**REPUBLIC OF KENYA**
**IN THE TAX APPEALS TRIBUNAL**
**APPEAL NO. 688 OF 2021**

**CANARIAN HOLDINGS LIMITED.....APPELLANT**

**VERSUS**

**COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT**

# JUDGMENT

## BACKGROUND

1. The Appellant is a company incorporated and licensed in Kenya. Its principal business activity is in developing, owning and letting real estate.

2. The Respondent is a principal officer of the Kenya Revenue Authority, which is an agency of the Government for the collection and receipt of revenue.

3. The Appellant filed Income Tax Self-Assessment for the year ended 31st December, 2018 on 20th May 2019 in which it reflected a taxable loss of Kshs. 7,529,814.00 with a tax claim of Kshs. 2,248,833.00, the claim was reflected under file 13.4 on the Appellant's iTax platform.

4. The Respondent via Rejection Order No. 20148166143 and an email both dated 16th June, 2021 rejected the Appellant's Income Tax Refund Claim.

5. The Appellant by a letter dated 24th June, 2021 objected to the Respondent's Income Tax Rejection Order.

6. By an email dated 18th August 2021 the Respondent requested for documents. The Appellant responded with a further notice of objection on 25th August 2021.

7. On 15th September, 2021 the Respondent requested for a meeting between the Appellant and the Independent Review of Objection Department to discuss the Appellant's Objection.

8. By an email on 23rd September, 2021, the Respondent served its Objection Decision which was dated 14th September, 2021

9. Dissatisfied with the Respondent's Objection Decision dated 14th September, 2021, the Appellant filed an appeal to the Tribunal on 28th October, 2021

## THE APPEAL

10. The Appeal is premised on the hereunder grounds as captured in the Memorandum of Appeal dated and filed on 26th October, 2021;

    i. The Respondent erred in law and in fact by disallowing the tax refund claim in the sum of Kshs 2,248,833.00, merely because it was reflected in the only available field on the iTax portal, being under Section 42 of the Income Tax Act (ITA) notwithstanding that the Appellant declared the returns under the said field on the advice of the Respondent.

    ii. To the knowledge of the Respondent, hitherto, the manual Self-assessment Return Form made provisions for a return claim for overpayment under Part D of the said form. This field was however not provided for in the Self-assessment Return Form on the iTax platform. The Respondent having advised the Appellant to reflect its overpaid tax claim in the field 13.4 under Section 42 of the ITA, it thereby created a legitimate expectation that the same would be considered and determined as properly reflected and filed. In the circumstances, the Respondent both in law and in fact is estopped from reneging this representation, the Appellant having relied thereon in making its returns.

iii. It was not open in law for the Respondent to disallow tax refund claim on the aforementioned grounds, particularly having sought further clarification by an email dated 18th August, 2021 and the Appellant having clarified the same and provided the requisite documentations by its further objection letter dated 25th August, 2021.

iv. The Respondent erred both in law and in fact in purporting to disallow the Appellant's refund claim on the basis that the same was reflected in the wrong field on iTax platform when by an email dated 20th May, 2019, the Respondent had acknowledged the refund claim as properly lodged and subsequent thereto issued the Appellant with a unique Refund Application Acknowledgement Receipt Number KRA201906153512. Having accepted the Appellant's refund claim, the Respondent is estopped from rejecting the same on grounds that it was reflected under the wrong field on iTax portal.

v. It was not open in law for the Respondent to find in its Objection Decision that failure to issue a refund decision within 90 days as prescribed by statute did not constitute approval of the refund claim when as a matter of fact, Section 47(3) of the Tax Procedures Act provides in mandatory terms that the Respondent must determine a refund application within 90 days thereof. To fail to determine a refund claim for years from the date of application is not only inordinate and unreasonable delay but also an abuse of the Respondent's statutory obligation, contrary to the statute and Article 10 of the Constitution.

vi. It was not open in law for the Respondent to consider whether or not the Appellant's tax claim related to Section 42 of the Income Tax Act under foreign income and special arrangements, when in the Notices of Objections dated 24th June, 2020 and 25th August, 2021, the Appellant had consistently in its claim established that the tax claim

arose out of overpaid taxes and did not relate to foreign credit and special arrangements as provided for under Section 42 of the ITA.

vii. The Appellant having applied to the Respondent for refund of over paid taxes within 5 years thereof, the Appellant was entitled to carry forward the same year in year out as a refund claim until the same was approved and accordingly applied by the Respondent as provided for under Section 47(4) of the Tax Procedures Act, 2015.

