

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
APPEAL NO. 159 OF 2016

ALTECH STREAM (E.A) LIMITED (ASEA)APPELLANT

=VERSUS=

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company duly incorporated in Kenya and carrying on the business of provision of management services.
2. The Respondent is an office established under the Kenya Revenue Authority Act, Cap 469, Laws of Kenya and is charged with the mandate to administer and collect tax revenue on behalf of the Government of Kenya.
3. By a letter dated 29th October 2015, the Respondent issued the Appellant with a Notice of Intention to Audit under Section 56 of the Income Tax Act and Section 48 of the VAT Act, 2013. In this letter, the Respondent informed the Appellant that it would be conducting an audit of the Appellant's operations for the years of income 2011 to 2015, specifically focused on the issues outlined below identified on its returns and requiring the Appellant to provide related books, records and documents by 11th November 2015 for examination;-
 - a) Verification of income and expenses for the years 2012 and 2013 as declared in the financial report.

- b) Bank borrowings are huge with regard to assets and turnovers of the company.
 - c) In the year ending 28th February 2012, entertainment and travel expenses comprised 83% of total administrative expense
 - d) Impairments on investments will be verified to ascertain correctness.
 - e) Impairments of trade receivables will also be verified.
 - f) There are high debit balances in the VAT ledger.
 - g) Withholding tax will be checked to see whether the system was operated correctly and taxes remitted to the Department.
4. Vide a letter dated 2nd December 2015 referencing the Notice of Intention to Audit and further email correspondence regarding production of documents, the Respondent gave its final reminder requiring the Appellant to provide the requested documents for examination within seven days failure to which an estimated assessment would be issued without further reference to the Appellant.
5. Thereafter, by a letter dated 19th January 2016, the Respondent issued a report outlining its preliminary findings on the tax audit covering the period 1st March 2011 to 31st August 2015. The report set out the Respondent's preliminary queries on certain tax heads including VAT, WHT and Corporation Tax and requested the Appellant to provide certain documents previously requested but not provided being; General Ledgers for the years of income 2012 and 2013, Trial Balances for 2012 and 2013, Income Tax returns, Tax Computations and Financial Statements for the years 2014 and 2015, VAT returns and analysis from March 2011 to December 2013, Z-reports from March 2011 to December 2013, Withholding tax returns and tax payments from March 2011 to December 2013, Import and Export documents 2012 and 2013, Asset registers 2012 and 2013, All sales invoices from March 2011 to December 2013. The Respondent also asked the Appellant to prepare reconciliations/explanations to the preliminary findings.

6. The Respondent notified the Appellant of its audit findings by a letter dated 11th February 2016. The Respondent raised an assessment on Corporation Tax for the periods 2011/2012 and 2012/2013 of Kshs.38,814,164.00 and Kshs.29,140,599.00 respectively. This Corporation tax assessment was based on; variance between declared income and the income as per withholding tax deemed as undeclared income, disallowed expenses of entertainment & travel and legal & professional fees and variance between impairment of investment expensed in profit & loss account and that added back in the tax computation.
7. The Respondent raised a VAT assessment of Kshs.94,113,326.00 comprised of Principal VAT of Kshs.48,730,983.00 and Interest of Kshs.45,382,343.00. This assessment was based on variance between declared income per VAT returns and income per withholding tax certificates for the years 2012 and 2013, various invoices not declared in the VAT returns in January 2013 to December 2013, declaration of various zero-rated supplies from February 2014 on supplies that should have been charged VAT at 16%, output VAT on disposal of assets in 2012 and 2013, reverse VAT on imported services in the year 2012/2013.
8. The Respondent also raised a Withholding (WHT) assessment of Kshs.138,593,642.00 comprising of Principal WHT of Kshs.83,560,299.00 and penalties and interest of Kshs.55,033,343.00. This assessment was based on Deemed Interest on interest free loans received from its non-resident parent company for the years 2011-2015, interest on a loan of Kshs.2.8 billion borrowed from CFC Stanbic South Africa and Standard Bank South Africa and various other fees paid in the years 2012, 2013 and 2014 that attract WHT but for which WHT was not deducted.
9. The Appellant vide its letter dated 5th December 2016 conceded to certain items raised in the additional assessment and paid Kshs.5,456,181.00 towards the

