Commissioner of Domestic Taxes v Barclays Bank of Kenya Limited (Now ABSA Bank Kenya PLC) (Income Tax Appeal E107 of 2021) [2023] KEHC 24807 (KLR) (Commercial and Tax) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24807 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E107 OF 2021

EC MWITA, J

OCTOBER 27, 2023

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED (NOW ABSA BANK KENYA PLC) ..... RESPONDENT

(Appeal against the Decision of the Tax Appeals Tribunal dated 30th April 2021 in TAT No. 246 of 2019)

JUDGMENT

1. The Commissioner of Domestic Taxes (the Commissioner) reviewed Barclays Bank of Kenya Limited's (Barclays) records for the period January 2016 to September 2018 for the purpose of confirming Barclays' tax compliance. The Commissioner then issued a notice of assessment dated 29th January 2019 for the principal excise duty, interest and penalties, totaling to Kshs. 300,320,076.

2. Barclays lodged an objection to the assessment on the grounds that the Commissioner had unlawfully assessed excise duty on exported services contrary to section 7 (1) of the *Excise Duty Act* and excise duty on fair value gains on reevaluation of financial instruments, on loan or credit related fees, charges and commissions, not subject to excise duty. Barclays also complained that the Commissioner alleged that it had not applied the correct excisable value on certain transactions and sought to charge penalties retrospectively.

3. The Commissioner issued an objection decision on 26th April 2019, vacating assessment on excise duty on fair value gains of Kshs. 44,513,930. The Commissioner however confirmed the assessments on

excise duty on exported services and loan or credit related fees, charges and commissions amounting to Kshs. 257,948,794.

4. Barclays filed an appeal before the TAT challenging the Commissioner's objection decision. Relying on section 78 of the *Tax Procedures Act*, the TAT held that the tax assessment and the objection decision issued by the Commissioner were valid. The TAT took the view, that a defect in an assessment is not a sufficient ground for its impeachment.

5. The TAT also held that international interchange fee on debit and credit cards earned from foreign merchants; foreign cash advance fees earned from automated teller machine withdrawals made outside Kenya; and inward remittance fees by customers of foreign banks, are exported services in so far as the consumers of those services are located outside Kenya. The attendant fees earned from those services are therefore exempt from excise duty.

6. The TAT also held that credit related fees charged by Barclays fell within the scope of "interest" and was not subject to excise duty with effect from the date the Finance Act 2013 came into force.

7. Applying the doctrine of pari materia, the TAT adopted the definition of "interest" under section 2 of the *Income Tax Act* to determine the scope of the word "interest" as used in the *Excise Duty Act*.

8. The TAT further held that the assessment of penalties under section 83A of the *Tax Procedures Act* at 5% and interest under section 38 of the Act for the years 2016, 2017 and 2018 lacked merit because the provision came into effect on 1st July 2018 and there was no intention to apply the penalty prior to its effective date.

9. On that basis, the TAT set aside the part of the objection decision confirming the demand for excise duty on fees charged on credit related fees after the commencement of the Finance Act, 2013; on fees earned from exported services after coming into force of the *Excise Duty Act* and for shortfall penalty under section 83A of the *Tax Procedures Act*.

10. The Commissioner was aggrieved and filed this appeal on the following grounds that:

    1. the Tribunal erred in law and in fact in finding that the *Income Tax Act* and the *Customs and Excise Act* are pari materia.

    2. the Tribunal erred in law and in fact in defining interest as used under the *Excise Duty Act* using the definition under the *Income Tax Act*.

    3. the Tribunal erred in law and in fact in finding that credit related charges fell within the scope of "interest" and therefore exempted from *Excise Duty Act* with effect from the date the Finance Act 2013 came into force.

    4. the Tribunal erred in law and in fact in failing to appreciate that the definition of interest in the *Banking Act* represents the industry practice of the respondent which informed the treatment of the same in the *Income Tax Act*.

    5. the Tribunal erred in fact and in law in failing to appreciate the treatment of loan or credit related fees charges and commissions under the Central Bank of Kenya Guidelines which clearly differentiate the said charges from interest.

    6. the Tribunal erred in law and in fact in failing to appreciate the evidence tendered by the appellant before it before rendering its judgement.

    7. the Tribunal erred in law and in fact in concluding that the money received by the respondent is participation fees and not subject to excise duty.

