Commissioner of Domestic Taxes v African Banking Corporation Limited (Tax Appeal E014 of 2021) [2023] KEHC 18720 (KLR) (Commercial and Tax) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18720 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E014 OF 2021

DAS MAJANJA, J

MAY 31, 2023

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

AFRICAN BANKING CORPORATION LIMITED ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 18th December 2020 in Tax Appeal No. 197 of 2019)

JUDGMENT

Introduction and Background

1. This is an appeal from the judgment of the Tax Appeals Tribunal ("the Tribunal") dated 18th December 2020. Following the judgment both parties have filed their respective appeals. The appeals concern the interpretation and application of Excise Duty on various bank transactions under the *Customs and Excise Act* (Repealed) as amended under Part III of the Fifth Schedule by the *Finance Act*, 2012, the *Finance Act*, 2013, the *Excise Duty Act*, 2015 and the *Finance Act*, 2018.

2. In order to give context to this appeal, it is important to set out the statutory framework under which Excise Duty is charged on banking transactions. It is common ground that section 117(1)(d) of the *Customs and Excise Act* (Repealed) provided the basis of charging Excise Duty as follows:

> Subject to provisions of this Act, there shall be charged —
>
> (d) in respect to excisable goods and services specified in the second column of the Fifth Schedule, excise duties at the respective rates specified in the Schedule.

3. Excise duty on financial services was introduced by the *Finance Act*, 2012 through amendments to Part III of the Fifth Schedule to the *Customs and Excise Act* (Repealed) as follows under Paragraphs 7 and 8:

    7. Excise duty on fees charged for money transfer services by cellular phone service providers, banks, money transfer agencies and other financial service providers shall be ten percent.

    8. Excise duty on other fees charged by financial institutions shall be ten percent.

4. Subsequently, the *Finance Act*, 2013 amended the said Part III of the Fifth Schedule to the *Customs and Excise Act* (Repealed) by deleting the words "financial service providers" appearing in Paragraph 7 above and substituting therefor the words "financial institutions". The said *Finance Act*, 2013 also introduced a new Paragraph 9 as follows:

    9. For the purposes of items 7 and 8—

    "financial institutions" means—

    a. a person licensed under—

        (i) the *Banking Act* (Cap. 488);

        (ii) the *Insurance Act* (Cap. 487);

        (iii) the *Central Bank of Kenya Act* (Cap. 491); or

        (iv) the *Microfinance Act*, 2006 (Cap. 493D);

    b. a Sacco Society registered under the *Sacco Societies Act*, 2008 (No. 14 of 2008); or

    c. the Kenya Post Office Savings Bank established under the *Kenya Post Office Savings Bank Act* (Cap. 493B).

    "other fees"

    includes any fees, charges or commissions charged by financial institutions, but does not include interest.

5. The Respondent is a bank licensed under the *Banking Act* (Chapter 488 of the Laws of Kenya). The Appellant ("the Commissioner") conducted a review of the Respondent's records in line with the provisions of the *Customs and Excise Act* (Repealed) as amended under Part III of the Fifth Schedule by the Finance Act, 2012, the *Finance Act*, 2013, the *Excise Duty Act*, 2015 and the *Finance Act*, 2018 for the periods between January 2013 and December 2015. The Commissioner communicated its findings through its letters dated 13th October 2016 and concluded that from the financial statements, trial balances and Excise Duty returns, the Respondent had not been paying Excise Duty on all commissions, any fees or charges as defined by the *Finance Act*, 2013 and Excise Duty, 2015. The Commissioner computed Excise Duty variances totaling Kshs. 44,980,050.50 for the said period and thus sought an explanation from the Respondent on the findings.

6. The Respondent answered the Commissioner through various meetings and correspondences. Ultimately it objected to the findings by the Commissioner and after reviewing the objection, the Commissioner made its objection decision through the letter dated 13th January 2017(erroneously dated 13th January 2016) ("the Objection Decision") in which the Commissioner concluded that the Respondent's objection was not justified and that the entire outstanding principal tax amount of Kshs. 39,234,522.00 was still due and payable.

