



REPUBLIC OF KENYA



**Commissioner of Domestic Taxes v Sidian Bank Limited (Tax Appeal E110 of 2021)  
[2023] KEHC 18382 (KLR) (Commercial and Tax) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18382 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
TAX APPEAL E110 OF 2021  
DAS MAJANJA, J  
MAY 31, 2023**

**BETWEEN**

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

**AND**

**SIDIAN BANK LIMITED ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal  
at Nairobi dated 30th April 2019 in Tax Appeal No. 329 of 2019)*

**JUDGMENT**

**Introduction and Background**

1. On 30<sup>th</sup> April 2021, the Tax Appeals Tribunal (“the Tribunal”) rendered the judgment concerning the application of the *Customs and Excise Act* (Repealed) as amended under Part III of the Fifth Schedule by the Finance Act, 2012 and the Finance Act, 2013, the *Excise Duty Act*, 2015 and the Finance Act, 2018 to certain bank transactions. The Appellant (“the Commissioner”) and the Respondent are both dissatisfied with the outcome and have appealed to the court. The parties have filed written submissions to putting forward their respective positions.
2. The Respondent is a bank licensed under the *Banking Act* (Chapter 488 of Laws of Kenya). Sometime in 2019, 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conducted a review of the Respondent’s records in line with the provisions of the *Customs and Excise Act* (Repealed) as amended under Part III of the Fifth Schedule by the Finance Act, 2012 and the Finance Act, 2013, the *Excise Duty Act*, 2015 and the Finance Act, 2018 for the period between January 2016 and September 2018. It communicated its findings through its letters dated 11<sup>th</sup> March 2019. The Commissioner concluded that its analysis had revealed a tax shortfall of Kshs. 48,130,740.00 inclusive of penalties and interest and issued an assessment for the same. The Respondent objected to the said assessment through its letter dated 5<sup>th</sup> April 2019.



3. After considering the objection and the additional information provided by the Respondent, the Commissioner issued an objection decision through its letter dated 31<sup>st</sup> May 2019 (“the Objection Decision”). The Commissioner considered commissions on the mobile money transfer services (“Mpesa”) and stated that this income falls within the ambit of ‘other fees’ as the Respondent earns the commission because of providing transacting infrastructure and that the settlements are done on net basis in line with the Respondent’s licensed financial activities and are as such subject to Excise Duty.
4. The Commissioner noted that ATM transactions amongst various bank customers are facilitated by non-resident switching companies such as VISA and Mastercard and that the participating banks earn commissions because of providing the transacting infrastructure and the settlements are done on net basis. The Commissioner therefore concluded that the income the Respondent earns from these ATM transactions and the attendant card interchange fees was derived commission which fall in the ambit of ‘other fees’ as defined by the Finance Act, 2013 and the Excise Duty ,2015 and that this was the income that was being subjected to Excise Duty.
5. The Commissioner also maintained that the management fees the Respondent earns from providing services to its subsidiary and credit card cash advance fee which was fees charged to a customer when they withdraw cash against the credit card limit fell under the scope of ‘other fees’ as defined by the Finance Act, 2013 and *Excise Duty Act*, 2015 and was therefore also subject to Excise Duty. On the issue of double taxation, it was the Commissioner’s position that where tax laws put an obligation on a person to subject an item to tax, the affected persons cannot plead double taxation. That the fact that an item is subject to the same tax when passed through different hands does not exempt the service from taxation unless the law provides that the tax on an item is final. In this regard, the Commissioner held that the amount earned by the Respondent relating to card business transactions fall within the scope of ‘other fees’ as defined by the Finance Act, 2013 and the *Excise Duty Act*, 2015
6. The Respondent being dissatisfied with the Objection Decision, appealed to Tribunal. The Respondent challenged the Commissioner’s decisions of imposing Excise Duty on the Mpesa commissions, card interchange fees and interest income on credit cards.
7. On the Mpesa Commissions, the Tribunal relied on its own decision in African Banking Corporation v Commissioner of Domestic Taxes Tribunal Tax Appeal No. 29 of 2019 to maintain that commissions earned by banks from Mpesa transactions were ‘other fees’ and are subject to Excise Duty. On the card interchange fees, the Tribunal also maintained the position it took in Barclays Bank of Kenya Limited v Commissioner of Domestic Taxes Tribunal Tax Appeal No. 246 of 2019 that VISA commissions and interchange fees earned from international card transactions are exported services and therefore exempt from Excise Duty in so far as the consumers of the services are located outside Kenya. However, that the interchange fees earned in respect to local transactions are however subject to Excise Duty.
8. As regards interest income from credit card transactions, the Tribunal relied on Black’s Law Dictionary (11<sup>th</sup> Ed.) definition of ‘Loan’ to conclude that the income earned from these transactions was more in the nature of interest on loan or return on loan than a fee, charge or commission charged by a financial institution. Noting that interest on loan is exempt from Excise Duty, the Tribunal determined that the Commissioner erred in charging Excise Duty on interest from credit cards. Based on its findings the Tribunal made dispositive orders partly allowing the appeal by setting aside the Excise Duty on interchange fees and interest income from credit cards.
9. As stated earlier, both parties have appealed. The Commissioner faults the Tribunal’s findings on the Excise Duty in respect of card interchange fees and interest income on credit card transactions whereas the Respondent is dissatisfied with the finding on the Mpesa commissions being subject to Excise Duty.



