REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 474 OF 2020

NATIONAL BANK OF KENYA LIMITED..... APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya under the Companies Act. Its principal business activity is the provision of banking, financial and related services which are regulated by the Central Bank of Kenya.

2. The Appellant, National Bank of Kenya Limited (NBK) is incorporated in Kenya under the Companies Act, 2015. Until 31st December 2019, NBK was a public limited company listed at the Nairobi Securities Exchange (NSE). Subsequently upon acquisition by the KCB Group Plc, NBK" s shares have since been delisted from NSE with the Bank becoming a private wholly owned subsidiary of KCB Group Plc. NBK" s principal business activity is the provision of banking, financial and related services which are regulated by the Central Bank of Kenya (CBK).

3. The Respondent is a principal officer of the Kenya Revenue Authority (KRA), a public body established under the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya, whose primary mandate is the assessment and collection of revenue on behalf of the Government of Kenya.

4. The Appellant claims to have tax overpayments brought forward from the year 2014 through to 2018 which it intended to utilize to offset its subsequent years up to 2018 tax liabilities. However, it was faced with a challenge while filing its returns as there was no field in the *iTax* portal in which to file tax credits. As a result, it filed the Credits under field 13.4 in the *iTax* portal which relates to "credit under special arrangements"

5. Vide a letter dated 15th March 2019, the Respondent requested the Appellant to provide records and information to help in the validation of the income tax credits of Kshs. 431,696,127.00, Kshs. 510,591,944.00 and Kshs. 504,520,521.00 claimed under credits under special arrangement in the tax returns for the years of income 2015, 2016 and 2017, respectively. The information and records were to be provided within 14 days' failure to which, the credits were to be disallowed. It further advised the Appellant that the said field 13.4 of ITR, was strictly restricted to the declaration of credits related to foreign income and that any overpayments were to be dealt with in accordance with Section 47 of the Tax Procedures Act, 2015(TPA).

6. The Appellant responded to the Respondent's letter of 15th March 2019 on 28th March 2019 stating the position and attached the Self-Assessment Returns (SAR) for the respective years.

7. The Respondent reviewed the documents availed by the Appellant and made findings,inter alia, that the credit claimed by the Appellant under field 13.4 was not related to foreign tax payable in respect of income earned under special arrangement and further that the overpayments from the previous years which the Appellant was seeking to carry forward through Section 42 of the Income Tax Act, Cap. 470 (ITA), were claimable under Section 47 of the Tax Procedures Act, 2015 (TPA), as a refund.

8. Based on the above findings, the Respondent analysed the Appellant" s ledger and identified for disallowance, the invalid credits in 2016, 2017 and 2018 returns, save for the 2015 return which was still under review.

9. The Respondent subsequently amended the 2016 Income Tax return through an Assessment Order dated 20th July 2020 of Kshs. 514,167,655.12 made up of Principal Tax Kshs. 510,951,944.00 and interest Kshs. 3,215,711.12.

10. The Appellant being dissatisfied with the Respondent's Assessment Order lodged its Notice of Objection vide a letter dated 29th July 2020 on the ground that there was no additional tax payable by it as it had overpayments of Kshs. 504,520,521.00 and Kshs. 475,730,499.00 for the years of Income 2016 and 2018, respectively.

11. The Respondent reviewed the Appellant's Objection and issued its Objection Decision on 31st August 2020 on the grounds inter alia, that the lodgement of the tax claims via Section 42 of the Income Tax Act is incorrect as the claim is not what was envisaged under that Section.

The Commissioner was therefore right in disallowing the credit claims under line 13.4 of the Appellant's tax returns.

12. In addition, the Respondent confirmed the additional assessment as raised on *iTax* with a total tax of Kshs. 510,951,944.00 comprising principal tax together with the resultant penalty and interest. The Respondent also informed the Appellant that until validation is complete and refund deemed to be payable, the demand notice for the year 2019 of Kshs. 331,958,745.00.00 remained due and payable since it arose from the Appellant's owns Self-Assessment Return.

13. Being dissatisfied with the Respondent's Objection Decision, the Appellant lodged the instant Appeal through its Notice of Appeal dated 29th September 2020. The Appellant later filed a Memorandum of Appeal and Statement of Facts both dated 13th October 2020.