7. The Respondent was aggrieved with the Objection Decision and lodged an appeal to the Tribunal in TAT No. 29 of 2017. The Commissioner then conducted a further audit of the Respondent's financial affairs for the years 2016,2017 upto September 2018 which resulted in an Excise Duty assessment of Kshs. 46,482,463.00 as evidenced by the Commissioner's letter of 17th January 2019. The Respondent objected to the same through its letter of 15th February 2019 where its arguments and explanations more or less mirrored that of its earlier objection dated 17th November 2016. The Commissioner made its objection decision on 8th April 2019 where it also restated its positions as in the previous Objection Decision and as a result upheld the assessment of Kshs. 46,482,463.00. The Respondent was also aggrieved with this Objection Decision and lodged an appeal to the Tribunal in TAT No. 197 of 2019.

8. Since the issues in the two appeals were similar save for the tax periods under audit, the Tribunal directed that the two matters be consolidated. After considering the rival submissions, the Tribunal rendered its judgement on 18th December 2020 where it identified and resolved the following five issues it framed for determination:

    i. Whether the amendments under the *Finance Act* 2012 were ambiguous?

    ii. Whether the amendments under Paragraphs 7 and 8 of the *Finance Act* 2013 were retrospective and if such retrospectivity was against the law?

    iii. Whether commission earned on money transfer provided by banks through mobile money service providers platforms, and card interchange fees were subject to Excise Duty?

    iv. Whether Excise Duty was chargeable on exported services provided by the Respondent?

    v. Whether loans commitment, processing fees and bills discounting fees were subject to Excise Duty?

9. As the same issues are raised in this appeal, I will deal with the findings of the Tribunal when resolving the appeal. In sum, the Tribunal found that the Respondent's appeal partly succeeded and ordered that the demand for Excise Duty in respect of fees charged on money transfer services that is, Kenswitch charges; interchange fees, Mpesa, Airtel and Moneygram and other money platforms to be amended to include only Excise Duty on commissions earned by the Respondent from the operators of money transfer platforms, that the demand for Excise Duty in respect of Excise Duty on rental income, profit on sale of assets, bad debt recovered, and miscellaneous income be quashed and that the Excise duty demanded in respect of fees charged on exported services offered by the Appellant was also due and payable.

10. As stated, both parties are dissatisfied with various aspects of the Tribunal's findings and orders above and have now appealed to the court through their respective Memorandums of Appeal.

11. The Commissioner faults the Tribunal's findings on the Excise Duty in respect of fees charged on money transfer services that is, Kenswitch charges; interchange fees, Mpesa & Airtel, Moneygram and other merchants and in respect of the loan commitment, processing fees and bills discounting fees and other fees offered by the Respondent. The Commissioner also faults the Tribunal for finding that miscellaneous income did not attract Excise Duty. On the other hand, the Respondent faults the Tribunal for finding that there was no ambiguity in the amendments introduced by the *Finance Act*, 2012, that Paragraphs 7 and 8 of the *Finance Act*, 2013 were not retrospective, and that exported services were exempted from Excise Duty under the *Customs and Excise Duty Act* (Repealed). The appeals were disposed by way of written submissions which are on record where the parties have restated their positions as outlined above.

Analysis and Determination

12. As summarised above, the issues in this appeal revolve around the interpretation and application of the law concerning Excise Duty. Since the factual issues are largely undisputed, then the court in determining the appeal is well within the limits of its appellate jurisdiction under section 56(2) of the *Tax Procedures Act*, 2015 ("the TPA") which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". The court will only intervene in factual issues if the conclusion of fact by the Tribunal cannot be reasonably drawn from the primary facts and evidence (*Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* Nrb CA Civil Appeal No. 300 of 2013 [2014] eKLR).

