



**Standard Chartered Bank Kenya Limited v Commissioner of
Domestic Taxes (Tax Appeal E074 & E076 of 2021 (Consolidated))
[2023] KEHC 18722 (KLR) (Commercial and Tax) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E074 & E076 OF 2021 (CONSOLIDATED)**

DAS MAJANJA, J

MAY 31, 2023

BETWEEN

STANDARD CHARTERED BANK KENYA LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal against the Judgment of the Tax Appeals Tribunal
at Nairobi dated 16th April 2021 in Tax Appeal No. 199 of 2019)*

Commissions from money transfers from Kenyan banks to non-resident Banks abroad were exempt from excise duty as they are deemed to be services exported outside Kenya.

The appellant, Standard Chartered Bank Kenya Limited, appealed the decision of the Tax Appeals Tribunal, which upheld several assessments by the Commissioner of Domestic Taxes concerning excise duty on the appellant's services, including VISA contributions, related party revenue allocations, and commissions on money transfers. The key issues involved determining whether the Excise Duty Act only imposed an obligation to financial institutions to pay excise duty whenever a financial institution charged for a fee. The High Court dismissed both appeals, holding that the Tax Appeals Tribunal rightly applied the law, particularly concerning the ultimate beneficiary and consumer test, and maintained the tax assessments, except for certain commissions from money transfers that were exempt from excise duty as they were deemed services exported outside Kenya.

Reported by John Ribia

Tax Law – excise duty – excise duty on financial services – exported money transfers to non-resident banks by a resident bank – commission arising from such a transaction – whether the commission was taxable - whether the Excise Duty Act only imposed an obligation to financial institutions to pay excise duty whenever a financial institution charged a fee - whether commissions paid to Banks from the Central Bank for purchase of treasury bonds were liable to excise duty - whether fees and commissions obtained from non-resident banks to resident banks for exported money transfers imposed an obligation to pay excise duty - whether commissions paid by VISA to the



banks for generation of the credit and debit cards was revenue that was for which excise duty was payable as fees charged by financial institutions - Excise Duty Act (Cap 472) sections 7(1)(c), (4) and Schedule 1 part 2(4); Tax Procedures Act (Cap 469B) section 56(2).

Words and Phrases – *matter of law – definition - a matter involving a judicial inquiry into the applicable law - Black's Law Dictionary 11th Edition.*

Brief facts

The appellant's (Standard Chartered Bank) offshore Group entities routinely provided financial services to Kenyan customers. It was typical where a local Kenyan customer would want to borrow funds in foreign currency and the appellant was unable to provide the required financing for various reasons including balance sheet limits. The appellant would refer the clients to an offshore group entity where the negotiations and structuring of the deals would be done by the offshore group entity with the appellant providing relationship management support to the offshore group entity. The offshore group entity would then compensate the appellant for the support services. The appellant thus considered the transaction to be an exported service that was exempt from excise duty.

The Commissioner rejected the appellant's explanation and maintained that the service was offered and consumed in Kenya hence did not qualify as an exported service and therefore subject to excise duty.

The Commissioner conducted a review of the appellant's records and issued a demand for unpaid excise duty, penalties, and interest, which the appellant contested. The Tax Appeals Tribunal (the Tribunal) rendered its judgment, partially upholding the Commissioner's assessment, particularly regarding excise duty on VISA contributions and related party revenue allocations. The appellant appealed to the High Court, arguing that the Tribunal erred in applying the law, especially regarding services provided to non-residents and certain commissions received. The Commissioner also cross-appealed certain findings regarding money transfer commissions.

Issues

- i. Whether the Excise Duty Act only imposed an obligation to financial institutions to pay excise duty whenever a financial institution charged for a fee.
- ii. Whether commissions paid to Banks from the Central Bank for purchase of treasury bonds were liable to excise duty.
- iii. Whether fees and commissions obtained from non-resident banks to resident banks for exported money transfers imposed an obligation to pay excise duty.
- iv. Whether commissions paid by VISA to the banks for generation of the credit and debit cards was revenue that was liable for excise duty as fees charged by financial institutions.

