

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**TAX APPEAL NO. E090 OF 2024**

**BETWEEN**

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

**AND**

**LIBERTY LIFE ASSURANCE KENYA LIMITED.....  
RESPONDENT**

***(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 23<sup>rd</sup> February 2024 in Tax Appeal No.1501 of 2022)***

**JUDGMENT**

**Introduction and Background**

1. This appeal arises from a judgment delivered by the Tax Appeals Tribunal (“the Tribunal”) on 23<sup>rd</sup> February 2024 in **Liberty Life Assurance Kenya Limited v Commissioner for Domestic Taxes [2024] KETAT 330 (KLR)** (“the Judgment”). The dispute before the Tribunal was in respect of a tax audit conducted by the

Appellant (“the Commissioner”) for the income years 2016–2020, where it assessed the Respondent for Kshs. 162,856,886.00 in corporate income tax together with interest, taking the position that accounting restatements amounted to transfers from the Respondent’s life fund for the benefit of its shareholders and were thus taxable under **section 19(5)** of the ***Income Tax Act(Chapter 470 of the Laws of Kenya)*** (“the ***ITA***”)

2. The Respondent appealed this decision by the Commissioner to the Tribunal which found the appeal merited. The Commissioner is aggrieved by the Judgment hence the present appeal which is anchored in the Memorandum of Appeal dated 19<sup>th</sup> April 2024 where it relies on four grounds of appeal. The Commissioner states the Tribunal erred in law and fact for failing to find that the Respondent’s transfers from the life fund are subject to tax under **section 19(5)** of the ***ITA***, finding that the treatment of items in financial statements is guided by International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS) and that the Respondent’s application of those standards was proper; failing to consider the Appellant’s submissions and responses in its findings and misapplying the law and facts,

thereby arriving at the wrong decision. As such, the Commissioner urges the court to allow the appeal and set aside the Judgment.

3. The appeal was responded to by the Respondent through its Statement of Facts dated 11<sup>th</sup> July 2025 and the appeal was canvassed by way of written and oral submissions by the parties' respective counsel which I have considered and I will be making relevant references to the same in my analysis and determination below.

### **Analysis and Determination**

4. As I determine this appeal, I am cognizant of the fact that this court's jurisdiction is circumscribed under **section 56(2)** of the ***Tax Procedures Act (Chapter 469B of the Laws of Kenya)*** ("the **TPA**") which provides that "*An appeal to the High Court or to the Court of Appeal shall be on a question of law only*". In dealing with matters of law, the court must also pay fealty to the findings of fact by the Tribunal but only intervene if such findings are perverse (see **Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 others [2014] KECA 621 (KLR)**].
5. As stated, even though the Commissioner raises four grounds in its appeal, as per its submissions, it has condensed the same to

one issue for determination; whether the Judgment should be set aside and the Objection Decision and assessments upheld. That the Respondent is licensed to provide long term insurance services to the general public is not in dispute. The Commissioner has submitted that life insurance involves policyholders who pay premiums and shareholders who invest premiums and owe fiduciary duty to policyholders. That under **section 45** of the ***Insurance Act(Chapter 487 of the Laws of Kenya)***, the insurer must maintain a statutory fund belonging to policyholders, that assets of the fund must be kept distinct and separate from all other assets and that the fund's assets cannot be used to meet shareholder liabilities or pay dividends.

6. The Commissioner submits that taxable gains/profits from long-term insurance business is the sum of actuarial surplus recommended to be transferred from the life fund for shareholders' benefit, any other amounts transferred from the life fund for the benefit of shareholders; and 30% of excess management expenses/commissions. That **section 46(5)** of the ***Insurance Act*** caps shareholder transfers at 30% of surplus and that tax liability is the shareholders' responsibility and cannot be

deducted from the policyholders' life fund. The Commissioner avers that the Respondent made prior-year adjustments to actuarial reports for the income years 2016, 2017, 2019 that distorted opening/closing surplus balances, that it deducted from the life fund actual income taxes payable and deferred tax liabilities. It submits that these deductions from the life fund amount to "*any other amounts transferred from the life insurance fund for the benefit of shareholders*" under **section 19(5)(b)** of the **ITA** and are therefore taxable.

7. The Commissioner contends that Institute of Certified Public Accounts of Kenya (ICPAK) Technical Guidance (TG) TG04/2014 and IFRS 17 cannot override express statutory provisions as statutes have primacy over accounting standards and guidelines. That **section 46(6)** of the **Insurance Act** only allows two adjustments to surplus adding back withholding tax credits and tax provisions for the current year only but not deferred tax. That the Respondent's deferred tax adjustment is unknown to law and not permitted. For these reasons, the Commissioner prays that the court sets aside the Judgment, uphold the Objection Decision and

the assessments, with due taxes paid and award it costs of the appeal and interest.