13. Against the background I have set out and based on the issues, I now turn to determine both appeals based on the following issues framed by the parties:

    a. Whether the Tribunal erred in its determination that Excise Duty was to be charged and accounted for by the operator of the Kenswitch platform who charged the fees and not the Appellant

    b. Whether the Tribunal erred in finding that the Commissioner could not demand Excise Duty on commissions earned by the Respondent as a vendor of the mobile money platform

    c. Whether the Tribunal erred in finding that the Respondent as the Issuing bank ought not to pay Excise Duty on interchange fees given its role in the transaction

    d. Whether the Tribunal erred in finding that the Respondent was only to pay Excise Duty on the commissions it earned from MasterCard, MoneyGram, Kenswitch, Western Union, Instant Cash, and other merchants for facilitation of transactions and not the whole interchange fees charged on the customer.

    e. Whether the Tribunal erred in finding that the definition of "interest" in the *Income Tax Act* also applied to the Section 117 of the *Customs and Excise Act*.

    f. Whether the Tribunal erred in finding that loans commitment/facilitation/ processing fees and bills discounting fees fell within the definition of "interest" and therefore exempt from Excise Duty

    g. Whether the Tribunal erred in finding that miscellaneous income is excluded from payment of Excise Duty

    h. Whether the Tribunal erred in finding that the amendments under the *Finance Act* 2012 were not ambiguous

    i. Whether the Tribunal erred in law and in fact by finding that the amendments under Paras. 7 and 8 of the *Finance Act* are retrospective and that such retrospectivity is allowed in law

    j. Whether the Tribunal erred in finding that exported services are subject to Excise duty under the Customs and *Excise Duty Act*

    k. Whether the Tribunal erred in law and in fact by finding that excise duty is chargeable on fees charged on money transfer platforms

14. Since the court is being called upon to interpret the law, it is now trite and a common principle that in interpreting tax statutes, the court needs to make such an interpretation strictly, leaving no room for

intendment or implication. This view was summarised by Nyamu JA., in *Stanbic Bank Kenya Limited v Kenya Revenue Authority* Nrb CA Civil Appeal No. 77 of 2008 [2009] eKLR as follows:

> In my interpretation of the law, it is quite evident that I have not sought any assistance from outside a dictionary in ordinary use. Moreover, I have not strained the meaning of the words in order to achieve any particular result. I have simply adopted the ordinary meaning of the words used in the relevant tax statute. This is because as regards tax law the issue of intention or intendment does not arise. If there is any ambiguity, and I did not detect any in my analysis, the same must be construed in favour of the tax payer. In tax law, the converse is also true that if the meaning is clear, that tax is chargeable, the issue of what was intended is not the function of the court and where tax liability is expressed and located by law the courts must uphold the taxman's position.

Commissions from Kenswitch

15. The Commissioner disagrees with the Tribunal's finding that the fees in respect of the Respondent's customers using the Kenswitch money transfer platform was charged by Kenswitch and that the Respondent only played an ancillary role. The Commissioner states that the Respondent admitted that only the commissions earned from those transactions should be subject to Excise Duty and not the entire interchange fee charged. The Commissioner contends that the commissions are what it exactly charged as per the Respondent's financial statements.

16. On its part, the Respondent states that the fees it charged its customers for using the Kenswitch platform were collected on behalf of Kenswitch and that they were wholly remitted to it. That where the Respondent is the bank facilitating the ATM service, it is reimbursed expenses incurred in facilitating the ATM transaction and as such the amounts in this instance are not fees charged by the Respondent but a reimbursement of the costs incurred in providing the service.

17. Having considered the nature of the transactions, I accept the position taken by the Commissioner that regardless of the role played by the Respondent in the transaction between itself, Kenswitch and the customers, fees or commissions earned or charged were subject to Excise Duty. The fact the Respondent played an ancillary role in the transactions did not exclude it from paying Excise Duty on commissions it had admittedly earned. From the financial statements and documents provided by the Respondent to the Commissioner, I do not find any evidence to demonstrate that the fees paid to it were a reimbursement rather than a commission earned from its customers for using the service. The Respondent also failed to rebut the Commissioner's position that the Respondent earned fees from ATM services provided by Kenswitch and that the Commissioner considered only the commission earned. Further, the Respondent did not deny that this information was what was contained in its own financial statements. This is in line with the legal and statutory position under section 56 of the TPA that it is the taxpayer to prove that the Commissioner's decision is wrong.

