



**National Bank of Kenya Ltd v Commissioner of Domestic
Taxes (Income Tax Appeal E155 & 533 of 2020 (Consolidated))
[2022] KEHC 10549 (KLR) (Commercial and Tax) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E155 & 533 OF 2020 (CONSOLIDATED)**

A MABEYA, J

MAY 26, 2022

BETWEEN

NATIONAL BANK OF KENYA LTD APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal from the Judgment of the Tax Appeals Tribunal at
Nairobi delivered on 23/10/2020 in Tax Appeal No. TAT/14 of 2017)*

JUDGMENT

1. The respondent carried out an audit on the appellant's tax affairs covering the period between January 2013 and December 2015. He consequently issued his findings vide a letter dated 6/9/2016 indicating that the appellant had an alleged tax liability of Ksh.573,384,525.00 being principal tax, penalties and interest relating to Capital Gains Tax (CGT), Value Added Tax (VAT) and Excise Duty.
2. The appellant responded to the audit findings and provided explanations and additional documentation to support its position. Subsequently, the respondent issued a notice of additional assessment on October 31, 2016 indicating the tax liability to be Ksh.430,356,551/-.
3. On 29/11/2016 the appellant lodged a notice of objection to which the respondent issued an objection decision on 13/12/2016 confirming the said assessment of Ksh.430,356,551/-.
4. Aggrieved by the objection decision, the appellant appealed against the same to the Tax Appeals Tribunal ("the Tribunal"). By its Judgment of 23/10/2020, the Tribunal allowed the appeal partially. It upheld the respondent's assessment with regard to VAT but set aside his assessment with regard to Excise Duty.



5. Both parties appealed against that decision in respect of the parts that each felt aggrieved with. These were; ITA Nos. 155 and 533 of 2020, respectively. The said appeals were consolidated and heard together with Appeal No.155 of 2020 being the head file.
6. This being a first appeal, this Court is enjoined to review and evaluate the evidence adduced before the Tribunal and come to its own independent conclusion and findings. See *Selle & Another vs. Associated Motor Boat Co. Ltd & others* (1968) EA 123.
7. The appellant's case before the Tribunal was that, following the assessment, the parties held various meetings and exchanged correspondence on the matter. This culminated in an arrangement whereby the appellant agreed to pay the undisputed tax by way of instalment.
8. That the respondent had wrongly rejected its notice of objection as being invalid yet there was a payment plan in place. That it was well within section 33 of the *Tax Procedures Act* which permits a tax payer to apply for extension of time to pay tax due. That the respondent had agreed to its payment plan. As a result of that plan, the appellant had paid an amount in excess of Kshs.112 million as at the time the appeal was being heard by the Tribunal. Accordingly, its notice of objection of 29/11/2016 was valid.
9. As regards the claim for VAT assessed at Kshs. 58,868,988.08 on the disposal of the appellant's properties, the appellant contended that the same was wrongly levied as it was based on the entire sales price instead of the price of land only. That land being exempted from VAT by virtue of paragraph 8 of Part II of the First Schedule to the *VAT Act*, 2013, it should not have been brought to charge.
10. As regards Excise Duty assessed at Kshs. 405,677,877.60, the appellant contended that the *Finance Act*, 2012 which came into effect on 9/1/2013 introduced Excise Duty on other fees charged by financial institutions. The same did not define what interest or 'other fees' was but was only defined by the Finance Act, 2013 which came into effect on June 18, 2013. That in the premises, there was no legal basis to charge Excise Duty prior to that date as there was ambiguity in the law.
11. The appellant further contended that the respondent had erroneously assessed Excise Duty on interest income of Kshs.59,524,960.05. That the assessment was on interest which was exempted and that therefore there was no Excise Duty due. That vide his communication to the Kenya Bankers Association, there was legitimate expectation that no Excise Duty was payable prior to 1/8/2013.
12. On his part, the respondent's case was that as at the time the appellant gave its notice of objection of 29/11/2016, there was no payment plan on the tax due. That in the premises, the notice of objection was invalid by dint of section 51(3) of the *Tax Procedures Act*. That his VAT assessment on the properties sold by the appellant was in accordance with the law since there is no distinction between land and the buildings erected thereon. That the same was not an exempt supply under Part II of the First Schedule to the *VAT Act*, 2013 Paragraph 8.
13. As regards his assessment on Excise Duty on interest and interest related fees, his case was that he had assessed Excise Duty on loan commitment fees and loan appraisal fees in accordance with the Finance Act, 2012 and 2013 as amended under the Fifth Schedule of the *Customs and Excise Act*, Cap 472. That these fees are not exempt under the law.
14. In its judgment of 23/10/2020, the Tribunal held that the notice of objection was valid and upheld the respondent's assessment with regard to VAT. On Excise Duty, the Tribunal held that in the absence of a definition of the term 'interest' in the *Excise Duty Act*, the definition found in the *Income Tax Act* would apply. That in terms of the said definition, loan commitment fees and loan appraisal fees fell within the ambit of interest and are therefore not subject to Excise Duty.



