



Parliamentary Service Commission v Kenya Revenue Authority (Appeal E399 of 2023) [2024] KETAT 1583 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KETAT 1583 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
APPEAL E399 OF 2023
E.N WAFULA, CHAIR, G OGAGA, RO OLUOCH & AK KIPROTICH, MEMBERS
NOVEMBER 22, 2024**

BETWEEN
PARLIAMENTARY SERVICE COMMISSION APPELLANT
AND
KENYA REVENUE AUTHORITY RESPONDENT

JUDGMENT

Background

1. The Appellant is an Independent Constitutional Commission established under Article 127 of *the Constitution* of Kenya 2010.
2. The Respondent is an agency of the Government of Kenya mandated with the duty of collection and receipting of all tax revenue, and the administration and enforcement of all tax laws set out in Parts 1& 2 of the First Schedule to the Act, for purposes of assessing, collecting, and accounting for all tax revenues in accordance with those laws.
3. The Respondent wrote to the Director of the Parliamentary Joint Ventures on 15th November 2022 indicating that pursuant to the Legal Notice of 27th July 2022 Vol. CXXIV, No.145 No.8795 the Motor Vehicle reimbursement and car maintenance allowance paid to the Speakers, Deputy Speakers and Members of Parliament were subject to tax under Section 3(2)(a) (ii) of the *Income Tax Act*.
4. The Clerk of the Senate replied vide a letter dated 7th December 2022. On 8th March 2023, the Respondent wrote to the Clerk of the Senate and the Clerk of the National Assembly demanding for settlement of PAYE computed on the Motor Vehicle reimbursements amounting to Kshs. 168,448,050.00 inclusive of penalties and interest. A further demand of KShs.877,438,350.00 inclusive of penalties and interest was issued to the Clerk of the National Assembly.



5. The Respondent vide a letter dated 12th April 2023 requested the Appellant to provide additional documents.
6. The Appellant objected to the demands on 27th March 2023. Subsequently the Respondent issued its Objection decision on 11th May 2023 confirming PAYE of KShs.1,045,886,400 inclusive of penalties and interest.
7. Aggrieved by the Respondent's decision, the Appellant lodged the Notice of Appeal on 5th July 2023.

The Appeal

8. The Appellant's Appeal is premised on its Memorandum of Appeal dated 4th July 2023 and filed on 20th July 2023. The said Appeal was premised on the following grounds:
 - a. Erroneous Interpretation of Section 5 (2) of the *Income Tax Act*.
 - i. That the Respondent erred in law and in fact in its interpretation of "gains or profits" as defined in Section 5 (2) of the *Income Tax Act*.
 - ii. That the Respondent erred in law and in fact in failing to Section 5(2)(a)(ii) of the *Income Tax Act* which exempts reimbursements to recipients of an amount expended by a person wholly and exclusively in the production of their income from the definition of "gains or profits".
 - iii. That the Respondent erred in law and in fact in failing to apply the definition of reimbursement that- the primary meaning of a reimbursement is "to pay back, to make return or restoration of an equivalent for something paid, expended, or lost; to indemnify, or make whole."
 - iv. That the Respondent erred in fact in failing to find that the Motor Vehicle reimbursement is a reimbursement to Members of Parliament for money expended to purchase a vehicle for official parliamentary duties and not income.
 - v. That the Respondent erred in fact in failing to apply the mandate of the Parliamentary Service Commission under Article 127 (6) of *the Constitution* to provide services and facilities that ensure the efficient and effective functioning of Parliament and pursuant to the terms set by the Salaries and Remuneration Commission.
 - vi. That the Respondent erred in fact in failing to consider the reimbursement to Members of Parliament is to facilitate the discharge of the official duties of a Member of Parliament.
 - vii. That the Respondent erred in law and erroneously interpreted Section 5 (2) (a)(ii) of the *Income Tax Act* which explicitly provides that reimbursements for amounts wholly expended in the production of income does not amount to a gain or profit.
 - b. Wholly and exclusively expenditure where personal or private consequences is incidental is not income.
 - i. That the Respondent erred in law and in fact in failing to consider that the Motor Vehicle reimbursement is to enable a Member of Parliament meet the requirement to constantly meet with their constituents and represent their interests in Nairobi by attending Parliamentary and Committee sittings in line with the role of Parliament under Articles 1(2) and Article 94 of *the Constitution*.



- ii. That the Respondent erred in law and in fact in failing to find based on the Salaries and Remuneration circular, the sole purpose of the Motor Vehicle reimbursement is "to undertake official duties as a Member of Parliament" and any personal or private consequences are purely incidental therefore the reimbursement is not a gain or profit.
 - iii. That the Respondent erred in law and in fact in failing to acknowledge the purpose of the Motor Vehicle reimbursement which is to facilitate official Parliamentary business and therefore does not fit the definition of gain or profit as defined in the [Income Tax Act](#).
 - iv. That the Respondent erred in law and in fact and erroneously attempted to apply the provisions of Sections 3 (2) (a) (ii) of the [Income Tax Act](#) to the Motor Vehicle reimbursement paid to Members of Parliament despite the same being solely a reimbursement for the amount expended to purchase a Motor Vehicle for work and not a gain or profit on the part of the Member of Parliament and is wholly expended in performing their official duties.
 - v. That the Respondent erred in law in failing to uphold Article 89 of [the Constitution](#) which requires delimitation of electoral units and creates constituencies that Members represent in the National Assembly as required under Article 95(1) of [the Constitution](#) and with regard to the Senate, Article 96 of [the Constitution](#) requires that the members of the Senate represent each of the 47 counties that make up the Country.
 - vi. That the Respondent erred in law in failing to uphold Article 1 of [the Constitution](#) which confers the people's sovereignty on Members of Parliament and in this regard therefore, Members of Parliament need to be present in their various electoral areas and also attend Parliament to represent their constituents.
 - vii. That the Respondent erred in law and in fact in failing to uphold the representation role that Members of Parliament play and thus in their official duties, are required that they commute from the National Parliament in Nairobi to their constituency or county as the case may be.
 - viii. That the Respondent has erroneously demanded tax, interest and penalties on the Motor Vehicle reimbursement contrary to Section 5 (2) (ii) of the [Income Tax Act](#) and erroneously rejected the Appellant's tax objection.
- c. Breach of legitimate expectation and arbitrariness.
- i. That the impugned tax decision violates the Appellant's legitimate expectation that the Motor Vehicle reimbursement which the Salaries and Remuneration Commission grants Members of Parliament to perform official duties is within the definition in Section 5(2)(a) (ii) of the [Income Tax Act](#) that an amount expended by a person wholly and exclusively in the production of his income from the employment or services rendered, then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure.
 - ii. That in the Objection decision, the Respondent failed to consider the Salaries and Remuneration Circular, provided for a reimbursement for the amount expended by a member of Parliament to purchase a motor vehicle solely to undertake official Parliamentary duties.



