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Select Tax Appeal Tribunal Decisions

Issue No. 8/2025

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Preface

In this issue of tax case summaries, we continue to provide succinct summaries on the decisions issued by the TAT.

Whether you are a seasoned tax professional seeking to stay abreast of recent developments, a student delving into the intricacies of tax law, or a curious individual with a penchant for understanding the legal framework that governs our fiscal responsibilities, these case summaries provide a valuable resource.

The “Index” section highlights the key issue(s) under consideration by the TAT and is not an indication that the issue(s) highlighted are the only issues raised by the parties.

For a detailed analysis on any case and how it would affect your tax affairs, please look out for our tax alerts, reach out to your usual contacts or the following PwC tax team members.

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TAT e808/2023:
Simon Kamau Ndungu vs Commissioner, Investigations and Enforcement

Background

The Appellant, Simon Kamau Ndungu, is a director of Nairobi Fairly Timbers & Hardware Ltd. The Respondent, Commissioner of Investigations and Enforcement, conducted tax investigations into the tax affairs of the company and the Appellant's personal bank statements for the tax period 2017 to 2021. The Respondent issued additional Income Tax and VAT assessments amounting to Kshs 30,491,726.00. The Appellant objected to these assessments, leading to an objection decision by the Respondent. Aggrieved by the decision, the Appellant lodged an appeal.

Issues for Determination

Whether the Appellant received income on behalf of Nairobi Fairly Timber and Hardware Limited and Property Outlook Limited. - Whether the assessments were statutorily time barred. - Whether the Objection Decision dated 17th October 2023 was justified.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by treating him and Nairobi Fairly Timber & Hardware Limited as one legal entity, and by assessing him for taxes that ought to be accounted for by the company. He also contended that the Respondent issued statutorily time barred tax assessments, and that he was not liable for VAT as he was not operating timber sales. The Appellant further argued that the Respondent erred in law and fact by treating him and a company called Property and Business Outlook Limited as one and the same entity.

Respondent's Argument

The Respondent maintained that it conducted tax investigations into the tax affairs of the company and the Appellant's personal bank statements for the tax period 2017 to 2021 and issued additional Income Tax and VAT assessments based on the information available. The Respondent argued that it was not bound by the Appellant's filed tax returns and could issue additional tax assessments based on available information and best judgement. The Respondent also contended that the assessments were issued within the statutory 5 years and adhered to Sections 29(5) and 31(4)(b) of the TPA.

Tribunal Findings

The Tribunal found that the Respondent acted illegally and unlawfully by treating the Appellant and Nairobi Fairly Timber & Hardware Limited and Property and Business Outlook Limited as one and the same person. The Tribunal also found that the Respondent's recruitment of the Appellant for VAT through a letter dated 19th July 2023 was unlawful. The Tribunal further found that the Respondent unlawfully assessed the Appellant based on income received on behalf of Nairobi Fairly Timber & Hardware Limited and Property and Business Outlook Limited.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the objection decision dated 17th October 2023, expunged the Respondent's letter dated 19th July 2023 registering the Appellant for VAT, and annulled the Appellant's VAT obligation. Each party was ordered to bear its own cost.

TAT e809/2023:
Terecia Wacuka Kamau vs Commissioner, Investigations and Enforcement

Background

The Appellant, Terecia Wacuka Kamau, is a director of Nairobi Fairly Timbers & Hardware Ltd. The Respondent, Commissioner of Investigations and Enforcement, computed the Appellant's income tax and VAT amounting to Kshs 74,008,571.00 for the period 2017 to 2021. The Appellant lodged an objection to the Assessments, which the Respondent considered and issued an objection decision confirming the assessments. The Appellant, aggrieved by the decision, lodged this Appeal.

Issues for Determination

Whether the Appellant received funds on behalf of Nairobi Fairly Timber and Hardware Limited. - Whether the assessments were statutorily time barred. - Whether the Respondent's Tax decision dated 16th October 2023 was justified.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by issuing statutory time barred tax assessments. She also contended that the Respondent unlawfully treated her and Nairobi Fairly Timber & Hardware Limited as one and inseparable legal entity, thereby subjecting her to VAT and income tax based on the deposits received from Nairobi Fairly Timber & Hardware Limited. The Appellant maintained that she received the income on behalf of Nairobi Fairly Timber & Hardware Limited.

Respondent's Argument

The Respondent argued that it carried out a review into the tax affairs of the Appellant for the period 2017-2021 and found that the Appellant in her role as the director of Nairobi Fairly Timber and Hardware earned income but underdeclared it. The Respondent maintained that the Appellant failed to discharge its burden of proof and did not provide any documentary evidence to support all the contentions to substantiate her objection.

Tribunal Findings

The Tribunal found that the Appellant received the income on behalf of Nairobi Fairly Timber & Hardware Limited, and therefore, the Respondent's assessments were unlawful. The Tribunal also found that the Respondent unlawfully treated the Appellant and Nairobi Fairly Timber & Hardware Limited as one and the same person, and thus, the VAT assessments were unlawfully carried out on the Appellant. The Tribunal further found that the Respondent's decision to recruit the Appellant for VAT through a letter dated 19th July 2023 is illegal.

Tribunal's Decision

The Appeal was allowed. The Respondent's letter dated 19th July 2023 registering the Appellant for VAT was expunged. The Appellant's VAT obligation was annulled. The objection decision dated 16th October 2023 was set aside. Each party was to bear its own cost.

