

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**INCOME TAX APPEAL NO. E077 of 2024**

**(CORAM: CHARLES KARIUKI – J)**

**THE COMMISSIONER OF DOMESTIC TAXES.....APPELLANT**

**VERSUS**

**CHRYSO EASTERN AFRICA LIMITED.....RESPONDENT**

**(Appeal from the Judgement of the Tax Appeals Tribunal delivered on 2<sup>ND</sup>**

**February, 2024)**

**IN THE REPUBLIC OF KENYA**

**IN THE TAX APPEALS TRIBUNAL AT NAIROBI, TAX APPEAL**

**NUMBER 1441 OF 2022**

**CHRYSO EASTERN AFRICA**

**LIMITED.....APPELLANT**

**VERSUS**

**THE COMMISSIONER FOR DOMESTIC TAXES.....RESPONDENT**

**JUDGEMENT**

**Background of the case**

1. The Appellant is a Principal Officer appointed under and in accordance with **Section 13 of the Kenya Revenue Authority Act**. The Kenya Revenue Authority is responsible for among other things:- Assessment, collection, accounting, and the general administration of tax revenue on behalf of the Government of Kenya. The Respondent is a limited liability company duly incorporated under the Companies Act and carries on the business of manufacturing, transforming, and marketing admixtures and additives for the construction industry.
2. During the years of income 2016 through 2020, the Respondent duly filed its Value Added Tax (“VAT”) and Income Tax Self-assessment Returns in full compliance with the VAT Act, 2013, and the Income Tax Act. The Appellant conducted an audit of the Respondent's tax affairs for the aforementioned period.
3. On 6<sup>th</sup> May 2021, the Appellant issued the Respondent with desk review findings, raising an additional assessment totaling KES 97,241,044.00. According to the Appellant's findings, this additional Assessment stemmed from unspecified sources:-
  - A. *Alleged variances between sales as per the accounting ledgers and those declared on the Income Tax Company return (IT2C);*
  - B. *Alleged variances on purchases reported in the VAT3 return (used for monthly VAT declarations) and the Corporate Income Tax IT2C returns.*

- C. Disallowed expenses amounting to KES 88,488,042.00.**
- D. Additional VAT on “expected sales” (KES 6,259,633.00);  
and**
- E. Withholding tax of KES 2,493,329.00.**

4. Consequently, the Respondent, through its tax representatives, lodged a Notice of Objection dated 1<sup>st</sup> July, 2022 against the Appellant's additional Assessment. The Respondent also paid the taxes not in dispute in accordance with Section 51(3) of the Tax Procedures Act ("TPA").
5. In the said Notice of Objection, the Respondent provided elaborate explanations and detailed reconciliations as well as supporting documents addressing the issues emanating from the Appellant's desk review findings.
6. In disregard for the Respondent's explanations and supporting evidence, the Appellant issued the Respondent with an Objection Decision dated 13<sup>th</sup> October 2022, in which it confirmed the Assessment of KES 97,241,004.00 for the period January 2016 to December, 2020.
7. Aggrieved by the Appellant's Objection Decision, the Respondent lodged an Appeal at the Tax Appeals Tribunal seeking the vacation of the Respondent's additional Assessment.
8. In lodging its Appeal and in accordance with the provisions of the Tax Appeals Tribunal Act, the Respondent filed a Memorandum of Appeal and a Statement of Facts, both dated 25<sup>th</sup> November, 2022.

9. Bearing in mind that the burden of proof rested upon it, the Respondent annexed to its Statement of Facts all supporting documents that were provided to the Appellant in the Notice of Objection dated 1<sup>st</sup> July, 2022.

**Respondent explanations**

10. In its Statement of Facts and Submissions, filed at the Tribunal, the Respondent reiterated the same explanations for the variances that it had provided the Appellant in its Notice of Objection.
11. The Respondent explained that some transport fees were included in export ledger accounts but related to local sales, causing the noted discrepancies. Additionally, some export customer details were inadvertently omitted.
12. A further variance of KES 7,060,271 arose from differences in currency conversion rates between accounting records and VAT declarations, given that most invoices were denominated in foreign currency.
13. The Respondent clarified that some purchases related to direct sales by Chryso South Africa to customers in other jurisdictions (e.g., Uganda and Tanzania), bypassing Kenya for VAT purposes, these did not qualify for input tax claims in Kenya as no import VAT was paid.
14. For income tax purposes, the Respondent stated these purchases were nonetheless claimed as cost of sales in the Respondent's books, consistent with tax law.
15. Additional variances were due to:

- A. Purchases cleared under the name of Bollore Logistics, not Respondent;*
- B. Purchases VAT claimed in a different year;*
- C. Invoices exceeding the 6-month claim window; and*
- D. Exempt supplies that did not attract VAT.*

16. The Respondent further evidenced that the expenses disallowed by the Appellant were, in fact, incurred wholly and exclusively in the production of income, as required under **Section 15 of the Income Tax Act**. These included: -

- A. Relocation fees, which include staff work permits processing fees and startup costs in Kenya when the company was being set up, were all fully supported.*
- B. Staff salaries are paid in South Africa but are recharged to the Respondent.*
- C. An increase in leave provision of KES 426,538 was added back in the tax computation for the year 2019, which could be confirmed in the tax return that was filed.*
- D. The bonus provision of KES 4,793,752 was treated as a specific provision and was not added back into the tax computation. A portion of the provision was actually paid out in bonuses in the year 2020, and the balance was reversed in the same year. and*

*E. Other expenses were also fully supported and qualified to be expensed against income, as they were incurred to earn revenue in the respective years.*

### **The Tribunal Judgement**

17. The Tribunal perused and analysed the Respondent's Memorandum of Appeal, Statement of Facts, and supporting documents annexed thereto, including invoices, local purchase orders, and bills of lading. The Honourable Tribunal also perused the Appellant's Statement of Facts and Objection Decision. Following its perusal and analysis, the Honourable Tribunal expressed dissatisfaction with the Appellant's responses to the detailed and elaborate explanations that the Respondent provided. Thus, it allowed the Appeal of the Respondent herein, precipitating the instant Appeal.

