REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E027 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

AND

BROOKHOUSE SCHOOLS LIMITED.....RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 27th March 2020 in Tax Appeal No. 119 of 2017)

JUDGMENT

Introduction and Background

1. In this appeal, the Appellant ("the Commissioner") challenges the decision of the Tax Appeals Tribunal ("the Tribunal") dated 27th March 2020 allowing the Respondent's Appeal and setting aside its additional assessments dated 27th June 2017 for the years of income 2010 - 2014 on PAYE for non-cash benefits to the Respondent's staff. The issue is this appeal concerns the treatment of non-cash benefits under the ***Income Tax Act (Chapter 470 of the Laws of Kenya)*** ("the ***ITA***") whereby the Respondent granted its teachers and members of staff a facility where they would pay reduced fees for their children attending the school.

2. The facts giving rise to this appeal are as follows. The Commissioner conducted a comprehensive audit of the Respondent's account covering the income period of 2010 – 2014. At the conclusion of the audit, the Commissioner communicated its finding in the letter dated 7th February 2017 in which it claimed additional taxes from the Respondent totalling KES. 186,657,587.00 under the tax heads of Withholding Tax, Pay As You Earn (PAYE) and Corporation Tax. The Respondent responded to this demand by its letter dated 5th April 2017 explaining and justifying its position. The Commissioner rejected the Respondent's response by its letter dated 6th April 2017 confirming the audit and directing the Respondent to file its returns and make payment.

3. Aggrieved by the Commissioner's decision, the Respondent filed its Notice of Objection dated 2nd May 2017. In particular, and in reference to PAYE on non-cash benefits, the Respondent explained that in the absence of clear legislation on taxation of school fees benefits, it charges its teachers 15% of the applicable school fees in accordance with best practice which requires that the teachers' pay the cost of delivery of the services. In the alternative, it stated that even if KRA were to take the view that the school fees benefit is taxable, then it should not be subject to the full 85% of the benefit to tax but should instead tax 10% of the benefit in accordance with the Commissioner's recommendation in the letter dated 14th June 2006 that, *"the school fees benefit has been charged at 10% of the fees foregone and submission on the same made to the Head Office Policy and Legislation for clear legislation to be put in place regarding circumstances where the employer run a school."* It further urged that under **section 5(5)** of the ***ITA*** the Commissioner can vary the rate of the benefit if the market rate cannot be determined as happened in this case by prescribing the rate of 10%, thus the Commissioner acted within the law. The Respondent therefore submitted that it would be contrary to its legitimate expectation for the Commissioner to take a different position from that already communicated.

4. The Commissioner reviewed the Objection and wrote to the Respondent on 16th May 2017 revising its initial demand by eliminating the Corporation tax. However, the Commissioner reiterated the demand for PAYE and withholding tax amounting to KES. 140,217,163.00 and KES. 43,703,747.00 respectively. It maintained the non-cash benefits in the form of discounted school fees for teaching staff was treated as a benefit under **section 5(4)(d)** of the ***ITA***. As regards that contention that it gave a direction to the Respondent to pay tax on 10% of the foregone fees, it asserted that, *"this was a stop gap measure awaiting clarification on the interpretation of the statute in respect to the*

issue." It maintained that its earlier position could not create a legitimate expectation. The Commissioner insisted the value of the benefit was based on the difference between the normal fees paid by other students and the fees paid by staff children.

5. The Commissioner issued its decision on the Respondent's Objection by its letter dated 27th June 2017 reiterating its position on non-cash benefits thus precipitating the appeal to the Tribunal. In its Memorandum of Appeal dated 20th August 2017 before the Tribunal, the Respondent contended that the Commissioner erred by finding that non-cash benefits afforded to the teaching staff for their dependants should be subject to market rates and that the Commissioner erred in finding that the market rate of non-cash benefits provided under **section (5)(5)** of the ***ITA*** is the fees payable by the ordinary students without due regard to the various categories of student and their varying backgrounds.

6. In its Judgment dated 27th March 2020, the Tribunal raised two issues for determination. First, whether non-cash benefits to the Respondent's employees is subject to PAYE. Second, whether the Commissioner's amendment of the appellant's self-assessment return was time barred under **section 31 (4)** of the ***Tax Procedures Act*(*"TPA")***.

