REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL NO. E191 OF 2023 (CONSOLIDATED WITH ITA NO. E207 OF 2023)

(CORAM: CHARLES KARIUKI – J)

BAKER HUGHES EHO LIMITED (K) …….APPELLANT

-VERSUS-

COMMISSIONER OF LEGAL SERVICES & BOARD COORDINATION…….RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a company registered in Kenya under the Companies Act. And a registered taxpayer. The Respondents is a principal officer appointed under the Kenya Revenue Authority Act, Cap 460 Laws of Kenya. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) of the Act with respect to the performance of its function under subsection (1). The Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule for the Act for the purpose of assessing, collecting and accounting for all revenues per those laws.

2. The Respondent by a Letter dated 1st May 2020 notified the Appellant of ongoing investigations into its tax affairs. The letter told that from the Appellant's bank statements. proforma invoices copies and swift transfer copies it appeared to the Respondent that the Appellant took part in the business of importing mobile phones and reselling the tame in Kenya.

3. The Respondent states that in the years 2018 and 2019 the Appellant sent out through its Equity account Kshs. 192,021.513.00 to various companies in Hong Kong, Taiwan, India and Dubai to buy mobile phones. The Respondent states further that the same Equity account received the rum of Kshs. 192,688,093.00 in the form of cash and cheque deposits from the Appellant's clients.

4. The Respondent communicated to the Appellant that these facts shown that the Appellant was in the business of importing goods. making supplies and earning income without filing tax returns.

5. The Respondent asked for an explanation on the tax infringements and the Appellant submitted contracts between it and 4 Chinese companies indicating that the Appellant was a commission agent through whom consumers in Kenya bought mobile phones and that the Appellant was paid a commission of 0.5% of the remittances.

6. On 1st August 2021 the Respondent calculated the Appellant's Corporation tax, VAT and custom duties at Kshs. 80,682,940.00.

7. The Appellant objected to the same in its notice of Objection of 30th April 2021.

8. The Respondent confirmed its assessment in its Objection Decision of 16th August 2021 for Kshs. 86,890,940.00 and the Appellant being aggrieved by the same filed the Appeal before the Tribunal.

9. The Tribunal after hearing the parties made a finding that the Appellant did not provide material information for the Respondent to find the taxes payable on its part and to that extent the Respondent appropriately resorted to alternative information for taxation. The Tribunal found that the Respondent did not misapply the law in making the assessments in issue. Therefore, tribunal held that the Appeal lacked merit. and made the orders dismissing the appeal. The Respondent's objection decision dated 16th August 2021 confirmed and upheld the tax assessment for the sum of Kshs. 86,890.803.00 inclusive of penalties and interest and parties to bear their own costs.

10. The appellant, being aggrieved by the said verdict appealed and mounted 20 grounds.

    (i) The decision of the Tribunal is bad in law for purporting to uphold an Objection Decision which was issued outside the sixty (60) day statutory timeline. The Objection Decision was irredeemably invalid for contravening Section 51 (11) of the Tax Procedures Act.

    (ii) The decision of the Tribunal is bad in law as it purported to uphold the Respondent’s amended assessments for the years of income 2015 and 2016 which was time barred by operation of Section 31 of the Tax Procedures Act having been issued outside the five (5) year statutory limit. The assessments in respect of the period prior to the year 2017 was in the circumstances contra statute.

(iii) The Tribunal erred in law in faulting the Appellant for failing to provide documents relating to the period 2015 and 2016 which were outside the five (5) year period that the Appellant was required to keep documents in accordance with Section 23 of the Tax Procedures Act.

(iv) The Tribunal errored in failing to consider that the withholding tax assessment with respect to the period 9th June 2016 to 7th November 2019 is without legal basis and is contrary to Article 210 of the Constitution.

(v) The Tribunal erred in law in failing to find that the Appellant is a non-resident company and therefore not subject to deemed interest provisions under the Income Tax Act.

(vi) The Tribunal erred in failing to consider the totality of the evidence provided by the Appellant and thereby arrived at the erroneous conclusions that the Appellant had not provided evidence and/or sufficient evidence to challenge the assessment. In so doing, the Tribunal placed an unreasonably high burden of proof on the Appellant.

(vii) The Tribunal erred in law in disregarding or failing to consider the totality of the documents and evidence provided by the Appellant and erroneously found that the Appellant did not provide documents to challenge the assessment and further erroneously finding that the Respondent was justified in using its best judgement in raising its assessment on inter-company costs.

(viii) The Tribunal erred in law in upholding the Respondent's assessment on intercompany rental costs on the basis that the Appellant failed to produce documents to support the transactions. This finding was erroneous because:

a) The Tribunal failed to consider the evidence provided by the Appellant as proof that the tools were rented from Baker Hughes Netherlands and as such the Appellant could not have the purchase invoices in its possession;
b) The Tribunal failed to consider that the Respondent's request for Baker Hughes Netherland's financial statements was unreasonable and contrary to Section 59 of the Tax Procedures Act;
c) The Tribunal failed to consider the fact that the benchmarking analysis advanced by the Respondent was erroneous as it was based on overall financial data of all of the Appellant's business segments rather than the intercompany subleasing activity; and
d) The Tribunal failed to consider the fact that the assessment by the Respondent was based on revenue data from the Appellant's Completions, Cementing and Drilling Bits business segments instead of revenue data from the Appellant's intercompany subleasing activity. The tools under the Completions, Cementing and Drilling Bits business segments are owned by the Appellant and not leased from Baker Hughes Netherlands

(ix) The Tribunal erred in law by disregarding the reconciliations provided by the Appellant on wear and tear variances assessed by the Respondent and thereby arrived at the erroneous finding that the Respondent was justified in disallowing the wear and tear costs.

(x) The Tribunal erred in law in disregarding the Appellant's explanations on wear and tear claimed on "leased assets" that

had been disallowed by the Respondent and thereby arrived at an erroneous conclusion that the Respondent was justified in disallowing the wear and tear costs.

(xi) The Tribunal erred in law in failing to consider the evidence produced by the Appellant supporting the correct tax treated of scrap assets write-off that had been disallowed by the Respondent.

(xii) The Tribunal erred in law in failing to consider the evidence produced by the Appellant in support of the provisions of obsolescence and thereby arrived at an erroneous finding that the Respondent was justified in disallowing the provisions for obsolescence.

(xiii) The Tribunal erred by failing to find that \the amounts deducted in respect to obsolete inventory was justified due to the global recession in the oil and gas industry and was therefore an expense wholly and exclusively incurred in the generation of the company's income in accordance with Section 15 of the Income Tax Act.

(xiv) The Tribunal erred in law by failing to find that the amounts deducted as bad debts written off met the conditions under section 15 of the Income Tax Act and Legal Notice No. 37 of 2011.

(xv) The Tribunal erred in law in failing to consider the explanations, breakdown of expense items, and Ledger extracts provided by the Appellant which demonstrated that there were no management support services provided by Baker Hughes SAS and as a result, wrongly concluded that the Respondent was justified in disallowing the amounts claimed as inter-company management fees.

(xvi) The Tribunal erred in law in finding that the documents provided by the Appellant did not meet the OECD guidelines for Transfer Pricing. This finding by the Tribunal was erroneous because there were no management support services provided by Baker Hughes SAS and accordingly the OECD Transfer Pricing guidelines for intragroup services were not applicable.

(xvii) The Tribunal erred in law in finding that the Respondent was justified in disallowing the forex exchange gains and losses claimed by the Appellant. This finding is erroneous as it disregarded the Appellant's explanations and computations setting out the correct tax position for the foreign exchange gains and losses.

(xviii) The Tribunal erred in law by disregarding the evidence provided by the Appellant to the effect that the costs associated with written off scrap assets were in fact disallowed by the Appellant in its returns. The confirmation of the assessment subjects the Appellant to double taxation contrary to Section 210 of the Constitution.

(xix) The Tribunal misinterpreted law in finding that time-barred input VAT claims is a non- deductible expense under Section 16(2)(c) of the Income Tax Act.

(xx) The decision appealed against is to the extent set out herein wrong in law and unjust in effect and therefore ought to be set aside.

APPELLANT CASE AND SUBMISSIONS

APPELLENT'S CASE:

11. The Appellant's case is premised on the Statement of facts filed on 15th September 2021 and Written Submis5ions filed on 27'° June 2022.The

Appellant was dissatisfied with the Respondent's objection decision of 16th August 202s and demand for the payment of Kshs. 86,890.803.00.

12. The Appellant avers that its business is that of a commission agent whose role is to ease Collection and remittances of payments from the importers of mobile phones and accessories to companies based in Asia. It earns a commission of 0.5% of the value of the remittances for the service. The support of this assertion is in the Agreements provided to the Respondent.