15. It is those findings that the parties were aggrieved with and on which they set out a total of 15 grounds of appeal in the two appeals. These can be summarized into three as follows: -
 1. That the Tribunal erred in failing to appreciate that the notice of objection did not meet the requirements of section 51(3) of the [Tax Procedures Act, 2015](#) and that it was therefore invalid.
 2. That the Tribunal erred in upholding the assessment on VAT and in failing to find that there was ambiguity in the VAT Act, 2013 and interpret the relevant provision in favour of the appellant.
 3. That the Tribunal erred in holding that the loan commitment fees, loan appraisal fees and other related fees were interest exempt from Excise Duty.
16. Both parties filed their respective statements of facts in response to each other's appeal. They also filed their respective written submissions and authorities. The court has carefully considered the same.
17. The first ground of appeal was that the Tribunal erred in failing to appreciate that the notice of objection did not meet the requirements of section 51(3) of the [Tax Procedures Act, 2015](#) ("TPA") and that it was therefore invalid. Although the respondent included this ground in its memorandum of appeal, he did not however submit on it. The appellant submitted that the Tribunal was right in its findings on this issue.
18. Under section 33 of the [TPA](#), the respondent has power to allow an extension of time within which a tax payer is to pay the tax due. Under section 51(3) of the [TPA](#), an objection to an assessment is to be valid if inter-alia, the tax payer has paid the entire tax due under the assessment. Otherwise, the same would be invalid.
19. In the present case, it is not in dispute that the appellant and the respondent did engage in negotiations and arrive at some settlement. By a letter dated 29/9/2016, the appellant's tax advisers wrote to the respondent requesting that the appellant be allowed to pay the total tax payable in instalments the last of which be payable on 30/6/2016. Although the respondent did not respond to the said request, he generated the requisite PRN's through which the appellant was to pay the instalments.
20. It would seem that pursuant to the foregoing, the appellant started to pay the tax due by instalments. Since the respondent did not decline the request and indeed accepted and received the instalments proposed and made by the appellant, it can safely be concluded that by his own conduct, he had acquiesced to the appellant's request. That as at the time the appellant gave its notice of objection, there was a payment plan in force. Accordingly, the notice of objection was valid. That ground fails.
21. The second ground was that, the Tribunal erred in upholding the assessment on VAT and in failing to find that there was ambiguity in the VAT Act, 2013 and interpret the relevant provision in favour of the appellant. The appellant submitted that the Tribunal failed to apply the binding precedent of the High Court decision in [David Mwangi Ndegwa v. Kenya Revenue Authority](#) [2018] Eklr which had determined that the sale of land was exempt from VAT. That on the authority of [Okiya Omtatah Okiiti v. President of Kenya & 4 others](#) [2019] eKLR, there could be no stay on the declaratory order made in the [David Mwangi Ndegwa](#) Case aforesaid.
22. It was further submitted that commercial buildings are part of the land and therefore exempt from VAT. That since land is defined under article 260 of [the Constitution](#) to constitute buildings, the same is exempt from VAT by dint of Paragraph 8, Part II of the First Schedule to the [VAT Act, 2013](#). The cases of [Waribu Chongo v. Benson Maina Gatibithi](#) [2014], [Alwi Mohamed Alwi v. Swaleh Omar Awadh](#) [2015] Eklr, amongst others, were cited in support of that submission.



