Commissioner of Domestic Taxes v Devyani Food Industries Kenya Limited (Income Tax Appeal E137 of 2023) [2024] KEHC 12744 (KLR) (Commercial and Tax) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12744 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E137 OF 2023

WA OKWANY, J

OCTOBER 17, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

DEVYANI FOOD INDUSTRIES KENYA LIMITED ..... RESPONDENT

(Being an appeal arising from the whole judgment of the Tax Appeals Tribunal delivered on 14th July 2023 in Tax Appeals Tribunal Number 846 of 2022)

JUDGMENT

Background

1. The Appellant is a principal officer appointed in accordance with Section 13 of the *Kenya Revenue Authority Act*, the Authority is charged with the mandate of, among others, the assessment, collection, accounting and the general administration of tax revenues on behalf of the Government of Kenya.

2. The Respondent herein, Devyani Food Industries (Kenya) Limited ("Devyani") is a company incorporated in Kenya and carrying on the business of the processing and sale of a wide range of milk products comprising UHT Milk, flavoured milk, ice cream, Yoghurt, Milk Drink, water and juices. The Respondent's products are traded under the brand name "Daima" or "Creambell' and Aquaclear.

3. The Respondent had obtained various financing facilities with NIC Bank to finance the expansion and upgrading of its processing plant in the Nairobi as well as erection of a new plant, installation, civil works and machinery purchase for the Salgaa- Nakuru plant.

4. The Appellant conducted review of the Respondent's transactions and books of accounts for the period February 2017 to September 2020 and issued its audit findings via a letter of preliminary findings dated 20 April 2021. The Respondent responded to this preliminary letter of findings by

providing all the requisite information and explanation to the issues raised in the Appellant's letter of preliminary findings via a response letter dated 27th April 2021.

5. The Appellant thereafter issued a tax assessment through a letter dated 23rd September 2021 comprising of: -

    i. an amendment downwards by an amount of KES 1,426,586,939 to the Corporate Income Tax (CIT) losses carried forward by the Appellant from KES 6,796,171,159 to KES 5,369,584,220;

    ii. a demand of Value Added Tax (VAT) liability of KES 45,324,814; and

    iii. a demand of Withholding Tax (WHT) liability of KES 192,464,150.

6. Dissatisfied with the Appellant's tax assessment and pursuant to the provisions of Section 51 of the *Tax Procedures Act*, 2015, the Respondent lodged its Notice of Objection, contesting the entire assessment vide a letter dated 22 October 2021 based on the grounds, inter alia:

    i. The Appellant erred in disallowing costs duly incurred to erection of a new plant, installation, civil works and machinery purchase and assets in the Nakuru plant se and which costs were correctly capitalized in accordance with the provisions of International Accounting Standards (IAS) 16;

    ii. That the Appellant erred by imposing WHT on costs which do not fall within the ambit of payments subject to WHT under the provisions of Section 10 as read with Section 35 of the *Income Tax Act*;

    iii. That the Respondent had duly deducted and remitted the WHT payable on all qualifying payments made for outsourced/subcontracted labour in accordance with the provisions of Section 10 and 35 of the *Income Tax Act* (ITA);

    iv. That the Appellant erred by seeking to subject reimbursements for salary costs to WHT at the rate of 5%, which reimbursements do not qualify as payments within the ambit of WHT;

    v. That the Appellant erred by imposing late payment penalty based on an erroneous WHT assessment; and

    vi. That the Appellant erred by imposing late payment interest based on an erroneous WHT assessment.

7. The Appellant rendered its Objection Decision vide a letter dated 30th June 2022 in which it revised its decision as follows:

    i. Adjusted the corporation tax losses carried forward downwards by the sum of KES 869,574,835 being disallowed investment deduction;

    ii. Confirmed an assessed VAT liability of KES 893,643;

    iii. Confirmed WHT liability of KES 58,613,056 on labour contracts inclusive of penalties and interest.

8. The Respondent conceded to part of the revised assessment and entered into a settlement agreement with the Appellant for the following items:

    i. Agreed to corporation tax adjustment on losses carried forward by an amount of KES 623,508,456;

    ii. Conceded to all the whole of the confirmed VAT liability of KES 893,643;

iii. Part of the confirmed WHT liability of KES 2,894,971.