Held

1. The High Court's jurisdiction was circumscribed under section 56(2) of the Tax Procedures Act which provided that an appeal to the High Court or to the Court of Appeal shall be on a question of law only. The issues raised by the parties were matters of law. A matter of law was one involving a judicial inquiry into the applicable law.
2. In interpreting tax statutes, the court needs to make such an interpretation strictly, leaving no room for intendment or implication.
3. The Tax Appeals Tribunal (the Tribunal) rightly relied on the ultimate beneficiary/consumer test in determining whether the services offered by the appellant were exported services.
4. For a service to be deemed an exported service, it mattered not whether that service was performed in Kenya or outside Kenya. The determining factor was the location where the service was to be finally used or consumed. The ultimate consumer or beneficiary of the services offered by the appellant to its offshore group entities was the local customer who borrowed the money and was in need of the facility in foreign currency. The benefit of the offshore group entity was ancillary and fringe to that of



- the local customer who was the final and greatest consumer of that service. The Commissioner and the Tribunal were right to hold that the service was not an exported service and thus subject to excise duty.
5. The Excise Duty Act defined other fees to include any fees, charges or commissions charged by financial institutions relating to their licensed activities, but did not include interest on a loan or return on a 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. The commissions paid by VISA to the appellant were the consideration for generation of the credit and debit cards and it was that commission that attracted excise duty which the appellant was duty bound to collect and pay.
 6. The appellant received commissions from the Central Bank of Kenya whenever it bought Treasury Bonds. The position by that appellant that it did not charge for those commissions/fees and that the Excise Duty Act only imposed an obligation to pay excise duty whenever a financial institution charged for a fee did not hold water. The appellant received the commissions/fees and was obligated to pay excise duty on it. Had it not received the commissions from the payer, it would have demanded them.
 7. Whereas the appellant provided the infrastructure to facilitate money transfers between itself and the non-resident correspondent banks, the ultimate beneficiary and consumer of those services when money was being transferred from the non-resident correspondent banks to the appellant was the non-resident correspondent bank. The reverse was also true were it to be that it was the appellant making the money transfer to the non-resident correspondent bank as in such a case, it would have been the appellant who was the ultimate consumer and beneficiary of the service and the infrastructure by the non-resident correspondent bank was what enabled the transfer.
 8. The appellant's explanation was plausible in that where the fees were received from an offshore bank, the user and/or consumer of the service was an entity/individual based outside Kenya and that the place of performance of the service, that was, remittance of money, was outside Kenya. Where the person bearing the transaction fees was not a customer of the appellant and the same was charged by the non-resident correspondent bank on the non-resident sender of the funds, such fees could not be within the scope of Kenya's excise duty law.
 9. Since the location of the consumer of the facilitation service offered by the appellant was outside Kenya, the service was deemed to be an exported service and thus not excisable and therefore, the consideration received by the appellant for the service was not subject to excise duty. Since the transfer fees was charged by a non-resident entity on a non-resident sender, the same was outside the scope of excise duty in Kenya. The Tax Appeals Tribunal did not err in its disposition.

Appeals dismissed.

Orders

No order as to costs.

Citations

Cases

Kenya

1. *Abdullahi, Bashir Haji v Adan Mohammed Nooru & 3 others* Civil Appeal 300 of 2013; [2014] KECA 707 (KLR) - (Applied)
2. *Chester Insurance Brokers Limited v Commissioner of Domestic Taxes* Tax Appeal E001 of 2020; [2021] KEHC 185 (KLR) - (Explained)
3. *Commissioner Of Domestic Taxes v Total Touch Cargo Holland* Income Tax Appeal 17 of 2013; [2018] KEHC 859 (KLR) - (Explained)
4. *Stanbic Bank Kenya Limited v Kenya Revenue Authority* Civil Appeal 77 of 2008; [2009] KECA 427 (KLR) - (Explained)

