Althaus Services Limited v Commissioner for Domestic Taxes (Income Tax Appeal E024 of 2023) [2024] KEHC 12742 (KLR) (Commercial and Tax) (3 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12742 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E024 OF 2023

WA OKWANY, J

OCTOBER 3, 2024

BETWEEN

ALTHAUS SERVICES LIMITED ..... APPELLANT

AND

THE COMMISSIONER FOR DOMESTIC TAXES ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal delivered at Nairobi on 13th January, 2023 in Tax Appeal No. 594 of 2021)

JUDGMENT

The Parties

1. The Appellant herein, Althaus Services Limited, is a limited liability company duly incorporated and licensed in Kenya to carry out the business of Management of Real Estate.

2. The Respondent is the Commissioner of Domestic Taxes, an officer appointed under and in accordance with Section 13 of the *Kenya Revenue Authority Act*, and is charged with the responsibility of among other functions, the assessment, collection, accounting, and the general administration of tax revenue on behalf of the Government of Kenya.

Background

3. The Appellant provided a detailed background of the sequence of events that culminated in the instant appeal in its Statements of Facts dated 27th September 2021 filed before the Tribunal and further Statement of Facts filed before this court pursuant to directions issued on 18th May 2023. According to the Appellant, the facts leading to this appeal were as follows: -

4. That as at 31st December 2015, the Appellant had a cumulative tax loss of Kshs. 6,614,467 with Kshs. 3,259, 585 being attributable to the year of income of 2015.

5. On 27th May 2016, the Appellant filed a self-assessment return for the year ended December 2015.

6. By a letter to the Appellant dated 24th August 2019 the Respondent requested for additional documentation in order to assess whether the Appellant was entitled to the tax credit and proceeded to advise further as follows: -

> " Kindly prepare the schedules and supporting documents under (i) above and deliver them in duplicate labelled folders at the KRA desk in KICC within 14 working days (from 23rd August,2019 to 12th September,2019) to avoid losing legitimate credits. Please use the attached template to submit the information on credits from manual withholding for credits on manual certificates, manual tax payments and Tax credits on foreign Income each year of income."

7. By a letter dated 10th September 2019, the Appellant objected to the Respondent's direction on treatment of income tax credits for the years of income 2013 to 2018 and supplied the necessary supporting documentation. In the same letter of objection, the Appellant applied for a refund of the income tax credits for the years of income 2013 to 2018 amounting to KES 3,025,291 as well as a refund of KES 1,022,997 being the amount erroneously withheld by the Appellant's tenants on the service charge component of its invoices thus making the total refundable amount to be Kshs. 4,048,288.00.

8. By a further letter dated 13th January 2020, the Appellant notified the Respondent that the latter had failed to issue a refund application decision within the statutory ninety-day period from the date of lodging the refund application and accordingly, requested the Respondent to advise on the timeline within which the refund will be made.

9. On 24th June, 2021, the Respondent issued the Appellant with an Assessment Order number KRA202113271221 for KES 331,778 relating to the year of income 2015 ("the Assessment Order") being the exact amount of the overpaid tax refundable to the Appellant as at 1st January 2015 by amending the return filed by the Appellant for the said year of income with the removal of the amount of overpaid tax brought forward from field 13.4 which relates to credits under section 42 that the Appellant had previously challenged by way of its notice of objection dated 10th September, 2019.

10. By a letter dated 21st July 2021, the Appellant lodged an objection against the Assessment Order and proceeded to lodge the same on its i-Tax portal on 22nd July 2021. In this Objection of 21st July 2021, the Appellant referred to its previous correspondences on the matter and particularly to its objection letter dated 10th September 2019 and letter of 13th January 2020 in which it had supplied the Respondent with all the documentation in support of its tax credit claim. In addition, the Appellant affirmed that its refund claim was deemed as allowed and refundable by operation of the law as the Respondent had failed to issue a refund decision within 90 days thereof and urged the Respondent to revoke the illegal Assessment Order and instead pay the refund amount due of KES 4,048,288 as at 31st December 2018 as the law provides to settle the matter once and for all.

11. By an email dated 23rd July 2021, the Respondent noted that its assessment was based on disallowed tax credits claimed in the Income Tax company self-assessment Return under section 42 of the *Income Tax Act* and required evidence of foreign income tax credit despite the Appellant's unequivocal objection.