- iii. That the Members of Parliament therefore have a legitimate expectation that the Section 5 (2)(a) (ii) of the *Income Tax Act* would be properly applied to the amounts expended by the Salaries and Remuneration Commission to enable them perform official duties.
 - iv. That the demand for tax and the Objection decision therefore violate the Appellant's legitimate expectation that Section 5 (2) (a) (ii) of the *Income Tax Act*.
- d. Strict interpretation of tax legislation
- i. That the Respondent erred in law and in fact in violating the well-settled maxim of income tax law that a subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him.
 - ii. That Section 3 (2) (a) (ii) which the Respondent seeks to rely on in making the current demand provides that income upon which tax is chargeable under this Act is income in respect of gains or profits from any employment or services rendered.
 - iii. That Article 210(1) of *the Constitution* provides - "No tax or licensing fee may be imposed, waived or varied except as provided by legislation." and therefore all tax imposed must be clearly provided for in legislation.
 - iv. That in the present case, the Salaries and Remuneration Commission has clearly stipulated that the Members of Parliament are provided with a Motor Vehicle Reimbursement the purpose of which is to enable Members of Parliament to perform their official duties.
 - v. That the Commissioner erred in failing to consider that members of Parliament are not employees within the meaning of Section 5(2B) of the *Income Tax Act* and therefore tax may not be imposed upon them based on this provision.
 - vi. That the Commissioner erred in law and in fact in failing to consider that a Motor Vehicle reimbursement to perform Constitutional functions is not a gain or profit from employment or services rendered and therefore the attempt to impose tax based on Section 3(2) (a) (ii) of the *Income Tax Act* is not founded on proper principles of tax legislation.
 - vii. That therefore, the Objection decision on the Motor Vehicle reimbursement was erroneous in law and in fact as the reimbursement is expended by Members of Parliament wholly and exclusively in the performance of their official duties and therefore, being a reimbursement of expenses, is properly excluded from gains or profits under Section 5 (2) (ii) of the *Income Tax Act*.

The Appellant's Case

9. The Appellant's case is premised on the following documents filed before the Tribunal;
- i. Its Statement of Facts dated 19th July 2023 and filed on 20th July 2023.
 - ii. Its written submissions dated 14th February 2024.
 - iii. Its supplementary written submissions dated 20th August 2024.



10. The Appellant stated that by letters dated 8th March 2023, the Public Sector Division of the Respondent wrote to the Clerk of the Senate/Secretary, Parliamentary Service Commission and the Clerk of the National Assembly on PAYE on Motor Vehicle grants/reimbursement.
11. That members of the National Assembly and the Senate were to be held liable to pay income tax on the Motor Vehicle reimbursement provided to Members of Parliament once every Parliamentary term as set by the Salaries and Remuneration Commission.
12. That on 27th July 2022, the Salaries and Remuneration Commission issued a Gazette Notice Number 8793 headed "Remuneration and Benefits for State Officers in the Senate and the National Assembly" and provided as follows with regards to the provision of a motor vehicle for Members of Parliament:

“(ii) Member of Parliament: Shall be provided with a Motor Vehicle Reimbursement of Ksh 7,550,000 for purchase of a car of engine capacity not exceeding 3000cc to undertake official duties as a Member of Parliament. The Motor Vehicle reimbursement shall be payable to a Member of Parliament once in a Parliamentary term.”

13. The Appellant submitted that the Respondent was seeking to rely on Section 3 (2) (a) (ii) of the [Income Tax Act](#) to compute tax on the Members of the National Assembly and the Senate as follows:

-	No. of Members	Chargeable Income as per the SRC Rate	PAYE @30%	Penalty @5%	Interest @1% per month	Total Tax Due
National Assembly	349	2,634,950,000	790,485,000	39,524,250	47,429,100	877,438,350
Senate	67	50,5850,000	151,755,000	7,587,750	9,105,300	168,448,050
Total	-	-	-	-	-	1,045,886,400

14. The Appellant gave the historical background stating that on 13th October 2021 the Parliamentary Service Commission held a consultative meeting with the following officers from the Respondent:
 - a. Ms. Rispah Simiyu, the Commissioner of Domestic Tax.
 - b. Mr. Moses Nyagiye, the Ag. Deputy Commissioner, Public Sector Division.
 - c. Ms. Alice Kiptoo-Chief Manager, Public Sector Relations.
 - d. Mr. Maurice Mudiga-Stakeholder Engagement.
 - e. Ms. Barbara Mududa-Stakeholder Engagement
15. That during the consultative meeting, the question of whether mileage payments are a reimbursement or an allowance was raised.
16. That the Respondent explained that mileage claims are intended to indemnify Members of Parliament for travel to their constituency offices and were pegged on AA rates at distances determined by the Ministry of Public Works.



17. That further, the Respondent clarified that all reimbursable claims, that are intended to indemnify the claimant and that are supported by relevant documentation are not taxable. It averred that it was therefore noted that mileage claims fall within that category and therefore should not be taxable.
18. That in light of the deliberations held at the consultative meeting, it was agreed that-
- a. The Respondent would issue an official communication addressing and clarifying the issues discussed at the meeting, including the matter of mileage reimbursement, by Monday, 18th October, 2021; and
 - b. The Commission would thereafter consider the contents of the letter from the Respondent and thereafter determine its next course of action.
19. That by a letter Ref: CDT/HO/54 dated 19th October 2021, the Commissioner for Domestic Taxes wrote to the Parliamentary Service Commission and stated as follows:

“...During the consultative meeting which took place on 13th October 2021 at the County Hall, Parliament buildings, the Kenya Revenue Authority (KRA) took note of the concerns raised by members on mileage claims and other allowance paid to Members of Parliament and the Senate. Specifically, the Chair, Hon. Justin B. N. Muturi, who is also Speaker of the National Assembly clarified that mileage claims by Members of Parliament are reimbursement made as per SRC's Circular based on AA rates and the distance to the respective Members' constituency/County.

The members further stated that KRA should rely on the audit reports prepared by the Auditor General's office instead of requesting for the said records to conduct a separate review. The Chair subsequently guided the KRA team to consult further and revert to them on the way forward.

In light of the foregoing, we wish to communicate that internal consultations are currently ongoing and once done, we shall revert on the way forward in respect to this matter.”