undisputed taxes being Kshs.679,932.00 for PAYE, Kshs.3,593,515.00 for WHT and Kshs.1,182,733.00 for VAT, all-inclusive of interest. The uncontested amount was paid prior to the Appellant issuing the Respondent with its Notice of Objection and the Respondent was informed of the Appellant's intention to apply for a waiver of the penalties.

10. Vide the same letter dated 11th February 2016, the Respondent also requested for production of the following pending documents failure to which a further assessment would be raised; evidence of loan receipt from external funder and onward remittance to Kenya Data Networks Ltd, sale agreement for the shares in the two subsidiaries ie. Swift Global (K) Ltd and Kenya Data Networks Ltd, details of persons who purchased the shares in the subsidiaries, self-assessment returns for the year 2014 and 2015 and details of bank credits and bank payments as contained in the letter dated 19th January 2016.
11. Following receipt of this letter, the Appellant wrote to the Respondent seeking extension of time to lodge an objection to the above assessments. This letter was followed by a letter dated 16th June 2016 from its agents Hamilton, Harrison and Mathews Advocates reiterating the Appellant's application on the ground that the Appellant was completely incapacitated in establishing its tax position following the massive destruction of documents by a former employee who having been implicated in fraud sought to remove evidence by destroying the Appellant's records. Due to this predicament, the Appellant was tasked with the painstaking process of reconstructing its records by various ways including reaching out to its suppliers to confirm payments and avail copies of tax certificates.
12. Further, the Appellant vide this letter dated 16th June 2016 and purely on a without prejudice basis proposed to make an immediate payment of Kshs.142,000,000.00 in consideration of which it requested that the Agency Notices served upon its

bankers Barclays Bank of Kenya Ltd and other parties be lifted so as to enable the Appellant carry on its business.

13. Vide an email dated 22nd June 2016, the Appellant also requested that the Respondent provide it with copies of all VAT returns from March 2010 to December 2013, statement of accounts recording unallocated payments from March 2010, withholding tax statement of accounts from March 2010 and copies of assessments for Corporate Income Tax for the period 2011 to 2013 to enable it complete reconstruction of its records.
14. The Respondent allowed the Appellant's application for extension of time to lodge an objection by a letter dated 29th June 2016 and granted it 30 days within which to file the objection. The Respondent also acknowledged receipt of Kshs.137,687,474.00 of the Kshs.142,000,000.00 referred to above and requested for the balance of Kshs.4,312,526.00 to enable the Respondent advise the Accounts Management Division to uplift the Agency Notices issued to banks and debtors.
15. The Appellant lodged its Objection to the assessment dated 11th February 2016 by a letter dated 15th August 2016. This objection was accompanied by another letter of even date containing a detailed response to the issues raised in the preliminary findings letter of 19th January 2016.
16. The Respondent considered the Appellant's Objection and issued his Objection decision by a letter dated 13th October 2016 amending assessments on Corporation Tax to Kshs.24,177,090.00 and Kshs.30,687,729.00 for the years 2013 and 2012, respectively, VAT to Kshs.64,012,712.00 inclusive of interest for the years 2012-2015 and WHT to Kshs.71,951,458.00 inclusive of interest and penalties for the years 2012-2014 resulting in a total tax liability of Kshs.190,833,889.00.

17. Aggrieved by this decision, the Appellant filed a Notice of Appeal dated 10th November 2016 on 11th November 2016 and served it on the Respondent on the same date. The Appellant then proceeded to file its Memorandum of Appeal and Statement of Facts setting out its substantive case on 25th November 2016.

