



**Car and General (Trading) Limited v Commissioner of Legal Services and Board Coordination
(Appeal E667 of 2023) [2024] KETAT 1235 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KETAT 1235 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
APPEAL E667 OF 2023**

**E.N WAFULA, CHAIR, CYNTHIA B. MAYAKA, RO
OLUOCH, T VIKIRU & AK KIPROTICH, MEMBERS**

AUGUST 23, 2024

BETWEEN

CAR AND GENERAL (TRADING) LIMITED APPELLANT

AND

**COMMISSIONER OF LEGAL SERVICES AND BOARD
COORDINATION RESPONDENT**

JUDGMENT

1. The Appellant is a limited liability company duly incorporated under the [Companies Act](#) of the laws of Kenya, and whose principal activity is the sale and service of motorcycles, household goods, agricultural tractors and implements, marine engines, three-wheeler vehicles, commercial laundry equipment, commercial engines, forklifts, excavators, power equipment and general goods.
2. The Respondent is a principal officer appointed under Section 13 of the [Kenya Revenue Authority Act](#), and the Kenya Revenue Authority is mandated with the responsibility for the assessment, collection, receipting and accounting for all tax revenue as an agent of the Government of Kenya. The Respondent is also mandated with the responsibility for the administration and enforcement of the statutes set out in the Schedule of the Act.
3. The Appellant vide a letter dated 20th January, 2023 sought a private ruling from the Respondent regarding whether it could include the share of profit from Watu Credit and Cummins C & G Joint Venture in determining its earnings before interest, tax, depreciation, and amortization (EBITDA).
4. The Respondent through a private ruling dated 1st March, 2023 informed the Appellant that it could not include the share of profits from Watu Credit and Cummings C & G Joint Venture in its EBITDA.



5. The Respondent thereafter vide a letter dated 17th May, 2023 issued a pre-assessment notice informing the Appellant of its intention to amend its Corporation tax return for the year of income ended September 2022 to restrict the deductible interest expense.
6. The Respondent issued its Assessment order to the Appellant on 6th June, 2023 for Corporation tax amounting to Kshs 60,885,063.53 inclusive of interest of Kshs 7,017,248.94.
7. The Appellant objected to the assessment through a letter dated 6th July, 2023. The Respondent subsequently issued its objection decision through a letter dated 23rd August, 2023 confirming total tax amounting to Kshs 49,566,383.28 inclusive of interest and penalties.
8. The Appellant aggrieved by the Respondent's objection decision, lodged its Notice of Appeal dated 22nd September, 2023 at the Tribunal.

THE APPEAL

9. The Appellant as per its Memorandum of Appeal dated 6th October, 2023 and filed on 12th October, 2023 raised the following grounds of appeal:
 - a. That the Respondent erred in fact and in law by failing to find that the principles of fair administrative action require that the assessment, which is a document recognized by the [Tax Procedures Act](#) 2015 (the [Tax Procedures Act](#)), must contain sufficient reasons to enable the Appellant sufficiently object to the assessment.
 - b. That the Respondent erred in fact and in law by failing to find that the assessment as issued did not meet the standard required by the relevant law and thus impeded the ability of the Appellant to mount a proper defense.
 - c. That the Respondent erred in fact and in law in determining that the Appellant should have excluded the share of profits from (a) the Appellant's associate company and (b) the Appellant's joint venture in calculating the Appellant's earnings before interest, tax, depreciation, and amortization (EBITDA) for the period between 1st October 2021 and 30th September 2022.
 - d. That the Respondent erred in fact and in law by ignoring the ambiguity created on the question of whether share of profit from associates and joint ventures should be excluded in computation of EBITDA due to the lack of definition of EBITDA under the [Income Tax Act](#) and the fact that due to the ambiguity, the provisions should be interpreted in the Appellant's favor.

Appellant's Case

10. The Appellant supported its case with its Statement of Facts dated 6th October, 2023 and filed on 12th October, 2023 together with the documents attached thereto and Written Submissions dated and filed on 11th April, 2024.
11. The Appellant stated that it holds a 29% shareholding in an associate company resident in Kenya, Watu Credit Limited (Watu Credit), and also has a 50% shareholding in a joint venture, Cummins C&G Holdings Limited (Cummins C&G Joint Venture).
12. That as per the Appellant's audited financial statements for the year of income ended 30th September 2022, the Appellant earned share of profits from Watu Credit and Cummins C&G Joint Venture, which amounts were included in the Appellant's income statement for the period.