## APPELLANT'S CASE

11. The Appellant's case is premised on the hereunder filed documents and proceedings before the Tribunal;

    i. The Appellant's Statement of Facts dated 26th October, 2021 and filed on the same day together with the documents attached thereto.

    ii. The Appellant's written submissions dated and filed on 28th June, 2022 together with the legal authorities filed therewith.

12. The Appellant submitted that at all times, it complied with the relevant tax statutes, filed its returns and remitted the tax payable by it as and when required by statute resulting in overpaid taxes in the sum of Kshs 2,248,832.80 as at 31st December, 2018.

13. That this arose from the overpayment of tax from the years of income of 2014 to 2018, which the Appellant was entitled to carry forward from year to year pending the Respondent's approval of the application of the tax refund.

14. The Appellant stated that by email dated 16th June, 2021, the Respondent informed the Appellant that it had rejected its Income Tax Claim. Annexed to the email was a Tax Claim Rejection Order Number:20148166143 dated

16th June, 2021 rejecting the tax refund claim for the sum of Kshs. 2,248,833.00

15. It was the Appellant's contention that it notified the Respondent that having lodged its Refund Application on 20th May, 2017 and by virtue of the provisions of Section 47 of the Tax Procedures Act (TPA), its refund claim was deemed as allowed after the lapse of 90 days thereof, by operation of the law. Accordingly, the Appellant submitted that the Respondent could not issue its Income Tax Rejection Order in relation to a refund claim that had, by operation of the law been deemed as due and refundable to the Appellant.

16. That in response to the Respondent's request for additional information dated 18th August, 2021, the Appellant filed a further Objection dated 25th August, 2021 in which it clarified that the Appellant had never claimed any credit under Section 42 of the Income Tax Act and that it had reflected its claim under the said Section on advice of the Respondent's support team as there was no other field available on iTax platform unlike the previous forms hitherto filed manually. That in any event it was not disputed that the tax credit in the sum of Kshs. 2,248,833.00 was due and refundable to the Appellant. As such, the Appellant asserted that it was therefore immaterial as to under what field on the iTax portal had it reflected the tax claim which was due and payable to it.

17. The Appellant reiterated that the contents of its earlier on Notice of Objection and reaffirmed that the Respondent having failed to make a refund decision in 90 days from the date of the refund application, the same was deemed as allowed by operation of law, thus could not be rejected by the Respondent two years later.

18. The Appellant averred that it objected to the Respondent's Income Tax Rejection Order on the ground that, *inter alia*, that by dint of the provisions of Section 47 of the Tax Procedures Act, 2015, the Respondent could not

in law reject the Appellant's refund application, 90 days having expired from the date of the application for refund acknowledgement on 20th may, 2019 vide refund Application Acknowledgement Receipt No. KRA201906153512.

19. Regarding Section 42 of the ITA, the Appellant averred that the Respondent in its Objection Decision does not only depart from the reasons issued in the Income Tax Rejection Order but was also misconceived.

20. That in the letter dated 25th August 2021, the Appellant while responding to the Respondent's email dated 18th August, 2021 requesting for additional information in connection with Section 42 of ITA, clarified that the source of the credit was a pending income tax refund claim carried forward and reflected in its Income Tax Returns Field on iTax under field 13.4, on the advice of the Respondent's customer support center.

21. It was the Appellant's contention that by a Refund Application Acknowledgement Receipt dated 20th May, 2019, the Respondent accepted the Appellant's refund claim for the year of income of 2018, thus creating a legitimate expectation that the same was properly lodged.