THE APPEAL

18. The Appellant filed its Memorandum of Appeal dated 24th November 2016 on 25th November 2016, setting out its grounds of Appeal as outlined below:-

- i. The Respondent erred in law and fact by finding that the Appellant had under-declared its taxable income for 2012 and 2013 years of income;
- ii. The Respondent erred in assessing corporation tax on the Appellant for the years of income 2012 and 2013 based on the disallowable expenses relating to entertainment, travel, legal and professional fees which were wholly incurred in the generation of the income.
- iii. The Respondent erred in assessing corporate income tax on the Appellant for the years of income 2012 and 2013 based on inaccurate re-computations of the Appellant's income for the said years of income.
- iv. The Respondent incorrectly assessed the Appellant's VAT liability at Kshs.64,012,712.00 and erred in failing to consider that;
 - a) The Appellant's tax records were destroyed and the requests to the Respondent for supply of these documents including the filed VAT returns to enable the Appellant respond to the assessment rejected; and
 - b) The Appellant had provided evidence from its bankers in the form of statements which showed that it had paid VAT due to the Respondent.

- v. The Respondent erred in assessing withholding tax on erroneous deemed interest calculations for the 2015 Year of Income.
- vi. The Respondent erred in fact and in law in assessing the Respondent's tax liability at Kshs.190,833,899.00 on account of corporation tax, value added tax and withholding tax when it was evident that the Appellant had paid its taxes.

The Response to the Appeal

19. The Respondent filed its Statement of Facts dated 21st December 2016, setting out its argument in response to the Appeal as outlined below:

a) Corporate Tax

i. Under-declared income

- a) The Respondent relied on the withholding tax claimed by the Appellant in the 2013 income tax return. The withholding certificate shows the date, the gross income and amount of withholding tax.
- b) The computed income is arrived **at** through accounting adjustments as shown on the demand letter or the Respondent's Objection Decision.
- c) The Respondent treated amounts relating to debtors impairment of Ksh119,536,768.00 as revenue. The amount was indicated as "impairment of the trade receivable" in the 2013 audited financial statement.

ii. Legal and Entertainment fee

- a. The supplier invoices for the payment of the legal fees shows that the payment is in respect of legal dispute for KDN, a subsidiary of the Appellant. Nothing supports the expense wholly and exclusively incurred for the production of Appellants income.
- b. Entertainment and travel expenses were not supported by source documents to show that the **expenses were** incurred for the furtherance of **the** Appellants business.

b) Value Added Tax

- i. The Respondent relied on withholding tax claimed by the Appellant in the 2013 **Income Tax Return**. The **Withholding Certificate** shows the date, the gross income and the amount of withholding tax. The gross amounts of income and amount of withholding tax. The gross amounts of incomes were used to compute the Appellants income which was compared with the income declared in VAT 3 returns.
- ii. The computed income is arrived **at** through accounting adjustments of gross income of withholding certificates per accounting period as shown on the demand letter or the Respondent's objection decision.
- iii. The Respondent referred to the specific invoices or payments that VAT was not declared. The Appellant failed to provide proof that VAT was paid on those invoices or payments received.

c) Withholding Tax

- i. The deemed interest for the year 2015 was calculated based on balances of year 2014 since the Appellant had not provided audited accounts for year 2015.

20. The Respondent filed its response to the Appeal vide a Statement of Facts dated 21st December 2016 and filed on even date. The Respondent prays and urges this Tribunal to:-

- i. Uphold the Respondent's assessment dated 13th October 2016.
- ii. Dismiss the Appellant's Appeal for being bad in law.

APPELLANT'S CASE

21. The Appellant's case in support of its grounds of Appeal is extensively set out in its Statement of Facts filed on 25th November 2016 and its Written Submissions dated 6th July 2017 filed on 7th July 2016.

22. As a prelude, the Appellant submitted that through no fault of its own, it experienced disruptions to its records filing and archiving system due to the actions of a former employee and as a result not all requested documentation was availed. In light of this situation, the Appellant requested the Respondent to avail copies of returns and supporting documents with the aim of retrieving information necessary to reconcile the variances between its position and that taken by KRA. The Respondent however did not respond to the request and did not avail the documents requested.