8. the Tribunal wrongly exercised its discretion by using wrong statutes to define the term interest.

9. the Tribunal erred in law and in fact in finding that loans commitment/facilitation/processing fees and bills fell within the definition of interest and exempt from excise duty.

10. the Tribunal erred in law and fact in disregarding the doctrine of stare decisis and disregarding the decision of the Court of Appeal in Nairobi Civil Appeal No. 195 of 2017 - Commissioner of Domestic Taxes (Large Tax Payer office) v Barclays Bank of Kenya Ltd which had made a finding on the issues in dispute and was brought to the attention of the Tribunal way before its judgment was delivered;

11. the Tribunal misapplied and misdirected itself on the law and therefore came to the incorrect decision.

11. The Commissioner prayed that this appeal be allowed with costs, part of the TAT's decision holding that credit related fees charged by Barclays fell within the scope of "interest" and not subject to excise duty be set aside and uphold the objection decision assessing excise duty on extra fees and charges which did not fall within the meaning of the term "interest."

12. This appeal was disposed of through writes submissions and oral high lights.

Commissioner's submissions

13. The Commissioner argued that it was right to charge excise duty on additional interest on late payment of loans charged by Barclays as fees, not interest. To support this contention, the Commissioner pointed out that in Barclays' financial statements, late loan repayment fees are reported under other operating income while interest on loans has been reported under interest income. For that reason, interest on late payment of loans is separate and distinct from interest on loans.

14. The Commissioner asserted that the TAT ought to have adopted the literal meaning of the word "interest" as used in the *Banking Act* since the banking industry treats interest and fees differently as interest excludes fees on loans and advances.

15. The Commissioner relied on clause II, Para. 1.1 p. 28 and clause 4.2, p. 260 of the Prudential Guidelines 2013, Central Bank of Kenya's Survey of Bank Charges and lending rates; the Kenya Bankers' Association Consumer Guide to Banking in Kenya and the decisions in Commissioner of Domestic Taxes v National Bank of Kenya [2022] eKLR and Commissioner of Domestic Taxes v Stima Credit Savings & Credit Society Limited, Nairobi HC ITA No. E090 of 2021, where the Courts applied the literal meaning of the term interest.

16. The Commissioner asserted that the TAT erred in adopting the definition of "interest" used in the *Income Tax Act* since that definition is only applicable for purposes of charge, assessment and collection of income tax. According to the Commissioner, income tax is a tax administered on gain or profit while excise duty is a consumption tax hence the ordinary meaning of the word "interest" should have been used.

17. The Commissioner further argued that whereas the *Income Tax Act* treats interest and other fees differently, under the *Excise Duty Act*, 2015, other fees except interest are subject to excise duty. Further, under section 2 of the *Income Tax Act*, interest includes other incidental expenses like commitment and appraisal fees for the purpose of charging withholding tax.

18. The Commissioner took the view, that the main consideration when drafting revenue statutes is how different industries carry out their businesses. Since the intention of the legislature was to impose excise duty on the incidental expenses associated with interest and not on interest, under the *Excise Duty Act*, the definition of other fees starts with exemption of interest.

19. The Commissioner relied on Mjengo Limited v Commissioner of Domestic Taxes [2016] eKLR for the argument that the use of a word in one statute can be adopted for use in another statute only in circumstances where both statutes deal with the same subject matter or form part of the same system.

20. The Commissioner further relied on Cape Brandy Syndicate v I. R. Commissioners [1921] 1KB 64 that in a taxing Act, one has to look at what is clearly said and nothing is to be read in, nothing is to be implied.

21. Reliance was again placed on Commissioner of Domestic Taxes v Stima Credit Savings & Credit Society Limited, (Nairobi HC ITA No. E090 of 2021), that in constructing tax statutes the court should use the plain and literal meaning of the words used in a statute to discern the intention of Parliament.

22. The Commissioner again cited Commissioner of GST & Central Excise v M/s Citi Bank, Civil Appeal No. 8228 of 2019 and London and Eastern Co. v Berriman [1946] 1 All ER 255, that it is only by reference to the industry that the meaning of words can be ascertained, and that it remains a question of evidence what the words mean in the industry.