22. That the Respondent had now reneged from this position and now claims in its Objection Decision as well as in its Statement of Facts that the claim for refund for overpaid taxes in the year 2018 was erroneous merely because the same was reflected in field 13.4 of the Income Tax Act (ITA) on its iTax platform. Prior thereto, the manual return form had a field for a refund claim which was later omitted from the iTax platform when the same was introduced.

23. It stated that the posting under field 13.4 was therefore on the advice of the Respondent though the same is now denied by the Respondent. That be that as it may, the Appellant did not claim any credit for the same beyond

posting on the said field. The returns will show that the Appellant was in a tax loss position.

24. That it was undisputable that the Respondent was the administrator and enforcer of the iTax system, and at all material times, was aware that some businesses always have tax credits, either as a result of overpayment of taxes, withholding of taxes or a tax loss position. It averred that it was therefore malicious and in bad faith for the Respondent to deliberately fail to provide for a field for recognizing such tax credits on iTax, and to use its own failure to make such provision for recognizing such tax credits to purport to disenfranchise taxpayers of tax credits through the misuse of additional assessments.

25. The Appellant asserted that it was an incontrovertible fact that prior to the year 2013, the tax self-declaration forms provided for a field for recognizing tax credits, and that in the iTax form the Commissioner deliberately failed to provide for such a field, while mandating all tax returns to be filed on iTax. The failure of the Commissioner to provide a provision for recognizing such tax credits on iTax was clearly unlawful as those tax credits ought to be reflected in self-assessment tax declaration forms until claimed as refunds within the five-year window period provided for under Section 47 of the TPA.

26. It stated that at hand, the Commissioner does not dispute the Appellant had credits in the year 2018, mainly because the Appellant was in a tax loss position due to overpayment of installment tax for that year of income.

27. It was the Appellant's contention that the Respondent cannot therefore in its Objection Decision confirm its Income Tax Rejection Order merely because the refund claim was reflected under field 13.4 of Section 42 of the Income Tax Act, while not disputing that the tax credits are valid and genuine or showing where the correct field for claiming the same was on its iTax platform.

28. The Appellant explained that it was accordingly not claiming any credits by reflecting the amount in the said field 13.4 for Section 42 of the ITA and therefore could not be the subject of an additional assessment as it neither claimed a credit for the said amount nor did the Respondent grant any.

29. That in the event the said section deals with computation of credits under special arrangements and is only applicable for the purposes of the Respondent allowing credit under such arrangement and not merely because a credit is posted in the said field, or for that matter claimed.

30. It was the Appellant's submission that the Respondent was in error in the presumption that credit is allowed merely because it is posted in the field 13.4 for Section 42 credits. To support the arguments, the Appellant relied on the finding in the case of **Althaus Service Limited Vs Commissioner of Domestic Taxes, TAT No. 704 of 2021.**

31. It averred that guided by the provisions of Section 47 of the TPA as well as the case in TAT No. 704 of 2021, the Appellant submitted that it was not open for the Respondent to confirm its Rejection Order of the refund claim for the sum of Kshs. 2,248,833.00, merely because the same was reflected under field 13.4 of Section 42 of the Income Tax Act, when it was the Respondent that failed in its duty by failing to provide a field reflecting refund claims for overpaid taxes.

32. The Appellant then addressed the issue of whether the Respondent had the right to issue an Income Tax Rejection Order for the amounts reflected in field 13.4 for Section 42 of ITA. It wished to distinguish the facts and issues in the case of **TAT 470 of 2020 National Bank of Kenya Limited vs Commissioner of Domestic Taxes**, which was a decision of the Tribunal, wherein it was upheld that the Respondent had the right to issue an additional assessment where a credit has been claimed for over paid taxes.

