



**Weihai International Economic & Technical Cooperative Company  
Limited v Commissioner of Domestic Taxes (Tax Appeal E789 of 2023)  
[2025] KETAT 182 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KETAT 182 (KLR)

**REPUBLIC OF KENYA  
IN THE TAX APPEAL TRIBUNAL  
TAX APPEAL E789 OF 2023  
RO OLUOCH, CHAIR, CYNTHIA B. MAYAKA & G OGAGA, MEMBERS  
FEBRUARY 28, 2025**

**BETWEEN**

**WEIHAI INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE  
COMPANY LIMITED ..... APPELLANT**

**AND**

**THE COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant is a foreign company registered in Kenya. It is a branch of Weihai International Economic & Technical Co. Limited incorporated in China. The Appellant is 100% owned by Weihai International Economic & Technical Co. Limited China which in turn is 10% owned by Weihai State-Owned Assets Management (Group) Co. Ltd and the rest by individual shareholders in China. The Appellant's principal activity is civil engineering and construction.
2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, CAP 469 of Kenya's Laws. Under Section 5 (1) of the Act, the Respondent is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Parts 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Respondent carried out an audit against the Appellant following a risk profiling exercise and it issued the Appellant with assessments for Income tax, Withholding income tax, PAYE and VAT for the period 2017 to 2021 vide a letter dated 18<sup>th</sup> April 2023.



4. The Appellant lodged an objection vide a letter dated 12<sup>th</sup> May 2023 and the Respondent issued its Objection decision through a letter dated 27<sup>th</sup> July 2023 wherein the Respondent demanded tax totaling Kshs 2,460,966,251.
5. The Appellant being aggrieved by the decision filed a Notice of Appeal on the 25<sup>th</sup> August 2023.

### **The Appeal**

6. The Appellant lodged its Memorandum of Appeal dated and filed on 9<sup>th</sup> November 2023 wherein it raised the following grounds of appeal (sic):
  - a. That the Appellant's notice of objection letter dated 12<sup>th</sup> May 2023 as buttressed by the further objection letter dated 29<sup>th</sup> May 2023 in response to the Respondent's notice of tax assessment dated 18<sup>th</sup> April 2023 were jointly and severally a valid objection within the meaning of Section 51(3) of the *Tax Procedures Act* (TPA); a fact conceded by the Respondent in its purported Objection decision dated 27<sup>th</sup> July 2023.
  - b. That the purported Objection decision dated 27<sup>th</sup> July 2023 was not a legally valid objection decision and thus the Appellant's objection was and is automatically allowed by operation of statute.
  - c. That no legally valid Objection decision was made by the Respondent within the statutory period, and thus the Appellant's objection was and is automatically allowed by operation of statute.
  - d. That the Respondent erred in law and in fact by assessing as income, monies in bank accounts and subjecting them to tax against the Appellant while in actual sense the monies were not of the Appellant but rather belonged to a separate legal entity in China, as revealed by the information and documentation submitted to it by the Appellant.
  - e. That the Respondent erred in law and in fact by rejecting the reasons and supporting documentation submitted by the Appellant explaining the variances between their banking versus their income as per audited accounts.
  - f. That the Respondent erred in law and in fact by failing to appreciate the nature of the Appellant's business and instead proceeded to make conclusions about the Appellant's tax status and tax affairs that are illegal, illogical, and contrary to how international construction companies in Kenya are run and taxed.
  - g. That the Respondent erred in law and in fact by levying PAYE against persons who were not employees of the Appellant; those employees belong to another Company, as described within the information and documentation provided by the Appellant to the Respondent.
  - h. That the Respondent erred in law and in fact by drawing unsustainable and prejudicial inferences from the unavailability of documents that were in any case not relevant to the impugned taxes.
  - i. That the demand of the Corporate Income tax and Pay-As-You-Earn in the aggregate amount of Kshs 2,460,966,251.00 inclusive of penalties and interest that is the subject of this Appeal is ultra vires, arbitrary, excessive, and erroneous; and have been levied on the Appellant in a manner that contravenes the law.



