Google Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E004 & E006 of 2021 (Consolidated)) [2022] KEHC 18118 (KLR) (Commercial and Tax) (27 May 2022) (Judgment)

Neutral citation: [2022] KEHC 18118 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E004 & E006 OF 2021 (CONSOLIDATED)

EC MWITA, J

MAY 27, 2022

BETWEEN

GOOGLE KENYA LIMITED .... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES .... RESPONDENT

AS CONSOLIDATED WITH

INCOME TAX APPEAL E006 OF 2021

BETWEEN

GOOGLE KENYA LIMITED .... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES .... RESPONDENT

(Appeals from the decision of the Tax Appeals Tribunal in Tax Appeal No. 120 of 2017, delivered on 20th November 2020)

JUDGMENT

1. These are two consolidated appeals, Income Tax Appeal(ITA) No E004 of 2021 (the First appeal) and Income Tax Appeal(ITA) No E006 of 2021 (the second appeal). Both appeals arise from the decision of the Tax Appeals Tribunal (TAT) dated November 20, 2020 in Tax Appeal No 120 of 2017. The first appeal is by Google Kenya Limited (Google Kenya), the appellant before the TAT, while the second appeal is by the Commissioner of Domestic Taxes (the Commissioner) the respondent before the TAT.

2. Google Kenya, a company incorporated in Kenya, entered into a service agreement with Google LLC, (Google Inc), a company based in the United States of America, whereby Google Kenya was to provide research and development services (R&D services) to Google Inc.

3. On July 1, 2007, Google Kenya again entered into a marketing and service agreement with Google Ireland Limited (Google Ireland), a company based in the Republic of Ireland, to provides marketing and support services to Google Ireland. The services provided to Google Ireland include marketing and demonstration of Google Ireland's Web services and other services that Google Ireland may designate from time to time, market and strategic analysis, including analysis of potential customers for which Web Services may be sold and forecasts of future sales of Web Services. According to Google Kenya, the services provided to both Google Inc and Google Ireland, do not include sales or distribution of Google Inc and Google Ireland's products or services in Kenya.

4. Google Kenya lodged VAT refund claims for the period February 2010 and February 2013 for Kes 58,753,106.002 with the Commissioner in relation to services rendered to both Google Inc. and Google Ireland. The claims were however rejected in an objection decision made on June 21, 2017.

Appeal before the TAT

5. Google Kenya was dissatisfied with the objection decision and lodged an appeal before the TAT, challenging that objection decision. the TAT heard the appeal and delivered its decision on November 20, 2020, holding, on one hand, that although Googled Kenya rendered marketing and support services to Google Ireland a company resident outside Kenya, those services were consumed in Kenya and were, therefore, not export services. On the other hand, the TAT held that the R&D services Google Kenya rendered to Google Inc were exported services because Google Inc was based outside Kenya and the services were rendered to an entity based outside Kenya and the services were consumed outside Kenya.

Appeal to this Court

6. Google Kenya was aggrieved by TAT's decision that the services rendered to Google Ireland were not export services, and lodged the first appeal through a memorandum of appeal dated January 15, 2021 and raised 6 grounds, namely, that:

    1. 'The Tribunal erred in law and fact by misapprehending the nature of marketing and support services rendered by the appellant to Google Ireland by failing to consider that the category of marketing and support services included marketing and strategic analysis and forecasts of the sales of Google Ireland products in addition to demonstration services of Google Ireland's web based products rendered by the Appellant;

    2. The Tribunal erred in law and fact in holding that the marketing and support services were consumed in Kenya even after agreeing with the Appellant that the consumer of the services is the person contracted to receive the benefit from the service and in this case Google Ireland, an entity outside Kenya;

    3. The Tribunal erred in law and fact in failing to hold that the use or consumption of marketing and support services rendered by the Appellant to Google Ireland was in the Republic of Ireland;

