REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO. E398 OF 2025

IN THE MATTER OF THE MATTER OF THE ARTICLE 23 (3) (F) CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE VALUE ADDED TAX ACT CAP 476

BETWEEN

REPUBLIC……………………………………………………………….……APPLICANT

VERSUS

KENYA REVENUE AUTHORITY...1ST RESPONDENT

THE COMMISSIONER, INVESTIGATIONS
& ENFORCEMENT (KRA)…………………………………...……2ND RESPONDENT

THE COMMISSIONER, LARGE &
MEDIUM TAXPAYERS DEPARTMENT...3RD RESPONDENT

EX PARTE

FONES DIRECT LIMITED…………………………………….EX PARTE APPLICANT

JUDGEMENT

1. By way of Notice of Motion dated 10th December 2025, the Applicant seeks the following orders.

1) **An order of Certiorari to remove to this Honourable Court to be quashed the administrative action and or Notice of the 1st , 2nd and 3rd Respondents of adding**

the Applicant's Personal Identification Numbers (PIN) No. P051150583U to the VAT special table.

2) **An order of prohibition prohibiting the 2nd and 3rd Respondents whether by themselves, agents, servants or howsoever otherwise, from suspending, cancelling, deactivating, deregistering, imposing PIN dormancy and or PIN restriction to the Applicant's Personal Identification Numbers (PIN) No. P051150583U.**

3) **An order of mandamus compelling the 2nd and 3rd Respondents whether by themselves, agents, servants or howsoever otherwise acting pursuant to its authority or under any of them, to activate the Applicant's Personal Identification Numbers (PIN) No. P051150583U so as to enable the Applicant to file their VAT returns & account for their ongoing taxable transactions under their self-assessment tax obligations**

4) **An order of prohibition prohibiting the 1st , 2nd and 3rd Respondents whether by themselves, agents, servants or howsoever otherwise, from threatening, intimidating or in any way harassing, acting in enforcement and/or implementation of the demand notices served upon the Applicant herein pursuant to the Demand Notices.**

5) **That costs herein be borne by the Respondents.**

2. The Application is expressed to be brought under Order 53 Rule 3 (7) (2) (3) and 4 (7) (2) 5, 6 and 7 (7) and (2) of the Procedure Rules. 2010. Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya, Article 159 of the Constitution of Kenya 2010 and all other enabling provision of the Law.

3. The Application is premised on the grounds on the face of it and the averments of the Applicant in the statutory statement and Verifying Affidavit sworn by **Rupaal Vithlani** who described himself as the Director of the Applicant Company.

4. He deponed that on 12th September 2025 during its ordinary course of business, the Applicant received a letter of even date, from the 2nd Respondent, notifying it that the 2nd

Respondent is conducting investigations on fraudulently generated Tax Invoices under the name of Viostruct Global Ltd, being PIN No. P051750466J.He annexed and marked as "RV-1" a copy of the letter. It is the Applications that the 2nd Respondent stated that the iTax records show that the Applicant purchased from the supplier goods worth Kshs. 7,203,879.00/= and claimed VAT input of Kshs. 1,152,620.00 in the July 2025 VAT return. The 2nd Respondent requested the Applicant to furnish it with supporting documents to verify the purchases, including: Purchase invoices, schedule of payment made to supplier and name of individual receiving payment, delivery notes, and proof of payment and contact details. Additionally, he deponed that the Applicant replied to the 2nd Respondent's letter on 17th September 2025 enclosing the requested documents, and making it crystal clear that it has always been in compliance with Section 17(1), (2) and (3) of the Value Added Tax Act, thereby refuting any claims of fraud. He annexed and marked as "RV-2" a copy of the letter and the enclosed documents as follows; a) "RV-2a" - copies of the purchase invoices and proof of payment; b) "RV-2b" - copies of the delivery notes.

5. The deponent averred that the 2nd Respondent summoned the Applicant for a meeting on 18th September 2025, to allow the Applicant to shed light on the transactions, and the Applicant duly complied with the requests, attended the scheduled meeting on 18th September 2025, and followed up the 2nd Respondent's demand by submitting the documents again, via email on 19th September 2025.

6. He urged that the Applicant received a letter from the 3rd Respondent, dated 29th September 2025, notifying it that from henceforth, its PIN had been added to the "VAT Special Table". The consequence being that the Applicant cannot file its VAT returns or claim VAT input. He argued that the Applicant registered a protest to the decision but did not receive a response from any of the Respondents.

7. The Applicant argues that on 1st October 2025, the 2nd Respondent issued the Applicant with a Demand Letter, of even date, demanding that the Applicant pay a total sum of Kshs. 1,152,620.00 within 7 days of receipt of the demand letter failure to which, the 2nd Respondent is at liberty to institute criminal prosecution. He pointed out that curiously, the inquiry and or notices came from two different departments of the 1st Respondent, all meting out different actions and or punishments, unilaterally. The Applicant argues that it

is a mystery to the Applicant how the decision to add it to the special table was reached, without notice, explanation and or opportunity to examine any of its suppliers.

8. The Applicant argues that the Respondents never made a report, finding or response to the information supplied by the Applicant to justify their Tax demand or VAT Special Table impositions. The Applicant responded to the 2nd Respondent's demand letter on 2nd October 2025, objecting to the demand citing that the amount in question was already remitted and an additional payment would not only be unfair but also amount to double jeopardy.

9. The Applicant further argues that on 8th October 2025 the Applicant received a letter from the 3rd Respondent, inviting the Applicant for a meeting to be held on 13th October 2025 at the 3rd Respondent's offices. The meeting did not proceed as 13th October 2025 was gazetted as a public holiday and as such, the same was rescheduled to 22nd October 2025. On 22nd October 2025, the Applicant attended the said meeting which was of no effect, in view of the fact that the 3rd Respondent did not address on its failure to follow due process, or the decision to add the Applicant to the VAT Special Table.

10. The Applicant argues that the 3rd Respondent stated that the Applicant would be issued with an assessment and that a further compliance audit would be conducted. The 3rd Respondent, vide a letter dated 28th October 2025, demanded that the Applicant pays a total of Kshs. 33,486,663.00 being the total outstanding tax, inclusive of penalties and interests.

11. In issuing the above demand, it unilaterally and arbitrarily widened the scope of its inquiry and, conveniently, failed to address the issue of the VAT Special Table. According to the Applicant, the meeting by the 3rd Respondent was an afterthought, fuelled with malice and a poor attempt by the Respondent to comply with due process. Additionally, that the VAT special table, is a creature not known in law and the act of suspending, cancelling, deactivating, deregistering, imposing PIN dormancy and or PIN restriction to the Applicant's Personal Identification Numbers (PIN) No P051150583U is not supported by the Constitution, tax laws and or regulation.

12. According to the Applicant, the act of suspension of the Applicants’’ PIN has crippled the Applicants’ business as they will not be in position to file their returns of the preceding

months pending this suspension, thereby preventing Applicant from being tax compliant. It argues that it had a legitimate expectation that the documents they furnished the Respondents with, during their prospecting phase, would be considered before a decision is taken and further that the Respondents would provide a finding report on how the decision was reached.