23. The Commissioner made further reference to the decision of the High Court of Delhi in Raees-Uz-Zama and Another v State NCT of Delhi LWAS (HLH) 2023-5-24 on the four elements that must be considered before the application of the doctrine of pari materia. (Acts which have been given a collective title, are required to be construed as one, having short titles that are identical) apart from the calendar year and other Acts which deal with the same subject matter on the same lines.

24. The Commissioner also cited the decision in Palm Oil Research and Development Board Malaysia and another v Premium Vegetable Oil SDN BHD [2004] 2 CLJ 265 that words are to be given their ordinary meaning and are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices.

25. The Commissioner thus faulted the TAT for finding that only the fees received by Barclays in form of participation fees were subject to excise duty. The Commissioner argued that interest on credit card transactions is subject to excise duty as this income is separately and distinctly reported from interest income in Barclays' financial statement. The Commissioner relied on the Consumer Guide to Banking which lists the loan costs separate from credit card transaction costs.

26. Relying on the TAT decisions in African Bank Corporation Limited v Commissioner of Domestic Taxes, (TAT No. 176 of 2016) and Stanbic Bank Kenya Limited v Commissioner of Domestic Taxes, (TAT No. 176 of 2016), the Commissioner asserted that the interchange fees earned by Barclays for assisting merchants and acquiring banks process card transactions is subject to excise duty as it falls within the definition of other fees.

27. The Commissioner took the position that as long as Barclays rendered a service to the acquiring bank which service earned interchange fees, the same fell within the definition of other fees as provided for under section 8 Part III of the Fifth Schedule to the *Customs and Excise Act* as amended by the Finance Act 2013 and the same provision for the period governed by the Finance Act 2012.

28. The Commissioner relied on the Court of Appeal decision in Commissioner of Domestic Taxes v Barclays Bank of Kenya Limited, (Nairobi Civil Appeal No. 195 of 2017) for the proposition that there is a service provided by an issuing bank to an acquiring bank for a consideration.

29. Reliance was also placed on Commissioner of GST & Central Excise v M/s Citi Bank N A., (Supreme Court of India Civil Appeal No. 8228 of 2019), that there is a service performed by the respondent as the issuing bank in a credit card transaction.

30. It should be noted that during the hearing of this appeal, the Commissioner admitted that the Court of Appeal decision in Commissioner of Domestic Taxes v Barclays Bank of Kenya Limited, (Nairobi Civil Appeal No. 195 of 2017) did not apply to this appeal since that decision was on a different issue namely withholding tax and was therefore distinguishable,

31. The Commissioner maintained that the TAT erred in failing to take into account the prudential guidelines and the international best practice in banking as mandated by the Central Bank of Kenya.

Submissions by Barclays

32. Barclays opposed this appeal through a statement of facts and written submissions. Barclays submitted that loan credit related charges constitute return on loan or interest on loan which were not subject to excise duty during the period in question. Barclays relied on Paragraph III of Part II of the First Schedule to the *Excise Duty Act* which excluded interest on loan or return on loan from the definition of "other fees."

33. Barclays contended that since Excise Act did not define interest on loans, the plain and ordinary meaning of the word interest was applicable. Reliance was placed on the definition of "interest" in Oxford Dictionary of Finance and Banking (Fifth Edition) that any fees that are charged with respect to a loan, including loan administration fees, loan arrangement fees, loan facilitation fees and loan appraisal fees would constitute charges made for borrowing of money.

34. Barclays again relied on the decisions in Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR, for the assertion that the first and foremost rule of construction of statutory provisions is literal construction.

35. Barclays further relied on Commissioner for Inland Revenua v Cactus Investments (Pty) Ltd 59 SATC 1, that interest is "the charge made for borrowing a sum of money. Reliance was also placed on Greenwood Trust Co. v Commonwealth of Massachusetts 971 F 2d 8181 [1992], that the term "interest" encompasses a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate.

36. Barclays also cited the decision in Aban Investment PVT v Deputy Commissioner of Income Tax, that loan processing fees fell within the definition of interest pursuant to section 2 (28A) of the Indian *Income Tax Act*, 1961 and Unilever Kenya Ltd v the Commissioner of Income Tax (No. 753 of 2003), that where there is no guidance on tax issues either from legislation or the Commissioner, recourse should be had to international best practice; and based on international standards, lending fees are treated as interest.

