Judiciary v Commissioner of Domestic Taxes (Appeal E714 of 2023) [2024] KETAT 1584 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KETAT 1584 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

APPEAL E714 OF 2023

E.N WAFULA, CHAIR, G OGAGA, RO OLUOCH, AK KIPROTICH & CYNTHIA B. MAYAKA, MEMBERS

OCTOBER 25, 2024

BETWEEN

THE JUDICIARY ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

Background

1. The Appellant is one of three co-equal arms of the Government of Kenya. It is the independent body responsible for the administration of justice in Kenya, deriving its mandate from Article 159 of *the Constitution* of Kenya, which donates judicial authority from the people and vests it in the courts and tribunals established under *the Constitution*.

2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*. The Kenya Revenue Authority 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 dispute in this Appeal arose when the Respondent carried out a compliance check on the Appellant for the period 1st July 2016 to 31st December 2021 for PAYE (Pay as You Earn Tax) Withholding Income Tax (WHT), Withholding VAT (WHVAT), Value Added Tax (VAT) Corporation tax and Value Added Tax (VAT) resulting in compliance check tax demand of Kshs 3,757,648,922.00 dated 8th June 2023.

4. The Appellant objected to the compliance tax demand vide a notice of objection dated 6th July 2023 and the Respondent issued its objection decision on 11th September 2023 varying the assessment from Kshs 3,757,648,922.00 to Kshs 351,002,246.00.

5. Aggrieved by the Respondent's decision, the Appellant lodged a Notice of Appeal to the Tribunal dated 9th October, 2023 and filed on 11th October, 2023.

The Appeal

6. The Appellant's Appeal is premised on its Memorandum of Appeal dated and filed on 24th October 2023. The said Appeal was premised on the following grounds:

    a. That the Respondent erred in law and fact by finding that the Appellant was liable to pay Fringe Benefits Tax on the staff mortgage and car loan scheme.

    b. That the Respondent failed to appreciate that the Judiciary's rental income and commissions on third-party deductions were remitted in whole to the National Treasury by the Chief Registrar of the Judiciary who is a collector of revenue on behalf of the Cabinet Secretary for the National Treasury, and that no tax remains payable there-from.

    c. That the Respondent erred in law and fact by finding that the Appellant was liable to pay VAT on rental income and Commissions on third-party deductions.

    d. That the Respondent erred in law in finding that the Appellant is subject to payment of Corporation tax on rental income, interest income and commissions on third-party deductions.

    e. That the Respondent erred in law and fact by finding that the Appellant did not remit withholding income tax including non-remittance of withheld taxes and non-deduction of withheld taxes.

    f. That the Respondent misdirected himself by finding that the Appellant did not sufficiently support the claim of voided transactions on withholding VAT deducted and not remitted and for payments made and not subjected to withholding VAT.

    g. That the Respondent erred in the assessment of total tax owed to the Authority.

The Appellant's Case

7. The Appellant's case is premised on its Statement of Facts dated 23rd October 2023 and filed on 24th October 2023.

8. The Appellant stated that the demand made against it by the Respondent was made up of the following:

    i. On PAYE (Fringe Benefits Tax), the Respondent asserted that the Appellant's employees enjoy mortgages and car loan facilities below the Commissioner's prescribed rates. That these benefits are taxable under Section 5 of the *Income Tax Act* but the Judiciary had not been charging and remitting the tax resulting in the charging of Fringe Benefits on Mortgages totalling Kshs 234,779,917.00.

    ii. On Value Added Tax, the Respondent stated that the documents provided by the Appellant revealed that the Judiciary receives Vat-able Income including court fees, rental income and commissions on third-party deductions. That these incomes generated by the Respondent

were brought to tax at a sum of Kshs. 1,191.229.643.00 because they are not exempt from taxation under the VAT Act.

iii. On Income Tax (Corporation Tax), the Respondent stated that the Appellant generates several incomes and that it is this income which was brought to tax under Section 3 of the *Income Tax Act* (ITA) and the First Schedule of the ITA.

iv. On Commission on Third Parties, the Respondent stated that the records provided show that the Appellant earned commission on third-party check-off facility services offered to various institutions such as banks, insurance companies and SACCOs. That this income totalling Kshs. 6,074,896.51 was brought to taxation under the First Schedule of the ITA.