18. The Appellant appealed and mounted the following grounds;

*i. **THAT the Honourable Tribunal erred in law and in fact in holding that the Respondent's Objection Decision dated 13<sup>th</sup> October, 2022 was not proper in law.***

*ii. **THAT the Honourable Tribunal erred in law and in fact in holding that the onus of providing evidence lies with the Appellant.***

iii. ***THAT*** therefore the Honourable Tribunal erred in law and fact by failing to consider the parties' pleadings and submissions and decide on the merits.

iv. ***THAT*** the Honourable Tribunal erred in law and in fact by concluding that the Appellant's Assessment and Objection Decision was not justified.

19. The Court directed parties to canvass the Appeal via submissions.

### **Appellant Submissions**

20. The Appellant relies on Section 3 of the Income Tax Act, which imposes a tax on all the income of a person, which was accrued and derived in Kenya, by stating;

A. ***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 accrued in or was derived from Kenya. Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—gains or profits from—any business, for whatever period of time, carried on;***

21. The Appellant avers that some elements of the local sales and transportation fees charged by the Respondent were recorded in the export customer's ledger but were not supported by any documents.

22.The Appellant reiterates that the purchases that relate to sales that were made ought to have been supported by way of;

- ***Bill of lading***
- ***Sample sales invoices to countries outside Kenya***
- ***Sample pre-export verification of conformity***
- ***Sample bill of lading***
- ***Proof of payments by clients***
- ***Entries from the country of destination***
- ***Confirmation from the customers.***

23.On the Purchases VAT incurred in one year but claimed in the VAT Returns for another year, the Respondent did not demonstrate how the timing differences affected the variances. Further, the unsupported expenses were not backed by invoices and proof of payment.

24.The Appellant states that the Respondent herein cannot merely allege that the Appellant erroneously raised an Assessment against the Respondent, as they did not provide sufficient reasons and evidence supporting the declared tax.

25.The Appellant further submits that it is a taxpayer's duty to keep records as prescribed in the Income Tax Act, the VAT Act, and the Tax Procedures Act.

26.Section 54A (1) of the Income Tax Act provides that;

*A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold, and accounts, books, deeds, contracts, and vouchers which, in the opinion of the Commissioner, are adequate for computing tax. [emphasis added]*

27. Section 43(1) of the VAT Act provides that;

*A person shall, for this Act, keep in the course of his business, a complete and accurate written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes, and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein. [emphasis added]*

28. Section 23(1) of the Tax Procedures Act requires the Appellant to keep records that enable the Respondent to assess its tax liability. The provision states that;

*A person shall—maintain any document required under a tax law, in either of the official languages; maintain any document required under a tax law to enable the person's tax liability to be readily ascertained; and subject to subsection (3), retain 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 a tax law.*

29. The Appellant further relies on the provisions of Section 59 of the Tax Procedures Act on the production of documents, which provides that:-

**59. Production of Records**

30. For the purposes of obtaining complete information in respect of the tax liability of any person or class of person, or for any other purposes relating to tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to—

- 1) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;*
- 2) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or*
- 3) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.*

31. The Appellant states that the Respondent had a duty under Section 51(3) (c) of the Tax Procedures Act to provide all relevant documentation in support of their objection. Moreover, Section 23 of the Tax Procedures Act mandates the Appellant to maintain documents required under any

tax law and to provide the same upon request by the Respondent. This is to ensure that the Taxpayer's tax liabilities can be readily ascertained. The Appellant failed to provide the relevant supporting documents to discharge the burden of proving the assessments as incorrect.

32. The Appellant places reliance on the South African Supreme Court decision in Metcash Trading Limited v. Commissioner for the South African Revenue Services and Another Case CCT 3/2000, which held that: -

***“But the burden of proving the Commissioner wrong then rests on the vendor under Section 37. Because VAT is inherently a system of self-Assessment based on a vendor's own record, it is obvious that the incidence of this onus can be a decisive factor in the outcome of an objection or Appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practices, legal interpretations, or similar matters, a VAT assessment must inevitably result in an adverse credibility finding by the Commissioner. By way of analogy, such a finding could usually have entailed a rejection of the truth of the vendors' records, returns, and related averments. Consequently, the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating***

***credibility finding can be shown to be wrong, the consequential Assessment must stand."***

33. Further, in *Kachanja Fabricators & Metal Works v Commissioner Domestic Taxes (Tax Appeal E074 of 2023) [2024] KETAT 715 (KLR) (9 May 2024)* (Judgment) referred to by *Justice D.S. Majanja in PZ Cussons East Africa Limited Vs. Kenya Revenue Authority (2013) eKLR*, the court holding was to the extent that: -

***"Where there is an assessment made by the Additional Commissioner upon the Appellant, it is perfectly settled by cases such as Norman v. Galder 267C 293, that the onus is upon the Appellant to show that the Assessment made upon him is excessive and incorrect, and of course, he has completely failed to do so. That is sufficient to dispose of the Appeal, which I accordingly dismiss with costs." 57.....the Appellant in the present Appeal has manifestly failed to discharge such an onerous burden of proof placed squarely on it...."***

34. In *Primarosa Flowers Limited vs. Commissioner of Domestic Taxes (2019) eKLR*, the *Hon Makau J*, whilst referring to the Australian case of *Mulherin vs Commissioner of Taxation [2013] FCAFC 115*, held that: -

***A. ".....the onus is on the taxpayer in proving that the assessment was excessive by adducing positive evidence which***

***demonstrates that the taxable income on which tax ought to have been levied...***

35. The Appellant therefore submits that the onus was on the Respondent to provide all material documents to enable the Appellant to ascertain that the correct tax returns had been filed on iTax.