18. I agree with the Commissioner that the Tribunal erred in finding that the fees earned by the Respondent were charged and accounted for by Kenswitch when there was no evidence supporting this contention. The Tribunal thus came to a conclusion that was not supported by evidence. The Tribunal also did not appreciate the evidence on record which indicated that that the Respondent had earned fees from ATM services provided by Kenswitch that were subject to Excise Duty. This ground by the Commissioner therefore succeeds

Commissions on the MPESA and Airtel Money Platforms

19. The Tribunal ruled that the Commissioner should not demand Excise Duty on commissions earned by the Respondent as a vendor of the mobile money platform as this had already been collected and remitted by the mobile money platform operator. The Commissioner on the other hand submits that from the Dealership Agreement between the Respondent and the one of the mobile money operators it is clearly shown that the commission payable to the Respondent is for specified services it renders to the mobile money operator, which charge is separate from the charge on the customer. The Commissioner thus submits that all commissions earned by the Respondent for services rendered on money transfer services offered to the mobile money operators fall within Para. 7 Part III of the repealed *Customs and Excise Act* and the provisions of the *Excise Duty Act* and should be subject to Excise Duty.

20. On its part, the Respondent did not deny that it earns commissions on agency services relating to mobile money transfer services and that mobile money operator collects Excise Duty on the money transfer fees at the point of providing the service and that the Respondent is later paid a percentage of the fees charged as commissions. The Respondent thus contended that imposing Excise Duty on the commissions amounts to double taxation of the money transfer fee and that furthermore, since the service is provided on the mobile money provider's platform, the Respondent is unable to transfer the Excise Duty to the end user.

21. On this issue the Dealership Agreement adduced by the Respondent was critical. It clearly delineates the charges that are borne by the customer and the commission earned by the Respondent for that service. Clause 5 therein states that the Respondent is to be paid fees and commissions for the services it offered the mobile money operator and the Respondent was to be responsible for all the tax required to be paid by law on the commissions received. I therefore disagree with the Tribunal that transactions or services where the Respondent was like a vendor of the mobile money platforms should be excluded from the charge of Excise Duty. All the services offered by the Respondent under the dealership were paid by way of a commission or fee consideration and they all attracted Excise Duty that were to be borne by the Respondent. This ground by the Commissioner therefore succeeds.

Interchange fees

22. The Tribunal relied on the decisions in *Barclays Bank of Kenya Limited v Commissioner of Domestic Taxes* [2020] eKLR and its own decision in *NIC Group and NIC Bank Kenya Plc v Commissioner of Domestic Taxes* TAT Appeal No. 361 of 2018 (UR) to hold that card services between the Respondent as the Issuing Bank and the Acquiring Bank do not amount to transfer of money or operation and that the Respondent should not be required to pay Excise Duty on interchange fees given its role in the transaction. The Commissioner disagrees with this finding by stating that the Tribunal confused the issue in dispute in the two decisions and that the issue herein is whether the Respondent, as an issuing bank offered excisable services to the acquiring bank and whether the consideration earned is subject to Excise tax. Furthermore, the Commissioner urged the court to find that there are ongoing appeals in respect of the aforesaid decisions.

23. The Commissioner submits that in so far as the Respondent renders to the acquiring bank a service, the service earns a fee called an "interchange fee" and the same would fall within the definition of "other fees" as provided for under the repealed *Customs and Excise Act* as amended by the provisions of the *Finance Act*, 2013.

24. The Commissioner has cited the Court of Appeal decision in *Commissioner of Domestic Taxes (Large Tax Payer Office) v Barclays Bank of Kenya Ltd* [2020] eKLR which accepted the explanation given by

the taxpayer therein about how a typical transaction between an issuing bank, customer and acquiring bank operates as follows:

> Upon application, an issuer provides a credit or debit card to a customer. The customer uses the card to purchase goods or services from a merchant. The merchant swipes the card on a machine configured to accept that card. By swiping the card, the merchant seeks authorisation from the acquirer, who in turn seeks authorisation for the transaction through the credit or debit card's network. At that point the network gets to the issuer to confirm and verify the customer's credit status, before confirming the transaction to the merchant through the acquirer. Once the merchant receives the authorisation, a charge slip is generated and the customer receives his goods or services. The merchant next uploads the transaction for payment by the acquirer and the acquirer, after payment, sends details of the transition to the card company's network. The network transmits that information to the issuer, who dispatches a statement to the cardholder. The cardholder then pays the issuer, who in turn pays the acquirer through the network.