13. It is the Applicant's case that the taxpayer is only required to provide documents prescribed as envisaged under Section 17 of the Value Added Tax Act, thereafter, the burden shifts to the Respondents. To this end, it affirms that it had complied with the above provisions of tax laws. However, the Respondent has failed to discharge its evidentiary burden.

14. It is argued further that it was not the first time that the Respondents are abusing their powers by unfairly targeting the Applicant as a similar case occurred which led to the Applicant filing a case at the Tax Appeals Tribunal in TAT No. E487 OF 2025, wherein the matter was settled out of court on 25th July 2025.

15. In a span of less than three months The Respondents have again pursued the Applicant over similar issues, which is an abuse of power and harassment of the Applicant. Prior to that, in the periods of May 2024, the 1st Respondent conducted an assessment and thereafter issued the Applicant with a preliminary investigations findings dated 7th May 2024 together with Notice of Tax Assessment dated 24th May 2024. As seen in the copy of the Preliminary investigation findings dated 7th May 2024 and Notice of Tax Assessment dated 24th May 2024.

16. The Applicant argues that the Applicant is a diligent taxpayer and has always remained compliant and up to date with respect to filing its taxes, as seen in a copy of the Applicant's iTax General Ledger.

17. The suspension of the PIN is tantamount to collapsing the business of the Applicant, as they will not be in a position to claim input vat from "ETR" invoices and or receipts on the eTims platform which is the only system available to taxpayers in Kenya.

18. Further, the Applicant's customers will equally not be in a position to generate and or claim input VAT thus strangling and frustrating the Applicant's business. Additionally,

that the Applicant has already received protests from its major customers who have threatened to cut ties with it as seen in the copies of the protest emails and letter dated 24th October 2025 from the Applicant's customers.

19. The actions of the 1st, 2nd and 3rd Respondent offend the right to fair hearing as stipulated under Article 50(2) of the Constitution and the rules of natural justice as envisaged under Section 4(3) of the Fair Administrative Actions Act. It argues that the Applicant's inherent rights to liberty and fair hearing have been violated and if the Respondents are allowed to enforce, having enforced their decisions, the Applicant will continue to suffer grievous breach of their Constitutional rights.

Respondents' Replying Affidavit

20. The 1st Respondent filed a Replying Affidavit dated 13th January 2026, sworn by one Victor Orege in opposition to the Application. He deponed that the Applicant's Notice of Motion Application lacks merit and the Respondents ought to be allowed to enforce the law, which is its statutory mandate.

21. He laid down the brief facts of the case, urging that the Applicant is a holding company operating retail chains dealing in mobile phones, laptops and ICT products under the brands Fonexpress and Phonelink. That upon conducting compliance check on the Applicant, it was established that the Applicant was found to have claimed input VAT for the month of July 2025 with a gross value of Kshs. 7,203, 879 without corresponding output tax being declared by the supplier, Viostruct Global Ltd thereby contravening section 17(2) of the VAT Act as well as Regulation 9 of the VAT Regulations. The supplier, Viostruct Global Ltd, had lodged a complaint with the Respondents reiterating that they did not make sales to the Applicant for the month of July, 2025. He annexed and marked as "KRA - 1" the correspondences from Viostruct Global Ltd. Vide various correspondences, the Applicant was requested to provide supporting documents to support the input VAT claimed from Viostruct Global Ltd and failed to provide the supporting documents requested. He annexed and marked as "KRA - 2" copies of the correspondences.

22. Consequently, the Applicant was issued with an assessment/demand on 28th October 2025 which copies he annexed and marked as "KRA 3". Further, that the Applicant, having claimed input VAT arising out of non-existent sales from the supplier therefore was in

contravention of the VAT Act and enforcement action was initiated, including placement in the VAT special table. Vide a notice dated 29th September 2025, the Applicant was given a notice of addition to VAT special table. He annexed and marked as "KRA - 4" is the copy of the notice).

23. The deponent proceeded to lay down the legal framework for Administration and enforcement of Value Added Tax, urging that the VAT Act CAP 476 is an Act of Parliament to review and update the law relating to value added tax; to provide for the imposition of value added tax on supplies made in, or imported into Kenya, and for connected purposes. He cited the provisions of Section 17 (2), 36, 42, 43, 44 and 47 of the VAT Act and reproduced the same. he stated that the 1st Respondent introduced the VAT Special Table in August 2022 as a targeted compliance enforcement tool designed to address VAT compliance challenges. Additionally, that the Administration of the VAT Special Table goes hand in hand with the 1st Respondent's administration and enforcement of the VAT Act together with the TPA.

24. On Whether the implementation and enforcement of the VAT Special Table violates the Applicant's rights to fair administrative action and fair hearing, the deponent averred that prior to placing a Taxpayer on the VAT Special Table, the 1st Respondent is first satisfied that the Taxpayer has noncompliance issues either the Taxpayer has failed to file returns, is a nil filer, has failed to pay taxes due after filing their returns or being a nil filer, some other parties have claimed from them. The 1st Respondent then proceeds to request the Taxpayer to either conform by either filing their returns or making the payments failure of which the 1st Respondent might proceed to place the Taxpayer on the VAT Special Table.

25. He stated that an assessment was issued to the Applicant on 28th October 2025 annexing and marking as KRA-10 the copy of the assessment. Further, that where the Taxpayer fails to conform to the request by the 1st Respondent, or does not satisfy the Respondents on the issues raised, the Respondent placed the Applicant on the VAT Special Table and the Applicant is subsequently informed of the same. He Annexed and Marked as "KRA-4" a copy of communication to the Applicant that they have been placed on the VAT Special Table. He stated that once a Taxpayer is placed on the VAT special table, the special table restricts taxpayers from performing certain Vat related functions until they comply with the specific issues that the Respondent's will have pointed to the taxpayer.

26. He urged that the 1st Respondent has developed internal/administrative guidelines for adding and removing tax payers form the VAT Special Table for its staff. Further, that guidelines which have been communicated to the general public by the Respondents which he annexed and marked as "KRA-10". The deponent averred that the argument that the Respondents' VAT Special Table lacks legal backing by suspending Applicant's rights without notice, hearing or review mechanism is thus misplaced. Further, that at no point has the 1st Respondent abandoned the VAT Act and Tax Procedures Act in favour of the VAT Special Table, but rather the 1st Respondent is exercising the powers conferred by, the VAT Act and the KRA Act. He stated that no evidence has been provided by the Applicant to prove that the VAT Special Table contravenes the Constitutional principles in Tax Administration.

27. He urged that the Applicant's prayers do not meet the threshold for grant of such orders. In response to paragraphs 7-11 of the Applicant's supporting affidavit, he urged that the Respondents reiterates that it is empowered by section 59 of the Tax Procedures Act to request for documents from the Applicant in the course of discharge of its statutory functions and doing so cannot be a reason to being dragged in the courts of law. Further, in response to paragraph 12-14, 17, 18 and 39 of the supporting affidavit, the Respondent stated that the Applicant was granted a fair and adequate opportunity to respond to the tax compliance issues before being placed in the VAT special table.