8. On its part, the Respondent submits that the Commissioner's grounds of appeal invite the Court to re-evaluate factual findings of the Tribunal but the Court cannot substitute the Tribunal's factual conclusions. That without jurisdiction, the Court must dismiss the appeal. On the merits of the appeal, the Respondent submits that the accounting adjustments were required by IAS 8 and IFRS 17. That for the 2019 adjustment of Kshs. 50,778,000.00, IFRS 17 replaced IFRS 4 effective 1<sup>st</sup> January 2021, introducing new principles for recognition, measurement, and disclosure of insurance contracts. The Respondent adopted the accrual concept for pension taxes and restated 2019 accounts per IAS 8 and that the restatement had a nil net effect as it reduced 2019 profit by Kshs. 50,778,000.00 and increased 2020 profit by the same amount.
9. The Respondent submits that ICPAK had mandated application of IAS in Kenya since 1999 and that for the income years 2016 and 2017, ICPAK TG04/2014 required life insurers to recognise deferred tax liabilities on the whole actuarial surplus and not just

the portion recommended for shareholders. Thus, the Respondent adjusted deferred tax of Kshs. 59,720,000.00 for the year 2016 and Kshs. 165,228,000.00 for the income year 2017 directly within equity. The Respondent contends it was obliged to comply with guidance from ICPAK and that the Tribunal correctly found that the Respondent should not be punished for complying with accounting standards.

10. The Respondent asserts that the adjustments did not occasion transfers for shareholders' benefit and that **section 19(5)** of the **ITA** only taxes transfers from the life fund made "for the benefit of shareholders." That the **ITA** does not define this phrase, but **section 46(1)(b)(i) and 46(5)** of the **Insurance Act** show that benefit means dividends or profits recommended by an actuary and approved by the Commissioner of Insurance. The Respondent submits that there is no such recommendation or approval occurred as the adjustments had no impact on retained earnings or statutory reserves and that no dividend or value was returned to shareholders as they were mere accounting entries.
11. The Respondent also submits that the Tribunal considered the Commissioner's submissions and applied the law correctly as it

outlined the Commissioner's case, recorded its submissions and expressly addressed his arguments. The Respondent states that the fact that the Tribunal disagreed does not mean submissions were ignored and that the Commissioner has also not demonstrated any specific misapplication of law or fact. As such, the Respondent urges the court to uphold the Judgment and dismiss the appeal with costs to the Respondent.

12. It is common ground that **section 19(5)** of the **ITA** defines a gain or profit of a life insurance company as follows:

*The gains or profits for a year of income from the life insurance business of a resident insurance company, whether mutual or proprietary, shall be the sum of the following: -*

*(a) the amount of actuarial surplus, as determined under the Insurance Act and recommended by the actuary to be transferred from the life fund for the benefit of shareholders and policy holders;*

*(b) any other amounts transferred from the life fund for the benefit of the shareholders; and*

*(c) thirty per centum of management expenses and commissions that are in excess of the maximum amounts allowed by the Insurance Act*

13. The Commissioner also relied on **sections 45 and 46** of the **Insurance Act** which provide as follows:

***45. Establishment of statutory fund***

*(1) An insurer carrying on long term insurance business in Kenya on the appointed date shall, as at the date of commencement of his financial year next after the appointed date, and every insurer commencing long term insurance business in Kenya after the appointed date shall, as at the date of commencement of that business, establish and maintain a statutory fund under an appropriate name in respect of the long term insurance business carried on by him.*

*(2) An insurer may establish and maintain a separate statutory fund, under an appropriate name, in respect of any class or classes of his long term insurance business.*

*(3) Where an insurer carries on long term insurance business of more than one class, the Commissioner may in writing direct the insurer—*

*(a) to establish, maintain and appropriately name one or more separate statutory funds in respect of any class or classes of long term insurance business carried on by him;*

*(b) to maintain an account in respect of each of those classes of long term insurance business and to carry and enter the receipts of each of those classes of business in the account maintained by him.*

*(4) All amounts received by an insurer in respect of any class of long term insurance business, after the establishment by the insurer of a statutory fund under this section, shall be carried to that fund.*

*(5) Where, at any time—*

*(a) an insurer is maintaining more than one statutory fund in respect of his long term insurance business;  
and*

*(b) a particular policy ceases to be included in the class of the long term insurance business of the insurer in respect of which one of the statutory funds is maintained (in this subsection referred to as "the first fund") and commences to be included in the class of the long term insurance business of the insurer in respect of which another of the statutory funds is maintained (in this subsection referred to as "the second fund"),*