25. While I agree that the Court of Appeal above stated that the interchange fees were payments for services rendered, the said decision was in respect of the *Income Tax Act* (Chapter 470 of the Laws of Kenya) and not the *Excise Duty Act*, 2015 and that in *NIC Group and NIC Bank Kenya Plc v Commissioner of Domestic Taxes* (*Supra*), the issue was whether the service offered therein was a money transfer or not and whether it was thus exempt from VAT. In that case, the role played by the taxpayer was crucial in determining whether the service was a money transfer. However, in this case, the role played by the Respondent in earning the fees was immaterial as the question was whether the service was one under the definition of "Other fees" and thus subject to Excise Duty.

26. More recently, the court in *Commissioner of Domestic Taxes v Bank of Africa Limited* (Civil Appeal E127 of 2020) [2023] KEHC 1036 (KLR) (Commercial and Tax) (17 February 2023) (Judgment) has stated that the nature of service the issuer renders to card holders is a financial service because the issuing bank owes cardholders a duty to verify not only their details and eligibility to use the cards but also deduct money from their accounts and pass it to the acquirer, thus enabling them complete their purchases. Verification of cardholders' details and eligibility to use the cards, precedes the decision to allow the cardholder to purchase goods which is later followed by transferring money from the cardholders' accounts to the merchant through the acquirer. In this respect, the court agreed that issuer banks such as the Respondent, rendered service to the cardholders.

27. I therefore agree with the Commissioner that interchange fees earned by the Respondent from local and resident acquiring banks are still subject to Excise Duty as they constitute income to the Respondent under the ambit of 'other fees'. This ground of appeal by the Commissioner therefore succeeds.

Commissions from MasterCard, MoneyGram, KenSwitch, Western Union, Instant Cash, and Other Merchants for Facilitation of Transactions

28. Whereas the Commissioner agrees with the Tribunal that the Respondent ought to have paid Excise Duty on commissions it earned from MasterCard, MoneyGram, Kenswitch, Western Union, Instant Cash, and Other Merchants For Facilitation Of Transactions, it faults the Tribunal for holding that the Commissioner ought not have charged Excise Duty on "the whole interchange fees charged on the customer."

29. The Commissioner submits that this was not the case as it only picked out commissions relating to MasterCard, MoneyGram, Kenswitch, Western Union, Instant Cash from the Respondent's financial

statements and that there was no mention of the term "interchange fee". The Respondent has not disputed this ground of appeal and having gone through the record, I agree with the Commissioner that there is no mention of commissions on "interchange fee" and the court can only conclude that this reference by the Tribunal was made in error and it is set aside.

Loan Commitment Fees, Processing Fees and Bills Discounted Fees

30. The Tribunal found that loans commitment/facilitation/ processing fees and bills discounting fees fell within the definition of "interest" and were therefore exempt from Excise Duty. The Tribunal borrowed the definition of "interest" from the *ITA* and observed that both the*ITA* and the repealed *Customs and Excise Act* could be seen as pari materia, in that both statutes put together form one system of legislation and referred to the same transaction and the same taxpayer. The Tribunal therefore found that the definition of "interest" in the *ITA* also applied to the section 117 of the *Customs and Excise Act*.

31. The Commissioner takes a different view and submits that the two statutes are not pari materia in view that they are taxing different elements and that in the absence of a definition of interest in the *Customs and Excise Act* (Repealed) and the *Excise Duty Act*, 2015 then guidance on what would constitute interest is as contained in the Central Bank of Kenya Prudential Guidelines, 2013.