28. He deponed that the Applicant has not demonstrated how the Respondent's discharge of its statutory is illegal or unreasonable. Further, that contrary to the Applicant's assertions at paragraph 19 of its affidavit, the Respondent states that upon conclusion of its investigations, a tax demand was issued on 28th September 2025 which the Applicant is required to object to the demand as required by section 51(2) of the TPA. Additionally, that the issues the Applicant is raising at paragraphs 20, 36-42 ought to be raised through an objection to the demands issued rather than doing so before this Court. In response to paragraphs 25-27, 43-45 of the Applicant's Supporting Affidavit, he urged that the Respondent's actions were in line with its statutory mandate and it cannot be gagged as argued by the Applicant. In response to paragraphs 28-30 of the Applicant's supporting affidavit, he urged that the Respondent affirmed its position that placement in VAT special table is supported by law.

29. The deponent averred that if the court grants the prayers sought, the likely party to suffer irreparable loss and immense prejudice would be the Respondents and the Government of Kenya which is likely to continue losing revenue through the various schemes which the VAT Special Table intends to curb. He urged that the public interest is for the denial of the prayers sought and prayed that the Application be dismissed.

Ex Parte Applicants' Supplementary Affidavit

30. The Ex Parte Applicant filed a Supplementary Affidavit dated 5th February 2026, sworn by Rupaal Vithlani in response to the Replying Affidavit. In response to paragraph 5 to 10, he averred that it indeed shows that the Respondents have no authority and or power to make law, in fact the Respondents concede in paragraph 8 that they can only administer and enforce the provisions of the written laws as set out in Part I & Il of the First Schedule of the Kenya Revenue Act. Further, that he denied the contents of paragraph 13 which is denied, and stated that the Respondent relies on Regulation 9 of the VAT Regulations which was deleted by Legal Notice 188 of 2020. Additionally, that the ex parte Applicant at all times adhered to the VAT Act when filing their VAT returns as relates to Viostruct Global Ltd and supplied information and evidence and the same was annexed RV-3a, 3b and RV-4, in my supporting affidavit.

31. In response to paragraphs 13 to 18, he denied the contents thereof as untrue. Further, that paragraphs 19 to 28 are a regurgitation of legal provisions and not relevant to the issue at hand. He urged that the Respondent cites Section 36 of the VAT Act which is not relevant because; The section deals with cancellation of registration and the matter before the Honourable Court is not about cancellation of registration; the section deals with a registered person who ceases to make taxable supplies, if anything the Applicant was not a supplier in the transaction with Viostruct Global Ltd, it was Viostruct Global Ltd that was the supplier and the provision would therefore apply to them, the suppliers; that there has never been any notice by the Respondents on a cancellation as per Section 36 (3) as the same was not applicable and, that Section 36 (5) of the VAT Act is crystal clear that a cancellation can only happen on a registered person (supplier) who is no longer required to be registered. This is a fact that was never established neither is it relevant to this suit, but if the Respondents are to rely on the same, to which they should be estopped, they never adhered to the said provision.

a) A perusal of the guidelines does not show that the same are anchored under Section 36 of the VAT Act. The provision and reliance are only supported by the Respondents fecund and stretched imagination only meant to dupe this court. f) A cancellation process is not equal to the VAT Special Table and the same are not synonymous.

32. The deponent averred that the Respondents' reliance on Section 17(2) of TPA and 42 of the VAT Act is misplaced. That the Ex Parte Applicant is in possession of a valid tax invoice issued by the supplier (Viostruct Global Ltd) through the eTlMS system, fully compliant with statutory requirements. Further, that Section 17(3) of the VAT Act clearly and exhaustively sets out the documentation a taxpayer is required to furnish in support of an input tax claim, and once such compliance is achieved, input tax may not be disallowed. The Ex Parte Applicant fully complied with the said statutory requirements and supplied all relevant documents as prescribed thereunder. Despite this compliance and without any lawful basis, the Respondents arbitrarily place the ex parte Applicant on the VAT Special Table, thereby disabling it from filing its VAT returns and remitting taxes as required by law. This action was punitive, disproportionate and wholly unsupported by statute and amounts to an unlawful administrative sanction in disregard of the clear provisions of the VAT Act.

33. The deponent averred that they have at all times kept proper records, and books of accounting. Further, that paragraph 28 does not in any way come to the aid of the Respondents, as it merely outlines the statutory powers conferred upon the Cabinet Secretary under the relevant tax statutes. However, the purported VAT Special Table Guidelines constitute delegated legislation within the meaning of the Statutory Instruments Act, yet the same were neither made, prescribed, nor issued by the Cabinet Secretary as required in law, nor subjected to mandatory public participation, parliamentary scrutiny, or gazettement.

34. Similarly, that Article 109 of the Constitution is clear that parliament has the power of legislation. The impugned VAT Special Table guidelines are governed by the Statutory Instruments Act as the same fit the definition of a Statutory Instrument. The Respondents came up with tax guidelines without power, authority and importantly, without

Parliament's scrutiny. That the VAT Special Table Guidelines ought to be declared void, the Respondents having failed to present said guidelines before Parliament within the prescribed timelines, as stipulated in the Statutory Instruments Act.

35. The deponent averred that paragraphs 29, 30, 31, 32, 33, 35, 36 and 37 are not applicable to the matter at hand and remain irrelevant. Further, that Section 14 of TPA which also deals with cancellation of PIN is not relevant as no party notified the commissioner of their intention to have their PIN cancelled, and that the VAT Special Table is not cancellation. He urged that paragraphs 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51 are general lamentations not supported in fact and or law, neither are the same relevant this case, and denied the contents. Further that he opposed paragraphs 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 and 62, averring that the measures taken were illegal, unprocedural and not supported by any law.

36. The deponent stated that paragraphs 63, 64, 65, 66, 67 and 68 are irrelevant and do not show where the Respondents obtain the power to continue enforcing the VAT Special Table. Further that at paragraph 64 and 65 the Respondents concede that it was the supplier who was to have the tax liability and not the Ex Parte Applicant. Additionally, that the Respondents concede that indeed every registered person shall submit a return, in the prescribed form and manner, in respect of each tax not later than the twentieth day after the end of that period as per Section 44 of the VAT Act. However, upon being put on the VAT Special Table, the ex parte Applicant's PIN was suspended and it could not file its VAT returns. He reiterated that the Respondents do not show what gives them power and authority to suspend this important provision. A suspension is therefore illegal as returns must be filed monthly.

37. The deponent averred that the core issue in this dispute is the Respondents' contravention of tax laws by placing the ex parte Applicant on the VAT Special Table, an enforcement mechanism with no express grounding in statute. The deponent urged that from the facts of the case it was also unprocedural of Respondents to issue the demand notice of 28th October 2025 prior to issue a letter of findings, which would allow the taxpayer time and opportunity to respond to or counter the findings, therefore the demand letter itself was unfairly issued. Additionally, that even if we were to consider the guidelines as proper,

the Respondents never adhered to the same, as a taxpayer is supposed to be given at least 7 days to respond to the Notice of Special Table, but this was not the case.