## The Appellant's Case

7. The Appellant relied on its Statement of Facts dated and filed on 9<sup>th</sup> November 2023 together with a bundle of authority filed on 23<sup>rd</sup> August 2024 and Written Submissions dated and filed on 3<sup>rd</sup> December 2024 to urge its Appeal.
8. The Appellant stated that after an audit process that began in the year 2022, the Respondent communicated its preliminary tax audit findings for the period 2017 to 2021 vide a letter dated 17<sup>th</sup> January 2023. The Appellant alleged that the Respondent expanded the scope of the ongoing in-depth tax audit vide a letter dated 18<sup>th</sup> January 2023 which made no reference to the preliminary audit findings which had been communicated the previous day through an audit letter dated 17<sup>th</sup> January 2023.
9. According to the Appellant, the Respondent subsequently crystallized its preliminary position into what it termed as a 'pre-assessment notice' vide a letter dated 9<sup>th</sup> March 2023. The purpose of the said letter was to invite the Appellant to review the preliminary findings and to communicate any non-agreed items to the Respondent pending the final tax assessment notice.
10. The Appellant stated that it responded to the pre-assessment notice through a letter dated 13<sup>th</sup> March 2023 where it addressed each of the issues raised by the Respondent and denied that any additional taxes were due and payable.
11. The Respondent informed the Appellant that the audit process had been concluded vide the Respondent's Assessment letter dated 18<sup>th</sup> April 2023.
12. The Appellant stated that the Respondent requested additional information which necessitated a further objection dated 29<sup>th</sup> May 2023 upon which the Respondent issued an Objection decision dated 27<sup>th</sup> July 2023 via email which was incomplete and had some pages missing.
13. The Appellant stated that its notice of objection dated 12<sup>th</sup> May 2023 as buttressed by the further objection letter dated 29<sup>th</sup> May 2023 in response to the Respondent's assessment were valid objections within the meaning of Section 51(3) of the TPA. That the Respondent had conceded to this fact in its Objection decision.
14. The Appellant averred that the purported decision is valid thus the Appellant's objection was and is automatically allowed by operation of statute. It added that the incomplete decision was communicated on the last possible day for compliance with the provisions of Section 51 of the TPA and given that it was an incomplete and incomprehensible document, it did not meet the legal and factual requirements for a valid objection decision. It therefore maintained that its objection was allowed by operation of statute.
15. The Appellant also contended that Respondent erred in law and fact by assessing monies in its bank accounts and subjecting them to tax while in actual sense the monies belonged to a separate legal entity in China, as revealed by the information and documentation it had submitted.
16. The Appellant averred that the Respondent erred in law and fact by rejecting the reasons and supporting documentation it had submitted to explain the variances between its banking and income as shown in its audited accounts.
17. The Appellant asserted that the Respondent erred in law and fact by failing to appreciate the nature of its business and thereby arriving at an assessment that was illegal, illogical, and contrary to how international construction companies in Kenya are run and taxed; resulting in excessive and illegal taxation in Corporation tax and Value Added Tax in particular.



18. That the Respondent levied PAYE against employees who belonged to another Company as described in the information and documentation it had provided.
19. The Appellant contended that the Respondent drew unsustainable and prejudicial inferences from the unavailability of documents that were in any case not relevant to the impugned taxes.
20. In further support of the Appeal, the Appellant relied on the following authorities:
  - i. [Equity Group Holdings Limited v Commissioner of Domestic Taxes \(Civil Appeal E069 & E025 of 2020\)](#) (2021) KEHC 25 (KLR) (Commercial and Tax);
  - ii. [Ndirangu t/a Ndirangu Hardware v Commissioner of Domestic Taxes \(Tax Appeal E070 of 2021\)](#) (2023) KEHC 19357 (KLR);
  - iii. Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR; and
  - iv. [Cyka Manpower Services Limited v Commissioner of Domestic Taxes \(Appeal 21 of 2022\)](#) (2023) KETAT 163 (KLR) (Civ) (10 February 2023).
21. The Appellant raised the following issues for determination in its Written submission:
  - i. Whether the Respondent's Objection decisions were valid?
  - i. Whether the assessment dated 18th April 2023 of Corporate income tax and Pay-As-You-Earn increased to the aggregate amount of Ksh. 2,460,966,251.00 inclusive of penalties and interest is justified?
  - ii. Whether the Appellant be granted the orders sought in the Memorandum of Appeal dated 9th November 2023?
22. The identified issues were discussed sequentially as follows:
  - i. Whether the Respondent's Objection decisions were valid?**
23. The Appellant stated that the purported Objection decision issued on 28th July 2023 was incomplete, inadequate and in non-conformity with the provisions of Section 51(10) of TPA, hence null and void.
24. That the subsequent full Objection decision issued on the 3rd October 2023 is invalid for being issued outside the statutory timelines for the reasons that:
  - a. The assessment was issued on 18th April 2023 for various taxes amounting to Kshs. 2,460,996,251.00 inclusive of penalties and interest.
  - b. The Appellant objected to the said assessment on 12th May 2023 and a further Objection dated 29th May 2023.
  - c. The Respondent issued its objection decision dated 27<sup>th</sup> July 2023 on 28th July 2023. That the said Objection decision dated 27th July 2023 was incomplete, inadequate, incomprehensible, and containing missing pages.
  - d. That the fact that the objection decision was incomplete was admitted by the Respondent via email dated 3rd October 2023.
25. The Appellant stated that the Respondent's witness, Davis Kipkoech Koskey (RW1) admitted on cross-examination that an Objection decision must contain material facts, statement of findings on the