7. On the first issue, the Tribunal accepted the Respondent's submission that **section 16(2)(a)(iv)** of the ***ITA*** being a specific provision should be used to charge as opposed to the general provision of **section 5(5)** thereof. It therefore concluded that Commissioner ought to have followed the procedure laid down in **section 16(2)(a)(iv)** and disallowed the cost of the benefit in the Appellant's tax computations. The Tribunal found in favour of the Commissioner on the second issue by holding that the assessment in issue was not time barred. In allowing the appeal, the Tribunal directed that, *"the value of the non-cash benefit should be brought to charge under Section 16(2)(a)(iv) of the Income Tax Act, Cap 470"*.

8. The thrust of the Commissioner's appeal is set out in its Memorandum of Appeal dated 7th April 2020. Both sides filed written submissions supplemented by oral submissions by their counsel.

Statutory provisions

9. In order to understand the nature of the dispute and provide the relevant context, it is appropriate to set out the relevant provisions of the ***ITA*.**

Section 3(2)(a)(ii) provides:

3.(1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which will accrue in or derived from Kenya.

(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—

(a) ***gains or profits from—***

(i) ……..

(ii) ***any employment or services rendered****;*

(iii) ……..

Section 5(2)(b) provides:

5 (2) *For the purpose of Section 3(2)(a)(ii), "gains or profits"* ***includes*** *-*

(a) any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, ***and any amount so received in respect of employment or services rendered*** *in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income:*

(b) save as otherwise expressly provided in this section, the value of a ***benefit, advantage, or facility of whatsoever nature*** *the aggregate value whereof is not less than thirty-six thousand shillings granted in respect of employment or services rendered;*

Section 5(4)(d) and **(5)** states:

5(4) Notwithstanding anything to the contrary in subsection (2) "gains or profits" do not include-

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(d) educational fees of employee's dependants or relatives disallowed under section 16(2)(a)(iv) which have been taxed in the hands of the employer.

(5) Notwithstanding any other provision of this Act, the value of the benefit excluding the value of premises as determined under

subsection (3) and the value of benefit determined under subsection (2B) for the purposes of this section, ***shall be the higher of the cost to the employer or the fair market value of the benefit:***

Provided that—

(a) ----------

(b) the Commissioner may, from time to time, prescribe the value where the cost or fair market value of a benefit cannot be determined.

Section 16 (2)(a)(iv) provides as follows:

16(2) Notwithstanding any other provision of this Act, no deduction shall be allowed in respect of –

(a) expenditure incurred by a person in the maintenance of himself, his family or establishment or for any other personal or domestic purpose including the following:

(iv) educational fees of employee's dependants or relatives; or

Commissioner's Submissions

10. The corpus of the Commissioner's complaint is that the Tribunal erred by holding that **section 16(2)(a)(iv)** of the ***ITA*** is a specific provision and therefore overrides **section 5(4)(d)** thereof which is a general provision. In so doing, it further complains that the Tribunal failed to consider and appreciate the requirements and implication of **section 3(2)(a)(ii)**, **5(2)(a)**, **5(4)(d)** and **5(5)** of ***ITA***.

11. The Commissioner contends that there is no dispute that the Respondent's employees enjoy a benefit by virtue of them being employees of the school, the only dispute is on how to treat the benefit and that therefore the court should apply the law strictly.

12. The Commissioner submits that a reading of **section 5(2)(b)** succinctly states *"gains or profits"* include *"a benefit, advantage or facility granted in respect of employment or services rendered"* and that where the Respondent opts to meet the school fees obligation of an employee, this sets in motion the provisions of **section 3(2)(a)(ii)** as read together with **sections 5(2)(b), 5(4)(d)** and **5(5)** of the ***ITA***. The Commissioner contends that **section 5(2)(b)** brings the benefit, advantage or facility granted in the course of employment within the meaning of gains or profits from employment as stated in **section 3** and sets a threshold of the value of the benefit to be brought to charge to be any benefit in excess of KES 36,000.00.

13. The Commissioner thus submits that as the charge on non-cash benefits, in the form of discounted fees for the children of teaching staff were derived from or accrued in Kenya, it is subject to income tax under **section 3(2) and 3(2)** of the ***ITA***. As a result, the Commissioner submits that the Respondent, as the employer, ought to have taxed the benefit at source and now cannot claim that the taxes cannot be remitted as they had not charged the same to its employees.

14. The Commissioner further submits that the Respondent did not demonstrate that the school fees discounted had been disallowed and taxed in the hands of the employer under **section 16(2)(a)** of the ***ITA*** hence the Commissioner has the power to invoke **section 5(4) (d)** and charge the benefit in the hands of the employee.