23. The Appellant submits that failure by the Respondent to avail documents and records that were uniquely in its possession and which would have assisted the Appellant to fully demonstrate that no tax liability was due was in violation of the provisions of Article 47 of the Constitution of Kenya, 2010. The Appellant avers that it was manifestly unfair of the Respondent to decline to avail documents and proceed to assess tax on the basis of certain assumptions which would have been cleared up by the said documents.

24. Despite being unable to reconstruct and avail 100% of the requested documents, the Appellant submits that it has reconciled the variances alleged by the Respondent and also retrieved source documentation in support.
25. The Appellant has discussed its case on the various tax heads as outlined in the paragraphs herein below.
26. Under the head of Corporation Tax, the Respondent raised an assessment of Kshs.35,762,124.00 and Kshs.75,437,903.00 for the years 2013 and 2011, respectively, based on under-declared income. This amount was based on the variance between the sales turnover declared in the Appellant's audited financial accounts and the amount obtained from grossing up Withholding taxes based on the withholding tax certificate amounts deducted by the Appellant's customers. The Appellant avers that the Respondent, in arriving at the computed revenues, has incorrectly grossed up the WHT paid in the periods 2012 and 2013.
27. The Appellant further submits that the Respondent disregarded the Appellant's financial statements for each of these years without any basis despite the fact that the statements had been audited by independent reputable firms. That, while the Respondent was happy to rely on certain entries in the financial statements eg. Debtors position, it also chose to ignore others without explanation. It is the Appellant's argument that the Respondent ought to have given compelling reasons for not taking them into account.
28. The Appellant submits that it carried out the intricate exercise of matching its WHT certificates against actual invoices raised. These amounts were then tied to the amounts declared in its Income Statement and VAT returns. The Appellant also submits that its witness Ms. Annette Beulah Brits, the Appellant's Group Tax Compliance Manager, was able to take the Tribunal through the documentation and demonstrated the fallacy of the Respondent's formula of simply grossing up

WHT certificates and adding up VAT to determine the total to be the Appellant's income for that period. It is the Appellant's contention that the witness was able to show that if that argument were applied, the net position would be that the Appellant was actually entitled to a tax refund.

29. It is the Appellant's case that in merely grossing up the WHT, the Respondent failed to take into account that some of the certificates related to invoices for prior periods and which had already been taken into account in declaring the income for that year. The Appellant submits that WHT is withheld on the invoice amount and not computed on instalment payments, therefore, one would only need to look at the invoice to ascertain the tax to be withheld and then remit the tax. A tax certificate cannot be issued for a future invoice. Every WHT certificate related to an invoice already raised and it behoved the Respondent to consider the year in which the invoice was raised.
30. To the Appellant, the additional assessment amounts to double taxation as all its income have already been subjected to Corporate Income Tax. In this regard, the Appellant's witness took this Tribunal through its documents with regard to the year 2011. It was shown therein that there were duplicate tax certificates relied on and further the sum total of the revenue accounted for as management fees for the year 2010/2011 was Kshs.87,613,854.20 which figure tallied with the one reported in its audited financial accounts and income tax returns for 2011 as shown in the relevant documents. The Respondent has purported to tax this figure in 2012 when in fact it was disclosed in 2011.
31. The Appellant's witness also pointed to the Appellant's documents where it had matched the WHT certificates for 2012. The sum of the gross revenue computed from the WHT amounts to Kshs.81 million with a difference of Kshs.1.7 million. This Kshs. 1.7 million was interest income for that year and was recorded as such in the

audited financial statements. Thus, the total revenue of Kshs.82.8 million was reported as the gross turnover in the income tax returns for the year 2012 and the audited financial accounts.