33. It stated that this was not applicable to the circumstances herein as in as in the National Bank case, the Appellant required its tax over payment to be brought forward in order to utilize the same to offset its subsequent years tax liabilities. In this case, the Appellant posted the refund claim without any request for credit or offset. That in any event that matter was concerned with issuance of an assessment whereas this case is concerned with a rejection order with respect to refund claim.

34. It emphasized that it neither made a claim nor sought to offset the same from tax dues. That certainly, there were no taxes due as the Appellant was in a loss position as reflected in the returns. That in the circumstances, the facts of this case are distinguishable from those of the National Bank of Kenya Limited case.

35. The Appellant contended that the issue of carrying over a refund claim from year to year was considered both by this Tribunal and the High Court in **Tax Appeal No. 376 of 2018 Sony Holdings Limited vs Commissioner of Domestic Taxes and the High Court HCCCO MMITA/E053 of 2020 Commissioner of Domestic Taxes Vs Sony Holdings Limited** which it cited.

36. The Appellant added that the Respondent seemed to be changing goal posts as to the reasons leading to the rejection of the refund claim from allegation that "credits in the return relate to previous period" as seen in the Income Rejection Order dated 16th June, 2021 and now to the issue of Section 42 of the Income Tax as presented in the Objection Decision dated 14th October, 2021.

37. That it was therefore a fundamental error for the Respondent to issue an Objection Decision on grounds that departed from the ones raised in the tax decision. By so doing, the Appellant's right to fair administrative action as enshrined under Article 47 and the Fair Administrative Action Act, 2015 were deeply injured.

38. Regarding Section 47(3) of the TPA, the Appellant submitted that tax laws abhor a situation where tax issues hang over the head of a taxpayer for an infinite period. That it was for this reason that tax statutes provide strict timelines within which tax related transactions, applications and decisions must occur.

39. That in this case Section 47 provides a time limit within which a refund application can be made and when the taxman should issue a decision in connection with the same. That Section 47(1) of the TPA allows taxpayers to apply for a refund of overpaid tax (save for VAT) within five years of the date of payment of such taxes. It added that Section 47(2) of the same Act allows the Respondent to carry out an audit on such refund claims before issuing a decision on the same.

40. It stated that the provisions of Section 47(3) implies that the Respondent can only carry out an audit, either reject or approve a refund within ninety-day period from the date of the application.

41. It was the Appellant's contention that not only was the Respondent's act of issuing an Income Tax Rejection Order in 2021 in relation to a refund application made in 2019, two years from the date of making the application, contrary to the provisions of Section 47 of the TPA but the same offends the provisions of Article 232(1)(c) of the Constitution of Kenya.

42. It stated that it was perturbing how the Respondent, in its Objection Decision, boasted that the Appellant had no recourse as the TPA did not provide a remedy for the Respondent's breach of the ninety-day rule and in purporting that the terms of Section 47 are permissive rather than mandatory in nature.

43. That to the contrary, it was the Appellant's submissions that the terms of Section 47(3) provide in mandatory terms that a refund application must

be determined within 90 days, with no room for exercising any discretion thereto.

44. It averred that it was apparent that the provisions of Section 47(3) TPA being in mandatory terms ("shall") dictates that where an application for refund has been lodged with the Respondent, then the Commission must within 90 days thereof, either reject or accept the refund application.

45. The Appellant stated that having failed to make a refund decision within 90 days as prescribed by statute, the Appellant's refund application dated 20th May, 2019 stood as allowed by operation of the law.

46. That the Respondent could not therefore purport to disallow the said refund on whatever grounds as after the lapse of the 90 days, the Commissioner had no powers to consider the Appellant's refund application or even issue a rejection order in connection thereto. That accordingly, the Income Tax Rejection dated 16th June, 2021 was issued *ultra vires* and consequent Objection Decision dated 14th September, 2021 was unlawful and the Tribunal cannot therefore uphold the same.

47. To buttress its case, the Appellant further relied on the following cases

    i. Lord Denning in the case of Allen Vs Sir Alfred McAlphine & Sons [1968] 1 ALL ER 543

    ii. High Court decision in John Otieno Mumbi v Republic [2011] eKLR.

    iii. The case of Republic V Council of Legal Education & another Ex Parte Sabiha Kassamia & another [2018] eKLR.

    iv. The case of Omega International Kenya Limited Vs Kenya Tourist Development Corporation Civil Appeal No. 59 of 1993.

## Appellant's Prayers

48. The Appellant made the following prayers:

    i. That the Honorable Tribunal be pleased to and hereby set aside the Respondent's Income Tax Rejection Order Number:20148166143

    ii. That this Honorable Tribunal be pleased to and hereby set aside the Objection Decision dated 14th September, 2021.

    iii. That this Honorable Tribunal be pleased to find that the Appellant is entitled to a tax claim in the sum of Kshs. 2,248,833.00

    iv. That the Honorable Tribunal be pleased to find that the Appellant is entitled to a tax refund by its Application for refund dated 20th May, 2019 having been allowed pursuant to Section 47(3) of the TPA

    v. That the costs of this Appeal be provided for.

## RESPONDENT'S CASE

49. The Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal;

    i. The Respondent's Statement of Facts dated and filed on 16th November, 2021 together with the documents attached thereto.

    ii. The Respondent's written submissions dated and filed on 6th July, 2022 together with the legal authorities filed therewith.

50. The Respondent contended the Appellant had claimed a refund in the year 2018 for tax credits which arose in the year 2016. That further verification revealed that the tax credits claimed in the field 13.4 relates to Section 42 of the Income Tax Act under foreign income and special arrangement.

51. That Section 47 of the TPA requires the Respondent to decide and give notification on application of refund application within 90 days from the date of refund application, this provision does not prescribe that a decision issued beyond ninety days allows the refund to stand.

52. It added that Section 47 was only permissive and not obligatory, which means the Respondent was not obliged to carry out audits for all the refund claim applications.

53. The Respondent relied on **Republic V Kenya Revenue Authority ex parte universal Corporation Ltd [2016] eKLR** where **G V Odunga J** stated that;

> *"the court does not have the liberty to read into the tax legislation the effect of what was not expressed herein"*

54. It emphasized that if the drafters of Section 47 of the TPA 2015 wanted to state that a decision by the Commissioner issued beyond ninety days allows a refund by the taxpayer to stand, they would have expressly stated so.

55. The Respondent referred the Tribunal to Section 51(11) of the TPA and stated that the Section provides clearly the circumstances when an objection will be allowable

56. The Respondent averred that it requested for evidence of foreign income earned under special arrangement via an email dated 18th August, 2021. The Appellant confirmed that it had never earned income under Section 42 via letter dated 25th August, 2021.

57. The Respondent cited Section 56(1) of the TPA which places the burden of proof in tax matters on the taxpayer. It further relied on Section 107 of the Evidence Act.

58. The Respondent averred that if the drafters of Section 47 of the TPA wanted to state that a decision by the Commissioner issued beyond ninety days

allows a refund by the taxpayer to stand, they would have expressly stated so.

59. It was the Respondent's contention that Section 47 of the TPA does not expressly state that a decision issued by the Commissioner beyond ninety days allows an application for a refund by the taxpayer to stand.

60. The Respondent submitted that the Appellant claimed refund in the year 2018 for tax credits in the field 13.4 which relates to Section 42 of the Income Tax Act under foreign income and special arrangement. That its verification revealed that the Appellant did not have any special credit under special arrangement or any foreign income.

61. The Respondent stated that although the Appellant claimed that the posting under field 13.4 was on advice of the Respondent, it did not provide evidence to show the same.

62. The Respondent cited the following authorities and provisions of the law to support its case:

    a) The case in the **Republic v Kenya Revenue Authority *ex-parte* Universal Corporation Ltd [2016] eKLR.**

    b) The case in **Kenya Revenue Authority V Maluki Kitili Mwendwa [2021] eKLR.**

    c) The case of **Mbuthia Macharia V Annah Mutua Ndwiga & Another [2017] eKLR.**

    d) The case of **Saj Ceramics Limited V Commissioner of Domestic Taxes.**

    e) **The case of National Bank of Kenya Limited V Commissioner of Domestic Taxes**

    f) Section 51(11) of the TPA.

g) Section 56(1) of the TPA

h) Section 107 of the Evidence Act.

i) The Halsbyry's Laws of England 4th Edition, Volume 17, at Paragraph 13 and 14.