*the insurer shall forthwith transfer from the first fund to the second fund assets equal to the liability on the policy at that time as ascertained by an actuary and approved by the Commissioner.*

*(6) The income arising from the investment of the assets of a statutory fund shall be carried to and form part of that fund.*

*(7) The assets of each statutory fund shall be kept distinct and separate from all other assets of the insurer.*

*(8) An insurer carrying on long term insurance business shall maintain such books of account and other records as are necessary for identifying—*

*(a) the assets representing each statutory fund maintained by the insurer under this section;*

*(b) the liabilities attributable to that class or, as the case may be, each of those classes of long term insurance business.*

#### **46. Application of statutory fund**

*(1) Subject to this Act, no part of the assets of a statutory fund shall, so*

*long as the insurer carries on the class or classes of long term insurance*

*business in respect of which the fund was established—*

*(a) be available to meet any liabilities or expenses of the insurer other than—*

*(i) liabilities or expenses referable to that class of long term insurance business; and*

*(ii) liabilities charged on those assets or any of them immediately prior to the appointed date, or be*

*otherwise directly or indirectly applied for any purpose other than the purpose of that class of long term insurance business;*

*(b) be—*

*(i) paid, applied or allocated as dividends or otherwise as profits to shareholders; or*

*(ii) transferred to another statutory fund.*

*(2) A mortgage or charge (including a charge imposed by a court on the application of a judgment creditor) shall be void to the extent to which it contravenes subsection (1).*

*(3) A person who contravenes subsection (1) shall be guilty of an offence and liable to a penalty not exceeding twenty thousand shillings and, if he is a natural person, additionally or in the alternative to imprisonment for a term not exceeding two years.*

*(4) Every director and principal officer of an insurer shall be under the same liability, in the event of a contravention of subsection (1), as if he had been a trustee under a trust for the execution of those provisions in respect of that fund, and as if the appropriate policy-holders had been*

*beneficiaries of such a trust, unless the director or principal officer proves that the contravention occurred without his knowledge and that he used all due diligence to prevent the contravention.*

*(5) Notwithstanding subsection (1), an insurer may, for the purposes of declaring or paying a dividend to shareholders or a bonus to policy-holders, utilize the surplus disclosed in the valuation balance sheet of a statutory fund set out in the actuary's abstract relating to an investigation made in pursuance of section 57 and accepted by the Commissioner, subject to the condition that the amount allocated or paid to the shareholders out of a statutory fund shall not exceed thirty per cent of the surplus disclosed therein after making the necessary adjustments to the surplus.*

*(6) The adjustments referred to in subsection (5) are—*

*(a) the actual amount of income tax deducted at source during the period following the date on which the last preceding investigation was made and preceding the date on which the investigation in question is made may be*

*added to the surplus after deducting an estimated amount of income tax on the surplus, the addition and deduction being shown in the abstract prepared by the actuary;*

*(b) the surplus may be increased by contributions out of a reserve fund subject to the condition and only to the extent that the reserve fund has been made up solely of transfers from similar surpluses disclosed by investigations in respect of which the returns have been accepted by the Commissioner.*

*(7) Notwithstanding anything to the contrary contained in this section, an insurer carrying on long term insurance business may declare an interim bonus or bonuses to policy-holders whose policies mature for payment by reason of death or otherwise during the inter-investigation period on the recommendation of the investigating actuary made at the last preceding investigation.*

14. From the above provisions, it is clear that the taxation of life insurance business of a resident insurance company shall be the sum of the amount of actuarial surplus, as recommended by the actuary to be transferred from the life fund for the benefit of

shareholders; any other amounts transferred from the life fund for the benefit of shareholders, and; 30% of Management expenses and commissions, that are in excess of amounts allowed under the **Insurance Act**. Thus, only amount that is taxable is the portion of surplus that is recommended by the actuary to be allocated to shareholders and any inter business transfer, for example, from life business to general business, during the year that is not reserved by the end of the year as this is deemed to be transfer of surplus for the benefit of shareholders.

15. An insurer must also have a statutory fund to back up any long-term business including ordinary life assurance business. That statutory fund may be referred to by whatever name but what it is important is that it is established in reference to long term business carried on by the insurer. In addition, and with the permission of Commissioner of Insurance, an insurer may establish a separate statutory fund for each class of long-term business. Thus, in the case of life assurance, an insurer may establish a statutory fund for that class of business or another statutory fund for bond investment business. I am in agreement with the Commissioner's submission that the purpose of such a

statutory fund is to protect policy holders by ring fencing the policy holders' funds from the vicissitudes of ordinary business and that the statutory fund contemplated therein is for purposes of protecting long term insurance business within the meaning of the ***Insurance Act*** and not for any other purpose (Also see **Kenindia Assurance Company Limited v Commissioner of Domestic Taxes [2020] KEHC 9487 (KLR)**)