14. The Respondent filed its Statement of Facts on 11th November 2020 and Submissions on 16th March 2021.

APPELLANT'S CASE

15. The Appellant set out its case in support of the Appeal through its Memorandum of Appeal and Statement of Facts both dated 13th October 2020, together with its written submissions dated 26th February 2021 and filed on even date. It based the Appeal on the grounds summarised hereunder; THAT:-

    i. The Respondent erred in law and in fact by disallowing tax credits of Kshs. 510,951,944.00 claimed on the *iTax* Income Tax Company Self-Assessment Return on the basis that it was captured under the wrong line of return. The Appellant's capturing of the

prior year tax overpayments as "credits under special arrangements" was necessitated by the fact that unlike the manual return, the *iTax* return did not provide a field to declare such credits.

ii. The Respondent erred in law and fact by confirming the assessment despite admitting that the issues giving rise to the assessment require reconciliation on their end and that the Respondent had experienced challenges in validating the payments; and reconciling the records per email correspondence.

iii. That the Respondent erred in law and fact by purporting to be validating and processing a refund for a tax overpayment that the Appellant had not made an application for and had instead, utilised the said overpayment, against subsequent tax liabilities. The Respondent had relied on Section 47 of the Tax Procedures Act, 2015, which was not applicable in the current case as the section relates to refund of tax paid.

16. The Appellant averred that in 2017, the Respondent issued the Appellant with a set of statements of account for the legacy balances for the years of income 2007 to 2014 showing cumulative tax payable of Kshs. 3,155,314,320.00.

17. The Appellant responded to the statements of account fully reconciling the same with the Appellant's tax records that showed that for the year 2014, there was a tax overpayment of Kshs. 431,696,127.00.

18. At the time of filing the 2015 Self- Assessment Returns (SAR), the Appellant captured the tax overpayment brought forward from the

year 2014 of Kshs. 431,606,127.00 under "credits under special arrangements" and did the same for the year 2016. The final position per 2016 return was a tax overpayment of Kshs. 504,520,521.00.

19. Vide a letter dated 15th March 2019, the Respondent requested the Appellant to provide support for the income tax credits of Kshs. 431,696,127.00, Kshs. 510,591,944.00 and Kshs. 504,520,521.00 claimed under credits under special arrangements in the tax returns for the years of income 2015, 2016 and 2017 respectively.

20. The Appellant responded to this letter on 28th March 2019 stating the position and attached the SAR for the respective years.

21. The Appellant reached out to the Respondent on 29th June 2020 when attempting to file the 2019 tax return after being unable to include the 2018 tax overpayment in the return since the overpayment had been posted in the refund account as opposed to the advance section.

22. The Respondent acknowledged the challenge and advised the Appellant to proceed with filing of the returns, and noted that any penalties and interest including any principal arising from the challenge would be considered upon validation of the tax overpayment. The Respondent reiterated that it intended to fast-track the validation of the balances in the legacy system and migrate the same to *iTax* to regularise the payment credits on *iTax*.

23. On 14th and 20th July 2020, the Respondent issued the Appellant with a defaulter notice and an assessment order respectively. The defaulter notice related to the year 2019 and showed additional corporation tax due amounting to Kshs. 331,958,745.00 while the assessment

order related to 2016 year of income and showed additional corporation tax due of Kshs. 514,167,665.00, both amounts inclusive of penalties and interest.

24. Vide a letter dated 29th July 2020, the Appellant objected to the Respondent's assessment of additional tax for both years of income 2016 and 2019.

RESPONDENT'S CASE

25. The Respondent through its Statement of Facts dated 11th November 2020 and written submissions dated 16th March 2021 objected to every ground of appeal and insisted that the taxes shown in the Objection Decision issued on 31st August 2020 confirming the assessment of Kshs. 510,951,944.00 together with the penalties and interest thereon were due and payable by the Appellant.

26. It asserted that vide a letter dated 15th March 2019, the Respondent wrote to the Appellant in reference to its credit claims under Section 42 of the Income Tax Act for the years 2014 – 2018. The Respondent observed that:-

    i. Field 13.4 of the Appellants ITR returns contain credits other than those relating to Section 42 of the Income Tax Act Cap 470.

    ii. The field is only meant to cater for credits arising out of tax paid on foreign income.

    iii. Section 42(1) of the Income Tax Act provides that:-

".... the section shall have effect where under a special arrangement, foreign tax payable in respect of income derived by a person resident in Kenya is allowed as a credit against tax chargeable in respect of that income"

iv. The Appellant's returns for the period in issue indicate that the Appellant had declared tax credits.

27. In view of the observations made, the Respondent advised the Appellant to provide certain documents and information to enable the Respondent validate the credits.

28. The Appellant responded vide a letter dated 28th March 2019 in which it provided a summary of its tax position for the years of income 2014, 2015, 2016, 2017 and 2018 as per the filed income tax self-assessment returns.

29. The Appellant claimed credits in line 13.4 of the income tax returns under Section 42 of the Income Tax Act. The Respondent through a letter dated 13th August 2019 wrote to the Appellant in respect of the claimed credits and advised the Appellant:-

i. To use the prescribed template to submit the following information:-

a. A schedule and copies of remittance/payment advice(s) for instalment or balance of tax payments made outside of *iTax* in support of credits claimed under the section for each year of income.

b. A schedule and clear copies of the relevant manual withholding certificates and evidence of remittance by the withholder in support of withholding credits claimed under the section for each year of income.

ii. That credits related to manual payments and certificates will be subjected to payment validation before being approved for recognition in the *iTax* system. Invalid credits would be disallowed.

iii. To submit a claim for refund of overpayment for validation which could be utilised or a refund issued for the same in accordance with the provisions of Section 47 of the Tax Procedures Act.

iv. Any overpayments from previous periods in *iTax* have already been credited to an advance tax account in *iTax* and should therefore not be captured manually in the returns. Any such amounts captured manually will be disallowed.

v. Field 13.4 of the Tax return is only meant for tax credits arising from tax paid on foreign income under special arrangement. The Appellant was requested to provide details for any such credits as follows:-

a. A schedule of tax credits of foreign income and supporting documents.
b. Evidence of special arrangements issued by CS National Treasury.

30. The Appellant was advised to prepare the schedules and supporting documents and deliver them in the manner and at the place specified in the letter, within 14 working days, to avoid losing its legitimate credits.

31. Upon review of the Appellant's documents, the Respondents made the following findings:-

    i. That the credit claimed by the Appellant under field 13.4 is not related to foreign tax payable in respect of income earned under special arrangement.

    ii. That the Appellant did not demonstrate having paid taxes outside Kenya claimable as credits under Section 42 of the Income Tax Act.

    iii. That the amounts claimed in the years 2015 – 2018 are a build-up of overpayments from the year 2014 of Kshs. 431,696,127.00 and have been carried forward by the Appellant in the subsequent years.

    iv. Further, that the overpayments from the previous years which the Appellant was seeking to carry forward through Section 42 of the Income Tax Act are claimable under Section 47 of the Tax Procedures Act as a refund.

    v. That to claim or include the overpayments as a credit in the subsequent years would amount to duplicate or multiple claims of the credits as refund tasks have been generated in each of the years.

32. Based on the above findings, the Respondent analysed the Appellants ledger and identified for disallowance the invalid credits in 2016, 2017 and 2018 returns save for the 2015 return which is still under review.

33. The Respondent subsequently amended the 2016 Income Tax return through an Assessment Order dated 20th July 2020 of Kshs. 514,167,655.12 made up of Principal Tax of Kshs. 510,951,944.00 and interest of Kshs. 3,215,711.12.

SUBMISSIONS BY THE PARTIES

Appellant's Submissions

34. Pursuant to the orders of the Tribunal of 12th February 2021, the Appellant, made its submissions dated 26th February, 2021 and filed on even date, in support of the Appeal, which was instituted by way of its Memorandum of Appeal and Statement of Facts, both dated 13th October 2020.

35. The Appellant apart from summarizing the facts, submitted that the issues in contention which fall for determination were as follows:-

    i) *Whether the Respondent was justified in disallowing tax credits of Kshs. 510,951,944.00 claimed on the Income Tax Company SAR on the basis that it was captured under a wrong line of the return;*

    ii) *Whether the Respondent was justified in confirming an assessment despite confirming that the issue requires reconciliation and that there has been a challenge in confirming the payments from the Respondent's side; and*

iii) *Whether the Respondent is justified in purporting to be validating and processing a refund of tax overpayment that the Appellant has not lodged an application for and has already utilised as a tax credit.*

36. The Appellant stated that it had made comprehensive submissions in its Statement of Facts dated 13th October 2020 which it fully adopted. It's submissions therefore highlighted the salient points, under each of the issues for determination, from the Appellant's Statement of Facts as follows:-

i) *Whether the Respondent was justified in disallowing tax credits of Kshs. 510,951,944.00 claimed on the Income Tax Company Self-Assessment Return on the basis that it was captured under a wrong line of the return*

37. The Appellant submitted that unlike the manual tax filing regime, the *iTax* Income Tax Company SAR did not provide for a field to key in tax overpayments from prior years. The said lack of an appropriate field to key in tax overpayments brought forward from prior years prompted the Appellant to disclose the 2015 tax overpayment of Kshs. 510,951,944.00 as "credit under special arrangement".

38. While it is in agreement with the Respondent that the "credits under special arrangements" field is reserved for credits claimed under Section 42 of the ITA, the Appellant reiterates that it is the responsibility of the Respondent to design an SAR template that will allow the Appellant to claim all the tax credits. In the absence of the Respondent playing this role, the Appellant had no choice but to squeeze all the credits in the fields available.

39. Section 47 of TPA is titled "Refund of overpaid Tax". Going by the above title, the Appellant contends that the section should be read in the context of refunds of overpaid tax. As a result, it should not apply where, like in this case, a taxpayer does not wish to have the overpaid tax refunded but instead offset against other tax liability.

40. Further, the Appellant submitted that the Section uses the word "may" which is merely permissive or directory and not obligatory. Therefore, the Appellant had an option to apply for a refund of tax overpayments or use the same to offset against future tax liabilities due, under the same title head.

41. It cited the case of **Keroche Industries Limited Vs Kenya Revenue Authority & 5 Others [2007] 2KLR 240** where the court held that:-

> *"taxation can only be done on clear words and cannot be on intendment and that where there are two or more possible meanings, the inclination of the court should be against the construction or interpretation which imposes a burden, tax or duty on the subject"*

42. The Appellant contended that the Respondent's long standing practice of allowing taxpayers to automatically offset tax overpayments against tax obligations arising within the specific tax head gives rise to a legitimate expectation that the Respondent cannot purport to abrogate unilaterally, unless informed by an overriding change in law or other matters of inordinate public interest.

43. The Appellant reiterated that since it did not elect to apply for a refund under Section 47 of the TPA, it should be allowed to utilise the tax credits against the tax liabilities arising in subsequent years and that the

Respondent was not justified in disallowing the tax credits on a mere fact that it had been declared in the wrong field while it had refused to provide an alternative field where such overpayment could be declared.

ii. *Whether the Respondent is justified in purporting to be validating and processing a refund of tax overpayment that the Appellant has not lodged an application for and has already utilised as a tax credit*

44. The Appellant submitted that the Respondent's argument that Section 47 of TPA provides for tax overpayments to be processed as refunds where a taxpayer makes an application to the Commissioner, and that there is no provision for the taxpayer to unilaterally carry forward the balances to subsequent years, was erroneous and that the section only applies where a taxpayer has elected to apply for a refund and that nothing would stop a taxpayer from utilising such overpaid tax against subsequent tax liabilities unless the validity of the credits is questioned by the Respondents.

45. The Appellant further submitted that prior to 2019, the *iTax* platform, as was then structured, would consider two accounts in determining the treatment of tax overpayments. Where a tax overpayment could easily be validated via the platform, the same were automatically posted in the respective taxpayer"s advance payment account, for offset against tax obligations arising within that specific tax head. Conversely, where a tax overpayment is not verifiable by the platform, the same were treated as overpayments and were channelled to the specific taxpayer"s refund account pending verification. This treatment, is not provided for anywhere in the law and amplifies the inconsistency by the Respondent in taking the

position that any overpayments arising from one year of income must be dealt with in line with Section 47 of the Tax Procedures Act.

46. Where an overpayment is verifiable by the platform and consequently, posted in the taxpayer"s advance payment account, a Payment Registration Number (PRN) would automatically be generated by the Platform with respect to the overpayment. This would enable the taxpayer to declare that overpayment in its annual SAR for offset against tax obligations arising in that year of income. This, the Appellant submitted, affirms its position that a tax overpayment can be carried forward from one year to another.

47. Further, the Appellant argued that the Tax Procedures Act came into force on 19th January 2016, and that the practice of utilising overpayments continued without any communication to the contrary from the Respondent. This reaffirms its position that Section 47 of the Tax Procedures Act did not impact setoff arrangements where a taxpayer did not require a refund of the overpaid tax.

Respondent's Submissions

48. The Respondent narrowed its issues for consideration into 3 points as set out below:-

Whether the Appellant was proper in claiming its tax credits under Section 42 of the Income Tax Act

49. According to the Respondent, Section 42 of ITA is not applicable in this case as it is only applicable in the computation of credits under special arrangements. Section 42 (1) provides:-

"This section shall have effect where under a special arrangement, foreign tax payable in respect of income derived by a person resident in Kenya is to be allowed as a credit against tax chargeable in respect of that income."

50. According to the Respondent, none of the amounts claimed by the Appellant were in relation to foreign tax credits nor were the claimed credits in any way related to credits under special arrangements.

51. Further, the Appellant did not provide any evidence to prove that a special arrangement existed at the time of claiming the credits under Section 42 of ITA.

52. The Respondent submitted that the Appellant having failed to satisfy the mandatory provisions of Section 42 of ITA, the only other section applicable would be Section 47 of TPA, which provides that:-

"(1) Where a taxpayer has overpaid a tax under tax law, the taxpayer may apply to the Commissioner, in the approved form for a refund of the overpaid tax within 5 years of the date on which the tax was paid.

(2) The Commissioner may for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit."

53. According to the Respondent, the provisions of Section 47 of the TPA are clear and should be looked at in their ordinary meaning as was guided by the court in **Mangin Vs Inland Revenue Commissioner [1971] AC 39**, where Lord Donovan stated that:--

" The words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices."

Thus, according to the Respondent, the section does not in any way deprive the Appellant of its right to property.

ii. **Whether the Respondent was justified in validating the Appellant's tax overpayments.**

54. The Respondent submitted that it is empowered under Section 47(2) of the TPA to subject any refund/ overpayment claim to audit before it is processed.

55. On the Appellant's contention that it had not applied for refund and therefore it was improper for the Respondent to process the same, the Respondent submitted that, prior to 2019, once a taxpayer claimed a refund, albeit being in the wrong field as in the case of the Appellant, the *iTax* system would automatically create a task to the refunds officer to initiate a tax refund process even if the taxpayer has not applied for the refund thus it was not required that the Appellant makes a formal application for the Respondent to begin processing the refunds.

56. It was the Respondent's submission that the claims made by the Appellant for the years 2015 – 2018 resulted in claims of multiple credits and creation of erroneous refund tasks of Kshs. 424,777,603.20, 504,520,521.00 and 475,466,391.40, for the years 2015, 2016 and 2018, respectively. These claims were not related to foreign tax payable in respect of income earned outside Kenya under

Special Arrangements as provided in Section 42 of the Income Tax Act and therefore the Respondent was justified in disallowing the same.

57. The Respondent contended that the only proper claim for refund of overpaid tax in this Appeal was for the year 2014, which the Respondent was in the process of validating and once completed, the Appellant would be informed of the same and the approved overpayments utilized as provided for under Section 47 (4) of TPA which provides:-

> *"(4) Where, in relation to an application for a refund made under this section or made under any other law, the Commissioner is satisfied that a taxpayer has overpaid a tax, the Commissioner shall apply the overpayment in the following order –*
>
> *(a) In payment of any other tax owing by the taxpayer under the tax law;*
>
> *(b) In payment of a tax owing by the taxpayer under any other tax law; and*
>
> *(c) Any remainder shall be refunded to the taxpayer."*

iv. <u>Whether the Respondent was justified in disallowing the claimed tax credits by the Appellants</u>

58. The Respondent reiterated that it was justified in disallowing the refund claims for overpaid taxes for the reason that the Appellant was given an opportunity to provide information and documents to support its credit claims as made under Section 42 of the Income Tax Act but failed to do so, to the satisfaction of the Commissioner as provided under Section 56(1) of the Tax Procedures Act, which states that:-

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

59. The Respondent maintained that it followed the laid down procedure in disallowing the Appellant's claim for overpaid taxes and therefore its decision was legal and rational. It cited the case of **Kapa Oil Refineries Limited Vs Kenya Revenue Commission, Commissioner of Income Tax and Commissioner of Value Added Tax and Commissioner of Domestic Taxes, Nairobi JR Misc. Application No 283 of 2009.**

60. In so submitting, the Respondent relies on the case of **Kapa Oil Refineries Limited Vs Kenya Revenue Authority, Commissioner of Income Tax and Commissioner of Value Added Tax and Commissioner of Domestic Taxes. Nairobi JR Misc. Application No. 283 of 2009** where it was held that:-

".... The Commissioners' decision was not malicious, oppressive or irrational. "

61. It concluded that the claim made for a refund of overpaid taxes by the Appellant was made under the wrong provision of the law and the multiple refund claims resulted into multiple credits and creation of erroneous refund tasks thus the Respondent was justified in disallowing the refund claim.

ISSUES FOR DETERMINATION

62. The Tribunal has considered the submissions by both parties along with the documentation filed by each party in support of its case and has narrowed down the issues for determination as follows:-

i. *Whether the Appellant was entitled to tax credits by dint of Section 42 of TPA.*

ii. *Whether it is justified for the Appellant to utilise the tax overpayment to offset tax liabilities arising in subsequent years.*

iii. *Whether the taxes confirmed by the Respondent via the Objection Decision dated 31st August 2020 are payable.*

ANALYSIS AND FINDINGS

i. Whether the Appellant was entitled to tax credits by dint of Section 42 of TPA.

63. The issue before the Tribunal is the determination of whether the Appellant is justified in utilising the tax overpayment to set off its tax liabilities. The Respondent acknowledged the existence of the said overpayment but contended that such overpayment was subject to validation prior to approval. The validation process was still pending at the time of this Appeal and therefore the Respondent's argument was that the Appellant should first settle the outstanding tax liabilities as per the assessment confirmed on 31st August 2020. The Respondent undertook to validate the tax overpayments and settle them in the form of a refund to the Appellant.

64. The Appellant, on the other hand, objected to this way of handling its tax credits on the basis that the Respondent is not authorised in law to process a refund in the absence of an application by the taxpayer. It contended that it did not apply for a tax refund and therefore the Respondent is not legally justified to purport to process one.

65. It is not in dispute that the tax credit claimed by the Appellant under Section 42 is not related to foreign tax payable in respect of income earned under special arrangement. Section 42 of ITA provides:-

> *"42. Computation of credits under special arrangements*
>
> *(1) This section shall have effect where, under a special arrangement, foreign tax payable in respect of income derived by a person resident in Kenya is to be allowed as a credit against tax chargeable in respect of that income."*

66. Further, the Appellant did not demonstrate having paid taxes outside Kenya which would be claimable as credits under Section 42 above. Indeed, the Appellant acknowledged that the only reason why it lodged the claim under the "Credit under special arrangement" section was because of lack of an appropriate field in the *iTax* portal to key in the tax overpayment.

67. According to the Respondent, lodging the tax credit under this section created multiple claims by the Appellant. As a result, the Appellant ended up having Kshs. 1,939,149,107.00 as credit when in actual sense, the only amount claimable was the overpayment of 2014. This needed to be corrected by disallowing the credits and processing a refund. The Appellant did not object to the Respondent's assertion on multiplication of credits.

68. In light of the above, the Tribunal agrees with the Respondent that the lodgement of the tax claims by the Appellant under Section 42 of the ITA was clearly incorrect as the claim is not what was envisaged by the said provision.

69. The Tribunal therefore finds that the Commissioner was right in disallowing the credit for overpaid tax entered under Section 42 of the ITA.

ii. <u>Whether it is justified for the Appellant to utilise the tax overpayment to offset tax liabilities arising in subsequent years.</u>

70. Having found that the Appellant was not in order in entering its tax overpayment as credit under Section 42 of ITA, the only other option is to treat the overpayment in line with the refund provisions under the TPA.

71. Section 47 of the Tax Procedures Act which is the governing law on handling of tax refunds provides as follows:-

"47. Refund of overpaid tax

(1) When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within five years of the date on which the tax was paid. Provided that for value added tax the period of refund shall be as provided for under the Value Added Tax Act, 2013 (No. 35 of 2013).

(2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.

(3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within ninety days of receiving the application for a refund.

(4) Where, in relation to an application for a refund made under this section or made under any other tax law, the Commissioner is

satisfied that a taxpayer has overpaid a tax, the Commissioner shall apply the overpayment in the following order—

(a) in payment of any other tax owing by the taxpayer under the tax law;

(b) in payment of a tax owing by the taxpayer under any other tax law; and

(c) any remainder shall be refunded to the taxpayer.

(5) The Commissioner shall repay the overpaid tax within a period of two years from the date of application, failure to which the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years. "

72. The Appellant objected to a refund on the basis that it had not made an application for refund and therefore the Respondent was not in order to purport to process one. It argued that the reason for lodging the tax credits was to utilise the overpayments to set off its tax liabilities. The challenge with this approach was that; first, the credits were lodged in an erroneous section and secondly, lodging the overpayments as tax credits had the effect of creating multiple claims when the Appellant was only entitled to the 2014 overpayment.

