



REPUBLIC OF KENYA



**Dow Chemicals East Africa Limited v Commissioner of Domestic Taxes (Income Tax Appeal E118 of 2020) [2023] KEHC 19134 (KLR) (Commercial and Tax) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19134 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E118 OF 2020  
JWW MONG'ARE, J  
JUNE 26, 2023**

**BETWEEN**

**DOW CHEMICALS EAST AFRICA LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(Being an appeal from the judgement of the Tax Appeals Tribunal dated 4/3/2020 in Nairobi)*

**JUDGMENT**

1. The Appellant is a private limited company incorporated in Kenya operating as a liaison office of its parent company, Dow Europe Holdings B.V, in the Netherlands, while the Respondent is an agency of the Government with the duty of collection and receipt of all revenue. It is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule to the [Kenya Revenue Authority Act](#) for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
2. The Respondent issued a VAT verification to the Appellant for the period January 2013 to December 2016 and made a tax assessment of Ksh.84,013,606/- against the Appellant. After explanations and further documents provided by the Appellant, the Respondent issued its Objection Decision *vide* its letter dated 11/10/2017. Subsequently, the Appellant appealed against the Objection Decision before the Tax Appeals Tribunal (the tribunal) which rendered its judgement on the issue on 4/3/2020 partly in favour of the Applicant.



3. Being dissatisfied with the decision of the Tribunal, and through a Memorandum of Appeal dated 6/11/2020, the Appellant appealed against the tribunal's judgment on the following grounds:

- “ 1. That the tribunal erred in law and in fact in failing to appreciate that the Respondent's decision on the assessment made on VAT on the Appellant issued on 11<sup>th</sup> October, 2017 for the years of income running from January, 2013 to December, 2016 was excessive and not in accordance with the fees charged and earned by the Appellant.
2. That the tribunal erred in law and in fact in failing to appreciate that the Respondent's decision on the assessment made on VAT on the Appellant issued on 11<sup>th</sup> October, 2017 for the years of income running from January, 2013 to December, 2016 was contrary to Section 13 (5) of the VAT Act as expenses incurred by the Appellant and reimbursed by third party do not attract VAT.
3. That the tribunal erred in law and in fact in failing to appreciate that the Respondent's decision on the assessment made on VAT on the Appellant issued on 11<sup>th</sup> October, 2017 for the years of income running from January, 2013 to December, 2016 violated Section 17, Subsection 6 and 7 of the VAT Act.
4. That the tribunal erred in law and in fact in failing to appreciate that the Respondent's decision on the assessment made on VAT on the Appellant issued on 11<sup>th</sup> October, 2017 for the years of income running from January, 2013 to December, 2016 violated Section 17, Subsection 6 and 7 of the VAT Act.
5. That the Tribunal erred in law in fact in failing to consider the self-assessment by the Appellant's Tax consultant and uphold the same as reflecting the true and accurate amount of VAT payable for the period January 2013 to December 2016.
6. That the Tribunal erred in law in fact in failing to appreciate that the Appellant's services to its related companies are export services.
7. That the Tribunal erred in law in fact in holding that only the Appellant's Research and Development services were exempt from VAT and not all the services the Appellant offered to its related companies that are based outside Kenya.”

4. Based on these grounds the Appellant prayed to have the appeal allowed and the tribunal's judgement of 4/3/2020 set aside. The Respondent opposed the appeal through a Statement of Facts dated 15/2/2021. Further, the Respondent raised a Preliminary Objection on a point of law on the ground that the Memorandum of Appeal is fatally defective for want of compliance with the mandatory provisions of law and urged the court to have the same be struck out with costs.

5. Further, the Respondent contended that the tribunal had in its decision duly considered the provisions of Section 13(5) and Section 17 (6) & (7) of the VAT Act in arriving at its final determination; that the tribunal duly considered the contents of the Appellant's Tax Consultant's letter dated 7/11/2021 in arriving at the determination as to the true and accurate amount of VAT payable for the period in



dispute; that the tribunal dutifully addressed itself to the Appellant's Tax Consultant's issues raised after Confirmation of the assessment as evidenced in Paragraphs 19, 20 and 21 in appreciating which of the Appellant's Services to its related companies are exported.