Treatment of payments made to card companies as royalties

TAT e084/2024:
Stanbic Bank Kenya Limited vs Commissioner for Domestic Taxes

Background

The Appellant, Stanbic Bank Kenya Limited, was assessed for withholding tax by the Respondent, Commissioner for Domestic Taxes, following a tax audit for the period November 2021 to December 2022. The Respondent claimed that payments made by the Appellant to non-resident card companies constituted royalties and that interchange services provided by the Appellant qualified as management or professional services, both subject to withholding tax. The Appellant objected to this assessment, arguing that the payments were not for the use of the card companies' trademarks (and thus not royalties) and that the services provided did not qualify as management or professional services. Dissatisfied with the Respondent's Objection Decision, the Appellant lodged an appeal to the Tribunal.

Issues for Determination

Whether the payments made by the Appellant to non-resident card companies are royalties to be subjected to withholding tax deductions as per Income Tax Act.

- Whether interchange services qualify as professional/management services as per Income Tax Act.

Appellant's Argument

The Appellant argued that the payments made to the card companies were not for the use of the companies' trademarks and logos, but for their clearing and settlement functions, and thus did not constitute royalties. The Appellant also contended that its role in the tripartite arrangement with the issuer, acquirer, and card companies did not constitute management or professional services as defined by the Income Tax Act. The Appellant relied on previous Tribunal decisions and interpretations of the Income Tax Act to support its arguments.

Respondent's Argument

The Respondent maintained that the payments made by the Appellant to the card companies constituted royalties as per the Income Tax Act, as they were for the use of the companies' trademarks and logos. The Respondent also argued that the Appellant's role in the tripartite arrangement constituted management or professional services, and thus was subject to withholding tax. The Respondent relied on the Court of Appeal decision in Commissioner of Domestic Taxes (Large Tax Payer Office) -vs- Barclays Bank of Kenya Ltd [2020] eKLR to support its position.

Tribunal Findings

The Tribunal found that the payments made by the Appellant to the card companies did consist of royalties for the use of their trademarks and logos, as well as payments for access to card payment systems and clearing and settlement functions. Therefore, these royalties were subject to withholding tax. The Tribunal also agreed with the Court of Appeal's decision that the Appellant's role in the tripartite arrangement constituted management or professional services, and thus was subject to withholding tax.

Tribunal's Decision

The Tribunal dismissed the appeal, upheld the Respondent's Objection Decision dated 13th December 2023, and ordered each party to bear its own costs.

Tax exemption of Japanese employees (Legal Notice 15 of 2021)

TAT e041/2024:
Shinryo Corporation Kenya Branch vs Commissioner of Domestic Taxes

Background

The Appellant, Shinryo Corporation Kenya Branch, is a branch of Shinryo Corporation, a company resident in Japan. The branch was registered on 31st July 2018 and issued a Certificate of Compliance under Section 366 of the Companies Act Cap 486 of the Laws of Kenya. The Respondent, Commissioner of Domestic Taxes, conducted an audit on the Appellant's transactions for the years 2018 to 2023 and raised additional Corporation tax amounting to Kshs. 143,496,565.00 and Pay As You Earn (PAYE) amounting to Kshs. 47,568,237.00 inclusive of penalties and interest in a notice of audit findings issued on 12th September 2023.

The Appellant objected to the entire assessment, and the Respondent issued its Objection decision on 4th December 2023, rejecting the Appellant's Objection in its entirety and confirming the additional assessments.

The Appellant, being dissatisfied with the Respondent's Objection decision, filed its Notice of Appeal on 2nd January 2024.

Issues for Determination

Whether the income of the Appellant and its Japanese expatriate employees is exempted from income tax. - Whether the Respondent was justified in issuing the Corporation tax and PAYE assessments on the Appellant's income and the employment income of the Appellant's Japanese expatriate employees.

Appellant's Argument

The Appellant argued that its income and that of its Japanese expatriate employees are exempted from income tax based on the Exchange Notes forming part of the Financing Agreements dated 20th November 2007 and 9th March 2015 between the Government of Kenya and the State of Japan.

The Appellant further argued that the Legal Notice No. 15 of 2021 given under Section 13 of the Income Tax Act affirms the exemption in the Exchange Notes to the extent specified in the Financing Agreements between the Government of Kenya and the Government of Japan.

The Appellant also argued that the Ruling in Civil Appeal No. E176 of 2023 has provisionally halted the enforcement of the declarations outlined in the Judgment of Petition No. E280 of 2021 regarding Legal Notice No. 15 of 2021 and Section 13 of the Income Tax Act in effect for six (6) months from the current date, pending hearing and resolution of the applicants' appeal.

Respondent's Argument

The Respondent argued that the income of the Appellant and its Japanese expatriate employees is not exempted from income tax based on the Judgment in Petition No. E280 of 2021 Eliud Karanja Matindi - Vs - Cabinet Secretary-National Treasury, Commissioner General - Kenya Revenue Authority, Attorney General, National Assembly and Speaker of National Assembly, where the High Court Judge held that the Legal Notice No. 15 dated 26th February 2021 was unconstitutional and did not undergo public participation as envisaged.

The Respondent further argued that the Ruling in Civil Appeal No. E176 of 2023 which suspended the enforcement of the declarations outlined in the Judgment of Petition No. E280 of 2021 regarding Legal Notice No. 15 of 2021 and Section 13 of the Income Tax Act remained in force for a period of six (6) months from the date of that Ruling which was 19th January 2023.

Based on this finding, the Tribunal finds that the stay orders given in the Ruling are no longer in force.

Tribunal Findings

The Tribunal found that the income of the Appellant and its Japanese expatriate employees is not exempted from income tax during the period of assessment.

The Tribunal further found that the Appellant failed to furnish the Tribunal with any document or records to illustrate which proportion of the Appellant's self-declared income and profits pertained to income and profits of its Head Office.