37. Barclays again relied on Richard Bonham Safaris Ltd v Commissioner of Income Tax [2006] eKLR and Allgemeine Gold v Customs and Excise [1980] All ER, that the TAT was correct to apply the doctrine of pari materia by adopting the definition of interest in the *Income Tax Act* as it relates to the same matter as the *Excise Duty Act*.

38. Barclays would further argue that although the Commissioner faulted the TAT for applying the doctrine of pari materia, the Commissioner still contended that the TAT should have made reference to the *Banking Act* for the definition of interest. Barclays asserted that the *Banking Act* does not define interest and its adoption would not be proper as it does not relate to the same subject matter. Reliance was placed on section 3 (2) of the *Interpretation and General Provisions Act*.

39. Barclays again relied on Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR for the contention that where there are two or more conflicting interpretations of the term interest, there is ambiguity which must be resolved in the tax payer's favour.

40. Barclays relied on Mount Kenya Bottlers Limited & 3 others v Kenya Revenue Authority & 3 others [2019] eKLR; Russell v Scott [1948] 2 All ER 5 and Republic v Commissioner of Domestic Taxes (Large Tax Payers Office) & another Ex-Parte British American Tobacco Kenya Limited [2015] eKLR, that tax statutes are to be interpreted strictly and there is no room to discern the intention of the legislature.

41. Barclays contended that the decisions the Commissioner relied on National Bank of Kenya v Commissioner of Domestic Taxes [supra] and Commissioner of Domestic Taxes v Stima Savings & Credit Society Limited [supra]) are distinguishable from this appeal.

42. The National Bank case related to assessment for the period between January 2013 and December 2015 when the *Customs and Excise Act* applicable did not provide for a return on loan in the definition of "other fees"

43. On the other hand, the Stima Savings & Credit case related to a 2013-2016 assessment and the Court only considered whether the fees constituted interest on loan but did not make any finding on whether the fees constitute a return on loan.

44. Barclays again contended that the National Bank case should not be considered in determining the present appeal as the Court erred by finding that loan related charges do not constitute interest thus limiting itself to one interpretation. The Court did not also consider the multiple definitions arising from the term "interest" and the decisions of various courts in other jurisdictions.

45. Barclays supported the holding by the TAT arguing that in determining the appeal, the TAT considered the evidence before it. The TAT did not also make any finding concluding that the money Barclays received as participation fees was not subject to excise duty because this issue had not been pleaded and did not therefore arise.

46. According to Barclays, the Court of Appeal decision in Commissioner of Domestic Taxes v Barclays Bank of Kenya Limited, (Civil Appeal No. 195 of 2017) is distinguishable because it related to whether withholding tax is chargeable on payments (subscription/scheme fees) made by banks to card companies and whether withholding tax was chargeable on interchange fees paid to other banks.

47. Barclays asserted regarding the issue of whether in interchange commissions for card transactions that there are two separate contracts between banks and between bank and customer. The TAT only considered the bank and customer. the issue of bank and bank was not raised by the Commissioner in its memorandum of appeal.

48. Barclays relied on Geodfrey Karinguri Mwiricha & another v Charity Mwonjiru Mbaabu [2020] eKLR to argue that the Commissioner is precluded from raising new grounds of appeal in submissions which depart from the memorandum of appeal that was before the TAT.

Determination

49. I have considered the appeal, arguments by parties, the decisions relied on and the impugned decision. The core issue in this appeal is whether the TAT was wrong on the definition of "interest." Depending on the answer to this issue, whether loan credit related charges, including additional interest on late payment on loans charged by Barclays was fees and not interest thus subject to excise duty. The other issue is whether money received from participation fees (MSC) is exempt from excise duty.

Definition of interest.

50. The issue here is whether the TAT was wrong on the interpretation of the word interest as used in the repealed *Customs and excise Act*.

51. The Commissioner faulted the TAT for seeking aid from the *Income Tax Act* for the interpretation of the term "interest." The Commissioner argued that since the repealed Customs and *Excise Duty Act* did not have define "interest" the TAT should have applied a literal interpretation and not the definition used in the *Income Tax Act*.

52. This issue of interpretation of the word "interest" arose before the TAT where the Commissioner had argued that it was in order to charge excise duty on additional interest on late payment of loans charged by Barclays as fees because it was not interest. To support this contention, the Commissioner pointed out that Barclays had in its financial statements reported late loan repayment fees under other operating income while interest on loans had been reported under interest income. For that reason, the Commissioner argued, interest on late payment of loans was separate and distinct from interest on loans.

