



**Kenya Ports Authority v Commissioner of Domestic Taxes (Tax Appeal E054 of 2022)
[2024] KEHC 14180 (KLR) (Commercial and Tax) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E054 OF 2022
PJO OTIENO, J
OCTOBER 11, 2024**

BETWEEN

KENYA PORTS AUTHORITY APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal from the judgement of the Tax Appeals Tribunal dated 14th April 2022)

JUDGMENT

1. The Appellant, Kenya Ports Authority, is a state corporation established under Section 3 of the [Kenya Ports Authority Act](#), Cap 391, Laws of Kenya. Its mandate and functions as bestowed under the statute are; maintaining, operating, improving and regulating all scheduled seaports on the Indian Ocean coastline of Kenya.
2. The Respondent, Commissioner of Domestic Taxes on the other hand is the principal officer appointed in accordance with section 13 of the [Kenya Revenue Authority Act](#). The Kenya Revenue Authority, a body established under the [Kenya Revenue Authority Act](#) has been charged with the responsibility of among others, assessment, collection, accounting and the general administration of tax revenue on behalf of the Kenyan Government.
3. The origin of the appeal traces back to the contract for the implementation of the Mombasa Port Development Project (MPDP), Phase I which was signed between the Appellant and the contractor Toyo Construction Company Limited (TCCL) on 28th February 2013. The implementation of the project has not been disputed to have been fulfilled in accordance with the agreed terms. The agreement in the contract was that the Government of the Republic of Kenya would exempt Japan Bank for International Cooperation, contractors, companies, suppliers, consultants and employees of Japanese companies engaged in the implementation of the project from all fiscal levies, taxes and duties payable



on income derived within Kenya during its implementation as per the provisions of the Exchange of Notes dated 20th November 2007.

4. Thereafter, a second Exchange of Notes instruments was signed between the Government of the Republic of Kenya through the Cabinet Secretary for National Treasury and Planning and the Ambassador of Japan to the Republic of Kenya on 16th January 2015 for the MPDP Phase II project. It is this second Contract that forms the basis of the underlying dispute. The Appellant contends that the second Exchange of Notes similarly exempted parties involved from all fiscal levies, taxes and duties payable on income derived within Kenya during the implementation being they were part of the same project.
5. The Respondent on the other hand asserts that the exemption allowed on MPDP Phase II was only for import duties as well as VAT on goods and services. The Respondent posits that the Exchange Notes relied on by the Appellant as authority for exemption of taxes was inadequate for purposes of exemption as much as it was superseded by a letter from the Principal Secretary National Treasury and Planning dated 10th August 2018 to the Commissioner of Domestic Taxes copied to the Appellant, the Principal Secretary State Department of Transport, Toyo Construction Co. Ltd and other stakeholders that advised on the payable WHT.
6. The respondent considered the contract subject to withholding tax and therefore assessed and demanded from the appellant withholding tax in the sum of Kshs 1,992,891,722/.
7. The appellant was aggrieved with the decision to levy tax and the assessment thus appealed to the Tribunal. The contention at the tribunal and now is that the project was exempt from taxation and therefore the decision of the Respondent to assess and demand withholding income tax was erroneous and unlawful.
8. The Tribunal in its Judgment delivered on 14th April 2022 decided in favour of the Respondent by upholding the Respondent's assessment of withholding tax. It found that the Withholding Tax Assessment was procedurally, hence dismissed the Appeal.
9. Dissatisfied with the Tribunal's decision, the appellant lodged an appeal before this honourable court faulting the Tribunal's decision of upholding the Respondent's assessment. The grounds of the appeal as outlined in the Memorandum of Appeal dated 9th March 2024 are; -
 - a. That the learned Tribunal erred in law and in fact in finding that other than the *Income Tax Act* and the Legal Notice, the sources cited by the Appellant were inadequate in granting tax exemptions in Kenya.
 - b. That the learned Tribunal erred in law and in fact in finding that there was no evidence that the exemption granted on 6th February 2021 was backdated to apply to the impugned tax assessment that was issued on 17th December 2020.
 - c. That the Tribunal erred in law and in fact in finding that 25th February 2021 was the effective date of the exemption.
 - d. That the learned Tribunal erred in law and in fact in finding that the Appellant had no evidence that the exemption was tabled before the National Assembly as provided for under Section 13 (3) of the *Income Tax Act*.
 - e. That the learned Tribunal erred in law and in fact in finding that the impugned assessment was issued by the Respondent to the Appellant on 17th December 2020 and since the respective



income tax exemption was effective from 25th February 2021, the impugned assessment remains.