9. The Respondent however appealed against Objection Decision to the Tax Appeals Tribunal (TAT) with respect to the following: -

i. Withholding tax on labour payments and payments in relation to statutory deductions which the Appellant had subjected to Withholding Tax under the provisions of Section 10 and 35 of the *Income Tax Act*; and

ii. Capitalized finance costs and interest paid on capital loan of KES 246,066,379 disallowed by the Appellant as qualifying for Investment deduction which had been duly and lawfully claimed for Corporation Tax purposes in accordance with the provisions of International Accounting Standards (IAS) 16 and the *Income Tax Act*, Cap 470 of the Laws of Kenya.

10. In a judgment rendered on 14th July 2023, the Tribunal allowed the Respondent's appeal and set aside the Commissioner's Objection decision dated 30th June, 2022.

The Appeal

11. The Appellant herein, being dissatisfied by the judgement of the Tax Appeals Tribunal dated the 14th July 2023, appealed to this court and set out the following grounds of appeal in its Memorandum of Appeal: -

a. That the Honourable Tribunal erred in law and fact in finding that withholding tax is based on commissions contrary to the provisions of paragraph 5 (f) (i) the Third Schedule to the *Income Tax Act*.

b. That the Honourable Tribunal erred in law and fact by failing to appreciate that withholding tax is charged on gross invoice amounts.

c. That the Honourable Tribunal erred in law and fact by ignoring the cardinal rule on burden of proof in its determination that the Appellant has not shown why finance costs incurred by the Respondent could not under law be claimed as investment deduction. THAT the Honourable Tribunal misapplied the law and facts and therefore arrived at the wrong decision in setting aside the Appellant's decision.

d. That the Honourable Tribunal erred in law and fact in failing to consider the Appellant's response and submissions in its finding.

12. The Respondent opposed the Appeal through its Statement of Facts wherein it reiterated narrated the sequence of events that culminated in the filing of the appeal before the Tribunal and the outcome thereof.

13. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions

14. The Appellant submitted that whereas the Respondent contended that it paid amounts equaling the total wages paid to the individual workers plus a commission fee of 15% and 17% of the total wages as payment for the Service Providers and that it is the 15% and 17% as commission fees which was supposed to be subjected to WHT and not the entire amounts paid to the service providers. The Appellant's position was that WHT was charged on the gross amounts paid to the labour sub-contractors who supplied the human resource services to the Appellants ("Service Providers").

15. The Appellant submitted that the accepted principle in construing a tax statute is that the court is guided by the statutory words themselves and that there is no room for intendment or adopting a purposive approach when the words of the statute are clear and unambiguous. For this argument, reference was made to the decision in Republic vs. Kenya Revenue Authority Exparte Bata Shoe Company (Kenya) Limited [2014] eKLR where it was held that: -

> " This brings me to the role and interpretation of tax laws. Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman. The taxman on the other hand is entitled to collect up to the last coin that is due from a taxpayer.
>
> ...In interpreting the tax laws, the plain language of Parliament should be adhered to lest the goods and services which Parliament did not want to tax are taxed as a consequence of the taxman's misinterpretation of the laws. In order to achieve this purpose, tax statutes must be strictly interpreted."

16. It was the Appellant's case that WHT should be charged on total/gross amounts payable and should not be restricted to the commissions. That is, at the rate applicable to management fees under the third schedule to the Income Tax on total amount payable to the sub-contractor (cost of labour plus mark-up).

17. The Respondent's case at trial was that costs that are incurred to bring the plant into working condition that should be included as part of the cost of the plant and be capitalized in accordance to the principles laid in International Accounting Standards [IAS 16.15] which states that:

18. An item of property, plant, and equipment should initially be recorded at cost. [LAS 16.15] Cost includes all costs necessary to bring the asset to working conditions for its intended use. This would include not only its original purchase price but also costs of site preparation, delivery and handling, installation, related professional fees for architects and engineers, and the estimated cost of dismantling and removing the asset and restoring the site.

19. The Appellant conceded that the Respondent obtained a loan from NIC Bank to finance construction and purchase of equipment among others and that the Respondent included finance cost associated with the capital loan as part of the cost of machinery and claimed investment deduction on it.