v. On Interest on Deposits, the Respondent stated that it was established that the Appellant earns interest income. That this interest income was taxed to an amount totalling Kshs 52,192,331.29 under the First Schedule of the ITA.

vi. On Rental Income, the Respondent asserted that its analysis of the Appellant's records indicated that the Judiciary received rental income from Sheria SACCO and KCB. That it subjected this income to a tax of Kshs 4,948,775.82 under Section 3 of the ITA.

vii. On Court Fees, the Respondent stated that the Appellant earns income from court fees collected from various courts all over the Country for the services that it offers. That this income was brought to tax totalling Kshs. 1,992,630,613.42. under the First Schedule of the ITA.

viii. On Withholding Income Tax

a. Non-Remittance of Withheld Taxes, the Respondent stated that its analysis of the IFMIS data provided revealed that the Judiciary withheld taxes on certain transactions and the same was not remitted as required by Section 35 of the ITA. That it is this income that was charged to tax totalling Kshs. 13,696,005.57.

b. Non-Deduction of Withholding Taxes, the Respondent stated that its analysis of IFMIS data established that there were also transactions incurred and paid out, which were not subjected to Withholding Income tax, contrary to Section 35 of the ITA. That it is this income that was brought to tax totalling Kshs. 1,119,116.00

ix. On Withholding VAT

a. Withholding VAT Deducted and Not Remitted, the Respondent stated that its analysis of the IFMIS data together with the CBK statements provided, established that the Judiciary withheld VAT amounting to Kshs. 22,287,604.74 and failed to remit the same to the Commissioner as required by Section 42A of the *Tax Procedures Act* 2015.

b. Payments Made and Not Subjected To WHVAT, the Respondent stated that the Appellant made payments for vatable goods and services received from suppliers and failed to charge WHVAT contrary to Section 42A of the *Tax Procedures Act* 2015 amounting to Kshs. 2,681,034.55.

9. The Appellant outlined its response to the tax demand as follows:

i. On PAYE (Fringe Benefits Tax), it confirmed that it offers mortgage and car loans which are administered by Kenya Commercial Bank (KCB).

ii. On Value Added Tax, it stated that all its income is gazetted and remitted to the exchequer without any claim expenditure. That it is also an arm of the Government that is not classified as a company or a business enterprise to be subject to VAT.

iii. On Income Tax (Corporation Tax), it states that all its income including rental income is collected and submitted to the exchequer every month without any claim for expenditure. That it is also an arm of the Government that is not classified as a company or a business enterprise to be subject to income tax.

iv. On non-remittance of Withheld tax, it stated that the transactions in question were voided because they were erroneous payments.

v. On non-deduction of Withheld tax, it stated that transactions in question were subjected to VAT Withholding and Income tax withholding where applicable except for the following transactions;

a. Payment for services related to repairs.

b. Payment for services related to school fees at the Kenya School of Government

c. Payment related to professional services of less than Kshs 24,000.00 per month.

vi. On Withholding VAT deducted and not remitted, it stated that the transactions in question were voided because they were erroneous payments.

vii. On payments made and not subjected to WHVAT, it stated that the payments related to net amounts whose taxes have been paid and a schedule of proof of payments was provided.

10. The Appellant stated that its tax liability was reduced in the objection decision from Kshs 3,757,648,890.00 to Kshs. 351,002,246.00 made up of the following inclusive of penalties and interest:

a. PAYE / Fringe Benefits tax of Kshs. 242,288,859.00

b. VAT on rental income and commissions on third-party deductions of Kshs. 8,941,940.00.

c. Corporation tax on rental income, interest income and commissions on third-party deductions of Kshs. 68,597,492.00

d. Withholding income tax of Kshs. 14,815,262.00

e. Withholding VAT of Kshs. 16,358,693.00.

Appellant's Prayers

11. The Appellant's prayer to the Tribunal was for orders that:

a. It allows this Appeal.

b. It annuls the Objection decision dated 11th September 2023 and the tax assessment contained therein.

c. It awards the cost of this Appeal to the Appellant.

Respondent's Case

12. The Respondent has opposed this Appeal while relying on its Statement of Facts dated 23rd November 2023.

13. The Respondent posited that the Appellant's employee enjoys mortgage and car loan facilities at 3% which was a rate below the Respondent's prescribed fees.