- material facts, and reasons for the decision. That he also admitted that the objection decision dated 27th June 2023 was incomplete and not in accordance with Section 51(10) and therefore invalid.
26. That during the cross-examination of the second witness, Ms. Linnet A. Ojiambo, (RW2), the said Respondent witness testified that she communicated the Objection decision dated 27th July 2023 to the Appellant on 27th July 2023 and she was aware that the same was received on 28th July 2023 by the Appellant as per the thread of email produced as Appendix 9 in the Appellant’s Statement of Facts.
  27. The Appellant submitted that the purported Objection decision dated 27th July 2023 was titled “weihai decision.pdf”. That the same was incomplete, inadequate, and contained missing pages.
  28. That when RW2, Ms. Linnet A. Ojiambo was referred to Appendix 10 on the Appellant’s Statement of Facts and asked to explain the meaning of the wordings [attachment “weihai decision.pdf” removed by Linet Anne Ojiambo/LEGAL/KRA] at the bottom of the email printout. She was unable to answer but finally confirmed that it meant that the attachment “weihai decision.pdf” was removed/deleted by her.
  29. That during the re-examination of RW2, she attempted to twist this clear fact by reading out the contents of the Appellant’s inbox as per the screenshot pasted on Appendix 9 in the Appellant’s Statements of Facts, to paint a picture that the Objection decision was not titled “weihai decision.pdf”.
  30. The Appellant asserted that the screenshot of the Appellant’s inbox pasted therein partly showed the subject and body of the email, the date and size of the attachment, and not the name of the attachment.
  31. The Appellant submitted that the purported Objection decision issued on 28th July 2023 did not amount to a valid objection as contemplated under Section 51(10) of the *Tax Procedures Act* since the Appellant could not comprehend the full findings on the material facts and the reasons for decision by the Respondent.
  32. The Appellant further submitted that Section 51(10) of the *Tax Procedures Act* is crafted in strict and mandatory terms, to the effect that, the non-compliance thereof would deem such a decision incompetent and unenforceable as was stated in the cases of:
    - a. Imco holdings Limited vs. *Commissioner of Domestic Taxes (Appeal 349 of 2023)* (2024) KETAT 1349 (KLR)(20 September 2024) (Judgment)
    - b. Ndirangu t/a Ndirangu Hardware *v Commissioner of Domestic Taxes (Tax Appeal E070 of 2021)* (2023) KEHC 19357 (KLR).
    - c. *Equity Group Holdings Limited vs. Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020)* (2021) KEHC 25 (KLR)
  33. The Appellant submitted that RW2, Ms. Linet A. Ojiambo, testified that she sent a copy of the Objection decision to the Appellant, on 3rd October 2023. On cross-examination, she failed to prove that the Appellant’s tax agent reached out to her requesting a copy of the Objection decision and the basis of her communicating the Objection decision for the second time.
  34. That on further cross-examination, RW2, confirmed that one of the Appellant’s grounds of the Appeal was that the purported Objection decision dated 27th July 2023 was not a legally valid Objection decision on grounds that it was belatedly communicated to the Appellant on 3rd October 2023.
  35. The Appellant submitted that the attachment on the email dated 3rd October 2023 was titled “weihai 2 sided.pdf” and not “weihai decision.pdf” which was sent on 27th July 2023. That the Respondent was so particular on the body of the email that the attached e-mail contained all the pages which was



a clear admission by the Respondent that what was sent earlier could contain missing pages but it has now attached a full Objection decision.

36. That 3rd October 2023 was 127 days from 29th May 2023, when the Respondent received the Appellant's letter of Objection dated 29th May 2023 which is contrary to the provisions of Section 51(11) of the *Tax Procedures Act*.
37. The Appellant supported its position on invalidity with the cases of *Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020)* [2021] KEHC 25 (KLR) (Commercial and Tax) (23 August 2021) (Judgment) and *Cyka Manpower Services Limited v Commissioner of Domestic Taxes (Appeal 21 of 2022)* [2023] KETAT 163 (KLR) (Civ) (10 February 2023)

**ii. Whether the assessment dated 18th April 2023 of Corporate Income Tax and Pay-As-You-Earn increased to the aggregate amount of Ksh. 2,460,966,251.00 inclusive of penalties and interest is justified**

38. The Appellant submitted that the assessment dated 18th April 2023 of Corporate Income tax and Pay-As You-Earn amounting to Kshs. 2,460,966,251.00 inclusive of penalties and interest was not justified for the following reasons:
  - a. The Respondent erred in law and in fact by assessing as income monies in bank accounts and subjecting them to tax against the Appellant while in actual sense the monies were not of the Appellant but rather belonged to a separate legal entity in China, as revealed by the information and documentation submitted to it by the Appellant.
  - b. The Respondent erred in law and in fact by failing to appreciate the nature of the Appellant's business and instead proceeded to make conclusions about the Appellant's tax status and tax affairs that are illegal, illogical, and contrary to how international constructions companies in Kenya are run and taxed, resulting in excessive and illegal taxation in Corporation Tax and Value Added Tax in particular.
  - c. The Respondent erred in law and in fact by levying PAYE against persons who were not employees of the Appellant, those employees belong to another company as described in the information and documentation provided by the Appellant to the Respondent.
  - d. The Respondent erred in law and in fact by drawing unsustainable and prejudicial inferences from the unavailability of documents that were in any case not relevant to the impugned taxes.

**Appellant's Prayers**

39. The Appellant prayed for the following reliefs:
  - a. The Tribunal be pleased to allow the Appellant's Notice of Appeal and set aside the assessments;
  - b. The Tribunal be pleased to find and order that the Appellant is not liable for the taxes raised and demanded in the Respondent's notice of tax assessment dated 18<sup>th</sup> April 2023 and which was confirmed by the Respondent's Objection decision dated 27<sup>th</sup> July 2023;
  - c. The Tribunal be pleased to order the Respondent to pay the costs of this Appeal; and
  - d. The Tribunal be pleased to issue any other orders favourable to the Appellant as it may find just and expedient to issue.