- f. That the learned Tribunal erred in law and in fact in finding that the Respondent did not err in law and in fact by raising a withholding tax assessment on the Appellant in respect of contractual payments in relation to the Mombasa Port Development Project MPDP phase II.
- g. That the learned Tribunal erred in law and in fact in failing to consider the Appellant's evidence on record and submissions thereof thus failing to consider the merits of the Appellant's case against the Respondent.

The appellant's case

10. The Appellant's case is premised on the filed documents of Statement of facts and the sworn affidavit in support of the memorandum of appeal both dated 9th March 2024 as well as the Appellant's written submissions dated 14th January 2024. The Appellant indicates that the Mombasa Port Development Project (MPDP) was conceived from a loan agreement between the Government of Japan and the Government of the Republic of Kenya signed in December of 2007 and which was to be implemented in two phases.
11. The Appellant presents that the second Exchange of Notes of the Mombasa Port Development Project (MPDP) Phase II was equally signed between the Government of the Republic of Kenya through the Cabinet Secretary for National Treasury and Planning and the Ambassador of Japan to the Republic of Kenya on 16th January 2015 after the completion of MPDP Phase I project and whose implementation was gazetted by the Government of Japan as is the procedure after signing of International Treaties with other Countries.
12. The Appellant further avers that the terms and conditions provided in the latter Exchange of Notes dated 16th January 2015 mirrored those previously agreed upon in the Exchange of Notes dated 20th November 2007 for the MPDP Phase I project including but not limited to the exemptions from all fiscal levies, taxes and duties payable on income derived within Kenya during the implementation being they were part of the same project.
13. Based on the grounds of appeal and the submissions offered, the appellant pleads and prays that this Honourable Court does allow the appeal with costs by reversing and setting aside the Tribunal's judgment delivered in Nairobi on the 14.04.2021.
14. The sought reliefs are grounded on the following grounds by the appellant;
 - i. That the Respondent in rendering the Exchange of Notes dated 16th January 2015 nugatory, acted in excess of its powers and in contravention of Article 7 of the United Nations Vienna Convention on the Law of Treaties 1969 being that the Respondent is not categorized as a signatory to an International Treaty to revoke its legality.
 - ii. The imposition of withholding tax on income amounting to Ksh.1, 992,891,722 was in contravention of Article 26 of the Vienna convention treaty of 1969 that stipulates that every international treaty in force is binding upon the parties to it and must be performed by them in good faith and further violations of Article 18 of the United Nations Vienna Convention on the Law of Treaties 1969 that relates to the obligations of a state not to defeat the objectives and purpose of international treaties by declining to accommodate the Appellant's objection to the tax assessments on withholding tax on income from the MPDP Phase II project.



- iii. The Respondent unilaterally rendered the provisions of the Exchange of Notes dated 16th January 2016 as inconsequential by invoking the provisions of Section 3 and 35 (1) (a) of the *Income Tax Act* 470 thus risking diplomatic ties between the Government of the Republic of Kenya and the Government of Japan by going against the provisions of Article 27 of the United Nations Vienna Convention on the Law of Treaties 1969 which states that a party may not invoke the provisions of its own internal law as justification for its failure to perform its obligations under the International treaty.
- iv. Further, the Respondent contravened the provisions of Article 2 sub-article (5) and (6) of *the Constitution* of Kenya 2010 by blindsiding the Exchange of Notes dated 16th January 2015 as an International Treaty that should form part of the Laws of Kenya.
- v. That the objection decision of the Respondent in rendering insignificant the provisions of the Exchange of Notes dated 16th January 2015 amounts to terminating or withdrawing from an International Treaty signed by the Government of Kenya and the Government of Japan as provided for under Article 65 of the United Nations Vienna Convention on the Law of Treaties 1969, and would lead to a diplomatic row alongside the provisions of Article 60 of the United Nations Vienna Convention on the Law of Treaties.

