

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 194 OF 2020

KAYSER INVESTMENTS LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. The Appellant is a limited liability company headquartered in Nairobi and is engaged in the business of commercial real estate investment.
2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and is charged with the mandate of assessment, collection and accounting for all revenues and taxes on behalf of the Government of Kenya according to the relevant laws.

B. BACKGROUND

3. The Appellant was selected by the Respondent for a tax audit for the tax period 2016 to 2018.
4. The Respondent issued the Appellant with a notice of amended assessment dated 14th October, 2019 wherein the Respondent demanded Corporation tax of Kshs. 17,683,873.00 and Withholding Tax (WHT) of Kshs. 3,118,752.00. The Respondent also disallowed legal fees of Kshs. 8,119,850.49 and landscaping expenses of Kshs. 3,045,000.00.

5. The Appellant lodged an objection dated 11th November, 2019. The objection outlined the Appellant's grounds of objection and also provided facts and documentary evidence to support the Appellant's position. The objection also stated that the Appellant had conceded to a Withholding Tax amount of Kshs. 1,862,673.00.
6. The Respondent issued an objection decision dated 6th April, 2020 where the assessment was amended to Kshs. 17,177,760.00 for Corporation tax and Kshs. 3,118,752.00 for Withholding tax on non-resident consultant fees. The total confirmed assessment under appeal is Kshs. 20,296,512.00.
7. The Appellant filed a notice of appeal against the entire decision of the Respondent on 5th May, 2020.

C. THE APPEAL

8. The Appeal as contained in the Memorandum of Appeal was premised on the following grounds:-
 - i) That on a preliminary issue, the Respondent erred in law by issuing an objection decision beyond the 60 days' time limit provided for by Section 31 (11) of the Tax Procedures Act, 2015.
 - ii) That the Respondent erred in law by issuing an objection for an objection that is already allowed by operation of the law.
 - iii) That the Respondent erred in law and fact by failing to consider and apply Section 15 (2) (f) of the Income Tax Act which allows for deduction of expenses for structural alterations necessary to maintain rental income.
 - iv) That the Respondent erred by ignoring the fact that the purpose of the rented equipment was to reinforce the building thereby maintaining the integrity of the structure and securing the existing rent.

- v) That the Respondent in fact by failing to consider that the Nairobi County Government, through a notice, had compelled the Appellant to reinforce the building structure.
- vi) That the Respondent erred in law and fact by concluding that the equipment were a permanent feature of the building, contrary to the applicable Building Code.
- vii) That the Respondent erred in law and fact by without evidence and any reasonable cause, imputing the applicability of Section 23 (1) of the Income Tax Act, in stating that the equipment rental expenses were transactions designated to avoid tax.
- viii) That the Respondent acted illegally by exercising his discretion under Section 23 (1) of the Income Tax Act without considering the material facts that were presented by the Appellant to support the equipment rental expenses.
- ix) That the Respondent erred in fact by failing to consider that the cost of rebuilding the structure, as compared to the cost of the alterations and reinforcement, would have been unsustainable and out of reach for the Appellant.
- x) That the Respondent erred in fact by failing to consider that the overall taxes to be collected in the demolition and rebuilding scenario.
- xi) That the Respondent erred in law and fact by failing to consider and apply Section 10 (1) of the Income Tax Act that provides that income that is subject to withholding tax is income that is deemed to be accrued in or derived from Kenya.
- xii) That the Respondent erred in fact by failing to analyze the items listed in the non-resident invoice and consequently determine which items were subject to withholding tax.

- xiii) That the Respondent's actions have amounted to gross violations of Article 47 of the Constitution of Kenya, 2010 which guarantees the Appellant's right to fair administrative action that is reasonable and procedurally fair.
- xiv) That additionally, the Respondent's action are in violation of Articles 3 and 4 of the Bilateral Investment Treaty between the Republic of Kenya and the Government of the United Arab Emirates, signed for the purpose of promotion and protection of investments as the Respondent's actions accord the Appellant unfair and inequitable treatment.
- xv) That in view thereof, the Appellant is apprehensive that the demand by the Respondent, if allowed without consideration of the applicable facts and law, will occasion a grave injustice and harm to the Appellant's business.