20. That by a letter ref: P051098787X dated 15th November 2022, Ms. Betty Wachira for the Deputy Commissioner-Public Sector Division of the Respondent wrote to the Director General of the Parliamentary Joint Services and copied the two Clerks of Parliament stating as follows:

“Dear Sir

RE:TAx Advisory On Motor Vehicle Reimbursement And
Car Maintenance Allowances Payable To Parliamentary Employees

The Salaries and Remuneration Commission (SRC) through the Gazette Notice Vol CXXIV NO. 145, Notice NO.8795 reviewed the remuneration and benefits for state officers in the Senate and National Assembly.

We note that Speakers, Deputy Speakers and Members of the Senate and Parliament are employees of the Parliamentary Service Commission. In this respect, any payments or benefits extended to the employees are gains or profits from employment or services rendered upon which tax is charged under Section 3(2)(a) (ii) of the *Income Tax Act* (ITA).

Section 5(2)(a) of the ITA provides that; for the purposes of section 3(2)(a)(ii), “gains or profits” includes wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission,



bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered...'

Consequently, please note that;

- 1) Motor vehicle reimbursement; and
- 2) Car maintenance allowance;

which are payable to the employees of the Commission pursuant to the said Gazette Notice, are income from employment and are subject to tax (PAYE) together with other emoluments payable in the month in which they are paid to the beneficiaries."

21. The Appellant stated that the Parliamentary Service Commission responded vide a letter dated 7th December 2022 as follows:

- “(i) That Members of Parliament are not employees of the Parliamentary Service Commission but duly elected representatives of their constituencies/counties. They serve on a full-time basis and the Salaries and Remuneration Commission has determined that they do not go on leave. They are therefore fully engaged in their responsibilities as Members of Parliament and require at all times to use their tools of trade which include motor vehicles.
- (ii) That there have been consultative meetings on the matters raised in the letter dated 15th November 2022 between the Parliamentary Service Commission and the Commissioner of Domestic Taxes where it was clarified by the Commissioner of Domestic Taxes, that in accordance with the law, all reimbursable claims that are intended to indemnify the tax payer and that are supported by relevant documentation are not taxable. It was therefore noted that motor vehicle reimbursement and mileage claims fall within that category and are therefore not taxable.
- (iii) That the claimable mileage reimbursement is provided as part of the Parliamentary Service Commission's mandate under Article 127 of *the Constitution* of Kenya, 2010 to provide such services and facilities as necessary for the efficient and effective functioning of Parliament. The Commission is further required to take measures to facilitate Members to discharge their mandate as provided for in Articles 94, 95 and 96 of *the Constitution*. The mileage reimbursement is payable at AA rates and covers both the running costs (fuel, servicing, tyre replacement, repair charges, toll charges etc) and standing charges (insurance and depreciation) required to operate a motor vehicle. It is neither a "gain" nor a "profit".
- (iv) That the car maintenance allowance was not a reimbursement and is therefore subjected to tax deduction. The car maintenance allowance is paid through the payroll and taxed at the applicable rates.”



22. That subsequently, the Respondent responded to the letter dated 7th December 2022 vide letters dated 8th March 2023 with an assessment of tax, interest and penalties. That the letter stated as follows:

“Kindly note that we have considered your presentations in regard to this issue but regret to note that our position on the taxability of the car grant remains the same. We therefore advise that PAYE has been computed in line with Section 3(2)(a)(ii) of the *Income Tax Act...*”

23. The Appellant stated that based on this position, the Respondent sought a total of Kshs. 1,045,886,400/- from the Members of Parliament being assessed tax, interest and penalties.

24. That pursuant to Section 51 of the *Tax Procedures Act*, the Parliamentary Service Commission objected to the assessment of PAYE on Motor Vehicle Grants/Reimbursement for Members of the National Assembly and the Senate.

25. On reimbursement the Appellant submitted that this is defined in the Law Dictionary as follows: “The primary meaning of this word is “to pay back.” Philadelphia Trust, etc., Co. v. Audenreid, 83 Pa. 264. It means to make return or restoration of an equivalent for something paid, expended, or lost; to indemnify, or make whole.”

26. That the Motor Vehicle reimbursement is a reimbursement for money expended to purchase a vehicle for official Parliamentary duties and not income. That it is treated as an expenditure by Members of Parliament in discharging their duties for which the Parliamentary Service Commission reimburses the Members in line with its mandate under Article 127 (6) of *the Constitution* to provide services and facilities that ensure the efficient and effective functioning of Parliament and pursuant to the terms set by the Salaries and Remuneration Commission.

27. That Section 5 (2) of the *Income Tax Act* provides as follows:

“(2) For the purposes of section 3(2)(a)(ii) “gains or profits” includes-

- (a) any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income:

Provided that-

- (i) where any such amount is received in respect of a year of income which expired earlier than four years prior to the year of income in which it was received, or prior to the year of income in which the employment or services ceased, if earlier, it shall be deemed to be income of the year of income which expired five years prior to the year of income in which it was received, or prior to the year of income in which the employment or services ceased as the case may be; and



- (ii) where the Commissioner is satisfied that subsistence, travelling, entertainment or other allowance represents solely the reimbursement to the recipient of an amount expended by him wholly and exclusively in the production of his income from the employment or services rendered then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure; and
- (iii) notwithstanding the provisions of subparagraph (ii), where such amount is received by an employee as payment of subsistence, travelling, entertainment or other allowance, in respect of a period spent outside his usual place of work while on official duties, the first two thousand shillings per day expended by him for the duration of that period shall be deemed to be reimbursement of the amount so expended and shall be excluded in the calculation of his gains or profits;"

28. It submitted that a Member of Parliament is required to constantly meet with their constituents and represent their interests in Nairobi by attending Parliamentary and Committee sittings in line with the role of Parliament under Articles 1(2) of *the Constitution* which provides: "(2) The people may exercise their sovereign power either directly or through their democratically elected representatives", and Article 94 of *the Constitution* which provides.

“ 94. Role of Parliament

- (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.
- (2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.
- (3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.
- (4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.
- (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.
- (6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), 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."

