Commissioner of Domestic Taxes v Swift East Africa Limited (Tax Appeal E201 of 2021) [2023] KEHC 1271 (KLR) (Commercial and Tax) (17 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1271 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E201 OF 2021

A MSHILA, J

FEBRUARY 17, 2023

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

SWIFT EAST AFRICA LIMITED ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeal Tribunal delivered at Nairobi on 8th October, 2021 in Tax Appeal No. 2 of 2020)

JUDGMENT

1. The Respondent is a limited liability company registered under the Laws of Kenya as a subsidiary of SWIFT SCRL, Belgium. Its core business is promoting the parent company's business of provision of secure financial messaging services. It lodged a VAT refund claim for Kshs 1,686,397/- for the period between September, 2015 and December, 2016 on the grounds that the services rendered to parent company amounted to exported services where all the VAT suffered locally should be refunded to them.

2. The Appellant declined the Respondent's refund claim and the Respondent filed an objection to the Appellant's decision to decline the refund. The Appellant reviewed the objection and reaffirmed its decision to decline the refund in its letter dated November 19, 2019.

3. The Respondent preferred an appeal to the Tax Appeals Tribunal and in its decision dated October 8, 2021 the Tribunal held in the Respondent's favour. The Tribunal allowed the appeal, vacated the Appellant's decision declining the refund and upheld the Respondent's claim for refund. Aggrieved by this decision, the Appellant filed the instant appeal on the following grounds;-

    a. The Tribunal erred in fact and in law in finding that the services offered by the Respondent were in the nature of exported services falling under Section 2 of the VAT Act, 2013;

b. The Tribunal erred in fact and in law in finding that the Respondent's claim for input VAT is merited under Section 17(1) of the VAT Act, 2013; and

c. The Tribunal erred in fact and law by upholding the Respondent's claim for refund for VAT amounting to Kshs 1,686,397.

4. The appeal was canvassed by way of written submissions which counsel for respective parties highlighted as follows;-

The Appellant's Case

5. The Appellant submitted that the services offered by the Respondent are not export services and should therefore be charged VAT at the standard rate of 16%. The agreement between the Respondent and parent company provides that the Respondent shall receive a service fee for the provision of its services. A cursory perusal of the agreement reveals that the parent company is the 'customer' of the services but an in-depth interrogation shows that the benefit from the services accrued within Kenya.

6. The Appellant relied on the Indian case of *Paul Merchants Ltd v CCE Chandigarh [2012] TMI 424-CESTAT*, Delhi LBJ where the Tribunal observed;-

> ' Even though the services in question were rendered in India the word 'used' could not be equated with the word 'performed' especially where the benefit of the service provided accrued outside India. Further in the case of Ms Microsoft Corporation (1)(P) –vs- Commissioner of Services New Delhi. WP (c) No 1460/2009 (Also an Indian Authority)n the Tribunal concluded that the words 'used outside India' referred to the place where the benefit of the service accrued.'

7. The services offered by the Respondent are beyond generic promotional and marketing services. According to Article 3 of Appendix 1 of the agreement they include operational services; sales support; educational and consulting services; ordering and customer support together with general support services. Court has to interrogate the services on a case by case basis to determine whether they were exported services. The alleged exported services include;-

a. Audit services;

b. Commercial rent;

c. Secretarial services;

d. Professional services by E & Y; and

e. Professional services by PWC.

8. For the audit fees, the Respondent did not provide a tax invoice disclosing the nature of service exported as required by Section 42(1) of the VAT Act. The requirement in Section 42(1) of the VAT Act that the nature of services be captured on the invoice is not cosmetic. The Tribunal overlooked this provision by referring to 'intercompany services' without verifying what that meant. This denied the Appellant the opportunity to link the expenses in question to the reported revenue. The Tribunal relied on the agreement to justify the Respondent's omission. The Appellant relied on *Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64* where it was stated;

> ' The meaning of the words of the VAT Act are clear and in interpreting them, the court must not read in or imply anything not clearly stated.'

9. The audit services were consumed in Kenya. Article 4 of the General Master Agreement recognizes the affiliate's operations as those of a subsidiary. Article 4 shows that the Respondent possesses the autonomy to control the circumstances, conditions, work schedule, mode of completion and operating means it uses to perform the services.