The Respondent's Case

15. In response to the Grounds of Appeal outlined in the Appellant's memorandum of appeal dated 9th March 2024, the respondent filed Statement of facts dated 24th November 2023 together with the Respondent's written submissions dated 7th February 2024. The Respondent in reiterating the position stated in the decision subjected to objection and the judgement issued by the Tribunal and concurs that under section 2 of the *Income Tax Act* (ITA) Cap 470 management fee to means payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional or consultancy services however calculated'
16. It then cites Section 3 of the ITA to bring into the tax bracket the income of a non-resident accrued or derived in Kenya and executed through withholding tax mechanism as guided by the provision of section 10 of the ITA. It is the Respondent's case that Section 13 of the ITA empowers the Cabinet Secretary Treasury to exempt taxes but must do so by order via Gazette notice and subject to the approval of the National Assembly. Further, the Respondent indicates that Section 35(1) requires every person making a payment of an amount to a non- resident person, not having a permanent establishment in Kenya, in respect of management or professional fee, to charge tax to deduct WHT therefrom at the appropriate non-resident rate.
17. Section 39A of the *Tax Procedures Act* (TPA) is cited and relied upon as specifying that where a person is required under a tax law to deduct or withhold tax and remit the tax to the Commissioner but fails to do, the provisions of the Act relating to the collection and recovery of tax, and the payment of penalties and interest thereon shall apply to the collection and recovery of that tax not deducted or withheld as if it were tax due and payable by that person and the due date for the payment shall be the date on which the amount of tax should have been remitted to the Commissioner.
18. Accordingly, it is the Respondent's case that the exemption allowed on MPDP Phase II was limited to import duties and VAT on goods and services and stressed that gazette notices were availed to support WHT exemption. The Respondent presents that the exchange notes submitted by the Appellant were superseded by a letter from the Principal Secretary National Treasury and Planning reference number DFN 415/232/011 and dated 10th August 2018 to the Commissioner of Domestic Taxes copied to the Appellant, the Principal Secretary- State Department of Transport Toyo Construction Co. Ltd



and other stakeholders. The aforementioned letter advised the Respondent that withholding tax on income was payable.

19. The Respondent avers that the commercial agreement and the loan agreement in MPDP Phase II does not refer to any Exchange Notes entered into by the Government of Japan and Government of Kenya as it's phase I where there was exemption and that the Tax Tribunal was right in upholding the its decision on the assessment which was issued on 17th December 2020 while the exemption granted on 25th February 2021 with no evidence that the effect of the exemption was backdated.
20. The Respondent further reiterates the provisions of section 56(1) of the *Tax Procedures Act*, 2015, section 30 of the *Tax Appeals Tribunal Act*, 2013 and section 107 of the *Evidence Act*, Cap 80, Laws of Kenya places the burden of proof upon the appellant which burden had not been discharged. It is contended that the Appellant has not proved on the applicable standards that the Respondent and the Tax Tribunal's decision are incorrect or erroneous and therefore prays that the Appeal herein be dismissed and the Tribunal's Judgment dated 14th April 2022 be upheld. It also prays that it be awarded costs of and incidental to the Appeal.

Appellant's Submissions

21. The Appellant condenses its submissions and collapses the grounds of appeal into one issue for determination to be Whether the Appellant was exempted from the withholding taxes on Income in relation to the Mombasa Port Development Project. It submits from the onset that in the agreements, the issues of tax exemptions were critically discussed and addressed by all parties involved and that in the Exchange Notes of MPDP project Phase I, the Appellant sought clarification on the exemption of taxes and the same was allowed and confirmed by the Ministry of National Treasury and Planning that no tax remittances would be required of them in relation to the project.
22. It adds that on 4th June 2009, the said Ministry issued a contradictory letter referenced DFN 415/232/011 indicating that withholding tax on income on the MPDP phase II was not exempted which upon conducting due diligence on the said position it was revealed that the letter dated 29th August 2011 confirmed that withholding tax was indeed exempted in the contract dated 28th February 2013 and which was signed between the Appellant and the Contractors, Toyo Construction Company Limited.
23. It was the appellant's further submission that the Exchange of Notes for the implementation of MPDP Phase II dated 16th January 2015 was similar to the Exchange Notes dated 20th November 2007 as to the exemptions from taxes because they were part of the same project and provided that the Government of Kenya shall exempt:-
 - a) JICA from all fiscal levies and taxes imposed in the Republic of Kenya in connection with the loan agreement No. KE-P25 as well as interest accruing therefrom.
 - b) The Japanese companies/suppliers/ contractors/ consultants from all fiscal levies and taxes with respect to income accruing from the supply of products and/or services to be provided under the loan agreement No. KE-PE25.
 - c) The Japanese companies/suppliers / contractors/ consultants from all duties and related fiscal charges imposed in the Republic of Kenya with respect to the import and re-export of their own materials and equipment needed for implementation of the project.