29. That indeed, a Member of Parliament who fails to attend the required number of sittings may lose their seat in Parliament and as such, the commute from the constituency or county to Nairobi is in the performance of official duties.
30. The Appellant averred that it was clear from the Salaries and Remuneration circular, that the sole purpose of the Motor Vehicle Reimbursement is to undertake official duties as a Member of Parliament. That further, each Member of Parliament is only entitled to one vehicle in a parliamentary term to enable them perform their official duties. That however, the Respondent did not acknowledge the purpose of the Motor Vehicle Reimbursement which is to facilitate official parliamentary business and therefore does not fit the definition of gain or profit as defined in the *Income Tax Act*.
31. That whereas the Motor Vehicle reimbursement is taken to be an expenditure incurred by Members of Parliament to facilitate travel to the constituencies/counties to undertake their mandate, the Respondent has erroneously attempted to rely on the provisions of Sections 3 (2)(a) (ii) of the *Income Tax Act*.
32. That Section 3 of the *Income Tax Act* provides for the charge of tax as follows:
- “(1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.
- (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of-
- (a) gains or profits from-
- (i) any business, for whatever period of time carried on;
- (ii) any employment or services rendered;
- (iii) any right granted to any other person for use or occupation of property;
- (b) dividends or interest;
- (c)
- (i) a pension, charge or annuity;"and
- (ii) any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund;and
- (iii) any withdrawals from a registered home ownership savings plan;"
33. The Appellant added that the motor vehicle reimbursement paid to Members of Parliament is solely a reimbursement for the amount expended to purchase a motor vehicle for work and is not a gain or profit on the part of the Member of Parliament and is wholly expended in performing their official duties.



34. That Article 89 of *the Constitution* requires delimitation of electoral units and creates constituencies that Members represent in the National Assembly as required under Article 95(1) of *the Constitution*. That with regard to the Senate, Article 96 of *the Constitution* requires that the members of the Senate represent each of the 47 counties that make up the country. That it is therefore clear that as the representatives of the people's sovereignty conferred upon them by Article 1 of *the Constitution*, Members of Parliament need to be present in their various electoral areas and also attend Parliament to represent their constituents.
35. The Appellant asserted that in light of this role of representation that Members play, their official duties require that they commute from the National Parliament in Nairobi to their constituency or county as the case may be.
36. That therefore, the Motor Vehicle reimbursement is expended by Members of Parliament wholly and exclusively in the performance of their official duties and therefore, being a reimbursement of expenses, is properly excluded from gains or profits under Section 5 (2) (ii) of the *Income Tax Act*.
37. It averred that it is important to note that the reimbursement to the Member of Parliament is limited to the amount actually spent to purchase the Motor Vehicle subject to a maximum amount of Kshs. 7,550,000.00. That for instance, where the Member purchases a vehicle for Kshs. 2,000,000.00, they are reimbursed Kshs.2,000,000.00.
38. That however, the assessment of tax demanded assumes that all Members of Parliament have utilized the maximum reimbursement allocation of Kshs.7,550,000.00 and therefore proceeded to demand tax thereon for each Member.
39. The Appellant stated that the Respondent failed to adhere to the finding of the High Court in Republic-vs-Commissioner General Kenya Revenue Authority & 2 Others ex-parte Dock Workers Union (K) [2016] eKLR and therefore erroneously demanded tax, interest and penalties on the Motor Vehicle reimbursement contrary to Section 5 (2) (ii) of the *Income Tax Act*.
40. The Appellant stated that in the United Kingdom, Canada and many other countries, business expenses are usually tax-deductible. That when taxpayers travel by plane, train or taxi, they can claim the money back and their employer can claim tax relief.
41. It added that in the United Kingdom, the Independent Parliamentary Standards Authority, which is the independent body that regulates and administers the business costs and decides the pay and pensions of Members of Parliament, has made provision to facilitate travel for Members of Parliament from the Constituency to Westminster. That Paragraph 9.3 of The Scheme of MPs' Staffing and Business Costs 2022-23 provides that a Member of Parliament's may claim for travel and subsistence costs relating to the following types of journeys:
 - a. Journeys between London and the MP's constituency
 - b. Journeys within the MP's constituency
 - c. Extended UK travel, meaning travel to another location in the United Kingdom not falling under a. or b.;
42. That further in Canada's case, the Parliament of Canada provides travel resources to Members in the fulfillment of their Parliamentary functions.



43. That in Australia, the Commissioner of Taxation in Taxation Ruling TR 1999/10, considered the income tax and fringe benefits tax of Members of Parliament-allowances, reimbursements, donations and gifts, benefits, deductions and recoupments.
44. The Appellant averred that in this question of reimbursements of Members of Parliament, the Commissioner in Taxation Ruling TR 92/15 observed as follows:

“Reimbursements

65. If a Member is compensated for an expense already incurred, the payment is a reimbursement
66. Where a reimbursement of a deductible expense is a fringe benefit under the FBTAA, any deduction otherwise allowable to a Member is reduced by the amount of the reimbursement (Section 51AH of the ITAA 1936). Where the actual expense incurred is reimbursed, no part of the reimbursement is included in a Member's assessable income, and no part of the expense is allowable as a deduction.”
45. That the South African *Income Tax Act*, 1962 also excludes reimbursements from the calculation of taxable income. That Section 8(1)(a)(ii) of the South African *Income Tax Act*, 1962 provides:

“8. Certain amounts to be included in income or taxable income

- (ii) There shall not be included in the taxable income of a person in terms of the provisions of paragraph (a) (i), any amount paid or granted by a principal in reimbursement of, or as an advance for, any expenditure incurred or to be incurred by the recipient-

(aa)

- (A) on the instruction of his or her principal; or
- (B) where the recipient is allowed by his or her principal to incur expenditure on meals and other incidental costs while such recipient is by reason of the duties of his or her office or employment obliged to spend a part of a day away from his or her usual place of work or employment, not exceeding an amount determined by way of notice in the Gazette in the furtherance of the trade of that principal; and (bb) where that recipient must produce proof to that principal that such expenditure was wholly incurred as aforesaid and must account to that principal for that expenditure:



Provided that where that expenditure was incurred to acquire any asset, the ownership in that asset must vest in that principal..."

46. Regarding interpretation of tax legislation, the Appellant stated that Section 3 (2) (a) (ii) which the Kenya Revenue Authority seeks to rely on in making the current demand provides as follows:
- “ 2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of-
- (a) gains or profits from-
- (i) any business, for whatever period of time carried on;
- (ii) any employment or services rendered;
- (iii) any right granted to any other person for use or occupation of property;”
47. That Article 210(1) of *the Constitution* provides - "No tax or licensing fee may be imposed, waived or varied except as provided by legislation." and therefore all tax imposed must be clearly provided for in legislation.
48. That the Respondent failed to properly apply the principles guiding tax legislation as set out in Republic v Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd[2012] eKLR.
49. That in the present case, the Salaries and Remuneration Commission has clearly stipulated that the Members of Parliament are provided with a Motor Vehicle reimbursement the purpose of which is to enable Members of Parliament to perform their official duties.
50. The Appellant explained that Members of Parliament are not employees within the meaning of Section 5(2B) of the *Income Tax Act* and therefore tax may not be imposed upon them based on this provision.
51. That further, a Motor Vehicle reimbursement to perform Constitutional functions is not a gain or profit from employment or services rendered and therefore the attempt to impose tax based on Section 3(2) (a) (ii) of the *Income Tax Act* was not founded on proper principles of tax legislation.
52. That in response to the Objections by the Clerk of the Senate/Secretary, Parliamentary Service Commission and the Clerk of the National Assembly, the Commissioner rendered an Objection decision dated 29th May, 2023 rejecting the Appellant's Objection.
53. The Appellant stated that the Respondent's interpretation of gains or profits as defined in Section 5(2) of the *Income Tax Act* was erroneous and violates Section 5 (2) (a)(ii) of the *Income Tax Act* which exempts reimbursements, to recipients of an amount expended by a person wholly and exclusively in the production of their income from the definition of gains or profits.
54. That the Respondent further failed to apply the definition of reimbursement that-the primary meaning of a reimbursement is "to pay back, to make return or restoration of an equivalent for something paid, expended, or lost; to indemnify, or make whole."