32. The court has had a chance to make a determination on this issue in *National Bank of Kenya Ltd v Commissioner of Domestic Taxes* (Income Tax Appeal E155 & 533 of 2020 (Consolidated)) [2022] KEHC 10549 (KLR) (Commercial and Tax) (26 May 2022) (Judgment)] and *Commissioner of Domestic Taxes v Co-operative Bank* ML ITA No. E095 of 2020 (UR). The courts observed that while it is tempting to invite the court to borrow the definition of "interest" from the *ITA*, the main issue is one of construction of the tax statute hence the plain and literal meaning of the words used in the statute should be applied first so as to discern the intention of Parliament. In both cases referred to the *Oxford Dictionary of Finance and Banking* defines "interest" as "the charge made for borrowing a sum of money" and *Halsbury's Laws of England* which states that it is "the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another."

33. The natural and ordinary meaning ought to have been the starting point once it was apparent to the Tribunal that the definition of "interest" was not available in the Customs and *Excise Duty Act* (Repealed) and the *Excise Duty Act*, 2015. I agree with the court's pronouncement in *National Bank of Kenya Ltd v Commissioner of Domestic Taxes*(*Supra*) that:

> The definition of interest in the *Income Tax Act* should not have been resorted to in ascertaining the intention of Parliament in Section 7 of the Finance Act, 2013. In the *Income Tax Act*, the term interest is used for the purposes of charge, assessment and collection of income tax; for the ascertainment of the income to be charged; for the administrative and general provisions relating thereto and for matters incidental to and connected therewith and not otherwise.

34. I therefore reject the Tribunal's decision to apply the definition of "interest" under section 2 of the *ITA*. A strict interpretation of the *Finance Act*, 2013 coupled with a plain and literal interpretation of the term "interest" meant that all fees incidental to obtaining a loan such as loans commitment/ facilitation/ processing fees and bills discounting fees among others would be subjected to Excise Duty while the interest earned from the loan would be exempted.

35. The Tribunal therefore erred in finding that loans commitment/facilitation/ processing fees and bills discounting fees fell within the definition of "interest" and were therefore exempt from Excise Duty. This ground by the Commissioner therefore succeeds.

Other Income Earned by the Respondent

36. The Commissioner contends that the Tribunal did not consider that there was no evidence placed before the Tribunal by the Respondent to show that the Kshs. 27,809,000.00 amounted to wholly rental income, profit on sale of assets and bad debts for the same to be set aside. That in its Objection Decision, the Commissioner advised that the miscellaneous income whose nature is unknown fell within the ambit of Excise Duty. The Objection Decision states, in part, as follows:

> Excise duty on other fees
>
> We note from your explanation that other income include rental income, profit on sale of assets, bad debts recovered and miscellaneous income. With the exception of miscellaneous income whose nature is unknown, all the rest do not fall under the ambit of excise duty and as such note chargeable

37. The above is clear that the Commissioner was satisfied with the Respondent's explanations of the other incomes save for miscellaneous income. From the record, the Commissioner did not seek supporting documents or further explanations for the other forms of income save for miscellaneous income. As such, I agree with the Tribunal that the Commissioner ought to vacate the assessment in respect of rental income, profit on sale of assets, bad debt recovered as the same was explained to the satisfaction of the Commissioner.

38. However, I fault the Tribunal for also including miscellaneous income as part of the income conceded by the Commissioner as having been satisfactorily explained. The Objection Decision indicates that the said miscellaneous income was not satisfactorily explained and thus the Commissioner was right to charge Excise Duty on it as forming part of "Other Fees". The Tribunal therefore erred in finding that miscellaneous income is excluded from payment of Excise Duty. This ground by the Commissioner succeeds.

Ambiguity of the Finance Act, 2012

39. The Respondent complained that the Tribunal misdirected itself in finding that the amendments brought to the *Customs and Excise Act* (Repealed) under the *Finance Act*, 2012 were not ambiguous. It contends that the Tribunal erred in determining that the provisions in the amendment for "financial service providers" and "other fees" were unambiguous. To this end, the Respondent maintains that at no time did the *Customs and Excise Act* (Repealed) as amended by the *Finance Act*, 2012 designate it as a taxpayer or collector for the Excise Duty for money transfer services and that it is for this reason that the amendments introduced under the *Finance Act*, 2013 brought clarity to these ambiguities.