13. That on 20th January 2023, the Appellant sought a private ruling from the Commissioner of Domestic Taxes of the Kenya Revenue Authority (the Commissioner) as to whether the Appellant could include the share of profits from Watu Credit and the share of profits from Cummins C&G Joint Venture in determining the Appellant's earnings before interest, tax, depreciation, and amortization (EBITDA) for the purpose of computing its deductible interest expense pursuant to Section 16 (2) (j) of the [*Income Tax Act*](#).
14. That the Commissioner, through a private ruling dated 1st March 2023 (the Private Ruling) ruled that the Appellant could not include the share of profits from Watu Credit and Cummings C&G Joint Venture in its EBITDA amount for purposes of determining the deductible interest expense.
15. That thereafter, sometime in April 2023, the Commissioner sought to audit the Appellant on the interest expense amount claimed in its tax return for the year of income ended September 2022.
16. That subsequently, the Commissioner issued an assessment for additional tax of Kshs.60,685,063.00 comprised of principal tax and interest of Ksh 53,666,814.00 and Ksh 7,018,248.00 respectively, vide an iTax assessment order dated 6th June 2023.
17. That aggrieved by the Assessment Order, the Appellant objected to the entire assessment vide a notice of objection dated 5th July 2023.
18. That as per the notice of objection, the Appellant's grounds of objection were that:
 - a. The Assessment Order was generic and lacked the requisite details and reasons on the basis of the additional assessment.
 - b. The Assessment Order was invalid as it impeded the ability of the Appellant to lodge a valid objection notice in accordance with the requirements of the [*Tax Procedures Act*](#) due to the lack of details on the adjustment made resulting in the incremental income tax liability.
 - c. Based on the lack of definition of EBITDA under the [*Income Tax Act*](#) and the provisions of the relevant accounting standards, profit share from the associated and joint venture should form part of EBITDA.
 - d. The profit share from Watu Credit and Cummins C&G Joint Venture does not constitute exempt income since the income was subjected to tax in the hands of the respective entities and should therefore not be excluded in the calculation of EBITDA for the purposes of determining the deductible interest expense.
 - e. Subsequent amendments by the Finance Act 2023 to restrict the applicability of EBITDA rule on restriction of interest only to taxable interest on loans from non-resident persons further emphasizes the lack of clarity of Section 16 (2)(j).
19. That on 23rd August 2023, the Respondent issued its Objection decision confirming the assessment of Ksh 49,566,383.00 comprised of principal tax, penalty and interest of Ksh 43,864,065.00, Ksh 2,193,202.80 and Ksh 3,509,124.48, respectively.
20. The Appellant anchored its case under the following sub-headings;
 - i. The Respondent did not discharge its burden to provide sufficient details in assessing the Appellant by purporting to provide details in a pre - assessment notice.
21. The Appellant submitted that the Assessment Order as issued was generic and lacked the requisite details and reasons on the basis of the additional assessment.



22. The Appellant noted that the Respondent having realized the mistake, now claims that the sufficient basis and clarity for the Assessment Order was provided in the Pre-assessment notice. The Appellant submitted that the Respondent could not be deemed to have discharged its duty to provide sufficient details in the Assessment Order by making reference to the Pre-assessment notice which is a separate document from the Assessment Order.
23. The Appellant averred that Section 51 (1) of the [Tax Procedures Act](#) provides that:
- “a taxpayer who wishes to dispute a tax decision shall first lodge an objection against the tax decision under this section.”
24. That the [Tax Procedures Act](#) defines a tax decision to include an assessment (but not a pre-assessment notice). That further, assessment is defined to mean a self-assessment, default assessment, advance assessment, or amended assessment, and includes any other assessment made under a tax law. That this definition does not include a pre-assessment order and no other Section of the [Tax Procedures Act](#) provides for the same.
25. That in addition, as the Respondent rightfully pointed out, the Assessment Order was issued pursuant to Section 31 of the [Tax Procedures Act](#), which Section provides for amended assessments.
26. That therefore, the Respondent cannot be deemed to have discharged its duty to give sufficient reasons by making reference to the Pre-Assessment Order, a document which is not recognized under the [Tax Procedures Act](#). That the Respondent ought to have included all the requisite details and reasons on the basis of the additional assessment in the Assessment Order.
27. The Appellant stated that in [Republic v Commissioner of Domestic Taxes ex parte Barclays Bank of Kenya Limited, \(Misc. Application no. 1223 of 2007\)](#), the Honourable Justice Majanja held that:
- “...in assessing taxes, the Respondent was under duty to identify the transactions or payments that attract tax, especially where there are objections to such categorization. Section 35(1)(a) of the [Income Tax Act](#) identifies specific types of payments that attract tax, the respondent is obligated by law to state with clarity its claim and state how the transaction falls within the terms of the statute. The respondent cannot exercise its duty like a trawler in the deep seas expecting all the fish by casting its net wide. The respondent's decision in this respect falls below this standard and the transaction caught by the decision cannot be said to fall within the statutory definition of the tax.”
28. The Appellant submitted that in line with the decision of the High Court, the Assessment Order as raised did not offer sufficient clarity in terms of the amounts assessed or how the assessment fell under the purview of the [Income Tax Act](#).
29. That in addition, Article 47 of [the Constitution](#) of Kenya 2010 provides that if a fundamental freedom of a person is likely to be adversely affected by administrative action, then the person has the right to be given written reasons for such an administrative action.
30. That further, Section 4 (2) of the [Fair Administrative Action Act](#) No. 4 of 2015 (FAA) provides that every person has a right to be given written reasons for any administrative action that is taken against them.
31. It contended that Section 2 of the FAA defines an administrative action to include “any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”



