REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI

COMMERCIAL AND TAX DIVISION

INCOME TAX APPEAL NO E215 OF 2023

(CORAM: CHARLES KARIUKI – J)

ECP KENYA LIMITED….....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES….....RESPONDENT

[Being an appeal against the Judgment and decision of the Tax Tribunal in Tax Appeal Tribunal Reference Number 614 of 2022 rendered on 10th November 2023]

JUDGMENT

BACKGROUND:

1. The Appellant is a limited liability company incorporated in Kenya pursuant to the provisions of the Companies Act (Cap 486, Laws of Kenya) (now repealed), and whose principal activity is the collection of data from the portfolio assigned to it by its parent entity, ECP › Manager LP (hereinafter referred to as ERP
   ›1ianager) in consideration for a fee. ECP Manager is a limited partnership based in the United States of America. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, 1995. Under Section 5
   (1) of the Act, the Kenya Revenue Authority (the Authority) is an agency of the Government for the collection and receipt of all tax revenue.

2. The Respondent issued a letter of assessment to the Appellant dated 4 February 2022, demanding the Corporation tax of Kshs - 2,521,185,943.00, inclusive of penalties and interest. The Appellant lodged a notice of objection dated 4

March

2022.The Respondent issued an objection decision dated 28 April 2022 in respect of the Appellant's notice of objection.

3. The Appellant, being dissatisfied with the decision of the Respondent, notified the Respondent of its intention to appeal to the Tribunal against the said decision vide a Notice of Appeal, which was filed on the same date. After hearing the Appeal, the Tribunal concluded that the Appeal lacks merit and accordingly made the following Orders: The Appeal is hereby dismissed. The Respondent's Objection decision dated 28 April 2022 was upheld, and each party is to bear its own costs.

4. The Appellant proffers this Appeal against the Judgment of the Tax Tribunal and has filed the Memorandum of Appeal through which it raises eight [8] grounds of appeal to be determined by the Honourable Court: -

    1) **The Tribunal erred in its duty by solely relying on the Securities and Exchange Commission filings of the Appellant's Holding Company, ECP Manager LP.**
    2) **The Tribunal erred in law by failing to consider, without justification, the audited financial statements of the ECP manager, which set out the actual profit for the period under assessment, and consequently endorsed the Respondents' approach to computing tax on fictitious income.**
    3) **The Tribunal erred in law in upholding the Respondent's tax demand, which was computed on the basis of the entire gross revenue earned by ECP Group outside Kenya, rather than the relevant profit attributable to the Appellant.**
    4) **The Tribunal erred by disregarding the Appellant’s Transfer Pricing Policy in its decision, without justification, contrary to the provisions of Section 18(8) of the ITA, as read with the Transfer Pricing Rules, 2006.**
    5) **The Tribunal erred in failing to recognize that, under the Transfer Pricing Rules 2006, the Appellant has the discretion to determine**

the

appropriate transfer pricing method to be used in charging for services rendered to the ECP Manager, based on its business model.

6) **The Tribunal erred by deliberately mischaracterizing the relationship between the ECP Manager and the Appellant, finding that the roles and functions were integrated, and thereby upholding the Respondent's erroneous tax demand.**
7) **The Tribunal erred in failing to recognize and appreciate that its failure to analyse the Appellant's evidence in its totality would result in the illegal imposition of taxes, contrary to Article 210 of the Constitution.**
8) **Parties were directed to canvass the Appeal via submissions, which they filed and exchanged.**

THE APPELLANT SUBMISSIONS:

5. The Appellant argued an appeal on the following issues;

I) Whether the Tribunal erred in law, failing to consider the Appellant's evidence and solely relying on the Securities Exchange Commission [SEC] filings of the Appellant's holding Company, ECP Manager LP.

II) Whether the Tribunal erred in law by failing to consider the Appellant's evidence in the form of the ECP Manager's audited financial statements on the actual profits under the period of assessment.

III) Whether the Tribunal erred in endorsing the Respondent's approach of tax computation based on fictitious gross revenue earned by the ECP Group outside Kenya.

IV) Whether the Tribunal erred in disregarding the Appellant's Transfer Pricing Policy [TP Policy] contrary to the provisions of Section 18 [8] of the ITA as read with the Income Tax [transfer Pricing] Rules 2006.

V) Whether the Tribunal mischaracterised the relationship between the Appellant and the ECP Manager, thereby erroneously conflating roles and functions played by the Appellant and ECP Manager.

VI) Whether the Tribunal upheld and sanctioned an illegal imposition of taxes contrary to Article 21 of the Constitution.

VII) Whether the Tribunal erred in law, failing to consider the Appellant's evidence and solely relying on the Securities Exchange Commission [SEC] filings of the Appellant's holding Company, ECP Manager LP.

6. The Appellant submits that, when called upon to provide its evidence before the Tribunal, it relied on the interview with Bryce Fort, its TP Policy, and filed audited financial statements, witness statements, and its job descriptions.
7. 2 Page 772 of the Record of Appeal.

8. The Tribunal erroneously upheld the Respondent's FAR analysis of the Appellant's role, which the Respondent had disagreed with, and disregarded the Appellant's FAR analysis as well as its TP Policy.

9. The Tribunal relied on the Respondent's FAR analysis, which was based solely on the ECP Group's SEC filing. The ECP Group did Group 3's SEC filing, which covers the ECP Manager LP, ECP Manager III LP, ECP Mena Management LP, Emerging Capital Advisors LLC, and ECP Manager IV LP.

10. In the SEC filing, it is described that the ECP is the principal investment advisor to various private funds and pooled investment vehicles. The ECP Group prepared the SEC filings to cover the various ECP US entities.

11. The Appellant is a subsidiary of the ECP Manager, with its functions set out in its TP Policy 4, namely to provide technical and administrative support to the ECP Manager. The Appellant, being a 100% owned subsidiary of ECP Manager, provides services to ECP Manager and has no direct relationship to any other entity. The Appellant's responsibilities include providing information to ECP Manager's ExCo, subject to assignments from the ExCo in support of ECP Manager's Advisory Activities, and undertaking support services in support of ECP Manager's Operating Activities.

12. In addition to Kenyan statutory requirements and filings, and the maintenance of local books and records, the Appellant provides information to the ECP Manager that US regulators and tax authorities require. The TP Policy clearly indicated

that the Appellant does not participate in ECP Manager's Fundraising Activities nor does it participate in the decisions relating to investment selection or disposal.

13. Further, in the interview between the Respondent and the Appellant’s Director, Bryce Fort, on 17 September 20205, it was unequivocally confirmed that local/regional offices such as the Appellant do not make any sourcing or exit decisions. It was further confirmed that there was a need to continually collect information from the portfolio companies and report back to the ECP Manager, whose role is performed by the Appellant. This interview confirmed the Appellant's role and function as an administrative support function to its holding company, the ECP Manager. Thus, it is submitted that this role is in line with the Appellant's TP Policy.

14. The Appellant, through its witnesses Daniel Beeton and Mark Gerdelman, testified about the FAR analysis undertaken by the Appellant in preparing its TP Policy. The testimony of Daniel Beeton confirmed the Appellant's administrative support function to the ECP Manager.

15. Gendelman's testimony concerned the financial statements of the ECP Manager for the period under taxation. The witness produced audited financial statements found on pages 103 to 127 of the Record of Appeal. The statements established that the ECP Manager incurred a loss for the periods 2016, 2017, and 2018, and incurred a gain for the periods 2019 and 2020. The witness confirmed that, if tax is due when the ECP Manager makes a gain and based on the Respondents' work, it would be at a lower rate than the Tax Assessment upheld in the objection decision.

16. It is submitted that the Tribunal disregarded this evidence and opted to give credence to Appellant’s evidence and to rely on the foreign filings of the ECP Group. The SEC filings did not relate to the Appellant herein, as it is a distinct and separate entity from the other ECP US entities. It is a trite law that a holding company is a distinct legal entity from its subsidiary. Reliance made on the Court

of Appeal case of ***Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited as cited in the case of RE: SOUTHARD LIMITED [1979] 3 ALL ER 565***.

17. The Appellant submits that the Tribunal's reliance on the ECP Manager's SE filings as a holding company violated the doctrine of a company's separate legal and distinct entity, thereby resulting in an erroneous decision.

Whether the Tribunal erred in law by failing to consider the Appellant's evidence in the form of the ECP Manager's audited financial statements on the actual profits under the period of assessment.

18. The Appellant submits that it provided the ECP Manager's audited financial statements, which show the ECP Manager's income and actual profits for the years under assessment. The Appellant's witness, Mark Gerdelman, testified before the Tribunal in accordance with his Witness Statement 9, in which he provided certified extracts of the audited financial statements of the ECP Manager, prepared by Deloitte & Touche LLP USA. The testimony before the Tribunal was that, if TPSM were correctly applied by the Respondent, the attribution to the Appellant and thus the subject of tax in Kenya would be profits, not income. The Appellant's evidence before the Tribunal was that the ECP Manager incurred a loss in 2016, 2017, and 2018, while it made a profit in 2019 and 2020. [10]

19. That, based on the audited financial statements of the ECP Manager and the computation thereunder, the Appellant's position is that no tax would be due in Kenya from the Appellant in the event of the correct application of the TPSM method, which the Respondent/Tribunal had relied on. The Appellant's evidence is that the application of TPSM resulted in the Appellant being declared to have low income for the period under review, taking into consideration that the ECP Manager reported significant losses from 2016 to 2018 and minimal profits in 2019 and 2020. This, when compared with the income of Kshs. 486, 781, 302/-, which the Appellant had declared in the years 2016 to 2020, and the corporate tax paid based on the TNMM method.

20. Thus, it submitted that, in error of its decision, the Tribunal disregarded the evidence adduced by the Appellant's holding company, endorsed and upheld the Respondent's tax computation based on a fictitious income. The Respondent and the Tribunal's purported assessment was based on the assets under management by ECP for the years under review, per the ADV form of ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP, as filed in the SEC, which was computed as per the Respondent's Statement of Facts.

21. It is further argued that, in disregarding the Appellants' evidence of the actual profits evidenced by audited financial statements, the Tribunal relied on the alleged assets under the management of the three entities. It is the Appellant's submission that the assets under the respective company’s management do not constitute an income or amount to a profit to be considered in tax assessment.

22. Furthermore, the Tribunal, in upholding the Respondent's tax assessment, erred in its Judgment in holding that the Appellant failed/refused to provide evidence of the financial information for the ECP Group. The Appellant adduced evidence that it is a subsidiary of the ECP Manager only, provides services to the ECP Manager, and not the ECP Manager III LP or ECP Mena Management LP. The Appellant could not obtain financial information of the other entities, which are neither its holding companies nor does it render any services to them. The Appellant, the ECP Manager III LP, and ECP Mena Management LP are distinct and separate legal entities. The Tribunal's expectation that the Appellant should have this financial information of the entire ECP Group was erroneous.

23. The Tribunal, in its Judgment, acknowledges that the Respondent did not have access to the required information to compute gross profit at the global level. 11 Then, one must ask, on what basis or information did the Respondent rely on to reach its tax assessment? By upholding the Objection Decision, the Tribunal affirmed the Respondent's decision to determine the gross revenue of the ECP: ECP Manager LP, ECP Manager III LP, and ECP Mena Management

LP. It is submitted that the Tribunal should have relied on the information provided by

the Appellant, namely its parent company's audited financial statements, which clearly indicated the profits/income for the years under review. Instead, the Tribunal erred and relied on a fictitious income, which the Respondent neither had access to nor could prove the existence of.

Whether the Tribunal erred in endorsing the Respondent's approach of tax computation based on fictitious gross revenue earned by the ECP Group outside Kenya.

24. It is argued that the Tribunal in Paragraph 187 of the Judgment holds that, despite being requested, the Appellant refused/failed to provide the financial information for the ECP Group, which would play a key role in calculating the gross profit prior to the profit split. The Tribunal acknowledges the use of the information, as it was reconstructed from the SEC forms filed by ECP.

25. The Tribunal, in relying on the ECP Group's SEC filings, used the ECP Group's total gross revenue, including that of the ECP Manager, ECP Manager III LP, and ECP Mena Management LP. This was done instead of using the gross revenue as earned by the ECP Manager, who is the holding company of the Appellant, as required by the TPSM Guidance. Your Lordship, the Appellant is a subsidiary of the ECP Manager and provides only technical and administrative support to the ECP Manager, as evidenced by the Appellant's TP Policy. We restate that the Appellant does not provide any services to the ECP Manager III LP and ECP Mena Management LP. The Tribunal was erroneous in its decision to attribute the income of the ECP Manager III LP and ECP Mena Management LP to the Appellant.

26. The Respondent urged the Tribunal to uphold its Objection Decision and the Tax Assessment, which were based on the alleged gross profits of the entire ECP Group, comprising ECP Manager, ECP Manager III LP, and ECP Mena Management LP. The Respondent's assessment was based on the ECP's assets under management, as per the ECP Manager, ECP Manager III LP, and ECP Mena Management LP forms filed with the SEC.