15. The Commissioner submits that the Tribunal's holding the that, *"the value of the non-cash benefit should be brought to charge under Section 16(2)(a)(iv) of the Income tax Act …."* amounts to directing the Commissioner to re-open the audit and assists the Respondent to add back the expenses in its books to enable **section 16** of the ***ITA*** apply. The Commissioner further submits that **Section 16(2)(a)(iv)** deals with determining taxable income for purposes of income tax and refers to *"educational fees of employee's dependants or relatives"* which are actual expenses. It thus brings to charge the income by disallowing the expense hence it is not possible, as was held by the Tribunal, to disallow or add back a non-cash benefit under **section 16(2)(a)(iv)** since it is not an actual expense.

16. Regarding the interpretation of the ***ITA***, the Commissioner urged the court to find that there is no ambiguity in the ***ITA*** as to taxation of benefits from employment as **sections 3** and **5** of the ***ITA*** bring to charge any benefit or gain from employment while **section 16** excludes the same as an allowable expense. The Commissioner emphasized that the ***ITA*** under ***PART IV — ASCERTAINMENT OF TOTAL INCOME*** and more so **section 16** is not a charging section but deals with exceptions and has the relevant provisions on how to ascertain total income of a person. It points out that the charging provision of the ***ITA*** is **section 3** which falls under ***PART II- IMPOSITION OF INCOME TAX***.

17. The Commissioner also faults the Tribunal for noting in this case that the education fees for the employees' dependents had not been disallowed as under **section 16(2) (a) (iv)** of ***ITA*** and therefore not taxed at the hands of the Employer hence a benefit on the employee. It points out that it actually guided the Respondent on how to treat this benefit to its employees and the Respondent actually went ahead to pay the taxes based on the fact that the benefit was taxable.

18. In regard to the value of the benefit, the Commissioner further states that the actual cost incurred by the taxpayer in providing the education to the employees is different from the taxable market value of the benefit. It submits that **section 16(2)(a)(iv)** applies to an employer who has actually paid fees to another entity, where the employer is not the provider of the education but has paid fees to a school as per a school fees structure which then would be an actual expense. In this case, the Commissioner submits that the school fees foregone by the school is not a direct expense that can be added back in tax computation under **section 16** and therefore no educational fees were paid per

se and the cost that would have been incurred is way below the school fees.

19. In support of its position, the Commissioner cited the decision of the Tribunal in **Tax Appeal No. 173 of 2015, *Braeburn Schools Limited v Commissioner of Domestic Taxes*** ("the ***Braeburn Tribunal Case***") where the Tribunal upheld a concession fee facility and found that it conferred a taxable benefit to the employees which was taxable.

The Respondent's Submissions

20. The Respondent submits that this appeal concerns the treatment of what is alleged to be a benefit or gain to students whose parents are teachers at its Schools. The Respondent explains that the case should be considered against the factual background of how it charges fees. The Respondent outlined three categories of students attending its schools. Under the First Category ordinary students whose parents do not have any connection with the School pay standard fees. The Second Category whose parents are members of staff in the School pay a prescribed lower fee than the standard fees that is within their means. The Third Category are students on scholarships and bursary offered by the School who pay a lower fee than that offered to the second category. The Respondent adds that the Second Category of students whose parents are members of staff, the students pay fees at the rate of 15% of the standard fees and this privilege is not available to all of its employees. It is also at the discretion of the employees/ teachers/ staff and the employees do not have a right of space in the School.

21. The Respondent accepts that **section 3** of the ***ITA*** is the charging section with respect to all income accrued in or derived in Kenya and no tax may be levied on any income unless the charge for the same originates under the said section. It adds that under **section 3(2)(a)(ii)** of the ***ITA*** brings to charge any income arising from gains or profits from any employment or services rendered while **section 5(2)(a)** of the ***ITA*** defines gains and profits from employment.

22. The Respondent contends that the reduced fee for the Second Category is the full fees as the teachers are expected to pay these fees and since the Respondent does not incur any additional cost to provide a reduced education fee for this category of student, there is no gain or profit received by the teachers under **section 3(2)(a)(ii)** of the ***ITA***. The Respondent further argues that the benefit can only be described as abstract or notional, which is not contemplated by the ***ITA*** which position is consistent with the Commissioner's position that it is not possible to disallow or add back a non-cash benefit under **section 16(2)(a)(iv)** since it is not an actual expense.

23. The Respondent further submits that from the express wording of **section 5(2)(a),** the fees for the Second Category do not fall within *gains or profits* with respect to employment as it is not a payment for employment of the teachers/ staff nor is it a payment for services rendered. The Respondent adds that the reduced fee is not available to all teachers suffice to mention that this reduced fee is the full fees for this category.