- d) The Japanese employees engaged in the project from all fiscal levies and taxes on their personal income derived from all the Japanese companies operating as suppliers/ contractors and/or consultants in the implementation of the project.
24. There is a stress that after the contract was signed, the Appellant exemption from the Respondent based on the Exchange of Notes dated 16th January 2015 but was declined by the Respondent who then demand to withholding tax on income from the Appellant.
25. The appellant submits having not received any loan disbursement to be paid to the contractor, TCCL, in the implementation of the MPDP Phase II, it took the position that its role was limited to the receipt of the invoices for works rendered by the contractor, approving the same then it forwarding them to JICA who then process and remitted the payments to the contractor directly. It denies having processed any payments to the contractor and as such the Appellant could not deduct and remit to the Respondent any taxes on payments in the implementation of MPDP Phase II contract.
26. The appellant further submits that the Respondent also forwarded to it Legal Notice No. 15 which was issued on the 26th of February 2021 exempting MPDP Phase II project from income tax accrued in or derived from Kenya by Japanese companies, consultants and employees thus anchoring the Appellant's position; an exemption that referred to the entirety of Phase II of the project. It contends that the gazette notice had retrospective effect rendering the subject tax assessment null and void.

Respondent's Submissions

27. The Respondent also isolated only one issue for determination condensed its argument into one issue for determination in the appeal to be; whether the Appellant was exempted from the withholding taxes on income in relation to the Mombasa Port Development Project?
28. The Respondent submitted that Article 210 of *the Constitution* provides that wherever it is envisaged that there would be a waiver or exemption from taxation, then it must have been legislated and reported to the Auditor General. Section 13 of the *Income Tax Act*, is cited to provide that the Cabinet Secretary for Treasury has powers to exempt taxes but must do so by order via a Gazette notice and table the same before the National Assembly for approval. It added that from an audit exercise, it discovered that the exemption allowed on MPDP phase II was only for import duties and VAT on goods and services and that no gazette notices were availed to support WHT exemption claim.
29. It is the Respondent's further submission that the Exchange Notes relied on by the Appellant as authority for exemption of taxes were superseded by a letter from the Principal Secretary National Treasury and Planning reference number DFN 415/232/011 and dated 10th August 2018 to the Commissioner of Domestic Taxes copied to the Appellant, the Principal Secretary State Department of Transport, Toyo Construction Co. Ltd and other stakeholders in the project which advised the Commissioner Domestic Taxes that withholding tax on income was payable.
30. The Respondent submitted that the allegation by the Appellant that it did not process any payments to the contractor, Toyo Construction Company Ltd and therefore could not deduct and remit to the Respondent any taxes on payments in the implementation of MPDP Phase II contract was unsupported. The information provided to the Respondent indicated that the Appellant prepared the invoices and made payments to TCCL hence was obliged to withhold and remit taxes to KRA.
31. The Respondent relied on section 8 of the *Treaty Making and Ratification Act* 2012 Laws of Kenya to underscore the position of the law that where the cabinet approves the ratification of a treaty, the Cabinet Secretary shall submit the treaty and a memorandum on the treaty, to the speaker of the National Assembly. Following the deliberation for consideration of Treaty, the National Assembly



approves the ratification of the treaty. Further reliance was made on section 10 of the same Act which specifies that all instruments of ratification of a treaty shall be signed, sealed and deposited by the Cabinet Secretary at the requisite international body and a copy thereof shall be filed with the Registrar (Gazette notice). As such, the Respondent submits that the Appellant could not have relied upon the Terms of Exchange of Notes since Section 13 of the ITA specifies the legality of an exemption is subject to an approval from National Assembly and a gazette notice to be issued.

32. It was further submitted that the Legal Notice 15, issued on 26th February 2021, two days after the Appellant filed the Notice of Appeal, and purporting to exempt the MPDP Phase II project from income tax accrued or derived from Kenya by Japanese companies, Consultants and Employees to be immaterial and inadmissible evidence.
33. The Respondent invokes the provisions of Section 3 and 35(1)(a) of the ITA to permit taxation of income earned by a non-resident when accrued or derived in Kenya and to provide for WHT charge on payments made to non-residents. It is pointed out that because no exemption had been validly given in terms of Section 13 of the ITA, the Appellant ought to have deducted and remitted to the Respondent WHT on payments on construction of civil works and buildings made to TCCL.
34. In conclusion, the Respondent contends that the Appellant has failed to precisely demonstrate their case within the provisions of the Law as required by the *Tax Procedures Act* and prays that the honourable Court affirms the judgement by the Tribunal. It is added that the appellant's grounds of appeal offend the mandatory provisions of Section 56 of the *Tax Procedures Act* 2015 which limit such grounds to questions of law only and that for appeals by a tax payers' only on the grounds preferred in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.