32. With regard to the year 2013, the Appellant pointed to documents where it had matched the WHT certificates. Yet again the total revenue shown of Kshs.45,434,952.42 tallies with the income reported in the Income Tax Return of 2013 and the audited financial accounts for the year.
33. The Respondent also treated the amounts of Kshs.119,536,768.00 relating to impaired debtors as revenue and added them back to the corporation tax. The Appellant averred that it had already added back this amount in its tax computation for the year of income ended February 2013. Further, the Appellant refers to the letter dated 25th June 2014 from Deloitte recording the fact that they had disallowed the provision for bad debts since they did not conform to the legal guidelines. Therefore, they had added them back for tax purposes. An additional add back would result in double taxation.
34. In arriving at the assessment for Corporation tax, the Respondent also disallowed legal and entertainment expenses incurred in the year 2012 and 2013 and added them back for tax purposes. In its submissions, the Appellant conceded to this assessment and avers that the principal tax obligation related to this has already been settled.
35. Therefore, as per Appendix E of the Appellant's written submissions, the Appellant conceded to a total add back of Kshs.26,929,137.00 for the year 2012/2013 comprised of:-
 - Interest not declared – Kshs.7,602,164.00

- Entertainment & travel – Kshs.9,786,463.00
- Legal & professional fees – Kshs.9,540,510.00

Along with entertainment & travel fees of Kshs.17,833,353.00 for the year 2011/2012.

36. Under the head of VAT, the Appellant submits that in arriving at the recomputed revenue, the Respondent grossed up WHT paid to determine VAT payable for the year 2012 and 2013 whereas the respective income to which the WHT relates had already been accounted for in 2011 and subsequent years VAT3 returns.
37. As with the Corporation tax, the Appellant reconciled the invoices against the income declared in its VAT returns and the income declared in the audited financial statements. The Appellant submits that based on the documents availed to the Respondent, it had correctly paid and accounted for all the VAT due and payable. To the Appellant, the Respondent has not indicated the manner in which the reconciliations were deficient but rather stuck to its position without due consideration of the actual facts.
38. The Appellant proceeds to admit that it did not file VAT 3 returns for the period of July to October 2013 but has produced calculations showing the VAT liability for the period and proof of VAT payment of Kshs.1,086,809.65 on 30th July 2013 for that period. The Appellant however conceded to the demand of VAT of Kshs.1,907,877.00 for the invoice INV 30302 of Kshs.13,832,106.00 as it could not find evidence of payment of the VAT.
39. On the methodology of arriving at the VAT liability, the Appellant submitted that the same was flawed in that it considered the periods covered in isolation without taking into account any opening balance. Applying this method to its logical

conclusion would result in a VAT credit as per the analysis captured in the Appellant's written submissions.

40. As per its written submissions, the Appellant also conceded to VAT on previously zero-rated sales of Kshs.3,831,575.00, output VAT on disposal of assets of Kshs.78,800.00 and reverse VAT on imported services of Kshs.16,933,047.00 totaling to a conceded VAT liability of Kshs.22,751,299.00.
41. Under the head of WHT, the Appellant confirmed that it had amounts owing to the related companies in South Africa i.e. Altron TMT Holdings Limited and Altron Management Services Limited. The Appellant was therefore in agreement with the Respondent's workings for deemed interest for the years 2012, 2013 and 2014 but contests the deemed interest computation for the year 2015.
42. The Appellant avers that in computing the deemed interest for 2015 year of income, the Respondent reproduced the loan balances for 2014 and disregarded the 2015 balances as correctly captured on pages 151 to 152 of its documents. The Appellant thus recomputed the correct deemed interest for 2015 and the resulting WHT due as Kshs.5,865,642.00 as captured in its documents and written submissions as opposed to the Kshs.6,812,029.00 assessed by the Respondent. This brings the total conceded WHT on deemed interest to Kshs.19,953,685.00.
43. The Appellant also conceded to WHT on interest from bank loans of Kshs.24,038,789.00 and WHT on other fees of Kshs.9,306,380.00 resulting in a sum total of Kshs.53,298,854.00 being the conceded WHT liability by the Appellant. The Appellant further requests for a relief of penalties and interests totaling to Kshs.13,939,902.00 since the omission was based on legal interpretation and it had no intention to evade or avoid the payment of any taxes.