36. The Respondent, having failed to provide the necessary documents and information to validate its objection as provided for in Section 51(11) despite having the burden of proof to do so, the Appellant was proper in exercising its best Judgment and thereby the notice of objection which was done in this case.

37. What constitutes the Commissioner's best Judgment was been dealt with extensively in The Commissioner for Her Majesty's Revenue and Customs TC/2017/02292 Saima Khalid Appellant Vs The Commissioners for Her Majesty's Respondents Revenue & Customs at paragraph 29 therein, where the Tribunal set out the following requirements for a decision to be to the best of HMRC's Judgment as follows: -

**A.     *"...the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them..."***

**B.     *Secondly, clearly, there must be some material before***

*the commissioners on which they can base their Judgment. If there is no material at all, it would be impossible to form a judgment as to what tax is due.*

- C. Thirdly, it should be recognized, particularly bearing in mind the primary obligation, to which I have referred, of the Taxpayer to make a return himself, that the commissioners should not be required to do the work of the Taxpayer in order to form a conclusion as to the amount of tax which, to the best of their Judgment, is due. In the very nature of things, the relevant information will often be readily available to the Taxpayer. However, it will be difficult for the commissioners to obtain that information without conducting exhaustive investigations. The use of the words 'best of their judgment' does not envisage placing a burden on the commissioners to carry out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will reasonably consider all material placed before them and, on that material, come to a decision which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the*

*commissioners can reasonably act, then they are not required to carry out investigations which may or may not result in further material being placed before them.”*

38. In the instant case, the Respondent failed to prove that the Commissioner's tax decision was inconsistent in any way, based on extraneous factors, excessive, or incorrect.

39. The Appellant submits that it demonstrated before the Tribunal what was considered in arriving at the Assessment and subsequently the objection decision, which are within the law.

40. It is upon this backdrop that the Appellant submits that its Assessment was hinged on the letter of the law. It was upon the Respondent to provide evidence to support its assertions against the Assessment at the objection stage—a fact which admittedly was not considered.

41. From the foregoing, the Appellant submits that the Tribunal erred in its Judgment by failing to dismiss, and the Appeal herein should be allowed.

### **Respondent Submissions**

42. The Respondent, in opposing the Appellant's Appeal, submits on the following issues.

#### ***A. Whether the Appellant's Appeal is proper before the Court.***

***B. Whether the Honorable Tribunal erred in law and fact in holding that the Appellant's Objection Decision dated 13 October 2022 was not proper in law.***

***C. Whether the honorable Tribunal erroneously placed the evidentiary burden of proof on the Appellant.***

43. The Respondent submits that the instant Appeal is a thinly veiled attempt by the Appellant to invite this Honorable Court to reconsider factual issues (specifically, whether Respondent provided supporting documentation), to improperly introduce submissions that were never filed before the Tax Appeals Tribunal, and to evade the burden of proof which it similarly failed to discharge before the Tribunal.

44. The instant Appeal does not raise any issue of law for determination by this Honorable Court. On the contrary, it raises a factual issue for determination, that is, whether the Respondent adduced supporting documentation to substantiate its case regarding the incorrectness of the Appellant's tax decision. The Honorable Tribunal conclusively settled this question of whether the Respondent provided supporting documentation.

45. In its Judgment, the Honorable Tribunal acknowledged that the Respondent had provided reconciliation and supporting documentation, which included invoices, local purchase orders, and bills of lading.

46. The Appellant, however, in the instant Appeal, maintains that these documents were not provided. Furthermore, the Appellant goes on to list

additional documents it claims were not produced—namely, pre-export verifications, proofs of payment by clients, entries from the country of destination, and confirmations from customers. Notably, these documents were never requested at the Objection stage.

47. The Appellant thus cannot at this stage require the Respondent to produce these additional documents, which it never requested in the first place.

48. Besides that, the question of whether supporting documentation was adduced is a factual issue, not a legal one (despite the Appellant's attempt to frame it as a legal issue concerning record-keeping obligations under the Income Tax Act, Value Added Tax Act, and the TPA).

49. The Respondent respectfully submits that the jurisdiction of this Honorable Court in the present Appeal is confined to questions of law only, as stipulated under Section 56(2) of the TPA, which provides: "An appeal to the High Court or to the Court of Appeal shall be on a question of law only. See also Kenya Revenue Authority vs Man Diesel & Turbo Se, Kenya [2021] KEHC 13347 (KLR), where the Court stated as follows:

- i. "28. Before considering the issues raised in this Appeal, it is important to point out that the jurisdiction of this Court is circumscribed by statute. In this regard, section 56 of the TPA is relevant, and because the said provision stipulates a pertinent jurisdictional question,*

*it is only proper that I reproduce the entire section below.....*

- ii. (2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only....*
- iii. An appeal limited to matters of law does not permit the appellate Court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.*

50. The Appellant, through its submissions in the instant Appeal, raises a question of fact, that is, whether the Respondent provided supporting documentation to disprove the Appellant's tax decision.