Issues, Analysis and Determination

35. Upon due consideration of the grounds of the appeal put forth in the memorandum of appeal and reiterated in the affidavit in support, both the appellant's statement of facts and the written submissions, the Respondent's filed Statement of facts together with the Respondent's written submissions, and in line with the judgement delivered by the Tax Appeals Tribunal on the matter, the court is of the considered view that the only issue for determination is whether the Appellant was exempted from the withholding taxes on income in relation to the Mombasa Port Development Project Phase II. Put the other way, whether the decision by the Tax Appeals Tribunal upholding the Respondent's assessment of withholding tax was accurate on the fact and the law applicable. Put more simply, was the appellant granted tax exemption in accordance with the law?
36. To start with, the power of the court in exercising appellate jurisdiction from the Tax Tribunal is vested under section 56(2) of the *Tax Procedures Act* 2015. The statute stipulates that an appeal to the High Court and Court of Appeal shall only be on questions of law and when the appeal is by a tax payer, no grounds other than those in the objection, unless the court grants permission to add new grounds.
37. This issue was raised as a preliminary issue and must be determined preliminarily and before the merit is delved into. The court is of the learning that whether or not a ground of appeal is or not on a pure point of law is not a straight jacket question. It is never limited to interpretation and application of a provision of the law or a decision of the court, but also encompasses how the evidence is analysed and applied to the law.



38. Thus, in *Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 Others* (2013) eKLR the Court of Appeal rendered itself as follows:

“ A conclusion although based on primary factual evidence that is erroneous becomes a point of law.”

39. Here, the question remains whether the appellant was tax exempted. That is a question that required the tribunal to look at all the material availed and consider the requirement of the law on what amounts to a valid exemption. It is a point of law whether the tribunal properly analysed the evidence presented and properly applied the law in arriving at its determination.

40. On the second point, whether the same point was raised in the objection, this being an appeal by the tax payer, the court finds that the issue was at the core of the objection.

41. It is thus the finding by the court that the underlying question remain whether the decision reached by the tribunal was in accordance with the evidence by both the Appellant and the Respondent in line with the existing laws. How the decision was reached becomes a point of law for determination even where the right to appeal is limited to points of law only. See *Tile and Carpet Centre Limited vs Commissioner of Domestic Taxes* (2020) eKLR for the enunciation of the law that where the issue is misapprehension of evidence, leading to a perverse decision, or ignoring material evidence and/or basing a decision on extraneous evidence amount to points of law that may be taken up on appeal. The preliminary point fails and the court determines that the appeal is properly before it.

42. As said before, the Appellant raised 8 grounds in its Memorandum of Appeal but during its submission condensed all into one main issue for determination; whether the Appellant was exempted from the withholding taxes on Income in relation to the Mombasa Port Development Project Phase II.

43. On the merits, the appellant faults the Tax Tribunal in finding that the sources cited and evidence availed by the Appellant were inadequate in granting tax exemptions in Kenya. It also faults the finding that there was no evidence that the exemption granted on 6th February 2021 was to be retrospective to apply to the impugned tax assessment issued on 17th December 2020.

Was the appellant granted tax exemption as alleged?

44. The appellant challenges the Tribunal’s finding of fact that the Respondent did not err in law and in fact by raising a withholding tax assessment on the Appellant in respect of contractual payments in relation to the Mombasa Port Development Project, MPDP Phase II. It is the Appellant’s contention of not having been receiving any loan disbursement to be paid to the contractor in the implementation of the MPDP Phase II project save for the invoices for works which it only approved and then forwarded to JICA to process and remit the payments to the contractor directly hence could not deduct and remit to the Respondent any taxes on payments.

45. As enacted, *Tax Procedures Act*, the procedural law governing tax dispute resolutions, taxpayer bears the burden of proof that a decision, like here, assessment is incorrect.¹ That incidence applies in all tax proceedings regardless of whether it be a review of an objection decision or an appeal.