## Analysis and Determination

10. In resolving this appeal, I am cognizant of the fact that this court’s jurisdiction is circumscribed by section 56(2) of the *Tax Procedures Act* (“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”. From a summary I have outlined above, the issue involves interpretation and application statutes concerning imposition of Excise Duty. The court is bound by the Tribunal’s findings of fact unless those findings of fact cannot be reasonably drawn from the facts and evidence on record (see *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* NRB CA Civil Appeal No. 300 of 2013 [2014] eKLR).
11. Before I deal with the subject of this appeal, it is important to outline the applicable statutory framework governing the imposition of Excise Duty on banking transactions subject of this appeal. 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.
12. 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.
13. 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.

14. Against the above background, I now turn to determine both appeals which as I have stated are in respect of Excise Duty on interchange fees, Mpesa commissions and income from credit card transactions.
15. The Commissioner has challenged the propriety of the Respondent's Cross-appeal. This issue was settled in *York Investments East Africa Limited v Commissioner of Investigations and Enforcement* (Miscellaneous Application E612 of 2021) [2021] KEHC 7 (KLR) (Commercial and Tax) (10 September 2021) (Ruling), where the court explained that:

‘.....although there is no express provision for filing a cross-appeal, the High Court exercising its appellate jurisdiction may entertain a cross-appeal as it is required to consider and make judgment on objections to the judgment of the Tribunal or subordinate court even as to those portions that have not been appealed against by either party. This position has found favour in *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission and 2 Others* MSA CA Civil Appeal No. 154 of 2013 [2014] eKLR and *Bulsho Trading Company Ltd v Rosemary Likholo Mutakha and Another* Busia HCCA No. 1 of 2018 [2020] eKLR. Since the Civil Procedure Rules provide for the filing of cross-appeals, I do not find this position inconsistent with Rules. In my view, therefore the Applicant was entitled to file a notice of cross-appeal in response to the Appellant's appeal. This view is consistent with the constitutional edict under Article 159 of *the Constitution* which provides that the court should strive to do substantive justice unhindered by technicalities.’

16. I therefore find that the Respondent's Cross-appeal is properly filed and that there is no prejudice that will be occasioned on the Commissioner if the same is heard and determined.

