REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

INCOME TAX APPEAL NO. E089 OF 2025

BRANCH INTERNATIONAL LIMITED..APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES................................RESPONDENT

AND

INCOME TAX APPEAL NO. E080 OF 2025

COMMISSIONER OF DOMESTIC TAXES....................................APPELLANT

VERSUS

BRANCH INTERNATIONAL LIMITED..................................RESPONDENT

(Consolidated)

JUDGMENT

Introduction

1. These consolidated appeals (**HCITA E080/2025 & HCITA 089/2025**) arise from the judgment of the Tax Appeals Tribunal ("the Tribunal") delivered on 28th February 2025 in Tax Appeal No. E850 of 2024.

2. In that Judgment, the Tribunal partially allowed an appeal by Branch International Limited ("the taxpayer") by setting aside the Commissioner's disallowance of (i) legal and marketing expenses and (ii)bad debt/cash loss. The Tribunal, however, upheld the Commissioner's disallowance of (i)fraud-related losses and (ii)related party expenses.

Background

3. Brief facts giving rise to the appeals are that in March 2024, the Commissioner of Domestic Taxes ("the Commissioner") issued the taxpayer with tax assessments covering the 2018 year of income. The assessments disallowed several categories of expenses claimed by Branch Ltd, including:

i. Fraud-related costs (KES 43,459,101);
ii. Related party expenses (KES 8,934,150);
iii. Legal and marketing expenses (KES 32,411,070); and
iv. Bad debts/cash loss (KES 796,715,271).

4. The Commissioner consequently raised additional assessments on corporation tax and VAT, including interests and penalties arising therefrom. Two separate notices of assessment were issued by the Commissioner, one dated 21st March 2024 and the other dated 28th March 2024.

5. The taxpayer lodged two separate notices of objection to the assessments under section 51 of the Tax Procedures Act. The objections were dated 25 April 2024 and 24 May 2024, respectively, and challenged both the substantive tax adjustments and the procedural propriety of the assessments.

6. On 21 June 2024, the Commissioner issued a single objection decision, confirming the assessments and maintaining the disallowance of the disputed expense categories. The Commissioner took the position that the impugned expenses were either insufficiently supported, capital in nature, not wholly and exclusively incurred in the production of income, and were therefore not allowable under the Income Tax Act and applicable guidelines.

7. Being dissatisfied with the objection decision, the taxpayer appealed to the Tax Appeals Tribunal vide Tax Appeal No. E850 of 2024, asserting that the disallowed expenses were deductible, having been incurred ‘wholly and exclusively’ for the generation of the taxable income, in the relevant year.

8. The Commissioner, on the other hand, maintained that the taxpayer failed to discharge its burden of proof under sections 56 of the Tax Procedures Act and 30 of the Tax Appeals Tribunal Act and that the disallowed items were either unsupported, incorrectly characterised, or not deductible in law.

9. Upon considering the evidence and submissions of the parties, the Tribunal delivered its judgment on 28 February 2025, partially allowing the taxpayer’s appeal by setting aside the disallowance of legal and marketing expenses and bad debts, but upholding the Commissioner’s disallowance of fraud-related losses and related party expenses.

10. Both parties, being dissatisfied with different aspects of the Tribunal’s determination, lodged the present appeals before this Court, which were subsequently consolidated for hearing and determination.

The Appeals before this Court

11. The Commissioner’s appeal (**HCITA No. E080 of 2025**) challenges the Tribunal’s decision allowing:

i. legal, consulting, and marketing expenses; and
ii. bad debts.

12. The taxpayer’s appeal **(HCITA No. E089 of 2025),** on the other hand, challenges the Tribunal’s decision upholding:

i. the disallowance of fraud-related losses;
ii. the disallowance of related party expenses; and
iii. the validity of the assessments and objection decision on procedural and constitutional grounds.

13. Given that both appeals arise from the same decision of the Tribunal, involve the same parties, and raise interrelated questions of law, the Court consolidated them and directed that they be heard together.

14. In opposition to the Appeals, both parties filed their respective Statements of Facts (SoF). The Commissioner’s SoF is dated 4 June 2025, whilst that of the taxpayer is dated 28 May 2025.

15. The Appeals were canvassed by way of written submissions. Parties filed submissions separately in each appeal.

16. In **HCITA No. E080 of 2025,** the Commissioner, being the Appellant, filed submissions dated 27th May 2025, whilst the taxpayer, being the Respondent in that Appeal, filed their submissions dated 13th June 2025.

17. In **HCITA No. E089 of 2025**, the taxpayer, being the Appellant, filed submissions dated 11th July 2025, whilst the Commissioner, as the Respondent, filed submissions dated 4th July 2025.

SUBMISSIONS

A. HCITA No. E080 of 2025: COMMISSIONER OF DOMESTIC TAXES – VS – BRANCH INTERNATIONAL LIMITED

(Commissioner's Appeal)

Commissioner's Submissions

18. On whether the appeal was properly on record, the Commissioner submitted that it fully complied with section 53 of the Tax Procedures Act, section 32 of the Tax Appeals Tribunal Act, and Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015.