Texts



1. Garner, BA., Black, HC., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 11th Edn

Statutes

Kenya

1. Banking Act (cap 488) In general - (Cited)
2. Customs and Excise Act (Repealed) (cap 472) section 117(1)(d) - (Interpreted)
3. Excise Duty Act (cap 472) sections 7(1)(c); 7(4); Schedule 1 part 2(4) - (Interpreted)
4. Finance Act, 2012 (Act No 57 of 2012) In general- (Cited)
5. Finance Act (Act No 10 of 2018) In general - (Cited)
6. Finance Act, 2013 (Act No 38 of 2013) In general - (Cited)
7. Tax Procedures Act (cap 469B) section 56(2) - (Interpreted)

Advocates

Ms Chelangat for the respondent

Mr Kimani, Senior Counsel and *Mr Ruto* for the appellant

JUDGMENT

Introduction and Background

1. This is an appeal from the judgment of the Tax Appeals Tribunal (“the Tribunal”) dated December 18, 2020. Following the judgment both parties have filed their respective appeal. The appeal concerns 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 and 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 appellant is a bank duly licensed under the *Banking Act* (Chapter 488 of the Laws of Kenya). The respondent (“the Commissioner”) conducted a review of the appellant’s records under 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 2014 and September 2018 to ascertain whether the appellant had collected and remitted the correct amount of Excise Duty as required. In a letter dated January 17, 2019 the Commissioner communicated its findings of the review. According to the Commissioner, its analysis had revealed an Excise Duty tax shortfall of Kshs. 505,705,469.00 inclusive of penalties and interest which it demanded from the appellant.
6. The appellant objected to the review and additional assessment through its letter of February 14, 2019 and urged the Commissioner to stand over the tax in dispute. In a letter dated April 10, 2019, the Commissioner responded to the appellant’s objection and made its objection decision by its letter dated April 10, 2019 (“the Objection Decision”). In the Objection decision, the Commissioner made various adjustments and proceeded to issue a revised Excise Duty computation for Kshs. 350,302,127.00 inclusive of penalties and interest which it now demanded from the appellant.
7. The appellant lodged an appeal to the Tribunal as it was dissatisfied with the Objection Decision. There Tribunal rendered its judgment on April 16, 2021. It framed the following issues for resolution:
 - a. Whether the Commissioner erred in law and fact by charging Excise Duty on card fees received from Acquiring Banks.
 - b. Whether the Commissioner erred in law and fact by charging Excise duty on VISA contributions for card costs?
 - c. Whether the Commissioner erred in law and fact law and fact by charging Excise duty on commissions on fixed income?
 - d. Whether the Commissioner erred in law and fact by charging Excise Duty on income received from non-resident custody clients?
 - e. Whether the Commissioner can be estopped from issuing an additional assessment for income received from non-resident custody clients by virtue of the appellant’s letter dated October 5, 2018 according to the Fair Administrative Act.



- f. Whether the Commissioner erred in law and fact by charging Excise Duty on related party revenue allocations?
 - g. Whether the Commissioner erred in law and fact by charging Excise Duty on optional fees?
 - h. Whether the Commissioner erred in law and fact by charging Excise Duty on commissions on money transfer?
 - i. Whether the Commissioner erred in law and fact by charging Excise Duty on commissions relating to Somalia transactions.
 - j. Whether the Commissioner erred in law and fact by charging Excise Duty on revenue earned by subsidiaries?
 - k. Whether the appellant erred in law and fact by offsetting Kshs. 115,612,1780.00 that it had overcharged and remitted on custodial services deemed against its Excise duty liability.
 - l. Whether the appellant is mandated in law to refund or reverse any Excise duty charges?
 - m. Whether the Commissioner erred in law and fact by finding that the late payment penalty of 5% was applicable?
8. After the considering the aforesaid issues, the Tribunal allowed the appeal, in part, and made the following dispositive Orders:
- a. The respondent's assessment with regard to Excise duty on card fees received from acquiring banks is hereby set aside.
 - b. The respondent's assessment with regard to Excise duty on VISA contributions for card costs is hereby upheld.
 - c. The respondent's assessment with regard to Excise duty commissions on fixed income is hereby upheld
 - d. The respondent's assessment with regard to Excise duty on income received from non-resident custody clients is hereby set aside.
 - e. The respondent is estopped from issuing an additional assessment for income received from non-resident custody clients by virtue of the appellant's letter dated October 5, 2018
 - f. The respondent's assessment with regard to Excise duty related party revenue allocations is hereby upheld.
 - g. The respondent's assessment with regard to Excise duty on optional fees is hereby set aside.
 - h. The respondent's assessment with regard to Excise duty commissions on money transfer is hereby set aside.
 - i. The respondent's assessment with regard to Excise duty commissions relating to Somalia transactions is hereby set aside.
 - j. The respondent's assessment with regard to Excise duty revenue earned by subsidiaries is hereby set aside.
 - k. The appellant should not have offset the Kshs.115,612,178.00 deemed against its Excise duty liability.