16. Having gone through the record and juxtaposed the same with the principles set out above, I have come to the conclusion that the Tribunal correctly found that the accounting restatements made by the Respondent for the subject years were not taxable transfers under **section 19(5)** of the **ITA**. I say so for a number of reasons. First, the Tribunal made factual findings that the adjustments were mere accounting restatements required by ICPAK TG04/2014 and IFRS 17, that the adjustments did not confer any benefit on shareholders and that no actuary recommended a transfer for shareholders' benefit, and no dividend was declared or paid as a result of these adjustments. The Commissioner's appeal repeatedly seeks to re-litigate these factual findings and I am in agreement with the Respondent's

submission and as I have stated before, appeals from the Tribunal to this court lie only on questions of law. This alone is a sufficient ground to dismiss the appeal.

17. In any event, the Respondent produced Actuarial reports (pgs. 335-355 of the record) showing no recommendation for shareholder transfer in the relevant years and Statements of Changes in Equity (pgs. 332-334) showing no movement in retained earnings or statutory reserves as a result of the restatements. The Commissioner failed to identify any specific benefit that actually accrued to shareholders as no dividend was paid and no funds left the life fund for shareholders.
18. Second, for the income years 2016 and 2017, ICPAK TG04/2014 ) required life insurers to recognize deferred tax liabilities on the whole actuarial surplus, not just the portion recommended for shareholders. The Respondent restated its accounts under IAS 8 on Accounting Policies, Changes in Accounting Estimates and Errors, adjusting deferred tax directly within equity. I agree that this was a corrective accounting measure, not a distribution to shareholders. For the income year 2019, IFRS 17 issued in May

2017 and effective as from 1<sup>st</sup> January 2021 replaced IFRS 4 and introduced fundamental changes to insurance contract accounting. I find that the Commissioner's argument that accounting standards cannot override tax statutes is irrelevant here as the Respondent was simply complying with mandatory professional and reporting requirements, not creating artificial tax avoidance schemes.

19. Third, the Commissioner submitted that any amount deducted from the life fund including deferred tax and actual tax payments is automatically a "transfer for the benefit of shareholders" under **section 19(5)(b)**. However, I find that such an interpretation would be an affront to the principle of interpretation of tax statutes which require strict construction leaving no room for intendment or implication (see **Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB, Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others [2019] KECA 500 (KLR)** and **Stanbic Bank Kenya Limited v Kenya Revenue Authority [2009] KECA 427 (KLR)**). In **Stanbic (supra)** the Court of Appeal held that terms in tax

statutes must be interpreted in their natural and ordinary meaning and that the issue of intention or intendment does not arise.

20. The correct interpretation of **section 19(5)(b)** of the *ITA* above is that only outflows that confer a benefit on shareholders such as dividends or profits are taxable and that payment of tax liabilities is not a benefit to shareholders. It is also my position that **section 46(6)** of the *Insurance Act* permits adjustment for income tax deducted at source such as withholding tax. Deferred tax is a legitimate accounting concept under IAS 12, not prohibited by the *Insurance Act*. The decision of *Kenindia(supra)* which the Commissioner strongly relied on actually supports the Respondent's position because the late Majanja J., held that it is only a transfer from the Life Fund established under **section 45(1)** of the *Insurance Act* for the benefit of shareholders that is subject to tax. The Commissioner attempts to distinguish this case from the present one but the principle remains that only transfers from the life fund for shareholders' benefit are taxable. If Parliament intended to tax every accounting adjustment or any deduction from the life fund including tax payments and deferred tax provisions, it would have said so clearly. **Section**

**19(5)(b)** requires both a transfer and a benefit to shareholders and the Commissioner cannot read out the benefit requirement.

21. Fourth, I am also in agreement with the Respondent that going through the Judgment, it is clear that the Tribunal summarized the Commissioner's case at paras. 29-37, it set out the Commissioner's written submissions at paragraphs 41-51 and it expressly addressed the Commissioner's arguments and position. Disagreement with a decision is not the same as failure to consider submissions and the Tribunal did not have to produce the submissions of the parties in verbatim for it to be said that it considered them (see **Njeri v Nyamesa & another (Suing as the legal representatives of Jane Kwamboka Machogu (Deceased)) (Civil Appeal E020 of 2022) [2023] KEHC 25150 (KLR)**)

### **Conclusion and Disposition**

22. I think it is now clear that the appeal by the Commissioner has no merit and

the same is dismissed but with no order as to costs.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this**

**8<sup>th</sup> DAY of MAY 2026**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. Ms. Almadi for the Appellant
2. Mr. Kimani for the Respondent
3. Amos- Court Assistant

ORIGINAL