The Tribunal also found that the Appellant failed to substantiate its argument that the Corporation tax assessment was invalid. The Tribunal further found that the Appellant did not make any pleadings against the basis of the Respondent's PAYE assessment on the employment income of Japanese expatriate employees based on comparable income earned by individuals having the same skill set as the expatriate employees for the period September 2018 to August 2023.

Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Respondent's objection decision dated 4th December 2023. Each party was ordered to bear its own costs.

PAYE on motor vehicle reimbursements

TAT e399/2023:
Parliamentary Service Commission vs Kenya Revenue Authority

Background

The Kenya Revenue Authority (KRA) issued a tax demand to the Parliamentary Service Commission (PSC) for the payment of Pay As You Earn (PAYE) tax on motor vehicle reimbursements given to Members of Parliament (MPs), Speakers, and Deputy Speakers.

The KRA argued that these reimbursements were taxable under Section 3(2)(a)(ii) of the Income Tax Act as they constituted 'gains or profits' from employment.

The PSC objected to this demand, arguing that the reimbursements were not income but were expenses incurred by MPs in the performance of their duties.

The KRA rejected this objection, leading to the PSC's appeal to the Tax Appeals Tribunal.

Issues for Determination

Whether Motor Vehicle reimbursements are gains and/or profits chargeable to tax under the Income Tax Act.

Whether the Respondent erred in charging PAYE to the Motor Vehicle reimbursements. - Whether the Appellant discharged its burden of proof.

Whether the Respondent breached the Appellant's Legitimate expectation.

Appellant's Argument

The PSC argued that the motor vehicle reimbursements were not income but were expenses incurred by MPs in the performance of their duties. They contended that these reimbursements were excluded from the definition of 'gains or profits' under Section 5(2)(a)(ii) of the Income Tax Act, which exempts reimbursements for amounts wholly expended in the production of income.

The PSC also argued that MPs were not employees of the PSC, but were elected representatives, and therefore the provisions of the Employment Act did not apply to them.

They further argued that the KRA's decision violated the PSC's legitimate expectation that the reimbursements would not be taxed.

Respondent's Argument

The KRA argued that the motor vehicle reimbursements were 'gains or profits' from employment and were therefore taxable under Section 3(2)(a)(ii) of the Income Tax Act. They contended that the MPs, Speakers, and Deputy Speakers were employees of the PSC and any payments or benefits extended to them were treated as income from employment.

The KRA also argued that the MPs retained the motor vehicles after the expiry of their parliamentary term, which amounted to a direct gain.

They further argued that the PSC had not provided any documents to prove that the assessment was incorrect, and therefore had not discharged its burden of proof.

Tribunal Findings

The Tribunal found that the motor vehicle reimbursements were gains from employment and were therefore subject to tax under the Income Tax Act.

It held that MPs were employees of the PSC and any payments or benefits extended to them were treated as income from employment.

The Tribunal also found that the MPs retained the motor vehicles after the expiry of their parliamentary term, which amounted to a direct gain.

The Tribunal further found that the PSC had not provided any documents to prove that the assessment was incorrect, and therefore had not discharged its burden of proof.

Tribunal's Decision

The Tribunal dismissed the appeal, upheld the KRA's objection decision, and ordered each party to bear its own costs.

Value Added Tax Act

Subjection of employee related disbursements to VAT

TAT e384/2024:
Fairlands Investment Limited vs Commissioner of Domestic Taxes Dept.

Background

The Commissioner of Domestic Taxes conducted a compliance check on Fairlands Investment Limited's tax returns for the period November 2021 to October 2022.

The Commissioner issued a pre-assessment notice and subsequently raised an assessment of Kshs. 11,678,587.66 on 1st December 2023. Fairlands Investment Limited objected to this assessment, arguing that the Commissioner had incorrectly treated disbursements as vatable income.

The Commissioner confirmed the additional assessment of Kshs. 12,379,302.92, leading Fairlands Investment Limited to lodge an appeal.

Issues for Determination

Whether the Objection Decision dated 25th March, 2024 was justified.

Appellant's Argument

Fairlands Investment Limited argued that it was contracted as a management agent of buildings and properties for various third parties. It claimed that it charged management fees which were correctly declared as vatable.

However, it argued that the Commissioner had erred in treating disbursements as vatable income and charged VAT instead of correctly treating them as a recovery of costs incurred by the agent on behalf of its principals.

Fairlands Investment Limited relied on the provisions of Section 13(5) of the VAT Act 2013, which states that if the Commissioner is satisfied that the supplier has merely made a disbursement for a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.

Respondent's Argument

The Commissioner of Domestic Taxes argued that Fairlands Investment Limited was a supplier of services to various clients and was not recipients of any services, and as such no payroll cost were reimbursable to them.

The Commissioner contended that the hiring of employees by Fairlands Investment Limited constituted a supply, hence the total consideration for the supply of services by Fairlands Investment Limited should include both the management fees and the payroll costs paid to them by their clients.

Tribunal Findings

The Tribunal found that the services rendered by Fairlands Investment Limited, including the deployment of staff at the clients' premises, amounted to a taxable supply, and were therefore subject to value added tax.

The Tribunal found that Fairlands Investment Limited had a duty to charge its clients VAT upon issuance of invoice for payments and thereafter, remit the received VAT to the Commissioner.

The Tribunal found that the Commissioner's Objection Decision dated 25th March 2024 was justified.

Tribunal's Decision

The Tribunal dismissed the appeal by Fairlands Investment Limited and upheld the Commissioner's objection decision dated 25th March 2024. Each party was ordered to bear its own cost.