24. The Respondent urges the court to adopt a strict reading of **section 5(2)(a)** of the **ITA** which confirms that reduced education fees are not listed as forming gains or profits from employment and that consequently hold that **sections 3(2)(a)(ii)** and **5(2)(a)** of the ***ITA*** do not apply to the reduced education fees thus barring the Commissioner from making a claim for taxes on the said fees.

25. The Respondent urged the court to follow the decision in ***Braeburn Schools Limited v The Commissioner of Domestic Taxes*** **NYR ITA No. 8 of 2017 (UR)** ("the ***Braeburn Appeal Case***") where the court held that a concessionary facility cannot be described as a gain or benefit or a profit in terms of **section 3(2)(a)(ii)** nor is it recorded as services rendered so as to fall within the ambit of **section 5(2)(a)** of the ***ITA***. Further that a strict reading of **section 5(2)(b)** of the ***ITA*** also confirms that reduced education fees are not a "*benefit, advantage, or facility*" granted in respect of employment or services rendered. It urged the court to conclude, like the court did in that case that reduced fees paid by the teachers and employees of the Appellant does not fit in the existing provisions of gains and profits of employment that are subject to taxation.

26. The Respondent puts forward an alternative argument in the event the court is persuaded to hold that the concessionary facilities are indeed gains or profits from employment, that the Tribunal was right in finding that **section 16(2)(a)(iv)** of the ***ITA*** was the specific section to be applied with respect to the treatment of the concessionary facilities.

27. The Respondent submits that **section 5(2)(a)** of the ***ITA*** provides a breakdown of what constitutes *gains or profits* with respect to employment income while **section 5(4)** provides a list of various amounts excluded from gains and profits but when it comes to the treatment of educational fees of employees dependants or relatives, **section 5(4)(d)** refers to **section 16(2)(a)(iv)** of the ***ITA***. The Respondent submits that adopting a strict interpretation of the wording of **section 5(4)(d)**, a taxpayer is directed to **section 16(2)(a)(iv)** of the ***ITA*** in order to determine the treatment of employment income relating to educational fees of employees' dependants or relatives. It therefore submits that **section 16(2)(a)(iv)** is the specific provision which is applicable with respect to the taxation of educational fees of employees' dependants or relatives, while **section 5(4)(d)** of the ***ITA*** is the general provision and where there is a conflict the specific provision shall prevail in line with the maxim *generalia specialibus non derogant.*

28. The Respondent further urged the court to interrogate the use of the word, *"notwithstanding"* in **section 16(2)(a)(iv)** of the ***ITA***, which according to the Cambridge Dictionary to mean *not considering or being influenced by*. The Respondent cited ***National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission and 2 Others*** **NRB Petition No. 328 of 2017 [2017] eKLR** to support this position and argue that using the term '*notwithstanding'* in **section 16(2)(a)(iv)** of the ***ITA***, the legislature expressly confirmed that the provision would take precedence and have an overriding effect over the general provision touching on the same issue, being **section 5(4)(d)** of the ***ITA***.

29. The Respondent therefore submits that taking into consideration that the concessionary facilities had already been taxed in the hands of the Respondent pursuant to **section 16(2)(a)(iv)** of the ***ITA*** and as such, **section 5(4)(d)** of the ***ITA*** is not applicable.

30. Turning to the value of the market benefit, the Respondent submits that the terms "*market value*" in **section 5(5)** of the ***ITA*** has not been defined, is ambiguous and must be resolved in the Respondent's favour. The Respondent submits that by not providing for what the term "*market value*" means as regards concessionary facilities, then the Commissioner cannot seek to rely on its excessive and unreasonable

interpretation of the said term by construing market value to be the value of the fees paid by an ordinary student to the Respondent's detriment.

31. In that regard, the Respondent submits that it did not incur any cost by providing the concessionary facilities. In its view, the reduced price was the full price payable by the students admitted under the concessionary facility and as such there was no gain to the employee as envisaged under **section 5** of the ***ITA*** and its employees did not incur any cost. As such the Respondent maintains that the benefit is an abstract or notional benefit outside the purview of the ***ITA***. The Respondent urges the court to apply the holding by the court in the ***Braeburn Appeal Case*** that the concessionary facilities do not fit any existing provisions on gains and profits of employment that are subject to taxation and found that the Tribunal erred in finding that the concessionary facilities have a market value.