    4. The Tribunal erred in law in failing to appreciate that there was no nexus between the provisions of section 2 of the *Value Added Tax Act*, 2013 and Paragraph 20(1)(a) of the Value Added Tax Regulations 2017;

5. The Tribunal erred in law in failing to uphold the 'destination principle' as set out in the OECD International VAT/ GST Guidelines that for business-to-business transactions, the place of the business of the consumer must be used to determine the place of consumption and hence taxation for VAT purposes

6. The Tribunal erred in law in misapprehending the provisions of Paragraphs 2.1, 2.34 and 3.53 of the OECD International VAT/ GST Guidelines with respect to their application to marketing and support services rendered by the Appellant to Google Ireland.'

7. Google Kenya prayed that the appeal be allowed with costs and the decision of the TAT and the objection decision be set aside. The Commissioner filed a statement of facts dated March 1, 2021, urging the court to find that the first appeal has no merit and dismiss it with costs.

8. On his part, the Commissioner was dissatisfied with the TAT's holding that the services Google Kenya rendered to Google Inc. were export services, and lodged the second appeal through a memorandum of appeal dated January 18, 2021, raising 8 grounds, namely:

1. 'That the Tribunal erred in law and fact by finding that Google LLC was the beneficiary of the research and development services rendered by the respondent but not the Kenyan public

2. That the Tribunal erred in law and fact by finding that the appellant should not deny the respondent deduction of input tax as the appellant had collected corporation tax from the respondent.

3. That the Tribunal erred in law and fact by making the aforesaid findings despite having found that the contract between the respondent and Google LLC did not provide for the jurisdiction to be covered.

4. That the Tribunal erred in law and fact by finding that internet users are not all located in Kenya but globally and, therefore, that the services by the respondent to Google LLC were exported services.

5. That the Tribunal erred in law and fact by disregarding the Appellant's statement of facts, evidence and submissions, thereby arriving at an absurd finding regarding services rendered to Google LLC.

6. That the Tribunal erred in law and fact by failing to appreciate the import of section 66 of the VAT Act, sections 4 and 93(2) of the *Tax Procedures Act*.

7. That the Tribunal erred in law and fact in not finding that the Value Added Tax is based on consumption of the service which were consumed by Kenyan consumer to whom it is targeted at and not the payer, hence taxable in Kenya.

8. That the Tribunal erred in law by blatantly ignoring the express provisions of section 8 of the VAT Act 2013, and thereby arriving at an absurd finding not in tandem with the clear intention of the legislature.'

9. The Commissioner urged that the second appeal be allowed with costs and the objection decision be upheld.

10. The two appeals were consolidated and were disposed of through written submissions with oral highlights.

Submissions by Google Kenya

11. Google Kenya filed written submissions dated July 2, 2021 and November 21, 2021 to the first and second appeals respectively. Google Kenya argued that section 2 of the repealed *Value Added Tax Act*, the applicable law at the time the dispute arose, defined exported service as 'service provided for use or consumption outside Kenya' but did not define the terms 'consumption' or 'use.' Google Kenya submitted that in the absence a definition of the two terms (use or consumption), the Organization for Economic Cooperation and Development (OECD) International Value Added Tax/Goods and Services Tax Guidelines (OECD Guidelines) apply to provide clarity. In this regard, Google Kenya relied on *Unilever Kenya Ltd v Commissioner of Income Tax [2005] eKLR* and *Coca-Cola Central East and West Africa Ltd v Commissioner of Domestic Taxes [2020] eKLR*.

12. With regard to the application of OECD Guidelines on the terms 'use' or 'consumption', Google Kenya cited 3M Kenya Limited v Kenya Revenue Authority (Tax Appeals Tribunal Appeal No 30 of 2016) and FH Services Kenya Ltd v Commissioner of Domestic Taxes (Tax Appeals Tribunal Appeal No 6 of 2012). Google Kenya asserted that in determining the use or consumption of a service, the first identifier is the location of the customer identified in the business agreement as the person receiving the services. The second identifier is from the business agreement. Relying on those principles, Google Kenya argued that under para 3.2, and 3.3 of OECD Guidelines, the marketing and support services were offered to Google Ireland an entity base outside Kenya. Google Kenya relied on the Coca-Cola case (supra) that the court must not confuse the consumer of the services with the consumer of the underlying products.