44. At the conclusion of its submissions, the Appellant avers that it has conceded to a total liability of Kshs.91,389,164.00 which amount has already been settled in full as part of the payment of Kshs.141,900,000.00 made to the Respondent in good faith to enable them lift the Agency Notices. That further, the Respondent has not placed before the Tribunal any evidence to challenge the reconciliation demonstrated by the Appellant. It therefore urged the Tribunal to allow the Appeal as prayed.

RESPONDENT'S CASE

45. The Respondent's response to the Appeal is set out in its Statement of Facts dated 21st December 2016 and Written Submissions dated 20th July 2016.
46. On the demand for Corporation Tax, the Respondent submits that it requested for invoices from the Appellant to enable it correctly compute its taxable income for the years under audit but the Appellant was unable to supply the documents thus constraining the Respondent to rely on withholding tax claimed by the Appellant in 2013 as illustrated in the schedule of WHT claimed in year 2013 as per the Respondent's documents annexed to the Statement of Facts.
47. The Respondent submitted that the computed income was arrived at through accounting adjustments of gross income of withholding certificates per each accounting period as shown on its objection decision.
48. The Respondent further submits that although it was not obligated to, it fully complied with the Appellant's request to supply it with copies of returns and supporting documents which it had filed with KRA and was baffled by the Appellant's allegation.

49. On the issue of impaired debtors, the Respondent averred that it treated the amounts as revenue as it was indicated as “impairment of trade receivable” in the 2013 audited financial statements.
50. On disallowed expenses being legal and entertainment fees, the Respondent submitted that no documents were provided to support that the same were incurred wholly and exclusively in the production of income. As captured hereinabove, the Appellant has conceded to the assessment on this item.
51. Under the VAT head, the Respondent avers that as in the Corporation tax assessment, it relied on Withholding tax claimed by the Appellant in the 2013 income tax return to arrive at the VAT liability. The gross amounts were used to compute the Appellant’s income which was compared with the income declared in VAT 3 returns.
52. The Respondent referred to specific invoices or payments on which VAT was not declared and the Appellant failed to provide proof that VAT was paid on those invoices or payments received. The Appellant has vide its submissions conceded to VAT on the invoice number INV 30302 of Kshs.1,907,877.00, VAT on previously zero-rated sales of Kshs.3,831,575.00 output VAT on disposal of assets of Kshs.78,800.00 and reverse VAT on imported services of Kshs.16,933,047.00 totaling to a conceded VAT liability of Kshs.22,751,299.00.
53. Under the head of WHT, the Respondent submits that the WHT on deemed interest for the year 2015 was based on balances for 2014 since the Appellant had not provided audited accounts for the year 2015.
54. Based on the foregoing, the Respondent prays and urges this Tribunal to uphold its assessment dated 13th October 2016 and dismiss the Appellant’s Appeal for being bad in law.

55. The Tribunal has noted that the Appellant's Appeal did not contain any specific prayers i.e. which relief the Appellant desired from the Tribunal. The Respondent did not take up this issue at any time before or at the hearing of this Appeal.
56. To find out this, the Tribunal has had to look at the Appeal, the Appellant's Statement of Facts and supporting documents *vis-a-vis* the Respondent's Statement of Facts and supporting documents together with the oral testimonies of M/s Annette Beulah Brits witness for the Appellant and Mr. Ken Mureithi witness for the Respondent.
57. From the positions taken by the opposing sides, certain issues arose which require this Tribunal to make a finding on. Upon analyzing and making findings on the **issues** as argued by the Parties, the Tribunal has the inevitable duty of pronouncing final orders or issuing certain directions.
58. As the Parties have ably argued their respective positions on the issues in dispute, there is no doubt as to which relief the Appellant is seeking. In order to render justice to the Parties, the Tribunal will proceed to frame the issues for determination and accordingly render a verdict notwithstanding that the Appellant did not make any specific prayers in the Appeal.