- l. The appellant is not mandated to refund or reverse any Excise duty charges.
 - m. The respondent's late payment penalty of 5% to be varied in line with section 38 of the TPA
 - n. Each party to bear its own costs.
9. Both parties are dissatisfied with various aspects of the Tribunal's findings and orders above and have appealed to this court. The appellant faults the Tribunal's decision on the support services it offers its offshore Group entities, VISA contributions for its card costs and the commissions earned on its fixed income. The Commissioner, on the other hand, is mainly aggrieved with the Tribunal's finding on the appellant's commissions on money transfer. The appeals were disposed by way of written submissions.

Analysis and Determination

10. As I determine the appeals, I am cognizant of the fact that this court's jurisdiction is circumscribed under section 56(2) of 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". It is clear from the issues raised by the parties are matters of law and as stated by *Black's Law Dictionary* (11th Ed) a "matter of law" is a "A matter involving a judicial inquiry into the applicable law." Where there are any issues of fact, the court will pay due deference to the Tribunal's findings unless those findings cannot be reasonably supported by the facts (see *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* NRB CA Civil Appeal No. 300 of 2013 [2014] eKLR).

11. Since the facts and the applicable law giving rise to the above issues were not in dispute, all the court is being called upon to determine is whether the Tribunal rightly interpreted and applied the law to those facts. 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* 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. [Emphasis mine]

12. I now turn to determine both appeals on the basis of the issues framed by the parties for determination as follows:

- a. Whether the Tribunal erred in upholding the Commissioner's assessment with regard to Excise duty on the appellant's related party revenue allocations.
- b. Whether the Tribunal erred in upholding the Commissioner's assessment with regard to Excise duty on VISA contributions for card costs.
- c. Whether the Tribunal erred in upholding the Commissioner's assessment with regard to Excise duty commissions on fixed income.



- d. Whether the Tribunal erred in setting aside the Commissioner’s assessment with regard to Excise duty commissions on money transfer The appellant’s related party revenue allocations
13. The parties’ views on this issue, though different, are fairly straightforward. The question before the Tribunal was whether support services offered by the appellant to its offshore Group entities were exported services and thus exempt from Excise Duty. These services stemmed from the fact that the appellant’s offshore Group entities routinely provide financial services to Kenyan customers and is typical where a local Kenyan customer would want to borrow funds in foreign currency and the appellant is unable to provide the required financing for various reasons including balance sheet limits. The appellant would refer these clients to an offshore Group entity where the negotiations and structuring of the deals would be done by the offshore Group entity with the appellant providing relationship management support to the offshore Group entity. The offshore Group entity will then compensate the appellant for these support services. The appellant thus considers this transaction to be an exported service that is exempt from Excise Duty as provided for by section 7 (1)(c) and section 7(4) of the [Excise Duty Act, 2015](#) as follows:
7. Goods and services not liable to excise duty
- (1) Subject to this section, no excise duty shall be charged on the following—
- (a)
-
- c. excisable services exported from Kenya;
- (4) Excisable services shall be considered to be exported from Kenya if the services are supplied from a place of business in Kenya for use or consumption outside Kenya.
14. The Commissioner rejected the appellant’s explanation and maintained that this service is offered and consumed in Kenya hence does not qualify as an exported service and therefore subject to Excise duty.
15. In resolving this issue, the Tribunal rightly relied on the, “ultimate beneficiary/consumer” test propounded by the court in [Commissioner of Domestic Taxes vs Total Touch Cargo Holland](#) (ML ITA No 17 of 2013) [2018] eKLR where it held that, “...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 the service is to be finally used or consumed.” I also agree with the Tribunal that the ultimate consumer or beneficiary of the services offered by the appellant to its offshore Group entities is the local customer who borrowed the money and was in need of the facility in foreign currency. The benefit of the offshore Group entity is ancillary and fringe to that of the local customer who is the final and greatest consumer of that service and therefore, I have little difficulty in finding that the Commissioner and the Tribunal were right to hold that this service was not an exported service and thus subject to Excise Duty. This ground by the appellant therefore fails.