55. That in so far as the Motor Vehicle reimbursement is a reimbursement to Members of Parliament for money expended to purchase a vehicle for official parliamentary duties and, the reimbursement is expended solely for the purpose of performing official duties and is therefore not income.
56. The Appellant posited that under Article 127 (6) of *the Constitution*, the Parliamentary Service Commission has the mandate to provide services and facilities that ensure the efficient and effective functioning of Parliament and pursuant to the terms set by the Salaries and Remuneration Commission and in failing to distinguish the facilities that the Salaries and Remuneration Commission has provided Members of Parliament to enable them perform their official duties from income, the Respondent's decision was erroneous.
57. That in light of the foregoing, the Respondent misinterpreted Section 5(2) (a) (ii) of the *Income Tax Act* which explicitly provides that reimbursements for amounts wholly expended in the production of income does not amount to a gain or profit.
58. The Appellant submitted that the Respondent's decision failed to consider that the Motor Vehicle reimbursement is to enable a Member of Parliament meet the requirement to constantly meet with their constituents and represent their interests in Nairobi by attending Parliamentary and Committee sittings in line with the role of Parliament under Articles 1(2) and Article 94 of *the Constitution*.
59. That based on the Salaries and Remuneration circular, the sole purpose of the Motor Vehicle reimbursement is to undertake official duties as a Member of Parliament and any personal or private consequences are purely incidental therefore the reimbursement is not a gain or profit.
60. That the Respondent therefore erred in failing to acknowledge that the purpose of the Motor Vehicle reimbursement is to facilitate official Parliamentary business and therefore does not fit the definition of gain or profit as defined in the *Income Tax Act*.
61. That the Respondent erroneously attempted to apply the provisions of Sections 3 (2) (a) (ii) of the *Income Tax Act* to the Motor Vehicle reimbursement paid to Members of Parliament despite the same being solely a reimbursement for the amount expended to purchase a motor vehicle for work and not a gain or profit on the part of the Member of Parliament and is wholly expended in performing their official duties.
62. It averred that in the Objection decision, the Respondent failed to uphold Article 89 of *the Constitution* which requires delimitation of electoral units and creates constituencies that Members represent in the National Assembly as required under Article 95(1) of *the Constitution* and with regard to the Senate, Article 96 of *the Constitution* requires that the Members of the Senate represent each of the 47 counties that make up the Country.
63. That in addition, the Objection decision violates Article 1 of *the Constitution* which confers the people's sovereignty on Members of Parliament and in this regard therefore, Members of Parliament need to be present in their various electoral areas and also attend Parliament to represent their Constituents.
64. The Appellant stated that in failing to uphold the representation role that Members of Parliament play and that in their official duties, Members of Parliament are required to commute from the National Parliament in Nairobi to their Constituency or county as the case may be, the same amounts to violation of Constitutional principles.
65. That owing to the errors of law and fact, the Respondent erroneously demanded tax, interest and penalties on the Motor Vehicle reimbursement contrary to Section 5(2)(ii) of the *Income Tax Act* and erroneously rejected the Appellant's Objection.



66. The Appellant submitted that the impugned tax decision violated the Appellant's legitimate expectation that the motor vehicle reimbursement which the Salaries and Remuneration Commission grants Members of Parliament to perform official duties is within the definition in Section 5 (2) (a) (ii) of the *Income Tax Act* that an amount expended by a person wholly and exclusively in the production of his income from the employment or services rendered, then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure.
67. That in the Objection decision, the Respondent failed to consider the Salaries and Remuneration Circular, which provided for a reimbursement for the amount expended by a Member of Parliament to purchase a motor vehicle solely to undertake official Parliamentary duties.
68. That the Members of Parliament therefore have a legitimate expectation that the Section 5 (2) (a) (ii) of the *Income Tax Act* would be properly applied to the amounts expended by the Salaries and Remuneration Commission to enable them perform official duties.
69. That the demand for tax and the Objection decision therefore violate the Appellant's legitimate expectation.
70. The Appellant reiterated that the Respondent erred in law and in fact in violating the well-settled maxim of income tax law that a subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him.
71. That Section 3 (2) (a) (ii) which the Respondent seeks to rely on in making the current demand provides that income upon which tax is chargeable under this Act is income in respect of gains or profits from any employment or services rendered.
72. That Article 210(1) of *the Constitution* provides - "No tax or licensing fee may be imposed, waived or varied except as provided by legislation." and therefore all tax imposed must be clearly provided for in legislation.
73. That in the present case, the Salaries and Remuneration Commission had clearly stipulated that the Members of Parliament are provided with a Motor Vehicle Reimbursement the purpose of which is to enable Members of Parliament to perform their official duties.
74. That the Respondent erred in failing to consider that members of Parliament are not employees within the meaning of Section 5(2B) of the *Income Tax Act* and therefore tax may not be imposed upon them based on this provision.
75. That Members of Parliament are duly elected representatives of the people. That the provisions of the *Employment Act* do not apply to them and the ingredients of an employer-employee relationship such as appointment, discipline, working hours, dismissal etc do not apply to Members of Parliament.
76. The Appellant averred that the Respondent erred in law and in fact in failing to consider that a Motor Vehicle reimbursement to perform Constitutional functions is not a gain or profit from employment or services rendered and therefore the attempt to impose tax based on Section 3(2) (a) (ii) of the *Income Tax Act* is not founded on proper principles of tax legislation.
77. That therefore, the Objection decision on the Motor Vehicle Reimbursement was erroneous in law and in fact as the reimbursement is expended by Members of Parliament wholly and exclusively in the performance of their official duties and therefore, being a reimbursement of expenses, is properly excluded from gains or profits under Section 5 (2) (ii) of the *Income Tax Act*.