10. The Respondent expends some expenses in offering these services such as conducting physical and virtual conferences and offering sales support to its customers within Kenya and East Africa. Article 1 of Appendix 1 of the agreement recognizes that in particular occasions, income can be received hence there is an inevitable need for audit services. Therefore audit benefited the Respondent and cannot be said to have been consumed outside Kenya.

11. Commercial rent also does not qualify as exported services. Rent is expended when a corporation is in occupation of a business premise. The benefit of such an office space where training and presentations are conducted can only be said to be consumed in Kenya. The settlement of a rent invoice inclusive of VAT cannot amount to exporting a service.

12. The Respondent also did not specify how it offered secretarial services. It only provided generic invoices to the Appellant to decide on its VAT refund claim. If the Respondent hired Axis Kenya to offer secretarial services, these services would include ensuring effective and efficient implementation and execution of management policies; ensuring the company works in accordance with the rules and regulations of the company's policy; ensuring corporate governance norms are being complied with; formulated decisions on which the structured of the company administration is constructed and ensuring compliance with statutory filing requirements. All these services would only benefit the Respondent in Kenya. According to Section 708 of the *Companies Act*, 2015 the officers of the company are liable for failure of the company to file annual returns on time.

13. The Respondent also alleged that it offered exported services to the parent company in the nature of professional services provided by E & Y and PWC invoiced as 'intercompany services'. The term 'intercompany services' is vague and contrary to section 42 of the VAT Act. The recipient and beneficiary of these services was the Respondent. Any advice on tax matters and transaction advisory was consumed by the Respondent who was the first port of call in the course of provision of these services.

14. The appellant urged the court to move beyond the veil of the generic names employed by the Respondent and to isolate the particulars that constitute the specific alleged exported services. All the services were consumed in Kenya. The Respondent failed to discharge its burden of proof provided under Section 56 of the VAT Act.

15. The business model adopted by the Respondent is devised to avoid and/or minimize VAT liability. The Appellant urged to court to depart from the main rule principle. The OECD Guidelines foresee that there will be specified and exceptional circumstances where the place of taxation will vary from the main rule. Reliance was placed on Guideline 3.6 which states;-

> ' The taxing rights over internationally traded services or intangibles supplied between businesses may be allocated by reference to a proxy other than customer location laid down as laid down in Guideline 3.2 when both the following conditions are met;-
>
> a. The allocation of taxing rights does not lead to an appropriate result when considered under the following criteria
>
> -Neutrality

-Efficiency of compliance and administration

-Certainty and simplicity

-Effectiveness

-Fairness

b. A proxy other than customer location would lead to a significantly better result when considered under the same criteria.'

16. The application of the main rule offends the cardinal principles of taxation above. The alleged exported services were locally consumed and such any benefit derived was to the Respondent. The ambiguity of determining usage and consumption makes the administration and compliance of VAT troublesome. The principles of certainty and simplicity are undermined.

17. The general master agreement shows that there is no clear way in which the Respondent bears its tax burden. The Respondent seeks that even tax that has crystallized be treated as zero-rated.

18. Since the services offered do not meet the threshold of exported services, the alleged claim for input VAT is unmerited. Appendix 1 of the agreement provides that the affiliate is to be reimbursed in accordance with SWIFT's global transfer pricing policy. Under Article 4 of Appendix 1 of the agreement the parties agreed to employ the cost-plus method to determine an arm's length remuneration for the prices provided. The Tribunal erred by finding that the provision for reimbursement was inexistent.

19. The Respondent is not deserving of refund of input VAT since it has not satisfied the provisions of section 17(5)(a) of the VAT Act which provides that only registered person who makes zero rated supplies can claim any excess. The Respondent urged the court to set aside the Tribunal's decision dated October 8, 2021 and uphold the Appellant's decision declining the Respondent's claim for a VAT refund.

RESPONDENT'S CASE

20. The Respondent executed an agreement with SWIFT SCRL, Belgium, for providing marketing and sales support services. The Respondent treated the marketing and sales support services provided to SWIFT SCRL as exported services pursuant to the Second Schedule to the VAT Act, 2013 which provides that export of taxable services is zero-rated for VAT purposes. It hence sought for VAT refund for the exported services.

21. At the hearing before the Tribunal, the Respondent's witness testified that the Respondent only had three employees. The Respondent therefore lacked capacity to provide education or training. Its role was limited to marketing and sales support services to SWIFT SCRL. These services create awareness of SWIFT SCRL's products with special focus on target groups such as banks. The Respondent delivers presentations on SWIFT SCRL's products during local conferences, workshops or events and generally informs target groups about the SWIFT SCRL's environment and how to leverage the use of these solutions.