19. The Commissioner asserted that the Tribunal, having delivered its judgment on 28 February 2025, its Notice of Appeal filed on 28 March 2025, and the Memorandum of Appeal

filed on 25 April 2025, were all filed within the statutory timelines.

20. It was submitted that contrary to the taxpayer's allegations, service of the Record of Appeal was properly effected, and that any alleged deficiencies arose only because the Tribunal had not yet supplied the certified proceedings and signed judgment. Relying on **Commissioner of Domestic Taxes v Gulf Badr Group (K) Limited [2023] KEHC** 26391, the Commissioner asserted that failure to annex a signed judgment where the Tribunal has not issued one should be excused.

21. On the substance of the appeal, the Commissioner submitted that the Tribunal erred in partially allowing the Respondent's appeal concerning disallowed legal expenses and disallowed cash loss (bad debts). It was argued that the taxpayer failed to meet its statutory burden of proof under sections 56(1) and 59 of the Tax Procedures Act, and section 30 of the Tax Appeals Tribunal Act.

22. With respect to bad debts, the Commissioner submitted that the Tribunal misapprehended Legal Notice No. 37 of 2011, particularly Guideline No. 4, which provides that bad debts of a capital nature are not deductible. The Commissioner argued that the loans advanced by the taxpayer constitute capital,

and the Tribunal failed to distinguish between the principal component (capital) and the interest component (revenue).

23. It was further submitted that the taxpayer did not provide adequate documents demonstrating reasonable steps taken to recover the alleged bad debts, nor did it justify the integrity of the data presented. The Commissioner maintained that the taxpayer failed to demonstrate that income from written-off loans later recovered had been reported.

24. On legal and marketing expenses, the Commissioner submitted that although the taxpayer provided certain ledgers and invoices, it failed to provide essential transactional documents such as requisition forms, delivery documentation, and proof of settlement. Therefore, the Commissioner's confirmation of the earlier assessment was justified.

25. The Commissioner emphasized that under section 51 of the Tax Procedures Act, submission of documents in support of an objection only establishes that an objection is validly lodged, but does not relieve the taxpayer of the obligation to prove the correctness of its position. Reliance was placed on **Republic v Kenya Revenue Authority; Proto Energy Limited (Ex parte) [2022] KEHC 5**, where the Court emphasized the taxpayer's burden to provide sufficient evidence.

26. The Commissioner therefore urged the Court to set aside the Tribunal's judgment and uphold the Commissioner's disallowance of legal, consulting, and marketing expenses, and bad debts.

Taxpayer's Submissions

27. The taxpayer, in its submissions, raised two broad issues. First, procedural and second, substantive.

28. On the procedural aspect, the taxpayer argued that the Commissioner's appeal to this Court is incurably defective and therefore incompetent for failing to comply with the mandatory provisions of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015. It was contended that although the Notice of Appeal was served on 28 March 2025, the Appellant failed to serve a complete, filed, and signed Record of Appeal within 30 days as required under Rule 3.

29. The taxpayer submitted that the Commissioner served an unsigned, unfiled, incomplete version of Volume 2 of the record on 29 April 2025, and only served Volume 1 after being prompted. The taxpayer maintained that both were served out of time, and neither contained a copy of the Tribunal's decision nor the Notice of Appeal, contrary to Rule 5(e).

30. Relying on **Nicholas Kiptoo Arap Korir Salat v IEBC [2014] eKLR** and on **Commissioner of Legal Services v Temenos EA Limited [2024] KEHC 16713,** the taxpayer argued that the appeal, the appeal having been filed out of time and without leave, is incompetent and therefore ought to be struck out.

31. On the substantive aspect, the taxpayer submitted that contrary to the Commissioner's assertions, the legal, consulting, and marketing expenses were wholly and exclusively incurred in the production of income, as required by section 15(1) of the Income Tax Act.

32. The taxpayer explained that its business involves the provision of unsecured digital microloans, funded largely through borrowings. It highlighted its financing arrangements with, among others, Victory Park Capital Advisors LLC, Barium Capital Ltd, and Nabo Capital Ltd, whose associated legal and marketing costs, was argued, were necessary for raising operational finance.

33. The taxpayer asserted that the Tribunal was right in its finding that the Commissioner erred in rejecting these expenses despite production of facility agreements, debt placement agreements, and invoices from legal and consultancy service providers.

34. On bad debts, the taxpayer submitted that its 2018 write-offs of **KES 796,715,271** satisfied the requirements of section 15(2)(a) of the Income Tax Act and Legal Notice No. 37 of 2011. It maintained that it had detailed its recovery processes, including reminder notices, CRB listings, and engagement of professional debt collectors.

35. The taxpayer maintained that its loans are unsecured, legal recovery costs exceed the loan amounts, and it took all reasonable steps to collect the debts before writing them off at 90 days past due. It relied on **Equity Bank Kenya Ltd v Commissioner of Domestic Taxes [2021] KEHC 8047** to support the argument that satisfaction of even one guideline under Legal Notice No. 37 may justify deduction under Legal Notice No. 37 of 2011.

36. The taxpayer further argued that the Commissioner's claim that it failed to distinguish principal from interest in the bad-debt computation was a new issue raised on appeal, and was never raised at the Tribunal, therefore constituting an impermissible ground of appeal. It relied on **Commissioner of Domestic Taxes v Kenya Maltings Limited [2013] KEHC 6073** in support of the argument.

