REPUBLIC OF KENYA

IN THE TAX APPEALS TRIBUNAL AT NAIROBI

TAX APPEAL NO. 934 of 2022

NAIVAS KENYA LIMITED.....APPELLANT

~VERSUS~

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. Naivas Kenya limited ("the Appellant") is a limited liability company incorporated under the companies Act.

2. That the Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, 1995. Under Section 5 (1), the Kenya Revenue Authority (**"the Authority"**) is an agency of the Government for the collection and receipt of all tax revenue.

3. The Appellant lodged an objection challenging the appointment as a tax representative of Gakiwawa Family Investments (herein referred to **"as GFI"**).

4. Gakiwawa Family Investments **("the GFI"/"Company"**) formerly Naivas Holdings Limited is a family investment holding company incorporated in Mauritius on 21st November 2017 and Gakiwawa Family Investments owns Naivas International Ltd (**"the NIL"**).
5. Naivas International Limited (NIL) was incorporated in Mauritius on 16th October 2015 and it owns Naivas Kenya Limited.

6. Gakiwawa Family Investments has (the GFI) has two (2) additional directors present who serve as directors from Trio-Pro Administrators (TPAL), which is a management, and trust company that acts as a Management Company, registered agent or trustee to willing high net worth individuals, institutional promoters of portfolio investment and private equity funds and private banking institutions domiciled in Mauritius and in other jurisdictions.

7. On 4th December 2019, Amethis Retail acquired 30% minority stake in Naivas International Limited (Mauritius) from GFI. The deal finalized in March 2020 priced at Kshs. 5.2 Billion.

8. The Respondent issued through the objection decision dated 18th July 2022 in response to notice of objection to the Appellant's appointment as tax representatives of Gakiwawa Family Investments Limited (the GFI) for purposes of corporate tax assessment of Kshs. 1,794,000,000.00 inclusive of penalties and interest.

9. The Appellant objected to the assessment vide a notice of objection dated 17th August 2022 objecting to the entire assessment.

10. Aggrieved by the Respondent's decision, the Appellant lodged the Notice of Appeal on 14th April 2022 and subsequently this Appeal on 10th June 2022.

THE APPEAL

11. The Appeal is premised on the following grounds as stated in the Appellant's Memorandum of Appeal filed on 31st August 2022:-

a) The Respondent erred in fact and in law by failing to find that there is no nexus between the transaction which is the subject matter of the corporate tax assessment and the Appellant;

b) The Respondent erred in fact and in law in failing to find that the Appellant does not meet any of the legal requirements for appointment as a tax representative of GFI.

c) The Respondent erred in fact and in law in failing to find that the Appellant would not legally and practically be able to carry out any obligations as GFI's tax representative.

d) The Respondent erred in fact and in law in disregarding the well laid out procedure as set out in the relevant tax laws in issuing an assessment on the Appellant through its objection decision.

e) The Respondent erred in fact and in law by disregarding the legal standard required with regard to presenting material facts and reasons in its Objection decision.

f) The Respondent erred in fact and in law in purporting to issue an assessment in contravention of the provisions of the Income Tax Act on the taxation of gains or profits from business.

g) The Respondent erred in fact and in law in appointing the Appellant as a tax representative in contravention of the provisions of Article 47 of the Constitution on fair administrative action.

APPELLANT'S CASE

12. The Appellant's case is premised on the following documents:

a) The Appellant's Statement of Facts filed on 31st August 2022 together with the documents attached thereto.

b) The Appellant's written submissions dated and filed on 4th January 2023 together with the authorities attached thereto.

13. That the Appellant in response to the Respondent's arguments disputes the averments made by the Respondent in their entirely on the basis of the facts and law discussed in detail herein below;

    i) **Whether there is a nexus between the transaction subject to the assessment and the Appellant.**

14. That the Appellant notes that the GFI is a company incorporated under Mauritian law under company registration number C151902. As earlier stated, the Appellant is a limited liability company incorporated in Kenya under registration number C81909 pursuant to the provisions of the repealed Companies Act , Chapter 486 of the Laws of Kenya.

15. That the Appellant further states that its solely engaged in retail business in Kenya and therefore does not undertake any other activities. In particular, the Appellant reiterates that it is not engaged in any management activities and specifically in the management of the GFI, either directly or through a nominee. In addition, the Appellant states that it has never been involved in the management or control of GFI in any other capacity.

16. That the Appellant clarifies that its only relationship with GFI is that GFI is an indirect shareholder in the Appellant by virtue of GFI's sixty-eight-point five (68.5%) shareholding in NIL.

17. That the Appellant states that to the best of its knowledge, the transaction subject to the assessment was between GFI (as the seller), Amethis Retail (as the buyer) and the subject matter being the shares in NIL (subject matter). It had

absolutely no role in the transaction, and no single piece of evidence has been adduced by the Respondent of any Board meeting minutes on the Appellant's letterhead or on account of the Appellant relating to the transaction.

18. That therefore, the Appellant states that it is grossly arbitrary for the Respondent to assess the Appellant on this transaction, despite the obvious fact that it was not a party to the same. The Appellant states that its appointment as a tax representative of the GFI is not found on or supported by any provisions of the law and hence a nullity.

ii) Whether the appellant meets the test for appointment as a tax representative for GFI.

19. That Sections 15 and 15 (A) of the Tax Procedure Act provide for a number of the criteria for the appointment of a person as a tax representative of another, both resident and non-resident. The Appellant notes that in both the assessment and the objection decision, the Respondent has not identified the specific provisions of Section 15 of the Tax Procedure Act upon which it relied in appointing the Appellant as a tax representative.