40. The history of the amendments that introduced Excise Duty on money transfer services have been set out earlier in this judgment. A reading of Paragraphs 7 and 8 above is clear that one of the institutions sought to be captured by the *Finance Act*, 2012 under the ambit of Excise Duty was banks. The Respondent has never denied that it is and has always been a bank. I find that even without a wholesome definition of the term "financial service providers" by the *Finance Act*, 2012, it was clear that institutions such as the Respondent were the target of being captured under the said term. If anything, the amendments by the *Finance Act*, 2013 expanded rather than restricted the definition of financial service providers and/or institutions but that in both of those amendments, institutions such as the Respondent were subject to the introduction of Excise Duty on money transfer services.

41. I do not find any ambiguity in the *Finance Act*, 2012 as to the Respondent, as a bank, being one of the institutions that Excise Duty was to be charged for money transfer services and I find no ambiguity

in the term "Financial Service Providers". I hold that the Tribunal correctly relied on the natural and ordinary meaning of the words "financial service providers" to conclude that the Respondent was one that offered financial services.

42. As regards the issue of fees, the amendment introduced by the *Finance Act*, 2012 did not specify or define what "Other Fees" constituted and that the amendment introduced by the *Finance Act*, 2013 in respect of what constituted "Other Fees" was more specific and definitive. Since the amendment introducing a more specific definition of "Other Fees" was introduced on 18th June 2013 and effected as from 1st January 2014, the legislative intent was that ''Other fees'' meant more than ''money transfer fees''. The amendment brought by the *Finance Act*, 2013 was curative and intended to clear the air on what amounted to "Other Fees" by excluding interest charged as subject to Excise Duty. But that amendment did not necessarily narrow the application of "Other fees" to a fixed set of transactions. By use of the word, ''includes'', the meaning and application of other fees was expanded. The Court of Appeal in *Mjengo Limited v Commissioner of Domestic Tax* Nrb CA Civil Appeal No. 85 of 2014 [2016] eKLR cited with approval the dictum of *Lord Watson in Dilworth v Commissioner of Stamps* [1899] AC 99, 105 that ,"The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those thing which the interpretation clause declares that they shall include."

43. In addition, it cannot be argued that the meaning of the word "fee" was unknown or ambiguous. As I have stated elsewhere, the natural and ordinary meaning of a fee must be the first port of call. According to *Blacks Law Dictionary* (10th Ed), a fee is, "A charge or payment for labor or services ..." Simply stated it is the consideration for the service rendered hence the Commissioner was entitled to charge Excise Duty on the Respondent's financial transactions as long as they constituted fees. The only change that was introduced by the Finance Act, 2013 was to exclude "interest" from the meaning of other fees. Further, the ambiguity resolved in the decided cases was what 'interest' meant, that is, whether interest as defined by the *ITA* or interest in its ordinary and natural meaning (see *National Bank of Kenya Ltd v Commissioner of Domestic Taxes* (Supra)). In all other respects, the use of the word fee captures any transaction of the nature and substance of a fee. I therefore hold that there was no ambiguity in respect of the terms "financial service providers" and "other fees" in the *Finance Act*, 2012.

Retrospectivity of Paras. 7 and 8 of the Finance Act, 2013

44. It is not in dispute that the *Finance Act*, 2013 came into force on 25th October 2013 and that, the definition of the terms "financial institution" and "other fees" were effective on 18th June 2013 through the provisional collection of taxes. However, section 137 of the Customs and *Excise Duty Act* as amended by the *Finance Act* 2013 on 25th October 2013 had an effective date of 1st February 2013.

45. The Respondent submits that the Tribunal erred in holding that the retrospective statutory provisions were legal and erred in failing to recognize the presumption that a statute should operate prospectively rather than retrospectively. The Respondent further submits that it only became cognizant of this fact on 25th October 2013 yet the *Finance Act*, 2013 gave an effective date of 1st February 2013 thereby imposing taxes on transactions that occurred prior to this enactment and that the Tribunal failed to properly appraise the effect of the retrospectivity of the said amendments and the resultant violation of the Respondent's rights.

