Aviat Networks (Kenya) Limited v Commissioner of Domestic Taxes (Income Tax Appeal E045 of 2024) [2024] KEHC 15224 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15224 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

INCOME TAX APPEAL E045 OF 2024

MA OTIENO, J

NOVEMBER 28, 2024

BETWEEN

AVIAT NETWORKS (KENYA) LIMITED .... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES .... RESPONDENT

(An appeal from the Judgment of the Tax Appeals Tribunal delivered on 26th January 2024 in the Tax Appeal Case No. 1104 of 2022)

JUDGMENT

Introduction

1. This is an appeal from the Judgment of the Tax Appeals Tribunal ("the Tribunal") delivered on 26th January 2024 in the TAT Case No. 1104 of 2022 in which the Tribunal dismissed an appeal by the Appellant, thereby upholding the Respondent's tax Assessment of Kshs. 82,340,790/-, inclusive of penalties and interest, against the Appellant.

2. The Appellant, Aviat Networks (Kenya), is a limited liability company incorporated in Kenya whose main business is the supply of microwave routers, switches, and all equipment related to the support of Internet for mobile telecommunication companies in Kenya. The Appellant is also a local sales representative of Aviat Network Singapore, on whose behalf it offers 'support services' pursuant to an agreement of 2nd July 2011 between the parties.

3. The Respondent (Commissioner), as part of its mandate, on 13th September 2021, issued the Appellant with a VAT credit verification notice with a view to conducting a tax compliance check on the Appellant. According to the Commissioner, the Appellant was in a perpetual VAT credit (refund) position and it was, therefore, necessary to have the Appellant's tax affairs verified.

4. Upon conclusion of the tax compliance check, the Commissioner, in its notice dated 27th May 2022, raised an additional Assessment in the sum of Kshs. 63,890,574.41/- against the Appellant for the tax period 2018 to 2021. The basis of the Commissioner's Assessment was that the Appellant had misclassified VAT on 'technical fees' as zero-rated instead of applying VAT at the standard rate (16%) and that the Appellant had also under-declared its income from the 'sales of equipment.'

5. Being dissatisfied with the Commissioner's findings, the Appellant lodged an objection with the Commissioner on the Assessment vide its letters of Objection dated 29th June 2022.

6. The Commissioner issued his Objection Decision on the Appellant's Objection and revised the principal tax Assessment from Kshs. 63,890,574.41/- to 61,992,746/-, comprising both VAT and income tax respectively. The total taxes confirmed inclusive of penalties and interest, were therefore Kshs. 82,240,790/-.

7. On 3rd October 2022, the Appellant lodged an appeal at the Tax Appeals Tribunal against the said decision arguing that the Commissioner erred in law and fact by among others, misinterpreting the agency relationship between the Appellant and its principal, Aviat Network Singapore ("Aviat Singapore"). The Appellant contended that the Commissioner failed to appreciate the Appellant's sales revenue from 'technical fees' related to exported services to its principal, and were therefore zero-rated under the VAT Act.

8. In response to the Appellant's Appeal at the TAT, the Respondent filed its Statement of Facts on 3rd November 2022 in which it maintained that its tax Assessment against the Appellant was supported by the law, as applied to the facts of the case.

9. On 8th March 2024, the Tribunal rendered its judgment in the matter and dismissed the Appellant's appeal thereat and upheld the Respondent's findings that the services in question were not exported services, and were therefore subject to tax at the standard rate (16%). It was, therefore, the Tribunal's finding that the Respondent was right in raising the additional VAT and income tax in the manner that it did.

The Appeal

10. Aggrieved by the Judgment of the TAT, the Appellant lodged this appeal vide its Memorandum of Appeal dated 28th February 2024 and raised the following twelve (12) grounds of appeal; -

    i. That the Honourable Tribunal erred in law and in fact by misinterpreting the agency relationship between the Appellant and its principal, Aviat Singapore.

    ii. That the Honourable Tribunal erred in law and in fact by holding that the technical services performed by the Appellant were consumed by Safaricom and Airtel instead of Aviat Networks (Singapore) Limited contrary to the express terms of contracts signed by the parties.