13. Regarding section 8 of the VAT Act as read with Regulation 20 (1) of the VAT Regulations, Google Kenya argued that those provisions deal with supply of services and define what will be deemed to be services provided within Kenya, but do not deal with use or consumption of services either in Kenya or outside. The term 'supply' cannot, therefore, be equated to 'use' or 'consumption.' Google Kenya took the view that the provisions of the Act cannot be relied on to determine whether use or consumption of the service was in Kenya or not.

14. Citing the Coca-Cola case (supra), Google Kenya maintained that the place of supply is irrelevant in determining whether use or consumption was outside Kenya. According to Google Kenya, section 8(1) of the VAT Act as read with Regulation 20 (1) (a) of the VAT Regulations contradict the OECD VAT Guidelines on the terms use or consumption and should, therefore, be disregarded. Reliance was placed on *Panalpina Air Flow Limited v Commissioner of Domestic Taxes [2019] eKLR* where the court, (Okwany, J), declined to adopt the definition in section 8(1) of the VAT Act and instead applied the OECD Guidelines. In the view of Google Kenya, the correct position to take, as the OECD Guidelines require, is that the marketing and support services were provided to Google Ireland in accordance with the destination principle.

15. Google Kenya further submitted that the Commissioner did not plead or prove that there was tax avoidance/evasion or an unintended non taxation as required under Guideline 3.7 to justify deviation from the main rule. Google Kenya relied on the Coca-Cola case (supra) for the proposition that if the court is not satisfied that the transaction in question does lead to tax avoidance or that there is un-intended non-taxation, there would be no reason to deviate from the main rule. Google Kenya maintained that the TAT was bound to apply the twin principles of tax neutrality and the destination principle under the OECD Guidelines.

16. Regarding the second appeal, Google Kenya argued the TAT did not err in finding that the R & D services were provided to Google Inc. outside Kenya, were consumed outside Kenya and were, therefore, exported services.

17. Regarding the 6th ground in the second appeal, Google Kenya argued that the Commissioner raised a new issue that had not been raised before the TAT and should be disregarded. Google Kenya urged the court to allow the first appeal with costs and dismiss the second appeal with costs.

Submissions by the Commissioner

18. The Commissioner filled written submissions dated October 14, 2021 to both appeals. With regard to the second appeal, the Commissioner submitted that in terms of the contract entered into between Google Kenya and Google Inc. the R&D services were rendered in Kenya and there was no evidence that those services were rendered in any other jurisdiction other than Kenyan. The Commissioner argued that since the contract between Google Kenya and Google Inc. is worded 'Research and Development Services Agreement Kenya', it follows that the issue as to where the services were rendered is neither here nor there.

19. The Commissioner relied on Section 8(1) of the VAT Act to argue that supply of services is made in Kenya if the place of business of the supplier from which the services are supplied is in Kenya. The Commissioner further relied on Paragraph 20 of the Value Added Tax Regulations, 1994 to argue that a service is supplied in Kenya if the supplier has established his business or has fixed physical premises in Kenya and the services are physically performed in Kenya.

20. The Commissioner asserted that although the R & D services were foreign based, they were for consumption within Kenya, thus fell outside the definition of export services in section 2 of the repealed VAT Act. The Commissioner contended, therefore, that the R & D services were taxable in Kenya under the destination principle in the OECD Guidelines which states that tax on cross-border supplies is ultimately levied in the jurisdiction where the final consumption occurs.

21. Relying on section 8(1) of the VAT Act and Paragraph 20 of the VAT Regulations, the Commissioner submitted that Google Kenya has established business in Kenya and its physical premises is also in Kenya from where the services to Google Inc. were supplied or performed.