27. The Tribunal relied on the above fictitious gross revenue allegedly earned by the entire ECP Group. The Respondent neither obtained nor availed the audited financial statements for the ECP Group to prove their revenue under the years of assessment. While the Tribunal faults the Appellant for failing to provide this information, the Appellant has reiterated that it is not in control of or in possession of the information for the entire ECP Group. It is a subsidiary of the ECP Manager, rendering its services only to that manager. The Appellant availed the audited financial statements for the ECP Manager, which showed the actual profits for the years under the assessment. The Tribunal, in turn, disregarded these statements and opted to rely on fictitious income generated by the Respondent.

28. The Respondent was insistent on basing its tax assessment on ECP Group's fictitious gross revenue and failed to provide any supporting information for that revenue. The Tribunal's upholding of the assessment based on a fictitious gross revenue renders the entire tax assessment invalid. The Court is urged to allow the Appeal, set aside the Judgment, and set aside the Objection decision.

Whether the Tribunal erred in disregarding the Appellant's Transfer Pricing Policy [TP Policy] contrary to the provisions of Section 18 [8] of the ITA as read with the Income Tax [transfer Pricing] Rules 2006.

29. The Income Tax (Transfer Pricing) Rules 2006 were established pursuant to Section 18 [8] of the ITA. The purposes of these Rules are to provide guidelines for related enterprises to determine the arm's length prices of goods and services in transactions involving them, and to provide administrative regulations, including the types of records and documentation to be submitted to the Commissioner by a person involved in transfer pricing arrangements.

30. Rule 4 of the Rules contemplates that the taxpayer may choose a method for determining the arm's length price from among the methods set out in Rule 7 thereunder. These methods include the comparable uncontrolled price (CUP) method, the resale price method, the cost plus method, the profit split method, and the transactional net margin method. The Commissioner is further

empowered to prescribe any method from time to time, where, in his opinion and in view of the nature of the transactions, the arm's length price cannot be determined using any of the methods contained in these guidelines.

31. The Appellant submits that it adopted the transactional net margin method pursuant to its Transfer Pricing Policy [TP Policy], which the Tribunal and the Respondent disregarded and, in turn, adopted the profit split method [TPSM]. The Tribunal erred in holding that the Appellant's services are integrated and that the appropriate method is TPSM. The Tribunal reasoned that the services provided by the Appellant are integrated with the services rendered by the ECP to the Funds. The integration is alleged to be such that it was difficult for the Appellant to split the exact services rendered by the Appellant and the ECP. Furthermore, the Tribunal erred in holding that the Appellant and the ECP jointly render exact services to the extent that it was impossible to evaluate each party's exact contribution to the Funds, making it difficult to evaluate each party's contribution to the services rendered.

32. It is submitted that the Tribunal erred in upholding the Respondent's Objection decision in changing the Appellant's TP Policy method. The Appellant is empowered by Rule 4 and 8 (2) of the Transfer Pricing Rules 2006 to apply the method most appropriate. The Tribunal and the Respondent are to accept the taxpayer's choice.

33. Method. The Tribunal and the Respondent do not have the power and/or discretion to change the taxpayer's chosen method. We take cognisance of the decision of the High Court in Kenya Fluorspar Company Limited v Commissioner of Domestic Taxes, where the Court held that: "47. I note that, under Kenyan law, both tax assessment methods may be used, depending on the specific operations and relationships among related enterprises. There are also other methods of assessing taxes. It is agreed that the choice has to be made governed by the Transfer Pricing Rules 2006 (LN67), under which Rule 4 provides as follows: 4. The taxpayer may choose a method to employ in determining the arm's length from among the methods set out in Rule 7.. Rule 7

thus provides various methods of choice, including the profit split method. In this regard, Rule 8(2) provides as follows: 8(2). A person shall apply the most appropriate method for his enterprise, having regard to the nature of the transaction, or class of related persons or function performed by such persons in relation to the transaction. It follows from the above provisions that the choice of the most favourable tax assessment method is for the taxpayer, not the Commissioners. In this regard, I agree with the reasoning in ***Unilever Kenya Ltd – vs – The Commissioner of Income Tax [2005] e KLR***, where it was held that the taxpayer is entitled to choose the most favourable method to their advantage as far as liability to tax is concerned.

34. The main issue that has arisen herein is that instead of addressing the objection raised using the selected profit margin method, the Commissioner changed to the Transactional Net Margin Method without indicating the law that confers on the Commissioner the power to change the method. Even in this Appeal, the Commissioner has not pointed to any section of the law that gives it the right to change the taxpayer's elected choice method.

35. First of all, there is no evidence that the mining and prospecting licences were new assets not known in the profit split method. Secondly, even if they were new intangible assets, the Commissioner would have to back his change of method with the law, which they have not. The Commissioner had no legal power to change to a new method for the Transaction Net Margin. The Commissioner could only use the Profit Split method chosen by the taxpayer. The Commissioner was thus correct in using the Transactional Net Margin Method."

36. It is submitted that the Tribunal erred in law in upholding the Respondent’s decision to change the Appellant’s choice method.

37. The Appellant prepared its TP Policy in accordance with the Income Tax Act [ITA], the TP Rules, and the OECD Guidelines, and has consistently applied it in all its dealings with the ECP Manager. The OECD Guidelines provide the

process to be followed when preparing a Transfer pricing policy and determining

the arm's-length price for a related-party transaction. Paragraph 3.4 of the Guidelines states the following.

- Step 1: Determination of the years to be covered
- Step 2: Broad-based analysis of the taxpayer’s circumstances
- Step 3: Understanding the controlled transaction(s) under examination, based in particular on a functional analysis, in order to choose the tested party (where needed) the most appropriate transfer pricing method to the circumstances of the case, the financial indicator that will be tested (in case of a transactional profit method), and to identify the significant comparability factors that should be taken into account.
- Step 4: Review of existing internal comparable, if any.
- Step 5: Determination of the available sources of information on external comparables, where such external comparables are needed, taking into account their relative reliability.
- Step 6: selection of the most appropriate transfer pricing method and, depending on the method, determination of the relevant financial indicator.
- Step 7: Identification of potential comparables; determining the key characteristics to be met by an uncontrolled transaction in order to be regarded as potentially comparable, based on the relevant factors identified in Step 3 and in accordance with the comparability factors set for the Section D.1 Chapter 1.
- Step 8: Determination and, where appropriate, making comparability adjustments. Step 9: Interpretation and use of data collected, determination of the arm’s length.
- Remuneration.

38. It is submitted that the Appellant followed the above nine-step approach in preparing its TP Policy and in determining the arm's length rate applied to its remuneration for the provision of its services to the ECP Manager. Therefore, based on the functions, assets, and risk analysis set out in the Appellant's TP Policy, the most appropriate method was the TNMM with Full Costs Markup as

the Profit Level Indicator, being the correct arm's length compensation applied. We submit that the Appellant undertook its transfer pricing analysis and provided a proper explanation and rationale for selecting TNMM, as set out in the Policy. Moreover, the Appellant, in its TP Policy, explained why the TPSM would not be a suitable method for transfer pricing on account of the routine administrative support services as provided by the Appellant.

39. According to the Revised Guidance on the Application of the Profit Split Method Inclusive Framework on BEPS: Action 10 July 2018 [the TPSM Guidance], the TPSM method is most appropriate where;
    a) Unique and valuable contributions by each of the parties to the transaction; and
    b) Highly integrated business operations.
40. The TPSM Guidance further states that: Contributions (for instance, functions performed, or assets used or contributed) will be unique and valuable in cases where: They are not comparable contributions made by uncontrolled parties in comparable transactions; and They represent a key source of actual or potential economic benefit in the business operations. The two factors are often linked: comparables for such contributions are seldom found because they are a key source of economic advantage.

41. The Appellant submits that the TPSM Guidance is clear on the circumstances in which TPSM should be applied and the conditions that are to be fulfilled. The Tribunal, in allowing the use of the TPSM method, held that the Appellant’s role extends beyond the general administrative role portrayed by the Appellant. While the Appellant provided evidence of its role and functions it undertakes as instructed by the ECP Manager, in the form of the TP Policy, the Interview by Bryce Fort15, and the witness testimony of Daniel Beeton16, the Tribunal disregarded this evidence and relied on a faulty FAR analysis.

42. The Appellant asserts that it performs an administrative support service role to the ECP Manager, which cannot be said to be highly integrated. The ECP

Manager's functions, analysis, and risks are well defined, and the independent comparables for the functions provided by the Appellant are readily available in its TP Policy. We take cognisance of the TPSM Guidance on integration inter alia. Although most multinational groups are integrated to some extent, an exceptionally high degree of integration in certain business operations is an indicator for the consideration of the transactional profit method. A high degree of integration means that the way in which one party to the transaction performs functions, uses assets, and assumes risks is interlinked with, and cannot reliably be evaluated in isolation from, the way in which another party to the transaction performs functions, uses assets, and assumes risks. In contrast, many instances of integration within a multinational result in situations in which the contribution of at least one party to the transaction can, in fact, be reliably evaluated by reference to comparable uncontrolled transactions.

43. It is the Appellant's submission that, based on the above, the Tribunal erred in applying the TPSM in the remuneration of the Appellant's functions. The Appellant reiterates that it followed the required approach set out in the OECD TP Guidelines in preparing its TP policy and in determining the correct arm's length rate for its remuneration for the provision of support services to the ECP Manager. Accordingly, based on the FAR analysis undertaken in respect of the Appellants' Policy, the most appropriate method, which was chosen, is the TNMM as discussed above.

Whether the Tribunal mischaracterized the relationship between the Appellant and the ECP Manager, thereby erroneously conflating roles and functions played by the Appellant and ECP Manager.

44. In its Judgment, the Tribunal made a finding that the Respondent did not err in its Functions, Assets and Risks [FAR] analysis. The Tribunal further held that the Appellant described itself in its SEC filings as providing advisory services on a discretionary basis, indicating a much greater role for the Appellant than its Transfer Pricing Policy indicated.

45. 17 Page 163 of the Record of Appeal

46. The Tribunal relied on the SEC filings and found that the Appellant's personnel and the job descriptions are similar to the descriptions of the services ECP Manager sets out in the SEC filings, indicating that the services that the Appellant provides are similar to those of ECP Manager and do not carry out a supportive administrative role as indicated in its Transfer Pricing Policy.

47. The Respondent, in its Statement of Facts, carried out the shown FAR analysis by relying on the following:
    a) **Interview with Bryce Fort.**
    b) **Documents availed by the Appellant, such as generic descriptions and a letter describing the functions of the ECP Manager and the Appellant.**
    c) **ECP entities filed returns at the SEC.**
    d) **SEC administrative proceedings.**

48. The Appellant submits that in upholding the Respondent's FAR analysis above, the Respondent and the Tribunal disregarded the Appellant's TP Policy, which was prepared pursuant to the provisions of Section 18 [3] of the Income Tax Act and the Income Tax (Transfer Pricing) Rules, 2006. The TP Policy sets out the Appellant's functions, assets, and risks in the provision of its services to the ECP Manager, as well as its relevant remuneration.

49. Contrary to the Respondent's averment and the Tribunal's holding, the Appellant's function is to provide technical and administrative support to the ECP Manager. In its TP Policy 19, Clause 6.1.2, the Appellant clearly stipulates that it offers technical and administrative support to the ECP Manager. The Appellant, being a 100% owned subsidiary of ECP Manager, provides services to ECP Manager and has no direct relationship to any other entity. The Appellant's responsibilities include providing information to ECP Manager's ExCo, subject to assignments from the ExCo in support of ECP

Manager's

Advisory Activities, and undertaking support services in support of ECP Manager's Operating Activities. In addition to Kenyan statutory requirements and filings, and the maintenance of local books and records, the Appellant provides information to the ECP Manager that US regulators and tax authorities require. The TP Policy clearly indicated that the Appellant does not participate in ECP Manager's Fundraising Activities nor does it participate in the decisions relating to investment selection or disposal. This FAR was confirmed by the Appellant's director, Bryce Fort, in his interview with the Respondent as captured on pages 772-778 of the Record of Appeal.

50. The Respondent and the Tribunal disregarded the Appellant's FAR analysis and instead referred to the ECP Brochure 20, which sets out the risks associated with the ECP US Investment Advisory business, and attributed those risks to the Appellant. The Appellant submits that the Tribunal and the Respondent's conclusion in this regard is littered with assumptions and is utterly untenable for various reasons. In the first instance, the Appellant submits that the Appellant does not bear the highlighted risks as the risks are only borne by the investors and the ECP US advisory business entities which are specifically identified under item 4 of the Brochure as ECP Manager LP, ECP Manager Ill LP, ECP Mena Management LP, ECP Manager IV LP, and Emerging Capital Advisors LP. The Tribunal blatantly disregarded the Appellant's TP Policy, which, under Section 6.2, states that the risk borne by the Appellant in undertaking its functions is credit risk only.