53. The Commissioner asserted both before the TAT and this Court, that the TAT ought to have adopted the literal meaning of the word "interest" as used in the *Banking Act* since the banking industry treats interest and fees differently and that interest excludes other fees on loans and advances. The Commissioner took the view, that the TAT should also have taken into account Central Bank Guidelines and arrive at a conclusion that interest excludes other fees on loans and advances.

54. The definition of the term "interest" arose when the TAT was dealing with the issue of whether the Commissioner could charge excise duty on lending fee and other bank charges. The Commissioner had assessed and demanded excise duty of Kshs. 333,954, 246 on arrangement fee, commitment fee and other loan related fees that Barclays had earned during the period under review.

55. Barclays' argument was that to the extent that lending constitutes a cost incurred by a customer for a loan borrowed, it qualified as interest. The Commissioner on its part argued that agreements between the banks and customers have two independent [separate] clauses, namely; "interest" and "other fees" such as commissions and negotiation fees. According to the Commissioner, these charges are not interest and attract excise duty.

56. Responding to the parties' respective positions, the TAT made reference to Paragraph 8 of the Fifth Schedule to the repealed Act which provided that Excise duty on other fees charged by financial institutions was ten percent. The TAT also made referenced the Finance Act 2013 that introduced Paragraph 9 to the effect that for purposes of items 7 and 8-other fees included any fees, charges or commissions charged by financial institutions, but did not include interest.

57. The TAT was of the view, and rightly so, that resolution of that issue really rested on the meaning of the word "interest." In determining that issue, the TAT appreciated that the repealed Act did not define

the word "interest" neither did the amendment introduced by the Finance Act 2013 on what "other fees" encompassed, thus leaving a lacuna.

58. The TAT turned to the definition of "interest" in section 2 of the *Income Tax Act* for aid. The TAT quoted the section defining "interest" thus:

> " Interest means interest payable in any manner in respect of a loan, deposit, debt, claim, or other right or obligation and includes a premium or discount by way of interest and commitment or service fee paid in respect of any loan or credit..."

The TAT then observed that the term "interest" encompassed all other lending fees.

59. The TAT then cited the decision in Greenwood Trust Co. v Commonwealth of Massachusetts 771 F 2d 818 (1992) to buttress the view that the word "interest" encompassed all other lending fees. In the above decision it was held that in the language of section 85 of [their] *Banking Act*, the term "interest" encompassed a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate. (See also CIR v Genn & Co (Pty) Ltd 20 SATC 113).

60. The TAT concluded that lending fees in question formed part of interest which were expressly exempted from the scope of the amendments into the Fifth Schedule to the repealed Act. In that regard, arrangement fees and negotiation fees among other lending fees, fell outside the purview of the repealed Act.

61. The Commissioner's argument is that the TAT was wrong in importing the definition of "interest" from the *Income Tax Act* into the *Excise Duty Act* as though the two statutes were pari material. According to the Commissioner, the TAT should have applied a literal interpretation and usage or practice in the banking industry to hold that the definition in the *Income Tax Act* was inapplicable in this case.

62. As correctly pointed out by the TAT, the disagreement between the parties on the issue resolved around the meaning or definition of the term "interest." Both parties agreed before the TAT and in this court, that the applicable statute [repealed *Customs and Excise Act*] did not define the word "interest." Where this is the case, the court may look elsewhere to get the meaning of that word.

63. The TAT not only turned to the *Income Tax Act* but also decided cases for help which the Commissioner faulted. The Commissioner's argument was that the *Income Tax Act* and the *Customs and Excise Act* are not pari materia and therefore the definition in one Act could not apply to the other.

64. Pari material refers to a situation where provisions of different laws relate to the same subject or object. In this regard, statutes will be considered pari material if they relate the same person, thing or class of persons and things. If two different statutes are not on the same subject [but have different objects] they operate on their own fields. That is, where two different pieces of legislation are of different scopes and with reference to different subject, they cannot be said to be in pari materia (State of Punjab v Okara Grain Buyers Syndicate Ltd 1963; 1964 AIR 669, 1964 SCR (5) 387).

