



**Stanbic Bank Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E057 of 2021) [2024] KEHC 13073 (KLR) (Commercial and Tax) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13073 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E057 OF 2021  
JWW MONG'ARE, J  
OCTOBER 31, 2024**

**BETWEEN**

**STANBIC BANK KENYA LIMITED ..... APPELLANT**

**AND**

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

*(Being an Appeal against the Tax Appeals Tribunal's judgement delivered on 23/4/2021)*

**JUDGMENT**

1. The Respondent carried out a review of the Appellant and issued an assessment of excise duty dated 24/1/2019 amounting to Kshs.818,400,584.00/= covering the period August 2015 to September 2018.
2. Vide an objection decision dated 17/4/2019, the Respondent confirmed the assessment of excise duty amounting to Kshs.450,271,065.44/= for the period of August 2015 to September 2018 inclusive of penalty and interest.
3. The Appellant was dissatisfied with the objection decision and filed an Appeal against it before the Tax Appeals Tribunal (hereinafter the Tribunal).
4. Upon considering the Appeal, the Tribunal found the Appeal partially successful and gave the following orders:
  - “ii. ii. The Respondent's confirmed assessment with regard to Excise Duty on rebates is upheld.
  - iii. The Respondent's confirmed assessment with regard to Excise Duty on custodial fees is upheld.



- iv. The Respondent’s confirmed assessment with regard to Excise Duty on fees earned from advisory services is hereby set aside.
- v. The Respondent’s confirmed assessment with regard to Visa and MasterCard are hereby set aside.
- vi. The Respondent’s confirmed assessment with regard to international counter guarantees is hereby upheld.
- vii. The Respondent’s confirmed assessment with regard to excise duty on money transfer into Kenya is hereby upheld.
- viii. The Respondent’s confirmed assessment with regard to excise duty on regional office is hereby set aside.
- ix. The Respondent’s confirmed assessment with regard to excise duty on insurance commission is hereby upheld.
- x. The Respondent’s confirmed assessment with regard to return on loan is hereby set aside.
- xi. Each party to bear its own costs.”

5. The Appellant being dissatisfied with part of the decision of the Tribunal Appealed against part of it to this court pursuant to section 32(1) of the [Tax Appeals Tribunal Act](#) on the following grounds:

- “1. 1. The Tax Appeals Tribunal erred in law in finding that Excise Duty is applicable on rebates, custodial fees, international counter guarantees and money transfer which are services exported from Kenya.
- 2. The Tax Appeals Tribunal erred in law and fact by upholding the Respondent’s assessment of Excise Duty on exported services contrary to section 7(1) (c) and (4) of the [Excise Duty Act](#).
- 3. The Tax Appeals Tribunal erred in law and fact by upholding the Respondent’s assessment of Excise Duty which is based on the location of the Appellant and place of performance as opposed to the place where the services are consumed.
- 4. The Tax Appeals Tribunal erred in law and fact by finding that the rebates earned from services provided to international banks is a local service and therefore subject to Excise Duty.
- 5. The Tax Appeals Tribunal erred in law by finding that a local service is subject to excise duty. The [Excise Duty Act](#) does not make reference to the term local service.
- 6. The Tax Appeals Tribunal erred and misdirected itself by misinterpreting the ruling in the Commissioner of Domestic Taxes v Total Touch Cargo Holland by finding that the person who consumed the service is not material in establishing whether a service has been used or consumed outside Kenya.