## The Respondent's Case

40. In response to the Appeal, the Respondent filed:
  - a. Statement of Facts dated 14<sup>th</sup> December 2023 and filed on 15<sup>th</sup> December 2023
  - b. Witness Statements of Linnet Anne Ojiambo dated 28<sup>th</sup> October 2024 and David Kipkoech Koskey dated 4<sup>th</sup> June 2024, that were both admitted in evidence and oath on the 14<sup>th</sup> November, 2024; and
  - c. Written Submissions dated 6<sup>th</sup> December 2024
41. The Respondent's case is that it carried out an audit against the Appellant following a risk profiling exercise which indicated that the Appellant could be under-declaring. It thereafter issued the Appellant with a pre-assessment notice dated 15<sup>th</sup> January 2021 and audit preliminary findings for the period 2017 to 2021 on 17<sup>th</sup> January 2023.
42. That it wrote a letter dated 18<sup>th</sup> January 2023, to the Appellant advising it to submit the following documents for review:
  - a. Audited financial statements and the tax computations for the financial years 2020 and 2021;
  - b. General ledgers, sales and purchases ledgers for the financial years 2020, 2021 and 2022;
  - c. The trial balance for the financial years 2020,2021 and 2022;
  - d. Bank statements for the financial years 2020, 2021 and 2022;
  - e. Wear & tear schedule and the asset movement register for the financial period 2020;
  - f. Valuation certificates and the sales invoices for the financial years 2020, 2021, 2021 and 2022; and
  - g. Purchases and expenditure invoices for the financial years 2020, 2021 and 2022.
43. That it issued a pre-assessment notice on 9<sup>th</sup> March 2023 and assessments dated 18<sup>th</sup> April 2023 for Income tax, Withholding Income tax, PAYE and VAT for the period 2017 to 2021 which was based on foreign income from transactions involving related entities; undeclared income from undisclosed bank accounts; undeclared valuation certificates; undeclared interest income; unsupported surveyor expense; unsupported travel and accommodation expenses; unsupported addition of plant and machinery and claim of wear & tear; payments attracting withholding income tax not deducted; and PAYE on salaries paid to expatriate employees and direct expenses.
44. The Respondent stated that the Appellant lodged an objection vide a letter dated 12<sup>th</sup> May 2023 which did not conform to the provisions of Section 51(3) of the TPA. It alleged that it advised the Appellant vide email correspondences dated 2<sup>nd</sup> May 2023 and 24<sup>th</sup> May 2023 to validate its objection by paying the taxes not in dispute in particular interest income, local income, unsupported surveyor fee and unsupported wear & tear and to also provide the following documents by 30<sup>th</sup> May 2023:
  - a. Invoices for travel and accommodation expenses;
  - b. A list of the persons who enjoyed the travel and accommodation services;
  - c. Detailed bank remittance advice details for outward transactions for all the accounts held by the company for the period under review;



- d. A breakdown of the Withholding tax declared and paid for the period;
  - e. A list with full names of the parent company staff sent to Kenya in 2018 to support the objection; improve the operations of the local company, their work permits, their payroll and employment contracts with the headquarter and with Kenya;
  - f. All the information must be provided in English;
  - g. Certificate Number 7 of Kshs 522,969,979.00 for the KURA Nakuru project; and
  - h. A transfer pricing policy document.
45. According to the Respondent, a review of the Appellant's Withholding Income tax records established that WIETEC was receiving interest income from amounts deposited in bank accounts maintained by the Appellant.
  46. It noted that there was an unsupported surveyor expense of Kshs 7,658,704.83 in the Appellant's books in 2018. That further review of this expense established that this expense could not be supported and that it was in fact a valuation certificate.
  47. The Respondent noted that the Appellant had incurred substantially high accommodation expenses which were not wholly and exclusively incurred in the generation of income.
  48. The Respondent noted that the Appellant made several additions of plant and machinery in the financial statements and subsequently claimed wear and tear allowances in the tax computations which expense had not been adequately reconciled and the wear and tear allowances were thus disallowed.
  49. With regard to Value-Added Tax, the Respondent noted that the Appellant's main business is construction and valuation certificates form the basis of determination of income. That a comparison of the Appellant's valuation certificates and income declared in the VAT returns highlighted that there are some valuation certificates that were not declared.
  50. Regarding PAYE, The Respondent stated that an analysis into the Appellant's general ledgers and the payroll expenses established that there were director expenses of Kshs 4,800,300.00 paid in December 2018 that were subjected to PAYE. The Respondent also noted that some expatriates of Chinese descent were not on the Appellant's payroll despite the existence of evidence that the company incurred expenses on work permits, renewal of work permits, accommodation services, travel air tickets and security bonds.
  51. In relation to Withholding Income tax, the Respondent stated that the payments attracting Withholding Income tax were crosschecked against withholding data and it was noted that the Appellant made some payments attracting Withholding Income tax and they were deducted as required.
  52. Regarding contractors, consultants and other professionals, the Respondent averred that it conducted a review of the Appellant's operations which revealed that some payments to contractors, subcontractors, consultants and other professionals were not subjected to Withholding tax.
  53. The Respondent noted that the Appellant validated its objection vide an email dated 29<sup>th</sup> May 2023 and hence its Objection decision of 27<sup>th</sup> July 2023.
  54. In response to grounds 1-3 of the Appeal, the Respondent stated that the Appellant lodged an invalid objection on 12<sup>th</sup> May 2023 which did not conform to the provisions of Section 51(3) of the TPA. The Respondent thereafter notified the Appellant that the objection had not been validly lodged and



requested the Appellant to validate it by paying the taxes not in dispute and providing documents for the Respondent's review which the Respondent submitted was in compliance with Section 51(4) of the TPA.