65. The point being made here is that statutes with common objectives may provide aid to each other.

66. The definition of a word in the definition section may be restrictive of its meaning or it may be extensive of the same. When a word is defined to "mean" such and such, the definition is prima facie restrictive and exhaustive, (Commissioner of Trade Tax v Kajaria Ceramics Ltd TML 1D=105572 2005 (1) TML 351; Commercial Taxation Officer v Rajasthan Taxchem Ltd 2007 (1) TML 187 (Supreme Court of India)

67. It is admitted by both sides that the repealed *Customs and Excise Act* did not define the word "interest." Neither did the amendments introduced by the Finance Act 2013, excluding "interest" from excise duty. In the circumstances, the Court may turn elsewhere in order to resolve the issue. Although in interpreting the word "interest" literal interpretation is favoured, that does not exclude the court from borrowing from related legislation and decided cases on the issue.

68. This court dealt with the issue in Stanbic Bank Ltd v Commissioner of Dommestic Services (ITA No. E156 of 2020) and agreed with TAT that *Income Tax Act* is closely related with *Excise Duty Act* and the definition of interest in the former Act could be used in the latter Act.

69. The object of the repealed Act was to raise revenue through taxation, thus it was a tax legislation. The *Income Tax Act* has the same object. In that respect, I would agree with the TAT that the two statutes were in pari material and in those circumstances, the TAT did not err in borrowing the definition of "interest" from the *Income Tax Act*.

70. The *Income Tax Act* defines "interest" thus:

> Interest (other than interest charged on tax,) means interest payable in any manner in respect of a loan, deposit, debt, claim, or other right or obligation and includes a premium or discount by way of interest and commitment or service fee paid in respect of any loan or credit or an Islamic finance return.

In that definition, interest encompasses more than the percentage rate.

71. The word "interest" has been defined by courts elsewhere. For instance, in Commissioner for Inland Revenua v Cactus Investments (Pty) Ltd 59 SATC 1, interest was defined as "the charge made for borrowing a sum of money.

72. In Greenwood Trust Co v Commonwealth of Massachusetts 971 F 2d 8181 [1992], term "interest" was defined to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate.

73. The court observed that it did not believe that the plain meaning of "interest" necessarily restricts the definition of the word to numerical percentage rates. Referring to dictionaries (Webster's Ninth New Collegiate Dictionary 630 (1989) and Black's Law Dictionary 812 (6th ed. 1990), typically which define interest as a charge for borrowed money; generally, a percentage of the amount borrowed; the court opined that such definitions do not limit interest to numerical percentage rates, for they simply note that interest is often, but not always, expressed as a percentage.

74. The court further noted that judicial opinions also tend to shy away from limiting the word "interest" to numerical percentage rates. Case law has long suggested that, in ordinary usage, interest may encompass late fees and kindred charges.

75. The definition of "interest" in the above decisions is non-restrictive which is in tandem with the definition in section 2 of the *Income Tax Act* that the TAT applied in this case. In the circumstances, I agree with the TAT that the two statues being pari material, the definition of interest in the *Income Tax Act* could be applied in this appeal.

Whether credit related charges were exempt from excise duty

76. The issue here is whether credit related charges, including loans facilitation fee, processing fee and late payment interest fall within the definition of interest, thus are exempt from excise duty.

77. This court has already stated in the preceding issue, that the definition of interest is not limited to numerical percentage rates only but encompasses other charges. In that regard, credit related charges including late payment interest, facilitation fee and processing charges fall within the definition of interest and are therefore exempt from excise duty.

78. This Court took a similar view in Stanbic Bank Ltd v Commissioner of Dommestic Services [supra] that loan administration fees could not be subject excise duty.

79. For that respect, I agree with the conclusion reached by the TAT on this issue that these charges fell under the definition of interest and were exempt from excise duty.

Money received from participation fees

80. The issue here is whether money Barclays received in form of participation fees is exempted from excise duty. The Commissioner argued that the services Barclays rendered as an acquirer were subject to were subject to VAT under the VAT Act of 2013. The TAT considered the evidence and arguments by parties and concluded that the Commissioner was wrong in demanding VAT on the cumulative MSC yet Barclays only charged acquiring fee and did not collect interchange or assessment fee.

81. The TAT then considered what the Bank's principal service was in relation to a card transaction and held that it was facilitation of transfer of money which was exempted under Paragraph 1 Part II of the First Schedule to the Act.