14. That the Fringe Benefit Tax was calculated using the Respondent's prescribed rate at the end of the financial year in which the loan was taken.

15. It asserted that it was guided by Section 12B of the *Income Tax Act*, which confirmed that Fringe Benefit Tax was due and payable because the Appellant accorded benefits to its employees at an interest rate that was lower than the market interest rate.

16. That the Appellant admitted to this oversight and confirmed that it was in the process of including this Fringe Benefit Tax in the payroll for purposes of deducting PAYE.

17. That the Chief Registrar of the Judiciary has been appointed as receiver of revenue by the Cabinet Secretary, National Treasury under Section 75 of the *Public Finance Management Act*, 2012. That the court fees emanate from a statutory duty of the Judiciary and are thus not supplies made in furtherance of business.

18. The Respondent took the view that the Appellant is not exempt from payment of tax. That it is thus liable to Corporation tax on its income and VAT for services that it offers under Section 3(1) of the ITA and Section 5(1)(a) of the VAT Act.

19. That the Appellant was thus liable to pay tax on its rental income and commissions on third-party deductions.

20. The Respondent stated that the First Schedule to the VAT lists all exempt supplies for purposes of VAT. That accordingly it follows that supply by way of sale, renting, leasing, hiring, and letting go of commercial premises is subject to VAT at the prescribed rates.

20. The Respondent disagreed with the argument that the Appellant is not a person as it forms part of the National Government. Its view, was that Section 13(1) of the *Income Tax Act* provides for exemption of certain income and the Appellant is not exempted from paying tax.

21. It posited that Section 3(1) of the ITA provides for income tax and the persons applicable. That this list includes the National Government.

22. That the Appellant is part of the National Government and is thus a person capable of being taxed under Section 3(1) of the ITA.

23. The Respondent stated that it requested payment vouchers, a list of payments not subject to withholding income, documents voided payments and sample payment vouchers from the Appellant to support the non-remittance of Withheld taxes. That these documents were not provided.

Respondent's Prayers

24. The Respondent's prayer to this Tribunal was for orders that:

    a. The Objection decision dated 11th September 2023 be upheld.

    b. This Appeal be dismissed with costs.

Issues for Determination

25. The Tribunal has gleaned through the pleadings and documents filed by the parties in this Appeal and it is of the view that the issues falling for its determination are the following:

a. Whether the Respondent was justified to charge tax on the fees, charges and other related income collected by the Appellant.

b. Whether the Respondent was justified in its assessment of withholding VAT against the Appellant

c. Whether the Respondent was justified in its assessment of the PAYE/ Fringe benefits tax against the Appellant.

Analysis and Determination

26. The Tribunal shall analyse the issues that have fallen for its determination in a sequential manner as follows:

a. Whether the Respondent was justified to levy tax on the fees, charges and other related income collected by the Appellant.

27. The gravamen under this head is whether the various monies collected by the Appellant are chargeable to tax under Sections 3(2) of the ITA.

28. Section 3(2) of the ITA provides as follows regarding the specific income that is taxable:

> " 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;

29. It is thus settled that the only income subject to tax under Section 3(1) of the ITA is a gain or a profit.

30. The Tribunal takes judicial notice of the fact that the Judiciary as established under Article 159 of *the Constitution* is not an entity that is engaged in carrying out any business. Its role is limited to resolving disputes presented before it as a non-profit and not trading entity.

31. Section 38 (1A) and (2) of the Judicial Service Commission(JSC) Act, provides as follows regarding financial statements that the Appellant is required to prepare:

> " The Commission shall submit the annual report to the President and Parliament within six months after the end of the year to which it relates.
>
> (2) The annual report shall contain, in respect to the year to which it relates –
>
> (a) the financial statements of the Commission and the Judiciary; and
>
> (b) a description of the activities of the Commission and the Judiciary."

32. Financial statements that the Appellant is required to submit to the President and Parliament under Section 38(1A) of the JSC Act is explained as follows under Section 28 of the JSC Act:

> "(1) At least three months before the commencement of each financial year, the Chief Registrar shall cause to be prepared, estimates of all the expenditure required for the purposes of this Act for that year, and shall present such estimates to the Commission for review."