32. The Respondent thus urges the Court to rely on the strict interpretation rule of taxing statues as well as the decision in the ***Braeburn Appeal Case*** and hold that the provisions of **section 5(5)** of the ***ITA*** with respect to fair market value, do not apply to the concessionary facilities. The Respondent puts forth the argument that in the event the Court finds that a fair market value exists with respect to the concessionary facilities, then the appropriate computation of the said value would be the cost of having the Respondent's employees' dependents in the school, that is the fee payable in the Second Category and not the difference between the cost of the fees incurred by the First Category students and the Second Category students.

Analysis and Determination

33. This appeal concerns the tax treatment of non-cash benefits to the Respondent's employees whose resolution is a matter of statutory interpretation. Both sides cited several authorities that support the established principle that tax legislation must be construed strictly without implication or intendment and that any ambiguity in the statute must be resolved in the tax payers favour. These decisions include ***Republic v Commissioner of Domestic Taxes Large Taxpayer's Office Ex-Parte Barclays Bank of Kenya Ltd [2012]*** **eKLR**, ***Kenya Bankers Association v Kenya Revenue Authority [2018] eKLR***, ***Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others [2019] eKLR*** and **Kenya Revenue Authority v Universal Corporation Ltd [2020] eKLR**.

34. These principles were summarized and restated by the Court of Appeal in ***Commissioner of Domestic Taxes (Large Taxpayers Officers) v Barclays Bank of Kenya Ltd*** **NRB CA Civil Appeal No. 195 of 2017 [2020] eKLR** observed as follows:

> *There is no doubt in our minds that the decisions in **Adamson v Attorney General [1933] AC 247, Cape Brandy Syndicate v. Inland Revenue Commissioners [1920] 1 KB 64**, **T. M. Bell v. Commissioner of Income Tax [1960] EA 224**, **Republic v. Commissioner of Income Tax ex parte SDV Transami [2005] eKLR** and the first judgment represent a correct statement of the law, namely strict construction of tax legislation, so that the tax demand must fall within the terms of the statute without ambiguity. If there's any ambiguity in the legislation, it is not to be rectified by considerations of intendment, but by amending the legislation. However, determination of whether there is clarity or ambiguity in the legislation or whether a tax demand is precise and within the terms of the legislation, is not an abstract or pedantic exercise. It must be based on the evidence and the circumstances of each case. We agree with the majority of this Court in **Stanbic Bank Ltd v. Kenya Revenue Authority [2009] eKLR** that meaning of words should not be strained so as to find ambiguity.*

35. Turning to the case at hand, how does the ***ITA*** treat non-cash benefits to employees? In this question, the first port of call is **section 3** of the ***ITA*** falling under the **Part II** titled, *"Imposition of Income Tax"* which is the charging section for income tax which is imposed on income accrued in and derived from Kenya. Under **section 3(2)(a)(ii)** of the ***ITA*** income upon which tax is chargeable includes any, *"gains or profits"* from any employment and services rendered. **Section 5(2)(a)** and **(b)** thereof elucidates and expounds on the meaning of *"gains or profits"* from employment and brings the, *"benefit, advantage or facility of whatsoever nature"* granted in the course of employment within the meaning of gains or profits from employment as stated in **section 3(2)(a)(ii)** and sets a threshold of the value of the benefit to be brought to charge to be any benefit in excess of KES 36,000.00.

36. Before I proceed to consider the matter further, I think it is important to pause and consider the nature of the benefit accruing to the Respondent's employees and whether it is indeed a taxable benefit under **section 3(2)(a)(ii)** and **section 5(2)(b)** of the ***ITA***. In their submissions, the parties cited and relied on two decisions on a similar and related issues which I shall now consider.

37. The Commissioner relied on the ***Braeburn Tribunal Case*** which was an appeal before the Tribunal. The dispute was whether the Commissioner was entitled to claim PAYE on the School Fee Concession Facility provided by the School to its employees' children. By a judgment dated 8th December 2016, the Tribunal held that the Facility provided by the School to its staff was an in kind benefit which the School could not claim the value thereof in its tax computation. The Tribunal concluded that the value of the benefit in terms of **section 5(5)** of the ***ITA*** was the difference in cost deducted from the employees after tax salary and the fair market value of the school fees which is the fee paid by willing parents based on the school fee structure. Counsel for the Commissioner assailed the Tribunal for refusing to follow its own decision and urged the court to follow and adopt the decision of the Tribunal in that case.