TAT e064/2024:
Lead Human Capital Limited vs Commissioner of Domestic Taxes

Background

The Appellant, Lead Human Capital Limited, a human capital resource company, was issued a pre-assessment notice by the Respondent, Commissioner of Domestic Taxes, following a returns review on the Appellant's income tax return and the turnover in VAT returns.

The Respondent demanded Kshs. 28,743,241.00 in taxes arising from the variance. The Appellant lodged a response letter seeking clarification and requested for a technical ruling.

The Respondent issued an i-Tax assessment, which the Appellant objected to. The Respondent rendered its objection decision confirming the VAT assessment of Ksh 28,743,241.00. Aggrieved by the Respondent's objection decision, the Appellant lodged its Notice of Appeal.

Issues for Determination

Whether the payments received by the Appellant for settlement of employment costs is subject to VAT.

Appellant's Argument

The Appellant argued that the Respondent committed a legal and factual error by imposing VAT on its entire consideration as opposed to only charging VAT on management fees because employee costs were received on behalf of its employees and was subject to statutory deductions such as NSSF, NHIF and PAYE and that purporting to subject the same to VAT was akin to double taxation.

Respondent's Argument

The Respondent was categorical that the entire consideration received by the Appellant constituted 'supply' within the meaning of Section 2 of the VAT Act and was thus subject to VAT at the standard rate.

The Respondent also argued that the Appellant's 'reimbursements' were indeed incidental costs necessary for it to provide services which pursuant to Section 13(5) of the VAT Act were part of the taxable value of supply as cost of labour could not be termed as reimbursement under the cited section.

Tribunal Findings

The Tribunal found that the Appellant herein provided services for a consideration in form of employee costs plus management fees, and that delineation of the Appellant's consideration was necessary for tax purposes. The Tribunal was convinced that the Respondent's objection decision dated 15th December 2023 was neither justified nor proper in law and found that the payments received by the Appellant for settlement of employment costs are not subject to VAT.

Tribunal's Decision

The Appeal was allowed and the Respondent's objection decision dated 15th December 2023 was set aside. Each party was to bear its own costs.

Input VAT and the agency relationship

TAT e952/2023:
Hapag Lloyd Kenya Limited vs Commissioner of Domestic Taxes

Background

Hapag Lloyd Kenya Limited (the Appellant) lodged a VAT refund claim with the Commissioner of Domestic Taxes (the Respondent) for Kshs. 1,691,316.00 covering the months of April, May, June, and July, 2023. The Respondent issued a VAT Claim Rejection Order, which the Appellant appealed against.

The Appellant is a shipping agent of Hapag Lloyd AG, an international sea carrier and shipping company registered in Germany. Issues for Determination Whether the Respondent was justified in rejecting the Appellant's input VAT Refund Application.

Issues for Determination

The Appellant argued that it provided exported taxable services in respect to business process outsourcing (BPO), which services were zero rated under Paragraph 23 of the Second Schedule to VAT Act, 2013.

The Appellant contended that the Respondent's basis of rejecting the Appellant's VAT refund claims is manifestly erroneous, not cognizant of the clear provisions of Paragraph 6 and 23 of the Second Schedule to the VAT Act, and not based on the correct facts, and thus the input VAT refund claim is properly due and payable to the Appellant.

Appellant's Argument

The appellant argued that it had incurred significant expenses in the years 2018 and 2019, which were not factored in by the respondent before arriving at the amended assessment.

The appellant also claimed that the delay in reaching the ADR agreement on the part of the respondent led to the appellant being time barred to file its written submission relating to the appeal.

Respondent's Argument

The Respondent averred that its decision to decline the Appellant VAT application is legally correct and the same should be upheld by the Tribunal.

The Respondent further averred that it made the decision to decline the Appellant VAT refund application upon reviewing an agency agreement between the Appellant and its parent holding company, Hapag-Lloyd AG, dated 15th September, 2021, for provision of agency services where it noted that the Appellant incurs expenses on behalf and in the name of its principal and is reimbursed all costs incurred plus a 3% mark up.