22. The Commissioner faulted the TAT for overlooking the fact that the payer of the services (Google Inc) was targeting members of public in Kenya, and since VAT in based on consumption of the service, taxation was to be in Kenya. The Commissioner relied on *Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018] eKLR* for the proposition that for a service to be deemed to be an exported service, the determining factor is the location where that service is to be finally used or consumed. The Commissioner contended, therefore, that Google Inc used Google Kenya's services in Kenya, thus this was not exported service.

23. The Commissioner went on to assert that the TAT erred by finding that Google Kenya was entitled to input tax since he had collected corporation tax. This, according to the Commissioner, was an irrelevant consideration in terms of section 7 of the VAT Act, 2013.

24. The Commissioner again faulted the finding by the TAT that internet users were globally located and not in Kenya alone. This, the Commissioner argued, was contradictory to the finding that the contract between Google Kenya and Google Inc. did not specify the jurisdiction to be covered, leaving no doubt that the services were to be rendered in Kenya, which was confirmed by the fact that billing was to be in Kenya Shillings.

25. Regarding the first appeal, the Commissioner supported the findings by the TAT. In the Commissioner's view, the TAT reached the correct conclusion that the marketing and support services Google Kenya rendered to Google Ireland were consumed in Kenya and, therefore, were not exported services.

26. The Commissioner urged that the first appeal be dismissed and the second appeal be allowed. The Commissioner prayed for costs for the two appeals.

Determination

27. I have considered these consolidated appeals, submissions and the decisions relied on. I have also perused the record of the TAT and the impugned decision. The single issue that arises for determination in both appeals is whether the services Google Kenya rendered to both Google Ireland and Google Inc were export services. Both appeals therefore, turn on the meaning of the words 'use' or 'consume.'

First appeal

28. Google Kenya argued that the marketing and services rendered to Google Ireland were consumed outside Kenya and were, therefore, export services. According to Google Kenya, the VAT Act does not define the word 'use' or 'consume' leaving a void which is to be filled by the OECD Guidelines on the basis of destination principle.

29. The commissioner on his part maintained that the services were targeted at Kenyans and were for local consumption. For that reason, they were not export services. The Commissioner relied on section 8(1) of the Act as read with Regulation 20(1) of the Regulations.

30. There is no disagreement that Google Kenya and Google Ireland entered into a business agreement dated July 1, 2020. There is also no dispute that the marketing and services were rendered to Google Ireland outside Kenya. The point of divergence is where those services were consumed. While Google Kenya argued that the consumer of their services was Google Ireland, the Commissioner took the view that the services were consumed locally.

31. On who the consumer of the services was, the TAT stated:

> [60] 'The Tribunal is inclined to agree with [Google Kenya]. The consumer of the service is the person contracted to receive the benefit from the service. In this case, Google Inc and Google Ireland are the ones who benefit from the R&D and advertising services respectively. Merely because the advertisement is directed at the public does not in any way make the public the consumer of the said services.'

32. On where services rendered by Google Kenya were consumed, after taking into account the provisions of section 2 of the VAT Act as read with paragraph 20(1)(a) of the VAT Regulations, and the OECD Guidelines, the TAT took the view that those services were consumed in Kenya, stating:

> (68) 'Accordingly, the Tribunal is of the finding that these services though provided to a non-resident person were consumed in Kenya as the ultimate goal was to increase sales in Kenya. The benefit, as discussed in Total Touch [case] above, was ultimately enjoyed in Kenya when the sales were made.'

33. The above holding would appear to suggest that consumption would take place in Kenya once the services were sold which would be the right interpretation. However, the conclusion that the services were generally consumed in Kenya has a problem.

34. According to the agreement between Google Kenya and Google Ireland, and as appreciated by the TAT, the services rendered to Google Ireland, were classifiable into marketing, and demonstration of Google Ireland's Web based products and market strategic analysis for the sale of Google Ireland products as well as forecast of Google Ireland future sales.