APPELLANT'S CASE

- 9. The Appellant's case as contained in the Statement of Facts is shown under the following headings:-

Preliminary Objection

- 10. The Appellant herein raises a preliminary objection on a point of law; that by issuing its objection decision beyond the statutory provided timeline, the Respondent is barred from confirming the assessment.

- 11. Section 51 (11) of the Tax Procedures Act provides as follows:-

“The Commissioner shall make the objection decision within sixty days from the date of receipt of:

a. The notice of objection; or

b. Any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.”

12. The Appellant received the assessment notice on 14th October, 2019 and lodged the objection with the Respondent on 12th November, 2019. This was within the statutory limit of 30 days.
13. The Respondent made the objection decision on 6th April, 2020, about 146 days after the objection was lodged. Evidently, this was beyond the timelines provided by Section 51 (11) of the TPA.
14. Importantly, Section 51 (11) of the TPA states that failure to make the objection decision renders the objection allowed. This provision is drafted in mandatory terms leaving no room for the Respondent to exercise discretion as to when they should issue objection decisions.
15. Notably, the courts have exhaustively and in clear terms determined that tax statutes must be interpreted strictly. One has to look at what is clearly said without any room for intendment.
16. The confirmation of the assessment, vide an objection decision issued beyond the statutory timelines, is therefore void and invalid ab initio. Consequently, a demand of any taxes based on that objection decision is legally otiose and cannot be enforced.

17. Without prejudice to the application above, the Appellant wishes to appeal to the Objection decision.

Corporation Tax

i. Disallowed Equipment Rental Expenses

18. The Respondent disallowed expenses relating to rent of equipment on the basis that firstly, the Respondent was not satisfied that the equipment was rented for structural alterations and reinforcement purposes.
19. The Respondent postulated that the scaffolds/props were necessary to preserve the building and avoid collapse and thus were a permanent feature of the building. In the circumstances, the Respondent declined the use of Section 15(2) (f) of the Income Tax Act (ITA) to justify allowing of the expenses.
20. The Appellant asserts that the scaffolds/props were for purposes of reinforcing the structure of the building and thus securing its structural integrity. Factually, the Nairobi County Government (NCG) had written to the Appellant on 26th February, 2015 asking the Appellant to address structural issues in the northern wing of the building failure to which legal action would be taken against the Appellant resulting in the demolition of the building.
21. The Appellant's position is that Section 15 (2) (f) of the ITA is applicable as it provides that:-

“15 (2) Without prejudice to sub-Section (1) of this Section, in computing for a year of income the gains or profits chargeable to tax under Section 3(2) (a) of this Act, the following amounts shall be deducted:

(f) in the case of the owner of the premises, any sums expended by him during such year of income for structural alterations to the premises where such expenditure is necessary to maintain the existing rent; but no deduction shall be made for the cost of an extension to, or replacement of those premises.”

22. Clearly, a deduction of expenditure under the above Section is allowed if the expenses are for structural alterations and if those alterations/reinforcement are necessary to maintain the existing rent.

23. The Income Tax Act has not defined what would constitute “structural alterations”. Nonetheless, a definition from Black’s Law Dictionary, 8th Edition shows that the word alter means:-

“to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed.”

24. In light of the definition above, the structural alterations would mean changing of minor details or elements of the structure without varying the identity of the building. In the perspective of Section 15 (2) (f) above, the safeguarding of the identity is pertinent as it means that the alterations ensure the existing rent is maintained.

25. Contrary to the assertion by the Respondent scaffolds/props are not a permanent feature of a building. In fact, the Draft National Building Regulations 2017 define scaffolding as follows:-

“A temporary erection of timber or steelwork, used in the construction, alteration, or demolition of a building, to support or to allow for the hoisting, lowering or provide working platform, materials, equipment, etc.”