### **Interchange fees**

17. The parties agree on the transaction flow between different players in card transactions leading up to interchange fees being paid to the Respondent. 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) recently explained the same as follows:

#### Card transactions

25. In a card transaction, different players are involved. The issuer, issues a debit/credit card to customers for instance Master Card or Visa. The acquirer installs swiping machines at merchants' premises. A customer, the cardholder, walks into a merchant's store to buy goods or services using the card. The customer hands the card to the merchant who swipes the card in the swiping machine at the merchant's premises. Information is transmitted to the Issuing bank through networks. The issuer verifies the authenticity of the cardholder, his eligibility to use the card and availability of sufficient funds to cover the purchase or service provided by the merchant. A response is sent to the acquirer and then to the merchant after the verification by the issuer. A charge slip is then generated from the swiping machine which the cardholder signs and takes a copy. The merchant retains a copy which is later submits to the acquirer for payment. The acquirer deducts some money from the merchants' money known as Merchant Discount Rate(MDR), then pays the balance to the merchant. The acquirer pays part of the MDR to the networks and the issuer. The money paid to the issuer is known as interchange fee.



26. The point of note, is that there is no contractual arrangement between the cardholder and the merchant; no contractual arrangement between cardholder and the acquirer and no contractual arrangement between the issuer and the merchant. There is, however, an arrangement between the issuer and acquirer to facilitate completion of the transaction through the networks.
18. The parties also agree that the Respondent earns the interchange fees for its role in these transactions. However, the question is whether the fee is excisable. In its objection, the Respondent stated that the card income assessed related to card interchange fees relating to international transactions. The Tribunal found that Commissions and Interchange Fees earned from international card transactions are exported services and therefore exempt from Excise Duty but held that interchange fees earned in respect to local transactions are subject to Excise Duty.
19. The Commissioner rejects this finding and submits that interchange fees cannot be exported services because they are services issued which the Respondent is licensed to provide and also because the services are provided to persons within Kenya in view of the nature of services provide and to whom they are provided to.
20. Section 7(1)(c) of the *Excise Duty Act, 2015* provides that excisable services exported from Kenya are not liable to Excise Duty. For a service to be deemed an “exported service”, it matters not whether that service was performed in Kenya or outside Kenya. The determining factor is the location where that service is to be finally used or consumed (see Commissioner Of Domestic Taxes v Total Touch Cargo Holland [2018]eKLR, Coca-Cola Central East and West Africa Limited v Commissioner of Domestic Taxes ML HC ITA No. 19 of 2013 [2020] eKLR and Panalpina Airflo Limited v Commissioner of Domestic Taxes ML HC ITA No. 5 of 2018 [2019] eKLR).
21. The Commissioner submits and the Respondent agrees that the Respondent offers various services to different acquirers or acquiring banks and in return, the Respondent is compensated through the interchange commissions/fees. When the acquirer receiving the services rendered by the Respondent is outside of the country or is a non-resident obtaining benefit from these services, it then follows that they are the ultimate consumers and beneficiaries of these services. I therefore agree with the Respondent and the Tribunal that interchange fees/commissions earned by the Respondent from services it renders to non-resident acquirers are exported financial services that are exempt from Excise Duty. This ground of appeal by the Commissioner fails.

### **Income from credit card transactions**

22. The Commissioner faults the Tribunal’s finding that the income the Respondent earned from the credit transactions were more in the nature of an interest on loan or return on loan rather than a fee, charge or commission charged by a financial institution. The Commissioner states that it charged Excise Duty on other fees other than interest levied by the Respondent on the said credit card transactions including late penalties, late fees, annual fees, cash advance fees, balance transfer fees and foreign transaction fees. The Respondent, on the other hand, argues that these fees and related charges it receives from advancing credit to its customers through credit cards constitutes interest as envisaged in the *Excise Duty Act, 2015*.
23. It is common ground that interest is not excisable under the *Excise Duty Act, 2015* which at Part III of the First Schedule excludes interest from the definition of ‘other fees’ “...as any fees, charges or commissions charged by financial institutions relating to their licensed activities, but does not include interest on loan or return on loan or any share of profit or an insurance premium or premium based or related commissions specified in the *Insurance Act* or regulations made thereunder”.