35. The Act does not define the words 'use' or 'consume.' *Black's Law Dictionary (Tenth Edition)* has several definitions for the word 'use.' They include: To employ for the accomplishment of a purpose; 2. To put into practice or employ habitually or as a usual way of doing something.

36. The same Dictionary defines the word 'Consume' to mean among others; 'To destroy the substance of; to use up or wear out gradually, as by burning or eating. or to expend wastefully, to waste, to squander. 3. To use up, whether fruitfully or fruitlessly.'

37. On the other hand, consumption is defined as; 'The act of destroying a thing by using it; the use of a thing in a way that exhausts it.'

38. Going by the above definitions, for instance; to employ for accomplishment of a purpose, or to put into practice or employ habitually, or to destroy a substance, use up or wear out gradually, would it be the case that the marketing of services, including demonstration of Google Ireland's web based products to Kenyans and doing market strategic analysis for Google Ireland's future sales amounted to use or consumption of those services? In other words, who puts into practice the services being marketed or makes use of those strategies? In answering this question, one must bear in mind the intention Google Ireland had in contracting Google Kenya to undertake marketing and services.

39. The Marketing services were commissioned by Google Ireland with the ultimate goal of increasing sales. This fact was appreciated by the TAT in its decision, that the Marketing and services would ultimately increasing sales in Kenya and, therefore, both Google Kenya and Google Inc. were the beneficiaries. In this respect, the TAT correctly found that the consumer of the service is the person contracted to receive the benefit from the service and Google Inc and Google Ireland were to benefit from the R&D and marketing services respectively.

40. Having come to the conclusion that Google Ireland was the beneficiary of the services rendered by Google Kenya, the TAT could not go on a tangent and hold that the services were consumed in Kenya. This was a contradiction. I say so because the TAT seemed to appreciate and again correctly, in my view, that 'Merely because the advertisement is directed at the public does not in any way make the public the consumer of the said services.'

41. The agreement between Google Kenya and Google Ireland stated at clause 2, that the obligations of the service provider (Google Kenya) Include; marketing and demonstration of [Google Ireland's] Web Services and any other services [Google Ireland] may designate from time to time. [Google Kenya] is also to assist [Google Ireland] in market and strategic analysis including 'analysis of potential customers to which Web Services may be sold and forecasts of sales of Web Services.'

42. It is clear from the reading of clause 2 of the agreement, that the services Google Kenya rendered were intended to draw people's awareness to Google Ireland's products with a view to attracting and persuading prospective users or consumers of those products in a future date. That is why the agreement required Google Kenya to do a strategic analysis of potential customers to whom Web Services may be sold and forecasts of sales of Web Services. There was no sale of Google Ireland's services

to people in Kenya at the time of marketing of the services. Use or consumption of any of the marketed services would come at a later date, if and when, those products were offered for sale and the people persuaded or attracted, agree to take up Google Ireland's marketed services.

43. This view is informed by the fact that even after marketing of the services, there was no guarantee that people in Kenya would take up the products once offered for sale. Marketing of services cannot be taken to be sales because quite often products being marketed are given free of charge to persuade potential customers to take up the products or services at a future date. Those members of the public do not become consumers of those marketed services.

44. Google Kenya argued that where the law is not clear on user or consumer, the OECD Guidelines apply by virtue of the holding in Unilever Kenya Limited v Commissioner of Domestic Servises(supra). In such a case, business to business services provided in different jurisdictions are taxable in the jurisdiction of consumption, which is the location of the consumer of the services. The identity of the consumer of the services is to be determined by reference to the business agreement between the entities for the provision of the services.