12. In response thereto, the Appellant did, by a letter dated 28th July 2021, reiterate that its Objection was on overpaid tax credit and not on foreign income credit and that the same had been reflected in the

self-assessment i-Tax return in the field under Section 42 on the advice of the Respondent's staff at the KRA Support Centre, and requested for revocation of the Assessment Order.

13. Further, by the said letter dated 28th July,2021 the Appellant brought to the Respondent's attention that it never claimed any credit under Section 42 of the *Income Tax Act* as purported rather that it merely followed the oral advice of KRA officers that it was to disclose its tax credits under Section 42.

14. In response to the Appellant's said letter of 28th July 2021, the Respondent did, by an email dated 3rd August 2021, state as follows: -

> " Good afternoon.
>
> Kindly provide the following;
>
> 1. Any evidence that you were advised by KRA to disclose tax brought forward from 2014 in the field meant for Section 42 credits.
>
> We would appreciate if the documents are shared within 5 days from the date of this e-mail and in soft."

15. In response to the above request, the Appellant did provide by a letter dated 6th August 2021, the details on the advice from the Respondent on treatment of tax credits, referencing the supporting documentation already provided to the Respondent. The Appellant reminded the Respondent that whether or not the Appellant had reflected its credit under the wrong section in the i-Tax portal did not negate the fact that the Appellant had overpaid taxes as it had demonstrated in its allowed Objection dated 10th September 2019 and which overpaid taxes are claimable and refundable to the Appellant as provided for in law.

16. In its response to the Appellant's objection letter, the Respondent disallowed the tax credit on the basis that the same had been mis declared on the i-Tax portal. The Respondent nevertheless advised the Appellant to visit the Section 42 credit validation project team at Ushuru Pension Plaza-Westlands for "reconciliation" of its ledger. It further requested for additional documentation in support of all credits.

17. The Appellant was dissatisfied with the Respondent's said response and sought recourse at the Tribunal by instituting the Tribunal Appeal pursuant to Section 52(1) of the TPA being Appeal No. 594 of 2021 before the Tribunal vide the Memorandum of Appeal dated 27th September 2021 which appeal was supported by the Appellant's Statement of Facts of even date.

18. The Tribunal heard the appeal and rendered its Judgement on 13th January 2023, dismissing the Appeal primarily on the basis that the Tribunal lacked jurisdiction to hear and determine the appeal. The Tribunal's final decision was as follows:

> " 72. The upshot of the foregoing analysis is that the Tribunal finds that the Appeal is incompetent and unsustainable in law and accordingly proceeds to make the following orders:
>
> a. The Appeal be and is hereby struck out;
>
> b. The Appellant is allowed a period of sixty days within which to comply with the Respondent's letter dated 17th August 2017, failing which the Appellant's assessment disallowing the Appellant's credits under Section 42 of the ITA amounting to

Kshs. 331,778.00 shall be deemed to have been upheld as a valid and lawful tax assessment."

Each party is to bear its own costs."

19. Dissatisfied with the Judgement of the Tribunal, the Appellant has lodged the instant Appeal before this Court through the Memorandum of Appeal dated 8th March 2023.

The Appeal

20. The Appellant listed the following grounds of appeal in the Memorandum of Appeal: -

a. The Tribunal erred in law and in fact by finding that the Respondent's letter dated 17* August 2021 was not an appealable decision against which an Appeal could be filed at the Tax Appeals Tribunal. because the conclusion of the said letter read as follows;

> "In light of the above, the Commissioner was right in expunging your claims under section 42 filed in your returns as part of cleaning your ledger and you have not lost your credit where it is due Please note that this is a response under sector 51 [4] of the *Tax Procedures Act* and not an objection decision under section 51(9)."

b. The Tribunal erred in law and in fact in finding that the Respondent's letter dated 17th August 2021 did not contain any tax Decision by the Commissioner which could qualify as an appealable decision as it merely advised the Appellant of reconciliation and review of Section 42 Credits when as a matter of fact the said letter confirmed the additional assessment that was the subject of the Appellant's Letter of Objection.

c. It was not in law and in fact open for the Tribunal to disagree with and/or contradict its own judgment delivered on 25th March 2022 in TAT No. 764 of 2021, Althaus Services Limited v Commissioner of Domestic Taxes relating to the same parties and involving the same series of assessment and additional assessments relating to the Appellant's applications for refund of overpaid tax tor the years of income 2015, 2016 and 2017. Indeed, in the said judgment in TAT No. 704 of 2021 the Tribunal summarizes the factual background as follows.