33. A reading of Section 28, 38(1A) and (2) of the JSC Act affirm that the Appellant is required to only make annual estimates of expenditure so that its entire operation is funded by the Exchequer. This confirms that it does not engage in any venture of gain or profit which would have enabled it to keep money it has collected to meet its expenditure. Secondly, it is not required to prepare books of accounts from where its annual or monthly income can be discerned for purpose of charging or paying Corporation tax.

34. The Appellant is thus not an entity involved in trade for profit or commission from the services that it offers to the public. Indeed the Respondent has also not asserted that the Appellant has been involved in any trade for profit or gains. Its view is only that the Appellant seems to be collecting some income from fees, rent, commissions and related revenue sources from which it ought to pay tax.

35. The fact that the Appellant:

    i. Is merely a conduit for transfer of money from the public to the National Treasury.

    ii. Does not charge any commission on the monies collected from its statutory services.

    iii. Does not make a profit or gain from the various income streams that it collects from the public.

    implies that it is not an entity that makes any gains or profits from the services that it offers and it cannot thus be categorized as an entity that is capable of being taxed on its profits or gains under Section 3(1) as read with Section 3(2) of the *Income Tax Act*.

36. Sample evidence showing how the Appellant transferred all its revenues to the Exchequer was provided by the Appellant as part of its evidence. The said extracts were not opposed and or rebutted by the Respondent. This piece of evidence thus addressed and settled the issue that the Appellant is not engaged in furtherance of any business that earns it a profit.

37. The Tribunal thus finds and holds that the Appellant has proved on a balance of probability that it has not earned any gains or profits from business, employment or a right granted for use or occupation of property. The monies, revenue or income that it collects and remits to the Exchequer does not therefore, fall within the ambit of Section 3(1)and (2) of the *Income Tax Act*.

38. Regarding VAT on rental income the Appellant stated that all its income is gazetted and remitted to the Exchequer without any claim for expenditure. The Appellant further stated that it is also an arm of the Government that is not classified as a company or a business enterprise to be subject to VAT.

39. The law has defined supply of service in Section 2(1) of the VAT Act as thus:

    > " supply of services" means anything done that is not a supply of goods or money, including –
    >
    > (a) the performance of services for another person;
    >
    > (b) the grant, assignment, or surrender of any right;
    >
    > (c) the making available of any facility or advantage; or

(d) ..."

40. Leasing of space for rent thus constitutes supply of services under Section 2(1) of the VAT Act.

41. What constitutes a business has also been defined in Section 2(1) of the VAT Act as thus:

> " Business means-
>
> (a) trade, commerce or manufacture, profession, vocation or occupation;
>
> (b) any other activity in the nature of trade, commerce or manufacture, profession, vocation or occupation;
>
> (c) any activity carried on by a person continuously or regularly, whether or not for gain or profit and which involves, in part or in whole, the supply of goods or services for consideration; or
>
> (d) a supply of property by way of lease, licence, or similar arrangement, but does not include—
>
> (i) employment;
>
> (ii) a hobby or leisure activity of an individual; or
>
> (iii) an activity of a person, other than an individual, that if carried on by an individual would come within sub-paragraph (ii);"

42. It is thus clear from Section 2(1) of the VAT Act that a supply of property by way of lease, licence, or similar arrangement constitutes a business.

43. Accordingly, the Appellant's activity of renting or leasing its properties to Sheria SACCO and KCB, and collecting rent on a regular basis from its various tenants falls within the definition of a business and a supply of services as is provided in the VAT Act.

44. Section 5(1)(a) of the VAT Act provides as follows regarding how VAT is charged:

> " (1) A tax, to be known as value-added tax, shall be charged in accordance with the provisions of this Act on—
>
> (a) a taxable supply made by a registered person in Kenya;
>
> (b) the importation of taxable goods; and
>
> (c) a supply of imported taxable services."

45. A taxable supply is defined under Section 2(1) of the VAT Act as thus:

> " Taxable supply" means a supply, other than an exempt supply, made in Kenya by a person in the course or furtherance of a business carried on by the person, including a supply made in connection with the commencement or termination of a business;"

46. A reading of Sections 2(1) and 5(1)(a) of the VAT Act makes it apparent that VAT is charged when a person makes a supply in the course of furtherance of a business.

47. Section 62 of the VAT Act further clearly states that the onus of proving that any goods or services are exempt from VAT lies with the taxpayer as follows: -

> " In any civil proceedings under this Act, the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax."

48. The Appellant was thus required under Section 5(1) of the VAT Act to account for VAT arising from this business unless it could specifically show that it was exempted from payment of VAT under the First Schedule to the VAT Act.

49. A perusal of the First Schedule to the VAT Act confirms that the Appellant's supply by way of renting or leasing of its premises is not listed thereon as an exempt supply. The Appellant did not also provide the Tribunal with any legal document to justify its exemption from accounting for VAT on its taxable supplies. The Appellant was thus required to charge VAT on its rent charged to its lessees or tenants at the general rate and remit that tax to the Respondent.

50. The Tribunal thus finds and holds that:

    i. The Respondent was not justified in its assessment of income tax on Corporation tax on Rental income, Interest Income and Commissions on third-party deductions.

    ii. The Respondent did not fall into error in its demand of VAT on rental income earned by the Appellant.

b. Whether the Respondent was justified in its assessment of withholding VAT against the Appellant

51. The Appellant argued that transactions regarding WHVAT deducted and not remitted were erroneous because these transactions were voided. It stated further that it supplied the Respondent with the schedule showing that it had paid WHVAT on the net of these transactions.

52. The Respondent on its part stated that it confirmed this assessment because the Appellant did not provide it with the documents or evidence to support the payment of the said taxes.

53. The burden on who is required to prove that a tax decision is incorrect is provided for in Section 56(1) of the *Tax Procedures Act* which reads as follows: -

> " In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect."

54. Additionally, Section 30 of the Tax Appeals Act provides as follows: -

> " In any 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."

55. The Appellant is also obligated under Section 54A of the ITA and Section 43 of the VAT Act to keep records of its tax affairs.

56. Section of the 54A (1) ITA provides as follows regarding the keeping of records: -

> "A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax."

57. Section 43 of the VAT Act provides as follows regarding keeping and availing of documents upon the request of the Commissioner:

> "(1) A person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein.
>
> (2) The records to be kept under subsection (1) shall include—
>
> (a) copies of all tax invoices and simplified tax invoices issued in serial copies number order;
>
> (b) of all credit and debit notes issued, in chronological order;
>
> (c) purchase invoices, copies of customs entries, receipts for the payment of customs duty or tax, and credit and debit notes received, to be filed chronologically either by date of receipt or under each supplier's name;
>
> (d) details of the amounts of tax charged on each supply made or received and in relation to all services to which section 10 applies, sufficient written evidence to identify the supplier and the recipient, and to show the nature and quantity of services supplied, the time of supply, the place of supply, the consideration for the supply, and the extent to which the supply has been used by the recipient for a particular purpose;

On Withholding VAT

58. In the instant case, the Appellant provided the following documents for the review of the Tribunal:

    i. Tax demand dated 8th June 2023

    ii. Objection Notice 6th July 2023

    iii. Objection decision dated 11th September 2023.

    iv. Judiciary Revenue Transfer to the National Treasury

    v. Extract of void transactions

59. The Tribunal notes that the Respondent did not dispute or make any comment on the extract of the erroneous transactions which were voided. The Respondent, in its Statement of Facts, did not dispute the sufficiency of this document nor did it assert that it had never been provided with these documents/ extracts.

60. The Appellant has thus proved on a balance of convenience that its transactions arising from unremitted taxes of Kshs 12,621,121.90 were indeed voided. The Respondent was thus not justified in its assessment of the Withholding VAT deducted and not remitted.

61. The Appellant has however not provided supporting documents of WHVAT deductions and remittance for transactions where payments were made but not subjected to VAT.

62. The Respondent was thus justified in its assessment of WHVAT for transactions where payments were made.

On Withholding Income Tax

63. On the other hand, the Appellant did not provide evidence to show that it had indeed remitted the WHT that it had withheld as was required of it under Section 35 of the ITA.

64. Its failure to provide a document to discharge its burden of proof as is required of it under Section 56(1) of the TPA, Section 30 of the TPA and as was stated in the case of *Commissioner of Domestic Taxes v Trical and Hard Limited (Tax Appeal E146 of 2020*) [2022] KEHC 9927 (KLR) where the Court held at paragraph *26* that: -

> " From the above, it is clear that the evidential burden of proof rests with the taxpayer to disprove the Commissioner and that once competent and relevant evidence is produced, then this burden now shifts to the Commissioner. I have emphasized and underlined 'competence' and 'relevance' because it is only evidence that meets these two tests that demolishes the presumption of correctness and swings the burden to the Commissioner. This means that even if one avails evidence but then it is found that the same is incompetent or irrelevant, then the burden continues to remain with the taxpayer."

65. Accordingly, the Respondent did not fall into error in its assessment of Withholding Income tax.

c. Whether the Respondent was justified in its assessment of the PAYE/ Fringe benefits tax against the Appellant.

66. The Respondent stated that the Appellant's employees enjoy mortgage and car loans at rates below the prescribed rates and yet they have not paid Fringe Benefits Tax as was required under Section 12B of the ITA.

67. The Appellant admitted that it indeed offers mortgage and car loans to its employees as administered by KCB.

68. Section 12B of the ITA provides as follows regarding Fringe Benefits Tax:

> " 12B.
>
> (1) Notwithstanding any other provision of this Act, a tax to be known as fringe benefits tax shall be payable commencing on the 12th June 1998 by every employer in respect of a loan provided at an interest rate lower than the market interest rate, to an individual who is a director or an employee or is a relative of a director or an employee, by virtue of his position as director or his employment or the employment of the person to whom he is related.

69. A plain reading of Section 12B of the ITA dictates that an employer is required to pay Fringe Benefits Tax in respect of any loan provided to an employee at an interest lower than the market interest rate.

70. The Appellant in this case has admitted to the existence of a mortgage and car loan scheme for its employees, but it neither asserted that it paid Fringe Benefits Tax in respect of these loans nor has it provided evidence to prove that that it has the paid tax.

71. The burden to provide such evidence or proof that tax is not due lies with the Appellant under Sections 56(1) of the TPA and Section 30 of the TAT Act. Its failure to provide such evidence means that it has not discharged its burden of proof. The Respondent's assertion thus stands proved as was stated In Judgment – Tat No. 435 Of 2022 Abyssina Iron and Steel Ltd Vs. Commissioner of Customs and Border Control, where the Tribunal stated as thus:

> "... it is apparent that the Appellant was required to present a minimum amount of information necessary to support its position. This safety valve seems to place the burden of proof on the Appellant without completely relieving the Respondent of its fair share of the burden of proof. The bottom line is that once the Appellant has provided evidence that the Respondent's assessment was wrong, then the Respondent must push back and show that its assessment was not arbitrary, capricious or imagined. The onus will then shift back to the Appellant once the Respondent has discharged its burden on a balance of convenience to discharge the prima facie case that has been presented by the Respondent."

72. Accordingly, the Appellant's failure to discharge its burden of proof means that the Respondent's assessment of Fringe Benefits Tax against the Appellant has not been faulted and it thus stands proven and justified.

Final Decision

73. The upshot of the foregoing analysis is that the Tribunal finds that the Appeal is partially merited and accordingly proceeds to make the following Orders:

    a. The Appeal be and is hereby partially allowed.

    b. The Respondent's objection decision dated 11th September 2023 be and is hereby varied in the following terms:

        i. The assessment on PAYE/Fringe Benefits Tax be and is hereby upheld.

        ii. The assessment on Withholding tax on income be and is hereby upheld.

        iii. The assessment on Withholding VAT where payments were made but not subjected to WHVAT be and is hereby upheld.

        iv. The assessment on Withholding VAT where payments were voided be and is hereby set aside.

        v. The assessment of VAT on rental income and commissions be and is hereby upheld.

        vi. The assessment of Corporation tax on rental income, interest income and commission on third parties be and is hereby set aside.

    c. The Respondent is hereby directed to recompute the tax assessments based on the Tribunal's findings under Orders (b) (i) to (vi) above within Thirty (30) days from the date of delivery of this Judgment.

d. Each party is to bear its own costs.

74. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

ERIC NYONGESA WAFULA - CHAIRMAN

GLORIA A. OGAGA - MEMBER

DR. RODNEY O. OLUOCH - MEMBER

ABRAHAM K. KIPROTICH - MEMBER

CYNTHIA B. MAYAKA - MEMBER