51. The Respondent submits that this is purely a factual issue, which the Tribunal conclusively determined. It does not amount to a legal issue, which is the threshold for appeals to the High Court.

52. In advancing its position, the Respondent further relies on the decision of the Court of Appeal in the case of John Munuve Mati vs Returning Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission and Paul Musyimi Nzengu [2018] KECA 700 (KLR), which was reiterated in the Man Diesel Case (supra), wherein the Court explained the limitation of the appellate Court in determining appeals as follows;

*"The interpretation or construction of the Constitution, statute, or regulations made thereunder, or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context. We satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law, that is the province of the trial court.*

53. The Court of Appeal in the case of Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad and three others [2018] KECA 677 (KLR) also distinguished a question of law from a question of fact when it cited with approval the reasoning of the Supreme Court of the Philippines' decision in **New Rural Bank Of Gumba vs Fermina S. Abad And Rafael Susan G.R. No. 16818 [2008]**. In the said decision, the Court stated, The petitioner would have us delve into the veracity of the documentary evidence and truthfulness of the testimonial evidence presented during the trial of the case at bar ...We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a particular set of facts, or when the issue does not call for an examination of the probative value of the evidence presented, the

truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts being admitted, or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth... by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which the trial court made.... absent any showing that there are significant issues involving questions of law."

54. The determination of whether the Respondent provided supporting documentation to reconcile the variances established during the audit is therefore a matter within the exclusive jurisdiction of the Tribunal and not this Honourable Court sitting in an appellate capacity.

55. In light of the above, it is evident that the Tribunal correctly analyzed the factual and documentary evidence to arrive at its decision and prays that this Court uphold the same.

56. The Respondent further submits that in its Statement of Facts dated 19<sup>th</sup> June, 2025, at Paragraphs 31- 40, pointed to the impropriety of the instant Appeal for reasons that the same was filed in violation of the provisions of **Rules 3 and 5 of the Tax Appeal Tribunal Act (Appeals to the High Court) Rules.**

57. The Appellant further submits that the Appellant has mischievously attempted to introduce into the Court's records submissions which were not admitted into the Tribunal's record. This is evidenced by the typed proceedings, where the Appellant failed to file its submissions as directed by the Tribunal. On 28<sup>th</sup> September 2023, the Tribunal directed that the Appeal would be determined based solely on the pleadings filed.

58. Additionally, the Appellant's Record of Appeal omits the Respondent's submissions as well as the supporting documents adduced before the Tribunal for this Court's appreciation. The same is in contravention of **Order 42, Rule 13 (4) of the Civil Procedure Rules**, which provides as follows;

- i. (4) Before allowing the Appeal to go for hearing, the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—*
- ii. The Memorandum of Appeal;*
- iii. The pleadings;*
- iv. The notes of the trial magistrate made at the hearing;*

- v. *The transcript of any official shorthand, typist notes, electronic recording, or palantypist notes made at the hearing;*
- vi. *all affidavits, maps, and other documents whatsoever put in evidence before the magistrate;*
- vii. *The Judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:*
- viii. *Provided that—*
- ix. *A translation into English shall be provided of any document not in that language;*
- x. *The judge may dispense with the production of any document or Part of a document which is not relevant, other than those specified in paragraphs (a),*
- xi. *(b) and (f).*

59. Noting the proviso of the provision highlighted above, pleadings are vital documents of the Record of Appeal for the Court's appreciation and determination. The Respondent thus submits that this Court ought not to adjudicate the matter based on an incomplete Record of Appeal.

60. In urging this, the Respondent relies on the finding of the Supreme Court in the case of *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2*

*others [2015] eKLR* held as follows at Paragraph 41: "**Without a record of Appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the Appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.**"

61. The Respondent submits that the instant Appeal is an attempt by the Appellant to invite this Honourable Court to determine issues of fact contrary to the provisions of the TPA and the TATA. The Respondent urges this Honourable Court to decline the Appellant's invitation to revisit issues of fact, to reject the Appellant's improper attempt to introduce material that does not form Part of the Tribunal's official record, and to dismiss this Appeal as it shuns the appellate process.

62. Further, the Tribunal, in its findings in the Judgment dated 2<sup>nd</sup> February 2024, held that the Appellant's Objection Decision was not proper in law because the Appellant upheld the Assessment without considering the supporting documents provided by the Respondent during the Objection stage.

63. The Appellant, in paragraph 23 of its submissions dated 19<sup>th</sup> June 2025, affirms that its Assessment was hinged on the letter of the law and that

the Respondent failed to provide evidence to support its assertions against the Appellant's Assessment at the objection stage.

64. Contrary to the Appellant's assertion, the Respondent reiterated the same explanations for the noted variances as those provided to the Appellant at the Objection stage before the Tribunal. These explanations were substantiated by supporting documents, which were also reproduced before the Tax Appeals Tribunal.

- i. The Respondent explained that some transport fees were included in export ledger accounts but related to local sales, causing the noted discrepancies. Additionally, some export customer details were inadvertently omitted.*
- ii. A further variance of KES 7,060,271 arose from differences in currency conversion rates between accounting records and VAT declarations, given that most invoices were denominated in foreign currency.*
- iii. The Respondent clarified that some purchases related to direct sales by Chryso South Africa to customers in other jurisdictions (e.g., Uganda and Tanzania), bypassing Kenya. For VAT purposes, these did not qualify for input tax claims in Kenya as no import VAT was paid.*

- iv. For income tax purposes, the Respondent stated these purchases were nonetheless claimed as cost of sales in the Respondent's books, consistent with tax law.*
- v. Additional variances were due to: Purchases cleared under the name of Bolloré Logistics, not the Respondent;*
- vi. Purchases VAT claimed in a different year due to the time of clearance. Invoices exceeding the 6-month claim window, which are not claimable for VAT purposes, yet the same are allowable for income tax purposes; and Exempt supplies that did not attract VAT.*

B. Disallowed expenses: The Respondent further evidenced that the expenses disallowed by the Appellant were, in fact, incurred wholly and exclusively in the production of income, as required under Section 15 of the Income Tax Act. These included relocation fees, which encompassed staff work permit processing fees and startup costs in Kenya when the company was being set up. All of these were entirely covered.