23. On his part, the respondent submitted that VAT on the appellant's sale of commercial properties was properly charged as the same was a taxable supply under sections 2(1) and 13(3) of the VAT Act, 2013. That the sale of the land is not separated from that of the commercial building thereon. That there was no ambiguity in paragraph 8 of the First Schedule of the VAT Act, 2013 on the sale or letting of commercial buildings.
24. This is an issue regarding the meaning and interpretation of the provisions of the VAT Act. Courts are always called upon to interpret the provisions of statutes. In doing so, all that the court is required to do is to give effect, so far as the language of the statute permits, to the intention of the Legislature. In the present case, the question is whether the sale of the land and commercial buildings by the appellant was a taxable supply.
25. Section 2(1) of the VAT Act, 2013 defines a taxable supply as: -
- “... a supply, other than an exempt supply, made in Kenya by a person in the course or furtherance of a business carried on by the person, ...”
26. On the other hand, supply of goods is defined, inter – alia, as a sale, exchange, or other transfer of the right to dispose of the goods as owner. From the above provision, all supplies are taxable save for those that are exempt under the relevant statute.
27. The exemption provision is paragraph 8 of the First Schedule to the VAT Act 2013. It provides, inter-alia, that: -
- “The supply of the following services shall be exempt supplies... Supply by way of sale, renting, leasing, hiring, letting of land or residential premises ...”
28. It is clear from the foregoing that, the exempt supply is the sale or renting of land or residential premises. Paragraph 8 of the First Schedule to the VAT Act 2013 exempts the levying of VAT on the sale of land or residential premises. The wording does not include commercial premises. Further, paragraph 8 itself goes on to define “residential premises” as ‘land or a building occupied or capable of being occupied as a residence, but not including hotel or holiday accommodation’.
29. In its judgment, the Tribunal relied on the case of Republic v Kenya Revenue Authority Ex parte Bata Shoe Company (Kenya) Limited 2014 eKLR and gave the provision its literal meaning. It concluded that paragraph 8 only exempted sale of land and residential premises.
30. In tax matters, tax statutes are to be interpreted strictly. The court has to look at what is clearly said and ascertain the intention of the Legislature. Nothing is to be read into or implied into the statute. One is only to look at the language used.
31. In Republic v Kenya Revenue Authority Ex parte Bata Shoe Company (Kenya) Limited [2014], it was held: -
- “In interpreting the tax laws, the plain language of Parliament should be adhered to lest the goods and services which Parliament did not want to tax are taxed as a consequence of the taxman's misinterpretation of the laws. In order to achieve this purpose, tax statutes must be strictly interpreted.”
32. The wording of paragraph 8 is clear and unambiguous. The question is whether there is a difference between the terms land, residential and, commercial properties. Land is constitutionally defined under article 260 of the Constitution. There is also a statutory definition of ‘residential properties’ in paragraph



- 8 aforesaid as being ‘land or a building occupied or capable of being occupied as a residence, but not including hotel or holiday accommodation’.
33. On the other hand, there is no mention or definition of ‘commercial property’. Obviously, commercial property is not the same as residential property. It is property used for commercial purposes or the undertaking of commerce. There can be erected on the surface of land, buildings that are commercial or residential.
 34. In this regard, land may contain buildings that are for residential purposes or commercial purposes. That being the case, there is a difference between land used for residential purposes from that used for commercial purposes.
 35. In view of the foregoing, the only irresistible conclusion is that, in its wisdom, the Legislature did not intend to include commercial properties amongst the exempted supplies. This is so because, if that was its intention, nothing would have been easier than to expressly say so.
 36. Further, by proceeding to define what constitutes a residential property, parliament intended to specifically exempt that what is set out in the Act. It knew that land includes the fixtures erected thereon which may be residential or commercial, yet it proceeded to define residential premises and exempted the same. In its wisdom therefore, Parliament deliberately excluded commercial properties from the provision. In this regard, that which is not expressly included is deemed to be expressly excluded.
 37. In this regard, the Court finds no ambiguity in the wording of Paragraph 8 of the First Schedule to the *VAT Act 2013*.
 38. The appellant relied on the case of *David Mwangi Ndegwa v Kenya Revenue Authority* [2018] eKLR where it was held that the sale of land is exempt from VAT regardless of the nature of the buildings on it. The appellant emphasized that under the principle of stare decisis, the Tribunal was bound by that decision.
 39. The court finds no fault in the Tribunal’s refusal to apply the finding in the *David Mwangi* case. The fact that the decision had been stayed pending appeal means that it has no effect and was not binding. And in view of the conclusion that this court has arrived at regarding commercial properties, that contention does not hold.
 40. It is trite law that whatever is affixed to the soil becomes part of the soil and runs with the land. In this regard, it was justifiable for the respondent to have calculated the taxable value in a commercial building to include land and other fees paid during the transaction. The land and the commercial buildings erected thereon were inseparable and the respondent cannot be faulted for bringing the same to charge.
 41. Accordingly, there is no merit in the second ground and the same is hereby dismissed.
 42. The third ground of appeal was that the Tribunal erred in holding that the loan commitment fees, loan appraisal fees and other related fees were interest exempt from Excise Duty. This ground is in respect of two respects, viz, application of Excise Duty on interest related fees for the period pre-July, 2013 and assessment of Excise Duty generally on other fees post July, 2013.
 43. It was the respondent’s submission that the effective date for the collection of Excise Duty on financial services was stipulated in the Finance Act, 2012 as published in the Gazette of 1/1/2013. That he could not and had not varied the effective date by his public notice as had been held by the court in Pet. No. 383 of 2013 Aki vs. KRA. That on the authority of *Kudheha v. Kenya Revenue Authority* [2014] Eklr, legislative authority to impose taxes rested with the Legislature. He submitted that all that the Finance Act, 2013 did was to define what ‘financial institutions’ and ‘other fees’ were but the tax liability still remained.