VISA’s Contributions to Card Costs

16. The appellant averred that in order to increase market penetration and use of its network, VISA routinely supports Issuing Banks in respect of certain costs associated with issuing and operating debit and credit cards. It contended that this revenue item therefore related to funds provided by VISA to the appellant and that Excise duty is not applicable to these funds as they are not fees charged by the appellant in accordance with the First Schedule part II (4) of the [Excise Duty Act, 2015](#) which provides that ‘Excise duty on other fees charged by financial institutions shall be twenty percent of their excisable



value'. On its part, the Commissioner held that the appellant had not provided any documents or evidence to support this position of costs and it therefore subjected this amount to Excise Duty.

17. In its decision, the Tribunal relied on the appellant's document titled, "Excise Duty Reconciliation" attached to its appeal where the Tribunal noted that upon receipt of this sum from VISA, the same is credited into its books as "passive income" and therefore forms part of its income irrespective of whether this amount it is netted off with Visa related costs or not. The Tribunal further observed that describing it as "passive income" is misleading given the fact that these bonuses are based on targets described by VISA within the Agreement between the appellant and VISA. The Tribunal further held that the fact that the appellant does not directly 'charge' VISA for this amounts does not exclude it from abiding by the principle of Excise Duty law and that in any case, it can be assumed that should Visa not automatically pay, the agreement in place gives the appellant the right to charge them for the commissions due.
18. The *Excise Duty Act, 2015* defines "Other Fees" to include "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". The Tribunal's took the position that it was immaterial whether the commissions received by the appellant were 'earned' or 'charged'. In *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), the appellant put forward an argument similar to that of the appellant herein and the court maintained that what is important is that as a "financial institution" it received those commissions and that it did not matter whether or not the appellant raised a bill for the amount. The court stated, as the Tribunal herein held, that in any event the payer fails to pay the commission by whatever name called, the appellant would obviously demand the amount due to it because it is the amount it has "charged" for the services rendered.
19. Ultimately the commissions paid by VISA to the appellant is the consideration for generation of the credit and debit cards and it is this commission that attracts Excise Duty which the appellant is duty bound to collect and pay. This ground by the appellant also fails.

The Appellant's Commission on its Fixed Income

20. It was not in dispute that the appellant received commissions from the Central Bank of Kenya whenever it bought Treasury Bonds. In its argument, the appellant stated that it does not 'charge' for these commissions/fees and reiterated that the *Excise Duty Act, 2015* only imposes an obligation to apply Excise Duty whenever a financial institution 'charges' for a fee. This position is similar to the argument it raised above on VISA's card contributions. I can only reiterate that the argument does not hold water as what is important is that the appellant received these commissions/ fees and was obligated to pay Excise Duty on it. Had it not received the commissions from the payer, it would have demanded them. This ground by the appellant similarly fails.