- i. Supported; staff salaries are paid via South Africa but recharged to the Respondent. An increase in leave provision of KES 426,538 was added back in the tax computation for the*

*year 2019, which could be confirmed in the tax return that was filed.*

*ii. The bonus provision of KES 4,793,752 was treated as a specific provision and was not added back into the tax computation. A portion of the provision was actually paid out in bonuses in the year 2020, and the balance was reversed in the same year.*

*iii. Other expenses were also fully supported and qualified to be expensed against income, as they were incurred to earn revenue in the respective years.*

65. As stated above, the above explanations were supported by extensive and elaborate documentation as noted by the Honourable Tribunal in Paragraphs 102 – 108 of its Judgment.

66. At Paragraph 102 of the Judgment, the Honourable Tribunal expressed its dissatisfaction with the Appellant's allegation that the Respondent failed to provide the documents it had been required to provide.

67. The Honourable Tribunal also disagreed with the Appellant's allegation, as per its Objection Decision dated 13<sup>th</sup> October 2022, that the Respondent did not explain how exchange rates created the noted variances in the VAT3 return and those declared on IT2C.

68. Furthermore, at Paragraph 106 of its Judgment, the Honourable Tribunal did not agree with the Appellant that the only information provided was general ledger extracts and tabulations with no supporting invoices.

69. At Paragraphs 107 and 108 of its Judgment, the Honourable Tribunal noted that the Respondent had attached to its pleadings several documents provided to the Appellant, including invoices, local purchase orders, and bills of lading.

70. The Honourable Tribunal thus rightly found that in the face of the above documentation, the Respondent had substantiated the incorrectness of the Appellant's Objection Decision and Desk Review Findings, thereby discharging its burden of proof under Section 56 of the TPA and Section 30 of the TATA and establishing a prima facie case.

71. The Respondent, having done its Part in proving the incorrectness of the Appellant's decision, it was upon the Appellant to prove the correctness of its decision, a task which it evidently failed to discharge. The Appellant merely raised allegations of a lack of documentation while failing to examine the documents provided by the Respondent. It is for this reason that the Tribunal found that the Appellant had not met its burden of proving the correctness of its tax demand. The Appellant thus prays that this Honourable Court uphold the same.

72. Whether the Honourable Tribunal erroneously placed the evidentiary burden of proof on the Appellant. It is a trite law that the burden of proof

in tax disputes is on the Taxpayer. In the instant Appeal, the Respondent bears the burden of disproving the Appellant's tax decision. This is provided by Section 56 of the TPA and Section 30 of the TATA, which provides as follows: TPA 56. The Appellant thus prays that this Honourable Court uphold the same.

73.TPA56 General provisions relating to objections and appeals In any proceedings under this Part, the burden shall be on the Taxpayer to prove that a tax decision is incorrect TATA Burden of proof In a proceeding before the Tribunal, the Appellant has the burden of proving—where an appeal relates to an assessment, that the Assessment is excessive; or in any other case, that the tax decision should not have been made or should have been made differently.

74.This Court, in the case of Commissioner of Investigations and Enforcement vs Pearl Industries Limited [2022] KEHC 51 (KLR), elaborated on the nature of the burden of proof as follows: "Under section 56 of the TPA, it was incumbent upon the Respondent to prove that the Commissioner's findings above were wrong. How could it do so? By providing evidence and supporting documentation to dislodge the Commissioner's findings.

75.Bearing in mind that it bore the onus of disproving the Appellant's desk review findings, the Respondent adduced evidence to support its explanations, which was reproduced before the Tribunal.

76.As stated above, the Tribunal thoroughly and meticulously examined these documents and was satisfied that the Appellant had discharged its burden of proof and established a prima facie case.

77.The burden of proof borne by the Taxpayer is not stagnant, however. Once the Taxpayer discharges its burden, the evidentiary burden shifts to the Commissioner. This principle was reaffirmed in Commissioner of Domestic Taxes vs Trical and Hard Limited [2022] KEHC 9927 (KLR) where the Court stated ***“I agree with the Tribunal’s holding that the burden of proof in tax matters is not stationary but is like a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer.”***

78.The Respondent also relies on the case of *Kenya Revenue Authority vs Man Diesel & Turbo Se, Kenya [2021] eKLR*, where the High Court observed:

***“Once the Taxpayer has made out a prima facie case to prove the facts, the onus then shifts to the Revenue Authority to rebut the prima facie case. If the Revenue Authority cannot provide any evidence to prove their position, the Taxpayer will succeed. Prima facie is another legal term that literally means “on its face.” To prove a case “on its face,” you must provide evidence that, unless rebutted, would prove your position. According to the said decision, a prima facie case is made when the Taxpayer can produce unchallenged and uncontradicted evidence.”***

.... It is not sufficient for the Commissioner to merely request information and then disregard it and to issue an assessment as it sees fit.” **(Emphasis ours)**

79. The Honourable Tribunal, being dissatisfied with the Appellant’s failure to substantially respond to the documents adduced by the Respondent at both the objection and appeal stages, found that the Appellant failed to discharge the burden of proof, which had shifted to it upon production of evidence by the Respondent. The Appellant has merely raised baseless allegations that the documents were not provided, allegations which the Tribunal considered and rejected.