20. The Appellant noted that its review of objection established that the plant started operations in April 2018 while the loan agreement was made in June, 2018. According to the Appellant interest on capital loan amounting to Kshs 246,066,379 was incurred after the plant started its operations.

21. The Appellant argued that costs that are directly attributable to the acquisition, construction or production of a qualifying asset form part of the cost of that asset and, therefore, should be capitalized while other borrowing costs are recognized as an expense.

22. The Appellant further submitted that it was justified in disallowing the interest on cost as only interest paid prior to operationalization of the plant should have been capitalized and the rest of the interest incurred expensed.

23. The Appellant referred to Section 56(1) of the *Tax Procedures Act* (TPA) for the argument that it provided a basis disallowing interest on cost which the Tribunal failed to consider in its Judgement when the Respondent did not counter the Appellant's position.

The Respondent's submissions

24. The Respondent isolated the issues for determination as follows: -

    i. Whether the Respondent correctly deducted and remitted withholding tax on the commission-based fees paid to the service providers;

    ii. Whether reimbursements of labour wages, salary costs and statutory deductions qualify as payments within the ambit of withholding tax;

    iii. Whether the Respondent duly claimed investment deduction in relation to interest on the capital loan incurred to operationalize the new plant.

25. On whether the Respondent was justified to deduct and remit withholding tax on the commission based fees paid to the service providers, the Respondent referred to the agreement that it signed with the said service providers and submitted that the said agreement clearly spelt out the obligations of each party and how the service providers were to be remunerated for the services rendered.

26. The Respondent submitted that the agreement that it had with its service providers envisaged that the consideration for the management services rendered would be a commission-based fee at an agreed. The Respondent added that it is this commission based fee that withholding tax was duly deducted and accounted for as correctly noted by the Tribunal.

27. The Respondent noted that the Appellant's main contention was that the WHT should have been based on the full invoice including the amounts paid as salaries to the outsourced employees. The Respondent submitted that having duly deducted and accounted for withholding tax on the commission-based management fee paid to the service providers, it had duly complied with the provisions of Section 35 of the *Income Tax Act* which requires that withholding tax be deducted on payments in relation to management, professional or training fees.

28. It was submitted that for the Appellant to seek to infer non-existent contractual obligations seeking to redefine the gross sum paid to the service providers to include the reimbursements for direct salary costs and wages would be contrary to the well-established principles of the law of contracts and the doctrine of freedom of contract. For this argument, the Respondent referred to the case of Osteria Ice Cream Limited vs. Junction Limited (TJL) (2011) eKLR where the court held that:

> " ...It is to be noted that there was no provision in the agreement for extension of the duration of the license. It was to be for a period of only one year. If the parties had intended to have it renewable, they would have said so. Since the term agreed upon has expired by effluxion of time, there is nothing to extend, and there is no basis for such extension. Any attempt by a court to extend the period would amount to rewriting the contract between the parties. Only the parties themselves can rewrite their contract.
>
> The duty of the court is to interpret and enforce contracts entered into by the parties but not to rewrite them..."

29. The Respondent submitted that the Tribunal correctly relied on the finding in T.M. Bell vs. Commissioner of Income Tax [1960] EALR where Roland J (as he then was) stated that:

> " ... 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."

30. It was the Respondent's case that the Tribunal correctly held that the Respondent having demonstrated that the payments to the labour subcontractors were not management fees, the Appellant erred in its assessment for withholding tax on the same.

31. On whether reimbursements of labour wages, salary costs and statutory deductions qualify as payments within the ambit of withholding tax the Respondent submitted that reimbursement for direct salary costs and statutory deductions such as NHIF or NSSF do not constitute a consideration for the services rendered by the service providers. The Respondent maintained that these are payments for employment services by an employer to its employee which are expressly excluded from the ambit of withholding tax.