51. Furthermore, in paragraph 18 of his witness statement, the Appellant's transfer pricing expert witness, Daniel Beeton, provides a table showing the functions of the Appellant and the ECP Manager, deduced from the TP Policy.

52. The Respondent, and subsequently the Tribunal, did not distinguish between the services provided by the ECP Manager and those provided by the Appellant. The Appellant and the ECP Manager are separate and distinct entities. It was untenable for the Tribunal to rely on foreign statutory filings of the ECP Manager to undertake a FAR analysis and make a conclusion that the

functions performed

by the Appellant, which are not explicitly provided or set out therein, in disregard of its TP Policy and the evidence in the form of the testimony of Daniel Betton.

53. Furthermore, the Tribunal undermined the doctrine of separate corporate personality, treating companies as distinct legal persons. The Appellant further submits that a holding company is, by law, a separate legal entity from its subsidiaries. This was the holding of the High Court ***in Chai Trading Co. Limited v Muli Mwanzia & 2 others,*** where the Court held:

54. ***"I entertain no hesitation to uphold the age-old principle of company law that a company is separate and distinct from its directors, shareholders and promoters, in Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor. (2014) eKLR. Gikonyo J, while appreciating the importance, relevance, and rationale of that principle, said: "***

55. It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of ***SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L.***, which holds that:

> ***"a company is a different person altogether from its subscribers and directors. Although it is a fiction of the law, it remains as important for all purposes and intents in any proceedings involving a company. Needless to say, the separate legal personality of a company can never be departed from except in instances where the statute or law provides for the lifting of the corporate veil, say, when the directors or members of the company use the company as a vehicle to commit fraud or other criminal activities. Moreover, that development has been informed by the courts' realization that, over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. Moreover, that has impelled the courts, in the interest of justice or the public interest, to identify and punish those who misuse the corporate personality. "***

56. The principle holds even where a holding company wholly owns a company. It

would not therefore, matter, and the trial court ought not to have been swayed by

the fact that the objector was related to the judgment debtor by shareholding or sharing of office and other facilities. The Court of Appeal, while settling this issue in ***Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited [2016] eKLR***, said:

> ***"In the circumstances, the Respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities. We are in agreement with the learned judge's holdings. The Authority that she cited, RE: SOUTHARD LIMITED [1979] 3 ALL ER 565, is quite apt:" … a parent company may spawn a number of subsidiary companies, all directly or indirectly controlled by the shareholders of the parent company. Suppose one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors. In that case, the parent company and the subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary."***

57. In the same breath, it is submitted that for purposes of this Appeal, a holding company and its subsidiary are held to be separate legal personae and taxpayers as was hled by the Indian Supreme Court in the case of Vodafone International Holdings vs Union of Indian held:" the approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle, i.e., treat a company as a separate person. The Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income tax. Companies and other entities are viewed as economic entities with legal independence vis-à-vis their shareholders/participants. It is generally accepted that a subsidiary and its parent are distinct taxpayers. Consequently, the entities subject to income tax are taxed on profits derived by them on a standalone basis, irrespective of their actual degree of economic independence and whether profits are reserved or distributed to shareholders/participants. Furthermore, they are generally taxed on profits

derived from their shareholdings/participations, such as capital gains. Nowadays, it is well settled that, for tax treaty purposes, a subsidiary and its parent are also separate and distinct taxpayers. [23]

58. The Tribunal erred in finding that the ECP described itself in its SEC filings as providing advisory services on a discretionary basis, pointing to a much greater role for the Appellant as set out in its TP Policy. It is our submission that the Tribunal failed to note that the ECP Manager and the Appellant are distinct entities, each with separate functions and responsibilities. The Tribunal's attempt to impute the functions of the ECP Manager upon the Appellant led to the conflation of roles and functions.

59. The Appellant submits that its functions, as set out in the TP Policy and in the interview with Bryce Fort, are purely technical and administrative support functions for the ECP Manager only. The Tribunal's upholding of the Respondent's erroneous FAR analysis and its analysis of the Appellant's provision of services to the ECP Manager led to the wrong conclusion that the Appellant carried out significant value-added services for the ECP Manager. The Tribunal mischaracterized the relationship between the Appellant and the ECP Manager, thereby erroneously conflating the roles and functions played by the Appellant and the ECP Manager.

60. The Court is urged to find that the Respondent's FAR analysis, as upheld by the Tribunal, has no basis in law and vacates the Respondent's tax assessment in its entirety.

Whether the Tribunal upheld and sanctioned an illegal imposition of taxes contrary to Article 210 of the Constitution

61. It is submitted that Article 210 of the Constitution of Kenya provides that no tax or licensing fee may be imposed, waived, or varied except as provided by the law. Section 3 of the ITA provides that, 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 provisions of the

Act, income upon

which tax is chargeable thereunder is income in respect of gains or profits from any business, for whatever period of time carried on. Section 4(a) thereafter states that for section 3(2)(a)(i), where a business is carried on or exercised partly within and partly outside Kenya by a resident person, the whole of the gains or profits from such business shall be deemed to have accrued in or to have been derived from Kenya.

62. The High Court in Commissioner for Domestic Taxes v Ralph Bunche Suites Limited rightly upheld that:

> ***"Corporation tax is income tax payable by corporations such as the Respondent. It is common ground that section 3 of the ITA is the charging section with respect to all income accrued or derived in Kenya, and no tax may be levied on any income unless the charge for the same originates under the said section."***

63. The Respondent applied the entire gross revenue allegedly earned by the ECP Manager and the ECP Mena Manager LP [being the US ECP entities] to compute the tax payable by the Appellant. This revenue was not an income earned by the Appellant, as evidenced by its audited financial statements that were provided.

64. The Respondent failed to determine the profit earned by the ECP US entities from the gross proceeds of the management fees earned/ expected to be earned in respect to the various portfolios. Instead, the Respondent lumped up the entire expected revenue from all the portfolio companies managed by the ECP US entities, disregarding the fact that neither the managed portfolios relate to investments in Kenya nor does the Appellant offer any form of support.

65. Erroneously, the Respondent, in raising a corporation tax based on gross revenue of the ECP US entities and not the income, profit, or gain of the Appellant, imposed tax that the law or the Constitution does not sanction. The corporation tax assessment of almost KES 2 billion is illegal and unconstitutional, as it lacks a legal basis in Kenya.

66. Thus, the Court seeks to allow the Appeal and set aside the Judgment of the Tax Tribunal delivered on 10 November 2023 in Tax Tribunal Appeals Number 614 of 2022. Further, we beseech the Honourable Court to set aside the Respondent's Objection Decision contained in the letter dated 28 April 2022, with costs being awarded to the Appellant.

RESPONDENT SUBMISSIONS:

67. The Respondent submits on the following issues arising from the dispute between the parties.

a) **Whether the Transfer Pricing Policy provided by the Appellant depicted an accurate representation of the Functions Performed, assets used, and risks assumed by the Appellant and its related entities.**
b) **Whether the Tribunal erred in disregarding the Appellant's Transfer Pricing Policy [TP Policy] contrary to the provisions of Section 18 [8] of the ITA as read with the Income Tax [transfer Pricing] Rules 2006.**
c) **Whether the Tribunal erred in its findings in upholding the Respondent's FAR analysis of the Appellant.**
d) **What is the appropriate Transfer Pricing Method applicable to the transaction under audit?**
e) **Whether the allocation key utilized by the Respondent was the most appropriate allocation key for the method chosen.**
f) **Whether the Tribunal considered the parties' evidence in arriving at its decision.**
g) **Whether the Tribunal erred in endorsing the Respondent's approach of tax computation based on fictitious gross revenue earned by the ECP Group outside Kenya.**
h) **Whether the Tribunal's decision was proper in law.**

68. The Respondent submits that the dispute between the parties boils down to the choice of the appropriate transfer pricing method to be used in determining the management fees attributable to the Appellant for services carried out with respect to the related entities. The Appellant is of the view that the Transactional

Net Margin Method with a full markup cost of 8% is the appropriate method as depicted in the Appellant's Transfer Pricing Policy. The Respondent, on the other hand, is of the view that the Transactional Profit Split Method with an allocation key of the number of employees is the most appropriate. This is because the Respondent opined that the Transfer Pricing Policy did not depict the correct FAR analysis. The Respondent consequently conducted its FAR analysis, which showed that the services provided by the Appellant to its related entities were not routine administrative support services but rather high-value-added services to ECP as a whole. A view Honourable Tax Appeals Tribunal agreed with the Respondent, hence this Appeal.

Whether the Transfer Pricing Policy provided by the Appellant depicted an accurate representation of the Functions Performed, assets used, and risks assumed by the Appellant and its related entities.

69. (i) At paragraph 166 of its judgement, the Honorable Tax Appeals Tribunal held as follows: *"166. Additionally, bearing in mind the descriptions of the work to be undertaken by the key staff, the risk that the Appellant bears is far greater than indicated in its Transfer Pricing Policy.*

(ii) 167. Accordingly, the Tribunal finds that the Respondent did not err in its FAR analysis. The FAR applied by the Appellant in its Transfer Pricing policy was erroneous and did not capture the Appellant's functions, the assets it applies to the transaction, or the risk it bears. "

70. The Respondent agrees with the Tribunal's findings for the reasons hereunder: - Section 18(3) of the Income Tax Act provides that related entities' transactions must be dealt with at arm's length. Where this is not the case, the Respondent is empowered to audit such a transaction and make the necessary adjustments to ensure that the related party transaction is at arm's length as would have been conducted by independent persons. The said section read as follows: - 18(3) Where a non-resident person carries on business with a related

resident person

and the course of such business is such that it produces to the resident person or through its permanent establishment either no profits or less than the ordinary profits which might be expected to accrue from that business if there had been no such relationship. The gains or profits of such resident person or through its permanent establishment from such business shall be deemed to be of such an amount as might have been expected to accrue if the course of that business had been conducted by independent persons dealing at arm's length. To ensure the implementation of section 18(3) of the Income Tax Act, subsection eight provides for regulations implementing that section. The said subsection read as follows: -

> ***"The Cabinet Secretary may, by rules published in the Gazette, issue guidelines for the determination of the arm's length value of a transaction for purposes of this section; or specify such requirements as he may consider necessary for the better carrying out of the provisions of this section."***

71. The Income Tax Act (Transfer Pricing) Rules 2006 were enacted pursuant to section 18(8) of the Income Tax Act to give effect to section 18(3) of that Act. A transfer Pricing Policy is drafted by a taxpayer pursuant to paragraph 9 of the Income Tax Transfer Pricing Rules (ITA TP Rules), explaining a related party transaction and the method applied, together with the reasons for the application of the transfer pricing method applied, to show that the related party transaction in issue is at arm's length.

72. This is the law behind the Appellant's Transfer Pricing Policy (See pages 113 to 148 of the Respondent's Supplementary Record of Appeal).

73. The Appellant is under a statutory obligation to ensure that the Transfer Pricing Policy provided is accurate and a true reflection of the Functions carried out, assets used, and risks assumed by parties to the related party transaction in question.

74. On the other hand, the Respondent has powers under the Income Tax Act to audit taxpayers to verify the information provided in their returns. Moreover, issue an amended assessment where necessary.

75. **Section 31(1)** of the tax Procedures Act provides as follows:-"(1)Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "*original assessment*") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that - ; or in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates.

76. The Appellant provided a Transfer Pricing Policy when the Respondent requested it as per paragraph 9(1) of the Income Tax (Transfer Pricing) Rules, 2006 of the Income Tax Act ("TP Rules"). According to paragraph 4 of the TP rules, *"The taxpayer may choose a method to employ in determining the arm's length price from among the methods set out in Rule 7."*

77. As per the Appellant's Transfer Pricing Policy, the method chosen for the transaction in issue was TNMM with Full markup cost basis.

78. The Appellant submitted tax returns for the period 2016 to 2020 (both years inclusive), where the income was determined by application of the transfer pricing method in the Transfer Pricing ("TP") Policy – Transactional Net Margin Method ("TNMM") of a Full Cost Mark Up basis. This means the income was determined by adding a 7% markup to the Appellant's total costs for each year of income.

79. According to Section 6.1.2 of the Appellant's TP Policy, it is stated that the Appellant provides information to the ECP Manager based on assignments given to it by the ECP Manager. Also, the Appellant provides support to the ECP Manager's operating activities. The TP policy adds that the Appellant monitored investments, provided management and technical support services to investee

companies. According to the TP policies, these were the services that the Appellant provided.

80. On the other hand, the TP policy states that the ECP Manager provides investment management advisory services to investment funds, conducts strategic business reviews, conducts business development, fundraising, and capital structuring, maintains financial accountability, assists with environmental, sustainability, and governance, and assists with employee share ownership plans.