ISSUES FOR DETERMINATION

- a) **Whether the Appellant under-declared income for the years 2012 and 2013 as raised in the Corporation Tax assessment in the Respondent's Objection Decision?**
- b) **Whether the Respondent was justified in treating amounts related to debtor impairment as revenue?**

- c) Whether the Appellant under-declared sales for VAT purposes for the years 2012 and 2013 as raised in the VAT assessment in the Respondent's Objection Decision?
- d) Whether the Respondent's assessment for WHT on deemed interest in the year 2015 relying on 2014 balances was justified?

ANALYSIS AND FINDINGS

- a) Whether the Appellant under-declared income for the years 2012 and 2013 as raised in the Corporation Tax assessment in the Respondent's Objection Decision.

- 59. The Respondent raised an assessment for under declared income of Kshs.35,762,124.00 and Kshs.75,437,903.00 for the years 2013 and 2012, respectively, which amount was added back for tax purposes. These amounts were arrived at based on the variance between the sales turnover declared in the Appellant's audited financial accounts and the amount obtained from grossing up withholding taxes based on the withholding tax certificate amounts deducted by the Appellant's customers.
- 60. The Appellant contends that the Respondent, in arriving at the computed revenues, incorrectly grossed up the WHT paid in the periods 2012 and 2013 and has completely disputed these amounts.
- 61. In disagreeing with the Respondent's treatment, the Appellant matched each withholding tax certificate to the actual revenues stream and reconciled the declared income in the financial statements.

62. The Tribunal is persuaded by the Appellant that all the income in 2012 and 2013 was fully and accurately accounted for as declared in the self-assessment.

b) Whether the Respondent was justified in treating amounts related to debtor impairment as revenue?

63. The Respondent submitted that it treated the amounts of Kshs.119,536,768.00 as revenue and added back this amount for tax purposes because it was indicated as *“impairment of trade receivable”* in the Appellant’s 2013 Audited Financial Statements.

64. The Appellant on the other hand submitted that it had already added back this amount in its tax computation for the year of income ended February 2013. Further, the Appellant referred to the letter dated 25th June 2014 from its auditor Deloitte & Touche stating that they had disallowed the provision for bad debts of Kshs.119,536,768.00 since it did not conform to the legal guidelines provided by the Cabinet Secretary. Therefore, they had added it back for tax computation purposes. An additional add back would result in double taxation.

65. The Tribunal examined the Audited Financial Statements and the Appellant’s taxable income computations for the year ended 28th February 2013 and noted that indeed the sum of Kshs.119,536,768.00 was disallowed and added back for tax purposes. The Tribunal thus concurs with the Appellant’s submissions that to add it back again would amount to double taxation.

66. This Tribunal thus allows the Appellant’s Appeal on this ground and sets aside the Respondent’s assessment on this item.

c) Whether the Appellant under-declared sales for VAT purposes for the years 2012 and 2013 as raised in the VAT assessment in the Respondent’s Objection Decision?

67. The Respondent raised VAT assessments based on under declared sales of Kshs.4,342,279.00 and Kshs.15,646,841.00 for the years 2013 and 2012 respectively. These amounts were arrived at based on the variance between the sales turnover declared in the Appellant's VAT 3 returns and the amount obtained from grossing up withholding taxes based on the withholding tax certificate amounts deducted by the Appellant's customers.
68. The Appellant contends that the Respondent, in arriving at the computed revenues, incorrectly grossed up the WHT paid in the periods 2012 and 2013 and has completely disputed these amounts.
69. The Tribunal appreciates the relationship between sales and VAT and therefore having earlier indicated that the Appellant had demonstrated that there were no undeclared sales as alleged by the Respondent, the Tribunal finds that the Respondent has failed to prove its case on undeclared sales.
70. The Tribunal observes that the Appellant also partially disputed the assessment of Kshs.5,119,542.00 based on under-declared sales for the period covering January 2013 to December 2013. Noteworthy, the Appellant submitted that it did not file VAT 3 returns for the period covering July to October 2013. It however produced calculations showing the VAT liability for the period and proof of VAT payment of Kshs.1,086,809.65 on 30th July 2013 for that period which payment was inclusive of INV 30308 as per the Respondent's schedule. The Appellant however conceded to the demand of VAT of Kshs.1,907,877.00 for the invoice INV 30302 of Kshs.13,832,106.00 as it could not find evidence of payment of the VAT.
71. From the Tribunal's analysis of the documents, the Tribunal notes that for the Kshs.5,119,542.00 assessment based on under-declared sales for the period covering January 2013 to December 2013, the Appellant has provided proof of payment of Kshs.1,086,806.65 and has also conceded to Kshs. 1,907,877.00 leaving a balance