32. The Appellant submitted that an Assessment Order is an administrative action since it is issued by an authority, being the KRA, and it affects the legal rights of the Appellant whom it is issued.
33. That in addition, the Tax Appeals Tribunal in the case of Local Productions Kenya Limited vs. Commissioner of Domestic Taxes Appeal No.50 of 2017, in upholding application of the fair administrative action principles in tax matters held that:-

“..therefore, the respondent cannot just cast aside this constitutional test for administrative action at the expense of collecting revenue. Article 47 of [the Constitution](#) is intended to subject administrative processes to constitutional discipline hence relief of common law or judicial review under the [Law Reform Act](#) (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by [the Constitution](#).”
34. That further in Geothermal Development Company Limited v Attorney General & 3 others, the High Court in upholding that the KRA had not issued the Petitioner with a proper assessment notice, thereby violating its right to fair administrative action held that:

“as a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demand that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well.”
35. The Appellant submitted that in line with the provisions of Article 47 and Article 50 of [the Constitution](#) of Kenya on fair administrative action and the right to a fair hearing, respectively, in issuing the Assessment Order, the Commissioner was required to make reference to the specific law which was being relied upon in issuing the Assessment Order and clearly outline the basis and computation of the amount assessed.
36. The Appellant submitted that the Assessment Order as issued does not meet the requirement of Section 4(2) of the FAA. To emphasize this, the Appellant noted that the Assessment Order only stated that it was an additional income tax assessment and proceeded to annex changes which had been made to the Appellant's income tax assessment. That as per the Assessment Order, the changes leading to the tax liability were neither highlighted nor designated. That consequently, the Appellant was unable to identify the relevant adjustments that had been made leading to the additional tax assessment. That further, the Assessment Order provided no reasons for the adjustments.
 - ii. The Assessment Order is invalid as it impedes the ability of the Appellant to lodge a valid objection notice in accordance with the requirements of the [Tax Procedures Act](#)
37. The Appellant asserted that the Respondent cannot allege to have provided details and the basis of the additional tax assessed under the Assessment Order vide the Pre-Assessment Order as these are two distinct documents and the latter had no legal basis under the [Tax Procedures Act](#).
38. That Section 51 (3) (a) of the [Tax Procedures Act](#) provides that a notice of objection shall only be treated as validly lodged if it states precisely (a) the grounds of objection (b) the amendments required to be made to correct the decision and (c) the reason for the amendments.
39. The Appellant submitted that the Assessment Order as issued impeded its ability to object to the Assessment Order since from a review of the Assessment Order, it was impossible for the Appellant to determine the relevant adjustments that have been made resulting in the incremental income tax



liability. That consequently, the Appellant was unable to precisely identify the amendments that would be required to be made to correct the assessment.