13. On 15th May 2020 the Appellant received a Notice from the Respondent on ongoing investigations into its tax affairs and it responded to the same through a letter dated 4th June 2020 explaining its nature of business. The Respondent requested further documents vide a letter dated 7th October 2020 and fixed a meeting wherein it supplied the requested documents to prove the nature of its business. The Respondent then issued a notice of assessment dated 1st April 2021 at Kshs.80.682.940.00. The Appellant lodged a Notice of Objection to the assessment vide a Letter dated 30th April 2021. The grounds in the same said precisely that the Appellant had no tax obligation related to importation. There was further correspondence between the parties that culminated in the Objection Decision dated 16th August 2021 that told further that the evidence provided by the Appellant was insufficient.

14. The Respondent argues that its nature of work was solely that of a Commission agent and relies on Halsbury Law of England 4th Ed. Vol.1{2) Para. 19 and 20 where it is told that a principal agency relationship is created by the express implied agreement of the parties or by ratification by the principal of the agent's acts done on its behalf. It also relies on several cases to support the principal/agency relationship

establishment. The cases include ***Julius Mwema Nyuguto vs. Anne Wairimu Gitogenin [20191 elk: KRA VS Man Diesel and Turbo Se [2021] e KLR and Sita Information Networking Computing BV vs. The Commissioner of Domestic Taxes [TAT case No.45 of 2015]***.

15. The Appellant further argues that the treatment of the Appellant's bank swift transfers as company purchases was mistaken, unreasonable, illegal and unlawful as the same disregarded the Appellant's nature of business. The Appellant relies on the provisions of Section 54(A) (1) of ITA but adds that it's not bound by the requirements off that Section due to the nature of Its business.

16. The Appellant also argues that Respondent baselessly applied the 11:22% "Industry/Startup" on the Appellant's swift remittances as the Appellant does not engage in the business of importation of electronics and mobile phones as alleged by the Respondent. It relies on the case of ***R vs. Kenya Revenue Authority Exported Jaffer Mujtab Mohammed [2015] e KLR*** were. The High Court held that:

> *"A faxing Lithotrity is not entitled to pluck a figure from the air .....and not another figure. Such action would be arbitrary, capricious and bad faith. It would be an unreasonable exercise our poser and discretion and that son/o'/u/// he Court in intervening".*

17. It further adds that the Respondent's assessment was premised on error of facts. Let state that the swift transfer whatsoever made to buy mobile phones as alleged by the Respondent and the same was not an income of the Respondent from the sale of mobile phones but payment from importers for orders to be remitted by the Appellant. The cost of sales and the consequent gross profit quoted were therefore not factual but based on mistaken sanctions.

18. The Appellant also submits that the Respondent did not consider the evidence and documents supplied by the Appellant. It refers to the Commission agreements tendered vide the letter dated 7th October 2020.

19. The Appellant further submits that the Respondent's request for documents vide its letter dated 18th May 2021 including list of importers of mobile phones in Kenya. instructions from suppliers in Asia and agreements between the Appellant and the mobile phones importers in Kenya was farfetched and unreasonable in view of the provisions of Sections 23, 30 and 51(1) of the TPA.

20. The Appellant also submits that the Respondent erred in increasing the tax in the final Objection Decision. On 1st April 2021, the Respondent issued a Notice of Assessment to the Respondent demanding Kshs.80,682.940.00 to which the Appellant objected. The Respondent issued the final decision dated 16’h August 202a demanding for Kshs.86,890.803.00. The Appellant relies on the provisions of Section II (8) of the TPA nod states that based on the same the Objection Decision must be limited to the objected amount, which is Kshs.80,682.940.00 contained in the letter of 1st April 2020.

21. The Appellant also argues that its service is an exported service and thus is zero rated. The Appellant also argues that it provides services which are consumed outside Kenya and therefore its services are zero rated. It tells that it has no relationship with the Kenyan mobile phone importers but only makes services to the suppliers in China.

SUBMISSIONS:

22. The appellant submits that, the statutory timeline within which the Respondent ought to issue an objection decision is set out in Section 51 (11) of the Tax Procedures Act ("the TPA"). At the time, Section 51(11) provided as follows:(11) The Commissioner shall make the objection decision within sixty days from the date of receipt of—the notice of objection; or any further information the Commissioner may need from the taxpayer, failure to which the objection shall be allowed.

23. The Appellant filed its notice of objection on 2nd March 2022. The Respondent misdirected the Tribunal and had incorrectly captured the date at which the objection was filed as 27th May 2022, which position the Tribunal erroneously reproduced in its decision.

24. The Respondent had sixty days from 2nd March 2022 or the date it requested more information from the Appellant to issue its objection decision. There were no other information requests from the Respondent and as such, the Respondent was allowed by law to issue his objection decision on or before 1st May 2022, failure to which the objection shall be reconsidered be allowed.

25. A reading of Section 51(11) clearly shows that where the Respondent does not issue an objection decision within sixty days from the date of the objection, the objection filed by the Appellant was allowed by operation of law.

26. In this matter, the Respondent issued its objection decision on 30th August 2022, 180 days from the date the Appellant filed its objection. The effect of an objection decision being issued outside the statutory timelines is that the taxpayer's objection is allowed by operation of law.

See - ***In Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020) [2021] KEHC 25 (KLR Republic v Kenya Revenue Authority Ex Partee M-Kopa Kenya Limited [2018] elk, Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another [2020].***

27. The upshot of the above is the Respondent's objection was allowed by operation of the law and the assessment ought to be quashed.

GROUND 2:

WHETHER THE RESPONDENT'S WHT ASSESSMENTS FOR 2015 AND 2016 WERE TIME BARRED FOR HAVING BEEN ISSUED OUTSIDE THE FIVE-YEAR STATUTORY LIMIT

28. Section 31(4)(b)(I) of the TPA states that the Commissioner may amend a taxpayer's self- assessment within five years from the date that the taxpayer gave the self-assessment return.

29. Different taxes have different tax periods. For example, income tax returns for a year of income are filed yearly. On the other hand, taxes such as withholding tax (WHT), Value Added Tax, Excise duty and pay as you Earn have monthly reporting periods. See ***Nakuru Cement Supplies Limited v Commissioner of Investigations and Reinforcement (Tax Appeal E038 of 2021) [2022] KEHC 16518 (KLR), Commissioner of Domestic Taxes v Airtel Networks Kenya Limited (Income Tax Appeal E062 of 2022) [2023] KEHC 25059 (KLR), , Stefanutti Stocks Kenya Limited v Commissioner of Domestic Taxes (Tax Appeal E117 of 2021) [2023] KEHC 2322 (KLR).***

30. It is submitted that once 5 years from the date a self-assessment is made has lapsed, the Respondent has no power or discretion to demand or

collect taxes for the period outside the said time limit. So, the WHT assessments for 2015 and 2016 amounting to Kshs. 16,401,425 and Kshs. 64,525,603 were statutorily time-barred and should be vacated in their entirety.

GROUND 3.

WHETHER THE TRIBUNAL ERRED IN LAW IN FAULTING THE APPELLANT FOR FAILING TO PROVIDE DOCUMENTS RELATING TO 2015 AND 2016 WHICH WERE OUTSIDE THE FIVE (5) YEAR STATUTORY PERIOD THAT THE APPELLANT WAS REQUIRED TO KEEP DOCUMENTS AS PROVIDED FOR IN SECTION 23 OF THE TAX PROCEDURES ACT

31. Paragraph(s) 59 and 60 of its judgement (Page 402 to 403 of the Record), the Tribunal faulted the Appellant for not providing documents that supported its transactions. Based on this finding, the Tribunal held that the Respondent's tax assessment based on its best judgement was justified.

32. The Appellant submits that the Tribunal misinterpreted Section 23 of the TPA. Section 23(1) of the TPA below as follows: -

> ***"(1) A person shall—***
>
> ***(a) claim any document required under a tax law, in either of the official languages.***
>
> ***(b) claim any document required under a tax law to enable the person's tax liability to be readily found; and***

(c) subject to subsection (3), keep the document for a period of five years from the end of the reporting period to which it relates, or such shorter period as may be specified in tax law."

33. The Tribunal ignored the provisions of Section 23(1)(c) of the TPA, which provide that the taxpayer should retain documents for five years from the end of the reporting period to which it relates, or a shorter period as may be specified in a tax law. The term "reporting period" is defined in Section 2 of the TPA as:

i. for income tax, the year of income or, when section 27 of the Income Tax Act applies, the accounting period of the taxpayer.

ii. for withholding tax under the Income Tax Act, the period for which the deduction of tax relates.

a) the income tax assessments

34. In relation to the income tax assessments, the term year of income is defined in Section 2 of the Income Tax Function as the period of twelve months beginning on 1st January in any year and ending on 31st December in that year. Section 27 of the Income Tax Act does not apply in this case, as the Appellant's year ends is December and coincides with the year of income.