82. On this, I agree with the finding by the TAT. Barclays as the acquirer, only facilitated the arrangement and received money on behalf of its client. This was a money transfer as the TAT correctly observed which was exempted under Paragraph 1 Part II of the First Schedule to the Act

83. On whether Barclays as an issuer could pay VAT on interchange fee earned, the TAT took the view, that the role of the issuing bank is to authorise, settle and clear funds in the customer's account after confirming that the customer has sufficient funds or credit for the transaction, then transfers the funds to the acquirer. The transaction does not call for VAT charge as there is no relationship between the issuer and the acquirer.

84. On this, I equally agree with the TAT. The service rendered by the issuer is on behalf of the customer and is initiated through the customer's request to verify availability of funds and transfer sufficient amount to cover the service or purchases. Transfer of funds is exempted under Paragraph 1 (a) (b) (c) and (h) of the First Schedule to the VAT Act 2013.

85. The TAT further considered the issue of whether the Commissioner could demand excise duty on entire merchant service fees (MSC). Barclays argued that the Commissioner it could not while the Commissioner took the opposite view. The TAT considered the issue and referred to section 117 of the repealed *Customs and Excise Act* (Fifth Schedule Para 7 Part III), which provided that excise duty on fees charged for money transfer services by among others, banks was 10%. A similar provision in the 2015 Act provided for 20%.

86. According to the TAT, that was however not the dispute before it. This was because Barclays as acquirer, had remitted excise duty on acquiring fee. That notwithstanding, the Commissioner argued that Barclays should have remitted excise duty in respect of the gross MSC

87. To resolve the contestation, the TAT reiterated, [a fact that was not disputed], that MSC is the aggregate fees charged for and by all the parties (usually three) involved in the card transaction and each party should bear own tax obligations. Barclays having accounted for its obligations [on excise duty] as the

acquirer, it would be imprudent for the Commissioner to demand that Barclays bears the burden of excise duty on the entire MSC.

88. In that respect, I agree with the TAT and add that if Barclays was to be made to pay excise duty on the entire MSC, there would be the prospect and likelihood of double taxation. That is; the Commissioner would have as well demanded or even received excise duty [payment] from the other players (where possible, like banks operating in the country) and again from Barclays on the same transaction.

89. I therefore agree with the TAT that Barclay was only liable on its tax obligations for what it received or what was paid to it a portion of the MSC and not what was paid to the other participants in the card transaction scheme. As the TAT correctly observed, the entities based outside the country had their tax obligations to the countries where they were based or operated and not this country.

90. Regarding export services and whether those services could attract excise duty, the Commissioner had assessed excise duty on the fees Barclays earned from persons/entities based outside the country, (e. g fees Barclays earned as acquirer from merchants based outside Kenya as well as excise duty on interchange fees earned from transactions that occurred outside Kenya.

91. The TAT considered whether Barclays could charge excise duty on fees earned from export services and took the view that section 117 (1) (d) of the repealed *Excise Duty Act* as well as Part II of the First Schedule to that Act, did not provide for charging excise duty on export services. The TAT relied on the definition in section 2 of the repealed Act which defined excise duty as "a duty imposed on goods manufactured in Kenya or imported into Kenya and specified in the Fifth Schedule" to hold that the definition did not expressly provide that export services were subject to excise duty.

92. The TAT expressed the position that "a tax authority is permitted to collect taxes expressly levied by statute" and there is no room for intendments or implications in tax laws. The TAT reasoned, relying on the decision in Keroche Industries Ltd v Kenya Revenue Authority & 5 others [2007] eKLR that taxation can only be done on clear words and not on intendment. The TAT concluded therefore that exported services were not among the services selected for specific taxation under the repealed law.

93. Export services are taxed that the point where the receiver of the service id resident. In that regard, where the service provided for is export service, country that has the right of taxation is the country where the service was exported to. In that regard, the TAT was right that exported service is not subject to excise duty.

Conclusion

94. Having considered this appeal and arguments by parties, the conclusion I come to is that the TAT did not err on the interpretation of the word "interest."

95. I also agree with the conclusions reached by the TAT on the issues that were before it and I find no reason to interfere with that decision.

Disposal

The appeal is dismissed with no order on costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2023

E C MWITA

JUDGE