> "17. By a letter dated 21st September, 2021, the Respondent issued its decision in which it confirmed its earlier assessments being the assessment dated 24th June, 2021 for Kshs 331,778 00 in relation to the year of income 2015 (the subject of appeal in TAT 594 of 2021 and the two (2) assessments dated 30th July. 2021 for Kshs. 364,771.00 and Kshs. 1,285,717.00 in relation to the 2015 and 2017 years of income respectively. The said decision therefore upheld these three assessments and proceeded to disallow tax credit in the sum of Kshs. 1,980,266.00."

d. The Tribunal erred in law and in fact by failing to take into consideration the language used in Section 61(4) of the *Tax Procedures Act* which does not confer upon the Respondent the power to confirm an additional assessment pending reconciliation or otherwise, thus arriving at its erroneous findings of fact and law in its Judgment.

e. The Tribunal erred in law and fact by failing to appreciate that an Invalidation Notice made under section 51(4) o; the *Tax Procedures Act* is not excluded from being an appealable decision pursuant to section 3 of the *Tax Procedures Act* as was upheld by the Tribunal in TAT No. 704 of 2021, Althaus Services Limited vs. Commissioner of Domestic Taxes which arose from the same series of transactions

f. The Tribunal erred in law and in fact in failing to determine the substantive issues it had framed far determination in the Judgment being, "whether the Respondent was justified in disallowing credits claimed by the Appellant and issuing additional assessment and thereby egregiously violating the Appellant's right to fair hearing as enshrined under Article 50 of *the Constitution* of Kenya, 2010.

g. The Tribunal erred in law and in fact by failing to take into consideration all the relevant information and the evidence filed before it by the Appellant to support its case, particularly the Letter of Objection dated 10th September 2019 which bad been allowed by operation of the law, thus issuing erroneous Orders in its Judgment.

21. The Appeal was canvassed by way of written submissions as follows: -

The Appellant's Submissions

22. The Appellant isolated the following issues arise for determination: -

a. Whether the Tribunal erred in law in finding that letter dated 17th August 2021 was not a decision that would cloth the Tribunal with jurisdiction.

b. Whether the Tribunal was misguided in law in finding that an objection decision is a mandatory pre-requisite to the invocation of the jurisdiction of the Tribunal.

c. Whether the Tribunal erred in law and in fact in finding that there was no appealable decision merely because the Respondent had not reconciled, reviewed and considered the claim for tax credits and the additional assessment.

d. Whether the Tribunal erred in law and in fact by failing to take into consideration all the relevant information and the evidence filed before it by the Appellant to support its case, particularly the letter of Objection dated 10th September 2019 which had been allowed by operation of the law.

e. Whether the Tribunal erred in yielding up jurisdiction thereby failing to consider the substantial issue being: "whether the Respondent was justified in disallowing credits claimed by the Appellant and issuing additional assessment" and as such, infringing on the Appellant's right to fair hearing.

f. Whether the Tribunal erred in law and in fact by failing to consider that the Respondent was not permitted, by law, to issue an additional tax assessment on a tax refund claim.

23. The Appellant was of the view that even though the letter dated 17th August 2021 was neither an objection decision, a tax decision or a decision issued in the course of making a tax decision, the said letter was a decision issued under a tax law given the definition of a "tax law" under Section 3 of the TPA as the Respondent expressly advised the Appellant to note that its response was made under section 51(4) of the *Tax Procedures Act* and not an objection decision under section 51 (9).

24. It was submitted that there can only be one conclusion: that a decision (whether the same is couched as a response or otherwise), which was made under Section 51(4) of the TPA, constituted a decision issued under a tax law and as such, it is an appealable decision as so defined under Section 3 of the TPA, particularly given that it was not exempted thereunder as it is not a tax decision.