    iii. That the Honourable Tribunal erred in law and in fact by conflating the sale of the microwave routers to include the provision of the technical support services contrary to the express terms of the separate contracts between the parties.

    iv. That the Honourable Tribunal erred in law and in fact by failing to distinguish that the cash inflows from Safaricom to Aviat Kenya were for the sale of the microwave routers and not for technical support.

v. That the Honourable Tribunal erred in law and in fact by failing to appreciate that the Respondent had not demonstrated the nexus between the cash-inflows from Safaricom and the assessment for technical support services.

vi. That the Honourable Tribunal erred in law and in fact by failing to appreciate that VAT had been paid for the sale of the microwave routers and that as such Safaricom had correctly invoiced Aviat Kenya and not Aviat Singapore.

vii. That the Honourable Tribunal erred in law and in fact by failing to appreciate that Safaricom had invoiced Aviat Singapore for the technical support services.

viii. That the Honourable Tribunal erred in law and in fact by failing to appreciate that Aviat Kenya invoiced Aviat Singapore for the technical support services performed in its capacity as the latter's sales representative hence rendering the services in question to be exported services.

ix. That the Honourable Tribunal erred in law and in fact by failing to appreciate that while Aviat Kenya took possession of the microwaves, the licenses to the software remained the property of Aviat Singapore and could not be redistributed to third parties without express authority from Aviat Singapore as per the terms of the contract between Aviat Kenya and Aviat Singapore.

x. That the Honourable Tribunal erred in law and in fact by failing to appreciate that the Appellant had furnished the Respondent with the transfer pricing policy between Aviat Kenya and Aviat Singapore which had not been controverted by the Respondent.

xi. That the Honourable Tribunal erred in law and in fact by failing to appreciate that the Respondent had breached the Appellant's right to fair administrative action under Article 47 of *the Constitution* by failing to request for relevant documents as required by Section 51(4) of the *Tax Procedures Act*.

xii. That the Honourable Tribunal erred in law and in fact by failing to appreciate that the Appellant had discharged its burden of proof as regards VAT variance for the period 2018 and 2019, and for equipment sales in 2021.

11. The appeal was canvased by way of written submissions. The Appellant filed its submissions dated 21st May 2024 whilst that of the Respondent is dated 22nd July 2024.

Appellant's submissions

12. The Appellant submitted that the Tribunal erred in failing to appreciate that the services in question were exported services and were offered and or provided by the Appellant to its principal, Aviat Singapore.

13. According to the Appellant, the Tribunal failed to appreciate that there was in existence a valid "Sales Support Agreement" between the Appellant and its principal, Aviat Singapore on whose behalf, and for whose consumption the services in question were offered. The Appellant asserted that it was immaterial that the parties were related.

14. The Appellant asserted that the Tribunal failed to fully appreciate the clear import of Clauses 2.1, 2.8, 5.2, and 5.3 of the Sales Support Agreement between the Appellant and its principal, Aviat Singapore which provided that the services were to be offered by the Appellant to its principal, Aviat Singapore, for its use and consumption outside the jurisdiction.

15. In support of its submission, the Appellant cited various decisions of this court on the subject of VAT treatment of exported services as follows; -

i. HCCOMMITA E063 of 2020 Commissioner of Domestic Taxes Vs Fortune Container Depot (Majanja, J)

ii. Commissioner of Domestic Taxes v Total Touch Cargo Holland ML HC ITA No. 17 of 2015 [2018] eKLR (Maureen Odero, J)

iii. Panalpina Airflo Limited v Commissioner of Domestic Taxes ML HC ITA No. 5 of 2018 [2019] eKLR (W.A. Okwany, J)

iv. Coca-Cola Central East & West Africa Limited V Commissioner of Domestic Taxes [2020] eKLR (E C Mwita, J)

16. It was therefore the Appellant's position that the issue of exported services is settled by judicial precedent and that it is immaterial whether the services are performed in Kenya or outside Kenya; that what is material is that the services are provided for use or consumption outside Kenya.

17. The Appellant submitted that the Tribunal erred in law by failing to follow the above decisions by this court, which are binding to the Tribunal. Citing among others, the Supreme Court decision in the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR, the Appellant urged this court to find that the Tribunal ought not to have departed from the decisions in the above-cited cases from this court.