32. The Respondent agreed with the Tribunal's finding that it had demonstrated that the contractors were merely facilitating the recruitment and salary payments of the outsourced staff, which meant that the amounts in relations to salaries were not management fees but disbursements not subject to withholding tax. It was submitted that some of these amounts in the nature of salaries were actually indeed subject to pay as you earn (PAYE) which itself is a tax. The Respondent cited the decision in the Indian case of DCIT vs. DLF Projects Ltd (ITA No. 5178/Del/2014) where the Indian Income Tax Appellate Tribunal held that withholding of taxes under section 195 of the Indian *Income Tax Act* was limited to the mark-up portion of the consideration received under a manpower supply agreement. The Tribunal held that a reimbursement of salaries for seconded employees was not subject to withholding tax. The Tribunal noted that before thrusting liability on withhold taxes, the following pre conditions must be satisfied:

    i. there must be an income element in the hands of the recipient; and

    ii. the income must be earned/derived in India. The Tribunal held that since the reimbursement of actual manpower expenses had no element of any income in the case of the service provider, no tax was required to be withheld. The Tribunal further noted that the salaries were subject to tax when the payments were made to the employees and as such there was no loss of revenue.

33. The Respondent also cited the case of Burt Hill Design (P.) Ltd. vs. DDIT (International Taxation) Ahmedabad [2017] 79 where it was held as follows:

> "Be that as it may, in any event, when undisputedly the payments are in the nature of the reimbursements, and, particularly when even the income embedded in these payments has already been brought to tax in India in the hands of ultimate beneficiaries- i.e., the seconded employees, there cannot be any tax withholding obligations under section 195."

34. On whether the Respondent duly claimed investment deduction in relation to interest on the capital loan incurred to operationalize the new plant, the Respondent submitted that it was not in dispute that the finance cost sought to be disallowed by the Appellant was in relation to a capital loan obtained from NIC Bank for construction of the plant and purchase of equipment and upgrading of the existing Nairobi plant.

35. The Appellant submitted that it tendered documentary evidence including financing agreements, interest schedules which were reviewed by the Appellant's teams and confirmed to tie back to the audited financial statements. It was the Respondent's case that the Tribunal correctly held that from a reading of the provisions of the International Accounting Standards (IAS) as well as provision of the

Income Tax Act nothing therein excluded the cost of capital incurred in the investment from the claim of investment deduction.

Analysis and Determination

36. I have carefully considered the record of appeal and the parties' respective submissions. I find that the main issues for determination are as stated by the parties, as follows: -

    i. Whether the Tribunal erred in finding that the amounts in relation to salaries were not management fees but disbursements not subject to WHT.

    ii. Whether the Respondent correctly deducted and remitted withholding tax on the commission-based fees paid to the service providers;

    iii. Whether reimbursements of labour wages, salary costs and statutory deductions qualify as payments within the ambit of withholding tax;

    iv. Whether the Respondent duly claimed investment deduction in relation to interest on the capital loan incurred to operationalize the new plant.

37. On the first issue of remittance of WHT, the Appellant submitted that the Tribunal erred in finding that amounts in relation to salaries were not management fees but disbursement not subject to WHT while the Respondent was of the view that it had correctly deducted and remitted WHT on the commission based fees paid to the service providers.

38. Section 2 of ITA defines management or professional fee to mean any payment made to any person, other than a payment made to an employee by his employer, as consideration for any managerial, technical, agency, contractual, professional or consultancy services however calculated.

39. Section 10 (i)(a) of the ITA provides that:

> " For the purpose of this Act, where a resident person having a permanent establishment in Kenya makes a payment to any other person in respect of- a management or professional fee or training fee the amount thereof shall be deemed to be income which is accrued in of was derived from Kenya;

40. Paragraph 5 (f) (i) of the Third Schedule of the ITA, stipulates that the resident withholding tax rates shall be— in respect of management or professional fee or training fee, other than contractual fee, the aggregate value of which is twenty-four thousand shillings in a month or more, five per cent of the gross amount payable;

41. A perusal of the impugned judgment by the Tribunal reveals that the TAT extensively reviewed the documents that the Respondent provided after which it held that the Respondent had demonstrated that the payments to the labour contractors were not management fees. The Tribunal then found that the Respondent erred in its assessment of the same for WHT. The Tribunal rendered itself as follows: -

> " 104. The Tribunal reviewed the documents provided and noted that the Agreement Signed between the Appellant and one of its contractors, Benori Agencies and Services Ltd titled Labour (Human Resource) Provision Contractor's contract' indicated at Clause 4 on responsibilities of the contractor as follows;
>
> a. Recruit qualified manpower and employ them for deployment with the company.

b. Pay salaries and allowances if any to its employees deployed to work with the company and remit any statutory payment and taxes payable to the government or any other authority.

i. ...