¹ Section 56 (1), Tax Procedure Act;

In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.



46. In emphasis, the court in *Kenya Revenue Authority vs Man Diesel & Turbo Se, Kenya (2021) eKLR* held that:

“The uniqueness of tax laws is underscored by the fact that even where the constitutionality of such provisions has been challenged, courts have consistently held that placing the burden upon the taxpayer is not unconstitutional nor is it contrary to Parliament’s intent. This is because there is a distinction between the legal burden of proof and the evidential burden of prove. These are two different concepts. The *Evidence Act* places the burden of proving the existence any fact in issue on the party who asserts. The evidential burden exists in the form of a tactical onus to contradict, weaken, or explain away the evidence that has been led. It is the latter form of burden which may shift from one party to the other.”

47. It was thus incumbent upon the Appellant to demonstrate by sufficiently producing evidence of exemption and controverting, equally sufficiently, the evidence by the Respondent that no valid tax exemption was made in appellant’s favour.

48. Even on the position that the appellant merely received, approved and forwarded invoices for payment, nothing was availed to prove same. It is however apparent from the documents of contract that the appellant was the employer of the contractor and thus the person expected to pay for the services rendered and the accompanying obligation to withhold and remit the withheld tax.

49. As to whether the Appellant availed sufficient evidence to meet the threshold of proof within a balance of preponderance, in discharge its burden, the court holds that the evidence was inadequately supported at the Tribunal and that the TAT undertook due consideration of the evidence availed in making its determination. There was nothing in the evidence that the constitutional and legal minima for valid tax exemption had been met.

50. In *Osho Drappers Ltd vs Commissioner of Domestic Taxes (2018) eKLR*, the court held that the taxpayer has to produce documents to discharge its burden of proof. The appellant did narrate how the request for waiver was declined and exhibited a letter to that effect. Even if there was the belated gazetteement, that was not sufficient in the absence of parliamentary approval. To fulfil the letter of article 210(2) of *the constitution* and section 13(3), *Income Tax Act*, it was the duty of the appellant to avail to court the public record and extent of the waiver and the reasons thereof. That was not done with the consequence that no proof of waiver was availed.

51. Without proof of waiver, section 35(1)(a) of ITA, obligated the Appellant to, upon making payments to TCCL, a non- resident person not having a permanent establishment in Kenya, to deduct WHT therefrom at the appropriate non-resident rate and remit to the respondent. It matters not that there was no direct payment by the applicant to the contractor. If the lender paid for it, that was payment by agent, and it remains the law that he who acts through agent acts by self.

52. The last point of attack is that the TAT erred in finding that there was no evidence that the exemption granted on 6th February 2021 was to apply retrospectively and undo the impugned tax assessment issued on 17th December 2020 and that 25th February 2021. The court finds that the law demands that the cabinet secretary in granting exemption gives the effective date and the extent of the action. If the intention was to act retrospectively, it ought to have been unequivocally so said. It was not. Moreover, gazetteement is not, by itself sufficient grant of exemption. The parliamentary approval is the ultimate authority.

53. From the records, this court equally finds no evidence that indeed the exemption granted on 6th February 2021 with an effective date of 25th February 2021 was to retrospectively apply to the issued



tax assessment to the Appellant on 17th December 2020. There being no such evidence to rebut the un-contradicted chronology of the events in the transactions evidenced by dates in the documents, the court finds no reason to depart from the decision by the tribunal. The court finds that position to be misconceived and meritless. It is dismissed.

54. In conclusion, the court appreciates its mandate, being an appellate court, to respect the factual conclusions by the trial court unless there is demonstrated material misdirection or misapprehension of the fact and the law to demonstrate that the conclusions thereby reached are clearly and outrightly erroneous. An appellant court will only reverse such findings where it is convinced that the said findings are wrong for being unsupported with evidence or where the Tribunal misdirected itself on material facts. I am unable to find any misdirection by the TAT with regard to the findings of facts and the applicable law. The grounds upon which the appellant's attempt to assail the TAT's decision are primarily on findings of the facts whether or not there was a waiver granted.
55. In conclusion, the court finds no misdirection or misapprehension of either law of fact by the Tribunal to justify interference with the decision appealed from. The court finds the appellant's appeal to be totally unmerited with no basis at all to disturb the TAT's decision. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 11TH DAY OF OCTOBER, 2024.

PATRICK J O OTIENO

JUDGE