of Kshs. 2,124,858.35 unaccounted for. These amounts are matched to specific invoices as outlined in the Respondent's Objection Decision to which the Appellant has not demonstrated any proof of payment neither has it provided any proof that VAT is not payable on the invoices.

72. The Tribunal thus finds that the Appellant is liable to pay Kshs. 2,124,858.35 being unpaid VAT on the said invoices. This amount shall be deductible from the lumpsum Kshs.141,900,000.00 already paid to the Respondent.

d) Whether the Respondent's assessment for WHT on deemed interest in the year 2015 relying on 2014 balances was justified?

73. The Respondent admits that it assessed WHT on deemed interest for the year 2015 relying on 2014 balances since the Appellant had not provided audited accounts for the year 2015. The Appellant drew the Tribunal's attention to the Trial balances indicating the correct balances for the year 2015.

74. Based on this figure, the Appellant has recomputed the deemed interest payable at page 153 as Kshs.5,856,642.00 and further at Appendix D of its submissions as Kshs.6,251,875.13. Noteworthy, the Appellant has conceded to Kshs.19,953,685.00 of the Kshs.20,513,840.00 assessment of WHT on deemed interest. The only disputed issue being Kshs.560,155.00 arising from this disputed computation for the year 2015.

75. The Tribunal concurs with the Appellant that it was improper for the Respondent to come up with a tax liability based on a figure plucked from a previous year of income. To this end, the Tribunal sets aside the assessment of Kshs.6,812,029.00 for the year 2015 and substitutes it with Kshs.6,251,875.13.00.

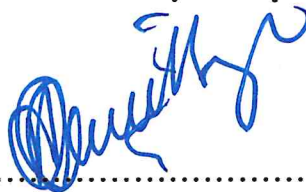
76. The Appellant's Appeal on this ground is therefore allowed subject to its concession of Kshs.19,953,685.00 being Withholding Tax on Deemed Interest. It should be noted that this tax amount of Kshs. 19,953,685.00, due under this head, should not be demanded afresh.
77. The Tribunal having found that the Appellant paid excess tax in order to have the Agency Notices against it lifted, it is entitled to a refund of the excess thereof from the Respondent.

FINAL ORDERS

78. The Tribunal gives its final Orders as follows: -

- I. The Respondent's assessment on undeclared income using the Withholding Tax method was erroneous and the Appeal on Corporation Tax Assessment be and is hereby allowed.
- II. The Appellant is liable to pay Kshs. 2,124,858.35 being VAT for the year 2013.
- III. The Appeal on Debtor Impairment be and is hereby allowed.
- IV. The Appeal on WHT on deemed interest be and is hereby allowed subject to the concession sum of Kshs.19,953,685.00 by the Appellant.
- V. The Appellant is entitled to a refund of the excess tax paid to the Respondent less Kshs 2,124,858.35 being VAT for year 2013.
- VI. The Appellant to deal with the waiver of the penalties and interests in line with the provisions of Section 89(6) of the Tax Procedures Act.
- VII. Each party shall bear its own costs.

DATED and DELIVERED at NAIROBI this 25th day of September, 2020



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PATRICK LUTTA
CHAIRPERSON



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HELEN BILA
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