37. The taxpayer asserted that it discharged its burden of proof under section 56(1) of the TPA once it produced primary documents evidencing legal expenses, marketing expenses,

and debt-recovery efforts. It cited **KRA v Man Diesel & Turbo SE [2021] eKLR and Hickman Motors Ltd v Canada [1997] 2 SCR** on the shifting nature of evidential burdens.

38. The taxpayer therefore urged the Court to uphold the Tribunal's decision on both legal and marketing expenses and bad debts, dismiss the Commissioner's appeal, and/or strike out the appeal with costs.

B. HCITA No. E089 OF 2025: BRANCH INTERNATIONAL LIMITED – VS – COMMISSIONER OF DOMESTIC TAXES

Taxpayer's Submissions

39. The taxpayer faulted the Tribunal for upholding the Commissioner's decision disallowing "**fraud-related loans"** and "**related party expenses**" that the taxpayer had claimed in its tax returns under Section 15(1) of the Income Tax Act.

40. The taxpayer also raised procedural objections to the Commissioner's assessments and objection decision, citing violations of section 31(4), section 51(11) of the TPA, and Article 47 of the Constitution.

41. On the procedural aspects, it was argued that the Tribunal erred by failing to find that the Commissioner wrongly issued a

single objection decision despite the admitted existence of two distinct assessments for the 2018 year of income, namely those dated 28th March 2024 and 21st March 2024 (communicated on 17th May 2024).

42. According to the taxpayer, each assessment triggered a separate objection, and therefore, the issuance of one objection decision purporting to respond to both was unknown to section 51 of the Tax Procedures Act. Consequently, it was asserted that the objection lodged on 25th April 2024 stood allowed by operation of law under section 51(11).

43. The taxpayer further contended that the later assessment was time-barred under section 31(4) of the Tax Procedures Act, having been communicated outside the statutory five-year period, without any allegation or proof of fraud, wilful neglect, or evasion. It was submitted that the Tribunal erred in accepting the respondent's assertion that the later assessment merely amended the earlier one, a proposition said to be illogical and unsupported by the record.

44. Secondly, the taxpayer challenged the Tribunal's finding that the assessment dated 28th March 2024 was valid. It was submitted that the assessment failed to disclose reasons or workings, in violation of Article 47 of the Constitution and section 49 of the Tax Procedures Act, and did not conform to

the statutory requirements under section 31(8), particularly as it did not specify late payment penalties.

45. Thirdly, the taxpayer argued that the Tribunal erred in upholding the disallowance of fraud-related losses amounting to KES 43,459,101. It was submitted that the losses were directly connected to the appellant's digital lending business, were irrecoverable, and qualified as deductible expenditure under section 15 of the Income Tax Act. The insistence on concluded criminal investigations was said to reflect an impractical and erroneous approach.

46. Lastly, the taxpayer contested the Tribunal's decision on related party transactions, submitting that the amounts in issue were intercompany reimbursements recorded as receivables, not loans or deductible expenses. Having provided documentary evidence, the appellant contended that it had discharged its burden of proof and that the Tribunal wrongly upheld the disallowance in the absence of rebuttal evidence from the respondent.

Commissioner's Submissions

47. The Commissioner submitted that the taxpayer's appeal raised no arguable questions of law and impermissibly invites the Court to re-evaluate evidence.

48. Relying on section 56 of the Tax Procedures Act, the Commissioner argued that the burden lay on the taxpayer to prove that the tax decision was incorrect, and that appeals to the High Court were confined only to questions of law. It was submitted that the Tribunal correctly set out and applied the applicable legal principles under sections 31, 51, and 56 of the Act.

49. On the objections and assessments, the Commissioner maintained that the objection decision was lawfully issued and that the taxpayer failed to demonstrate any substantive prejudice arising from the process adopted. The Tribunal was therefore correct in upholding the assessment.

50. With respect to fraud-related losses and related party expenses, the Commissioner submitted that the Tribunal properly found that the appellant had not discharged its evidential burden, and its conclusions were neither irrational nor perverse.

Analysis and Determination

51. Having considered the pleadings, the record of appeal, the parties’ submissions, and the applicable law, the Court finds that the consolidated appeals raise the following issues for determination:

i. Whether the appeals before this Court are competent and whether the Court has jurisdiction to entertain them under section 56(2) of the Tax Procedures Act.
ii. Whether the Tax Appeals Tribunal erred in law in allowing the deduction of legal, consulting, and marketing expenses under section 15(1) of the Income Tax Act.
iii. Whether the Tribunal erred in law in allowing the deduction of bad debts under section 15(2)(a) of the Income Tax Act and Legal Notice No. 37 of 2011.
iv. Whether the Tribunal erred in law in upholding the validity of the Commissioner's assessments and objection decision under sections 31 and 51 of the Tax Procedures Act and Article 47 of the Constitution.
v. Whether the Tribunal erred in law in upholding the disallowance of fraud-related losses under section 15 of the Income Tax Act.
vi. Whether the Tribunal erred in law in upholding the disallowance of related party expenses.