Tribunal Findings

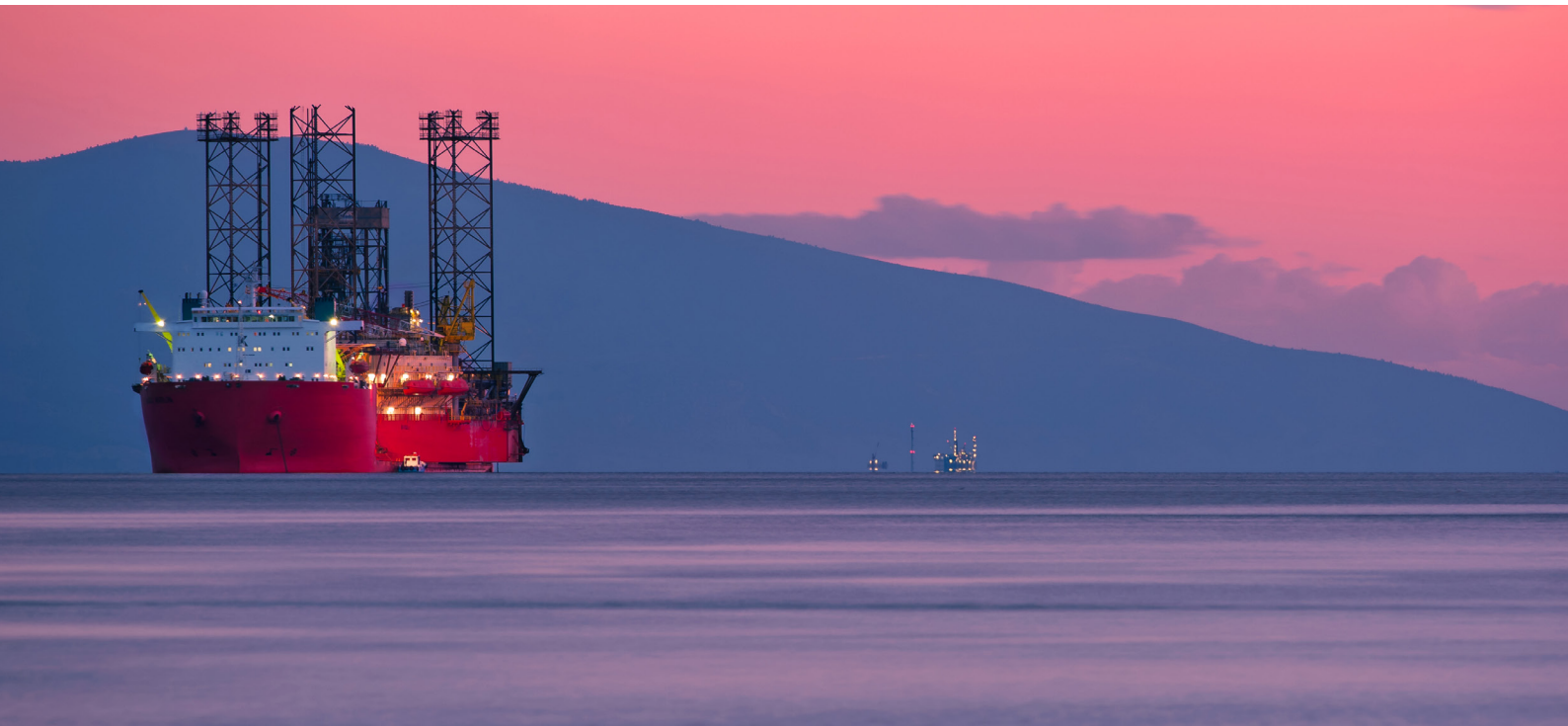
The Tribunal found that the services offered by the Appellant fall within the meaning of 'Service exported out of Kenya' as envisaged under Section 2 of the VAT Act, 2013.

However, the Tribunal also found that the Appellant acted as an agent of its principal, Hapag Lloyd AG, and the claim for input VAT would therefore belong to the principal, Hapag Lloyd AG.

Consequently, the Tribunal found and held that the Respondent was justified in rejecting the Appellant's input VAT refund application.

Tribunal's Decision

The Appeal was dismissed and the Respondent's VAT Claim Rejection Order dated 11th October, 2023 was upheld. Each party was ordered to bear its own costs.



TAT e176/2024:
Malco Group Limited vs Commissioner of Domestic Taxes

Background

The Appellant, Malco Group Limited, was awarded a tender by the Ministry of Petroleum & Mining to supply LPG table top cookers. At the time of the contract, the goods were exempt from VAT.

However, the Finance Act 2020, which came into effect after the contract was signed, changed the VAT status of the goods from exempt to vatable at 14%.

The Respondent, Commissioner of Domestic Taxes, issued an assessment order to the Appellant for the VAT amounting to Kshs. 14,000,000. The Appellant objected to the assessment, leading to the appeal.

Issues for Determination

Whether the payment of Kshs 100,000,000.00 paid to the Appellant by the Ministry of Petroleum & Mining was inclusive of VAT.

Whether the assessment and demand for VAT remittance to the Respondent is factually sustainable.

Whether Respondent erred in fact and law in disregarding the loss suffered by the Appellant and the subsequent double jeopardy by imposing VAT that was not charged at the time of supply.

Appellant's Argument

The Appellant argued that the contract was made before the enactment of the Finance Act 2020 and therefore, the contractual sum was not subject to VAT.

The Appellant also argued that it suffered a loss and that the imposition of VAT constitutes double jeopardy.

Respondent's Argument

The Respondent argued that the goods were subject to VAT because they were supplied after the amendments by the Finance Act 2020 had taken effect.

The Respondent also argued that the Appellant's argument of suffering a loss did not negate its obligation to comply with the VAT law as amended by the Finance Act, 2020.

Tribunal Findings

The Tribunal found that the VAT status of any supply is determined at the point of supply and not at any other point. In this case, at the point of supply, the goods were subject to VAT and therefore the Appellant ought to have charged the same and remitted to the Respondent as envisaged in the VAT Act. The Tribunal also found that the amendment in law meant that the goods were subject to VAT at the point of supply even though the same goods were exempt at the time of entering the contract.

Tribunal's Decision

The Tribunal dismissed the Appeal and upheld the Respondent's objection decision dated 21st December 2023. Each party was ordered to bear its own cost.

Refund of tax paid prior to registration

TAT e314/2024:
Tullow Kenya B.v vs. Commissioner of Domestic Taxes

Background

The Appellant, Tullow Kenya B.V, a company involved in oil and gas exploration, had entered into a production sharing agreement with the Government of Kenya.

The Appellant had incurred input tax amounting to Kshs. 488,202,633.00 during its pre-registration period. The Appellant made an application for relief of the same under Section 18 (1) (b) of the VAT Act and Kshs. 487,853,110.00 was approved. The Appellant incorporated another sum of Kshs. 441,826,058.00 in the VAT return for the period September 2023 increasing their credit carried forward to Kshs. 952,054,111.00.

The Appellant sought that the relief granted be converted to a cash refund since they were unable to deduct the same from the tax payable since they were in a perpetual credit position.