38. The Respondent, on the other hand, relied on the decision of the High Court in the appeal from the ***Braeburn Tribunal Case***. In the ***Braeburn Appeal Case***, the High Court reversed the position taken by the Tribunal and by the judgment dated 6th February 2020, it held as follows:

> *[44] …[T]he tribunal fundamentally misconstrued the meaning and import of Section 5(2)(a) of the Income Tax Act that a concessionary facility cannot be described as a gain or a benefit or a profit in terms of Section 3(2)(a)(ii) nor is it recorded as services received so to fall within the ambit of Section 5(2)(a) of the Act.*
>
> *[45] The court is satisfied the that the provisions of the Act relied on by the respondent are ambiguous and lack of clarity and finds that the reduced fees paid by the teachers and employees of the appellant does not fit in the existing provision of gains and profits of employment and that are subject to taxation.*

39. The court then proceeded to hold that having regard to **section 5(5)** of the ***ITA***, the market value of the benefit could not be determined as the Fee Concession Facility did not fit any of the existing provisions. The court allowed the appeal and set aside the Tribunal's determination.

40. The decision in ***Braeburn Appeal Case*** is a decision the High Court and although it is not binding on me, it is of persuasive authority and in fidelity with the principle that the law ought to be stable and consistent, I am entitled to depart from it for good reasons. The learned judge in the ***Braeburn Appeal Case*** was persuaded that the Concessionary Fee facility was not one of the benefits listed in **section 5(2)(a)** of the ***ITA*** and was therefore not a gain or profit under **section 3(2)(a)(ii)** of the ***ITA***.

41. The learned judge's position was that **section 5(2)(a)** of the ***ITA*** provides a closed list of what constitutes gains or profits from employment. I however take a different position. **Section 5(2)(a)** does not set out an indicative, exclusive and closed list of what constitutes gains and profits from employment. The use of the word, "*include*" expands the meaning of gains or profits to not only the matters set out but also matter of similar or like nature and is not exclusive to what is set in the list (see ***Mjengo Limited v Commissioner of Domestic Tax*** **CA Civil Appeal No. 85 of 2014 [2016] eKLR**). In addition, the reference to, *"any amount so received in respect of employment or for services rendered …."* opens the door further and brings to charge to any amount received for whatever purpose or reason or by whatever name called as a gain or profit as long as the amount is in respect of employment or services rendered. It is not even necessary for the benefit to be given for services rendered, as long as the person is in employment, the benefit so given is taxable.

42. Further, as I have pointed out, **section 5(2)(b)** thereof expounds on the meaning of *"gains or profits"* and brings the, *"benefit, advantage or facility of whatsoever nature"* granted to the employee in the course of employment within the meaning of gains or profits from employment as provided in **section 3(2)(a)(ii)** and sets a threshold of the value of the benefit. Again, it does not matter what name or label is placed on the benefit for it to attract tax. As the name suggests, the Concession Fee Facility in the ***Braeburn Appeal Case*** is a "*facility*" affording the employees a benefit accruing from their position in employment. In taking advantage of the facility, the employee obtains the benefit of paying less fees at the school. In other words, but for the fact that the person is an employee he or she would not have had the *"advantage"* of the reduced or discounted fee. It is this benefit that is considered as a gain or profit and brought to charge. I am therefore constrained to depart from the decision in the ***Braeburn Appeal Case*** and for purpose of this case hold that such a facility is a non-cash benefit afforded to the Respondent's employees and falls within the meaning of gains and profits under **section 3(2)(a)(ii)** as read with **section 5(2)(b)** of the ***ITA***.

43. The Respondent submits that the facility offered to its employees falls outside the purview of income tax because the reduced fee for the Second Category is the full fees the teachers are expected to pay and since the Respondent does not incur any additional cost to provide a reduced education fee for this category of students hence there is no gain or profit received by the teachers under **section 3(2)(a)(ii)** of the ***ITA***. I reject this argument because the definition of "*gain or profit*" does not refer to the cost incurred by the employer. To hold otherwise would be to imply a meaning contrary to the clear words of the statute as the cost of the benefit is not relevant in defining the *"benefit, advantage or facility of whatsoever nature"* as the tax is on employment income which includes the benefit to the employee.

44. The issue of the cost of the benefit to the employee only becomes a relevant consideration in determining the value thereof. Since a *"benefit, advantage or facility of whatsoever nature"* is not an, *"amount received*" by the employee, **section 5(5)** of the ***ITA*** proceeds to provide for the manner in which the value of an in-kind benefit is determined. The value of the benefit is the higher of the cost to the employer or the fair market value of the benefit but where the value of the benefit cannot be determined, the Commissioner has power to prescribe the value.