Ex Parte Applicants' Submissions

38. Counsel for the Ex Parte Applicant identified the issues for determination and proceeded to submit on the same.

39. On whether the action of placing the ex parte Applicant under VAT Special Table was legal and lawful, Counsel urged that that the VAT Special Table is not a creature of law as contended by the Respondent. That it is not expressly anchored under the VAT Act or any other tax law. Further, that the Respondents continue to enforce this alien creature without legal backing, public participation, or transparency which is not only illegal but also a gross violation of taxpayers' constitutional rights. He urged that it is now trite law that every policy that affects the general public must be subjected to participatory safeguards. Counsel cited the case of Law Society of Kenya v National Assembly of Kenya & 3 others (2025)1 KEHC 5472 (KLR) and maintained that the VAT Special Table Guidelines remain unlawfully promulgated, procedurally improper and devoid of any legal force or effect. Further, that the Respondents knowing fully well the implications of a taxpayer being added into the VAT Special Table, they ought to have subjected such policy to public participation for the purposes of generating public input as opposed to imposing the same on taxpayers, arbitrarily.

40. Counsel urged that the ex parte Applicant does not refute that it ought to remit taxes and that it has in fact remained compliant in discharging its VAT obligations. However, it has a legitimate expectation that the taxes it remits must be governed by a detailed statutory law and not the discretion of the tax master. Further, that the implications of placing the ex parte Applicant on the VAT Special Table illegally, goes beyond tax compliance or enforcement issues. That the existing tax laws already provide robust legal and lawful tools to monitor compliance such as requesting for records, conducting audits and issuing assessments as envisaged by Section 58-61 of the Tax Procedures Act. He cited the case of Silver Chain Limited v Commissioner Income Tax & Others (2016) KEHC, Fleur

Investments Limited v Commissioner of Domestic Taxes and another (2018) KECA 341 (KLR) and Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited (2019) KEHC 11987 (KLR).

41. Counsel urged that the purported VAT Special Table Guidelines constitute delegated legislation within the meaning of the Statutory Instruments Act, yet the same were neither made, prescribed, nor issued by the Cabinet Secretary as required in law, nor subjected to mandatory public participation, parliamentary scrutiny, or gazettement. Consequently, the said. He maintained that the Respondents have failed to establish the tax law provision that creates the VAT Special Table.

42. Counsel urged that the unlawful nature of the VAT Special Table emanates from lack of legal framework and it continues to violate constitutional principles such as public participation under Article 10 and constitutional rights of Article 47, 50(2). That Article 47 of the Constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He invited the court to interrogate the guidelines vis-a-vis the Statutory Instrument Act, urging that under the Act, a "statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued. Further, that it would therefore mean that the impugned VAT Special Table guidelines herein are governed by the Statutory Instruments Act as the same fit the definition of a Statutory Instrument.

43. Counsel submitted that the guidelines never complied with the provision as laid out under the Statutory Instruments Act for various reasons to wit; The Respondents never adhered to Section 4 as it shows the objective of the Act. No consultation was done, as the Respondents averred that the guidelines are an internal administrative guideline; Section 5 also delves into consultation in detail and indeed the Respondents failed and or neglected to adhere to this provision; Section 5A was also not adhered to as there is no explanatory memorandum; Part III was also not complied with when it comes to impact assessments; Part IV was equally not complied with as it required Parliamentary scrutiny in compliance with Article 109 of the Constitution; Section 22 (1) provides: every

statutory instrument shall be published in the Kenya Gazette and shall be assigned a serial number as of the year in which it is made which shall be printed on the face of the statutory instrument. The guidelines are not compliant with this section, they remain to therefore have no legal effect, void, inoperative and unenforceable.

44. Counsel urged that the above non-compliance demonstrates how the Respondents came up with a guideline without power, authority and importantly, without Parliament's scrutiny. Counsel cited the case of Kenya Country Bus Owners' Association (Through Paul G Muthumbi Chairman, Samuel Njuguna Secretary, Joseph Kimiri Treasurer) 9 others v Cabinet Secretary for Transport and Infrastructure 46 others [2014] KEHC 7525 (KLR) and submitted that, having found that the VAT Special Table is not a creature of law, it therefore follows that any actions or decisions ensuing from it, remain unlawful.

45. Counsel urged that the VAT Special Table is not a formal enforcement mechanism within the meaning of Section 36 of the VAT Act or Section 58-61 of the Tax Procedures Act. That it is not a "tax decision" as defined under applicable tax legislation or common law principles. He cited the case of Wanderi 106 others v Engineers Registration Board & others; Egerton University another (Interested Parties) (2018) KESC 54 (KLR). Counsel urged that the implications of being placed under the VAT Special Table are very' serious and that the ex parte Applicant's business has been exposed to loss of business due to lack of customer trust and confidence, operational disruptions, reputational damage among others. Further, that the ex parte Applicant was not treated fairly prior to the Respondents arriving at the decision to place it under the VAT Special Table. He urged that the purported VAT Special Table Guidelines remain unlawfully promulgated, irregular and greatly offend critical constitutional rights and rules of natural justice.

46. Counsel submitted that the Respondents' application of Section 36 is misleading and unfounded. He reproduced the relevant provisions and urged that the import of Section 36 is to remove a taxpayer's obligation to account for and comply with remission of Value Added Tax. That under Section 36(5), the Commissioner may undertake cancellation where there above conditions have not been met by the taxpayer. The scope of cancellation of registration under Section 36(5) is limited to where a person registers for Value Added Tax, such that upon cancellation, the person ceases to be a registered VAT taxpayer. That even so, Section 36 lays down a procedure that must be followed by the

Commissioner. Section 36(3) requires that the Commissioner must issue a notice on cancellation, this is not the case in this instant case because the entire Section does not apply. Counsel submitted that this section has nothing to do with the VAT Special Table. Further, that a look at the implications of the guidelines on page 131 of the Respondents' Replying Affidavit, it can be discerned that the pin is not cancelled as per Section 36, but a suspension and rejection of taxpayer's PINs stops it from being operational. The impact of this is enormous that the same must be provided for in law and in clear terms. Counsel cited Cape Brandy Syndicate v IRC [CA 1921 12 TC 358 II 92112 KB 403 and submitted that the Respondents' purported averment that the VAT Special Table ensures compliance under Section 36 of the VAT Act is misplaced. The Respondents are attempting to enlarge the scope of this section to justify the existence of the VAT Special Table, which makes the whole concept of an administrative and monitoring tool, irrational and procedural improper.

47. Counsel urged that Section 36 does not anticipate a situation where the Respondents are allowed to enlarge the scope to include an enforcement mechanism known as VAT Special Table. He cited the case of Law Society of Kenya v Kenya Revenue Authority another [2017] KEHC 8539 (KLR) in this regard.