35. The income tax assessments that were the subject matter before the Tribunal were for the periods 1st January 2015 – 31st December 2017. For the years of income 2015 and 2016, the Appellant only had to keep December 2020 and 31st December 2021.

b) the withholding tax assessments

36. With respect to WHT, the reporting period is monthly, which means that for the entire 2015 and 2016 years, the Appellant similarly only had to

keep December 2020 and 31st December 2021 for the 2015 and 2016 years, respectively.

37. The tax assessment that forms the subject matter of this dispute was issued by the Respondent on 4th February 2022, which is outside the statutory period within which the Appellant had to keep poses.

38. The statutory period for which the Appellant had to retain dokeep2015 and 2016 had however lapsed before the Respondent issued its tax assessment.

39. The Appellant submits that the Tribunal error in finding that the Appellant had to keep records of its documents for 2015 and 2016 since the statutory period for retention of documents that supported the demands for 2015 and 2016 had lapsed on 31st December 2020 and 31st December 2021.See Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex- Partee Unilever Tea Kenya Limited [2017] elk, Commissioner of Domestic Taxes v Airtel Networks Kenya Limited (Income Tax Appeal E062 of 2022) [2023] KEHC 25059 (KLR) the Court found that the Taxpayer is absolved of the burden of maintaining records after five years from the end of a reporting period.

40. In view of the foregoing, it is our submission that the Tribunal erred in finding that the Appellant had to keep keeps beyond the five-year period provided by statute. This finding is unfair, arbitrary and runs contrary to Section 23 of the TPA. We therefore urge this Honorable Court to quash the Tribunal's decision.

GROUND 4.

WHETHER THE TRIBUNAL ERRED IN LAW IN FAILING TO CONSIDER THAT THE WITHHOLDING TAX ASSESSMENT WITH RESPECT TO THE PERIOD 9TH JUNE 2016 TO 7TH NOVEMBER 2019 LACKS A LEGAL BASIS

41. Section 35 of the Income Tax Act places an obligation on a person making payment of amounts which are subject to withholding tax to deduct and remit withholding tax to the Commissioner at the prescribed resident or non-resident rates.

42. Before 9th June 2016, the Income Tax Act under Section 35(6) empowered the Commissioner in instances where a taxpayer did not withhold tax when making payments to recover the withholding tax from the person making the payment as follows:

> *"35 (6) Where a person who is required under this section, by the rules made under section 130 to deduct tax:*
>
> *a) does not make the deduction or does not deduct the whole amount of the tax which he should have deducted; or*
> *b) does not remit the amount of deduction to the Commissioner on or before the twentieth day following the month in which the deduction was made or ought to have been made.*
>
> *the Commissioner may impose such penalty as may, from time to time, be prescribed under the rules, and the provisions of this Act relating to the collection and recovery of tax and the payment of interest thereon, shall apply to the collection and recovery of that amount of tax and penalty as if they were tax due and payable by that person and the due date for the payment of which was the date on which the amount of tax should have been remitted to the Commissioner."*

43. The Finance Act 2016 repealed this provision with effect from 9th June 2016. Once Section 35 (6) of the Income Tax Act was repealed, there was no legal basis for the Respondent to demand payment of withholding tax from the Bank for alleged failure to withhold for the period 9th June 2016 to 7th November 2019. The deletion of section 35 (6) of the ITA meant that effective 9th June 2016, where a person did not deduct or remit the WHT from any payment made, the Commissioner had no statutory power to demand WHT from the payer.

44. This was the position until a similar provision was reintroduced into the law by Section 29 of the Finance Act 2019 with effect from 7th November 2019. The provision that was introduced is section 39A of the TPA which provides as follows:

> ***"Where a person who is required under a tax law to deduct or withhold tax and remit the tax to the Commissioner fails to do so, the provisions of this 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."***

45. The demand for withholding tax in the absence of a legal provisions is therefore contrary to the provisions of Article 210 (1) of the Constitution of Kenya which provides that no tax may be imposed, waived, or varied except as provided by legislation. See Commissioner of Domestic Taxes v Pecans East Africa Limited & 6 others (Tax Appeal E003 of 2019) [2022] where the Court held that:

"I agree with the Tribunal that prior to 2016, section 35(6) of the ITA provided that the commissioner could claim taxes from a player who does not make a deduction as though the taxes were due from them. However, the amendment introduced by the Finance Act, 2016 deleted the said section 35(6) of the ITA meaning that the Commissioner could no longer demand taxes not withheld from the person who should have withheld the same and that this position remained until the enactment of the Finance Act, 2019 came into force on November 7, 2019 when the previously deleted provisions of section 35(6) of the ITA were now reintroduced and reproduced as a new section 39A under the TPA .Consequently, I therefore find and hold that during the subject years of 2018 and 2019, the Commissioner could not collect the WHT that ought to have been deducted by the Respondents from the punters and that all the Commissioner could do was seek the same from the punters directly."

<u>GROUND 5</u>.

WHETHER THE TRIBUNAL ERRED IN LAW IN FAILING TO FIND THAT THE APPELLANT IS A NON-RESIDENT COMPANY AND THEREFORE NOT SUBJECT TO DEEMED INTEREST PROVISIONS UNDER THE INCOME TAX ACT

46. This issue relates to the Tribunal's findings at paragraph's 118 to 122 of the Tribunal's decision (Page 416 of the Record) where the Tribunal found that the Appellant is a resident company and as such, deemed interest and withholding tax on deemed interest apply to interest free advances from the Appellant's related parties.

47. It is an uncontroverted fact that the Appellant is a branch of Baker Hughes EHO Limited, a company incorporated in Bermuda. A copy of the Appellant's certificate of compliance is attached at Page 296 of the Record.

48. A resident company is defined under Section 2 of the Income Tax Function as follows:

"resident" in relation to a body of persons, means.

i. that the body is a company incorporated under a law of Kenya; or
ii. that the management and control of the affairs of the body was exercised Kenya in a particular year of income under consideration; or
iii. that the body has been declared by the Minister, by notice in the Gazette, to be resident in Kenya for any year of income.

49. A branch is, however, a permanent establishment of a non-resident company and is considered non-resident for tax in Kenya. Section 2(1) of the Income Tax Act defines the term permanent establishment to include inter alia, a fixed place of business through which business is wholly or partly carried on and includes a place of management, a branch, an office, a factory, a workshop….

50. A branch is non-resident and unambiguous evidence of this is that a company incorporated in Kenya would pay corporate income tax at the resident tax rate of 30% and a Branch, would pay corporate income tax at the non-resident rate of 37.5%.

51. From the definition of the term considered interest in Section 2 of the Income Tax A considered interest only applies to bodies that are

considered tax resident in Kenya. Section 2 of the ITA defines considered interest as follows:

> ***"Deemed interest" means an amount of interest equal to the average ninety-one-day Treasury Bill rate, considered to be payable by a resident person in respect of any outstanding loan provided or secured by the non-resident, where such loan is provided free of interest"***

52. The Tribunal made a grave error and misdirected itself at paragraph 120 of its judgement in finding that a Branch of a foreign company is incorporated in Kenya. Section 3 of the Companies Act, 2015 defines a foreign company as a company incorporated outside Kenya. Branches of foreign companies are foreign companies that are incorporated outside Kenya but registered in Kenya. This is why Branch companies are granted certificates of compliance and not certificates of incorporation.
53. From the definition of considered interest, Clearent that considered interest only applies to residents.

54. In addition, Section 10(1)(ii) of the Income Tax Act specifically provides that WHT shall not apply for any payments made to its head office. We reproduce Section 10 below:

> *"10. Income from management or professional fees, royalties, interest and rents*
>
> *1) For the purposes of this Act, where a resident person or a person having a permanent establishment in Kenya makes a payment to any other person in respect of—*
>
> *c) interest and considered interest.*
>
> ……

the amount thereof shall be income hindered in or was derived from Kenya:

Provided that:-

(i) *……*

(ii) *this subsection shall not apply to any such payment made, or purported to be made, by the permanent establishment in Kenya of a non-resident person to that non-resident person except for deductions provided for by agreements under section 41.*

(iii) *for the avoidance of doubt, the expression "non-resident person" shall include.*

both head office and other offices of the non-resident person.

55. The Tribunal erred in finding that a branch of a foreign company is incorporated in Kenya and that a branch is resident. Based on this mistaken conclusion, the Tribunal misdirected itself to find that considered interest provisions apply to the Appellant soggy, the Tribunal's decision upholding the WHT assessment on deemed considered interest has no legal basis and ought to be quashed.

GROUND 6,7&8:

WHETHER THE TRIBUNAL ERRED IN FAILING TO CONSIDER THE TOTALITY OF THE EVIDENCE PROVIDED BY THE APPELLANT AND WHETHER THE TRIBUNAL ERRED IN LAW IN UPHOLDING THE RESPONDENT'S ASSESSMENT ON INTERCOMPANY RENTAL COSTS:

56. The Tribunal, at Paragraphs 60 - 65 of the judgement (Page 403 to 404 of the Record) errors in upholding the Respondent's income tax assessment on the intercompany rental costs for equipment.