26. Further to the above, the Building Code at by-laws 238 provides as follows:-

“Holding or scaffolding

238. (1) If, required by the council, a person, who erects, alters or demolishes a building shall erect and properly maintain throughout the period of work an approved hoarding.

(2) No person shall erect a hoarding or scaffolding on or over any street without first obtaining a license from council. An application for a license shall be in writing and at the time of making the application the applicant shall pay to the council the appropriate license fee set out in the Tenth Schedule of these By-laws.”

27. Undoubtedly, the Appellant had instructions from the NCG to use the scaffolding/props to reinforce the building or risk demolition. The Appellant was therefore legally and otherwise bound to comply by renting the equipment that would reinforce the structure.
28. In addition to the above, the Appellant asserts that it is trite law that where tax laws are ambiguous, the interpretation should be to the taxpayer's favor. The Respondent should not be allowed to take advantage of the lack of definition of structural alterations/reinforcement in the ITA to punish the Appellant for expenses that were legitimately and justifiably incurred.

29. Secondly, the Respondent has also claimed that the Appellant did not demonstrate that they incurred the expense by providing proof of payment to the Commissioner's satisfaction. The Appellant is not aware of the measurements applied to determine the Respondent's satisfaction and whether the satisfaction has any threshold set in law.
30. The Appellant claimed that it submitted bank statements showing payments made to the equipment supplier during the period in question.
31. Notably, the rental equipment expenses have been recorded as income on the side of the supplier. The Respondent has not raised any objection to the recording of that income and has in fact levied the appropriate income taxes from that income. To deny the existence of the expense on one side while at the same time accepting the income and consequent taxes on the other side is preposterous, ridiculous and a classic case of unjust enrichment by the Respondent.
32. To exacerbate, the Respondent visited the construction site of the Appellant on 16th July, 2019 with a view to confirming the existence of the equipment. The Respondent indeed confirmed not just the existence of the equipment but also its use. To then assert that it is not clear whether the equipment expense was incurred is startling and out-rightly unjust to the Appellant.

33. The Appellant asserts that the Respondent has also stated that without providing any basis or proof, that the renting of equipment was designed to avoid tax under Section 23 (1) of the ITA. This is even after proof being given to the Respondent that the reinforcement was sanctioned by the NCG.

34. The Appellant relied on Section 23(1) of the ITA which states:-

“Where the Commissioner is of the opinion that the main purpose or one of the main purposes for which a transaction was effected (whether before or after the passing of this Act) was the avoidance or reduction of liability to tax for any year of income, or that the main benefit which might have been expected to accrue from the transaction in the three years immediately following the completion thereof was the avoidance or reduction of liability to tax, he may, if he determines it to be just and reasonable direct that such adjustments shall be made as respects liability to tax as he considers appropriate to counteract the avoidance or reduction of liability to tax which could otherwise be effected by the transaction.

(2) Without prejudice to the generality of the powers conferred by subSection (1) of this Section, those powers shall extend –

(a) to the charging to tax of persons who, but for the adjustments, would not be charged to the same extent;

(b) to the charging of a greater amount of tax than would be charged but for the adjustments.

(3) Any direction of the Commissioner under this Section shall specify the transaction or transactions giving rise to the direction and the adjustments, as respects liability to tax which the Commissioner considers appropriate.”

35. That the foregoing Section is applied based on the Respondent’s opinion or at his discretion. The Appellant asserts that even where the law empowers the Respondent to act at their discretion, courts have stated that the discretion must be exercised properly. Improper exercise of the discretion amounts to an illegality.

36. That illegal exercise of discretion occurs where a decision is made on the basis of insufficient evidence, errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion and failing to fulfil substantive legitimate expectations.
37. The Appellant asserts that the Respondent, by contending that the expenses were designed to avoid tax without tabling any sufficient reasons and without due regard to the material facts of the case, is exercising an illegality.
38. The Appellant avers that where the powers to administer statutes have been conferred on the Respondent by the legislature, these powers should not be exercised in a manner that should result to abuse of discretionary powers against the Appellant.
39. The Appellant submits that the Constitution in Article 47 provides for the right to fair administration action that is expeditious, efficient, lawful, reasonable and procedurally fair.
40. By failing to consider the material facts relevant to this case, which includes invoices and proof of payment for the services rendered, the Respondent made an incorrect and unsubstantiated claim and on the same basis assumed that the Appellant was engaged in tax avoidance.
41. Given the seriousness of the claim, and the implications thereto, the threshold of determining whether a taxpayer has engaged in tax avoidance cannot be as low as mere assumptions.