Appellant's Prayers

78. The Appellant's prayer to the Tribunal was for orders that:
- a. This Appeal be allowed.
 - b. The decision of the Commissioner given at Nairobi on the 29th day of May 2023 be set aside and vacated in its entirety.
 - c. The costs of and incidental to this Appeal be awarded to the Appellant.
 - d. Any other or further order(s) as the Tribunal may deem appropriate to grant in the circumstances of this case.

Respondent's Case

79. The Respondent case is premised on the following documents filed before the Tribunal
- a. Its Statement of Facts dated 15th August 2023.
 - b. Its written submissions filed on 27th February 2024.
 - c. Its supplementary submissions filed on 19th August 2024.
80. The Respondent averred that the Salaries & Remuneration Commission through Gazette Notice dated 27th July 2022 Vol. CXXIV, No.145 No.8795 reviewed the remuneration of and benefits for State Officers and the National Assembly.
81. The Respondent stated that it wrote to the Director of the Parliamentary Joint Ventures on 15th November 2022 advising them pursuant to the Legal Notice above, that Motor Vehicle Reimbursement and Car Maintenance allowance paid to the Speakers, Deputy Speakers and Members of Parliament were subject to Income tax.
82. That the Respondent informed the Appellant that payments made to the Speakers, Deputy Speakers, Members of the National assembly and Senate amounted to gains or profits from employment which is subject to tax under Section 3(2)(a) (ii) of the *Income Tax Act*.
83. That the Clerk of the Senate in a letter dated 7th December 2022 wrote to the Respondent indicating that car maintenance allowance is not reimbursement and is therefore subjected to tax deduction. The car maintenance allowance was paid through payroll and taxed at the applicable rates.
84. That on 8th March 2023, the Respondent wrote to the Clerk of the Senate and the Clerk of the National Assembly demanding for settlement of PAYE computed on the Motor Vehicle Reimbursements and a demand of KShs. 168,448.050 inclusive of penalties and interest was issued to the clerk of the Senate. That further, a demand of KShs.877,438,350.00 Inclusive of penalties and interest was issued to the clerk of the National Assembly.
85. The Respondent further averred that vide a letter dated 12th April 2023 it requested the Appellant to provide additional documents. That the Appellant objected to the demand on 27th March 2023.
86. The Respondent stated that it issued its Objection decision on 11th May 2023 confirming PAYE of KShs.1,045,886,400.00 inclusive of penalties and interest.
87. The Respondent was of the view that the following were the issues for determination in this Appeal.



- i. Whether Motor Vehicle reimbursements are gains and/or profits chargeable to tax under the *Income Tax Act*.
 - ii. Whether the Respondent erred in charging PAYE to the Motor Vehicle reimbursements.
 - iii. Whether the Appellant discharged its burden of proof.
 - iv. Whether the Respondent breached the Appellant's legitimate expectation.
88. That Section 3 (2(a) (ii) of the *Income Tax Act* provides that;
- “Subject to this Act, income upon which tax is chargeable under this Act is income in respect of-
- a. gains or profits from-
 - i. any business, for whatever period of time carried on;
 - ii. any employment or services rendered;
 - iii. any right granted to any other person for use or occupation of property;”
89. It was the Respondent's contention that gains that accrue to a person including Speakers, Deputy Speakers and MPs from employment or services rendered should be subjected to Income Tax.
90. That the Speaker, Deputy Speaker and MPs are employees of the Appellant and any payments or benefits extended to them by the government are treated as income from employment or services rendered.
91. It averred that the Salaries and Remuneration Commission vide a Gazette Notice of 27th July 2022 reviewed the Speakers, Deputy Speakers and MPs' Motor Vehicle reimbursements payable once in a Parliamentary term. The Gazette Notice provided that;
- “Members of parliament shall be provided with a motor vehicle reimbursement of Kshs 7,550,000 for the purchase of a car engine capacity not exceeding 3000cc to undertake official duties as an MP. The reimbursement shall be payable to a member of parliament once in a parliamentary term.”
92. The Respondent stated that the Speakers, Deputy Speakers and MPs are allowed to buy cars of their choice and the amount spent is refunded on condition that it is capped at Kshs 7,550,000. That further, the Speakers, Deputy Speakers and MPs register the Motor Vehicles in their name and are in full control of the Motor vehicle during pendency of the parliamentary period.
93. That in addition, the Speakers, Deputy Speakers and MPs retain the Motor Vehicles after the expiry of the parliamentary term with the option of disposing the same and retaining the proceeds of the disposal. That this amounts to a gain by the Speakers, Deputy Speakers and MPs.
94. The Respondent contended that the cases cited by the Appellant from South Africa Australia expressly provide that a reimbursement is applicable where the ownership is on the principal and not the recipient. That in the present case, the Appellant is the recipient of the motor vehicle.



95. That further, every time Speakers, Deputy Speakers and MPs are re-elected for a new term in office, the same benefit is granted. That it does not matter that one had enjoyed the benefit previously.
96. The Respondent insisted that the motor vehicle reimbursement is therefore a gain which accrues to the Speakers, Deputy Speakers and MPs by virtue of the position they hold and the services they render.
97. That the Motor Vehicle reimbursement is a cash benefit which the Speakers, Deputy Speakers and MPs are entitled by virtue of the offices they hold and they get the same in the course of their employment with the Parliament.
98. That the Motor Vehicle reimbursement does not indemnify the Speakers, Deputy Speakers and MPs from anything, in actual sense it is simply a benefit issued to them just as housing allowance accorded to other employees of other government and private entities. That the housing allowance is not an indemnification for the rent but a benefit to the employee and that is the correct nature of the motor vehicle reimbursement benefit.
99. That Section 5(2) (a) (ii) of the [Income Tax Act](#) provides that;

“For the purposes of section 3(2)(a)(ii) "gains or profits" includes-

- a. any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income:

Provided that-

- i. Where any such amount is received in respect of a year of income which expired earlier than four years prior to the year of income in which it was received, or prior to the year of income in which the employment or services ceased, if earlier, it shall be deemed to be income of the year of income which expired five years prior to the year of income in which it was received, or prior to the year of income in which the employment or services ceased as the case may be; and
- ii. Where the Commissioner is satisfied that subsistence, travelling, entertainment or other allowance represents solely the reimbursement to the recipient of an amount expended by him wholly and exclusively in the production of his income from the employment or services rendered then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure; and
- iii. Notwithstanding the provisions of subparagraph (ii), where such amount is received by an employee as payment of subsistence, travelling, entertainment or other allowance, in respect of a period spent outside his usual place of work while on official duties, the first two thousand shillings per day expended by him for the duration of that period shall be deemed to be



reimbursement of the amount so expended and shall be excluded in the calculation of his gains or profits.”