25. The Appellant contended that Section 51(4) of the TPA empowers the Commissioner to make a decision referred to as "Notice of Invalidation of Objection" which is an appealable decision. For this argument, the Appellant referred to a similar/related case being; TAT No. 704 of 2021: Althaus Services Limited Vs. Commissioner of Domestic Taxes, where a letter from the Commissioner dated 21st September 2021 was similarly worded thus: "Please note that this is a response under Section 51(4) of the *Tax Procedures Act* and not an objection decision under Section 51(9). For any clarification contact...". The Appellant noted that when faced with the issue as to whether the said letter constituted an appealable decision, the Tribunal made a finding that a decision issued under Section 51(4) was an appealable decision.

26. It was submitted that the Tribunal therefore erred in finding that the decision before it was not an appealable decision particularly noting that the judgment in TAT No. 704 of 2021 involved the same parties and was a decision that arose from a series of similar transaction According to the Appellant, there was no justification in law or at all for the contradicting finding in respect of the Tribunal's jurisdiction.

27. The Appellant implored this court to find that the Respondent's letter dated 17th August 2021 was an appealable decision and that as such, the Tribunal was misguided in declining to seize jurisdiction and to determine the Tribunal Appeal on its merits.

28. On whether the Tribunal's finding that an objection decision is a mandatory pre-requisite to invoke the jurisdiction of the Tribunal was misguided, the Appellant referred to the provisions of Section 52(1) of the TPA and Section 12 of the *Tax Appeals Tribunal Act* and submitted that a plain reading of the said provisions leads to the inevitable conclusion that the law does not support the Tribunal's findings and neither does it make an objection decision a mandatory pre-requisite to the invocation of the jurisdiction of the Tribunal. It was submitted that to the contrary, it is an appealable decision that is required for a party to invoke the jurisdiction of the Tribunal. The Appellant reiterated that an appealable decision means and include either an objection decision or any other decision issued under tax law other than a tax decision or a decision made in the course of making a tax decision. Consequently, a decision issued under section 51(4) of the TPA is an appealable decision.

29. It was further submitted that had the Appellant complied with the unlawful purported "advisory", the Appellant would have lost its right to appeal the Appealable Decision to the Tribunal. The Appellant would have been left in limbo, with no way to challenge whatever decision the Respondent arrived at following the reconciliation. This is in view of the fact that such reconciliation was not pursuant to any statutory provision set out in a tax law.

30. The Appellant maintained that it had provided all supporting documentation in support of the objection as well as in support of the overpaid taxes that were the subject of the tax credit in question. It added that all that was left for the Respondent to do was to provide its Objection Decision either confirming the impugned assessment order or vacating the impugned assessment order. Should the Respondent have been dissatisfied with the supporting documents provided, all it was required to do was reject the objection and confirm the impugned assessment.

31. The Appellant argued that the Tribunal misapprehended the law when it found there was no appealable decision merely because the Respondent had not reconciled, reviewed and considered the claim for tax credits and the additional assessment. The Appellant noted that the Respondent's letter expressly stated that it had been issued under Section 51(4) of the TPA. The Appellant maintained that whichever way one looked at the said letter of 17th August 2021, it was an appealable decision for consideration by the Tribunal.

32. It was submitted that the Tribunal erred in its holding that it lacked jurisdiction. It was the Appellants case that the Tribunal erred in law and in fact by failing to take into consideration all the relevant information and the evidence filed before it by the Appellant to support its case, particularly the letter of Objection dated 10th September 2019 which had been allowed by operation of the law.

33. It was submitted that the preliminary dismissal of the TAT Appeal deprived the Tribunal of the opportunity to consider the evidence and the documents presented by the parties before it, and in particular, the fact that by a letter dated 10th September 2019, the Respondent had lodged an objection on the same subject, which objection had been allowed by operation of the law by dint of Section 51(11) of the TPA.

34. The Appellant argued that its objection having been allowed by operation of the law, it was neither open in law nor permissible for the Respondent to issue its Assessment dated 24th June 2021 or even to issue the purported notice of invalidation of objection under Section 51(4) of the TPA which is the appealable decision dated 17th August 2021. The Appellant relied on the decision in TAT NO. 168 of 2021: Walters Trading Co. Ltd vs. Commissioner of Domestic Taxes [Unreported] where the Tribunal emphatically held that: -

> " .... after the lapse of this 60 days, the Respondent had no jurisdiction to issue an objection decision, let alone an invalidity notice."