42. Further to the above arguments, the Appellant submits that the cost of rebuilding, as compared to the cost of reinforcement, would have been unsustainable and out of reach for the Appellant. The reinforcement was the viable option compared to the loss incurred on demolition by the NCG and the cost of rebuilding.
43. The Appellant avers that the overall taxes collected by the Respondent in the reinforcement scenario are higher than those that would have been collected in the rebuilding scenario. Hence, incurring the rental equipment expense for the reinforcement was the better alternative both in the short and long term for the Appellant and the Respondent.

Withholding Tax on Fees Paid to Non-Residents

44. That the Respondent contends that the Withholding Tax (WHT) should have been on the total invoice amounts paid to the non-resident including the reimbursed air travel and accommodation costs.
45. The Appellant opposes that view on the basis that the law on WHT is clear. The Obligation to withhold tax should be limited to the portion of the payment, which is chargeable to tax under the ITA. To demand a payment of WHT on reimbursable costs is to assume that WHT arises on all remittances to non-residents.
46. That the appropriate test should be whether the amount being remitted to the non-resident is an income accrued in or derived from Kenya and whether that income is chargeable to WHT. Reimbursements are not income; they are

not compensation for any service offered but rather repayments of what has been expended by someone else.

47. The Appellant further relied on Section 10 (1) of the ITA which states that:-

“For the purpose of this Act where a resident person or a person having a permanent establishment in Kenya makes a payment to any other person in respect of –

(a) A management or professional fee or training fee

The amount thereof shall be deemed to be income which accrued in or was derived from Kenya;

Provided that –

(i) This subsection shall not apply unless the payment is incurred in the production of income accrued in or derived from Kenya or in connexion with a business carried on or to be carried on, in whole or in part, in Kenya.”

48. That without a doubt, the Section does not envisage a charge of WHT on a payment to a non-resident that is not deemed as income accrued in or derived from Kenya.

49. It would therefore be illegal to ask for payment of WHT on remittances which are plain reimbursements to the non-resident and which are not the non-resident's incomes accrued in or derived from Kenya.

50. Notably, the Appellant deducted and remitted to the Respondent WHT on the management fee part of the invoice.

The Appellant's Prayers

- (a) That the objection decision made by the Respondent on 6th April, 2020 be declared illegal, null and void as it does not adhere to the law;
- (b) That the objection dated 11th November, 2019 be declared allowed by operation of the law;
- (c) That the Respondent's decision to confirm the assessment of Kshs. 20,296,512.00 be vacated;
- (d) Costs against the Respondent.

D. RESPONDENT'S CASE

51. In its Statement of Facts, the Respondent responded to the Appellant's case as follows:-

The Respondent erred in giving a decision beyond the 60 days' time limit provided by Section 51 (11) of the Tax Procedures Act.

52. That Section 51 (3) of the Tax Procedures Act, 2015 was amended by Finance Act 2019 as follows effective date 7th November, 2019.

***"Section 51 of the Tax Procedures Act, 2015 is amended in subSection (3) ---
(a) By inserting the words "or has applied for an extension of time to pay the tax not in dispute under Section 33 (1)" at the end of paragraph (b);
and
(b) By adding the following new paragraph immediately after paragraph (b)-
(c) all the relevant documents relating to the objection have been submitted.
51 (11) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed."***

53. The objection application was dated 11th November, 2019 which was a date after Section 51 of the Tax Procedures Act was amended by the Finance Act.
54. The Respondent reviewed the grounds for the objection application by the Appellant, the Appellant was immediately notified via email dated 18th December 2019 that the objection was invalid and that there was need to validate the objection as per Section 51 (3) (c) of TPA by providing the specified records.
55. The Appellant objection was considered validly lodged on 25th February, 2020 when it forwarded documentation in support of objection as had been initially requested.
56. The Objection Decision was issued within 42 days, which was within 60 days as envisaged under Section 51 (11) of the Tax Procedures Act.