81. Based on the Appellant's analysis, the tested party is the Appellant when compared to the ECP Manager. The tested party is the one with the least complex functions and will be subjected to benchmarking analysis when TNMM is used as the transfer pricing method.

82. The Appellant classified itself as a low-value adding entity and therefore characterized itself using the following Standard Industrial Classification ("SIC") when searching for the comparables:
    a) **8742 – Management and consultancy services.**
    b) **8748 – Business consulting; and**
    c) **8720 – accounting, auditing, and bookkeeping.**

83. Paragraph 3.20 of the Organization for Economic Co-operation and Development (“OECD”) TP Guidelines 2010 states that “In order to select and apply the most appropriate transfer pricing method to the circumstances of the case, information is needed on the comparability factors in relation to the controlled transaction under review and in particular on the functions, assets and risks (FAR) of all the parties to the controlled transaction, including the foreign associated enterprise(s).” Paragraph 3.20 of the OECD TP Guidelines remains the same.

84. The Respondent relied on Section 31 (1) (c) of the Tax Procedures Act 2015 ("TPA") that reads,

> ***"Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates."***

85. The Respondent avers that to determine whether the most appropriate transfer pricing method was applied by the Appellant, the Respondent, keeping in mind paragraph 3.20 of the OECD TP Guidelines and Section 31 of the TPA, requested the Appellant for information with respect to the controlled transaction (services provided by the Appellant to ECP Manager) as provided for under Section 59 of the TPA and paragraph 9 of the TP Rules.
86. In coming up with the FAR analysis of the Appellant, the Respondent relied on:
    a) **Interviews with the Appellant.**
    b) **Correspondences with the Appellant.**
    c) **The Appellant's TP Policy.**
    d) **Returns filed by ECP Manager LP, ECP Manager III LP, ECP Mena Management LP at the Securities and Exchange Commission ("SEC")**
    e) **An SEC Administrative Proceeding.**
    f) **Job descriptions provided by the Appellant.**
    g) **LinkedIn profiles of Bryce Fort and Paul Maasdorp.**
    h) **ECP profiles of Bryce Fort and Paul Maasdorp.**

87. The FAR analysis carried out by the Respondent revealed that the Appellant:
    a) **Identifies new business opportunities for the Funds to invest in.**
    b) **Carries out due diligence on prospective investee companies.**

c) **Structures and negotiates transactions that require the preparation of all necessary documents to complete.**
d) **Develops and executes exit strategies.**
e) **Structures and negotiates financing for investee companies.**
f) **Monitors investee companies.**
g) **Develops and supports portfolio company strategy.**

88. The Respondent further noted that the assets employed were the Funds and Advisory Personnel. Also, it is imperative to note that, based on the functions noted above, the Appellant was involved in the management and control of risk. The outcome of the FAR analysis conducted by the Respondent, looking at all the documents provided at paragraph 138 above (see also theList Documents in the Respondent's Supplementary Record of Appeal at Appendix 2 to 26), was different from the position presented by the Appellant in its Transfer Pricing Policy.

89. It is for this reason that the Respondent opined that the Appellant's Transfer Pricing Policy was not a true reflection of the Functions performed: assets used and Risks assumed by the Appellant with respect to the transaction in issue. The Transfer Pricing Policy as adduced by the Appellant was therefore not correct and could not be relied upon by the Appellant. The Appellant agrees with the Honourable Tribunal's findings at paragraph 160 of the Judgment that a FAR analysis is factual and can only be deciphered from the various documentation that unravels the actual transaction taking place.

90. The Honourable Court shall note that at paragraph 160 of the Judgment, the Tribunal noted that the Appellant sought to rely on its Transfer Pricing Policy and the interview by Bryce Ford. On the other hand, the Respondent analysed various documents (see paragraph 158 of the Judgment), some provided by the Appellant, and others obtained by the Appellant.

91. It is on the basis of the analysis of the documents at paragraph 158 of the Judgment that the Respondent concluded that the Appellant's Transfer Pricing Policy was not correct. The findings of the said analysis were communicated to the Appellant in both the Respondent's assessment dated 4th February 2022(see pages 49 to 63 of the Respondent's Supplementary Record of Appeal) and the Respondent's Objection decision (pages 81 to 109 of the Respondent's Supplementary Record of Appeal).

92. The Respondent did not dispute the contents of the said documents, both on assessment and also at the Appeal before the Honourable Tax Appeal Tribunal. With respect to the Appellant's own job descriptions (Appendix 7 of the List of documents in the Respondent's Supplementary Record of Appeal), the Appellant termed the same as "generic". The Tax Tribunal made a finding with respect to the said job descriptions at paragraph 162 of the Tribunal's Judgment, which sets out the nature of the functions performed by the Appellant for the ECP Group through its employees in Kenya.

93. It is on the basis of the Tribunal's analysis of the aforesaid documents that the Honourable Tax Appeals Tribunal arrived at the correct finding at paragraphs 166 and 167 of the Judgment that the Appellant's Transfer Pricing Policy was erroneous. Notably, at paragraph 166 of the Judgment, the Honourable Tribunal agreed with the Respondent that, bearing in mind the descriptions of the work to be undertaken by the key staff, the risk that the Appellant bears is far greater than that indicated in the Transfer Pricing Policy.

94. The Respondent humbly submits that this Honourable Court agrees with the Tribunal and finds that indeed the Transfer Pricing Policy adduced by the Appellant does not depict a true reflection of the functions performed, assets used, and risks assumed by the Appellant with respect to the transaction in issue.

95. The Respondent invites this Honourable Tribunal to peruse Appendix 2 to 26 of the List of documents adduced by the Respondent in its Supplementary

Record

of Appeal, which shall show the evidence of the Respondent's findings with respect to the FAR analysis.

96. The Tax Appeals Tribunal ("The Tribunal") agreed with the Respondent that the services that ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP (all three investment advisors collectively referred to as ECP hereinafter) were like those provided by the Appellant. In fact, the Appellant was providing Investment Advisory Services.

97. Despite several requests by the Respondent to the Appellant to provide all relevant information, the Appellant declined to provide some of the information and even put it in writing.

98. The Tribunal rightly noted that the risk and functions undertaken by the Appellant are far greater than indicated in the Appellant's TP Policy. Further, the Appellant pleaded that the Respondent should have accepted all the assertions made by Bryce Fort without checking the veracity of his statements. It should be noted that the Respondent identified several inconsistencies in Bryce Fort's interview, including that he is one of the founding employees of ECP. Based on the Form ADV returns filed by the three investment advisors, it was noted that Bryce Fort is indeed an equity partner in ECP, that is, ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP.ECP does not make decisions on how the monies in the Funds (Advisory Client) are invested. In ECP's Brochure under item 16, *"…ECP provides investment advice to its Advisory Clients on a discretionary basis." The Brochure further notes that, "…the…investment manager has the authority to make all decisions concerning the investigation, evaluation, selection, negotiation, structuring, commitment to, monitoring of, and disposition of investments."* This is corroborated by the Glossary of terms, which states that, *"Your firm has discretionary authority…if it has the authority to decide which securities to purchase and sell for the client. "* Further inconsistencies are highlighted in paragraph 78 above.

99. The Tribunal rightly noted that the FAR analysis carried out by the Appellant was erroneous and therefore was subject to adjustment based on all the information presented to it by the Respondent. It is inaccurate for the Appellant to state that the Tribunal solely relied on the SEC filings of the Appellant's holding company. The Tribunal meticulously reviewed all evidence presented by both the Appellant and the Respondent at the oral hearings, as well as all pleadings filed in the case.

100. The Respondent avers that, other than the TP policy and the interview with Bryce Fort, which has factual inconsistencies, the Appellant has not provided any further information to support its FAR analysis and subsequent benchmarking. It goes without saying that if the FAR analysis is incorrect, the benchmarking is erroneous as well.

101. Paragraph 4 of the TP rules cannot be read in isolation, in that the Appellant has the discretion to select the TP method to apply. The entire TP rules must be applied, including paragraphs 6, 9, 10, 11, and 12. This must go hand in hand with the provisions of Section 18(3) of the Income Tax Act ("ITA"). that states:

> ***"Where a non-resident person carries on business with a related resident person… and the course of that business is such that it produces to the resident person… either no profits or less than ordinary profits which might be expected to accrue from that business if there had been no such relationship, then the gains or profits of the resident person… from that business shall be deemed to be the amount that might have been expected to accrue if the course of that business had been conducted by independent person's dealing at arm's length."***

This further buttresses the point that the Respondent was well within its rights to adjust the Appellant's under-declared income for the period under review. The Appellant did not receive arm's length remuneration for the functions and risks it was assuming.

102. Paragraph 4 of the ITA TP Rules provides as follows*:-"Person to choose method The taxpayer may choose a method to employ in determining the arm's length price from among the methods set out in rule 7."* The interpretation of the said rule is that the taxpayer may choose a method to employ in determining the arm's length price. The rule does not provide that the method chosen by the Appellant cannot be questioned or audited by the Respondent.

103. Paragraph 8(2) of the ITA TP Rules provides as follows with respect to the application of the method*:- "2) A person shall apply the method most appropriate for his enterprise, having regard to the nature of the transaction, or class of transaction, or class of related persons or function performed by such persons in relation to the transaction."*

104. At the same time, the Respondent is empowered by law under the Tax Procedures Act to carry out audits of taxpayers' necessary self-assessments made by the taxpayer. See section 31 of the Tax Procedures Act.

105. The contents of a Transfer Pricing Policy and the attendant documents that the Commissioner is empowered to audit under the Tax Procedures Act and Rule 9 of the ITA TP Rules to determine whether the contents/assessments therein are within the law.

106. Where a taxpayer has chosen the wrong method or the FAR analysis in the Transfer Pricing Report is contrary to the contents of the FAR analysis of the actual transaction or dealing between parties. Section 18 of the ITA empowers the Commissioner to make the necessary adjustments, guided by the ITA TP Rules and the OECD Transfer Pricing Guidelines.

107. Consequently, it is an erroneous understanding of the law for the Appellant to suggest to this Court that it is a taxpayer that has discretion to choose a method. Once that has been done, the Respondent should acquiesce in the chosen method without an audit. As noted in the FAR analysis above, the representations made by the Appellant in its Transfer Pricing Report regarding Functions performed,

Assets used, and risks assumed were not a true reflection of what was actually happening in the transaction. The Appellant's averment at paragraphs 45 to 56 of its submissions is an apparent misdirection of the Court with respect to the law and should be ignored.

108. The Tribunal therefore did not err in disregarding the Appellant's Transfer Pricing Policy [TP Policy], as the said decision was arrived at in tandem with the provisions of Section 18 [8] of the ITA, as read with the Income Tax [Transfer Pricing] Rules 2006.

109. Having established that the Transfer pricing Policy adduced by the Appellant was erroneous, the Respondent needed to carry out a FAR analysis on the Appellant's role in the related party transaction in issues to determine the accurate remuneration of the Appellant based on the Functions performed, assets used, and risks assumed.

Whether the Tribunal erred in its findings in upholding the Respondent's FAR analysis of the Appellant.

110. The next issue concerns whether the Tribunal's findings regarding the Respondent's FAR analysis were correct. The Tribunal's findings on this issue are at paragraphs 155 to 167 of the Judgment. The Respondent submits that the Tribunal's findings with respect to the FAR analysis carried out by the Respondent on the Appellant's role in the related transaction are correct and should be upheld. At paragraphs 157 to 162, the Tribunal clearly indicates that it considered the information provided by both parties in the determination of whether the Respondent's FAR analysis was accurate.

111. To be specific, the Tribunal averred that the Appellant relied on its FAR analysis outlined in the Transfer Pricing Policy, while for the Respondent, it carried out its FAR analysis relying on interviews, documents availed by the Appellant, Returns filed by ECP at the SEC; SEC administrative proceedings, Linked in profiles by Bryce Fort and Paul Maasdorp; and ECP Profiles of Bryce Fort and Paul Maasdorp (paragraph 157 and 158 of the judgement).

112. The Tribunal further analysed the job descriptions of ECP and the Appellant's employees, the assets utilised, and the Risks assumed, as per the documentation available. It is for these reasons that the Honourable Tribunal, in agreeing with the Respondent, held at paragraph 164 - 167 of its judgement as follows: -"164. In this case, the information included the Appellant's job descriptions and its own SEC filings. To ask the Commissioner to disregard these in favour of the Transfer Pricing Manual and the interview with Mr Fort would be to ask the Commissioner to go against the provisions that require him to assess using all the information available to him. A FAR analysis requires an analysis not only of the function but also of the assets and the risk. The assets in this case, as rightly indicated by the Respondent, are the personnel. This is the key asset in providing the services. As indicated in the ECP brochure, the loss of key personnel could have a material adverse effect on the Advisory Client. This indicates that the staff are key assets. Additionally, bearing in mind the descriptions of the work to be undertaken by the key staff, the risk that the Appellant bears is far greater than indicated in its Transfer Pricing Policy.