6. In addition, the Respondent further averred that the tribunal duly considered the contents of the Appellant's Tax Consultant's letter dated 7/11/2021 in arriving at the determination as to the true and accurate amount of VAT payable for the period in dispute and that the tribunal duly appreciated the facts and the law in arriving at the determination that the Appellant's Research and Development Services were exempt from VAT and not all services the Appellant offered to its related companies that are based outside Kenya.
7. Based on the reasons above, the Respondent prayed to have the appeal dismissed and the tribunal's judgement of 4/3/2020 upheld.

**Analysis and Determination: -**

8. I have considered the record of appeal, the grounds of opposition to the appeal and respective submissions filed by the parties and carefully analysed the same. I note that the grounds of appeal can be condensed to the following issue for determination, to wit: "whether the services provided by the Appellant to its parent company based in the Netherlands are exported services and thus exempt from VAT."
9. It is not contested that the objection decision dated 11/10/2017 was in respect of assessment of the Appellant's VAT tax for the period January 2013 to December 2016. Further, it is admitted that the Appellant, as a subsidiary of Dow Europe Holdings B.V, carried out various services for its parent company in the region. These services entailed customer invoice and settlement services, sales, selling and marketing services, Research and Development services among other ancillary services. I note that the Respondent in its assessment of the VAT due concluded that these services are consumed in Kenya and therefore VAT ought to be levied on them and raised a demand for VAT due from the Appellant for the sum of Kshs.84,057,800/- which included interest accrued for the period 2013-2016.
10. From the record of appeal, I note that the Appellant's tax associates, M/S Delyde Associates Limited, wrote a letter dated 7/11/2021 to the Respondent indicating the Appellant's intention to appeal against the objection decision (found on pages 22-24 of the Respondent's statement of facts). Under Paragraph 2 of the said letter, the Respondent's tax agent stated:

"As you agreed with us when we met, apart from "Research and Development Services", all other services are consumed in Kenya and thus subject to VAT. Research and Development services involve collation of data and market trends for consumption by the parent company to aid in the formulation of market strategies. Therefore, the service is not consumed in Kenya and thus not subject to VAT in accordance with section 8 of the VAT Act."
11. From the paragraph above, it is clear that the Respondent conceded that all the other services that it offered its parent company were subject to VAT save for 'Research and Development services'. The tribunal therefore correctly found that the Appellant had conceded to its services being chargeable to VAT other than the "Research and Development" services that it offered to its parent company. The Tribunal went on to determine that the Research and Development services were an export service and therefore zero rated.
12. Section 2 of the VAT Act states that a "service exported out of Kenya" means a service provided for use or consumption outside Kenya.



13. We are guided by the decision of the court in the case of *Commissioner of Domestic Taxes v Total Touch Cargo Holland* (2018) eKLR where the court held that 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.
14. In the *Total Touch* case (*supra*), Odero J held:

“From the above it is clear that Section 2 of the repealed *VAT Act* which stipulates that an “exported service” is that which is provided for use or consumption outside Kenya is in keeping with the destination principles under the OECD guidelines. As such the taxing rights in terms of VAT to be charged on the services offered by KAHL to the Respondent is in the Netherlands and not in Kenya, since the final consumer of the horticultural produce and flowers being prepared for export is the Respondent and its customers in Europe.”
15. In the present case, the Research and Development services involved the collation of data by the Appellant which assisted its parent company in the Netherlands to formulate marketing strategies. I find that although the services were carried out in Kenya, they were consumed by the parent company in the Netherlands.
16. I find therefore that the tribunal’s judgment dated 4/3/2020 was sound as only the Research and Development services qualified as export services and were VAT exempt. The rest of the services, as admitted by the Appellant’s tax representatives, were consumed in Kenya and VAT was rightfully levied against them by the Respondent.
17. I find and hold that the Tribunal made the correct findings in the matter before it and therefore there is no need to interfere with its judgment. The appeal before me is dismissed with costs to the Respondent for lacks merit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2023**

**J. W. W. MONG’ARE**

**JUDGE**

**In the Presence of:-**

1. Mr. Ongoto for the Applicant.
2. N/A for the Respondent.
3. Sylvia- Court Assistant.