The Commissioner erred in law by issuing an objection decision for an objection that was already allowed by operation of law.

57. The Appellant Objection was considered validly lodged on 25th February, 2020 when it sent documentation necessary in review of objection. It is after the validation of the objection that the 60 days started running.
58. The fact that the Appellant actually requested for additional time on 17th January, 2020 as a result, it cannot come again and use the Section of the law.

The Commissioner erred in law and in fact by failing to consider and apply Section 15 (2) (f) of the Income Tax Act which allows for deduction of expenses for structural alterations necessary to maintain rental income.

59. The Appellant used the scaffolds to reinforce a building that was otherwise weak, the use of scaffolds cannot be considered to be structural alteration but a necessity in order to preserve the building from collapsing. It is therefore a permanent feature of the building.
60. Section 15 (2) (f) of the Income Tax Act is clear that structural alterations shall be allowed only if the expenditure is necessary to maintain the existing rent.
61. It is evident that the purpose of hire of scaffolds was not to maintain existing rent. Our analysis of the audited accounts show that revenue increased from Kshs. 6,664,237.00 in 2015 to Kshs. 22,654,813.00 in 2016. This therefore shows that the rent increased by 239%.
62. The structure of the building did not change at all by the scaffolds, as the building cannot support itself without the scaffolds, therefore they are necessary and become a permanent feature of the building and thus are capital in nature.

The Commissioner erred by ignoring the fact that the purpose of the rented equipment was to reinforce the building thereby maintaining the integrity of the structure and securing the existing rent.

63. The fact that the Appellant was instructed by the County Government of Nairobi to reinforce the building does not negate the fact that the expenditure was of capital nature and not a revenue expenditure.

64. The Respondent avers that the County Government of Nairobi is mandated by law to ensure buildings within the County have a sound structural integrity to safeguard the safety of the public and thus they were just doing their work.
65. The scaffolds are permanently fixed on the building and cannot be removed, unless the building redone. This is supported by County Government of Nairobi report.
66. It is either the building be demolished and redone afresh or the scaffolds installed.

The Commissioner erred in law and fact by without evidence and any reasonable cause imputing the application of Section 23 (1) of the Income Tax Act, in stating that the equipment rental expenses were transactions designed to avoid tax.

67. The hire of scaffolds was between two related parties and therefore it was hard to determine the arm's length values.
68. The lease charged annually is higher than the cost of buying the props/scaffolds once. The total lease rentals claimed for 2016 to 2018 is higher than what it would cost to rebuild the reinforced Section or buying the scaffolds. The lease arrangement is not economically viable. The lease rentals accounted for 60% of the total rent and this points to inflated costs.
69. From the data obtained in the market, buying of the same costs at Kshs. 3,800.00 which is way too low compared to what the Appellant claimed for hiring purposes. A quote from one of the leading scaffolds/props provider Liberty Events & Contracts Scaffolding Ltd is attached for reference.

70. The Respondent avers that the Appellant was unable to demonstrate payment of Kshs. 57,319,310.00.

71. The above clearly shows that the transaction was designed to avoid liability and that is why the Commissioner invoked Section 23 (1) of the Income Tax Act.

The Commissioner acted illegally by exercising his discretion under Section 23 (1) of the Income tax without considering the material facts that were presented by the Appellant to support the equipment rental expenses.

72. The Respondent issued a decision based on the available documents produced by the Appellant. The Appellant did not provide all the documents requested. It was unable to demonstrate it incurred Kshs. 57,319,310.00.

The Commissioner erred in fact by failing to consider that the cost of rebuilding the structure as compared to the cost of alterations and reinforcements would have been unsustainable and out of reach for the Appellant.