80. The Appellant now argues that the Tribunal erred by holding that the onus of proof lay with the Appellant and that the burden of providing evidence was placed on the Appellant contrary to the provisions of Section 56 of the TPA. This Argument is not only unfounded but a grave misinterpretation of the Tribunal's holding.

81. The Tribunal established that the Respondent had, in accordance with the provisions of Section 56 of the TPA and Section 30 of the TATA, met its burden by providing evidence and explanations against the Appellant's Assessment and Objection Decision but the Appellant had failed to examine the import and weight of the evidence provided thereby failing to meet its burden which had shifted to the Appellant upon presentation of the documentary evidence and explanations by the Respondent.

82.The Respondent submits that the Appellant is now employing the same tactic in the instant Appeal: reiterating the allegation regarding the non-provision of documents and going even further to allege that documents never requested at the objection stage were not provided, to evade discharging its burden of proof.

83.The Respondent thus urges this Honourable Court to decline the Appellant's attempt to evade discharging its evidentiary burden of proof through the instant Appeal.

84.Evidence in response to the issues that the Appellant had raised in its Assessment.

85.The Respondent submits that the Tribunal's findings were based on uncontroverted documentary evidence and a correct application of law. No legal error arises in its decision that warrants this Honorable Court's interference.

### **ISSUES, ANALYSIS, AND DETERMINATION**

86.After reviewing the pleadings, tribunal proceedings, entire record, and parties' submissions, the issues are whether the Appellant's Appeal is proper before the Court. Whether the Honorable Tribunal erred in law and fact in holding that the Appellant's Objection Decision dated 13<sup>th</sup> October 2022 was not proper in law. Whether the honorable Tribunal erroneously placed the evidentiary burden of proof on the Appellant.

87.PRINCIPLES: Section 13(8) of the Tax Appeals Tribunal Act, Section 55 of the TPA, Section 55(2) of the TPA. If aggrieved with the decision of the Tribunal, appeal to the High Court on a question of law only.

88.Under Section 56(2) of the TPA, appeals to the High Court or Court of Appeal must be based solely on questions of law. The Burden of Proof in Tax Cases Section 56 of the Tax Procedures Act, which falls under Part VIII, 'on Tax Decisions, Objections and Appeals', provides for the burden of proof in tax disputes as follows: "In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect."

89.Burden of proof in tax disputes.

90.In tax disputes, the burden of proof can shift between the Taxpayer and the tax authority, resembling the motion of a pendulum. The High Court of Kenya in the case of Commissioner of Investigations and Enforcement v Pearl Industries Limited (Tax Appeal E086 of 2020) articulated this concept. The Court observed as follows:"***...In this case, the pendulum of proof swung three times. The first shift was to the Respondent (Pearl Industries Ltd), which provided the documents requested by the Commissioner. The second shift was to the Commissioner, who, after reviewing the documents, challenged their authenticity and validity. This meant that the burden of proof finally swung back to the Respondent to prove that the Commissioner was wrong in its position and overall findings.***"

91. The above analogy underscores the dynamic nature of the burden of proof in tax disputes, highlighting that it may shift between parties as evidence is presented and contested.

92. In Kenya Revenue Authority v Maluki Kitili Mwendwa [2021] KEHC 4148 (KLR), the High Court reaffirmed that the Taxpayer must present competent and verifiable evidence to challenge a tax assessment. The Court emphasized that the presumption of correctness applies unless rebutted.

93. The Appellant, through its submissions in the instant Appeal, raises a question of fact, that is, whether the Respondent provided supporting documentation to disprove the Appellant's tax decision.

94. The Respondent submits that this is purely a factual issue, which the Tribunal conclusively determined. It does not amount to a legal issue, which is the threshold for appeals to the High Court.

95. In advancing its position, the Respondent further relies on the decision of the Court of Appeal in the case of John Munuve Mati vs Returning Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission and Paul Musyimi Nzengu [2018] KECA 700 (KLR) which was reiterated in the Man Diesel Case (supra.) wherein the Court explained the limitation of the appellate Court in determining appeals as follows;

***"The interpretation or construction of the Constitution, statute or regulations made thereunder or their application***

*to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context. We satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law, that is the province of the trial court."*

96. The Court of Appeal in the case of Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad and three others [2018] KECA 677 (KLR) also distinguished a question of law from a question of fact when it cited with approval the reasoning of the Supreme Court of the Philippines' decision in New Rural Bank of Gumba vs Fermina S. Abad and Rafael Susan G.R. No. 16818 [2008].

97. In the said decision, the Court stated that the petitioner would have us delve into the veracity of the documentary evidence and the truthfulness of the testimonial evidence presented during the trial of the case at bar. We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a particular set of facts, or when the issue does not call for an examination of the probative value of

the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts being admitted or when the query invites calibration of the whole evidence, considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth... by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which the trial court made.... absent any showing that there are significant issues involving questions of law."

98. The determination of whether the Respondent provided supporting documentation to reconcile the variances established during the audit is therefore a matter within the exclusive jurisdiction of the Tribunal and not this Honourable Court sitting in an appellate capacity.

99. In light of the above, it is evident that the Tribunal correctly analyzed the factual and documentary evidence to arrive at its decision and prays that this Court uphold the same.