100. The Respondent stated that from the above provisions, any payment which is received by any employee of whichever class, in the course of employment or services rendered is income chargeable to tax no matter how it is named as long as it is a benefit unless specifically exempted by a written statute.
101. That in addition, the First Schedule of the *Income Tax Act* does not provide for Motor Vehicle Reimbursement or car grants as part of income exempted from income tax.
102. The Respondent averred that Article 210 of *the Constitution* of Kenya 2010 provides that-No tax or licensing fee may be imposed, waived or varied except as provided by legislation.
103. The Respondent stated that the Motor Vehicle reimbursements paid to the Speakers, Deputy Speakers and MPs is paid in cash and it therefore qualifies as income from employment as other allowances and/or any amount so received in respect of employment or services rendered.
104. The Respondent contended that for an amount to be excluded from gains in calculation of taxable income, the amount must have been wholly and exclusively been used in production of income.
105. That the Motor Vehicle bought by the Speakers, Deputy Speakers and MPs is used for their official and personal benefits during their tenure and ownership is retained even after their term ends.
106. The Respondent contended that the motor vehicle is used for two purposes; personal and official use and is therefore not wholly and exclusively used in production of income.
107. That there was no law exempting the Speakers, Deputy Speakers and/or MPs from taxation of the Motor Vehicle reimbursement benefit received in the course of their employment.
108. That in view of Section 5 (2) (a) (ii) as read together with Section 3(2)(a), cash and none cash benefits however named, is subject to tax together with the other emoluments under the PAYE system in the month it is disbursed to the beneficiaries.
109. The Respondent further contended that it did not err in interpreting Section 5(2) of the *Income Tax Act*. That the motor vehicle reimbursement is a benefit chargeable to tax under Section 5 (2) (a) (ii) and 35 of the *Income Tax Act* as read with the PAYE Regulations.

ii. Whether the Respondent erred in charging PAYE to the Motor Vehicle reimbursements.

110. That Section 29 (1) of the Tax Procedure Act provides that;

“Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement make an assessment (referred to as a "default assessment") of-

- a. the amount of the deficit in the case of a deficit carried forward under the *Income Tax Act* (Cap.470) for the period;
- b. the amount of the excess in the case of an excess of input tax carried forward under the *Value Added Tax Act*, 2013 (No.35of 2013), for the period; or
- c. the tax (including a nil amount) payable by the taxpayer for the period in any other case.”



111. That further, Section 31 (1) of the Tax Procedure Act provides that;

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

- a. in the case of a deficit carried forward under the *Income Tax Act* (Cap.470), the taxpayer is assessed in respect of the correct amount of the deficit carried forward for the reporting period;
- b. in the case of an excess amount of input tax under the *Value Added Tax Act*, 2013 (No. 35 of 2013), the taxpayer is assessed in respect of the correct amount of the excess input tax carried forward for the reporting period; or
- c. in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates.”

112. The Respondent stated that it is mandated to issue a default assessment where a return has not been filed and/or an additional assessment to ensure that the correct amount of tax is paid.

113. That it established that the Motor Vehicle reimbursement paid to Speakers, Deputy Speakers and MPs amounted to a gain in the course of employment and the same had not been subject to tax. That the Respondent therefore proceeded to subject the same to tax according to the provision of the *Income Tax Act*.

iii. Whether the Appellant discharged its burden of proof.

114. The Respondent submitted that Section 56 (1) of the Tax Procedure Act provides that;

“In any proceedings, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”

115. The Respondent stated that it subjected the Motor Vehicle reimbursement to PAYE in accordance with the provision of the *Income Tax Act*. That the Appellant needed to provide documents which would prove that the Motor Vehicle reimbursements were not subject to tax.

116. The Respondent stated that, in absence of any documents to proof that the assessment was incorrect, the Appellant failed to discharge its burden of proof and the Respondent was correct in partially confirming the assessment.

117. That Section 59 of the Tax Procedure Act 2015 allows the Respondent to request for additional documents which are essential and necessary to establish the tax obligation of a taxpayer such as the Appellant.

118. The Respondent averred that it wrote to the Appellant requesting for copies of the motor vehicle reimbursements application forms. That however the same were not availed.

119. That the Appellant provided some of the documents however none of the documents was relevant to the issue of whether or not the car grants/ reimbursements granted to the Speakers, Deputy Speakers and MPs were not subject to Income tax.



120. That Section 30 the *Tax Appeals Tribunal Act* provides that;

“In a proceeding before the Tribunal, the appellant has the burden of proving-

- a. where an appeal relates to an assessment, that the assessment is excessive; or
- b. in any other case, that the tax decision should not have been made or should have been made differently.”

121. The Respondent stated that the Appellant had not placed any material before the Tribunal to prove that the assessment made by the Respondent was excessive or should have been made differently.

122. The Respondent contended that the Appellant had not discharged its burden of proof before the Respondent and the Tribunal and thus the Respondent’s objection decision should be upheld.

iv. Whether the Respondent breached the Appellant’s Legitimate expectation.

123. The Respondent stated that a legitimate expectation can only operate within the confines of the law and it can only be legitimate if founded on law. That further, legitimate expectation can only be created in a clear and uncontroverted statements predicated upon the law.

124. The Respondent averred that *the Constitution* of Kenya 2010, Article 210 (3) provides- “No law may exclude or authorize the exclusion of a state officer from payment of taxes by reason of-

- (a) The office held by the state officer; or
- (b) The nature of the work of the state officer”

125. The Respondent contended that failure to subject the Motor Vehicle reimbursement which is a gain to the provision of the *Income Tax Act* would be against the law which is the very spirit of the doctrine of legitimate expectation.

126. The Respondent further contended that it has a duty to ensure equity in taxation, that is tax should be levied on citizens on the basis of equality. That the sacrifice of all citizens must be equal. That in the words of Adam Smith “The subject of every state ought to contribute towards the support of the Government, as nearly as possible, in proportion to their respective abilities, that is, in proportion to their revenue which they respectively enjoy under the protection of the state.”

Respondent’s Prayers

127. The Respondent’s prayer to this Tribunal was for orders that:

- a. The Appeal be dismissed with costs.
- b. The additional assessments be confirmed.
- c. The principal taxes and interest be found due and payable as per the objection decision rendered by the Respondent.

Issue for Determination

128. The Tribunal has gleaned through the pleadings and documents filed by the parties in this appeal and is of the view that the only issue falling for its determination is: Whether the Respondent was justified to charge tax on motor vehicle reimbursements.