The Respondent rejected the Appellant's refund application.

Issues for Determination

Whether the Respondent erred in disallowing the Appellant's VAT refund claim of Kshs. 441,846,058.00 incurred in relation to Early Oil Pilot Scheme export /supply of August 2019 pursuant to Section 18 of the VAT Act.

Appellant's Argument

The Appellant argued that the Respondent erred in law and fact by holding that there is no provision in the law allowing for refund of a relief granted under Section 18 of the Value Added Tax Act, and thereby erroneously rejecting the Appellant's refund application.

The Appellant contended that the Respondent's decision is based on an erroneous interpretation of Section 18 (2) of the VAT Act, whereas its application for refund ought to be considered under the provisions of Section 17 (5) (a) since it relates to excess input incurred in making zero rated supply.

Respondent's Argument

The Respondent contended that the relief that is deductible against tax payable as provided in Section 18 of the VAT Act, does not qualify as excess input tax arising from Section 17 (1) of the VAT Act.

The approved deduction under Section 18 is for deduction against tax payable and does not qualify as refundable excess credit under Section 17 (5) of the VAT Act.

The Respondent also submitted that the relief granted under Section 18 (1) of the VAT Act was intended to provide relief of VAT on supplies held by a registered person as at the time of registration so that there is no double taxation when VAT is charged upon sale of supplies.

Tribunal Findings

The Tribunal found that the Appellant's VAT input incurred prior to registration qualifies as a relief granted under Section 18 (1) & (2) of the VAT Act, and thus cannot qualify for cash refund as sought.

Therefore, in accordance with Section 18 (2) of the VAT Act, the relief so granted ought to be utilized against tax payable, by making appropriate deduction of the relief claimed under subsection (1) from the tax payable on his next return.

Tribunal's Decision

The Appellant's Appeal was dismissed, and the Respondent's Refund Decision dated 1st February 2024 was upheld.

VAT on sewerage services

TAT 197/2015:
Nyeri Water and Sanitation Company Limited vs Commissioner of Domestic Taxes

Background

The appellant, Nyeri Water and Sanitation Company Limited, a non-profit public interest organization, was assessed by the respondent, Commissioner of Domestic Taxes, for additional VAT amounting to Kshs. 35,384,476.00.

The assessment was based on the respondent's interpretation that the appellant's provision of sewerage services and meter rent were not zero-rated supplies under the VAT Act 2013, and thus were subject to VAT.

The appellant objected to this assessment, arguing that these services were part and parcel of water supply, which is zero-rated under the VAT Act 2013.

Issues for Determination

Whether sewerage services offered by the appellant were exempt from VAT during the period September 2013 to February 2015 - Whether the respondent erred in charging VAT on the payments for water meters supplied by the appellant to its customers.

Appellant's Argument

The appellant argued that sewerage services and meter rent are directly related to the supply of natural water, and therefore should be considered zero-rated under the VAT Act 2013.

The appellant also contended that it did not charge the additional non-agreed VAT as it was not in a position to charge any VAT on sewer and meter rent to its customers without approval from the Water Services Regulatory Board.

Respondent's Argument

The respondent maintained that the VAT Act 2013 only zero-rated the 'supply of natural water', not 'water service', which includes sewerage services and meter rent. Therefore, the respondent argued that these services were not exempt from VAT. The respondent also contended that the supply of water meters is a taxable supply, regardless of whether the appellant made a profit from it.

Tribunal Findings

The tribunal found that the sewerage services offered by the appellant were not exempt from VAT during the period September 2013 to February 2015, and the respondent did not err in its objection decision.

The tribunal also held that the respondent did not err in charging VAT on the payments for water meters supplied by the appellant to its customers.

The tribunal's decision was guided by the principle of stare decisis, following a similar ruling by the High Court in a previous case.

Tribunal's Decision

The tribunal dismissed the appeal, upheld the respondent's objection decision demanding payment of Kshs. 35,384,476.00, and made no order as to costs.

Excise Duty Act

Excise on imported raw materials

TAT e945/2023:
Buyline Industries Limited vs Commissioner of Domestic Taxes

Background

Buyline Industries Limited, a manufacturer of beauty and personal care products, was issued an assessment notice by the Commissioner of Domestic Taxes for excise duty claimed of Kshs. 8,300,174.00 for the period January 2021 to June 2023.

The Commissioner disallowed the company's claim of excise tax paid on imported glass bottles, labels, and plastic caps used for the manufacture of excisable end products.

The company objected to the assessment notice, but the Commissioner rejected the objection and confirmed the tax assessment. The company then appealed to the Tax Appeals Tribunal.

Issues for Determination

Whether the Commissioner erred in law and in fact by disallowing the company's claim of excise tax paid on imported glass bottles, labels, and plastic caps used for the manufacture of excisable end products.

Appellant's Argument

Buyline Industries Limited argued that its imported products subject of excise duty claim are raw materials used in the manufacturing of its glass products such as perfumes, deodorants, hair care, nail polish and treatment, colour cosmetics, men aftershaves and baby care products.

The company argued that the glass bottles form a critical constituent in the manufacturing process of the end product, and the product is unfinished and unusable without glass bottle.

The company also argued that the labels in the products contain mandatory statutory and regulatory requirements without which the products cannot be approved and offered for sale.

Respondent's Argument

The Commissioner of Domestic Taxes argued that glass bottles, labels and plastic caps are not raw materials used in the manufacture of excisable goods within the meaning of Section 14 of the Excise Duty Act, and therefore do not qualify as raw materials for which excise tax is claimable.