Whether the Commissioner's Appeal is Competent and properly before Court

52. The taxpayer challenged the competence of the appeal on two grounds. First, that the Commissioner failed to comply with the procedural requirements governing appeals from the Tax Appeals Tribunal to this Court, particularly Rules 3 and 5 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 ("the Rules"). Second, that the appeal offends section 56(2) of the Tax Procedures Act by raising issues of fact rather than questions of law.

53. The question whether an appeal is properly before the Court is jurisdictional and must therefore be determined at the threshold, before the Court may proceed to consider the merits.

54. An appeal from the Tribunal can only be entertained where it is instituted in accordance with the statutory framework established under section 53 of the Tax Procedures Act, section 32 of the Tax Appeals Tribunal Act, and the Rules made thereunder.

55. Section 53 of the Tax Procedures Act entitles a party dissatisfied with a decision of the Tribunal to appeal to the High Court within thirty days of notification of the decision, while section 32(1) of the Tax Appeals Tribunal Act contains a similar provision. Rule 3 of the Rules requires the filing of a memorandum of appeal within thirty days after service of a notice of appeal.

56. In this case, it is not disputed that the Tribunal delivered its judgment on 28 February 2025. The Commissioner lodged its Notice of Appeal on 28 March 2025 and subsequently filed its Memorandum of Appeal on 25 April 2025. These steps were taken within the 30-day timelines prescribed by statute and the Rules. The appeal was therefore properly initiated.

57. It is, however, clear from the documentary trail, and it is admitted by the Appellant, that “Volume 2” was initially served unfiled, and that the filed volumes did not at first include the Tribunal decision as contemplated by Rule 5(e). The Appellant nevertheless later moved and regularized the same.

58. On these facts, the Court agrees that there was procedural default by the Appellant in serving an unfiled volume (volume 2) and in initially omitting mandatory accompaniments. However, two countervailing factors weigh against the draconian remedy of striking out at this stage: the fact that the Notice and Memorandum were filed within the statutory windows, and that the unavailability of a signed judgment and certified proceedings, a matter primarily within the Tribunal’s control, reasonably impeded a complete record.

59. Rule 5 of the Rules provides that a memorandum of appeal shall be accompanied by a copy of the decision of the Tribunal and the notice of appeal. Rule 5 states as follows:

> "A memorandum of appeal shall—
>
> (a) be signed by the appellant;
> (b) contain an address of service of the appellant;
> (c) set out concisely under consecutively numbered distinct heads, the grounds of appeal without any arguments or narrative;
> (d) contain an index of all documents supporting the appeal with number of pages at which they appear; and
> (e) accompanied by a copy of the decision of the Tribunal and the notice of appeal."

60. The object of the Rule is practical rather than punitive: to place before the Court the decision under challenge and to ensure that the respondent is properly apprised of the case it must answer.

61. The Commissioner explained, and the explanation was not seriously controverted, that the Tribunal had not availed a signed judgment or certified proceedings despite formal request, and that the Record of Appeal—filed in several volumes because of its bulk—was subsequently completed and regularised before the hearing.

62. Rule 5 does not require that the Tribunal’s decision annexed to the memorandum be a certified or signed copy. Nor does it provide that a delay or default arising from the Tribunal’s own processes automatically renders an appeal incompetent.

63. In **Commissioner of Domestic Taxes v Gulf Badr Group (K) Limited [2023] KEHC 26391 (KLR),** this Court held that where failure to annex a signed judgment is attributable to the Tribunal and not to indolence or bad faith on the part of the appellant, such omission does not, without more, warrant striking out the appeal. That reasoning applies with equal force here.

64. The taxpayer’s reliance on **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** is well taken so far as it affirms the importance of procedural discipline. However, the present case concerns curable defects in the record, not non-compliance with jurisdictional timelines or conditions precedent.

65. The Court is further guided by **Article 159(2)(d) of the Constitution**, which obliges courts to administer justice without undue regard to procedural technicalities. While that provision does not excuse disregard of procedural rules, it requires the Court to adopt a purposive approach and to

distinguish between defects that go to jurisdiction and those that are curable and non-prejudicial.

66. In the present case, the taxpayer was served with the Notice of Appeal and Memorandum of Appeal and participated fully in the proceedings, filing detailed submissions on both procedural and substantive issues. No prejudice has been demonstrated to have arisen from the manner in which the Record of Appeal was compiled or served.

67. The Court is therefore satisfied that the Commissioner substantially complied with the statutory and procedural requirements governing appeals from the Tribunal to this Court, and that the procedural lapses complained of were adequately explained, timeously remedied, and do not justify striking out the appeal.

68. The second procedural objection raised by the taxpayer was that the appeal is incompetent because it raises issues of fact rather than questions of law, contrary to **section 56(2) of the Tax Procedures Act**.