57. The Appellant leases equipment (various Baker Atlas and INTEQ oilfield tools) from Baker Hughes (Nederland) B.V. ("BHNL"). It is noteworthy that BHNL handles managing the distribution, deployment and repair of the tools within the Baker Hughes Group. These tools are usually leased by BHNL from JDI International Leasing Limited ("JDI"). BHNL then sub- leases to various affiliates (including the Appellant) as well as to third parties.

58. BHNL charges the Appellant a monthly rental charge, which the Respondent claimed was understated. The Respondent claimed that the Appellant did not provide the basis for the computation of the monthly rental charge, invoices for the original cost of tools or BHNL's financial statements to assess the margins earned by BHNL in the sub-leasing arrangement.

59. To support the monthly lease charge by BHNL, the Appellant provided a lease rental agreement (Page 111 of the Record), a transfer pricing policy (Page 128 of the Record), and various clarifications in Paragraph 12 to 18 of its statement of facts (Page 25 of the Record), which would have supported the rental cost.

60. Instead of reviewing the information provided, the Respondent disregarded all of it and instead requested for invoices from the manufacturer and the financial statements from BHNL. It is important to point out to this Honorable Court that the Appellant provided evidence to the Respondent and to the Tribunal that it was sub-leasing equipment from BHNL and as such, invoices from the manufacturer would be in the lessor’s custody outside the country. Further, the Appellant clarified that BHNL’s financial statements would not provide any useful information

on the margins as BHNL's financial data across all BHNL's business segments, and as such would not be useful to the Respondent.

61. The Tribunal error in law in finding that the Respondent was justified in requesting information not within the Appellant's custody. The Tribunal's decision was manifestly unfair and unreasonable as it did not consider the explanations and documents provided by the Appellant. The Tribunal also did not consider the documents and evidence that were provided (which fact is not disputed) and instead made a mistaken finding based on the failure to produce documents that do not relate to nor belong to the Appellant.

62. The Appellant would also like to reiterate to this Court that the request for documents was outside the statutory period within which the Appellant was required by law to provide the documents.

63. The Tribunal's decision to uphold the assessment of the rental charge is also wrong for the following reasons: -

    i. The Tribunal did not consider the fact that the benchmarking analysis advanced by the Respondent was mistaken it was based on overall financial data of all the Appellant's business segments rather than the intercompany subleasing activity; and

    ii. The Tribunal did not consider the fact that the assessment by the Respondent was based on revenue data from the Appellant's Completions, Cementing and Drilling Bits business segments instead of revenue data from the Appellant's intercompany subleasing activity. The tools under the Completions, Cementing and Drilling Bits business segments are owned by the Appellant and not leased by Baker Hughes Netherlands

64. All these explanations were provided to the Respondent and to the Tribunal. There is nowhere in the Tribunal's decision where it considers these explanations and the documents published by the Appellant. The Tribunal's decision is prima facial, unreasonable, unfair and the Appellant prays that this Court quashes the Tribunal's finding on the Respondent's assessment on the inter-company rental costs.

GROUND 9&10:

WHETHER THE TRIBUNAL ERRED IN LAW IN UPHOLDING THE RESPONDENT'S ASSESSMENT ON THE DISALLOWED WEAR AND TEAR CLAIMED IN THE APPELLANT'S TAX RETURNS

65. This issue relates to the Tribunal's finding at Paragraph 68 and 69 of its decision that the Appellant did not provide documents to help the Respondent verify the wear and team claims by the Appellant. So, the Tribunal found that the Respondent was justified in using its best judgement and evidence to confirm the assessment.

66. This issue has two sub-heads; the wear and tear claim on capital asset additions and the wear and tear claims on leased assets.

Wear and tear claim on capital asset additions.

67. The Respondent's assessment on this issue was that there was a variance in the asset additions in the financial statements when compared to the asset additions in the wear and tear schedule and the Appellant's tax return.

68. What the Tribunal failed to note is that the Appellant indeed provided the Respondent with a reconciliation of the additions and clarified to the Respondent that the variances highlighted by the Respondent comprised asset transfers from Work in Progress (highlighted as Reclassifications in the Financial Statements) as well as capital assets which had been expensed by the Appellant in accordance with its capitalization policy. Please refer to Page 26 of the Record in the Appellants statement of facts where it clarified the issue and Page 119 of the Record where the Appellant added the reconciliation clarifying the additions.

69. Had the Tribunal and the Respondent considered the reconciliation that was adduced by the Appellant on the asset additions, the variance was fully explained and accordingly there were no taxes due and payable.

70. The Tribunal further errand in finding Paragraph 67 of its decision that the Respondent had requested invoices, export documents, tax exemption certificates to confirm the tax assessment on wear and tor claims on additions. This information was requested in relation to the leased assets and not the variance in the additions. This clearly shows that the Tribunal not only failed to consider the evidence adduced by the Appellant buts erred in appreciating the purpose of the documents requested by the Appellant in relation to these issues.

71. The effect of the Tribunal's error was that it wrongly confirmed the Respondent's assessment of a variance on wear and tear variances without considering the reconciliations provided that show there are no taxes due and payable. The Appellant prays that this Honorable Court finds that the Tribunal error in not considering evidence adduced by the Appellant and further prays that this Court quashes the Respondent's assessment on wear and tear variances on additions.

Wear and tear claim on leased assets.

72. On this issue, the Respondent claimed that the Appellant was taking a wear and tear deduction on leased assets. The Respondent's contention was that the Appellant took a wear and tear deduction on the leased assets as well as an expense deduction on the lease charge, which in effect would amount to a double claim.
73. The Appellant submits that this contention is wrong and without any basis.
74. The assets in question were not leased assets but were assets that Appellant owned. Such assets are not deducted as expenses but instead are subjected to wear and tear deductions per the Second Schedule for the Income Tax Act.
75. In its notice of objection, the Appellant explained this and provided evidence that it owned the assets and did not claim wear and tear allowance on leased assets. Instead of interrogating the evidence, the Respondent again ignored the explanations and evidence and requested for other documents. The Appellant further provided these clarifications and evidence of ownership in its appeal and submissions filed before the Tribunal.
76. The only reason that the Tribunal upheld the Respondent's assessment was because the Appellant provided sample purchase invoices to prove it owned the assets, instead of providing the entire population of purchase invoices.

77. The Appellant submits that the Tribunal error in imposing an unreasonably high standard of evidence upon the Appellant. It is unreasonable to require that only one hundred percent (100%) of the documents must be provided before the assessment can be vacated without even considering the sample that was provided.

78. What the Tribunal ought to have done was to at least consider and interrogate the invoices that the Appellant provided and either uphold/quash the assessment or if not satisfied could have directed the Appellant to provide added invoices for perusal.

79. The Tribunal's decision is in circumstances unreasonable, unfair and we pray that this. Honorable Court quashes the Tribunal's decision upholding the Respondent's assessment.

GROUND 11:

WHETHER THE TRIBUNAL ERRED IN LAW IN FAILING TO CONSIDER THE EVIDENCE PRODUCED BY THE APPELLANT SUPPORTING THE CORRECT TAX TREATMENT OF SCRAP ASSETS WRITE-OFF THAT HAD BEEN DISALLOWED BY THE RESPONDENT

80. This issue relates to the Respondent's assessment of tax written off on scrap assets. The basis of the Respondent's assessment was that the Appellant did not provide any documents relating to support the asset write off amounting to KES 24,100,409 and KES 51,400,181 for the 2015 and 2016 periods, respectively.

81. The Tribunal upheld the Respondent's assessment based on the mistaken conclusion that the documents had not been provided.

82. What both the Tribunal and the Respondent ignored is that the write-offs the Respondent purported to disallow had already been disallowed in the Appellant's tax computation and tax returns for the respective periods.

83. The Appellant provided this explanation and supporting documentation in its objection (Page 82 of the Record), in its statement of facts and its annexures (Page 28 and 138 of the Record respectively) as well as in its submissions (Page 312 of the Record). The Respondent completely ignored these explanations and evidence, and the Tribunal similarly did not consider the explanations and evidence provided.

84. The Appellant had already disallowed the assets written off and did not take a deduction of the write off in its tax returns. The effect of the Respondent disallowing the asset write off is to subject the asset write off to tax twice which is manifestly unfair.

85. The Tribunal clearly did not review the Appellant's evidence and the record of appeal, which had these explanations. The Tribunal erred in upholding the tax assessment without consideration of the evidence and facts placed before it. The Appellant submits that the Tribunal's decision to uphold the Respondent's assessment is wrong, unfair and prejudicial to the Appellant since it seeks to have the same amount disallowed and taxed for a second time without a legal basis.