45. In tandem with its position that the Fee Concession facility was not contemplated within the meaning of gains or profits, the court in ***Braeburn Appeal Case*** took the position that since **section 5(5)** of the ***ITA*** does not make reference to notional benefits like reduced fees or its measurability, the provision was ambiguous hence the Commissioner's quantum of the benefit assessed on the market value was incorrect as the value could not be determined. A reading of **section 5(5)** of the ***ITA*** could not be more clear. The point of reference in determining the value is the higher cost to the employer or the fair market value. In the case of any difficulty, the law gives the Commissioner to prescribe the value of the benefit where the fair market value cannot be determined.

46. I wish to point out at this stage that from the record of the dispute, the Respondent did not contest that the non-cash benefit was indeed a taxable benefit. In its memorandum of appeal before the Tribunal, the Respondent complaint concerned the manner of determining the value of the benefit and not the fact that the facility afforded to its teachers was indeed a benefit.

47. While the Commissioner's case is that non-cash benefits should be charged and the value determined under **section 3(2)(a)(ii)** as read with **section 5(5)** of the ***ITA***, the Respondent supports the Tribunal's decision that the benefits should be charged under section **16(2)(a)(iv)** of the ***ITA*** which ought to take priority and the education benefits be disallowed on the employer before the employee can be taxed. This calls for a consideration of **section 16** of the ***ITA***.

48. **Section 16** falls under **Part IV** of the ***ITA*** which deals with, *"Ascertainment of Total Income."* Under **section 15(1)**, a person is generally entitled to deduct all expenditure incurred wholly and exclusively in the production of that income for purposes of ascertaining the total income of a person for a year income. **Section 15(2)** then sets out a specific or indicative list of the kind of expenditure the taxpayer shall deduct in computing the income chargeable.

49. **Section 16** of the ***ITA*** is the converse of **section 15** as it provides for deductions that are not allowed in ascertainment of income. Under **section 16(1)** of the ***ITA*** no deduction shall be allowed in respect of expenditure or loss which is not wholly and exclusively incurred by the taxpayer in the production of income.

50. From a scheme of the ***ITA***, it is clear that **section 3** defines and deals with imposition of the income tax and is the charging section hence it is not correct for the Respondent to argue that **section 16** of the ***ITA*** is a charging provision as it deals with deductions for purposes of ascertaining the income that is brought to charge. The Respondent submitted that the use of the word, *' 'notwithstanding*" was decisive in interpretation of the provision. **Section 16(2)** must be read in the context of and under the rubric of deductions generally. The meaning of the

word *"notwithstanding"* was considered by the court in ***National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission and 2 Others*** **(Supra)** where the court cited with approval the decision of the Supreme Court of India in ***Chandavakar Rao v Ashalata Guram*** **[1986] 4 SCC 447** where the court observed that;

> *A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section at the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment.*

51. I agree with the aforesaid observation and I find and hold that the import of **section 16(2)** of the ***ITA*** means that in spite of any other the provisions of the ***ITA***, certain types of deductions listed therein shall not be allowed. The term, *"notwithstanding"* does not mean that the provision takes precedence over other provisions of the ***ITA*** including **section 5** of the ***ITA***. It only emphasizes the fact that under no circumstances will, *"expenditure incurred by a person in the maintenance of himself, his family or establishment or for any other personal or domestic purpose including – educational fees of employee's dependants or relative"* be allowed. For example, and by way of illustration, a tax payer may be in a position to justify expenditure on education fees for its employees dependants or relatives on the grounds that it was wholly and exclusively incurred in the production of income hence deductible under **section 15** of the ***ITA*** but by reason of **section 16(2)**, such expenditure cannot be allowed even if it is incurred wholly and exclusively in the production of that income.

52. Once the employer makes an expenditure on account of an employee's dependants or relatives, it cannot be deducted and under **section 16(2)(a)(iv)** of the ***ITA***, the amount becomes part of the employer's taxable income and is taxed accordingly. That expenditure having been disallowed and subjected to tax is the reason why it is excluded in the definition or gains and profits forming part of employment income for the employee **section 5(4)(d)** of the ***ITA***.

53. In the present case, the Tribunal ordered that the value of non-cash should be brought to charge under **section 16(2)(a)(iv)** of the ***ITA***. I hold this was clearly a misdirection by the Tribunal because, as I have shown, the facility granted to the Respondent's employees is a taxable benefit for which the employee is liable and the Respondent has the obligation to collect PAYE under **section 37** of the ***ITA***. Consequently, I reject the Respondent's contention and the Tribunal's finding that **section 16(2)(a)(iv)** of the ***ITA*** is the charging section for the benefit in the circumstances.