44. As regards loan commitment fees and loan appraisal fees, the respondent submitted that these are not exempted from Tax. That they do not constitute interest. That it was erroneous for the Tribunal to import the definition of interest from the *Income Tax Act* as the *Finance Acts*, 2012 and 2013 and the *Excise Duty* 2015 clearly define what ‘other fees’ is. That the implementation challenges of the tax did not make it unconstitutional. He relied on the cases of *Mark Obuya & others v. Commissioner of Domestic Taxes & 2 others* [2014] and *Association of Gaming Operators & Others v. Attorney General & 4 others* [2014] eKLR, in support of those submissions.
45. On its part, the appellant submitted that Excise Duty was not due for the period 9/1/2013 and 31/7/2013 for three reasons; firstly that the *Finance Act*, 2012 was ambiguous which was only clarified by the Finance Act, 2013; secondly that it cannot be applied except after its effective date viz 18/6/2013, and thirdly, that the Finance Act, 2013 excludes interest from the ambit of Excise Duty.
46. It was submitted that the failure to define the terms ‘financial institutions’ and ‘other fees’ rendered the Finance Act, 2012 ambiguous. That before 18/6/2013, the appellant had not been identified as a taxable person and the nature of the income to be taxed. That the *Finance Act*, 2013 did not have retrospective application. The cases of *Adamson v. Attorney General* [1933] AC 257 and *Samuel Kamau Macharia & Anor v. Kenya Commercial Bank & 2 others* [2012] Eklr, amongst others, were cited in support of those submissions.
47. As regards interest related fees post July, 2013, the appellant submitted that commitment and loan processing fees were incidental costs in advancing loan or credit facilities by financial institutions. That they constitute interest which is exempt from Excise Duty. In support of these submissions, the appellant cited Black’s Law Dictionary, *Skeen v. Slavik*, 555, S. W 2d 516, *Imperial Corporation of America v. Frencmans Creek Corporattona E* [1972] USCA 153 and *Baird v. Commissioner of Internal Revenue* 689 T.C. 115 (U.S.T.C. 1977).
48. The starting point is that tax statutes are to be construed strictly. There is no room for intendment or presumption. In construing tax statutes, the court has to ascertain the clear intention of Parliament. The Court should avoid a construction that will lead to an injustice or absurdity. See *Cape Brandy Syndicate v. I.R. Commissioners* [1921] 1 KB and *Republic v. Kenya Revenue Authority Exparte Bata Shoe Company (Kenya) Ltd* [2014]. Further, the construction should use the plain and literal meaning of the words used in the statute to discern the intention of Parliament.
49. The Finance Act, 2012 is the one that introduced an amendment relating to Excise Duty on other fees. It provided thus: -
- “Excise duty on other fees charged by financial institutions shall be ten percent.”
50. It neither defined what ‘financial institutions’ were nor ‘other fees’. It was left to speculation what these two were until clarification came in by way of the Finance Act, 2013. I agree with the submission by the respondent that what the latter Act did was only to provide for the two definitions. However the question that arises is, why was it necessary to provide the definitions? The obvious answer is that, the then existing legal framework was not clear as to what these two meant. There was an ambiguity which called for that clarification.
51. It is trite law that a person is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. Payment of tax being involuntary, a tax statute must not only identify the service or income to be taxed, it must clearly set out the rate of such tax as well as the person on whom it is imposed.