20. That the Respondent's blanket reference to Section 15 as the basis of the appointment of the Appellant as a tax representative is in bad faith and lacks tangible grounds for the appointment. This goes against the established canon of taxation of certainty as was held in **Obbo & Another vs. Attorney General Petition No 71 of 2014 (2015) eKLR** where it was held that:

> *"blatant inconsistency /leaves the Petitioners and the taxpayers at large at a position of uncertainty as to what is applicable to them in respect of Income Tax... inconsistency, is not only unlawful but also contravenes the*

cardinal rule of legislation, and more so fiscal policies and legislation that legislation must be clear and certain."

21. That in the case of **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd (Miscellaneous Application 1223 of 2007)** it was held that:

"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 to catch all the fish by casting its net wide."

22. That despite the lack of specificity by the Respondent. the Appellant went out of its way to clarify that on the understanding that GFI was a non-resident entity, the only provision which the Respondent could have purported to rely on in appointing any person as their tax resident was Section 15 (1) (i) of the Tax Procedures Act. Section 15 (1) (i) of the Tax Procedures Act provides that;

"a person can only be a tax representative of a non - resident person if they are in control of the non - resident's persons affairs in Kenya including being a manager of the business of that non-resident person."

23. The Appellant states that the Respondent in both its assessment and objection decision did not demonstrate the role played by the Appellant to bring it within the provisions of Section 15 (1) (i) of the Tax Procedures Act.

24. That in addition, the Appellant states that the mere fact that GFI indirectly holds sixty-eight- point five percent (68.5%) of the shareholding in the Appellant does not qualify the Appellant to be appointed as a tax representative pursuant to Section 15 of the Tax Procedures Act.

25. That therefore, the Appellant's purported appointment as a tax representative has no legal basis and is null and void.

iii) NKL would not legally and practically be able to carry out any obligations as GFI's tax representative.

26. That without prejudice to the grounds of objection already outlined above, the Appellant states that even if it is appointed as GFI's tax representative under the general provision as provided for by Section 15 (1) (j) of the Tax Procedures Act, it would not be able to meet its obligations as a tax representative since Section 16 (5) of the Act provides that any tax payable by a tax representative shall be recoverable from the representative only to the extent of the income or assets of the taxpayer that are in the possession of or under the control of the tax representative. The Appellant does not hold any cash or assets on account of GFI and as such, would not be able to effect such obligations.

27. That while the Appellant concurs with the Respondent to the extent that holding of such income or assets is not a prerequisite for appointment of a person as a tax representative, the Act is clear that any amount due from the taxpayer may only be paid by the agent from such amounts and therefore absence of such monies or assets would render the carrying out of the representative's duties impossible. The appointment of the Appellant would therefore be an exercise in futility.

28. That the Appellant therefore states that this Honourable Tribunal ought to follow the position set out by the Court of Appeal in **Kutima Investments Limited vs. Muthoni Kihara & Another (2006} eKLR** where the court held that;

> *"The general principle of law is that courts should not act in futility. An order of this Court in favour of the applicant will not add anything." The Appellant reiterates that appointing it as a tax representative would be an act in futility as it does not and would not at any single moment hold any cash or assets on account of GFI."*

iv) The Respondent's disregard for procedure in issuing of an assessment through the Objection Decision

29. That the Appellant notes that the Respondent through its objection decision purported to shift the corporate tax assessment from GFI to the Appellant by stating that the tax assessment was on the Appellant as it carried out the substance of the transaction which was the subject of the assessment. The original assessment of 27th May 2022 assessed the tax on GFI and not the Appellant. As earlier stated, the said assessment merely sought to appoint the Appellant as a tax representative for the purposes of correspondence with GFI and responsibility for any tax decision arrived at.

30. That Section 51 (8) of the Tax Procedures Act stipulates that:-

> *"where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision."*

31. That the Appellant states that Section 51 (8) of the Tax Procedures Act is couched in mandatory terms that grant the Respondent three options when dealing with a validly lodged objection decision namely either to allow the objection in whole or in part or disallow it. Further, the use of the word 'shall' connotes that the Respondent's responses to a validly lodged objection decision are limited as it must mandatorily either allow the objection decision in whole, in part or disallow the same altogether.

32. That the Appellant notes that the courts have deliberated on the use of the term 'shall' in **Equity Group Holdings Limited vs. Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020) (20211 KEHC 25 (KLR) (Commercial and Tax) (23 August 2021) (Judgment)** where the learned judge held that;

> *"The word "shall" when used in a statutory provision imports a form of command or mandate. If is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory."*

33. That therefore, the Appellant notes that the Respondent's purported assessment of the Corporation tax on the Appellant through the objection decision is in contravention of the express provisions of Section 51 (8) of the Tax Procedure Act and hence null and void.

v) The Respondent's disregard of the legal requirements for adducing material facts and reasons for an Objection Decision.

34. That in addition to the disregard of procedure in the issuance of the assessment as outlined in (i) above, the Appellant notes that the Respondent purported to issue the corporate tax assessment on the Appellant on the basis

that GFI did not demonstrate a reasonable cause of existence and the alleged failure of both the Appellant and GFI to pass the independent entity test.

35. That the Appellant holds that by taking the above position, the Respondent has effectively dispensed with the status of the Appellant and GFI as separate legal entities. It is trite law that a company is a separate legal entity distinct from its members and directors. In **Securex Agencies Kenya ltd vs. Kenya Revenue Authority (2014) eKLR** while quoting the case of **Salomon vs. Salomon and Company Limited (1897) AC 22** with approval, the High Court reiterated that:

> *"a company is a distinct legal entity independent from its members and directors."*

36. That in addition, the Appellant avers that the Respondent cannot allege to pierce the veil of both NIL and GFI without outlining sufficient grounds or basis of the same. **In Ancent Mumo Kalani vs. Nairobi Business Ventures Limited [2020] eKLR** the Court held as follows in relation to lifting of the corporate veil:

> *" ...English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct (See the cases of **Gilford Motor Co. vs. Horne [1933) Ch. 935 And Jones vs. Hipman** {1962) IW.L.R. 832) The law is that the corporate veil can only be lifted where the directors use the notion of a legal entity to defeat public convenience, justify wrong, protect fraud or defend crime."*

37. That the Appellant therefore states that the Respondent, whose burden it is to prove that indeed there are grounds for piercing of the corporate veil, has not adduced any evidence of the same but has only made general statements

such as alleging that GFI and the Appellant failed the "independent entity test" without demonstrating the metrics of the said test and the manner in which the Appellant has failed the test.