46. In finding that the sections of the *Finance Act*, 2013 were retrospective and that the retrospectivity was legal according to the law then, the Tribunal relied on the court's case in *Mark Obuya, Tom Gitogo*

and Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers and 5 others v Commissioner of Domestic Taxes and 2 others [2014] eKLR, where it was stated in part as follows:

> Whether there is retrospective imposition of Excise Duty
>
> The petitioners claim is hinged on the fact that the Commissioner issued a notice on 23rd July 2013 purporting to call for collection of taxes from the 20th July 2013. I must agree with the respondents the effect of the notice is for information purposes and whether or not the law is retrospective must be determined from a reading of the statutory provisions applicable.
>
> The Finance Bill, 2013 was published in the Kenya Gazette Supplement No. 81 (National Assembly Bills No. 2) on 18th June 2013. Section 1 of the Act stipulates its commencement date in the following terms;
>
> 1. This Act may be cited as the Finance Act 2013, and shall come into operation or be deemed to have come into operation as follows;
>
> (a) Sections 2, 3, 4, 6 and 7 on the 18th June 2013.
>
> (b) Sections 5 on the 1st July 2013
>
> (c) All other sections on the 1st January 2014.
>
> Section 6 of the Finance Bill, 2013 is the provision that introduced duty on financial institutions which include members of the 3rd, 4th, 5th and 6th petitioners. The commencement date was 18th June 2013 hence the legal provision was already in force by the time the notice was published. Section 6 of the Finance Act, 2013 came into force by dint of section 2 of the Provisional Collection of Duties and Taxes Act which provides that, "If a Bill is published in the Gazette whereby, if such Bill were passed into law, any tax or duty, or any rate, allowance or administrative or general provision in respect thereof, would be imposed, created, altered or removed, the Minister may, subject to this Act and notwithstanding the provisions of any other written law relating to taxes and duties, make an order that all or any specified provisions of the Bill relating to taxes or duties shall have effect as if the Bill were passed into law."
>
> I find and hold that the Notice had no legal effect and could not be relied upon to negate the legal obligation to pay duty imposed by Finance Bill, 2013 from 18th June 2013 irrespective whether the petitioner and their members had knowledge of the law. I further find and hold that the petitioners' right to fair administrative action has not been violated as alleged or at all.

47. I cannot fault the Tribunal for being guided by the decision of a Superior and binding jurisdiction that Paragraphs 7 and 8 of the *Finance Act*, 2013 had retrospective application in accordance with the existing law at the time irrespective of whether the Respondent had knowledge of the law. This ground of appeal by the Respondent therefore fails.

Exported services under the Customs and Excise Duty Act (Repealed)

48. The Respondent also submits that the *Customs and Excise Act* (Repealed) was in effect before the enactment of the *Excise Duty Act*, 2015 and was silent on the levy of Excise Duty on exported services and that this silence meant the exclusion of exported services from Excise Duty. According to the Respondent, even though there was no express provision in the *Customs and Excise Act* (Repealed) relating to exemption for services as it did for exported goods, an implication ought to be made that exported services were covered as well.

49. The Tribunal held that it could not infer an exemption based on the silence of the *Customs and Excise Act* (Repealed) with regard to export of services. It explained that if Parliament intended to exempt services it would have so stated. I agree with position and as I have already held, no inference or intendment can be made on tax statutes and the same can only be read and interpreted as is. This principle is well embedded in tax law and the Tribunal correctly cited *Cape Brandy Syndicate v Inland Revenue Commissioners* (1) (1930) 12 TC 358 where it was held that:

> In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

50. The Respondent cannot ask the court to make an inference of what the legislature intended under the *Customs and Excise Act* (Repealed). If the legislature did not make any provision for exempting exported services thereunder, then the said services could not be exempted by implication. This ground by the Respondent fails.

Conclusion and Disposition

51. From the findings I have set out, the Commissioner's appeal succeeds in its entirety whereas that of the Respondent fails in its entirety.

52. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 31st DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Nyapara, Advocate instructed by the Kenya Revenue Authority for the Appellant.

Mr Abincha instructed by Abincha and Company Advocates for the Respondent