113. The Respondent consequently submits that the Honourable Tribunal’s findings with respect to the Respondent’s FAR analysis are in tandem with the findings in the documents availed by the Appellant and relied upon by the Respondent in carrying out the said FAR analysis. The Respondent invites this Honourable Court to look at part C of these submissions for the said FAR analysis, which analyses the documents relied upon by the Respondent in detail. To that end, the Respondent submits that the burden is on the Appellant to prove that the Tribunal’s findings on the Respondent’s FAR analysis are erroneous.

Response to paragraphs 19 to 38 of the Appellant’s submissions.

114. In its submissions, the Appellant has alleged that the Tribunal failed to consider its evidence and relied solely on the SEC filings of its holding company, ECP Manager LP. In response, this Honourable Court needs to look

only at paragraphs 158 to 165 of the Judgment to note that the Tribunal relied on other

documents apart from the filings at the SEC. It is erroneous for the Appellant to make such wrong assertions.

115. Notably, the Appellant has not explained to this Honourable Court how the *"alleged evidence"* excluded by the Tribunal would change the assessments in issue or, ultimately, the Tribunal's holding. The Appellant only states that it incurred significant losses. The Appellant has not discharged its burden under section 56(1) of the Tax Procedures Act, which states that the burden is on the taxpayer to prove that an assessment is incorrect.

What is the appropriate Transfer Pricing Method applicable to the transaction under audit?

116. At paragraphs 168 to 175 of its Judgment, the Honourable Tribunal found that TPSM is the most appropriate method for the transaction at hand. In making this finding, the Honourable Tribunal held as follows at paragraph 174:- In the current transaction, the documentation indicates that the services provided by the Appellant are highly integrated with the services rendered by ECP to the Funds. So integrated are the services that it is difficult, if not impossible, to reliably separate the services rendered by the Appellant from those rendered by ECP. In addition, both entities (the Appellant and ECP) jointly render services to the Funds, making it difficult to evaluate each party's exact contribution to those services. The few services that neither provides are fundraising, which is carried out by ECP, and preparation of periodic reports, which the Appellant carries out. The other services are performed jointly by both, and delineating each party's role reliably is difficult, if not impossible.

117. The Respondent submits that, as far as the Respondent substantiated its FAR analysis, which the Honourable Tribunal upheld, then the most appropriate method applicable to the transaction in question, as per the FAR analysis carried out by the Respondent, is the Transactional Profit Split method. The Honourable Court shall note that the Tax Tribunal explained, with reference to the UN

Practical Manual on Transfer Pricing for Developing Countries 2021, when the TPSM method is to be used.

118. In the dispute herein, the FAR analysis carried out by the Respondent and upheld by the Tribunal established that the Appellant offers high-value-added services to ECP as a group. The Tribunal's findings are also in tandem with the OECD Transfer Pricing Guidelines on the use of the TPSM Method as adduced at paragraphs 86 to 94 above. Lastly, the Respondent relies on its submissions at paragraphs 95 to 103 above in support of the TPSM being the most appropriate method.

Whether the allocation key utilized by the Respondent was the most appropriate allocation key for the method chosen.

119. The Respondent agrees with the Tax Tribunal and submits that, looking at the circumstances of the dispute herein, as brought out by the Respondent's FAR analysis, the use of the number of employees as a profit allocation key of the TPSM method was the most appropriate allocation key to be used herein. The Honourable Court shall note that the Tribunal's finding at paragraphs 179 to 180 of its Judgment was that the main asset used by the Appellant in the performance of its services was its personnel. Consequently, if the Appellant's primary asset were its personnel, then the headcount of personnel performing the services subject to the transaction in issue would be the most appropriate allocation key. The Respondent further refers this Court to paragraphs 86 to 94 above, which provide for the OECD Transfer Pricing Guidelines on the use of appropriate allocation keys for the TPSM Method.

What is the nature of the relationship between ECP Kenya Limited and Emerging Capital Partners?

120. The Respondent avers that it has already been established that the Appellant is a wholly owned subsidiary of ECP Manager LP, a Limited Liability Partnership registered in Delaware. Further, ECP Manager LP, ECP Manager III

LP, and ECP Mena Management LP are all investment advisors registered with the SEC and are part of Emerging Capital Partners. All three investment advisors have discretionary Authority to make all decisions concerning the investigation, evaluation, selection, negotiation, structuring, commitment to, monitoring of, and disposition of investments.

121. The Appellant was providing services to all three investment advisors, that is, ECP. In fact, it was determined that the Appellant was providing investment advisory services to all three investment advisors, not only to ECP Manager LP. Bryce Fort, a Managing Director for the Appellant, is also an equity partner at ECP. Paul Maasdorp, a Managing Director in the Appellant, is also a partner in ECP. Both Bryce Fort and Paul Maasdorp were tax residents in Kenya for the period under review, that is, the financial years 2016 to 2020.

122. In the Form ADV return filed by ECP (all three investment advisors), it is noted that the number of investment advisory personnel in the Appellant (7 in total) is counted as part of the investment advisory personnel for ECP. This further supports the Appellant's offer of investment advisory services.

123. ECP Manager LP was compensating the Appellant for providing low-value, non-additive support services, which, according to the Appellant's TP policy, entitled the Appellant to a cost-plus 7 percent remuneration. The Respondent carried out a FAR analysis that found that the FAR analysis presented by the Appellant was factually incorrect. The Tribunal agreed with the Respondent's FAR analysis. In fact, by the Appellant's own admission, it was noted that the Appellant, together with other related entities, consistently work in multi-office teams to perform the role of ECP in investment advisory.

124. Once again, the Tribunal agreed with the Respondent regarding the role the Appellant performs. The Tribunal arrived at its decision having looked at all the evidence adduced by both the Respondent and the Appellant. The relationship between the Appellant and ECP was primarily defined by:

a. The job descriptions provided by the Appellant.

b. The SEC filings (Form ADV) by ECP.

125. The Appellant has not provided any evidence contrary to the above documents, and, as such, insists that the Respondent and the Tribunal should have relied on Bryce Fort's interview and the TP policy. The assertions made by Bryce Fort and in the TP policy have already mainly been proven inaccurate.

Were there Management Fees derived and accrued in Kenya?

126. The Appellant, as determined by The Tribunal and the Respondent, offers investment advisory services for the Funds. The Appellant offers this service in conjunction with ECP to the Funds. The investment advisory services, as determined by the Tribunal, include, but are not limited to, identifying new business opportunities; negotiating; analyzing; structuring and negotiating financing; completing transactions; and planning and executing exit strategies.

127. In the Form ADV Part 2A – Emerging Capital Partners Brochure, item 5: Fees and Compensation, it is stated that: "ECP generally receives management fees and carried interest or similar profit allocations from its Advisory Clients." The compensation for investment advisory services is management fees and carried interest or similar profit allocations.

128. The management fees are charged as a percentage of assets under management. Given the functions and risks assumed by the Appellant, the income earned by ECP is partly attributable to the Appellant, namely, the Appellant provides investment advisory services to the Funds.

129. Section 3 (1) of the Income Tax Act states that:

> ***"Subject to and in accordance with this Act, a tax 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 in Kenya."***

130. Further, Section 3(2)(a)(i) of the Income Tax Act then provides that:

> ***"Subject to this Act, income upon which tax is chargeable under this Act is income in respect of gains or profits from the business, for whatever period carried on."***

131. The Appellant recognized the cost plus 7% as income in its income tax return for each of the years under review. The income was based on the Appellant's benchmarking process, which compared various administrative support services to arrive at a cost-plus 7% basis. Hence, 7% of the costs were the profit declared in Kenya.

132. Having carried out a FAR analysis, the Respondent found that the TP method applied by the Appellant and the income declared by the Appellant were incorrect, a position that the Tribunal confirmed.

133. The Respondent sought to determine the income that the Appellant should have earned based on its contribution to ECP, that is, for the Appellant's role in providing investment advisory services to the Funds.

134. The Appellant, the seven investment advisory personnel employed by the Appellant, including Bryce Fort and Paul Maasdorp, who double up as partners of ECP, were tax residents in Kenya for the period under review. The Appellant's investment advisory income was derived and accrued in Kenya, as the services were offered there.

135. In conducting a FAR analysis of the Appellant, the Respondent determined that ECP and the Appellant each make unique and valuable contributions to the core business, namely investment advisory.

136. The Respondent found that the Transactional Profit Split Method ("TPSM") is the most appropriate because the Appellant and ECP are highly integrated and each makes unique and valuable contributions. According to paragraph 2.114 Chapter II of the OECD TP Guidelines:

"The transactional profit split method seeks to eliminate the effect on profits of Special conditions made or imposed in a controlled transaction… by determining the division of profits that independent enterprises would have expected to realize from engaging in the transaction or transactions. The transactional profit split method first identifies the profits to be split for the associated enterprises from the controlled transactions in which the associated enterprises are engaged (the combined profits)."

137. The Tribunal added that according to the United Nations Practical Manual on Transfer Pricing for Developing Countries 2021 ("UN TP Manual"), TPSM is applicable where:

a. Each unique party to the transaction makes unique and valuable contributions; and/or

b. The business operations of the related parties are so highly integrated that they cannot be reliably evaluated in isolation from each other; and/or

c. The parties share the assumption of economically significant risk or separately assume closely related risks.

138. By Bryce Fort's own admission, Bryce noted that in dispensing its function(s), ECP operates in multi-office teams drawing on the strengths of the investment advisory personnel in different regions, including Kenya (that is, the Appellant). The Tribunal also added that the documentation availed by both parties indicated that the services provided by the Appellant are highly integrated with the services rendered by ECP to the Funds. Additionally, the Tribunal stated that:

"So integrated are the services that it is difficult, if not impossible, to reliably split the exact services rendered by the Appellant and those rendered by ECP."

139. Paragraph 2.115 of the TP Guidelines also adds that, "*The main strength of the transactional profit split method is that it can offer a solution for highly integrated operations for which a one-sided method would not be appropriate…"*

140. The Respondent, on various occasions, requested that the Appellant provide ECP's financial statements, the contract between ECP and the Appellant, and ECP's group structure. The Appellant declined to provide this information during the audit and at the objection phase.

Was the Respondent wrong in using the Management Fees earned by the ECP Group as the basis of the income to be attributed to the Appellant?

141. Tribunal determined that the most appropriate transfer pricing method that should have been used is the TPSM. The contribution analysis method, which requires that the profits of transactions transcription to their respect each party's contribution of TPSM that the Respondent applied. Paragraph 2.137 of the OECD TP Guidelines notes that;

> ***"Generally, the combined profits to be split in a transactional profit split method are operating profits… However, occasionally, it may be appropriate to carry out a split of the gross profits and then deduct expenses incurred in or attributable to each relevant enterprise (and excluding expenses taken into account in computing gross profits)."***

142. The Respondent, not having the requisite financial statements of ECP Group, was able to reconstruct the management fees earned by ECP (ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP) from the SEC filings. It should be noted that the reconstructed income relates only to management fees as a percentage of assets under management. The Respondent was unable to obtain any information regarding carried interest as another source of income for ECP Group.

143. Having only considered the Funds that ECP had discretionary Authority over, the Respondent used the rate of two percent (2%) as the management fee, which was derived from the SEC Administrative Proceeding File No. 3- 19535. Since the Respondent did not have the direct cost of the ECP Group, the Respondent proceeded to treat the gross income as the Gross Profit, which could then be attributed to the Appellant based on its contribution. Gross profits can serve as the basis for TPSM, as envisioned under paragraph 2.137 of the OECD TP Guidelines.

144. The Respondent used the number of advisory personnel as the allocation key to attribute the income to the Appellant. Paragraph 2.141 of the OECD TP Guidelines states:

"In practice, allocation keys based on assets/ capital (operating assets, fixed assets, intangible assets, capital employed) or costs (relative spending and/or investment in key areas such as research and development, engineering, marketing) are often used. Other allocation keys are based for instance on incremental sales, headcounts (number of individuals involved in key functions that generate value to the transaction), time spent by a certain group of employees if there is a strong correlation between the time spent and creation of combined profits, number of servers, data storage, floor area of retail points, etc. may be appropriate depending on the facts and circumstances of the transactions."

145. In the ECP Brochure that was filed with the SEC, it is stated that, *"The Advisory Client's success depends in large part on the performance of ECP. The loss of any key personnel could have a material adverse effect on the Advisory Client."* This confirms that investment advisory personnel are highly instrumental to the success of the funds and ECP.

146. It should also be noted that in paragraph 2.121 of the OECD TP Guidelines, *"The Guidelines do not seek to provide an exhaustive catalogue of ways in which the transactional profit split method may be applied.*

*Application of the method will depend on the circumstances of the case and the information available. However, the overriding objective should be to approximate as closely as possible the split of profits that would have been realised had the parties been independent enterprises." T*he TPSM method based on contribution analysis need not be applied verbatim.