69. It is settled that this Court has no jurisdiction to re-evaluate evidence or interfere with the Tribunal's findings of fact. However, whether an appeal raises questions of law or fact is determined by examining the substance of the grounds of appeal rather than their form. An appeal raises a question of

law where it alleges misinterpretation or misapplication of statute, application of the wrong legal test, or misdirection on the burden of proof. This principle was affirmed by the Court of Appeal in **Romageco Kenya Limited v Commissioner of Customs Services.**

70. In the present appeal, the Commissioner challenges the Tribunal's interpretation and application of **section 15 of the Income Tax Act**, **section 56(1) of the Tax Procedures Act**, and **Legal Notice No. 37 of 2011**, particularly on deductibility and burden of proof. These are questions of law, notwithstanding that their resolution may be informed by the factual matrix.

71. As this Court observed in **Commissioner of Investigations & Enforcement v Doshi Enterprises Limited [2025] KEHC 4501 (KLR),** the application of legal principles to established facts lies squarely within the province of appellate review on points of law.

72. The mere fact that factual considerations form the background against which legal questions arise does not convert an appeal into one of fact.

73. The upshot of the foregoing is that the appeal is hereby held to be competent. Accordingly, the Court will therefore proceed and consider the same on its merits.

Whether the Tribunal erred in allowing Legal, consulting, and marketing expenses

74. The Commissioner contended that the Tribunal erred in law in allowing the taxpayer's legal, consulting, and marketing expenses incurred during the 2018 year of income. It was argued that the taxpayer failed to discharge the statutory burden of proof and that the Tribunal misapplied section 15 of the Income Tax Act by accepting inadequate documentation.

75. The taxpayer maintained that the impugned expenses were incurred in the ordinary course of its digital lending business, principally in relation to financing arrangements necessary to raise funds for lending operations, and that the Tribunal properly applied the law to the facts placed before it.

76. Section 15(1) of the Income Tax Act, which is the applicable statutory framework, provides that:

> "For the purpose of ascertaining the total income of any person for a year of income, there shall, subject to section 16 of this Act, be deducted all expenditure incurred in that year of income which is expenditure wholly and exclusively incurred by him in the production of that income."

77. Section 16 of the Act sets out categories of non-deductible expenses. It is common ground that legal, consultancy, and

marketing expenses are not prohibited per se under the provision.

78. In the present case, the Tribunal found that legal and marketing expenses incurred by the taxpayer were in connection with financing arrangements entered into for purposes of raising funds to support its lending operations, and were therefore wholly and exclusively in the production of the income.

79. In reaching that conclusion, the Tribunal relied on documentary evidence, including financing agreements, contractual clauses requiring the Respondent to bear legal and advisory costs, and invoices issued by identified professional service providers.

80. On the basis of that evidence, the Tribunal concluded that the statutory test under section 15(1) had been satisfied and allowed the expenses as deductible.

81. This Court's appellate jurisdiction is confined to questions of law under section 56(2) of the Tax Procedures Act. It does not extend to re-evaluating evidence or substituting the Court's own factual conclusions for those of the Tribunal.

82. In **Romageco Kenya Limited v Commissioner of Customs Services (Civil Appeal No. 37 of 2018)**, the

Court of Appeal reaffirmed that where a statutory tribunal has properly directed itself on the law and arrived at factual findings supported by evidence, an appellate court must not interfere merely because it would have reached a different conclusion.

83. Similarly, in **Commissioner of Investigations & Enforcement v Doshi Enterprises Limited [2025] KEHC 4501 (KLR),** the Court declined to entertain grounds of appeal that invited a re-assessment of evidential sufficiency, holding that such matters lie outside the scope of appellate review on points of law.

84. The test under section 15(1) is whether the expenditure was incurred wholly and exclusively in the production of income. From the statutory scheme, it is evident that the section does not prescribe a rigid evidentiary template nor does it require a taxpayer to produce every conceivable internal document relating to an expense.

85. Courts have consistently held that expenditure incurred in raising working capital or facilitating the conduct of a business is deductible where it is closely connected to income production. In **SARS v Pretoria East Motors (Pty) Ltd [2014] ZASCA 91**, the Court observed that expenditure incurred bona fide in the course of carrying on income-earning

operations is deductible provided it is directly linked to those operations.

86. Locally, in **Commissioner of Income Tax v Kencell Communications Limited (ITA No. 272 of 2015)**, the Court recognised that expenditure relating to activities forming part of a taxpayer's income-generating structure is revenue in nature and deductible under section 15.

87. The Tribunal applied these principles and correctly distinguished the Respondent's legal and marketing expenses from capital expenditure that creates an enduring asset.

88. The Commissioner's principal complaint—that additional transactional documents such as requisitions, delivery notes, and settlement vouchers were not produced—was considered and rejected by the Tribunal, which found that the contractual documentation and invoices were sufficient to establish incurrence and business relevance.

89. Once the taxpayer produced prima facie evidence demonstrating the nature and purpose of the expenditure, the evidential burden shifted to the Commissioner to show, with specificity, why that evidence failed the statutory test.

90. In **Republic v Kenya Revenue Authority; Proto Energy Limited (Ex parte) [2022] KEHC 5 (KLR**), the Court held that the Commissioner cannot merely assert insufficiency of

evidence without engaging with the material produced or explaining why it fails the statutory test.

91. The Tribunal found that the Appellant did not discharge that evidential burden. That conclusion is a factual determination supported by the record.

92. In the premises, the Court finds that the Tribunal properly directed itself on section 15(1) of the Income Tax Act and the applicable burden-of-proof provisions. The Appellant has not demonstrated any misdirection in law or jurisdictional error.