48. On whether the ex parte Applicant was compliant with Section 17 of the VAT Act, Counsel urged that the Respondents rely on Section 17(2) and 42 of the VAT Act in claiming that the ex parte Applicant failed to comply, which averment is misplaced and unfounded as no evidence has been tendered demonstrating at what point the ex parte Applicant failed to comply with. That first and foremost, the ex parte Applicant has always remained compliant and up to date with respect to filing its returns. Further, it has kept proper records and books of accounting, otherwise it would not have adduced any documents to support the transaction with Viostruct Global Limited. That the chronology of events is a testament that the ex parte was compliant from the onset. Counsel posited that even after the ex parte Applicant complied with Section 17(2) of the Value Added Tax Act by providing all the requested documentation and availing itself for a meeting with the Respondents, the Respondents failed to consider these material evidences and imposed punishment against the ex parte Applicant.

49. Further, Section 17 (2) (b) of the VAT Act does not impose an obligation on the taxpayer to ensure the supplier's compliance beyond holding the required documentation, which the ex parte Applicant did. The ex parte Applicant informed the Respondents on several occasions that it had complied and the person to be investigated is the supplier, Viostruct Global Limited. That the Respondents have still not provided any explanation or justification on why the ex parte Applicant is being punished for omission and/or commissions of its supplier. The absence of such an explanation adds to the more reason why the Respondents actions cannot be sustained in law Secondly, that Section 17(3) of the VAT Act stipulates that where the Commissioner is satisfied that a taxpayer has complied with the invoicing requirements, input tax shall not be disallowed solely on procedural grounds. The ex parte Applicant has met this threshold. The Respondents, on the other hand, have not given any reasonable explanation on why they failed to consider the documentation submitted as evidence and proceeded to impose punishment on the ex parte Applicant concurrently without justification and fair hearing. Counsel placed reliance on the case of Commissioner of Investigations & Enforcement v Renova Limited (2024) KEHC 12803 (KLR) in this regard and urged that this is an abuse of power and irrational decision making by the Respondents, which amounts to unreasonableness. That it therefore goes without saying that ignoring and or failing to consider such evidence undermines the ex parte Applicant's right to fair administrative process under Article 47 of the Constitution.

50. Counsel urged that the ex parte Applicant maintains that the actions of the Respondent have infringed upon its constitutional rights of fair administrative action as per Article 47 and right to be heard as stipulated under Article 50(2). Additionally, the VAT Special Table offends the constitutional values and principles of public participation and good governance, in view of the fact that the same is being imposed arbitrarily and illegally. That the decision of placing a taxpayer under the VAT Special Table being an administrative decision, it is paramount that the Respondent must ensure that the right to fair administrative action is adhered to and the administrative processes meet constitutional standards. He cited the case of Judicial Service Commission v Mutava & another (2015) KECA 741 (KLR) and submitted that in addition to encapsulating the principle of constitutionality, Article 47 requires that administrative actions that are dictated by statutes must meet the test of legality, reasonableness and procedural fairness.

51. Counsel posited that the Respondents have failed to establish the tax laws that underpin the VAT Special Table. That in terms of reasonableness, the Respondents' enforcement of illegal, unlawful guidelines of the VAT Special Table, to the extent of imposing extreme punishment upon the ex parte Applicant and other taxpayers is very unreasonable. Counsel cited the case of Republic v Public Procurement Administrative Review Board; County Government of Laikipia & another (Interested Parties): Pelt Security Services Ltd (Ex parte) [2018] KEHC 2068 (KLR) and urged that the decisions and actions of the Respondents as to the conduct of this case, are beyond the range of responses open to a reasonable decision maker.

52. Counsel urged that in terms of procedural fairness, the Respondents issued a demand notice dated 28th October 2025 prior to issuing a Findings Report, which would afford the ex parte Applicant an opportunity to respond and/or counter the findings. The Respondents proceeded to place the ex parte Applicant under the VAT Special Table on the same day they were issued with the notice and there was no notice to the effect that ex parte Applicant would be placed under the impugned Special Table by the Respondent. The ex parte Applicant objected but the objection was ignored along with documents in support of the purchase transaction between the Applicant and Viostruct Global Limited. The ex parte Applicant had a legitimate expectation that it will be accorded a fair process having being a compliant taxpayer. He cited the decision of the Supreme Court in Communications Commission of Kenya 5 others v Royal Media Services Ltd 5 others (2014) KESC 53 (KLR) in this regard.

53. Counsel urged that having found that the Respondents' decision and administrative actions are illegal, unlawful, unreasonable, irrational and ultra vires, the ex parte Applicant has met the required standard of being granted reliefs as prayed for. He stated that it is now trite that an order of certiorari is issued where the court finds that the decision challenged was made without or in excess of jurisdiction, in abuse of power, in bad faith and in breach of rules of natural justice. That the ex parte Applicant has qualified for this relief in view of the fact that the Respondents acted in excess of their powers by adding the ex parte Applicant in the VAT Special Table, without as much as affording it an opportunity to be heard. That the ex parte Applicant was condemned unheard and in the absence of a legal and lawful provision underpinning the VAT Special Table, a notice, to and hearing of the ex parte Applicant, the Respondents were in breach

of those cardinal rules of natural justice and also in a violent and reckless abuse of statutory power. He cited the case of Makori v Kenya National Highways Authority (2025) KEHC 4443 (KLR) and urged that the Respondents have not advanced any explanation, justification or rational reason on why the ex parte Applicant is being punished for omission and/or commissions of another taxpayer, being the supplier.

54. Counsel urged that the Applicant seeks for an order of prohibition in view of the fact that the Respondents continue to threaten it with prosecution under Section 87 of the Tax Procedures Act, intimidate and harass it despite the ongoing court case, to the extent that the ex parte Applicant is contemplating to close its business. That in fact, the ex parte Applicant has been forced to cease active trading due to the brutal consequences arising from being added on the impugned VAT Special Table. He placed reliance on the case of Kenya National Examination Council v Republic: GGN & 9 others (Ex parte) 119971 KECA 58 (KLR) and urged that the Respondents have contemplated the decision of charging and prosecuting the ex parte Applicant. That if the Respondents are allowed to proceed with this prosecution, the ex parte Applicant will be condemned unheard and a serious miscarriage of justice will be done to the ex parte Applicant. He urged that such an action would amount to an abuse of court process. Counsel prayed that the Application be allowed as prayed

<u>Ex Parte Applicants' Supplementary Submissions</u>

55. On whether the VAT Special Table Guidelines are a statutory instrument within the meaning of Section 2 of the Statutory Instrument Act, Counsel reiterated that Section 2 of the Statutory Instrument Act. Further, that the Respondents' submission that the mere fact that a document has been named guideline does not in itself escalate the document to statutory instrument within the meaning of the Statutory Instrument Act is totally misguided. Counsel posited that statutory instruments are documents with legal force. The VAT Special Table Guidelines is a statutory instrument which continues to have the force of law within the public. They remain binding and also attract legal consequences. He placed reliance on the decision in the case of Okoiti v Attorney General [20201 KEHC 471 1 (KLR).