24. Since the *Excise Duty Act*, 2015 does not define ‘interest’, it is left ultimately to this court to determine the meaning thereof. 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 court held that in the interpretation of tax statutes, the plain and literal meaning of the words used in the statute should be applied first so as to discern the intention of Parliament. 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 definition 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.”
25. While I agree with the Respondent that the credit card services offered by the Respondent to its customers may be termed as a ‘soft loan’, a plain and literal interpretation of the term “interest” above can only lead to the conclusion that all fees incidental to obtaining such a ‘loan’ such as cash advance/ balance transfer/commitment/facilitation/ processing fees among others would be subjected to Excise Duty while the interest earned from using the said credit card would be exempted. I therefore agree with the Commissioner that the Tribunal erred in its findings that all the fees and charges earned by the Respondent from the credit card transactions were akin to interest and therefore non-excisable. This ground of appeal by the Commissioner therefore succeeds.

### **Mpesa Commissions**

26. The Respondent faults the Tribunal’s conclusion that the Mpesa commissions earned by it are subject to Excise Duty. In its objection, the Respondent had argued that it does not ‘charge’ this income but rather, the same is ‘allocated’ to it and that Excise Duty should only apply to fees actually charged by the Bank as opposed to an allotment of an income. In any case, the Respondent stated that Mpesa transactions are already subjected to Excise Duty at the point where the third party transacts through the Mpesa platform and therefore, this means that the commission earned by the Bank is from an amount on which Excise Duty has already been charged and therefore imposing Excise Duty on it amounts to double taxation.
27. In the Objection Decision, the Commissioner stated that the Respondent earned a commission because of providing transacting infrastructure and the settlements are done on a net basis in line with the Respondent’s financial activities and that this is derived commission which falls in the ambit of ‘other fees’.
28. Let me start by stating that whether the Respondent ‘earned’ or was ‘allocated’ rather than ‘charged’ these commissions is immaterial. What is material is that the Respondent, as a financial institution, received the commission. The commission received by the Respondent is what is charged for the service it rendered to Safaricom, the provider of the Mpesa platform. It matters not that the Respondent does not raise or bill for the amount. In the event, for example, Safaricom failed to pay the commission due, the Respondent would obviously demand the amount due to it because it is the amount it has “charged” for the services rendered. In short, the commission paid by Safaricom to the Respondent is the consideration for services rendered (See *Chester Insurance Brokers Limited v Commissioner of Domestic Taxes (Tax Appeal E001 of 2020)* [2021] KEHC 185 (KLR) (Commercial and Tax) (3 November 2021) (Judgment)]).
29. Whether this commission attracts Excise Duty is what the court is being called to determine. I agree with the position taken by the Commissioner that these commissions received by the Respondent are



subject to Excise Duty as they are ‘other fees’ earned by the Respondent for the financial agency services they are licensed to carry out on behalf of the Mpesa platform owner, Safaricom.

30. The Respondent had raised the issue of double taxation arguing that the Excise Duty had already been collected and accounted for by Safaricom from its customers. In *Kenya Pharmaceutical Association and Another v Nairobi City County and the 46 other County Governments and Another* NRB HC Petition No. 97 of 2016 [2017] eKLR, Mativo J., accepted the definition of ‘double taxation’ as the taxing of the same income twice. However, in this case, there are two different incomes; for Safaricom it is the fees charged to its customers for the money transfer services and for the Respondent, it is the commission received from Safaricom for acting as its agent/super-agent. The fees charged by Safaricom to its customers and the Excise Duty derived from the said fees has nothing to do with the commission income received by the Respondent and the Excise Duty that is expected to be remitted from it. If for example, the Bank is also to pay a commission from this commission received by Safaricom to its sub-agent, that sub-agent will also have to pay Excise Duty on it or such relevant taxes from this income. I therefore find that the issue of double taxation does not arise in this case. This ground of appeal by the Respondent therefore fails.

### **Disposition**

31. In conclusion I find that the Commissioner’s appeal succeeds only to the extent that the Tribunal erred in holding that all the income from credit cards was more in the nature of interest on loan or return on loan than a fee, charge or commissions charged by a financial institution.
32. The Respondent’s appeal fails in its entirety and is dismissed.
33. Each party shall bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Ms Naeku, Advocate instructed by Kenya Revenue Authority for the Appellant.

Ms Miringu instructed by Munyao, Muthama and Kashindi Advocates for the Respondent.