86. So, the Tribunal error in finding that that the Respondent's assessment in relation to scrap assets written off is unfair and lacks a legal basis. We pray that this Court vacates the Tribunal's decision upholding the Respondent's assessment.

GROUND 12 & 13:

WHETHER THE TRIBUNAL ERRED IN LAW IN FAILING TO CONSIDER THE EVIDENCE PRODUCED BY THE APPELLANT SUPPORTING THE PROVISIONS FOR OBSOLESCENCE

87. The Tribunal found at paragraph 91 of its judgement that the Respondent did not err in its assessment of provisions for stock obsolescence on the basis that the Appellant did not provide an obsolescence policy, which would have helped the Respondent work out the provisions.
88. An obsolescence policy is not a requirement for financial reporting purposes and there is no legal provision that requires a company to keep one. A company may have one if it considers it necessary, but most companies do not need or have any. It is a document used primarily by huge industrial or manufacturing concerns that deal heavily in plant and equipment.
89. The Appellant in its objection (Page 83 of the Record), in its statement of facts (Page 28 of the Record) and in its submissions (Page 312 of the Record), instead provided various explanations and documents that showed the procedure followed in valuing the obsolete inventory. In particular, the Appellant provided the following documents:
    i. list of inventories valued.
    ii. email correspondence showing procedure followed in valuation.
    iii. sample photos of the scrap inventory; and
    iv. serial numbers of the obsolete assets and tax computations highlighting the disallowed provision.
90. The Appellant submits that the documents provided were sufficient to show that the provision for obsolete inventory disallowed in the Appellant's tax computation and tax returns was supported.

91. The Tribunal erred in agreeing with the Respondent's contention on an obsolescence policy which is not a legal requirement and without considering the documents and explanations provided by the Appellant. In doing so the Tribunal erroneously upheld the assessment on provisions for obsolescence. The Appellant urges this Honorable Court to quash the Tribunal's decision upholding the Respondent's assessment of this issue.

GROUND 14:

WHETHER THE TRIBUNAL ERRED IN LAW IN UPHOLDING THE RESPONDENT'S

ASSESSMENT DISALLOWING PROVISIONS FOR BAD DEBTS

92. This relates to the Tribunal's finding at paragraph 95 of its judgement that the Respondent did not err in disallowing the Appellant's provision for bad debts as the said debts were not proved to be bad and non-collectable as provided for in Legal Notice No. 37 of 2011.

93. The Tribunal errored and misdirected itself in confusing actual bad debts written off with provisions relating to bad debts. A provision for unmanageable debt is an accounting practice where a company sets aside a certain amount of money to cover potential losses arising from accounts receivable that may not be collected. On the other hand, an unmanageable debt written off is a debt that is removed from an entity's debtors once the debt is uncollectable and the entity recognizes the amount as an unrecoverable loss.

94. In addition to the error made by the Tribunal, the Appellant sends that it gave the provision for bad debts proper treatment as the decrease in the bad debts was correctly added back to the tax computation.

95. The Tribunal therefore erred in relying on the wrong legal provisions to uphold the assessment on the provision for bad debts and so, we pray that this Court vacates the Tribunal's decision on this issue.

GROUND 15 & 16:

WHETHER THE TRIBUNAL ERRED IN LAW IN FAILING TO CONSIDER THE EXPLANATIONS, BREAKDOWN OF EXPENSE ITEMS, AND LEDGER EXTRACTS PROVIDED BY THE APPELLANT WHICH DEMONSTRATED THAT THERE WERE NO MANAGEMENT SUPPORT SERVICES PROVIDED BY BAKER HUGHES SAS

96. It is the Respondent's assertion that the Appellant had received management services from a related party, Baker Hughes SAS, and no supporting documentation was availed to support the need and value of the services there. Based on this assertion, the Respondent disallowed expenses amounting to KES 946,299,638 for the 2015 - 2017. This amount is broken down below as follows:

	2015	**2016**	**2017**	**Total**
Management fees declared in the CIT return	943,460,621	zero	zero	943,460,621
Management fees declared as claimed in the P&L return	1,620,596	312,712	905,709	2,839,017
Total	**945,081,217**	**312,712**	**905,709**	**946,299,638**

97. The Appellant provided for the Respondent and to the Tribunal explanations in relation to these amounts as follows:

a) Management fees declared in the Appellant's corporate income

tax return

98. Primarily, the Appellant would like to highlight that it does not receive management services from Baker Hughes SAS or any other related party. The amount declared as management fees declared in the Appellant's income tax return for 2015 amounting to KES was a number of expense items that had been bundled up and erroneously included in the management fee schedule in the return at the time of the Appellant was populating its tax return.

PARTICULARS	**AMOUNT (KES)**
Rental expense	288,074,906.43
Repair and maintenance	13,443,704.58
Utilities	63,131,748.13
Non-income taxes	13,314,472.00
Charitable contributions	430,876.77
Advertising and promotions	2,459,560.57
Travel and entertainment	84,512,419.68
Supplies	174,718,249.93
Professional services	270,324,608.32
Research and project engineering costs	7,118,509.62
Freight expense	27,552,160.97
Total	**945,081,217.00**

99. It is clear from the table above that these were clearly operating costs and not management fees. Indeed, had the Respondent reviewed the Appellant's audited financial statements for 2015, there was no management fee reported.

100. This explanation was provided by the Appellant in its statement of facts (Page 31 of the Record) and in its submissions (Page 315 of the Record). The Appellant further provided documentary evidence to show that the figure declared as management fees in the tax return did not

relate to management fees but related to various expense items (Page 223 of the Record).

101. These expenses did not relate to inter-company management fees but related to other expenses that are wholly and exclusively incurred in the production of the Appellant's income and therefore allowable under Section 15 of the Income Tax Act.

102. The Tribunal error in finding that the Appellant received intercompany management fees and that it did not provide documents justifying that the said services were provided. The Tribunal's ruling is absurd as the Appellant clearly said it does not receive management services from any related party, and it provided evidence to show that it had made a mistaken declaration of other expenses as management fees.

103. The Tribunal further erred in law in finding that the documents provided by the Appellant did not meet the OECD guidelines for Transfer Pricing. This finding by the Tribunal was mistaken because there were no management support services provided by Baker Hughes SAS and accordingly the OECD Transfer Pricing guidelines for intragroup services were not applicable.

104. The Tribunal had no basis to find that the Appellant received management fees when there is unmistakable evidence showing that the Appellant did not receive management fees. The Tribunal did not or did not properly interrogate the issue in confirming a colossal assessment on the management fees of KES 946,299,638 for the 2015 to 2017 years of income. The Respondent's assessment on management fees is prima facie mistaken and has no factual and/or legal basis. We urge this Honorable

Court to vacate the Tribunal's decision upholding the Respondent's assessment of management fees.

GROUND 17:

THE TRIBUNAL ERRED IN LAW IN FINDING THAT THE RESPONDENT WAS JUSTIFIED IN DISALLOWING THE FOREX EXCHANGE GAINS AND LOSSES CLAIMED BY THE APPELLANT. THIS FINDING IS ERRONEOUS AS IT DISREGARDED THE APPELLANT'S EXPLANATIONS AND COMPUTATIONS SETTING OUT THE CORRECT TAX POSITION FOR THE FOREIGN EXCHANGE GAINS AND LOSSES

105. This issue relates to the Tribunal's findings in paragraphs 109 to 113 of its judgment, asserting the Respondent's justification to disallow forex exchange gains and losses claimed by the Appellant.

106. To provide clarity on the quantum of realized and unrealized forex gains/losses for the Audit Period, the Appellant shared a detailed analysis with the KRA Audit Team which was acknowledged by the Respondent in its Assessment (Page 55 of the Record). This analysis differentiated forex gains/losses from transactions involving related parties and third parties.

107. The Respondent in rebuttal contended that because the General Ledger provided by the Appellant lacks essential details such as transaction description, date, and applied exchange rate, the expenses were disallowed. Furthermore, the Respondent argued that the Appellant's accounting system, functioning on an accrual basis, keeps a consistent balance in forex gain and losses.

108. In contrast, the Appellant's automated accounting system, built for both monetary and non-monetary accounts, runs on SAP software. The system exclusively revalued foreign currency-denominated monetary accounts

using month-end SAP exchange rates, and the resulting gains/losses are accurately documented in the financial statements. It's important to note that the system, unfortunately, lacks the capability to generate a detailed schedule for the forex differences of each transaction, as contended by the Respondent. Nevertheless, the Appellant has provided a breakdown of monthly exchange rates applied for the computation of foreign exchange gains and losses (Page 56 of the Record).

109. Realized exchange gains and losses stem from invoices settled at different exchange rates than those valued in SAP, particularly when customers settle invoices in local currency.