45. The Commissioner argued, relying on section 8(1) of the VAT Act, and Regulation 20(1) of the VAT Regulations, that supply of services is made in Kenya if the place of business of the supplier of the services is in Kenya and a service is supplied in Kenya if the supplier has established his business or has fixed physical premises in Kenya and the services are physically performed in Kenya. The Commissioner asserted that Google Kenya's place of business is in Kenya, has physical premises in Kenya, established business in Kenya and the services were rendered in Kenya. The TAT also relied on *Commissioner of Domestic Services v Total Touch Cargo Holland [2018] eKLR*, that the location of the person paying for the services, is irrelevant in determining the place of consumption.

46. That argument would be true where consumption related to the final products resulting from the marking services. Where, like in the present case, marketing services were intended to boost sales, which sales are yet to take place or crystalise, the people to whom marketing services are directed cannot, in my view, be the users or consumers of the marketing services.

47. In this respect, I agree with the position taken in Coca-Cola Central East and West Africa Ltd v Commissioner of Domestic Taxes (supra), whose facts were more or less similar to the present case. Coca-Cola Africa, a company based in Kenya provided marketing and promotion services to Coca-Cola Export, a company based in the United States. The issue before the TAT was whether those services were export services. The TAT held that the services were not export services. On appeal, the court observed that:

> [20] 'Consumption of the soft drink must not be confused with consumption of the services. Indeed, a promotion or marketing activity may not lead to a sale or consumption of the promoted or marketed product.'

48. In the present case as was in the Coca Cola Case, the contract between Google Kenya and Google Ireland was for cross board supply of services. Google Kenya rendered marketing services to Google Ireland based outside Kenya with the intention of boosting sales in Kenya. The marketing services were to be consumed by Google Ireland which was to benefit from a boost of sales. That was why Google Kenya was to do market analysis of prospective customers to whom the services could be sold.

49. Even going by the OECD Guidelines, there is no dispute that the location of the consumer is the Republic of Ireland and taxation is to take place in the jurisdiction of consumption. This is so because OECD guideline 3.1, states that for consumption tax purposes, internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption. Similarly,

Guideline 3.2 states that for business-to-business supplies, the jurisdiction in which the customer is located has the taxing rights over internationally traded services or intangibles. Guideline 3.3 provides that the jurisdiction of the customer's location can stand as the appropriate proxy for the jurisdiction of consumption as it achieves the objective of neutrality. This is the jurisdiction where the customer has located its permanent business presence. The import of these guidelines, therefore, is that the taxation jurisdiction is where the customer of the service is located.

50. Looking at the facts of this appeal and the business agreement, the relevant law and OECD guidelines, it is my holding that the consumer of the services was Google Ireland and not the people in Kenya. The marketed services targeted people in Kenya who would in future be persuaded to take up Google Ireland's services. The services were only intended to boost future sales in Kenya and only when people in Kenya bought into Google Ireland's services after the marketing exercise, would they become consumers. This is even more so because one of the marketing services Google Kenya rendered was demonstrating how Google Ireland's Web Services would work. Whether people would be persuaded to take up those services, is a different matter altogether.

51. This finding is also informed by the fact that under the business agreement, Google Kenya receives a fee for marketing Google Ireland's services but not for distributing those services. Applying the Main Rule principle in the OECD Guidelines for determining the jurisdiction of consumption of international services, it would be difficult to agree with the TAT that and the Commissioner's argument that section 8(1) of the VAT Act, and Regulation 20(1) of the VAT Regulations should apply in place of the definition in section 2. To do so would be to take a simplistic view of the meaning of the words 'use' or 'consume' as used in section 2 of the Act to define services exported out of Kenya. Section 8 and Regulation 20 cannot, in my respectful view, come into play to replace the definition of exported services in section 2 as the TAT attempted to do. (See Commissioner of Domestic Taxes v Total Touch Cargo Holland (supra);Panalpina Air Flow Limited v Commissioner of Domestic Taxes (supra).