147. The Tribunal noted that the Respondent rightfully applied Section 31 of the TPA and buttressed this point by referring to Van Boeckel v C & E QB Dec 1980, [1981] STC 290 Woolf J.

148. The Respondent avers that, in view of the above analysis, to aver that the gross revenue calculated was fictitious would be inaccurate.

Whether the Financial Statements for ECP Manager LP should be considered as material in determining the profits that should have been attributed?

149. The Appellant did not provide the above information during the audit or objection stage; it was introduced at the Tax Appeals Tribunal, despite several requests to provide it.

150. Also, the ECP Manager LP's financial statements have income and expenses from affiliates. According to Appendix C of the Form ADV - Glossary of terms, affiliates are: "(1) all of your officers, partners, or directors (or any person performing similar functions; (2) all persons directly or indirectly controlling or controlled by you; and (3) all of your current employees (other than employees performing only clerical, administrative, support or similar functions). In summary, these affiliates are related parties and, therefore, we cannot rely on these figures at face value as provided in the financial statements. The actual income from management fees levied on the Advisory Client (Fund) has not been shown.

151. On page 3 of all consolidated financial statements, it reads: *"See notes to Consolidated Financial Statements."* It is worth noting that the Appellant

has

cherry-picked parts of the financial statements that suit them, rather than the complete financial statements. The notes to the financial statements provide further clarity on the figures presented. Without the entire context, the financial statements as presented cannot be relied upon.

152. The financial statements provided are only for ECP Manager LP. It has already been well established that (as per Form ADV Part 2A – Emerging Capital Partners Brochure): *"ECP operates its private equity business through three registered investment advisers and two covered entities: (1) ECP Manager LP;*
(2) ECP Manager III LP; (3) ECP Mena Management LP, (4) ECP Manager IV LP, and (5) Emerging Capital Advisors LP and their respective affiliates."

153. The three investment advisors are therefore ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP (collectively, ECP). It should be noted that all three investment advisors file their Form ADVs and are legally registered and domiciled in Delaware, United States.

154. Therefore, if the entire context is to be appreciated, all financial statements of ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP should be provided. The Appellant has not provided the financial statements for the last two. The Respondent avers that the Appellant was requested to provide the Group structure of ECP, but the Appellant did not provide the correct structure.

155. As a litmus test, the Respondent avers that the reported income for ECP Manager LP does not match the calculated management fees (and is not even remotely close) because the number is not for the three investment advisors, namely ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP.

156. Conclusion. The Respondent submits that its decision to charge the taxes was within the Law and the Appellant has not demonstrated in the Appeal which Law the Respondent has contravened.

157. Further, the Respondent submits that the Honourable Tribunal's decision of 10 November 2023 was well within the law, with the Tribunal explaining and adducing the law relied upon.

ISSUES ANALYSIS AND THE DETERMINATION:

158. The Court, having evaluated the Tribunal's proceedings, judgment, pleadings, and submissions of the parties, is of the view that four issues call for its determination:

a. **Whether the Transfer Pricing Policy provided by the Appellant depicted an accurate representation of the Functions Performed, assets used, and risks assumed by the Appellant and its related entities.**
b. **Whether the Tribunal erred in disregarding the Appellant's Transfer Pricing Policy [TP Policy] contrary to the provisions of Section 18 [8] of the ITA as read with the Income Tax [Transfer Pricing] Rules 2006.**
c. **Whether the Tribunal erred in its findings in upholding the Respondent's FAR analysis of the Appellant.**
d. **What is the appropriate Transfer Pricing Method applicable to the transaction under audit?**
e. **Whether the allocation key utilized by the Respondent was the most appropriate allocation key for the method chosen.**
f. **Whether the Tribunal considered the parties' evidence in arriving at its decision.**
g. **Whether the Tribunal erred in endorsing the Respondent's approach of tax computation based on fictitious gross revenue earned by the ECP Group outside Kenya.**
h. **Whether the Tribunal's decision was proper in Law.**

ANALYSIS AND FINDINGS

159. The duty of the High Court in the Appeal from Tribunal decision is restricted by the provisions of Section 56(2) of the Tax Procedures Act, 2015 of Kenya, which entails a jurisdictional provision that limits Appeal from the Tax Appeals Tribunal to the High Court and the Court of Appeal to questions of Law only. The text of the subsection is:

"An appeal to the High Court or to the Court of Appeal shall be on a question of law only".

160. In essence, the higher Court's role is to ensure that the Tribunal applied the Law correctly and that its factual conclusions were reasonable and grounded in the evidence presented, rather than conducting a fresh hearing of the facts. In the case of ***Commissioner of Customs and Border Control v Proma Sidor (K) Limited [2023] KEHC 20587 (KLR)***, where the Late Majanja J. held as follows: ***"The appellate jurisdiction of this Court is circumscribed by section***

56(2) of the Tax Procedures Act ("the TPA"), which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". An appeal limited to matters of Law does not permit the appellate Court to substitute its own conclusions for the Tribunal's decision based on its own analysis and appreciation of the facts. It will only intervene if the facts do not support the findings (see John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR and Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others NYR CA Civil Appeal Mo. 48 of 2013 [2013] eKLR). I am therefore satisfied that the Tribunal correctly analyzed the evidence on record and reached a conclusion supported by the CET, the GIRs, the Explanatory Notes, and the evidence before it. The Miksi product more likely than not fell within Heading 19.01 as opposed to 04.02, and I cannot fault the Tribunal for arriving at this conclusion."

Whether the Transfer Pricing Policy provided by the Appellant depicted an accurate representation of the Functions Performed, assets used, and risks assumed by the Appellant and its related entities.

161. At paragraph 166 of its judgement, the Honourable Tax Appeals Tribunal held as follows: -

> ***"166. Additionally, considering the descriptions of the work to be undertaken by the key staff, the risk that the Appellant bears is significantly greater than indicated in its Transfer Pricing Policy. 167. Accordingly, the Tribunal finds that the Respondent did not err in its FAR analysis. The FAR carried out by the Appellant in its Transfer Pricing policy was erroneous and did not capture the functions of the Appellant, the assets it applies to the transaction, as well as the risk it bears. "***

162. The Tribunal's findings were as follows: Section 18(3) of the Income Tax Act stipulates that transactions between related entities must be conducted at arm's length. Where this is not the case, the Respondent is empowered to audit such a transaction and make the necessary adjustments to ensure that the related party transaction is at arm's length as would have been conducted by independent persons. The said section read as follows: -18(3) Where a non-resident person carries on business with a related resident person and the course of such business is such that it produces to the resident person or through its permanent establishment either no profits or less than the ordinary profits which might be expected to accrue from that business if there had been no such relationship. The gains or profits of such resident person or through its permanent establishment from such business shall be deemed to be of such an amount as might have been expected to accrue if the course of that business had been conducted by independent persons dealing at arm's length.

163. To ensure the implementation of Section 18(3) of the Income Tax Act, subsection eight provides for the regulations that implement the said section. The said subsection read as follows: -

> ***"The Cabinet Secretary may, by rules published in the Gazette, issue guidelines for the determination of the arm's length value of a transaction for purposes of this section; or specify such requirements***

as he may consider necessary for the better carrying out of the provisions of this section."

164. The Income Tax Act (Transfer Pricing) Rules 2006 were enacted pursuant to section 18(8) of the Income Tax Act to give effect to section 18(3) of the Income Tax Act. A transfer Pricing Policy is drafted by a taxpayer pursuant to paragraph 9 of the Income Tax Transfer Pricing Rules (ITA TP Rules) explaining a related party transaction. The method applied, along with the reasons for using the transfer pricing method, indicates that the related party transaction in question is at arm's length. This is the Law behind the Appellant's Transfer Pricing Policy. The Appellant is under a statutory obligation to ensure that the Transfer Pricing Policy provided is accurate and a true reflection of the Functions carried out, assets used, and risks assumed by parties to the related party transaction in question.

165. On the other hand, the Respondent has the power under the Income Tax Act to audit taxpayers to verify the information provided in their returns. Moreover, where necessary, issue an amended assessment. Section 31(1) of the tax Procedures Act provides as follows:-

"i) (1)Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that—

ii)…….

iii)……..; or in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates.

166. The Appellant provided a Transfer Pricing Policy when the Respondent requested it as per paragraph 9(1) of the Income Tax (Transfer Pricing) Rules, 2006 of the Income Tax Act ("TP Rules"). According to paragraph 4 of the TP

rules, it is stated that *"The taxpayer may choose a method to employ in determining the arm's length price from among the methods set out in Rule 7."*According to the Appellant's Transfer Pricing Policy, the method chosen for the transaction in issue was the TNMM with a Full Markup Cost basis.

167. The Appellant submitted tax returns for the period 2016 to 2020 (both years inclusive), where the income was determined by application of the transfer pricing method in the Transfer Pricing ("TP") Policy – Transactional Net Margin Method ("TNMM") of a Full Cost Mark Up basis. This means the income was determined by adding a 7% markup to the total costs for each year of the Appellant's income.

168. According to Section 6.1.2 of the Appellant's TP Policy, it is stated that the Appellant provides information to the ECP Manager based on assignments given to it by the ECP Manager. Additionally, the Appellant offers support to the ECP Manager's operational activities. The TP policy states that the Appellant monitored investments and provided management and technical support services to investee companies. According to the TP policies, these were the services that the Appellant provided.

169. On the other hand, the TP policy states that the ECP Manager provides investment management advisory services to investment funds, conducts strategic business reviews, engages in business development, fundraising, capital structuring, and financial accountability, and assists with environmental, sustainability, and governance initiatives, as well as employee share ownership plans. Based on the Appellant's analysis, the tested party is the Appellant when compared to the ECP Manager. The tested party is the party with the least complex functions and is the one that will be subjected to benchmarking analysis when using TNMM as the transfer pricing method.

170. The Appellant classified itself as a low-value adding entity and therefore characterized itself using the following Standard Industrial Classification ("SIC") when searching for the comparables:

a. **8742 – Management and consultancy services.**
b. **8748 – Business consulting; and**
c. **8720 – accounting, auditing, and bookkeeping.**

171. Paragraph 3.20 of the Organization for Economic Co-operation and Development (“OECD”) TP Guidelines 2010 states that "To select and apply the most appropriate transfer pricing method to the circumstances of the case, information is needed on the comparability factors in relation to the controlled transaction under review and in particular on the functions, assets and risks (FAR) of all the parties to the controlled transaction, including the foreign associated enterprise(s).” Paragraph 3.20 of the OECD TP Guidelines remains the same.

172. The Respondent relied on Section 31 (1) (c) of the Tax Procedures Act 2015 (“TPA”) that reads,

> ***“Subject to this section, the Commissioner may amend an assessment (referred to in this section as the “original assessment”) by making alterations or additions, from the available information and to the best of the Commissioner’s judgement, to the original assessment of a taxpayer for a reporting period to ensure that in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates.”***

173. The Respondent avers that to determine whether the most appropriate transfer pricing method was applied by the Appellant, the Respondent, keeping in mind paragraph 3.20 of the OECD TP Guidelines and Section 31 of the TPA, requested the Appellant for information with respect to the controlled transaction (services provided by the Appellant to ECP Manager) as provided for under Section 59 of the TPA and paragraph 9 of the TP Rules.

174. In coming up with the FAR analysis of the Appellant, the Respondent relied on:

a. **Interviews with the Appellant.**
b. **Correspondences with the Appellant.**
c. **The Appellant's TP Policy.**
d. **Returns filed by ECP Manager LP, ECP Manager III LP, ECP Mena Management LP at the Securities and Exchange Commission ("SEC")**
e. **An SEC Administrative Proceeding.**
f. **Job descriptions provided by the Appellant.**
g. **LinkedIn profiles of Bryce Fort and Paul Maasdorp.**
h. **ECP profiles of Bryce Fort and Paul Maasdorp.**

175. The FAR analysis carried out by the Respondent revealed that the Appellant:

a. **Identifies new business opportunities for the Funds to invest in.**
b. **Conducts due diligence on prospective investment companies.**
c. **Structures and negotiates transactions that require the preparation of all documents to complete transactions.**
d. **Develops and executes exit strategies.**
e. **Structures and negotiates financing in connection with investee companies.**
f. **Monitors investee companies.**
g. **Develops and supports portfolio company strategy.**

176. The Respondent further noted that the assets employed were the Funds and Advisory Personnel. Additionally, it is essential to note that, based on the functions stated above, the Appellant was involved in managing and controlling risk. The outcome of the FAR analysis conducted by the Respondent, examining all the documents provided in paragraph 138 above, differed from the position presented by the Appellant in its Transfer Pricing Policy.