22. The Respondent's witness testified that the Respondent's role involves creating awareness of SWIFT SCRL's products and services in Kenya and other East African countries. By creating awareness of SWIFT SCRL's messaging service, this leads to an increase in sales of SWIFT SCRL's products which in turn leads to an increase in revenue for SWIFT SCRL in Belgium. SWIFT SCRL is therefore the beneficiary of the marketing and sales support services provided by the Respondent.

23. SWIFT SCRL provides secure financial messaging services through standardized proprietary platform together with products and services to facilitate access and integration, identification, analysis and regulatory compliance for banking and security organizations. The Respondent does not provide services to any entity in Kenya or sell SWIFT SCRL's products. If entities in Kenya wish to purchase SWIFT SCRL's products they contact SWIFT SCRL who sells the products directly to them.

24. The Appellant set out the full range of services that are anticipated in the standard form General Master Agreement between the Respondent and SWIFT SCRL and erroneously claimed that the Respondent offered services such as operational services, educational and consulting services, ordering and customer support together with general services to SWIFT SCRL. This issue was not raised in the Appellant's pleadings before the Tribunal neither was any evidence adduced that the Respondent provided other services apart from marketing and sales support.

25. The Respondent's evidence before the Tribunal was restricted to sales support services. The onus is on the Appellant to prove the other alleged services offered, The Respondent's witness confirmed that even though the agreement makes for various services, it is a standard form agreement and the only services that were provided by the Appellant to SWIFT SCRL, Belgium, are marketing and sales support services. The Appellant only has three employees who do not have training or capacity to provide other services.

26. The Second Schedule to the VAT Act 2013 provides that the exportation of taxable services is zero rated for VAT purposes. A service exported outside Kenya is defined in the VAT Act as 'a service provided for use or consumption outside Kenya'. The words 'use or consumption' are not defined in the VAT Act. The High Court in *Unilever Kenya Limited v Commissioner of Income Tax [2005]eKLR* paved the way for use of international best practice where our tax laws do not provide adequate guidance.

27. In the absence of a definition, the High Court has in several decisions relating to the determination of export of services applied the Organization for Economic Co-operation and Development (OECD) International VAT/GST Guidelines (OECD VAT GUIDELINES) to determine where use or consumption of a service occurs. The overriding principle of the OECD VAT Guidelines is to set forth a tax-neutral, destination-based system (the destination principle) which is contained in Guideline 3.1.Guideline 3.2 of the OECD VAT Guidelines provide for the mechanism to apply the destination principle to services as follows;-

> ' For business-to-business supplies, the jurisdiction in which the customer is located has the taxing rights over internationally traded services or intangibles.'

28. The High Court in *Coca Cola Central East and West Africa Limited v the Commissioner of Domestic Taxes (Tax Appeal No 19 of 2013*, *Google Kenya Limited v Commissioner of Domestic Taxes Civil Appeal No E004 of 2021* and *Commissioner of Domestic Taxes v WEC Limes (K) Limited Tax Appeal No E084 of 2020* has focused on the following three main questions in determination of the issue of export of services;-

    a. Who is the customer of the services being provided?

    b. Is the location of the customer the correct location for charging VAT?

    c. Where does the benefit of the service accrue?

29. On whether SWIFT SCRL is the customer of the Respondent, the Respondent relied on Coca Cola Central East and West Africa Limited v the Commissioner of Domestic Taxes (Supra) where the court acknowledged that the marketing services provided by Coca Cola Central East and West Africa

(CCCEWA) to Coca Cola Export in the United States was a business-to-business supply. The Court applied the OECD VAT Guidelines in addressing the issue of identifying the customer of the supply. The court stated that the identity of the customer is established by referring to the business agreement. The Respondent's witness testified that the Respondent had entered into an agreement with SWIFT SCRL for provision of services that involve creating awareness of SWIFT SCRL's products. SWIFT SCRL is therefore the customer of the Respondent and that there is a business-to-business relationship between SCRL and the Respondent. The Appellant also admitted that the Respondent does not have any other customer and exclusively works for the parent company.