## Respondent's Prayers

63. The Respondent prayed that the Tribunal:

i. Dismiss the Appeal for lack of merit

ii. Uphold the Respondent's amended and confirmed assessment.

iii. Award the Respondent the costs of the Appeal.

## ISSUES FOR DETERMINATION

64. After considering the pleadings, documents and written submissions filed by both parties, the Tribunal is of the view that the Appeal raises the following issues for its determination;

i. Whether the Appellant's Refund Claim was allowed by operation of the law.

ii. Whether the Respondent was justified in rejecting the Appellant's refund claim.

## ANALYSIS AND FINDINGS

### *i) Whether the Appellant's Refund Claim was allowed by operation of the law.*

65. The Dispute emanates from the Appellant's Refund Application of 20th May, 2017 which the Respondent rejected on 16th June, 2021.

66. It was the Appellant's contention that it lodged its Refund Application on 20th May, 2019 and received Application Acknowledgement Receipt No. KRA201906153512 from the Respondent. That by virtue of the provisions of Section 47 of the Tax Procedures Act (TPA), its refund claim was deemed as allowed after the lapse of 90 days thereof, by operation of the law. Accordingly, the Appellant asserted that the Respondent could not issue its Income Tax Rejection Order in relation to a refund claim that had, by operation of the law been deemed as due and refundable to the Appellant.

67. The Respondent on the other hand averred that Section 47 of the TPA requires the Respondent to decide and give notification on application for refund within 90 days from the date of the refund application. That this provision does not prescribe that a decision issued beyond ninety days allows the refund to stand. It added that Section 47 was only permissive and not obligatory, which means the Respondent was not obliged to carry out audits for all the refund claim applications.

68. Section 47 of the TPA provides as follows as regards timeline allowed to the Respondent to process refund claims by taxpayers;

> ***"Refund of overpaid tax***
>
> *(1) When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within five years of the date on which the tax was paid. Provided that for value added tax the period of refund shall be as provided for under the Value Added Tax Act, 2013 (No. 35 of 2013).*
>
> *(2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.*
>
> *(3)* ***The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within***

***ninety days of receiving the application for a refund."*** (Emphasis added)

69. In the instant case, the Appellant made a refund application to the Respondent on 20th May 2019 in respect of overpaid taxes in the sum of Kshs. 2,248,832.80 as at 31st December, 2018. As per the provisions of Section 47(3) of the Tax Procedures Act, the Respondent ought to have notified the Appellant of its decision regarding the claim on or before 18st August, 2019. However, it was not until 16th June, 2021 that the Respondent issued its decision rejecting the Appellant's refund claim. This was more than 2 years after the lapse of time allowed by law.

70. It is the Tribunal's position that this delay was inordinately long and inexcusable on the part of the Respondent. However, the Tribunal noted that although the provisions of Section 47(3) are couched in mandatory terms, the recourse in cases where the Respondent fails or refuses to issue its decision within the stipulated time does not lie within the jurisdiction of the Tribunal.

71. Under the circumstances, the Tribunal finds that the Appellant's refund claim was not expressly allowed by operation of the law.

***ii) Whether the Respondent was justified in rejecting the Appellant's refund claim.***

72. The Tribunal noted that the Respondent's main reason for rejecting the Appellant's refund claim was that the Appellant claimed the refund of the tax credits in the field 13.4 which relates to Section 42 of the Income Tax Act under foreign income and special arrangement. The Respondent stated that its verification revealed that the Appellant did not have any special credit under special arrangement or any foreign income.

73. However, the Appellant on its part stated that in its further Objection dated 25th August, 2021 it clarified that it had never claimed any credit under Section 42 of the Income Tax Act and that it had reflected its claim under the said section on advice of the Respondent's support team as there was no other field available on iTax platform unlike the previous forms hitherto filed manually. That in any event it was not disputed that the tax credit in the sum of Kshs 2,248,833.00 was due and refundable to the Appellant. That as such, it was immaterial as to under what field on the iTax portal had it reflected the tax claim which was due and refundable to it.

74. From the submissions, the Tribunal noted that the Appellant had made a loss in the year 2018 and that placed it on a tax credit position which was reflected in its self-assessment for the year ending 31st December, 2018, to which it wished to be recognized and carried forward for purposes of offsetting the same with any tax due at a subsequent period.

75. Going by the facts presented to the Tribunal, it was of the view that what the Respondent ought to have done was to subject the Appellant's refund claim to an audit to confirm its veracity if it deemed so, as provided for under Section 47(2) of the TPA. Section 47(2) of the TPA provides as follows;

> *"The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit."*

76. In addition, upon audit and where applicable, the Respondent was under duty to consider the same on its merit within ninety days and not to wake up from a two-year slumber only to reject the claim merely for the reason that the claim was done in a wrong field in its iTax portal. The Tribunal relies on Section 78(1) of the TPA which provides as follows regarding such self-declarations or documents under tax law;

*"When a notice of assessment or* ***any other document purporting to be made,*** *issued, or executed under a tax law is, in substance and effect, in conformity with,* ***is consistent with the intent and meaning of, the tax law under which it has been made and the person assessed,*** *intended to be assessed, or affected by the document, is designated in it according to common intent and understanding—*

*(a) the validity of the notice of assessment or* ***other document is not affected by reason that any of the provisions of the tax law under which it has been made or issued have not been complied with;***

*(b) the notice of assessment or* ***other document shall not be quashed or deemed to be void or voidable for want of form;*** *and*

*(c) the notice of assessment* ***or other document shall not be affected by reason of any mistake, defect, or omission therein.****"(Emphasis added)*

77. The Tribunal further relied on its finding in the case of **TAT No. 704 of 2021 Althaus Services Limited Vs Commissioner of Domestic Taxes (Supra)** where the Tribunal held at paragraph 51 as follows;

*"The Tribunal is quick to note that Section 47 of the TPA, which deals with refund of overpaid tax, makes no reference to a declaration on the respective self-assessment return. The Tribunal therefore holds that correct declaration on the respective return is not a condition precedent for purposes of making claims for refund of overpaid tax as long as it is done in compliance with Section 47 of the TPA."*

78. Going by the finding in the above case and the provisions of Section 78(1) of the TPA, the Tribunal is of the view that the Appellant cannot be deprived of its right of making the refund claim merely because the claim was declared in an incorrect field on the Respondent's iTax portal.

79. Accordingly, the Tribunal finds that the Respondent was not justified in rejecting the Appellant's refund claim.

## FINAL DECISION

80. On the basis of the foregoing analysis the Tribunal finds that the Appeal is merited and therefore succeeds. The Orders that commend themselves to are as follows: -

    i) The Respondent's Rejection Order No. 20148166143 dated 16th June, 2021 and the Objection Decision dated 14th September, 2021 be and are hereby set aside.

    ii) The matter is referred back to the Respondent to consider the Appellant's refund claim made on 20th May, 2019 timeously on its full merits based on the information provided by the Appellant and communicate its decision in writing based on any audit process undertaken and which process ought to be completed and a decision issued within a period of ninety (90) days from the date of delivery of this Judgement.

    iii) Each party to bear its own costs.

81. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** on this **9th** day of **September, 2022.**

.....
**ERIC N. WAFULA**
**CHAIRMAN**

.....
**ABRAHAM K. KIPROTICH**
**MEMBER**

.....
**GRACE MUKUHA**
**MEMBER**

.....
**JEPHTHAH NJAGI**
**MEMBER**

.....
**CYNTHIA B. MAYAKA**
**MEMBER**