35. It was therefore the Appellant's submission that the Respondent had no powers to either issue the Assessment Order, seek for further documentation or even to issue the purported response/notice of invalidation under Section 51(4) of the TPA or make any other decision of whatever nature, after the Notice of Objection dated 10th September 2019 had been allowed by operation of the law.

36. The Appellant maintained that the Respondent was stripped off the jurisdiction to consider the issue of Section 42 credits covering the years of income 2013 to 2018 after the lapse of 60 days from the date of the Notice of Objection dated 10th September 2019, having failed to issue an objection decision within the stipulated time. According to the Appellant, the Assessment Order and the letter dated 17th August 2021 amounted to nothing in law and that the Tribunal therefore erred in directing the Appellant to comply with the Respondent's letter dated 17th August 2017.

37. The Appellant faulted the Tribunal for yielding up jurisdiction thereby failing to consider the substantial issues raised by the Appellant such as ; whether the Respondent was justified in disallowing credits claimed by the Appellant while at the same time issuing additional assessment thereby infringing on the Appellant's right to fair hearing, and; whether the Tribunal erred in law and in fact by

failing to consider that the Respondent was not permitted by law to issue an additional tax assessment on a tax refund claim.

Respondent's Submissions

38. The Respondent, on its part, isolated only two issues for determination, namely: -

    a. Whether the appeal is competent.

    b. Whether the Respondent was justified in disallowing the tax credits claimed by the Appellant and issuing the additional tax assessment.

39. The Respondent challenged the validity of the Supplementary Statement of Facts filed before this court on 8th June, 2023 as a preliminary issue, and submitted that the same contravenes the general principle, as set out under Section 56 (2) of the *Tax Procedures Act* that all appeals from the Tax Appeals Tribunal to the High Court are only on matters of law and not of facts.

40. The Respondent noted that the Appellant had however chosen to file a Supplementary Statement of Facts which raises separate questions of fact that were not presented before the Tribunal at the time of the determination of the appeal thereby prejudicing the Respondent's case. It was submitted that whereas the Court has discretion to allow additional evidence, the Appellant has not set out a basis for the inclusion of the additional facts. The Respondent added that none of the facts adduced at the High Court could not have been reasonably pleaded before the Tribunal. The Respondent urged this court to strike out the Supplementary Statement of Facts for contravening the clear provisions of Section 56 (2) of the *Tax Procedures Act*. Reference was made to the decision in Daniel Otieno Migore vs. South Nyanza Sugar Co. Ltd (2018) eKLR where both an appeal and a cross - appeal were dismissed and the court held as follows: -

> " It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

41. The Respondent also submitted that the record of appeal, as filed, is improper and not in line with the provisions of the Tax Appeal Tribunal (Appeals to the High Court) Rules as the Appellant has included the judgment in TAT 704 of 2021; Althaus Services Limited v The Commissioner Of Domestic Taxes, yet the said decision is not the subject of this appeal and was not submitted before the Tribunal as an authority to support the Appellant's case. The Respondent urged this court to expunge the said decision from its record.

42. On whether the Respondent's letter dated 17th August 2021 was an appealable decision, the Respondent submitted that the aforementioned letter, was not an objection decision and was therefore not an appealable decision as envisaged under Section 3 of the *Tax Procedures Act*.

43. It was the Respondent's case that in absence of an appealable decision, the Tribunal was right in holding that it lacked the jurisdiction to entertain the appeal.

44. The Respondent maintained that the appeal, as filed before the Tribunal, was premature and incompetent and that the Tribunal was therefore justified in dismissing the appeal on this ground.