30. On whether Belgium is the correct location for charging VAT for the services rendered by the Respondent, the Respondent relied on Guideline 3.2 of the OECD VAT Guidelines which provides that for business-to-business supplies, the jurisdiction in which the customer is located has the taxing rights over internationally traded services or intangibles. The Respondent also cited Coca Cola Central East and west Africa Ltd v the Commissioner of Domestic Taxes (supra) which relied on the destination principle contained in the OECD VAT Guidelines.

31. On where the benefit of the service accrue, the Respondent relied on Commissioner of Domestic Taxes v WEC Lines (K) Limited Tax Appeals No E084 of 2020 where the court held that marketing services provided to non-resident persons are for the benefit of the non-resident. The Respondent's witness testified that the purpose of the marketing and sales support services provided by the Respondent to SWIFT SCRL was to increase sales of SWIFT SCRL's messaging services. The benefit of services therefore accrues to SWIFT SCRL in Belgium, outside Kenya.

32. The Appellant confirmed that the services provided to SWIFT SCRL are exported services since it stated in its objection decision that only those inputs that related directly to the commission earned will be eligible for the refund as opposed to the aggregate third party cost. The Appellant affirmed that the Respondent's refund arose from making zero rated supplies. However, in the objection decision, the Appellant restricted the export of service to the mark-up that the Respondent charged SWIFT SCRL rather than the entire income earned by the Respondent. The Tribunal correctly found that the Respondent was entitled to claim the input VAT against the value of the taxable supplies and not just restricted to the mark-up.

33. By applying the OECD VAT Guidelines and the cited cases, the taxing rights for the services provided by the Respondent to its customer, SWIFT SCRL, would accrue to the jurisdiction in which SWIFT SCRL is located, which is in Belgium. The marketing and sales support services were exported services pursuant to Section 2 of the VAT Act, the Second Schedule to the VAT Act and the OECD VAT Guidelines.

34. In reply to the Appellants submissions, the Respondent stated that the Appellant did not claim that the marketing and sales support services were locally consumed in its pleadings. This issue was brought up later as an afterthought in its submissions before the Tribunal. The Appellant also dropped its assertion in the pleadings that the Respondent was entitled to a refund on the part of exported services relating to mark-up charged to SWIFT SCRL.

35. The Appellant introduced a new ground that the Kenyan banking and security organizations were the users and consumers of the services offered by the Respondent. This is because they are the persons to whom the impact of the marketing and sales support services lie. This argument by the Appellant on export of services has been rejected by the court in the cases cited above by the Respondent.

36. Even if the banks and other entities attending the conferences in which the Respondent marketed SWIFT SCRL's products benefitted from the services, this would not make them consumers of the marketing and sales support services. The Respondent relied on paragraph 3.48 of the OECD VAT

Guidelines which is to the effect that even if marketing or maintenance services under the agreement between the Respondent and SWIFT SCRL were provided to purchasers of SWIFT SCRL's products, the taxing rights would still accrue to the jurisdiction in which SWIFT SCRL is located, which is Belgium.

37. The Appellant introduced a new issue that the Respondent and its officers in Kenya benefitted from these services. This is an attempt to support the alleged assertion that the services were used or consumed in Kenya. The Appellant's claim before the Tribunal however was that the banking and the security organizations are the users and consumers of the service.

38. Without citing any clause in the agreement between the Respondent and SWIFT SCRL, the Appellant erroneously stated that the Respondent provided the following services to SWIFT SCRL;-

    a. Audit fees;

    b. Commercial rent;

    c. Secretarial services;

    d. Professional services by E & Y; and

    e. Professional services by PWC.

39. The fees cited by the Appellant represent the costs incurred by the Respondent in providing the marketing and sales support services to SWIFT SCRL. The Respondent's costs of running its business such as rent are not exported services and the Respondent did not state so in any of its pleadings. Neither did the Respondent represented that it offered audit services as exported services as alleged by the Appellant.

40. The agreement between the Respondent and SWIFT SCRL provides that the value of the service will be determined in accordance with SWIFT SCRL's global transfer pricing policy and the Respondent's Statement of Facts before the Tribunal shows that transfer pricing method agreed upon was Cost Plus Method. The Cost Plus Method is accepted as a transfer pricing method for determining the market value of transactions between related parties under the *Income Tax Act*. The Respondent relied on Unilever Kenya v The Commissioner of Income Tax (ITA No.753 of 2003).