Commissions on Money Transfers

21. The Commissioner is dissatisfied with the Tribunal's finding on the commissions earned by the appellant in respect of money transfers. In its objection, the appellant stated that these related to a portion of fees received by it from correspondent banks for facilitating cash transactions where the terms of the transaction are such that the fees were to be borne by customers of those banks. The appellant explained that in every cash transfer transaction, the sender is required to indicate who should bear the transaction fees and that depending on the choice selected, the transaction fees are either borne by the sender or by the receiver of the money. Where the person bearing the transaction fees



is the appellant's customer, the appellant will charge the fees as well as Excise Duty which is remitted to the Commissioner and thereafter remit a portion of the fees charged to the correspondent bank. That on the other hand, where the fees are borne by a customer other than the appellant's, the fees will be charged by the correspondent bank and the appellant will receive a portion or the income for facilitating the transaction. The appellant contended that in this instance, it was not possible for it to charge the customer Excise Duty since it did not have access to the customer account and that the income received from the correspondent banks is what it termed as 'passive' income'. The appellant restated that the [Excise Duty Act 2015](#) only imposes an obligation to apply Excise Duty whenever a financial institution charges for a fee and as such no Excise Duty was applicable in respect of fees received.

22. The appellant added that where the fees are received from an offshore bank, the User and/or consumer of the service is an entity/individual based outside Kenya and that the place of performance of the service, that is, remittance of money, is outside Kenya. Therefore, the appellant stated that such a service can be considered to be out of scope of the [Excise Duty Act, 2015](#) and that it excluded from the calculation those fees not collected by it.
23. On its part, the Commissioner alluded to a meeting held on August 19, 2013 between it and the Kenya Bankers Association where the latter was advised that derived commission which include, commission received for top ups of airtime, Inbound transfers, bills discounted, Mpesa-connect commissions which include use of ATM third party settlement are subject to Excise Duty in accordance with the provisions of [Finance Act, 2012](#) and the [Finance Act, 2013](#). That the [Excise Duty Act, 2015](#) is also explicit on the chargeability of Excise Duty on fees charged for money transfer services.
24. It would appear the argument before the Tribunal centered on whether the fees and commissions received by the appellant from the non-resident correspondent banks for such transactions was subject to Excise Duty. The Commissioner thinks it would and submitted that this is because the payment is being received on account of the appellant's infrastructure being used. In its decision, the Tribunal held that based on the fact that these fee-bearing clients are outside Kenya, the services do not qualify for Excise Duty and hence the Commissioner erred in law and fact by subjecting the same to Excise Duty.
25. In my view, resolution of this issue required *inter alia*, the application of the 'ultimate beneficiary and consumer' test described above and not necessarily whether the appellant's infrastructure was being used. Whereas the appellant provides the infrastructure to facilitate money transfers between itself and the non-resident correspondent banks, the ultimate beneficiary and consumer of these services when money is being transferred from the non-resident correspondent banks to the appellant is the non-resident correspondent bank. The reverse is also true were it to be that it was the appellant making the money transfer to the non-resident correspondent bank as in such a case, it would have been the appellant who is the ultimate consumer and beneficiary of the service and the infrastructure by the non-resident correspondent bank is what enabled the transfer. I also find that the appellant's explanation was plausible in that where the fees are received from an offshore bank, the User and/or consumer of the service is an entity/individual based outside Kenya and that the place of performance of the service, that is, remittance of money, is outside Kenya. That where the person bearing the transaction fees is not a customer of the appellant and the same is charged by the non-resident correspondent bank on the non-resident sender of the funds, such fees cannot be within the scope of Kenya's Excise Duty law.
26. Since the location of the consumer of the facilitation service offered by the appellant is outside Kenya, the service is deemed to be an exported service and thus not excisable and therefore, the consideration received by the appellant for the service is not subject to Excise Duty. Further, since the transfer fees is charged by a non-resident entity on a non-resident sender, the same is outside the scope of Excise Duty



in Kenya. I find that the Tribunal did not err in its disposition of this issue and for the aforementioned reasons, I find that this ground of appeal by the Commissioner also fails.

Disposition

27. For the reasons I have set out both appeals have failed. They are dismissed with no order as to costs.

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

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango.

Mr Kimani, SC with him Mr Ruto instructed by Hamilton, Harrison and Mathews Advocates for the Appellant.

Ms Chelangat, Advocate instructed by Kenya Revenue Authority for the Respondent.