93. Accordingly, this ground fails.

Whether the Tribunal Erred in Allowing the Bad-Debt Deductions

94. The Commissioner challenged the Tribunal’s decision allowing the taxpayer to deduct bad debts amounting to KES 796,715,271 for the 2018 year of income. The gravamen of the Commissioner’s case was that the Tribunal misapplied section 15(2)(a) of the Income Tax Act and the Guidelines set out under Legal Notice No. 37 of 2011, and that the taxpayer failed to discharge its statutory burden of proof.

95. The taxpayer’s position was that the bad debts arose in the ordinary course of its business as a digital micro-lender, that

extensive recovery measures were undertaken prior to write-off, and that the Tribunal correctly applied the law to the facts before it.

96. Section 15(2)(a) of the Income Tax Act permits deduction of bad debts incurred in the production of taxable income where the Commissioner is satisfied that such debts have become bad during the year of income. The provision further authorises the Commissioner to issue guidelines for determining when a debt may be considered bad.

97. Pursuant to that authority, the Commissioner issued **Legal Notice No. 37 of 2011**, which provides that a debt is considered bad if it is proved to have become uncollectable after reasonable steps have been taken to recover it. The Guidelines further enumerate circumstances under which a debt may be deemed uncollectable, including lack of realisable security, disproportionate recovery costs, or abandonment of recovery efforts for reasonable cause.

98. Guideline 4 provides that a bad debt of a capital nature shall not be an allowable deduction.

99. In this case, the Tribunal found, as a matter of fact, that the taxpayer’s principal business consists of advancing unsecured digital loans and that borrower default is an inherent risk of that business model. It further found that the Respondent

undertook structured recovery efforts prior to write-off, including automated reminders, engagement of licensed debt collectors, reporting to credit reference bureaus, and eventual write-off after loans remained outstanding for more than ninety days.

100. On the basis of that evidence, the Tribunal concluded that the Respondent satisfied the requirements of section 15(2)(a) of the Income Tax Act and Legal Notice No. 37 of 2011.

101. The Appellant argued that the Respondent failed to exhaust all possible recovery avenues. That submission is inconsistent with the Guidelines themselves.

102. Legal Notice No. 37 of 2011 does not require exhaustion of all conceivable recovery mechanisms. It requires that reasonable steps be taken and that at least one of the enumerated circumstances of uncollectability be satisfied.

103. This interpretation was affirmed in **Equity Bank Kenya Limited v Commissioner of Domestic Taxes [2021] KEHC 8047 (KLR**), where the Court held that satisfaction of one or more of the Guidelines is sufficient and that the Guidelines do not impose an obligation to pursue recovery at all costs.

104. The Tribunal applied that principle and found that the Respondent's unsecured lending model, coupled with documented recovery efforts and disproportionate recovery costs, satisfied multiple limbs of the Guidelines. No error of law has been demonstrated in that reasoning.

105. The Appellant further contended that the Tribunal erred by failing to distinguish between the principal and interest components of the bad debts, arguing that the principal constituted capital expenditure.

106. As correctly pointed out by the Respondent, this issue was neither raised in the objection decision nor pleaded before the Tribunal. It is settled that an appellate court cannot determine issues not placed before the court of first instance where their determination would require factual inquiry.

107. In **Commissioner of Domestic Taxes v Kenya Maltings Limited [2013] KEHC 6073 (KLR),** the Court declined to entertain a new argument on bad-debt treatment that had not been canvassed before the Tribunal, emphasising the limits of appellate jurisdiction. The Court stated as follows:

> "48. This court is not hearing the matter in its original jurisdiction but rather in the appellate stage. It would therefore not be possible to interrogate whether or not the Respondent was able to realise its securities over the

farmers’ barley crop. Making a determination on this issue would clearly be exceeding the mandate and scope of this reference.”

108. In any event, even on its merits, the argument is fundamentally flawed. In a lending business, monies advanced to borrowers constitute circulating capital—the very stock-in-trade of the enterprise. Losses arising from default in the ordinary course of such business are therefore revenue in nature.

109. The distinction between capital and revenue, in the view of the Court, turns not on the inherent nature of the asset, but on the purpose for which it is deployed in the taxpayer’s business. Accordingly, money may assume either capital or revenue character, depending on the purpose for which it is held and deployed in the taxpayer’s business.

110. In ordinary commercial undertakings, money serves merely as a financing medium used to acquire capital assets forming part of the profit-making structure. By contrast, in a lending business, money itself is the income-generating commodity, continuously advanced and recovered in the course of trade, and thus assumes the character of trading stock.

111. The position is analogous to land held by a property dealer or vehicles held by a motor trader, which, though ordinarily capital assets, constitute stock-in-trade when acquired for resale. Their character is determined by their commercial use.

112. Similarly, loan principal in a lending business forms part of the circulating capital of the trade, being integral to its income-generating operations.

113. It therefore follows that the risk of non-recovery of ‘stock-in-trade’ is an ordinary incident of the business, and any resulting loss is a revenue loss incurred in the production of income.