73. The Appellant did not provide any documentary evidence to substantiate the above fact.

The Commissioner erred in fact by failing to consider the overall taxes to be collected in the alteration and reinforcement scenario which are higher than those that would be collected in the demolition and rebuilding scenario.

74. This was not a matter of fact or law as the Appellant failed to provide any basis as to how this can be done.

The Commissioner erred in law and fact by failing to consider and apply Section 10 (1) of the Income Tax Act that provides that income that is subject

to withholding tax is income that is deemed to be accrued in or derived from Kenya.

75. The income paid as professional fees was actually accrued and derived in Kenya as evidenced by the invoices.

The Commissioner erred in fact by failing to analyze the items listed in the non-resident invoice and consequently determine which items were subject to Withholding Tax.

76. The Respondent reviewed the invoice produced and charged Withholding tax on the total amount of the invoice. The Commissioner is empowered under Section 2 of the Income Tax Act to charge Withholding Tax on the total amounts payable.
77. The definition of management or professional fee under Section 2 of the Income Tax Act is hereby reproduced:-

“management or professional fee” means a payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional or consultancy services however calculated;”

The Commissioner’s actions amounted to gross violations of Article 47 of the Constitution of Kenya, which guarantees the Appellant a right to administrative action that is reasonable and procedurally fair.

78. The Appellant was given a right administrative action that is reasonable and procedurally fair, this is evident by the number of extensions of time to provide documents that were required for review of the objection. In fact,

some of the objected amounts were vacated where proper evidence was provided.

The Commissioner's action is in violation of Article 3 and 4 of the Bilateral Investment Treaty between the Republic of Kenya and the Government of the United Arab Emirates, signed for the purpose of promotion and protection of investments as the actions accord the Appellant unfair and inequitable treatment.

79. Kenya and UAE do not have a Double Tax Agreement, and by absence of a Double Tax Agreement then the laws of Kenya apply. The Commissioner was guided and empowered by Section 3 of the Income Tax Act to charge tax accordingly.
80. Further that the Commissioner is empowered by Section 73 (2) (b) of the Income Tax Act to determine and assess accordingly when he has reasonable cause to believe a return submitted is not true. It is prudent to note that every taxpayer must pay their fair share of taxes.

The Appellant is apprehensive that the demand by the Commissioner, if allowed without consideration of the applicable facts and law, will occasion a grave injustice and harm to the Appellant's business.

81. The Commissioner was guided by Section 3 of the Income Tax Act in charging tax and Section 15 and 16 of the Income Tax Act on the computation of chargeable income. These Sections allow a fair administration and computation of taxes.

RESPONDENT'S PRAYERS

82. The Respondent prays that this Honourable Tribunal finds that:-

- i) The Respondent's confirmation of assessment dated 6th April, 2020 be upheld.
- ii) The taxes due and unpaid together with interest thereon be paid to the Respondent.
- iii) The Respondent reserves the right to adduce any further oral and written evidence during the hearing of the Appeal.
- iv) That this Appeal be dismissed.
- v) That the Appellant be compelled to pay costs to the Respondent.

E. ISSUES FOR DETERMINATION

83. Having carefully reviewed the parties documents in support of and against the appeal herein, we find that three issues present themselves for determination by the Honorable Tribunal, namely;-

- a. Whether the Objection by the Appellant dated 11th November 2019 should be declared allowed by operation of the law;
- b. Whether the Objection Decision made by the Respondent on 6th April 2020 is supported by law or not; and
- c. Whether the Respondent's decision to confirm the assessment of Kshs. 20,296,512.00 should be upheld.

F. ANALYSIS AND FINDINGS

a) Whether the Objection by the Appellant dated 11th November 2019 should be declared allowed by operation of the law.

84. Whilst it is clear that the Appellant lodged an Objection within the allowable time line of 30 days (having lodged the same on 12th November 2019), the Respondent contended that the objection was invalid by virtue of not having provided specified records as provided for under Section 51 (3) (c) of the Tax Procedures Act 2015. This provision was introduced vide an amendment to the Finance Act 2019 which became operational on 7th November 2019. By virtue of this provision, the Appellant had not complied with the amended Finance Act 2019 and thus the Tribunal finds that the Respondent's position is justified.

b) Whether the Objection Decision made by the Respondent on 6th April 2020 is supported by law or not.