Tribunal Findings

The Tribunal found that the failure by legislature to define 'raw material' within the meaning of Section 14(1) of the Excise Duty Act creates an ambiguity and should be resolved in favour of the tax payer.

The Tribunal also found that the impugned products are integral to the Appellant's products, and without them the products would not be finished products for purpose of use and distribution.

Therefore, the Tribunal found that the company was justified to offset the excise duty due on its finished product from the excise duty paid on the imported raw materials.

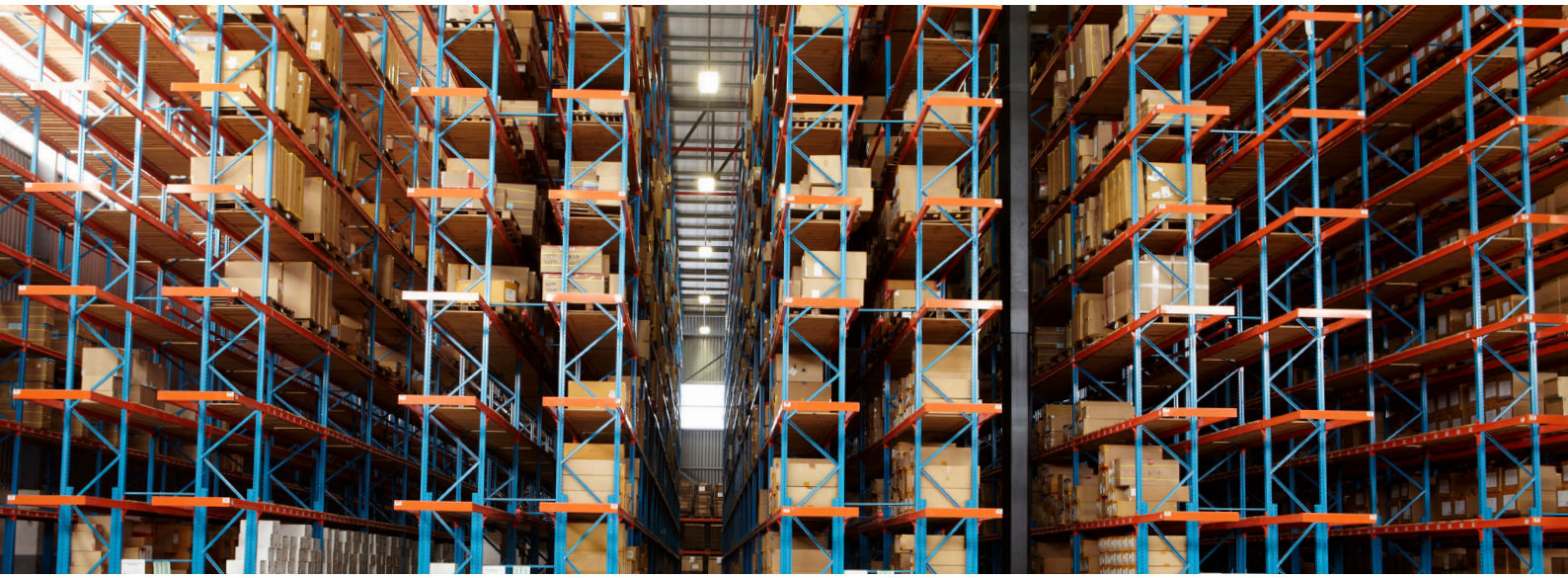
Tribunal's Decision

The Tribunal allowed the appeal, set aside the Commissioner's Review Decision dated 14th November, 2023, and made no order as to costs.

East African Community Customs Management Act

Tariff reclassification

TAT e697/2023:
SICPA Kenya Limited vs Commissioner Of Customs & Border Control



Background

SICPA Kenya Limited, a company involved in the management of the excise goods management system (EGMS) for the Kenya Revenue Authority (KRA), appealed against a decision by the Commissioner of Customs & Border Control.

The Commissioner had conducted a post-clearance compliance review on imported coding machine parts and reclassified the items under a different tariff code, leading to a demand for additional taxes.

The Appellant maintained that the items should be categorised under a different chapter, which pertains to measuring and checking instruments and apparatus. The Respondent upheld its decision to reclassify the items and impose additional taxes.

Issues for Determination

Whether the Respondent raised assessments beyond the five-year statutory timeline - Whether the Respondent erred in reclassifying the Appellants LSM coding machine parts from tariff code 9031.49.00 to tariff code 8543.70.00.

Appellant's Argument

The Appellant argued that the Respondent erred in reclassifying the items under a different tariff code, leading to an incorrect tax assessment. They also claimed that the Respondent issued an assessment beyond the five-year statutory limit. The Appellant relied on the General Interpretation Rules for Classification of Goods under the East African Community Common External Tariff, arguing that the items should be classified under a chapter pertaining to measuring and checking instruments and apparatus.

Respondent's Argument

The Respondent argued that it was within its rights to reclassify the items under a different tariff code, leading to a demand for additional taxes. They also claimed that they were within the five-year statutory limit to issue an assessment. The Respondent relied on the East Africa Community Customs Management Act and the Harmonized Commodity Description and Coding system to justify their reclassification of the items.

Tribunal Findings

The Tribunal found that the Respondent did not raise assessments beyond the five-year statutory timeline. However, it found that the Respondent erred in reclassifying the Appellants LSM coding machine parts from tariff code 9031.49.00 to tariff code 8543.70.00.

The Tribunal noted that the Appellant had imported the said machine parts for many years using tariff code 9031.49.00 and had legitimate expectation that this would not be abruptly changed without justification or any form of consultation.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the Respondent's Review Decision, and ordered each party to bear its own costs.