110. The Tribunal erred in not appreciating that these forex losses are legitimate business expenses, eligible for deduction per Section 4A of the Income Tax Act. Unrealized forex gains/losses are meticulously recorded in separate General Ledger Codes, adjusted in the computations, and reflected in the Corporate Income Tax (CIT) returns.

111. Notably, the adjustment made by the Respondent in the Assessment Letter resulted in double taxation of unrealized forex losses on third-party transactions. The Appellant claims that these had already been correctly addressed in its CIT returns. The assessment on this issue should accordingly be quashed.

GROUND 19:

WHETHER THE TRIBUNAL ERRED IN LAW BY HOLDING THAT TIME-BARRED INPUT VAT CLAIMS IS A NON-DEDUCTIBLE EXPENSE UNDER SECTION 16(2)(C) OF THE INCOME TAX ACT

112. This issue relates to the Tribunal's finding at Paragraph 101 and 102 of its decision where the Tribunal found that the Appellant could not claim time-barred VAT as an expense in its income tax returns.

113. By way of a brief background, the Respondent disallowed KES 5,746,043 in the year 2015 relating to time barred input VAT that has been expensed by the Appellant. The Respondent based the decision on Section 16(2)(c) of the Income Tax Act which, according to the Respondent, does not allow taxes as a deductible expense for tax purposes.

114. Section 16(2)(c) of the Income Tax Act provides disallows "income tax or tax of a similar nature." VAT is not a tax of a similar nature to income tax and as such, Section 16(2)(c) is not available to the Respondent. Generally, VAT is claimable under provisions of the VAT Act through the input – output mechanism. In instances where VAT is not claimable under the VAT Act relating to exempt supplies and/or time barred VAT, this VAT must from an accounting perspective be treated as an expense in financial statements.

115. Section 16(2)(c) of the Income Tax Act disallows income tax or tax of a similar nature. As gave above, VAT is an indirect tax and a consumption tax, which is dissimilar from income tax, which is a direct tax. So, Section 16(2)(c) does not prohibit VAT that is not claimable under the VAT Act from being claimed as a tax-deductible expense.

116. The Tribunal erred in law in finding that the Appellant was bound to claim its time-barred input VAT under Section 16(3) of the VAT Act. The sole reason is that it is referred to as time-barred VAT inputs it is out

of a statutory 6-month period to claim input VAT and therefore is not claimable under Section 17 of the VAT Act.

117. Based on the foregoing, the Tribunal error in upholding the Respondent's assessment disallowing the expense claim of the time barred VAT. We pray that this Court vacates the Tribunal's decision on this issue.

A. SECTION 56(2) OF THE TAX PROCEDURES ACT

118. At paragraph 90 of its submissions, the Respondent asserts that in considering this appeal this Court is enjoined by Section 56(2) of the Tax Procedures Act to deal with matters of law and not the facts of the case.

119. The Appellant submits that while this Court's primary function is to review questions of law, there are instances where factual considerations are indispensable for the proper adjudication of the legal issues at hand. Particularly, where errors of law affect the Tribunal's factual determinations, this Court's intervention is necessary to ensure proper application of the law.

120. In the present case, the Appellant contends that errors of law committed by the Tribunal have significantly affected its factual determinations. Specifically, the Tribunal ignored and/or did not carefully consider the evidence presented by the Appellant, resulting in factual findings that are unsupported by the record. This resulted in the Tribunal making a perverse decision which calls for intervention by this Court. Reliance made on In ***FREDRICK OTIENO OUTA –VS- JARED OKELLO & OTHERS (2014) elk, GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 2 OTHER elk***

121. In its Judgment, the Tribunal held that the Appellant had not provided evidence to dislodge the Respondent's claim. However, in reaching this conclusion, the Tribunal entirely ignored key pieces of evidence which proved that the Appellant properly accounted for tax. The Tribunal did not analyst they said evidence and its effect. It is the Appellant's contention that the failure by the Tribunal to consider or consider the evidence it produced to dislodge the Respondent's claim led to errors of law.

122. 122.The said evidence includes: -

(a) Intercompany rental costs: On this limb of the assessment, the Respondent disallowed a monthly rental expense claimed by the Appellant relating to lease of equipment. To support the monthly lease charge by BHNL, the Appellant provided a lease rental agreement (Page 111 of the Record), a transfer pricing policy (Page 128 of the Record), and various clarifications in Paragraph 12 to 18 of its statement of facts (Page 25 of the Record), which would support the rental cost. Had the Tribunal considered the evidence provided, it would have concluded that the Appellant incurred the expense. It is not in doubt that the expense was a business expense that is allowable under Section 15 of the ITA.

(b) Wear and tear allowance on capital assets: On this issue, the Respondent charged tax on alleged variances in the fixed assets additions captured in BHEL's CIT returns and those presented in the FS for the period. The Appellant provided reconciliations (Page 119 - 125 of the Record) which showed that there was no variance.

(c) Wear and tear allowance on lease rental assets: The Respondent's contention on this issue was that the Appellant

took a wear and tear deduction for assets that it had leased and that by taking a wear and tear deduction and lease deductions, this would amount to a double claim. The Appellant's case was that it owned the assets and provided a sample invoice (Page 126 of the Record), which was disregarded by the Tribunal.

(d) Disallowed costs on scrap assets written off: The Appellant provided the list of inventories, email correspondence, and sample photographs to prove that the scrap assets were correctly written off. The said evidence was however ignored by the Tribunal.

123. It is clear from the foregoing that the Tribunal completely ignored key and relevant evidence which shows that the Respondent's tax assessment was mistaken. Further, even where the Tribunal considered the evidence provided, it simply glossed over it and misapprehended the same. The said errors affected the legal outcome needing this Court's intervention.

a) Reliance made on COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT V KIDERO (INCOME TAX APPEAL E028 OF 2020) [2022] KEHC 52 (KLR) (Commercial and Tax) (4 February 2022) (Judgment) where the High Court considered the import of Section 56 of the Tax Procedures Act and held as follows:

"8. It is thus clear that this court will only intervene in matters of fact where the conclusions of the Tribunal are not supported by any evidence. In performing this duty, the court is entitled to scrutinize all the evidence on record and to satisfy itself with the correctness of the Tribunal's decision in line with the statutory prescriptions.

(Ile And Carpet Center limited v Commissioner of domestic taxes [2020] Elk where the High Court held as follows:

"27…Where the issue is misapprehension of evidence, leading to a perverse decision or ignoring material evidence or basing a decision of extraneous evidence amount to points of law that may be taken up on appeal." (Emphasis Added)"

B. THE APPELLANT PROVIDED EVIDENCE AT THE PRE-AAUDIT, UDIT, ASSESSMENT AND OBJECTION STAGE(S)

124. At paragraph(s) 92 of its submissions, the Respondent wrongly asserts that the Appellant did not provide any documents during the pre-audit, audit, assessment, and objection stage(s) to support its position and objection. This assertion is not only false but is also deliberately intended to mislead this Honorable Court.

125. The correct position is that the Appellant provided documents to the Respondent at all the previously mentioned stages as set out below:

a) Pre-audit and audit – During the audit, the Appellant had various correspondence and engagements with the Respondent which culminated in the Respondent issuing a preliminary findings letter dated 25th November 2021. The Appellant responded to the preliminary findings letter dated 8th December 2021. In this response, the Appellant provided clarifications to the preliminary findings and provided various documents including Baker Hughes leasing memorandum, intercompany transfer pricing policy on leasing, breakdown of assets for 2014 to 2016 and PPE workings for 2015 and 2016, various expense ledger breakdowns among

others. This fact is acknowledged by the Respondent in its assessment letter annexed at Page 37 of the Record. The response letter of 8th December 2021 is at Page 226 of the Record.

b) Assessment and objection stage - Once the assessment was issued, the Appellant filed its notice of objection on 2nd March 2022 and provided in-line responses and clarifications on the issues raised in the assessment. The Appellant also provided the Respondent with added documents to the ones provided at the audit stage including the 2015 plant, property and equipment workings, sample invoices, reconciliations of assets, and Baker Hughes fixed assets memorandum. By way of example, at Page 71 of the Record, the Appellant provided a reconciliation of the additions of assets in the financial statements to the tax returns and the PPE schedules. This was relevant evidence that was provided to the Respondent but was ignored.

126. At paragraph 93 of the submissions, the Respondent invites this Court to look at Page 39 of the Record, where the Respondent alleges that the Appellant did not provide invoices to support the local or original cost. We have addressed this issue at paragraph 51 of the Appellant's submissions. Section 59(1)(a) of the Tax Procedures Act is to the effect that a taxpayer can only provide information within their custody and control. It is a fact that the invoices from the manufacturer to the lessee could not have been in the custody of the Appellant who was sub-leasing the equipment from the lessee. The Tribunal therefore erred in law in upholding the Respondent's assessment on the basis that the Appellant did not provide information that was not within its custody and control.