114. As Majanja J observed in **Commissioner of Income Tax v Kencell Communications Limited (ITA No. 272 of 2015)**, where a loss relates to a taxpayer’s stock-in-trade or the cost of earning income, it is revenue in nature, notwithstanding its magnitude.

115. Comparable reasoning was adopted by the Supreme Court of South Africa in **Solaglass Finance Company (Pty) Ltd v Commissioner for Inland Revenue (125/1989) [1990] ZASCA 157**, where it was held that in a lending business, loss of loan capital is, in principle, revenue in nature and deductible.

116. This Court fully associates with that reasoning.

117. Accordingly, there was no error on the part of the Tribunal in concluding that the Respondent's bad debts were not barred by Guideline 4 of Legal Notice No. 37 of 2011.

118. Regarding the Commissioner's argument that the taxpayer failed to demonstrate recognition of recoveries from previously written-off loans. The Court notes that the Tribunal found that recoveries were recognised as income in the year of recovery and subjected to tax.

119. That finding was supported by evidence and was not displaced. This Court, therefore, has no basis to interfere with that factual determination.

120. As held in **Republic v Kenya Revenue Authority; Proto Energy Limited (Ex parte) [2022] KEHC 5 (KLR),** the Commissioner cannot merely assert insufficiency of evidence without demonstrating, with precision, why the evidence fails to meet the statutory threshold.

121. Accordingly, the Tribunal's decision allowing the taxpayer's bad debt deductions is upheld.

Whether the Commissioner's Objection Decision and the 2018 year of income were valid

122. The taxpayer contended that the Tribunal erred by upholding a single objection decision notwithstanding the existence of two assessments and two notices of objection relating to the 2018 year of income.

123. The record confirms that an initial assessment dated 21st March 2024 was issued, and a subsequent assessment dated 28th March 2024 followed. The taxpayer lodged objections in respect of both.

124. Section 51(8) and (9) of the Tax Procedures Act requires the Commissioner to consider and determine a valid objection and communicate the decision.

125. The taxpayer argued that the failure to issue distinct objection decisions violated the statutory scheme. However, the Court notes that the Tribunal addressed this issue squarely. It acknowledged that more than one assessment appeared in the record and considered the content and substance of the objection decision.

126. It found that the Commissioner had engaged with the issues raised by the taxpayer and rendered a decision on the objections, and that the taxpayer was aware of the basis of the assessment. Further, no prejudice was demonstrated.

127. This Court agrees with the approach adopted by the Tribunal. First, the function of section 51 of the Act is to ensure that objections lodged by taxpayers are considered and determined. The statute does not elevate procedural form over substance, especially where the taxpayer's objections have been considered on their merits, and no prejudice has been demonstrated.

128. The taxpayer did not establish that any tax was confirmed without its objection being considered, nor did it demonstrate that the outcome would have been different had separate objection decisions been issued.

129. In tax litigation, courts should be slow to invalidate decisions on purely technical or procedural grounds, leaving the substance of the dispute unaddressed. This is in line with the command given under Article 159(2)(d) and Article 259 of the Constitution, which applies to all statutes, tax statutes included. In **Magenta v Kenya Revenue Authority HCCOMITA/E242/2024,** this Court, in its judgment delivered on 24 July 2025, the Court stated as follows:

> "The proper approach, as outlined above, is that before dismissing, striking out, or even allowing a tax appeal on the basis of a procedural technicality, it is prudent for the Tribunal to first consider whether, on the merits, the taxes assessed are lawfully payable. The outcome of this initial

inquiry should then inform the subsequent determination as to whether the procedural lapse affects the Tribunal's jurisdiction or causes material prejudice to the opposing party."

130. The Court, in paragraph 46 of the Judgment, further stated that:

"As was held in Mbaki & Others v Macharia & Another [2005] 2 EA 206, procedural rules are handmaidens of justice and not its mistress. While compliance with procedural requirements remains essential for the orderly conduct of proceedings, such requirements must be applied in a manner that facilitates, not frustrates, the attainment of justice on the merits. Accordingly, unless the procedural lapse goes to the jurisdiction of the tribunal or causes material prejudice to the other party, a court or a tribunal ought to lean in favour of a determination on substance rather than form."

131. Similarly, in Commissioner of Investigation & Enforcement v Zhao [2025] KEHC 16297 (KLR), the Court, while upholding the desirability for the determination of tax issues on merits, stated as follows: -

"I am persuaded that it would be unjust and contrary to the dictates of Article 159(2)(d) and Article 210 of the

Constitution to simply uphold the Commissioner's Objection Decision and thereby trigger enforcement of the entire tax demand of over Kshs. 1.1 billion, without allowing the taxpayer to have its substantive objections ventilated and determined on their merits."

132. In line with these decisions, the Court is satisfied that the Tribunal's conclusion on this point was not erroneous since it involved an assessment of whether the statutory purpose had been met.

133. On the alleged invalidity of the assessment, the taxpayer argued that the assessment dated 28th March 2024 was invalid for want of reasons and for failure to meet constitutional and statutory requirements of fair administrative action.

134. The Court is, however, of the view that the Tribunal correctly identified the legal framework governing tax assessments under section 31 of the Tax Procedures Act and the constitutional requirement of procedural fairness under Article 47 of the Constitution.