38. That the Appellant notes that the Respondent's baseless allegation that the Appellant and GFI failed the "independent entity test" without giving sufficient reasons and basis for arriving at such a conclusion is in blatant breach of Section 51 (10) of the Tax Procedures Act requires an objection decision to include a statement of findings on material facts and the reasons for the decision.

39. That as such, the Appellant states that the purported assessment of the Appellant on the basis that it was the substance of the transaction is unfounded and contrary to the requirements of the Tax Procedures Act in relation to support and justification of the Respondent's decisions.

vi) The purported assessment is contrary to the provisions of the Income Tax Act on taxation of gains or profits from business.

40. That the above notwithstanding, the Appellant avers that the corporation tax assessment, which is purportedly based on the provision of Sections 3 (1) and (2) (a) (i) of the Income Tax Act, Chapter 470 of the Laws of Kenya (the Income Tax Act), is unlawful and contrary to the provisions of the said Section. Section 3(1) and (2) (a) (i) of the income Tax Act stipulate that:-

> *"3(1)(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 3 (2) (a) (i) - income upon which tax is chargeable under this Act is income in respect*

of gains or profits from a business for whatever period of time carried on."

41. That the above provision implies that for a person to be subject to tax under the said Section, the person must have carried on business in Kenya and realized taxable gains from the same. The Appellant reiterates that it was not involved in the material transaction and as a result no gains or profits accrued to it in Kenya in relation to the same.

42. That the Appellant states that it is a basic principle of law that a public authority must exercise its power only on lawful grounds. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 (20071 KLR 240** it was held that:

"But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others."

43. That the Appellant therefore states that the purported action to assess the Appellant for a gain which it did not derive is not grounded on any law and hence a nullity. Further, the Appellant avers that it would be a breach of the Appellant's right to its property as provided for in Article 40 of the Constitution for the Respondent to assess the Appellant on gains or profits which were not earned by the Appellant but by GFI, which is a separate legal entity.

44. That the above notwithstanding the Appellant further states that even from a capital gains tax perspective, the Income Tax Act provides that capital gains

tax is applicable on a gain accrued on the transfer of property situated in Kenya. The transfer would involve a transferor and a transferee. Such a gain would ordinarily accrue to the transferor of the property. As earlier stated, the Appellant was not involved in the material transaction and was as a result neither the transferor nor the transferee. Therefore, the Respondent's purported assessment on the Appellant would not stand as (a) the Appellant was not the owner and the subsequent transferor of the shares and (b) the shares in NIL being the property, related to a company registered in Mauritius hence do not amount to property situated in Kenya. In relation to shares, the property is said to be situated where the shares are registered. that is the place of incorporation of the company.

vii) The Respondent's appointment is inconsistent with the provisions of Article 47 of the Constitution.

45. That while the Appellant acknowledges that under Section 15(1) of the Tax Procedures Act, the Respondent has the power to appoint any person as a tax representative, the Appellant states that this power must be exercised fairly and in line with the provisions of Article 47 of the Constitution of Kenya which provides that;

> *"every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."*

46. That in addition, Section4 (1) and (2) of the Fair Administrative Actions Act. Act No. 4 of 2015 (FAA) provide as follows:

> *"4(1) Every person has the right to administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair."*
>
> *"4(2) Every person has the right to be given written reasons for any administrative action that is taken against him."*

47. That the Appellant further notes that Section 2 of the FAA describes an **'administrative action'** to include;

> *"the powers and functions and duties exercised by authorities or quasi-judicial tribunals; or 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."*

48. That the Appellant states that there is no doubt from the foregoing provisions that the Respondent is an administrative person within the meaning of the FAA and therefore required to conduct its mandate according to the provisions of Article 47 of the Constitution of Kenya.

49. That the Appellant states that having outlined the above, the Respondent in appointing the Appellant as a tax representative did not give reasons as to why the Appellant had been selected to be the tax representative for GFI. In addition, in the objection decision, the Respondent completely failed to address the issue and instead alleged that the GFI and NIL had failed the independent entity tests and therefore the assessment was now on the Appellant.

50. That therefore, the Appellant states that its appointment did not meet the requirements of Article 47 of the Constitution and the provisions of Section 4 (2) of the FAA which provides that reasons must be provided where an administrative body is taking action and especially so in this case where the potential liability is enormous.

51. That the Appellant therefore states that its appointment as a tax representative is unlawful and contrary to the right to fair administrative action as provided for under the Constitution of Kenya and the FAA.

Appellant's Prayers

52. The Appellant therefore prayed that:

i) The Objection decision be set aside to the extent that it has wrongfully assessed the Corporation tax assessment on the Appellant;

ii) The objection decision be set aside to the extent that it has confirmed the appointment of the Appellant as a tax representative of GFI;

iii) The Appeal be allowed with costs to the Appellant; and

iv) Any other remedies that the Honourable Tribunal deems just and reasonable.

RESPONDENT'S CASE

53. That the Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal: -

a) The Respondent's Statement of Facts dated and filed on 30th September 2022 together with the documents attached thereto.

b) The Respondent's written submissions dated and filed on 2nd March 2022 together with the legal authorities filed therewith.