For clarity purposes, the company reserves the right to vet any employee deployed to work with it by the contractor and a/so the right to dismiss any such employee so deployed by the contractor without giving any notice and or reasons to the Contractor or the employee so affected and that al/ the employees deployed to work with the company shall be direct/y answerable to the Management of the company."

105. Further, the Agreement under Clause 5 states in part as follows regarding responsibilities of the Appellant;

" Responsibilities of the Company

a) The Company shall pay commission to the contractor on a monthly basis in arrears and such commission payable shall be in accordance with Clause 6 to this contract-

b) ....

Under Clause 6 (Commissions) the agreement states in part as follows;

" a) the Company agrees to pay the Contractor and the Contractor agrees to accept as full and complete payment for its services under this contract the commission on its provision of manpower in accordance with the company's scale of commissions described in the schedule hereto. Currently, the commission is at 15%.

b) The Company reserves the right to modify the scales of commissions by notice to that effect in writing but such alterations will not be retroactive unless mutually agreed by and between the

106. From the above extract of the Agreement between the Appellant and one its labour contractors it is clear that there were two aspects of the payments in the contract namely cost of supply and labour and commission for the service which was stated as 15%.

107. The Tribunal further noted that under Clause 4 of the Agreement, the Appellant reserved the right to vet any employee deployed to work with it by the labour contractor and also the right to dismiss any such employee deployed by the contractor and that all the employees deployed to work with the company shall be directly answerable to the management of the company. The import of this clause in the Tribunal's view is that the staff deployed by the labour contractor were at all times the employees of the Appellant.

108. It was therefore the Tribunal's view that the staff contracted on behalf of the Appellant by the contractor under the contracts were at all times under the direct supervision by the Appellant. The contractor was therefore a mere facilitator in the recruitment and facilitating in the payment of the wages and/or emoluments of the employees so engaged.

109. It was not in dispute that the Appellant had deducted WHT on the commission and remitted the same to the Respondent. The only dispute was that the Respondent wanted the WHT to be based on the full invoice including the amounts paid as salaries to the outsourced employees.

110. It was the Tribunal's view that the Appellant having demonstrated that the contractors were merely facilitating the recruitment and salary payments of the outsourced staff, it follows that the amounts in relations to salaries were not management fees but disbursements not subject to WHT.

111. The Tribunal reiterates the finding in McMillan v Canada 2012 FCA 126 where the Court of Appeal held that:

> " In our respectful view, it is settled law that the initial onus on an appellant taxpayer is to "demolish" the Minister's assumptions in the assessment. This initial onus of "demolishing" the Minister's assumptions is met where the taxpayer makes out at least a prima facie case. Once the taxpayer shows a prima facie case, the burden is on the Minister to prove, on a balance of probabilities, that the assumptions were correct."

112. Additionally, in T.M. Bell vs. Commissioner of Income Tax [19601 EALR 224 Rofand J. Stated that:

> " ...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."

42. My finding is that the Tribunal correctly interpreted the contracts signed between the Respondent and its contractors and noted the specific provisions on the responsibilities assigned to Respondent under the said contract. I note that, as correctly submitted by the Respondent, the contracts provided for the payment of commissions to the contractor for its services at a given rate while the salaries and allowances were paid directly to the employees deployed to work for the Respondent less the statutory deductions and taxes that are payable to the government. The agreement was also categorical that all the employees deployed to work with the Respondent were directly answerable to the Respondent.

43. I find that the in the circumstances of this case and going by the provisions of Section 2 of the ITA on the definition of management fees, the employees deployed to work for the Respondent were for all intents and purposes the Respondent's employees and therefore the salaries paid to them cannot, by any stretch of imagination be deemed to have been management or professional fees that is subject to WHT.