127. At paragraph 93, the Respondent contends that the Appellant did not sufficiently provide documents through the audit. It is important to first clarify that the document referred to is the assessment by the Respondent. After the assessment, the Respondent provided further documents in its objection and in the appeal before the Tribunal to support its contention that no added tax was due. For example, at Page 47 of the Record, the Respondent alleged that there was a variance in the asset additions in its assessment. A reconciliation was provided for the asset additions at Page 119 - 125 of the Record.

128. It is clear from the foregoing that the Appellant provided documents at the pre-assessment stage, audit stage and objection stage to challenge the Respondent's assessment. The Respondent ignored the Appellant's clarification and documents. Therefore, the assertion that the Appellant did not provide the Respondent with documents is false and is not supported by the evidence on record.

129. It is noteworthy that the Appellant also provided evidence to challenge the tax assessment before the Tribunal. The said evidence is to be found at Pages 106, 111, 119, 126, 138, 222 and 223 of the Record. The Tribunal similarly ignored the evidence and/or did not review the evidence adduced on the various issues assessed and as such, arrived at a wrong finding.

C. RESPONDENT'S AUTHORITIES DISTINGUISHED

130. The decisions cited by the Respondent in its submissions are distinguishable and not relevant to the matter at hand as proved below: -

1) In ***Commissioner of Domestic Taxes vs Methoxide Africa Limited*** the issue for determination was whether the taxpayer had satisfied its

burden of proof in providing evidence to dispute a tax claim by the Commissioner. The Court did not consider whether the taxpayer had to keep the records for more than five years by Section 23(1)(c) of the Tax Procedures Act, which is an issue arising from this appeal. The decision is to that extent distinguishable.

2) The decision in ***Republic vs Kenya Revenue Authority; Proto Energy Limited (Exported) (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022)*** is similarly distinguishable and does not help the Respondent's case. We say so because the Respondent is not empowered to raise assessments and/or request for documents that are beyond five years from the date that the tax return was filed. Unlike in the Proto Energy Case, the Appellant here provided explanations and evidence both to the Respondent and the Tribunal to show that it correctly accounted for tax but the same was ignored and/or not considered. For example, on the issue of wear and tear allowance on lease rental assets, the Appellant provided sample purchase invoices to support the fact that the assets were on lease (Page 127 of the Record). In response to this issue, the Tribunal said as follows at Paragraph 75 of its judgement, …

> ***"The admission by the Appellant that it only provided sample invoices is an admission that it indeed never provided the evidence and or documents required to displace the veracity of this assessment."***

3) The finding by the Tribunal in ignoring sample documents provided for the full population is contrary to the test set out in the Proto Energy case above, considering that the taxpayer presented the smallest amount of information necessary to support its position. In the circumstances, the Tribunal errors in-law disregarding the evidence

provided by the Appellant and upholding the Respondent's assessment.

4) As was said in ***Commissioner of Domestic Taxes v Airtel Networks Kenya Limited (Income Tax Appeal E062 of 2022) [2023] KEHC 25059 (KLR)*** the taxpayer is absolved from its burden of keeping records once five years lapse. We submit that there can be no presumption of correctness of the assessment where the same is statute-barred as it is void ab initio.

D. RESPONDENTSSTATEMENTOFFACTS/RESPONDENT'S

RESPONSE TO THE PLY TO THE APPEAL

131. In its Memorandum of Appeal, the Appellant has raised 20 grounds of appeal and can be summarized as follows, to which the Respondent responds thus:

Whether the Respondent correctly adjusted the deductible lease rental expense considering the existing transfer method and operation model of the Appellant.

132. The Respondent reviewed the grounds of objection and supporting evidence provided and had several meetings to discuss the transfer pricing adjustments. The Appellant did not produce the following:

i Invoices issued by the manufacturer of equipment and tools.

ii Provide the basis of applying for a 7-year useful life of assets.

iii Provide explanation for varying benchmarking results conducted by the Appellant.

iv Provide the financial statements of Dutch affiliate to support the margin costs and the use of benchmarks.

v Proof that the Respondent's FAR analysis was defective in any way which had shown that the Respondent bore most of the functions and risks.

In the performance of its fun': tons, the Authority it mandated to

a) Administer and enforce the provisions of the written laws, set out in part II of the first Scheduled refuting to revenue and for that purpose, to assess, collect and account for all revenues by those laws.

b) to recommend the Covermount on Alf matters relating to the administration and no//emcee/one of revenue under the written laws.

133. In fulfilling its mandate, the Respondent is not bound by the tax returns of the Appellant. The respondent may assess a taxpayer's tax liability using any information available to the Respondent. Section 24(2), Tax Procedure Act, 2015 provides:

"The Commissioner shall not be bound by a tax return or information provided by, or on behalff a taxpayer and the Commissioner may assess a taxpayer? Tax liability using any information available to the Commissioner."

134. Section 23(1)(a) of the Tax Procedures Act 2015 provides that a taxpayer must keep documents or records in such a manner that the taxpayers' tax liability can be readily found.

135. The Appellant was to avail those documents whenever needed so that the tax liability can be easily as found without production of the requested documents, the Appellant has not discharged the burden of disapproving the Respondents decision.

Whether the Respondent errors in law and fact by adjusting the Wear & Tear allowance claimed by the Appellant based on incorrect values and analysis contrary to what was contained in the financial statements.

The Appellant did not produce the required documents to support their claims.

The Respondents adopts the arguments for ground (I).

The Respondent erred in law and fact by demanding added corporate income tax on disposal of used assets by employing a flawed transfer pricing adjustment.

136. The Appellant did not provide primary documents requested such as your Dutch affiliate's financial statements. Without production of the documents the Respondent would not find the appropriateness of the benchmarking.

137. The Appellant did not produce the required documents to support their claims. The Respondents adopts the arguments for ground (I).

Whether the Respondent erred in law and fact by disallowing the cost of scrap assets written off.

138. The Appellant did not provide documents to support the expenses written off for years 2015 and 2016 amounting to Kshs.24, 100,409 and Kshs.51,400.181.

Further the basis for the computations and the policy in place of write-offs was not provided.

The Appellant did not produce the required documents to support their claims. The Respondents adopts the arguments for ground (I).

Whether the Respondent correctly disallowed deductible business expenses related to stock obsolescence and bad debts.

139. The Appellant had general provisions for obsolescence charged as a percentage of the value of inventory at the end of the year.

The provisions were explained to be 50% of all outstanding trade receivables up to 360 days. The amounts charged were Kshs.97,578.700 and Kshs.14,632,497 for years 2015 and 2016, respectively.

Kshs.4,444,382 and Kshs.4,239,916 were added back to the tax computation for the movements in provisions.

e.g. The Appellant did not support the assertions with documents. The provisions were not supported to the basis of the provisions, company policy on provisions and movements in the provisions clearly showing the opening and closing balances for the years 2015 and 2016.

140. Without the documents it was impossible to confirm decrease or increase in the provisions that were added back in the tax computation. Further, the general provisions for bad debts did not meet the conditions set out under Legal Notice No.37 of 2011 and section 15 of the Income Tax Act.

Whether the Respondent correctly disallowed Value Added Tax (VAT) expenses claimed by the Appellant.

141. The Appellant claimed other taxes under account code 60700 in Profit and Loss expenses for the year 2015 amounting Kshs.13,314,472 as You explained that this related VAT that was not recoverable under the VAT returns.

142. Section 16(2)(c) of the Income Tax Act does not allow taxes as an expense. Further and without prejudice a detailed breakdown of the said expenses together with their primary supporting evidence was not provided.

Whether the Respondent correctly disallowed the claimed management fees.

143. The Appellant provided the support services agreement between Baker Hughes SAS and Bakers Hughes EHO Limited that showed the services chargeable under the intercompany account.

144. However, the following were not supported: The above was dissolved for lack of supporting documents.

Whether the Respondent correctly demanded added tax on foreign exchange gains and losses claimed by the Appellant.

145. The Appellant recognized Kshs.429,494,524 as unrealized exchange gain, Kshs.220,605,628 as realized exchange gain and Kshs.167,816,145 as exchange losses realized.

146. The expenses were disallowed The Commissioner because the ledgers provided on forex gains/ losses did not have any entries on the description of the transaction, the date of the translation, rates applied among other key details.

147. Without this information, the Respondent is unable to verify the particular transaction on which the forex gains/losses apply, the date of the transaction and particular invoice/document number.

148. The Appellant did not avail documents which would be used to find its tax liability.

Whether the Respondent correctly imposed withholding tax on considered interest.

149. Any financial advances from a related entity ought to conform to the conditions of a conventional arm's length transaction.

150. Interest that ought to have gained in these advances was therefore subject to withholding tax.

CONCLUSION

151. The Respondent submits that the Appellant did not provide documents in support of its objection and claims. It is the obligation of the Appellant to keep documents in a manner that its tax liability can be easily found and provide.