55. The Respondent averred that the Appellant validated its objection on 29<sup>th</sup> May 2023 and as such the Respondent's timelines started running from this date hence the Appellant cannot plead that the Respondent's objection decision was issued outside the stipulated timelines.
56. In response to grounds 4-9 of the Appeal, the Respondent contended that it considered all the Appellant's documents as provided in coming up with the assessments. The Respondent argued that upon review of the Appellant's objection, it issued its objection decision on 27<sup>th</sup> July 2023 and noted that other than the notice of objection, the Appellant failed to provide records to support its grounds of objection.
57. The Respondent argued that the Appellant failed to provide sufficient information requested relating to undisclosed bank accounts as well as to disclose the full information about the undisclosed bank account in the Appellant's financial statement for the 2016-2021 despite the fact that the amounts transacted were material.
58. The Respondent contended that it was correct to request the Appellant to provide a transfer pricing policy because the Appellant's submission stated that WIETC China provides management and professional services support to ensure that contracts awarded to WIETC Kenya were undertaken and executed as required among other services.
59. The Respondent noted that the Appellant's explanation on the declaration of interest income together with other income contravened the provisions of Section 15(7) of the *Income Tax Act* (ITA) and therefore it was justified to bring to charge interest income from the undisclosed bank accounts as a separate source of income.
60. The Respondent contended that it was justified to bring to charge the undeclared withholding certificates for local works. Further, the Respondent stated that the Appellant's explanation that it did not declare some of the withholding certificates since it had not been paid for the contract does not disqualify the fact that the income had been earned.
61. It asserted that the Appellant's explanation of the unsupported surveyor expenses having been covered in a previous audit and concluded at ADR does not fault the Respondent's decision to review the transactions again. The Respondent argued that it reserves the right to revisit matters upon acquisition of material information regarding the same.
62. Further, the Respondent observed that the records reviewed during the audit were misclassified as expenses when they were in fact, income. It added that the Appellant did not provide the ADR agreement confirming that position.
63. According to the Respondent, the Appellant failed to support its ground of objection on travel and accommodation expenses through provision of invoices for travel and accommodation as well as a list of persons who enjoyed the benefit.
64. It averred that the Appellant's explanation of the failure to account for Withholding Income tax on contractual works was insufficient since the Appellant did not provide evidentiary records to support the grounds of objection.



65. It averred that it was correct to disallow over-claimed wear and tear and the explanation provided by the Appellant was insufficient and did not justify the claimed wear and tear on machinery owned by WIETC Kenya.
66. The Respondent argued that its demand for PAYE on remunerations made to expatriate employees is justified since the Appellant did not support the ground of objection that they were employees of WIETC China.
67. The Respondent stated that the Appellant's explanation of the expenditure receipts being addressed to the Director is unjustified and unsupported. It argued that the Appellant failed to provide evidentiary record to support the ground of objection.
68. The Respondent further stated that the Appellant failed to avail detailed supporting documentation and records to counter the assertions of the Respondent in the various engagements at the assessment stage as well as the objection stage contrary to Section 59 (1) of the TPA. The Respondent also stated that the Appellant did not provide any evidence to show or demonstrate that the assessments were erroneous or excessive despite being given several opportunities to support its position.
69. The Respondent maintained that it is competent to assess, demand and collect taxes established from the investigation from Section 24(2) of the TPA which gives the Commissioner the power to assess a taxpayer's tax liability using information available. Further, the Respondent stated that its decision was based on Section 31 of the TPA which allows it to assess taxes based on information available and best judgment.
70. The Respondent relied on Section 56(1) of the TPA which provides that the burden of proving that the tax assessment is wrong lies with the taxpayer but the Appellant failed to prove to the satisfaction of the Commissioner any information to show that its assessment was wrong.
71. The Respondent raised the following issues for determination in its Written submissions:
  - a. Whether the Respondent's objection decision was validly issued;
  - b. Whether the Respondent's Objection decision complied with the provisions of Section 51(10) of the *Tax Procedures Act*;
  - c. Whether the additional assessments are legally justified;
  - d. Whether the Appellant has discharged its burden of proof.

**a. Whether the Respondent' Objection decision is Valid**

72. The Respondent stated that its Objection decision issued on 27th July 2023 which was acknowledged by the Respondent on 28<sup>th</sup> July 2023 was issued within the legal timelines under with Section 51(11) of the *Tax Procedures Act*.

**b. Whether the Respondent's Objection decision complied with The Provisions of Section 51(10) of The *Tax Procedures Act***

73. The Respondent submitted that its Objection decision issued on 28th July 2023 complied with the law under Section 51(10) of the TPA as affirmed by its witness Linnet Anne Ojiambo. That no correspondence was provided and no witness was called by the Appellant to testify to the fact that the said decision was incomplete.



74. That in any event the Appellant lodged its Notice of Appeal dated 24<sup>th</sup> August 2023 supported by a complete Objection decision.
75. That receipt of an incomplete objection decision was not a ground for filing the Appeal late when it lodged its application to file its Appeal out of time.
76. That no evidence has been tendered to show that the Appellant raised the issue of an incomplete Objection decision with the Respondent at any time to support its assertion that it was issued with an Objection decision that had missing pages.
77. That the Appellant was obliged to demonstrate that it sent communication and/or sought clarification from the Respondent on the issuance of an incomplete decision.
78. That even if the Tribunal was to hold that the said decision was incomplete, the bottom line is that it was still in compliance with the law as it contained a statement of finding as well as the Respondent's decision.
79. That the said incomplete decision was valid because it began with an introduction to the decision and laid the basis of the assessments at item 1, while item 2 contained the Appellant's objection, item 3 contained the statement of findings and concluded by laying down the Respondent's decision and the last page showed how the computation was arrived at. That the Appellant's right of Appeal was also contained in the said decision

### **c. Whether the Additional Assessments are Legally Justified**

80. The Respondent asserted that it proceeded to issue the Appellant with pre-assessment notices, tax audit preliminary findings and assessment notices.
81. The Respondent stated that it established that the Appellant failed to disclose bank accounts and in particular, Standard Chartered Bank account that was earning interest income and that there was Withholding Income tax certificates that featured in the Appellant's iTax ledger.
82. That from the undisclosed bank accounts, it established that the accounts were opened and operated by the Appellant's Kenyan Branch and further that the signatories of the bank account resided in Kenya.
83. That it was also noted that the undisclosed bank account accrued interest income which was subjected to 15% of the gross interest income and the business income was subjected to Corporation tax at 37.5%.
84. The Respondent alleged that the Appellant also failed to disclose transactions between its head office (the parent company) its affiliates and its Kenyan Branch (WEITC Kenya). That its request for a transfer pricing document to help it verify that all the transaction with the related parties were disclosed and declared was unsuccessful as the document was never provided.
85. The Respondent stated that it analyzed the company's average Gross Profit Margin (23%) based on declared local incomes from previously filed self-declared Income tax returns to help it establish comparable Gross Profit Margins (GPM). That the rationale for this was that if the company achieved a 23% GPM from the local incomes, a similar margin should be expected from its foreign incomes. That this average GPM of 23% was subsequently applied to estimate the margins likely earned from the undeclared foreign incomes.
86. That its decision was also informed by the Income Tax (Transfer Pricing) Rules, 2006 Paragraphs 4 and 7, whereby one can choose the transfer pricing method to apply. That in this particular case the Comparable Uncontrolled Price (CUP) method was selected when it compared the transfer price in a



controlled transaction with the prices in an uncontrolled transaction and it made accurate adjustments to eliminate material price differences.

87. The Respondent posited that it relied on the established average Gross Profit Margins (23%) as per previously self-declared Income tax returns in order to estimate the taxable income and it also allowed the Appellant the salaries cost for expatriates charged for PAYE in order to arrive at the taxable income and subjected it to Corporation tax at the rate of non-resident person of 37.5%.
88. The Respondent submitted that this test was reasonable in the circumstances as was stated in the case of Digital Box Limited V Commissioner of Investigations and Enforcement (Tat 115 Of 2017).
89. The Respondent submitted that the bank deposit method is based on the premise that money received must either be deposited or spent. That this approach is particularly useful if an analysis of bank accounts and a taxpayer's cash expenditure indicates a likelihood of undeclared income and the taxpayer makes regular payments into bank accounts that appear to be from a taxable source as was affirmed in the case of TAT 551 OF 2021 Atronix Limited-Vs Commissioner of Domestic Taxes and Civil Appeal 154 Of 2007 Pili Management Consultants Ltd V Commissioner of Income Tax Kenya Revenue Authority [2010] ECLR.

#### **d. Whether the Appellant Discharged Its Burden of Proof**

90. The Respondent stated that the Appellant failed to provide sufficient information relating to undisclosed bank accounts contained in the Appellant's financial statement for the 2016-2021 years of income despite the fact that the amounts transacted were material.
91. That the Appellant failed to support its ground of objection on travel and accommodation expense through provision of invoices for travel and accommodation as well as list of persons who enjoyed the benefit.
92. That the Appellant failed to discharge its burden of proof as contained in Section 56(1) of the [Tax Procedures Act](#) and Section 30 of the [Tax Appeals Tribunal Act](#) and as was also illuminated in the cases of:-
  - a. Tumaini Distributors Company (K) Limited V Commissioner of Domestic Taxes [2020] eCLR
  - b. Prima Rosa Flowers Limited Versus Commissioner of Domestic Taxes [2019] .
  - c. Ushindi Exporters Limited Versus Commissioner of Investigation and Enforcement (Tax Appeals Tribunal No 7 Of 2015).
  - d. Kenya Revenue Authority V Maluki Kitili Mwendwa [2021] eCLR
  - e. Mbuthia Macharia V Annah Mutua Ndwiga & Another [2017] eCLR

#### **Respondent's prayers**

93. The Respondent prayed that this Honourable Tribunal be pleased to: -
  - i. Uphold the Respondent's decision dated 27<sup>th</sup> July 2023 as proper and in conformity with the provisions of the law.
  - ii. Find that the Appeal is devoid of merit and ought to be dismissed with costs to the Respondent.



## Issues For Determination

94. Having looked at the Memorandum of Appeal, the Appellant's Statements of Facts, Respondent's Statement of Facts, Witness statements, submissions filed by both parties and the documentary evidence thereon the Tribunal determined that the issues falling for its determination are as follows:
- a. Whether the Respondent's Objection decision dated 27<sup>th</sup> July 2023 was invalid
  - b. Whether the assessments were time-barred; and
  - c. Whether the Respondent was justified in confirming the assessments.

## Analysis And Findings

### a. Whether the Respondent's Objection decision dated 27<sup>th</sup> July 2023 was invalid

95. The Appellant lodged an objection vide a letter dated 12<sup>th</sup> May 2023 while the Respondent issued its Objection decision dated 27<sup>th</sup> July 2023 wherein the Respondent demanded tax totaling to Kshs 2,460,966,251.00.
96. Whereas the Appellant argued that the objection decision is statute time-barred, the Respondent argued that the Appellant validated its objection on 29<sup>th</sup> May 2023 and as such the Respondent's timelines started running from this date hence the Appellant cannot plead that the Respondent's Objection decision was issued outside the stipulated timelines.
97. The 2022 version of the TPA was the applicable law at the time of filing of the notice of objection in this Appeal. It read as follows in Section 51(11):
- “The Commissioner shall make the objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.”
98. The Respondent was thus required to make its decision within 60 days from the date of receipt of a valid objection.
99. The Respondent stated that it advised the Appellant through correspondences dated 23<sup>rd</sup> May 2023 and 24<sup>th</sup> May 2023 to validate its Objection. Appellant confirmed that it was indeed notified to validate the said objection when it stated as follows in paragraph 8 of its Statement of Facts:-
- “The Respondent requested additional information from the Appellant which necessitated a further Objection dated 29<sup>th</sup> May, 2023.”
100. Time thus started running from 29<sup>th</sup> May 2023 when the Appellant validated its objection. In which case the Respondent was required to issue its Objection decision on or before the 28<sup>th</sup> July 2023.
101. In this instant Appeal the Objection decision dated 27<sup>th</sup> July 2023 was issued on 28<sup>th</sup> July 2023 which was within the sixty days as provided for under Section 51(11) of the TPA. As such it is a valid decision under Section 51(11) of the TPA.
102. The Appellant's second contention on invalidity was that the impugned Objection decision was invalid because it was incomplete, inadequate, incomprehensible and had missing pages.
103. On this issue the Respondent averred that it provided the Appellant with a valid and complete Objection decision.



104. The issue of what amounts to a valid objection is encapsulated in Section 51(10) of the TPA which provides as thus:-
- “An objection decision shall include a statement of findings on the material facts and the reasons for the decision.”
105. The law thus provides that an Objection decision would be lawful provided that it contains a statement of findings and reasons for the decision.
106. The Tribunal has looked at the Objection decision dated 27<sup>th</sup> July 2023 and it has noted that the said Objection decision contained the decision of the Commissioner in pages 6 and 7 and the reasons for the said decision in the preceding pages.
107. The issue of the missing pages has not been included under Section 51(10) of the TPA as one of the things that can make an Objection decision invalid. It thus follows that any decision by the Commissioner that has a statement of findings and the reason for the Commissioner’s decision is a valid decision.
108. On the face of it the impugned Objection decision was issued in time, it contained the statement of finding on several tax heads and the reasons for the said findings. The issue of missing pages did not therefore go into the root of the said decision to an extent that it could result in its invalidation.
109. An issue would only have arisen if the Appellant managed to prove that the Respondent declined to provide it with the missing pages within a reasonable time upon its request. And that it was thus unable to file its appeal or comprehend the full decision of the Respondent to enable it file an Appeal.
110. The Appellant did not plead or explain whether it was prejudiced in the filing of its Appeal by the alleged incomplete decision. On the contrary the Tribunal has gleaned through the Appellant’s Statement of Facts dated 9<sup>th</sup> November 2023 and noted that the Appellant attached the complete Objection decision as its Appendix 11. Its response to all the issues raised in the said Objection decision also confirms that it was aware and in possession of the complete Objection decision as the time it was filing its Appeal. It was hence not prejudiced by this alleged omission.
111. This shows that the Appellant was in possession of the complete Objection decision prior to the filing of its Appeal. It was thus not prejudiced or disenfranchised in any way by the initial missing pages, if at all, and hence the reason why such prejudice or disfranchisement has not been pleaded in this Appeal.
112. Moreover, nothing would have stopped the Appellant from responding to the issues/assessments that were apparent on the pages of the objection while reserving its rights to respond to the issues contained in the missing pages when it sights the missing pages. Alternatively, it would have pointed out this issue in its Appeal by stating that its response was only limited to the decisions and statement of findings it had sighted. This way no assessment may have risen regarding whatever was contained in the missing pages that were never sighted by the Appellant.
113. Based on the above analysis it is clear that the issue of missing pages was a clerical error which was not so severe as to make the Objection decision to be incomprehensible and thus invalid. It was instead an administrative issue that the Appellant ought to have sorted out by requesting for the missing pages to facilitate its Appeal.
114. In end, the Tribunal finds and holds that the impugned Objection decision met the minimum threshold of a decision as contained in Section 51(10) of the TPA. It is thus a valid decision.



## **b. Whether the Assessments are Time-barred**

115. The Respondent issued assessments seeking to recover taxes from 2017 to 2021 vide assessment letter dated 18<sup>th</sup> April 2023.

116. Section 31(4) (b) of the TPA provides that,

“The Commissioner may amend an assessment—

In any other case, within five years of—

- (i) For a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates.”

117. Section 23 of the TPA also speaks to aspects of time. It provides as follows:

“Record-keeping

(1) A person shall—

- (a) Maintain any document required under a tax law, in either of the official languages;
- (b) Maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and
- (c) subject to subsection (3), retain the document for five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.”

118. Whereas Section 31(4) (b) of the TPA requires the assessment to be made within five years, there is an exemption to this rule under Section 31(4) (a) of the TPA wherein the Respondent has to demonstrate a case of gross or wilful neglect, evasion, or fraud by or on behalf of the taxpayer.

119. The fact of the issues of gross or wilful neglect, evasion or fraud on the part of a taxpayer ought to be proved to negate the provision of Section 31(4)(b) of the TPA was discussed in *Africa Oil Kenya BV v Commissioner of Domestic Taxes (Tax Appeal E024 & E051 of 2020 (Consolidated))* [2022] KEHC 15967 (KLR), where the Court held as thus:

“On this issue, I agree with the tribunal that the commissioner did not allege, let alone prove any willful neglect on the part of the appellant. Willful or gross neglect entails an intentional or reckless failure to carry out a legal duty. There is no evidence on record of such conduct on the appellant's part.”

120. The Tribunal notes that the allegation of fraud or wilful neglect was not pleaded or propounded by the Respondent in this case. Consequently, the Tribunal finds that the Respondent was not justified in issuing an assessment against the Appellant beyond the five-year statutory limit period.

121. Assessment in this matter was issued on 18<sup>th</sup> April 2023. The reporting date for the 2022 financial year was 30<sup>th</sup> June 2024. The assessments for 2022 were thus not due and would not be included in the computation of time under Section 31(4)(b) of the TPA.

122. Accordingly, the Respondent did not err when it issued assessments for income tax, PAYE and WHT for the period between 2017 and 2021.



123. The reporting period for VAT is usually the 20<sup>th</sup> of every subsequent month. The reporting period for VAT in this Appeal was on 20<sup>th</sup> of April 2023. This means that the VAT for the month of March, 2023 was not due and should thus not be included in calculating time limit under Section 31(4)(b) of the TPA.
124. As a result, the VAT assessments for March 2018 and backwards were unlawful for contravening Section 31(4)(b) of the TPA.

**c. Whether the Respondent was justified in confirming the assessments**

125. The Appellant accused the Respondent of erroneous assessments concerning income monies in bank accounts and subjecting them to tax against the Appellant, the Appellant also stated that in actual sense the monies were not of the Appellant but rather belonged to a separate legal entity in China. The Appellant further alleged that the Respondent erred in law and in fact by rejecting the reasons and supporting documentation it submitted explaining the variances between the banking versus the income as per audited account. Conversely, the Respondent alleged that the documents that the Appellant provided were not sufficient to alter the assessments.
126. The Tribunal has examined the Appellant’s pleadings and noted that the Appellant did not file any documentary evidence to support this Appeal. The purpose of an Appeal is to resubmit to this Tribunal, the documents that the Appellant placed before the Respondent for the Tribunal to reconsider them to make a finding. Without those documents, the Tribunal cannot make a determination on matters of fact whether the Respondent erred or not.
127. The annexures that the Appellant filed in this Appeal included the assessments, the Objection decision, the letter of authority, email correspondence, notice of objection and nothing else. The Respondent averred that it requested documents such as invoices for travel and accommodation expenses; a list of the persons who enjoyed the travel and accommodation services; detailed bank remittance advice details for outward transactions for all the accounts held by the company for the period under review; a breakdown of the Withholding tax declared and paid for the period; a list with full names of the parent company staff sent to Kenya in 2018 to support the objection; work permits, payroll and employment contracts; transfer pricing policy document among other documents.
128. There is nothing on record to show that these documents were ever provided to the Respondent. Taxpayers have a statutory obligation to file documentary evidence to support their notices of objection.
129. Rule 5 of the Tax Appeals Tribunal (Procedure) Rules, 2015 provides for the need to file relevant documentary evidence while filing an Appeal. It provides as hereunder:
- “ (1) Statement of fact signed by the appellant shall set out precisely all the facts on which the appeal is based and shall refer specifically to documentary evidence or other evidence which it is proposed to adduce at the hearing of the appeal.
- (2) The documentary evidence referred to in paragraph (1) shall be annexed to the statement of fact.”
130. Filing relevant and applicable documentary evidence would have enabled the Appellant to aptly challenge the Respondent’s assessment which is often presumed to be correct and due in all cases where the Appellant has failed to discharge its burden of proof under Section 56(1) of the TPA and Section 30 of the *Tax Appeals Tribunal Act* (TATA).



131. Section 56(1) of the TPA provides as follows with regard to burden of proof:-

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

132. Further Section 30 of TATA 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, the tax decision should not have been made or should have been made differently.”

133. In *Katebes Enterprises Limited v Commissioner of Domestic Taxes (Tax Appeal E332 of 2023)* [2024] KETAT 1293 (KLR), this Tribunal emphasized that the taxpayer has to produce documentary evidence to support its objection.

134. Pursuant to the above analysis, the Tribunal finds that the Respondent failed to discharge its burden of proof to challenge the Respondent’s assessment. Consequently, the Tribunal finds that there is no reason to interfere with the Respondent’s assessments save for the assessments that are time barred.

#### **Final Decision**

135. The upshot to the foregoing analysis is that the Tribunal finds and holds that the Appeal is partially meritorious and consequently makes the following orders; -

- a. The Appeal is partially allowed;
- b. The VAT assessment for the period March 2018 backwards be and is hereby set aside.
- c. The Respondent’s assessments for Income tax, PAYE and WHT be and are hereby upheld.
- d. The VAT assessment for the prospective period of April 2018 onwards be and is hereby upheld;
- e. Each party to bear its own costs.

136. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025**

**DR. RODNEY O. OLUOCH - CHAIRPERSON**

**CYNTHIA B. MAYAKA - MEMBER**

**GLORIA A. OGAGA - MEMBER**