44. On whether the Respondent was justified to claim investment deduction in relation to interest on the capital loan incurred to operationalize the new plant, the Respondent contended that the Commissioner erred in disallowing its capitalization of finance costs and interest. The Appellant, on the other hand, argued that its review of objection established that the plant started operations in April 2018 while the loan agreement was made in June, 2018. According to the Appellant interest on capital loan amounting to Kshs 246,066,379 was incurred after the plant started operations. The Respondent however argued that costs attributed to the acquisition, construction or production of a qualifying asset form part of the cost of that asset and should therefore be capitalized while other borrowing costs are recognized as an expense.

45. It was not disputed that the Respondent obtained a loan facility from NIC bank for the construction of the plant, purchase of equipment and upgrading of the existing Nairobi plant.

46. I have perused the financing agreements produced at pages 92 to 141 of the Appellant's record of appeal and I note that page 106 and 107 thereof contains details of purpose of the loan facilities which included the following:-To finance 70% cost of expanding the Nairobi Dairy Processing Plant,To refinance 70% cost of expanding the Nairobi Dairy Processing Plant.To refinance cost of plant installation and civil works.

47. The Tribunal held as follows on capitalization of finance: -

> " 113. Consequently, the Appellant having demonstrated that the payments to the labour subcontractors were not management fees, the Tribunal finds that the Respondent erred in its assessment for WHT on the same.
>
> b) Whether the Respondent erred in disallowing capitalization of finance costs and interest paid by the Appellant.
>
> 114. It was the Respondent's submission that the Appellant obtained a loan from NIC Bank to finance construction and purchase of equipment among others and that the Appellant included finance cost associated with the capital loan as part of the cost of machinery and claimed investment deduction on it.
>
> 115. The Respondent stated that the interest was disallowed on the basis that the Appellant did not demonstrate how interest claimed in profit and loss accounts leapt from Kshs. 125,796,717.00 to Kshs. 404,518,902.00 for the years of income 2018 to 2019, respectively.

116. The Appellant on its part averred that it acquired a financing facility to finance the purchase of equipment as well as the cost for installation. That the interest charged on this loan facility is capital in nature and the facility was obtained and utilized before one of the Appellant's newest projects being the Salgaa - Nakuru plant commenced commercial operations and as such was capitalized as part of the cost of the assets and investment deduction claimed accordingly.

117. The Appellant submitted that in accordance with the International Accounting Standards (IAS), the finance cost and interest charged on the capital loan facility are recognized as being capital in nature and allowed to be capitalized in its books of account.

118. Paragraph of the Second Schedule allowances and states as follows: -

> " Where a person incurs capita/expenditure in respect of an item listed in the first column of the table, an investment allowance may be deducted in computing the gains or profits of that person at the corresponding rate specified in the second column, for each year of income."

119. Subparagraph IA goes further to provide for invest deductions as follows: -

> " (Notwithstanding paragraph 1, the investment deduction shall be one hundred per cent where;
>
> i. The cumulative investment value in the preceding three years outside Nairobi City County and Mombasa County is at least two billion shillings: Provided that where the cumulative value of investment for the preceding three years of income was two applicable rate of investment deduction was one hundred and fifty per cent, that rate shall continue to apply for the investment made on or before the 25th April, 2020;
>
> ii. The investment value outside Nairobi City County and Mombasa County in that year of income is at least two hundred and fifty million shillings; or
>
> iii. The person has incurred investment in a special economic zone."

120. Subparagraphs *2 - 9* provide for ascertainment of the value to be deducted under the following headings: -

i. Calculation of written down or residual value

ii. Treatment of excess or deficit of realized amounts

iii. Balancing charge or deduction on cessation of business

iv. Determination of market value of items used in a business

v. Restriction on capita/ expenditure on motor vehicles

vi. Expenditure incurred for a person."

121. From a reading of these provisions, the Tribunal observes that nothing therein excludes the cost of capital incurred in the investment from the claim of investment deduction. There is no intendment in tax and the Respondent has not shown why the finance costs incurred by the Appellant could not under the law be claimed as investment deductions."

48. My finding is that the Tribunal correctly applied its mind to the evidence presented before it and the applicable law before arriving at the decision that the Appellant erred in disallowing capitalization of finance costs and interest paid by the Respondent. I find no reason to upset the Tribunal's findings on this aspect of the appeal.

49. In conclusion and having regard to the findings and observations that I have made in this judgment, I find that the instant appeal is not merited and I therefore dismiss it with no orders as to costs.

50. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE