

REPUBLIC OF KENYA

IN THE TAX APPEALS TRIBUNAL AT NAIROBI

TAX APPEAL NO. E1217 OF 2024

SONY HOLDINGS LIMITED APPELLANT

~VERSUS~

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company duly incorporated under the Companies Act of the laws of Kenya and is engaged in the business of development, owning and letting real estate.
2. The Respondent is the principal officer appointed under the Kenya Revenue Authority Act and mandated with the responsibility for the assessment, collection, receipting and accounting for all revenue as an agent of the Government of Kenya. The Respondent is also mandated with the responsibility for the administration and enforcement of the statutes set out under the schedule to the said Act.

3. The Appellant has stated that the issues subject of the appeal arose from the decision of the Respondent contained in its letter dated 13th September 2024 rejecting the Appellant's Objection Notice dated 19th July 2024 and confirming an assessment for VAT in the sum of Kshs. 201,125,150.88.
4. The Appellant stated that the dispute revolves around the migration of legacy debit balances which the Respondent brought up.
5. The Appellant stated that on 17th September 2019, it received a letter dated 30th August 2019 from the Respondent, titled; "*migration of legacy final balances to iTax.*"
 - a) The Respondent proposed to migrate the alleged final ledger balance from the legacy system for the period up to 2014 for income tax amounting to Kshs. 171,584,860.00 and for VAT amounting to Kshs. 170,949,668.00.
 - b) The Appellant was given 14 days to dispute the migration of the proposed legacy balances and provide relevant evidence in support of any objection.
6. The Appellant lodged a Notice of Objection dated 24th September 2019 and disputed the legacy balances proposed to be migrated.
7. It stated that on 25th February 2020, the Respondent issued a demand to the Appellant for income tax amounting to Kshs. 180,254,405.00 for the period 2009, 2010, 2012 years of income.

8. It was also stated that on 2nd March 2020 the Appellant objected to the Appellant's tax demand and provided the relevant supporting evidence that there was no tax due as demanded.
9. It was stated that following further correspondence between the parties, the Respondent issued a response to the Appellant's objection to the legacy assessments on 20th August 2024 pursuant to the provisions of Section 51 (4) of the TPA.
10. It was stated that on 13th September 2024 the Respondent issued its Objection Decision to legacy assessment order of Kshs. 201,125,150.88 for years of income 2009, 2010, and 2012.
11. The Appellant aggrieved by the Respondent's decision filed a Notice of Appeal dated and filed on 11th October 2024 with the Tax Appeals Tribunal.

THE APPEAL

12. The Appellant filed its Memorandum of Appeal dated 24th October 2024 on the same date and set out the following grounds of appeal;
 - a) The Respondent erred in law and in fact in purporting to issue an Objection Decision in respect to an objection to a tax demand, as a tax demand is not a tax decision under Section 3 of the Tax Procedures Act which can be objected to under Section 51 (1) of the TPA and an Objection Decision issued under Section 51 (8) of the TPA. An Objection Decision can only arise from an objection to a tax decision, and a tax

demand is not such a tax decision under Section 3 of the Act. The Objection Decision therefore has no basis in law and ought to be set aside.

b) The Respondent erred in law and fact in issuing two conflicting decisions on the same matter. In the letter dated 20th August 2024, which the Respondent affirmed was not an Objection Decision, it asserted that it had not issued any new assessment and that the balances alleged needed to be verified. In the Objection Decision dated 13th September 2024, the Respondent purported to depart from its earlier decision of 20th August 2024 by converting the very same disputed tax demand into a tax assessment, and there and then, dismissing the Appellant's objection and making an assessment on what it had stated on 20th August 2024 not to be an assessment but an unverified tax demand arising from the migration from the legacy system to iTax.

c) The Commissioner erred in law and fact in converting an unverified demand into an assessment by acting without jurisdiction. Under the TPA, a Commissioner can only issue a default assessment under Section 29 of the Act if the taxpayer has not filed returns; an advance assessment under Section 30 as read with Section 26 of the Act; and an amended assessment under Section 31 of the Act amending a self-assessment of the taxpayer. The Commissioner has no power in law to convert an unverified tax demand into a tax assessment.

- d) The Commissioner erred in law and in fact in purporting to issue an alleged assessment not known in law from an unverified tax demand, and in failure to set out the amount of alleged assessment; the amount of penalty; the amount of interest; the reporting period of the assessment; and the due date of the payment of the assessment in clearly violations of Section 29 (2), 30 (4) and 31 (8) of the TPA.
- e) The Respondent by its notice of migration of legacy balances to iTax and demand for payment in the sum of Kshs. 201,125,150.88 before 30th June 2024 with respect to VAT for the periods up to the year of income 2013 when the legacy system ceased to be used acted contrary to the provisions of Section 23 and 31 of the TPA as such action was time barred.
- f) The Respondent in purporting to seek of the purported legacy balances with respect to the years of income 2009, 2010, and 2012 in the year 2024, over 12 years after the relevant period allegedly under review, acted contrary to the provisions of Section 23 (1) (c) of the TPA.
- g) The Respondent erred in law in confirming the alleged assessment as issued when the migration notice purported to reflect the same as a principle ledger balance previously held under the legacy system which would be as a result of self-assessment returns filed by the Appellant and whereas Section 31 (4) of the TPA granted powers to the Respondent to

amend an assessment, and for that, within five years as provided for under Section 31 (4) of the TPA.

- h) That it was not open in law for the Respondent to revisit the issue of migration of legacy debit balances related to VAT when the same had been raised in its letter of 30th August 2019, and email of 15th August 2020 against which comprehensive notices of objection issued by the Appellant in response to both cases in its letters of 24th September 2019 and 3rd November 2020 respectively which were not responded to within sixty days or at all and therefore were allowed by operation of the law under Section 51 (11) of the TPA. The Respondent was in the event estopped by the doctrine of estoppel from revisiting the same matter.
- i) The Objection Decision was made without jurisdiction, the Respondent having made an earlier decision on 20th August 2024 with respect to the same matter, in which it held that the matter concerned unverified account balances and not an assessment that could be objected to.
- j) The Commissioner has no power in law to convert an unverified account balances to an assessment after objection to the same, and then purport to convert the unverified account balances into an assessment, without stating the amount of the alleged assessment; the amount of the penalty; the amount of interest; the reporting period of the assessment ;and the due date of the payment of the assessment in clearly violations of Section

29(2), 30(4), and 31 (8) of the TPA deprived the Appellant of a fair opportunity to object to the same and the right to be heard.

- k) The Respondent having by the decision dated 20th August 2024 found that the migration notice of legacy balances in the sum of Kshs. 201,125,150.88 with respect to VAT to iTax system dated 25th June 2024 to which the Appellant objected vide the Objection to migration notice dated 19th July 2024 was an existing pre iTax migration unverified balance debt and not a fresh assessment was estopped in law in the event by the doctrine of *functus officio* from issuing the Objection Decision dated 13th September 2024 on the same and confirming it as an assessment of the said amount.
- l) That it was not open in law for the Respondent to issue the Objection Decision dated 13th September 2024 by way of an assessment to confirm the sum of Kshs. 201,125,150.88 together with interest and penalties contrary to the provisions of the TPA and more particularly Section 31 thereof, and specifically when the Respondent has by a public notice advertised to the public that they have up to 31st December 2024 to raise any concerns they may have on migrated legacy balances.
- m) The migration notice dated 25th June 2024 did not provide the make-up of the balance demanded and specifications of the periods to which the alleged balances related to. By linking the alleged amount to the years of

income 2009, 2010, and 2012 in the decision dated 20th August 2024 and the Objection Decision dated 13th September 2024 without providing the make up of the balance despite the Appellant requesting for the same in its objection to migration notice dated 19th July 2024 and without prior notice to the Appellant, the Respondent violated the Appellant's right to fair administrative action as guaranteed by Article 47 of the Constitution of Kenya, and the Fair Administrative Actions Act.

- n) The Respondent erred in law and fact by claiming in its Objection Decision dated 13th September 2024 that the Appellant had declined to submit the requisite documentation to DTD Legacy support team on any amount that had been erroneously charged to the Appellant's account. To the contrary the Appellant in line with the requirements in the migration notice dated 25th June 2024 had served its objection to migration notice dated 19th July 2024 together with the supporting documents to the TSO, and in addition sent the same to the alternative email given which failed to receive delivery. The Appellant resubmitted the same documents by hand delivery on 2nd September 2024 and successfully by email through its Further Objection to Migration Notice on 3rd September 2024. By the Respondent disregarding the attachments to the objection migration notice dated 19th July 2014 and the further objection to the migration notice dated 2nd September 2024 and adopting

the route of claiming that no document had been filed, violated the Appellant's right to fair administrative action as guaranteed by Article 25 and Article 50 of the Constitution of Kenya, 2010.

- o) The Respondent knew or ought to have known that DTD legacy support team had not been established as of the date of the objection to Migration Notice being 19th July 2014 as notified to the Appellant's sister company, Canarian Holdings Company Ltd, by the Respondent in its email dated 15th August 2014 and by relying on the same as the basis of confirming the alleged assessment against the Appellant in its Objection Decision dated 13th September 2024, it denied the Appellant the right of equal protection of the law as guaranteed by Article 27 of the Constitution of Kenya. In any event, it was clear in the migration notice dated 25th June 2024 that any clarifications on the migrated balances should be sought from the nearest TSO or reach out through the given email address but not both. The Appellant had already served the TSO with a copy of the objection migration notice dated 19th July 2024 together with all supporting evidence.
- p) The Respondent further erred in law and in fact by purporting to post what it reflected in the Appellant's iTax portal as legacy balance statement for the years of income 2007 to 2013 with respect to VAT and years of income 2004 to 2014 with respect to income tax after the Objection

Decision dated 13th September 2024 which was specific to the years of income 2009, 2010, and 2012. The Appellant has without prejudice to its rights under Sections 21 and 31 of the TPA responded to the same both to the Respondent and the DTD legacy support team enclosing a reconciliation with all the relevant documents confirming non-existence of the purported balance. The Appellant will contend at the hearing of the Appeal that the said posting subsequent to the Objection Decision dated 13th September 2024 was a clear indication that the demand was unsubstantiated, unlawful, illegal and also a further violation of its fundamental rights to fair administrative action and a fair hearing.

- q) The Respondent erred in law and in fact by alleging that the Appellant did not provide supporting evidence to substantiate the demanded migrated legacy debit balances relating to VAT amounting to Kshs. 201,125,150.88 were inaccurate when in fact such evidence had been repeatedly provided by the Appellant in its First and Third Objections dated 24th September 2019 and 3rd November 2020 respectively, and the objection to migration notice dated 19th July 2024 and further objection to migration notice dated 2nd September 2024 without any conclusive consideration by the Respondent.
- r) The Respondent erred in law and fact by alleging that the Appellant declined to submit requisite documentation to the DTD Legacy support

team on any amounts that had been erroneously charged on the Appellant's account when in fact, the Respondent in the same Objection Decision dated 13th September 2024 acknowledged that the Appellant was in touch with the DTD Legacy support team and that the documents which the Appellant had submitted to the said team were yet to be reviewed as communicated by the said team in its email of 11th September 2024.

- s) The Respondent erred in law and fact by alleging that the Appellant declined to submit requisite documentation to the DTD support legacy team on any amounts that had been erroneously charged on the Appellant's account when in fact vide the email of 19th July 2024 and that of 3rd September 2024, the Appellant submitted all the relevant evidence vide its objection to migration notice of 19th July 2024 and further objection to migration notice of 2nd September 2024 sent to the TSO and DTD legacy support team and the Respondent's legal team was in copy of the said emails.
- t) The Respondent having acknowledged vide its emails of 11th September 2024 and 26th September 2024 from its Debt Validation Team that it had not examined the evidence submitted by the Appellant in its objection to migration notice dated 19th July 2024 and further objection to migration notice dated 2nd September 2024 condemned the Appellant unheard by

issuing the decision dated 20th August 2024 and Objection Decision dated 13th September 2024 without considering the evidence on record.

- u) That it was not open in law as a matter of fact for the Respondent to confirm the alleged migrated legacy debt of VAT balances amounting to Kshs. 201,125,150.88 when in fact the Respondent's debt validation team also called the DTD legacy support team was yet to review the Appellant's documentary evidence and validate the same.
- v) That it was premature and not open in law for the Respondent to direct the Appellant to consult DTD legacy support team for the validation of the contested migrated legacy debt VAT balances and at the same time confirm the balances as debt when in fact the validation process by the DTD Legacy team was ongoing and the Appellant had up 31st December 2024 to provide any additional information to the said team to aid it in its validation process.
- w) The said Objection Decision dated 13th September 2024 was in the event issued unlawfully, capriciously and in bad faith in that, the Respondent failed to consider the evidence submitted before it by the Appellant in its objection to migration notice dated 19th July 2024 and its further objection to migration notice dated 2nd September 2024 and therefore confirming erroneous legacy balances which were yet to be reviewed by

the Respondent's DTD legacy Support team responsible for the validation of such balances.

- x) That it was not open in law for the Respondent to revisit the issue of migration of legacy debit balances related to VAT when the same had been raised in its letter of 30th August 2019, and email of 15th August 2020 against which comprehensive notices of objection were issued by the Appellant in response to both cases in its first and third objections dated 24th September 2019 and 3rd November 2020 respectively which were not responded to and therefore were allowed by operation of the law under Section 51 (11) of the TPA.
- y) That by issuing the said Objection Decision dated 13th September 2024, the Respondent went against the Appellant's legitimate expectation.
- z) That it was not open in law for the Respondent to keep mutating its demand for the migrated legacy balance by associating the demanded VAT amount to different years of income under review which it kept changing even after issuing its Objection Decision dated 13th September 2024.

THE APPELLANT'S CASE

13. The Appellant has premised its case on the following;

- a) The Statement of Facts dated and filed on 24th October 2024 together with the documents attached thereto;

- b) The written submissions dated and filed on 14th February 2025; and,
 - c) The supplementary submissions dated 13th March 2025 and filed on the same date.
14. The Appellant has stated that at all material times it complied with the relevant tax statutes, filed its returns, and remitted the tax payable by it as and when required by the statutes and in particular the VAT Act, the Income Tax Act and the TPA.
15. It stated that it is essential to establish that the main dispute in the Appeal revolves around the migration of legacy debit balances which the Respondent has repeatedly brought up since the year 2019 and it is therefore critical to narrate such history in order to show how the Respondent has been treating the Appellant's issue of migration of legacy balances unfairly, illegally, irregularly, and with pure malice.
16. The Appellant stated that on 17th September 2019, it received a letter dated 30th August 2019 sent by way of ordinary post by the Respondent on 12th September 2019. The letter was titled, "*Migration of Legacy Final Balances to iTax,*" and stated that;
- a) The Respondent had proposed to migrate the alleged final ledger balance from the legacy system for the period leading up to 2014 for Income Tax amounting to Kshs. 171,584,860, and for VAT amounting to Kshs. 170,949,668.

- b) The Appellant was given 14 days to dispute the migration of the proposed legacy balances and provided evidence in support of such objection in accordance with Section 51 of the TPA.

17. The Appellant stated that it made a comprehensive Notice of Objection dated 24th September 2019 (first objection) in which it disputed the said legacy balances proposed to be migrated by the Respondent. It stated in its grounds of objection as follows;

- a) It was not possible to respond to the letter dated 30th August 2019 within 14 days because the said letter was sent by the Respondent on 12th September 2019 via ordinary post and received by the Appellant on 17th September 2019 when 14 days had already lapsed.
- b) Despite the Respondent sending the letter to the Appellant late, and by design trying to bar the Appellant from the right of response, the Appellant noted that the said legacy balances were erroneous, unsupported and unknown to it.
- c) The Respondent vide its final audit report dated 11th April 2016, and a subsequent final audit report dated 25th January 2017 had confirmed that the Appellant did not owe it any VAT or income tax, and that the taxes due had been duly paid, and the alleged legacy balances contradicted the Respondent's own audit reports.

- d) The legacy balances were completely different from the self-assessment returns and audited financial statements of the Appellant and were also different from the opening balances contained in iTax based on returns filed in the legacy system.
 - e) Contrary to the allegations made by the Respondent, the Appellant was in a tax refundable position as at 31st December 2013 and was to be refunded Kshs. 33,187,669 in relation to income tax confirmed by the Respondent and refundable VAT amounting to Kshs. 1,921,534.50 which had never been refunded by the Respondent despite it alleging to have refunded the same.
 - f) Even though the Appellant provided all the documents in support of its Notice of Objection dated 24th September 2019, the requirement to provide documents which are more than five years old from the end of the affected year of income was a violation of clear provisions of Section 23 of the TPA.
 - g) Further, Section 31 of the TPA provides that the Respondent cannot make any amendments to any tax self-assessments more than five years after such self-assessment were filed unless there was an allegation of fraud.
18. It was stated that after providing the comprehensive objection together with the supporting documents showing that the alleged legacy balances were unsubstantiated and unfair, the Respondent did not respond to the Appellant's

first objection dated 24th September 2019 within 60 days or at all and the said objection was deemed allowed by operation of the law as per Section 51 (11) of the TPA.

19. The Appellant also stated that in the subsequent year 2020, the Respondent came up with another demand vide a tax demand letter dated 25th February 2020 in which it issued a demand to the Appellant to pay an amount of Kshs. 180,254,405 in income tax for the period 2009, 2010, and 2012 years of income. Even though the demand related to income tax, it is noteworthy that the amount demanded was almost equal to the amount included in the alleged legacy balances for income tax in the Respondent's letter of 30th August 2019 which the Appellant had objected to in its first objection. The Respondent thus was trying to reinstate a matter that had been conclusively defended by the Appellant vide its first objection of 24th September 2019.
20. The Appellant vide a letter dated 2nd March 2020 objected to the tax demand dated 25th February 2020 and provided all the relevant supporting evidence supporting the fact that there was no tax due as demanded (second objection).
21. It was stated that despite the comprehensive objection dated 2nd March 2020, the Respondent failed to respond to the second objection notice, and therefore the same was deemed allowed by operation of the law pursuant to Section 51 (11) of the TPA.

22. On 17th August 2020, the Respondent sent a document titled, “*Data Clearing Project*” to the Appellant, but the said document had tax details of a different taxpayer. The Appellant duly notified the Respondent of the confusion and responded that the details in the said document were not for the Appellant. The Respondent then sent an email dated 22nd October 2020 apologizing for the unnecessary confusion that was brought about by a typological error on the document-request template titled “*Data Cleaning Project*”.

23. It was stated that however another email was sent by the Respondent dated 15th August 2020 titled “*Migration of Final Legacy Balances to iTax (Sony Holdings Ltd)*” which communicated to the Appellant that;

- a) The Respondent was undertaking a reconciliation exercise of the Appellant’s accounts in the legacy system to establish the correct tax balances.
- b) Thereafter, the balances would be migrated to the current tax system and therefore the Appellant was expected to confirm the correctness of the alleged legacy balances.
- c) The Appellant was expected to provide specific documents that would be critical in reconciliation exercise and validation of the legacy debit balances which were communicated as Kshs. 171,465,344.00 for income tax and Kshs. 199,363,504.00 for VAT respectively.

d) The necessary documents expected to be provided by the Appellant were all listed in the Data Cleaning Project template attached to the email of 15th August 2020 and the Respondent communicated that the needed documents including returns and payment receipts will be crucial in validating any discrepancies the Appellant may have had with the alleged legacy balances.

24. It was asserted that this was the third time the Respondent raised the issue of migration of legacy debit balances and again requested documents from the Appellant despite the same having been provided in the first objection and the second objection without any response from the Respondent.

25. The Appellant stated that despite the open display of malice and unfairness, the Appellant prepared a comprehensive response to the email of 15th August 2020 and provided all the requested documents and information listed in the attached Data Cleaning Project template. This third objection is dated 3rd November 2020 and provided all the specific information requested for in order to validate its position that there was no legacy debt owing to the Respondent for income tax and VAT as alleged and demanded.

26. The Appellant contended that it was then expected that after the Respondent had received the Appellant's third objection of 3rd November 2020, the issue of migrating the alleged legacy debit balances would be brought to a conclusion

because this was the third time the Appellant was comprehensively responding to such issue without getting any response.

27. The Appellant further contended that as usual, the Respondent after receiving the documents it had requested and the explanations thereto provided by the Appellant in its third objection on 3rd November 2020, went mute and did not respond to the third objection thus the same was deemed allowed by operation of the law pursuant to Section 51 (11) of the TPA.

28. That almost four years (4 years) down the road, on 25th June 2025, the Respondent behaving as if it had never received the Appellant's first, second, and third objections related to the issues of migration of legacy balances, sent an email of even date which again was related to the migration of legacy balances, this time round varying the VAT balance to Kshs. 201,125,150.88 and making no claim for income tax.

29. The Appellant averred that the migration stated as follows;

“a). The Appellant was notified that the principal ledger balances which were previously held under the legacy system had been migrated to iTax.

b). As per the Respondent's record (not provided) the Appellant had a VAT Legacy debit balance of Kshs. 201,125,150.88.

c). The Appellant was expected to make arrangements to clear the said outstanding liability before 30th June 2024 so as to take advantage of the ongoing tax amnesty program .

- d). *Any amount that remained unpaid after 30th June 2024 would accrue interest and penalties and the same was not to be subjected to waiver.*
- e) *The demanded legacy balances were subjected to adjustments upwards or downwards based on availability of any additional information/documents not previously factored in, while arriving at the final migrated balance ...”.*

30. The Appellant stated that it was perplexed by the Respondent’s notice considering that it had in the past, without prejudice to its rights under Section 23 and 31 of the TPA, provided all the requested information and documents which supported the fact that there were no legacy debit balances to be migrated to iTax in relation to Income Tax and VAT and that the Respondent never replied to such objections despite acknowledging receipt of the same. The Appellant was therefore shocked that the Respondent had arbitrarily migrated to iTax, the VAT legacy debit balance of Kshs. 201,125,150.88 and was expecting payment of the same.

31. The Appellant stated that on 19th July 2019 it decided to object to the migration notice on a without prejudice basis to its rights under Sections 23 and 31 of the TPA. The Appellant attached submitted all the previous objections with relevant supporting documentation to the Respondent, reminding them of the history of the matter. Among other issues it took issue with;

- The act of asking the Appellant to account for alleged legacy debit balances whose history dates back to more than ten years and without giving any reason as to where such balances were coming from or how such balances had been arrived at is a breach of principles of fair administrative action envisaged under article 47 of the Constitution of Kenya, and Section 4 of the Fair Administrative Actions Act.
- The correct VAT legacy credit balance which was carried over to the iTax system in December 2013 was Kshs. 1,921,534.30 and the same has never been challenged or amended by the Respondent to date.
- The Respondent never provided the Appellant with the make up of the alleged VAT migrated legacy debit balance after taking into consideration all the previous correspondence on the same proving that there is no tax due that was to be migrated to the Appellant's iTax.

32. It was stated that on 20th August 2024 through an email of the same date, the Respondent sent its letter titled "*Objection Decision to Legacy Assessment Order of Kshs. 201,125,150.88 for the Year 2009, 2010, and 2012 (the Decision)*," in which the Respondent stated as follows;

- a) It had carefully considered the Appellant's notice of objection dated 19th July 2024 and which it received on the same date and its decision was thus guided by Section 51 of the TPA.

- b) It noted that the application related to an existing pre-iTax migrated balance debt and not a fresh assessment.
- c) It was simply demanding payment of an existing debt that was not carried down to iTax upon migration.
- d) It acknowledged that the issue at hand required validation of debt balances carried forward as a standard procedure in migrating to a new system.
- e) The response dated 20th August 2024 was a response under Section 51 (4) of the TPA and not an Objection Decision under Section 51 (9) of the TPA.
- f) The Appellant was thus advised to consult with the Corporate Data Office located at the Times Tower in Nairobi.

33. The Appellant stated that on 2nd September 2024 it responded to the Respondent's letter dated 20th August 2024, as follows;

- a) That the Respondent's letter dated 20th August 2024 could not in law be a response under Section 51 (4) of the TPA because the same was sent 32 days after receipt of the Appellant's notice of objection dated 19th July 2024 contrary to Section 51 (4) of the TPA.
- b) The Notice of objection dated 19th July 2024 was validly lodged.
- c) The Respondent did not consider evidence attached to the notice of objection dated 19th July 2024.

- d) The Respondent's demand of the migrated legacy balances kept on mutating based on the amount being demanded and the period of income being contested.
- e) It had in the past given information to the Corporate Data Office for confirmation of the legacy balances through its third objection dated 3rd November 2020 in response to a demand via an email of 15th August 2020 attached to the email of 22nd August 2020 from the said Corporate Data Office, which never responded to the issues to date, and therefore the objection was allowed by operation of the law.
- f) It had forwarded its notice of objection dated 19th July 2024 to the DTD legacy support team.
- g) It adopted all its arguments in its objection notice dated 19th July 2024, resubmitted the said letter and its annexures as an attachment to the further objection to migration notice dated 2nd September 2024 and requested that it be provided with reasons explaining how the legacy migrated debit balances related to VAT amounting to Kshs. 201,125,150.88 had been arrived at.

34. The Appellant further stated that on 3rd September 2024, it sent its Further Objection to Migration Notice dated 2nd September 2024, and on 11th September 2024 the Appellant received an email from the DTD Legacy Support Team in response to its email of 3rd September 2024, in which the Respondent stated that

the Appellant's concerns were being reviewed and the Appellant shall be contacted by the debt validation office, which up to now is yet to contact the Appellant.

35. That on 13th September 2024 the Respondent issued its Objection Decision in which it confirmed the migrated legacy debit balances related to VAT amounting to Kshs. 201,125,150.88.

36. The Appellant contended that it was clear that the Respondent made its Objection Decision of 13th September 2024 without considering any report or getting any communication from the Corporate Data Office and or DTD Legacy Support Team who by that time were yet to review the documentation and validate the alleged migrated legacy debit balances.

37. It was stated that on 30th September 2024, the Appellant wrote to the DTD Legacy Support team and narrated the history of the dispute in a chronological manner. Amongst others, the Appellant brought to the Respondent's notice that the Respondent in computing its alleged legacy balances for VAT had ignored inventory claim relief on building construction granted by the Respondent itself on 4th April 2008 in the tune of Kshs. 189,759,384 against the Appellant's future output tax which the Appellant had applied for on 7th January of the same year. Also, in computing its alleged legacy balances for VAT, the Respondent also ignored a number of payments made and credits carried forward resulting in the

erroneous debit balance of Kshs. 201,125,150.88 instead of credit of Kshs. 1,921,534.35.

38. The Appellant further stated that on 1st October 2024 after considering the apparent fact that the Respondent's legal team confirmed the VAT Legacy balances as debt, while the DTD legacy support team was still validating data, wrote a letter to the Respondent requesting it to reconsider its decision based on the new information and events post the making of its Objection Decision of 13th September 2024.

39. The Appellant being aggrieved by the Objection Decision dated 13th September 2024 filed its Notice of Appeal to the Tribunal on 11th October 2024.

40. In its submissions, the Appellant stated that at the outset it was vital to note that the Appellant's Appeal against the Objection Decision dated 13th September 2024 has not been defended as the Respondent in its Statement of Facts dated 21st November 2024, has decided to defend its decision of 20th August 2024 which is not the subject of this Appeal. The Appeal herein being against the Objection Decision of 13th September 2024, and not against the Respondent's decision of 20th August 2024 as pleaded in the Respondent's Statement of Facts.

41. The Appellant submitted that it has submitted solid evidence to prove that the Objection Decision dated 13th September 2024 was irregular, unlawful, capricious, issued in bad faith and thus should be set aside.

42. It was submitted that the Appellant had provided a plethora of evidence that warrants the setting aside of the Respondent's Objection Decision and which evidence is effectively in support of the Appeal. The Respondent on the other hand has not refuted any evidence adduced by the Appellant herein nor pleaded the legality of the Objection Decision and in such circumstances, it has failed to meet its burden of proof to the required standard in responding to the Appeal.

43. It was also submitted that though the burden of proof in tax disputes solely lies with the Appellant, it is now a well-established law that when the Appellant has provided sufficient evidence to support its case, the burden of proof then shifts to the Respondent to challenge the provided evidence. Where the Respondent has failed to provide any evidence to prove their position, the taxpayer's Appeal must succeed.

44. The Appellant cited the case of **Kenya Revenue Authority vs. Man Diesel & Turbo Se, Kenya (2021) eKLR**, where the court stated;

"...a prima facie case is made when the taxpayer can produce unchallenged, and uncontradicted evidence. Once a taxpayer has made a prima facie case to prove the facts, the onus then shifts the Revenue Authority to rebut the prima facie case. If the Revenue Authority cannot provide any evidence to prove their position, the taxpayer will succeed."

45. The Appellant also cited the case of **Prabakhi Developers Ltd vs. Commissioner of Legal Services & Board Coordination [2024] KETAT 430 (KLR)**, where it was held;

“The Respondent has an obligation to demolish any evidence furnished by the Appellant, this was the Tribunal’s ruling in TAT 435 of 2022 Abyssinia Iron and Steel Ltd, where it held that; This onus may however shift to the Respondent if the Appellant has made a prima facie case. In this case, the onus may then shift to the Respondent to rebut the prima facie case.”

46. The Appellant submitted that based on the foregoing, it pleaded a lot of unlawful actions related to the Objection Decision and provided overwhelming evidence contained in nine volumes of list and bundle of documents. Instead the Respondent decided not to respond to this Appeal, or even contest any evidence provided by the Appellant and therefore the Appellant must succeed in this Appeal.

47. It was further submitted that the Respondent has not in its Statement of Facts provided any reason to support its decision to affirm an unknown tax assessment of Kshs. 201,125,150.88. It has not even provided the alleged assessment, of which it has stated there was no assessment. The Respondent was therefore not in compliance with Section 15 (1) of the TPA, it was submitted.

48. The Appellant stated that the Respondent should not be allowed to respond to the Appeal through its written submissions, as it is trite law that parties are bound

by their pleadings and therefore the Respondent cannot defend nor controvert a fact through its written submissions when it had the opportunity to defend its appeal through the statement of facts.

49. The Appellant cited the case of **TAT 129/2022 Shop and Deliver Ltd vs. Commissioner of Domestic Taxes (KETAT 1018 (KLR))**, where it was stated;

“submissions cannot take the place of evidence...submissions are not evidence on which a case is decided. Submissions only find their basis from pleadings. They cannot stand on their own or be used to introduce new grounds of appeal or defense which were bereft in the initial pleadings.”

50. The Appellant also submitted that the purported confirmed assessment of Kshs. 201,125,150.88 communicated through the Objection Decision dated 13th September 2024 is unlawful for being statutorily time-barred pursuant to Section 31 of the TPA.

51. It was submitted that the Respondent in its Objection Decision stated;

“In view of the above reasons, and the provisions of the law, the Commissioner rejects your grounds of objection and confirms the assessment as issued. The Principle tax of Kshs. 201,125,150.00 is therefore due and payable by you together with the resulting interest and penalties.”

The Respondent has therefore referred to the migration notice as an assessment. However, prior to the Objection Decision, the Appellant was never issued with any assessment for the alleged balance.

52. It submitted that its VAT self-assessment for the months in the years 2009, 2010 and 2012 had been provided to the Respondent and they all indicated that there was no VAT payable for the alleged period. The Respondent confirmed receipt of the evidence and did not contest the same.
53. The Appellant submitted that Section 31 (4) (b) (i) of the TPA provides that the Respondent may amend an assessment within five years of the date the self - assessment taxpayer submitted the self-assessment return to which the self - assessment relates .The only exception being where the Respondent has proved tax evasion, willful neglect or fraud by the taxpayer.
54. It was submitted that the Respondent has not pleaded any fraud, tax evasion or willful neglect by the Appellant and therefore it is statutorily time-barred from any attempt to vary the self-assessment returns as filed by the Appellant in the year 2009, 2010, and 2012 because it is more than five years since the said returns were filed. The Appellant cited the case of **Commissioner of Domestic Taxes vs. Airtel Networks Kenya Ltd [2022 KEHC 25059(KLR)** , and, **Stefanutti Stocks Kenya Ltd vs. Commissioner of Domestic Taxes [2023] KEHC 2322**.
55. The Appellant submitted that bearing the foregoing, the Respondent should not be allowed to amend the Appellant's self - assessments for the years allegedly under review by casually disguising such tactics behind purported unsupported migration of unknown VAT legacy debit balances.

56. The Appellant further submitted that the Respondent's Objection Decision dated 13th September 2024 is unlawful and should be set aside.

57. It was submitted that the Objection Decision dated 13th September 2024 was unlawful and thus ought to be set aside for the following reasons;

- a) It was prematurely issued by the Respondent while the revalidation of the alleged balances was ongoing and is yet to be completed.
- b) It was issued without a tax decision.
- c) It confirmed an unknown assessment based on unsupported figures.
- d) It offended the doctrine of legitimate expectation.

58. The Appellant also submitted that it was unlawful for the Respondent to request for submission of documents that were more than five years old from the end of the respective reporting periods. The Migration Notice and the Objection Decision was contrary to Section 23 of the TPA. By implication, the Respondent obligated the Appellant to retain and provide documents for a period of more than five years from the end of the reporting period. The Appellant cited the case of **Commissioner of Domestic Taxes vs. Airtel Networks Kenya Ltd (supra)** and **Republic vs. Commissioner of Domestic Taxes (LTO) Exparte Unilever Tea Ltd (2017) KEHC 9113**.

59. The Appellant submitted that relying on the foregoing authorities, there was no allegation of fraud by the Respondent which would make a reasonable demand for documents that are more than 12 years old from the date of filing. It was

therefore submitted that there was no justification for the Respondent to issue the migration notice which in effect was to subject the Appellant to undue harassment, and an unreasonable onus to prove allegations based on purported taxes arising from events that occurred more than 12 years back.

60. The Appellant also submitted that it was unlawful for the Respondent to keep shifting goal posts in relation to the alleged legacy balances and the years under review, as the Respondent keeps on changing the year under review and the amount being demanded without justification.

61. The Appellant relied on the case of **Barclays of Kenya Ltd vs. Commissioner of Domestic Taxes [2020] eKLR**, in which Majanja J. stated;

“...the respondent cannot exercise its duty like a trawler in the deep seas expecting all the fish by casting its net wide ...”

62. It was therefore submitted that the tax demanded must be demanded with clarity and proper justification. The Respondent cannot be shifting its allegations without proper clarity and justification on the years of review or the tax being demanded.

63. The Appellant also submitted that the Respondent is estopped from revisiting the issue of alleged legacy debit balances as the same had been settled by operation of the law, as though the same was raised unlawfully, the Appellant provided all the requested documents and explanations and the Respondent neither controverted nor issued a response to the Appellant’s objections.

64. It was submitted that it was trite law that once a notice of objection is not responded to within the 60 days timeline stipulated under the TPA, then by operation of the law, such notice of objection is deemed allowed and the Respondent is not allowed to reopen the same issue.
65. The Appellant cited the case of **Equity Group Holdings Ltd vs. Commissioner of Domestic Taxes [2021] KEHC 25(KLR)**.
66. It was submitted that the totality of the foregoing is that the Migration Notice and the Objection Decision issued by the Respondent were illegal for the reasons submitted hereinabove and therefore the Appeal herein ought to be allowed.
67. The Appellant also filed supplementary written submissions on 13th March 2025 in which it stated that there is nowhere in the Appellant's pleadings or submissions that the Appellant submits that the migration of the unknown legacy balances amounts to an assessment or a tax decision. It was therefore unlawful for the Respondent to purport to issue the Objection Decision confirming the unknown assessment of a principal tax amounting to Kshs. 201,125,150.88, demanding the same as due and payable, when the Respondent has contended that it has never issued any assessment order.
68. The Appellant submitted that the Respondent has purported to contend that it did not issue any appealable decision and that the only decisions that it issued are the legacy balances and its letter of 20th August 2024, thus concealing the apparent fact that it did issue an Objection Decision dated 13th September 2024,

which in fact is an appealable decision. The Appellant never argued and does not intend to argue that the legacy balances are an appealable decision, it was submitted.

69. It submitted that the appeal herein is not against the migration notice of legacy balances, and it is also not against the decision issued by the Respondent on 20th August 2024 as the Respondent purports it to be. The Appeal is about the Respondent issuing a final Objection Decision on 13th September 2014 confirming and determining unknown taxes.

70. It was also submitted that the Appellant submitted all the relevant documents and explanations to TSO, the debt revalidation team, and Corporate Data Office as directed by the Respondent, but the Respondent made its Objection Decision without considering the Appellant's evidence.

71. It was further submitted that it was open in law for the Respondent to issue an Objection Decision where there was no assessment in the first instance, and even confirm taxes and proceed to demand the same without considering the evidence submitted showing that there was no tax payable.

72. The Appellant submitted that the Respondent has argued that the Tribunal has no jurisdiction because there was no appealable decision. The Appellant reiterated that it did not appeal against the Respondent's Legacy Balances Migration Notice or ledger balances as portrayed by the Respondent.

73. It submitted that its Appeal is against the Respondent's Objection Decision dated 13th September 2024 which therefore raises the question whether the Tribunal has the jurisdiction to hear and determine an Objection Decision issued by the Respondent unlawfully. The Respondent cannot on one hand issue an Objection Decision confirming a purported assessment issued which it does not explain when it was issued or even provide the assessment order number, it was submitted.

74. It was also submitted that the jurisdiction of any court or Tribunal is derived from the statute and or the Constitution of Kenya. Section 52 (1) of the TPA provides;

“A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the TAT Act.”

75. Sections 3 and 12 of the TAT Act were also cited as follows;

“(3) There is established a Tribunal to be known as the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner.”

“(12) A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice to the Commissioner, appeal to the Tribunal, provided that such person shall before appealing pay a non-refundable fee of twenty thousand shillings.”

76. It was further submitted that the foregoing provisions are the statutory underpinnings upon which the jurisdiction of the Tribunal is derived. The Tribunal therefore has the power to hear and determine any appealable decision.

77. It was also submitted that Section 2 of the TPA stipulates what is considered an appealable decision ;

“ appealable decision means an objection decision, and any other decisions made under a tax law, other than,

(a) a tax decision,

(b) a decision made in course of making a tax decision.”

78. In view of the provisions cited, the Appellant submitted that the Tribunal is clothed with the power to determine the legality of any Objection Decision issued to a dissatisfied taxpayer. The Appellant having been issued with an Objection Decision on 13th September 2024, pleads with the Tribunal to hear the illegality and irregularity concerns raised about the said Objection Decision, and set the same aside as prayed by the Appellant.

79. The Appellant submitted that it relied on the well-established law that jurisdiction flows from the statute and the constitution, and where such jurisdiction is expressly provided, the court or the Tribunal has to offer justice to the Appellant, who is at a risk of being robbed of over two hundred million shillings Kenya shillings for taxes that have not been confirmed and do not exist.

80. The Appellant relied on the case of **Macharia & Another vs. Director of Public Prosecutions & 11 others [2022] KESC 61 (KLR)**, where the Supreme Court held;

“We acknowledge the fact that jurisdiction is everything and without it a court has no power to make one more step; and that a court’s jurisdiction flows from either the constitution or legislation, or both. It follows that we must, in limine, be satisfied that the petitioners have properly invoked the jurisdiction of this court.”

81. The Appellant further submitted that the Respondent should not be allowed to disregard the debt revalidation process and issue an Objection Decision which confirm an unknown and non-existent assessment.

82. It submitted that the Tribunal has jurisdiction as submitted hereinabove and the Respondent should be barred from creating its own Appeal and omitting essential facts so as to mislead this Tribunal that there was no appealable decision that could be appealed against.

83. It was also submitted that the Respondent has contended that the Appellant did not exhaust all the available remedies and therefore the Tribunal lacks jurisdiction to hear this Appeal. The Respondent has argued that;

- a) That the Appellant failed to consult the Respondent’s debt revalidation team as directed and therefore should not be heard and instead ought to be levied with taxes amounting to Kshs. 201,125,159.88.

b) That the Appellant would have utilized the Amnesty Framework introduced by Section 37E of the TPA.

84. The Appellant submitted that on the first contention, it has already comprehensively submitted that it is a fallacy and a wild allegation for the Respondent to argue that the Appellant refused to consult and submit relevant information to the Respondent's debt revalidation team. The Appellant submitted that it has demonstrated a plethora of evidence including the Respondent's own admission that the debt revalidation team was consulted and is yet to revalidate the alleged balances based on the documentation and responses submitted by the Appellant.

85. It was submitted that on the second issue the Respondent cited Section 37 E of the TPA as an alternative way of resolving the dispute herein. The plain reading of the section clearly indicates that it is applicable where a taxpayer has not disputed the principal tax and has further paid the same, thus afforded a reprieve on the payment of penalties and interest.

86. It was further submitted that the Appellant cannot utilize the Amnesty program because the alleged principal tax is contested, has not been determined with finality and the evidence on record indicates that the alleged principal tax imposed through the Respondent's Objection Decision of 13th September 2024 is erroneous.

87. It was also submitted that an Objection Decision once issued by the Respondent can only be challenged by a taxpayer through an Appeal at the Tribunal, and not through any other process. The case of **Republic vs. Commissioner of Legal Services & Board Coordination Ex-pate LLP KEHC 4371 (KLR)** was cited, where the Court stated that the first thing to do when issued with an Objection Decision is to Appeal to the Tribunal.

88. It was submitted that the doctrine of exhaustion was not pleaded in the Respondent's pleadings and it has been introduced through the Respondent's submissions. It is trite law that parties cannot plead new issues in their submissions as submissions are not pleadings and parties are only bound by what they pleaded. On this basis, the Respondent's issue on exhaustion ought to be expunged. Also cited is the case of **Odinga & Anor vs. IEBC & 2 Others (2017)KESC 31 (KLR)**, where the Supreme court stated;

“It is a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for consideration”.

89. The Appellant also submitted that the Respondent did not controvert or defend several fundamental issues raised by the Appellant in its Statement of Facts and

the Appellant's principal submissions and therefore the same are considered to be admitted. The Appellant cited the case of **Andrian Kithinji Mungania vs. Japhet R. Nkonge Auctioneers & Anor (2013) KEHC 3035 (KLR)** which supports the trite law that any statement of fact not controverted by the opposite party is deemed to be admitted.

90. The Appellant in conclusion submitted that in view of the foregoing, the Tribunal has the jurisdiction to hear and determine this Appeal, and prayed that the Appeal be allowed as prayed in its Memorandum of Appeal.

The Appellant's Prayers

91. By reason of the foregoing the Appellant prayed the Honourable Tribunal for orders;

- a) That the Honourable Tribunal do find that the Migration Notice and demand for payment of legacy balance migrated to iTax system in the sum of Kshs. 201,125,150.88 with respect to VAT dated 25th June 2024 was barred by limitation of time and is barred in law;
- b) That the Honourable Tribunal be pleased to and hereby set aside the Respondent's Objection Decision dated 13th September 2024 in its entirety;
- c) That the Honourable Tribunal be pleased to and hereby set aside the legacy balance statement for the period 2007 to 2014 posted in the

Appellant's iTax portal in its entirety and issue an order to remove the same from the Respondent's iTax portal;

- d) That the Honourable Tribunal be pleased to issue any further or other reliefs as may be just and expedient in the circumstances; and,
- e) That the costs of the Appeal be provided for.

THE RESPONDENT'S CASE

92. The Respondent has premised its case on the following;

- a) The Statement of Facts dated 21st November 2024 and filed on 22nd November 2022 together with the documents attached thereto; and,
- b) The written submissions dated and filed on 11th March 2025.

93. The Respondent issued a public notice informing all Taxpayers of migration of VAT and Income Tax ledger balances from Legacy system to the iTax system. The Notice further informed the public that taxpayers with ledger balances would receive further communication in their emails.

94. The Respondent stated that the notice further informed the public that the migrated debit balances were not new assessments and therefore not tax demands nor appealable decisions subject to objection or appeal process.

95. The notice notified the taxpayers that the debit balances were subject to revalidation by both parties based on additional information provided where applicable. The taxpayers were advised that they had up to 31st December 2024 to raise concerns on the migrated debit balances for resolution. Any debit

balances remaining after the above date would then be confirmed and demand notices for the taxes due issued.

96. The Respondent also stated that vide an email dated 15th August 2024 it notified the Appellant of the offices to visit for the revalidation of the migrated legacy data, and the Appellant was issued with a notice for the migration of the legacy ledger balance to iTax system dated 25th June 2024.

97. It was stated that the Appellant filed a manual objection application received on 19th July 2024, while the Respondent issued its response on 20th August 2024 as guided by Section 51 (4) of the TPA.

98. The Respondent avers that the migration of debit balances from legacy system to iTax does not constitute a fresh assessment and relied on the public notice to the taxpayers that indicated that the migration of balances did not constitute assessments.

99. The Respondent posited that it relied on Section 3 of the TPA which defines a tax decision, and further relies on the definition provided for assessments;

“assessment means a self-assessment, default assessment, advance assessment, or amended assessment, and includes any other assessment made under a tax law.”

100. The Respondent averred that the debit balances are not assessments as per the definition provided for under the TPA, and further relied on the notice that indicated all taxpayers disputing the balances to visit the Respondent’s offices for

the revalidation exercise. It further relied on the email correspondence informing the Appellant the offices they should for revalidation of the ledgers.

101. The Respondent contended that the Appellant ought to have followed the correct channel as provided by the Respondent in revalidating the debit balances.
102. It was averred that the Appellant is misconceived in filing the said Appeal as there are no assessments or tax decision, and further averred that there is no appealable decision in the Appellant's appeal and that the Appellant is undeserving of the prayers sought due to the aforesaid reasons.
103. In its submissions, the Respondent submitted that the migrated legacy debit balances from legacy system to iTax system does not constitute a fresh assessment, and relied on the public notice issued to all taxpayers that indicated the migration of balances did not constitute assessments.
104. The Respondent also submitted on the definition of a tax decision as per Section 3 of the TPA, and the definition of assessment, and stated that the debit balances are not assessments under the TPA.
105. The Respondent also submitted that there is no appealable decision or tax decision that was issued in this matter to which the Appellant could Appeal as filed before the Tribunal.
106. It was submitted that on 25th June 2024, the Respondent issued a Notice of Migration of Legacy balances to iTax, which notice was to the effect that;

- “i). Kenya Revenue Authority was migrating taxpayers of VAT and Income Tax ledger balances from the legacy system to the iTax system.*
- ii). Kenya Revenue Authority emphasizes that the communication under this exercise will be a request for confirmation of the correctness of the balances and not an assessment.*
- iii). However, the balances transferred after validation will be displayed on the iTax platform for the taxpayer to take the appropriate compliance action.*
- iv). For clarification, please call the contact Centre on Email:- dtdlegacysupport@kra.go.ke”.*

107. It was submitted that the Appellant filed a manual objection application received on 19th July 2024, and the Respondent issued a response to the Appellant to the legacy assessments on 20th August 2024 as guided by Section 51 (4) of the TPA.

108. The Respondent submitted that from the foregoing, the final ledger balance was neither an assessment which then required the Appellant to lodge a notice of objection nor was it an appealable decision or tax decision, which could not be reviewed under Section 51 of the TPA, which then gave the Appellant the anchor in which to file its Appeal before the Tribunal.

109. It was submitted that the Respondent having not issued an assessment in the matter, to which the Appellant could lodge a notice of objection, the Appellant lacks grounds in which to anchor its Appeal as provided for under Section 56 (3)

of the TPA. The Appellant could not lodge a notice of objection because the Respondent had never lodged an assessment order.

110. The Respondent submitted that from the foregoing no appealable decision was issued in this Appeal and as such the appeal before the Honourable Tribunal is premature.

111. It was submitted that the legacy balances having been carried forward at the point of migration from the legacy system to the iTax system, the Appellant's solution lied in visiting its Tax Office for purposes of resolving the issues noted which they failed to do despite having been advised numerous times.

112. The Respondent also submitted that the doctrine of exhaustion requires that the Appellant ought to have exhausted the internal dispute resolution mechanisms before moving to the Tribunal as it was cited in **Speaker of National Assembly vs. Kurume (1992) eKLR,**

“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.”

113. It was further submitted that Section 9 (2) of the Fair Administrative Actions Act provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the

mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-Section (3) which provides that the High Court or a subordinate shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an Applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

114. The Respondent by reason of the foregoing submitted that there being no appealable decision issued in this matter, therefore there is no proper Appeal for determination in the matter before the Tribunal and the Respondent prays that the Tribunal holds as such.
115. The Respondent submitted that having demonstrated to the Tribunal that there is no appealable decision issued by the Commissioner that submitted the Tribunal has no jurisdiction to determine the Appeal.
116. It was submitted that jurisdiction is everything and without it, the court has no *locus standi* to make one more step. In so submitting the Respondent cited the case of **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd (1989) KLR 1**, where it was stated;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything .Without it, a court has no power to make one more step.

Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds that it is without jurisdiction .”

The Respondent also cited the case of **Adero & Another vs. Ulinzi Sacco Society Ltd (2002) KLR 577.**

117. It was submitted that in this Appeal the Respondent having not issued a tax decision, there is therefore no tax dispute for the Tribunal to review and determine. It was submitted that the Tribunal’s jurisdiction as conferred in Section 3 and 29 of the TAT Act is limited to hear and determine Appeals filed against any tax decisions made by the Commissioner.
118. It was also submitted that the orders sought by the Appellant in its Appeal are outside the jurisdiction of the Tribunal and as such the Tribunal lacks the jurisdiction to hear and determine this Appeal.
119. The Respondent relied on the case of **Republic vs. Commissioner of Customs & Excise Exparte Abdi Gulet Olus (2014) eKLR.**
120. The Respondent also submitted that the Appeal could have easily have been resolved through the Amnesty Framework established under Section 37 E of the TPA, and despite the Respondent reaching out, the Appellant chose to proceed with the matter at the Tribunal. It added that Article 159 of the Constitution of Kenya recognizes the use of alternative dispute resolution in settlement of disputes.

121. The Respondent submitted that the Appellant having refused and declined to comply with the terms of the public notice issued by the Authority, the Respondent prays that the Tribunal finds that the Appellant is liable to paying the sum of Kshs. 201,125,150.88 demanded for in the migration of final legacy ledger balances to iTax issued vide email dated 17th August 2022.

The Respondent's Prayers

122. By reason of the foregoing, the Respondent prayed the Tribunal for orders;

- a) Uphold the Respondent's Decision dated 20th August 2024 as proper and in conformity with the provisions of the law;
- b) Return the matter back to the Respondent to enable revalidation of the legacy debit balances as per the public notice;
- c) Dismiss the Appeal with costs to the Respondent.