73. It is clear that the objective of the Appellant is to utilise its tax overpayment to set off subsequent tax liabilities. Section 47(4) of the TPA authorises the Commissioner to apply a tax overpayment in payment of any taxes owed by a taxpayer. What comes into play, is the timelines involved and the issue of whether the law provides a leeway for a taxpayer with tax overpayment to directly apply for set off prior to the ascertainment of the overpayment by the Commissioner.

74. Section 47 allows the Commissioner to ascertain the validity of a refund claim by subjecting the claim to an audit. The Commissioner is obligated under the said provision to make a decision and give notification, on the application within 90 days from the date of receipt of the application. In the event of a repayment, it ought to be made within a period of two years.

75. It is important to state that the law does not envisage a scenario where, after self-assessment, a taxpayer would utilise its overpayment to set off due taxes, prior to verification of the overpayment by the Commissioner.

76. The Tribunal agrees with the Respondent that the Appellant cannot use the alleged overpayment without going throught the validation process set out under Section 47 of the TPA. So to speak, offsetting a tax due from an overpayment of tax is not automatic, the taxpayer must apply under Section 47 of the TPA for validation.

77. This position was upheld by the Tribunal in the recent case of **TAT 402 of 2020 Pevans East Africa Ltd-vs-Commissioner of Domestic Taxes,** where it stated as follows:-

104. .....To quote Justice Odunga in Republic V Kenya Revenue Authority & another Ex-parte Fontana Limited (2014) eKLR:

> *"In Tanganyika Mine Workers Union vs. The Registrar of Trade Unions (1961) EA 629, it was held that where the provisions of an enactment are penal pensions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it but ought rather to take care that no-one is brought within it who is not brought within it in express language".*

105. The only recourse for the Appellant is to apply for a refund of the Withholding Tax it paid as stipulated under the provisions of the TPA since Withholding Tax is

Indeed governed by the TPA. To do so it must follow the process as laid out in the TPA. A mere letter or email indicating the Appellant's intention to offset this amount falls short of the process set out in Section 47 of the TPA. Our decision is informed by the findings of the court in Krystalline Salt Limited VS Kenya Revenue Authority (2019) eKLR where it stated that:

> *"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures".*

78. The Tribunal finds that the Appelllant is therefore free to utilize the avenue provided by law and is thus not automatically entitled to the credit from the overpayment.

79. Regarding the taxes demanded by the Respondent, the Tribunal observes that the law does not envisage a scenario where the Appellant would automatically offset its tax dues prior to verification of any claimed overpayments. Indeed, under Section 47 of the TPA, it is only after the Commissioner is satisfied that there is an actual an overpayment, that he can utilise the same in payment of any taxes due by the taxpayer.

80. Drawing from the above, it is regrettable that this is how section 47 of the TPA is to be applied. Justice Majanja in his Judgment in ***Republic V Commissioner of Domestic Taxes Large Tax Payer's Office Ex-parte Barclays Bank of Kenya Ltd (2012) eKLR*** stated as follows on the guiding principles of interpreting tax legislation:

> *"The approach to this case is that stated in the oft cited case of* ***Cape Brandy Syndicate v Inland Revenue Commissioners (1920)***

1 KB 64 *as applied in* ***T.M. Bell v Commissioner of Income Tax (1960) EALR 224*** *where Roland J. stated, "....in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.... if a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be".*

iii. Whether the taxes confirmed by the Respondent via the Objection Decision dated 31st August 2020 are payable.

81. The Tribunal finds that the taxes assessed and demanded by the Respondent via its Objection Decision of 31st August 2020, to the extent that they are a correction of the "multiple claims", are due and payable.

FINAL DECISION

82. In view of the foregoing findings, the Tribunal makes the following Orders:-

    i) The Appeal be and is hereby dismissed.

    ii) The Respondent's Objection Decision dated 31st August 2020 is hereby upheld.

    iii) Each Party shall bear its own costs.

83. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** on this **13th** day of **May, 2021.**

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PATRICK LUTTA
CHAIRPERSON

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HELEN BILA
MEMBER

.....

MWAI MBUTHIA
MEMBER

.....

ELISHAH NJERU
MEMBER

.....

HABON FARAH
MEMBER