41. In applying the Cost Plus Method, the Respondent determines the amount that it needs to charge for its services to SWIFT SCRL by first considering the cost incurred in rendering the service and thereafter adding 5% mark-up in accordance with the Respondent's transfer pricing policy. This invoice for the entire amount of cost plus mark-up to SWIFT SCRL forms the basis for the Respondent's income. This is in accordance with Section 13 (1) of the VAT Act which provides that the taxable value of a supply shall be the consideration for the supply or if the supplier and recipient are related, the open market value of the supply.

42. The Respondent applied the Cost Plus Method to determine the open market value of the supply. The Appellant's claim that these costs are services provided to SWIFT SCRL lacks basis in law.

43. The appellant stated that the Respondent failed to provide a tax invoice sufficiently disclosing the nature of services exported with regards to audit fees. This is misleading since the services offered by the Respondent are marketing and sales services, not audit fees. The Respondent cannot provide a tax invoice of audit fees yet that is not what it exported to Belgium.

44. The respondent's sole business is marketing and sales support services to SWIFT SCRL as captured in the agreement between the Respondent and SWIFT SCRL. These are the only services that

the Respondent can bill SWIFT SCRL which it did in the invoices attached to the Respondent's Statement of Facts and described as 'intercompany services.' The Appellant's attempt to portray 'intercompany services' as being ambiguous lacks merit. The Respondent urged the court to dismiss the appeal with costs.

ISSUES FOR DETERMINATION

45. This appeal only raises one germane issue for determination;

> 'Whether the services offered by the Respondent to SWIFT SCRL constitute exported services hence zero-rated and amenable for VAT refund;'

ANALYSIS Whether the services offered by the Respondent to SWIFT SCRL constitute exported services hence zero-rated and amenable for VAT refund;

46. Before delving into the analysis of this issue, it is noteworthy that Section 56 (2) of the *Tax Procedures Act* provides that an appeal to this court or to the Court of Appeal shall be on a question of law only.

47. Section 2 of the VAT Act defines services exported outside of Kenya to mean a service provided for use or consumption outside Kenya. Paragraph 1 of Part A of the Second Schedule to the Act provides for zero-rating of exportation of goods or taxable services for VAT purposes.

48. The place of use of the service is key in determining whether a service is an exported service. However, our VAT legislation does not provide guidance on how to determine the place of 'use' or 'consumption' of exported services. In absence of such guidance this court is at liberty to draw inspiration from international best practices. The practice in our courts has been to be guided by the Organization for Economic Cooperation and Development (OECD) VAT Guidelines. The court in Coca-Cola Central and West Africa Ltd v Commissioner of Domestic Taxes [2020]eKLR stated;-

> ' The statute itself does not flesh out the two important phrases that appear in the definition provision, 'use or consumption outside Kenya' and 'performed in or outside Kenya'. The Guidelines are, therefore, an invaluable tool in determining the place of use and consumption where, like here, it is not readily apparent that a service is used or consumed in Kenya.'

49. Guideline 3.1 provides;-

> ' For consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption'

50. The above guideline is meant to achieve VAT neutrality in international trade through the implementation of the 'destination principle'. The destination principle is designed to ensure that tax on cross-border supplies is ultimately levied only in the jurisdiction where the final consumption occurs, thereby maintaining neutrality within the VAT system as it applies to international trade.

51. Guideline 3.2 provides;-

> ' For business-to-business supplies, the jurisdiction in which the customer is located has the taxing rights over internationally traded services or intangibles.'

52. Guideline 3.2 further elaborates that;

> ' The jurisdiction of the customer's location can stand as the appropriate proxy for the jurisdiction of consumption as it achieves the objective of neutrality. This is the jurisdiction where the customer has located its permanent business presence.'

53. The import of this rule is that the country with the taxing rights over internationally traded services should be the country of the customer's location.

54. Guideline 3 guides on determining customer location as follows:-

> ' The identity of the customer is normally determined by reference to the business agreement'.

55. As to what is a business agreement, the Guideline provides:-

> ' Business agreements consist of the elements that identify the parties to a supply and the rights and obligations with respect to that supply. They are generally based on mutual understanding.'

56. The Appellant acknowledges that exported services are zero-rated and that the OECD VAT Guidelines are applicable in Kenya. It however seeks the court to avoid applying the principles to the Respondent's services alleging that the Respondent has modeled its business to avoid VAT liability. The Appellant averred that an in-depth interrogation would show that the benefit of the services offered by the Respondent accrued in Kenya and that SWIFT SCRL was not the customer.