100. The Respondent further submits that in its Statement of Facts dated 19<sup>th</sup> June 2025, at Paragraphs 31- 40, pointed to the impropriety of the instant Appeal for reasons that the same was filed in violation of the

provisions of Rules 3 and 5 of the Tax Appeal Tribunal Act (Appeals to the High Court) Rules.

101. The Respondent further submits that the Appellant has mischievously attempted to introduce into the Court's records submissions which were not admitted into the Tribunal's record. This is evidenced by the typed proceedings, where the Appellant failed to file its submissions as directed by the Tribunal. On 28<sup>th</sup> September 2023, the Tribunal directed that the Appeal would be determined based solely on the pleadings filed.

102. Additionally, the Appellant's Record of Appeal omits the Respondent's submissions as well as the supporting documents adduced before the Tribunal for this Court's appreciation. The same is in contravention of **Order 42, Rule 13 (4) of the Civil Procedure Rules**, which provides as follows.

*(4) Before allowing the Appeal to go for hearing, the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—*

*i. The memorandum of Appeal.*

*ii. The pleadings.*

- iii. *The notes of the trial magistrate were made at the hearing.*
- iv. *The transcript of any official shorthand, typist notes, electronic recording, or palantypist notes made at the hearing.*
- v. *All affidavits, maps, and other documents whatsoever are put in evidence before the magistrate.*
- vi. *The Judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:*
- vii. *Provided that—*
- viii. *A translation into English shall be provided of any document not in that language;*
- ix. *The judge may dispense with the production of any document or Part of a document which is not relevant, other than those specified in paragraphs (a),*
- x. *(b) and (f).*

103. Noting the provision highlighted above, pleadings are vital documents of the Record of Appeal for the Court's appreciation and

determination. The Respondent thus submits that this Court ought not to adjudicate the matter based on an incomplete Record of Appeal.

104. In urging this, the Respondent relies on the finding of the Supreme Court in the case of Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others [2015] eKLR held as follows at Paragraph 41: "***Without a record of Appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the Appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.***"

105. The Respondent submits that the instant Appeal is an attempt by the Appellant to invite this Honourable Court to determine issues of fact contrary to the provisions of the TPA and the TATA. The Respondent urges this Honourable Court to decline the Appellant's invitation to revisit issues of fact, to reject the Appellant's improper attempt to introduce material that does not form Part of the Tribunal's official record, and to dismiss this Appeal as it shuns the appellate process.

106. Further, the Tribunal, in its findings in the Judgment dated 2<sup>nd</sup> February 2024, held that the Appellant's Objection Decision was not proper in law because the Appellant upheld the Assessment without

considering the supporting documents provided by the Respondent during the Objection stage.

107. The Appellant, in paragraph 23 of its submissions dated 19 June 2025, affirms that its Assessment was hinged on the letter of the law and that the Respondent failed to provide evidence to support its assertions against the Appellant's Assessment at the objection stage.

108. Contrary to the Appellant's assertion, the Respondent reiterated the same explanations for the noted variances as those provided to the Appellant at the Objection stage before the Tribunal. These explanations were substantiated by supporting documents, which were also reproduced before the Tax Appeals Tribunal.

- i. The Respondent explained that some transport fees were included in export ledger accounts but related to local sales, causing the noted discrepancies. Additionally, some export customer details were inadvertently omitted.*
- ii. A further variance of KES 7,060,271 arose from differences in currency conversion rates between accounting records and VAT declarations, given that most invoices were denominated in foreign currency.*
- iii. The Respondent clarified that some purchases related to direct sales by Chryso South Africa to customers in other jurisdictions (e.g., Uganda and Tanzania), bypassing*

*Kenya. For VAT purposes, these did not qualify for input tax claims in Kenya as no import VAT was paid.*

- iv. For income tax purposes, the Respondent stated these purchases were nonetheless claimed as cost of sales in the Respondent's books, consistent with tax law.*
- v. Additional variances were due to: Purchases cleared under the name of Bolloré Logistics, not the Respondent.*
- vi. Purchases VAT claimed in a different year due to the time of clearance. Invoices exceeding the 6-month claim window, which are not claimable for VAT purposes, yet the same are allowable for income tax purposes; and Exempt supplies that did not attract VAT.*

**Disallowed expenses:** The Respondent further evidence that the expenses disallowed by the Appellant were in fact incurred wholly and exclusively in the production of income, as required under Section 15 of the Income Tax Act. These included relocation fees, which encompassed staff work permit processing fees and startup costs in Kenya when the company was being set up. All of these were entirely covered.

- a. Supported; staff salaries paid via South Africa but recharged to the Respondent. An increase in leave provision of KES 426,538 was added back in the*

*tax computation for the year 2019, which could be confirmed in the tax return that was filed.*

- b. The bonus provision of KES 4,793,752 was treated as a specific provision and was not added back into the tax computation. A portion of the provision was actually paid out in bonuses in the year 2020, and the balance was reversed in the same year. and*
- c. Other expenses were also fully supported and qualified to be expensed against income, as they were incurred to earn revenue in the respective years.*

109. As stated above, the above explanations were supported by extensive and elaborate documentation as noted by the Honorable Tribunal in Paragraphs 102 – 108 of its Judgment.

110. In Paragraph 102 of the Judgment, the Honourable Tribunal expressed its dissatisfaction with the Appellant's allegation that the Respondent failed to provide the required documents.

111. The Honourable Tribunal also disagreed with the Appellant's allegation, as per its Objection Decision dated 13<sup>th</sup> October 2022, that the Respondent did not explain how exchange rates created the noted variances in the VAT3 return and those declared on IT2C.