45. On whether the Tribunal could depart or disagree with its own judgment in the similar aforementioned related case being TAT 704 OF 2021, the Respondent submitted that the Tribunal is not bound by its previous decisions as it retains its powers to address a dispute on a case-to-case basis. For this argument,

the Respondent cited the decision in SGS Kenya Limited vs Energy Regulatory Commission & 2 Others [2020] eKLR, where the Supreme Court (Ibrahim, Ojwang, Wanjala, Njoki, Ndungu & Lenaola SC JJ) held that: -

> "(41) So we turn to the single issue before us: are the Tribunals bound by the doctrine of stare decisis? The petitioner has contended that the Review Board failed to follow its own decision in Avante, without any explanation. According to the petitioners, stare decisis applies to quasi - judicial tribunals, to the intent that there be uniformity/consistency, predictability, and certainty in law, in general terms. The 1st respondent, quite to the contrary, has argued that tribunals are not bound by their previous decisions such being only persuasive; and that each tribunal's task is to be determined on the basis of the facts before it.
>
> (44) We would agree with the 1st respondent, that administrative decision-makers should have significant flexibility, in responding to changes that affect the subject-matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place. "

46. The Respondent therefore urged the Court to find that the appeal before the Tribunal was incompetent and that the Tribunal was therefore justified in dismissing the same, as it had no jurisdiction to entertain the appeal in absence of an appealable decision.

47. On whether the Tribunal was justified in disallowing the credits claimed by the Appellant and for issuing additional taxes, the Respondent submitted that upon the Tribunal finding that it had no jurisdiction to determine the appeal, it was not legally obligated to consider any other question before it, as the same would not be in furtherance of the overriding objective on the expeditious disposal of suits.

48. It was submitted that the Tribunal cannot be faulted for refusing to engage in an academic exercise as the Courts & Tribunals are not supposed and should not be seen to make orders in vain. Reference was made to the decision in B vs. Attorney General [2004] 1 KLR 431 and the celebrated case of Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited 1989, where the court held that a court must down its tools once it finds that it has no jurisdiction.

49. On the Appellant's argument that the Tribunal erred in failing to consider the relevant information before it and in particular that the objection was allowed by operation of the law and that the Respondent lacked the power to issue additional assessments on invalidating the Appellant's objection, the Respondent submitted that having failed to avail the requested documentation, the Respondent had no choice but to invalidate the objection and confirm the assessments since Section 51 (8) of the *Tax Procedures Act* obligates the Respondent to consider only a validly lodged objection.

50. The Respondent further submitted that it was justified and within the law to disallow the unsupported Section 42 credits claim and in making the additional assessment. Reference was made to the decision in Ushindi Limited vs. Commissioner of Investigation and Enforcement Kenya Revenue Authority [2020] e KLR where it was held that: -

> "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. "

51. The Respondent submitted that the Appellant had the burden to prove that the assessment made by the Respondent was incorrect and/or that the documents and/or information relied upon by the Respondent in making the assessment was wrong.

52. It was submitted that the Appellant was granted ample time to validate its objection and was even further advised to seek reconciliation of its ledger with the Section 42 unit but instead it chose to appeal against the Respondent's communication. The Respondent cited the case of Republic vs. KRA: Proto Energy Limited (2022) eKLR where the Court stated as follows: -

> " The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability, it is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payer's evidence must meet this minimum threshold. " (Emphasis mine)

53. The Respondent argued that it was therefore justified, in absence of any documents to warrant a review of its decision, to use the available information to assess and invalidate the objection.

Analysis and Determination

54. I have carefully considered the pleadings filed herein and the parties' respective submissions together with the authorities that they cited. I find that the main issue for determination is whether the Tribunal arrived at the correct finding when it held that it lacked the jurisdiction to entertain the Appellant's appeal.

Preliminary Issues

55. Before I delve into determining the merits of the appeal, I am minded to consider the preliminary issue raised by the Respondent over the validity of the Appellant's Supplementary Statement of Facts filed on 8th June, 2023. The Respondent urged this court to strike out the Supplementary Statement of Facts for being in clear contravention of the provisions of Section 56 (2) of the *Tax Procedures Act*.

56. The Respondent also urged this court to note that the record of appeal, as filed, is improper as it includes the judgment in TAT 704 of 2021; Althaus Services Limited vs. The Commissioner of Domestic Taxes, (hereinafter "the related case") which is not the decision that is the subject of this appeal. The Appellant however implored this court to uphold the Tribunal's decision in the related case because both cases arise from the same series. The Appellant was of the view that nothing prohibits it from relying on previous decisions of the Tribunal which though not binding on the court are persuasive in nature.

57. Turning to the validity of the Supplementary Statement of Facts, I find that it basically consisted of the uncontested facts of the case relating to the sequence of events that led to the dispute before the Tribunal. I do not believe that he contents of the Supplementary Statement of Facts prejudiced the Respondent's case in any way.