56. Counsel submitted that Section 36 of the VAT Act does not apply to the VAT Special Table as it speaks to cancellation of registration, which unlike suspension of a PIN, has a

permanent effect. The Respondents intention was not to cancel the registration of the Applicant. Further, that it is not in the interest of the ex parte Applicant to cease being registered under VAT, being a business which values tax compliance and strives to be compliant. Counsel placed reliance on the case of Law Society of Kenya v Kenya Revenue Authority & another (2017) KEHC 8539 (KLR) and Republic v Kenya Revenue Authority Exparte Bata Shoe Company (Kenya) Limited (2014) KEHC 7529 (KLR). Counsel pointed out that the case of Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another (2017) eKLR does not aid the case of the Respondents as firstly, the statute in question is not an ordinary one which ought to be construed ordinarily, but a tax statute. Secondly, the quoted paragraphs of this judgment form the obiter dicta and not ratio decidendi. This Court ought to remain alive to the ratio decidendi.

57. Counsel urged that even if it is argued that Section 36 applies, then the establishment of the VAT Special Table does not conform with the procedure set out in the Statutory Instruments Act. Counsel pointed out that the authorities relied on by the Respondents in paragraphs 50, 51, 52, 53 and 56 of their submissions do not aid their case. In those cases, the Courts found that the documents therein were not statutory instruments as they were explanatory.

58. On Whether the VAT Special Table was enforced in violation of the ex parte Applicant's fair administrative action and fair hearing, Counsel submitted that the ex parte Applicant provided the Respondents with all the required documentation in line with Section 17 of the VAT Act to prove that the actual purchases occurred. It provided proof of payment and the Respondent did not revert on any further queries. As evidenced in the correspondence the Respondent did not request for any further documents, and it cannot now cast aspersions on the Ex Parte Applicant, who co-operated fully with the Respondents' agents. That the Respondents have not adduced any evidence demonstrating that their request for further documents was declined by the ex parte Applicant. Counsel submitted that it should not be lost that the ex parte Applicant furnished the Respondents with the eTlMS receipt, a receipt that is provided by the supplier which was key and robust evidence that was never considered by the Respondents. That the ex parte Applicant provided all the relevant documentation and explanations to the Respondents

and it was for the Respondent to rebut the ex parte Applicant's position, with sufficient reasons for departing from what the documents demonstrated which was not done.

59. Counsel urged that the Respondents did not discharge their onus of rebutting the prima facie case that had been made out by the ex parte Applicant. They deliberately failed to consider the evidence tendered by the ex parte Applicant and proceeded to impose punitive measures against it without following due process and discharging its evidentiary burden. He cited the case of Kenya Revenue Authority v Man Diesel Turbo .Se. Kenya (2021) KEHC 13347 (KLR) in this regard. Secondly, contrary to the Respondents' submissions, that the ex parte Applicant was granted several opportunities to address the compliance gaps, he urged that the Applicant was never granted an opportunity to be heard which actions were unfair and infringed on the ex parte Applicant's fair administrative rights and right to be heard.

60. On whether this matter ought to be determined by the Tax Appeals Tribunal, Counsel urged that the issues raised in this Application are issues that are outside the jurisdiction of the Tax Appeals Tribunal. That this is not just an issue of supply of documents, but a matter of the manner in which the decisions by the Respondents were arrived at unlawfully, irrationally, procedurally improper and acting beyond their powers. That these are issues to be determined by the judicial review court and not the tax appeals tribunal. He urged that the ex parte Applicant is not asking this Court to determine the objection to an assessment, but to determine whether the VAT Special Table is a tool that has been established and is being enforced beyond the powers of the Respondents. He cited the case of Kiliswa v Independent Electoral a Boundaries Commission & 2 others [2015] KESC 17 (KLR) in this regard.

61. Counsel urged that the tax appeals tribunal concerns itself with appealable decisions arising from tax decisions as per Section 3 of the Tax Procedures Act. The VAT Special Table being an alien without legal backing, cannot be said to be appealable let alone tax decisions. That the Respondent ought to have demonstrated to this Court that for the ex parte Applicant to invoke the jurisdiction of the tax appeals tribunal, then the VAT Special Table is firstly legal and lawful, therefore decisions arising from it are within the meaning of Section 3 TPA.

62. On whether the principle of proportionality is applicable, Counsel urged that it does not apply as the Respondents are asking this Court to sanitize an illegal and unconstitutional tool in the name of revenue collection. This would only cement the illegality and unlawfulness of the Respondents actions. He placed reliance on the case of Taxwatch Africa v Attorney General & 4 others (2026) KEHC 779 (KLR). Further, that the Respondent has failed to demonstrate that the collection revenue under the VAT Special Table is in alignment with constitutional rights and tax laws to warrant the invoking of the doctrine of proportionality. The VAT Special Table and the ramifications therein does not only affect the ex parte Applicant but any taxpayer can be a victim.

63. Counsel urged that the implications of being placed under the VAT Special Table for taxpayers include: Loss of business due to lack of customer trust and confidence; Operational disruptions and reputational damage; Closure of businesses; and Restriction of access to filing VAT returns; and violation and infringement of constitutional rights, among others. He urged that if the Court is inclined to apply the doctrine of proportionality, then such consideration must be weighed against these effects to millions of taxpayers. Counsel prayed that the court find that the Judicial Review Application is merited and the same be allowed with costs to the ex parte Applicant.

Respondents' Submissions

64. Counsel laid down the background of the dispute and identified the issues for determination. Further, that before addressing said issues, he urged that it is important for the court to appreciate what the VAT Special Table is all about and why it was introduced by the Respondents as a way of administration and enforcement of tax laws. He urged that in the backdrop of the recent decline in VAT performance, it was established that the same is attributed to several factors including non-compliance with tax laws, impact of missing trader schemes and non-declaration or fictitious declaration of input VAT claims. Accordingly, in August 2022, the Respondents with the mandate to enforce and administer tax laws introduced VAT Special Table as a strategy and mechanism to mitigate continued loss of VAT revenue. VAT Special Table program seeks and targets key non-compliance cases and taxpayers and anyone brought on the VAT Special Table then such Taxpayers has exhibited non-compliance gaps. He submitted that the VAT

Special Table entails putting these taxpayers with tax compliance gaps under one single table developed in Respondent's iTax system and temporary cancelling their VAT registration thereby restricting them from performing various obligations like claiming input VAT etc.

65. He regurgitated the contents of the replying affidavit and urged that it is however important to note that prior to being placed in VAT special table, and in line with a taxpayer's right fair administrative action, they are notified of the VAT compliance gaps established and requested to address the same. On whether there exists legal provision to support the administration and enforcement of tax law using VAT Special Table, Counsel urged that it is a tax enforcement and administrative mechanism well supported by various provisions of the tax law.