40. The Appellant therefore submitted that the Assessment Order as issued violated its rights to fair hearing as set out in Article 50 of the Constitution of Kenya. That Article 50 of the Constitution of Kenya guarantees every person a right to a fair hearing which includes the right to be informed of the dispute as well as the nature of the same, and have adequate opportunity to object and file a defense. The Appellant submitted that its right to be heard and adequately prepare a defense was impeded by the incomprehensible Assessment Order which denied it the ability to file a proper objection.
- iii. Based on the lack of definition of EBITDA under the Income Tax Act and the provisions of the relevant accounting standards, share of profits from the Appellant's associate company and the Appellant's joint venture should form part of EBITDA
41. The Appellant stated that it noted that the Respondent relied on the OECD Guidelines and comments on its publication "Limiting Base Erosion involving Interest Deductions and Other Financial Payments Action 4-2016" in holding that the share of profit from the Appellant's associate company and the Appellant's joint venture should be excluded in computation of EBITDA. The Appellant submitted that while OECD Guidelines and Commentaries offer supplementary guidance, they are not legally binding in Kenya.
42. The Appellant submitted that Section 16 (2) (j) of the Income Tax Act provides that in determining the amount of interest that is deductible in the computation of taxable income, the amount of interest deductible shall not exceed thirty percent (30%) of EBITDA in any financial year provided that any income which is exempt from tax shall be excluded from the calculation of EBITDA.
43. The Appellant further noted that the Income Tax Act lacks an operative definition of the term "EBITDA". That to this end, it was the Appellant's considered view that in the absence of the definition of the term EBITDA in the Income Tax Act, reliance can be placed on the ordinary accounting practice, and dictionary definitions of the term.
44. That in accordance with International Accounting Standards (IAS) 28 and 31, the equity method of accounting is prescribed for associates and joint ventures. That under this method, an entity's initial investment in an associate or joint venture is recognized at cost, and the carrying amount is increased or decreased to recognize the entity's share of profit or loss from the associate or joint venture. That this share of profit or loss is then recognized in the profit and loss statement.
45. The Appellant submitted that IAS 31 provides two methods of accounting for investments in joint ventures: proportionate consolidation and the equity method (similar to that under IAS 28). That proportionate consolidation allows for the combination of an entity's share of assets, liabilities, income, and expenses with similar items, line by line, in its financial statements, or the inclusion of separate line items for the share of these items from the joint venture.
46. That on the other hand, the International Financial Reporting Standards (IFRS) IASB agenda, ref 21B on the project "Primary Financial Statements"- on the topic "Presentation of the share of the profit or loss of 'integral' associates and joint ventures" January 2018, discussed the need to differentiate between "integral" and 2 associates and joint ventures. That an "integral" associate or joint venture, as per paragraph 32, was defined as being integrated into an entity's business activities and essential and fundamental to carrying out those activities.
47. It submitted that its associate, Watu Credit Ltd, was involved in lending and offers credit to the company's customers, while its joint venture, Cummins C&G Joint Venture, supplies goods to the



- company. That these entities are integrated into the Appellant's operations and are critical to its operation and generation of business income.
48. The Appellant maintained that the recommendation from the IFRS paper suggests that the profit share of integral associates and joint ventures should be reported as a separate line item in the profit and loss statement before "Profit before Tax" or "Earnings Before Tax" (EBT). That this reporting presentation had been adopted by the Appellant.
49. That moreover, from an accounting perspective, the term "EBITDA" comprises various components, including Earnings Before Tax (EBT), Earnings Before Interest and Tax (EBIT), and Earnings Before Interest, Tax, Depreciation, and Amortization (EBITDA).
50. The Appellant further submitted that EBT represents money retained internally by a company before subtracting tax expenses, and it is an accounting measure of a company's operating and non-operating profits which is at times referred to as "income before tax" or "pre-tax income". That it was used in accounting for comparing performance of similar entities located in different tax rates jurisdiction/area. That while EBT adds back taxes to net income, EBIT and EBITDA add back additional layers of expenses. That EBIT adds back interest and taxes, while EBITDA goes further by adding depreciation and amortization expenses. The Appellant therefore submitted that these add-backs do not necessarily reflect an entity's ability to generate earnings from its operations.
51. That in addition, the Appellant holds that it is trite law that tax statutes should be interpreted strictly, with no room for implication or intendment. That further, if there is any ambiguity in tax law, the same ought to be interpreted in the taxpayer's favour. That this position was affirmed in the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 Others* [2007] 2 KLR 240 where it was held that:
- “taxation can only be done on clear words and cannot be on intendment and that where there are two or more possible meanings, the inclination of the court should be against the construction or interpretation which imposes a burden, tax or duty on the subject”.
52. That considering the aforementioned definitions and considering that EBT, which is included in EBITDA, comprises both operating and non-operating profits, the Appellant asserts that its profit share from Watu Credit and Cummings C&G Joint Venture should form part of EBITDA for the purpose of calculating allowable interest expense.
- iv. Share of profits from associates and income from joint ventures does not constitute exempt income and should therefore not be excluded in the calculation of EBITDA for the purposes of restricting the deductibility of interest.
53. The Appellant stated that Section 16 (2) (j) of the [Income Tax Act](#) provides that in determining the amount of interest that is deductible in the computation of taxable income, the amount of interest deductible shall not exceed thirty percent(30%) of EBITDA in any financial year provided that any income which is exempt from tax shall be excluded from the calculation of EBITDA.
54. The Appellant submitted that the [Income Tax Act](#) does not contain a definition of the term exempt income. On that basis, the Appellant submitted that the phrase "income which is exempt from tax" would imply that the income which is to be excluded from the EBITDA calculation is income which has not been subjected to income tax.
55. In this case, the Appellant averred that applying the interpretation above, it was entitled to take into account the profit share from Watu Credit and Cummins C&G Joint Venture in the determining its EBITDA since such profits were subjected to tax in the hands of Watu Credit and Cummins C&G Joint Venture, respectively, and therefore could not constitute income which is exempt from tax.



56. That the Respondent holds that the profits from the Appellant's associates and income from the joint venture were not considered taxable income while computing the Appellant's tax and as a result should be excluded in computing EBITDA per Section 16(2)(j) of the [Income Tax Act](#). The Appellant noted that the Section merely refers to "income which is exempt from tax" and does not specify under which entity the income is not taxable.
57. To this end, the Appellant submitted that Kenyan courts have repeatedly held that where there is ambiguity in a taxing provision, such ambiguity should be interpreted in favour of the taxpayer. That in *Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd* (2012) eKLR the Judge held that:
- "I am also guided by the dictum of Lord Simonds in *Russell v Scott* [1948] 2 ALL ER 5 where he stated, "My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him" adopted in *Stanbic Bank Kenya Limited v Kenya Revenue Authority* CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR per Nyamu JA (See also *Jafferli Alibhai v Commissioner of Income Tax* [1961] EA 610, *Kanjee Naranjee v Income Tax Commissioner* [1964] EA 257). Any tax imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute."
58. The Appellant therefore submitted that considering the various interpretations that the phrase "income which is exempt from tax" can have and the fact that there is no definition of the said phrase in the [Income Tax Act](#), the phrase is ambiguous. That on this basis, the phrase "income which is exempt from tax" must be interpreted in favour of the understanding held by the Appellant which entitles the Appellant to take into account the profit share from Watu Credit and Cummins C & G Joint Venture in calculating its EBITDA.
- v. Subsequent amendment by the Finance Act 2023 further emphasizes the lack of clarity of Section 16(2)(1)
59. The Appellant noted that effective 1st January 2024 the Finance Act 2023 amended Section 16(2)(j) of the [Income Tax Act](#) so that any interest in excess of thirty per cent of EBITDA be an allowable deduction in ascertaining the total income of a person in the subsequent three years of income to the extent that the deduction of interest on loans from non-resident persons does not exceed the thirty percent of EBITDA. That effectively, the EBITDA rule on restriction of interest would only apply in relation to taxable interest on loans from non-resident persons. That the Finance Act 2023 further provides that the amended provision shall not apply to interest income exempt from tax under the [Income Tax Act](#).
60. The Appellant asserted that the amendment of Section 16(2)(j) and particularly the clarification that the new provision shall not apply where the interest is exempt from tax under this Act shows is reflective of the fact that the current Section 16(2)(j) was ambiguous and hence the attempt to further clarify any new amendments relating to the Section.
61. The Appellant noted that reference to the amendments to Section 16(2)(j) of the [Income Tax Act](#) was only meant to point out the inherent ambiguity in the provisions and not to rely on the amendments retrospectively as implied by the Respondent.
62. The Appellant asserted that it should not be penalized where a taxing provision is in itself ambiguous and subject to amendments intended to clarify its application.



Appellant's Prayer

63. The Appellant's prayer to the Tribunal was for the following orders:
- a. Sets aside the assessment and demand of Ksh 49,566,383.28 per the Objection decision.
 - b. Awards costs of the Appeal to the Appellant.

Respondents Case

64. In its response to the Appellant's case, the Respondent grounded its response on its Statement of Facts dated 1st November 2023 and filed on 8th November, 2023 and Written submissions dated and filed on 9th April 2024.
65. The Respondent submitted that the Appellant holds 29% shareholding in an associate company resident in Kenya, Watu Credit Limited (Watu Credit) and has a 50% shareholding in a joint venture, Cummins C & G Holdings (Cummins C&G Joint Venture).
66. That prior to the Appellant filing its Income tax returns, the Appellant sought for the sector's advice on whether or not to include the share of profits from its associates and income from the joint venture into the computation of its Earnings Before Interest, Tax, Depreciation and Amortization (EBITDA) for purposes of ascertaining allowable interest expenses.
67. That the Appellant received the sector's advice via email where it was advised not to include the said profits in its computation for EBITDA.
68. That the Appellant further sought for a private ruling from the Respondent on the above issue for purposes of Section 16(2)(j) of the Income Tax Act.
69. The Respondent stated that through a private ruling dated 1st March 2023, guided the Appellant not to include the said share of profits and income from the joint venture when computing its EBITDA as the same income had been treated by the Appellant as non-taxable income.
70. That upon review of the Appellant's 2021-2022 Income tax returns, the Respondent noted that the Appellant did not adhere to both the Sector's advise and the Respondent's private ruling but instead share of profits from its associates and income from joint venture were included in computation of EBITDA for purposes of restriction of interest expense claimable.
71. The Respondent stated that on 6th June 2023 issued the Appellant with an assessment notice based on the review of the specific issue of restriction of interest expense in line with the provisions of Section 16(2)(j) of the Income Tax Act.
72. That the Appellant was dissatisfied with the said additional assessment, and on 5th July 2023 lodged an objection against the said assessment.
73. That the Respondent considered the Appellant's grounds of objection & accompanying documentation, and fully rejected the Appellant's objection subsequently confirming the assessments on 23rd August 2023 in the sum of Kshs.49,566,383.28 inclusive of penalties and interest.
74. The Respondent stated that it exercised its best judgment in making the assessment in full consideration of the documentation and information available pursuant to Section 31 of the Tax Procedures Act.



75. That the Appellant alleged that the assessment infringed on its right to fair administrative action. The Respondent contended that the assessment was based on the computation of disallowed interest expense as clearly set out in the private ruling and the pre-assessment notice issued to the Appellant in line with Section 16(2)(j) of the [Income Tax Act](#) therefore the assessment was justified.

76. That Section 16 (2) (j) of the [Income Tax Act](#) states;

- “(1) Save as otherwise expressly provided, for purposes of ascertaining the total income of a person for a year of income, no deduction shall be allowed in respect of-
- (2) Notwithstanding any other provision of this Act, no deduction shall be allowed in respect of-
 - (1) gross interest paid or payable to related persons and third parties in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial year; Provided that-
 - (i) any income which is exempt from tax shall be excluded from the calculation of earnings before interest, taxes, depreciation and amortization; and
 - (ii) this paragraph shall apply to-
 - (a) Interest on all loans;
 - (b) Payments that are economically equivalent to interest; and
 - (c) Expenses incurred in connection with raising the finance"

77. The Respondent stated that it reviewed the Appellant's IT2C returns for the financial year ending September 2022 and the same established that the Appellant had claimed interest expense amounting to Kshs. 323,455,290.00 which translates to computed EBITDA of Kshs. 1,078,184,300/- as shown in the table below;

TABLE

TR

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Description

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Amount (Kshs.)

TR

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Interest Expense-P& L

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428,507,000

TR

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Interest Disallowed-Tax

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105,051,710

TR

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Interest Claimed

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323,455,290

TR

TC{style border: 1px solid #000; width: 48%}

EBITDA

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1,078,184,300

78. That upon review of the Appellant's tax computation of the aforesaid EBITDA, the Respondent established that the Appellant included share of profit from associates of Kshs. 623,274,000.00 and share of profit from the joint venture of Kshs.17,497,000.00.
79. That the Respondent communicated to the Appellant through the private ruling that according to Section 16(2)(j) of the [Income Tax Act](#) interest and in line with the OECD's publication. That non-taxable income such as branch profits or dividend income that benefit from participation, exemption should not be included in the calculations of EBITDA.
80. The Respondent averred that the Appellant had all along been aware of the basis of the assessment as evidenced by the detailed objection whose grounds include the source of the amount assessed and the historical genesis of the assessment.
81. The Respondent averred that the profits share from associates and joint ventures are not considered taxable income when computing the tax payable and therefore the same should be omitted when computing the EBITDA.
82. The Respondent contended that there is no ambiguity in the law. That the Respondent in its private ruling clearly guided the Appellant based on Section 16(2)(j) of the [Income Tax Act](#), the Appellant was required to make appropriate adjustments for taxable branch profits and dividend incomes to the extent that it is shielded from tax by foreign tax credits in order to address Base Erosion & Profit Shifting issues.
83. That the Appellant in its computation for income tax payable for the year ending 31st October 2021 considered the share of profit from its associate and joint venture partners excluded the same as non-taxable income.



84. The Respondent contended that the amendment of the Finance Act 2023 is not material to the present Appeal as the law should be applied prospectively unless expressly provided, which is not the case herein.
85. The Respondent stated that this Appeal is unmeritorious because the assessment and the subsequent objection decision is proper and duly anchored in law, and there was therefore no basis to set aside the assessment.

Respondent's Prayer

86. The Respondent's prayer to the Tribunal was for orders that:
- a. Upholds the Respondent's decision as proper and in conformity with the provisions of the law.
 - b. That this Appeal be dismissed with costs to the Respondent as the same is devoid any merit.

Issues for Determination

87. The Tribunal having considered the pleadings and submissions made by the parties is of the considered view that the Appeal distils into a single issue for determination namely:

Whether the Respondent's Income tax additional assessment was justified.

Analysis and Determination

88. Before delving into the substantive issue in this case, the Tribunal notes that the Appellant challenged the legality of the Respondent's Assessment Order. It stated that that the Assessment Order as issued was generic and lacked the requisite details and reasons on the basis of the additional assessment.
89. The Appellant noted that the Respondent having realized the mistake, now claims that the sufficient basis and clarity for the Assessment Order was provided in the Pre-Assessment notice.
90. The Tribunal notes that prior to the issuance of the assessment order to the Appellant, the Respondent had vide a letter dated 17th May 2023 issued a letter titled 'Pre-assessment Notice [on Review of 2022](#) year of Income Return.' In the letter the Respondent stated in part as follow;

“ ...

We have reviewed your corporation tax returns for the year of income ended 30th September, 2022 and noted that you have deducted, against your taxable income, interest expense in excess of 30% of earnings before interest, tax, depreciation and amortization (EBITDA) contrary to the provisions of Section 16(2)(j).

The purpose of this letter is therefore to notify you of our intention to amend your corporation tax return for the year of income ended 30th September, 2022 to restrict the deductible interest expense to 30% of EBITDA as computed below;

...”

91. From the contents of the above-mentioned letter which the Appellant does not deny receiving, it was clear that the Respondent had notified the Appellant of the intention to amend the Appellant's Corporation tax return and it further had mentioned the basis of the intended assessment.
92. It was the view of the Tribunal that the Respondent had, prior to issuing the assessment informed the Appellant of the basis. Further, the Tribunal notes that given that the Respondent had already issued



the tariff ruling which the Appellant has not challenged, it follows that the Appellant ought to have been aware of the Respondent's basis for the assessment.

93. The Tribunal will therefore proceed to deal with the substantive issue of the tax that is in dispute.
94. It was the Appellant's case that Section 16(2)(j) of the [Income Tax Act](#) provides that in determining the amount of interest that is deductible in the computation of taxable income, the amount of interest deductible shall not exceed thirty percent (30%) of EBITDA in any financial year provided that any income which is exempt from tax shall be excluded from the calculation of EBITDA.
95. The Appellant further stated that the [Income Tax Act](#) lacks an operative definition of the term "EBITDA". That to this end, it was the Appellant's considered view that in the absence of the definition of the term EBITDA in the [Income Tax Act](#), reliance can be placed on the ordinary accounting practice, and dictionary definitions of the term.
96. That in accordance with International Accounting Standards (IAS) 28 and 31, the equity method of accounting is prescribed for associates and joint ventures. That under this method, an entity's initial investment in an associate or joint venture is recognized at cost, and the carrying amount is increased or decreased to recognize the entity's share of profit or loss from the associate or joint venture. That this share of profit or loss is then recognized in the profit and loss statement.
97. The Respondent on its part contended that the profits share from associates and joint ventures are not considered taxable income when computing the tax payable and therefore the same should be omitted when computing the EBITDA.
98. It was the Respondent's case that there was no ambiguity in the law. That the Respondent in its private ruling clearly guided the Appellant based on Section 16(2)(j) of the [Income Tax Act](#), the Appellant was required to make appropriate adjustments for taxable branch profits and dividend incomes to the extent that it is shielded from tax by foreign tax credits in order to address Base Erosion & Profit Shifting issues.
99. Section 3 of the [Income Tax Act](#) provides as follows as regards charge to income tax:
- "(1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.
 - (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—
 - (a) gains or profits from—
 - (i) any business, for whatever period of time carried on...
 - (3) For the purposes of this section—
 - (a) "person" does not include a partnership;"
100. Further, Section 4 of the [Income Tax Act](#), discusses taxation of business income. It provides the following regarding income from partnerships:
- "For the purposes of section 3(2)(a)(i)–



- (a) where a business is carried on or exercised partly within and partly outside Kenya by a resident person, the whole of the gains or profits from such business shall be deemed to have accrued in or to have been derived from Kenya;
- (b) the gains or profits of a partner from a partnership shall be the sum of—
 - (i) any remuneration payable to him by the partnership together with any interest on capital so payable, less any interest on capital payable by him to the partnership; and
 - (ii) his share of the total income of the partnership, calculated after deducting the total of any remuneration and interest on capital payable to any partner by the partnership and after adding any interest on capital payable by any partner to the partnership,

and where the partnership makes a loss, calculated in the manner set out in subparagraph (ii), his gains or profits shall be the excess, if any, of the amount set out in subparagraph (i) over his share of that loss...”

101. The Tribunal notes that the parties had argued on the issue of justification of the Respondent’s income tax additional assessment after the Respondent disallowed interest expense based on the Section 16(2)(j) of the *Income Tax Act*.
102. Section 16(2)(j) restricts the amount of deductible interest expense in ascertainment of taxable income. The Section provides that:

- “16(1) Save as otherwise expressly provided, for purposes of ascertaining the total income of a person for a year of income, no deduction shall be allowed in respect of –
- (a) expenditure or loss which is not wholly and exclusively incurred by him in the production of the income;
 - (b) capital expenditure, or any loss, diminution or exhaustion of capital.
- (2) (j) gross interest paid or payable to related persons and third parties in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial year: Provided that—
- (i) any income which is exempt from tax shall be excluded from the calculation of earnings before interest, taxes, depreciation and amortization; and
 - (ii) this paragraph shall apply to—
 - (A) interest on all loans;
 - (B) payments that are economically equivalent to interest; and
 - (C) expenses incurred in connection with raising the finance.”



103. The Tribunal notes that although the parties did not attach a copy of the private ruling by the Respondent, it was not in dispute that prior to the assessment, the Appellant had sought and received a private ruling regarding whether to include the share of profits from its associates and income from joint venture into the computation of EBITDA. To which the Respondent had advised that the same was not allowable.
104. According to Section 4 of the [Income Tax Act](#), business income is taxed on a person and a person does not include a partnership, which gains or profits from business are determined according to Section 4(b) of the [Income Tax Act](#).
105. The Appellant included in its computation of earnings before interest, taxes, depreciation and amortisation (EBITDA) amounts which it described as:
- a. Profit-share from associate; and
 - b. Profit-share from joint venture.
106. It is the Tribunal's position that the Kenyan [Income Tax Act](#) does not envision group tax accounting or consolidated tax accounting as argued by the Appellant. The Appellant is a resident person in Kenya by virtue of its being a company incorporated under the [Companies Act](#).
107. The Appellant stated in its pleadings that the so-called profit-share from associate is profits from Watu Credit Limited, a company which the Appellant has a shareholding of 29%, and that the so-called profit-share from joint venture is profits from Cummins C&G Holdings Limited, a company which the Appellant has a shareholding of 50%.
108. Going by the reading of the [Income Tax Act](#), the Tribunal observes that both Watu Credit Limited and Cummins C&G Holdings Limited are persons, and that the Appellant's relationship with the two companies is not one of partnership with other persons, but that of shareholding. The Tribunal, therefore, concludes that the Appellant erred in including in its EBITDA computation in its so-called share of profits from the two entities as though it were income from a partnership.
109. The Tribunal further concludes that purporting to include share of profits of other companies in the computation of the Appellant's EBITDA was equivalent to the Appellant alluding that it accounts for the income tax of the two entities, which in this case, the Appellant has not demonstrated it does, neither has it demonstrated that it is within the law to do so.
110. The Tribunal notes that the terminology employed by the Appellant to describe its inclusions of profits from associate and joint-venture in its computation of EBITDA is not founded under the Kenyan [Income Tax Act](#). The [Income Tax Act](#), under Sections 15 and 16 clearly provide for the deductions allowed or not allowed in the ascertainment of the total income of a person for a year of income.
111. A person, according to the [Income Tax Act](#), does not include a partnership or in any case, a group of companies as alluded to by the Appellant. The Tribunal finds that it would, therefore, be improper to imply or read into the provisions of Sections 2, 3, 4, 15 and 16 of the [Income Tax Act](#) any other meaning of the term person. As to do so violates the clear words of the statute. It also violates the principles of interpretation of tax statutes.



112. The Tribunal reiterates the holding in Cape Brandy Syndicate V Inland Revenue Commissioners (1920) 1KB as applied in TM Bell V Commissioner of Income Tax (1960) EALR 224 where Roland J stated:

“ In a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax, nothing is to be read in, nothing is to be implied. One has look into the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, ...”

113. Consequently, the Tribunal finds that the Respondent’s Income tax additional assessment was justified.

Final Decision

114. Given the foregoing analysis the Tribunal finds that the Appeal lacks merit and accordingly makes the following Orders: -

- a. The Appeal be and is hereby dismissed.
- b. The Respondent’s Objection decision dated 23rd August 2023 be and is hereby upheld.
- c. Each Party is to bear its own costs.

115. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF AUGUST, 2024

ERIC NYONGESA WAFULA

CHAIRMAN

CYNTHIA B. MAYAKA DR. RODNEY O. OLUOCH

MEMBER MEMBER

DR. TIMOTHY B. VIKIRU ABRAHAM K. KIPROTICH

MEMBER MEMBER

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