58. My finding is that the Appellant could still have cited or referred to the decision in the related case even if it did not form part of the record of appeal.

The Merits of the Appeal

59. The crux of this appeal is the Respondent's letter to the Respondent dated 17th August 2021 in response to the Appellant's letter dated 6th August 2021 and a culmination of a series of correspondence between the parties herein.

60. The Tribunal struck out the Appellant's appeal on the basis that it was filed prematurely since, according to the Tribunal's decision, the Respondent's letter dated 17th August 2021 was not an objection decision that would clothe it with the requisite jurisdiction to hear and determine the appeal. The Tribunal rendered itself as follows: -

> " 63. The Appellant proceeded on the belief that the letter dated 17th August 2021 was a tax decision and it therefore, filed the Appeal herein with prayers that the Tribunal sets aside the assessment contained in the impugned letter.
>
> 64. An impartial and close review of the impugned letter reveals and brings to the inescapable conclusion that it did not contain any tax decision by the Commissioner which could qualify as an appealable decision. It merely advised the Respondent of the reconciliation and review of Section 42 credits."

61. The Tribunal further rendered itself as follows: -

> " 72. The upshot of the foregoing analysis is that the Tribunal finds that the Appeal is incompetent and unsustainable in law and accordingly proceeds to make the following orders:
>
> a. The Appeal be and is hereby struck out;
>
> b. The Appellant is allowed a period of sixty days within which to comply with the Respondent's letter dated 17th August 2017, failing which the Appellant's assessment disallowing the Appellant's credits under Section 42 of the ITA amounting to kshs. 331,778.00 shall be deemed to have been upheld as a valid and lawful tax assessment."
>
> c. Each party is to bear its own costs."

62. The Appellant submitted that contrary to the findings of the Tribunal, the said letter was an appealable decision as it was a decision issued under a tax law given the definition of a "tax law" under Section 3 of the TPA since the Respondent expressly advised the Appellant to note that its response was made under section 51(4) of the *Tax Procedures Act* and not an objection decision under section 51 (9). It was the Appellant's case that a decision (whether the same is couched as a response or otherwise), which was made under Section 51(4) of the TPA, constituted a decision issued under a tax law and as such, was an appealable decision as so defined under Section 3 of the TPA, particularly given that it was not exempted thereunder as it is not a tax decision.

63. The Respondent, on the other hand, submitted that its letter dated letter dated 17th August 2021 was merely an advisory and not an appealable decision since it was not an objection decision as envisaged under Section 3 of the *Tax Procedures Act*.

64. The question that this court has to grapple with is whether the Respondent's letter of 17th August 2021 amounted to an appealable decision. I note that the letter in question was worded, in part, in the said letter as follows: -

> " However, we do acknowledge that the issue at hand requires reconciliation of the disallowed credits under the correct section of the law (either the repealed 105 of ITA or Section 47 of the *Tax Procedures Act*). Since this credit was due to an overpayment in the i-TaX.'
>
> In light of the above, the Commissioner was right in expunging your claims under Section 42 field in your returns as part of cleaning up your ledger and you have not lost your credit where it is due.....
>
> "Please note that this is a response under Section 51(4) of the *Tax Procedures Act* and not an Objection decision under Section 51(9)."

65. Section 3 of the TPA defines an appealable decision as follows: -

> " appealable decision" means an objection decision and any other decision made under a tax law other than—
>
> a. a tax decision; or
>
> b. a decision made in the course of making a tax decision."

66. The jurisdiction of the Tribunal flows from Section 52 of the *Tax Procedures Act*, which states that "a person dissatisfied with an appealable decision may appeal the decision to the Tribunal."

67. Section 51(4) of the *Tax Procedures Act*, provides that: -

> " Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged."

68. My finding is that, as correctly submitted by the Appellant, the Respondent's letter of 17th August 2021, though couched in the wordings of an advisory, was clearly a Notice of Invalidation of the Appellant's objection which is an appealable decision. My take is that the said letter should not be considered in isolation but must be read alongside the numerous correspondence exchanged by the parties as highlighted in the introductory part of this judgment. I am guided by the decision in Krystalline Salt Limited vs. Kenya Revenue Authority [2019] eKLR where the court considered the effect of a decision made under Section 42 of the TPA and held that: -

> " Section 12 of the Act provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal [...] The phrases to note in these two provisions are "any tax decision and subject to the provisions of the relevant law." [...] The act defines an "appealable decision" as "an objection decision and any other decision made under a tax law other than— (a) a tax decision; or (b) a decision made in the course of making a tax decision. The word any other decision under the tax laws is significant. The impugned decision was made pursuant to the provisions of section 42 of the *Tax Procedures Act*.