52. The view the court takes is that, while the Finance Act, 2012 identified the rate of tax payable, it did not clearly identify the service or the income to be taxed nor the tax payer. It never defined what “Financial Institutions” were or what “other fees” was. Accordingly, I hold that there was ambiguity in that Act which was clarified by the Finance Act, 2013.
53. Having held that there was ambiguity in the Finance Act, 2012 on the tax introduced, it goes without say that liability to pay the tax would arise when the ambiguity was cured. The ambiguity was cured on 18/6/2013.
54. In this regard, with the *Finance Act*, 2013 not having expressly provided for retrospective application, the ambiguity must be resolved in favour of the tax payer and there would therefore be no liability to pay Excise Duty before 18/6/2013. The Tribunal cannot be faulted in its judgment on this issue.
55. The next issue is whether commitment fees and appraisal fees are interest. The appellant submitted that the two are interest on the basis of the definition of interest in Black’s Law Dictionary and the authorities cited.
56. *Black’s Law Dictionary*, 10th Edn. 2014 pg 935 defines interest as: -
“The compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; esp., the amount owed to a lender in return for the use of borrowed money.”
57. On the other hand, the *Oxford Dictionary*, 8th Edn. define interest as: -
“the extra money that you pay back when you borrow money or that you receive when you invest money; to pay interest on a loan.”
58. From the foregoing, it is crystal clear that interest is the compensation paid in consideration of using someone else’s money. Or put differently, it is the consideration that is paid for keeping someone out of the use of his money. It is payable both when a lender lends money to a borrower or an institution takes a deposit from a depositor and puts it for its own use.
59. Section 7 of the Finance Act, 2013 defined ‘other fees’ to include any fees, charges or commissions charged by financial institutions, but does not include interest.
60. The appellant submitted that the commitment and loan processing fees fall within the definition of ‘interest’ based on the ordinary meaning of the word and are therefore not subject to excise duty. Conversely, the respondent submitted that there was no ambiguity as to what interest was and that the appellant’s revenue report in the financial statements clearly distinguished interest from other fees.
61. The issue therefore is, whether loan commitment fees and loan appraisal fees fall within the definition of interest and therefore not subject to Excise Duty.
62. In its judgment, the Tribunal relied on the definition of interest under the *Income Tax Act* on the ground that it was not defined under the *Excise Duty Act*. The Tribunal concluded that these fees, the loan commitment and loan appraisal, fell within the ambit of interest.
63. I am of the view that there was no need to look for the definition of interest in the *Income Tax Act*. Before going out of the *Excise Duty Act* to look for the definition of interest, there should have been difficulty first as to what Parliament’s intention was. The term ‘interest’ should have been given its plain



and literal meaning before seeking its legal meaning or definition in other statutes. It is not a technical term to warrant looking for its legal definition. The cases relied on by the appellant are inapplicable in the present case.

64. I have already found that the literal meaning of the term “interest” is the consideration payable for keeping one away from his money or for using someone else’s money. The definition of interest in the *Income Tax Act* should not have been resorted to in ascertaining the intention of Parliament in Section 7 of the Finance Act, 2013. In the *Income Tax Act*, the term interest is used for the purposes of charge, assessment and collection of income tax; for the ascertainment of the income to be charged; for the administrative and general provisions relating thereto and for matters incidental to and connected therewith and not otherwise.
65. In *Cape Brandy Syndicate v I.R Commissioners* [1921] 1KB the court held: -
- “... in a taxing Act one has to look at what was clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”
66. The court concurs with the above rendition of the law. A strict interpretation of the *Finance Act*, 2013 meant that all fees incidental to obtaining a loan would be subjected to Excise Duty while the interest earned from the loan would be exempted.
67. There are various fees associated with acquiring a loan and they include commitment fees, appraisal fees, front-end fees, arrangement fees, loan administration fees and many other fees and charges that lenders charge when lending. These are distinguishable from interest as they are only costs incidental to the loan while interest is the main consideration that is charged for the loan. The rest are only expenses incurred in obtaining the loan.
68. Accordingly, the Tribunal erred when it held that commitment and appraisal fees are part of interest and are exempt from Excise Duty. Obviously, these fees are just but expenses and not interest and are therefore not exempt from Excise Duty.
69. As regards the letter by the respondent to the Kenya Bankers Association, no legitimate expectation can be said to have arisen on the same. The respondent was only sympathetic to the hardship the members of KBA were undergoing in complying with the law.
70. Accordingly, the court makes the following determinations: -
- a. The Appeal No. 155 of 2020 is hereby dismissed with costs and Appeal no. 533 of 2020 is partially successful.
 - b. The Judgment of the Tribunal dated 23/10/2020 is sustained in respect of its findings on assessment on VAT and Excise Duty for the period 9/1/2013 to 18/6/2013.
 - c. That part of the Judgment of the Tribunal that held that commitment and appraisal fees are in the ambit of interest and therefore exempt from Excise Duty is hereby set aside. The respondent’s assessment on Excise Duty on the said fees after 18/6/2013 is hereby upheld.
 - d. The respondent will have the costs of the appeals in any event.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2022.

A. MABEYA, FCI Arb



JUDGE