57. The Appellant also stated that the services offered by Respondent went beyond the generic promotional and marketing services. They included audit services, communication services, secretarial services and professional services. The Appellant also claimed that the Respondent did not provide tax invoices showing the nature of services offered.

58. An analysis of the documents and evidence adduced before the Tribunal and this court indicate that Appellant's averments cannot be further from truth. Both parties agree that the Respondent entered into an agreement with SWIFT SCRL, a company incorporated in Belgium, for promotional and sales support services as set out in Article 3 of Appendix 1 of the General Master Agreement as follows;-

> ' Sales Support, Education & Consulting
>
> This service consists of the Affiliate to manage and develop the commercial relationship with SWIFT's customers. More specifically, it includes the following activities: relationship and account management capabilities, promotion and marketing of SWIFT product and services, organization of local events, delivery of education and consulting services (i.e trainings, presentations, consulting services) to customers, delivery of services that support customers to implement best practice enhancements to their infrastructure & processes, to leverage the use of SWIFT products and services and to represent SWIFT throughout a specified territory.
>
> The Affiliate agrees to promote and market SWIFT products and services in accordance with the applicable standard terms and conditions and not to take any initiative or to commit SWIFT towards any third-party without SWIFT's prior approval.'

59. At the hearing before the Tribunal, the Respondent's witness, Frederic Herman, circumscribed the services offered by the Respondent to include only marketing and sales support. He stated that these services were meant to increase SWIFT SCRL's sales in the East African region. The services help to grow the customer base of SWIFT SCRL and adoption of new products. SWIFT SCRL sells financial messaging services and connects with banks worldwide to exchange financial messages in a secured manner. The Respondent only raises awareness of these products into the region so that customers can contract with SWIFT SCRL for the acquisition of the products.

60. The Respondent provided invoiced describing the services offered as 'intercompany services'. This term clear and is used in the agreement between SWIFT SCRL and the Respondent to refer to the services offered by the Respondent. It is not true that this term denied the Appellant an opportunity to link the expenses to the reported revenue as alleged. The nature of the services were well explained in the Respondent's Notice of Objection to the rejection of the VAT refund claim.

61. Marketing services rendered for companies outside Kenya are exported services. The benefits of such services such as increased sales accrue to those companies. In Commissioner of Domestic Taxes v WEC Lines (K) Limited (Tax Appeal E084 of 2020) [2022] KEHC 57 (KLR) the court held;-

> ' Therefore, I have little difficulty in coming to the conclusion that the greatest beneficiary and consumer of the respondent's services of marketing, customer care and post landing services was its principal WEC BV. It is WEC BV who would benefit from their business being marketed by the respondent. WEC BV would also be the beneficiary of good customer care relations and post landing services offered by the respondent as the respondent was offering these services on behalf of WEC BV and never contracted any third parties, customer and/or importers on its own behalf.'

62. The services alleged by the Respondent including audit services, communication services and secretarial services were neither pleaded by the Appellant nor did the Appellant claim that it offered them to its sole client, SWIFT SCRL. The evidence indicates that the Respondent offered marketing and promotional services to a company registered in Belgium. Kenyan entities may benefit from those services by being aware of secure financial messaging services, but the customer was SWIFT SCRL because it had an agreement with the Respondent and benefitted from increased sales through the marketing services.

63. The upshot is that the court is satisfied that the marketing and promotional services offered by the Respondent to SWIFT SCRL were in the nature of exported services in accordance with section 2 of the VAT Act. These services were therefore zero-rated in accordance with Paragraph 1 of Part A of the second Schedule to the VAT Act.

FINDINGS AND DETERMINATIONS

64. For the reasons given, this court makes the following findings and determinations;

    i. This court finds the Appeal lacking in merit and it is hereby dismissed;

    ii. This court upholds the decision of the Tribunal dated October 8, 2021 and the Respondent is found to be entitled to the VAT refund in terms of the said decision.

    iii. The appellant shall bear the costs of the appeal.

    Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

HON.A.MSHILA

JUDGE

In the presence of;

Mr. Onyango holding brief for Lydia Ng'ang'a for the Appellant

Rao holding brief Miss Malik for the Respondent

Sarah----------Court Assistant