135. The Tribunal examined the assessment in its factual context, including the audit process, the correspondence exchanged between the parties, and the appellant's own conduct in lodging a detailed objection. The Tribunal

concluded that the appellant understood the basis of the assessment and was not deprived of an opportunity to challenge it.

136. As has already been pointed out elsewhere in this judgment, the Court is guided by the principle that not every procedural irregularity vitiates a tax decision unless prejudice is shown. The fact that the appellant mounted a detailed objection militates against the contention that the assessment was incomprehensible or procedurally unfair.

137. Accordingly, the Court finds no legal error in the Tribunal's conclusion that the assessment and objection decision were valid.

Whether the Tribunal erred in law in upholding the disallowance of the taxpayer's fraud-related losses for the 2018 year of income.

138. The taxpayer claims it incurred fraud-related losses arising from fictitious accounts created using stolen identities, resulting in loan defaults. It was contended that the losses were wholly and exclusively incurred in the production of income and are therefore deductible under Section 15 of the Income Tax Act.

139. The taxpayer relied on internal reports and a Safaricom investigation. However, as noted by the Tribunal, the evidence was inconclusive, there were discrepancies in the amounts claimed, and no final determination of the fraud loss was demonstrated. The Court reiterates that deductibility requires not only occurrence of loss, but also sufficient proof and quantification.

140. There was no dispute before the Tribunal, or before this Court, that fraud-related losses may in principle be deductible under section 15 of the Income Tax Act if they are incurred wholly and exclusively in the production of income. What is in dispute is whether the Appellant, at the Tribunal, proved to the required standard that the loss was incurred in the ordinary course of business, was attributable to the relevant year of income, and that it had been sufficiently ascertained and rendered irrecoverable.

141. In this case, the Commissioner disallowed the deduction on the basis that the losses were not sufficiently supported by evidence, the amounts were inconsistent, and that investigations were incomplete.

142. The Tribunal, after considering the parties’ respective arguments, upheld the disallowance, finding that the taxpayer failed to provide adequate documentation.

143. The taxpayer now invites this Court to find that the Tribunal adopted an unduly rigid and impractical approach by insisting on completed investigations and finality of loss.

144. With respect, the Tribunal's reasoning does not support that characterization. The Tribunal did not require criminal convictions or concluded prosecutions. Rather, it required objective evidence demonstrating that, from a business and accounting perspective, the losses had become irrecoverable and appropriately attributable to the 2018 year of income.

145. Under Section 56(1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act, the burden of proof lies on the taxpayer. In **Kenya Revenue Authority v Man Diesel & Turbo SE [2021] eKLR**, the High Court underscored that while the burden may shift, the taxpayer must first establish a prima facie case.

146. Here, the taxpayer relied on internal reports and a Safaricom investigation, but as noted by the Tribunal, the evidence was inconclusive, there were discrepancies in the amounts claimed, and no final determination of the fraud loss was demonstrated.

147. Further, the Tribunal's finding that the evidentiary threshold was not met is a factual determination, which this

Court cannot interfere with unless it is perverse or based on no evidence.

148. Accordingly, no such error has been demonstrated. The disallowance of fraud-related losses by the Tribunal was lawful.

Whether the Tribunal erred in the disallowance of related party expenses

149. The taxpayer contended that the impugned amounts were reimbursements for costs incurred by related entities and not loans or taxable expenses. It relied on accounting principles recognizing receivables for reimbursable costs.

150. The Commissioner, however, maintained that the taxpayer failed to substantiate the nature of the transactions, that no sufficient documentation was provided, and therefore, the burden of proof was not discharged.

151. The Tribunal found that the tax did not provide adequate evidence to support the deductions.

152. Tax deductibility is a matter of strict proof. Related party transactions attract even heightened scrutiny. The Tribunal found that this threshold of proof was not reached.

153. As pointed out elsewhere in this judgment, the Appellant's invitation to this Court to reach a different conclusion would necessarily require a re-examination of evidence and a reassessment of factual matters, which the Court is not permitted to undertake in an appeal confined to questions of law.

154. The upshot of the foregoing is that the Court finds no basis to fault the finding of the Tribunal on the issue.

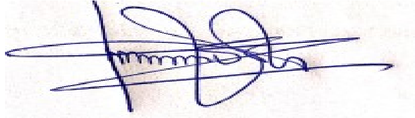
155. that the Tribunal correctly applied the law. Neither the Commissioner nor the taxpayer has demonstrated an error of law to warrant interference.

156. In the result, and for the reasons set out herein:

i. HCITA No. E080 of 2025 (Commissioner's Appeal) is hereby dismissed.
ii. HCITA No. E089 of 2025 (Taxpayer's Appeal) is hereby dismissed.
iii. The Judgment of the Tax Appeals Tribunal delivered on 28th February 2025 is hereby affirmed in its entirety.
iv. Each party shall bear its own costs.

157. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI
THIS 10TH DAY OF APRIL 2026



HON. MR. JUSTICE MOSES ADO
Judge of the High Court

In the presence of: -

C/A – *Moses*

Kimani…………………. for the Appellant/Taxpayer

Wainaina…………. for the Respondent/Commissioner