TAT e832/2023:
Alpharama Limited vs Commissioner of Customs and Border Control

Background

The dispute arose when the respondent carried out a desk audit of the appellant's imports for the period between March 2018 and January 2023. The respondent subsequently issued its review decision on 25th September 2023, in which it classified the appellant's products under HS Code 3402.90.00 and demanded additional tax liability of Kshs 24,743,999.00.

The appellant, aggrieved by the respondent's review decision, lodged a Notice of Appeal.

Issues for Determination

Whether the respondent's demand for Kshs 3,433,163.73 is justified.
- Whether the respondent's classification of the appellant's product under HS Code 3402.90.00 was correct.

Appellant's Argument

The appellant argued that its product was correctly classified under HS Code 3202.10.00, based on the respondent's Tariff Ruling dated 30th November 2011.

The appellant claimed that the respondent's reclassification of the product under HS Code 3402.90.00 amounted to a retrospective application of the law.

The appellant also argued that the respondent's demand was an unjust and unfair attempt to demand for classification under a different code which is subject to higher taxes.

Respondent's Argument

The respondent argued that the appellant's product was correctly classified under HS Code 3402.90.00, based on a lab analysis conducted on a sample of the product.

The respondent also argued that it was allowed under Sections 135, 235, 236, 249 of the EACCMA, 2004, to conduct a post clearance audit to assess and demand for the shortlevied taxes within five years of importation.

Tribunal Findings

The tribunal found that the respondent did not err in demanding short-levied taxes vide its decision of 25th September 2023. Its actions were thus justified. The tribunal also found that the respondent was justified in reclassifying Maralen PCA 85 from HS Code 3202.10.00 to HS Code 3402.90.00.

Tribunal's Decision

The appeal was dismissed and the respondent's review decision dated 25th September 2023 was upheld. Each party was ordered to bear its own costs.

TAT e007/2024:
UNILEVER Kenya Limited vs Commissioner of Customs and Border Control

Background

Unilever Kenya Limited (the Appellant) is a company incorporated in Kenya, primarily involved in the manufacture and sale of food, home, beauty, wellbeing and personal care products in the East Africa region.

The Commissioner of Customs and Border Control (the Respondent) conducted an audit of the Appellant's import and export operations for the period between 2018 and May 2023. Upon conclusion of the audit, the Respondent issued a demand notice for additional taxes amounting to Ksh. 1,875,950,576.00.

The Appellant objected to the entire demand. After reconciliation meetings and provision of further documentation, the Respondent issued a review decision revising the demand amount attributed to export consignments downwards and upholding the demand amount attributed to tariff classification of the imported flavour powders and royalty payments.

The Appellant, aggrieved by the Respondent's review decision, filed an appeal.

Issues for Determination

Whether the Royalty payments made by the Appellant meet the cumulative conditions for inclusion as an adjustment to the customs value of the imported goods.

Whether the Four (4) flavour powders imported by the Appellant are raw materials classifiable under HS Code 3302.10.00 or finished and ready to consume seasonings classifiable under HS Code 2103.90.00.

Whether the Commissioner had issued tariff rulings classifying lovage blend flavour powder, flavour powder type beef spice, chicken flavour powder, and onion dry flavour under tariff code 3302.10.00 thereby creating a legitimate expectation that HS Code 3302.10.00 was the correct tariff code in the declaration of the products.

Whether the reclassification of the products was arbitrary, unreasonable, and in bad faith.

Whether all the export consignments by the Appellant were duly processed by the Respondent and exited the country.

Appellant's Argument

The Appellant argued that the royalty payments made were neither related to the goods under consideration nor a condition of sale of those goods and thus should not form part of the transaction value as an adjustment.

The Appellant also contended that the four flavour powders imported were raw materials used in the food industry and were classifiable under HS Code 3302.10.00.

The Appellant further argued that the Respondent had issued tariff rulings classifying the flavour powders under tariff code 3302.10.00, thereby creating a legitimate expectation that this was the correct tariff code.

The Appellant also disputed the reclassification of the products, arguing that it was arbitrary and unreasonable. Lastly, the Appellant maintained that all its export consignments were duly processed by the Respondent and exited the country.

Respondent's Argument

The Respondent maintained that the royalty payments made by the Appellant were related to the goods under consideration and were a condition of sale of those goods, and thus should form part of the transaction value as an adjustment.

The Respondent also contended that the four flavour powders imported by the Appellant were not raw materials used in the food industry and were not classifiable under HS Code 3302.10.00.

The Respondent further argued that the tariff rulings it had issued did not create a legitimate expectation as they were only valid for a period of 12 months. The Respondent also defended its reclassification of the products, arguing that it was not arbitrary or unreasonable.

Lastly, the Respondent argued that the Appellant had failed to provide sufficient evidence to prove that all its export consignments were duly processed and exited the country.

Tribunal Findings

The Tribunal found that the royalty payments made by the Appellant were not related to the goods under consideration and were not a condition of sale of those goods, and thus should not form part of the transaction value as an adjustment.

The Tribunal also found that the four flavour powders imported by the Appellant were raw materials used in the food industry and were classifiable under HS Code 3302.10.00.

The Tribunal further found that the tariff rulings issued by the Respondent did create a legitimate expectation that this was the correct tariff code. The Tribunal also found that the reclassification of the products by the Respondent was arbitrary and unreasonable. Lastly, the Tribunal found that the Appellant had provided sufficient evidence to prove that all its export consignments were duly processed and exited the country.

Tribunal's Decision

The Tribunal allowed the appeal, set aside the review decision dated 24th November, 2023, and ordered each party to bear its own costs.