177. It is for this reason that the Respondent held the view that the Appellant's Transfer Pricing Policy was not a true reflection of the Functions performed., Assets used and Risks assumed by the Appellant with respect to the transaction in issue. The Transfer Pricing Policy as adduced by the Appellant was therefore not correct and could not be relied upon by the Appellant. The Tribunal thus held, as stated in paragraph 160 of the judgment, that a FAR analysis is a factual matter and can only be deciphered from the various documentation that reveals the actual transaction taking place.

178. This Court observes that at paragraph 160 of the judgment, the Tribunal noted that the Appellant sought to rely on its Transfer Pricing Policy and the interview by Bryce Ford. On the other hand, the Respondent analyzed various documents, some of which were provided by the Appellant and others that the Appellant obtained.

179. It is based on the analysis of the documents at paragraph 158 of the judgment that the Respondent concluded that the Appellant's Transfer Pricing Policy was not correct. The findings of the said analysis were communicated to the Appellant in both the Respondent's assessment dated 4th February 2022(see pages 49 to 63 of the Respondent's Supplementary Record of Appeal) and the Respondent’s Objection decision (pages 81 to 109 of the Respondent’s Supplementary Record of Appeal).

180. The Respondent did not dispute the contents of the said documents, both on assessment and also at the Appeal before the Honourable Tax Appeal Tribunal. With respect to the Appellant's own job descriptions (Appendix 7 of the List of documents in the Respondent's Supplementary Record of Appeal), the Appellant termed the same as "generic". The Tax Tribunal made a finding regarding the job descriptions at paragraph 162 of the Tribunal's judgment, which outlines the nature of functions performed by the Appellant on behalf of the ECP Group through its employees in Kenya.

181. It is based on the Tribunal's analysis of the documents above that it arrived at the correct finding, as stated in paragraphs 166 and 167 of the judgment, that the Appellant's Transfer Pricing Policy was erroneous. Notably, at paragraph 166 of the judgment, the Honourable Tribunal agreed with the Respondent that, bearing in mind the descriptions of the work to be undertaken by the key staff, the risk that the Appellant bears is far greater than that indicated in the Transfer Pricing Policy.

182. Thus, this Honourable Court agrees with the Tribunal and finds that indeed the Transfer Pricing Policy adduced by the Appellant does not depict a true reflection of the functions performed, assets used, and risks assumed by the Appellant with respect to the transaction in issue.

183. The Respondent invites this Honourable Tribunal to peruse Appendices 2 to 26 of the List of documents adduced by the Respondent in the 1st Supplementary Record of Appeal, which show the evidence of the Respondent’s findings with respect to the FAR analysis.

184. The Tax Appeals Tribunal ("The Tribunal") agreed with the Respondent that the services that ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP (all three investment advisors collectively referred to as ECP hereinafter) were like those provided by the Appellant. In fact, the Appellant was providing Investment Advisory Services.

185. Despite several requests by the Respondent to the Appellant to provide all relevant information, the Appellant declined to provide some of the information and even put it in writing.

186. The Tribunal rightly noted that the risk and functions undertaken by the Appellant are far greater than indicated in the Appellant’s TP Policy.

187. Further, the Appellant pleaded that the Respondent should have accepted all the assertions made by Bryce Fort without checking the veracity of his statements. It should be noted that the Respondent identified

several

inconsistencies in Bryce Fort's interview, such as the fact that he is one of the founding employees of ECP. Based on the Form ADV returns filed by the three investment advisors, it was noted that Bryce Fort is indeed an equity partner in ECP, specifically in ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP.ECP does not make decisions on how the monies in the Funds (Advisory Client) are invested. In ECP's Brochure under item 16, "…ECP provides investment advice to its Advisory Clients on a discretionary basis." The Brochure further notes that,

> ***"…the…investment manager has the authority to make all decisions concerning the investigation, evaluation, selection, negotiation, structuring, commitment to, monitoring of, and disposition of investments." This is corroborated by the Glossary of terms, which states that, "Your firm has discretionary authority…if it has the authority to decide which securities to purchase and sell for the client."***

188. The Tribunal rightly noted that the FAR analysis carried out by the Appellant was erroneous and therefore was subject to adjustment based on all the information presented to it by the Respondent. It is inaccurate for the Appellant to state that the Tribunal solely relied on the SEC filings of the Appellant's holding company. The Tribunal meticulously reviewed all the evidence provided by both the Appellant and Respondent, including the oral hearings and pleadings filed in the case.

189. The Respondent avers that, other than the TP policy and the interview with Bryce Fort, which has factual inconsistencies, the Appellant has not provided any further information to support its FAR analysis and subsequent benchmarking. It goes without saying that if the FAR analysis is incorrect, then the benchmarking is erroneous, too.

190. Paragraph 4 of the TP rules cannot be read in isolation, in that the

Appellant has the discretion to select the TP method to apply. The entire TP rules

must be used, including paragraphs 6, 9, 10, 11, and 12 of the TP rules. This must go hand in hand with the provisions of Section 18(3) of the Income Tax Act ("ITA"). that states,

"Where a non-resident person carries on business with a related resident person… and the course of that business is such that it produces to the resident person… either no profits or less than ordinary profits which might be expected to accrue from that business if there had been no such relationship, then the gains or profits of the resident person… from that business shall be deemed to be the amount that might have been expected to accrue if the course of that business had been conducted by independent person's dealing at arm's length."

191. This further buttresses the point that the Respondent was well within its rights to adjust the under-declared income by the Appellant for the period under review. The Appellant did not receive arm's length remuneration for the functions and risks it was assuming.

192. Paragraph 4 of the ITA TP Rules provides as follows:-"Person to choose method The taxpayer may choose a method to employ in determining the arm's length price from among the methods set out in rule 7." The interpretation of the said rule is that the taxpayer may choose a method for determining the arm's length price. The rule does not provide that the method selected by the Appellant cannot be questioned or audited by the Respondent.

193. Paragraph 8(2) of the ITA TP Rules provides as follows with respect to the application of the method: -"2) A person shall apply the method most appropriate for his enterprise, having regard to the nature of the transaction, or class of transaction, or class of related persons or function performed by such persons in relation to the transaction.

194. At the same time, the Respondent is empowered by Law under the Tax Procedures Act to carry out audits on taxpayers' affairs and, where necessary, to amend the self-assessments made by the taxpayer. See section 31 of the

Tax

Procedures Act. The contents of a Transfer Pricing Policy and the attendant documents that the Commissioner is empowered to audit under the Tax Procedures Act and Rule 9 of the ITA TP Rules, to determine whether the contents/assessments therein are within the Law. Where a taxpayer has chosen the wrong method or the FAR analysis in the Transfer Pricing Report is contrary to the contents of the FAR analysis of the actual transaction or dealing between parties. Section 18 of the ITA empowers the Commissioner to make the necessary adjustments, guided by the ITA TP Rules and the OECD Transfer Pricing Guidelines. Consequently, it is an erroneous understanding of the Law for the Appellant to suggest to this Court that it is a taxpayer who has discretion to choose a method and, once that has been done, the Respondent should acquiesce to the technique selected without an audit. As noted in the FAR analysis carried out above, it is clear that the representations made by the Appellant in its Transfer Pricing Report with respect to Functions performed, Assets used, and risks assumed were not a true reflection of what was exactly happening with respect to the transaction. The Appellant's averments at paragraphs 45 to 56 of its submissions are an apparent misdirection of the Court with respect to the Law.

195. The Tribunal did not therefore err in disregarding the Appellant's Transfer Pricing Policy [TP Policy] as the said decision was arrived at in tandem with provisions of Section 18 [8] of the ITA as read with the Income Tax [transfer Pricing] Rules 2006. Having established that the Transfer pricing Policy adduced by the Appellant was erroneous, the Respondent needed to carry out a FAR analysis on the Appellant's role in the related party transaction in issues to determine the accurate remuneration of the Appellant based on the Functions performed, assets used, and risks assumed.

Whether the Tribunal erred in its findings in upholding the Respondent's FAR analysis of the Appellant.

196. The next issue seeks to determine whether the Tribunal's findings regarding the Respondent's FAR analysis were correct. The Tribunal's findings with respect to the FAR analysis carried out by the Respondent on the Appellant's role in the related transaction are accurate and should be upheld. At paragraphs 157 to 162, the Tribunal clearly indicates that it considered the information provided by both parties in the determination of whether the Respondent's FAR analysis was accurate.

197. To be specific, the Tribunal averred that the Appellant relied on its FAR analysis outlined in the Transfer Pricing Policy, while for the Respondent, it carried out its FAR analysis relying on interviews, documents availed by the Appellant, Returns filed by ECP at the SEC; SEC administrative proceedings, Linked in profiles by Bryce Fort and Paul Maasdorp; and ECP Profiles of Bryce Fort and Paul Maasdorp (paragraph 157 and 158 of the judgement).

198. The Tribunal further analyzed the contents of the job description of ECP and the Appellant's employees, the assets utilized, and the Risks assumed as per the documentation provided. It is for these reasons that the Honourable Tribunal, in agreeing with the Respondent, held at paragraph 164 - 167 of its judgement as follows: -"164. In this case, the information included the job descriptions provided by the Appellant as well as its own SEC filings. To ask the Commissioner to disregard these in favour of the Transfer Pricing Manual and the interview with Mr Fort would be to ask the Commissioner to go against the provisions that require him to assess using all the information available to him. A FAR analysis requires an examination not only of the function but also of the assets and associated risks. The assets in this case, as rightly indicated by the Respondent, are the personnel. This is the key asset in providing the services. As indicated in the ECP brochure, the loss of key personnel could have a material adverse effect on the Advisory Client. This indicates that the staff are key assets. Additionally, considering the descriptions of the work to be undertaken by the key staff, the risk that the Appellant bears is significantly greater than indicated in its Transfer Pricing Policy.

199. The Respondent consequently submits that the Honourable Tribunal's findings with respect to the Respondent's FAR analysis are in tandem with the findings in the documents availed by the Appellant and relied upon by the Respondent in carrying out the said FAR analysis. This Honourable Court looked at part C of these submissions for the said FAR analysis, which analyses the documents relied upon by the Respondent in detail. To that end, the burden is on the Appellant to prove that the Tribunal's findings on the Respondent's FAR analysis are erroneous.

200. The Appellant has submitted that the Tribunal failed to consider the Appellant's evidence and instead relied solely on the SEC filings of the Appellant's holding company, ECP Manager LP. In response, the Respondent submitted that this Honourable Court needs to look only at paragraphs 158 to 165 of the judgment to note that the Tribunal relied on other documents apart from the filings at the SEC. Notably, the Appellant has not explained to this Honourable Court how the "alleged evidence" excluded by the Tribunal would alter the assessments in issue and ultimately the Tribunal's holding. The Appellant only states that it incurred significant losses. The Appellant has not discharged its burden under section 56(1) of the Tax Procedures Act, which states that the burden is on the taxpayer to prove that an assessment is incorrect.

What is the appropriate Transfer Pricing Method applicable to the transaction under audit?

201. At paragraphs 168 to 175 of its judgment, the Honourable Tribunal found that TPSM is the most appropriate method for the transaction at hand. In making this finding, the Honourable Tribunal held as follows at paragraph 174:-In the current transaction, the documentation indicates that the services provided by the Appellant are highly integrated with the services rendered by ECP to the Funds. So integrated are the services that it is difficult, if not impossible, to reliably split the exact services rendered by the Appellant and those rendered by ECP. In addition, both entities (the Appellant and ECP) jointly provide the services to the Funds, making it difficult to evaluate each party's exact contribution to the

services rendered. The few services that both do not offer are fundraising, which is carried out by ECP, and the preparation of periodic reports and support for portfolio companies, which the Appellant undertakes. The other services are performed jointly by both, and reliably delineating the role of each is a difficult, if not impossible, task.

202. The Respondent submits that, as far as the Respondent substantiated its FAR analysis, which the Honourable Tribunal upheld, then the most appropriate method applicable to the transaction in question, as per the FAR analysis carried out by the Respondent, is the Transactional Profit Split Method. The Honourable Court observes that the Tax Tribunal explained, referencing the UN Practical Manual on Transfer Pricing for Developing Countries (2021), when the TPSM method is to be applied. In the dispute herein, the FAR analysis carried out by the Respondent and upheld by the Tribunal established that the Appellant offers high-value-added services to ECP as a group. The Tribunal's findings are also in line with the OECD Transfer Pricing Guidelines on the use of the TPSM Method, as outlined in paragraphs 6 to 94 above. Lastly, the Respondent relies on its submissions at paragraphs 95 to 103 above with respect to the TPSM being the most appropriate method.

Whether the allocation key utilized by the Respondent was the most appropriate allocation key for the method chosen.