54. In order to exclude expenditure on educational fees for employees' dependants or relatives from being considered as part of "gains or profits" in accordance with **section 5(4)(d)** of the ***ITA***, expenditure on account of educational fees of employee's dependants or relative must have been subjected to tax in order to relieve employee from paying tax on the education fee benefits. The facts from the record show that the Commissioner has always insisted that the Respondent's facility to its employees was a benefit taxable under **section 5** of the ***ITA***. In its letter dated 7th February 2017, the Commissioner discounted any application of **section 16(2)(a)(iv)** as follows:

> *Our verification established that teaching staff enjoy discounted fees when their children attend school. Since the education fees for the employees' dependants have not been disallowed as under section 16(2)(a)(iv) of the Income Tax Act, they become a taxable benefit on the employees as is provided for under Section 5(4)(d) of the Income Tax Act.*

55. The Commissioner rightly points out that it has the discretion to disallow expenditure on education fees for employee dependants and relatives and add the expenditure to the taxable income. It has not done so and cannot be directed to do so in the circumstances of this case as it is being asked to disallow or add back what is a non-cash benefit under **section 16(2)(a)(iv)** which was not an actual expenditure.

56. The final issue concerns how the benefit should be valued. The Respondent's case is that the ***ITA*** does not define "market value" and how it is determined. It is for this reason that the court in the ***Braeburn Appeal Case*** held that the ***ITA*** was ambiguous. **Section 5(5)** of the ***ITA*** is not ambiguous as submitted by the Respondent. It provides that the value of the benefit is the higher cost to the employer or the market value and in the case of difficulty, the Commissioner is empowered to prescribe value where either the cost or market value cannot be determined.

57. The Respondent also pointed out that the ambiguity is compounded by the fact that market value has not been defined. In my view, the term market value must be given its natural and ordinary meaning in the absence of a technical definition. In its submissions before the Tribunal, the Commissioner cited a Canadian case; ***Henderson Estate Bank of New York v M. N. R.*** **[1973] CTC 636 at P.644** where Cattanach J., explained the meaning of fair market value, in words I think are apposite, as follows:

> *The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. These definitions are equally applicable to "fair market value" and "market value" and it is doubtful if the word "fair" adds anything to the words "market value.* [Emphasis mine]

58. The Commissioner's position stated in its letters dated 7th September 2006 and 16th May 2017 is that market value of the benefit is the difference between the normal fees paid by other students and the fees paid by staff children. The Respondent's position is that if the court should find that a fair market value exists with respect to the concessionary facilities, then the appropriate computation of the said value would be the cost of having the Respondent's employees' dependents in the school being the fee payable to the Second Category and not the

difference between the cost of the fees incurred by the First Category and the Second Category.

59. Bearing in mind that the Commissioner has the discretion to determine the value of the benefit under **section 5(5)** of the ***ITA***, the court can only interfere if it is shown that the error was contrary to the law or established principle in accordance with the appellate jurisdiction of this court under **section 56** of the ***Tax Procedures Act*** that this court can only intervene in matters of law.

60. I find the Commissioner's position reasonable since staff members would pay the normal and ordinary school fees, which constitute the market rate, but for the employment related benefit. On the other hand, the suggestion by the Respondent to use the Second Category fees as a measure for market value would mean that Respondent would determine for itself the value of the benefit by changing the fees in that category. In other words, the determination of the value of the benefit would no longer be arm's length.

Conclusion

61. In conclusion, I find and hold that Respondent's facility where it afforded discounted fees for its employees' children is a non-cash benefit falling within the meaning of gains and profits under **section 3(2)(a)(ii)** as read with **section 5(2)(b)** of the ***ITA*** and therefore a taxable benefit. Being a taxable benefit, its value is ascertained by reference to **section 5(5)** of the ***ITA*** which provides that the value of the benefit may be the higher cost to the employer or the market value of the benefit and in the event the Commissioner cannot not determine the cost or value, it may prescribe the cost.

Disposition

62. For reasons I have set out above, I find and hold that the Tribunal came to the wrong conclusion when it made an order that, *"The value of non-cash benefit should be brought to charge under **section 16(2)(a)(iv)** of the **Income Tax Act**."* I allow the appeal on the following terms:

(a) The decision of the Tribunal Appeal Tribunal be and is hereby set aside.

(b) The objection decision by the Commissioner of Domestic Taxes dated 27th June 2017 to the extent applicable to this case be and is hereby affirmed.

(c) The Respondent shall bear the costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF APRIL 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Otieno, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.

Ms Macharia with Mr Muhindi instructed by Anjarwalla and Khanna LLP Advocates for the Respondent.