the manufacture of an excisable product, Section 5 of the *Excise Duty Act*, 2015 obligates them to pay their share of excise duty as provided for under Part 1 of the first schedule of the said Act, which provides that rate for "other manufactured tobacco and manufactured tobacco substitutes; "homogenous" and "reconstituted tobacco"; tobacco extracts and essences at Kshs 11,382.48 per kg. The appellant products would broadly fall under this category especially under the category of, "other manufactured tobacco". The excise duty levied upon their products was thus justifiable.

iv. Whether the tribunal erred in law by upholding an excessive tax demand contrary to the principles of Taxation and fair administrative Action.

68. The Appellant faulted the tribunal for upholding the application of excise duty on the appellants stemmed/threshed tobacco at the rate of Kshs 7,000/= or Kshs 8,837 per kg, while in actual fact the sold their most expensive grade of stemmed/blended tobacco leaves at about Kshs 600 per kg. The tax applied was therefore arbitrary, and excessive contrary to the provisions of Article 47(1) of *the Constitution* of Kenya 2010 thus rendering the said decision to be void.

69. While the rate of taxation maybe disproportionately high, and irrational, it is clear that the constitutionality of the law as passed cannot be challenged at the tribunal, nor was it an issue for determination before the said panel. In other words, it was not a pleaded issue and/or canvassed before the tribunal and cannot be raised on Appeal. See; Gandy v. Caspair Air Charters Ltd. (1956) 23 EACA 139

v. Whether the tribunal erred in law by failing to adhere to the principles of stare decisis.

70. The final issue raised in this appeal was that the tribunal erred in failing to adhere to the principles of stare decisis, which was a foundational doctrine in our legal system, which binds subordinate court to follow and uphold the decisions of higher courts. Specifically, the appellant had cited the cases of Commissioner of customs and Border control Vrs Adula (Tax Appeal E 003 of 2021),(2022)KEHC 248 (KLR) & Commissioner customs & Border control Vrs Jayraj Impex Limited, Income Tax Appeal No E137 of 2021, where in both cases it was held that unmanufactured tobacco remined within the scope of H.S 2401 even after undergoing stemming, provided that it was not ready for smoking.

71. As already determined above provisions the harmonized commodity coding system and General rules of interpretation (GIR) as codified under EAC-CAT as read together with the relevant provisions of the *Excise Duty Act*, 2015, will be applied where a dispute arises for "imported goods". In the above cited cased both respondents imported "unmanufactured tobacco" from India, and it was rightly determined that H.S code 2401applied. The facts as laid out in the two citations referred to, differ slightly when compared to the facts in the present case, as the appellant's products are not imported and thus excise duty is applied on locally stemmed and threshed tobacco, for which *Excise Duty Act*, 2015 expressly provides for its taxation.

G. Disposition

72. For the reasons I have set out above, I do find and hold that the tribunal did not err in finding and holding that the Appellant was liable to pay Excise Duty on its products based on the definition of "manufacturing" as provided for under Section 2(b) of the *Excise Duty Act*, 2015.

73. The Judgment of the Tax Appeals tribunal issued in Tax Appeal No. 42 of 2023, dated 20th September 2024, is therefore upheld, but modified based on the parameters set out in the partial consent filed in court on 28th May 2025 and adopted as an order of the court on 16th June, 2025.

74. Each Party, will bear their own costs of this Appeal

75. It is so ordered.

RULING WRITTEN, DATED, AND SIGNED AT NAIROBI THIS 10TH DAY OF SEPTEMBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 10TH DAY OF SEPTEMBER, 2025.

In the presence of;

..... for Appellant

..... for Respondent

..... Court Assistant