203. The Tax Tribunal's view was that, in the circumstances of the dispute herein, as brought out by the Respondent's FAR analysis, the use of the number of employees as a profit allocation key of the TPSM method was the most appropriate allocation key to be used herein. This Honourable Court shall note that the Tribunal's finding at paragraphs 179 to 180 of its judgment was that the main asset used by the Appellant in the performance of its services was its personnel. Consequently, if the main asset of the Appellant were its personnel, then the use of the headcount of the personnel carrying out the services subject to the transaction in issue would be the most appropriate allocation key. See also

paragraphs 86 to 94 above, which provide for the OECD Transfer Pricing Guidelines on the use of proper allocation keys for the TPSM Method.

What is the nature of the relationship between ECP Kenya Limited and Emerging Capital Partners?

204. It has already been established that the Appellant is a wholly owned subsidiary of ECP Manager LP, which is a Limited Liability partnership registered in Delaware. Further, ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP are all investment advisors registered with the SEC and are part of Emerging Capital Partners. All three investment advisors have discretionary authority to make all decisions concerning the investigation, evaluation, selection, negotiation, structuring, commitment to, monitoring of, and disposition of investments. The Appellant was providing services to all three investment advisors, that is, ECP. In fact, it was determined that the Appellant was providing investment advisory services for all three investment advisors, not just ECP Manager LP. Bryce Fort, a Managing Director for the Appellant, is also an equity partner at ECP. Paul Maasdorp, a Managing Director in the Appellant, is also a partner in ECP. Both Bryce Fort and Paul Maasdorp were tax residents in Kenya for the period under review, that is, the financial years 2016 to 2020.

205. In the Form ADV return filed by ECP (all three investment advisors), it is noted that the number of investment advisory personnel in the Appellant (7 in total) is counted as part of the investment advisory personnel for ECP. This provides further evidence that the Appellant offers investment advisory services. ECP Manager LP was compensating the Appellant for providing low-value, non- additive support services, which, according to the Appellant's TP policy, were entitled to a cost-plus 7 percent remuneration. The Respondent carried out a FAR analysis that found that the FAR analysis presented by the Appellant was factually incorrect. The Tribunal agreed with the Respondent's FAR analysis. The Appellant must prove that this was per se against the Law, which it has not.

206. The Appellant's own admission was noted that the Appellant, together with other related entities, consistently works in multi-office teams to dispense

the role of ECP in terms of investment advisory. Once again, the Tribunal agreed with the Respondent regarding the role that the Appellant carries out. The Tribunal arrived at its decision having looked at all the evidence adduced by both the Respondent and the Appellant. The relationship between the Appellant and ECP was primarily defined by the job descriptions provided by the Appellant.

The SEC filings (Form ADV) by ECP

207. The Appellant has not provided any evidence contrary to the above documents, and as such, insists that the Respondent and the Tribunal should have relied on Bryce Fort's interview and the TP policy. The assertions made by Bryce Fort and in the TP policy have already been proven inaccurate.

Were management fees derived and accrued in Kenya?

208. The Appellant, as determined by The Tribunal and the Respondent, offers investment advisory services for the Funds. The Appellant provides this service in conjunction with ECP to the Funds. The investment advisory services, as determined by the Tribunal, include, but are not limited to, identifying new business opportunities, negotiation, analysis, structuring and negotiating financing, completing transactions, and planning and executing exit strategies. In the Form ADV Part 2A – Emerging Capital Partners Brochure, item 5: Fees and Compensation, it is stated that: "ECP generally receives management fees and carried interest or similar profit allocations from its Advisory Clients." The compensation for investment advisory services typically includes management fees and carried interest, or similar profit allocations. The management fees are charged as a percentage of assets under management.

209. Due to the functions and risks assumed by the Appellant, the income earned by ECP is partly attributable to the Appellant; that is, the Appellant is engaged in the provision of investment advisory services to the Funds. Section 3

(1) of the Income Tax Act states that:

"Subject to and in accordance with this Act, a tax 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 in Kenya. Further, Section 3(2)(a)(i) of the Income Tax Act then provides that: "Subject to this Act, income upon which tax is chargeable under this Act is income in respect of gains or profits from the business, for whatever period carried on."

210. The Appellant recognized the cost plus 7% as income in its income tax return for each of the years under review. The income was based on the benchmarking process conducted by the Appellant, which benchmarked various administrative support services to arrive at a cost-plus 7% basis. 7% of the costs was hence the profit declared in Kenya. Having carried out a FAR analysis, the Respondent found that the TP method applied by the Appellant and the income declared by the Appellant were incorrect, a position that the Tribunal confirmed. The Respondent sought to determine the income that the Appellant should have earned based on its contribution to ECP, that is, for the Appellant's role in providing investment advisory services to the Funds.

211. The Appellant, along with the seven investment advisory personnel employed by the Appellant, including Bryce Fort and Paul Maasdorp, who also serve as partners of ECP, were tax residents in Kenya for the period under review. The investment advisory income for the Appellant was derived and accrued in Kenya since the services were offered in Kenya. During the process of conducting a FAR analysis of the Appellant, the Respondent determined that both ECP and the Appellant make unique and valuable contributions to the core business, specifically investment advisory services.

212. The Respondent found that the Transactional Profit Split Method ("TPSM") is the most appropriate because the Appellant and ECP are highly integrated, making unique and valuable contributions. According to paragraph 2.114 Chapter II of the OECD TP Guidelines, "The transactional profit split method seeks to eliminate the effect on profits of special conditions made or imposed in a controlled transaction… by determining the division of profits that independent enterprises would have expected to realize from engaging in the transaction or transactions. The transactional profit split method first identifies

the profits to be split for the associated enterprises from the controlled transactions in which the associated enterprises are engaged (the combined profits)."

213. The Tribunal added that according to the United Nations Practical Manual on Transfer Pricing for Developing Countries 2021 ("UN TP Manual"), TPSM is applicable where: Each unique party to the transaction makes unique and valuable contributions; and/or The business operations of the related parties are so highly integrated that they cannot be reliably evaluated in isolation from each other; and/or The parties share the assumption of economically significant risk or separately assume closely related risks.

214. By Bryce Fort's own admission, Bryce noted that in dispensing its function(s), ECP operates in multi-office teams drawing on the strengths of the investment advisory personnel in different regions, including Kenya (that is, the Appellant). The Tribunal also noted that the documentation provided by both parties indicated that the services offered by the Appellant are highly integrated with the services rendered by ECP to the Funds. Additionally, the Tribunal stated that, "So integrated are the services that it is difficult, if not impossible, to reliably split the exact services rendered by the Appellant and those rendered by ECP." Paragraph 2.115 of the TP Guidelines also adds that, *"The main strength of the transactional profit split method is that it can offer a solution for highly integrated operations for which a one-sided method would not be appropriate…"*

215. The Respondent, on various occasions, requested that the Appellant provide the financial statements of ECP, the contract between ECP and the Appellant, and the group structure of ECP. The Appellant declined to provide this information during both the audit and objection phases of the process.

Was the Respondent wrong in using the Management Fees earned by the ECP Group as the basis of the income to be attributed to the Appellant?

216. Tribunal determined that the most appropriate transfer pricing method that should have been used is the TPSM. The contribution analysis method, which requires that the profits of the transaction be shared in proportion to their respective contributions, was the method applied by the Respondent in TPSM. Paragraph 2.137 of the OECD TP Guidelines notes that,

> ***"Generally, the combined profits to be split in a transactional profit split method are operating profits… However, occasionally, it may be appropriate to carry out a split of the gross profits and then deduct expenses incurred in or attributable to each relevant enterprise (and excluding expenses taken into account in computing gross profits)."***

217. The Respondent, not having the requisite financial statements of ECP Group, was able to reconstruct the management fees earned by ECP (ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP) from the SEC filings. It should be noted that the income reconstructed only relates to the management fees as a percentage of assets under management. The Respondent was unable to obtain any information regarding carried interest as an alternative source of income for the ECP Group. Having only considered the Funds that ECP had discretionary authority over, the Respondent used a rate of two percent (2%) as the management fee, which was derived from SEC Administrative Proceeding File No. 3-19535. Since the Respondent did not have the direct cost of the ECP Group, the Respondent proceeded to treat the gross income as the Gross Profit, which could then be attributed to the Appellant based on its contribution. Gross profits can be the basis for TPSM as envisioned by paragraph
2.137 of the OECD TP Guidelines.

218. The Respondent used the number of advisory personnel as the allocation key to attribute the income to the Appellant. Paragraph 2.141 of the OECD TP Guidelines states:

> ***"In practice, allocation keys based on assets/ capital (operating assets, fixed assets, intangible assets, capital employed) or costs (relative spending and/or investment in key areas such as research and development, engineering, marketing) are often used. Other allocation***

keys are based for instance on incremental sales, headcounts (number of individuals involved in key functions that generate value to the transaction), time spent by a certain group of employees if there is a strong correlation between the time spent and creation of combined profits, number of servers, data storage, floor area of retail points, etc. may be appropriate depending on the facts and circumstances of the transactions."

219. In the ECP Brochure that was filed with the SEC, it is stated that, "The Advisory Client's success depends in large part on the performance of ECP. The loss of any key personnel could have a material adverse effect on the Advisory Client." This confirms that investment advisory personnel are highly instrumental to the success of the funds and ECP.

220. It should also be noted that in paragraph 2.121 of the OECD TP Guidelines, *"The Guidelines do not seek to provide an exhaustive catalogue of ways in which the transactional profit split method may be applied. The application of the method will depend on the specific circumstances of the case and the available information. However, the overriding objective should be to approximate as closely as possible the split of profits that would have been realised had the parties been independent enterprises."*

221. The application of the TPSM method based on contribution analysis does not require strict adherence to the method's verbatim application. The Tribunal noted that the Respondent rightfully applied Section 31 of the TPA and buttressed this point by referring to ***Van Boeckel v C & E QB Dec 1980, [1981] STC 290 Woolf J.*** Thus, the Court finds that in view of the above analysis, to aver that the gross revenue calculated was fictitious would be inaccurate.

Whether the Financial Statements for ECP Manager LP should be considered as material in determining the profits that should have been attributed?

222. The Appellant did not provide the above information during the audit or

objection stage; it was introduced at the Tax Appeals Tribunal, despite several

requests to do so. Also, the ECP Manager LP's financial statements have income and expenses from affiliates. According to Appendix C of the Form ADV - Glossary of terms, affiliates are: "(1) all of your officers, partners, or directors (or any person performing similar functions; (2) all persons directly or indirectly controlling or controlled by you; and (3) all of your current employees (other than employees performing only clerical, administrative, support or similar functions).

223. In summary, then, these affiliates are related persons and therefore we cannot rely on these figures at face value as provided in the financial statements. The actual income from management fees levied on the Advisory Client (Fund) has not been shown. On page 3 of all consolidated financial statements, it reads: "See notes to Consolidated Financial Statements." It is worth noting that the Appellant has selectively chosen parts of the financial statements that suit their purpose, rather than presenting the complete financial statements. The notes to financial statements provide further clarity to the figures presented. Without the entire context, the financial statements as presented cannot be relied upon.

224. The financial statements provided are only for ECP Manager LP. It has already been well established that (as per Form ADV Part 2A – Emerging Capital Partners Brochure): *"ECP operates its private equity business through three registered investment advisers and two covered entities: (1) ECP Manager LP;*
(2) ECP Manager III LP; (3) ECP Mena Management LP, (4) ECP Manager IV LP, and (5) Emerging Capital Advisors LP and their respective affiliates."

225. The three investment advisors are therefore ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP (collectively referred to as ECP). It should be noted that all three investment advisors file their Form ADV and are all legally registered and domiciled in the state of Delaware, United States.

226. Therefore, to fully appreciate the entire context, all financial statements of ECP Manager LP, ECP Manager III LP, and ECP Mena Management LP

should be provided in their entirety. The Appellant has not provided the financial statements for the last two. The Respondent avers that the Appellant was requested to give the Group structure of ECP; however, the Appellant did not provide the correct structure. As a litmus test, the reported income for ECP Manager LP does match the calculated management fees (and is not even remotely close) because the number is not for the three investment advisors, that is, ECP Manager LP, ECP Manager III LP and ECP Mena Management LP after having reviewed all evidence adduced to it by both the Appellant and Respondent, the Court agrees with the Respondent's assessment due to the following reasons: The Appellant failed to produce documents despite several requests by the Respondent.

227. In summary, the Respondent considered all available information in making its decision, including information obtained from the SEC. The Respondent arrived at its assessment using sound TP principles. The Respondent acted in accordance with Article 210 of the Kenya Constitution. The Respondent's decision to charge the taxes was within the Law, and the Appellant has not demonstrated in the Appeal which Law the Respondent has contravened. Thus, the Court makes the orders that.

I) The Appellant's Appeal lacks merit; therefore, it is dismissed. This Court confirms the Tribunal's decision, upholding the Respondent's Objection Decision as proper and in conformity with the provisions of the Law.

II) The parties are to bear their own costs.

Orders accordingly.

DATED AND DELIVERED VIA MICROSOFT TEAMS IN NAIROBI THIS 14TH NOVEMBER,2025.

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CHARLES KARIUKI JUDGE