66. Counsel posited that Administration and enforcement, in the context of section 5(2) of the act thereby means "giving life" to the provisions of the tax laws by putting in place mechanisms, administrative or otherwise to ensure that what is sanctioned by the law in terms of the 1st Respondent's statutory mandate is achieved. Accordingly, to answer the question whether VAT special table is sanctioned by the law, recourse lies in the wholesome interpretation of the provisions of the tax laws. Counsel urged that it would be a simplistic approach as the Applicant invites the court to do that the term' VAT Special Table ' has to be specifically mentioned in the tax law for the same to be said to having a force of law in tax administration and enforcement.

67. Counsel further submitted that accordingly, all that this court has to ascertain is whether VAT Special Table is sanctioned by any provision of the tax law which answer to the same is to the affirmative. Counsel cited the case in Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another [2017] eKLR on statutory interpretation and further, submitted that the powers to place a Taxpayer are provided for under Section 36(3) &36(5) of the VAT Act and as such, the placing of the Applicant was done as required under Statute. That the provision and interpretation of section 36 of the VAT Act clearly supports the Respondent's tax enforcement action against the Applicant.

68. Counsel reproduced the provisions of Section 36(3) and 36(5) of the VAT Act and urged that these provisions permit the Respondent to cancel VAT registration of a person if the

Respondent is satisfied that the person has ceased to make taxable supplies and is not otherwise required to be registered or when certain conditions are not met. Counsel submitted that there exists various provisions of the law that puts obligations on the Taxpayer to keep proper tax records, furnish regular and reliable returns and comply with obligation under revenue laws as quoted in the replying affidavit.

69. Counsel urged that the actions taken by it in placing non-compliant Taxpayers on VAT Special Table fits the statutory language of Section 36 of the VAT Act. On whether the Guidelines issued by the Respondents on the issue of VAT special table are illegal, Counsel submitted that there is no doubt that Respondent has developed administrative guidelines for adding and removing tax payers form the VAT Special Table for its staff, Guidelines which have been communicated to the general public by the Respondents. He stated that VAT Special Table Guidelines are not subsidiary legislation subject to the statutory instruments act. They are administrative procedures issued to the public by the Respondent that guides the public and the Respondent on the issue of VAT special table.

70. Counsel cited Article 94(5) & (6) of the Constitution and urged that the two provisions are clear that a person's power to make a provision having the force of law must be derived from the Constitution or by legislation. Further, that where an Act of Parliament confers on any state organ or state officer the authority to make provisions having the force of law, such Act of Parliament shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority. An Act is a law passed by both Houses; – Parliament, and the Senate. The two legislative arms of government must assent to the statute before it is released for use.

71. On what a statutory instrument is, Counsel reproduced the provisions of Section 2 of the Statutory Instruments Act and urged that it means that for something to be termed as a statutory instrument, it must be made or established under an express provision of an Act of Parliament and the said Act must expressly authorise the instrument to be issued. In other words, it is a secondary or delegated legislation that implements an Act of Parliament from which it derives its express authority. Counsel cited the case of Commissioner of Domestic Taxes v Excel Chemicals Limited (Income Tax Appeal E058 of 2023) [2024] KEHC 2440 (KLR) (Commercial and Tax) (8 March 2024) (Judgment)

and Section 3 of the Statutory Instrument Act, urging that the Courts have had a chance to decide on cases that seek to determine whether regulations, rules, and or executive orders or guidelines issued by state offices or state organs amount to a statutory instrument that should be subjected to the provisions of the statutory instrument Act. The decisions made by the Court stipulate that prior to subjecting a rule, regulation, executive order, guidelines et al to the requirements of the Statutory Instruments Act, the Court must satisfy itself that indeed the said rule, regulation, executive order or guidelines are a statutory instrument.

72. Counsel reiterated that the Guidelines issued by the Respondent on the issue of VAT Special Table is therefore not a statutory instrument within the meaning of the Statutory Instruments Act. Further that in determining whether the Guidelines on the VAT Special Table is a statutory instrument, to demand that such guidelines be subjected to the provisions of statutory instruments act is untenable and a gross apprehension of the law.

73. On Whether the manner by which the VAT Special Table was administered against the Applicant violated their right to fair administrative action and fair hearing, Counsel urged that the record before this court clearly demonstrates that prior to the Applicant being placed in the VAT Special Table, it was granted several opportunities to address tax compliance gaps to avert enforcement action being undertaken. From the correspondences marked as KRA -2 of the Respondent's replying affidavit, the Applicant was requested to provide for several documents to support its transaction with Viostruct Global Ltd, documents which the Applicant could not provide and only partial records were availed. The documents that the Applicant failed to provide, including before this Court were the Local Purchase Order (LPO) and proof of payment to the supplier.

74. Counsel submitted that the Applicant admitted that there were correspondences and meetings with the Respondent and it is after these correspondences and meetings that the Applicant was issued with an assessment on 28th October 2025. Since the outcome of the review established that the Applicant did not discharge its obligations as required by tax law, it was, vide a notice dated 29th September 2025, informed of addition to VAT special table. He stated that if indeed the Respondent did not properly consider the documents submitted, then that is an issue that can only be raised at the objection stage, duly lodged pursuant to the provisions of section 51(2) of the TPA. Once an objection decision is

issued, in any case rejecting the Applicant's objection, the Applicant's route is to contest the decision at the Tax Appeals Tribunal as required by section 52 of the Tax Procedures Act. He urged that where a statute has provided a remedy to a party, a court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. That this principle was well articulated by the Court of Appeal in Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425.

75. Counsel urged that the merits of the decision made by the Respondent and the sufficiency or otherwise of the documents submitted by the Applicant is not a case to be answered by this court as its jurisdiction is clear. Further, that one cannot fathom a situation where the Applicant is seeking to object to an assessment/demand before this court rather than complying with available and effective remedies of contesting an assessment. These remedies are contained at section 51(2) of the TPA.

76. On whether, in line with the principle of proportionality, the prejudice against the public outweighs the Applicants', Counsel submitted that the power of the court to review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. Further, that later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; proportionality. In this regard, the Court is required to balance between the rights of the Applicant and that of the public, before making a decision whether to grant the orders sought by the Applicant. He cited Republic v Machakos County Government & 3 others Ex Parte Richard Kalembe Ndile [2019] eKLR, Republic vs National Highways Authority and another (JR No. E004 OF 2021), and urged that upon weighing the interest of the Applicant and that of the public, it is clear that the public interest far much outweighs that of the Applicant thus discrediting the Applicant from award of prayers sought. He stated that in the event the Court allows this Application, the consequences to tax administration will be dire and the prejudice not only to the Respondent but to the public will be grave.

77. Counsel urged that the Application is devoid of any merit and prayed that it be dismissed with costs to the Respondents.