ISSUES FOR DETERMINATION

123. The Tribunal having considered the pleadings filed, evidence adduced and submissions made by the parties, is of the considered view that the Appeal herein distils into three issues that commend for determination as follows;

- i. Whether the Tribunal has the jurisdiction to hear and determine the Appeal herein;*
- ii. Whether the Appellant's legacy debit balances migrated by the Respondent to iTax system are statutorily time barred; and,*

- iii. Whether the Respondent was justified in confirming and demanding as assessments the Appellant's legacy balances in the Objection Decision issued on 13th September 2024;*

ANALYSIS AND FINDINGS

124. The Tribunal having identified the issues for determination proceeds to analyze and determine the same as hereunder;

- i. Whether the Tribunal has jurisdiction to hear and determine the Appeal herein;*

125. The background to the dispute subject of this Appeal stems from a migration notice issued by the Respondent to taxpayers notifying them of the migration of their VAT and income Tax ledger balances from the legacy system to the iTax system.

126. The notice further informed taxpayers that the legacy ledger balances were subject to revalidation by both parties based on additional information provided where applicable, and taxpayers were advised that they had up to 31st December 2024 to raise concerns on the migrated debit balances for resolution, and any debit balances remaining would then be confirmed and appropriate demands issued.

127. The Appellant has averred that the instant Appeal arises from the Respondent's Objection Decision dated 13th September 2024, issued in response to the Appellant's objection to claims that it had balances from the legacy system, which

when migrated to iTax, the Respondent alleged that it created new balances which was demanded from the Appellant.

128. The Appellant has contended that the claim of taxes only on the basis of migration of system from legacy to iTax is clearly without any basis in law, and is unjust, unfair, unjust and illegal.

129. The Appellant has further contended that at the time of migration from legacy to iTax it did not have any tax due or any balance that could lead to a tax liability as alleged by the Respondent. It also stated that it severally submitted the requested supporting documentation, records, information and explanations to enable the Respondent reconcile and validate its balance, which the Respondent ignored, failed and neglected to act.

130. On the other hand, the Respondent has stated that the matter subject of Appeal concerns its letter of 20th August 2024, and has contended that the Tribunal does not have the jurisdiction to hear and determine the Appeal.

131. The Respondent has contended that having not issued a tax decision in this matter, there is no tax dispute for the Tribunal to review and determine. It was submitted that the Tribunal's jurisdiction as conferred in Sections 3 and 29 of the TAT Act is limited to hearing and determining appeals filed against tax decisions made by the Commissioner.

132. The Respondent cited the cases of;

- i. Owners of the Motor Vessel “Lillian S ” vs. Caltex Oil (Kenya) Ltd (1989) KLR 1;
- ii. Adero & Another vs. Ulinzi Sacco Society Ltd (2002) 1 KLR 577;
- iii. Republic vs. Commissioner of Customs & Excise Exparte Abdi Gulet Olus (2014) eKLR;

133. The second thrust of the Respondent’s contention that the Tribunal lacks jurisdiction is founded on the argument that the Appellant failed to exhaust the laid down dispute resolution mechanism before filing its Appeal.

134. The Respondent stated that the doctrine of exhaustion requires that the Appellant ought to have exhausted the internal dispute resolution mechanism before moving to the Tribunal. The Respondent submitted that the Appeal would have been resolved through the Amnesty Framework introduced by Section 37 E of the TPA, had the Appellant not chosen to proceed to the Tribunal. It cited the case of **Speaker of the National Assembly vs. Karume (1992) eKLR**, where the court stated;

“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.”

135. The Tribunal has considered the averments and submissions made by the parties in regard to the Tribunal's Jurisdiction.

136. In addressing this question of jurisdiction, the Tribunal focuses on the twin contentions raised as the grounds ie. there being no appealable and exhaustion of internal process.

137. The jurisdiction of the Tax Appeals Tribunal is conferred by statute. Section 52 (1) of the Tax Procedures Act provides;

“(1). A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Act .”

138. The Tax Appeals Tribunal Act under Section 3 and 12 provide;

“(3) There is established a Tribunal to be Known as the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the commissioner.”

“(12) A person who disputes the decision of the commissioner on any matter under the provisions of any tax law may , subject to the provisions of the relevant tax law, upon giving notice in writing to the commissioner, appeal to the Tribunal, provided that such a person shall before appealing, pay a non-refundable fee of twenty thousand shillings.”

139. The aforesaid provisions confer on the Tribunal the power to hear and determine any appealable decision. Section 2 of the Tax Procedures Act provides a definition for an appealable decision;

“Appealable decision means an objection decision or any other decision made under a tax law other than

(a) a tax decision; or

(b) a decision made in the course of making a tax decision.”

Thus, the law clothes the Tribunal with power to hear and determine any dispute arising out of an Objection Decision issued to a dissatisfied taxpayer.

140. In the prescribed procedure for filing of an Appeal at the Tribunal, Section 13 (2) (c), provides that one of the mandatory documents to be submitted with the Memorandum of Appeal and Statement of Facts, is the tax decision.

141. Gleaning through the parties’ pleadings, the Tribunal takes note that, both parties, including the Respondent, have submitted an Objection Decision dated 13th September 2024 as the tax decision. In this Objection Decision, the Respondent has exhaustively set out to the Appellant, a statement of findings, reasons for the decision, the decision, and the caution to appeal to the Tribunal if dissatisfied.

142. The foregoing Objection Decision has not been contested by the Respondent as invalidly issued or defective, and the Tribunal is thus satisfied that the same

conforms to the provisions of Section 51 (10) of the TPA, which sets out the threshold of an Objection Decision.

143. By reason of the foregoing, the Tribunal is satisfied that the Appeal herein is grounded on the Objection Decision dated 13th September 2024, which is the tax decision, and hence an appealable decision.

144. On the issue of exhaustion of internal processes and remedies and therefore the Tribunal lacks jurisdiction, the process proffered by the Respondent as the alternative the Appellant ought to have taken, is the Amnesty Program set out under the amnesty framework under Section 37 E of the TPA.

145. However, it is noteworthy that the amnesty provided under Section 37 E is an absolutely voluntary process whereby a taxpayer has not disputed the principal tax, which he/she pays and benefits by getting a reprieve from the penalties and interest.

146. Section 37E (3) (b) of the TPA provides that amnesty shall be granted only if the taxpayer applies for the same and pays all the principal taxes by 30th June 2025.

147. In the instant Appeal, the Appellant has contested the principal taxes demanded and therefore amnesty is not a route amenable to them. Secondly, once a taxpayer has been issued with an Objection Decision, the only available remedy is to appeal to the Tribunal.

148. In the Tribunal's view, the Amnesty Framework does not qualify as an alternative mandatory internal process for determination of disputed taxes, and capable of

being exhausted before an Appeal process is commenced, as it is a voluntary mechanism where principal taxes are not disputed, and only relieves penalties and interest.

149. Consequently, the Tribunal comes to the inescapable conclusion that the doctrine of exhaustion is inapplicable in the instant case as contended by the Respondent.

150. The Tribunal is guided by the case of **Macharia & Anor vs. Director of Public Prosecutions & 11 others (2022) KESC 61 (KLR)**, where the Supreme Court held;

“We acknowledge the fact that jurisdiction is everything and that without it, a court has no power to make one more step; and that a court’s jurisdiction flows from either the Constitution or legislation or both. It follows that we must, in limine be satisfied that the petitioners have invoked the jurisdiction of this court.”

151. In view of the foregoing, the Tribunal determines and holds that the Appeal herein is founded on an appealable decision and therefore competently before the Tribunal, and is therefore legally clothed with the jurisdiction to hear and determine the same.

ii. Whether the Appellant’s legacy system debit balances migrated by the Respondent to iTax system are statutorily time barred;

152. The Appellant has contended that the Respondent’s confirmed assessment of Kshs. 201,125,150.88 issued through the Objection Decision dated 13th September

2024 is unlawful for being statutorily time barred contrary to Section 31 of the TPA.

153. However, the parties are in consensus that the legacy system debit balances migrated to the iTax system are not assessments. The said debit balances were however confirmed in the Objection Decision issued as assessments and due and payable.

154. It has been submitted that under Section 31 (4) (b) (i) of the TPA provides that the Respondent may amend an assessment within five years of the date of self - assessment the taxpayer submitted the self-assessment return to which the self - assessment relates, with the exception of where the Respondent has proved tax evasion, fraud or willful neglect by the taxpayer, the section provides;

“(a). in the case of gross or willful neglect , evasion ,or fraud by , or on behalf of , the taxpayer , at any time ; or

(b). 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; or

(ii) for any other assessment , the date the commissioner notified the taxpayer of the assessment ;

Provided that in the case of Value Added Tax, the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.”