Analysis And Determination

129. The Tribunal shall analyse the issue that has fallen for its determination as hereunder.
130. The genesis of this dispute is the Respondent's decision to charge tax on amounts paid to Speakers, Deputy Speakers and MPs and which were described as Motor Vehicle reimbursements. The key issue here is whether these monies paid by the Appellant are chargeable to tax under the ITA.
131. Section 3(2) of the ITA provides as follows regarding the specific income that is taxable:
- “(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of-
- (a) gains or profits from –
- (i) a business, for whatever period carried on;
- (ii) employment or services rendered
- (iii) a right granted to another person for use or occupation of property;
132. According to the Appellant, the Motor Vehicle reimbursement is a reimbursement for money expended to purchase a vehicle for official parliamentary duties and not income. That it is treated as an expenditure by Members of Parliament in discharging their duties for which the Parliamentary Service Commission reimburses the Members in line with its mandate under Article 127 (6) of *the Constitution* to provide services and facilities that ensure the efficient and effective functioning of Parliament and pursuant to the terms set by the Salaries and Remuneration Commission.
133. That a Member of Parliament is required to constantly meet with their constituents and represent their interests in Nairobi by attending parliamentary and committee sittings in line with the role of Parliament under Articles 1(2) of *the Constitution*.
134. The Appellant averred that it was clear from the Salaries and Remuneration Commission circular, that the sole purpose of the Motor Vehicle reimbursement is to undertake official duties as a Member of Parliament. That further, each Member of Parliament is only entitled to one vehicle in a parliamentary term to enable them perform their official duties. That however, the Respondent did not acknowledge the purpose of the Motor Vehicle Reimbursement which is to facilitate official parliamentary business and therefore does not fit the definition of gain or profit as defined in the *Income Tax Act*.
135. The Respondent on its part averred that gains that accrue to a person including Speakers, Deputy Speakers and MPs from employment or services rendered should be subjected to Income tax.
136. That the Speaker, Deputy Speaker and MPs are employees of the Appellant and any payments or benefits extended to them by the Government are treated as income from employment or services rendered.
137. It averred that the Salaries and Remuneration Commission vide a Gazette Notice of 27th July 2022 reviewed the Speakers, Deputy Speakers and MPs' Motor Vehicle reimbursements payable once in a Parliamentary term.



138. The Tribunal notes that in the Gazette Notice by the Salaries and Remuneration Commission dated 27th July 2022 titled ‘REMUNERATION AND BENEFITS FOR STATE OFFICERS IN THE SENATE AND NATIONAL ASSEMBLY’ stated in part (b) that;

“Official transport

- i. Speakers of the Senate and National Assembly: Shall be provided with an official car of engine capacity not exceeding 3000cc.
- ii. Member of Parliament shall be provided with Motor Vehicle reimbursement of Kshs 7,550,000 for purchase of a car of engine capacity not exceeding 3000cc to undertake official duties as a member of Parliament. The Motor Vehicle reimbursement shall be payable to a member of Parliament once on a parliamentary term.
- iii. Car maintenance Allowance: Shall be paid to a Member of Parliament at the rate of Ksh 356,525 per month.
- iv. ...”

139. Although the Appellant had averred that the Members of Parliament were not employees of the Parliamentary Service Commission, from the above-mentioned Gazette Notice the Speakers of Parliament and Members of Parliament are recognized by the SRC as state officers.

140. It is further crucial to note that *the Constitution* of Kenya 2010 defines State Officers as:

“State office” means any of the following offices—

- (a) President;
- (b) Deputy President;
- (c) Cabinet Secretary;
- (d) Member of Parliament;
- (e) Judges and Magistrates;
- (f) member of a commission to which Chapter Fifteen applies;
- (g) ...”

141. It follows therefore that Members of Parliament are subject to employment terms under by Parliamentary Service Commission just like other state officers in other Commissions such as Judges are under Judicial Service Commission.

142. It is the Tribunal’s view that the Members of Parliament are employees of the Parliamentary Service Commission.

143. The Tribunal further notes that as asserted by the Respondent, which assertion has not been controverted in any way, that the Members of Parliament register the motor vehicles in their personal names and further retain the motor vehicle after the expiry of the parliamentary term with the option of disposing the same and retaining the proceeds of the disposal. This in itself amounts to a direct gain to each of the state officer.



144. The Tribunal in the circumstances finds that the Motor Vehicle Reimbursement to the Members of Parliament are gains from employment that is subject to tax as provided for under Section 3(2) of the *Income Tax Act*.

145. Further, Section 5(2) of the *Income Tax Act* provides as follows regarding gains and profits;

“For the purposes of section 3(2)(a)(ii) “gains or profits” includes—

- (a) any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income:

Provided that—

- (i) where any such amount is received in respect of a year of income which expired earlier than four years prior to the year of income in which it was received, or prior to the year of income in which the employment or services ceased, if earlier, it shall be deemed to be income of the year of income which expired five years prior to the year of income in which it was received, or prior to the year of income in which the employment or services ceased as the case may be; and
- (ii) where the Commissioner is satisfied that subsistence, travelling, entertainment or other allowance represents solely the reimbursement to the recipient of an amount expended by him wholly and exclusively in the production of his income from the employment or services rendered then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure; and
- (iii) notwithstanding the provisions of subparagraph (ii), where such amount is received by an employee as payment of subsistence, travelling, entertainment or other allowance, in respect of a period spent outside his usual place of work while on official duties, the first two thousand shillings per day expended by him for the duration of that period shall be deemed to be reimbursement of the amount so expended and shall be excluded in the calculation of his gains or profits;”

146. From the above provision of the law read together with Section 3(2)(a)(ii) ITA it is clear that the Motor Vehicle Reimbursements is subject to tax under ITA.



147. The Tribunal reiterates the position taken by the court in the case of Mount Kenya Bottlers Limited & 3 Others V Attorney General & 3 Others [2012] eKLR, Hon Lenaola J cited a statement by Justice G. P. Singh who stated that.

” Whether the taxation imposed is unfair, harsh or inequitable cannot be the reason for holding that it should not be imposed. It is the duty of the state to impose taxation and it is the duty of its subjects to pay such taxes as are so imposed.”

148. Similarly, in T.M. Bell v Commissioner of Income Tax [1960] EALR 224 Roland J. Stated:

“ ... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”

149. Accordingly, the Tribunal determined that the Respondent was justified to charge tax on Motor Vehicle reimbursements.

Final Decision

150. The upshot of the foregoing analysis is that the Tribunal finds that the Appeal lacks merit and accordingly proceeds to make the following Orders:

- a. The Appeal be and is hereby dismissed.
- b. The Respondent’s Objection decision dated 29th May 2023 be and is hereby upheld.
- c. Each party is to bear its own costs.

25. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2024.

ERIC NYONGESA WAFULA

CHAIRMAN

GLORIA A. OGAGA

MEMBER

DR. RODNEY O. OLUOCH

MEMBER

ABRAHAM K. KIPROTICH

MEMBER