Second appeal

52. In the second appeal, the Commissioner's complaint is that the TAT was in error in finding that Google Inc. was the consumer and beneficiary of the R&D services and not the people in Kenya; failed to find that the agreement did not have jurisdiction to be covered; disregarded their statement of facts, evidence and submissions regarding services rendered to Google Inc.; failed to appreciate section 66 of the VAT Act, sections 4 and 93(2) of the *Tax Procedures Act* and ignored the provisions of section 8 of the VAT Act.

53. Google Kenya argued that the TAT was right in finding that the R & D services were provided to Google Inc. the USA and consumed outside Kenya and were, therefore, exported services. Regarding the 6th ground of appeal, Google Kenya argued that the Commissioner raised a new issue that had not been raised before the TAT and should be disregarded. The Commissioner complained in the 6th ground that the TAT erred in failing to appreciate the import of section 66 of the VAT Act, sections 4 and 93(2) of the *Tax Procedures Act*.

54. Regarding services Google Kenya rendered to Google Inc. the TAT stated

> (78) 'It is the Tribunal's understanding that the services rendered by [Google Kenya] are services rendered to google Inc and aid them in improving the products they ultimately make available for use to internet users. The internet users are however not all located in Kenya.'
>
> (79) the services rendered by [Google Kenya] were rendered to improve the Google Inc.'s products. These products are owned by Google Inc. and are available for

use globally. Accordingly, we are of the view that the services were consumed in the USA by Google Inc.

55. As earlier stated, the issue here is the meaning of 'use' or 'consume' as used in section 2 of the VAT Act to define exported services. The court has already made a finding on the meaning of the word or 'consume' in relation to services Google Kenya rendered to Google Ireland.

56. The agreement between Google Kenya and Google Inc and dated July 1, 2009, is clear that Google Inc. is based in the USA while Google Kenya is a subsidiary of Google Inc, but based in Kenya. As correctly pointed out by the TAT in its decision, the subject of this appeal, those services were to aid Google Inc. in improving products that were ultimately to be made available for use by internet users and those products were owned by Google Inc.

57. Just like in the Coca Cola Case (supra) where Coca Cola Africa was a subsidiary of Coca Cola Export, there is no doubt in the present appeal that this was a business to business agreement for provision of cross border and, therefore, destination services. The R&D services Google Kenya rendered to Google Inc. were rendered to a company based outside Kenya and who was the consumer of those services.

58. The Commissioner argued that the agreement between the parties did not have the place of jurisdiction, that the heading of the agreement stated that it was an agreement for Research and Development Services Kenya and that internet was to be used globally, including Kenya. In the Commissioner's view, this should be taken to mean consumption is in Kenya. This argument cannot be correct. The R&D services were to enable Google Inc. improve on its products for use by its customers. The services included localization and translation of internet products into various local dialects and other languages for multiple jurisdictions. The consumer of the R&D services was Google Inc which commissioned those services and not the people in Kenya as the Commissioner argued. There should be no confusion between consumption of R&D services and consumption of the products after the R&D services have been developed. (SeeCoca Cola Case-supra). I respectfully agree with the conclusion arrived at by the TAT that the R&D services were consumed outside Kenya.

59. On the complaint that the TAT failed to appreciate section 66 of the VAT Act, sections 4 and 93(2) of the *Tax Procedures Act*, I agree with Google Kenya that the issue was not raised before the TAT and cannot be raised on appeal for the first time. In any case, the issue here is who consumed the R&D services and nothing more.

Conclusion

60. Having considered the two appeal, the facts and the law, the conclusion I come to is that the marketing services rendered to Google Ireland were consumed by google Ireland in the Republic of Ireland and not in Kenya. I also agree with the TAT that R&D services were consumed by Google Inc outside Kenya.

61. In the end, the first appeal (No E004 OF 2021) is allowed, the decision of the TAT dated November 20, 2020 set aside and replaced with an order setting aside the objection decision dated June 21, 2017. The second appeal (No E006 of 2021) is dismissed.

62. Each party will bear own costs for the appeals.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2022

E C MWITA

JUDGE