155. Flowing from the foregoing, it is clear that the TPA requires taxpayers to maintain their records for a period of five years from the end of the reporting period to which that document relates. However, in the case of amended assessments, the taxpayer shall retain the documents until the specified period lapses; or in case of proceedings that was in existence before the end of the five-year period, the person shall retain the documents until all proceedings have been completed.

156. The question that emerges in the context of Section 31 (4) of the TPA, is what happens to the taxpayer's self-assessments in the returns already filed, in the wake of the digitization of legacy system accounts, where the relevant documentation is not available, or taxpayers have settled their tax liabilities, yet may not trace their records?

157. In the case of **Commissioner of Domestic Taxes vs. Airtel Networks Kenya Ltd (2023) KEHC 25059 (KLR)**, the High Court stated;

“In this regard, under section 31(4) of the Tax Procedures Act, an amendment outside the five-year period can only be permitted if there is evidence of gross or willful neglect, evasion or fraud by or on behalf of the taxpayer therefore the legal position is that all assessments ought to be made within five years

except where there is evidence of gross or willful neglect, evasion or fraud on the part of the taxpayer.”

158. In another High Court case, **Stefanutti Stocks Kenya Ltd vs Commissioner of Domestic Taxes (2023) KEHC 2322**, Majanja J. echoed the same and stated that courts ought to be watchful to any tactics by the Respondent to try to directly or by implication amend the self-assessment past the five years of filing. The Judge stated;

*“I agree with the Appellant that an interpretation of the aforementioned provision has to observe the strict principles of interpretation of tax statutes as enunciated by the court of Appeal in **Mount Kenya Bottles & 3 others vs. Attorney General & 3 others NRB CA 164 of 2015 (2019) eKLR**, that ‘...the statute must be looked at using different lenses . With regard to tax legislation, the language imposing the tax must receive strict construction.’ A simple and strict interpretation of the above is that the only time the commissioner may amend an assessment beyond the five-year statutory period after the filing of the self-assessment return is in the case of gross or willful neglect, evasion or fraud by, or on behalf of the taxpayer.”*

159. The Appellant has averred that its VAT self-assessment for the years of income 2009, 2010, and 2012 had been filed and provided to the Respondent and they all indicated that there was no VAT payable for the alleged period. It was further

averred that the Respondent was provided with this evidence and has not contested the same.

160. It was further averred that the Respondent conducted audits on the Appellant in 2016 and 2017 which confirmed that the Appellant did not owe any VAT or Income TAX, and any taxes due were duly paid, and therefore the purported legacy debit balances contradicted the Respondent's own audits, and there could not be any tax liability due on account of the Appellant for the years of income 2009 , 2010 and 2012.

161. The Appellant has further averred and adduced supporting records confirming that it submitted the requested documentation more than thrice to the Respondent to facilitate the validation of its legacy balances, which the Respondent ignored or failed to act on, thus coming up with erroneous and unsupported legacy debit balances, which it went on confirm as an assessment through the Objection Decision issued.

162. It has been averred that the Appellant self-assessment VAT returns for the subject years under review indicate that the Appellant was not liable for any tax and thus any variation to the self-assessment returns of the Appellant is an attempt to unlawfully amend the said returns post the statutory timeline contrary to Section 31 of the TPA.

163. The Tribunal has no doubt whatsoever that the purported migration of the Appellant's balances from the legacy system to the iTax system without taking

into account its supporting information for purposes of validation of the said balances amounts to amendment of the Appellant's already filed returns for the years of income 2009, 2010 and 2012, being undertaken in the year 2024, a period of more than twelve years since the returns were filed.

164. It is worth noting that the Respondent has not pleaded any gross or willful neglect, evasion or fraud by the Appellant. Therefore, any attempt by the Respondent to vary or amend the self-assessment returns filed by the Appellant for the period 2009, 2010 and 2012 would be statutorily time barred as it is for a period that is more than five years since the said returns were filed.

165. Consequently, the Tribunal finds and holds that the variation or amendment of the Appellant's VAT self-assessment returns for the period 2009, 2010 and 2012, without taking into consideration the Appellant's provided records and information, is statutorily time barred pursuant to the provisions of Section 31 (4) of the Tax Procedures Act, and therefore unjustified.

iii. Whether the Respondent was justified in confirming and demanding as assessments the Appellant's legacy balances in the Objection Decision issued on 13th September 2024;

166. The Appeal herein has been grounded on the Objection Decision issued by the Respondent against the Appellant on 13th September 2024. This is the appealable decision subject of the instant Appeal. In the said Objection Decision, the Respondent states;

“In view of the above reasons and the provisions of the law, the Commissioner rejects your ground of objection and confirms the assessment as issued. The principle tax of Kshs. 201,125,150.88 is therefore due and payable by you together with the resulting interest and penalties.”

167. It is not in doubt that both parties are in consensus that the legacy system debit balances are not assessments.
168. The Appellant has averred that the Respondent has not provided any basis to support its Objection Decision affirming an unknown tax assessment of Kshs. 201,125,150.88. It contended that it did not even provide the alleged assessment which in fact it has stated there was no assessment, and therefore the Respondent is not in compliance with Section 15 (1) of the TAT Act.
169. It is noteworthy that save the enforced migration of the legacy system balances, the Respondent did not issue the Appellant with any assessment for the alleged VAT balance of Kshs. 201,125,150.88. However, in its Objection Decision the Respondent confirmed assessments for the year 2009, 2010 and 2012 amounting to Kshs. 201,125,150.88 without regard to any assessment.
170. It has been averred by the Appellant that its VAT self-assessments for the months in the years 2009, 2010 and 2012 had been provided to the Respondent and they all indicated that there was no VAT payable for the alleged period, and the Respondent has not controverted this evidence. Therefore, the variation to the self-assessment returns of the Appellant amounts to amending the said returns

post the statutory time frame contrary to the provisions of Section 31 (4) of the TPA.

171. It has further been averred that the Appellant submitted its supporting records, information and explanations to the Respondent on several occasions in response to its legacy system migration notices, to facilitate validation of its legacy balances, but the Respondent ignored, neglected or failed to act on the said information to validate its balances, but went ahead to confirm an unknown assessment of Kshs. 201,125,150.88 and went ahead to demand the same.

172. The Respondent in its Public Notice issued on 25th June 2024, among others had stated;

- “i. The Revenue Authority was migrating taxpayers of VAT and Income Tax ledger balances from Legacy to iTax systems.*
- ii. It emphasized that the communication under this exercise will be a request for information of the correctness of the balances and not an assessment.*
- iii. Balances transferred after validation will be displayed on the iTax platform for the taxpayer to take appropriate compliance action.”*

173. The Tribunal notes that pertinent from the Public Notice is that the same was to be treated as a request for information on the correctness of the legacy ledger balances and not an assessment; The information was to be applied to validate the ledger balances; The validated balances were to be posted in the iTax platform for the taxpayers to take appropriate compliance action.

174. It is further noteworthy that upon the Appellant severally submitting its supporting material information for the reconciliation of its legacy ledger balances, the Respondent failed to undertake the said exercise as per its notice, but instead proceeded to post the balances in the iTax system without any iota of validation, treating the same as confirmed assessments and demanding payment thereof.

175. It is in view of the foregoing that the Tribunal comes to the conclusion that the impugned Objection Decision was issued by the Respondent prematurely and unprocedurally, whilst the supposed revalidation of the legacy ledger balances was still ongoing and not yet completed, a fact acknowledged in the Objection Decision.

176. Consequently, the Tribunal is satisfied that the Respondent's confirmation and demand of the Appellant's legacy ledger balances as assessments in its Objection Decision dated 13th September 2024 was erroneous and unjustified.

177. The upshot of the foregoing is that the Appellant's Appeal is merited and hereby succeeds.

FINAL DETERMINATION

178. The Appellant's Appeal having succeeded the Tribunal makes the following orders;

- a) The Appellant's Appeal be and is hereby allowed;

- b) The Respondent's Objection Decision dated 13th September 2024 be and is hereby set aside;
- c) The Appellant's Legacy System Ledger balances migrated to iTax system be remitted back to the Respondent for reconsideration, reconciliation and validation within 60 days of the date of delivery of this judgement as per its Public Notice and in accordance with the relevant laws; and,
- d) Each party to bear its own costs.

179. It is so ordered .

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF APRIL 2025

ROBERT M. MUTUMA
CHAIRPERSON

MUTISO MAKAU
MEMBER

JEPHTHAH K. NJAGI
MEMBER

DELILAH K. NGALA
MEMBER

DR TIMOTHY B. VIKIRU
MEMBER