18. The Appellant submitted that both the Tribunal and the Respondent were misdirected on the real issue for determination before the Tribunal. That while both focused on the sale of the equipment by the Appellant to its customers, the Appellant submitted that the only major issue in the appeal before the TAT concerned the technical services that were offered by the Appellant to Aviat Singapore for its consumption outside Kenya.

19. According to the Appellant, the sale of equipment to its customers (Safaricom Ltd & Airtel Networks Kenya Limited) was properly accounted for and appropriate taxes (VAT) were declared and paid.

20. The Appellant therefore asserted that the "Sales Support Agreement" it signed with its principal Aviat Singapore, ought to have been upheld by the Tribunal since it should not be in the business of the courts and Tribunals to rewrite agreements between parties. the case of South Nyanza Sugar Co. Ltd V Leonard O. Arera [2020] eKLR, was cited by the Appellant in support of this argument.

21. Consequently, the Appellant urged this court to find that the marketing and technical support services in question were offered to its principal, Aviat Singapore, and were therefore exported services.

22. Regarding the Commissioner's Assessment of income tax based on the variances between VAT declarations and Income Tax declarations, the Appellant submitted that it furnished the Respondent with all the requisite explanation and documentation and it was, therefore, the understanding of the Appellant that the issue had been settled. That in any event, no correspondence was received from the Commissioner to the effect that the Objection was not compliant with Section 51(3) of the *Tax Procedures Act*.

23. The Appellant therefore urged this court to allow the appeal with costs and set Judgment by the Tribunal.

Respondent's Submissions

24. On his part, the Respondent supported the judgment by the Tribunal and urged this court to uphold the same. According to the Respondent, the Tribunal was right in its interpretation of the relationship between the Appellant and Aviat Singapore.

25. It was submitted on behalf of the Commissioner that the Tribunal reviewed the agreement between the Appellant and Aviat Singapore and noted that the said agreement not only allowed the Appellant to be a sales representative for Aviat Singapore but also permitted the Appellant to distribute its products within the agreed territory. That accordingly, the Appellant did not, in its pleadings prove that it was an agent for Aviat Singapore for the services in question.

26. The Respondent submitted that from its review of the Appellant's documents in respect of the transactions in question, it established that there were no exported services offered by the Appellant to Aviat Singapore.

27. The Respondent asserted that the agreement between the Appellant and its alleged principal on the shipment of the equipment is clear that "risk or loss and title to the products and title to the tangible components of the products" are transferred from Aviat Singapore to the Appellant at the designated port of entry country within the territory.

28. It was therefore the Respondent's position that both risk and title to the equipment having passed to the Appellant, the Appellant was therefore the exclusive owner of such equipment, and therefore any sale and attendant services offered in respect of such goods could not be termed as services offered to Aviat Singapore.

29. It was further the Respondent's position that the fact that the Appellant acquires title in respect of the subject goods is further supported by Clause 3.2 (g) of the agreement of 2nd July 2022 between the Appellant and Aviat Singapore that it would repurchase at the Appellant's request, products which the Appellant does not sell within 90 days of receipt. The Respondent argued that the situation would have been different if the agreement was one for the return of the unsold products.

30. The Respondent further submitted that upon its audit of the Appellant's tax affairs and bank accounts, it was established that there were significant cash inflows from Safaricom Limited to the Appellant and that the Appellant in its statement before the Tribunal admitted that the inflows related to its sales of microwave routers to Safaricom Limited and even declared such sales for purposes of VAT.

31. The Respondent therefore submitted that given the fact that the products (microwave routes) to which the technical support related belonged to the Appellant, it was therefore unfathomable that such services could be considered services supplied by the Respondent to Aviat Singapore.

32. Regarding the place of consumption, the Respondent submitted that the services in question (technical support) were supplied by the Appellant in relation to goods that were owned and sold by them to both Safaricom Ltd and Airtel Networks Ltd for use and consumption in Kenya. The case of Commissioner of Domestic Services v Dutch Flower Group Kenya (Income Tax Appeal E101 of 2020) [2021] KEHC 23 7 (KLR) (Commercial and Tax) was cited by the Respondent in support of this position.

33. The Respondent maintained that the consumer of the sales services was Safaricom Ltd since the Appellant was selling its own products, which it had imported from its related entity. In return, the Appellant would invoice Safaricom who would in turn transfer the payments to the Appellant's account.

34. On the taxes arising from the variances between VAT declarations and income tax declarations, the Respondent maintained that the same was proper and in accordance with the law. That in any event, the Appellant did not dispute the variances. That the only reason provided by the Appellant was that the variances were attributable to technical fees earned from Aviat Singapore which they did not declare since the payments related to exported services.

35. The Respondent therefore submitted that having demonstrated that the services were indeed not exported and therefore not zero-rated, the same ought to have been declared and that the variances should therefore be brought to tax in the manner that it did, and as confirmed by the Tribunal.

36. Consequently, the Respondent urged this court to dismiss the appeal with costs in its favour.

Analysis and determination

37. This is an appeal from the Tax Appeals Tribunal to this court pursuant to Section 53 of the *Tax Procedures Act*, Cap. 469A of the Laws of Kenya which provides as follows; -

> " 53. A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the *Tax Appeals Tribunal Act* (Cap. 469A)"

38. Further Section 32 of the *Tax Appeals Tribunal Act* (Cap. 469A) provides that appeals from the Tribunal lie with the High Court and that the rules applicable in the High Court are those set out by the Chief Justice.

> " 32.
>
> (1) Appeals to the High Court on decisions of the Tribunal (1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.
>
> (2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice."

39. The Appeal to this court from the decision of the Tribunal being one limited to the points of law only, this court is not therefore expected to entertain an invitation to interfere with the factual findings of the Tribunal, except where it is shown that the Tribunal considered matters it should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).

40. In Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR the Court of Appeal, distinguishing between matters of law and matters of fact stated as follows: -

> " First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it, and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

41. Again, in Charles Kipkoech Leting v Express (K) Ltd & another [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That it should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated as follows; -

> "This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

42. I have carefully reviewed and considered the Appellant's memorandum of appeal dated 28th February 2024, the pleadings and proceedings from the Tribunal as well as the parties' submissions in support of their respective positions and note that the main issue for determination in this appeal is whether the services offered by the Appellant to both Safaricom Ltd and Airtel Networks Limited were provided for the use and benefit of Aviat Singapore, and therefore constituted exported services.

43. The other related issue for this court's determination is whether the Tribunal erred by upholding the Commissioner's Assessment based on the variances between the Appellant's VAT and Income Tax declarations.

44. I will therefore first examine whether the services in question were exported services, and therefore zero-rated, or whether the same constituted supply of services for use and consumption in Kenya and therefore taxable (vatable) at the standard rate, that is at 16%.

The Law

45. The applicable law on matters VAT is the *Value Added Tax Act*, 2013. Section 5 of the Act is the legal authority by which value-added tax is charged in Kenya. Subsection (1) identifies transactions upon which VAT is to be levied while subsection (2) prescribes the rate applicable in the following terms; -

> "5. Charge to tax
>
> 1. A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on—
>
> (a) a taxable supply made by a registered person in Kenya
>
> (b) the importation of taxable goods; and

(c) a supply of imported taxable services.

2. The rate of tax shall be—

a. in the case of a zero-rated supply, zero per cent; or

b. in any other case, sixteen per cent of the taxable value of the taxable supply, the value of imported taxable goods, or the value of a supply of imported taxable services.

46. The term “taxable supply” is defined under Section 2 of the Act to mean a supply, other than an exempt supply, made in Kenya by a person in the course or furtherance of a business carried on …… including a supply made in connection with the commencement or termination of a business.

47. From the above, it therefore follows that, unless specifically exempt under the Act, all supplies made in Kenya (whether for goods or services), made in the course or furtherance of business, are taxable (vatable), either at zero per cent (0%) or at the rate sixteen per cent (16%).

48. Section 7 of the VAT Act provides for zero-rating of supplies, in the following terms; -

“ 7. Zero rating

(1) Where a registered person supplies goods or services and the supply is zero rated, no tax shall be charged on the supply, but it shall, in all other respects, be treated as a taxable supply.

(2) A supply or importation of goods or services shall be zero-rated under this section if the goods or services are of the description for the time being specified in the Second Schedule.”

49. Among the supplies specified under Part A to the Second Schedule of the *Value Added Tax Act*, 2013 is the “exportation of goods or taxable services”. The Schedule is as follows; -

“ Second Schedule

Zero-Rating

Part A – Zero-Rated Supplies

Where the following supplies, excluding hotel accommodation, restaurant, or entertainment services where applicable, take place in the course of a registered person’s business, they shall be zero-rated in accordance with the provisions of section 7—

1. The exportation of goods or taxable services.

2. ……………………………….

3. ……………………………”

50. It is instructive to note that the term ‘services exported out of Kenya’ is defined under Section 2 of the Act to mean “services provided for use or consumption outside Kenya.”

51. The implication of zero rating of supplies (charging VAT at the rate of 0%) is that no VAT will be collected on such supplies. A trader dealing in zero-rated supplies will therefore not collect or remit to

the Commissioner any VAT arising from such sales/supplies. The trader is however permitted to claim the input VAT incurred in the course of making such supplies.

52. To the extent that businesses making zero-rated supplies are allowed to claim input VAT incurred in the course of making such supplies without being expected to remit to the Commissioner any VAT on such sales, such businesses are likely to be in a perpetual credit/refund position, especially where the proportion of their zero-rated sales/supplies (charged at 0%), is significantly higher the standard rated sales (for now 16%).

53. In the instant case, the Commissioner submitted that after realizing that the Appellant was in a perpetual credit position, it sought, vide its notice of 13th September 2021 to conduct a VAT credit verification and a general tax compliance check on the Appellant for the tax period 2018-2021.

54. Upon conclusion of the compliance check, the Commissioner, vide its letter of 25th May 2022 communicated its findings to the Appellant. The findings were that the Commissioner found that the Appellant had earned technical fees from both Safaricom Ltd and Artel Networks Ltd and declared such sales as zero-rated, and therefore not remitted to the Commissioner any VAT on the sales.

55. According to the Commissioner, the sales (supplies), not being exported services within the meaning of section 7 of the VAT Act as read with Part A, Paragraph 1 of the Second Schedule, ought to have attracted VAT at the rate of 16% and not the 0% declared by the Appellant. The Commissioner consequently reclassified the Appellant's VAT declarations on the technical fees earned by the Appellant from both Safaricom Ltd and Airtel Networks Ltd and charged VAT thereon at the rate of 16%.

56. The Appellant vide its letter of Objection dated 26th June 2022 objected to the Commissioner's additional Assessment stating that the Commissioner's basis of charging VAT at the standard rate (16%) on the technical fees was incorrect in law since the services were exported and therefore zero-rated.

57. The Appellant asserted, both in its letter of Objection to the Commissioner and at the Tribunal that its role is that of a limited risk distributor and a provider of sales representative and support services, without taking title to the goods. That in addition, Aviat Singapore provides support services (such as operating software upgrades, engineering assistance related to the products, training, etc.).

58. In a nutshell, it was the Appellant's position that the services in respect of which the technical fees were paid, was provided by Aviat Singapore through the help of Aviat Kenya (Appellant herein). That Aviat Singapore being located out of Kenya, then the Appellant's services/supplies to it were therefore exported services for use and consumption outside the country and therefore ought to be zero-rated.

59. From the parties' submissions, it is common ground that exported services are zero rated by dint of section 7 of the VAT Act as read together with the Second Schedule, Part A at paragraph 1 thereof. What is in dispute is whether, on the facts of this case, the services offered by the Appellant to Safaricom Ltd and Airtel Ltd were provided on behalf of Aviat Singapore and therefore exported services within the meaning of the VAT Act.

60. The question of whether the Appellant offered the subject services for the use and consumption of Aviat Singapore Ltd, is in my view, one of fact, which can be easily discerned from the agreement and conduct of parties.

61. It is however critical to bear in mind that the burden of proof in tax cases rests with the taxpayer (Appellant). In this case, it was incumbent upon the Appellant to demonstrate, by way of evidence, to

the satisfaction of the Commissioner, that the services were indeed offered on behalf of Aviat Singapore Ltd, an entity located outside Kenya, and therefore constituted exported services.

62. Section 56 (1) of the *Tax Procedures Act* which deals with the burden of proof in tax matters provides as follows; -

> " 56. General provisions relating to objections and appeals
>
> 1. In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect."

63. The justification for placing the burden of proof on the taxpayer in tax matters was clarified by the court in the case of *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021)* [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) where Mativo J, stated as follows; -

> " 47. Placing the burden of proof in tax cases on the taxpayer reflects the unique nature of the tax system. This is evident from the three-fold justifications for placing the burden on the taxpayer. These are: - (a) the presumption of correctness; (b) the government's need for revenue' and, (c) the taxpayer's possession of evidence.
>
> 48. The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The taxpayers' evidence must meet this minimum threshold."

64. In support of its submissions that the services in question were exported services, I note from the proceedings that the Appellant relied heavily on the "Support Service Agreement" of 2nd July 2011 between the Appellant and Aviat Singapore.

65. I have carefully reviewed the agreement and note that the same is a general agreement, a Master Service Agreement (MSA) between the parties, providing a broad framework, and defining in general terms the relationship between the Appellant and Aviat Singapore. The agreement provides for both goods and services and, in general terms, spells out the roles and responsibilities of each party.

66. It is critical to note that under the agreement, Clause 3.1 of the agreement provides as follows; -

67. In relation to goods, I note from the agreement between the parties that the Appellant is a limited-risk distributor (LRD) of equipment/goods from Aviat Singapore.

68. It is apparent from the agreement between the parties that while Aviat Singapore passes title to the goods to the Appellant at the designated port of entry (Clause 3.1), the arrangement between Aviat Singapore and the Appellant significantly limits the Appellant's risks in relation to the goods. For

instance, under clause 3.2(g), of the agreement, Aviat Singapore undertakes to buy back any products supplied to the Appellant but not sold within ninety (90) days from the date of receipt thereof. The Appellant equally has the right to return any unsold inventory of the Products to the Company for a full refund."

> " 3. 2 Terms and conditions of Distribution of products: when authorized to act as Company's distributor pursuant to section 3.1, Contractor shall adhere to the following guidelines and conditions in connection with the sale and distribution of the products; -
>
> (a) ....
>
> (b) "Contractor shall maintain an inventory of Products sufficient to meet anticipated sales for Products in the Territory. Notwithstanding the transfer of title to and risk of loss borne by Contractor pursuant to Section 3.2(d), Company shall bear the risk of any damage or loss to inventory held or maintained by Contractor under this Section 3.2(b) to the extent that such damage or loss is (i) not attributable to negligence caused by the Contractor and (ii) not otherwise recoverable after taking into account any policy or arrangement purchased or procured by Contractor to insure such inventory. The Parties further agree that the Contractor shall have the right to return any unsold inventory of the Products to the Company for a full refund."

69. From the proceedings, it is evident that there was no dispute regarding the tax/VAT treatment of the products/goods 'bought' by the Appellant from Aviat Singapore and subsequently sold to Safaricom Ltd or Airtel Ltd. The Appellant declared these sales under its name and accounted for both VAT and income tax. The dispute between the parties related mainly to the provision of services under the agreement.

70. The Appellant argued that Paragraphs 5.2 and 5.7 of the Sales Support Agreement provides for Advertising and Promotional Services and Customer support respectively, and that the tribunal erred in failing to find that those services were offered for the use and consumption of Aviat Singapore.

71. I have carefully reviewed the Sales Support Agreement and while I agree with the Appellant's submissions that the agreement provided that there are certain services (including sales support, advertising, and promotional services) that would be offered by the Appellant on behalf of the Aviat Singapore, I find no evidence adduced by the Appellant that such services were indeed offered and how the Appellant was compensated for the services.

72. While I agree with the decision in the case of Coca-Cola Central East & West Africa Limited V Commissioner Of Domestic Taxes [2020] eKLRthat exported services are zero-rated for VAT purposes and that the location of the recipient of such a service is the guiding factor as to the place of consumption, it is however my view that the burden of proving that the services were indeed offered for use and consumption outside Kenya lies with the provider of such services, the Appellant herein.

73. The Appellant needed to prove and distinguish and demonstrate by way of evidence, how much of its sales related to the supply of equipment/goods (for which it admits are subject to VAT) and what portion of those sales related to the supply of services. Further, in relation to the supply of services, it was also imperative upon the Appellant to demonstrate, again, by way of credible evidence, which of the services were supplied on behalf and for the benefit (use and consumption) of Aviat Singapore.

74. It was not enough for the Appellant just to produce an agreement, which is quite general, without clearly specifying which of the services listed in the agreement were actually offered to Aviat Singapore and how they were remunerated for the same during the tax period in question.

75. I have carefully reviewed the record of appeal and note that the Appellant adduced no evidence of the existence of any contract between the Kenyan entities and Aviat Singapore on whose behalf the Appellant allegedly offered the services in question. In my view, the Appellant needed to specifically demonstrate that there existed a contract for the supply of the services between the Kenyan entities and Aviat Singapore and that the Appellant was engaged by Aviat Singapore to offer those specific services on its behalf.

76. The need for specificity regarding the actual services offered is critical, particularly considering that VAT is transaction-based.

77. Since VAT is transaction-based, it is important that the specific services supplied be clearly identified (and the recipient thereof – that is the person for whose business use and consumption) the services were been provided – This was the duty of the Appellant pursuant to section 56 of the TPA.

78. Additionally, it was also imperative for the Appellant to demonstrate how invoicing and payment for the services in question were being done and how they were being remunerated for the same. In instances where invoicing and/or payment was to be done by the Appellant on behalf of Aviat Singapore, it was equally necessary, in my view, for the Appellant to demonstrate how the monies received from the Kenyan entities were eventually remitted or otherwise accounted, for the benefit of Aviat Singapore.

79. In any event, I have perused the record of appeal and note that in a number of instances, the Appellant invoiced and directly received payments from the Kenyan entities (Safaricom and Airtel) for the services in question. For instance, on 10th September 2021, the Appellant invoiced (Invoice No….) and received from Safaricom an amount of Kshs. 565,692.00/- for services that were described in the invoice as "Civil works installation services-optimization, microwave installations, and upgrades; Supply for additional material for Turkana North MW Upgrades."

80. It is also critical to note that on the Appellant's invoice of 10 November 2021, the Appellant levied a VAT (at the rate of 16%) of Kshs. 90,510.72/—on the invoice amount, and Safaricom eventually paid the Appellant a total of Kshs. 656,202.72/— (inclusive of VAT).

81. Having levied VAT at the rate of 16% in its invoice indicated in the foregoing paragraph, the Appellant cannot, in law, turn around and argue that the services were exported and therefore zero-rated under the VAT Act. The law is that VAT on exported services (zero-rated supplies) should be charged at the rate of 0% and that no VAT is to be collected from such supplies.

82. From the above, the question that may be asked, for instance, is; for whose use and consumption were the services of "Civil works installation services-optimization, microwave installations, and upgrades; Supply for additional material for Turkana North MW Upgrades, billed vide the Appellant's invoice No. 66003088 of 10th November 2021? While it may very well be argued that the above services are for "the use and consumption" of Aviat Singapore to the extent that the services will help boost its sales and customer loyalty within Kenya, that in my view, would be stretching the reasoning/argument too far.

83. From the record, it is common ground that the underlying equipment, though sourced from Aviat Singapore by the Appellant, was sold by the Appellant, under its name, to Safaricom. Any installation works in respect of such equipment cannot be exported services "for the use and consumption" of Aviat Singapore.

84. In the circumstances, I hold and find, as the Tribunal did, that the Appellant did not provide sufficient evidence, of the specific services which they supplied for the "use and consumption" of Aviat Singapore.

85. Finally, regarding the Appellant's argument that the Respondent ought not to have come with additional assessment since the Appellant's objection to the same had not been invalidated under Section 51(4) of the *Tax Procedures Act*, it is the position of this court that the mere fact that no invalidation notice was issued under s. 51(4) does not of itself mean that the Appellant's position had been accepted.

86. For the reasons set out above, the appeal herein fails and the same is hereby dismissed with costs to the Respondent.

87. It is so ordered

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant

N/A............for the Appellant.

Almadi............ for the Respondent.