54. That the Appellant, Naivas Kenya Ltd (NKL) lodged an objection challenging the appointment as a tax representative of Gakiwawa Family Investments (GFI).

55. That Gakiwawa Family Investments ("GFI"/"Company") formerly Naivas Holdings Limited is a family investment holding company incorporated in Mauritius on 21st November 2017. Gakiwawa Family Investments owns Naivas International Ltd (NIL).

56. That Naivas International Ltd incorporated in Maritius on 16th October 2015 owns Naivas Kenya Ltd.

57. That the Directors of Gakiwawa Family Investments Ltd are:

a) David Kimani Mukuha
b) Grace Wambui Mukuha
c) Linet Wairimu Mukuha
d) Simon Gashwe

58. That GFI has two (2) additional Directors present in Mauritius who also serves as directors from Tri-Pro Administrators Ltd (TPAL). TPAL is a management and trust company which acts as a management company, registered agent or trustee to willing high net worth individuals, institutional promoters of portfolio investment and private equity funds and private banking institutions domiciled in Mauritius and in other jurisdictions.

59. That on 4th December 2019, Amethis Retail acquired 30% minority stake in Naivas International Ltd (Mauritius) from GFI. The deal finalized in March 2020 priced at Kshs.5.2 Billion.

60. That the Respondent attempts to tax the sales proceeds in Kenya at 30% resulting to a principal tax liability of Kshs. 1,560,000,000.00 (30%*5.2B) under Section 3 (2) (a) (i) of the Income Tax Act Cap 470 as gains derived from Kenya.

Basis of Appointment as Tax Representatives.

(1) Corporate Tax Residency of GFI

61. That the Respondent argues that corporate tax residence is related to central management and control of business of a company which is exercised by directors and NOT by the control of the company itself which is exercised by shareholders. **(Stanley vs. Gramophone and Typewriter Ltd (1908)5TC 358)**.

62. That the enquiry is not from where GFI is controlled from, but as to where the business of GFI is controlled. To achieve this the Respondent relied on various aspects about the company:

a) Directors and their actions:

That majority directors are Kenyans and Tax residents in Kenya.

b) Knowledge of the Naivas Limited Business:

That the Kenyan directors are knowledgeable and significant to the business.

c) Records and Administrative matters;

That documents have gaps for instance there are no accurate minutes of each board meeting.

d) Nominee services:

There is no real evidence that TPAL directors are paid for any real work.

e) Meetings:

No evidence apart from Mercy Waithera's travel to Mauritius in 2018. Most of the meetings were held virtually.

f) Assets in Mauritius:

No evidence that NIL and GFI had employees or assets in Mauritius.

(2)Adventure in Trade

63. That GFI has no employees, premises, functions performed and risks undertaken in Mauritius and there is no real economic activity in Mauritius. It was created for the purpose of owning shares in NIL which does not produce goods or services.

64. That the 30% stake in NIL was held for trade and not for long term investment.

65. That the period of acquisition, ownership and disposal are clear indicators of whether shares are for trade or investment.

66. That the acquisition and disposal of NIL shares therefore was an adventure and concern in the nature of trade and the realized gains from disposal taxable at 30%.

(3)Section 15 of the TPA 2015

67. That the Respondent in its assessment appointed Naivas Ltd as a tax representative in line with Section 15 of the TPA.

i. On the Appointment of Naivas Kenya Ltd as a Tax Representative.

68. That the Appellant relied on provisions of Sections 15 and 15 A of TPA to challenge the appointment of NKL as tax representatives of GFI.

69. That the grounds of objection are as summarised below:

a) That GFI and NKL are separate legal entities:
The Appellant's assertion is that GFI is merely a holding company and a shareholder in NKL through its shareholding in NI (Naivas International) therefore NKL has no control of income or assets of GFI and KRA cannot purport that NKL was party to the transaction.

b) That NKL does not meet any specific requirements of appointment as tax representative:
NKL is neither an officer of GFI nor is it responsible for accounting for monies on behalf of GFI in Kenya.

c) Further, GFI are domiciled in Mauritius with no operations in Kenya.

d) That NKL would not legally and practically carry out obligations as GFI tax representatives to the extent that they are not in possession of GFI's

income or assets (Section 16 (5) of TPA-revised 2020). That this section of the law limits the liability to pay taxes by a tax representative for and on behalf of a Appellant to the extent of the income or assets of the Appellant that are in possession or under the control of the tax representative.

e) That the appointment is inconsistent with the provisions of Article 47 of constitution of Kenya (Fair Administrative Actions Act No. 4 of 2015):
The assertion is that KRA failed to give reasons why NKL was selected to be the tax representative and has not specified the criteria under Section 15 of the TPA that the appointment falls.

2. On Tax Residence of GFI

70. That GFI is a Mauritian incorporated company that is primarily managed and controlled from Mauritius.

71. That GFI is a Mauritian entity, tax resident in Mauritius and controlled by Mauritian Directors. GFI does not have any trading activities in Kenya and its only activity is that of an investment holding company.

72. That according to the Kenya's Income Tax Act (ITA), an entity can be deemed a resident in Kenya if the management and control of that entity is conducted in Kenya.

73. That the ITA, however, does not provide for the definition of management and control, and therefore, reliance is placed on international best practices and principles, which would be considered persuasive in a Kenyan court.

74. That the United Kingdom has developed what is broadly known as the central management and control test (CMC Test) and which is relied heavily

upon by common law jurisdictions such as Kenya. The CMC Test is not a statutory test, but a common law test developed over time through judicial decisions.

75. That given the facts and the legal principles enunciated above, it is GFI's view that the company is not managed and controlled from Kenya.

76. That the Appellant further states that KRA has not satisfied the legal threshold required to hold GFI as a company resident in Kenya.

3) Respondent's Findings

i. That there is no Nexus between the transaction subject of the assessments and Naivas Kenya Limited.

77. That the assertion is that GFI is merely a holding company and a shareholder in NKL through its shareholding in NI (Naivas International) therefore NKL has no control of income or assets of GFI and KRA cannot purport that NKL was party to the transaction.

78. That Naivas Kenya Limited is 100% owned by Naivas International Limited which is owned by Gakiwawa Family investments.

79. That the Respondent carried out the independent entity test to determine the nature of operations of the two entities (Gakiwawa and NKL) and discovered that the operations in Mauritius had limited or no activities nor tangible structures demonstrating its independent going concern status.

80. That it is therefore, not possible to attribute the returns of the operations relating to an entity that does not demonstrate reasonable cause of existence.

81. That Gakiwawa and NKL failed the independent entity tests hence generating the need for a tax assessment on NKL where the substance of the transactions with tax implication lie.

ii. That NKL does not meet any specific requirements of appointment as tax representative:

82. That Section 15 (1) (i) of the Tax Procedures Act 2015 states that:

"(i) in the case of a non-resident person, if that person is controlling the non-resident person's affairs in Kenya, including a manager of a business of that non-resident person."

83. That as explained in (i) above, it was established that the control and management of Gakiwawa Family Investments is by the Directors and therefore qualify as tax representatives.

iii. That NKL would not legally and practically carry out obligations as GFI tax representatives to the extent that they are not in possession of GFI's income or assets (section 16(5) of TPA-revised 2020).

84. That this Section of the law limits the liability to pay taxes by a tax representative for and on behalf of the Appellant to the extent of the income or assets of the Appellant that are in possession or under the control of the tax representative.

85. That Section 15 defines appointment, while Section 16 provides the duties and obligation and is therefore does not determine the qualification of the tax representatives and absence of Section 16 (5) does disqualify and exempt a tax

representative from appointment and this is not a mandatory requirement to be appointed as a tax representative.

iv. That the appointment is inconsistent with the provisions of article 47 of constitution of Kenya (Fair Administrative Actions Act no.4 of 2015):

86. That the tax assessment dated 27th May 2022 was elaborate and provided the basis of assessments as well as Appellant's rights.

87. That the assertion that the Respondent failed to give reasons why NKL was selected to be the tax representative is therefore untrue.

v. That GFI is not a Tax Resident in Kenya.

88. That for management and control, we do not look at the shareholding we look at the people managing the company. Who are the key people? Shareholding is different from the person managing it.

89. That the Respondent in their tax assessments elaborated the tests carried out in making this determination.

90. That the common-law test provides that a person is a resident in the location of the person's *management and control.* Management and control refer to the decisions that drive the person's business, that is, the person's top-level management decisions.

91. That the Director's appointment of TPAL was to satisfy the GBC-1 licensing and tax residency requirement of Mauritius especially on the appointment of two (2) directors in Mauritius and them attending meetings of directors.

92. That the Mauritius tax law records that where Central Management and Control of entities holding a global business license is exercised elsewhere such an entity is not a resident in Mauritius. Reference to **Section 73 (b) and 73 A of the Mauritius Income Tax Act.**

Section 73 (b) defines residence in relation to a company to mean;

> *"a company that is incorporated in Mauritius or has its central management and control in Mauritius".*

Section 73 A of the Mauritius Income Tax Act states:-

> *"Notwithstanding Section 73, a company incorporated in Mauritius shall be treated as non-resident if it is centrally managed and controlled outside Mauritius."*

93. That GFI has no own physical location in Mauritius. It uses office and address designated for TPAL.

94. That to reiterate the Respondent's observations on corporate tax residency in its tax decision dated 27th May 2022, Corporate residence is related to management and control of the business of the company which is exercised by Directors. Majority of the GFI Directors are Kenyans.

vi. The Appointment of Viva Africa Consulting LLP as Tax Agents.

95. That the appointment of Viva is irrelevant in determination of the control and management of the affairs of GFI and cannot by itself counter the residence status of GFI.

Respondent's Prayers

96. The Respondent prayed that the Tribunal finds:

i. That the Tribunal upholds the Respondent's decision to confirm Kshs. 1,794,000,000.00.

ii. That the Honourable Tribunal dismisses the Appeal with costs borne by the Appellant.

ISSUES FOR DETERMINATION

97. The Tribunal having evaluated the pleadings and submissions of the parties is of the view that there are two issues that call for its determination;

a) Whether Gakiwawa Family Investments (GFI) is a tax resident in Kenya and if so, whether there is a nexus between the transaction subject of the assessments and Naivas Kenya Limited.

b) Whether Naivas Kenya Limited meets the specific requirements of appointment as tax representative for GFI.

ANALYSIS AND FINDINGS

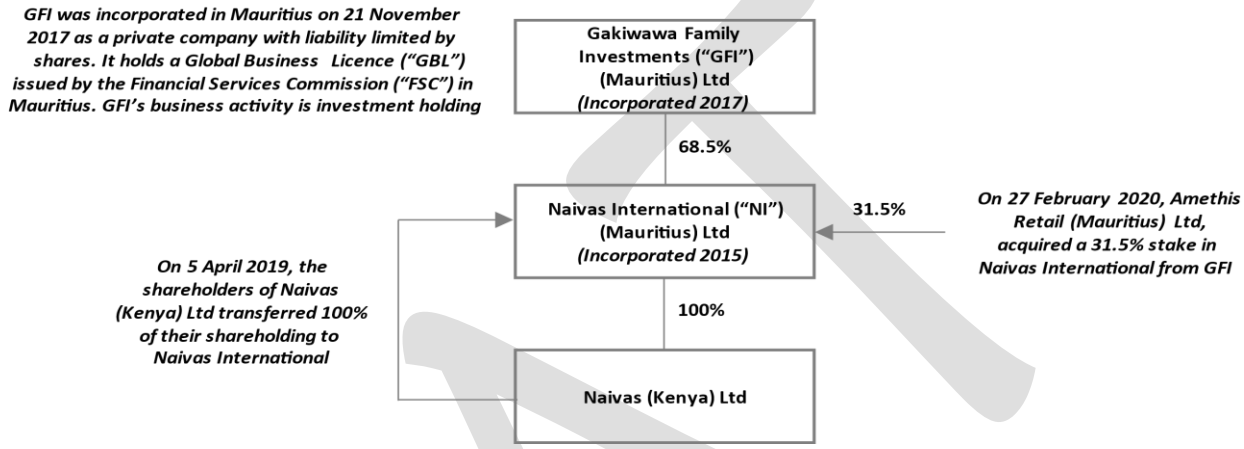
98. The Tribunal having determined the issues falling for its determination proceeded to analyze them as hereunder.

a) Whether Gakiwawa Family Investments (GFI) is a tax resident in Kenya and if so, whether there is a nexus between the transaction subject of the assessments and Naivas Kenya Limited.

99. The Tribunal noted that, GFI was incorporated in Mauritius on 21st November 2017 as a private company with liability limited by shares. It holds a Global Business License (**GBL**) issued by the Financial Services Commission (**FSC**) in Mauritius. GFI's business activity is holding investments. GFI initially held a 100% shareholding in Naivas International (**NI**), another company incorporated in Mauritius on 16th October 2015 and that holds a GBL license

from the FSC. NI holds 100% shareholding in Naivas Limited, which is the Appellant in the present Appeal.

100. On 27th February 2020, Amethis Retail (**Amethis**), another company incorporated in Mauritius and holding a GBL from the FSC, acquired a 31.5% stake in NI from GFI (the **Transaction**). The sales proceeds received by GFI was Kshs. 5,200,000,000.00. As shown below.



"Control, in relation to a person, means:

a) *that the person, directly or indirectly, holds at least twenty per cent of the voting rights in a company;*
b) *a loan advanced by the person to another person constitutes at least seventy per cent of the book value of the total assets of the other person excluding a loan from a financial institution that is not associated with the person advancing the loan;*
c) *a guarantee by the person for any form of indebtedness of another person constitutes at least seventy per cent of the total indebtedness of the other person excluding a guarantee from a financial institution that is not associated with the guarantor;*

d) the person appoints more than half of the board of directors of another person or at least one director or executive member of the governing board of that person;

e) the person is the owner of or has the exclusive rights over the know-how, patent, copyright, trade mark, license, franchise or any other business or commercial right of a similar nature, on which another person is wholly dependent for the manufacture or processing of goods or articles or business carried on by the other person;

f) the person or a person designated by that person supplies at least ninety per cent of the supply of the purchases of another person; and upon assessment, the Commissioner deems influence in the price or other conditions relating to the supply of the purchases of another person;

g) the person has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control."

101. The Appellant submitted that it does not control GFI, by any of the 7 definitions of the word 'Control' above. The Appellant is a fully owned subsidiary of NIL, which is then owned by GFI.

102. According to Section 3(b) of the ITA provides that a resident for a body of persons to be as follows;

"to a body of persons, means -

(i) that the body is a company incorporated under a law of Kenya; or

(ii) that the management and control of the affairs of the body was exercised in Kenya in a particular year of income under consideration; or

(iii) that the body has been declared by the Minister by notice in the Gazette to be resident in Kenya for any year of income;"

103. Further, for management and control the main aspect considered is the key people managing the company, which implies that shareholding is different from management.

104. That it was well noted by the Tribunal from the Respondent's findings that according to the Minutes of the meeting held on 18th March 2020, only the Kenyan directors can initiate and authorize transactions of the bank accounts in Mauritius, this confirms that the financial management is done from Kenya.

105. In the Tribunal's view, this therefore buttresses the fact that Gakiwawa Family Investments (GFI) and Naivas International Limited are managed and controlled in Kenya and thus this is a confirmation that they are tax residents in Kenya.

106. In the case of **Laerstate B V vs. HMRC (2009)UKFTT 209 TC** the learned judge held that the management and control of function of a taxpayer will be where the board meetings are held where a company is managed by its directors in board meeting(central). However, if the management is outside the board meetings, then one needs to consider who is managing the company by making high-level decisions (strategic decisions).

107. Further, in the case of **De Beers Consolidated Mines Ltd vs. Howe (1906) AC, 455,5 TC 198** it was established that a company resides for tax purposes where its real business is carried out. The real business of a company is carried out, not where the trading operations are taking place but where the central management and control of its business actually takes place.

108. In the instant case, the Tribunal is of the position that, the place of the real business is Kenya and by Kenyan directors and ultimate beneficial owners of Gakiwawa Family Investments.

109. The common law test provides that a person is resident in the location of the person's management and control. Management and control refers to the decisions that drive the person's business and the person's top-level management decisions.

110. Further, the Mauritius tax law records that where central management and control of entities holding a global business license is exercised elsewhere such an entity is not a resident in Mauritius. This is with reference to **Section 73 (b) and 73 A of the Mauritius Income Tax Act**, which define residence in relation to a company.

111. The Respondent submitted that, Gakiwawa Family Investments (GFI) has no known physical location in Mauritius nor employees or assets and which position was not controverted by the Appellant.

112. That the Tribunal observed that, the concept **"Management and control"** has not been defined in the Kenyan tax laws. This term has however been subjected to significant judicial interpretation under English law. In broad terms, the term 'management and control' has been determined by English law to mean "*making decisions about the strategic policy and direction of a company".*

113. In the case of **Bullock vs. Unit Construction Company (1959) 38 TC 712,** the court stated that the issue of management and control is "a pure question of fact, to be determined … upon scrutiny of the course of business and trading".

Citing the case of **Union Corporation Ltd vs. Commissioner of Inland Revenue 34 TC 207,** the Court further stated as follows:

> *"The Company may be properly found to reside in a country where it "really does business" that is to say, where the controlling power and authority which according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and the authority, is to some substantial degree to be found".*

114. It is the Appellant's case that Gakiwawa Family Investments (GFI) is merely a holding company and a shareholder in Naivas Kenya Limited through its shareholding in Naivas International thus Naivas Kenya Limited has no control of income or assets of GFI and the Respondent cannot purport that Naivas Kenya Limited was party to the transaction.

115. According to an independent entity test carried out to determine the nature of operations of the two entities (GFI and NKL), the operation in Mauritius had limited or no activities nor tangible structures demonstrating a going concern status.

116. The Tribunal finds that it is not possible to attribute the returns of the operations relating to an entity that does not demonstrate reasonable cause of existence thus leading to the Respondent carrying out a tax assessment on Naivas Kenya Limited where the substance of the transactions with tax implication lie.

117. In view of the afore mentioned, it is the Tribunal's considered view that there exists a nexus between the transaction subject of the assessments and Naivas Kenya Limited is so far as the sale exist.

118. From the foregoing, it is therefore clear that GFI is managed and controlled from Kenya and that makes GFI resident for tax purposes in Kenya and further therefore the Appellant is liable to pay corporation tax as assessed by the Respondent.

b) Whether Naivas Kenya Limited meets the specific requirements of appointment as tax representative for GFI.

119. The Tribunal noted, throughout the Respondent's Statement of Facts, it attempts to set out the basis of its appointment of the Appellant as GFI's tax representative in Kenya. The Respondent's position, which is its main ground, is to be found at paragraphs 31 through to 33 of the Respondent's Statement of Facts, where it states that:

> *"…the Respondent carried out the independent entity test to determine the nature of operations of the two entities (Gakiwawa and NKL) and discovered that the operations in Mauritius had limited or no activities nor tangible structures demonstrating its independent going concern status. It is therefore not possible to attribute the returns of the operations relating to an entity that does not demonstrate reasonable cause of existence. Gakiwawa and NKL failed the independent entity tests hence generating the need for a tax assessment on NKL where the substance of the transactions with tax implications lie."*

120. The Appellant submitted the provisions of Section 15 of the Tax Procedures Act do not apply to it, which is the relevant law for purposes of the appointment of a tax representative. Section 15 of the TPA does not talk of any independent entity test requirement. Its provisions on who qualifies as a tax representative are very clear and unambiguous, and so are its provisions on the extent to which an appointed person can be obliged to settle the tax liabilities of the taxpayer in respect of which the appointment is made.

121. The Appellant avers that the nexus that is required, is clearly set out at Section 16 (5) of the Tax Procedures Act. This nexus is that the tax representative must either possess or be in control of the income, or the assets of the taxpayer.

122. The Appellant's further states that the assertions that have been made by the Respondent on independent entity testing have no place under the relevant law and cannot be placed within the context of the provisions of section 16 (5) of the Tax Procedures Act, or any of the provisions of Section 15 of the TPA. The Appellant submitted that where the law is clear, there is no room for inference of other alleged principles.

123. It is the Appellant's position that the Appellant does not meet any specific requirements of appointment as a tax representative as stated in its notice of objection, as stated in paragraph 34 of the Respondent's Statement of Facts, that:

> *"As explained in 1 above, it was established that the control and management of Gakiwawa Family Investments is by the Directors and therefore qualify as a tax representative."*

124. The Appellant submitted that the only nexus that could bring the Appellant within the provisions of Section 15 of the TPA, is if it is in possession of or in control of the income or assets of GFI, which it clearly is not. That the independent entity test as invoked by the Respondent to address this question of nexus is a theoretical position that cannot be used to substitute the clear provisions of Sections 15 and 16 of the Tax Procedures Act, which are unambiguous and sufficient to determine the issue of whether or not there are any liabilities and obligations on the Appellant.

125. The Tribunal noted from the Appellant's written submissions that GFI was incorporated in Mauritius on 21st November 2017 as a private company with liability limited by shares. It holds a Global Business License (GBL) issued by the Financial Services Commission (FSC) in Mauritius. GFI's business activity is holding investments. GFI initially held a 100% shareholding in Naivas International (NI), another company incorporated in Mauritius on 16th October 2015 and that holds a GBL from the FSC. NI holds shareholding in Naivas Limited, which is the Appellant in the present Appeal. This establishes that the control and management of Gakiwawa Family Investments is by the directors, qualifying them for appointment as tax representatives.

126. Further, it is the Tribunal's position that the Respondent is mandated to administer and enforce all provisions of the written laws for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. This mandates the Respondent to appoint the Appellant as tax representative.

127. In **Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR** Majanja, J states that:-

> "*13. The approach of to this case is that stated in the often cited case of Cape Brandy Syndicate vs. Inland Revenue Commissioners [1920] 1 KB 64 as applied in T.M. Bell vs. 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 it to be implied. One can only look fairly at the language used… If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the*

subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

128. Similarly the case of **Mount Kenya Bottlers Ltd & 3 others vs. Attorney General & 3 Others NRB CA Civil Appeal No. 164 of 2013 [2019] eKLR,** the Court of Appeal observed as follows:-

"*48. […], when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in Cape Brandy Syndicate vs. I.R. Commissioners [1921] 1KB (cited by the Appellants), expressed the common law position in this area when he stated '…in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'".*

129. It is the Tribunal's view that Appellant is capable to legally and practically carry out the tax representative obligations of Gakiwawa Family Investments (GFI).

130. The appointment of Viva Africa Consulting Group LLP as tax agents is irrelevant in determination of the affairs of Gakiwawa Family Investments (GFI) and cannot counter the residence status of Gakiwawa Family Investments(GFI).

131. The basis of appointment of a person as a tax representative for another person is set out at Section 15 of the Tax Procedures Act. This is a statutory provision and is therefore the primary source of information with regard to the procedural rules for the administration of tax laws in Kenya.

132. The starting point in the determination of whether a person is qualified for appointment as a tax representative is Section 15 (1) of the Tax Procedures Act, which provides a long list of situations under which a person is deemed to automatically be the tax representative of another person. In the case of non-residents, it is provided at Section 15 (1) (i) that:

> *"A person is the tax representative of another person for the purposes of this Act or a tax law, in the case of a non-resident person, if that person is controlling the non-resident person's affairs in Kenya, including a manager of a business of that non-resident person."*

133. For one to fall under Section 15 (1) (i), it must be a person that controls the affairs of a non-resident person's affairs in Kenya. In the present case therefore, it means Naivas would have to be in control of GFI's affairs in Kenya, or to be a manager of GFI's affairs in Kenya for this provision to apply to it.

134. The Kenyan directors had knowledge of the business and were significant to the business. However, the Appellant did not provide any evidence to show records and administrative matters. There are gaps for instance, the lack of accurate minutes of each board meeting and also there is no real evidence that TPAL directors are paid for any real work.

135. The Tribunal finds that Gakiwawa Family investments (GFI) is a family investment holding company incorporated in Mauritius and own Naivas International Limited which consequently own 100% Naivas Kenya (The Appellant). The Directors of GFI are namely:

a) David Kimani Mukuha
b) Grace Wambui Mukuha
c) Linet Wairimu Mukuha
d) Simon Gashwe

136. The GFI directors are Kenyans and tax residents in Kenya. That the enquiry is not from where GFI is controlled from, but as to where the business of GFI is controlled.

137. That it was well noted from the Minutes of the meeting held on 18th March 2020, only the Kenyan directors can initiate and authorize transactions of the bank accounts in Mauritius, this confirms that the financial management is done from Kenya.

138. The above therefore, buttresses the fact that Gakiwawa Family Investments (GFI) and Naivas International Limited are managed and controlled in Kenya and thus this is a confirmation that they are tax residents in Kenya.

139. Section 15 of the Income Tax Act is clear that the Respondent has the discretion under the law to appoint a tax representative. It states that:

> "*(2) where a person required to appoint a tax representative in accordance with sub section (1) fails to do so, the Commissioner may appoint a tax representative for that person, and the tax representative so appointed shall have the duties and obligations specified under section 15.*
>
> *(3) The registration of the tax representative shall be in the name of the non-resident person being represented.*
>
> *(4) A person may be a tax representative for more than one non-resident person, in which case the person shall have a separate registration for each non-resident person."*

140. Further, under Section 16 the Income Tax Act, provides that:

"A tax representative of a taxpayer shall be responsible for performing any duty or obligation imposed by a tax law on the taxpayer, including the submission of returns and the payment of a tax.

(2) Despite the provisions of this Act, if a tax law requires a tax representative to perform a duty or an obligation in respect of the taxpayer, that tax representative shall comply with the requirements of that other tax law in addition to complying with the provisions of this Act.

(3) Where a taxpayer has more than one tax representative, each tax representative shall be responsible for all of the obligations of the taxpayer as required under this Act or any other tax law.

(4) Where a tax representative pays a tax on behalf of a taxpayer with the authority of that taxpayer, that tax representative shall be indemnified by the taxpayer in respect of that payment.

(5) Except as provided under a tax law and subject to subsection (6), any tax that is payable by a tax representative of a taxpayer under this section shall be recoverable from the tax representative only to the extent of the income or assets of the taxpayer that are in the possession or under the control of the tax representative.

(6) Subject to subsection (7), a tax representative shall be personally liable for the payment of any tax due by the tax representative in that capacity if, during the period when the amount remains unpaid, the tax representative—

(a) alienates, charges, or disposes of any monies received or accrued in respect of which the tax is payable; or

(b) disposes of or parts with any monies or funds belonging to the taxpayer that are in the possession of the tax representative or which come to the tax representative after the tax is payable, when such tax could legally have been paid from or out of such monies or funds.

(7) A tax representative shall not be personally liable for a tax under subsection (6) if—

(a) the monies were paid by the tax representative on behalf of a taxpayer

and the amount paid has priority, in law or equity, over the tax payable by the taxpayer; or

(b) at the time the monies were paid, the tax representative did not know, and could not reasonably be expected to know, of the taxpayer's tax liability.

(8) This section does not relieve a taxpayer from performing any obligation imposed on the taxpayer under a tax law that the tax representative of the taxpayer has failed to perform.

(9) A reference in this section to a tax liability of a taxpayer includes any penalty or late payment interest payable in respect of the liability."

141. Based on the foregoing the Tribunal finds that Naivas Kenya Limited meets the specific requirements of appointment as tax representative of GFI.

FINAL DECISION

142. In view of the foregoing, the Tribunal finds that the Appeal lacks merit and accordingly makes the following Orders;

a) The Appeal be and hereby dismissed.

b) That the objection decision dated 18th July 2022 is hereby upheld.

c) Each party to bear its own costs.

143. It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of August, 2023

ERIC NYONGESA WAFULA

CHAIRMAN

CYNTHIA B. MAYAKA

MEMBER

GRACE MUKUHA

MEMBER

JEPHTHAH NJAGI

MEMBER

ABRAHAM K. KIPROTICH

MEMBER