> From the phrase "...subject to the provisions of the relevant law," three key points emerge. First, whether the impugned decision was taken pursuant to the above section. I find no difficulty answering this question in the affirmation nor is there an argument before me to suggest otherwise. The provisions speak for themselves. Second, whether the decision is an appealable decision within the above provision. [...] The impugned notice falls under the above definition. To hold otherwise would amount to intellectual dishonesty given the clarity of the provision."

69. I find that in the present case, just like in the above cited case, the Respondent made its decision pursuant to the provisions of section 42 of the TPA thereby falling within the definition of an appealable decision.

70. The Appellant noted that when the Tribunal was faced with an exactly similar scenario involving the same parties in TAT No. 704 of 2021: Althaus Services Limited Vs. Commissioner of Domestic Taxes, (hereinafter" the related case") where a letter from the Commissioner dated 21st September 2021 similarly indicated thus: "Please note that this is a response under Section 51(4) of the *Tax Procedures Act* and not an objection decision under Section 51(9). For any clarification contact..." the Tribunal made a finding that a decision issued under Section 51(4) was an appealable decision. I note that in the said case, the Tribunal held that: -

> " 33. The Tribunal notes that Section 51(4) of the TPA deals with invalidation of a notice of objection. Therefore, the Respondent's letter of 21st September 2021 should be treated as an Invalidation Notice of the Appellant's Notices of Objection served on the Respondent on 22nd July 2021 and 27th August 2021. The question that the Tribunal will now turn to is whether the Invalidation Notice is an appealable decision. In this connection, the Tribunal makes reference to Section 3 of the TPA
>
> 34. ....
>
> 35. From the above provisions, the Tribunal notes that an invalidation notice to an objection notice is not excluded from being an appealable decision.
>
> 36. Consequently, the Tribunal finds that the Respondent's letter dated 21st September 2021 constitutes an appealable decision."

71. The Respondent, on the other hand, objected to the Appellant's reference to the similar case and submitted that the Tribunal, unlike s ordinary courts, is not bound by the doctrine of stare decisis and that the decision in the said related case had no binding authority on the Tribunal as it retains the flexibility to determine matters on a case to case basis.

72. My finding is that in as much as the Tribunal may not be bound by the doctrine of stare decisis such that each case is determined based on its own peculiar fact, the facts of this case are exactly similar and identical to the facts in the related case. It is to be noted that in the related case arises from the same series as the instant case and that in the said case, just like in this case, the issue in contention was whether the Appellant's letter worded "Please note that this is a response under Section 51(4) of the *Tax Procedures Act* and not an objection decision under Section 51(9). For any clarification contact..." was an appealable decision.

73. I find that since the facts in this case are similar to the facts in the related case, and further, since the cases arise from the same series, it will only be fair that there be some level of consistency in the manner in

which the cases are dealt with at the Tribunal level. For this reason, since the Tribunal found that a letter written by the Respondent, under similar circumstances was an appealable decision, this court finds that there was no justification for the contradictory finding in respect of the Tribunal's jurisdiction.

74. My wholesome analysis of the facts of this case further leads me to conclude that apart from the issue of reconciliation of the disallowed credits under the correct section of the law, the Tribunal was also required to deal with the pertinent issue of the letter dated 10th September 2019, in respect of which the Appellant alleged that its objection had been allowed by operation of the law under Section 51(11) of the TPA and the issue of whether the Respondent could issue additional tax assessment on a tax refund claim.

Disposition

75. For the reasons that I have stated in this judgment, I find that the instant appeal is merited and I therefore allow it and set aside the Judgment of the Tribunal and substitute it with an Order remitting the Appeal for hearing on its merits by the Tax Appeals Tribunal as sought in the Memorandum of Appeal dated 8th March 2023. I make no orders as to costs.

76. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 3RD DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE