



**Commissioner of Domestic Taxes v Bid Management Limited (Income Tax Appeal E010 of 2024)  
[2024] KEHC 16709 (KLR) (Commercial and Tax) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16709 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E010 OF 2024  
BM MUSYOKI, J  
NOVEMBER 22, 2024**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**BID MANAGEMENT LIMITED ..... RESPONDENT**

*(Being an appeal from judgment of Tax Appeals Tribunal  
dated 24th November 2023 in its appeal number 1117 of 2022)*

**JUDGMENT**

1. The appellant is established under Section 3 of the [Kenya Revenue Authority Act](#) Chapter 469 of the Laws of Kenya. Its mandate is to act as an agency of the Government of Kenya in assessing, collecting, receiving and accounting for all the government revenue. The appellant is a company registered in Kenya and for that matter liable for payment of taxes through the appellant. Part I and II of the First Schedule of the [Kenya Revenue Authority Act](#) give the laws which the appellant is mandated to administer and enforce including for the purpose of this appeal, [Value Added Tax Act](#) chapter 476 of the Laws of Kenya.
2. In exercise of its mandate to administer [Income Tax Act](#) and Value Added Tax, the appellant on 27<sup>th</sup> July 2021 selected the respondent for tax audit in relation to its level of compliance with the VAT Act and according to the appellant, the respondent was upon audit found to have been non-compliant for the period between 2017 and 2019. This was followed by VAT default assessment for the respondent posted in the appellant's iTax portal on 7<sup>th</sup> June 2022. The appellant went on to make an additional assessment on 4<sup>th</sup> March 2021. The total of the additional assessment with penalties was Kshs 6,617,956.00. The assessment was in respect of income earned from a company known as AIB Capital Limited which was a registered stock broker.



3. The respondent objected to the assessment through various letters done by its tax consultants one Thakrar Financial Consultants. These letters are on pages 6 to 227 of the further supplementary record of appeal dated 6<sup>th</sup> June 2024 filed by the respondent. The said letters explain at length the business of the respondent in relation to the transactions subjected to the appellant's audit and assessment. Going by the contents of these letters, the services for which the payment in contention was done are exempted from VAT under part II of the First Schedule of the VAT Act 2014 specifically paragraphs (k) and (m) since they were in stock trade or brokerage.
4. After the respondent objected to the assessment, the appellant dismissed the objection and upheld its assessment which prompted an appeal by the respondent to the Tax Appeals Tribunal under Section 52 of the *Tax Procedures Act*. On 24-11-2023, the tribunal returned a verdict in favour of the respondent which has culminated to this appeal. In the appeal, the appellant has raised the following grounds of appeal;
  1. The Honourable Tribunal erred in law in finding that the tax assessment in relation to VAT amounting to Kshs 6,617,956 were not justified.
  2. The Honourable Tribunal erred in law and fact by finding that the respondent was exempted from VAT payable.
  3. The Tribunal erred in law by finding that the appellant ought not to have assessed the respondent for commission income earned from AIB Capital Ltd for VAT.
5. This appeal was heard by way of written submissions. The appellant filed its submissions dated 14<sup>th</sup> August 2024 while the respondent filed its submissions dated 1<sup>st</sup> October 2024. The appellant maintains that the money received from AIB Capital Limited was for services which were subject to VAT. According to the appellant, the respondent did not provide any document to support its position that the services it provided to AIB Capital Limited were exempt from VAT. The appellant contends that the respondent is not a registered stock broker and as such, it did not trade or have any dealings in shares on behalf of any investors. It is the appellant's stand that the respondent did not deal with the investors and that the investors paid directly to the said AIB Capital Limited. It is on this background that the appellant maintains that the respondent's income earned from sourcing for clients on behalf of AIB Capital Limited could not fall under paragraph 1 (k) and (m) of Part II of the First Schedule to the VAT Act and as such they are not exempted services.
6. On its part, the respondent maintains that the services it offered to AIB Capital Limited were exempt from VAT since its agreement with AIB Capital Limited was for provision of stock brokerage agency services on a 50:50 commission sharing from what AIB Capital Limited earned from investors. The respondent does not deny receiving the payment from AIB Capital Limited. It admits that it was not registered as a stock broker but argues that, the fact that it was an agent of AIB Capital Limited which was a registered broker meant that it was involved in sourcing clients for the principal and ensuring continued relationship between the investors and the broker. It maintains that AIB Capital Limited was not dealing with the investors directly but through the respondent where the respondent was the primary point of contact.
7. Having read through the record of appeal and the submissions by the parties, I discern that the parties are in agreement that the money was earned by the respondent from its dealing with AIB Capital Limited for the period in question. The point of departure of the parties is that while the appellant takes position that the services were not exempt from VAT, the respondent maintains that they were exempt. According to the appellant, the respondent was providing consultancy services whereas the respondent categorises the income as commission from stock brokerage services. So much so that if



this court were to find that the services fell in the category of the exempted services, this appeal would lack merit while a contrary finding would mean that the appeal succeeds.

8. The burden of proving that the services are exempted from VAT was on the respondent. The appellant's position is that the services were not on agency relationship but consultancy services. The appellant admits that the word agent is not defined in the VAT Act and submits that the court should adopt the definition in the *Capital Markets Act* where it is defined as follows;

‘agent’ means any person appointed in writing by a licensed person, except in a derivative market, to perform any of the functions ordinarily performed by the licensed person on behalf of that licensed person.”

9. In my considered view, the above definition would perfectly fit in the relationship between the respondent and AIB Capital Limited. The said AIB Capital Limited was a licensed person and it is common ground that there was a written agency agreement between the two. Even without definition of an agent in the statutes, it would not require rocket science or special language to define who an agent is. In my mind, an agent is someone or entity who acts or performs some identified duties on behalf of another called the principal, under an agreement such that whatever the agent does is taken as the principal's act. It should not be hard for anyone to understand the agent/principal doctrine. Faced with similar situation in *Commissioner of Domestic Taxes v W.E.C. Lines (K) Limited (2022) KEHC 57 (KLR)*, Honourable Justice D.S. Majanja held as follows;

‘It is not in dispute that the respondent was an agent of WEC BV and that their relationship was governed by the Agency Agreement. As an agent, it follows that any contract or contact made by the respondent to a third party is essentially a contractual relationship between the principal and the third party and that all actions by agents are deemed to be those of the principal.’

10. On the other hand, consultancy, in my view involves an engagement where the consultant is retained at a fee to advise the appointing person on a specifically defined aspect or field of competency. In other words, consultancy is the exercise of giving an expert advice on a particular subject. In *Republic v Kenya Revenue Authority, Ex parte Stanbic Bank Kenya Limited (2007) eKLR* Honourable Justice R.V. Wendoh adopted the definition of consultancy fees in the *Income Tax Act*, thus;

‘Section 2 of the Income Come Tax defines consultancy fees as payments made to any person acting in advisory capacity or provided services on consultancy issue.’

11. I think this is a clear case where I can adopt the same definition and in doing so, it is my finding that what the respondent was receiving from AIB Capital Limited was not consultancy fees.
12. According to the appellant, since the respondent was not dealing directly with the investors, he could not be considered as an agent but a consultant. The appellant based its argument on the position that the investors would open CDS accounts with AIB Capital Limited and not the respondent. In my view, this is position is too narrow and selective. My understanding is that CDS accounts are not operated at the stock brokers' system but the Central Depository Services Limited where an investor can be represented or managed by different brokers. The fact that the eventual payment for the brokerage services goes directly to the stock broker does not remove the broker's agent from the chain of stock trade.
13. I have seen some terms of the agency agreement between the respondent and AIB Capital Limited which appears at pages 62 and 63 of the record of appeal. Clause 7 of the said agreement which the appellant has not disputed has 23 subclauses which all bespeak of agency and principal relationship. I



cannot see this agreement in any definition other than agency agreement. It is therefore my finding that the respondent had been engaged by AIB Capital Limited as an agent and not independent consultant.

14. There is no dispute that the respondent was getting 50% commission on the business brought by the clients through it and not a salary or a scaled consultancy fees. It is illogical that the appellant admits that AIB Capital Limited was exempt from VAT on the same services from which it paid the respondent 50% commission and at the same demand VAT from the respondent on the same. If the respondent was to pay VAT on the same commission, it would automatically mean that it will not be getting 50% of the earning from the business as per the agreement. In such a case, I hold the view that the scenario would breach the tax principle of equality or equity and in violation of Article 201(b)(i) of *the Constitution*. It will amount to applying different taxation on the respondent and the appellant in respect of the same source, earning and category of income.
15. Another argument by the appellant is that since the respondent was not registered as a stock broker, its services were not exempted. What I understand from this argument is that registration as a stock broker is a prerequisite to the exemption. That position is in my opinion stretching the classification beyond what the law provides. If the legislature intended to make it mandatory for the agent to be registered stock brokers in order to qualify for exemption, nothing would have been easier than expressly stating so. Paragraph I (k) and (m) of Part II of the First Schedule of the VAT Act 2013 provides that the following services are exempted from VAT;
  - k. the issue, transfer, receipt or any other dealing with bonds, sukuk, debentures, treasury bills, shares and stock
  - m. the provision of the above financial services on behalf of another on a commission basis.
16. The appellant has no problem with placing AIB Capital Limited under paragraph I(m). Similarly, this court sees no problem in placing the respondent under paragraph I(k) in relation to AIB Capital Limited. Nothing in this section of the law demands that the agent be a registered stock broker before its services qualify for exemption. I therefore find that argument by the appellant unpalatable.
17. The upshot of my above analysis is that I find not merit in this appeal. The decision of the tribunal was sound and there is no need to disturb it. This appeal is therefore dismissed with costs to the respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered online in presence of:

Mr. Chelangat the appellant; and

Miss Gakure for Miss Wairoto for the respondent.