112. Furthermore, at Paragraph 106 of its Judgment, the Honourable Tribunal did not agree with the Appellant that the only information provided was general ledger extracts and tabulations with no supporting invoices.
113. At Paragraphs 107 and 108 of its Judgment, the Honourable Tribunal noted that the Respondent had attached to its pleadings several documents provided to the Appellant, including invoices, local purchase orders, and bills of lading.
114. The Honourable Tribunal thus rightly found that in the face of the above documentation, the Respondent had substantiated the incorrectness of the Appellant's Objection Decision and Desk Review Findings, thereby discharging its burden of proof under Section 56 of the TPA and Section 30 of the TATA and establishing a prima facie case.
115. The Respondent, having done its Part in proving the incorrectness of the Appellant's decision, it was upon the Appellant to prove the correctness of its decision, a task which it evidently failed to discharge. The Appellant merely raised allegations of a lack of documentation while failing to examine the documents provided by the Respondent. It is for this reason that the Tribunal found that the Appellant had not met its burden of proving the correctness of its tax demand. The Appellant thus prays that this Honourable Court uphold the same.
116. Whether the Honorable Tribunal erroneously placed the evidentiary burden of proof on the Appellant. It is a trite law that the

burden of proof in tax disputes is on the Taxpayer. In the instant Appeal, the Respondent bears the burden of disproving the Appellant's tax decision. This is provided by Section 56 of the TPA and Section 30 of the TATA, which provides as follows: TPA 56. The Appellant thus prays that this Honorable Court uphold the same.

117. TPA56 General provisions relating to objections and appeals In any proceedings under this Part, the burden shall be on the Taxpayer to prove that a tax decision is incorrect TATA Burden of proof In a proceeding before the Tribunal, the Appellant has the burden of proving —where an appeal relates to an assessment, that the Assessment is excessive; or in any other case, that the tax decision should not have been made or should have been made differently.

118. This Court, in the case of Commissioner of Investigations and Enforcement vs Pearl Industries Limited [2022] KEHC 51 (KLR), elaborated on the nature of the burden of proof as follows: “Under section 56 of the TPA, it was incumbent upon the Respondent to prove that the Commissioner’s findings above were wrong. How could it do so? By providing evidence and supporting documentation to dislodge the Commissioner’s findings.

119. Bearing in mind that it bore the onus of disproving the Appellant's desk review findings, the Respondent adduced evidence to support its explanations, which was reproduced before the Tribunal.

120. As stated above, the Tribunal thoroughly and meticulously examined these documents and was satisfied that the Appellant had discharged its burden of proof and established a prima facie case.

121. The burden of proof borne by the Taxpayer is not stagnant, however. Once the Taxpayer discharges its burden, the evidentiary burden shifts to the Commissioner. This principle was reaffirmed in Commissioner of Domestic Taxes vs Trical and Hard Limited [2022] KEHC 9927 (KLR) where the Court stated ***“I agree with the Tribunal’s holding that the burden of proof in tax matters is not stationary but is like a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer.”***

122. The Respondent also relies on the case of Kenya Revenue Authority vs Man Diesel & Turbo Se, Kenya [2021] eKLR, where the High Court observed: Once the Taxpayer has made out a prima facie case to prove the facts, the onus then shifts to the Revenue Authority to rebut the prima facie case. If the Revenue Authority cannot provide any evidence to prove their position, the Taxpayer will succeed. Prima facie is another legal term that literally means ***“on its face.” To prove a case “on its face,” you must provide evidence that, unless rebutted, would prove your position. According to the said decision, a prima facie case is made when the Taxpayer can produce unchallenged and uncontradicted evidence.”***.... It is not sufficient for the Commissioner to

merely request information and then disregard it and to issue an assessment as it sees fit.” (Emphasis ours)

123. The Honourable Tribunal, being dissatisfied with the Appellant’s failure to substantially respond to the documents adduced by the Respondent at both the objection and appeal stages, found that the Appellant failed to discharge the burden of proof, which had shifted to it upon production of evidence by the Respondent.

124. The Appellant has merely raised an untenable claim that the documents were not provided, allegations which the Tribunal considered and rejected.

125. The Appellant now argues that the Tribunal erred by holding that the onus of proof lay with the Appellant and that the burden of providing evidence was placed on the Appellant contrary to the provisions of Section 56 of the TPA. This Argument is not only unfounded but a grave misinterpretation of the Tribunal's holding.

126. The Tribunal established that the Respondent had, in accordance with the provisions of Section 56 of the TPA and Section 30 of the TATA, met its burden by providing evidence and explanations against the Appellant's Assessment and Objection Decision but the Appellant had failed to examine the import and weight of the evidence provided thereby failing to meet its burden which had shifted to the Appellant upon presentation of the documentary evidence and explanations by the Respondent.

127. The Court agrees with the Respondent that the Appellant is now employing the same tactic in the instant Appeal: reiterating the allegation regarding the non-provision of documents and further alleging that documents never requested at the objection stage were not provided, to evade discharging its burden of proof.

128. The Court thus agrees with the Tribunal's findings as they were based on uncontroverted documentary evidence and a correct application of law. No legal error arises in its decision that warrants this Court's interference.

129. Thus, the Court makes the orders.

*I. The Appellant's Appeal is dismissed.*

*II. The Judgment of the Tax Appeals Tribunal dated 2<sup>nd</sup> February 2024, setting aside the Objection Decision dated 13<sup>th</sup> October 2022, is upheld.*

*III. The parties are to bear their own costs.*

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAROK THIS**

**14<sup>TH</sup> NOVEMBER, 2025.**

.....

**CHARLES KARIUKI**

**JUDGE**