7. The Tax Appeals Tribunal erred in law and fact by failing to appreciate that the benefit for introduction of customers accrues outside Kenya when the international banks use and consume the information from the Appellant.
  8. The Tax Appeals Tribunal erred in law by failing to appreciate that the location of the consumer is a relevant factor in determining export of service and not the place where the service is performed.
  9. The Tax Appeals Tribunal erred in law and fact by finding that the safe custody services provided to international customers is a service consumed in Kenya.
  10. The Tax Appeals Tribunal erred in law and fact by finding that the counter guarantee commission earned from provisioning services to international banks is a service consumed in Kenya.
  11. The Tax Appeals Tribunal erred in fact by misrepresenting the counter guarantee transaction as a commission arising from a guarantee that the Appellant provides to companies.
  12. The Tax Appeals Tribunal correctly held that the Respondent erred in its assessment of Excise Duty on fees earned from money transfer service but thereafter erred in law and fact in proceeding to uphold the Respondent's assessment of Excise Duty on fees earned from money transfer services in the final orders that it issued.
  13. The Tax Appeals Tribunal erred in law and fact by finding that there is no contention that Excise Duty does not apply on insurance commission and yet proceeded to uphold the Respondent's assessment of Excise Duty on insurance commission on the basis of an alleged lack of information.
  14. The Tax Appeals Tribunal erred in fact by finding that the Appellant did not provide documentation regarding the insurance commission earned in 2015 yet the amount was included in the annexures to the Appellant's memorandum of Appeal.
  15. The Tax Appeals Tribunal erred in fact by finding that the Appellant did not provide documentation regarding the insurance commission earned despite the Respondent's own admission in the statement of facts that the Appellant provided detailed explanations and supporting documentation against each item.
  16. The Tax Appeals Tribunal erred in law and fact by upholding the Respondent's assessment of Excise Duty on exported services despite the Respondent's own admission in the Objection decision that income from outside Kenya and income charged to entities located outside Kenya should not be charged excise duty."
6. Based on the foregoing grounds the Appellant prayed to have its Appeal allowed and an order to have the Respondent pay it for the costs of this Appeal.
  7. In opposition to the Appeal, the Respondent filed a Statement of Facts dated 25/11/2021. The Respondent argued that on excise duty being charged on rebates received by the Appellant, the



- Respondent contended that the sourcing of clients for organisations is a local service that should be subjected to excise duty normally like any other over the counter service.
8. The Respondent further contended that on advisory and custodial services to foreigners, the Respondent contended that the Appellant's clients who obtain custodial services for items that they would put to use locally during their stay in Kenya demonstrates a misunderstanding of the export provisions as advanced in the Appeal. The Respondent asserted that advisory services offered to foreign clients were for use in the Kenyan market which did not make them exported and excise duty is therefore chargeable.
  9. The Respondent submitted that on international Visa and Mastercard fees, the Respondent contended that it should be subjected to excise duty normally like any other over the counter service. In addition, the Respondent maintained that on international counter guarantees, the Respondent contended that the guarantees are in support of local business entities and should be subjected to excise duty in the normal manner.
  10. The Respondent further submitted that on fees on money transfers into Kenya from other countries and regional office recharges, the Respondent stated that the accuracy of the amount shown could not be ascertained and the Appellant could not prove its claim without supporting information thus the commissioner found no reason to amend his assessment in relation to this head.
  11. The Respondent went further to argue that on insurance commissions, the Appellant became exempted from December 2015, however the Appellant was unable to demonstrate out of Kshs.1,390,870/= in 2015 amounted to the month of December, If any.
  12. Lastly on return on loan, the Respondent contended that loan related charges are not the same as interest and that the term 'return on interest' specifically targets Islamic banking and is not synonymous with interest charged. That these charges therefore correctly fit in the definition of other fees and commissions levied by banks in the administration of loan products.
  13. Based on the foregoing, the Respondent prayed to have the court uphold the decision of the Tribunal that upheld the Respondent's decision to charge tax amounting to Kshs.450,271,065.44/= inclusive of interest and penalties as stipulated under the [Tax Procedures Act 2015](#).

### **Analysis and Determination**

14. The Appellant filed written submissions dated 20/3/2023 and further written submissions dated 27/4/2023. The Respondent also filed written submissions dated 21/3/2023. I have considered and carefully analysed the Record of Appeal, the pleadings filed in opposition to it and the rival submissions filed by counsels representing the parties.
15. To my mind, I believe that the 16 grounds of Appeal may be formulated to the following four issues for determination:
  - a. Whether the Respondent erred in applying excise duty on rebates received from international banks.
  - b. Whether the Respondent erred in applying excise duty on custodial services.
  - c. Whether the Respondent erred in applying excise duty on international counter guarantees.
  - d. Whether the Respondent erred in applying excise duty on money transfer commission.



**Whether the Respondent erred in applying excise duty on rebates received from international banks.**

16. The Appellant submitted that international organisations domiciled outside of Kenya have on several occasions requested it to introduce potential clients to them. That it provided such referral services to the international organisations which would benefit from the services by obtaining potential customer referrals to whom it can sell its offshore products. The Appellant submitted that when a potential client introduced by it took up a product marketed by the international organisation, it would be paid a commission/rebate. The Appellant treated the rebates as an income emanating from an exported service and therefore exempt from excise duty.
17. On the other hand the Respondent submitted that the sourcing of clients for international organisations is a local service that should be subjected to excise duty.
18. On this issue the Tribunal found that sourcing of clients for the international organisations is a local service and therefore subject to excise duty.
19. Section 7 (1)(c) of the *Excise Duty Act* states:
- “ Subject to this section, no excise duty shall be charged on the following
- (c) excisable services exported from Kenya.”
20. Section 7 (4) of the *Excise Duty Act* provides that:
- “ Excisable services shall be considered to be exported from Kenya if the services are supplied from a place of business in Kenya for use or consumption outside Kenya.”
21. The above provisions are clear; services may be performed in Kenya but will be deemed to be exported services if they are consumed outside of Kenya. Excise duty is not chargeable on services exported from Kenya.
22. In a number of decisions, the court has faced a similar issue of what constitutes ‘consumption outside of Kenya’ albeit from a VAT perspective.
23. In *Commissioner of Domestic Taxes v Total Touch Cargo Holland (ITA no.17 of 2013)* the Court held:
- “ ... the VAT Act which stipulates that an exported service is that which is provided for use or consumption outside The test is the location (or place) of use or consumption of that service. Therefore the relevant factor is the location of the consumer of that service.”
24. In *Panalpina Aitflo v the Commissioner of Domestic Taxes (ITA no. 8 of 2015)* the Court upheld an Appeal by the taxpayer after having regard to the destination principle which provides that internationally traded services should be taxed according to the rules of jurisdiction of consumption.
25. Similar decisions were rendered in *Coca-Cola Central East and West Africa v Commissioner of Domestic Taxes (ITA 19 of 2013)* and
- Google Kenya Limited v Commissioner of Domestic Taxes, Civil Appeal No E004 of 2021.*
26. I am guided by the above authorities. In this case, I note that the Appellant introduced potential customers to international organisations who would offer investment products to them. It is therefore the international organisations that benefited from the Appellant’s services by obtaining potential customers. This means that the referral service was consumed outside of Kenya and falls squarely within



the definition of exported services. Thus, the rebates/commissions obtained from the provision of such services is not subject to excise duty as stipulated under section 7 (1)(c) of the [Excise Duty Act](#).

27. It is therefore my finding that the Tribunal erred in finding that sourcing of clients for the international organisations is a local service and therefore subject to excise duty.

**Whether the Respondent erred in applying excise duty on custodial services.**

28. The Appellant submitted that it issues invoices to international clients outside of Kenya for providing custodial services to non-resident investors who do not have an establishment in Kenya.
29. That as a custodian, its role involves organising for settlement related to purchase and sale of securities (such as shares and bonds) on behalf of non-residents, holding the non-resident investor's securities for safekeeping, collating investment information relating to the securities, such as dividend and interest pay out, forthcoming corporate actions relating to the securities such as rights offering, meeting notices and thereafter transmitting the information to the non-resident investor.
30. The Appellant further submitted that the economic benefit of the custodial service provided by the Appellant accrued to the non-resident investors who use and consume the information collated by the Appellant outside Kenya.
31. The Respondent submitted that the Appellant offered safe keeping services for items kept in its premises and that the specific items are not kept for onward transmission to overseas destinations. Further that some customers obtain custodial services for items that they put into use locally during their stay in Kenya.
32. On this issue, the Tribunal, at paragraph 76 of its judgement, found that the custodial services carried out by the Appellant to international clients are consumed in Kenya and cannot be categorised as exports and should therefore attract excise duty.
33. On the nature of custodial services, I am guided by a similar case before the Tax Appeals Tribunal; Standard Chartered [Bank of Kenya Limited v The Commissioner of Domestic Taxes Appeal no.199 of 2019](#) which dealt with a similar matter involving custodial services provided to non-resident persons. The Tribunal held:

“ 61. 61. While these services are performed in Kenya, the Tribunal considers the use or consumption of these services to be outside Kenya where the clients are located. The foreign custody clients draw economic benefit from the provision of the custodial services and, ultimately, they are to be considered to be users or consumers of these services.”

34. I therefore agree with the Appellant's description of custodial services and that they accrue to non-resident investors, who use or consume the information collated by the Appellant outside Kenya to make investment decisions. It is my finding that Excise duty is therefore not to be levied against custody fees, contrary to the Tribunal's finding.

**Whether the Respondent erred in applying excise duty on international counter guarantees.**

35. On this issue, this Appellant submitted that it provided counter-guarantees to international banks which arose where the international bank provides its own customers with a guarantee outside Kenya then seeks to counter guarantee for itself from the Appellant. The Appellant asserted that it charges a commission to the international bank for providing it with a counter guarantee.



36. The Respondent on the other hand submitted that the guarantees are for local businesses and form part and parcel of the local transactions. The Respondent emphasised that when foreigners undertake local commercial activities, it does not constitute an export.
37. At paragraph 88 of its judgement, the Tribunal held that the guarantees are meant to enable the international banks' clients to secure local businesses therefore the place of consumption is Kenya which makes it subject to excise duty.
38. My understanding is that the Appellant would provide counter guarantees to international banks upon request. This mainly happened where international organisations without a presence in Kenya need to provide guarantees to their customers to secure business locally.
39. The service of issuing a counter guarantee was for the benefit, use and consumption of the foreign bank which is not located in Kenya. It goes without saying that the service was not consumed in Kenya but in the jurisdiction where the international bank is located. I disagree with the Tribunal's finding that the place of consumption of this service was in Kenya and find that the Respondent erred in applying excise duty on international counter guarantees.

**Whether the Respondent erred in applying excise duty on money transfer commission.**

40. On this issue, the Tribunal at paragraph 94 of its decision held:
- “the Tribunal therefore finds that the Respondent erred in its assessment of excise duty on fees earned from money transfer fees.”
41. It however contradicted itself under paragraph 117 (vii) of the decision when it stated:
- “The Respondent's confirmed assessment with regard to excise duty on money transfer into Kenya is hereby upheld.”
42. I have read paragraph 90-94 of the Tribunal's decision. It noted that the Respondent did not contest the Appellant's position that money transfer into Kenya is not subject to excise duty and that its only issue was that it could not ascertain the amounts shown using the transaction records provided by the Appellant. It noted further that the Respondent was invited to the Appellant's premises to carry out an electronic review of the data but it failed to take up the offer. The Tribunal found that the Respondent ought to have taken up the invitation to review the data electronically, as provide for under section 59 of the *Tax Procedures Act*, before demolishing the evidence if it wished to do so.
43. Based on the foregoing, I believe that the Tribunal, under paragraph 117 (vii) intended to set aside the Respondent's confirmed assessment with regard to excise duty but many made an error by affirming the same. The upshot of the foregoing is that this court finds that the Appeal has merit and the same is allowed as prayed.
44. On costs, it is trite that costs follow the event. However, the Respondent being a public entity has no money of its own and if condemned to costs would be forced to pay the same from public funds under its custody. It is therefore my finding that this is a suitable case where each party should bear their costs of the Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER 2024**

**J.W.W. MONG'ARE**



## **JUDGE**

In the Presence of:-

Ms. Malik for the Appellant

Mr. Wairire for the Respondent

Godfrey - Court Assistant