THE APPEAL

152. The Appellant filed a Memorandum of Appeal dated 13th September, 2021& on the 15th September 2021 in which it raised the following grounds of appeal: -

a) That the Respondent erred in fact and in law by not appreciating that the Appellant is a Commission Agent whose role is to ease remittances and not an importer of mobile phones and accessories.

b) That the Respondent erred in fact and in law by treating the Appellant's bank swift transfers as company buys despite unambiguous evidence that the Appellant was neither an importer

nor a seller of mobile phones and accessories and thereafter preaging headcount and impose corporation tax, value added tax and customs duties in the sum of Kshs. 86.890.803.00

c) That the Respondent erred in fact and in law by baselessly applying the 'Industry mark-up' of 11.22% to the swift remittances made by the Appellant. The Appellant was not an industry player importing and selling mobile phones and accessories to call for the application of the said markup.

d) That the Respondent carried in fact and in law in not considering all the evidence and documents supplied by the Appellant in support of its position that it was a commission agent and not an importer.

e) That the Respondent erred in law and fact by issuing the impugned objection decision which purported to increase the taxes demanded from the Appellant to Kshs.86.890.803.00 while the assessment dated Est April 202J was for the sum of Kshs.80,682,940.00.

f) That the Respondent erred in law and in fact by increasing the taxes demanded by Kshs.86,890,803.00 in the Objection decision from Kshs.80,682.940 thereby violating the Appellant's right to fair administrative action as the Appellant cannot object against an objection decision.

RESPONDENTS CASE

153. The Respondent's case is grounded on the Statement of Facts and the Written Submissions filed on 9th October 2021 and 8th July 2022, respectively.

154. The Respondent submits that the Appellant was buying phones from foreign companies and the amounts remitted to the companies were the payment for the same. The Appellant states that after carrying out a

desk audit and realizing the foregoing gave the Appellant a chance to provide documentation to show that the amounts received were from the consumers on behalf of the foreign companies. It requested for specific documents in its letter dated 18th May 2021 from the Appellant.

155. The Appellant did not supply the documents and the Respondent concluded that the Appellant was not a commission agent as alleged. The Respondent relies on Section 56()) of the TPA to state that the law places burden on the Appellant to show that the Respondent's decision was wrong in making the assessments in issue. It also relies on the case of ***KRA vs. Man Diesel and Turbo SE, Kenya [2021] elk.*** The Respondent also says that relevant evidence in this case would be documents showing that the Appellant sent invoices to the foreign entities for the services as commission agents, the Appellant was paid commission fees, that the consumers oversaw the consignment and that the consumers contracted the Appellant. The Appellant did not produce even one of the documents.

156. The Respondent submits that the Appellant has a duty to keep records of its transactions and provide them when needed to do so. It relies on Section 23(1) of the TPA and Section 54A of the income tax Act. That the Appellant ought to have provided the records to show that it was carrying on the business of a commission agent to enable the Respondent to find its corporate tax liability.

157. That Section 43 of the VAT Act also provides for the documentation needed to enable the Respondent to find a taxpayer's VAT liability. The Respondent avers that the Appellant did not provide the same thereby failure in demonstrating's alleged mode of business and failing not discharging burden of proof.

158. The Appellant avers that the Respondent did err in the application of the 11:22%" Industry Mark up" to the Appellant's swift remittances in calculating the Appellant's profits. The Respondent states that it suspected that the Appellant was selling mobile phones and the Appellant did not dissuade it from suspicion, and it had therefore to go ahead and estimate the Appellant's tax liability. It relies on Section 24 (2) of the TPA to support this.

159. The Respondent also relies on the case of ***Digital box vs. Commissioner of Investigations and Enforcement [TAT Appeal No GIS of 2OJ7]*** which said that:

> ***"The tax procedures Act in granting the Respondent powers to assess taxpayers does not specify the methods that maybe used instead the law provide that the Beit judgement munt be- exercised".***

160. The Respondent avers that it looked at other traders in similar industries and they acted as a reference thereby exercising proper judgement. The Respondent

avers that in the question of whether the Appellant's services are exported and therefore zero rated that the same would only have arisen had the Appellant proved that it's a commission agent. In the absence of the proof the Respondent treats the Appellant as a seller of mobile phone5 and the question of exported! services does not arise.

161. On the tax returns amendment issue that had been raised by the Appellant the Respondent states that Section 31(J) of the TPA allows it to do the Anne.

ISSUES ANALYSIS AND DETERMINATION:

162. After going through records, proceedings of the tribunal and parties' cases and their submissions. I find the issues were.; Whether the tax assessments issued by the Respondent based on bank deposits were correct and costs? To start with, the court sets out the The Respondent notified the Appellant of ongoing investigations into its tax affairs on l5'h May 2020 and gave its findings for the period 2018 and 2019. It also invited the Appellant to respond. The findings showed that the Appellant had received through its Equity account in the two years ferociously mentioned sum of Kshs.192.688.093.00. The calculated total taxes for the two years in corporate tax, VAT and custom duties amounted to Ksh. 63,414.412.20. The Appellant was given 14 days to respond to the assessment.

163. The parties. thereafter. continued to engage and by 1st April 2021 the Respondent issued a notice of assessment, and it also demanded the sum of Kshs. 80.682.940.00, and which amount included the taxes, penalties and interest. The court observed that the documents that the Appellant provided during the engagement in support of its notice of objection were only the copies of agreements between it and third parties. This was a fact appreciated and taken to account by the tribunal in its analysis.

164. The Appellant therefore did not provide sufficient documents to confirms objection and prove that the assessment was wrong. The law places a burden on the Appellant to show that the decision of the Respondent is mistaken in the assessment. Burden of Proof on the Taxpayer – Under Section 56(1) of the TPA, the taxpayer bears the burden of proving that an assessment is incorrect. The Tribunal ruled that without sufficient supporting documents, the taxpayer failed to discharge this burden.

165. The taxpayer's burden to prove that the assessment is wrong is also raised elaborately in the case of KRA vs. Man Diesel & Turbo SE, Kenya [2021] elk at Para. 31 and 32 where it says. *"The import of the above provisions is that the Party with the obligation of persuasion is said to bear the burden of proof…"*

166. The documents provided by the Appellant raised more queries than answers. It does not appear to be in order that the documents of the Appellant. Related to its business are that minimal. The Respondent through its Letter dated 18th May 2021 acknowledged receipt of the Appellant's notice of objection. It requested documents including;

a) Fee notes and Invoices for the suppliers based in Asia.
b) Proof of payments for the commissions by the suppliers based in Asia's. Instructions emanating from the suppliers based in Asia,
c) List of importers of mobile phones in Kenya. Agreements between Atronix Ltd. And importers of mobile phones in Kenya.

167. The Appellant did not provide the requested documents thereby inviting the Respondent to disallow its objection as per the content of its objection. It is on record that upon the Appellant not providing sufficient documents to prove its objection it gives the Respondent the leeway to invoke and take into consideration and rightly so the provisions of Section 24(2) of the TPA which provides:" The Commissioner- shall not be bound by a tax return or information. Provided by. or on behalf of a taxpayer and the Commissioner may assess a taxpayer's tax liability using any information available to the Commissioner".

168. The Tribunal rightly so noted that the Appellant had violated the provisions of Section 23 of the- TPA which provides for the necessity of

taxpayers to keep their business documents and specifically states as follows: - (1)A person shall - (a)maintain any document required under a tax law, in either of the official languages; (b)maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained;

169. In conclusion the sums up that the burden lies with the Appellant to prove that the assessments and objection decision is wrong by virtual of Section 56 of the Tax Procedures Act. Section 56 (1) of the Tax Procedures Act, 2015 provides that: In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

170. Thus, the Appellant is duty bound to prove or discharge its burden of proof as provided under Section 107 of the Evidence Act and Section 56(1) of the Income Tax Act. Further as a second Appellant Court, this Court's mandate is restricted to issues of law and not issues of fact. This Court should therefore not deal with what has factually been decided by the first Appeal and that is the Tax Appeals Tribunal.

171. The Tribunal finds that the Appellant did not provide material information for the Respondent to ascertain deductible taxes on its part and to that extent the Respondent appropriately resorted to alternative information for taxation. This court therefore agrees with the Tribunal findings that the Respondent did not misapply the law in making the assessments in issue.

172. In the circumstances the court finds that the Appeal lacks merit. Therefore, make the following Orders as follows: -

a) The Appeal be and is hereby dismissed.

b) The tribunal's decision dismissing appellants appeal is hereby upheld.

c) Each party to bear its own costs.

It is so ordered.

DATED AND DELIVERED VIA MICRODOFT TEAMS IN NAROK THIS 14TH NOVEMBER, 2025

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CHARLES KARIUKI

JUDGE