85. The Objection decision by the Respondent was supported by law given that there was an existing statute requiring production of all supporting and relevant documentation by an Appellant when lodging an Objection. The referenced statute is Section 51 (3) (c) of the Tax Procedures Act 2015.

c) Whether the Respondent's decision to confirm the assessment of Kshs. 20,296,512 should be upheld.

86. The Appellant submits that the scaffolds/props were for purposes of reinforcing the structure of the building and thus securing its structural

integrity. The Nairobi County Government (NCG) demanded in its letter dated 26th February 2015 that the Appellant address the structural issues in the northern wing of the building failure to which legal action would be taken against it, resulting in the demolition of the building. The Appellant avers that Section 15 (2) (f) of the Tax Procedures Act is applicable in this situation as quoted in the Appellant's Statement of Facts.

87. In its rejoinder, the Respondent submits that the scaffolds/props were a permanent feature of the building as they were affixed to the beams supporting the structure. They further argued that the scaffolds/props were permanently fixed on the building and cannot be removed unless the building is re-done. The report by CHINATO CONSULTANTS LTD Civil and Structural Engineers avers that, **"We however recommend that the supporting props should not at any time be removed unless it is for demolition of the whole structure."**
88. The Appellant submits that the scaffolds were rented for purposes of reinforcing the structure of the building in compliance with the NCG Notice but not to reduce or avoid taxes. The Appellant further states that the expenses of hiring the equipment were a revenue expenditure which allowed them to maintain the rent.
89. In its rejoinder, the Respondent submits that the scaffolding is a permanent structure to the building and cannot be removed, unless the building is redone. The Respondent further argues that the annual lease rentals claimed for 2016 to 2018 is higher than what it would cost to rebuild the reinforced Section or buying the scaffolds and hence the arrangement is not economically viable.

90. The Tribunal notes that the Appellant has not given a timeline when the scaffolds will be removed. The Tribunal finds that the leasing arrangements for the scaffolding is permanent in nature and therefore a capital expenditure. **“Capital expenditure or capital expense is the money an organization or corporate entity spends to buy, maintain, or improve its fixed assets, such as buildings, vehicles, equipment, or land that have a useful life of more than one accounting period.”** (Oxford Languages Dictionary.)
91. The Tribunal notes that the Respondent in its submission has averred that the expenditure by the Appellant amounts to a capital rather than a revenue expenditure. The Tribunal further notes that in absence of a time line when the scaffolds will be removed, it is left with no choice but to agree with the Respondent that this expenditure is chargeable to tax according to Section 23(1) of the Income Tax Act, which provides as hereunder:

“Where the Commissioner is of the opinion that the main purpose or one of the main purposes for which a transaction was effected (whether before or after the passing of this Act) was the avoidance or reduction of liability to tax for any year of income, or that the main benefit which might have been expected to accrue from the transaction in the three years immediately following the completion thereof was the avoidance or reduction of liability to tax, he may, if he determines it to be just and reasonable, direct that such adjustments shall be made as respects liability to tax as he considers appropriate to counteract the avoidance or reduction of liability to tax which could otherwise be effected by the transaction.”

G. FINAL DECISION

92. In line with the foregoing analysis we find that the Appeal lacks merit.

Accordingly, the Tribunal makes the following Orders:-

- i) The Appellant's Objection of 12th November 2019 is invalid.
- ii) The Respondent's objection decision dated 6th April, 2020 confirming the assessment of Kshs. 20,296,512.00 is hereby upheld.
- iii) Each Party to bear its own costs.

93. It is so Ordered.

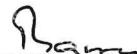
DATED and DELIVERED at NAIROBI this 4th day of June, 2021.



MAHAT SOMANE
CHAIRPERSON



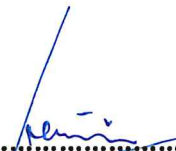
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TIMOTHY CHESIRE
MEMBER