Analysis & Determination

78. The issues that arise for determination are;

1) **Whether the court has jurisdiction to grant the orders sought and if so;**
2) **Whether the Applicant is entitled to orders for certiorari, mandamus and prohibition**

Whether the court has jurisdiction to grant the orders sought

79. The question of jurisdiction was discussed in the locus classicus case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1969] KLR**, wherein Nyarangi JA held, inter alia as follows:

> **''…Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

80. The instructive provision on the Appeals process as raised by the 1st Respondent is Section 51(2) of the Tax Procedures Act which provides as follows;

> **(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.**

81. A tax decision is defined under section 2 of the Tax Procedures Act as;

> **"tax decision" means—**
>
> **(a) an assessment;**
>
> **(b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;**
>
> **(c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under section 15, section 17 and section 18;**

(d) a decision on an application by a self-assessment taxpayer under section 31(2);

(e) deleted by Act No. 4 of 2023, s. 49 (a);

(f) a decision under section 48 requiring repayment of a refund; or

(g) a demand for a penalty or late payment interest;

82. Consequently, the court must then determine whether the Respondents' actions are considered a tax decision within the definition of the Tax Procedures Act. The orders sought are with regards to the addition of the Applicant to the VAT Special Table which the Applicant contends was illegal as it has no basis in law. The Respondents on their part contend that the same is an internal administrative mechanism. The VAT Special table has been considered in various Tax Appeal Tribunal decisions where consequently, the Tribunal has often issued directions removing applicant from the listing pending determination of an appeal. In TAT Misc. Application E087 of 2025 Milele Tents Vs Commissioner of micro & small taxpayers the tribunal held:

"The Tribunal also finds that it has no jurisdiction to issue anticipatory or speculative orders relating to administrative actions that have not yet occurred. The placement of a taxpayer on the VAT special table is an internal administrative process of the Respondent. The Tribunal is of the view that the VAT Special Table is that it is a monitoring mechanism that flags VAT-registered taxpayers who demonstrate specific patterns of non-compliance. Once flagged, these taxpayers are restricted from filing VAT returns through the i-Tax portal until the issues are resolved.

"The Tribunal's jurisdiction is limited to reviewing and determining tax decisions that have crystallized and have been communicated to a taxpayer. It cannot suspend, stay, or restrain possible future administrative actions that have not crystallized into a tax decision capable of appeal."

"The Tribunal finds that in the absence of an actual tax decision placing the Applicant on the VAT special table, there is nothing before the Tribunal to adjudicate. Any order restraining the Respondent from taking such future action would amount to issuing an anticipatory or speculative order, which is outside

the Tribunal's remedial powers pursuant to the provisions of Section 29 of the TATA.

83. I have considered the pleadings and annexures filed by the parties and the sequence of events that emerge are that the Applicants' listing on the VAT special table was a culmination of a number of events that occurred. The 1st Respondent conducted a compliance check on the Applicant and established that the Applicant claimed input VAT for the month of July 2025 without corresponding output tax being declared by the supplier, which was in contravention of section 17(2) of the VAT Act as well as regulation 9 of the VAT regulations.

84. The Applicant referred the court to a letter dated 12th September 2025 from the 2nd Respondent notifying it that it was conducting investigations on fraudulently generated tax invoices and requesting supporting documents for verification of the same. The Applicant replied vide a letter dated 17th September 2025, and the enclosed documents as RV3a and b.

85. Additionally, there was a scheduled meeting on 18th September 2025 between the Applicant and the 2nd Respondent and on 19th September 2025,where it submitted the requisite documents again.

86. Consequently, the respondent conducted an assessment based on the documents supplied to it and issued a demand, which was a formal notice of assessment dated 28th October 2023, which was annexed by the 2nd Respondent as KRA-10.

87. The Applicant was thereafter issued with a Notice of Addition to the VAT Special table on 29th September 2025 based on the outcome of the assessment. The Applicant seeks to have its addition to the special table quashed.

88. In my assessment, the addition of the Applicant to the special table was a consequence of a tax assessment and is therefore considered a tax decision under section 2 of the Tax Procedures Act. Therefore, under the provisions of Section 51(2) of the act, the Applicants' recourse was to refer the matter to the tribunal.

89. This then brings into question the application of the doctrine of exhaustion. As per the statutory provisions cited above, it is clear that there exists an alternative remedy for the Applicant other than judicial review. In **Anthony Miano & others v Attorney General & others [2021] eKLR,** the court held that;

> **The doctrine of constitutional avoidance deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion.**

90. The exceptions to the doctrine of exhaustion were discussed in **Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR** where, a 5-judge bench held;

> **As observed above The first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.**
>
> **The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively.**

91. In **Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others (2017) eKLR,** the court held that:-

> **…that was an alternative remedy which the appellant ought to have disclosed and explained why it was not efficacious, thus resorting to judicial review. The appeal process, unlike judicial review, would afford the parties an opportunity to explore the merits of the decision. We think in the circumstance; the trial court did not misdirect itself in the exercise of its discretion as it accorded with the law. That finding would be sufficient to dispose of this appeal.**

92. In **Mohamed Ali Baadi & Others v The Attorney General & 11 others [2018] KEHC 5397 (KLR)** it was held that;

> **“While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia, it was held that:**
>
>> **“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."**

93. In the case of **Jamlick Muriithi Mwenda versus The Law Society of Kenya & 10 Others (2022) eKLR** it was held that

> **“The doctrine of exhaustion appears to be closely intertwined with the doctrine of constitutional avoidance which doctrine is also referred to as the constitutional avoidance rule. The doctrine is part of the wider doctrine of non-justiciability.”**

94. The principle running through the above cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the Court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it.

95. The Fair Administrative Act, particularly Section 9(4) provides as follows;

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

96. Accordingly, the Applicant has not made any application to be exempted from the obligation to exhaust the available remedies and therefore, are subject to the doctrine of exhaustion.

97. A reading of Section 51(2) of the Tax Procedures Act provides that an objection should be filed within thirty days of the decision. The provision is not couched in mandatory terms and further, Section 51(6) gives provisions for extension of time to file an objection as follows;

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner shall consider and may allow an application under subsection (6) if:-

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

98. Additionally, the Tax Appeals Tribunal Act provides an elaborate procedure for filing of appeals and hearing of parties and at Section 18, the Tribunal has jurisdiction to order to stay or affect the implementation of the decision under review. The Section provides:

Where an appeal against a tax decision has been filed under this Act, Tribunal may make an order staying or otherwise affecting the operation or implementation of the decision under review as it considers appropriate for the

purposes of securing the effectiveness of the proceeding and determination of the appeal.

Determination;

99. Having considered the Application, the Applicant has not demonstrated that it attempted to Appeal the assessment to the Tribunal, nor that the matter falls within any of the recognized exceptions to the exhaustion doctrine, such as lack of jurisdiction, unreasonable delay, or violation of fundamental rights in a manner that cannot be addressed by the Tribunal. It follows that the Applicant should have filed the Appeal with the Tax Appeals Tribunal before approaching this court.

Costs follow the event.

Order;

100. The Application is dismissed with costs.

Dated, signed and delivered virtually in Eldoret this 24th day of April, 2026.

…………………………….

J. CHIGITI (SC)

JUDGE